



## An overview of the antitrust model of telecommunications regulation in the USA: A case for the Nigeria legal regime

\*<sup>1</sup> Dr. Jacob Otu Enyia, <sup>2</sup> Dr. Michael P Okom

<sup>1</sup> Senior Lecturer, Faculty of Law University of Calabar, Calabar Nigeria, Cross River State, Nigeria

<sup>2</sup> Associate Professor, Faculty of Law, University of Calabar, Calabar Nigeria, Cross River State, Nigeria

### Abstract

Antitrust, which is also known in some jurisdictions as Competition Regulations, is generally perceived as a technical subject that is not easily understood. In developing countries, there is a paucity of antitrust legislation which accounts for the ineffective application of deregulation policies which in effect inhibits designs to protect the consumer, promote free trade and commerce, and prevent unwholesome and unethical trade practices. In the United States of America and the European Union, antitrust legislation is fortified and the utilitarian values seemingly obvious in the telecomm sector. Unlike the USA and the EU models of regulation which are anchored on the antitrust model, the Nigerian regulatory framework is not based on competition rules. Nigeria has not given the antitrust law model of regulation a priority despite its pursuit of economic liberalization, through privatization of government-owned commercial enterprises and deregulation policies. This work sets out to X-ray the Nigerian antitrust models *vis-à-vis* the United States of America. The goal is to sort out those desirable features that can be domesticated in the Nigerian economy for effective and efficient telecommunications regulations for enhanced consumer protection.

**Keywords:** telecommunications, antitrust, regulation, USA, consumer

### Introduction

Regulation in the telecommunications industry globally is aimed at deterring a monopoly of the air waves and service lines which serve as the basic channels through which services are provided or distributed to customers. This is largely taken care of through licensing procedures designed by relevant regulatory agencies <sup>[1]</sup>. There are also structural problems that arise from corporate growth and expansion into markets through mergers and acquisition which, in turn, raise problems about the level of competition that is permissible or desirable within a given economy and in the context of the industry. Much of the concern shown in this regard relates to business methods that are employed in securing a share of the relevant markets.

Antitrust or Competition Laws and Regulations are generally designed to promote and protect a transparent and competitive market from unjust and unfair business practices. Thus, Antitrust Laws and Regulations achieve most of their objectives by discouraging and preventing price or rate fixing, price discrimination, price gouging, restrictive exclusive contracts, abuse of a dominant market position, predatory pricing practices, conspiratorial pricing between some competitors against other competitors, hoarding, institutionalised boycotting of a competitor, supplier or equipment vendor, etc. Antitrust and Anti-Competitive practices substantially stifle and inhibit healthy competition to the detriment of the Consumer and the larger economy <sup>[2]</sup>. The US antitrust law, as presently interpreted, implies that “attempting to monopolize” is illegal under section 2 of Sherman Antitrust Act if the specific actions taken have anti-competitive consequences. It has generally been accepted in the application of antitrust law in the United States that anticompetitive acts harm consumers. Consumer harm or

attempted harm is necessary for an antitrust violation. The affected consumer group may be present or future. Consumers may lose directly from high prices or indirectly through a limitation of choices of variety and quality or by a retardation of the innovation process <sup>[3]</sup>.

### Regulation of Telecommunications in Nigeria

In the Post-independence period i.e during (Colonial Rule), the major sectors of the Nigerian economy – power supply, telecommunications, aviation, petroleum, railway, radio, television, etc were nationalised with monopolistic structures, sole ownership and control residing in the hands of the Government. Unfortunately, these Government monopolies reportedly promoted large scale corruption and inefficiencies which inhibited growth to the detriment of the entire Nigerian economy.

The liberalisation and privatisation of some sectors of the Nigerian economy, especially the telecommunications and broadcasting sectors, starting from the 1990s, ushered in some competition from the private sector against previous public monopolies. The legislations which liberalised some aspects of the Nigerian economy also tried to introduce some minimal Antitrust and Consumer Protection Regulations.

There is no Legislation or Regulation that is dedicated solely to Antitrust or Competition issues in Nigeria. None of the numerous Bills before the National Assembly on the subject have been passed into Law. In different Legislations however, there are some Antitrust or Competition provisions, with the most far-reaching of these Antitrust Provisions currently being in the Nigerian Communications Act.

Parts II, VI and VII, Sections 26, 80-82 of the Electric Power Sector Reform Act, 2005 has Statutory provisions which seek to provide guidelines regarding consumer service and

protection, license performance, with competition and market power provisions. The Nigerian Electricity Regulatory Commission (“NERC”) is expressly required to, on a continuous basis, monitor the Nigerian Electricity market for the potentials that exist to drive additional Competition and the Tariff Regulations in the best interest of the market.

In the Aviation industry, Section 30(4) (i) of the *Civil Aviation Act, 2006* authorises the Nigerian Civil Aviation Authority to investigate any case or cases of unfair or deceptive trade practices or methods of competition, including the prices of airline tickets. Where an infringement is found, the Nigerian Civil Aviation Authority is authorised to require the offending party to desist from such antitrust or anti-competition practice.

For capital market transactions, which are mainly publicly quoted and Government quoted securities, the *Investment and Securities Act, 2007* has provisions which require the Securities and Exchange Commission (“SEC”) to prohibit market rigging and manipulation, insider rigging and all other forms of unfair and fraudulent trade practices in the Nigerian Stock Market. Where a business practice prevents or lessens competition, SEC is authorised to in the interest of the public, among other things, undertake a Court sanctioned break-up of the infringing company into separate entities, in such a way that its operations do not cause a substantial restraint on competition.

In the liberalised Broadcasting Industry, the National Broadcasting Commission (“NBC”) is the body charged under the *National Broadcasting Commission Act* to regulate and control all the kinds of broadcasting businesses in Nigeria – i.e. Radio, Television, Cable Television Services, Direct Satellite Broadcast, etc. This is whether such broadcasting business is privately or government owned. Through its licensing regime, the NBC seeks to uphold the principles of equity and fairness, with an aberration for unfair and unethical trade practices in the broadcasting industry.

To protect consumers of stable and essential items, like sugar, salt, milk, flour, matches, petroleum products, motor vehicles, motorcycles and bicycles’ with their spare parts (“controlled commodities”), the Price Control Act empowers the Price Control Board to fix the Controlled Price range for these mentioned essential items. It is an offence for any person to sell any of the listed Controlled Commodities above their approved controlled price. Hoarding of Controlled Commodities is also an offence which on conviction carries fines and terms of imprisonment, seizure of the concerned goods, sealing of the premises from where the offence is carried on, etc.

The review of the methods in use covers the Nigerian regulatory model in the field of telecommunications, against the backdrop of the antitrust models of regulation in the United States of America. As a comparative study the models are examined by pointing out the differences between the models and showcasing the advantages, along with lessons that can be learnt in the process. The antitrust model which is featured in this work has been the dominant theme in the control of corporate mergers, acquisition, and expansion in the United States of America in particular where the concept of antitrust emerged as a means of controlling unfair competition. Antitrust laws strike at the roots of monopoly power by removing barriers to entry into a market and by regulating market power where such power arises largely from coercive tactics used to ensure that existing small businesses are unable to compete in the market <sup>[4]</sup>.

## The Antitrust Movement

After the Civil War in the United States of America, and its adoption of the free market enterprise policy without an overbearing Government interference in the market, the Sherman Act of 1890 was enacted to curb and criminalise any restraint to free trade and commerce, especially by conspiratorial and monopolistic corporations. In the United Kingdom (“UK”), the United Kingdom Monopolies and Restrictive Trade Practices Act 1969, metamorphosed into the Competition Act 1998, the Enterprise Act 2002 and then the Enterprise and Regulatory Reform Act, 2013 which established the Competition and Markets Authority. In spite of these legislations, Competition regulations in the United Kingdom have continued to follow the European Union robust jurisprudence on this subject.

Again, the underlying objective of all Antitrust and Competition Laws and Regulations remain the protection of the Consumer with minimum Government interference in the market.

The antitrust concept emanates from cross currents that underlie corporate formation, corporate governance and ownership and the increasing participation of corporations in the economy. In this connection it is important to mention the Sherman Antitrust Act <sup>[5]</sup>. The Act was passed by the U.S. Congress in 1890 and derives its name from its author, Senator John Sherman who was the Chairman of the Senate Finance Committee at the time. In spite of the word trust that features in the title of the statute, it does not say much trusts. What is known in the United States as Antitrust law is more broadly known around the world as competition law <sup>[6]</sup>. In Nigeria, the effort at market regulation embodied in a legislative proposal in 2002 is set in the form of a competition statute <sup>[7]</sup>. The purpose of the American statute was to oppose the combination of business entities that could potentially harm competition, and result in monopolies, creation of cartels and trusts. What the Sherman Act in 1890 sought to achieve was to stem monopolistic practices. Through the medium of the trust it was possible for monopolists to hold their businesses and for members in a cartel enforceable agreement <sup>[8]</sup>.

From the passage of the Sherman Antitrust Act by the United States Congress in 1890, through the passage of the Clayton Act in 1914, antitrust was a movement, a rallying point that galvanized socio-political ideas about the terms upon which participation in the economy was to be anchored. As a movement, it inspired popular public agitation. Politicians did not miss the opportunity to have their say as witnessed from the following statements by leading politicians of the age. Theodore Roosevelt made the following statement:

Concentration and co-operation are conditions imperatively essential for industrial advance; but if we allow concentration and co-operation there must be control in order to protect the people, and adequate control is only possible through the administrative commission. Hence concentration, co-operation, and control are the keywords for a scientific solution of the mighty industrial problem which now confronts this nation.

Louis D. Brandeis who became a Justice of the United States Supreme Court stated in a letter that "the proper role of government is to encourage not combination, but cooperation" <sup>[9]</sup>. It is apparent from these positions that the antitrust

movement had to contend with the problems posed by the existence of big business and its impact on the U.S. economy. The main issue was whether business should be allowed to combine or cooperate. The answer was that any such moves would occasion harm on the economy.

By 1899, the United States Supreme Court had established that the Sherman Act broadly prohibited price fixing cartels. However, on the crucial issues of inter-firm cooperation and business consolidations, much remained to be determined. This is evidenced by major studies of the case law and informed opinion of that period<sup>[10]</sup>. The decision in *United States v. E. C. Knight Co*<sup>[11]</sup>, nearly derailed antitrust enforcement. By an 8-1 margin, the Supreme Court rejected a challenge to the Sugar Trust's acquisitions of four Pennsylvania plants as a result of which the trust obtained a 98 per cent share of the national sugar market. Nevertheless the court held that the commerce clause of the U.S. Constitution placed the transaction beyond the purview of federal law because it affected commerce "only incidentally and not directly". The trust, it was held, was engaged in manufacture, and commerce check to manufacture, and is not part of it.

Two years later, the case of *United States v. Trans-Missouri Freight Association*<sup>[12]</sup> became the first case where a Sherman Act violation was noticed. The court found a railway price setting agreement unlawful. In the majority opinion, authored by Rufus Peckham J.<sup>[13]</sup> the court declared that the laws required "free and open competition" and forbade "all" contracts in restraint of trade<sup>[14]</sup>. The court also articulated a rationale for the Sherman Act. In reference to combinations of manufacturers, the court found harmful those combinations whose "purpose... is to control the production or manufacture of any particular article in the market and by such control dictate the price at which the article shall be sold"<sup>[15]</sup>. In this sense, antitrust protected both consumers and competitors from economic harm and, in protecting small dealers from economic ruin, antitrust also averted social harm.

The *Trans-Missouri*<sup>[16]</sup> decision was not unanimous. Moreover, in view of the earlier decision in *E.C. Knight* (the sugar trust case), the court in *Trans-Missouri* had to restrict itself to opinionating on the direct impact of the combination on restraint of trade, in the context of the interstate commerce clause. Thus, the *E.C. Knight*<sup>[17]</sup> limits were undisturbed and raised question. The Court opinion reasoned that the company's control of manufacture did not constitute a control of trade. The U.S. Supreme Court developed further its directness test in three cases in all of which Justice Peckham wrote the lead judgment. In *United States v. Joint Traffic Association*,<sup>[18]</sup> another case in which railway companies entered into an agreement to fix prices, the Supreme Court held that the natural and direct effect of the agreement was to maintain higher rates than would otherwise prevail. However, in *Anderson v. U. S. and Hopkins v. U. S.*,<sup>[19]</sup> the court rejected challenges to association rules that governed the sale of livestock in Kansas city. It was concluded in both cases that none of the association rules was found to control price or output directly. The court held that some of the rules affected commerce but that such commerce was not interstate. There were other rules which did affect interstate commerce but the court concluded that their effect was too remote and unintended<sup>[20]</sup>.

If there is anything to be said about the antitrust model, it is that antitrust laws prohibit agreements in restraint of trade,

monopolization and attempted monopolization, anticompetitive mergers and tie-in schemes, and, in some circumstances, price discrimination in the sale of commodities. According to section 1 of the Sherman Act, every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.

Using the common law for guidance, several important decisions have identified the following specific kinds of contracts, combinations, or conspiracies as illegal under section 1. Each of the following then is a *per se* violation of section 1 of the Sherman Act: They include horizontal price-fixing, horizontal agreements regarding customers or territory; and boycotts. Section 2 of the Sherman Act provides as follows:

Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$350, 000.00 or by imprisonment not exceeding three years, or by both such punishments, in the discretion of the court.

Section 2 of the Sherman Act prohibits monopolization and attempts to monopolize. The standards for violations of these two prohibitions are similar but distinct. It is illegal to monopolize an industry, but it is not illegal to be a monopoly. "This seeming confusion reveals the tension between the antitrust laws and innovation."<sup>[21]</sup> What is described as a conundrum is that a firm may through innovativeness, become very large because they are selling superior products, but this same firm may, often, become the target of antitrust authorities for violating section 2 of the Sherman Act. Violations of section 2 in terms of monopoly power often requires about a minimum market share of about 60 percent. When this is proved, the company or firm is usually made to break up based either by court decision or through a consent judgment. Among some of the more famous section 2 monopolization cases are the *Standard Oil Case and the Microsoft case*<sup>[22]</sup>.

The Microsoft case is a landmark case of antitrust intervention in network industries. The United States Department of Justice and 19 States sued Microsoft alleging (i) that it monopolized the market for operating systems of personal computers and took anti-competitive actions to illegally maintain its monopoly; (ii) that it attempted to monopolize the market for internet browsers because such browsers would create competition for operating systems; (iii) that it bundled its browser (Internet Explorer) with windows; and that it engaged in a number of other anti-competitive exclusionary arrangements with computer manufacturers, internet service providers, and content providers attempting to thwart the distribution of netscape's browser. The District Court Judge found in most points for the plaintiffs and ordered the break of Microsoft into two companies, one with all the operating systems software, and one with all other products of the company. The Court also imposed a number of service restriction on the business conduct of Microsoft.

The Standard Oil Company of California Case arose out of sales of gasoline by the standard oil company to United States Post Exchange located within the presidio military reservation at San Francisco. The Standard Oil Company in that case

refused to pay the tax, and the action was brought to compel its payment. In that case it was contended by the Standard Oil Company that Sales made to Military Post Exchanges were exempt from the state tax by virtue of the provision of section 10 of the State statute hereinbefore referred to. The decision reached was to the effect that an organisation largely engaged in business of a private nature and that sales to it should not be beyond the reach of the taxing power of the state wherein it is located and that it is not one of those agencies through which the Federal Government directly exercises its constitutional or sovereign power.

Antitrust laws were enacted principally against trusts. A trust was an arrangement pursuant to which shareholders in several companies transferred their shares of stock to a single set of trustees. In return, the shareholders received certificates entitling them to a specified share of the consolidated earnings of the jointly managed companies. The trusts became a major feature of corporate ownership and management and operated as monopolies. It was this tendency of the trusts to monopolize trade in particular markets thereby killing competition, hiking prices and depressing the standard of manufacturing that led to the enactment of antitrust laws. The Sherman Antitrust Act was the first to be enacted in this respect. But in the *U.S. v. E. C. Knight Company*,<sup>[23]</sup> (the "Sugar Trust" decision), the Supreme Court of the United States practically emasculated the Sherman Act when it held that the sugar refining company that controlled approximately 98 percent of all sugar refining in the United States had not violated the Sherman Act.

Apart from the political will to bolster the antitrust movement, it was clear that new statutes were needed to strengthen the Sherman Antitrust Act. In 1914 Congress passed two measures that provided additional support for the Sherman Antitrust Act<sup>[24]</sup>. One of these was the Clayton Antitrust Act. The provision of the Clayton Antitrust Act elaborated on the general provisions of the Sherman Act and specified a number of illegal practices that constituted monopolies. It made explicitly illegal such commercial practices as price discrimination that is, charging different prices to different customers, the buying-out of competitors and interlocking boards of directors. The second statute set up the Federal Trade Commission<sup>[25]</sup>, an agency vested with powers to investigate violations of antitrust laws and to issue orders barring unfair competitive practices. A significant reform of section 2 of the Clayton Act which dealt with price discrimination took place in 1936 with the passage of the Robinson Patman Act<sup>[26]</sup>, in which congress strengthened the Clayton Act. The new legislation made it illegal for goods and services of like grade and quality to be sold at widely varying prices in order to reduce competition.

Firms could overtly discriminate by charging lower prices. They can also disguise price discrimination by paying secret rebates to purchasers, by offering them below cost delivery terms, or by rendering services in kind at very low cost. The Act also allowed firms injured by price discrimination to sue for treble damages. Another step in antitrust legislation in the United States was taken by the enactment of the Celler Kefauver Act, 1950<sup>[27]</sup>. This Act strengthened the Clayton Act by preventing one company from merging with a competitor by purchasing the physical assets of the other if that resulted in a substantial lessening of competition. Finally, the Hart-Scott-Rodino Antitrust Improvement Act of 1976<sup>[28]</sup> lightened the merger requirements: since mergers have become an every day affair in the modern economy and it is difficult to evaluate the

competitive consequences of each merger, Congress passed the Hart-Scott-Rodino Act which stipulates that any firm with more than \$100 million in assets or sales must report to the U.S. Department of Justice and to the Federal Trade Commission any planned merger with a firm that has more than \$10 million in assets or sales.

The statutes that have been set out in outline comprise the core of the antitrust legal domain in the United States of America. They have been designed to safeguard competition in the market place, and, in that sense, they apply across the board to all firms and to all forms of business activities. However, other areas of business are regulated by states, and such regulations are peculiar to the regulated fields or areas of business. What this means is that the antitrust laws apply in all cases especially to structures of the firms in the market, while the operational activities are monitored to ensure equal access to facilities.

Peculiar regulation raises the issue as to the relationship between antitrust law, i.e. competition law, and regulation law. Brennan maintains that "the implicit assumption in recent decisions is that regulation and antitrust are substitute methods for controlling market process". This author opines that regulation and antitrust are complementary<sup>[29]</sup> but firms may, often, become targets of antitrust authorities for violating section 2 of the Sherman Act.

Violations of that section in terms of monopoly, often require about a minimum market share of about 60 percent. When this is proved, the company or firm is usually made to break up by court decision or through a consent judgment. Among some of the more famous section 2 monopolization cases are the Standard Oil Case and the Microsoft case.

### **Antitrust Model in the USA in the Context of the Telecommunications Industry**

In the foregoing section of this work the antitrust model has been explained mainly in terms of the general law in the US, this has been done basically because the concept of antitrust is essentially an American concept. Even though the Federal Communications Act in the United States deals essentially with matters in the communications industry, the antitrust law has also been used in the field of communications. It is therefore important to determine the rationale of the underlying antitrust system.

One of the major uses to which antitrust law has been put in the U.S in relation to telecommunications is what has come to be known as the AT and T. Divestiture Cases<sup>[30]</sup>. Beginning in the 1960s, new technologies, many of them pioneered at Bell Labs, began to stimulate competitive activities in the telephone industry. According to Weber<sup>[31]</sup>, there were four principal technologies that led to this (1) large radio systems for carrying long distance calls, (2) semiconductor devices built for computers that could be used as switches; (3) miniature connectors, for telephones and other terminal equipment and (4) tone signaling, that made it possible for calls to be sent over the network after a connection was established<sup>[32]</sup>.

The regulators faced these challenges and, in a bid to limit the rate of growth of the Bell system, tended to allow competitive entrance into various areas of the market. In the first place, companies with the capacity to do so began building their own private microsystems for internal communications. Moreover telecommunications equipment manufacturers began building terminal equipment and customer switches that could be connected to the telephone network. In addition, other

manufacturers began with some success to sell equipment to the Bell system, and finally MCI one of the leading competitors in the industry, built a long distance network using microwave radio systems which allowed people to make local calls to MCI's switches, and complete the calls by using the signaling to get the necessary information to the MCI network. This undermined the Bell or AT & T position which had always been one of keeping tariffs on long distance calls well above cost in order to reduce the cost of local calls. Bell, in the words of Weber, "objected furiously" <sup>[33]</sup>.

It was not only in matters of pricing but issues of access and the use of complementary gadgets also infuriated the Bell/AT & T group. Richard Posner, now a judge of the US Court of Appeals, but then a legal consultant to the Bell/AT&T group has made this observation:

I also think that AT & T's attitude of never yielding an inch irritated people including officials and staff of the FCC. Hush-a-Phone (a rubber cup-device that one attached to the speaking end of the phone so that other people in the room couldn't hear what you were saying, and that AT & T claimed was a forbidden "foreign attachment" to the telephone network) was the famous example of that absurdity <sup>[34]</sup>.

This obviously absurd posturing led, in turn, to a series of FCC decisions- *The Hush-A-Phone* <sup>[35]</sup> and *Carterfon* <sup>[36]</sup> decisions which weakened AT & T's position. From these decisions it became apparent that customer-owned terminal equipment could be connected to the network without service degradation. The FCC finally adopted a set of interconnection standards and deregulated the provision of terminal equipment. The U.S. Federal government filed a lawsuit in 1973 alleging that AT & T had illegally limited the kinds of connections and services MCI and others could get; and secondly that AT & T had illegally prevented other manufacturers from selling equipment to their Bell companies. The case finally came to trial in 1981 with the main concern being the provision of equipment and access to long distance services which were required to be competitive.

What was left untouched was the local exchange monopoly. The lawsuit was not intended to change that. In the Modification of Final Judgment ("MFJ") <sup>[37]</sup> a clear distinction was drawn between monopoly and competitive services. Questions of monopoly were to remain regulated, while competitive services were removed from regulatory oversight.

In recent times, the question that is asked most often is whether the AT & T divestiture was necessary <sup>[38]</sup>. Given the resources and energy that went into prosecuting and fighting the divestiture, it is not surprising that some think the technological innovations that were already afoot by the late 1970's would have greatly undermined the AT & T monopolies in the manufacturing of telephone equipment's and the spectrum of services that it commanded by the time of the divestiture. According to Joseph Weber, the telecommunications environment in the United States has been so transformed by new services and technologies in the past twenty-five years as to be almost unrecognizable. It is, on balance, competitive and many new services have appeared. It is likely, however, that had the divestiture never happened, the industry would have landed at much the same place <sup>[39]</sup>.

Among the factors listed by Weber are, deregulation of the supply of terminal equipment before divestiture. For reasons unrelated to the divestiture, AT & T had been obliged to spin-off its captive manufacturer of equipment, the Bell Labs; low cost fibre optics transmission systems had made long distance calls almost free. The internet data communication systems have become a significant market; and local competition for basic telephone services is on the rise due to digital and cellular technologies that have been developed since the divestiture.

These changes came about due to technological innovation and not, as Joseph Weber emphasized, because of the organizational re-arrangement entailed by the divestiture <sup>[40]</sup>. This raises afresh the need to distinguish between structural and conduct remedies <sup>[41]</sup>. What should guide the choice between the use of structural or corrective remedies? A structural remedy is normally sought in a monopolization case brought under section 2 of the Sherman Act <sup>[42]</sup>. It seeks to change the form in which the regulated entity does business, by requiring, for example, the break-up of, or the spin-off of a particular subsidiary.

These claims of monopolization typically involve suits against single firms charging them with a pattern of conduct that has allowed them to acquire improperly a position of monopoly power within a certain industry. The planned break-up in the ALCOA case <sup>[43]</sup> was averted by the creation of two new aluminum companies-Reynolds and Kaiser-at the end of the Second World War. The structural remedy was used in the "endless pursuit which the United States made of the hapless United Shoe Machinery Company" <sup>[44]</sup>. The effort to break-up the United Shoe Machinery Company spanned over seventy years from the completion of the merger in 1899 to the final dissolution of the company in 1968 as a result of the break up which sent the company into bankruptcy <sup>[45]</sup>.

It is not only the antitrust scheme which requires organizational re-arrangement that has been used to regulate competition in the telecommunications industry in the United States. Policy makers have also relied on the need to provide for access to providers of complementary services offered through the local telephone network. At the time of the AT & T breakup, local telephone service was thought to be the root of natural monopoly in the telecommunications industry.

The Telecommunications Act of 1996 was designed to "open all communications services to competition" including local telephone service. Policymakers believed that competition in local telephone markets might emerge through any of three paths <sup>[46]</sup>. An entrant, in the first place, might simply obtain access to all of the elements needed to provide local telephone service from the incumbent and resell them. Another path was that an entrant might build an entirely new network. This is because any new entrant would need to be able to place calls to and receive calls from the incumbent local telephone companies' customers. The 1996 Act requires that incumbents allow any requesting telecommunications carrier to interconnect with their networks at any technically feasible point on terms that are equal in quality to those that the incumbent provides for its own circuits and that are "fast, reasonable, and nondiscriminatory" <sup>[47]</sup>. The third approach envisioned is that an entrant may provide some of the elements needed to offer local telephone services and obtain the rest from an incumbent. In this connection, Congress required every incumbent local telephone company to provide all other

carriers with access to any of its network elements on an unbundled basis.

The problem that the 1996 Telecommunication Act <sup>[48]</sup> appears to have created is whether the antitrust law and its attendant divestiture upon a finding of anti competitive or monopolistic structures should be transposed on the purely regulatory requirements of the 1996 Act where an incumbent Telecommunications operator frustrates an entrant under the Act. A transposition may not be what is required. As Brennan has suggested complementarities is what is indicated.

### **The Nigerian Model in Comparison with the USA Model**

Unlike the USA and the EU models of regulation which are anchored on Antitrust Model, the Nigerian regulatory framework is not based on statutory competition rules. The regulating mechanism has not been purely determined by a competition policy perspective as the end users are not put at the centre of any economic activity. The approach to regulation is wholly administrative. In the administrative approach, emphasis is placed on administrative agencies in providing enabling rules for the effective and efficient operation of the industry. Attention is paid particularly on the continuous provisions of the services in question without much concern about the degree of satisfaction of the end users of these services.

Nigeria has not given the antitrust law model of regulation a priority despite its pursuit of economic liberalization, through privatization of government owned commercial enterprises and deregulation policies. In 2002 <sup>[49]</sup> however, the Federal government through the then Director-General of the Bureau of Public Enterprise (BPE) announced that it was in the process of introducing an anti-trust regime in Nigeria by the enactment of a competition legislation. The government through, the National Council on Privatization (NCP) engaged the services of some Legal Consultants whose activities resulted in a draft legislation entitled Federal Competition Bill and more elaborately captioned as; “A Bill for An Act to establish the Federal Competition Commission, promote the Balanced Development of the National Economy, welfare and interest of consumers, maintain and encourage competition by prohibiting restrictive Business practices that substantially lessen competition, prevent the Abuse of Dominant Positions of Market Power in Nigeria and for Matters connected therewith.” During the period, Nigerians with any experience and interest in this area of law were invited to make comments on this draft legislation (then posted on the internet), as part of a wider debate not just on antitrust but also on the overall liberalization of the Nigerian economy. Sadly enough, nine years <sup>[50]</sup> after the government indicated its interest and the draft bill was introduced, nothing has been heard of it.

Section 2 of the Bill has set out the objects of the law to include:

1. The balanced development of the Nigerian economy;
2. The welfare and interests of consumers, and provide them with competitive price and product choices;
3. Maintain, and encourage competition and enhance efficiency in production, trade and commerce; and
4. Expansion of opportunities for domestic enterprise to participate in world markets; and
5. Enhance the ability of small Federal and medium enterprises to compete effectively and

6. Prohibit restrictive business practices which prevents, restricts or distorts competition or constitutes the abuse of a dominant position of markets power in Nigeria.

The Bill also set out in S.3(1) the establishment of the Federal Competition Commission with the objectives, functions and powers of the Commission in sec. 8, to:

1. Promote the efficiency, adaptability and development of the Nigerian economy
2. Provide consumers with competitive prices and product choices
3. Promote employment and advance the social and economic welfare of Nigerians
4. Ensure that small and medium enterprises have an equitable opportunity to participate in the Nigerian economy; and
5. Protect Nigerians from unfair trade practices.

However, this Bill has never been accorded serious consideration by the National Assembly. The other Bill is the 2002 Federal Competition Bill for an Act to set up a Federal competition (Commission). “The bill was also to prohibit restrictive contract and business practices that substantially lessen competition and regulate the abuse of dominant position of market power and anticompetitive business combines.” Another bill which was sponsored by the federal government through the Bureau of Public Enterprise (BPE) was presented as an Executive Bill to the Nigerian Senate in 2002. However, there has been no further action on the bill since its presentation stage.

In 2008, a Bill sponsored by Joel Ikenya, a Senator at the time, was presented to the National Assembly to provide for the establishment of the Nigerian Trade and Competition Commission. The bill passed through its first reading in April 23, 2008, a second reading on November 6, 2008, and was then referred to joint committees on Establishment and Public Service Matters, Judiciary, Human Rights and Legal Matters and Commerce <sup>[51]</sup>.

According to Adedeji, the Bill was able to move so far because Mr. Ikenya was the Senate Committee Chairman on Commerce at the time. However, the Bill has since been stalled at the joint committee stage. Another bill was the National Antitrust Bill drafted in 2000 as an Act to regulate and prohibit unfair competition and unreasonable combinations in restraint of commerce, industry and trade. According to Adedeji the Bill would have prohibited monopolies, regulated mergers and acquisitions, and policed all forms of business practices which constitute the abuse of dominant player in the market. It would also have promoted the welfare and interest of consumers and provide them with competitive prices and choices.

As stated by Ubochioma Wiseman, <sup>[52]</sup> the role of the antitrust law and the authority that goes with it are relevant in Nigeria especially in the telecommunications sector because of the increasing growth and competition in the industry. When discussing the efficiency of utilities such as telecommunications, the macro-discursive agenda should shift from mere policy of liberalisation and achieving competition towards preventing anti-competitive conduct. This also involves the establishment of antitrust law and authority that will assist the regulatory body in the detection, prevention and prosecution of market abuses by operators. This law together with established institution will ensure that the telecommunications sector does not gravitate towards extremes

of blatant anti-competitive practices by operators, on the one hand, and infringements on consumer's rights on the other. Nigeria has already committed itself to market liberalization. All the policies being pursued by contemporary Nigerian governments seem to be so oriented. All these measures have one feature in common: the end of government monopoly and the entry of private players. It is indisputable that without an appropriate competition regime instituted, all these liberalization policies, no matter how well they are orchestrated, would only enjoy limited effectiveness. The only solid foundation upon which any genuine market liberalization programme must stand is a functioning competition regime. At the moment, there are complaints that the operators in the telecommunications sector, especially the global system of mobile telephony (GSM) operators, are engaged in excessive pricing and price fixing. The implication here is that any liberalization policy that lacks the essential ingredients like a competition regime will be fundamentally flawed and would need to be reconsidered. The regulatory model which emphasizes administrative agencies and rules without the effective and conscious development of a competition law amounts to a futility. A lack of competition law is leaving Nigerian consumers vulnerable to unhealthy competition. Adedeji <sup>[53]</sup> maintained in Abuja at a National Training Workshop on Competition Policy and Law that without a policy to checkmate the activities of business owners who impose high prices for goods and services, the predator-prey relationship between consumers and suppliers will continue. He concludes that,

It is natural for firms to compete, but in some situations, the rivalry is undermined and the impact on consumers is disastrous. There have been a series of initiatives and efforts towards putting in place an effective competition regime in Nigeria. Some of these initiatives and efforts are the various bills on competition and anti-trust at the National Assembly and the Draft Federal Competition Bill/National Competition and Consumer Protection Bill of the Federal Executive Council <sup>[54]</sup>.

### Conclusion

It is therefore indisputable to conclude that when the competition law is in place, it will promote efficient allocation and utilization of resources, which are usually scarce in developing countries. This also means more output, lower prices and consumer welfare. Though competition will most likely lead to some job losses in some sectors in the short run, this can be taken care of by having an appropriate social safety net in place. A good competition policy and law lowers entry barriers in the market and makes the environment conducive to promoting entrepreneurship and growth of small and medium scale enterprises. In Nigeria, efforts by government to adopt such legislation in the past have culminated in the development of six different draft competition bills that are yet to be translated into relevant competition laws.

The bills, if passed, will provide the necessary conditions for market competition, stimulate creative business activities, protect consumers and promote the balanced development of the economy. Recently, the Federal Government through the National Assembly has given positive indication to enact a competition law in the Country. The Competition framework will give effect to the liberalization regime in the Country

which invariably will remove all barriers to entering in the market, eliminate cartels, trusts and combination and enhance consumer protection.

It is therefore recommended that the Federal Government of Nigeria should galvanise the power will to course the passage of the National Competition Bill currently pending in the National Assembly.

Again, the National Assembly should without further delay consider the quick passage of the National Competition and Consumer Bill to enhance telecommunications regulatory best practices in Nigeria.

Furthermore, the National Communications Commission (NCC) in collaboration with service providers should consider the need for sensitization and education of telecom stakeholders, for effective implementation of the law when passed.

### References

1. See Markesinis, Deakin. Tort Law, Oxford: Clarendon Press, 2003, 95-696
2. [www.oseroghoassociates.com/.../185-legal-alert-october-2015-antitrust-and-competitionlawandregulation](http://www.oseroghoassociates.com/.../185-legal-alert-october-2015-antitrust-and-competitionlawandregulation).
3. Economides N. The Microsoft Antitrust Case <http://www.stern.nyu.edu/networks/.neonomi@...stern.nyu.edu>
4. Arthur Sullivan, Economics: Principles in Action Upper Saddle River, N. J. 2003, 50-52.
5. 15 U.S.C.S. 1-7.
6. Sherman Antitrust Act Wikipedia, Globalize/talk page (November, 2010).last accessed on 20/11/11
7. See National Assembly Papers: A Bill for an Act to Establish the Federal Competition Commission etc.
8. William L Letwin. Congress and the Sherman Antitrust Law: 1887-1890 23 U. Chicago L. R. 1956.
9. Ibid.
10. See for example Robert Landes, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenges 34 Hastings, L.J. 65 (1982); Letwin supra note 4.
11. The Decision in United States v. E. C. Knight Co. 167 U.S.290 (1897).
12. 166 U.S. 290 (1897).
13. [www.mycourts.gov/history/legal-history-new-york/...court.../peckham-rufus-jr-html](http://www.mycourts.gov/history/legal-history-new-york/...court.../peckham-rufus-jr-html)
14. Ibid.
15. Ibid
16. United States v. Trans-Missouri Freight Association 166 U.S. 290 (1897) p-1
17. United States v. V. E. C. Knight Company (1895)
18. United States v. Joint Traffic Association 171 U.S. 505 (1898).Anderson v. United States 171 U.S. 578 (1898).
19. 171 U.S. 505 at 565 (1898).
20. Anderson, cattle purchasers agreed to do business only with members of their exchange, which was found to do no business of its own, not to muddle with prices, and be open to anyone following its rules. Anderson 171 U.S. at 614. The commerce clause is embodied in Article 1 section 8 of the U.S. Constitution.
21. David Baumer, Poindexter JC. Legal Environment of Business in the information Age. New York: McGraw-Hill Irwin 2004, 625.

22. United States v. Microsoft Corporation 84 F. Supp 2d 9(D.D.C).
23. 15 U.S.C.S. 18.
24. 15 U.S.C. 545(a) (1).
25. 15 U.S.C. 345(a) (1).
26. 15 U.S.C. 454(a) (1).
27. Ibid, 77.
28. Ibid, 78.
29. Timothy J. Brennan, Essential Facilities and Trinko: Should Antitrust and Regulation be Combined? 61 Federal Communications Law Journal 133, 135 (2008). Timothy J. Brennan, Why Regulated Firms Should be Kept out of Unregulated Markets: Understanding the Divestiture in US v. AT & T. 32 Antitrust Bulletin 741 (1987).
30. United States v. AT, & T. Co. 552F, Supp 131(D.D.C 1982).
31. Joseph H. Weber, The Bell System & Divestiture: Background, Implementation and Outcome, 61 Federal Communications Law Journal 21, 22 (2008).
32. Ibid.
33. Weber, op. cit., p.182.
34. Richard A. Posner, "The Decline and Fall of AT & T: a Personal Recollection" 61 Federal Communications L.J. 11-13.
35. Hush-a-Phone Corp v. United States 238 F.2d 266 (D.C. cir 1956).
36. Use of Caterfone Device. Toll Telephone Service Decision 13 F.C.C. 2d 420 (1963).
37. United States v. AT & T Co. 552 F. Supp 131 (D.D.C. 1982) affirmed Sub nom. Maryland v. United States 460 U.S 1001 (1983).
38. Federal Communications Law Journal (2008). 149,157.
39. Weber, op.cit., p.183.
40. Ibid.
41. Richard A. Epstein.
42. 15 U.S.C. sections 1-7 (2000), see also Richard A. Epstein, "Antitrust Consent Decrees in Theory and Practice: Why Less is More", pp.40-53.
43. United States v. Aluminum Co. of America (ALCOA) 148 F. 2d 416 (2d cir. 1945).
44. Richard Epstein, The AT & T Consent Decree: In Praise of Interconnection Only.61 No. 1 Federal Communications Law Journal 149,157.
45. United States v. United Shoe Machinery Co. 247 U.S. 32(1918).
46. See Gerald R. Fauchaber, Will Access Regulation Work? 61 No. 1 Federal Communications L.J. 37-42.
47. 47, U.S.C.S. 2552(c)(2)(B)-(D).
48. Ibid.
49. Nnamdi Dimgba, The Urgent Need for Antitrust Law, [www.GlobalCompetitionForum.org/Africa.htm](http://www.GlobalCompetitionForum.org/Africa.htm). Last accessed on 27/06/2011.
50. Ibid.
51. Ngozi Sams, Nigeria needs competition law Next Newspaper, Monday, June 27, 2011, p.1.
52. Babatunde Adedeji is the Coordinator-General of the Consumer Empowerment Organization of Nigeria (EON).
53. Wiseman Ubochioma, The Need For Antitrust Law in Nigeria's Liberalized Telecoms Sector, Unpublished Ph.D. Research Thesis, York University, 2009, MR 53837.
54. Sams, op.cit. 212.