

How has the telecommunications industry evolved commerce essay



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INTRODUCTION

Human beings need communication, and from time immemorial various ways have been used to communicate from one point to the other.

Communication deals generally with the dissemination of information which has been found to be one of the most, if not the most important elements for the efficient growth of any economy and “ Telecommunication” in this era has proven to play a vital role in information management and development of any country’s economy.[1]

Technology has played an important role in the evolution of telecommunication and as the telecommunication market evolved, so warranted the need for a strong effective regulatory regime. Bringing about a new wave of regulatory reforms in the telecommunications service sector, focusing on eradicating the already existing monopoly markets to full competition and also ensure services are delivered to the end users efficiently and fairly. The key element of regulatory success to achieving all these is the existence of an independent and separate regulatory agency outside the influence of both government policies and the private-sector interest.

The purport of this essay is to examine regulatory independence in telecommunication, its key aspects and constraints/limitations where necessary, to a regulator’s independence in the telecommunication sector. In the course of this work the researcher shall make reference to the United Kingdom’s Regulatory Agencies and that of Nigeria respectively.

1. 1 The Evolution of Telecommunication

Electronic communication began in the 19th century and “

Telecommunication has evolved tremendously from its beginning to the present.”[2]But looking back at the old telecoms industry the “ conventional wisdom” then was that telecoms is a good example of natural monopoly and services rendered in the sector could only be provided efficiently by a monopoly provider.[3]

In most countries of the world telecoms services were provided under state controlled monopoly or by private companies in some instances (all under monopoly conditions). For instance in the United States of America the monopoly conferred on Bell by the patent

granted ensured that Bell Telephone Corporation developed its network without competition. The effect this had was, even after the expiration of the patent, Bell’s telephone company’s dominance was still in existence and not “ until landmark antitrust actions in the 1970’s sought to break the market”. [4]

In the United Kingdom electronic communications was in public ownership (note, with the exception of services in Kingston upon Hull) controlled by the Post Office latterly by British Telecommunications.[5]Then the post office decided what can and could not be connected to its network and decided who gets telephone services[6]thereby making telephone services to users more of a privilege than a right that should be available to all.

Not until the enactment of the British Telecommunication Act, 1981 did

British Telecom’s sever its links with the Postal Office. The Act also <https://assignbuster.com/how-has-the-telecommunications-industry-evolved-commerce-essay/>

established an independent procedure to set standards and approve improvement for connection of network and also it was at this time that first steps were being taken in the United Kingdom to introduce competition into the telecommunication industry.[7]For instance this process led to licence being granted to Mercury to provide telecoms services, creating a competition with a then privatised British Telecom (this privatisation was provided for by then new 1984 telecommunication Act).[8]

United Kingdom in the 1980's with the enactment of the 1981 and subsequently the 1984 telecommunication Act opened up the market for competition and also developed regulatory mechanisms (Director General of Communication office known as Office of Telecommunication (OFTEL). This was designed to ensure that incumbent operators could not use their position to drive new operators out of the market.[9]

In Nigeria telecommunication was a total monopoly by NITEL (NITEL came to being in 1985 as a result of a merger between Post & Telegraph Department and Nigerian External Telecommunication Ltd) “ wholly owned and controlled by the government.”[10]During this

period there was no competition in the provision of telecommunication service and there existed a free unregulated market in the sector.

In 1992 the Federal Military Government made a Decree (Decree No. 75 of 1992 (as amended) creating the Nigerian Communication Commission (NCC) with the primary aim of promoting and regulating competition in the service provision. The NCC at this period was not effective has it been under the

control of the government and there was little or no change in the telecom sector, with NITEL almost running aground.[11]

Not until the emergence of Civilian Government in 1999 were plans announced for the privatisation of NITEL and appointment of additional carriers and also not until the beginning of the 21st century was there an independent regulatory agency for the sector.[12] This marked the beginning of the liberalisation of the communication industry in Nigeria with the licensing of several Digital Mobile Operators and Service Providers and also the enactment of the Communications Act 2003.

In the 20th century the telecommunications industry of most countries was being run by state government or its agencies.[13] But with the liberalisation of the communication industry from that of a monopoly to a more competitive market, privatisation of the sector and the licensing of several operators and service providers, coupled with technological development. [14] Led to the transformation and development of the telecommunication industry into the Information and Communication Technology (ICT) sector, these created new legal issues and challenges bringing about the need for an “ Independent Regulator.”

NEED FOR AN INDEPENDENT REGULATOR IN TELECOMMUNICATION

In the last three decades there have been revolutionary changes in technology and the market forces driving communications. With the increase in corporatization and privatization, the liberalization of various market segments bringing about competition and the change in services offered by

telecommunication operators, the need for a regulator to serve as an independent referee becomes necessary.[15]

Regulation is also required because even after privatization the status of the national carrier (which is usually the incumbent) remains and new operators are required to interconnect if

they are not to suffer undue market disadvantage created by the incumbent. Therefore an Independent Regulator is needed to remove explicit barriers to entry “(for example the inability to interconnect with the incumbent operator), and dismantle implicit barriers (such as the potential influence of the incumbent telecommunication operator over the regulator).”[16]

Therefore in creating an Independent Regulator for the sector certain regulatory reform must be in place and it must strive towards achieving the following;

To create independent entities to oversee the introduction of competition in the market and establish regulatory mechanisms for issues such as interconnection, licensing and tariff rebalancing.

Preparing the incumbent operator to face competition, including timetables setting deadlines for termination of market exclusivity.

Allocating and managing scarce resources such as numbers and spectrum resources in a non-discriminatory way within the liberalized market.

Expanding and enhancing access to telecommunication and ICT networks and services.

Promoting and protecting consumer interest, including universal service and privacy.[17]

Focus of the regulator therefore is to ensure a level playing field for the operators and ensure that there is no abuse of dominant market position. In order for the regulator to achieve all these, “ it is vital that the regulator establishes and maintains effective relationships with the three core groups most affected by its functions: the users, operators and government.”[18]

2. 1 Regulatory Independence In Telecommunication

With the advent of the liberalisation era the United Kingdom took one of the first initiatives in creating an Independent Regulatory Body (OFTEL now known as OFCOM (Office of Communication). Several other nations followed suit after the (especially the developing countries) World Trade Organisation (WTO) General Agreement on Trade and Services (GATS) and the Agreement on Basic Telecommunications) annexed to it, presented a

Reference Paper which came into effect on the 1st of January 1998.[19]The Reference Paper sets out six key principles by which the market for basic telecommunication services should be governed. This essay is focused on one of these six key principles; there must be an Independent Regulator in the telecommunication sector.[20]

The Independent Regulatory body must be separate and not accountable to any supplier of basic telecommunication services. Decision reached by the regulator and procedures used in reaching those decisions shall be impartial with respect to all market participant.[21]

The term “ independence” as used in the telecoms sector should not be misconstrued. The term does not imply independence from government policy or usurping the power to make such policy, but the independence to implement policy without undue interference from the government or industry lobbyist.[22]

Former United States Chairman of the Federal Communication Commission Michael K. Powell stated that, “ to be independent, not only should a regulator be physical and operationally separated from those it regulates, but also be empowered to carry out policy by making objective well-reasoned, written decisions arrived through transparent processes and based on a complete public record.”[23]

The European Union Guarantees the independence of its national regulatory authorities by ensuring that;

“ member states shall guarantee the independence of national regulatory authority by ensuring that they are legally distinct from and functionally independent of all organisations providing electronic communications network equipment or services. Member States that retain ownership or control of undertakings providing electronic communication networks and/ or services shall ensure effective structural separation of the regulatory function from the activities associated with ownership or control.”[24]

The Directive also stipulates that regulatory authorities of member states should exercise their powers “ impartially and transparently.”[25]

In the United Kingdom the present independent regulatory body is known as Office of Communication (OFCOM).[26]OFCOM later received its full authority from Communication Act 2003[27]also inheriting the duties that had previously been the responsibilities of five regulatory bodies (OFTEL inclusive) making it a converged independent regulatory authority. OFCOM is independent of any governmental/operators intervention or influence in carrying out its organisational objectives/functions and also meting out its responsibilities. Although the Secretary of State answers questions in Parliament about OFCOM and OFCOM is also accountable to Parliament through various parliamentary committees and national audit office, this can be seen as means of ensuring transparency and accountability by the body and not under government control.[28]

In 1996, African Leaders endorsed an ITU sponsored African Green Paper which called for major reform in the telecommunications sector in Africa. [29]Nigeria put this into effect by enacting the Communication Act 2003 which established “ a regulatory framework for the Nigerian Communication industry and for this purpose to create an effective, impartial and independent regulatory authority.”[30]This piece of legislation has reformed the regulatory authority in Nigeria making it an independent National Regulatory Authority. The NCC has henceforth been responsible for creating an enabling environment for competition among operators “ as well as ensuring the provision of qualitative and efficient telecommunication services throughout the country.”[31]

In practice the degree of independence of a national regulatory authority depends on several factors differing from country to country. A true
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independent regulatory authority will bring about confidence in operators, consumers and investors that the telecoms market will be regulated transparently and objectively. This can only lead to increased investment in the sector and immense growth and benefit to the economy[32](an example of this is Nigeria, the positive impact the telecoms sector has had on the economy).

3. 0 REGULATORY INDEPENDENCE AND ITS KEY ASPECTS

An independent regulatory authority is an important factor in the success of any country's effort to introduce competition, to privatize and liberalize the telecommunication sector. It is imperative on every country to establish an impartial and independent referee in the form of a regulator to create the rules and processes by which the telecommunication industry is to be regulated and service to the public will be provided. In achieving this, certain fundamental

elements must be present in any country's national regulatory authority and these are; Structural Independence, Financial Independence and Functional/Operational Independence.[33]

3. 1 Structural Independence

National Regulatory Authorities (NRA) has been created in many forms depending on the country where it is being created. Some countries have regulatory department within government ministry, some are separate from the ministry but are accountable to the ministry while others have regulatory agencies that are separate from, and not accountable to government or its

ministries. Whatever structure NRA takes it should be one with a distinct legal mandate capable of engaging and retaining qualified personnel able to understand, assess technological and industry trends and enforcing technical requirements with up-to-date technological tools.[34] Structural independent also reduces the “ possibility of political or industrial capture”[35]of the regulatory authority. Creating a clear division between a regulator and the government/operators and increasing the degree to which the actions of the regulator are perceived to be neutral and transparent thereby boosting market confidence in the sector. A regulator not tied to the existence of any government is also immune from the effect of short-term political expediency making the sector a more attractive prospect for long term inward investment.[36]

Any NRA well structured and effectively independent from external influence are advantageous to the telecommunication sector in the following ways;

It meets the key requirement of the World Trade Organisation’s Reference Paper on Regulation that the NRA should be structurally separate from any supplier of basic telecommunication services;

It facilitates the transparent and non-discriminatory implementation and application of policy even where the government may still retain ownership rights to one or more of the principal operators;

It facilitates greater impartiality of decision making, both when implementing policy and in recommending to policymakers suitable courses for the future action.[37]

For instance in Nigeria the statute creating the NCC and its functions creates a structural base for its independence. Chapter II of the Nigerian Communication Act 2003 establishes the

NCC as a body corporate with perpetual succession, clothing it has a legal person capable of suing and being sued in its corporate name.[38]A Governing Board (referred to as “ the Board”) is created to see to the administration of the commission.[39]It also provides for the commission to be structured into departments by the Board for the purpose of effective discharge of its functions.[40]It should be noted that though appointment of commissioners to the board is done by the President of the country[41]this does not in any way make the NCC a department of the executive arm of government.

In the UK OFCOM has a Board consisting of a Chairman and both executive and non executive members.[42]The executive arm of the Board is responsible for the running of the organisation and reports back to the Board.[43]To further ensure OFCOM’s structural independence, the Communication Act 2003 provides that the principal duty of OFCOM is to carry out its functions[44]and this is enshrined in OFCOM and no other governmental agency. The Board members of OFCOM are appointed by the Secretary of State[45]and he shall have such powers as to set the maximum or minimum number for the executive members[46]but this power does not extend to the way the Board run the affairs of the regulatory agency.

In most countries, it is inevitable that NRA will need to work closely with other official and even non governmental bodies in order to fulfil its

objectives. That is why "...persons appointed to these positions must have personal qualities to resist improper pressures and inducements. They must exercise their authority with skill to win the respect of stakeholders, enhance the legitimacy of their role and decisions and build a constituency for their independence." [47]

3. 2 Financial Independence

An effective regulation cannot be accomplished without adequate funding. The source of any NRA funds and means by which such funds are received and becomes part of the agency's budget is vital as it can determine the degree of a regulator's autonomy and competence when carrying out its functions. Funding is critical in ensuring a regulator's effectiveness. While a regulator's budget may come from government (in form of government appropriation) or from the sector it regulates through licensing fees, fines and other administrative and service charges etc. The fundamental part of these is that funding should be free from any political and private interest. [48]

In a number of countries NRA has been allowed to retain revenues derived from other means other than government appropriation. This is because reliance on multiple sources of funding other than budgetary allocation by the government allows regulators to be more financially independent and less subject to outside influence (an independent source of revenue, therefore, can effectively safeguard a regulators independence). [49]

For instance in Nigeria the regulatory authority have diverse source of funding which provide some level of financial freedom from the government. <https://assignbuster.com/how-has-the-telecommunications-industry-evolved-commerce-essay/>

The Nigerian Communication Act 2003 requires that the NCC “ shall establish and maintain a fund from which all expenditures incurred by the commission shall be defrayed.”[50]Further goes on to state that this fund shall not be limited to funds generated from more than one source such as government appropriation, licensing fees, spectrum fees, grants, loans, aids.[51]

In United Kingdom the regulatory body (OFCOM) also generates its funds from more than one source. One of such means is the making of grants available or the advancements of funds to OFCOM from the Secretary of State.[52]It also generates funds from the issuance of administrative charges imposed on providers,[53]penalties in form of fines,[54]and even contributions by service operators.[55]

The availability of diverse source of funding to any NRA provides a level of financial independence and also unties the regulatory agency from the apron of the government. Therefore financial independence, coupled with a NRA’s ability to manage and administer its own funds gives it more regulatory certainty to assert more independence in regulating the telecommunication sector.[56]

3. 3 Functional/Operational Independence

The establishment of the regulatory framework of an independent regulator is the duty of the government, but the implementation and administration of this regulatory framework is the duty of the independent regulator.

Therefore for a regulator to carry out its functions and act as a competent watch-dog for the sector it is important that sufficient regulatory power is

given to the independent regulator. Not only by the legal framework creating its existence but also by the government in implementing their policies.

It should be noted that there is no definite characteristics for determining the functionality of a regulator; rather it is comprised of elements which allow a regulator carry out its functions effectively as a going-concern and thereby establish its credibility.[57]Therefore for a regulators guaranteed independence in carrying out its functions, its duties and powers must be set out in clear terms in the statute creating it. To create effectiveness and certainty, regulators power to manage the sector should include the following;

the ability to give opinion on draft laws relevant to the telecommunication sector;

the ability to make decisions and carry out measures in accordance with the provisions of the law, the principles of a good regulatory decision making process must consist of transparency, objectivity, professionalism and independence;

the regulator should be responsible for the issuing of licenses in telecommunication activities, the supervision of their implementation, their monitoring, amendment and enforcement and, if required, their suspension and revocation in accordance with the enabling law;

the establishment of interconnection rules and review of interconnection contracts;

the creation of technical standards for operators and rules ensuring compliance;

the establishment and management of the National Numbering Plan;

the supervision of tariffs of service providers deemed to exercise Significant Market Power;

the determination and collection of tariffs and fees;

the enforcement of the law within the limits of the powers granted the regulator;

the establishment of rules and regulations emanating from the law, including the establishment of the criteria and procedures for the hearing and adjudication of complaints, conduct investigations and other claims that may arise with the ability to impose appropriate penalties and sanctions without external influence;

acting as a mediator and arbitrator to settle conflicts between licensees;

the ability to promote competition in the sector and the prevention of anti-competitive behaviour by the operators and also ensuring market transparency;

supporting educational and health institutions in carrying out their programmes through telecommunications and facilitate access telecommunication services for the physically disadvantaged and the protection of customers right by the operators;

to implement all these the staffing of the regulatory body must consist of “ technical, legal, regulatory, financial and industrial expertise” with the head of the regulatory body having the autonomy to recruit staff, and remuneration different from that of normal civil servants.[58]

In Nigeria the Communication Act 2003 in Chapter II, Part I (Establishment and Functions of Commission) provides for the functions of the NCC.

[59]These functions are strictly within the powers of the NCC to carry out, and these has led to guaranteeing the independence of the commission, attract investors to the sector and development to the Nigerian economy.

In United Kingdom the duties and functions of OFCOM is guaranteed under the Office of Communication Act 2002 and the Communication Act 2003.

[60]These responsibilities are the duties imposed and to be implemented by the regulatory body.

“ Without functional effectiveness, it is difficult if not impossible, for a regulator to attain the necessary credibility among participants in the sector and potential investors.”[61]Its one thing for a regulator to have an independent structural base and a financial structure for funds that guarantees independence. But where the apparatus for carrying out its functions are connected to external factors outside the body, then a regulatory body cannot operate effectively.

4. 0 NECESSARY LIMITATIONS ON A REGULATOR’S FREEDOM OF ACTION

Independence connotes freedom, but this does not guarantee the regulatory body’s freedom from government policies, but rather has independence to

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implement its regulation and policies without intervention from the government or the operators. There must be a process ensuring sufficient checks and balances on the activities of the regulator, to ensure the regulator does not stray from its mandate, engage in corrupt practices or become grossly insufficient. In achieving