Regulation of Competition in the Liberalised Telecommunications Sector in Sub- Saharan Africa: Uganda's Experience.

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I. Introduction.

The past three decades have seen a remarkable transformation in the structure of telecommunications markets in Sub Saharan Africa with the liberalisation of the sector. [2] The reform of the telecommunications sector has seen unprecedented growth in the industry with the sector becoming more dynamic and competitive. [3]

Critical to realising the policy of liberalisation of telecommunications has been the use of regulation to bring about the transition from monopoly to competition.

With liberalisation and the introduction of competition, regulatory oversight has not disappeared. Liberalisation is about market opening which is an essential element to stimulating competition and market growth but that alone is not enough. The incumbent operator is likely to have many advantages over new operators and engage in acts detrimental to competition. There is therefore need for effective regulation of other factors such as tariff, interconnection and anti competitive practices. This could be through economic regulation for example interconnection obligations or competition based measures that curb anti competitive practices. Therefore competition law and sector specific rules are regarded as the main rules for regulating competition in telecommunications.

However there seem to be disagreements among academicians and practitioners over the appropriateness of either sector specific rules or generic competition law for purposes of regulation of competition in telecommunication.[4] A constant issue of debate in the developed world is the extent to which competition can and should replace regulation.[5]

In sub Saharan Africa the trend has been to establish a regulatory framework providing for an independent regulator with its role extending to administering fair

[2] Several factors have led to this shift in government policy including growing awareness of the inefficiency of the incumbent monopolists and technological change. However the primary factor for change in Africa has been the push by the World Bank and IMF in the 1980s for market liberalisation in the form of structural adjustment programmes.

[3] ITU figures indicate that between 2003 and 2008 Africa had the fastest growing mobile phone services market in world. The mobile market is quite competitive with 48.8 percent opening up the market to full competition, while 43.9 percent allow for partial competition. Despite the fact that mobile phones services penetration figures having doubled or even tripled since 2006, mobile phone penetration rates remain below 40% in many countries. ITU figures of 2006 indicate that the internet is the most competitive market in Africa with 68.6 percent of the economies allowing full competition and another 11.8 percent partial competition. This market is however characterised by low penetration rates mainly as a result of the prohibitively high costs of internets services. While there are positive developments in the above mentioned markets in the fixed line markets- the level of competition remains very low with penetration figures declining. In most countries the penetration rates stand at less 3% of the population.

[4] D.Geradin & M.Kerf, *Controlling Market Power in Telecommunications*, (2003), M. Taylor, *Looking to the Future: Towards the Exclusive application of Competition Law?*, (2004)

[5] W. Moeschel, *The Future Regulatory Framework for Telecommunications: General Competition Law instead of Sector Specific Regulation- A German Perspective(*2009), H. Shelanski, *From Sector-Specific Regulation to Antitrust Law for US Telecommunications: the Prospects for Transition*, (2002),P. Larouche, *Competition Law and Regulation in European Telecommunications*(2000)

competition in the sector. [6] Therefore the regulatory framework has tended to incorporate provisions aimed at promoting competition and controlling market power in the telecommunications sector.

The role of generic competition law in Africa and in the telecommunications sector is a new concept that African countries have began to embrace in the last decade.[7] Given that the majority of countries in the continent are yet to adopt a generic competition law, the issue arises as to whether this law is relevant to a regulated sector such as telecommunications. In other words, is regulation an effective tool in pre-empting the application of generic competition law? To address these issues, Uganda, a country with some experience in regulating competition in the telecommunications sector without a generic competition law will be used as a case study.

The rest of the paper is divided into two parts, Part II discusses the theoretical framework concerning the relationship between competition law and sector specific law. In addition, the different regulatory models adopted to regulate competition in telecommunications are highlighted. Part III analyses the efficacy of the regulatory framework in Uganda in promoting competition and addresses the issue whether general competition law is relevant.

II. Competition Regulation and the Special Case of the Telecommunications Sector.

For the greater part of the twentieth century, telecommunications services were offered by a state run monopoly. [8] In order to prevent the operator from abusing its monopoly power, a series of controls was put in place. With the liberalisation of the telecommunications sector in most countries and the introduction of competition, the need for intervention by public authorities still remains relevant. The benefits arising from the liberalisation of the telecommunications sectors cannot be reaped without adequate intervention of public authorities given that merely allowing for competition may not be enough. The structure of the market might need to be modified in order to promote competition.[9] For example, in addition to eliminating exclusive rights and other explicit barriers to entry into the various segments of the telecommunications markets, it might also be advisable to introduce a degree of vertical separation between different activities in order to reduce the risks of anti competitive practices and facilitate access to essential facilities. [10]

For years countries, particularly industrialised countries have employed generic competition law to promote competition and to control market power across sectors. In addition to that, a great number of countries have put in place sector specific rules to promote competition and control market power in telecommunications. Therefore

[6] According to the ITU Telecommunications Development Report of 2009, 93 percent of African countries have in place a regulator.
[7] Member of the regional economic body SADC have adopted national competition laws, in East Africa out of the five members of the East African Community Kenya and Tanzania have competition laws in place and a regional law the East African Community Competition Act of 2005.
[8] With the exception of the United States and Canada where the services were offered by a private run monopoly
[9] Geradin & Kerf, *Controlling Market Power in Telecommunications*, (2003) page 9
[10] Ibid.

sector specific rules and competition law have come to be recognised as the main categories of laws which can be used to facilitate or maintain competition in the telecommunications sector.

In this section, the importance of these rules is outlined. Furthermore the different approaches to regulating competition in telecommunications are highlighted.

1. Competition law in Telecommunications: Generic and Special Competition Rules. (Ex Post Regulation)

Competition law is the form of government intervention that most directly promotes the competitive process, so competition law is typically viewed as the optimal form of government intervention.[11]Proponents of competition policy view competition law as the minimum necessary regulation of competition consistent with the correction of market failures associated with market power and the maximisation of economic efficiency.[12] Therefore generic competition law can provide a framework for effective regulation in the telecommunications sector.

Three main types of anti competition rules that can be identified. That is, rules that prevent the conclusion of anti competitive agreements between operators; rules which deal with firms in a dominant position with the objective of preventing those firms from abusing their position vis a vis end- users or other operators and rules which prohibit mergers which substantially lessen competition.

While these rules are able to cover a variety of anti competition problems within the telecommunications sector, they have limits that impair their ability to play a role as the sole driving force behind a country's telecommunications policy. This is because of the two special characteristics of the telecommunications sector firstly, the existence of an entrenched incumbent with a very high market share and secondly, the barriers to market entry to build a national fixed or mobile network are very high.[13] These three unique factors display the weaknesses of generic competition law. These are:[14]

(i) An abuse can only be committed by an undertaking which is dominant in a relevant market. Normally only one undertaking is dominant in any market.

(ii) An abuse is 'nasty' economic behaviour- acts designed or likely to drive a competitor out of market or seriously weaken it. Not all behaviour that weakens competition is abusive

(iii) The concept of 'abuse of dominant position' is not enough where, as a matter of policy, you wish to deliberately stimulate competition, and encourage new entrants to the market.

Accordingly it would appear that special competition rules for telecommunications are important in addition to generic competition rules. Special competition rules to assist market entry such as prohibition of undue discrimination or special competition

[11] M.Taylor, *Looking to the Future: Towards the Exclusive application of Competition Law?,* (2004) page 184
[12] Ibid. page 177
[13] Walden & Angel, *Telecommunications Law and Regulations* (2005) page 316
[14] Ibid

rules for operators in a dominant position could help tilt the playing field against the incumbent and assist to protect the new entrant. [15]

2. Rationale for Sector Specific Rules (Ex Ante Regulation)

While competition law is a useful tool for correction of market failures, it has its limitations. There are market failures specific to the telecommunications industry that can best be regulated by sector specific regulation. Critical among which is the market failure in the industry arising from the control by an incumbent of so called ‘bottleneck’ or essential facilities. [16] Such essential facilities comprise resources, facilities or services to which access is essential if a competitor wishes to enter a telecommunications market to compete.

In addition, the telecommunications sector exhibits certain characteristics that tend to differentiate it from other industries. It exhibits both natural monopoly features for some activities and network externalities which require focused remedies not available under generic competition law.[17] It also presents some technical issues, such as numbering for example, which do not have an exact equivalent in other sectors.[18] Therefore sector specific rules such as rules interconnection and price control are important.

3. Regulatory Model for Telecommunications Competition.

The ideal regulatory model to adopt for purposes of regulation of competition in the telecommunications has been the subject of a lot of discussion focusing on the appropriateness of either sector specific rules or generic competition law. A growing trend among countries with highly competitive markets to rely on competition laws to regulate the sector. Indeed a number of authors and commentators claim that, in the long run, telecommunications sector will be adequately governed by competition law alone.[19]

3.1 Regulation of Competition in Telecommunications at the International Level.

The World Trade Agreement on Basic Telecommunications (the WTO Basic Telecoms Agreement) offers some insight in relation to regulation of telecommunications.

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[15] Ibid. page 322
[16] Supra note 12 page 189.
[17] Kerf & Geradin, *Controlling Market Power in Telecommunications: Antitrust vs. Sector Specific Regulation. An Assessment of the United States, New Zealand and Australia Experiences*(1999) page 933
[18] Ibid.
[19] According UK government policy as indicated in the Communications White Paper, *A New Future for* Communications(Cm 5010) the regulation of the telecommunications industry should, wherever possible, be achieved by applying general competition law rather than regulation specific for telecommunications. This view is also advocated by H. Ungerer in *Ensuring Efficient Access to Bottleneck Network Facilities: The Case of Telecommunications in the European Union*, available at http:europa,eu.int/comm./dg04/index-en.htm.

Most of the signatories to the WTO Basic Telecoms Agreement included in their individual schedules a commitment to some or all features of a negotiated 'Regulatory Reference Paper which set out regulatory principles for the establishment and maintenance of competitive telecommunications markets.[20] The Reference Paper articulated the following key obligations relating to domestic telecommunications regulation:[21]
1. Competitive safeguards: Appropriate measures must be maintained for the purpose of preventing suppliers- who, alone or together, are major suppliers- from engaging in or continuing anti competitive practices
2. Interconnection. Interconnection with a major supplier must be ensured on reasonable, non – discriminatory, terms and conditions and rates for interconnection. A service supplier requesting interconnection with a major supplier must be permitted recourse to an independent domestic body to resolve disputes regarding appropriate terms, conditions and rates for interconnection.

These two key obligations seem to support the co-existence of generic competition law (competitive safeguards obligation) with sector specific rules (interconnection obligation).

3.2 Regulation of Telecommunications at the National Level.

Countries with liberalised telecommunications market have developed different models to regulate competition. Three approaches can be discerned, these are:

(1) Relying solely on competition law enforced by the competition authority for all aspects of regulation.
(2) Relying solely on sector specific rules which include sector specific competition rules
(3) Opting for concurrent approach applying both sector- specific and economy wide regulation

3.2.1 Approach 1: Exclusive Use of Competition Law.

This regulatory approach to telecommunications regulation appears to be the exception rather than the norm. No African country has adopted this type of model. New Zealand is the only country that until 2001 relied on generic competition law and the courts to regulate its telecommunications sector. Although New Zealand's telecommunications sectors experienced positive developments under this regime, the model has been heavily criticised.[22] The regime failed to deal effectively with the issue of network interconnection and involved high litigation costs from reliance on courts to deal with competition issues that arose. It was observed that litigation itself had become a barrier to entry given that competition litigation through the courts in

[20] Reference Paper (1997) 36 ILM 367. Cote D'Ivoire, Kenya, South Africa, Uganda, Mauritius, Ghana and Senegal committed to the Agreement and all save for Mauritius added the Reference Paper to their commitments.
[21] Ibid. Paragraphs 1 and 2
[22] Supra note 9, 12

In the context of Africa, this approach is highly unsuitable not due to the fact that some countries are yet to adopt generic competition laws but also because of the capacity of the judicial institutions to deal with the complex competition issues.

3.2.2 Approach 2: Regulation solely through Sector Specific Rules.

This approach could be regarded as the most suitable if not convenient way of regulating competition in the telecommunications sector in Africa. While many countries with a liberalised telecommunications sector are yet to adopt a competition law, the majority have in place sector specific rules which include a self contained competition regime with principles similar to those found in competition statutes.
Countries with competitive telecommunications markets such as Nigeria including pioneer countries in the liberalisation process such as Uganda and Ghana have adopted this model.

However, this approach has been criticised as not suitable to deal with emerging issues such as convergence which can best be regulated through generic competition law. Long term opponents of competition law in developed jurisdictions such as Hong Kong and Singapore have been compelled to change their stance. In the case of Hong Kong, the change in attitude is based primarily on the fact that there is clear evidence that the sector specific regime is no longer able to regulate competition in the local communications sector.[23] Furthermore, it has been argued that the continued process of technological convergence, cross media acquisitions and mergers will intensify the development of media conglomerates resulting in higher level of anti competitive practices that can only be regulated through generic competition law.[24]

3.2.3 Approach 3: The Co- Regulatory Approach.

The majority of countries with liberalised telecommunication markets have opted for the co-regulatory approach with the balance between sector- specific and economy-wide regulation set differently. In the case of the United States the regulatory framework gives more emphasis to sector specific rules and has been subject to criticism.[25] While the EU regulatory model and the Australian regulatory model seem to opt for strong emphasis on competition policy. The Australian approach though not perfect given the risk of over regulation has been cited as the illustrating the virtues of the co- regulatory approach.[26] The EU regulatory model has also been heralded as a good model for regulating telecommunications competition.[27]

Literature on the subject of regulation of competition supports the application of both generic competition law and sector specific rules. On the issue of balance the between

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[23] Cheng, *A Tale of Competition Law Regimes- The Telecom- Sector Competition Regulation in Hong Kong and Singapore* (2007)
[24] Wu & Leung, *Competition Regulation in the Hong Kong Telecommunications Sector- Challenges and Reforms* (2008)
[25] Supra note 9 ,Green,& Teece, *Four Approaches to Telecommunications Deregulation and Competition, the U.S, U.K. Australia and New Zealand*
[26] Supra note 9 and 12
[27] Supra note 14 page 650

competition law and sector specific rules,a study carried out by Kerf and Geradin[28]offers some guidance. The study addresses the issue whether the balance of the approaches matters for competitiveness, they conclude , drawing from the experiences of Chile, United Kingdom, Australia, New Zealand and the United States (countries with fully liberalised telecommunications market and different mixes of anti-trust and sector specific regulatory instruments) that it does matter. Countries such as Australia that balance right tend to have more competitive telecommunications markets.

Judging by the current trend in Africa, a number of countries seem to be adopting the co-regulatory approach. Notable examples are Zambia and South Africa which lead the way in the use of the co-regulatory approach for their telecommunications sector.

However, the South African system of regulation has been criticised as not necessarily resulting in more competitiveness in the sector. Khosa while analysing the South African telecommunications market, observes that there is no coherence in the regulation of competition in the telecommunications sector, due to legislation that fails to clearly define the objectives and roles of different actors involved in the regulation of the sector.[29] He concludes that owing to conflicting legislation, the regulatory framework in general, the dual role of the sponsoring ministry (Department of Communications), and the ineffectiveness of the sector- specific regulator (ICASA), the South African telecommunications sectors is characterised by ineffective competition.[30]

Therefore while this model seems the most appropriate to adopt for purposes of regulating the telecommunications sector, its implementation in Africa, it would appear, has not been very successful.

3.3 Differing Characteristics in Sub Saharan Africa for Purposes of Regulating Competition in the Telecommunications Market.

The regulatory path that a country chooses to take has implications for how competitive its telecommunications market will be. Developed countries have modelled their telecommunications regulatory framework to suit their telecommunications market. Therefore, African countries should also take into account special characteristics of their telecommunications markets as they influence the choice between ex ante and ex post regulation.

One of the main characteristics is the substitution of fixed line networks with mobile networks. In developed countries, the rapid growth of mobile network subscriptions reflects user preference for mobile technologies due to the added functionality of mobility.[31] However, mobile services continue to co- exist with fixed telephony services. In contrast, in sub Saharan Africa, the lack of capacity, low penetration, and

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[28] Supra note 9.
[29] Miyelani Khosa, *The Interplay of Sector Regulators and Competition Authorities in Regulating Competition in Telecommunications: The South African case,* (2009) page 94
[30] Ibid page 96.
[31] Supra note 14 page 650

poor quality of services of fixed network coupled with the introduction of prepaid models in mobile services market means that mobile networks have tended to become the primary means of access to communications services.[32] That is, users have a mobile phone only and no fixed line subscription.

The dominance of the mobile networks in Africa has implications for many aspects of the regulatory framework. Notable among which is the role of regulations specific to fixed networks such special focus on incumbent fixed line operator as well as local loop unbundling. While these are an important part of EU and U.S regulatory models, regulations of this type may serve no useful purpose in Africa where the primary means of access is mobile network.[33]

Another aspect to consider is that many countries in Africa are in early stages of telecommunications market liberalisation and the majority of its markets are not workably competitive. Particularly, elements of monopoly still remain in parts of the fixed network. This would tend to indicate a greater need for a heavy handed regulatory approach in form of sector specific regulation.

Therefore for purposes of establishing the regulatory model ideal for regulatory competition in the telecommunications market note should be taken of the market composition and development in Africa.

III. Regulation of Competition in Uganda’s Telecommunications Market.

Uganda makes for an interesting case study of regulation of competition in telecommunications in Africa. It has been at the fore front of the liberalisation of telecommunications on the continent commencing in 1993 and finally opening up its market to full liberalisation in 2006. Despite having one of the more liberalised telecommunications markets on the continent the market in Uganda is still solely regulated by sector specific rules.[34] The strategy adopted has been the incorporation of core competition law principles into the regime, through the enactment of sector specific competition rules.

Given that international precedent and national experiences in developed countries hint at the importance of generic competition law for purposes of regulating competition in the telecommunications sector, the strengths and weaknesses of the existing regulatory framework will be analysed.

Under the current regulatory regime, the telecommunications liberalisation process has made considerable progress in Uganda. The telecommunications sector has demonstrated the highest growth rate since the introduction of competition, especially

[32] ITU figures of 2009 show that in all countries in Africa that have opened up their telecommunications markets to competition, mobile phone subscriptions have fast surpassed those of fixed line phones.
[33] Supra note 31
[34] Uganda does not have a generic competition law in place but has a draft Competition bill of 2004 that is yet to be tabled for discussion before Parliament. In addition Uganda is also party to the East African Community Competition Act of 2005; however this Act is yet to come into force as it is subject to the operationalisation of national competition legislation in all member states.

in the mobile phone services market. The state of competition in Uganda can be summarised as follows:[35]

The mobile telephony market is the most competitive of the markets with over 10 million subscribers and accounts for 63% of the telecommunications revenue. There are six mobile network operators in the market with one of the incumbents, MTN Uganda Limited dominant in the provision of mobile telephony services. These operators serve a population of more than 30 million.

Despite the introduction of competition, fixed line penetration in Uganda remains very low with two operators MTN Uganda Limited and UTL formerly national operators providing the fixed lines services.[36] UTL is the dominant operator in this market. One of the primary reasons for the low penetration rate is the substitution effect of mobile services.

The internet market has grown significantly since the liberalisation of the telecommunications market. According to ITU figures of 2009 internet penetration rate stands at 9,78% making it the country with the fourth highest number of internet users on the continent.

In the liberalised market the most important regulatory tasks that enhance competition include preventing the misuse of market power, ensuring non-discriminatory access to essential facilities, providing for interconnection. The analysis of the legal and regulatory framework for telecommunications competition will focus on a few important areas for the promotion of competition in telecommunications and how the regulator, the Uganda Communications Commission (U.C.C) implements the provisions of the law. These areas are interconnection, retail price control and regulation of anti competitive behaviour. The focus of this study will, to a great extent, be on the mobile services market which is the most developed and competitive market in the sector.

1. Regulation of Interconnection.

Interconnection is essential for creating and maintaining effective competition and is therefore a key regulatory issue. Given that Uganda's most competitive market, the mobile telephony market, is characterised by infrastructure competition rather than service competition, interconnection the main means through which competition can be fostered.

There are three modes of regulation of interconnection:[37]

- Detailed regulation of interconnection which includes the regulator setting the prices and checking compliance by parties
- The regulator sets the rules and requirements, but the incumbent prepares an interconnection offer according to the requirements and if the regulator

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[35] Uganda Communications Commission, *Post and Telecommunications Market Review* (2009) http://www.ucc.co.ug/endOfFYReview2011.pdf

[36] Uganda Communications Commission statistics of 2009 indicate that the number of fixed lines as a percentage of the population was 0,71%.

[37] HTE, *Telecommunications Networks and Informatic Services* http://www.hte.hu/hte2007/data/upload/File/online/THIS/8_en.pdf page 32

accepts it, it will be the standard basis for individual interconnection agreements with any party who ask for it
- The regulator may withdraw from the interference in interconnection issues partly or totally, leaving the decision on the whole question to the interested parties

Uganda interconnection regime follows the first approach. The legal framework is made up of the Communications Act and the Telecommunications (Interconnection) Regulations of 2005 with responsibility for implementing the regime conferred on U.C.C.

Under the Regulations, all network operators are obliged to interconnect with other operators[38] and provide for number portability.[39] However number portability is yet to be implemented in Uganda. For the past two years U.C.C has been conducting a study on the viability of the mobile number portability concept in Uganda.[40]

However, while interconnection may be availed by an interconnect provider to network elements on an unbundled basis, the interconnection is restricted to the switching and transmission facility and does not extend to local loop unbundling.[41] Uganda's legislation and policy does not support the unbundling of the local loop, the rationale being the existence of substitute technologies to the not very extensive wired last mile access.[42]

Accounting separation is also mandatory for all interconnect operators.[43] The Regulations require that these accounts are independently audited. This provision is very important for purposes of competition as a means of controlling a vertically integrated operator operating in nearly all sectors of the market by ensuring interconnection charges are fairly derived and demonstrate that the network business is charging the same to new operators as to its retail business and preventing unfair cross subsidies and undue discrimination.

Although the incumbent licencees (MTN and UTL) do carry out an obligation to provide leased lines to customers including operators, leased lines are a major bottleneck in competition due to the rates offered by the operators particularly affecting the internet market where the issue of cross- subsidisation is most prevalent.[44] Therefore U.C.C is seeking to enforce accounting separation particularly given the problem of vertical integration of UTL affecting competition in the internet market.[45]

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[38] Telecommunications (Interconnection) Regulations of 2005, Regulation 5
[39] Ibid. Regulation 15(5)(m)
[40] *Uganda Still Studying Mobile Number Portability*, East Africa Business Weekly, 2nd April, 2011 located at http://www.busiweek.com/11/news/uganda/732-uganda-still-studying-mobile-number-portability
In Africa only Egypt, South Africa and Nigeria has implemented number portability with many countries still carrying out feasibility studies
[41] Supra note 38 Regulation 8
[42] Nora Mulira et al, *Uganda ICT Sector Performance Review 2009/2010*, (2010) page 4
[43] Regulation 16
[44] Supra note 42 page 3
[45] Ibid page 4

The Regulations provide competition safeguards by having special provisions for an operator in a dominant position or an operator with significant market power.
According to the Regulations, an interconnect provider who is dominant in a particular interconnect service market or with significant market power shall have the following additional obligations inter alia : [46]

(a) supply interconnect services on an unbundled basis
(b) not discriminate on supply, conditions of price, quality of service and the supply time between users of the service
(c) shall not abuse its position
(d) the operator's refusal to supply essential facilities to a requesting operator constitutes anti competitive behaviour under certain conditions stipulated in the Regulations.

The Regulations provide for the negotiation and completion of interconnection agreements including dispute resolution. According to the Regulations, interconnection agreements must be entered into not later than three months after an interconnect provider receives a request of interconnection. [47] Any negotiated agreement must be approved by U.C.C.[48] If the parties are unable to come to an agreement on their own, either party may request the U.C.C to participate in the negotiations and to mediate any differences arising n the course of the negotiations.[49] Within forty five days after the initial interconnection request, either party to the negotiation can request U.C.C to arbitrate any contentious issue.[50]

Another important issue that the Regulations deal with in detail is interconnection rates. In line with WTO guidelines, the law adopts the cost orientation regime specifying the use of the forward- looking long run average incremental cost methodology or its equivalent.[51] The Regulations specify features of the cost- oriented pricing regime and obligations of the interconnect provider when determining interconnection charges.

The Regulations also provide that charges for interconnection offered by an interconnect provider shall be sufficiently unbundled so that the interconnect seeker is not requires to pay for anything not strictly related to the service requested.

The U.C.C had until recently left determination of interconnection rates to the players in the market who did not necessarily adopt the cost based regime. The result was in the mobile telephony market, the incumbents attempted to use interconnection rates to

[46] Supra note 38 Regulation 14
[47] Ibid.Regulation 12
[48] Ibid Regulation13(14) and Section 62 of the Communications Act
[49] Supra note 38 Regulation 13(4)
[50] Ibid. Regulation 13
[51] Ibid. Regulation 15. Determining interconnection prices is a challenging task for any country and the method chosen for determining the interconnection prices should depend on the policy goals the government seeks to achieve. However it worth noting that in a study of telecommunications regulatory regimes in the U.S.A. U.K. Chile, Australia and New Zealand by Damien & Kerf supra note 9, it is observed that the forward looking incremental costs method tends to be favourable to new entrants and thus more likely to stimulate competition. Since the telecommunications policy in Uganda is to promote competition this observation coupled with international precedent supports the adoption of this method.

create barriers to entry by offering unattractive interconnections rates.[52] In 2010 the U.C.C finally stepped in to determine interconnection rates and in June 2011 expressed its intention of farther reducing interconnection rates which happen to be the highest in East Africa.[53]However, the issue of interconnect rates in the mobile market is yet to be satisfactorily resolved.

An overview of the regulation of interconnection of in Uganda's telecommunications indicates that the country had adopted a detailed interconnection connection regime which has been recommended as good approach for a certain period after the liberalisation of the telecommunications market.[54] However the regulator appears to be slow in implementing the regime and it has been criticised by players in the market has being ineffective.[55]

2. Retail Pricing Regulation.

Uganda has a detailed price regulation regime, the Telecommunications (Tariffs & Accounting) Regulations of 2005. Among the objectives of these Regulations are: establishing an accounts separation of specified telecommunications activities in order to prevent anti- competitive acts of among others, cross- subsidisation and under pricing by operators and promoting a competitive environment and a level playing field by ensuring that charges are cost-based, transparent and non discriminatory.[56] According to the Regulation, retail prices are to be regulated through a system of price-caps.[57]

This system of price- caps has for the most part not been implemented by U.C.C. Given that for a long period after liberalisation, the prices for mobile services in Uganda have been one of the highest in the region, the implementation of a price-cap regime might appear to be an appropriate strategy to control the prices of mobile services prices. However increased competition between mobile phone operators in the last year has seen a drastic reduction in price.[58] Uganda's mobile services industry has in the past two years become quite competitive bringing into question the relevance of the price caps regime.

Also worth noting is the key factor affecting the price of mobile phone services, the 30 percent duty on mobile phone services which has had a negative impact on retail prices. Uganda ranks second as the country with one of the highest services tax on mobile phone usage internationally, placing it only behind Turkey.[59]

3. Anti Competitive Practices.

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[52] Supra note 42 page 23
[53] the Monitor, *Interconnections Rates Likely to Be Reviewed*, 16th June 2011, located at http://allafrica.com/stories/201106160378.html
[54] Supra note 9 page 311
[55] Supra note 42
[56] Telecommunications (Tariffs and Accounting) Regulations of 2005, Regulation 3
[57] Ibid. Regulation 5
[58] *Telecom Price War Looms as Warid Fires First Shot*, the Monitor, 23th September 2010 http://allafrica.com/stories/201009230057.html
[59] Eria Hisali, *Review of Sector Taxation Policies and Determining the Elasticity of Penetration and Price of the Various Telecommunications Services in Uganda,* (2007).

As previously noted, Uganda has no generic competition legislation. She does however have sector specific competition rules for telecommunications, the Communications (Fair Competition) Regulations of 2005. The objectives of these Regulations include promoting efficiency and competitiveness of the communications industry, designing consumer protection mechanism and preventing anti competitive conduct in the communications industry.[60] Like the generic competition rules, the Regulations provide for the three main types of anti competition rules:[61]

(a) rules preventing the conclusion of anti competitive agreements between operators;
(b) rules preventing abuse of dominant position
(c) rules prohibiting anti-competitive mergers, take-over, consolidations or acquisitions.

The Regulations state that these rules are to be based on the principles of competition law and practice.[62]

3.1 Anti competitive agreement, decisions or concerted practices.

The Regulations prohibit agreements between an operator or a decision by an association of operators or a concerted practice restricting or distorting competition in the communications sector.[63] The wording of the regulation shares some similarity with article 101(1) of the TFEU which prohibits agreements and concerted practices which have as their object or effect the prevention, restriction or distortion of competition.

U.C.C is yet to deal with a case under this provision although they have been allegations of collusion of incumbents to restrict competition in the liberalised market by offering new entrants interconnection at a high rate.

3.2 Abuse of dominant position.

Regulation 6 of the Fair Competition Regulations prohibits abuse of dominant position. The Regulations states that an act or omission of an operator with a dominant position whether independently or with others shall constitute or amount to abuse by the operator of its dominant position where specified conduct occurs.

In order for an operator to fall within this provision, it must have a dominant position. The term dominant position has been defined in the Schedule to Regulations as follows: [64]

An operator in a dominant position is the operator who has a position of economic strength enjoyed by an undertaking which enables the operator to prevent effective competition from being maintained on the relevant market, by affording the operator

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[60] Telecommunications (Fair Competition)Regulations of 2005, Regulation 3
[61] Ibid. Regulation 5
[62] Ibid.
[63] Ibid. Regulation 6(3)
[64] Schedule to the Fair Competition Regulations, Guideline 3(5) This definition appears to stem from the ECJ definition of dominant position as stated in the Hoffman La- Roche case (Case 85/76[1979] ECR 461

the power to behave, to an appreciable extent, independently of competitors, customers and consumers.

Whether an operator has market strength depends on its market share. An operator is likely to be dominant if it has a market share that exceeds more than 35 percent.[65]

The provision is applicable to the abuse of dominant position by an operator with others and brings into play the concept of collective dominance. According to the Regulations, two or more operators may jointly have collective dominance where they are linked in such a way that they adopt the same conduct in the market, which makes them dominant against other operators on the market.[66] Joint dominance would be of great relevance in the mobile market which though perceived to be competitive runs the risk of becoming a natural oligopoly.[67]

The prohibited conduct that amounts to abuse of dominant position includes price abuses through predatory pricing, price squeezes and cross subsidisation, predatory network alteration, refusal to supply or grant access to facilities and refusal to interconnect or act in good faith during interconnection negotiations.

Competition principles require that the assessment of an undertaking's dominance of a market requires a definition to be made of the relevant market. Under Ugandan law, the relevant market is made up of the product market and the geographical market.[68]

This provision of the Fair Competition Regulations does not imply that an operator in a dominant position cannot protect its commercial interests and take advantage of its market share. It is entitled, like any other party, to take reasonable steps, as it deems appropriate, to protect the said interest.

3.2.1 Control over 'Essential Facilities'.

Access is a central issue in the telecommunications sector. Of particular concern in telecommunications is access to an 'essential facility' such as control of a bottleneck on the national system, through which all operators must pass. Ownership of this facility is of concern because it can put the owner in a position of super dominance.[69] This special form of dominance is hinted at in the Fair Competition Regulations. Regulation 6(1) includes refusal to supply or grant access to facilities as abuse of dominant position by an operator.
The Interconnection Regulations go further by providing for the definition of essential facility. According to the Regulations, 'essential facility' means a facility which is essential for reaching customers or conducting business and which cannot be replicated by any reasonable means.[70] Furthermore the Regulations provide that an interconnect provider who is dominant in a particular interconnect services market or with significant market power must under certain specified circumstances supply

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[65] Ibid. Guideline 3(9)
[66] Ibid. Guideline 3(8)
[67] ITU, *Mobile overtakes Fixed: Implications for Policy and Regulation*(2003) http://www.itu.int/osg/spu/ni/mobileovertakes/Resources/Mobileovertakes_Paper.pdf page 23
[68] Ibid. Guideline 3(1)
[69] Supra note 14 page 314
[70] Regulation 4

essential facilities to a requesting operator, failure to comply with the provision constitutes anti- competitive behaviour.[71]

3.3 Anti Competitive Mergers and Acquisitions.

The Regulation deals with the issue of merger control. It provides that a transaction by an operator relating to its ownership, shareholding, constitution, composition, management, control or change shall be deemed to be anti competitive with an appreciable effect on fair competition in the communications market; to the extent it affects the market structure.[72] The Regulation also makes it mandatory for an operator undergoing a restructuring, consolidation, amalgamation, re-arrangement to obtain approval from U.C.C prior to undergoing the scheme or arrangement.

The Regulations do not aptly deal with the issue of merger control. The Guidelines in the Schedule to the Regulation are silent on anti-competitive mergers. There is no specific regulation that details how the commission can enforce merger control in particular, a definition of a merger is not provided and the specific elements needed to establish contravention are not stipulated.

Given the absence of generic competition law, definitions, guidelines and indication of how U.C.C would enforce the prohibitions are required to ensure that the sector specific regime is effective.

A clear legal regime on mergers and acquisitions is crucial given the fact that foreign direct investment in the telecommunications in the form of cross border mergers and acquisitions is on the rise.

3. 4 Exemptions from Anti Competitive Conduct.

Just as under EU Competition law, the Regulations provide for exemptions from the applicability for anti competition rules to an operator. However, in contrast to EU law where the exemptions as stipulated in article 101(3) TFEU are restricted to anti competitive agreements, under the regulations, the exemptions also apply to abuse of dominant position and anti competitive mergers.[73] The Regulations provide for individual exemptions and block exemptions to be granted by the U.C.C.[74]

U.C.C may grant an exemption order in relation to particular conduct of an operator where it is satisfied that:
(a) the conduct will result, or is likely to result in a benefit to the public
(b) the benefit to the public outweigh the disadvantages
(c) the conduct is not anti-competitive or a breach of the fair competition rules.

The problem with the first condition is that there is no detailed definition of what ‘benefit to the public’ means. This could leave open the possibility for abuse of this provision by giving a very broad meaning to ‘benefit to the public.

[71] Ibid. Regulation 14(4)(g)
[72] Ibid. Regulation 6(5)
[73] Ibid.Regulation 8(1)
[74] Ibid.Regulation 9

Furthermore, the third condition requires that the conduct is not anti competitive. This goes against whole purpose of exemptions which is to exempt certain conduct that is anti competitive but provides certain benefits to the public. The requirement that the conduct not be anti- competitive therefore renders it impossible for U.C.C to grant any exemption orders and makes the entire provision null and void from the onset. The law should be amended by eliminating the third requirement in order for the provision to be implementable.

1.1 Critic of the Anti Competitive Practices Regime.

An overview of these rules shows that the law is to some extent influenced by the principles embedded in the EU competition law framework as provided under article 101 and 102 of the TFEU.[75] However, the rules have some weaknesses as have been highlighted above particularly the provisions on exemptions and merger control.

With regards implementation of the law, the telecommunications market is plagued with anti competitive conduct despite this law being in place. Dominance of certain players and cross subsidisation by the vertically integrated incumbent (UTL) continues.

The fact is that the U.C.C has not focused on scrutinising whether the actions of mobile telecommunications operators are restricting competition adopting a non-intervention policy. In fact U.C.C interventions have sometimes proved to go against its mandate of promoting competition.[76]

U.C.C has been criticised for being ineffective in controlling anti competitive conduct. One commentator has noted that U.C.C's mandate might be too big and this could justify the establishment of a body that would focus on the competition aspects of the sector.[77]

This prompts the question whether Uganda needs to adopt competition law to regulate the market. One argument in favour of this suggestion is that the impact of digital convergence has fused telecommunications, broadcasting, media, IT into what is now called communication. This presupposes that competition law that is economy wide is more appropriate.

Furthermore, U.C.C appears to lack the capacity to deal with the competition related issues in the sector. It is questionable whether U.C.C has the resources to investigate complex competition complaints, more particularly; U.C.C appears to lack the jurisprudence and expertise to effectively deal with competition disputes. This would

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[75] Regulation 6 that prohibits abuse of dominant position and anti competitive agreements seems to have adopted some concepts of EU Competition law including the definition of a dominant operator/ undertaking.

[76] The recently withdrawn directive by U.C.C which tried to step in to control the price war between mobile phone operators for calls made by customers by using the price cap system to set a price floor and thereby render discounts offered by mobile phone operators illegal. Not only did it go against the provisions of Tariff and Accounting Regulations which link price caps to cost of providing the services, it would have deprived consumers of the benefit of competition since it is consumers who gain from discounts and lower tariffs.

[77] Brenda Ntambireki, *Is the U.C.C Really Carrying Out Its Mandate in Telecommunications Industry?*, http://www.sebalulule.co.ug/articleUCC.php

seem to support the inclusion of generic competition law in the telecommunications legal and regulatory framework.

However in the context of Uganda, it would make sense to leave regulation of competition in telecommunications in the hands of the regulator as it has more expertise in the sector and the financial capacity. Telecommunications regulators in Africa are one of the few well funded public institutions as a result of the booming telecommunications market. This is in contrast with competition commission on the continent riddled with institutional problems, lack of expertise for enforcement and poor funding.[78]

Competition authorities tend to lack the requisite expertise. This lack of expertise is often more acute at the time of first implementing competition law enforcement.[79] When the competition authority is first established the technical staff responsible for the application often still has to undergo or is undergoing training in the doing the necessary rigorous analysis that includes understanding both economics and the law. Thus at the onset there is a lack of technical staff and often also the technical resources and appropriate data to do the required economic analysis are inadequate.

Furthermore, in contrast to the well funded telecommunications regulatory bodies, funding of the competition authority would tend to come from government such that the authorities are poorly funded and cannot carry out their mandate efficiently.[80]

Furthermore, there is no evidence to suggest that the application of generic competition law has increased competitiveness in the telecommunications in countries in Africa that have opted for the co-regulatory approach. In the case of South Africa it has been observed that the system is ineffective.[81]

Therefore applying competition law to the telecommunications market will not necessarily enhance competition in the market.

2. Conclusion.

An overview of the regulatory framework for competition in the telecommunications market in Uganda indicates that areas critical for promoting competition such as interconnection and price control have been provided for in detail. However, as has been noted in the previous sections, these regimes have not been satisfactorily implemented. It is critical for U.C.C to change from its pre liberalisation stance of leaving market players to do as they wish and transform itself into a regulator of a liberalised telecommunications market. Recent interventions by the U.C.C in interconnection rates and pricing are a step in the right direction. Effective regulation requires the implementation of the legal and regulatory framework to create an

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[78] Pieter Kloppers, Competition Policy Enforcement- Ideas for Regional Enforcement in Developing Countries, with Particular Reference to the Southern African Customs Union (2003) Pg 16 http://web65.uranus.ibone.ch/images/stories/MILE/MILE%20Theses/Competition%20Policy%20Enforcement.pdf?PHPSESSID=ecef7b52199f222944f680311e85488e
[79] Ibid page 17
[80] Ibid. Page 18
[81] Supra note 29

environment that promotes competition and therefore improvements are needed in the institutional framework.

Furthermore, despite the absence of a generic competition law, the sector specific competition rules which are governed by competition law principles provide obligations similar to the obligations found in generic competition legislation. However, some provisions of the law for example provisions on mergers and acquisitions require more detail. Legislation or guidelines on how U.C.C can deal with mergers and acquisitions in the telecommunications market should be enacted.

There is a need for competition law in Uganda but whether it is relevant in the telecommunications sector is questionable. Implementation of competition law on the continent has been a problem due to lack of funding and expertise. In contrast U.C.C is a well funded public institution with qualified personnel. Countries in Africa that have adopted competition law and sector specific rules to regulating competition in telecommunications have not necessarily benefitted from the system.

The role of competition law in telecommunications could be regarded as a futuristic role. That is, as the degree of competition increases in the sector, the need for sector regulation will diminish. It is important for the law not to remain static given that the telecommunications market is fast moving sector.

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