

E.M.T.S. Limited v. MTN Communications Limited & Another: Boon or Bane to Enforcement of Competition Law in Nigeria's Telecommunications Sector?

Wiseman Ubochioma, Ph.D

Abstract

In February 2016, the Federal High Court made a seminal decision in Nigeria's telecommunications industry. It struck out a suit filed by E.M.T.S. Limited (popularly known as Etisalat) against MTN over the latter's acquisition of Visafone Communications Limited on the grounds that it lacked jurisdiction to entertain the suit. This comment argues that the decision of the court should not be construed as "a missed opportunity" to address the topical issue of anti-competitive conduct in the sector. Instead, it represents a progressive step towards recognising the significance of exploration and compliance with the internal statutory procedures before bringing anti-competitive claims in courts. This would not only enhance compliance with the law but also avail an opportunity for courts to intervene and determine anti-competitive conduct in the sector if the sector-specific regulator fails to do so.

Keywords: E.M.T.S., MTN, Nigerian Communications Act, Competition, Telecommunications Sector.

1. Introduction

Early in 2016, the Federal High Court of Nigeria made a seminal decision in the Nigerian telecommunications sector. The court struck out a suit filed by E.M.T.S. Limited (popularly known as Etisalat) against MTN over the latter's acquisition of Visafone Communications Limited on the grounds that it lacked the jurisdiction to entertain the case.¹

*Ph.D, LLM (Osgoode Hall Law School, York University Canada, LLB (Hons) Abia State University, BL (Abuja), Lecturer at Law, Baze University, Abuja, Partner, Blackfriars LLP, Nigeria.

The decision could be criticised on the grounds that the court squandered a rare opportunity to address the growing concerns about possible monopoly in the industry.² While this comment is not averse to this concern, it argues that the court's decision should not be interpreted as "a missed opportunity" to address the topical issue of anti-competitive conduct in the sector.

Instead, it represents a progressive step towards recognising the significance of exploration and exhaustion of internal statutory procedures before bringing anti-competitive claims in courts. This would not only enhance compliance with the law but also avail an opportunity for courts to intervene and determine anti-competitive conduct in the sector if the sector-specific regulator fails to do so. Part one serves as a primer to the comment. Part two provides a summary of the facts of the case and the decision of the court. Part three hashes out the core legal issues and the rationale for the court's decision. It also analyses and justifies the decision of the court. Part four concludes the comment.

1. Summary of the Facts and the Decision of the Court

E.M.T.S. and MTN Communications Limited were duly licensed by the Nigerian Communications Commission (NCC) to operate 2x5 MHz, 2x15 MHz and 2x10MHz spectrums in the 900 MHz, 1,800 MHz and 2,100MHz spectrum bands.³ Visafone Communications Limited, the 2nd Respondent, was also duly licensed by the NCC to operate 2x10 MHz in the 800MHz spectrum.⁴

¹*E.M.T.S. Limited v. MTN Communications Limited & Another, F.H.C./L/CS/130/2016*. See also Iriekpen, D. Court strikes out Etisalat's suit against MTN over Visafone acquisition Thisday(26 January 2016) 9

² For the concerns, see Adekusibe, J. Averting looming monopoly in Nigeria's telecom industry/The Guardian(30 April 2015) 70. Ubochioma, W. (2013). Regulation of competition in Nigeria's liberalised telecommunications market: A case for complementing sector-specific regulation with a general competition law commission' 19(6) Computer and Telecommunications L. Rev. 179, 181-182

³*E.M.T.S. Limited* supra note 1 at 2

⁴ Ibid

However, while E.M.T.S. (the Applicant) and MTN (the 1st Respondent), provided the Global System for Mobile Communications (GSM) 2G and the Universal Mobile Telecommunications Services (UMTS) 3G services in their 900 MHz, 1800MHz and 2,100MHz spectrums,⁵ Visafone Communications Limited provided the Code Division Multiple Access (CDMA) services in its 800MHz spectrum.⁶As a result of advancements in telecommunication technologies, the 800MHz spectrum owned by Visafone Communications Limited became an important spectrum that assisted telecommunication operators to provide 4G Long Term Evaluation (LTE) services in a highly cost efficient manner.⁷ Comparatively, unlike the 1800MHz and the 2,600 MHz, the 800MHz could cover additional “distances due to its longer wavelength, geographical and enhanced indoor/in-building coverage and significantly cheaper cost of deployment.”⁸

The NCC had never issued the 800MHz spectrum to service providers in the GSM segment of the market. It had only issued the spectrum to non-providers of GSM services.⁹ Thus, the spectrum became a rare but essential facility for the providers of GSM services.¹⁰

⁵ Ibid

⁶ Ibidat 3

⁷ Ibid

⁸ Ibid

⁹ Ibid

¹⁰ Ibid. For the definition of the “essential facility doctrine”, see Meadows, M. (2015). The essential facilities doctrine in information economics: illustrating why the antitrust duty to deal is still necessary in the new economy. 25(3) *Fordham Intellectual Property, Media & Entertainment L.J.* 795, 805, noting that “the essential facilities doctrine posits that it is anticompetitive to allow a monopolist in a market that has exclusive control over an input essential to that market to deny potential competitors access in order to concentrate control over that market.”; see also Soma, J., Forkner, D. & Jumps B. (1998) The essential facilities doctrine in the deregulated telecommunications industry. 13(2) *Berkeley Tech. L.J.* 565, 582, noting that it arises when “a single monopolist controls an essential facility and via this control unilaterally forecloses competition in a relevant market.”; Piropatto, M.(2000) Open access and the essential facilities doctrine: promoting competition and innovation. 1 *University of Chicago Legal Forum* 269, 370, noting that “under the essential facilities doctrine, a company that controls a facility that is essential for competition must provide its competitors with reasonable access to that facility.” On what facility is essential, Piropatto notes that “a facility is essential; if the competitor

Sometime in 2015, MTN made a takeover bid to Visafone to acquire all the equities of Visafone.¹¹ E.M.T.S. brought an action challenging the takeover on the ground that the bid, if successful, would give MTN an unjust advantage over other operators in the GSM segment of the industry because other operators did not have access to this rare and vital facility.¹² E.M.T.S. also alleged that the takeover amounted to a breach of section 8 of the Nigerian Communications Commission Competition Practices Regulation of 2007.¹³ It further claimed that MTN was already a dominant operator in the retail mobile voice services and wholesale leased line in the market.

seeking access cannot reasonable duplicate the facility." See also Podell, D.(1989) The evolution of the essential facilities doctrine and its application to the deregulation of the natural gas industry 24(4) Tulsa L. Rev. 605, 617, asserting that "an essential facility, is at a minimum, a resource possessed by the defendant that is vital to the plaintiff's competitive viability." In contrast, it has been noted that "a facility is truly essential when public necessity justifies treating that facility as a public utility. The duty to share a facility should only arise when occasioned by the needs of the public. Consequently, the needs of the competitor, the preferences of the consumer, and the analysis of the market are all irrelevant in determining what facilities are so essential that they must be shared." See Seelen, C. (1997) The essential facilities doctrine: what does it mean to be essential. 80 (4) Marquette L. Rev. 1117, 1133. Under case law, it has been noted that "the essential facilities doctrine imposes liability when one firm which controls an essential facility denies a second firm a reasonable access to a product or service that the second firm must obtain in order to compete with the first.", see *Alaska Airlines Inc. v. United Airlines Inc.* 948 F.2d 536, 542 (9th Cir. 1991). In *MCI Communications Corp. v. American Telephone and Telegraph Co.* 708 F.2d 1081, 1132-1133 (7th Cir. 1983), the court noted that for the courts to apply the doctrine, it must consider the following: (a) control of the essential facility by a monopolist; (b) a competitor's inability practically or reasonably to duplicate the essential facility; (c) the denial of the use of the facility to a competitor; and (d) the feasibility of providing the facility. For other cases in which courts have applied the doctrine, see *United States v. Terminal Railroad Association of St. Louis*, 224 U.S., 383 410 (1912); *Commercial Solvents v Commission*, Joined Cases 6/73 & 7/73, *Istituto Chemioterapico Italiano S.P.A. & Commercial Solvents Corp. v. Comm'n*, [1974] E.C.R. 223.

¹¹Businessday, 'MTN's Visafone Acquisition Bid Reflects Changing Market Dynamics' Businessday (21April 2015) [Online] Available: <http://businessdayonline.com/2015/04/mtns-visafone-acquisition-bid-reflects-changing-market-dynamics/> (June 8, 2015)

¹² Ibid

¹³ Ibid. Section 8 of the said Regulation deemed pre-emptive acquisition or securing of scarce facilities or resources, including rights of way, required by another licensee for the operation of its business, with the effect of denying the use of the facilities or resources to the other service provider as a conduct capable of resulting in a substantial lessening of competition.

Consequently, the acquisition would make MTN a dominant operator in the retail mobile data services since the other telecommunication firms that provide GSM services did not have the said 800 MHz spectrum or any other cost efficient 4G LTE spectrum.¹⁴

E.M.T.S. brought an originating motion on notice and sought an order of perpetual injunction restraining MTN from using or deploying the 800MHz spectrum issued to Visafone which was pre-emptively purchased by MTN.¹⁵ It also sought an order of perpetual injunction restraining MTN from using the said Spectrum until E.M.T.S.'s petition to the NCC challenging the NCC's approval of MTN's takeover of the 100% shares of Visafone was determined.¹⁶

Finally, E.M.T.S. requested the court to grant an order of perpetual injunction restraining Visafone from any purported approval of the takeover of its shares by MTN or performing any act that would make it possible for MTN to use or profit from the 800MHz spectrum until E.M.T.S.'s on-going process challenging the acquisition at the NCC was determined.¹⁷ On a didactic note, these reliefs sought by E.M.T.S were interlocutory.¹⁸ The court, after a consideration of the reliefs sought by the E.M.T.S., held that it lacked the jurisdiction to entertain the suit because E.M.T.S. did not exhaust the statutory procedure under the Act before seeking the injunctive orders and judicial review.¹⁹

¹⁴ Ibid at 4

¹⁵ Ibid at 1

¹⁶ Ibid

¹⁷ Ibid at 2

¹⁸ The Black's law dictionary defines interlocutory as an order that is "interim, temporary; not constituting a final resolution of the whole controversy. See Garner, B.(2011) Black's Law Dictionary, (4th Pocket ed.) (USA: Thomson Reuters,) 400. For case law on the nature of an interlocutory injunction, see *Chief Oyibo Agbomagbo & Anor v. Chief Oloku Okpogo & Ors* (2005) LPELR-11409 (C.A.) 1 at 4

¹⁹See the Nigerian Communications Act 2003

3.0 Comment: Is the Decision of the Court Justified?

3.1 Statutory Procedure under the Nigerian Communication Act before a Party can Institute an Action for Judicial Review

The Nigerian Communications Act is the principal legislation that regulates the telecommunications sector in Nigeria. Under the Act, there are procedures which a party should follow if the party alleges that the decision of the Commission adversely affects its interests. Thus, the Act provides that “a person who is aggrieved or whose interest is adversely affected by any decision of the Commission made pursuant to the exercise of the powers and functions under this Act or its subsidiary legislation may request in writing for statement of reasons for the decision.”²⁰ Once a party makes the written request, the Nigerian Communications Commission shall furnish the party with a copy of the statement of reasons for the decision and any relevant information the Commission considered in arriving at such decision.²¹

The Act also provides an opportunity for a party who is dissatisfied with the statement of reason for the decision of the Commission to ventilate his dissatisfaction. Thus, it provides that “an aggrieved person may at any time within but not later than 30 days after the receipt of the Commission’s statement of reason request the Commission in writing for a review of the Commission’s decision and specify the reasons and the basis for his request.”²² Upon receipt of the aggrieved party’s written request for the review, the Act requires the Commission to meet,²³ conclude the review and provide written information of its final decision and the basis for the decision not later than 60 days from the day that it received the request.²⁴

²⁰Ibid, s.86(1)

²¹ Ibid, s. 86(2)

²²Ibid, s.87(1)

²³Ibid, s.87(2)

²⁴Ibid, s.87(4)

To avoid foreclosure of the right of parties to seek relief in a regular court, the Act allows an aggrieved party to apply to a regular court²⁵ for a judicial review of the decision of the Commission.²⁶ However, the right of an aggrieved party to apply to a regular court for judicial review is not absolute. Indeed, the Act expressly provides that the party must first exhaust all the procedures and reliefs under the Act before making such application before a regular court.²⁷

It is a trite principle of law that where a statute provides a statutory procedure which an applicant shall follow and exhaust before he brings a claim to the court, the applicant should follow such procedure otherwise the court would not have jurisdiction to entertain the suit. A litany of case law supports this position. Thus, in *Obasanjo v. Yusuf*,²⁸ the Supreme Court gave a seal of approval to this principle when it held that "it is elementary law that a plaintiff in the commencement of an action must comply strictly with the provisions of the enabling law. He cannot go outside the enabling law for redress."²⁹

Apart from the fact that non-compliance with the statutory procedure for instituting the action is an issue that affects the jurisdiction of the court, such procedural defect would also affect the competence of the suit. Panoply of Nigerian case laws gives credence to this legal principle.

²⁵A regular court in the context implies the Federal High Court. This is because under the Constitution of the Federal Republic of Nigeria 1999 (as amended), the Federal High Court has exclusive jurisdiction to entertain suits relating to any Federal enactment on commercial and industrial monopolies, combines and trust. See 1999 Constitution of the Federal Republic of Nigeria, s 251(f). Additionally, section 138 of the Nigerian Communications Act confers exclusive jurisdiction on the Federal High Court in respect of all matters, suits and cases arising from the Act or a subsidiary legislation of the Act.

²⁶*Ibid*, s.88(1)

²⁷*Ibid*, s.88(3)

²⁸ (2004) 9 NWLR (Pt. 877) 144

²⁹ *Ibid* at 221

In *Agip Nigeria Limited v. Agip Petroli International & Ors*,³⁰ the Supreme Court noted that, “where a statute or rule of court provides for a procedure for the commencement of an action, failure to follow that procedure renders any suit commenced otherwise incompetent.”³¹ Similarly, in the *Chairman and Members of Customary Court Mbawsi & Ors v. The State Ex-parte Ndimele Nwosu*,³² the Court of Appeal hewed to this legal principle without sentimental indulgence when it noted that:

It is a trite law that where a statute or rules are put in place for compliance for institution of an action or suit or proceeding, the method or procedure prescribed by the statute or rules of the court must be followed by a claimant otherwise the action will be incompetent thereby robbing the court of jurisdiction.³³

Given the above precedential decisions, it is reasonable and inevitable to assert that since the E.M.T.S. never followed the procedures for review under section 87 of the Act, Buba J. was right in holding that the suit was incompetent.

Equally important, the incompetence of E.M.T.S.’s suit was compounded by lack of evidence before the court to show that E.M.T.S. had either instituted or had a pending review proceeding before the Nigerian Communications Commission.³⁴ The content of the letter that E.M.T.S. wrote to the Commission and which it relied upon in the proceedings was a ‘Request for Statement of Reason’ for the decision of the Commission and not a ‘Request for a Review’ for the Commission’s decision. This clearly fell short of the provision of section 87 of the Act.³⁵

³⁰ (2010) 5 NWLR (Pt. 1187) 348

³¹ Ibidat 419-420

³² (2014) LPELR-22852 (C.A.) 1

³³ Ibid at 32

³⁴ *E.M.T.S. Limited* supra note 1 at 10

³⁵ Ibid at 12

At best, E.M.T.S. complied with section 86 of the Act which could not form the basis of a claim for a pending review before the Commission. As the court agreed with the counsel for MTN, there exists a fine line between sections 86 and 87 of the Act. Indeed, the section that triggers a review proceeding is section 87 and not section 86 of the Act.³⁶

In view of E.M.T.S.'s non-compliance with section 87, it follows that had the court granted the perpetual injunctive relief of E.M.T.S, such order would have caused severe injustice against MTN since there was no pending review or proceeding before the Commission.³⁷ Assuming without conceding that there was a pending review before the Commission, the Act envisages that the Commission must have reached a decision before an application is made to the court for a review of the Commission's decision. By parity of reasoning, since E.M.T.S. did not apply for a review of the decision of the Commission, the Commission could not have made a decision that finally determined the right of E.M.T.S. and upon which E.M.T.S. could seek an order of perpetual injunction. As the counsel for the respondent rightly noted and which the court concurred, an order of perpetual injunction has "a perpetual character"³⁸ and ought to be granted "after a final determination of the rights of the parties."³⁹

Additionally, the case of E.M.T.S. was patently defective because it adopted a wrong procedure in seeking the judicial review. Accordingly, E.M.T.S. ought to have instituted the suit through Judicial Review Action and not by way of Originating Motion on Notice.⁴⁰

³⁶ Ibid at 35

³⁷ Ibid at 13

³⁸ Ibid at 31

³⁹ Ibid at 12

⁴⁰ Ibid at 19-20

This would require the E.M.T.S. to first seek the leave of court to institute the action by way of Judicial Review before invoking the jurisdiction of the court to determine the validity of the decision of the Commission.⁴¹ On a more fundamental plain, even if E.M.T.S. had duly applied for the judicial review, its claim would not have escaped the judicial cul-de-sac because the Act provides that “the decision or direction of the Commission that is the subject matter of an application for judicial review shall subsist and remain binding and valid until it is expressly reversed in a final judgement or order of the Court.”⁴² This implies that the decision of the Commission could not be reversed through an interlocutory order which the applicant sought but from a final judgment or order of the court.⁴³

At this point, it is worth noting that during the trial, E.M.T.S. argued that it was entitled to seek injunctive reliefs pending the outcome of review proceedings and commencement of an action for judicial review under section 94 of the Act.⁴⁴ Given the entire provision of section 94, this argument is quite tenuous and humbug. For the purposes of analysis, it is important to state the provision of section 94. Thus, section 94(1) provides that “the Commission or any person may seek an interim or interlocutory injunction against any conduct prohibited in this part.” Under subsection 2, a party is required to “obtain a certificate from the Commission for leave to proceed to the court for the enforcement of the provisions of this part except in the case of an injunction.” Indeed, the marginal note of section 94 upon which the applicant premised its argument is clearly titled ‘legal action against default.’⁴⁵

⁴¹ Order 34(3)(1) of the Federal High Court Civil Procedure Rules of 2009 provides that an application for judicial review shall not be made unless the leave of court has been obtained in accordance with this rule. For this argument, see *E.M.T.S. Limited* supra note 1 at 19.

⁴² Nigerian Communications Act 2003 supra note 2 s.88(2)

⁴³ For this argument, see *E.M.T.S. Limited* supra note 1 at 45-46

⁴⁴ Ibid at 25, 28

⁴⁵ Ibid at 40

Admittedly, these provisions entitle a party to seek an order of interlocutory injunction for anti-competitive conduct of an operator which affects another operator. However, the right of a party to seek an interlocutory injunction under these provisions is contingent upon the breach of anti-competitive practices enumerated in the Act and the Regulations by an operator and a pronouncement of the Commission to that effect.⁴⁶

As the counsel for the Respondent persuasively and rightly argued, E.M.T.S should have adduced credible evidence to show that an anti-competitive conduct had occurred and that the Commission had adjudged MTN a defaulter pursuant to the powers of the Commission under section 90.⁴⁷ Consequently, since the Commission, which has the exclusive jurisdiction under section 90 of the Act, had not declared MTN a defaulter, it was premature for E.M.T.S. to seek the order of perpetual injunction against MTN.⁴⁸ Buba J. made this position venomously clear when he noted that:

This court has no doubt that even though an application for interlocutory injunction can be made before, during, or at the hearing of a case and even after, certainly this court knows that proceedings cannot begin in the High Court by interlocutory applications and end by interlocutory applications. Section 94(1) of the Nigerian Communications Act provided a remedy; we must distinguish between a remedy and a procedure. The commencement of this action by way of injunction without any declaration is arguably self-defeatist.....⁴⁹

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Ibidat 50

At the very least, this dictum shows that the court did not intend to foreclose the right of the applicant to seek relief under the Act. Instead, it simply applied the principle of primary jurisdiction which requires that “a matter shall be considered by a regulatory before the matter comes under judicial scrutiny.”⁵⁰

3.2 Exclusive Power Conferred on the Nigerian Communication Commission under Section 90 of the Act and the Recognition of Sector-specific Regulation

A revisit of section 90 of the Nigerian Communications Act would assist to elucidate whether the judgment of Buba J. was entirely rational. As noted earlier, section 90 gives the Nigerian Communications Commission the “exclusive competence to determine, pronounce upon, administer, monitor and enforce compliance of all persons with competition laws and regulations, whether of a general or specific nature, as it relates to the Nigerian communications market.”

⁵⁰Barrow, R. (1964) Antitrust and the regulated industry: promoting competition in broadcasting. Duke L.J. 282, 294. See also Travis, R. Primary jurisdiction: a general theory and its application to the Securities Exchange Act. 63(4) California L. Rev. 926, 926, noting that “primary jurisdiction is a doctrine of judicial administrative that provides guidance regarding whether a court should allow an agency an initial opportunity to decide an issue in a case over which the court and the agency have concurrent jurisdiction.”; Lockwood, A. (2007) The primary jurisdiction doctrine: competing standards of appellate review. 67 Wash. & Lee L. Rev. 707, 710, stating that “the doctrine allows a court to refer issues to an agency that, because of a congressional delegation of power, has special knowledge and discretion over the subject matter.”; Callahan, P. (1974) The doctrine of primary jurisdiction: was it inverted? 2 (1) Pepperdine L. Rev. 190, 190 noting that, “the doctrine of primary jurisdiction states that the court will not determine a question within the jurisdiction of an administrative tribunal prior to a decision by that tribunal. This doctrine is applied when the expertise of the agency is desired or when a uniformity of ruling is important.”; Sanataguida, B. (2007) The primary jurisdiction two-step. 74 University of Chicago L. Rev. 1517, 1517, asserting that “the doctrine of primary jurisdiction applies when a claim is originally cognisable in the court but involves issues that fall within the special competence of an administrative agency. Under the doctrine, the court can stay litigation and refer such issues to the agency for its decision.” For other scholarly works on the doctrine, see Mehren, V. (1954) The antitrust law and regulated industries: the doctrine of primary jurisdiction. 67 Harv. L. Rev. 929; and Schwartz, B. (1953) Primary administrative jurisdiction and the exhaustion of litigants. 41 Geo. L. J. 495. The doctrine has been applied in case laws in other jurisdictions. See *Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.* 204 U.S. 426 (1907); and *Unites States v. Western Pac. Ry. Co.* 352 U.S. 59 (1956)

In Buba J.'s decision that the court would decline jurisdiction and strike out the applicant's suit on the exclusivity of jurisdiction of the Commission under section 90, he noted that "the legislature was very careful with its choice of words and the phrases or phraseology selected is in recognition that special competence is a desiderata in handling the complex communication world."⁵¹ According to him, a critical analysis of the section 4 of the Act would reveal the regulatory responsibilities of the Nigerian Communication Commission and an understanding of these responsibilities are vital.⁵²

From this standpoint, the court could not be said to have erred in law when it declined jurisdiction on grounds of the provision of section 90. This is because by all stratospheric standards, section 90 does not suffer 'the problem of statutory vagueness.' Indeed, the section clearly expresses the intention of framers of the Act that the Nigerian telecommunications sector should adopt a sector-specific regulatory model in which the regulator would have the exclusive jurisdiction to entertain competition issues.

Inherent in this regulatory approach is that if there is any procedure for dealing with anti-trust complaint, a party must exhaust it before approaching the court for reliefs. Courts have held that where the words used in a statute are clear, such words should be given their literal meaning. Thus, in the case of *First Bank of Nigeria Plc v. Ndoma Egba*,⁵³ the court held that once the words used in a statute are unambiguous, they should be given their literal meaning even if such meaning cause hardship to a litigant.⁵⁴

⁵¹ *E.M.T.S. Limited* supra note 1 at 45

⁵² *Ibid* at 51

⁵³ (2005) 4 FWLR (Pt. 284) 776

⁵⁴ *Ibid* at 829-830. See also *Ugwuanyi v. NICON Insurance PLC* (2013) 11 NWLR (Pt. 1366) 435 at 556; and *Buhari v. Obasanjo* (2003) 15 NWLR (Pt. 843) 236.

Additionally, if the court had not recognised the exclusive right on the Commission to first determine anti-competition issues and adjudge a service provider a defaulter before a party can bring an action for judicial review, there is a huge risk that an operator may evade the expertise of the Commission to determine competition related matters and institute an action in courts. Conceivably, the operator might do so even when there is no legitimate justification for challenging the conduct of a rival operator.

Obviously, the court aligned itself with the sector-specific regulatory model in the telecommunications sector under the Nigerian Communications Act. As noted earlier, under this model, a regulatory agency is saddled with the responsibility of regulating competition in the industry.⁵⁵ This regulatory model is based on the assumption that a sector-specific regulator is in the best position to know what is beneficial to the industry. As Stawicki noted,

It is the sector-specific Acts which define- in relation to regulated undertakings- how the monopolist should behave in order to create as much room for competition as possible. The extent to which such an undertaking is made subject to competition (within the regulatory framework of the regulatory regime) is a result of many various factors and political decisions...⁵⁶

⁵⁵ I have argued elsewhere that the sector-specific regulatory model should be substituted with a co-regulatory model in which the Nigerian Communication Commission and a Competition Law Commission would regulate competition in the sector. See Ubochioma, W. *supra* note 2 at 181

⁵⁶ Alexander, S. (2011) The anatomy of sector-specific regulation- is it still worth protecting? further thoughts on the parallel application of competition law and regulatory instruments. 4(4) *Yearbook of Antitrust and Regulatory Studies* 115, 124. See also Kerf, M. & Geradine, D. (1999) Controlling market power in telecommunications: antitrust vs. sector specific regulation- an assessment of the united states, new zealand and australian experiences. 14(3) *Berkeley Tech. L.J.* 919, 931 noting that "some argue that a sector-specific regulator is better able to develop the expertise required to tackle difficult telecommunications issues than infrastructure-wide regulators and, a fortiori, than economy-wide bodies such as antitrust authorities."

The Nigerian court is not alone in the 'show of deference' to the sector-specific regulatory model. Jurisprudentially, the United States adopted this model. Thus, in *Verizon v. Trinko*⁵⁷, the United States Supreme Court held that *Trinko* could not bring an action for an anti-competitive conduct under section 2 of the Sherman Act of 1990 because the Telecommunications Act of 1996 had already made rules governing access to network of service providers and reliefs for anti-competitive conduct.

At a didactic pedestal, although the expertise of a sector regulator makes the sector regulatory model beneficial to an industry, a sector-specific regulator may be prone to industry capture. Put another way, the constant interface between the regulator and the regulated entities "could in theory raise the risk that a sector-specific agency would be captured by the regulated industry, leading the agency to act to favour the interests of the industry rather than the public interest."⁵⁸

⁵⁷ 540 U.S. 398 (2003). The Supreme Court of the United States of America has extended this principle in some of the antitrust cases in securities regulation. See *Gordon v. New York Stock Exchange Inc.* 95 S.Ct. 2598 (1975); *Credit Suisse Securities LLC v. Billing*, 551 U.S. (2007); and *United States v. National Association of Securities Dealers Inc.* 95 S. Ct. 2427 (1975). It has also been noted that "the SEC is better equipped than courts in both expertise and staff to fully investigate antitrust issues. It is the appropriate forum to handle antitrust disputes, and the exemptions, therefore, should not be removed." See Wild, R. (1969) Antitrust and the securities industries: lessons from the shipping industry' 55(1) Cornell L. Rev. 96, 110

⁵⁸Baker, J. (2011) Sector-specific competition enforcement at the F.C.C. 66 N.Y.U. Annual Survey of American Law 413, 416. Regulator capture also arises where the regulated "persuades regulators to alter or be lenient in enforcing those rules." See Thomas, C. et al, (2010) Special interest capture of regulatory agencies: a ten-year analysis of voting behaviour on regional fishery management council 38 Pol'y Stud. J. 447, 448. For other definitions, see Reiss, D. (2012) The benefits of capture 47 Wake Forest L. Rev. 569, 570 noting that "capture refers to an extremely close relationship between the regulators and the industry."; and Lawrence, B. (2011) Capture in financial regulation: can we channel it toward the common good. 21(1) Cornell J. L & Pub. Pol'y 175, 176, noting that regulatory capture occurs "whenever a particular sector of the industry, subject to the regulatory regime, has acquired persistent influence disproportionate to the balance of interests envisaged when the regulatory system was established." For other scholarly works on capture, Bo, E. (2008) Regulatory capture: a review 22(2) Oxford Review of Economic Policy 203, 203; Posner, R. (1974) Theories of economic regulation. The Bell J. of Econs. & Mgt. Science 5(2) 335, 341

The above disadvantage of the regulatory model notwithstanding, it could be argued that the court's emphasis on section 90 demonstrates an admission that the Commission is in a better position to regulate competition issues than the regular courts in Nigeria. From a broader analytical perspective, the rationale for the emphasis transcends the technical nature and the expertise required to regulate telecommunications markets.⁵⁹ It also endorses the fact that the Commission could regulate to attain a smorgasbord of economic and social goals.⁶⁰ These issues may have informed the requirement under the Act that an operator who seeks a remedy should first comply with the statutory procedures before applying to the court by means of judicial review.

Curiously, the Court of Appeal had once decided that the procedures under sections 86, 87, and 88 of the Act are not permissive but mandatory.⁶¹ As a common law jurisdiction, the Nigerian legal system recognises the doctrine of judicial precedent.⁶² Recently, the court re-echoed this fact when it opined that:

Now, Nigeria is a common law country and the foundation upon which the common law system is erected is the doctrine of judicial precedent. In common law, legal systems, a precedent or authority is a principle or rule established in a previous legal case that is either binding on or persuasive for a court or other tribunal when deciding subsequent cases with similar issues or facts.

⁵⁹In the opinion of the court, the rationale for the provision is simply because the industry has technical issues that need experts. Consequently, the courts should interfere minimally in the sector. See *E.M.T.S Limited* supra note 1 at 46

⁶⁰See Broumas, A. (2009) The necessity of sector-specific regulation in electronics communications law 4(3) *J. Int'l Commercial Law & Tech* 176, 183, noting that "sector-specific regulation, as implemented by independent regulatory agencies, attains economic, technical and social goals ..."

⁶¹ See Buba J. in *E.M.T.S. Limited* at 45, referring to the case of *MTN v. NCC*, Appeal No. CA/A/25/004

⁶² For articles on application and justification of judicial precedent in Nigeria, see Ikegbu, E., Duru, S. & Dafe, E. (2014) The rationality of judicial precedent in Nigeria's jurisprudence. 4(5) *American International Journal of Contemporary Research* 149.

The general principle in common law legal systems is that similar cases should be decided so as to give similar and predictable outcomes, and the principle of precedent is the mechanism by which that goal is attained.⁶³

Indeed, apart from the clear statutory imperative under these sections, the praxis is that the Federal High Court was bound to follow the decision of the Court of Appeal.

The court could also not have erred in law when it concurred with the argument of the Respondent's counsel that the anti-competition provisions in the Nigerian Communications Act does not confer an individual right to a service provider to obtain an injunctive order against a rival service provider for anti-competitive conduct. Instead, the Act confers exclusive right on the Nigerian Communications Commission to determine conduct which amount to a breach of the anti-trust rules under the Act; the operator who breaches such rules and the right of enforcement to ensure that all market participants comply with the rules in the interest of the public.⁶⁴ In this regard, the case of E.M.T.S. was fundamentally flawed because, as the Respondent's Counsel argued, it did not seek the leave of the Commission to bring the action in a representative capacity on behalf of the Commission.⁶⁵

⁶³*Adeyemi & Ors v. O. Achimu/NDIC/Assurance Bank Ltd & Ors* (2015) LPELR- 2437 (C.A.) 1 at 3. See also *Kehinde Oduneye v. Federal Republic of Nigeria & Ors* (2014) LPELR- 23007 (C.A.) 1 at 3 where the court noted that "it is a cardinal principle of law under the doctrine of stare decisis that an inferior court is bound by the decision of a superior court. A point of law that has been decided and settled by a superior court must be followed by inferior courts where the facts and the circumstances are the same." For other case laws on importance of judicial precedent in Nigeria, see *NEPA v. Edegbero* (2002) 18 NWLR (Pt. 798) 79; *Abubakar Mahmud Wambai v. Dr Kizaya Donatus & Ors* (2014) 14 NWLR (Pt. 1427) 223 at 233-234; and *Beneth Igbani & Anor v. Bayelsa State Independent Electoral Commission & Ors* (2013) LPELR – 21239 (C.A.) 1 at 3

⁶⁴*E.M.T.S. Limited* supra note 1 at 44

⁶⁵ *Ibid*

More so, the above procedural defect was compounded by the fact that there was nothing in the claim of the applicant that showed that it sought the injunctive orders as a result of a dispute between the applicant and the respondent. Instead, a conspectus of the claim clearly disclosed that the applicant sought the injunctive order to restrain a takeover that it assumed violated the provisions of the Nigerian Communications Act.⁶⁶ Thus, the pith and substance of E.M.T.S.'s claim was purely a public interest issue for which section 90 of the Nigerian Communication Act vests exclusive jurisdiction on the Nigerian Communications Commission to bring a claim. E.M.T.S could only have the locus standi to institute the claim with the permission of the Commission after the Commission has adjudged an operator a defaulter.

Locus standi is a condition for the grant of judicial review under adjectival rules in Nigeria. For instance, under the Federal High Court Civil Procedure Rules of Nigeria, the court would not grant leave for judicial review to an applicant unless the applicant has sufficient interest in the matter.⁶⁷ Jurisprudentially, Nigerian courts have held in a plethora of cases that a party would lack the locus standi to institute the action if he fails to establish how his individual rights are affected in a dispute.⁶⁸ They have also established the criteria for determining whether a party has the locus standi to institute an action.

⁶⁶ Ibidat 39-40. As the respondent's counsel rightly argued, even if there was a dispute between the applicant and the respondent, the provisions of sections 73-78 require the parties to first attempt to resolve the dispute before they may any request to the Commission to mediate between them. Ibid at 40

⁶⁷ Order 34 Rule 3(4) of the Federal High Court Rules 2009

⁶⁸ See generally, *Thomas v. Olufosoye* (1986) 1 NWLR (Pt. 18) 669; *Isaac Jitte & Anor v. Dickson Okpolor* (2016) All FWLT (Pt. 820) 1371; and *Adesanya v. The President* (1981) S.C. 112. The doctrine also has constitutional backing under section 6 (6) (b) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). It provides that "the judicial powers vested in the courts shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person."

Thus, in *Revenue Mobilisation Allocation and Fiscal Commission v. Attorney General of the Federation & Ors*,⁶⁹ the court noted that “the two tests in determining locus standi of a person are: that the action must be justifiable; and there must be a dispute between the parties.”

It must be noted that the tests for judicial review in Nigeria sit snugly with that of England. Indeed, under the Supreme Court Act of England, “no application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with the rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.”⁷⁰ In the celebrated case of *Inland Revenue Commission v National Federation of Self Employed and Small Businesses*,⁷¹ the court held that a party could be denied the standing to sue both at the leave stage and during the actual trial if it is established that he lacks sufficient interest in the subject matter of the suit.

Finally, it is worth reiterating that the decision of the court did not foist a state of despondency on the applicant. Indeed, courts in Nigeria have one of the finest tradition of jurisprudential recognition of the principle of *ubi jus ibi remedium* (i.e. for every wrong, the law provides a remedy).⁷²

⁶⁹ (2014) LPELR- 24105 (C.A.) 1 at 5. See also *Attorney General of the Federation v. A.G. Abia State & 35 Ors*, (2001) FWLR (Pt. 64) 202; and *Taiwo v. Adegboro* (2011) 5 SCNJ 125 at 127.

⁷⁰ S.33(1), Supreme Court Act 1981

⁷¹ [1982] A.C. 617

⁷² In *Oyekanmi v. NEPA*, the Supreme Court per Uwaifo J.S.C. (as he then was), noted that “indeed, adjudication will only be beneficial if it is in the pursuit of justice of a case and this ought to be the abiding ethos of a court of justice and equity whenever a lawful remedy is available for a wrong. It is sometimes put in short form in the latin maxim: *ubi jus ibi remedium*.”, see (2000) 15 NWLR (Pt. 690) 414. For cases on this principle, see generally, *Aliu Bello v. Attorney General Oyo State* (1986) 5 NWLR (Pt. 45) 828 at 890; *State v. Gwonto* (1983) 1 SCNLR 140 at 160; *Evelyn Ewhrudje v. Warri Local Government Council & Anor.*, (2005) 7 NWLR (Pt. 924) 334 at 360; and *Attorney General Lagos State v. Eko Hotels Limited* (2006) NWLR (Pt. 1011) 378.

What the court stressed in the decision is that the enforcement of rights should be done within the ambit of the law especially where the law has provided clear procedures for seeking reliefs.

4.0 Conclusion

Dialectically, this comment has demonstrated that legally and symbolically, the decision of the court presents an opportunity for telecommunication operators to challenge anti-competitive conduct in the industry through the proper procedures and mechanisms. It has shown that although E.M.T.S. might have had a legitimate claim that MTN's acquisition of Visafone would increase MTN's dominance in the industry, it should comply with the internal statutory procedure for challenging monopolistic practices under the Nigerian Communications Act.

The modest opinion advanced in this comment is that the decision of the court is not a death knell for E.M.T.S.'s suit. Instead, it provides a cautionary tale for E.M.T.S. and other prospective litigants to exhaust the provisions of sections 87 and 88 of the Act before seeking the injunctive reliefs in a regular court. More so, E.M.T.S. can relist the suit if it complies with the statutory procedures and establishes that the Commission erred in law in its decision. This would not only enable the court to decide whether the acquisition would create monopoly in the industry but also provide the court the first opportunity to subject the antitrust provisions in the Act to rigorous judicial tests. Until E.M.T.S. follows this approach, it would be bound by the decision of the court or wait until the legislature amends the provisions of sections 87, 88 and 90 of the Act.