# Competition Law and Socio-Economic Advancement:

## Nigeria as a Case Study – Giving a Hungry Man a Silk Tie?

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## ABSTRACT

**Competition Law and Socio-Economic Advancement: Nigeria as a case study**
**Giving a hungry man a silk tie?**

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This thesis follows the recognized position that a means of improving the Nigerian socio-economic environment is through a free market economy and a competitive economic environment that has strongly rooted equal and easy access to raw materials, workforce, and technology that would be available to all businesses. It backs the position that in free market economies, through protecting demand and supply, competition law more efficiently maximizes consumer welfare as opposed to government regulation or unregulated competition, and it enhances economic development.

The thesis recognizes that competition law is relatively new in Nigeria, answers the question: to what extent can the proper implementation of competition law and policy be employed to promote economic advancement in Nigeria? The submitted views are somewhat based on an analysis of the objectives of competition law and policy, in order to determine whether Nigeria has unique problems, and if so, whether the common principles in competition policy are adequate to address them. Furthermore, this research examines existing regulatory regimes and the role it plays with regards to competition regulation.the question that arises is whether the regulations set out by these bodies are sufficient to promote and preserve competition. This thesis analyses the position and effectiveness of these regulatory organs in the promotion of competition.

The thesis examines the historical antecedent and institutional structure, including developments in competition law in the United States of America (US) and the European Union (EU). Furthermore, it examines some of the standards in the competition policies of these jurisdictions such as those concerning agreements, abuse of dominant position and mergers, to determine which competition model could be best adopted by Nigeria.

The thesis recognises that in 2019 the Nigerian President, General Muhammadu Buhari signed the Federal Competition and Consumer Protection Act (FCCPA) 2019 which

repealed the Consumer Protection Council Act. The introduction of a codified set of competition rules into Nigeria's regulatory oversight framework came as a long anticipated change, to ensure that market distortions across all sectors are minimized and rules of fair play are respected in the market place. Before the enactment, the laws governing competition and consumer protection were separate, fragmented and industry-specific. The thesis recognises that while the enactment of the law was a good start, there will be certain challenges.

It proposes Nigeria uses these laws and advancements which have been made over the years as a mechanism to determine whether the same rules could apply, which competition law model could be best adopted and for building a suitable competition law. Through examining these jurisdictions, the thesis provides a setting to compare policy experiences, seek answers to common problems and identify best practices so as to make recommendations which may improve existing policy.

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| | |
|---|---|
| AT&T | American Telephone and Telegraph |
| AAEC | Appreciable Adverse Effect on Competition |
| BPE | Bureau of Public Enterprises |
| CAMA | Companies and Allied Matters Act |
| CC | Competition Commission |
| CCI | Competition Commission of India |
| CIA | Competition Impact Assessment |
| CITN | Chartered Institute of Taxation of Nigeria |
| CNPC | China National Petroleum Corporation |
| COMESA | Common Market for Eastern and Southern Africa |
| COMPAT | Competition Appellate Tribunal |
| EPIC | Electric Power Reform Implementation Committee |
| EPSR | Electric Power Sector Reform |
| ESI | Electricity Supply Industry |
| EU | European Union |
| FCC | Federal Communications Commission |
| FCCPA | Federal Competition and Consumer Protection Act |
| FCCPC | Federal Competition and Consumer Protection Commission |
| FCT | Federal Capital Territory |
| FMP | Federal Ministry of Power |
| FRN | Federal Republic of Nigeria |
| GDP | Gross Domestic Product |
| GNP | Gross National Product |
| IBA | International Bar Association |

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|---|---|
| ICAN | Institute of Chartered Accountants of Nigeria |
| ICN | International Competition Network |
| IMF | International Monetary Fund |
| ISA | Investment and Securities Act |
| M&A | Merger and Acquisition |
| MRTP Act | Monopolies and Restrictive Trade Practices Act, 1969 |
| NAFDAC | National Agency for Food and Drug Administration and Control |
| NBA | Nigerian Bar Association |
| NCAA | Nigerian Civil Aviation Authority |
| NCC | Nigerian Communications Commission |
| NCP | National Council on Privatization |
| NEPA | National Electric Power Authority |
| NEPAD | New Partnership for Africa's Development |
| NERC | Nigerian Electricity Regulatory Commission |
| NERSA | National Energy Regulator South Africa |
| NGO | Non-governmental organizations |
| NITEL | Nigerian Telecommunications |
| NLNG | Nigerian Liquified Natural Gas |
| NNPC | Nigerian National Petroleum Corporation |
| NTP | National Telecommunications Policy |
| OECD | Organization for Economic Cooperation and Development |
| OFT | Office of Fair Trading |
| PFS | Passenger Fuel surcharges |
| PHCN | Power Holding Company of Nigeria |
| RBP | Restrictive Business Practices |
| SEC | Securities and Exchange Commission |

| | |
|---|---|
| SON | Standards Organisation of Nigeria |
| SRP | Securities Regulation Panel |
| TFEU | Treaty on the Functioning of the European Union |
| UJV | Unincorporated Joint Ventures |
| UNCTAD | United Nations Conference on Trade and Development |
| UNDP | United Nations Development Programme |
| WTO | World Trade Organization |

# CHAPTER 1: INTRODUCTION

This chapter serves as an introductory chapter, stating the background to the thesis identifying the research objectives and defining the research question as well as the scope of the study, the research methodology, and the framework of the thesis. The chapter further examines competition law as a concept, its framework, goals, characteristics, and nature and their importance to this research. The chapter also analyses the different theories of competition, and the significance and aim of competition law, and also makes a distinct comparison between competition law and competition policy. In addition, the chapter presents a brief summary of the conclusions and recommendations made in the thesis.

In general, this thesis explores the anti-competitive practices that take place in Nigeria and how they are currently dealt with under existing anti-competitive provisions in various laws. It compares this with the position in South Africa as it is a country with similar characteristics as Nigeria with a notable business presence in Nigeria and has an effective competition law in place.

The thesis further considers the influence of key international organizations on the implementation of competition law, including the International Monetary Fund (IMF), the Organization for Economic Cooperation and Development (OECD), the World Trade Organization (WTO), and the World Bank. It will conclude with a critical analysis of Nigerian competition law policies using examples derived from the experiences of the UK, the US, India and South Africa. It is hoped that the research findings and outcomes of this thesis will add to the body of knowledge in this field, enabling greater understanding of competition law and leading to the proper enforcement of competition law in Nigeria.

## 1.1 Purpose of Competition Law: A Brief Overview

Competition law is a crucial element of any modern trading system. Its purpose is to boost fair competition between businesses and safeguard consumers and small businesses by applying and preserving the principles of the free market. It aims to preserve lower prices and afford improved quality and a wide range of alternatives of goods and services. Competition law prohibits three main kinds of practice: anti-competitive agreements, such as fixing prices; abuse of a firm's dominant position in the market that entails the imposition

of unfair prices of purchase or hindering competitors from entering the market; and merger operations which create dominant positions and affect fair competition.[1]

The practice of competition law differs from jurisdiction to jurisdiction. Consumer welfare and ensuring businesses have an opportunity to compete in the market economy are frequently treated as significant objectives. Other significant objectives are to prohibit agreements or practices that restrict free trading and creating a common market. Competition law is linked with law on deregulation of access to markets, state aids and subsidies, the privatization of state-owned businesses and the creation of independent sector regulators, among other market-oriented supply-side policies. Competition is about increasing choice and efficiency to benefit consumers and make the economy more productive. This also applies to sectors which in many countries have been liberalised (such as electricity, water, railways, and telecoms), which are subject to regulation (banking and other financial services) or where the government plays an important role (healthcare, education and local public services).

The theory of perfect competition advocates a model of the marketplace that achieves consumer benefit. The conditions for a market to be perfectly competitive are as follows[2]:

• a large number of buyers and sellers;

• similar product sold by all firms;

• all buyers and sellers having a perfect knowledge of prices and accurate information on the market; and

• no transaction costs and no barriers to entering or exiting the market.

A monopoly, on the other hand, represents a market where one producer (or a group of producers acting in concert) controls the supply of a good or service, and where the entry of new producers is prevented or highly restricted. Monopolist firms (in their attempt to maximize profits) keep the price high and restrict the output, and show little or no sensitivity to the needs of their consumers. A business's ability to increase prices is usually controlled by competitors and the likelihood that its consumers can change their suppliers. When these

[1] M Dabbah, *International and Comparative Competition Law* (Antitrust and Competition Law) (CUP 2010) 34.
[2] JM Perloff, *Microeconomics* (6th edn, Pearson/Addison-Wesley, Boston 2012).

limits are weak, a firm is said to have market power and if the market power is excessive, the firm is said to be in a position of dominance or monopoly. While control of monopoly power does not in itself create abuse of competition laws, the abuse of such power principally if it is used to weaken competition further by excluding rivals calls for interference from competition authorities.

A monopoly can exist as a result of lawful entry barriers restricting other businesses from entering the market, also a natural monopoly may occur when only one business can in practice operate and make profits in the market. Further, research has shown that prices in a market where monopoly exists are always higher than prices in a competitive market; consequently, the presence of a monopoly may often have adverse effects on the market, which may lead to damage to both consumers and potential competitors. Thus, competition law aims to regulate the relationship between various parties who have conflicts of interests in the market: sellers on the one side and consumers or commercial buyers on the other and regulating the relationship between potential sellers (competitors).

In order to facilitate a clear understanding of competition law, it is vital to make clear the meaning of competition. The Oxford English Dictionary defines competition as 'the activity or condition of striving to gain or win something by defeating or establishing superiority over others'. Competition may also be equated to rivalry in the market which is having or displaying a strong desire to be more successful than others. Conversely, scholars have described competition differently. According to Goyder, competition is: 'The relationship that exists among any number of undertakings which sell goods or services of the same kind at the same time to an identifiable group of customers.'[3] Whish, on the other hand, states: 'Competition means a struggle or contention for superiority, and in the commercial world this means a striving for the custom and business of people in the marketplace.'[4]

Competition thus indicates the presence of rivalry between firms in the market and is based on the freedom to compete. Whereas Whish based his definition of competition on the definition given in the Oxford Dictionary, it appears that Goyder chose a more extensive expression to describe competition. Whish used the term 'struggle', which implies a 'process'; Goyder used the word 'relationship', which is more far-reaching. In competition law, these circumstances or relationships may range from a vertical agreement between a

[3] D Goyder, *EC Competition Law* (OUP 2003) 9.
[4] R Whish, *Competition Law* (Butterworths 2001) 1.

supplier and a buyer to joint dominance to implied or unstated collusion. Hence, it can be argued that, although in the wide sense competition concerns a relationship, it is more suitable to use a word that would imply the presence of a process, because the term relationship falls short of offering a specific definition.

Nonetheless, the question is asked as to why the process of competition is so vital that there needs to be distinct rules in place to safeguard it. The hypothesis is that competition between businesses is the essence of robust and effective markets.[5] Competition aids consumers to get the best deal, It inspires firms to be more inventive, putting downward pressure on costs and providing incentives for the efficient organization of production.[6] Consequently, by providing the structure for competitive activity, competition law aims to empower markets to function more efficiently and by safeguarding the process of competition, competition law is of vital importance.[7]

Competition creates four distinguishable efficiencies in the marketplace:[8] productive efficiency ensures that any time a good or service is produced, it is done by using the smallest number of resources possible; allocative efficiency ensures that available resources are used in a satisfactory manner; dynamic efficiency stresses the need for innovativeness, and that firms are able to adapt to meet new needs by searching for and adopting new technologies and methods; and lastly, inter-temporal efficiency ensures that the available resources are used in a sustainable way, taking into account the needs of future members of the population. These efficiencies are critical to society and it is for their sake that the law seeks to safeguard competition. In other words, competition is not an end in itself, but rather is the means by which society can attain those efficiencies. Competition law, therefore, is the story of the above efficiencies. Its goals include, principally, the promotion of economic efficiency in order to enhance consumer welfare.[9] It also includes the following: dispersal of economic

[5] UK Government, White Paper Productivity and Enterprise (Cm 5233, July 2001), cited in Mark Furse, *Competition Law of the EC and UK* (5th edn, OUP 2006).
[6] A similar view is expressed about competition law and competition by Justice Thurgood Marshall in *United States v Topco Associates, Inc* 405 US 596, 610, 92 SCt 1126, 31 LEd2d 515 (1972): 'Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.'
[7] HL Deb 30 October 1997, col 1156, cited in Furse (n 5) 1.
[8] N Dimgba, 'The Need and the Challenges to the Establishment of a Competition Law Regime in Nigeria', (Global Competition Forum) <www.globalcompetitionforum.org,regions/Africa/Nigeria> accessed 14 May 2014.
[9] J Vickers and D Hay, 'The Economics of Market Dominance' in D Hay and J Vickers (eds), *The Economics*

power,[10] the protection of competitors[11] (though heavily criticized by the Chicago school of antitrust analysis[12]), and a broader range of other goals such as social, employment, industrial, and environmental goals.[13] It is characteristic for most competition legislation to stipulate clearly the goals that the law seeks to achieve. Such clear goal provision is a practice that is encouraged since it focuses the mind of the competition authority in setting its priorities.[14] The draft Nigerian Federal Competition Commission Bill (FCC) contains a clear goal provision,[15] as do the competition laws of jurisdictions such as the EU, South Africa, India, Canada, and New Zealand.[16] It must be stated here that while these laws would provide for a number of policy goals, there is always one key goal among all of them that is usually identified as being of prime importance, often informed by the countries' social and political experiences. It is normally that single policy goal which gives the competition regime its essential character, and may well on occasion outplay other inconsistent policy goals. In the EU, for instance, it has been suggested that the integration of the European

*of Market Dominance* (OUP 1987) 2; Richard Whish, *Competition Law* (5th edn, LexisNexis 2003) 17, cited in Dimgba (n 8).

[10] This is often phrased as the 'promotion of economic equity rather than economic efficiency': Whish (n 9). This argument appears to form the very foundation of the development of antitrust law in the US—the general suspicion with which big business was held in the 19th and 20th centuries. It was under the US antitrust laws that the world's largest corporation at the time, AT&T, was eventually dismembered. One sees such concerns resonating in the *Microsoft* case. For a highly critical view of the *Microsoft* case generally, see McKenzie, *Antitrust on Trial: How the Microsoft Case Is Reframing the Rules of Competition* (2nd edn, Perseus Publishing 2001) and see also G Amato, *Antitrust and the Bounds of Power* (Hart Publishing 1997) 2-3, cited in Dimgba (n 8).

[11] The argument is that 'the competition authorities should hold the ring and ensure that the "small guy" is given a fair chance to succeed': Whish (n 4) 19.

[12] R Posner, 'The Chicago School of Antitrust Analysis' (1979) 127 Univ Pa LR 925. This school of thinking called for less intervention by competition authorities and placed greater faith in the ability of the market itself to achieve economic efficiency and to discipline recalcitrant market participants. Unlike the Harvard School, the foundations of its antitrust analysis were rigorously theoretical rather than empirical. The Harvard School, on the other hand, believed that the Chicago School had too much faith in the correcting power of the market, but that empirical evidence shows that there are situations where market forces alone are never able to control distortions created by a firm, and that here a competition authority should intervene to straighten things out.

[13] In the EU, single market integration is a major goal of competition law, often overriding the goal of market efficiency: Barry J Rodger and Angus MacCulloch, *Competition Law and Policy in the European Community and United Kingdom* (2nd edn, Cavendish Publishing 2001) 13; Whish (n 4); A Jones and B Sufrin, *EU Competition Law: Text Cases and Materials* (OUP 2014).

[14] Michal Gal, *Competition Policy for Small Market Economies* (Harvard University Press 2003) 50-51.

[15] S 2 of the Bill provides:

2. The objects of this Act are to promote-

(a) the balanced development of the Nigeria economy; (b) the welfare and interests of consumers, and provide them with competitive price and product choices; (c) maintain, and encourage competition and enhance economic efficiency in production, trade and commerce; (d) expansion of opportunities for domestic enterprises to participate in world markets; (e) and enhance the ability of small and medium enterprises to compete effectively; and prohibit restrictive business practices which prevents, restricts or distorts competition or constitutes the abuse of a dominant position of market power in Nigeria.

[16] The New Zealand Commerce Act 2003 has a statement of purpose which clearly states that the purpose of the competition rules is: 'to promote competition in markets for the long-term benefit of consumers'.

single market is the primary objective of EU Competition Law[17]; for South Africa, it is the promotion of the interests of historically disadvantaged people.[18]

Furthermore, this research argues that the presence of competition law in any economy stimulates growth, ensures better and qualitative products and value-added services, protects consumers and taxpayers from exploitation, and ensures that there is no oligarchy in the distribution of the society's resources and the running of the major sectors of the economy. Competition law seeks to curb anti-competitive practices, which include abuse of dominant market positions, resale price maintenance, price fixing, and bid rigging. It must be pointed out that competition law may not prevent certain arrangements between firms such as competitors cooperating to perform joint research and developmental projects that benefit consumers. In addition, competition law prohibits unfair methods of competition in interstate commerce and illegal activities, including laws that prohibit false statements to government agencies, perjury, obstruction of justice, conspiracies to defraud government of revenue, hoarding of goods, and cartel agreements to the detriment of the nation and international economy.

In summary, competition law strives to ensure that where competition already exists, it would deliver the goods in terms of realizing all the efficiencies normally associated with it. This it achieves by laying down rules by which firms can compete in the marketplace. Secondly, that where competition does not already exist, it would be encouraged to exist by, for instance, instituting structural remedies in a market that is unduly concentrated.

Competition laws typically tackle the harms of monopoly power in three scenarios: agreements among businesses, activities of a particular business, and mergers of independent businesses. The first scenario, which is agreements among businesses, can be divided into two categories: 'horizontal' agreements between organizations in the same line of business, and 'vertical' agreements between organizations at different stages of production or distribution. The second scenario (activities of a particular business) is where a single firm holds economic power and is referred to as 'abuse of dominant position' or 'monopoly'. The third category, often called 'mergers' or 'concentrations', commonly takes account of other types of structural combination, such as joint ventures and share or asset

[17] This point will be discussed in greater detail in Chapter 4 of this thesis.
[18] South African Competition Act 1998, s 2.

acquisitions.

Agreements often allow the businesses in collaboration to achieve monopoly status and therefore able to increase prices, limit output, and also prevent entry, improvement, and innovation in the market place. Most modern-day competition laws treat arrangements to fix prices, limit output, rig bids, or divide markets very severely. To enforce such agreements, competitors may also agree on strategies to avoid new competition. As such, competition laws seek to detect and penalize boycotts. Some of the most difficult horizontal agreements are those agreements that prevent competition in terms of price and output. Horizontal cooperation issues such as research and quality may also affect competition. However, whether the consequence is positive or negative may be subject to market conditions. As a result, most laws tackle these agreements by considering a wider range of possible costs and benefits, or by designing more comprehensive rules to ascertain and exempt constructive agreements.

Vertical agreements attempt to control aspects of distribution. These agreements may also lead to inferior-quality goods, limited entry into the marketplace, and an increase in prices. Because the competitive effects of vertical agreements can be more complex than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements. One basic type of agreement is resale price maintenance: vertical agreements can control minimum, or maximum, prices. In some settings, the result can be to curb market abuses by distributors. In others, though, it can be to duplicate or enforce a horizontal cartel. Agreements granting exclusive dealing rights or territories can encourage greater effort to sell the supplier's product, or they can protect distributors from competition or prevent entry by other suppliers. Depending on the circumstances, agreements about product combinations, such as requiring distributors to carry full lines or tying different products together, can either facilitate or discourage introduction of new products. Franchising often involves a complex of vertical agreements with potential competitive significance: a franchise agreement may contain provisions about competition within geographic territories, about exclusive dealing for supplies, and about rights to intellectual property such as trademarks.

Abuse of a dominant position or having monopoly status are categories that are related to the behaviour and statuses of individual businesses. Businesses that enjoy monopoly status and face no competition or threat of competition will charge higher prices and produce less

or lower-quality goods and services. Additionally, it may be less possible to introduce more resourceful methods or novel products. Legislation against monopolies and abuse of a dominant position is characteristically targeted at exclusionary tactics used by businesses to attempt to attain or safeguard monopoly statuses.

Merger control attempts to stop the establishment, through mergers and acquisitions or other structural combinations, of undertakings that will have the ability to exercise market power. In certain instances, the test of legality of such mergers is derived from the laws on dominance or restraints; in other situations, there is a separate test formulated in terms of the possible effect on competition. The procedure applied requires characterizing the goods that compete, the businesses that are likely to offer competition, and the shares and importance of those businesses with respect to the product markets. A significant factor is the possibility of new entry and the presence of obstacles to new entry. Most countries apply some form of market-share test, either to guide further investigation or as a presumption about legality. It is presumed that mergers in concentrated markets, or that form businesses with extraordinary market shares, are more likely to affect competition. As such, most countries have laid out procedures for pre-notification to necessary enforcement authorities before such large transactions take place. Hence, difficulties can be recognized and resolved before the restructuring takes place.

The first country in the world to establish a modern system of competition law is the United States of America. The majority of the US antitrust (competition) laws were enacted during 1890–1950. At that time, monopolies dominated the US markets. Subsequently, the concept of competition law was transferred to Europe. Modern statutory competition policy began in the aftermath of the Second World War, but even then the forerunners although mindful of the benefits of monopoly and cartelisation during times of crisis – were no free-market ideologues`. In consequence, from today's vantage the laws that they introduced were tentative, partial, and under-enforced.

It was only in 2000 with the coming into force of the Competition Act 1998, and 2002 with the passage of the Enterprise Act that the United Kingdom saw the completion of a rounded scheme of law which may have been introduced as a consequence of EU/EEA obligations.. This scheme demonstrates the promotion of competition and economic efficiency, now the

orthodox position in international terms, as its key underpinning rationale.[19] The main provisions of competition rules were to be found initially in the Rome Treaty, which created the European Economic Community (now the European Union), signed on 25 March 1957 and which came into force in January 1958. Member States of the EU must conform to the European Union objectives, one of which is the integration of the internal market which is regarded as one of the main aims of EU law in general and competition law particularly.[20] Since provisions on competition law are a part of EU law, they have to be interpreted bearing in mind general purposes of the European Union. Thus, for example, the UK entered the European Community in 1973 and, in that year, the Fair Trading Act (FTA) 1973 was passed.

The current law in force in the United Kingdom is the Competition Act 1998, along with the Enterprise Act 2002 drafted in line with relevant EU regulations[21]which are important in the interpretation and application of UK Competition rules. The UK Competition Act prohibitions are modelled on those in articles 101 and 102 Treaty of the Functioning of the European Union (TFEU). To reduce discrepancy between the application of the respective prohibitions, Section 60 of the Competition Act integrates into UK law a governing principle that UK should not diverge in its substantive application of EU law; a duty on national courts and tribunals to ensure consistency of interpretation between the Competition Act, TFEU and established and future jurisprudence of the European courts and a general duty to have regard in determining any matter to any relevant decision or statement of the European Commission . However, in cases where the effect of business practices reach across borders, the European Commission has the power to deal with the issues and EU law will apply.

### 1.2 Competition Law vs Competition Policy

Competition policy is often used interchangeably with competition law. In order to avoid confusion, this thesis sheds light on the differences at the outset. Both a competition policy and competition law are necessary to maintain competition in the economy. Competition policy generally refers to governmental measures that may affect competition in the economy of a country, by having an open impact on the conduct of businesses and the

[19] A Scott, 'The Evolution of Competition Law and Policy in the United Kingdom', LSE Law, Society and Economy Working Papers <www.lse.ac.uk/collections/law/wps/wps.htm> accessed 20 August 2019.
[20] Article 3 TEU and Article 3 TFEU.
[21] B Rodger and A McCulloch, *Competition Law and Policy in the EC and UK* (5th edn, Routledge 2014); M Motta, *Competition Policy Theory and Practice* (Cambridge University Press 2004) 11-12.

structure of industry. Competition policy may be described as a mechanism for attaining an effective allocation of resources, technological advancement, and consumer welfare. Additionally, it aids in the regulation of concentration of economic power harmful to competition. Furthermore, competition policies are governmental measures that give priority to market forces, aid entry and exit, minimize administrative controls and regulations. Competition law refers to a law to exclude and punish anti-competitive practices and regulate mergers which may be potentially anti-competitive. Competition policy and law complement each other, while one promotes a market-based economy as opposed to a regulated economy, the other seeks to get rid of impediments that may be placed by private players in the functioning of the market economy, and as such preserve competition in the markets.[22]

As a result of its diverse purposes, there are two parts of an all-inclusive competition policy. The first part denotes government measures that boost competition in the markets, such as liberalized trade policy, relatively flexible entry and exit environments, reduced governmental controls in the marketplace, and more dependence on market forces. The second part of competition policy is a competition law and its active use to check anti-competitive behaviour by firms, to oust abusive market conduct by dominant firms, to control mergers which have the tendency to be anti-competitive, and to reduce unnecessary government controls.[23] For optimum efficiency, competition law should be enacted as part of a comprehensive competition policy so as to avoid market failures. A country's competition policy usually consists of its trade policy, industrial openness, and its liberalization policy.

Trade policy occupies a key position in influencing competition in an economy. The amount of goods obtainable in the marketplace is determined by the degree to which the economy is open to the outside world. A tight trade policy limits competition in the market, and may bring about influence of the market by dominant domestic firms. However, trade liberalization brings about innovation and an inflow of goods into the economy, which can correspondingly have a vast effect on competition in the market. To attain an optimum level

[22] H Qaqaya and G Lipimile, 'The Effects of Anti-Competitive Business Practices on Developing Countries and Their Development Prospects' (United Nations Conference on Trade and Development 2008) <http://unctad.org/en/docs/ditcclp20082_en.pdf> accessed 24 May 2014.
[23] Planning Commission of India, 'Report of the Working Group on Competition Policy' (Government of India 2007) <http://planningcommission.nic.in/aboutus/committee/wrkgrp11/wg11_cpolicy.pdf> accessed 24 May 2014.

of competition in an economy, the trade policy of a country ought to encourage private involvement in the economy by making it attractive for new businesses to invest in the economy and also by strengthening the position of present ones.

The extent of competition in an economy mirrors the country's outlook to entry and growth of businesses. Laws aimed at the entry and formation of businesses in a country influence competition. In countries that have a restrictive industrial policy regime where entry and growth of businesses are subject to rigid licensing conditions, there will be a very low level of investments. An effective competition policy aids inflow of investment by providing a relatively stable legal and regulatory atmosphere that lessens the possibility of random decision making, and in so doing infusing transparency and accountability in the system. Privatization improves the potential for competition by making environments favourable for the entry of new players. Government participation in the economy, particularly when in direct competition with private firms, discourages private involvement and suppresses competition. Privatization is further examined in later parts of this thesis.

### 1.3 Competition Law in Nigeria: A Brief Overview

Nigeria is the world's seventh populous country, the most populous African country, and the world's ninth largest oil exporter; and that the country's aggregate output of goods and services is greater than that of the rest of black Africa combined, with Nigeria having the largest consumer market in Africa. Accordingly, Aliko Dangote, a prominent businessman in Nigeria, is of the opinion that: 'Nigeria is the best-kept secret in the world. Anybody who doesn't invest in Nigeria only has himself to blame, going forward, if he misses out. I do not really know of any place where you can make as much money as you make in Nigeria.'[24] It is thus clear that the study of the 'Nigerian State' is fundamental because Nigeria is one of the fastest-growing economies in the world. Nigeria is one of only two African countries in the list of 3G (or Global Growth Generators) countries[25]. These countries have been identified as attractive places for investment because of the incredible growth potential they have. Citigroup predicts that Nigeria will have the highest average growth in GDP in the world between 2010 and 2050. Not only does this anticipated growth imply that Nigeria may

[24] Femi Aribisala, 'The South Africanisation of Nigeria' *Vanguard* (8 March 2014) <http://www.vanguardngr.com/2014/03/south-africanisation-nigeria/#sthash.EOHN4bTc.dpuf> accessed 18 March 14.

[25] Vietnam, Bangladesh, China, Egypt, India, Indonesia, Iraq, Mongolia, Nigeria, Philippines, Sri Lanka.

be a model for economic development for other countries in the developing world, it also means that Nigeria is bound to have more bargaining power in the international system and increasingly important relations with countries like the United States and the United Kingdom.

This research focuses on whether prevailing competition law models from developed or developing countries can be embraced in Nigeria and the most suitable form of competition law for Nigeria. This thesis further explores the necessity of competition law and policy as a means of promoting and sustaining economic growth and development in Nigeria. This thesis also critically examines the enactment of an all-encompassing competition law in Nigeria, as opposed to the sector-specific competition regulations currently in place. In order to identify possible "best practices" and possibly the "best model" for Nigeria, this thesis will review the competition law regimes of the US, the EU, South Africa and India[26].

In Nigeria, there are businesses that make large amounts of profits from industries where their wealth does not compare with the activity that such businesses should generate[27]. These companies make unusual profits through protectionist government policies or government ineptitude intended to favour businesses or individuals that then use the opportunity to make excessive profits from the Nigerian people, whom the legal system is in fact meant to protect. Although no novel industries or products are formed, the people pay higher prices for goods and services. This creates a wealth transfer from the masses to these business owners without solving any economic or social problems. For example, the consumer pays an extraordinary amount for mobile phone tariffs as a result of government ineffectiveness in enacting necessary laws to promote competition and curb monopolistic business practices such as cartels and price fixing. Similarly, people pay extremely high rent because real estate in Nigerian cities is among the most expensive in the world. This may be due to the fact that a few companies hold monopoly power in the cement industry.

Competition law has received remarkable attention in recent years and is no longer an exclusive feature of the statute book of countries in the developed world: a large number of developing countries have adopted some form of competition law domestically and in an

[26] The choice of countries is looked at further in this thesis.
[27] T Leye, 'Tin Billionaires – Why Dangote and His Ilk Won't Thrive Outside Nigeria' <http://www.ynaija.com/tunde-leye-tin-billionaires-why-dangote-and-his-ilk-wont-thrive-outside-nigeria-y-frontpage/> accessed 27 May 2014.

even larger number, competition law currently ranks high on their national agenda.[28] Competition law has emerged in most developing countries and it would be untrue to assert that developing countries do not have competition policies.[29] For instance, industrial policies that aim to achieve scale economies and industrialization through the protection of state-owned monopolies or private enterprises explicitly limit competition. Subsidies, state aids, and procurement preferences further limit the accessibility of important markets.[30] Competition policy of this nature is anti-competitive and counter-productive. Trade barriers choke off imports of technologically sophisticated capital goods and material inputs. Protected and subsidized enterprises have limited incentives to innovate or adopt new technologies. Small and segmented markets limit the attainment of meaningful economies of scale. Monopolies in important service markets tend to be unresponsive to changing consumer needs. Tolerance of cartels and monopolies limits competitive entry by both foreign competitors and new domestic firms.[31]

Nigeria is increasingly seen by businesses as a country of great prospect from its strengths in mineral resources to vibrant sectors such as mobile telecommunications networks. As market economies develop and become more advanced globally, the need for an effective competition law regime has become more apparent. Thus, across most developing countries, governments are introducing competition law regimes. Similarly, although there are competition policies in place in Nigeria,[32] competition legislation is still an area of law that has not been fully tapped into. Although regulators in certain industries have the power to regulate competition within their industry,[33] the question that arises is whether the

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[28] M Dabbah, *International and Comparative Competition Law* (CUP 2010) ch 1.

[29] A table which lists some developing countries and indicates the existence or absence of competition law in the relevant country is annexed to this thesis.

[30] KE Maskus and L Mohamed, 'Competition Policy and Intellectual Property Rights in Developing Countries' (2000) 23(4) The World Economy 595-611. <http://siteresources.worldbank.org/DEC/Resources/84797-1251813753820/6415739-1251814020192/maskus.pdf> accessed 27 May 2014.

[31] Ibid.

[32] According to s 16(2)I of the Constitution of the Federal Republic of Nigeria 1999, the economic system of the country should not be operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of a few individuals or of a group. S 128 of the Investments and Securities Act 2007 also gives the Securities and Exchange Commission (SEC) the power to order the breakup of companies whose business practices restrict competition. This provision is coined after the US antitrust law and will be analysed further in this work

[33] For example, under s 82 of the Electricity Power Sector Reform Act 2005, the Nigerian Electricity Regulatory Commission is responsible for the prevention of the abuse of market power within the electricity sector and whether or not to approve a merger/acquisition in the electricity sector so as to ensure that services are offered competitively. Another example can be seen in the aviation industry where s 30(4)(i) of the Civil Aviation Act 2006 empowers the Civil Aviation Authority to investigate and determine upon its own initiative whether any air carrier has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation and the sale of tickets. The effectiveness of these regulatory provisions will be analysed

regulations set out by these various bodies are sufficient to promote and preserve competition.

### 1.4 Research Questions

The focal research question asked by this thesis is as follows: Will the implementation of an all-encompassing competition law in Nigeria aid socio-economic development? This question will be answered through examining the objectives of competition law and policy and also the characteristics, peculiar problems, and goals of Nigeria in the context of its status as a developing country. In order to arrive at a sound conclusion to this question, the following issues will also be addressed:

1. To explore whether the existing sector-specific competition provisions and current market reforms in Nigeria are adequate without a competition-law backing;
2. To assess whether models from developed countries or other developing countries are the most suitable form of competition law for Nigeria;
3. To identify the expected challenges and benefits of adopting competition law;
4. To explore how competition law can be implemented if adopted and the necessary conditions for competition to bloom; and
5. To examine the way that the political economy in Nigeria will affect the implementation of competition law.

To analyse these issues, a number of research hypotheses have been formulated. The first is that competition policy is the best tool for advancing the economic and social objectives of developing countries. Trade liberalization on its own does not automatically lead to more competitive markets. To benefit from trade liberalization, an appropriate regulatory framework must be put in place; otherwise, private barriers may merely substitute governmental barriers to trade, an outcome that might prevent improvements in social welfare. The second is that the enactment of a competition law may encounter opposition from many groups in society because it restricts the powers of an incumbent monopolist to build artificial barriers to the growth or entry of its rivals; it confines the ability of businesses

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further in this work.

to increase their prices or profits collectively, and it restricts the ability of businesses to attain market power by distorting the market structure by way of merger or joint venture. As a result, it may change the legal status of deep-rooted types of business conduct.[34] Thirdly, it is important for Nigeria to enact a competition law which takes account of its level of development and the long-term goal of sustained economic growth.. Finally, in order to be implemented efficiently, competition legislation must be detailed, and anti-competitive behaviour must be clearly defined together with the necessary enforcement procedures and structure.

This thesis notes that Nigeria suffers major economic problems notwithstanding the resource endowments. The research contends that a key reason for these economic setbacks could be the lack of suitable competition law and policy granting that these setbacks could also be as a result of other factors not directly connected with competition. These other elements include fractional politics, corruption, and lack of transparency in the conduct of government business. The thesis, therefore, argues that competition law enactment in Nigeria will improve competition regulation and further sustain the market-based economy and thus expand consumer benefits resulting from the market-based economic policy. A broad examination of competition laws in terms of rules, institutions, and enforcement is not possible within the remit of this thesis. Consequently, this research is narrowed down to the basic standards of competition and how the adoption of a competition law regime will impact Nigeria.

There has been some[35] academic literature on the role and importance of the implementation of competition law in Nigeria, and the ambition of this thesis is to make an addition to the work done through the critical examination of the actual and perceived role that implementation of a competition law regime would play in Nigeria. This will be done by analysing various regulatory regimes in Nigeria and reviewing the administration and efficacy of such regimes. Furthermore, by and considering their roles in advancing economic

[34] 'Competition, competitiveness and development: Lessons from developing countries' <http://unctad.org/en/docs/ditcclp20041ch1_en.pdf> accessed 27 May 2014.

[35] Work has been done by academic writers some of which are Nnamdi Dimgba, 'The Changing Landscape: Federal Competition And Competition Protection Act' (Keynote Address Delivered at the Jackson, Etti & Edu in Partnership with Norton Rose Fulbright Conference On Competition Law, 18 June 2019) 4; Eleanor Fox and Mor Bakhoum: *Making Markets Work for Africa: Markets, Development and Competition Law in Sub-Saharan Africa* (OUP 2019): Anthony Idigbe 'Overview Of Development Of Competition Law In Nigeria' 26 September 2019

development, this research findings and outcome will make a distinct contribution to knowledge in this field enabling understanding Competition Law. Additionally, the findings will be of benefit to both law researchers and to practitioners such as judges and lawyers, as well as investors (domestic and foreign) and consumers. This study provides a framework for the countries in Africa, particularly the West African countries, which are seeking to move towards more competitive markets, whether they have already adopted or are planning to adopt competition law.

### 1.5 Scope of Study

Some form of competition law has been adopted in various jurisdictions around the world, all of which differ in terms of their domestic or regional circumstances. However, a noteworthy development in competition literature, practice, and understanding have been to view competition law in different parts of the world through the same lens. It can be argued that this should not be the case in Nigeria as countries have differences in their cultural perspectives and, further, that competition law is understood differently in various countries. However, with the aid of international organizations, competition law rules, practices, and theories that are developed mostly in the EU and the US may seem to have been forced down on developing countries. This in many cases has resulted in the developing country facing difficulties in understanding the competition rules and also in enforcing such competition law provisions.

While it is crucial to consult the experience of experienced and long standing regimes such as the US and the EU, when it comes to designing a regime for enforcing the law, it may be argued that a law which also takes into consideration Nigeria's specific circumstances may be more efficient. Competition law revolves around the idea of needing to protect the process of competition and consumers. The process thus sits at the heart of not only the economic, political, and social circumstances of the country in question but also the legal system and culture prevailing in the country concerned. It is thus necessary to have a firm understanding of the economic, social, political, and cultural circumstances of Nigeria in order to enact a competition law, as opposed to 'emailing' competition laws already in existence in developed countries. In line with this argument, this thesis suggests that Nigeria should develop her own brand of competition law, resisting pressure to adopt 'international standards' without regard to fit. It also makes suggestions on how to find common ground

on rules and standards so that such a law can be home-grown.

In terms of the regions covered, the scope of the thesis will be confined to the laws in place as of January 2016 in South Africa, India, the US and the EU studying three countries and one regional system respectively. This is because they are the most advanced models. The US being the first modern regime, and the EU as possibly the most sophisticated regime which has gone through various reforms over the years. The South African regime is being considered as the competition law, even with its broad objectives, puts economic efficiency as priority. Public interest objectives run alongside the goal of economic efficiency. Furthermore, development concerns featured strongly in the debates on the role of South Africa's competition policy in addressing both structural features of the economy and corporate behaviour, especially of the large businesses.[36]

The challenges of addressing poverty and unemployment were as much a part of the policy discussion as was the promotion of competition and economic efficiency. Additionally, Nigeria and South Africa are considered the emerging giants of Africa. Politically, both countries are the dominant state entities in their respective sub-regions. They also have a history of cooperation with, and involvement in, a range of continental projects like the New Partnership for Africa's Development (NEPAD). The two countries have worked closely on conflict prevention and resolution, the establishment and operationalisation of the African Union, and put forward a detailed blueprint for sustainable development for Africa.

Bilateral political relations between South Africa and Nigeria are strong with Nigeria considered as one of South Africa's important partners on the African continent in advancing the vision of Africa's political and economic renewal. The leaders of both countries have traversed the globe spreading the idea of African renaissance - focusing largely on democracy, development and security and seeking foreign investments to revive Africa's ailing economies. They have called for greater international burden-sharing in peacekeeping missions, campaigns for the annulment of Africa's external debt, championed better access for African goods entering western markets and called for Africa's integration into the global economy in fairer terms[37]

[36] David Lewis, 'The Objectives Of Competition Law and Policy and the Optimal Design of a Competition Agency' (2003) 4 <http://www.oecd.org/dataoecd/57/59/2486466.pdf> accessed 10 January 2018.
[37] Joseph Ebegbulem , 'An evaluation of Nigeria- South Africa Bilateral Relations' (2013) http://jirfp.com/journals/jirfp/Vol_1_No_1_June_2013/3.pdf accessed 10 December 2018.

Furthermore, with Nigeria's large population and natural resources the country has become one of South Africa's most important trading partners in Africa. The trade relations between Nigeria and South Africa recorded substantial growth over the period 1999 to 2007. This increase in growth can be attributed to an increase in the demand for energy resources in South Africa; hence 98% of imports from Nigeria comprises of crude oil.

Furthermore, since the inception of democratic rule in Nigeria, South Africa and Nigeria have had encouraging bilateral economic relations. Since then, South Africa has emerged among the top investors in many sectors of the Nigerian economy. Over the years South African companies have become major players in almost all sectors of the Nigerian economy. The biggest investment by South African companies in Nigeria has been in the telecommunications sector. The South African and Nigerian governments signed bilateral agreements on trade and investment. These agreements amongst other things, aimed to increase the amount of trade and investment between South Africa and Nigeria[38].

The signing of these agreements saw (a) improved trade relations between South Africa and Nigeria and (b) South African corporations as big players in the Nigerian economy. On improved trade relations between both countries, it was noticed that the volume of trade between South Africa and Nigeria increased from 1999. Prior to 1999, trade between the two countries was minimal. The presence of many South African investors in Nigeria has increased the economies of both counties. This is the result of encouraging bilateral trade relations that existed between the two nations. The South African state has not only opened up Nigeria's economy to South African investments and exports through NEPAD, it has also done so through bilateral agreements and a Bi-national Commission. Both countries established the Bi-national Commission to promote trade and political cooperation in 1999. A Nigeria-South Africa Chambers of Commerce was also established in 2000.

The strong relationship between Nigeria and South Africa forms the main reason why South Africa is used as a comparative analysis in this thesis. South Africa has not been known to encourage competition law practices in Nigeria and a South African company in Nigeria has been MTN Communications Limited (MTN) is accused of not being lenient on sharing of infrastructure, that it prices essential inputs higher than it implicitly charges itself for internal use of such facilities. For instance, an MTN transmission link is alleged to cost as much as

[38] B Sifingo, , 'South African High Commissioner to Nigeria comments on Business Relations', African Business Journal (2003) Issue 13, February-May.

N1.3million per month even though such a link should normally not cost more than $200 per month in other countries, and that the incumbent advantage is used subtly to exclude rival networks from participation in markets that are strategic thereby lessening competition.[39] Furthermore, the introduction of free midnight calls by MTN and other larger providers captures the subscribers to the larger networks and makes it difficult for them to be accessed by the smaller operators who cannot match the same offer due to capacity constraints.[40]

Since the restoration of democracy in 1998, Nigeria has joined India in becoming the largest democracies in their respective regions with diverse religious and ethnic populations. They possess diverse natural and economic resources and are the largest economies in their respective regions. Both are members of the Commonwealth of Nations and G-77.[41] Furthermore, India is one of Nigeria's largest trading partners and likewise, Nigeria is India's largest trading partner in Africa. Indian owned/operated companies are the second largest employer in Nigeria after the Federal Republic of Nigeria. Like South Africa, India's imports from Nigeria form a large part of crude and petroleum products and India is the largest importer of Nigeria petroleum products. In recent years, Nigeria has been one of the main sources of crude for India. The strong bilateral relations between Nigeria and India led to the choice of India as a model in this thesis.

This thesis argues that the experiences of these regimes could help to nurture the development of competition law in Nigeria. They offer an opportunity to consider the merit of the dominant consensus in developed economies that competition, in the long run, offers better results than state ownership and direct involvement in the economy considering the current liberalization programs in developing economies.

### 1.6 Research Methodology

Although most of this research was conducted by doctrinal research in libraries, it also

[39] Comments on the NCC consultation paper on dominance in selected telecommunications markets in Nigeria. Submitted by ZOOMmobile, 26 March 2010 (Reliance Telecommunications Ltd) <http://www.ncc.gov.ng/Archive/RegulatorFramework/Consultation+Dominance_Zoom_Paper.pdf> accessed 15 July 2014.
[40] ibid.
[41] The Group of 77 (G77) at the United Nations is a coalition of 134 developing countries, formed to promote its members' collective economic interests and create joint negotiating capacity in the United Nations. There were 77 founding members of the organization, but by November 2013 the organization had since expanded to 134 member countries.

involved qualitative methods such as interviews, teleconferences, and discussions with government officials, policy makers, and lawyers. To attain the objectives of this research, a comparative analysis methodology was also utilized. This was necessary to show where the chosen area of research stands compared to other jurisdictions. It not only compares different legal systems but also analyses legislative solutions of the different legal systems. For the purposes of this thesis, this research examined lessons from the EU, the US, South Africa and India in order to develop a competition law regime for Nigeria. Through such method, this research aims to compare foreign and domestic systems in order to uncover any similarities and differences; analyse solutions offered by different systems; investigate the causal relationships between different systems of law, identify reasons and the logic in one jurisdiction and attempt to transplant it to another; and, finally, compare the different stages of different systems.[42]

There are three schools of thought within the comparative research methodology. According to the Watson school, legal rules are equally at home in many places and 'whatever their historical origins may have been, rules of private law can survive without any close connection to any particular people, any particular period of time or any particular place'. Accordingly, Watson is of the opinion that 'laws are borrowed from pre-existing laws in other legal systems without any initial inherent relationship between these laws (transplant) and society. However, once brought over, the interpretation and impact of the law is adapted locally'. [43] Another school is the Schlesinger school. This sets out 'to compare means to observe and to explain similarities as well as differences'. It further argues that periods of 'contractive' comparison with the emphasis on differences alternate with periods of what might be called 'integrative' comparison, that is, comparison placing the main accents on similarities. A third school of thought is that of Zweigert and Kotz, and Jhering. This takes a functional approach to comparative research. This school argues that:

> The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden.[44]
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> — Rudolf von Jhering, 1818–1892

[42] Peter De Cruz, *Comparative Law in a Changing World* (3rd edn, Routledge-Cavendish 1995).
[43] Alan Watson, 'Legal Transplants: An Approach to Comparative Literature' (University of Georgia 1993).
[44] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, OUP 1998).

This thesis borrows from all three schools. This is because it uses existing legal rules to suggest competition law for Nigeria, furthermore, the thesis analyses different jurisdictions to observe and to explain similarities as well as differences and through the use of various intellectual statements, this research aims to prove that where two or more legal systems face the same need which has been identified, the jurisdiction becomes less relevant and a legitimate comparison can be made. Comparative analysis in this work was is through the use of secondary data or literature; this assisted in reproducing the past with new perspectives and analysis. In this research, both primary and secondary sources of information were used to collect and analyse data to come to a viable conclusion.

The primary sources utilized include authoritative materials of the law such as the Constitution of the Federal Republic of Nigeria, statutes, and legislation in force, and official publications and judicial decisions relating to competition law, deregulation, and privatization in Nigeria. The secondary data relied on includes various unpublished records, published official records and statistics, statistics from other researchers in research monographs, books and journals, various competition law bills, and internet documents. These are materials that pertain to the law but are not themselves authoritative records of legal rules. It should be noted that because the area of law being researched in this thesis is relatively young in Nigeria, it was necessary to perform foundation research and, as such, there was heavy reliance on secondary sources. This research also employs the socio-legal approach to research which means the research will examine the law in action. This method encompasses evaluating the application of competition laws in developing countries with a similar background to Nigeria. The findings from this method are expected to lead to a better understanding of competition law and a better enforcement system when the law comes into effect.

Like most research, this doctoral thesis faced certain challenges. As a starting point, competition law is a relatively new unexplored area of law in Nigeria and, as such, there are a limited number of literature and cases dealing with competition law. Secondly, there is a scarcity of publications on anti-competitive activities that may have occurred. However, the use of comparative research analysis has greatly reduced the effects of these challenges on the outcome of this thesis as reference is made to the position in other jurisdictions in order to access the likelihood of successfully implementing competition law in Nigeria.

## 1.7 Structure of Thesis

This thesis is divided into parts and materials have been arranged to accommodate research findings. This research is divided into three parts. Part I addresses the current legal framework in Nigeria. Part II suggests possible competition law models for Nigeria on the back of the analysis of the US, EU, Indian and South African competition law models this thesis offers. Part III offers the way forward towards implementing a competition law regime in Nigeria….

Part I consists of two chapters. Chapter 2 first provides an introduction to Nigeria, an overview of the national legal an economic system, and the challenges encountered as a developing country. It evaluates the characteristics of developing economies, with a view to establishing how competition law could promote economic development. Whether or not competition law and economic reforms could be adapted and implemented without political support is also examined. The position of this thesis is that appropriate law and economic reforms are necessary but not sufficient; the determining factor in economic performance is the state's capacity to implement its law and reform its policies.[45] It observes that while most developing countries share the same problems, Nigeria has additional challenges that require specific economic policies and reforms. The chapter further states that these problems constitute the core research issue this thesis aims to answer; that is, how competition law and policy could be used in the furtherance of development in developing economies. However, the thesis observes that some of the problems faced in Nigeria, such as corruption, are not peculiar to Nigeria and therefore not mainly caused due to lack of a competition policy. Nevertheless, it is submitted that a competition law and policy could reduce their effects. In addition, the chapter explores the significance of competition law for the realization of Nigeria's vision 2020 goals and defends the view that certain arrangements have to exist for competition law to be implemented efficiently. The chapter further argues that the requirement for a competition agency in Nigeria are a competition culture that places great importance on competition enforcement and competition advocacy. Consequently, the thesis concludes that adopting a competition law and policy is in the ultimate best interests of Nigeria and although this would not solve all the economic problems, it would contribute to economic advancement through putting in place appropriate regulatory structures. Further, implementing competition law in Nigeria would offer an essential guide and also

[45] Richard Whish, *Competition Law* (5th edn, Butterworths 2003) 30.

provide foreseeable results for foreign and local investors alike

Chapter 3 provides a background on the current situation regarding competition law in Nigeria, examines competition policies or regulations currently in place in various industries in Nigeria and investigates the enforcement systems in use. It uses the telecommunications, aviation, cement, power, and oil and gas industries as brief case studies. The chapter critically analyses the provisions of section 128 of the Investment and Securities Act 2007. It concludes by arguing that the industries examined have not been able to comply with the anti-competitive provisions in their various laws because they not properly equipped to implement competition provisions The chapter further concludes that due to the far-reaching nature of the structural remedies provided for in section 128 of the Investment and Securities Act 2007, the provisions of the Act does not enjoy universal approval as 'courts are reluctant to order relief that may not be sustainable in the marketplace'.[46]

Part II of the thesis consists of Chapters 4, 5 and 6 which examines the possible models for Nigeria.

Chapter 4 analyses key aspects of competition law regimes in advanced economies with the US and the EU being used as examples. For the purposes of this study, the features examined are those that deal with monopolies, cartels and mergers. The aim of this chapter is to find out whether the same concepts could be employed in different jurisdictions, and which competition design could be best adopted in Nigeria. The chapter concludes that the success of any model of competition law and policy enacted in Nigeria will be determined by how well it relates to the economic conditions of Nigeria.

Chapter 5 focuses on the evolution of competition law in India, analysing the factors that led to the enactment of India's first competition law in 1969 and how the economic reforms initiated after the 1990s made India's first competition law redundant, and the subsequent enactment of the Competition Act 2002 and the Competition Amendment Bill 2012. The chapter analyses the approaches in dealing with various trade practices detrimental to competition and consumer interest. It also considers the symbiotic relationship between law and economics in a changing society for meeting the changing needs and desires of the community. Furthermore it recognises that Indian competition jurisprudence has made

[46] Robert W Crandall, 'The failure of Structural Remedies in Sherman Act Monopolization Cases' (2001) AEI-BROOKINGS Joint Centre for Regulatory Studies, Working Paper 01-05 5.

remarkable progress in developing the law through its statutory bodies, namely the Competition Commission of India (CCI) and the appellate forum, the Competition Appellate Tribunal (COMPAT) and it considers the efficacy of the Indian Competition Law analysing cases that have been dealt with the Competition Commission and the Competition Appeals Tribunal.[47] It concludes that the relative success that has been achieved by the Indian Competition Law can also be achieved in Nigeria .

Chapter 6 analyses the competition law provisions in South Africa and also briefly examines provisions set out by the Common Market for Eastern and Southern Africa (COMESA).[48] The COMESA competition law regulations (which came into effect on 14 January 2013) have significant implications for transactions and firms doing business in COMESA countries. The chapter further analyses the goals of the South African Competition Act, one of which is to remedy any concentration of 'economic power,' on the grounds that it is detrimental to balanced economic development. Its purpose was not only to adopt a law that followed international norms and practices but also to curb 'continued dominance of the economy by a minority within the white minority and to promote greater efficiency in the private sector'.[49]

Part III of the thesis consists of two chapters (Chapter 7 and Chapter 8) and examines the necessary steps in moving forward and effectively implementing a competition law regime in Nigeria. It examines the most recent competition bill that has been passed to law in 2019. It considers whether this law will be effective in addressing the competition problems in Nigeria, and presents the analytical conclusion and recommendations for the implementation of a sound competition law regime. Furthermore, it examines the application of competition law to developing countries, providing arguments in support of and against competition law in developing countries. The chapter further considers competition advocacy and the requirements for establishing a competition law agency in Nigeria. The thesis recommends

[47] COMPAT has held that penalty on a business found to be anti-competitive needs to be determined on relevant turnover and not based on total turnover and this principle has been recently endorsed by the Supreme Court. However the Indian Government through the Finance Act, 2017 dissolved the COMPAT from May 2017. The National Company Law Appellate Tribunal (NCLAT) is to adjudicate the appeals filed against the orders passed by National Company Law Tribunal (NCLT) benches and Insolvency and Bankruptcy orders.

[48] COMESA is a regional body of 19 African countries (Burundi, Comoros, Democratic Republic of Congo, Djibouti, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, Zimbabwe, Egypt, and Malawi) <http://www.lexafrica.co.za/news-comesa-regional-competition-authority-commences-operations> accessed 30 April 2013.

[49] Executive summary of the Proposed Guidelines for Competition Policy prepared by the National Economic Development and Labour Advisory Council (NEDLAC), a consortium of government, business, and labour.

that competition law in Nigeria should prioritise the provision of good institutional infrastructure that supports transparency in market conducts, efficient judiciary, and clear administrative and regulatory procedure together with competition aimed at mergers and other restrictive business practices.

# PART I – NIGERIA'S COMPETITION LAW REGIME AND ITS SHORTCOMINGS

## CHAPTER 2: KEY FEATURES OF NIGERIA'S ECONOMIC AND LEGAL SYSTEM

### 2.1 Introduction – Social and Economic Framework

This chapter addresses the research question: 'Will the enactment of competition law in Nigeria aid economic development?' this question is answered by examining the Nigerian legal system and also through analysing some social and economic challenges in operation in Nigeria. This is because before an effective law can be put in place, obstacles such as anti-competitive agreements, abuse of dominance, and concerns that are related to some merger activities need to be identified and dealt with.

While some form of competition law has been embraced in countries which have various national or regional conditions, competition law has continued to be seen in the same way in different countries regardless of the differences in cultures and legal systems.[1] In many circumstances this has led to these countries finding it difficult to grasp the competition rules and also to implement such competition law provisions. It is noteworthy that although it is important to refer to the vast experience of effective competition law regimes such as those of the US and the EU, when it comes to the development of a system for implementing the law in Nigeria, a home-grown competition law which takes into consideration the circumstances of the country may be the best option. As such, it is crucial to first have an understanding of the economic, social, political, and cultural circumstances of the country concerned in order to devise and implement an effective competition law regime. Consequently, this chapter examines such circumstances together with the provisions of Nigerian legal system, with the aim of further emphasizing the urgent need for developing a competition law regime that will fit in with the political, economic, and social circumstances in Nigeria.

[1] 'Challenges of International Co-operation in Competition Law Enforcement' <https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf> 'accessed 12 February 2020'.

## 2.2 An Overview of the National Legal System and sources of Nigerian Law

The Federal Republic of Nigeria consists of 36 states and 774 local government areas. The administrative capital is Abuja located in the Federal Capital Territory, which is geographically situated in the middle of the country. The commercial capital is Lagos. Nigeria is classified as a mixed economy emerging market, and has already reached lower middle income status according to the World Bank list of economies[2], with its abundant supply of natural resources, well-developed financial, legal, communications, transport sectors and the Nigerian stock exchange[3], which is the second largest in Africa[4]. In 2014, Nigeria's economy (GDP) became the largest in Africa, worth more than $500 billion, and overtook South Africa[5] to become the world's 26th largest economy.[6] By 2050, Nigeria is expected to become one of the world's top 20 economies.[7] The country's oil reserves have played a major role in its growing wealth and influence. Nigeria is also a member of the MINT[8] group of countries, which are seen as the next "BRIC-like"[9] economies. It is also listed among the 'Next Eleven' economies.[10] Nigeria is a member of the United Nations, The African Union, The Commonwealth of Nations, The Economic Community of West African States and The Organisation of Petroleum Exporting Countries (OPEC) among other international organizations.

In its early history Nigeria was a combination of self-governing colonies. Through growth and conquest, the colonies developed into kingdoms, empires, and countries, which the British established into Protectorates of Northern Nigeria (1900) and the Protectorate of

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[2] 'World Bank List of Economies' <http://www.worldbank.org July 2014> accessed 10 September 2014.
[3] The NSE is regulated by the Securities and Exchange Commission(SEC), which is a government agency with the mandate to develop the Nigerian Capital market. Furthermore, the NSE has the mandate of surveillance over the exchange to stop breaches of market rules and to deter and detect unfair manipulations and trading practices.
[4] Anthony Miller, Nigerian Stock Exchange joins United Nations Sustainable Stock Exchanges Initiative-With 258 listed securities and a current market capitalization of $114 billion, the Nigerian Stock Exchange is Africa's second-largest financial centre after the Johannesburg Stock Exchange. <http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=637> accessed 10 September 2014.
[5] Daniel Magnowski, 'Nigerian Economy Overtakes South Africa' <http://www.bloomberg.com/news/2014-04-06/nigerian-economy-overtakes-south-africa-s-on-rebased-gdp.html> accessed 4 August 2014.
[6] 'Nigeria Becomes Africa's Largest Economy' *Aljazeera* 6 April 2014 <http://www.aljazeera.com/news/africa/2014/04/nigeria-becomes-africa-largest-economy-20144618190520102.html> accessed 4 August 2014.
[7] Ronak Gopaldas, 'Nigeria Is Poised to Become Africa's Most Powerful Nation', *Business Day* (31 October 2012) <http://www.businessday.co.za/articles/Content.aspx?id=161942> accessed 4 August 2014.
[8] MINT are the economies of Mexico, Indonesia, Nigeria and Turkey.
[9] BRIC refers to Brazil, Russia, India and China.
[10] The Next Eleven refers to eleven countries identified by Goldman Sachs as having a high potential of being the world's largest economies in the 21st century. They are Bangladesh, Egypt, Indonesia, Iran, Mexico, Nigeria, Pakistan, the Philippines, Turkey, South Korea and Vietnam.

Southern Nigeria (1906). Both protectorates merged in 1914 to form Nigeria. Monarchy rule was established from 1841 to 1960, Parliamentary rule from 1960 to 1963, Republican rule from 1963 to 1965, Military dictatorship from 1966 to 1979 and 1983-1999 (except for the brief diarchy in August–September 1992) and a Presidential system of government from 1979 to 1983 and from 1999 to date. Before the colonial era, the political machinery and legal institution were home-grown which means they were domestic or native laws. The law in place was the customary law. Colonization brought about new legal machinery known to the colonial powers. English-type courts were set up and they applied the common law of England, and the doctrines of equity

Nigeria operates a federal political structure under the 1999 Constitution, which confers the legislative, executive, and judicial powers of the country in the National Assembly, the government and the courts established under the Constitution. Likewise, the powers of the States vest in the state government, the state House of Assembly and the state judiciary. The Attorney General of the Federation and Minister of Justice is the Principal Law Officer of the Country. The Nigerian Constitution bestows on him the power to institute, undertake, take over, continue or discontinue criminal cases before courts in Nigeria regarding offences created under any Act of the National Assembly. Similarly, the Attorney General of the States has similar powers in regard to laws enacted by the state House of Assembly.

### 2.2.1 The 1999 Constitution

Nigeria uses a federal constitution which is one that provides for separation of powers between the various arms of government. The Nigerian Constitution is supreme and as such has authority over all other laws. Section 1(1) provides, ‘this Constitution and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria’. Furthermore, section 1 (3) provides, ‘if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail and that other law shall to the extent of the inconsistency be void.’

According to section 13 (2) (b), the protection and welfare of the people is the chief aim of the government. Sections 15–21 set out the several means of making certain that this object is accomplished without breaking the underlying rights of the people, which are listed in Chapter 4 of the Constitution. These are: the right to life; right to the dignity of persons; right to personal liberty; right to a fair hearing; right to private and family life; right to

freedom of thought, conscience and religion; right to freedom of expression and the press; the right to peaceful assembly and association; right to freedom of movement; right to freedom from discrimination; and the right to acquire and own immovable property anywhere in Nigeria.[11]

### 2.2.2 Legislation

The Constitution governs the distribution of legislative business between the National Assembly (which holds the power to establish laws for the Federation) and the House of Assembly of each state in Nigeria. The statute in force at the federal level is mostly contained in the Laws of the Federation of Nigeria 2004 (LFN). Laws made afterwards are found in the annual volumes of the laws of the Federal Republic of Nigeria (FRN). Federal laws enacted under the military regime known as 'Decrees' and state laws known as 'Edicts' form the majority of primary legislation.

### 2.2.3 The influence of English Law

The Common Law England and Wales that constitutes part of the Nigerian legal system comprises the common law, the doctrine of equity, statutes of general application in force in England on 1 January 1900, statutes and subsidiary legislation on specified matters, and English law (statutes) made before 1 October 1960 and extending to Nigeria which are not yet repealed. Laws established by the local colonial legislature are treated as part of the Nigerian legislation.

Notwithstanding the influence of English law, the Nigerian legal system is multifaceted because of legal pluralism, which is the presence of various legal systems in one geographic area. It ensues when diverse laws govern different groups in a country or where, to an extent, the legal system of the indigenous population is recognized. Legal pluralism is predominant in former colonies, where the law of a past colonial master may co-exist with traditional or indigenous legal systems. This is evident in the Nigerian legal system where the customary law exists side by side with the inherited English legal system.

[11] Nigeria:Introduction to the legal system of Nigeria <http://elearning.trree.org/mod/page/view.php?id=142> accessed 28 May 2014.

### 2.2.4 Customary Law

Customary laws may be defined as ‘practices’ which by common acceptance and long consistent behaviours have come to have the force of law. They may further be defined as ‘instructions’ which in a specific community have from long practice attained the force of law. They may also be described as a framework of customs, acknowledged by members of the community as binding upon them.

This was coined from the custom, tradition, and practices of the people. Customary law may be classified into:

***Ethnic or Non-Sharia***: This is the home-grown law that relates to the members of the different cultural or ethnic groups. Nigeria is made up of several ethnic groups, each with its own scope of customary law. Ethnic customary law is unwritten and uncertain. These laws are applied in customary courts. These courts are at the last rank of the court grading.

***Islamic Law or Sharia***: In the southern part of Nigeria, Islamic law, where it subsists, is incorporated into and is seen as a part of the customary law. In Northern Nigeria, Islamic law has been in existence since 1959. Sharia law is written with well-defined principles. It is founded on the Islamic faith, the Holy Koran, and the instructions of the Prophet Mohammad.

### 2.2.5 Judicial Precedent

This is an earlier judicial decision used as a model or rule for subsequent decisions. The doctrine of precedent is established on the unprejudiced view of law that guarantees that similar cases are decided in a similar way. The operation of the doctrine is linked to the court hierarchy. Lower courts are bound by the judgments of higher courts in the hierarchy and usually by a court of coordinate or equivalent jurisdiction. The Supreme Court is the highest court in Nigeria. The Court of Appeal is the penultimate court and hears appeals from the High Courts, which are the trial courts of general jurisdiction. The Court of Appeal and all lower courts are bound by Supreme Court decisions. The judicial precedent does not apply to certain courts, such as the customary or area courts and the Sharia courts.

### 2.2.6 International Law

Nigeria is a member of the Commonwealth of Nations, the African Union, the United Nations and many other international organizations. While Nigeria is a party to various international agreements and treaties, these can only be enforced in Nigeria if they are enacted into law.

### 2.2.7 The Types of Governance in Nigeria

The Nigerian system of government is fashioned after the American presidential system with three branches of government, that is, the legislature, the executive, and the judiciary. This is referred to as 'separation of powers'. That is, the legislature makes the law, the executive implements the law, and the judiciary interpret the law.

### 2.2.8 Legislature

Section 4(1) of the Constitution provides that' the legislative powers of the country shall be vested in the National Assembly'. Additionally, Subsection (2) gives the National Assembly powers to create laws for the public security, orderliness, and good government of the federation, to the exclusion of the State House of Assembly. The National Assembly which is made up of the Senate and the House of Representatives enacts laws based on the law-making procedures laid out in sections 58 and 59 of the 1999 Constitution. The powers of the National Assembly to legislate refer to:

- Any matter included in the Exclusive Legislative list, to the exclusion of the State House of Assembly.
- Any matter in the concurrent legislature list set out in the 1st column of Part II of the 2nd Schedule of the Constitution to the extent prescribed in the 2nd Column opposite; and
- Any other matter with regard to which the National Assembly is authorized to work laws in conformity with the provisions of the Constitution.

Each state has its own law-making organ known as the state house of assembly. State House of Assemblies have powers to legislate on any subject in the concurrent legislative list and

any other matter with respect to which it is authorized to make laws in conformity with the provisions of the Constitution. According to section 4(5), where a discrepancy exists between the laws of the State House of Assembly and that of the National Assembly, the latter prevails and the former is void to the extent of the inconsistency.

### 2.2.9 Executive

Section 5(1) of the 1999 Constitution confers 'the executive power of the Federation in the President of the country. These powers can be carried out directly or through the Vice President or Ministers or officers of the government. In the states, the executive power of a state is vested in the Governor and may be carried out through the Deputy Governor or Commissioners or other public officers'.

### 2.2.10 Judiciary

Section 6(1) of the 1999 Constitution creates: 'the Supreme Court; Court of Appeal; Federal High Court; High Court of a State; the Sharia Court of Appeal of the Federal Capital Territory, Abuja; a Sharia Court of Appeal of a State; the Customary Court of Appeal of the FCT, Abuja; and the Customary Court of Appeal'. The courts established by the Nigerian Constitution are the only superior courts of record. The Constitution gives the National Assembly and the House of Assembly the authority to establish courts with lesser authority than the High Court. These courts are inferior courts of record. Nigeria operates an adversarial system of court proceedings similar to other common law countries. Nevertheless, the jury system is not employed in the system of administration of justice, as the presiding judge is both a jurist of the law and fact. The 1999 Constitution makes provisions for the formation and constitution of the following courts:

#### *2.2.10.1 The Supreme Court of Nigeria*

This is the highest court in the hierarchy of courts in Nigeria . The Chief Justice of the Federation heads the Judiciary of Nigeria and presides over the Court. The court has limited but exclusive original jurisdiction in any dispute between the Federation and a State or between States if and insofar as that dispute involves any question (whether of law or fact) on which the existence of a legal right depends. Its appellate jurisdiction is to decide appeals

from the Court of Appeal and this is also to the exclusion of any other court.[12] The Court consists of the Chief Justice of Nigeria and such number of Justices not exceeding 21 as may be prescribed by the National Assembly. Normally, the Court is duly constituted if it consists of not less than 5 jurists of the Court, except where it is exercising its original jurisdiction or a matter involves a query as to the interpretation or application of the Constitution or whether any provision pertaining to the fundamental rights provisions of the Constitution has been, is being, or is likely to be contradicted. In this respect, the Court is properly constituted if it is made up of 7 Justices of the Court. Determinations reached by the Supreme Court on any matter is final and is not open to an appeal to any other body or individual. This is, however, without prejudice to the power of the President or Governor of a State's exercise of the Prerogative of Mercy in appropriate circumstances. The judgments of the Court are binding on all other courts in Nigeria.

#### *2.2.10.2 The Court of Appeal*

The Court of Appeal is next to the Supreme Court in the hierarchy of courts in Nigeria and its determinations are binding on all other lower courts. It is composed of the President of the Court of Appeal and other judges of the Court of Appeal not being less than 49. The court has sole jurisdiction over queries as to whether or not a person has been genuinely elected to the Office of President or Vice President of the Federation or whether the term of office of such person has come to an end or whether the office has become vacant. It also has jurisdiction to hear appeals from judgments of the State High Courts, FCT High Court, Federal High Court, the Sharia Courts of Appeal of the States or of the FCT, the Customary Courts of Appeal of the States, or of the FCT and also from judgments of a court martial or other tribunals as specified by an Act of the National Assembly. The Court is duly formed by not less than three Justices for the function of exercising any of its stated jurisdiction. For administrative convenience, the Court is divided into Judicial Divisions which sit in several regions of the state.

#### *2.2.10.3 The Federal High Court*

There is a Federal High Court in the country, comprising of a Chief Judge and such number of judges as the National Assembly may prescribe. The court has limited but exclusive

[12] The Judicial System in Nigeria, hyattractions <http://hyattractions.wordpress.com/2013/03/07/the-judicial-system-in-nigeria> accessed 29 May 2014.

jurisdiction in civil and criminal suits or cases as set out in the Constitution. In exercising its jurisdiction, the Court is duly formed by one Judge of the Court. Like the Court of Appeal, the Federal High Court is divided into Judicial Divisions for administrative convenience but takes in a broader geographical spread as these divisions are located in over 17 States of the Federation with plans to establish a Division of the Court in all the States of the Federation.

#### *2.2.10.4 The State High Court*

Every state in Nigeria including the FCT has a High Court. Each Court is made up of a Chief Judge and such other number of judges as the State House of Assembly or the National Assembly (in the case of the High Court of the Federal Capital Territory) may recommend. The High Courts of the States have jurisdiction over civil and criminal cases except cases in which any other court has exclusive jurisdiction, making them the courts with the most extensive jurisdiction under the Constitution. The Court is properly constituted by one judge. Each High Court is divided into Judicial Divisions for ease of administration.

#### *2.2.10.5 The Sharia Court of Appeal*

Sharia Courts of Appeal are in the FCT and in any State where they are required. These Courts have jurisdiction in civil cases which relate to issues of Islamic personal law, which the Court is skilled to decide in accordance with the Constitution. The Court consists of a Grand Khadi and other Khadis recommended by the National Assembly or State Houses of Assembly.

#### *2.2.10.6 The Customary Court of Appeal*

There is a Customary Court of Appeal for the Federal Capital Territory and any State that requires it. This Court has appellate and supervisory jurisdiction in civil proceedings involving questions of customary law and is comprised of a President and such number of judges as the National Assembly or the State Houses of Assembly (as the case may be) may prescribe.

#### *2.2.10.7 Statutory Institutions*

Apart from the arms of government created by the Constitution, there are establishments and governmental institutions that are created by statutes. These institutions, such as the Nigerian

Communications Commission, Nigerian Electricity Regulatory Commission and National Agency for Food and Drugs Administration and Control, may create rules and regulations in relation to their enabling Acts and, therefore are binding. These establishments also have the authority to set up committees needed in performing their functions. Procedures devised for these committees have binding force on all parties concerned.[13] These statutory institutions have powers to regulate competition which is analysed further in this work, and this thesis argues that as competition regulation is not the core function of these bodies, it is important that Nigeria implements a competition law that regulates all businesses.

### 2.3 The Developing Country Characteristics Peculiar to Nigeria

Development can be described as an adjustment of a system so as to improve the overall well-being of the people.[14] It does not only embody a reengineering of the economy of a state but may also involve a change in the culture of the people. The degree of development and the speed with which it occurs may be subject to factors such as the politics, education, availability of technology, the leadership of the country, and corruption. Although development is viewed in various ways, it is generally agreed that development brings about a positive adjustment which is made evident through better overall quality of life.[15] Nigeria is a developing nation, characterised with a lower standard of living, underdeveloped industrial base, and low human capital index, as likened to other countries. This is irrespective of the fact that the Nigerian economy is now worth $510bn, making Nigeria Africa's largest economy, and overtaking South Africa.[16]

Various challenges that affect economic growth and development exist in developing countries. These challenges may be a combination of political challenges, social issues, and economic issues. Some problems general to most developing countries include, but are not

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[13] J Sodipe, O Akintola and C Adebamowo, 'Nigeria: Introduction to the legal system of Nigeria' <http://elearning.trree.org/mod/page/view.php?id=142> accessed 28 May 2014.

[14] The World Bank has defined a developing country as 'one in which the majority lives on far less money—with far fewer basic public services—than the population in highly industrialized countries. Five million of the world's 6 billion people live in developing countries where incomes are usually under $2 per day and a significant portion of the population lives in extreme poverty (under $1.25 per day)' <http://web.worldbank.org/WBSITE/EXTERNAL/EXTSITETOOLS/0,,contentMDK:20147486~menuPK:344190~pagePK:98400~piPK:98424~theSitePK:95474,00.html> accessed 9 September 2013.

[15] YA Aluko and A Aluko, *Human Capital Development: Nigeria's Greatest Challenge* (2012) 13(1) Journal of Management Policy and Practice 162-177.

[16] Tolu Ogunlesi, 'Nigeria Overtakes South Africa To Become Afr'ca's Largest Economy' *The Guardian* (7 April 2014) <http://www.theguardian.com/world/2014/apr/07/nigeria-south-africa-largest-economy> accessed 7 April 2014.

limited to, susceptibility to crisis in developed countries, corruption, and access to electricity; other challenges that have a direct effect on competition include foreign merger activities, monopolies, cartels, and abuse of dominant market position. This chapter considers some of these challenges. Majority of the developing countries have similar challenges, particularly concerning economic growth and development. However, in the last two decades, this position has seen some change, especially in Africa. For instance, in the 1960s and 1970s, there was a high economic growth rate in Nigeria. This growth also existed in Indonesia, and was a result, of the oil boom.[17] Through this period, Nigeria's economic growth was higher than that of Indonesia. However, economic growth began to decline in the early 1980s.[18] This reversal of fortune was possibly as a result of the economic policies that were in place or some policies that should have been in place and were not.

Irrespective of the high prices of crude oil in the international market in the recent past, Nigeria remains one of the poorest nations in sub-Saharan Africa.[19] Furthermore, the Human Development Report of the UNDP has described the Nigerian Government's efforts in poverty alleviation as 'very poor and lacking in accountability and equity'. In 2005, the IMF mission to Nigeria reported that corruption, the abysmal state of basic infrastructure, and weak institutions remained the major disincentives to investment, growth, and advancement in social welfare. The report stated that employment growth was negligible and the cost of doing business unpromising, this is regardless of the official claims by the government.[20]

The challenge of a pro-poor growth environment is to encourage policies and organizations that provide opportunities and capabilities for the less privileged while reducing their vulnerabilities. Therefore, the pro-poor growth must be aimed at improvement in primary healthcare and education, job creation and income opportunities, the development of skills, micro-finance, agricultural development (especially for developing countries like Nigeria with a large population of rural poor), and gender inequality. Some of the specific developing country characteristics that have affected sustainable economic growth and development in Nigeria are high rate of corruption, population challenges, resource problems, political instability, and access to education.

[17] GM Meier and JE Rauch, *Leading Issues in Economic Development* (OUP 2005) 63.
[18] ibid.
[19] Michael Ross, 'Nigeria's Oil Sector and the Poor' (prepared for DFID's Nigeria: Drivers of Change program, May 2003).
[20] IMF, 'Nigeria: Request for a Two-Year Policy Instrument' (Country Report No 05/432, December 2005).

### 2.3.1 High Rate of Corruption

> To achieve an equitable, inclusive and more prosperous future for all, we must foster a culture of integrity, transparency, accountability and good governance … Corruption supresses economic growth by driving up costs, breaches human rights, increases inequality, and undermines the sustainable management of natural recourses.[21]

Corruption can simply be defined as:

> The abuse of entrusted power for private gain; it is behavior which digresses from the prescribed responsibilities of a role because of individual gain (personal, close family, friends) pecuniary or status gains; or disregards rules against the use of certain types of private regarding influence. This includes deeds such as bribery (use of a compensation or reward to alter the opinion of a person in a position of trust); nepotism (favour as a result of relationship as opposed to merit); and embezzlement (misappropriation of public funds for private uses).[22]

Corruption, poverty, unhurried economic growth, and imbalanced income wealth distribution are widespread in African countries, and although corruption is a worldwide problem, in most of the developing countries including Nigeria it remains one of the causes of low economic development.[23] The Nigerian economic and political scene is infused by widespread corruption and abuse of office. This is in addition to poor economic performance. Accordingly, the Nigerian National Planning Commission has noted: 'corruption and low levels of transparency and accountability have been foremost causes of growth and development failure. Illegal activities such as the advance fee-fraud (known as *419*)[24] and money laundering have torn the fabric of Nigerian society'.[25]

Economic development aims at increasing the living standards and the well-being of all citizens in a country. Accordingly, Kwabena Gyimah opines that 'Anything that blocks the chances of improving the quality of life for any group of citizens, especially the poor, blocks

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[21] Ban Ki-Moon, United Nations Secretary General at the 2013 International Anti-Corruption Day 'Corruption, Barrier to achieving development goals - UN *Punch Newspapers* <www.punchng.com> accessed 11 December 2013.

[22] L Pellegrinni, 'Economic Analysis of Corruption' in Corruption, Development and Environment *Springer* (2011) <http://www.springer.com/cda/content/document/cda_downloaddocument/9789400705982-c2.pdf?SGWID=0-0-45-1077237-p174082620> accessed 9 December 2013.

[23] GJ Yadav, 'Corruption in Developing Countries: Causes and Solutions' *Patel Center* <http://www.patelcenter.usf.edu/assets/pdf/IPSA-Yadav.pdf> accessed 9 December 2013.

[24] The Nigerian Law on Advance Fee-Fraud is established under the Penal Code number 419.

[25] National Planning Commission, 2005 National Economic Empowerment and Development Strategy, (NEEDS), Abuja in Omololu Fagbadebo, 'Corruption, Governance and Political Instability in Nigeria' (2007) 1(2) African Journal of Political Science and International Relations 028-037 29 <http://www.academicjournals.org/AJPSIR> accessed 9 December 2013.

the chances for economic development and may retard economic growth. To the extent that corruption has a negative effect on economic growth and increases income inequality, it hampers economic development.'[26] Generally, economists view corruption as part of the problem of rent seeking.[27] This is due to the fact 'corruption reduces economic development and growth because it interferes with incentives and market signals and as such leads to mis-allocation of capital and resources, especially human talent, into rent-seeking activities. Secondly corruption leads human resources to be channelled into rent seeking, as opposed to, productive activities. Third, corruption is seen as an inefficient tax on those who are forced to pay it, hence it raises the cost of production. Fourthly, because corrupt practices are conducted in secrecy and contracts emanating from them are legally not enforceable, corruption increases transaction cost. Fifth, corruption may lead bureaucrats to channel government expenditures into unproductive sectors that offer opportunities for rent seeking.'[28]

Corruption causes production of inferior quality and brings about a rise in the cost of production of better-quality goods. Some factors which add to the increasing rate of corruption are low levels of law implementation, lack of clearness of the rules, lack of transparency and accountability in public activities, too many controls that present too much discretion to the public official, too much centralization and monopoly given to the public official, low relative wages of public officials, as well as the large size of the public sector.[29]

As stated above, corruption is prevalent in many of the developing countries, and its connection with economic efficiency and development is apparent. As opposed to seeking foreign aid, Nigeria can achieve the necessary millennium development goals if more appropriate reforms that lessen corruption are not only put in place, but enforced without prejudice, and as such lead to long-term economic growth that is sustainable. This thesis further suggests that less attention should be paid to the characters involved in corruption and that the focus should be on enacting laws that will stimulate transparency, accountability,

[26] Kwabena Gyimah-Brempong, 'Corruption, Economic Growth, and Income Inequality in Africa' (2002) 3 Econ Gov 183-209.
[27] V Tanzi and H Davoodi, 'Corruption, Public Investment and Growth' (1997) IMF Working Paper No WP/97/139; A Shleifer and RW Vishny, 'Corruption' (1993) 108(3) Quarterly Journal of Economics 599-617.
[28] S Gupta, L DeMello and R Sharon, 'Corruption and Military Spending' 2000 IMF Working Paper No WP/00/23.
[29] A Ades and R Di Tella, 'Rents, Competition, and Corruption' (1999) 89(4) American Economic Review 89(4) 982-983; V Tanzi and H Davoodi, 'Corruption, Public Investment and Growth' (1997) IMF Working Paper No WP/97/139; C Van Rijckeghem and B Weder, 'Corruption and the Rate of Temptation: Do Low Wages in the Civil Service Cause Corruption?' (2001) 65(2) Journal of Development Economics 307–331.

and a competitive market. In addition, it is necessary for an effective independent judiciary to be in place so that contractual rights and any necessary sanctions can be enforced.

Developed countries and international organizations are presumed to be in support of the fight against corruption in Nigeria. However, it has been argued that these countries are insincere about their commitment to the fight against corruption in Nigeria. One of the conditions for debt relief and development aid from Western countries was that corruption should be reduced. However, it has been alleged that foreign missions in Nigeria put undue pressure on the Nigerian budget office to avert due process in giving out contracts to their chosen candidates. The inducement was so that it would encourage them to pressure their home countries to back debt relief for Nigeria and/or offer additional development aid.[30] As a result of such scenarios, some researchers have condemned the activities of multinational corporations in developing countries. Hawley proposed:

> Effective action against corruption has to involve effective sanction by developing countries against multinationals, which engage in corrupt practices; greater political transparency to remove the secrecy under which corruption flourishes; and resistance to the uncritical extension of privatization and neo-liberal economic policies.[31]

This thesis accepts that economic policies such as privatization and competition law policies will help in the war against corruption and further promote economic development and good governance.

### 2.3.2 Access to Power

It is common knowledge to citizens of Nigeria that the energy sector is inefficient[32] and as a result the majority of the population do not have access to constant electricity, oil, and gas.[33] This has adversely affected the economy as ineffective power obstructs economic growth and

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[30] L Odion, 'Economy: Towards a De-Colonization' (2005) *The Sun* <www.sunnewsonline.com> cited in O Fagbadebo (n 25).

[31] S Hawley, 'Exporting Corruption: Privatization, Multinationals and Bribery' (2000). Dorset: The Corner House

[32] 'Despite holding the world's seventh largest gas reserves, Nigeria, Africa's second largest economy, only produces around 4,000 Megawatts (MW) of electricity for its 160 million people, less than a tenth of the amount South Africa provides for a population a third of the size. Despite an estimated $40 billion of capital injected into reforming the power sector over the last two decades, capacity has only improved marginally. If Nigeria can fix its electricity problems, it could launch Africa's second largest economy into double-digit growth and help pull millions out of poverty', 'Power Sector Privatisation Milestones F O Akinrele (2012) <http://foakinrele.com/Publications/Power-Sector-Privatisation-Milestones.aspx> accessed 14 March 2014.

[33] DF Barnes and others, 'Tackling the rural energy problem in developing countries' [June 1997] IMF- Finance and Development 11.

development, and thus brings about low standards of living. Due to this lack of electricity, the majority of the population in rural areas are heavily dependent on biomass, which is less efficient than other sources of energy such as petroleum and gas. Where a nation aspires to have a vibrant, competitive economy with active industrial sectors, it is necessary for an efficient power sector to be in place. This can be achieved with a well-articulated energy policy. In this regard, Nigeria has now made power reform a priority and commenced the privatization of the energy sector in order to enhance economic development. It is hoped by the promoters of competition law that the absence of a competition law will not lead to the creation of private monopolies.[34] A danger of privatization is that it may replace former state monopolies with private monopolies, which would possibly reduce social welfare because the private sector is usually not obliged to advance the welfare of the people. Consequently, there is a pressing need for a suitable competition policy so as not to create monopolies which is one of the goals of this thesis.

### 2.3.3 Political Instability

> The giant was brought to its knees by 20 years of brutal and corrupt military rule, which left a legacy of executive dominance and a political corruption in the hands of Nigeria's so-called 'godfathers' – powerful political bosses sitting atop vast patronage networks who view the government primarily through the lens of their own personal enrichment.[35]

Nigeria has vast wealth as a result of oil and agricultural resources and as such can rightly be referred to as the giant of Africa. However, Kew has described the present situation as this:

> The Nigerian Government remains distant from serving the interest of its people. Politics at the federal, state, and local levels of the Nigerian federation are dominated by the powerful mandarin who built vast patronage networks during the military days and who now use political office to expand these networks and their personal fortunes. Moreover, many of these so-called 'godfathers' have been cultivating personal militias to secure their positions, prompting a local arm race in some regions…even though several governors are under indictment for money laundering abroad and others are being investigated at home, the bonanza continues at public coffers for these power holders, while basic infrastructure in many parts of the country remains as dilapidated as it was under military rule.[36]

[34] Privatisation began in 1999 with the formation of the Electric Power Sector Implementation Committee by the National Council of Privatisation.
[35] Fagbadebo (n 25); D Kew, 'Nigeria' in Sanja Tatic (ed), *Countries at the Crossroads* (Freedom House 2006).
[36] ibid.

Kew's view correctly describes the political situation in Nigeria. This is because the enormous wealth gotten as a result of being in a powerful position has led to the marginalization of national development for the personal interest of those in power. It is useful to mention that the governance challenge in Nigeria was as a consequence of the unproductive and dysfunctional pattern of the years of military rule.[37]The thesis suggests that the proper implementation of competition law will aid consumer protection and national development as a whole.

### 2.3.4 Access to Education and Low Level of Human Capital Development

In the 2017 Human Development report, Nigeria ranked 157 out of 189 countries, which put the country in the low human development category and automatically reflects the level of development and the quality of life of citizens. The key elements considered in the ranking include: the rate of literacy, health hazards, economic performance (Gross Domestic Product (GDP), Gross National Product (GNP), and per capita income), access to water, life expectancy, nutrition and sanitation status, and technology dissemination and use. Regardless of the fact that the Nigerian economy is worth $510bn making Nigeria Africa's largest economy, it is widely known that more than half of Nigerian citizens are poor and survive on less than $2 a day, that the economy is still largely import-dependent, that unemployment rates continue to increase, that life expectancy in Nigeria is as low as 51, that there is little or no access to basic medical care, that there is no confidence in the educational system, and that due to poor infrastructure Nigeria remains one of the most expensive countries for businesses to successfully operate. These factors evidence the low human capital status of Nigeria.

Access to basic education has an impact on every citizen of a country. It has been generally agreed that there is a positive relationship between educational and economic development.[38] In Nigeria, the Federal government is principally responsible for the establishment and funding of tertiary institutions. However, state governments also fund state universities. The approval of the various new universities has also caused a rise in the

[37] RJ Mundt and O Aborisade, 'Politics in Nigeria' in A Gabriel, G Almond, Bingham Powell Jr, Kaare Strom and Russell J Dalton (eds), *Comparative Politics Today: A World View* (8th edn, Pearson Longman 2004) 691-741.

[38] The 1960-1961 report of the Ashby Commission on higher education in Nigeria supported this view and in fact favoured the expansion of the educational sector.

number of the nation's private and government universities. Although there has been an expansion in the educational system, there still remain inefficiencies which affect Nigeria's level of human capital development and utilization. The Nigerian educational system has a tendency to produce more graduates who lack the necessary skills for employment than is required for the economy to be productive. This inadequacy has resulted in decreasing industrial capacity utilization, a continuous rise in unemployment, and threats of social insecurity by unemployed youths. Other challenges include 'inadequate resource input and consequent low output and overdependence on government as an employer of labour'.[39]

In order to make a meaningful contribution to development, and meet human capital development challenges, the weaknesses in the Nigerian educational system need to be urgently addressed. Education must meet the skill–demand needs of the economy. It is also instrumental to develop the production capacity of any nation; consequently, there may be need for reforms in educational policies and programmes as it is only through well-planned policies that the country will benefit from human capital development such that it boosts economic performance and growth

### 2.3.5 Monopolies, Merger Activities, and Abuse of Dominant Position

When a foreign multinational acquires a domestic firm and creates a monopoly, the developing country is affected by the effects of such a takeover. Where such a merger takes place in developed countries, developing countries may still be affected by such merger activities. According to Tichy,[40] this is the case because the 'rule of being in the top three' applies. Such rule 'lessens the contestability' of markets and is especially detrimental to the interests of developing countries where the industries are building up their abilities to participate in global markets. 'The reduced contestability of markets is therefore of special concern for developing countries'.[41]

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[39] Aluko and Aluko (n 15).

[40] G Tichy, 'What do we know about success and failure of mergers?' (paper presented at UNIP Conference in Vienna, December) in Ajit Singh, 'Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions' (2002 G-24 Discussion Paper Series, UNCTAD and Centre for International Development Harvard University, No 18); UNCTAD, 'The Relationship Between Competition, Competitiveness and Development' (Geneva, UNCTAD 2002) <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.200.9923&rep=rep1&type=pdf> accessed 4 November 2013.

[41] Ajit Singh, 'Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions' 2002 G-24 Discussion Paper Series, UNCTAD and Centre for International Development Harvard University, No 18; UNCTAD, 'The Relationship Between Competition, Competitiveness and

Although it has been argued that even where there is a competition legislation in place, Nigeria may not have the power to stop anti-competitive behaviours by multinational corporations due to an underdeveloped legal and institutional framework, lack of access to necessary information, and problems of proving that prices are being controlled by international cartels, it is evident that in order to properly deal with monopolies and abuse of dominant positions, it is necessary for there to be a competition law in place. The thesis suggests that the institutional structures be put in place in order for the proper implementation of competition law.

### 2.4 Purpose of Focusing on Developing Countries and Nigeria in Particular?

Many countries have enacted some form of competition law, and authorities to administer such competition laws have also been put in place. 'Many of these countries represent rapidly modernized economies, including the Republic of Soviet Union, New democracies of eastern Europe, rapidly emerging industrialized nations of Asia, fast growing economies of South America', and of most importance to this thesis, the developing countries of Africa, Asia and South America.[42] This implies that competition laws now reach well beyond the industrialized countries into the developing world. Most of these jurisdictions have enacted their competition laws based on or influenced by US and EU competition laws. For instance, most of these competition laws contain a provision which prohibit conduct such as horizontal price fixing, attempts to monopolize the market by wrongful means, and exclusive dealing. The competition laws of many emerging economies, however, consider protection of domestic industry against foreign competition which would not be seen as the proper provisions of a 'pure' competition law in more industrialized jurisdictions.[43] These variances reflect the differences in the economic circumstances[44] of these nations and also differences in competition policy.[45]

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Development,(Geneva,UNCTAD2002) <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.200.9923&rep=rep1&type=pdf> accessed 4 November 2013.

[42] ABA Section of Antitrust Law, Competition laws outside the United States (2001).

[43] Eleanor M Fox, 'Equality, Discrimination, and Competition Law: Lessons From and For South Africa and Indonesia' (2000) 41 Harv Intl LJ 579.

[44] William E Kovacic, 'Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe' (1995) 44 Depaul L Rev 1197.

[45] Derek Devgun, 'Cross-Border Joint Ventures: A Survey of International Antitrust Considerations' (1996) 21 WM Mitchell L Rev 681.

Developing countries pose challenging concerns for the implementation of competition law. The low economic development, corruption, and political instability tend to produce challenges that should be identified before the competition law can be successfully implemented. The experience of many developing competition authorities highlights the significance of recognizing the exact challenges faced by a country in order to enact and implement competition law as a part of a general policy reform in the pursuit of economic development. The role of competition law has increased as a result of the privatization and liberalization market reforms that have taken place in Nigeria and other developing economies in the past two decades. In order to fully benefit from liberalization, it is necessary that a suitable regulatory framework be in place. In situations where there is no suitable regulatory framework in place, private barriers may simply substitute governmental barriers to trade, and this may avert advances in social welfare. Trade liberalization alone does not necessarily lead to more competitive markets. An important share of economic activity in developing countries relates to non-tradable goods and services (eg electricity, financial services, and legal services), which are only marginally exposed to international competition.[46]

Moreover, trade liberalization may sometimes intensify the need for competition law because 'the liberalization process has entailed in many developing economies the displacement and closing down of many small and medium local enterprises, and has led to market dominance of a few firms through unilateral or harmonized conduct.'[47] If such markets are not subject to constraints on private limitations to competition, companies might not be able to take advantage of competitive opportunities and social welfare might even be harmed.[48] Furthermore, the need for competition laws has increased due to the globalization and the changes it has brought about at the international level, as well as the cross-border merger movement of the 1990s.[49] Developing countries such as Nigeria might be significantly affected by the monopoly power of large international firms, exercised either unilaterally or collusively, if such power is not properly regulated.[50] Competition law is thus

[46] M Correa Carlos, 'Competition Law and Development Policies' in Roger Zach (ed), *Towards WTO Competition Laws* (Kluwer Law International 1999) 361.
[47] R Shyam Khemani, 'The Interface between Competition and Trade Policies' in Bora Bijit and Mari Pangestu (eds), *Priority Issues in Trade and Investment Liberalization: Implications for the Asia Pacific Region* (Singapore: Pacific Economic Cooperation Council 1996) 107.
[48] UNCTAD, 'Developing a Competition Advocacy Model in the Context of the Introduction of Competition Policies in Latin America' (Geneva, UNCTAD 2000) 12.
[49] Singh (n 41) 9; UNCTAD (n 41) 17.
[50] UNCTAD (n 41) 11.

a significant part of market reform, to ensure that social welfare is increased and that developing countries can enjoy at least some of the benefits of world markets.

Although Nigeria shares similar challenges with most developing and emerging countries, the nation faces various other challenges which provide an enabling environment for anti-competitive activities such as anti-competitive agreements, abuse of dominance, and concerns related to some merger activities. This is especially due to the ongoing privatization and liberalization reforms of the economy. This chapter notes that there is a close relationship between competition policy and economic development, and as such concludes that dealing with some specific challenges faced by Nigeria requires a practical method which focuses on putting in place long-lasting policies that will aid development

It is significant to note that the anti-cartel legislation in developed nations does not typically cover developing countries. Exports or foreign markets are usually exempt from such laws. In these situations, it is necessary for Nigeria not only to have domestic competition legislation in place but also cooperation from developed nations in order to efficiently handle any anti-competitive market behaviour of developed country cartels between the multinational corporations. It is therefore necessary for Nigeria to have in place both the right domestic competition laws and also a suitably structured framework for international support on competition issues. Although there is little or no literature on the practical effects that the enactment of a competition law will have on economic development in Nigeria, this thesis contends that enacting a competition law in addition to the other market reforms is necessary to build a competitive culture with the ability to enhance sustainable economic development in Nigeria.

## 2.5 Nigeria's Move Towards Development and Economic Reforms

Similar social, political, and economic forces of liberalization and globalization which brought about the merger wave in the developed countries have also been responsible for significant economic and market reforms in developing countries. As far back as the 1980s, many developing countries went through market reforms which led to substantial reduction in the direct role of the government in economic activity. These reforms were in the form of privatization, deregulation, and internal and external financial liberalization.[51] As discussed

[51] Ajit Singh, 'Competition Policy, Development and Developing Countries' (South Centre TRADE Working Papers, November 1999).

earlier, various countries in Africa are contending with economic growth and development characterized by the high level of poverty, lack of basic infrastructure, and poor economic performance.[52] Accordingly, the United Nations has classified 33 of the 53 member states of the African Union as least developing countries.[53] In view of the economic development challenge facing Africa and the fact that poverty has continued to remain high even in some of the countries that have witnessed some economic growth,[54] the development policy framework (New Partnership for Africa's Development (NEPAD)) adopted by the African Union in 2001, notes that:

> While growth rates are important, they are not by themselves sufficient to enable African countries to achieve the goal of poverty reduction. The challenge for Africa, therefore, is to develop the capacity to sustain growth at levels required to achieve poverty reduction and sustainable development. ... The strategy has the following expected outcomes: economic growth and development and increased employment; reduction in poverty and inequality ...[55]

To achieve economic development, a vast investment in the development of a country's productive capacity for various goods and services, including utility and infrastructural services like power, water, telecommunications and education, is necessary. However, whether the public or the private sector should be at the forefront of such economic development efforts, the role which law plays in economic advancement and, of most relevance to this thesis, the necessity of the implementation of a competition law in the development process for economic reforms to be effective will be considered in this thesis.

In the past three decades, significant changes have been made in the economic structure of most developing countries. First, there has been the privatization or denationalization of many government-controlled industries. Second, new methods of management practices have been introduced into the public sector. And third, many activities which had been Government-controlled and regulated were deregulated. These changes were made so as to facilitate economic development and privatization.[56] Many of the developing countries had

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[52] Bryan Mercurio, 'Growth and Development: Economic and Legal Conditions' (2007) 30 UNSWLJ 437, 438; World Bank, *Can Africa Claim the 21st Century?* (World Bank 2000) 83; NJ Udombana, 'The Summer Has Ended and We Are Not Saved - Towards a Transformative Agenda for Africa's Development' (2005-2006) 7 San Diego Intl LJ 5, 11-13.

[53] This is out of a total of 48 developing countries in the world.

[54] 'Economic Commission for Africa, Economic Report on Africa 2005: Meeting the Challenges of Unemployment and Poverty in Africa' (Economic Commission for Africa, Addis Ababa 2005) 57, 61, 70, 91-92.

[55] Organization of African Unity, 'The New Partnership for Africa's Development' (2001) <http://www.nepad.org/2005/files/documents/inbrief.pdf> accessed 20 June 2013 paras 64, 69; JW Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role for

earlier adopted national policies and enacted laws to pave the way for the state to occupy a leading role in facilitating economic advancement.[57] In the majority of the developing countries that followed the path of state-led development, various laws were enacted. These laws were aimed at implementing nationalization, regulating and placing various restrictions on private local and foreign enterprises, establishing new enterprises in various business sectors, and generally controlling the ownership and use of private property.[58]

The goals sought to be achieved by nationalization were diverse and included job creation, provision of various goods to the citizens, extension of infrastructural services to as many as possible, and general improvement in living standards. However, most public enterprises were not very effective in achieving these objectives and were criticized principally from the point of view that public ownership and control of these enterprises had an adverse effect on low-income earners and further negatively impacted on the investment climate in some of these countries.[59] This situation gave rise to concerns as to whether or not the Government should continue to occupy a forefront position in economic development in a country or whether perhaps this role should be ceded to the private sector, functioning in a market economy, with the government only playing an indirect and supportive role.

Privatization favours the latter approach; however, the key question is, if various laws enacted to facilitate state-led development, including state ownership of enterprises, did not result in successful economic development in many countries that undertook such measures in the 1970s and 1980s, is there any reason to believe that the privatization laws and associated regulations that have now been enacted by many of these countries will lead them down the economic development path? This thesis argues that for any such laws to be effective, other policies such as an effective competition law need to be in place.

In further addressing the above question, other issues besides laws that could impact on development efforts in a state should be considered. This is because, in a variety of cases,

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Law in the Third World' (1999) 33 Intl L 875, 884.

[57] Salacuse (n 56) 877-882

[58] ibid 876-882; DM Trubek 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' (1972-1973) 82 Yale LJ 1, 36-37; KD Ewing, 'The Politics of the British Constitution' [2000] PL 405, 418; R Pritchard, 'The Transformation in Foreign Investment Law - More Than a Pendulum Swing?' (1997) 8 ICCLR 233, 233; K Appiah-Kubi, 'State-Owned Enterprises and Privatisation in Ghana' (2001) 39 J Mod Afr Stud 197, 199.

[59] MM Shirley, 'The What, Why, and How of Privatization: A World Bank Perspective' (1991-1992) 60 Fordham L Rev S23, S32; World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership: A World Bank Policy Research Report* (OUP 1995) 1-2, 32-35; World Bank, *World Development Report 2005: A Better Investment Climate for Everyone* (OUP 2004) 29.

these laws were used to advance the economic or political interests of sub-groups within a country rather than the interests of the nation as a whole.[60] As such, there has been major concern that the pursuit of new legal reforms in various developing countries in order to aid market reforms and progress economic development runs the risk of inadequate consideration of the socio-cultural and political context of the enacting countries.

### 2.5.1 Economic Reforms in Nigeria National Economic Empowerment and Development Strategy (NEEDS)

In the developing world, the years between 1960s and 1970s are considered as the era of growth. It was a period where policy makers had emphasized direct state intervention to redress perceived failures in the operation of private markets.[61] This institution of state-led policies was challenged as a result of various critical issues—particularly the dissatisfaction among the populaces with governmental inefficiencies, the declining situation of inflation supposedly triggered as a result of public sectors deficits, the abysmal performance of public enterprises, the decreasing public confidence in government establishments, the neo-liberal criticism of state involvement, and the advocacy for market-driven remedies.[62] The challenges of the traditional state-centred policy perspective were reinforced further by the breakdown of major socialist states and the general success of market ideology.[63]

As a result, the first decade of the twentieth century brought about a global rise of market-oriented policies. In developing countries, policies such as liberalization, privatization, and deregulation were embraced mainly under stabilization and structural adjustment programmes. Amongst these policies, privatization and liberalization has been one of the most prominent changes in the contemporary history of policy reform. This vital change in policy has major socio-political and economic effects on developing countries. Thus, this section attempts to address the following concerns: (a) the definition and forms of

[60] MO Chibundu, 'Law in Development: On Tapping, Gourding, and Serving Palm-Wine' (1997) 29 Case W Res J Intl L 167, 195-197; DM Trubek and M Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States [1974] Wis L Rev 1062, 1083-1084.
[61] Nicolas Van de Walle, 'Privatization in Developing Countries: A Review of the Issues' (1989) 17(5) World Development 601-615.
[62] Thomas Clarke, 'Reconstructing the Public Sector: Performance Measurement, Quality Assurance, and Social Accountability' in Thomas Clarke (ed), *International Privatisation: Strategies and Practices* (Walter de Gruyter & Co 1994) 399-431.
[63] Shamsul M Haque, 'Globalization of Market Ideology and Its Impact on Third World Development' in Alexander Kouzmin and Andrew Hayne (eds), *Essays in Economic Globalization, Transnational Policies and Vulnerability* (IOS Press 1999) 75-100.

privatization; (b) the case for and benefits of privatization; (c) the case against privatization. It is necessary to mention, however, that the emphasis of this section is on Nigeria and the forms of privatization that has been adopted in recent years.

Ensuing from years of economic unproductivity, Nigeria embarked on a comprehensive reform program. The program was centred on the National Economic Empowerment and Development Strategy (NEEDS) and concentrated on four key issues: improving the macro-economic environment, pursuing structural reforms, strengthening public expenditure management, and implementing institutional and governance reforms. The NEEDS program highlighted the significance of private-sector growth to give backing to wealth creation and reducing poverty in Nigeria. Its aims were examined in four key areas: macro-economic reform, structural reform, public sector reform, and institutional and governance reform. These structural reforms were in form of privatization, civil service reforms, banking sector reforms, and trade policy reforms. This section focuses on privatization. The importance given to privatization in NEEDS is based on the supposed superiority of the private sector in providing resources that had been considered exclusive to the public sector.

Privatization is one of the main features in NEEDS and it encompasses a decrease in government participation in the economy and in free trade, liberalization, and deregulation. It is thus regarded as a lasting approach in handling structural aspects of economic development in Nigeria. This is because NEEDS is based on the idea of rebuilding the economic growth based on private-sector participation. The NEEDs strategy further recommends the necessity of building a regulatory environment that encourages investment and does not enforce needless barriers to trade. Consequently, it emphasizes the development of a competitive and market-oriented private-sector-led market-oriented economy in Nigeria.

Although there have been notable achievements under the programme, significant challenges exist, particularly in translating the benefits of reforms into welfare developments for citizens, in improving the domestic business environment, and in extending reform policies to states and local governments. As a result, it is arguable that the reform program must be seen as the preliminary phase of the journey of economic development and growth in Nigeria.

#### *2.5.1.1 Privatization: Definition and Forms*

Various scholars have come up with diverse explanations of privatization due to different expert opinions, academic views, and experiences. For instance, Daintith states: 'Privatization is coming to mean all things to all men (and women) as it is adopted in different countries as a conveniently topical and attractive label for a wide variety of steps in economic and social policy.'[64] Accordingly, he classifies privatization into six forms:

> Change in ownership (from the public to private sector), change in public activities or assets (in the terms of their reduction), change in legal status of public provisions (such as liquidation), change in economic status of the public sector (from direct producer to indirect provider), and change in competitive environment (by withdrawing monopoly rights of public enterprises).[65]

Whereas a narrow description of privatization means the sale of state assets to private investors, a more extensive interpretation of privatization may include 'deregulation, denationalization, liberalization, competitive tendering contracting out, cuts in public provisions, increases in private ownership'.[66] Privatization has also been defined 'as a process of transferring assets, organizations, functions, and activities from the public sector to the private sector'.[67] And also:

> For others, the direct transfer of public ownership and control to the private sector represents a more classic mode of privatization; whereas the leasing and franchising arrangements between the public and private sectors can be considered as partial privatization; and reforms in subsidies, tariffs, taxes, and regulations may be viewed as factors catalytic to privatization rather than privatization as such.[68]

However, it should be accepted that modern-day privatization in developing countries has been implemented as a key component of the structural adjustment program that includes not only privatization but also policies such as reduction in import tariffs, deregulation of pricing and marketing, trade liberalization, and exemption of foreign investors from taxes and labour codes.[69] Privatization may also come in the form of takeovers by foreign firms which have a grave impact on several developing countries. Researchers have reported

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[64] Terence Daintith, 'The Legal Techniques of Privatisation' in Clarke (n 62) 43-77.
[65] ibid 45.
[66] Keith Hartley and David Parker, 'Privatization: A Conceptual Framework' in Attiat F Ott and Keith Hartley (eds), *Privatization and Economic Efficiency* (Edward Elgar Publishing Ltd 1991) 11-25.
[67] LG Cowan, *Privatization in the Developing World* (Greenwood Press 1990).
[68] Nicholas van De Walle, 'Planning for Privatization' in United Nations (ed), *Methods and Practices of Privatization* (United Nations 1993) 4.
[69] Brendan Martin, *In the Public Interest: Privatization and Public Sector Reform* (Zed Books Ltd 1993).

situations where foreign acquiring establishments, usually multinationals, request that the state create a barrier to entry or allow certain anti-competitive pricing practices. Khemani notes: 'Often developing and emerging market economies facing hard budget constraints or rising deficits, and/or are in desperate need of foreign investment, may have no choice but to cave in to such demands'.[70] Another comprehensive list of privatization is given by Jiyad,[71] who groups the numerous methods of privatization under two key categories—the divestiture and non-divestiture options. The divestiture option includes the direct sale (full or partial) of public assets to private investors, public share offerings on stock markets, sales to investment or mutual funds, sales to employees or management teams through ownership plans or employee buy-outs, public auctions, and liquidation followed by the sale of assets. The non-divestiture option, on the other hand, covers management contracts, leasing and operating concessions, commercialization, joint ventures, and contracting out.[72]

The magnitude of privatization in developing countries has been exceptional. In the past three decades, most of these methods of privatization have been embraced and implemented in developing countries. For example, between the 1980s and 1990s, the forms of privatization adopted in Malaysia, South Korea, the Philippines, Thailand, and India included the sales of assets, leasing, and sale of equity, management buy-out, and corporatization.[73] Management contract, which is a rare form of privatization, has also been adopted in many developing nations in various sectors.[74] Some other illustrations of the privatized Government firms which previously enjoyed monopoly status are the telecommunications industry in Nigeria, Ghana, Jamaica, Chile, Peru, Malaysia, South Africa, Turkey, Mexico, Argentina, Barbados, and Venezuela; power generation and distribution in Mexico, Korea, Malaysia, Chile, Turkey, the Philippines, Argentina and recently Nigeria; airlines in Nigeria, Argentina, Mexico, Chile, Brazil, Pakistan, Honduras, Panama, Turkey, Venezuela, Malaysia, the Philippines, and Thailand; roads and transports

[70] S Khemani, 'International Mergers Activity: Some Concerns for Developing and Emerging Economies' in Policy Directions for Global Merger Review (Global Forum for Competition and Trade Policy, 1998)
[71] Ahmed M Jiyad, 'The Social Balance Sheet of Privatization in the Arab Countries' (Paper presented at the Third Nordic Conference on Middle Eastern Studies: Ethnic Encounter and Culture Change, Joensuu, Finland, 19-22 June 1995).
[72] ibid.
[73] Kraiyudht Dhiratayakinant, 'The Impacts of Privatization on Distributional Equity in Thailand.' in VV Ramanadham (ed), *Privatization and Equity* (Routledge 1995) 99-117; Rugayah Mohamed, 'Public Enterprises.' in KS Jomo (ed), Privatizing Malaysia: Rents, Rhetoric, Realities. Boulder (Westview Press 1995) 63-80; World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership* (OUP 1995).
[74] World Bank (n 73).

in Argentina, Togo, and Peru; and gas distribution in Argentina and Turkey.[75] The far-reaching range of privatization in Nigeria is also made clear as it affects many economic sectors such as telecommunications, electricity, oil and gas, mass transit, airlines, cement, printing, banking, insurance, and tourism. It may therefore be said that while privatization may aid economic development, privatization without competition in place may lead to private monopolies. The following sub section considers the benefits of privatization.

#### *2.5.1.2 The Case for Privatization and Liberalization and its Benefits*

This section examines the benefits attributed to privatization such as its benefit to the public sector of the implementing country, its benefit to privatized enterprises, its contribution to overall private-sector development, its benefit to the citizens, and finally its usefulness as a conduit for beneficial foreign investment inflow. The identified benefits of privatization show various arguments which have been expressed by financial institutions that have supported the development efforts in developing countries[76] and also those proffered by scholars regarding privatization.[77] Some national governments also based their decision to embark on privatization on some of these benefits.[78]

Generally, privatization commences so as to increase economic efficiency, reduce government borrowing, encourage competition, generate government revenues, expand customers' choices, and improve quality of service.[79] Researchers have also categorized the foremost grounds of privatization into these categories:

(a) The efficiency argument, which faults state enterprises for ineptitudes and prescribes privatization for better outcomes;

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[75] World Bank, 'World Development Report: Infrastructure for Development' (OUP 1994); *World Bank World Tables* (Johns Hopkins University Press 1994)
[76] Ioannis Kessides, *Reforming Infrastructure: Privatization, Regulation, and Competition: A World Bank Policy Research Report* (World Bank 2004) 3-4; World Bank (n 73) 8-9.
[77] William Megginson, 'Privatization' [2000] 118 Foreign Poly 14, 14-27; P Morgan, 'The Privatization and the Welfare State: A Case of Back to the Future?' in P Morgan (ed), *Privatization and the Welfare State: Implications for Consumers and the Workforce* (Dartmouth Publishing Co Ltd 1995) 10; Salacuse (n 56) 884.
[78] Olusegun Obasanjo (President of Nigeria), 'Statement on the Occasion of the Inauguration of the National Council on Privatisation' in National Council on Privatisation, Nigeria (ed), *Privatisation Handbook* (3rd edn, BPE 2001) 4-5.
[79] Haile Asmerom, 'The Impact of Structural Adjustment Policy on Administrative Reform Strategies' in RB Jain and H Bongartz (eds), *Structural Adjustment, Public Policy and Bureaucracy in Developing Societies* (Har-Anand Publications 1994) 381; Christos Pitelis and Thomas Clarke, 'Introduction: The Political Economy of Privatization' in Thomas Clarke and Christos Pitelis (eds), *The Political Economy of Privatization* (Routledge 1993) 7.

(b) The property ownership argument, which asserts that state ownership is not encouraging to administrators in public enterprises to work efficiently since they have no stake in them;

(c) The distortion argument, which blames government intervention for creating distortion in resource allocation; and

(d) The fiscal argument, which considers excessive government as the main cause of budgetary deficits.[80]

These reasons for privatization are evident in the privatization policies embarked in developed and developing countries. In the UK, the Thatcher government embarked on privatization on the basis that it would bring about increased efficiency, a reduction in public debt, increased share ownership, increase people's power, and ensure the overall welfare of every person.[81]It should be noted however that this policy is a decade old and has been subject to intense criticism. In the US, the main goals of privatization were 'to increase economic performance, decrease the federal deficit, promote economic recovery, and reinforce popular capitalism by expanding share ownership'.[82] In developing countries such as Nigeria, similar arguments have been put forward by the current governments and international agencies. This is particularly in line with the stabilization and structural adjustment programs recommended by the IMF and the World Bank advising market-oriented reforms to cut public expenses and subsidies, resolve public sector ineptitudes, balance trade and budget deficits, decrease government involvement and trade controls, and privatize public enterprises.[83] In line with, and as an essential factor of, the structural adjustment program, various developing countries embraced privatization in order to reverse financial losses supposedly acquired by state-owned enterprises, to eradicate inefficiency, to create capital for new ventures, to lessen inflation, to ensure fair sharing, and to decrease external debts.[84]

Thus, in some Asian countries such as Indonesia and Singapore, the foremost justifications

[80] Jiyad (n 70).
[81] John Rentoul, 'Privatisation: The Case Against' in Julia Neurberger (ed), *Privatisation: Fair Shares for All or Selling the Family Silver?* (Macmillan 1987) 4; Okumura Hiroshi, 'Privatization and Popular Capitalism: The Case of Japan' in Clarke (n 62) 78.
[82] Laurie Clements, 'Privatization American Style: The `Grand Illusion' in Clarke (n 62) 94-95.
[83] Jiyad (n 70).
[84] El-Khider Ali Musa, 'Privatisation of Public Enterprises in the Less Developed Countries' in Clarke (n 62) 356.

of privatization are to increase efficiency and economic growth, decrease economic and financial burden, improve the overall well-being of the people, stimulate stock markets, stimulate the private-sector growth, fast-track competition, and expand economic activities.[85]

Like other developing countries, the proponents of privatization in Nigeria argue that it brings about efficiency in public enterprises. A reason for this is because the staffs of these public enterprises are not held accountable for losses sustained as a result of poor performance and the efficiency of most state-owned enterprises is not measured based on their profitability.[86] In most cases, staff employment is based on political factors that have nothing to do with merit. 'Nigerian Supreme Court jurisprudence holds that the staff of government owned enterprises cannot be terminated at will'.[87] Job loss can only be as a result of gross misconduct which is only determined after an intense process.[88] As opposed to this, because the private sector is largely driven by profit, efficiency and performance of staff are measured based on profit, and there is a constant awareness of the necessity to make profits. As a result, it is argued that the transfer of ownership of state-owned enterprises to private hands will bring about efficiency which is the required standard in private enterprises.[89]

It has also been put forward that privatization frees the government to perform its core functions such as the provision of security and regulation.[90] This argument suggests that privatization allows the government use its resources for the essential aspects of running the nation and that this will bring about efficiency in that area, while the private sector takes over the provision of goods and services. Further it will be argued that the government, being the regulator of the market, should not be a market participant, otherwise fairness in performing its role as the regulator may be called into question as there will be conflict of

[85] Ismail Muhd Salleh, 'The Impacts of Privatization on Distributional Equity in Malaysia' in Ramanadham (n 73) 119.
[86] Stephanie R Nicolas, 'Privatizing South Africa's Industries: The Law and Economics of a New Socialist Utopia' (1999) 30 Law & Poly Intl Bus 724.
[87] Lawrence Azubike, 'Privatization and Foreign Investments in Nigeria' (2005-2006) 13 Tulsa J Comp & Intl L 66 <http://heinonline.org> 2 November 2013.
[88] *Fed Civil Serv Comm'n v Laoye* (1989) 202 NSCC 87 (Nigeria); *Garba v Univ of Maiduguri* [1986] 1 NWLR 550 (Nigeria); *Olaniyan v Univ of Lagos* (1985) 2 NWLR 599 (Nigeria).
[89] Nicolas (n 86).
[90] Olusegun Obasanijo, Former President of Federal Republic of Nigeria, Inauguration of the National Council on Privatization (29 July 1999) <http://www.nopa.net/UsefulInformation/Presidential-Speeches/29july99.html> accessed 2 November 2013.

interest which may lead to inefficiencies.[91] Privatization therefore removes this structural imbalance in the economy. A major argument in favour of privatization put forward by the National Council on Privatization in Nigeria is that it attracts foreign direct investment and thereby increases capital inflow into the country.[92] However, although privatization makes public enterprises available to be invested in by foreign investors, other variables are considered by foreign investors before investing in them. These are factors such as political atmosphere and regulations in place. One of such laws may be the availability of competition provisions. From the above, although there are various reasons why Nigeria has embarked on privatization, the predominant aim is to attain economic efficiency. This ties back to the research question that are current market reforms adequate without effective competition law in place.

#### *2.5.1.3 The Case Against Privatization and Obstacles to Privatization*

Critics of privatization have argued that it brings about an increase in the prices of goods and services and this is detrimental to the common man.[93] This view suggests that the public enterprises charge low prices because they are mostly subsidized by the Government and also not profit-driven. However, where an enterprise has been privatized, there is a need to compete on equal terms with other enterprises and this may bring about an increase in the prices of goods and services. However, proponents of privatization would counter that position by arguing that although the price of goods and services may increase, there is an equivalent increase in the quality of goods obtained.

Critics have also argued that privatization may also bring about 'loss of a sense of symbolic ownership of the state-owned enterprises'.[94] Azubike argues that because the enterprises are owned by the government, it is assumed that they 'belong' to all citizens. As such, when they are sold, all citizens are divested and any monies realized from such sale may not be

[91] Mary M Shirley, 'The What, Why, and How of Privatization: A World Bank Perspective' (1992) 60 Fordham L Rev 26 (an example was given here of a country where the public enterprise had not been paying tax).
[92] *Privatisation Handbook* (n 78) art 1(2) (3rd edn, Bureau of Public Enterprises 2000) states that the government intends to use the privatization program to reintegrate Nigeria into the global economy, as a platform to attract foreign direct investment in an open, fair and transparent manner.
[93] In Nigeria, opposition to the earlier privatisation and commercialisation policy of the Babangida Military Administration was mainly by the National Labour Congress (NLC), which claimed that privatisation was 'a sale of common wealth to money bags to the detriment of workers who created such wealth ... ' in African Concord (Lagos 4 February 1992) 46.
[94] Azubike (n 87).

used for the common good of all citizens.[95] It is also argued that privatization brings about job losses because privatized entities may cut down on staff so as to achieve maximum efficiency. As a result of this, most labour unions strongly resist privatization. In Nigeria, there was stiff opposition from PHCN workers when the government decided to privatize the company.[96]

In certain instances, the governments of the respective nations may make the prospective buyers or investors guarantee that there would not be a major downsizing of workers. Another argument against privatization is that it brings about dominance, and may therefore lead to private monopolies. This is because most state-owned enterprises in developing countries have monopoly status. It is argued that while these enterprises are owned by the state, political pressure may insulate the consumers from predatory pricing tendencies of the monopolies. However, upon transfer to the private sector, the consumers may be exploited as the private investors may abuse their market dominance. In order to avoid this, it is necessary for there to be competition law in place. Vickers and Yarrow have also argued that 'theoretical analysis and empirical evidence support the view that private ownership is most efficient – and hence privatization is most suitable – in markets where effective (actual or potential) competition prevails.'[97]

Some critics also see privatization as a way or re-colonization. However, to avoid this, First, the country may remove any barriers to entry in the particular market and thereby increasing competition and reducing the market power of the enterprise, Secondly, the enterprise may be restructured so as to eliminate its market dominance. In situations where monopoly power remains as of necessity, the state has to enact effective competition laws and other regulations. Ideally, both reduction of market power and regulation should precede the privatization. However, in Nigeria, regulatory laws were enacted only as part of the privatization exercise.[98]

### 2.6 Conclusion

Nigeria has been going through substantial economic reforms and market liberalization.

[95] ibid.
[96] Ironically, the issue in Nigeria was not that the PHCN should not be privatised, but that the staff should be compensated. There is still an ongoing battle and the Bureau of Public Enterprises has said that the $3bn generated from the sale of PHCN will be used to settle the entitlements of its workers.
[97] John Vickers and George Yarrow, 'Privatization: An Economic Analysis' (MIT Press 1988) 426.
[98] Azubike (n 87) 70-71.

These are the deregulation of the oil and gas sector, liberalization of the aviation and public transport sectors, the telecommunications industries, and most recently the power industry. Some of the key elements of the reforms are: maintenance of sound macro-economic policies, deregulation, with emphasis on power, telecommunications, and downstream petroleum sectors, financial sector reforms and privatization. These policy reforms, combined with investments in human resources and physical infrastructure as well as the establishment of macro-economic stability and good governance, are essential to achieve a high rate of self-sustaining, long-term economic growth.[99]

These reforms have resulted in removing entry barriers and thereby opening up the market in these sectors and enhancing foreign direct investment. Although these economic reforms in Nigeria have generated returns and have set the foundation for permanent private-sector-led growth, the fact that there remains no competition law may lead to unknown dangers. Accordingly, Dimgba is of the view that 'half liberalization could be worse than no liberalization at all, since it ends up creating hitherto unknown risks'.[100] Furthermore, while it is put forward that it is unnecessary for a competition law to be enacted because other regulatory bodies carry out the same function a competition law would have if it is enacted, these regulatory bodies, such as the Manufacturers Association of Nigeria and Consumer Protection Council, only act ex-ante (that is, in advance) while competition law applies where an undertaking acts in breach of competition policies. It, therefore, acts ex post (conduct that has already occurred or is presently occurring).[101]

The reform programs generally focus on increasing private-sector involvement in economic activity. Privatization in Nigeria has thus provided an enabling environment for foreign direct investment. Furthermore, international agencies such as the World Bank, the United Kingdom Department for International Development, the International Development Agency, and the United States Agency for International Development has vigorously contributed to the privatization regime in Nigeria.[102] In addition to providing grants towards

[99] CO Amah, 'Strategic Innovation and Corporate Performance in Nigeria's Food and Beverages Industry' (2007) (Rivers State University of Science and Technology, Port Harcourt) in Monday Osemeke, 'Problems and Prospects of Private Sector Organizations in Nigeria' (2011) 6(4) International Journal of Business and Management.

[100] Dr Nnamdi Dimgba, 'The Need and Challenges to the Establishment of Competition Law in Nigeria' *Global Competition Forum* <http://www.globalcompetitionforum.org/> accessed 6 November 2013.

[101] Laura Anibus, 'Rethinking Competition Law and Policy: Building a Framework for Implementation in Nigeria' NIALS Journal of Business Law 7-8 <http://www.nialsnigeria.org/journals/Laura%20Anibus.pdf> accessed 1 November 2013.

[102] United Nations Conference on Trade and Development, NY, US and Geneva, Switzerland, 2003, World

the effective execution of the program, they have also given support with technical resources and manpower. This has further persuaded foreign investors in taking a decision to invest in Nigeria as the participation of these international agencies has been seen both as an endorsement of the privatization exercise in Nigeria and a show of some confidence in the direction the Nigerian economy is taking.[103]

However, in order for foreign investors to have full confidence in the Nigerian economy, a regulatory framework such as competition rules should be reinforced. Regrettably, Nigeria does not have an effective competition regime in place. Although the Bureau of Public Enterprise is still ambitious in the drive for the establishment of a competition law, and continues to work hard towards this, the National Assembly is yet to pass the proposed bill into law. As a result of the ongoing socio-economic and market reforms, it has become pertinent for Nigeria to institute formal competition policies. Due to the fact that the majority of the privatized industries were natural monopolies, it is essential that a suitable competition policy framework is in place to bring about value-added economic performance.

A noteworthy risk is that privatization may lead to a replacement of public sector monopolies by private monopolies, which would possibly lessen public welfare, as distinct from the case of the public sector, the private sector is usually not legally obliged to develop the people's welfare. Further, privatization in the UK recommends that performance of a firm is more dependent on external circumstances such as competition as opposed to ownership of the firm.[104] As such, it is necessary for an appropriate competition policy framework to be in place.

The necessity of an effective competition law cannot be overemphasized. It should at least be an addition, if not a forerunner, to successful privatization. It is arguable that if there had been a competition law in place, the opposition to privatization may have been reduced. Foreign investors are comfortable with a predictable and stable environment. ‘They are aware that the absence of clear and tested standards will bring about illogical regulations. Such retrospective enactment and application of rules will detract from the assurances

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Investment Report, FDI Policies for Development: National and International Perspectives <http://www.unctad.org/en/docs/wir2003ch2-en.pdf> in Azubike (n 87) 87.

[103] Azubike (n 87) 88.

[104] M Pollitt ‘A Survey of the Liberalisation of Public Enterprises in the UK since 1979’ (DAE Working Paper, No 9901, Department of Applied Economics, University of Cambridge).

contained in the laws and distort the economy'.[105]

In order to obtain the full benefits of market liberalization, all existing monopolies have to be controlled; in the UK, it was necessary to appoint an independent officer 'with specific powers and duties under each privatization statute to carry out this task. This function is in addition to the ongoing regulatory role retained in all these sectors by the existing competition authorities. In the case of the UK, these are the Office of Fair Trading which has now been replaced by the Competition and Market Authority CMA (operating closely with the Department of Trade and Industry which has now been replaced by Department for Innovation, Universities and Skills and Department for Business Enterprise and Regulatory Reform) and the Monopolies and Mergers Commission'.[106] This model may be adopted in Nigeria however suggested models will be analysed in chapter 8 of this thesis.

Furthermore, this chapter has indicated that developing countries are faced with challenges that invariably encourage anti-competitive market behaviour. Consequently, it is necessary to implement certain economic reforms such as competition law and policy in order to aid economic development and rectify these market failures. Given that competition law is part of the reforms endorsed by international institutions such as the World Bank, there is a fear that these suggested reforms do not take into consideration certain significant facts.

Firstly, dominant businesses will protect themselves and undermine institutions which seek to reduce their market power or profits. Secondly, enacting a competition law is not only associated with embracing legal provisions and creating institutions, but it is also part of choices concerning the standards for a market economy, on which there is considerable international disagreement. This is evident in South Korea, in which case the competition law is concerned with more 'balanced' or 'shared' growth given the importance of the chaebol[107] conglomerate groupings.[108] The law contains provisions enabling the authority to monitor the chaebols and to tackle 'unreasonable' practices and 'unjustifiable' restrictions

[105] ibid.
[106] Tim Clarke, 'United Kingdom Privatisation and Competition Policy' (1998) 26 Intl Bus Law 508 Content downloaded/printed from HeinOnline <http://heinonline.org> accessed 6 November 2013
[107] Chaebol (from chae: wealth or property + pol: faction or clan) refers to a South Korean form of business conglomerate. They are usually global multinationals owning numerous international enterprises, controlled by a chairman who has power over all the operations. The term is often used in a context similar to 'conglomerate'. Chaebol are family-based and are largely controlled by their founding families.
[108] Korea Fair Trade Commission (KFTC), 'Annual Report 2011 Special Edition 30 Years of KFTC, Looking Back, Moving Forwards' (KFTC, Seoul 2011). While South Africa appears to adopt a similar approach of linking competition standards to economic development, if one looks at the objectives of the Act, this is not reflected in the specific provisions.

on competition.[109] Thirdly, many countries have developed very successfully without competition law (although there was increased economic participation). For instance, Malaysia and Singapore established competition institutions in the past decade.

This chapter has argued that Nigeria's competition law should fit in the present economic circumstances. This might encompass legislating a wide-ranging competition law and policy, with multiple goals. This research has focused on Nigeria because it is the largest economy in Africa and has a strong natural resource base. Nigeria has through the present market liberalization programme, attracted multiple foreign investors. This therefore gives a justification for an analysis of the current situation regarding competition law in Nigeria. It is key that in order for Nigeria to achieve the profits of the ongoing liberalization policy and therefore aid economic development, it is crucial to enact a competition law and in addition to appoint an independent regulatory body as well as the sector-specific regulators present so as to control and regulate any anti-competitive market behaviours. This point will be further developed in Chapter 3 of this thesis where the sector-specific regulators are examined.

[109] E Fox, 'We Protect Competition, You Protect Competitors' (2003) 26(2) World Competition 149-165; JS Hur, 'The Evolution of Competition Policy and Its Impact on Economic Development in Korea' in P Brusick and others (eds), *Competition, Competitiveness and Development: Lessons from Developing Countries* (United Nations Conference on Trade and Development 2004).

# CHAPTER 3: THE LIMITATIONS OF THE NIGERIAN COMPETITION FRAMEWORK

## 3.1 Introduction and History of Competition Law in Nigeria

The chapter begins by examining anti-competitive business practices in Nigeria and the reasons why competition law regime should be embraced. The chapter then proceeds to analyse the current competition law provisions in Nigeria, and considers their efficacy in addressing anti-competitive business practices. It also analyses the challenges faced in establishing competition law and possible future challenges in implementing competition law in Nigeria. The chapter finally makes recommendations for the determination of an appropriate competition law and policy suitable to be adapted in Nigeria.

To fully comprehend the attitude to competition policy in Nigeria, it is necessary to give a brief analysis of some of its political and economic antecedents. Between the 1950s and 1980s, the Nigerian economy enjoyed an economic growth that was sustained by state control of prices, interest rates, subsidized and easy access to essential services for consumers and generous banking credits to producers.[1] Furthermore, it was enhanced by the large quantity of energy resources first discovered in 1956. Nonetheless, vast fiscal deficits, restrictive business practices and other related difficulties with excessive reliance on proceeds generated from its oil resources led to a close in the growth it attained between this period (1950s and the 1980s) and thus reduced its economic development since the late 1990s

Nigeria's current industrial policy is based on a guided deregulation of the economy and the Government's disengagement from activities which are market-oriented. This leaves the Government to play the position of facilitator focusing on the provision of incentives, policy and infrastructure, which are necessary to enhance the private-sector role as the engine of growth. The industrial policy is intended to create employment and raise productivity, intensify distribution and exportation of locally manufactured goods, improve technological skills, attract FDI and increase private-sector involvement.

Furthermore, empirical evidence from international practice shows that although economic

[1] Peter Lewis, *Growing Apart: Oil, Politics and Economic Changes in Indonesia and Nigeria* (Michigan: University of Michigan Press 2007), 129

reforms, particularly trade liberalisation and privatisation, will contribute to improve the competition process in domestic markets, they do not give any assurances that these markets will work efficiently devoid of any additional regulatory controls against anti-competitive business practices.[2] Consequently, criticism has followed the liberalisation and privatisation of most of the public enterprises in Nigeria. These exercises were carried out in anticipation of an improvement in the performance of the sectors concerned and an improvement of Nigeria's economic development. For instance, the energy sector has been subject to a very low level of operational and pricing inequalities while significant improvements have been recorded in the telecommunication sectors, but the overall effect has increased the potential conducive to collusion and other anti-competitive behaviours. This is because the larger percentage of ownership and control of the former public enterprises are now concentrated in a few private hands giving them significant economic and political powers to possibly influence competition and the regulatory process.

The tendency by private enterprises to create private barriers to entry and exit and other anti-competitive agreements will not be automatically corrected by free-market forces; rather there is an urgent need to address these. Otherwise the markets will not function effectively; market failures will become rampant and total welfare will not be maximized. In a situation like this economic development will be greatly hindered or unachievable.

As a consequence, there have been calls by different groups, including development agencies like the World Bank, WTO, IMF, local policy makers, like the Consumer Protection Council of Nigeria and some academics in Nigeria, for the introduction of competition law in Nigeria.[3] They expect this will complement other reform programmes and also curb or mitigate some of the competitive problems and thereby stimulate or enhance economic development.[4] These reforms were generally aimed at improving conditions of markets, maximizing the utilization of resources and supporting economic growth and development.

The overall effects of these have not generally improved the competitiveness nor enhanced

[2] Lucian Cernat, 'The role of competition in the promotion of competitiveness and development: experiences from a sample of developing countries' (September 2004) Paper prepared for the 3rd International ICR Conference Pro-Poor Regulation and Competition Issues, Policies and Practices, Cape Town, South Africa, 15.
[3] Sylvanus Ibeabuchi and others, 'Liberalization and privatisation of public utilities in Nigeria' in OJ Nnanna and others (eds), *Contemporary Economic Policy Issues in Nigeria* (Abuja: Central Bank of Nigeria 2003) 57.
[4] Paul Marsden, 'Building an effective competition law regime in Nigeria: establishing a local content and building international standards', National Conference on Competition Law, International Law Institute and Lagos Business School, Nigeria, March 9th-10th 2006.

the economic growth of the Nigerian economy relative to its resource abundance although it is becoming more diversified and has started to attract more foreign investment and trade in recent times.[5]

Nigeria is not only eager to achieve sustainable growth domestically, but also desires that its domestic firms are able to compete globally. In addition, the increasing international economic integration involving desegregations of production processes (out-sourcing and off-shoring of components) facilitated by modern information and communication technologies have continued to put pressure on developing countries to embrace new methods to develop their economies into more competitive ones to fit into and benefit from global structures. These methods, thus call for an adoption of competition culture, particularly clear competition law and policy. This thesis argues that this will not only promote the establishment of a competitive process, but it will go a long way to assure both local and foreign investors that its government is interested in establishing a conducive business environment and thereby facilitate trade and economic development.

In Nigeria, the initial sign of an interest in embracing a competition law regime was in December 2002 when the then Director-General of the BPE, Malam Nasiru El-Rufai, indicated that the Nigerian Government was going to propose a bill on competition law that would protect against the prevalence of foreign businesses dumping their goods in Nigeria and consequently making it difficult for local businesses to compete. Following this pronouncement, a consultant was engaged by the Nigerian Government and consequently, a draft competition bill was proposed in early 2003. However, nothing was heard of this draft bill for many years. This may have been due to insufficient understanding of competition law by the law makers,

In early 2006, a new competition bill was introduced and drafted by a different consultant sponsored by the Federal Ministry of Justice (FMoJ). The FMoJ bill was approved by the Federal Executive Council (FEC) and this led to its introduction as a government bill to the Senate of the National Assembly. However, in September 2006 in the course of its first reading, the bill was unreceptive assumedly due to an insufficient understanding of the nature and essence of competition law by the members of the Senate.

[5] Sunday Ukpata and AdemolaOlukotun, 'The effect of organisational development in the Nigerian economy' (2008) 2(5) African Journal of Business Management 092.

It can be argued that the initial lack of interest in passing a competition law can be linked to large businesses dominance and exploitation of smaller businesses and consumers. This is typically due to the absence of a competition law, as well as the control of the political terrain by a particular set of people who find themselves in positions of political authority. Because of the high level of corruption which prevails in Nigeria, it may be speculated that there is a compromise between the ruling business class and the political one, the terms of which permits each to respect the other's territory.

One could strengthen the above theory by noting that when the government set up a Committee to introduce competition policy and law for Nigeria, that Committee was made up of heads of industry and business moguls whose interests may have been more rooted in maintaining the status quo. Competition issues in various sectors of the Nigerian economy are handled directly or indirectly by various regulatory institutions. Some of such institutions are; The Investment Promotion Commission Decree No 16 of 1995 and the Foreign Exchange Decree No 17 of 1995.[6] These two laws promote competition in the economy,[7] The Nigerian Communications Commission (NCC),[8]Special Trade Malpractices Investigation Panel,[9] Consumer Protection Council(CPC),[10] The Standards Organisation of Nigeria (SON), The Nigerian Civil Aviation Authority (NCAA). Some of these regulators will be further examined in this thesis.

### 3.2 Current Competition Law Provisions in Nigeria

This section intends to analyse the current competition law provisions in Nigeria. There have

[6] The Nigerian Investment Promotion Commission (NIPC) which previously regulated foreign participation in various sectors of the economy and repressed competition was repealed in 1995.
[7]The NIPC was established by the Nigerian Investment and Promotion Decree No 16 of 1995. This commission was established to coordinate, monitor, encourage and provide necessary assistance and guidance for the establishment and operation of enterprises in Nigeria, initiate and support measures which shall enhance the investment climate in Nigeria for both Nigerian and Non Nigerian investors, promote investments in and outside of Nigeria through effective promotional means; register and keep records of all enterprises to which the NIPC Decree legislation applies, identify specific projects and invite interested investors to participate in those projects; provide and disseminate up-to-date information on incentives available to investors; assist incoming and existing investors by providing support services; and evaluate the impact of the commission on investment in Nigeria and recommend appropriate remedies and additional incentives
[8] The NCC is the regulatory authority for telecommunications industry in Nigeria. The purpose of the NCC is to facilitate private sector participation in telecommunications service delivery, coordinate and regulate the activities of the operators to ensure consistency in availability of service delivery and fair pricing.
[9] The Trade Malpractices Decree 1992 indicates certain offences relating to trade malpractices and sets up a special trade malpractices panel to investigate such offences.
[10] The CPC was established in Nigeria under decree No. 66 of 1992 and one of its main objectives is to provide redress to consumer complaints through negotiations, mediation and conciliation

been several steps taken to embrace competition legislation in Nigeria. Some of the laws intended to promote vigorous competition in Nigeria are the Competition and Practices Regulations 2007 made in accordance with the Nigerian Communications Act 2003 (NCA2003); The Investments and Securities Act 2007 (ISA 2007); Nigerian Investment Promotion Commission Act 1999 and the Public Enterprises (Privatization and Commercialization) Act 1999. These laws and their benefits and consequences are further considered below

Furthermore, so as to offer the legal and regulatory framework for an operative competition law regime in Nigeria, Competition Bills have been sponsored and forwarded to the National Assembly. A bill is proposed law under consideration by a legislature. A bill comes to law when it is passed by the legislature and, in most cases, approved by the executive. Once a bill has been enacted into law, it is called an act of the legislature, or a statute The first of Bill was the 2002 Federal Competition Bill, which aimed to set up a Federal Competition Commission. The Bill was also to proscribe restrictive contracts and business practices that significantly reduce competition and to regulate the abuse of dominant position of market power. Another bill was presented in 2008, this is the bill for an Act to provide for the establishment of the Nigerian Trade and Competition Commission and other matters. This bill passed through its first and second reading, but has stalled since then.[11]Finally a competition bill was presented in 2011 but no progress has been made this.[12] The lack of progress of the competition bills could be due to the lack of adequate resource, information and knowledge of competition by the law makers. These are analysed in the coming chapters of this thesis.

### 3.2.1 The Investment and Securities Act of 2007 (ISA 2007)

Prior to ISA 2007, Section 100 of the ISA 1999 authorized SEC Nigeria to approve mergers as long as the said mergers will not have a negative impact on competition such as lessen competition. Nevertheless, due to the ambiguity of this section, and with no additional guidance provided on what the SEC should be looking out for, Proponents of competition

[11] Laura Anibus, Rethinking Competition Law In Nigeria: Building A Framework For Implementation In Nigeria <http://www.nials-nigeria.org/journals/Laura%20Anibus.pdf> accessed 2 June 2014.

[12] The Bill is cited as A Bill for an Act to Encourage Competition in the Economy By Prohibiting Restrictive Trade Practices, Controlling Monopolies, Concentrations of Economic Power and Prices and for Connected Purposes. All competition bills can be viewed at <http://nassnig.org/nass/legislation2.php?search=competition> accessed 15 May 2014.

law thought that competition issues were not properly catered for by the SEC, but that SEC focused on evaluating merger transactions in view of the fairness of a merger on the stakeholders of the companies merging, which though not expressly mentioned in the Act, was in line with the role of a securities regulator such as SEC. Additionally, as a result of the frustration caused by the failure of the Nigerian Government to enact a competition law, the panel of experts who advised on the reform of ISA 1999 thought it wise to introduce competition law into Nigeria through securities regulation, albeit via merger control, till such a time that the enactment of a competition law in Nigeria becomes more politically acceptable.

The question that arises, however, is whether the provisions of ISA 2007 are sufficient to effectively regulate competition in Nigeria. ISA 2007 contains provisions on mergers and acquisition and vests the SEC Nigeria with powers similar to those exercised by a competition authority in merger regulation. The ISA 2007 introduces three classes of mergers (small, intermediate, and large) falling within different asset and turnover thresholds,[13] and also subject to different approval regimes. The categorization of mergers into 3 types in ISA 2007 has its origins in the South African competition law, and was introduced in Nigeria through a revised version of the Federal Competition and Consumer Protection Bill.

The SEC is empowered to give approval for mergers to which SEC had been pre-notified where the merger is not likely to prevent or substantially lessen competition, or if it would, where the merger may result in technological efficiency or other pro-competitive gains that would offset whatever harms it would have on competition.

#### *3.2.1.1 Power to Impose Structural Remedies – ISA, s 128*

A notable provision of the ISA 2007 is SEC's power to impose structural remedies in form of an order the break-up of a firm into separate entities where it is of the opinion that the business of a company will significantly diminish competition. Prior to the break-up order being given, the Commission notifies the affected company and also gives the company an opportunity to make a representation to the Commission. Thereafter the Commission shall refer the break-up order to the court for sanction.[14] This is a far-reaching antitrust power and

[13] ISA 2007, s 120.
[14] ISA 2007, s 128

has its roots in the United States Antitrust law, under sections 1 and 2 of the Sherman Act.

Section 128 ISA 2007provides:

> 1) Where the Commission determines that the business practice of a company Substantially prevents or lessens competition, the Commission may in the public Interest order the break-up of the company into separate entities in such a way that its Operations do not cause a substantial restraint of competition in its line of business or in the market.
> 2) Before the break-up order becomes effective, the affected company shall have been notified by the Commission and given a specified time within which to make representations to the Commission.
> 3) Thereafter the Commission shall refer the order to the Court for sanctioning.

Aside from stating the Commission's power to order break-up of a company that it considers its business practices to be 'substantially lessening competition', and reference to court for sanction, the Act does not give any additional guide on what business practices would be taken as 'substantially lessening competition'. Hopefully, SEC would have to develop and issue guidelines on how these powers would be exercised

The application of structural remedies as provided for in section 128 ISA 2007 brings about difficulty even to more experienced antitrust jurisdictions. As a result, this remedy has only been known to be executed on very few occasions. One of these occasions in the US Microsoft case where Judge Thomas Penfield Jackson gave an order that Microsoft is divided to two companies to remedy its monopoly status in the market for Intel-based PC software.[15] From studies undertaken on the subject, it is obvious that the courts and antitrust bodies are more disposed to granting structural remedies (divestiture or dissolution) where the type of activity in respect of which violation arises is either a merger and acquisition (M&A) transaction or bilateral/multilateral pricing behaviour, than where a single firm conduct is involved. As Crandall notes:

> Divestiture or dissolution in cases involving pricing coordination is generally quite simple because dissolution of a trade association or other organization that exists principally to carry out a price-fixing or market-sharing conspiracy is straightforward and does not necessarily imperil the viability or efficiency of the independent firms that were found to have been involved in the market

[15] Tom Foremski, Christopher Grimes and Richard Wolfe, 'Judge Jackson Orders Break-Up Order to Microsoft', *Financial Times* (8 June 2000). ***United States v. Microsoft Corporation***, 253 F.3d 34 (D.C. Cir. 2001)

> coordination. Similarly, divestiture of recently-merged entities is much more easily accomplished than is the break-up of a unitary firm that is not a combination of recently independent companies. However, divestiture of a single organic firm can be much more difficult and risky in terms of lost output or producer efficiency. Courts are understandably reluctant to order relief that may not be sustainable in the marketplace.[16]

On account of the far-reaching nature of structural remedy involving single firm conducts, its usefulness or rather indispensability as a tool in the hands of antitrust bodies to deal with anti-competitive conducts of firms is not devoid of controversy and certainly does not enjoy universal appeal. There are many who posit that rather than apply structural remedies, antitrust bodies should consider alternative methods of dealing with anti-competitive conducts.

In the US for instance, in his study of single firm monopolization cases where structural remedy was applied, Crandall concludes that there are only four or five cases in the history of Sherman Act enforcement where structural relief has been imposed in monopolization cases that involve a single firm that has not attained its market position through merger or from conspiring with other firms. He argues that with the exception of the AT&T case in 1984, there is very little evidence that such relief is successful in increasing competition, raising industry output, and reducing prices to consumers, and that the exception (AT&T structural relief) turns out to be a case of over-kill because the same results could have been obtained through a simple regulatory rule, obviating the need for vertical divestiture of AT&T. Crandall supported his argument by conducting a review of the leading cases involving single firm conduct where structural remedy of divestiture or dissolution was used in US law.

#### *3.2.1.2 Assessing ISA 2007, s 128*

The crux of the account made above about structural remedy powers is not to discredit its usefulness, but rather to draw attention to the need for the agency to which such power has been given (SEC, in the context of this research) to avoid the assumption that such a power can solve all problems, or that could be applied without adequate consideration. The descriptive account is also intended to illustrate some of the activities that could come under

[16] Robert W Crandall, 'The Failure of Structural Remedies in Sherman Act Monopolization Cases' (2001 Working Paper 01-05, Aei-Brookings Joint Center For Regulatory Studies) 5. <http://law.uoregon.edu/org/olrold/archives/80/80_Or_L_Rev_109.pdf> accessed 3 June 2014.

the remedial purview of section 128 ISA. However, the overall point to note is that if well-established antitrust jurisdictions have tested and found such a provision difficult to implement, whether an emerging market securities regulator such as SEC (that is not even an antitrust body) is well suited or equipped to wield this sort of power is questionable.

The power to impose 'structural remedies' is relevant in the context of a full blown antitrust investigation, especially in a situation of dominance with clear criteria spelt out in an existing competition legislation and guideline to avoid abuse. Incidentally, beyond stating the Commission's power to order break-up of a company that it considers its business practices to be substantially lessening competition, and also the enhanced competition law criteria in the assessment of mergers,[17] the Act gives no further guide. In view of all these, the view sought to be propagated here is that the innovation of a provision such as section 128 in a predominantly securities legislation such as ISA 2007, and the conferment of such a power to a securities regulator should be approached with extreme caution as it could potentially be misapplied.

Some lessons also ought to be commended to the SEC from a review of the limitations of structural remedy power. The first lesson is that structural remedy power (or any antitrust power, for that matter) is not an end in itself, but is only a means to an end. What is the end? The end is increased competition and competitiveness of the market, increased industrial output, all leading to enhanced consumer welfare. Therefore, if the exercise of any type of antitrust power (here structural remedy) cannot lead to the attainment or achieve the above result, then there is no need to exercise that power or apply that measure; for doing so would amount to an abuse of power. In précis, antitrust powers are to be exercised in a pragmatic way, in a manner that is result-oriented. The second lesson, which flows from the first, is that if the end goal can be achieved by the exercise of less far-reaching power, such as a milder or behavioural remedy, then that alternative less radical measure should be applied.

In other words, structural remedy power is to be exercised only as a last resort; it should not be, as they say, the first port of call. It is precisely here that one identifies readily what is the main problem with section 128 of the ISA 2007. Section 128 appears to have moved from point zero to point 100, without any middle course. It provides for SEC to order the break-

[17] Nnamdi Dimgba, 'The Regulation of Competition through Merger Control: The Case under the Investments and Securities Act 2007' <www.globalcompetitionforum.org/africa/Nigeria> (Global Competition Forum) accessed 15 May 2014.

up of a company where SEC forms the opinion that the business practice of the firm restricts competition.

Having stated the above, it is also worth recognizing, on a positive note, that the presence of this sort of power creates a strong visual and deterrent effect in terms of dissuading firms from engaging in anti-competitive conducts. Firms are discouraged from seeking to obtain monopoly power given the cost in terms of resources and negative publicity of defending antitrust proceedings in which a structural remedy such as in section 128 ISA 2007 is the potential sanction.

Another point is that a provision such as section 128 being an antitrust power is novel in this jurisdiction where we do not and have never had antitrust laws. Most businesses do not understand what business practices of theirs could be considered to restrain competition due to ignorance of the antitrust rules. Therefore for the sake of transparency and to ensure that any measures of the SEC in the enforcement of this provision are not struck down by the Courts on fair-hearing grounds, it is important that a definition be made by the SEC of practices that it could consider as 'restraining competition' and in respect of which it could invoke the structural remedy power conferred on it by section 128. Such a definition would even enable the Commission to amplify its jurisdiction as a full antitrust/competition body and thus fill the gap in the Nigerian legal system of the absence of a competition law and a competition authority. Accordingly, it is recommended that the provisions listed below are included in the Rules and Regulation of SEC implementing the ISA 2007:

The following shall be considered as business practices capable of restraining competition and creating a monopoly:

i. 'The entry into agreements with other companies or business undertakings which have as their object or effect the prevention, restriction or distortion of competition in any part of the Nigerian market, and in particular those which:

a. directly or indirectly fix purchase or selling prices or any other trading conditions;

b. limit or control production, markets, technical development, or investment;

c. share markets or sources of supply;

d. apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

e. make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

ii. The abuse by companies or business enterprises of dominant positions achieved by them in any part of the Nigerian market irrespective of how such positions of dominance were achieved. Such abuse may, in particular, consist in:

a. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

b. limiting production, markets or technical development to the prejudice of consumers;

c. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

d. making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts'[18].

Furthermore, owing to the far-reaching nature of break-up powers which even authorities in advanced jurisdictions are reluctant to wield, it is important that the Commission clarifies in the Rule that its power to order the break-up of a company is only an ultimate sanction, not an exclusive or exhaustive one, and that in instances where anti-competitive business practices are established, the Commission reserves the right to impose administrative fines in line with its powers under the Act, as opposed to ordering the break-up of the company. It is submitted that this clarification and retention of the power to fine would encourage the Commission to enforce the provision of section 128 ISA, than it otherwise would if the only sanction available is break-up of a company. Understandably, the Commission would be only minded to exercise this power in extremely limited circumstances, as experience in other jurisdictions show, and without an alternative less stringent sanction that the Commission can apply, offending firms may not be penalised for anti-competitive violations. Carrying out the above adjustments by way of Rules by the SEC would ensure that the provision of section 128 ISA is not serving merely a decorative function.

Although the introduction of competition provisions into the ISA 2007 is worthy of commendation by those who promoted it,[19] it does not close the gap created in the Nigerian

[18] Rules on Mergers (March 2010) New Rule/ Amendments to the rules of the securities and exchange commission <http://www.sec.gov.ng/rules-on-mergers_march-2010.html> accessed 3 June 2014.
[19] The new provisions in the ISA 2007 reflect, to a large extent, the new merger control provisions which were included in the draft Competition Bill. This is no surprise since Anthony Idigbe SAN, who was a member of the team of consultants for the draft Competition Bill, was also heavily involved in the drafting of the ISA

legal system by the lack of a competition law. It is arguable that if antitrust merger control in Nigeria lies with the SEC, there is an inherent insufficiency because the SEC is not well equipped for the implementation of competition law.

The object of the SEC is securities regulation, not competition enforcement. Thus, it may appear that something is lost on both fronts when the SEC becomes encumbered with the responsibilities of protecting the integrity of the capital market and acting as an antitrust watchdog in cases of merger control. Also, the competition regulation provisions in the ISA 2007 cannot significantly address the structural and behavioural issues in the market that occur due to the absence of a comprehensive competition regime in Nigeria. While merger regulation deals with the structural part of competition law, it is only one aspect of several that make up a complete competition law regime, which also takes into consideration regulation of cartels and restrictive agreements, control of dominant firms and abuses, and price regulation in areas of natural monopolies.

Furthermore, as monumental as section 128 ISA 2007 is, it is an ineffective provision if it remains hidden among the fine prints of the ISA 2007. As many businesses who would otherwise be deterred by the presence of this provision are not aware of its existence, SEC should embark on a massive sensitization and awareness- creation of the public and businesses of the new antitrust role conferred on it, and particularly of the availability to it of the tool of section 128. This awareness would achieve two aims. Firstly, it would alert small businesses and consumers of the possibility of lodging complaints to SEC and of obtaining justice for those situations where they have been victimized by the anti-competitive practices of big businesses in Nigeria which they have been enduring on the false belief that they do not have any remedy. Secondly, it would draw the existence of this radical break-up power of the SEC to the large dominant businesses in Nigeria and thus compel them to behave better in competition terms. In other words, the huge deterrent effect of section 128 is better realizable if businesses are aware of its existence.

#### *3.2.1.3 Effectiveness of Regulation of Competition Through the Merger Control*

2007. In fact, it appears that he drafted Part XII of the ISA 2007 and had used the opportunity afforded him to work on the ISA to try and fill the gap created in Nigeria's merger control regime by the insufficient consideration of competition issues.

***Provisions in the ISA 2007***

The creation of the provisions on competition and the conferment of competition powers on SEC were as a result of the failure of the Nigerian Government to enact a competition law in Nigeria. The panel that amended the ISA 1999 used the opportunity they had to revise the ISA to bring in competition law provisions into the Nigerian legal system. The assumption was that when the competition bill is passed to law and a proper competition body set up, SEC would no longer be involved in competition issues, and the new competition body will take over competition issues. Secondly, by having SEC familiarize itself with competition law and develop capacity in this area, when a competition body is created, the manpower and expertise developed within SEC, would form the foundation staff of the new competition body and thus assure it of an effective early start[20].

However, on assessment of the competition provisions of the Act, there are a number of features upon which it may be argued that the provisions would not substitute for the need to enact a competition law in Nigeria. This contention can be supported by the following arguments:

1) Traditionally, competition law is made up of a number of complementary aspects which have to exist together in a system for the effectiveness of each or any one of them to be felt. These aspects are: a) regulation of restrictive agreements and cartels; b) regulation of dominant positions and their abuse; c) regulation and control of prices in a natural monopoly market; and d) merger control. Merger control is only one aspect of an effective competition law system. Consequently, for merger control from a competition point of view to be meaningful, all the other aspects of a competition law system must also be operational and integrated with the merger control regime. Nigeria does not have any competition rules for all the other components. In the absence of any rules for the other competition law components as mentioned above, the idea of competition law provisions for mergers might be of limited effect in terms of the competition expectations.

2) With regards to competition, the model adopted in the ISA does not provide any guarantee to the yardstick of competition. As already reported, following the South

[20] Anthony Idigbe and Nnamdi Dimgba, 'Appraisal of Mandatory Takeover Offers under the Investments and Securities Act 2007' *Guardian Newspapers* (9 December 2009).

African model, SEC is to consider first whether the merger is likely to substantially lessen competition. If SEC were to end the analysis here, then one would have been glad that to a large extent, competition is going to be protected. However, the analysis does not end there. If SEC comes to the conclusion that the merger would substantially lessen competition, SEC would consider if the merger can contribute to technological efficiency or some other gain offsetting the harm to competition to be caused by the merger, and if so, shall approve the merger irrespective of the fact that it substantially lessens competition. In a case that the otherwise anti-competitive merger is not saved by any technological efficiency that it has, SEC is thirdly authorized to consider and if it deems fit approve the merger on 'substantial public interest grounds' by regarding to dynamics such as employment and regional development. Thus, the model is such that where there is conflict, other policy considerations such as industrial policy and regional development have to triumph over competition policy.

Thus, the design of the ISA 2007 is such that whatever competition law provisions that may have been improved upon in ISA 2007 are at risk of being cancelled out by the industrial policy elements in the merger control provisions of the Act.

3) The Act misconstrues the proper role of SEC. In other words, in cases where the competition provisions in ISA 2007 are not cancelled by the industrial policy elements, the question arises that does SEC really have the capacity to consider competition law issues? This question could easily be answered in the negative, in other words, it is doubtful that such capability exists within SEC, though this could easily be solved by SEC contracting the services of expert consultants in the field, and to steadily build the capacity in-house. However, in the period before any such capacity is developed in-house, it is fearful that because the Act provides alternative tests such as the competition policy, industrial policy and public interest tests, there will always be a predisposition for SEC to steer in the direction of more familiar territories of industrial policy and public interest to the disadvantage of competition concerns.

While SEC may be in support of the test of the 'effect of the merger on competition', the real test would be the other alternative tests, to wit, industrial policy and test of public interest. It may be argued that a reason why SEC might take the industrial policy or public

interest path predicted above could be as a result of the confusion of roles conferred upon it. The ISA 2007 combines the role of a competition authority and that of securities regulator in SEC in an unprecedented manner. In most jurisdictions, SEC or similar bodies in a merger never have to consider and determine the effect of mergers on competition. They traditionally have concerned themselves with the fairness aspect of the deal while on competition issues they have to defer to a separate body with the mandate to consider the competition law aspects of a merger.[21]

In cases where competition issues are brought up in the middle of consideration of a merger, a body such as SEC compulsorily have to stop proceedings until the appropriate competition law commission finishes its analysis and approves the merger, before SEC or its equivalents continue with the determination of the fairness aspects of the merger. For instance, In the UK, the Takeover Panel deals with the fairness issues while the OFT and Competition Commission (CC) deal with competition law issues. By the City Code on Takeovers and Mergers, once a merger is referred to the CC, the Takeover Panel automatically stays action. In South Africa, the Securities Regulation Panel (SRP) performs the role of the UK's Takeover Panel and deals with the fairness aspects of a merger while the CC and Competition Tribunal deal with the competition issues.

Further to the above, the Act seems to misconceive the proper role of SEC by virtue of some specific antitrust powers given to SEC outside the sphere of merger control. This is evidenced for example by the conferment of the power to break-up a company into separate entities on SEC by section 128 of the Act, which is an abuse of dominance power normally exclusively reserved for an antitrust/competition authority. I doubt if a securities regulator such as SEC is well equipped to play the role of an antitrust enforcer or competition authority in this way. This power of the Commission in section 128 referred to above to impose 'structural remedies' is far-reaching. The application of this type of provision poses major challenges to established antitrust/competition bodies the world over, and is likely to present greater challenges to SEC in the absence of any guide in the Act. In fact, in the history of antitrust, it is on about two occasions that such far-reaching structural remedies have been imposed. The first is in the early 20th century at the early stages of the antitrust movement when the US judiciary ordered the break-up of Rockefeller's Standard Oil into separate

[21] Nnamdi Dimgba, The Regulation of Competition through Merger Control: the Case under the Investment and Securities Act 2007' (paper presented at the NBA Section on Business Law Conference, Abuja, 16 April 2009)

entities because of its super-dominant position in the US economy. The second was in the early 21st century when the US judiciary ordered the break-up of Microsoft into separate entities, also on account of its super-dominant and domineering position in the IT sector of the US economy.

In view of the historic limitation to this sort of power in antitrust law, the innovation of section 128 ISA 2007 in a predominantly securities legislation, and the conferment of break-up powers on a securities regulator such as SEC is quite ambitious. In justifying the rationale behind this provision, Idigbe explains that the ISA 2007 sought to fill the vacuum created by the absence of a comprehensive legal framework for regulation of competition in the Nigerian economy, and that the expectation was that when the Competition Bill becomes law in Nigeria, the capabilities achieved by SEC would be transferred to the new CC, while SEC's true focus should now revert to the determination of the fairness of a merger transaction between the various shareholders.[22]

Based on the above analysis, there is a possibility that regardless of the competition law provisions in the ISA 2007, SEC would almost certainly carry on 'business as usual' pay no mind to the issue of competition, especially where it conflicts with its core function. Consequently, on the issue of competition promotion and protection, nothing changes, and at best, the presence of the competition law provisions in the ISA might be superficial and create a misconception of progress and a sense of false achievement in all those who have been advocating for the enactment of a competition law regime in Nigeria.

### 3.2.2 Competition Practices Regulations 2007 and Nigerian Communications Act 2003

In Nigeria, telecommunications facilities were first introduced by the colonial administration in 1886 and until the sector was deregulated in 1992, state monopolies controlled the sector. Deregulation of the sector was as a result of an urgent need to attract foreign direct investment and also the reality that the government could not continue to fund what had become a highly inefficient industry. The NCC was inaugurated in 1993 as an independent national regulator for the telecommunications sector.[23]The objectives of the NCC include 'the promotion of fair competition in the communications industry and the protection of

[22] Anthony Idigbe and Nnamdi Dimgba, 'Appraisal of Mandatory Takeover Offers under the Investments and Securities Act 2007' *Guardian Newspapers* (9 December 2009).
[23] Decree No 75 of 1992.

communications services and facilities providers from misuse of market power or anti-competitive or unfair practices' and one of its objects is to 'ensure fair competition in all sectors of the Nigerian communications industry'.[24]

The legislative and regulatory provisions governing competition and anti-competitive practices in the telecommunications sector in Nigeria include the Communications Act 2003 and the Competition Practices Regulations 2007, issued by the NCC pursuant to the Communications Act 2003. The Nigerian Telecommunications Act 2003 contains wide-ranging competition provisions giving the NCC 'exclusive competence to determine, pronounce upon, administer, monitor and enforce compliance of all persons with competition laws and regulations' with regards to the telecommunications industry.[25]

The provisions of section 91 (1) of the Communications Act 2003 prohibit licensees from engaging in conduct which has the purpose or effect of substantially lessening competition in any aspect of the Nigerian communications market. Section 91(2) permits the Commission to publish guidelines or regulations from time to time, which clarify the meaning of 'substantial lessening of competition', and section 92(4) permits the Commission to direct any licensee in a dominant position to cease conduct which has or may have the effect of substantially lessening competition in any communications market, and to implement appropriate remedies.[26] The Regulations identify the following conduct as substantially lessening competition:[27]

- 'failing to supply interconnection or other essential facilities to a competing licensee within 30 days of a request and on reasonable conditions, except under circumstances that are objectively justified based on supply conditions (for example, failure to supply based on a shortage of available facilities);

- discriminating in the provision of interconnection or other communications services or facilities to competing licensees, except under circumstances that are objectively justified based on supply conditions (for example, discrimination based on differences in the costs of supply);

[24] <www.ncc.gov.ng> accessed 18 May 2014.
[25] Nigerian Communications Act No 19 of 2003, s 90.
[26] Competition Practices Regulations 2007, s 4.
[27] ibid s 8.

- bundling of communications services whereby the licensee requires, as a condition of supplying a service to a competing licensee, that the competing licensee acquire another service that it does not require;

- offering a competing licensee more favourable terms or conditions that are not justified by cost differences if it acquires another service that it does not require;

- pre-emptively acquiring or securing 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;

- supplying communications services at prices below long-run average incremental costs or such other cost standard as adopted by the NCC;

- using revenues or the allocation of costs from one communications service to cross-subsidize another communications service, except where such cross-subsidy is specifically approved by the NCC, including by approval of tariffs or charges for the relevant communications services;

- failing to comply with interconnection or facilities access obligations, interconnection regulations and any other interconnection or access terms specified or approved by the NCC, or any interconnection or access-related decisions, directions or guidelines of the NCC;

- performing any of the following actions, where such actions have the effect of impeding or preventing a competing licensee's entry into, or expansion in, a communications market:

    - deliberately reducing the margin of profit available to a competing licensee that requires wholesale communications services from the licensee in question by increasing the prices for the wholesale communications services required by that competing licensee, decreasing the prices of communications services in retail markets where they compete or both;

    - requiring or inducing a supplier to refrain from selling to a competing licensee;

- adopting technical specifications for networks or systems to prevent interconnection or interoperability with a network or system of a competing licensee deliberately;

- failing to make available to competing licensees on a timely basis technical specifications, information about essential facilities or other commercially relevant information that is required by such competing licensees to provide communications services and which is not available from other sources;

- using information obtained from competing licensees for purposes related to interconnection or the supply of communications facilities or services by the licensee in question, to compete with such competing licensees; and

- any failure by a licensee to comply with any decision, rule, direction or guideline issued by the NCC regarding either prohibited or required competitive practices'.

It is vital for the NCC to take into consideration any matter that it is satisfied is applicable. This includes, global trends in the relevant market and the effect of the market behaviour on barriers to entry into the market. Furthermore, section 16 of the Regulations provides that in determining whether a licensee is in a dominant position, the NCC may consider a range of market circumstances or criteria, including:

- 'The market share of the licensee, determined by reference to revenues, numbers of subscribers or volumes of sales;

- The overall size of the licensee in comparison to its competitors;

- The control of network facilities or other infrastructure;

- The absence of buying power or negotiating position of customers or consumers;

- The ease of market entry; and

- The rate of technological or other changes in the market.'

The Regulations also provide for the presumption of a dominant position in relation to any licensee whose revenues in a specific communications market exceed 40% of the total gross revenues of all licensees in that market. The fact that a licensee occupies a dominant position is not unlawful, as long as the licensee does not abuse its dominant position. An abuse of dominant position results from the behaviour of the licensee which has or may have the result of substantially lessening competition in one or more communications markets.

According to section 34 of the Regulations, if the NCC comes to a determination that the actions of a licensee is anti-competitive, as an addition to any remedy provided for under the Communications Act (such as an injunction against the licensee), the NCC may::

- 'instruct one or more persons mentioned in the direction to: (i) cease the actions or activities specified in the direction immediately or at a time prescribed in the direction, and subject to such conditions as are prescribed in the direction; and/or (ii) make identified changes in actions or activities specified in the direction as a means of eliminating or reducing the abusive or anti-competitive impact;

- require the licensee involved in the abusive actions or anti-competitive practices and the persons affected by such actions, activities or practices to meet and attempt to determine remedies to prevent, eliminate or compensate for such actions, activities or practices, and to resolve any remaining dispute;

- require the licensee to pay compensation to persons affected by its abusive actions or anti-competitive practices;

- require the licensee responsible for the abusive actions or anti-competitive practices specified in the direction to publish an acknowledgement and apology for such actions or practices in one or more newspapers of general circulation, in such a form, at such times and otherwise as the NCC specifies in the direction; and

- require the licensee to:

    - provide periodic reports to the NCC;

    - assist in determining whether the actions or practices are continuing; and

    - determine their impact on communications markets, competing licensees and

consumers'.

Furthermore, The Communications Act 2003 and the Regulations also prohibit licensees from anti-competitive business practices such as conditional sales where the basis for the supply of a good or service is that the customer must obtain or not obtain another service from a licensee, market sharing, rate fixing and also boycotts. Although this Act takes into consideration competition concerns, there is still a gap in the implementation of the provisions and although the provision has been in force since 2003, there are very few matters that have been tried. This may be due to lack of man power or understanding of competition law

#### *3.2.2.1 Mergers, Acquisitions and Joint Ventures*

Competition concerns should be taken into consideration in the case of a merger, acquisition, or joint venture arrangement, since the provisions of various communications licences made pursuant to the Communications Act 2003 have specific provisions on such arrangements. The Regulations (in particular, the unified access service, digital mobile, national long-distance operator, second national carrier, fixed wireless access and private network links licences) require that the NCC be made aware of certain changes in licensee shareholding before the transfer of such shareholding.

For instance, the licence regulating the actions of the second national carrier calls for the licensee to notify the NCC if the equity of a shareholder (held directly or indirectly through a nominee, associate or trustee) goes beyond 10%[28] of the authorized or paid-up share capital of the licensee. Likewise, businesses that hold fixed wireless access licences are mandated to inform and get the prior authorization of the NCC in cases of any alteration in the control of any of the shares in the licensee. Generally, a licensee is should provide 30 days' notice of arrangements anticipated to get its shares listed on any stock exchange, and also any arrangement for dealing in shares on an unlisted exchange. The NCC is authorized to take steps to stop monopolies or cross-ownerships.

The applicable test for NCC appraisal of merger, acquisition, and joint venture arrangements is: Do the arrangements have the aim or result of substantially lessening competition in the communications sector? The Regulation authorizes the NCC to make a ruling that there is a

[28] Competition Practices Regulations 2007, s 27(a).

substantial lessening of competition when there is 'a degree of interference with competition that results in identifiable injury to competitors or consumers'.[29]

It should be noted that the requirements set out in Section118 ISA 2007 are also applicable when a telecommunications sector merger or acquisition is being considered. The ISA 2007 provides that every merger, acquisition or business combination between or among companies shall be subject to prior review and approval by the SEC.[30] The SEC rules define an 'acquisition' as 'the takeover by one company of sufficient shares in another company to give the acquiring company control over the other company'. The SEC will give its approval only if it is satisfied that: (i) the acquisition is unlikely to cause substantial restraint of competition or tend to create a monopoly in any line of business; and (ii) the use of such shares by voting or granting proxies or otherwise shall not cause substantial restraint of competition or tend to create a monopoly in any line of business enterprise.

It is clear from the regulations that the interests of consumers are vital to the NCC. For example, regulation 6 provides that the impact on consumers in terms of choice and price and the degree of interference with competition that may result in identifiable harm to consumers are key factors that must be taken into account in determining whether there has been substantial lessening of competition. The Regulation provides that a breach of a provision may result in a fine, sanction or penalty as determined under the Enforcement Process Regulations 2005,[31] and that an abuse of dominant position or anti-competitive business practices falling within the prohibitions contained in the Communications Act, entitle the NCC to issue a 'cease and desist' order, take remedial action, pay compensation to those who have suffered due to the activity in question and issue a public apology in a newspaper the NCC selects.[32]

#### *3.2.2.2 Securities and Exchange Commission (SEC) Approval*

The provisions of the ISA 2007 which have already been analysed above are relevant where a telecommunications sector merger or acquisition is being considered. Section 118 of the Act provides that every merger, acquisition, or business combination between or among

[29] CPR 2007, s 27.
[30] ISA 2007, s 118.
[31] Reg 33.
[32] Reg 34.

companies shall be subject to prior review and approval by the SEC. The SEC rules define an 'acquisition' as 'the takeover by one company of sufficient shares in another company to give the acquiring company control over the other company'. The SEC will give its approval only if it is satisfied that: (i) the acquisition is unlikely to cause substantial restraint of competition or tend to create a monopoly in any line of business; and (ii) the use of such shares by voting or granting proxies or otherwise shall not cause substantial restraint of competition or tend to create a monopoly in any line of business enterprise.

### 3.2.3 Electric Power Sector Reforms Act 2005

Before the enactment of the Electric Power Sector Reform Act 2005, the Federal Government of Nigeria was responsible for regulation and operation in the power sector. Regulation of the sector was carried out through the Federal Ministry of Power (FMP) while operations through the NEPA,[33] a state-owned enterprise in charge of power generation, transmission, and distribution.

To address the concerns of NEPA's inadequate infrastructure and poor operational and financial performance, the Nigerian Government revised the Electricity and NEPA Acts in 1998 to do away with NEPA's monopoly and boost private-sector participation. The amendments, however, were not far-reaching. This informed the government of the need to undertake complete policy, legal, and regulatory reforms. The Electric Power Reform Implementation Committee (EPIC) was initiated by the BPE and brought about the FEC approving the National Electric Power Policy in September 2001, which recommended the institution of a sector regulator, the privatization of the electric power sector, a market trading design, and new rules, codes, and processes.

The National Electric Power Policy 2001 stipulates the reform programme, while the Electric Power Sector Reform Act provides the legal reasoning for the unbundling of NEPA, the creation of successor companies, and the privatization of the latter. The Act further makes provision for the development of a competitive electricity market, the establishment of a

[33] The Act establishing NEPA as a statutory body was repealed by the Electric Power Sector Reform Act and a public limited liability company known as Power Holding Company of Nigeria Plc was incorporated in its place in July 2005 <http://www.ip3.org/ip3_site/the-nigerian-electric-power-sector-reform-establishing-an-effective-licensing-framework-as-a-tool-for-attracting-investment.html?print=1&tmpl=component#sthash.NOVpRlwf.dpuf> accessed 18 May 2014.

committed regulatory body, and the institution of a rural electrification agency.

The ultimate goal of the electric power policy statement is to ensure that Nigeria has an electricity supply industry (ESI) that can cater to the requirements of the people in the 21st century. This entails a necessary reform at all levels of the industry. The Nigerian ESI must be able: to provide for reasonable demands for electricity all over the country; to update, improve and enlarge its coverage; and to give support to national economic and social development, as well as relations with neighbouring countries.

The main concern is to create well-organized and competent market structures, within vibrant regulatory frameworks, that inspire more competitive markets for electricity generation and sales, which, at the same time, have the ability to appeal to investors in the private sector and also ensure comprehensive economic development of the system. Thus, the objectives of the reform include (i) the handover of administration and financing of the successor firm's tasks and operations to the private sector; (ii) the creation of an autonomous and active regulatory commission to administer and monitor the industry; and (iii) government concentration on policy creation and long-term growth and development of the industry. This will lead to (i) improved accessibility to electricity services; (ii) enhanced efficiency, affordability, dependability, reliability, and quality of services; and (iii) heightened investment in the sector to inspire economic advancement.

The government established the Power Holding Company of Nigeria (PHCN) and subsequently unbundled it into eighteen (18) successor companies, including 6 generation companies, 1 transmission company and 11 distribution companies. The power sector has also been deregulated, bringing about private-sector involvement in the generation sector and the operation of Independent Power Plants in Nigeria. The Nigerian Electricity Regulatory Commission (NERC) was also inaugurated as the sector regulator in line with the Reform Program.

One of the key thrusts of the Government's economic reform strategy[34]was to guarantee the comprehensive overhaul of the power sector, which led to the setting up of EPIC, a working

[34] The Government instituted a National Economic Empowerment and Development Strategy (NEEDS) to fast track economic growth through people empowerment, promotion of private enterprise and improvement of public sector service Electric Power Sector Reform: <http://www.ip3.org/ip3_site/the-nigerian-electric-power-sector-reform-establishing-an-effective-licensing-framework-as-a-tool-for-attracting investment.html?print=1&tmpl=component#sthash.NOVpRlwf.dpuf> accessed 13 May 2014.

group[35] specifically focusing on power and the adoption of the National Electric Power Policy which outlined the structure for the power sector reform in Nigeria.

The putting into practice of the Electric Power Sector Reform has been a key priority for the Nigerian Government. For over two decades the stalled expansion of Nigeria's grid capacity and the high cost of diesel and petrol generation have slowed the growth and development of the Nation's industries. Thus, The Federal Government was resolute to make the necessary changes to the ownership, control, and regulation of the sector as laid out in the National Electric Power Policy (2001) and enacted in the Electric Power Sector Reform (EPSR) Act 2005 already examined above. The power sector reform was carried out in different stages starting with the creation of the PHCN that is the holding company of the assets of NEPA. As previously mentioned, the PHCN was subsequently unbundled into 18 successor companies which led the way for the privatization program. On 30 September 2013, the Federal Government formally handed over the unbundled PHCN to private organizations that bought it.

The regulatory body for the power sector is The Nigerian Electricity Regulatory Commission (NERC). The NERC was established under the Nigerian EPSR Act 2005. NERC has been set up as an independent and self-funding sector regulator whose primary functions include:[36]

i. Promote competition and private-sector participation, when and where feasible.

ii. Establish or approve appropriate operating codes and safety, security, reliability, and quality standards.

iii. License and regulate persons engaged in the generation, transmission, system operation, distribution, and trading of electricity.

iv. Approve amendments to the market rules and monitor the operation of the electricity

[35] Electric Power Sector Reform Implementation Committee (EPIC) was set up to recommend measures for sector reform, promote the policy of liberalization, competition, and private sector-led growth and superintend the drafting of a new power sector bill <http://www.ip3.org/ip3_site/the-nigerian-electric-power-sector-reform-establishing-an-effective-licensing-framework-as-a-tool-for-attracting-investment.html?print=1&tmpl=component#sthash.NOVpRlwf.dpuf> accessed 13 May 2014.

[36] Ifey Ikeonu, 'The Nigerian Electric Power Sector Reform: Establishing an Effective Licensing Framework as a Tool for Attracting Investment' <http://www.ip3.org/ip3_site/the-nigerian-electric-power-sector-reform-establishing-an-effective-licensing-framework-as-a-tool-for-attracting-investment.html> accessed 14 May 2014.

market.

Before the recent privatization of the electric power industry in Nigeria, the status quo in the electric power sector in Nigeria was highly problematic from a competition point of view, and it was clear that a sole operator was incapable of meeting the demand for electric power services in Nigeria. By introducing competition, this huge demand will not only be satisfied, it will also bring about development in terms of better services and quality, enhanced choice overall and lower prices.

With the entrance of private companies in the power sector, there is an increased likelihood of market abuses; thus, consumers need to be protected from these private players who are fundamentally profit-driven. However, because the Nigerian Competition Bill has not been passed into law, competition-related matters in the power sector are regulated by the NERC. The EPSR Act authorizes the NERC to monitor the Nigeria ESI with regards to its potential for additional competition and to monitor electricity businesses and markets to determine whether there is or may be an anti-competitive market behaviour and an abuse of market power, and where such abuse exists, to take the suitable steps which include issuing a cease order and imposing fines.

Nigeria seems to be embracing more of sector regulation of competition rather than accelerating plans on the pending Competition Bill. This is made clear from other existing laws such as the SEC regulates competition in of mergers and acquisitions as provided under the ISA 2007 while the NCC regulates competition in the telecommunication sector. It is, however, arguable that although sector regulation may be needed occasionally, predominantly for problems peculiar to that sector, sector regulation may make the government less inclined to enact the pending Competition Bill, and lack of a competition law will leave many vital sectors unregulated. Additionally, sector regulation may lead to conflict and ‘over-regulation’ for certain sectors in the event that competition law finally comes into force. To this end, in order to deal with issues of possible conflict between sector regulators and the Commission created by the Competition Bill, there is a provision in the federal competition bill that the Commission created under the Bill will coordinate the activities of sector regulators which may have an impact competition with a view to maintaining consistency in policy execution.

Although the privatization of the electricity industry in Nigeria has many advantages, more

harm will be done if these newly emerging private companies are not properly regulated. It is thus pertinent for Nigeria to enact and implement competition law as the basic legal framework which other sector regulators can build on.

### 3.3 Anti-competitive Business Practices in Nigeria – Cartels

The absence of competition policy results in a reduction of consumer welfare, mainly through the raising of prices and the restriction of output. These practices harm diversity and innovation in the markets. A brief examination of cartels will be undertaken to show the impact of anti-competitive behaviour on the Nigerian economy as a whole.

#### 3.3.1 Cartels

This section looks at general cartel behaviours and efforts that have been made to tackle it outside Nigeria. The Oxford English Dictionary defines cartels as 'an association of manufacturers or suppliers with the purpose of maintaining prices at a high level and restricting competition'.[37] Another concise definition of cartels was given by the former UK Office of Fair Trading (OFT)[38] where a cartel is described as 'an agreement between businesses not to compete with each other'.[39] The agreement is typically secret, oral, and mostly informal. Normally, parties to the cartel agree on: prices, production levels, concessions, credit agreements, which customers they will supply, which areas they will supply, and who should win a contract (bid rigging). These agreements are prohibited by the UK Competition Act 1998 and Article 101 of the Treaty of the Functioning of the European Union (TFEU).[40] In addition, under the provisions contained in section 188 of the UK

[37] Oxford Dictionaries, 'cartel' <http://www.oxforddictionaries.com/definition/english/cartel> accessed 18 February 2014

[38] As part of the UK Government's reforms to the arrangements for competition, consumer protection, and consumer credit regulation, the Office of Fair Trading (OFT) closed on 31 March 2014, and its work and responsibilities passed to a number of different bodies.

[39] OFT, 'What is a cartel?' <http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/cartels/what-cartel#.U065sahdUs8> accessed 18 May 2014

[40] Formerly EC Treaty, art 81. It provides: 'The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations

Enterprise Act 2002,[41] it a criminal offence for individuals to dishonestly take part in certain specified cartels, essentially those that involve price fixing, market sharing, and limitation of production or supply or bid rigging.

Usually cartels involve an agreement between businesses not to compete with one another and can involve goods or services at the manufacturing, distribution or retail level. Industries form cartel agreements to control sales and prices. These restraints are also known as anti-competitive, antitrust, monopolies, trade combinations, restrictive trade practices, restraint of trade or competition law. Generally cartels are formed by the industrial undertakings in the same line of business. The basic characteristic of cartel is that the combining enterprises concentrate on production according to the limits of output fixed by the cartel keeping in view the market conditions and to restrain or regulate the distribution of output for maintaining returns or the selling price of certain commodities by restrictive trade or marketing practices. Such trade combinations between firms have the potential of restricting competition.

Businesses may encourage cartels because there are various advantages but the law discourages cartels as they are presumed to be against public interest. Cartels are a damaging form of anti-competitive behaviour. Their aim is to increase prices by eliminating or decreasing competition and as a result, they openly affect the purchasers of the goods or services, whether they are public or private businesses or individuals. Cartels also have a damaging effect on the wider economy as they remove the incentive for businesses to operate efficiently and to innovate. The purpose of cartels is to preserve the businesses' individual positions in the market and to attain pricing stability through price increases. Thus, the parties to a cartel intentionally set out to tamper with free competition and to act in its place to protect the wealth of the industrial group as a whole. Such cartels reduce social welfare, generate allocative inefficiency, and transfer wealth from consumers to the partakers in the cartel. The creation and operation of a cartel is easier for firms operating in an oligopolistic market, where each firm's profits are strongly dependent upon the course of action chosen by its competitors.

In a report by the OECD, it was estimated that cartels cost society billions and stop

which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'

[41] As amended by s47 The Enterprise and Regulatory Reform Act 2013.

improvements sought to be realized through global market liberalization. The typical price increase resulting from price fixing is projected to come to about 10% of the selling price and the equivalent decrease in productivity to be as high as 20%. The report stated:

> Cartels harm consumers and have pernicious effects on economic efficiency. A successful cartel raises prices above the competitive level and reduces output. Consumers (which include businesses and governments) choose either not to pay the higher price for some or all of the cartelized product that they desire, thus foregoing the product, or they pay the cartel price and thereby unknowingly transfer wealth to the cartel operators. Further a cartel shelters its members from full exposure to market forces, reducing pressures on them to control costs and to innovate. All of these harm efficiency in a market economy.[42]

Furthermore, the European Commission has adopted numerous cartel decisions. In *Cartonboard*,[43] the Commission fined 19 producers of Cartonboard for their participation in a price-fixing cartel. The producers had met in secret, but regularly in order to plan and implement uniform and regular price increases within the community, to plan and coordinate price incentives in advance, to freeze market shares, to control output, and to organize the exchange of confidential information. In the *Polypropylene*[44] cartel case, the Commission fined producers of polypropylene approximately €57m for their participation in an agreement and/or concerted practice to implement price initiatives, to set target prices, and to operate production and sales quotas.

In the US, hard-core cartel activity is prosecuted criminally and since the mid-1990s the Department of Justice has concentrated its enforcement resources on international cartels that victimize US consumers and businesses. Huge fines are now imposed on corporations, and executives are sent to prison for long periods.[45] An example of this can be seen in *Hoffman-la Rouche*,[46] where the United States Supreme Court heard a case arising out of the activities of a price-fixing cartel in the vitamins market. The

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[42] OECD, 'Hard Core Cartels - Implementation of the 1998 OECD Recommendation' (2006) 8 OECD J of Competition Law and Policy 7-54.
[43] Case C-94/601 *Cartonboard* [1994] OJ L243/1, [1995] 5 CMLR 547.
[44] *Polypropylene Cartel* [2001] OJ L152/24, [2001] 5 CMLR 322.
[45] Harry First, The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law, 68 Antitrust Law Journal 715-19, (2001)- gives a description of the penalties against cartel participants.
[46] Case 85/76 *Hoffman-La Rouche v Commission* [1979] ECR 461, [1979] 3 CMLR 211, para 39., F *Hoffman-LaRoche Ltd v Empagran SA*, 124 S.Ct. 2359, 159 L.Ed.2d 226 (2004). The case that eventually made its way to the U.S. Supreme Court was a private action, initiated by foreign vitamin distributors who had purchased the cartelized goods in Australia, Ecuador, Panama, and Ukraine see 124 S.Ct. at 2363-64. Domestic purchasers of the vitamins had consolidated their claims into a separate lawsuit

defendants were a number of major international pharmaceuticals companies[47] that had fixed prices for bulk vitamins and vitamin pre-mixes in markets around the world[48] this organization was fined $500m in the US in 1999 for its participation in a vitamins cartel by dividing up the world market and price fixing for different types of vitamins, which had gone on for as long as ten years. The defendants also agreed to pay $1bn dollars in damages to customers. The cartel, which has been described as "probably the most economically damaging cartel ever prosecuted under US antitrust law," is estimated to have affected over $5 billion of commerce worldwide.[49]

### 3.3.2 Examples of Notable Cartels

Major sectors of the Nigerian economy were regulated and controlled by government agencies. These offices are created by an Act of the National Assembly or military orders which require amendments before any other contender can be permitted into the sector. Some of these sectors are Nigerian Telecommunications (NITEL), the National Electric Power Authority (NEPA), and the Nigerian National Petroleum Corporation (NNPC). With the recent liberalization of these major key sectors, it may be contended that consumers now enjoy better services. For example, the introduction of Global Satellite Mobile Systems was a welcome positive occurrence due to the unreliable character of NITEL. Nevertheless, the question arises as to what checks and balances are put in place to curb any excesses of the new entities which were created as a result of market liberalization? What measures are put in place to prevent anti-competitive agreements amongst these industries that may have formed cartels?

One of the most severe anti-competitive behaviour in major markets in Nigeria is implicit collusion and cartels. These anti-competitive conducts are most visible in commodities, manufacturing, GSM telecommunication and petroleum products marketing markets. The rise of cartels in Nigeria may have been overlooked owing to the non-existence of enforcement frameworks or criminal regimes to check the excesses of these cartels. Consequently, there are very few reported cases on such abusive market behaviours. A few

[47] These companies included F. Hoffman-La Roche, Rhone-Poulenc, Daiichi Pharmaceutical, and BASF
[48] *F Hoffman-LaRoche Ltd v Empagran SA*, 124 S.Ct. 2363
[49] Harry First, The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law, 68 Antitrust Law Journal 711, 712 (2001). See also EU Fines Eight Companies For Roles in Vitamin Cartels, 81 Antitrust & Trade Regulation Reports (BNA) 483, 483 quoting Mario Monti, who described it as 'the most damaging series of cartels the [European C]ommission has ever investigated.'

of these cases are analysed in this chapter. Some industries in Nigeria, where cartels and anti-competitive market practices exist and would benefit from the enactment of a competition law include the following sectors;

#### *3.3.2.1 The Aviation Sector*

With regard to the aviation industry, it is noteworthy that in 2011, British Airways paid at least $540m in the EU and US as fines and compensation to passengers in settlement deals for colluding with Virgin Atlantic Airlines to fix prices in long-distance flights (which included to Nigeria) and cargo charges between 2000 and 2006. The two airlines colluded to regularly increase passenger fuel surcharges (PFS), which was a disguise for the increase in ticket prices. Virgin Atlantic did not get fined because it had entered the leniency programme; hence it received immunity under the leniency rules.[50]

Taking a prompt from these investigations and their outcomes, in May 2011, the Director General of the NCAA commenced investigations against British Airways and Virgin Atlantic airlines, accusing these airlines of collusion, and deceptive and anti-competitive conduct, resulting in adverse effects and exploitation of air travellers in Nigeria.[51] Accordingly, the NCAA argued that, in effect, the conduct of the 2 airlines suppressed choice by the consumers. If there was no collusion, the competition for the consumers would have seen both airlines working competitively to undercut the other to secure more customers. Competition between the airlines would have been to the advantage of the consumers. They further argued that although a measured analysis with respect to direct harm to the local market is not needed to establish this violation, it is obvious that there is difficulty for the local airline to develop their business successfully on the Lagos to London route.[52]

The NCAA found that Nigerian consumers were exploited, in the light of the unfair and deceptive operation of the PFS. 'The NCAA therefore consulted with both Virgin Atlantic

[50] In 2006, Virgin Atlantic entered the leniency programme of the USDoJ and the OFT and admitted to communications between employees at VAA and BA regarding fuel surcharges. News of an investigation by the UK and US competition authorities led to the filing of multiple class actions in the United States. These were consolidated into *In re International Air Transportation Surcharge Antitrust Litigation (MDL No. 1793 N.D. Cal)* in which case, plaintiffs alleged that collusion between VAA and BA on PFS led to inflated airfares. However, as a condition of the leniency programme VAA had entered into, it was spared monetary penalty.
[51] NCAA letter to Virgin Atlantic dated 4/4/11, Re: Collusion, Deceptive and Anti-Competitive Conduct by British Airways and Virgin Atlantic Airways resulting in Adverse Effects and Exploitation of Air Travelers in Nigeria.
[52] NCAA letter to Virgin Atlantic dated 14/11/11, Re: NCAA findings on investigation into alleged collusion, unfair, deceptive and or unfair methods of compensation by British Airways and Virgin Atlantic Airways

and British Airways on appropriate compensation for affected Nigerian air travellers. However, both airlines did not concede to any compensation to Nigerian consumers. Non the less, both airlines had settled consumer litigation on the same subject in the US and UK markets where yields are not as high as the Nigerian market and who ordinarily have access to the lowest available fares on comparable travel unlike Nigerian consumers'.[53]

The violation was even more flagrant seeing as Virgin Atlantic and British Airways are effectively a duopoly controlling about 90% of the market. As a result of this duopoly, Nigerian airlines have limited chances of survival. Consequently, The panel set up by the agency in their final report recommended fines of $135m for British Airways and $100m for Virgin Atlantic for colluding to fix prices, thereby exploiting Nigerian consumers and denying the government accruable taxes.[54]

However, in the absence of clear-cut competition law proceedings, the issue became political. Furthermore, the Senate Committee carried out an investigation on the allegations and recommended that the two airlines should pay the fines, having found them to be engaged in abusive pricing practices. The Senate Committee further confirmed that the Nigerian Government was losing about NGN 3.7m every year to the abusive pricing practices of the two airlines.

Section 30(4)(i) of the Nigerian Civil Aviation Act 2006 authorizes the NCAA to investigate and determine upon its own initiative whether any air carrier has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation and or the sale of tickets thereof. Under section 27(1) of the same Act,

> … the Authority may investigate any occurrence after due notice is given to the person(s) concerned. If the Authority is satisfied after such investigation that such person(s) have, is or are violating any provisions of the Act, regulations, rules or orders, as the case may be, it shall by order require the person(s) to take such action as may be necessary in the opinion of the Authority to prevent further violation of the provisions of the Act, regulations, rules or orders.

The NCAA complied strictly by notifying the airlines of its investigative process. Understanding that part of the period of the subject of investigation was between 2004 and

[53] NCAA letter to Virgin Atlantic dated 14/11/11, Re: NCAA findings on investigation into alleged collusion, unfair, deceptive and or unfair methods of compensation by British Airways and Virgin Atlantic Airways.
[54] The NCAA found that the PFS caused a loss and distortion that has a negative impact on the revenue that should accrue to tax authorities because PFS was not subject to tax imposition.

2006, resort had to be made to s7(2)(j)[55] of the now repealed NCAA (Establishment etc) Act No 49 of 1999 that conferred similar powers on the Authority. However, in concluding this case, a 'judicial panel' was set up to review the case. The chairman of the panel agreed that:

> The scheme under which Virgin Atlantic and British airways colluded to introduce PFS on their ticketing on air travelers to and from Nigeria is dishonest, exploitative and unbecoming of the two airlines given the impression which their standing in the aviation industry conveys. It is extremely disappointing.[56]

The panel however, overruled the decision of the NCAA on the basis that the NCAA Act of 1999 which was the law in force when the abuse ensued (2004–2006) did not provide for fines but only authorized the NCAA to make 'cease and desist orders'. Consequently, due to the weak legal framework, Nigeria lost millions of dollars in fines and possible refunds to customers. This case brings to light that the old legal saying that 'Nothing is an offence except that which is created by law' still subsists.

#### *3.3.2.2 The Nigerian Cement Industry*

In the Nigerian cement industry, the backward integration policy of the government has led to enormous investments, but has also left the sector in the hands of several industrialists. A subjective indication of anti-competitive business practice in the cement industry is in the fact that the cost of cement in Nigeria is alleged to be four times higher than the global price. Further, it is alleged that one or two businesses fix cement prices in Nigeria. In the past, the dominant market operator in the cement industry, Dangote Cements, threatened to close down one of its plants if the government did not stop a competitor (Ibeto Group) from importing cement into the country because, according to Dangote, the market was saturated.

In a market where there is competition, saturation would lead to a reduction in price. However, in a market where oligopoly or monopoly exists, the dominant supplier(s) would take steps to limit supply to maintain artificially high prices. This is the situation that

[55] Nigerian Civil Aviation Authority Act No 49 of 1999, s 7(2)(j) provides: 'Notwithstanding the provisions of subsection (1) of this section, the authority shall investigate and determine upon its own initiative or upon the receipt of a complaint by Nigerian air carrier, foreign air carrier or air travel agent has been or engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale of tickets thereof and order such Nigerian air carrier, foreign air carrier or travel agent to cease and desist from such practices or methods of competition.'

[56] Judgement of GA Oguntade JSC(Retd) in the Appeal Panel between *Virgin Atlantic Airways v Nigerian Civil Aviation Authority.*

triumphs in the Nigerian cement industry. This indicates the part government trade and industrial policy play in generating distortions in the market and placing an encumbrance on consumers and the economy at large.

Competition policy and law would guarantee that interventionist policies for industrial advancement and growth do not place unnecessary burden on consumers and the economy. It would embrace an empirical approach to find a balance between the industrial policy objectives and the necessity of maintaining competition. However, in the absence of competition law, it is not difficult for vested interests to take over genuine policy objectives and manipulate them for the benefit of a number of individuals.

Dangote, Nigeria's largest importer of bulk cement, has four bagging plants in the country[57] with a combined production of 3 million MT per annum. 'With its influence on the government, Dangote Cement was continually able to take cement import quotas of between 6.5 and 9 million MT per annum. The high import quota allowed Dangote to limit what was accessible to other operators. Dangote regulated how much of their cement import quota to use and when to use it and so has successfully been manipulating market prices. Dangote Cement did not only oppress other cement producers, but also scared away prospective entrants into the cement industry with bogus claims. These claims included wild production and expansion figures that were never met, but were accepted by the government as a basis for the issuance of import quotas'[58]

#### *3.3.2.3 The Nigerian Telecommunications Industry*

The Nigerian telecommunication industry has experienced tremendous changes in recent years. The liberalization and deregulation of the nation's telecommunication industry and the economy as a whole has prompted the entry of many new players into this sector. Taking advantage of the opportunities provided by the deregulation, many local and foreign investors of different sizes and strength have sought to create a niche for themselves. The level of activities in this sector has increased significantly over the past ten years and it is envisaged that this will not abate soon. The environment is therefore becoming more

[57] The Lagos Cement Terminal at Apapa Port, the Aliko Inland Terminal at Lagos, one in Onne/Port Harcourt and one in NPA Area 1 Port Harcourt

[58] Competition regime scenario in Nigeria Preliminary Country Paper (PCP), Nigeria, 2008, <http://www.cuts-ccier.org/7up4/pdf/PCP-Nigeria.pdf> accessed 23rd May 2014.

competitive than before while some of the leading telecom companies have started expanding their operations overseas especially into the West African sub-region to compete with long established international players.

The relative competition witnessed in the telecoms sector is because the sector is regulated by the NCC, which has the mandate to enforce competition rules in the sector.[59] The NCC has taken measures in this regard in terms of having a guideline for interconnectivity, making a determination of dominance which led to the NCC issuing directives to MTN (the dominant operator in the voice-call market) to eliminate disparate tariffs between calls within its network and those going outside its network. The mobile number portability scheme is another measure to promote competition. The NCC's functions and duties are set out in s4 NCA 2003. These functions include the expedition of investments in and entry into the Nigerian market for the provision and supply of communications services, equipment and facilities (section 4(a)), the protection and promotion of the interests of consumers against unfair practices including but not limited to matters relating to tariffs and charges and the availability and quality of communications services, equipment and facilities (section 4(b)), and the promotion of fair competition in the communications industry and protection of communications services and facilities providers from the misuse of market power or anti-competitive and unfair practices by other service or facilities providers (section 4(d)).

Section 90 of the Act states that the Commission shall have 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. Section 90(1) of the Act empowers the Commission to determine whether a licensee is in a dominant position in any aspect of the Nigerian communications market. Further, s90(23) states that the Commission may publish guidelines and regulations which clarify how it shall apply the test of "dominant position" to licensees. These guidelines may specify the matters which the Commission may take into account in determining dominance, including-

a) the relevant economic market;

[59] Section 1(e) NCA 2003.

b) global technology and commercial trends affecting market power;

c) the market share of the licensee;

d) the licensee's power to make independent rate setting decisions;

e) the degree of product or service differentiation and sales promotion in the market; and

f) any other matters which the Commission is satisfied are relevant.

The Act, under section 92 (4) also authorizes the Commission to direct a licensee in a dominant position in the communications market to cease a conduct in the market which has or may have the effect of substantially lessening competition in any communications market and to implement appropriate remedies.

In 2007, the NCC, as empowered by the Act, published its Regulations on Competition Practices (CPR (2)) which:

a) provide further guidance on the standards and procedures which the Commission will apply in determining whether particular conduct constitutes substantial lessening of competition for the purposes of the Act;

b) clarify what agreements or practices the Commission will find to be anti-competitive, and so prohibited under the Act;

c) provide further guidance on the standards and processes which the Commission will apply in determining whether a Licensee has a dominant position in one or more communications markets;

d) clarify what conduct the Commission will find to be an abuse of dominance and subject to a "cease conduct" direction under the Act.

In June 2012, the Commission commenced the Study on the Assessment of the Level of Competition in the Nigerian telecommunications Industry The outcome of the study was published on the NCC portal in a document titled 'Determination of Dominance in Selected Communications Markets'.[60] The document identified six major segments – Mobile voice,

[60] Determination of dominance in selected communications markets in Nigeria. Issued by Nigerian Communications Commission

Fixed voice, Fixed data, Mobile data, Upstream, and Downstream.

In its assessment of competition in these segments, NCC labelled MTN Nigeria a dominant operator in the Mobile Voice segment with 44 percent market share of subscribers. In the document, the NCC noted that: "The mobile voice market is not effectively competitive and is still highly concentrated with an HHI (Herfindahl Hirschman Index) of 3063. MTN has a 44 percent market share of subscribers within this market. There is also a wide differential (of about 300 percent) between on-net and off-net calls and this is indicative of the likely establishment of a calling club for MTN subscribers."[61] Further, the regulator also designated both MTN Nigeria and Glo as joint dominant operators in the wholesale leased lines and transmission capacity sub-segment of the upstream market. Both MTN and Glo have substantial investments in broadband; MTN has WACS while Glo has Glo 1.

To address the issue of competition, the NCC resolved that the dominant operator in the Mobile Voice market, in this case, MTN Nigeria, shall be required to adhere to the following obligations:

a) Accounting separation: The Commission will immediately enforce and implement accounting separation on the dominant operator;

b) Collapse of on-net and off-net retail tariffs: The differential between the on-net and off-net retail tariffs will be immediately collapsed. The tariff for on-net and off-net will be the same, and subject to periodic review; and

c) Submission of required details: MTN's operation will come under stricter scrutiny and The Commission may require the dominant operator to submit details on specific aspects of its operations from time to time as the need arises in the upstream segment of the market (comprising spectrum, tower sites, network equipment, wholesale broadband/ internet access, and wholesale leased lines and transmission capacity).[62]

*3.3.2.3.1 Abuse of Dominant Position: Telecommunications Industry as an Example*

The aim of classifying some operators as dominant is to guarantee fair pricing that will

[61] See note 124 on 2012 Study of the Determination of dominance in selected communications markets in Nigeria. Issued by Nigerian Communications Commission at section 4.1.
[62] See note 124.

safeguard smaller operators in the said market. The telecommunications industry is one that has many elements and where big players can suppress the development of small players and the core principle of dominant operator providing facilities and pricing model that is balanced is to allow other operators to survive.

Notwithstanding the amplitude of the competition law provisions in the Nigerian Communications Act as detailed above, there are concerns that anti-competitive practices are rife or at least do exist in the sector. In submissions made to the Commission in response to a Consultative Paper on Dominance in Selected Communications Markets,[63] allegations of market power abuse and exclusionary practices were made by some small operators against the major players.

For example, MTN Communications Limited (MTN) is accused of not being lenient on collocation and sharing of infrastructure, and that even when it agrees to collocate, there is evidence that it prices essential inputs higher than it implicitly charges itself for internal use of such facilities. For instance, an MTN transmission link is alleged to cost as much as N1.3million per month even though such a link should normally not cost more than $200 per month in other countries, and that the incumbent advantage is used subtly to exclude rival networks from participation in markets that are strategic thereby lessening competition.[64]

There are also allegations that leading GSM operators introduce retail tariffs to their subscribers that are lower than wholesale tariffs charged to small operators and new entrants Also, that internal economies of scale makes it possible for larger networks such as MTN to tap from their savings to subsidize production for competitive markets aimed at bonding subscribers to their network. The introduction of free midnight calls by MTN and other larger providers captures the subscribers to the larger networks and makes it difficult for them to be accessed by the smaller operators who cannot match the same offer due to

[63] In 2010 NCC had carried out a Determination of Dominance which considered the mobile telephony market and International Internet Connectivity (IIC) market. The purpose of the Consultation was to assist the Commission in determining whether certain telecommunications service providers were in a position of market dominance in selected telecommunications industry markets in Nigeria. Following the conclusion of the Study, the Commission determined that that no licensee held a position of market dominance in the Mobile Telephone Services market. The Commission also determined that no group of two or more licensees held a position of joint or collective dominance in that market

[64] Comments on the NCC consultation paper on dominance in selected telecommunications markets in Nigeria. Submitted by ZOOMmobile, 26 March 2010 (Reliance Telecommunications Ltd) http://www.ncc.gov.ng/Archive/RegulatorFramework/Consultation+Dominance_Zoom_Paper.pdf accessed 15 July 2014.

capacity constraints.[65]

It is also believed that the mobile telephony market, being an oligopolistic market, is a market in which collective dominance exists and as such that there could be tacit collusion to increase or control prices above the competitive price even without concluding a cartel agreement. MTN, GLO and ZAIN, are in effective control of infrastructure, transmission backbone, fibre optic, international gateway etc. And the fact that they carry traffic for other operators and generate high interconnect fee for domestic and international calls should further lend credence to this suspicion[66]

The fact that these allegations were made in the presence of competition provisions in the Act is bothersome. Further, the fact that there are provisions permitting the NCC to check anti-competitive conduct by operators does not mean that the provisions are being enforced. Apart from the issue of capacity on competition matters, there is the concern of giving sector regulators competition law powers within their sectors. The regulators may focus more on their core function to ensure technical efficiency in the sectors, and often pay little attention to competition law matters which is only an additional function to their core competence.

### 3.4 Allegations of Bid Rigging and Collusion: the Petroleum Refining Industry

Bid rigging is a form of cartel that may arise when contracts are awarded by competitive tender. In this case, the parties to the cartel agree with each other on who should win a particular contract and at what price. The possibility of bid-rigging will be particularly relevant to public sector purchasers, given their legal obligations to award certain contracts by competitive tender.

Although bid rigging operations are often very sophisticated in order to avoid detection, there are certain signs that may indicate bid rigging has occurred. For example:

- do certain suppliers unexpectedly decline an invitation to bid?
- is there an obvious pattern of rotation of successful bidders?
- is there an unusually high margin between the winning and unsuccessful bids?

[65] ibid.
[66] ibid.

• do all bid prices drop when a potential new bidder (ie who is not a member of the cartel) comes on the scene?

• is the same supplier the successful bidder on several successive occasions in a particular area or for a particular type of contract?

• are there one or more suppliers who continue to submit bids although they consistently fail to win a contract?

In Nigeria, the BPE revealed that for the sale of the oil refinery in Kaduna and Port Harcourt, a company called Blue Star won the competitive bidding. However, Blue Star was a syndicate made up of two companies (Dangote and Otedola) and River State government, revealing that the transaction itself had signs of collusion and price fixing. Furthermore, the two companies were competitors who came together to make a bid, and as such removing any other strong competition. Additionally, acting in concert with the Rivers State government neutralizes local opposition and assures government support. However, there could be nothing illegal about any of these moves in the absence of competition legislation, but in its presence the consortium should have been disallowed from bidding solely on the ground of collusion and unfair advantage.

Furthermore, in this case, it is alleged that Blue Star Consortium did not take part in the bidding process which led to the sale of the Kaduna Refinery. The steps that brought about its emergence is filled with gaps that any business person will exploit for unfair advantage. A case in point is that of the China National Petroleum Corporation (CNPC), which was offered the right of first refusal in the Kaduna Refinery, had offered $102 million for the firm. This, according to BPE, could not satisfy the reserve price. This paved the way for Dangote to offer $160 million to purchase the refinery. The process was not open to a competitive process. It is thus probable that Dangote had asked the Chinese to lower their bid so it can still get Kaduna Refinery for a cheaper price, implying that a case of price fixing can be legitimately made against Blue Star.

### 3.5 The Need for a new Competition Law Regime in Nigeria

From the foregoing, it is arguable that Nigeria is a safe haven for international cartels, being that there are only sector-specific competition regulations in place. How does Nigeria engage in bilateral agreements with foreign counterparts when it has no general all-

encompassing law in force? It is obviously a free jungle of anti-competitive agreements, where offences can go simply unpunished. There is an urgent need for a reorientation on the benefits of competition law policy. Although there are various strong arguments in support of the adoption and implementation of new competition rules in Nigeria, the argument has also been put forward that embracing a competition law regime does not necessarily aid economic development.

Accordingly, Jean-Jacques Laffont proposed:

> Competition is unambiguously a good thing in the first-best world of economics. That world assumes large numbers of participants in all markets, no public goods, no externalities, no information asymmetries, complete markets, no natural monopolies or, more generally, convexity of technologies in addition to full rationality of economic agents, a benevolent court system to enforce contracts, and a benevolent government with lump-sum transfers to achieve any desirable redistribution. Developing economies are of course very far from this ideal world, and the policy question: 'Should competition be encouraged in developing countries?' must be raised in a more realistic framework.[67]

Nigeria has all the above-mentioned attributes of a developing economy, and therefore the question stated above applies to Nigeria. In the same vein, Drexl notes that while wealthier nations can depend on efficient competition law regimes to protect their markets, developing countries are mostly new to the market economy. With their national economies still in transition stages, they not only need to draft laws, they are also confronted with issues such as lack of acceptance of the competition phenomenon among local businesses, authorities and the general public.[68]

There have been situations in developing countries where reservations have been expressed that introduction of competition law would hinder economic growth and development;[69] the reason for this is that due to the checks which a competition law regime would put on their activities, the reason to invest in the economy would decrease, a risk that a country in pressing need of economic development should not take. This shows that regardless of how important a legal rule to protect competition is, it is not universally believed that it is an

[67] Jean-Jacques Laffont, *Competition Information and Development* (World Bank 1998) cited in Alice Pham, 'The Development of Competition Law in Vietnam in the Face of Economic Reforms and Global Integration' (2006) 26(3) Northwestern Journal of International Law and Business 547, 548.
[68] Josef Drexl, 'International Competition Law – A Missing Link between TRIPS and Transfer of Technology' (year) Max Planck Institute for Intellectual Property, Competition and Tax Law.
[69] Dr Pijan Wu and Caroline Thomas, 'Taiwan's Fair Trade Act: Achieving The "Right" Balance?' (2006) 26(3) Northwestern Journal of International Law and Business 643.

appropriate and needed law to have in all nations, especially in developing ones. However, this thesis is of the view that on proper balance, both in the short-, medium- and long-term, Nigeria is ripe for a competition law regime for various reasons.[70]

Firstly, it is commonly agreed that competition law is an essential part of any liberalization programme.[71] Accordingly Alice Pham opined:

> An effective competition law, as is now widely recognized, is a concomitant requirement for market-based reforms. Such a law aims at limiting unnecessary interventions or abuses of power in the marketplace by the state or by private sector enterprises that adversely affect economic efficiency and consumer welfare.[72]

Consequently, if the Nigerian Government, which over the past decades has committed to market liberalization through the privatization and deregulation of various sectors of the economy, does not enact a competition law, it might inadvertently bring about new dangers Because when key sectors of the economy are liberalized and deregulated, replacing government monopolies with private players who are not inhibited by social interests and whose foremost aim is to make maximum profit, nothing stops the new enterprises from participating in the abusive market conduct. In an environment where competition law does not exist, such practices would be legal, no matter how much damage they inflict upon the economy and consumers. a clear example of this is the case between Virgin Atlantic Airways and the NCAA analysed earlier in this chapter.

Thus, it is arguable that incomplete liberalization could in some cases be worse than no liberalization at all since it ends up creating unknown dangers. Hence, this thesis argues that any market liberalization programme like Nigeria's that lacks a legal system to regulate competition in the market cannot be strong and should to be re-examined since competition law is a vital complementary support to general market liberalization.

The above argument may further be analysed in terms of the controversy over the privatization of refineries in Nigeria. Out of four refineries, the Bureau of Public Enterprises (BPE) transferred two of the major refineries (Port Harcourt and Kaduna); together with a share of close to 60 percent of the petroleum refining market to one business entity, even

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[70] Nnamdi Dimgba, 'The Urgent Need For Antitrust Law in Nigeria' *Nigeria This Day* (3 February 2004).
[71] Simon Roberts, 'The Role For Competition Policy in Economic Development? The Effects of Competition Policy in South Africa, and Selected International Comparisons' (paper presented at the Trade and Industrial Policy Strategies Annual Forum 2003).
[72] Pham (n 67).

though other entities had expressed interest in the refineries. The justification given for this was that the entity was the highest bidder. [73] However, Dimgba argued that what happened during the refineries privatization saga exposed the shortfall in the Nigerian economic liberalization programme by the absence of a legal regime to regulate competition. If there had been a competition law in place which required the BPE to take into consideration the effect on competition prior to selling national assets, it is arguable that the BPE may not have sold the assets to a single entity given the negative result it would have on the state of competition in the petroleum refining market. It may further be argued that with regard to the ongoing privatization regime in Nigeria, in the absence of competition law, the BPE should have an obligation to conduct a Competition Impact Assessment (CIA) test before a national asset is sold. This seems to be the position. in Brazil,[74] and one that is recommended for Nigeria.

Competition law and the institutions that it would create would also aid to promote economic equality in Nigeria, as it has contributed to creating in developing countries where it has been enacted.[75]It is accepted that such a law serves to drive away 'rents',[76] which tend to accrue among a privileged few in countries where not only is the rule of law weak but corruption is also widespread. It is a known fact that the accumulation of rents can be disadvantageous to developing countries that are undergoing economic growth and development.

The concentration of wealth can lead to broadening income inequality, a major problem facing developing countries such as Nigeria, and that threatens economic growth. Furthermore, concentration of wealth leads to the concentration of political power where money matters in political pursuits. This is likely to undermine the growing democracy found in many countries.

The experience of some developing countries such as Thailand, Pakistan, and Vietnam indicates that where large businesses take political rein, they can certainly establish their monopoly statuses by manipulating government policy. At this point, where the law is

[73] Nnamdi Dimgba, 'Privatisation: Why Highest Bid Not Always Best', *ThisDay* (31 July 2007).
[74] Brazilian Law No 8884 cited and discussed in Gesner Oliveira and Thomas Fujiwara, 'Competition Policy in Developing Countries: The Case Of Brazil' (2006) 26(3) Northwestern Journal of International Business and Law 619, 639-640.
[75] Oliveira and Fujiwara (n 74) 619.
[76] Rents in economics refer to profits or investment returns that are excessive compared to those available in a competitive market.

captured by the state and large businesses, the prospect of introducing competition in the domestic market would be bleak. Thus, it is urgent that a developing country arms itself with a competition constituency that could counter the intimidating (financial and political) strength of incumbent operators that would like to ward off competition so as to protect their own private interests. It would be essential to support the competition constituency by means of an empowering legal framework.

Further, the introduction of competition law regime would encourage Nigeria's corporations to acquire an awareness of competition law rules. Given the increasing significance of competition law all over the world, the law has acquired a notable cross-border character in the sense of having an impact on most commercial transactions that have an international reach. An example of one of such transactions is the case of the Nigerian Liquified Natural Gas Company (NLNG) which had issues with the European Commission because some of the terms in its gas supply contracts with its European customers were held to be offensive to EU competition law.[77]

Embracing a competition law regime in Nigeria would encourage the growing businesses to be mindful of the rules and also be capable of dealing with competition law provisions. Furthermore, in relation to Nigeria, there are public accountability grounds to argue for the institution of an effective competition law regime. The National Council on Privatization (NCP), at a significant cost to the public, has at numerous times contracted the services of consultants to draft or redraft a competition bill for Nigeria.

Adding to the above are issues, being the largest economy in Africa, it is assumed that Nigeria should have an effective competition law system in place as countries with smaller economies such as Kenya,[78] Zambia,[79] Namibia, and South Africa,[80] have had such regimes for years. An effective competition law regime inspires worldwide assurance in an economy,

[77] A European contract entered into by NLNG contained a territorial sales restriction, which stopped the customer, in this case the Italian utility company ENEL, from re-selling the gas outside Italy. In the deliberations and settlement with the Commission, NLNG agreed in October 2002 to remove the destination clause from its contract with ENEL and also undertook not to introduce territorial restriction clauses or use restrictions in its future supply contracts. It further confirmed that none of its existing gas supply contracts contained profit-splitting mechanisms affecting the EU markets and that it would not introduce these in future contracts. For a detailed discussion of this case and of destination clauses in gas contracts generally, see 'Commission Settles Investigation Into Territorial Sales Restrictions with Nigerian Gas Company NLNG, EC Commission Press Release, IP/02/1869 (12 December 2002).
[78] The Restrictive Trade Practices, Monopolies and Price Control Act 1988, cap 504, Laws of Kenya.
[79] The Competition and Fair Trading Act 1994, cap 417, Laws of Zambia.
[80] The Competition Act No 89 of 1998.

thereby increasing the level of foreign direct investment into the country. Foreign financiers and investors would be more eager to inject capital freely in a country where they were guaranteed of the transparency and accountability of the system. This research argues that the enactment of a competition law assures international financiers and stake holders that all participants in the economy would be subject to rules which condition the behaviour of firms in the marketplace.

In addition, without adequate national competition laws, it becomes challenging to end anti-competitive behaviour by the local subsidiaries of multinational companies in industrial economies. These multinational businesses may obey competition law provisions in Europe and the US due to the operative competition rules, but may take part in anti-competitive practices in developing countries such as Nigeria with non-existent or weak competition laws. Additionally, businesses may participate in cross-border anti-competitive behaviour with liberty, especially in countries that do not have domestic competition law, and developing countries such as Nigeria are mostly susceptible to these practices.[81] Similarly, in the absence of an effective competition law, the domestic businesses may form anti-competitive associations to make it challenging for foreign firms to enter the local markets and, in so doing, discourage foreign investment.

### 3.6 Challenges to Establishing a Competition Law Regime

In Nigeria's bid to establish a competition law regime, certain challenges have been encountered. These challenges relate to the question this thesis seeks to answer which is if a competition law regime is needed for the socio economic advancement of Nigeria.

#### 3.6.1 Need to Safeguard Competition

It is not unanimously believed that free and undistorted competition is a necessity and should be protected; there are fears that competition law and policy would damage rather than promote economic development. More often than not, there is a lack of approval of the need to embrace a competition law regime among local businesses, authorities, and the general public, especially in developing countries such as Nigeria which are new to the

[81] George Lipimile, 'Merger Control in COMESA Member States: Approach and Practice' (paper presented at International Antitrust Law and Policy Conference, Fordham Corporate Law Institute, New York, 7-8 October 2004).

market economy. Some of these views result from lack of understanding as to what competition means and competition law entails.

For the legislators, the problem of lack of knowledge was exposed during the introduction of the Competition Bill in the Nigerian Senate in September 2006. Some of the explanations the Senate gave for their antagonistic reaction to the Bill were the fact that there were already too many Commissions in Nigeria dealing with various issues and that a comparable law to the competition bill had been passed previously. In brief analysis, none of the explanations are valid due to the fact that the existence of other Commissions does not eliminate the need for a regime that handles the promotion and protection of competition, and furthermore, the Consumer Protection Act and the proposed competition law, which are two separate laws dealing with separate issues.

The enactment and implementation of a competition law regime is always difficult. The reason for this is that the law not only works contrary to the interests of politically connected companies and/or those which are in a dominant position, which in most jurisdictions such as Nigeria are linked to the ruling political class, but it is also often associated with Western capitalism or free-market propaganda. It can easily become victim to nationalistic sentiments that may be made up by local monopolies. This challenge may be best dealt with through competition policy advocacy, which could be even more important than competition adjudication. A country needs to establish a wide competition constituency among civil society, academics and the media[82].

### 3.6.2 Lack of Public Support for, and Interest in, Competition Law

Another significant obstacle to the adoption of competition rules is the absence of public awareness of competition law. Most charitable and non-governmental organizations (NGOs) more often than not are centred on human rights, environmental, educational, and health, concerns where the effects on the community are more noticeable. On the other hand, competition law may be viewed by the general public as being concerned with disputes that have arisen as a result of business transactions that are not of direct concern to citizens.

As opposed to trade policy, no particular groups will benefit from effective competition law

[82] Competition advocacy and ways in which it may be achieved in practice is further examined in part 111 of this thesis.

enforcement. Instead, benefits are normally spread among various consumers. Furthermore, In contrast to consumer protection, competition law matters may be distant from the consumers' experiences. Thus, it may be challenging to educate consumers as to how conferences and consultations on abuse of market power will directly affect them. As a result, most NGOs have paid very little attention to competition policy in the context of pertinent social problems.

Given the lack of awareness and the lack of conviction of society as to the significance of competition law in Nigeria, it is recommended that a mechanism is set up by the Government, which encourages the establishing of organizations whose task should be to educate the public on the law, focusing on the actions that would most likely succeed and will benefit the market, as well as other confidence-building and support-mobilizing measures.

### 3.6.3 Corruption and Political Intervention

Even after the establishing of a competition law regime, it is likely that the groups that had been opposed to the enactment may go the extra length to compromise the law and institution(s) set up to administer the law. Due to the high rate of corruption in Nigeria, this problem is highly significant. The lack of a competition law permits vested interests to thrive. Businessmen are able to collude with politicians to design policy interventions such as waivers or import prohibitions, so as to impede competition in that particular sector. As a payback, the businessmen/women make generous contributions to politicians. Competition law enforced by an independent authority would examine these policies and get rid of those that do not satisfy the necessary tests. The relationship between economic power and political power is not a hidden one. In situations where markets in a country are intentionally distorted so as to continue to enrich a few individuals, those individuals would have control of political power. For example, in Egypt, a critic is of the mind that the deep-rooted interest of numerous key entrepreneurs in protecting monopolies after privatization, and the absence of consumer moves and awareness, is the reason why competition laws end up as a failure in enacting a fully-fledged competition policy in developing countries.[83]This is likely to

[83] Ahmed Farouk Ghoneim and Pascal Lamy, 'The Multilateral Trading System and Global Governance after Doha' (speech delivered at the German Council on Foreign Relations, Berlin, 27 November, 2001, cited by Ghoniem; World Bank and OECD, 'A Framework for the Design and Implementation of Competition Law and Policy' (Washington D.C. and Paris 1998).

happen in Nigeria as entrepreneurs with vested interests of key industries such as the cement industry, pay tv are likely to protect existing monopolies for purposes of maximizing profits. The law is often tailored to allow for exceptions and those exceptions are often not shielded from political interference and key interest groups' influence.

To deal with this problem, individuals who have the capacity to resist corruption should be employed. The leadership of an authority is critical to the effective performance of its mission, and as has been stated, 'it is trite but true that the Commission can be no better than its leaders';[84] and also, 'the quality of the members is the most vital single factor in the successful operation of these Commissions'.[85] Consequently, in Nigeria, where corruption is widespread and as such the risk of 'regulatory capture'[86] is extraordinary, due process, transparency, and accountability in both the appointment of commissioners and the administration of the law is central to the integrity and the success of a new competition regime which is however yet to be devised let alone adopted.

Additionally, in drafting a competition bill, a reasonably comprehensive competition law should be drafted. This would assist to reduce the discretionary power of the administrative authority, particularly where it is susceptible to political influences. Active checks should also be put in place. An appellate body that is independent of the main competition authority could ensure objectivity of the decisions of the authority.

### 3.6.4 The Presence of a Large Informal Sector

Another challenge to the establishment of an effective competition law regime in Nigeria is the presence of a large informal sector. Informal sector refers to all economic activities by workers and economic units that are not covered or are insufficiently covered by formal arrangements. The informal economy is largely characterised by: low entry requirements in terms of capital and professional qualifications; small scale of operations; skills often acquired outside of formal education; and, labour-intensive methods of production and

[84] Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, reprinted in (1989) 58 Antitrust LJ 43, 60.
[85] Joseph Wilson, 'At The Crossroads: Making Competition Law Effective In Pakistan' (2006) 26(3) Northwestern Journal of International Business and Law 565, 591.
[86] Regulatory capture describes a situation where a state regulatory body is influenced by the interest of the industry which it regulates. A detailed description of the term can be found in ME Levine, 'Regulatory Capture' (1998) 3 New Palgrave Dictionary of Econ and Law 267, 267-71.

adapted technology.[87]

The informal sectors in Nigeria are economic activities in sectors of the economy that function outside of government regulation. 'This sector could be unseen, irregular, parallel, non-structured, backyard, underground, subterranean, unobserved or residual'.[88] Informal economic undertakings in Nigeria include a variety of small-scale, mostly self-employment, activities. The majority of them are dated methods of production. Others include economic endeavours such as: transport, restaurant, repair services, retail and household services. Activities in the informal sector in Nigeria are difficult to measure; they are highly dynamic and contribute substantially to the general growth of the economy and personal or household income.

The presence of large informal sectors creates dual markets and may misrepresent the analysis specialists conduct for the formal markets. Market power of dominant formal firms may be over-estimated due to an under-estimation of the price elasticity of demand. The presence of a large informal sector also generates additional clamour in price information, making cartels more unstable and cartel analysis more challenging. The challenge of a large informal sector is one that will be difficult to tackle and this thesis will not go into detail in this regard. However, legislators should be guided when assessing the strength of dominant firms in the economy, especially in an abuse of dominance inquiry.

### 3.6.5 Education, Capacity and Skilled Staff

Effective competition and regulatory enforcement requires very specific abilities within academia, legal, and economic professionals, Government agencies, the private sector, and consumers. Inadequate capacity may bring about regulatory capture by a minority. Weak implementation of decisions can hinder the growth and development of a competition culture. Consequently, as a result of the novel nature of competition law in Nigeria, a major challenge to the setting up of the legal regime is that of capacity. Due to the fact that there is no competition law in place in Nigeria, there is minimal academic knowledge of the discipline, and as such there is minimal research work on competition law issues and also very little understanding of the subject among legal professionals and policy makers in

[87] Onyemaechi Joseph Onwe, 'Role of the Informal Sector in Development of the Nigerian Economy: Output and Employment Approach ' (June 2013) 1(1) Journal of Economics and Development Studies 60-74.
[88] NelsonMagbagbeola, 'The Role of the Informal Sector in Nigeria's Post Adjustment Economy' (1996) 1(5) Osigwe Development Philosophy.

Nigeria.

Lack of education and capacity will thus affect the efficacy of the regime when it is established. This is because even if an institution is established, if it is managed by individuals who do not have adequate awareness and understanding of the subject, it will be extremely difficult for such a regime to be efficient. The issue of capacity is mainly responsible for the weak enforcement record in some developing countries where competition law has been enacted but no significant advancement has been made in terms of activity by the competition authority, at least in the early years.[89]

Another challenge is that of employing skilled staff. Competition experts are likely to become very attractive to law firms and large businesses. Nevertheless, it should be noted that although this may be challenging for the body that invests in training and on-the-job learning only to lose its experts, it may be important to focus on broader, economy-wide effects. The movement of competition law experts from one sector of the economy to another may lead to the growth of a better grasping of the role of competition in the economy and in development. To deal with this challenge, resources in terms of time and money needs to be allocated to the development of capacity, even before the competition law regime is established, and also after it is set up. This may be in terms of introducing competition law in universities in Nigeria.[90]

The Nigerian Government should also seek foreign technical assistance which has aided in the formation of a competition law regime in developing and transition economies. This assistance is available from organizations such as the OECD, the WTO, the International Competition Network (ICN), the International Bar Association (IBA), and the United Nations through the United Nations Conference on Trade and Development (UNCTAD). Developed antitrust regimes such as in Europe, the US, and Asia are also very eager to share their skills and expertise to help developing countries embrace effective competition law regimes. It should be stressed, however, that any support to be sought should not end with the enactment of the competition law itself, but rather it extends into the community, through assistance, to build a competition law and policy constituency among the various non-governmental stakeholders of the economy.

[89] Eg Pakistan; Wilson (n 85) 594.
[90] The Nigerian Bar Association Section on Business Law has a Committee on Competition Law.

### 3.6.6 Problem of Jurisdictional Conflict Between Different Regulatory Bodies

Jurisdictional conflicts may arise where the jurisdiction of different bodies overlaps. The relationship between the sectoral regulatory bodies such as the NCC and the future body to be established by the government to encourage and monitor competition may contribute to conflict and should be studied and fixed before the law is enacted, otherwise complications regarding the supremacy on competition issues between the competition body and sector regulators to determine the behaviour of firms in specific industries may come up. For instance, in regard to the NCC, the NCC Act contains competition provisions which the NCC (the sector regulators) has the power to enforce.

Various countries have designed different formula for dealing with this issue. However, the one that appears to be very practical, and which was adopted during Nigeria's revision of the Competition Bill was the South African formula. The South African formula requires that the Competition Commission enters into agreements with each of the sector regulators and makes provision for the exercise of concurrent jurisdiction with those regulators. On the strength of this, the South African Competition Commission has negotiated and signed various Memoranda of Understanding with the different sector regulators defining the manner in which jurisdiction on competition issues over enterprises in their sectors would be exercised in a manner of collaboration and interaction. This removes conflict from the outset and ensures that all available expertise (both in the competition authority and within the sector regulators) is harnessed towards the solution of competition problems for the overall development of the country.

## 3.7 Conclusion

The process of enacting a competition law regime in Nigeria has been likened to 'an egg that never hatches'.[91] However, the lengthy process to enact a competition law regime in Nigeria is not peculiar to Nigeria; many countries have enacted competition laws but have not been able to successfully enforce them. For example, Egypt took almost a decade to enact a competition law in 2005,[92] receiving a first draft in 1999, and even after adoption, it

[91] Nnamdi Dimgba, 'Nigeria's Competition Law: The Egg That Never Hatches' <http://www.globalcompetitionforum.org/regions/africa/Nigeria/antitrust%20article.pdf> accessed 10 May 2014. An egg that never hatches could mean a situation that never comes to being however after many years competition law has been adopted in 2019- Federal Competition and Consumer Protection Act 2019

[92] Law on the Protection of Competition and the Prohibition of Monopolistic Practices No 3/2005 (Egypt).

was not certain that the law could be implemented effectively. Similar circumstances can be found in countries like Indonesia, Pakistan, Sri Lanka, Malawi,[93] and Namibia. Also, Thailand enacted its first law in 1979, but it was not implemented until 1999 when the law was replaced, and even then the enforcement record remained extremely poor. The purpose of the above account is not to say that it is impossible to establish successful competition law, otherwise we would not be having the examples of the US, Europe, South Africa and India, where the regimes are successfully established. Beyond demonstrating that the mere enactment of a competition law does not bring instant success, or that a competition law cannot be enacted overnight, an effective implementation will take longer where there is inadequate support from political, legal, institutional, and social environments. What is intended to be highlighted here is that there are specific challenges to the establishment of a functional competition law system. And only by identifying, analysing, and understanding them can they be surmounted.

From the analysis in the first part of this thesis, it is strange that competition law has not yet been enacted in Nigeria. The majority of the sectors of the economy has been subject to at least one form of anti-competitive conduct. The relative competition in the telecoms sector is due to the fact the sector is regulated by the NCC, which has the power to administer competition rules in the sector. The NCC has taken steps in regard to this, as already noted above, in terms of having a guideline for interconnectivity and making a determination of dominance. This has led to the NCC issuing directives to MTN (the dominant operator in the voice-call market) to remove to remove unequal call rates between phone calls made within its network and those made to other networks. The mobile number portability scheme is also an additional measure to promote competition. Regardless of this, Although the NCC is an independent body, it still has to take account of the government's National Telecommunications Policy (NTP)[94] and there are questions as to the weight attached by the NCC to the NTP

Likewise, the ongoing reforms in the power sector focus on safeguarding competition in the long term, and the guidelines for achieving this are set out in the EPSRs Act 2005.

In conclusion, it may be argued that a successful economic reform agenda cannot be accomplished without a supporting regulatory framework that would see the smooth

[93] Pham (n 67) 563.
[94] NTP 2000, ch 3.1.4.1.

functioning of the reformed sectors. The consequence of privatizing and liberalizing certain key sectors without a competition law in place is that business actors are able to engage in anti-competitive practices and the consumer and the economy are worse off for it. Furthermore, as the drive for increased contribution of the private sector in the economy is becoming more popular, there is an urgent need to safeguard competition. This is more crucial in ensuring that the small- and medium-scale enterprises have a reasonably fair chance to compete without being choked by the larger more dominant enterprises in the marketplace. In the long run, lack of competition not only has an effect the consumer, but also affects the businesses and the sector in which the business operates by hampering innovation and encouraging inefficiency, waste, and low-capacity utilization. It thus brings about both consumer and producer welfare loss. This in turn has a dead weight-effect on the economy as capital and resources are distributed to less-efficient sectors, while the more efficient sectors suffer. Generally, the lack of competition law in Nigeria creates a large hole in the regulatory environment leading to a high - risk rating by investors and contributing to the poor rating in the global business environment and competitiveness rankings.

For a systemic analysis of the need to embrace competition law in Nigeria, reference should be made by way of comparison to the US and the European Union, as these Jurisdictions have convincing impacts that would lead Nigeria to completely embrace competition legislation. Thus, the following part of this thesis briefly examines a number of jurisdictions which have strong competition law regimes. It considers the USA, the EU, and the UK. The section briefly looks at the socio-economic ideology, the institutional and organizational conditions and also the political conditions that enabled competition law to grow, by way of comparison to the conditions present in Nigeria.

# PART II – REMEDYING CURRENT SHORTCOMINGS BY BORROWING FROM FOREIGN COMPETITION LAW REGIMES

## CHAPTER 4: THE EU AND US COMPETITION LAW REGIMES AS POTENTIAL SUITABLE MODELS FOR NIGERIA

### 4.1 Introduction

This chapter makes a comparative analysis of the historical perspective of competition law in the EU and US. The chapter aims at reviewing contemporary issues in the competition law regimes of these jurisdictions and, in particular, to explore how the experiences of these regimes can be applied to shape the development of competition law in Nigeria. The section recognizes that although the competition law systems of the two jurisdictions have developed out of varied concerns such as the need to prohibit contracts that restrain trade, creation of a common market and consumer welfare maximization, the competition laws have a common objective: efficient allocation of resources and consumer welfare maximization with a particular European concern on preventing markets from being compartmentalised on a national basis. The thesis submits that these goals are similar to Nigeria's economic development objectives as analysed earlier in this research and contends that competition law is essential for Nigeria to achieve her set goals of being one of the top twenty economically advanced nations by 2020.

Furthermore, the chapter considers certain aspects of the competition law regimes in these jurisdictions such as the systems of enforcement. It recognizes that the policy concerns addressed by competition law are not static, and ranges from the US's response to public outcry against monopoly in the name of trusts and consumer welfare, and the EU's common market goals, to South Africa's objective of economic empowerment of the historically marginalized population. While the Sherman Act 1890 aims at prohibiting conduct intended to acquire or maintain monopoly power and provides ways to enforce the prohibitions[1], in

[1] Firstly, it made violation of the act a criminal offence; therefore, any person who violates this act may be punished by fine and/or imprisonment. Secondly, courts are empowered to grant injunctions to either the Department of Justice (prosecutors) or a private party to stop violations of the act. An injunction in monopoly cases can also require divestiture, which is the breaking up of the monopoly. If the defendant does not obey an injunction it will lead to an action for contempt. Thirdly, any person who has suffered loss as a result of violations of the Act can sue for damages. The award for which can be up to three times the genuine loss suffered. Each injured party, such as competitors and consumers, can take an action for damages. Finally, any property which is owned due to violation of Section 1 of the Act

the EU, Article 101 Treaty on the Functioning of the European Union TFEU concerns anti-competitive practices between undertakings, called 'collusion'. The Article prohibits any agreement between undertakings or decisions by associations of undertakings and concerted practices that may affect trade between member states. Article 102 aims at controlling 'abuse of dominant position' between undertakings, which may affect trade. Article 106 presents rules that apply to public enterprises or to undertakings that are awarded particular privilege, while Articles 107–109 prohibit State aid to undertakings by Member States, which can distort competition.

Article 2(3) states the general aims of the Treaty on the European Union (TEU) as follows:

> The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It is noted that there are important common factors in the Competition rules of these jurisdictions such as the prevention of anti-competitive practices such as cartels and abuse of dominance. Consequently, it is important for Nigeria to enact competition law which recognizes the common factors in the legislation of these jurisdictions and also takes account of its level of development and the long-term goal of sustained economic growth. The thesis does not propose that Nigeria reinvents the wheel in terms of developing its own competition law and suggests that Nigeria may, use models from these jurisdictions as a guide in developing its competition law. However, it proposes that the Nigerian Competition law should be modelled according to its own social and economic circumstances while borrowing from the historical experiences of these developed nations. Consequently, the following section examines the historical development of antitrust law in the US and Competition law in the EU with the eventual aim of comparing it with the current situation in Nigeria.

### 4.2 The US Competition Law Regime

This section discusses mainly proto-competition law rules on monopolies in the common

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can be seized by the Government.

law, bookended by the Sherman Act 1890. The US antitrust law[2] regime is one of the most influential regimes in the world. The US Sherman Act adopted in 1890 is regarded as the first modern statutory system of competition law. However, the roots of competition law lie much deeper. Accordingly, Senator Sherman was of the view that the bill did 'not announce a new principle of law but applies old and well-recognized principles of the common law to the complicated jurisdiction of our state and Federal Government'. Accordingly, the Sherman Act was viewed largely as a codification of existing common law principles.

Although there is no single satisfactory history of the early competition laws, history has it that Saxon Kings which is now the UK had taken action against various trading practices such as the purchase of commodities before they reached their designated market place in order to increase price, and make profit on a later sale known as forestalling. Other laws set out punishments for ingrossers who obtained agricultural products with the aim of selling at a higher price. The Magna Carta provided that all monopolies were illegal because of their harmful effect on individual freedom. Furthermore, the great plagues in Europe which occurred in the late medieval period and resulted in shortage of goods and services has been suggested to have led to the emergence of the doctrine of restraint of trade. The essence of this doctrine is that it is contrary to public policy to enforce contracts that are in unreasonable restraint of commerce[3]. The Sherman Act was enacted in the era of "trusts" and of "combinations" of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The goal was to prevent restraints of free competition in business and commercial transactions which tended to restrict production, raise prices, or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.[4] Thus the phrase "restraint of trade," which, had a well-understood meaning in common law, was made the means of defining the activities prohibited.

The common law of England prohibited contracts in restraint of trade, general agreements to refrain from competition, collusion between rivals to fix prices or to restrict output, and

[2] The term trust is synonymous with monopolistic practices. In most countries outside the US, Antitrust law is known as competition law and the term will be used interchangeably in this thesis.
[3] The first reported case appears to be John Dyer's case (1414) YB 2 Hen 5, fo. 5 pl.26. where the defendant had given a bond to the plaintiff not to exercise his trade in the same town for six months. The bond was declared void.
[4] Senator Sherman asserted the bill prevented only 'business combinations' 'made with a view to prevent competition': 21 Cong Rec 2457, 2562.

other anti-competitive practices that would likely lead to public harm. Therefore, the early lawmakers on competition laws in the US merely modified the common law concepts to suit their local conditions. However, their underlying economic policies reflected the inherited legal precedents. It can, therefore, be argued that the common law shaped US competition law. There are also early records of how 'Americans have expressed reservations and revulsion regarding monopolies and monopolization since the early days of settlement'.[5] The root of this attitude can also be traced to England during the colonial period when the Crown granted monopolies to favoured enterprises, and the abuse of this power led to the intervention of the English Parliament which whittled down the power of the Crown to grant monopolies with the common law over time and also developing legal principles against trade restraint. Thus, as early as 1776, before the proclamation of the Declaration of Independence, a Connecticut Law stated that: 'Monopolizers, the great pest of society, who prefer their own private gain to the interest and safety of their country, and which if not prevented, threaten the ruin and destruction of the State.'[6]

The Sherman Act was enacted in 1890 to tackle the high number of monopolies in its local markets. A notable example was the state of affairs in the transportation of goods sector, which had been dominated by the railroad industry that used to charge excessive prices. The prices were undue because they surpassed what the clients of those companies would charge for their goods, and disproportionate because the prices did not match the value of the service the companies provided. These anti-competitive prices were detrimental to public interest while the business owners were able to derive excessive profits from their activities. During this period, individuals such as John Rockefeller formed trusts which were controlled by trustees who also held stocks in competing firms and as such were able to manage affairs in the industry in question. The power held by the trustees meant that they could eliminate competition among the firms they were controlling. As a result of these detrimental and injurious practices, the term 'antitrust' was coined and the Sherman Act 1890 was passed [7] and is still in force today.[8]The activities described above which led to the adoption of the

[5] Khan ibid 758.
[6] An Act to prevent Monopolies and Oppression by excessive and unreasonable Prices for many of the Necessaries and Conveniences of Life (1776), in the (1894) 1 The Public Records of the State of Connecticut 62-63, cited by Khan at 757.
[7] Maher M Dabah, *International and Comparative Competition Law* (CUP 2010) 228.
[8] Preamble of the Act: 'An act to protect trade and commerce against unlawful restraints and monopolies', 15 USC, 2 July 1890. It was supplemented by later statutes: the Clayton Antitrust Act of 1914, the Federal Trade Commission Act of 1914, the Robinson–Patman Act of 1936, the Celler–Kefauver Act of 1950, and the Hart–Scott–Rodino Antitrust Improvements Act of 1976.

Sherman Act appears to be the order of the day in Nigeria, with the existence of high number of monopolies in the local market which charge disproportionate prices which do not match the services provided. There is thus a call for the proper implementation of competition rules which will benefit the consumer as well as lead to socio economic advancement.

### 4.2.1 Background and Consideration of the Sherman Act, the Clayton Act, and the Federal Trade Commission Act

There are various laws in the US which are relevant to competition law though not all share the same degree of significance.[9] The following is a brief description of three main federal competition laws: the Sherman Act of 1890, [10] the Clayton Antitrust Act 1914 (hereinafter the 'Clayton Act') and the Federal Trade Commission Act 1914. These three are specifically selected in this research because the Sherman Act was the foremost major legislation passed to address unfair business conduct connected with cartels and oppressive monopolies. The Sherman Act is a federal law prohibiting any contract, trust, or conspiracy in restraint of interstate or foreign trade. However, like most laws, the Sherman Act has been expanded by court rulings and other legislative amendments since its inception. One such amendment came in the form of the Clayton Act 1914. The objective of the Clayton Act was to aid in the enforcement of the Sherman Act. The Clayton Act regulates general practices that may be damaging to fair competition. Some of these general practices controlled by the Clayton Act are price discrimination, exclusive dealing contracts, tying agreements, mergers, and acquisitions.

The Clayton Act is enforced by the Federal Trade Commission (FTC) and the Department of Justice (DOJ). Many of the requirements of the Clayton Act set out how the FTC or DOJ can respond to violations. Other parts of the Clayton Act are designed to prevent antitrust issues. For example, before two companies can merge, they must notify the FTC and obtain

[9] Eg Sherman Act of 1890; Wilson Tariff Act of 1894; Clayton Act of 1914; Federal Trade Commission Act of 1914; Anti-Dumping Act of 1916; Webb–Pomerene Act of 1918; Tariff Act of 1930; Robinson–Patman Act of 1936; Trade Act of 1974; Antitrust Procedures and Penalties Act of 1974; Hart–Scott–Rodino Antitrust Improvements Act of 1976; Export Trading Company Act of 1982; Federal Trade Antitrust Improvement Act (FTAIA) of 1982; Local Government Antitrust Act of 1984; National Cooperative Research Act of 1984; National Cooperative Research and Production Act of 1993; International Enforcement Assistance Act of 1994; Antitrust Criminal Penalty Enforcement and Reform Act of 2004.

[10] **Act** of July 2, **1890**(**Sherman** Anti-Trust **Act**), July 2, **1890**; Enrolled **Acts** and Resolutions of Congress, 1789-1992; General Records of the United States Government; Record Group 11; National Archives. ... The **Sherman** Antitrust **Act** was based on the constitutional power of Congress to regulate interstate commerce.The pioneer of antitrust law was Senator Sherman (1890). The Sherman Act is named after him.

approval prior to the merger. The Clayton Act also created exemptions from enforcement for certain organizations, the most significant being labour unions.

Both the Sherman Antitrust Act and the Clayton Act are federal laws. Many states have passed their own legislation regulating business entities. These three Acts are Federal laws and interrelated and thus are examined in this thesis

The Sherman Act was the first federal statute that articulated a general government policy towards monopolies in the US. It prevents two types of anti-competitive conduct. Section 1 states: 'Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.' Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.[11] Individuals committing an offence on or after 22 June 2004 can be fined up to $1,000,000 and can be sentenced for up to ten years in prison for each charge, and legal bodies can be fined up to $100,000,000. These fines may be increased by the courts, as they may impose a fine that is twice the defendant's gain or the victim's loss resulting from the offence.[12]

Section 1 of the Sherman Act prohibits direct restraint of agreements, whether the agreements contain explicit or implicit agreements conducive to restraint of trade. The Act does not define the kind of restrictive agreement that is deemed illegal: every contract in restraint of trade is prohibited. Different activities are considered a violation of the Act if the restraint is not reasonable. This principle known as the 'rule of reason' was applied in *Standard Oil Co of New Jersey v the United States*.[13] where the defendants faced charges of conspiring to restrain trade and establish a monopoly in the petroleum products sector. The court deemed that contracts in restraint of trade were illegal only if they contained unreasonable restraints of trade, and it found the defendants guilty as they operated unreasonably. Violations of the Sherman Act are divided into two types: illegal per se and illegal only if unreasonable (rule of reason). In *National Society of Professional Engineers*

[11] Sherman Act of 1890, s 1.
[12] United States Code, 18 USC S 3571(d).
[13] *Standard Oil Co v FTC* 340 US 231, 249 (1951).

*v United States*, [14] the court stated:

There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anti-competitive that no elaborate study of the industry is required to establish their illegality – they are illegal per se; in the second category are agreements whose anti-competitive effect can only be evaluated by analysing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.[15]

One of the main issues in the application of Section 1 of the Sherman Act is the question of how to determine whether the conduct unreasonably restrains competition. As mentioned above, courts addressed the subject by classifying restraints into one of two categories: (1) restraints that were presumed to be unreasonable and therefore per se illegal, and (2) restraints that were to be analysed under the rule of reason. The classification of a restraint depended on the nature of the restraint. Consequently, the following subsection briefly looks at the rule of reason and the illegal per se approach. While some actions such as market division[16] and price fixing[17] are inherently illegal and thus illegal per se, other arrangements such as possession of monopoly status may be analysed under the rule of reason and are considered illegal when their effect is to unreasonably restrain trade. These are discussed in order to determine if these rules can be transplanted in Nigeria

### 4.2.2 The Rule of Reason and the Per Se Approach

Based on the rule-of-reason approach, the circuit Court of Appeals should consider 'all the circumstances of the case in determining whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.'[18] Consequently, the court has a duty to consider all possible positions before coming to a conclusion on the legality of a particular restraint where the conduct does not consist of a per se offence. This approach suits practices that fall within a 'grey' area – that is, those whose object or effects do not clearly harm competition. In applying the rule of reason, courts will:

[14] *National Society of Professional Engineers v United States* 435 US 679 (1978).
[15] JH Agnew, *Competition Law* (Allen & Unwin 1985) 193-194; *National Society of Professional Engineers v United States* (n 14)
[16] *United States v Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898) 175 US*
[17] *United States v Socony Vacuum Oil Co., 310 US 150,210 (1940)*
[18] *Continental TV, Inc v GTE Sylvania, Inc* 433 US 36, 49 (1977) .

i. examine whether the restraint has substantial anti-competitive effects, including whether the restraint at issue has market impact, in that it raises prices, reduces output, limits choice, or diminishes quality;

ii. examine any evidence of pro-competitive aspects of the restraint; and

iii. weigh the anti-competitive effects against the pro-competitive impact of the alleged restraint.[19]

The rule of reason is based on the notion that only the circumstances that are detrimental to competition should be proscribed, and in the majority of cases, this is decided by analysing the effects produced in the relevant circumstance. The rule of reason also "differs in focus depending on the nature of the agreement and market circumstances[20]." The rule of reason is not a directive defined ex-ante.[21] Instead, the term embraces antitrust's most vague and open-ended principles, making prospective compliance with its requirements difficult. In certain circumstances, the application of the rule-of-reason approach would not be suitable because the conduct being questioned is clearly anti-competitive and as such should be deemed illegal per se. This indicates that it is unnecessary for a court to examine whether the conduct is harmful to consumers and competition or unreasonably restrains trade. The existence of such conduct is sufficient to fall within the ambit of the section 1 prohibition. Some circumstances falling within this description are cases involving price fixing.

Section 2 Sherman Act states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.[22]

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[19] *Leegin Creative Leather Products, Inc, Petitioner v PSKS, Inc, DBA KAYiS KLOSET . . . KAYiS SHOES*, 127 S Ct 2705, 2712-13 (2007).
[20] Federal Trade Commission & U.S. Department Of Justice, Antitrust Guidelines For Collaborations Among Competitiors § 1.2, at 4 (2000) <http://www.ftc.gov/ os/2000/04/ftcdojguidelines.pdf> accessed 1 June 2015 [hereinafter COLLABORATION GUIDELINES]. The rule of reason also governs most monopolization claims under section 2 of the Sherman Act. See United States v. Microsoft Corp., 253 F.3d 34, 58-59 (D.C. Cir. 2001)
[21] Lawrence A. Cunningham, A Prescription to Retire the Rhetoric of "Principles Based Systems" in Corporate Law, Securities Regulation, and Accounting, 60 VAND. L. REV. 1411, 1418 (2007).
[22] Sherman Act of 1890, s 2.

Section 2 of the Sherman Act is concerned with monopolization. The offence of monopoly comprises two aspects: controlling monopoly and the acquisition or continuation of monopoly. Regarding the control of the power of monopolies, the Act does not define size or percentage of the market share to be considered as a monopoly, but 70% demonstrates at least that the firm is monopolistic.[23] There are significant issues regarding what constitutes monopoly: first, the capacity to set prices without consideration of the competition; and second, the power to create barriers to prevent entry into the market. The Act does not prohibit monopoly itself, but rather conduct aimed at acquiring or maintaining monopoly power. Monopolization can be defined as 'control power of monopoly to prevent other competitors from entering the market or from increasing their market share'.[24]

The Sherman Act provides four ways to enforce the prohibitions. First, it made violation of the Act a criminal offence; therefore, any person who violates this Act may be punished by fine and/or imprisonment. Second, the courts are empowered to grant injunctions to either the DOJ (prosecutors) or a private party to stop violations of the Act. An injunction in monopoly cases can also require divestiture, which is the breaking up of the monopoly. If the defendant does not obey an injunction, it will lead to an action for contempt. Third, any person who has been injured or has suffered damage due to a violation of the Act may bring an action for damages.

The compensation award for damages can be up to three times the actual loss suffered. Each injured party, such as competitors and consumers, may bring an action for damages. Finally, any property that comes into ownership by virtue of a violation of section 1 of the Act can be seized by the government.[25] Although the Sherman Act granted power to the federal government and a new responsibility to control the local economy, the lack of experience of the lawmakers at that time created an ambiguously implemented Act that was difficult to interpret by courts.[26] Therefore, it was argued that the Sherman Act needed to be replaced in order to adopt a new system based on precondition competition and the technological system to prevent monopoly and oligopoly in the contemporary industry.[27]

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[23] *Paramount Pictures v United States* 334 US 131 (1948).
[24] Agnew (n 15) 195.
[25] ibid 195-196.
[26] William Letwin, 'Congress and the Sherman Antitrust Law: 1887-1890' (1956) 23(2) University of Chicago Law Review 255.
[27] Theodore Levitt, 'The Dilemma of Antitrust Aims: Comment' (1952) 42(5) American Economic Review 895.

The Sherman Act does not define or explain key terms contained in it such as restraint of trade or monopoly. With these significant and fundamental terms left undefined, the result is that broad authority is granted to the government and courts in determining what these terms are. Thus, what the courts in the US make of the provisions of the Act determine what they become. It has been argued that the Act is very brief, prohibiting monopolization, attempted monopolization, and agreements in restraint of trade, without defining any of those terms. While defining the terms could narrow the application, the vague nature of the Act has been highly criticized and can bring dangers in terms of its implementation since the character of the Act gives a wide interpretational latitude to the courts in determining what constitutes the prohibited acts under the Act. Furthermore, the vagueness of the Sherman Act makes it difficult to understand its objective.

There is a debate on whether the Act intends to protect consumers' interest in low prices or small business's interest in high prices. The confusion on this intention was illustrated in the case of *United States v Transport-Missouri Freight Association*,[28] where the Supreme Court in its first case of applying the Act held that the Act could be violated by business combinations that decrease prices as well as by those that increase them. Low prices, the Court held, may 'drive out of business the small dealers and worthy men whose lives have been spent therein and who might be unable to adjust themselves to their altered surroundings.' Furthermore, The Court (in the *Transport-Missouri* case) stated that the Act prohibited cartelization ('naked' price-fixing agreements that do not involve any integration of operation) and that it could undo monopolistic mergers. However, despite the criticism of the Act, it has remained the upholder of antitrust policy in the US. Its vagueness and failure to define some provisions in the Act have ensured judicial interpretational freedom in its application by the courts, even in the most contemporary of cases.

### 4.2.3 The Clayton Act of 1914

The core provisions of American federal antitrust law are found in the 1890 Sherman Act and the 1914 Clayton Act. The Clayton Act is a civil statute and as such provides only civil remedies for violations of its provisions. The Act declared four restrictive or monopolistic acts as illegal but not criminal: price discrimination, where the seller is selling the same product at different prices to different buyers (section 2); tied and exclusive dealing

[28] (1897) 166 US 290.

contracts, which are made with a condition to prevent the buyer dealing with the seller's rivals (section 3); the acquisition of competing companies (section 7); and interlocking directorates, which have common board members in different competing companies (section 8). Section 2, dealing with price discrimination, was revised in the Robinson–Patman Act of 1936, and concerned dealing with acquisitions in the Celler–Kefauver Act of 1950.[29]

Like the Sherman Act, the Clayton Act has been criticized as stifling innovation and creating undue inefficiency in the free market. It has been suggested that larger commercial entities have the ability to continue innovation to maintain their market share and that supporting smaller, less capable enterprises in the name of competitiveness is inherently anti-competitive[30]. These advocates also firmly support the notion of the self-correcting nature of markets and the possibility that inefficient collusive companies that work contrary to consumers will ultimately fail. The Clayton Act has also been criticised as doing away with "economies of scale" by preventing business expansion that in turn prevents cost reducing devices such as bulk buying, long-term contracts, and specialization. Larger companies also get better interest rates from banks for long-term borrowing. Increasing economies of scale create natural monopolies that usually benefit the consumer as the growing commercial interest gets capable of providing lower cost goods and widespread commercial success from growing in new markets.

### 4.2.4 The Federal Trade Commission Act of 1914

The Federal Trade Commission Act 1914 established the Federal Trade Commission (FTC), an independent agency to control discriminating trade practices. According to section 5, the Act's individual key provision (as amended in 1938), provides: 'unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful'. Though section 5 covers conduct prohibited by the Sherman Act and the Clayton Act, 'unfair' has been defined by courts to include conduct that runs counter to established public policy, and may cover conduct that

[29] A Neale, *The Antitrust Laws of United States of America* (CUP 1970) 3.
[30] Robert Bork, The Antitrust Paradox,1993 "Fragmentation is sought as 'an end in itself and not merely for the sake of competition'" (54). Bork notes that "A policy of rivalry for its own sake, and in spite of the costs of industrial fragmentation, would outlaw monopoly no matter how gained" (57). Bork's analysis illustrates that both the framers of the law and many of its enforcers have upheld the law not as a means of promoting capitalistic efficiency, but rather as a means of preserving "competition" and "rivalry" as goods unto themselves.

may not be an infringement of the Sherman Act or the Clayton Act.[31] Like the Clayton Act, a violation of section 5 is not a criminal offence and the FTC shares responsibility for the enforcement of the Clayton Act with the DOJ.[32]

The duties of the FTC are not restricted to the area of competition. It also has a Bureau of Consumer Protection in addition to the Bureau of Economics, which gives support to the Bureau of Competition. Although the Bureau of Competition looks at business phenomena for possible anti-competitive effects, its key duties are the review of notified mergers under the Clayton Act 1914. The Bureau's stand on 'what to investigate' is based on the notion that the FTC takes strict prosecution action under the law when this is considered necessary to protect consumers. Furthermore, the Bureau of Competition has a key research role in submitting reports and legislative recommendations to Congress and being a vital resource on competition subjects—for instance, by publishing guidance to businesses working hand in hand with the Antitrust Division.[33]

On analysis of the antitrust system in the US, academics have recognized five features in the US model. First, the enforcement system in the US contains two authorities: the FTC and the DOJ. However, neither has the power to grant exemptions to firms from the prohibitions of antitrust laws or make a binding decision. Second, US antitrust laws criminalized several violations, such as price fixing (therefore, executives of firms may be jailed if the firms violate the law). Third, in different states, attorney generals have the power to bring actions to enforce US antitrust laws, regardless of whether the FTC and the DOJ have already made different decisions. Fourth, the US system of antitrust permits private parties to take actions for damage suffered. Fifth, the system sets the amount of compensatory damages at three times the actual loss.[34]

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[31] *Federal Trade Commission v Sperry & Hutchinson Co* 405 US 233, 244 (1972).
[32] E Gellhorn, *Antitrust Law and Economics* (West Publishing Co 1986) 30-31.
[33] Dabah (n 7) 237, where he is of the opinion that 'publishing guidance comes to serve a number of important purposes, including enhancing transparency in the work of the authorities and reducing the compliance costs on the part of businesses with the competition rules'. Over the years, the authorities published guidance covering different areas, ranging from the licensing of intellectual property rights to the application of the competition rules in an international context (international operations) to the healthcare industry; guidance has also been published in the field of merger control, notably the Horizontal Merger Guidelines (1992) and Non Horizontal Merger Guidelines (1984). The DOJ and the FTC revised the Horizontal Merger Guidelines in August 2010.
[34] Maher Dabbah, *The Internationalisation of Antitrust Policy* (CUP 2003) 274. A large number of publications have been written on US antitrust (competition) laws, eg A Neale, *The Antitrust Laws of United States of America* (CUP 1970); R Peritz, *Competition Policy in America, 1888–1992 History, Rhetoric, Law* (OUP 1996).

### 4.2.5 Theoretical Foundations of US Competition Law

The foundation of competition law in the US is examined to determine if there are similarities in the factors that led to the enactment of competition law in the US and the arguments for competition law in Nigeria and if the approaches used to regulate competition are ones that may be adopted in Nigeria. Over the years, many theories have been developed advocating the use of a particular type of economic approach in the area of competition law. Some of these theories extended to the fundamental question concerning intervention in the market place and goals of competition law. Two prominent schools of thought have been most active in the debate: the Chicago School and the Harvard school. The influence of Chicago School can be seen in competition law regimes all over the world, the approach followed when enforcing competition law rules in many regimes shows the relevant authorities follow this school of thought and its teachings.

This thesis contends that the adoption of competition law in Nigeria will bring about increased efficiency and thus achieve consumer welfare through lower prices and better quality. This constitutes one of the arguments of the Chicago School as proferred by Robert Bork.[35] Consequently, the following section considers the line of thinking and arguments proffered by these schools of thought and considers whether these arguments may be adopted in Nigeria.

#### The Harvard School and Chicago School

The Harvard school of thought focuses on the structure of the market and industry. It is based on a structuralist approach to competition law and its enforcement. This approach was applied in US competition laws from the 1950s to the 1970s. In following a structuralist approach, the emphasis was on the structure of the relevant market as the main standard for determining how likely anti-competitive behaviour is in the relevant market. It was considered that the more concentrated the market is, the fewer the number of firms operating in the market, and the higher the likelihood that the firms in question will participate in anti-competitive activities. Consequently, markets which present such structural problems were seen to provide opportunities for businesses operating in them to exercise market power in

[35] Bork was a prominent Chicago scholar who believed the goal of competition law was the maximisation of consumer welfare: RH Bork, 'The Role of the Courts in Applying Economics' (1985) Antitrust Law Journal 2.

a way that would help them maximize their personal profits. The Harvard School of thought was based on the model that market power alone could not be relied on without intervention by public authorities. As such, in the absence of proper intervention, market failure was considered to be inevitable. This line of thinking attached considerable importance to the legislative intent behind the Sherman Act and the Clayton Act, and its followers relied on what they believed to be Congress' intention for adopting competition law in the US—the need to combat the immense economic and political power of large market players.[36] The school advocated heavy intervention in the market and considered this the intention of the Sherman Act and the Clayton Act. The School argued that the goal of the law was to protect competitors and not competition, and considered that this was the explanation that should be followed in light of the all-encompassing language used in the law and the risk to small and medium-sized businesses caused as a result of economic power enjoyed by their larger competitors.[37]

Consequently, it was considered to be key to use competition law to regulate the economic power of large businesses; priority was not given to the benefits consumers may have in this case.[38] The Harvard School suffered some drawbacks which meant the school had no place in the modern field of competition law. It was considered to be unsatisfactory as it meant that the conduct of a firm with lower market shares would be permitted but that similar behaviour by a business with more market power would not without attention being given to the behaviour itself to see whether or not it enhanced competition. As a result, of the drawbacks suffered by the Harvard School of thought and the undesirable effect, it had on firms engaging in aggressive competition, the Chicago School of thought developed.

The Chicago School followers argued that the purpose of competition law was to increase efficiency rather than to protect small and medium size competitors. It was considered that attention when applying competition rules should be given to protecting competition because it was argued that through this, consumer welfare in terms of lower prices, better

[36] An example is the United States Steel Corporation which controlled two thirds of steel production in the early twentieth century.
[37] T Dilorenzo, The Origins of Antitrust: An Interest-Group Perspective' [1985] International Review of Law and Economics 73.
[38] For example, in *Brown Shoe Co v United States* 370 US 294 (1962), the Supreme Court prohibited a merger under section 7 of the Clayton Act 1914 between two shoe manufacturers, stating that the main issue was to protect small businesses against potential abuses of power by larger firms, despite acknowledging that the merger would allow the firms to 'market their own brands at prices below those of competing independent retailers'.

quality and choices will be achieved. Advocates of Chicago School (most notably, Robert Bork) argued that the ultimate goal of competition law is the maximization of consumer welfare.[39] Furthermore, the Chicago scholars saw no validity in the argument that unless intervention by public authorities occurs, market failure was bound to happen. Contrary to this, Chicago school contended that markets can be relied on to deliver significant benefits to consumers and intervention should occur only in exceptional cases, when market failure occurs.[40] This theory is based on assumptions that consumers can make rational choices in terms of product and price and have sufficient information.

The Chicago School saw a transformation in the US competition law regime which is evident in the move away from the per se approach and the presumption of illegality towards the rule of reason approach. Consequently, the focus was on the use of economic power and whether the behaviour is harmful and not on its mere existence. It should, however, be noted that although the Chicago school led to the end of the Harvard school, it cannot be said that a structuralist approach has become irrelevant as the structure of a market, and concentration of economic power remains highly critical to competition law as can be seen in merger analysis. Furthermore, the Harvard School is said to have provided certainty for firms in relation to how the competition rules are to be applied in a given situation and the ability for the courts to use presumptions of illegality[41]

### 4.3 The European Union Competition Law Regime and the US Influence

This subsection briefly considers the competition law regime of the EU which has served as a valuable model that many competition authorities rely on for an understanding of how competition concerns are investigated and recent trends in the field.[42] This shows the evolving nature of the law and legal writing on EU competition law inclines towards distinguishing between 'old' and 'new' competition law.[43] 'Old' competition law, which is competition law doctrine developed before the 1990s, is considered as 'formalistic,'

[39] RobertBork, 'The Role of the Courts in Applying Economics' [1985] Antitrust Law Journal 2.
[40] Eleanor Fox, 'The Battle for the soul of Antitrust' [1987] California Law Review 917.
[41] Maher Dabbah, *The Internationalisation of Antitrust Policy* (CUP 2003) 255
[42] Extensive literature has been published on EU competition law and policy in books and articles. Notable are: Bellamy& Child, *European Union Law of Competition* (supplement to 7th edn, OUP 2015); A Jones and B Sufrin, *EU Competition Law: Text Cases and Materials* (OUP 2014); R Whish, *Competition Law* (OUP 2015); M Furse, *Competition Law of the EC and UK* (OUP 2008); M Dabbah, International and Comparative Competition Law (Antitrust and Competition Law) (CUP 2010).
[43] James S Venit, 'Article 82: The Last Frontier—Fighting Fire with Fire?' (2004) 28 Fordham International Law Journal 1157, 1161-6.

interventionist, and economically uninformed.[44] On the other hand, 'New' competition law has profited from the insight of a 'more economic approach.' While 'old' competition law, supposedly concentrated on goals such as fairness and impartiality, was 'contaminated' by a common market goal and based on a pro-regulatory idea, the goal of 'new' competition law is consumer welfare maximization and has left the irrationalities of 'old' competition law behind. Accordingly it may be suggested that the 'more economic approach' is to EU competition law what the 'Chicago School revolution' was to antitrust law in the United States.

This thesis does not address the question of how and why this alleged break in European competition law thinking has occurred. Rather, this section focuses on the foundation period of European competition law and on the difficulties that EEC competition law had during its foundation years. This is so as to compare to the challenges faced in enacting a competition law in Nogeria and the expected implementation challenges once such a law has been passed. What was then the EEC had to build up a regime of substantive competition law from inception since no comparable regime had existed before in the member states. While the US approach to competition law provided some orientation, the EEC legal order required new and concrete solutions in many respects. There had to be efficient and uniform competition law enforcement across all member states, each with its diverse backgrounds concerning the relationship between the state and market. In such a situation, the focus was essentially on public enforcement, and on implementation by the Commission. From inception, the evolution of European competition law was tied with the Community's task to create a single market and the need to define and to confine the member states' function in the economy. The questions that arose are should and could competition rules prevail over the public interest as defined by national governments? Should the Commission apply competition rules according to shifting economic needs? Should competition rules cede to industrial policy goals?[45].

Over the years, there have been modifications in the founding EU treaties. However, competition law has traditionally not been affected by these changes. The text of the Treaty

[44] Barry E Hawk, 'System Failure: Vertical Restraints and EC Competition Law' (1995) 32 Common Market Law Review 973, 975-82, 983-6; James S Venit, 'Slouching Towards Bethlehem: The Role of Reason and Notification in EEC Antitrust Law' (1987) 10 Boston College International and Comparative Law Review 17, 33-35, 42-44; James S Venit, 'Future Competition Law' in Claus-Dieter Ehlermann and Laraine L Laudati (eds), *European Competition Law Annual 1997: The Objectives of Competition Policy* (Hart Publishing 1998) 567, 567-9.
[45] ibid.

of Rome's competition law provisions has remained essentially the same, although with some structural changes in terms used for example, 'European Community' and 'Community' is replaced by 'European Union' or 'Union'. The European Court of Justice (ECJ) is renamed the 'Court of Justice of the European Union' and the European Court of First Instance the 'General Court'. Lastly, 'common market' is replaced with 'internal market'[46]. The most notable moments of this change have been: the adoption of a Merger Regulation;[47] the new decentralized approach to the enforcement of Articles 101 and 102 TFEU, subsequent to the adoption of Regulation 1/2003;[48] and the turn to a 'more economic approach', generated by the publication of a series of new Block exemption regulations and policy guidelines in all areas of competition policy.[49] This had made the EU Treaties, because of the slow nature of Treaty amendment negotiation and ratification process, unsuitable for reforming the substance and procedure of competition law. Consequently, the European Commission has been granted the discretion, sometimes exercised jointly with the European Council, to structure the suitable competition law framework that would be parallel to the demand of times. The TFEU is not an exception: at first sight, the area of competition law has not been affected by a substantial number of changes. Some of the changes brought about are minor; nevertheless, others have the potential to become transformative for competition law in the EU. Changes introduced that may produce significant effects in the interpretation, and enforcement of EU competition law is due to the structural, functional and teleological methods of interpretation that have often been employed by the courts, which offer various interpretative options, and as such leading to a

[46] Ioannis Lianos, Competition law in the European union after the Treaty of Lisbon (CUP 2012) 256

[47] Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings [1989] OJ L 395/1.

[48] Ioannis Lianos, Competition law in the European Union after the Treaty of Lisbon; Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003) OJ L 1/1.

[49] Ioannis Lianos, n 48 at page 257, Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102/1; Commission Regulation (EU) 461/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector [2010] OJ L 129/52; Commission Regulation (EC) no. 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements [2000] OJ L 304/3; Commission Regulation (EC) no. 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements [2000] OJ L 304/7; Commission Regulation (EC) no. 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements [2004] OJ L 123/11; Commission Regulation (EC) of 24 March 2010 on the application of Article 101(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance [2010] OJ L 83/1; Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) [2009] OJ L 256/31

transformation of EU competition law. For example, Article 3(1)g of the Treaty of European Communities (now mentioned in Article 3 TEU) recognized the importance of establishing 'a system ensuring that competition in the internal market is not distorted'. Based on a teleological interpretation of this provision, the Court of Justice of the EU was able to extend the application of what is now Article 102 TFEU to exclusionary conduct that harms the effective competition structure and prejudices consumers indirectly.[50] Furthermore, the Court placed particular emphasis on ex Article 3(1)g EC when confronted with a conflict between competition rules and other policies and objectives and has pronounced, on the basis of this provision, that competition law constitutes a 'fundamental objective of the Community'.[12] Finally, the Court referred to this article when it granted to national competition authorities the power to set aside provisions of domestic legislation that jeopardize the *effet utile* of what is now Article 101 TFEU.[13]

Another major development of EU competition law practice is the interface between competition law and other public policies. In the practice of many member states, particularly of France and UK, competition policy had been planned and applied in the light of varying public policy goals such as control of anti-competitive agreements and dominant firm abuses. The accepted approach today, although with some limited exceptions, is that competition law revolves around the idea of the need to protect consumers and the process of competition, and thus sits at the heart of the culture of the country or region concerned.

The concurrent applicability of European and national competition rules, which is another aspect much debated in the early years, has also become uncontroversial.[51] It is supported by the rule that EU law takes priority over national law to the extent that applying national law in the case at hand would be incompatible with the *effet utile* of EU rules, [52] a proposition incorporated in Article 3 of Regulation 1/2003.[53] The Commission's initial proposition to

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[50] Ioannis Lianos at page 259, Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission* [1973] ECR 215, para. 23–26; Joined Cases 6/73 and 7/73, *Instituto Chemiotherapico Italiano SpA & Commercial Solvents Corp v Commission* [1974] ECR 223, para. 32; Case 85/76, *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461, paras. 38 and 125; Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207, paras. 63 and 183

[51] Case C-17/10, *Toshiba Corporation and Others vÚřad pro ochranu hospodářskésoutěže* (not yet reported) para 81; Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619, para 38.

[52] Case 14/68, *Walt Wilhelm and others v Bundeskartellamt* [1969] ECR 1; confirmed in Joined Cases 253/78 and 1 to 3/79, *Procureur de la République and others v Bruno Giry and Guerlain SA and others* [1980] ECR 2327 paras 14-16.

[53] Art 3(1) and (2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1.

limit the application of national competition rules to cases with no effect on interstate trade was not embraced by the ECJ, and when the Commission tried to re-activate this model in the context of the drafting of Regulation 1/2003, [54] it was not accepted by the member states. Another significant development of EU competition law in comparison with US antitrust law is its successful application to open up state-regulated sectors.[55] This concern was contentious during the 1980s when the Commission made its first forceful moves in this way. The Commission's broad interpretation of the Community competition rules in relation to state-run or sponsored activity was, however, fully backed by the ECJ.[56]

Repeated demands in particular by the French Government to change the relevant Treaty provision to protect the French concept of *service public*, closely intertwined with French conceptions of state sovereignty, were not successful.[57] The adoption of Article 14 TFEU (formerly Article 7(d) EC) by the Treaty of Amsterdam in 1997 has not reduced the substantial force in the application of competition rules to state-regulated sectors; nor substantial changes of interpretation based on the adoption of Protocol No 26 on services of general interest or other provisions introduced by the Treaty of Lisbon.[58] Furthermore, case law of the European Courts displays a strong sense of continuity. Contrary to the situation in the US, where early case law was overruled by the courts. Significant judgments of the foundational period, some of which are *Consten and Grundig*[59] on the interpretation of Article 85 EEC (now Article 101 TFEU), *Continental Can*[60] on the objectives of European competition law and the interpretation of Article 86 EEC (now Article 102 TFEU), and *Hoffmann-La Roche*[61] are still cited in recent judgments of the ECJ.[62]

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[54] Art 3 of the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 ('Regulation implementing Articles 81 and 82 of the Treaty') COM (2000) 582 final, OJ 2000, C365E/284.

[55] For a comprehensive analysis, Heike Schweitzer, *Daseinsvorsorge,* '*Service Public', Universaldienst* (Baden-Baden: Nomos, 2001/2002) 229-365,with references to the ECJ's case law.

[56] Case C-41/90, *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979, paras 21-23.

[57] Schweitzer (n55) 380-384.

[58] OJ 2008, C115/308.

[59] Joined Cases 56/64 and 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299, 340.

[60] Case 6/72, *Europemballage Corporation and Continental Can v Commission* [1973] ECR 215, paras 23-26.

[61] Case 85/76, *Hoffman-La Roche & Co AG v Commission* [1979] ECR 461.

[62] With regard to *Consten and Grundig*, see, for example, Case C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA* [2006] ECR I-11987 para 37. With regard to *Continental Can*, see Case C-202/07 P, *France Télécom SA v Commission* [2009] ECR I-2369, para 105; Case C-280/08 P, *Deutsche Telekom AG v Commission* [2010] ECR I-9555, para 176; Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, [2011] ECR I-527, para 24. With regard to *Hoffman-La Roche*, see, for example, Case C-549/10 P, *Tomra*, judgment of the ECJ of 19 April 2012 (not yet reported) para 70;

While observers of US antitrust law often distinguish different periods in which courts have followed different ideological trends and schools of economic thinking, [63] the predominant perception is that no similar doctrinal divergence exists in the evolution of EU competition law. The Chicago School thinking never became established in Europe, regardless of the introduction of a 'more economic approach' as we shall see below. As a consequence, it is possible that in implementing a competition law for Nigeria, the EU accepted approach that competition law revolves around the idea of the need to protect consumers and the process of competition, and thus sits at the heart of the culture of the country or region concerned will be taken.

### 4.4 Overview of EU Competition Law

Stepping back from the various lines of debate which EU competition law has lived through over its existence, the first observation is that due to significant reforms it has proven strong. Competition law developed as a novel legal regime with limited tradition in the national legal orders, and it met with significant opposition from the member states once its full force was known. With its direct applicability and exclusive enforcement regime at EU level, which is now connected with national enforcement, it has set itself at the core of EU law. The success of this policy domain was based on various factors. Among them was the fact that, due to its close links with the free movement rules and the goal of a common market, EU competition law has always been at the core of the European integration project. The function of competition law to realize and protect undistorted competition has translated into legal rules that provided safeguards against its discretionary instrumentalization for variable political purposes, and into a powerful system of public enforcement by the Commission, most of the time in close cooperation with the Union Courts. The growing body of precedents to which both Commission and the Courts have adhered has led to a strong sense of continuity over time, generally unaffected by changing schools of economic thought and policy.

The reforms that the EU competition law has gone through such as Merger Regulation and the turn towards a 'more economic approach', generated by the publication of a series of

Case C-52/09, *TeliaSonera Sverige*, para 23.

[63] William E Kovacic and Carl Shapiro, 'Antitrust Policy: A Century of Economic and Legal Thinking'(1999/2000)14 Journal of Economic Perspectives 43–60, where the authors distinguish five different periods.

new Block exemption regulations and policy guidelines in all areas of competition policy.[64] which have been analysed in this chapter have meant a partial demise from this prevailing continuity. However, the reforms have not disrupted the general continuity of the Union Courts' case law. As regards to the less controversial aspects of a 'more economic approach' the focus on strong economic evidence, both qualitative and quantitative there may be a risk that the added cost of better evidence may outweigh its added value. Most especially, in a European setting of decentralized competition law enforcement, not all NCAs may be in a position to live up to the expectations regarding economic evidence. The Commission, on the other hand, may be forced to focus on a small set of large cases, losing sight of other areas of competition law enforcement, or to shift towards an increasing use of consensual enforcement instruments outside the purview of judicial review. Another aspect to be closely observed is the interaction between competition law enforcement at the European level and at the national level. The following section, however, considers the cooperative relationship between the EU and US competition law regime.

### 4.5 Cooperation Between Competition Law Agencies: EU and US Competition Law

Having examined the EU and US competition law regime, this subsection briefly looks at the cooperative relationship between them considering globalisation and the existence of multinational firms operating in both markets, and some of which operate in Nigeria. Globalisation brings about focus on international cooperation economies are moving ever closer together and becoming more interdependent. On a microeconomic level, businesses increasingly operate across borders. Although there have been an increased number of competition systems worldwide over the last twenty years, these competition laws - and the practices of competition authorities and courts - have remained mostly national (or regional). With the global increase in the number of competition regimes, mostly in developing countries, who are more aware of the importance of putting a sound competition policy in place, it is crucial to recognise the need for effective international cooperation as well as its

[64] Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102/1; Commission Regulation (EU) 461/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector [2010] OJ L 129/52; Commission Regulation (EC) of 24 March 2010 on the application of Article 101(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance [2010] OJ L 83/1; Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) [2009] OJ L 256/31.

significant benefits, and also the risks associated with a lack of cross-border dialogue and coordination. For example, in international cartels, companies make anti-competitive agreements and operate them across borders. For competition authorities to respond properly, they have to communicate with other authorities at an initial stage of the investigation, coordinate enforcement activities, and exchange information. Companies will consequently be aware of the increased costs and risks when engaging in competition law infringements across frontiers and deterrence will be greater. By contrast, if there is no cooperation, it will be challenging for Nigeria to have an effective competition law enforcement. Furthermore, cooperation encourages a constant mutually beneficial learning process which brings an increase in efficiency as information and evidence are exchanged, and results are compared, to the benefit of all stakeholders concerned (including the parties to the investigation). Cooperation aids in avoiding conflicting outcomes and facilitates coordination of remedies. cooperation is a necessity in order to promote effective enforcement; globalisation of markets, and consequently of anti-competitive activity, requires increasing and enhanced cooperation in enforcement. international enforcement cooperation is not just a means to coordinate action in parallel investigations, but also as a way to improve their enforcement action by learning from the experience of others. The cooperative relationship between the EU and the US in antitrust policy is governed by the bilateral agreement of 23 September 1991.[65] The agreement provides for cooperation in respect of several aspects of EC and US antitrust laws. Article II deals with the need to notify the other party when it is clear to one party that its enforcement activities are likely to affect the interests of the other. Article III deals with the exchange of information between the parties. Article IV deals with coordination of enforcement activities between the parties. Art V deals with the important issue of 'positive comity'. It has the benefit, including the opportunity, for the parties to exchange views in all cases of mutual interest and, when appropriate, to coordinate enforcement activities.[66] Furthermore, the agreement introduced the principle of 'positive comity'.[67] Under this principle, one party to the agreement (known as the requesting party) can request the other party (known as the requested party) to address

[65] OJ [1995] L-95/45 as corrected by OJ [1995] L-131/38; D Ham, 'International Cooperation in the Antitrust Field and in Particular the Agreement Between the United States and the Commission of the European Communities' (1992) 30 CML Rev 571; J Griffin, 'EC/US Antitrust Cooperation Agreement: Impact on Transnational Business' (1993) 24 Law & Policy Intl Bus 105.

[66] A Haagsma, 'International Competition Issues: The EC-US Agreement of September 23, 1991' in Slot and McDonnell 229.

[67] 98/386/EC, ECSC: Decision of the Council and of the Commission of 29 May 1998 concerning the conclusion of the Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws.

anti-competitive behaviour within the latter's boundaries which has an effect on the interests of the former. Cooperation under this agreement has generally been productive.[68]

A case where such collaboration was significant is the CRS SABRE case where the US DOJ requested the Commission to investigate activities in the computer reservation system (CRS) markets that were alleged to be obstructing US CRS undertakings from efficiently competing in European markets. SABRE, which is owned by American Airlines, alleged that the anti-competitive conduct of the three large airline owners of Amadeus in Europe, the leading CRS, acted in an anti-competitive manner to make it difficult for SABRE to enter European markets.[69] The US DOJ decided to make a positive comity referral on the basis of the cooperation agreement between the then EU and the US. Justice Klein stated that the Commission was in the best position to investigate this conduct because it occurred within the EU and consumers are the ones who are principally at risk if competition has been distorted.[70] In its investigation, the Commission treated this as a priority case.[71] The case led to a statement of objections being issued against Air France, [72] one of the three European airline owners of Amadeus named in the US request. The Commission stated, on the basis of its initial inquiry, that Air France had discriminated against SABRE to favour Amadeus.

It is arguable that this particular case enhanced the confidence of the EC and the US regarding the effectiveness of the principle of positive comity.[73] In June 1996, and in the wake of successful negotiations with the US authorities, the Commission adopted a proposal

[68] The MCI WorldCom-Sprint case is a symbolic example of the European Commission and the US antitrust authorities working closely and sharing information constructively: Commission Press Release, 'Commission Opens Full Investigation into the MCI WorldCom-Sprint Merger' (21 February 2000) <http://europa.eu/rapid/press-release_IP-00-174_en.htm> accessed 22 February 2015. The European Commission did not allow the merger between US telecommunications firms MCI WorldCom Inc and Sprint Corp as it would have resulted in the creation of a dominant position in the market for top-level universal Internet connectivity. The companies proposed to divest Sprint's Internet business, but it was held that this was not enough to resolve the competition concerns resulting from the merger: Commission Press Release, 'Commission prohibits merger between MCI WorldCom and Sprint' (28 June 2000) <http://europa.eu/rapid/press-release_IP-00-668_en.htm> accessed 22 February 2015.

[69] It was alleged that the three airline owners in conjunction with their travel providers did not supply SABRE with the same fare data that it supplied to Amadeus, and also denied SABRE the ability to carry out the various booking and ticketing functions available to Amadeus.

[70] Department of Justice Press Release, 'Justice Department Asks European Communities to Investigate Possible Anticompetitive Conduct Affecting US Airlines' Computer Reservation Systems (28 April 1997) <http://www.justice.gov/atr/public/press_releases/1997/229081.htm> accessed 22 February 2015.

[71] Maher Dabbah, 'The Internationalisation of Antitrust Policy' (CUP 2003) 114.

[72] This led to Air France amending some of its policies and the matter went no further.

[73] US legislators made positive statements regarding the EU responses to US requests for enforcement. Senator H Kohl of the Antitrust, Business Rights and Competition Subcommittee stated that it was becoming obvious that the US's most important positive comity agreement, with the EU, was beginning to generate benefits: 'Senate Sub-Committee Focuses on International Enforcement, Positive Comity' (6 May 1999) 76 Antitrust & Trade Reg Rep (BNA) 482.

to build on the 1991 Agreement. The step to deepen the EU–US relations through another formal agreement was taken in 1998.[74] This agreement has many advantages. First, it contributes to advancing the principle of positive comity. Second, it confirms the efforts of the parties to continue employing the principle. Third, it clarifies the manner in which the principle will be implemented. Further agreements enhancing the level of cooperation between the EU and the US, as well as between the EU and other nations, have been entered into.[75] Entering into such cooperation agreements will be beneficial in Nigeria once competition law is established as it will encourage foreign direct investment which leads to socio economic advancement. Another agreement is the 2011 EU/US Best Practices on Cooperation in Merger Investigations.[76] In 2002, a set of best practices for cooperation in reviewing mergers was decided on. These best practices revised in 2011 are not legally binding but were intended to bring about an advice-giving structure for interagency cooperation. They put in place a controlled basis for cooperation in reviews of individual merger cases. The best practices recognize that collaboration is most operational when the investigation timetables of the reviewing agencies run more or less in parallel. Merging companies will, thus, be offered the option of meeting at an early stage with the agencies to consider timing issues. Companies are also encouraged to permit the agencies to exchange information that they have submitted during an investigation and, where applicable, to allow joint EU/US consultations of the businesses concerned. The practices designate key points in the respective EU and US merger investigations when it may be suitable for direct contacts to occur between senior officials on both sides.

### 4.6 'The More Economic Approach' as a New Era of EU Competition Law?

The 'more economic approach' was debatably the most critical challenge to EU competition law as it evolved between 1958 and the late 1980s. This said, and in contrast to the Chicago

[74] OJ [1998] L-173/26, [1999] 4 CMLR 502. Under the rules of positive comity, one party may request the other party to remedy anti-competitive behaviour that originates in its jurisdiction but affects the requesting party as well. The agreement clarifies both the mechanics of the positive comity cooperation instrument, and the circumstances in which it can be availed. Positive comity provisions are not frequently used, as companies (ie complainants) prefer to address directly the competition authority they consider to be best suited to deal with the situation. The positive comity agreement is important because it represents a commitment on the part of the US to co-operate with respect to antitrust enforcement rather than seeking to apply its antitrust laws extra-territorially.

[75] An agreement has also been entered into with Canada: Co-operation Agreement between Canada and the EC OJ [1999] L-17 5 49, [1999] 5 CMLR 713.

[76] US-EU Merger Working Group Best Practices in Co-operation in Merger Investigations (*European Commission*) <http://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf> accessed 12 February 2015.

School, which has been influential in US antitrust law the 'more economic approach' is not a monolithic theory or concept but rather a conglomerate of suggestions on how to make increased use of economic perceptions in interpreting and applying competition law. Three aspects can be distinguished. In its most far-reaching version, the 'more economic approach' is a proposition to redefine the goals of EU competition law. A different aspect of the 'more economic approach' is the suggestion to make more use of economic theories and methods to establish the significant facts of the case and provide evidence for the anti-competitive effects of a particular type of unilateral conduct. Finally, the 'more economic approach' in a 'light' form can be understood to suggest a review of the established tests for anti-competitive conduct in light of recent insights of economic theory with a view to determining whether EU competition can be interpreted in a more concise manner.

In different contexts, the Commission has endorsed these various aspects of a 'more economic approach'. The use of economic theory and methods to determine the relevant facts, define the market, and determine anti-competitive effects has become the rule rather than the exception. This development was prompted by the General Court's invalidation in 2002 of three Commission decisions in the field of merger control for their economically incomplete and illogical line of reasoning. Following these defeats in *Airtours*[77] ,*Schneider Electric*[78], and *Tetra Laval*, [79] DG Competition implemented significant internal changes especially in regard to its merger practice. One of these was the appointment of the first Chief Economist, who has the task of providing independent guidance on methodological issues of economics and econometrics in the application of EU competition rules both in individual cases and in the shaping of the Commission's overall competition policy. In controversial cases, the Commission now uses complex econometric evidence to back up a challenging market definition and test various theories of harm, although econometric evidence complements and does not normally replace qualitative analysis. Politically and legally, this aspect of the 'more economic approach' is relatively uncontroversial. In principle, it is up to the competition authority handling a case to decide on the method to be used to clarify the relevant facts and to provide evidence of infringement. Some concerns were raised about whether the Commission has gone too far in its use of economic evidence;

[77] Case T-342/99, *Airtours plc v Commission* [2002] ECR II-2585, paras 109-120, 172-181 and 270-277.
[78] Case T-310/01, *Schneider Electric SA v Commission* [2002] ECR II-4071; Case T-77/02, *Schneider Electric SA v Commission* [2002] ECR II-4201.
[79] Case T-5/02, *Tetra Laval BV v Commission* [2002] ECR II-4381; Case T-80/02, *Tetra Laval BV v Commission* [2002] ECR II-4519; confirmed by the ECJ, C-13/03 P, *Commission v Tetra Laval BV* [2005] ECR I-1113.

that is, whether the gains in accuracy still justify the additional cost. It is also unclear whether smaller national competition authorities within the European Competition Network can meet a similar standard. Courts should arguably be cautious, therefore, when they substantially raise the standard of proof.

An attempt by the Commission to redefine certain legal tests to reduce error costs is another version of a 'more economic approach'. In recent judgments on Article 102 TFEU for example, the EU Courts have given emphasis to the need to show anti-competitive effects in cases that do not by their nature create a strong presumption of such effects. So far, the Courts have left open whether likely or highly likely impact must be shown, or whether a showing of possible effects will suffice. They have highlighted that adverse impacts on the competitive process are to be distinguished from showing consumer harm. Legal controversy has arisen around the most far-reaching version of a 'more economic approach': since the mid-1980s, the proposition has gained traction that efficiency or the maximization of consumer welfare is the exclusive goal of EU competition law and that in implementing this objective the effects of any potentially anti-competitive action on consumer welfare must be analysed in order to determine its legality.[80] Agreements or unilateral behaviour are to be prohibited only if direct negative welfare effects can be shown, and whenever presumptions are used, an efficiency justification should be allowed. Competition Commissioners have, in various public statements, advocated this approach.[81]

In its enforcement practice, DG Competition today strives to identify direct and concrete consumer harm before issuing an infringement decision or prohibiting a merger. The 'more economic approach' in this interpretation proposes a break with the goals of EU competition law as defined by the ECJ, and with fundamental principles of interpretation in EU law. Traditionally, the rules of competition law have been derived from a functional interpretation which places the competition rules in the context of the general purpose and objectives of the Treaty[82] and highlights the interaction between the competition rules and free movement

[80] Damien J Neven, 'Competition Economics and Antitrust in Europe' (2006) 21 Economic Policy 741.
[81] In 2004, Mario Monti, summarizing the key achievements of his term as a Commissioner, contended that he had 'put consumer welfare at the top of the agenda of competition policy in Europe': Mario Monti, 'Competition for Consumer's Benefit', speech of 22 October 2004 given at the European Competition Day, Amsterdam <http://ec.europa.eu/competition/speeches/text/sp 2004_016_en.pdf>
[82] Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health (CILFIT)* [1982] ECR 3415, para 20: '[…] every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.'

rules. Efficiency and consumer protection goals have always been implicated. The increase of efficiency and competitiveness of European firms were among the key objectives of the common market from the start, yet the finding of a competition law infringement has never presupposed a direct showing of consumer harm. However, In *Continental Can*, the ECJ established that the EU competition rules in general, and Article 102 TFEU in particular, were 'not only aimed at practices which may cause damage to consumers directly but also at those which are detrimental to them through their impact on an effective competition structure.'[83] It has maintained this line of thought ever since, including in direct reaction to calls for a 'more economic approach.'

During the past twenty years, EU competition law has followed, the path of economic analysis, either by adopting more economically oriented block exemption regulations and guidelines or by using more economic and empirical evidence in the competition law decisions, at least at the European Commission's level. The turn towards a more economic approach in the EU is exemplified by the use of economic concepts in the vocabulary of EU competition law, such as 'consumer welfare' or 'market power'. Although the notion of consumer welfare has been sparingly employed in official texts adopted by the EU Institutions, [84] it has had a significant appeal to the legal and economic commentators in EU competition law, to the extent that some contend that it constitutes competition law's primary objective.[85] In several soft law instruments adopted by the Commission (EU guidelines), economic efficiency and the protection of the interest of final consumers figure as objectives equal to that of the completion of the internal market.[86]

However, there have been cases in which the concept of consumer welfare collides with the market integration policy, as illustrated in the *Glaxo* case where the Court had to compare the potential benefits for consumers of restrictions to parallel trade with a possible encroachment on the internal market principle. After some initial hesitations generated by the case law of the General Court,[29] the Court of Justice seems to have re-affirmed the

[83] Case 6/72, *Continental Can* [1973] ECR 215 para 26.
[84] For an analysis see, I. Lianos, '"Lost in Translation?" Towards a Theory of Economic Transplants', *Current Legal Problems* (2009) 346–404.
[85] For an analysis see, J. Drexl, W. Kerber & R. Posdzun (eds.), *Competition Policy and the Economic Approach: Foundations and Limitations* (Edward Elgar, 2011).
[86]Commission, Notice – Guidelines on the application of article 81(3) [2004] OJ C 101/7, para. 13: 'The objective of Article 81 [now Article 101 TFEU] is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers'

(primary) role of the internal market objective.[30] The modifications introduced by the TEU and the TFEU seem to confirm the importance of market integration in EU competition law. It is also true that the protection of the competitive process, in this case, intraband competition among various pharmaceutical wholesalers across the Union may also enhance the objective of the internal market if the latter objective is conceived as an elimination of public and private barriers to trade. However, as the judgment of the General Court in this case illustrates, there is tension between the protection of the internal market and the welfare of final consumers: Because of the intense price regulation of pharmaceuticals and the involvement of state actors, enhancing parallel trade does not necessarily lead to lower prices for final consumers but, on the contrary, to the enrichment of intermediaries, such as parallel importers, which do not contribute to research and development efforts in the industry. Consequently, in the long run, there is less innovation from which consumers may benefit. A pro-consumer welfare perspective would thus lead to finding that restrictions on parallel imports should not be prohibited if this could encourage innovation benefiting consumers sufficiently in the long term so as to outweigh the short-term effects to allocative efficiency of such prohibition.

Consumer protection constitutes an important objective of the Union. Article 12 TFEU provides that 'consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities'. This article may be interpreted as requiring that the protection of the consumer's interest should be an integral part of EU competition law and policy.[87] The interpretative outcome would, therefore, depend on the balance between allocative efficiency (the price of pharmaceuticals is lower with parallel imports) and dynamic efficiency (there is more innovation in the pharmaceutical industry if parallel restrictions are limited). Protocol no. 27 emphasizes that the system of competition law is part of the broader internal market objective. In doing so, it clarifies that market integration constitutes the *specific* aim of competition law, meaning that in the case of conflict between this and other more general objectives followed by the Treaty – such as protection of the interest of consumers – the objective of the internal market should take priority. In the case of conflict, the repeal of Article 3(1)g certainly raises the issue of the rank of competition law and its relation to other provisions of the Treaty. In terms of legal

[87] Ioannis Lianos, Competition law in the European union after the Treaty of Lisbon at page 268; For a strong correlation between competition law and consumer policy see, J. Stuyck, 'EC Competition Policy after Modernisation: More Than Ever in the Interest of Consumers' 28 (2005) *Journal of Consumer Policy* 1–30

effect, pursuant to Article 51 TEU, Protocol no. 27 has, however, the same legal status as the TEU and the TFEU. The courts maintain their ability to ensure the *effet utile* of this provision, as was previously the case with Article 3(1)g.EC

Second, it is argued that the inclusion of Article 3(3) of the concept of 'a highly competitive social market economy' might influence the courts when deciding on the interaction of competition law with other policies pursued by the Treaty. Thus, it has been suggested that this situation should be distinguished from that relating to the existence of a specific objective of EU competition law, the internal market, following Protocol no. 27. One could analyse the inclusion of the concept of social market economy in the text of the Treaties as profoundly interlinked with the addition of broad horizontal integration provisions with the goal of managing the interaction between the different policies pursued by the Treaty, included in Title II of the TFEU, entitled 'Provisions having general application'.[88] The concept of social market economy will thus operate more as an interpretative principle rather than as an objective of EU competition law. The idea is to transform the Union into an all-inclusive polity with competence to act, or, at least, to consider, all aspects of the welfare of its citizens and constituent states. Article 9 of the TFEU states that 'in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high standard of education, training and protection of human health'.[89] As discussed earlier, one could also add Article 12 on consumer protection. Such broad policy integration provisions did not exist in the general principles part of the previous Treaties, although it did in some specific areas, such as the protection of the environment.[90] The inclusion of these provisions will inevitably lead the Commission, and arguably the courts, to grant more importance to broader public interest concerns in some circumstances.

Further, Article 257 TFEU enables the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, to establish specialised courts attached to the General Court to hear and determine at first instance certain classes of proceedings brought in particular areas. The decisions reached by special courts may be subject to a right of appeal on points of law only or, when provided for in the regulation establishing the

[88] ibid 268.
[89] Article 9 TFEU.
[90] Article 6 TEC, now Article 11 TFEU.

specialised court, a right of appeal on matters of fact before the General Court. There has been some discussion on the need to create a specialised competition court in the EU, following some proposals made by the Confederation of British Industries in 2006.[91] However, there has not yet been any formal proposal in this direction.

This thesis does not intend to broadly analyse the pros and cons of the most economic approach. However, against the background of the history of EU competition law, two points should be noted. First, the 'more economic approach' was from the beginning presented as an effort to overcome an alleged European Ordoliberalism, which holds that the state must provide an adequate legal environment for the economy and preserve a healthy level of competition. The concern is that if the state does not protect competition, firms with monopoly power will emerge and thus subvert the advantages offered by the market economy. Certainly, the attempt to replace the protection of the competitive process by a welfare maximization goal is in contrast to an ordoliberal conception. Yet it was not the key difference between ordoliberalism and utilitarianism, between a rights-based and a welfare effects-based approach, that dominated the debate. Rather, ordoliberalism, the major goal of which had been to translate economic theory into law, was misrepresented as a political movement, mainly attached to fairness concerns, misaligned with economic theory, formalistic by nature, with no regard for the effects of a given type of conduct, and committed to a pro-regulatory stance.

The 'more economic approach', on the other hand, was equated with a competition policy based on a determination of welfare effects. In such a scenario, the real dispute remained: should competition law be concerned with welfare effects only, or rather also with effects on the competitive process, as EU competition law has always been?

The 'more economic approach' has created a systemic influence within the EU. Arguably, pressure came from the US antitrust authorities.[92] The *Intel* case is an illustration of the

[91] See, Confederation of British Industry (CBI) proposal for the creation of an EU Competition Court, CBI Report, 15 June 2006. The suggestion has been examined by the House of Lords, European Union Select Committee, 15th report of Session 2006–07, An EU Competition Court, HL Paper 75, 23 April 2007, in Lianos (ed) Competition Law in the EU at page 287.

[92] Former DOJ Deputy Assistant Attorney General Deborah Platt Majoras, 'GE-Honeywell: The U.S. Decision', address given 29 November 2001 to the Antitrust Law Section State Bar of Atlanta, (<http://www.justice.gov/atr/public/speeches/9893.htm>) in reaction to Commission Decision No 2004/134/EC of 3 July 2001 declaring a concentration to be incompatible with the common market and the EEA Agreement, Case COMP/M.2220—General Electric/Honeywell, OJ 2004, L48/1; confirmed by CFI in Case T-209/01, *Honeywell International, Inc v Commission* [2005] ECR II-5527 and Case T-210/01, *Honeywell International, Inc v Commission* [2005] ECR II- 5575.

difficulties the 'more economic approach' raises. On the basis of established case law, the facts presented by the Commission in its decision[93] suggest a case of exclusionary loyalty rebates and hence an infringement of Article 102 TFEU. Nonetheless, the Commission's decision delves deeply into an analysis of the rebates' negative consumer welfare effects. While this is done on the basis of the Commission's Guidance Paper on the Enforcement Priorities in applying Article 102 TFEU, [94] there is an apparent mismatch: enforcement priorities are characteristically defined to focus scarce resources on particularly important cases. However in the *Intel* decision, the impression is that it takes more resources to show the priority characteristics than to identify a violation of Article 102 TFEU. In fact, the *Intel* decision seems to propose a new type of test for identifying anti-competitive rebates, but its wording suggests that consumer harm is shown merely to argue that the *Intel* case is indeed an enforcement priority—a fact that would normally be irrelevant for the legality of the infringement decision as such. The principle that the Commission must regularly stick to its self-imposed rules so as to ensure equal treatment cannot save an undertaking from the finding of infringement where it exists. On the other hand, the double reasoning of the Commission meant to satisfy both proponents and opponents of a 'more economic approach' imposes an extra burden on the defendant, who will try to disprove negative welfare effects.

The debate on the need for a 'more economic approach' has no close equivalent in the early discussions on the design and interpretation of the EEC competition rules. Rather, early debates focused on differing conceptions of a largely discretionary competition policy at the service of varying political goals on the one hand, and a justiciable, rule-oriented and thereby non-political competition law on the other. Only a rule-oriented regime seemed capable of protecting a system of undistorted competition against temptations at the national and EU level to engage in centralized planning or ad hoc intervention and protect against political influence. In this regard, the transformation of competition policy into law has been one of the major achievements of the EU.

### 4.7 Conclusion

Based on the foregoing, this thesis suggests that the expansion of antitrust policy to Nigeria may well depend on the respective positions and trends in the EU and the US. While some

[93] Commission Decision D(2009)3726 of 13 May 2009, Case COMP/C-3/37.990—*Intel*.
[94] European Commission, Guidance on the Commission's Enforcement Priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009, C45/7.

developing countries have established competition laws solely on EU competition law, [95] other states seem to have turned to the US model when implementing antitrust laws.[96] Between these two ends, a few states have adopted combined aspects of EU and US antitrust laws; for example, Canadian antitrust law on dominance is similar to that of the EU, while provisions on mergers, horizontal and vertical agreements are similar to US antitrust law.[97] Nigeria has been slow to implement either type of competition law. It is arguable that this may be due to the fear that antitrust law is a tool for developed states to exploit the economy. This is an unusual situation, seeing that Nigeria appears keen on ensuring adequate control over anti-competitive behaviour, particularly because it may be vulnerable to such conduct as a result of the ongoing liberalisation of various sectors of the economy and as it may be subject to the extraterritorial application of antitrust laws of other states.

It is may be argued that if Nigeria adopts competition policies followed by the EU or USA they would not be able to implement them. Developing countries adopt the language of modern Western competition law models without an effective enforcement bureaucracy, and even if it exists it may be understaffed and subject to political constraints. Advocating for different competition laws in Nigeria is not only based on the different local circumstances but more importantly on the different goals these laws should address inNigeria. However, despite the conclusion that Nigeria needs laws that address different issues and goals than those of theEU and USA, one can easily conclude that the reality is different. The reality is that most developing countries adopt laws that do not address their particular conditions.'One size fit all' models of competition laws have developed that are adopted

[95] M Ojala, *The Competition Law of Central and Eastern Europe* (Sweet & Maxwell 1999); M Cowie and M Novotria, 'Pre-Merger Notification in Central and Eastern Europe' (1998) 12 Antitrust 19; C Brzezinski, 'Competition and Antitrust Law in Central Europe: Poland, the Czech Republic, Slovakia and Hungary' (1994) 15 Mich J Intl L 1129; G Oprescue and E Rohlck, 'Competition Policy in Transition Economies: The Case of Romania' (1999) 3 EC Comp Poly NewsL 62. Such states include most Central and Eastern European countries.

[96] One of such countries is Mexico. However, Mexico recently passed a Bill amending some provisions of the Mexican Federal Constitution which will bring key changes to competition regulation. The Bill provides for the establishment of two independent agencies to implement competition policy: (i) the Federal Economic Competition Commission (FECC) and (ii) the Federal Institute of Telecommunications (FIT). With the application of the amendments, the FIT is in charge of handling antitrust matters relating to the telecommunications industry, and the FECC retains the current Federal Competition Commission's (FCC) enforcement actions as to other industries. Before the amendments, only the former FCC dealt with antitrust issues, including merger control, and investigations and proceedings with respect to dominant undertakings, irrespective of the industries involved. In contrast, in most regulated sectors in the US, including the telecommunications, electricity, and banking industries, both the antitrust authorities, the DOJ and the FTC, and the relevant regulatory authorities have concurrent jurisdiction over commercial conduct, with the regulatory agency's operative review standard typically including both competition and non-competition factors.

[97] Canada Competition Bureau <http://www.competitionbureau.gc.ca/> accessed 12 February 2015.

across the world. Studies show that the laws enacted in the developing world are quite similar to those adopted in the developed countries.[98] One can conclude that the Competition laws are relatively similar in the developed and in the developing world. One can also conclude that the scope of the law does not differ depending on the developmental status of a country. This of course is leaving out enforcement of the law, which assumingly is where the real difference resides.

The thesis suggests that where the Nigerian competition law is modelled on the lines of EU law, the Competition Commission should not be bound to interpret similar provisions in the Nigerian law in the manner interpreted under EU law. However, the Commission is bound to interpret it in a way that promotes economic development in Nigeria. This is because the conditions that exist in Nigeria are remarkably different than those that exist in the EU and to come to the level where there can be talk of similar interpretation of laws in the two jurisdictions, similar development level would necessarily be a condition precedent.

The following chapter analyses the historical antecedents and developments in the competition law regime in India and in Africa using South Africa as a model and concludes by suggesting possible competition law models for Nigeria.

[98] Keith N. Hylton and Fei Deng; 'Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects'; (2006); BU Univ. Working Paper Series L. & Econ. 06-47.

## CHAPTER 5: THE INDIAN EXPERIENCE

### 5.1 Introduction

This section focuses on the evolution of competition law in India, analysing the factors that led to the enactment of India's first competition law in 1969 and how the economic reforms initiated after the 1990s made India's first competition law redundant, and the subsequent enactment of the Competition Act 2002 and the Competition Amendment Bill 2012. This is relevant to Nigeria as it highlights the evolving nature of competition law and indicates the possibility that with time the first competition law enacted may become redundant. The chapter analyses the approaches in dealing with various trade practices detrimental to competition and consumer interest. It also considers the symbiotic relationship between law and economics in a changing society for meeting the changing needs and desires of the community. Furthermore it recognises that Indian competition jurisprudence has made remarkable progress in developing the law through its statutory bodies, namely the Competition Commission of India (CCI) and the appellate forum, the Competition Appellate Tribunal (COMPAT) and it considers the efficacy of the Indian Competition Law analysing cases that have been dealt with the Competition Commission and the Competition Appeals Tribunal.[1]. It concludes that the relative success that has been achieved by the Indian Competition Law can be achieved in Nigeria.

#### 5.1.1 Historical Background of Competition Law in India

Temple inscriptions and inscriptions on other monuments of over 2,000 years ago record the prohibition of merchants and producers from making collective agreements to influence the natural market price of goods by withholding from trade.[2] The Monopolies Enquiry Commission, established in 1964, was of the opinion that dangers from concentrated economic power and monopolistic practices were significant.[3] The first legislation with regard to anti-competitive practices and pertaining to free trade was the Monopolies and

[1] COMPAT has held that penalty on a business found to be anti-competitive needs to be determined on relevant turnover and not based on total turnover and this principle has been recently endorsed by the Supreme Court. However the Indian Government through the Finance Act, 2017 dissolved the COMPAT from May 2017. The National Company Law Appellate Tribunal (NCLAT) is to adjudicate the appeals filed against the orders passed by National Company Law Tribunal (NCLT) benches and Insolvency and Bankruptcy orders.
[2] Surendra L Rao, 'Towards a National Competition Policy for India', (1998) 33 Economic and Political Weekly 31.
[3] CUTS Center for International Trade Economics and Environment, 'Reorienting Competition Policy and Law in India' (2002) 23 <www.cuts-internationa.org/7upindia.pdf> accessed 10 October 2017

Restrictive Trade Practices Act (MRTP Act) 1969. This Act was based on different laws such as UK legislation including the Restrictive Trade Practices Act 1956, and US legislation including the Sherman Act 1890 and the Clayton Act 1914. It was also influenced by the Combined Investigation Act of Canada and the Australian Restrictive Trade Practices Act 1964.[4] The genesis of the MRTP Act is also traceable to Articles 38 and 39 of the Constitution of India, which are a part of the Directive Principles of State Policy[5]. The Government of lndia had been deeply concerned with the control of concentration of wealth and the removal of economic disparities among people, and these are also in congruence with the goals set out in the Constitution of India. The Constitution, in its quest to build a just and humane society, has mandated the state to direct its policy towards securing that end. In a similar vein, the Nigerian Consitution addresses competition issues however, competition concerns have never brought before the courts.

The MRTP Act, 1969 was brought into force in order to realize the explicit mandate set out in the Directive Principles envisaged in the Constitution of India, namely, the prevention of concentration of economic power. The provisions on restrictive trade practices, including resale price maintenance, are largely based on the UK legislation, in particular the Restrictive Trade Practices Act, 1956 and the Re-sale Prices Act, 1964. Similarly, the provisions on unfair trade practices are influenced by the UK's Fair Trading Act 1973. Antitrust legislations of the US (notably the Sherman Act, the Clayton Act and the Federal Trade Commission Act), Australia, Sweden and Canada have also been a guide in framing the provisions relating to monopolistic, restrictive, and unfair trade practices. The thrust of the MRTP Act is directed towards: the prevention of concentration of economic power to the common detriment; the control of monopolies; the prohibition of monopolistic trade practices; and the prohibition of unfair trade practices. Although the terminology of the MRTP Act does not contain any reference to consumers or their welfare, monitoring and curbing monopolistic, restrictive, and unfair trade practices have the primary aim of

[4] GD Aggarwal, 'New Competition Act' (1999) 35 **(**December) (2) 184-187, 184.
[5] The Directive Principles of State Policy are aimed at establishing a welfare state. These principles, though fundamental in the formulation of policies by the state, are explicitly made as non-enforceable against the state. These Principles provide that the state shall strive to promote the welfare of the people by securing and protecting the social order in which social, economic and political shall inform all the institutions of the national life, and the state shall, in particular, direct its policy towards ensuring that the ownership and control of material resources of the community are so distributed as best to serve the common good; and the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

promoting consumer welfare.

### 5.1.2 Shift from the MRTP Act to the Competition Act

The MRTP Act was enacted in India in 1969, with a focus on curbing monopolies and concentration of economic power. Since then, there have been many changes in the economic environment in India and the structure of its markets. Structural reforms were initiated in 1991 to reduce government controls and lower barriers to international trade. This deregulation process increased the scope of competition in the economy. In addition, the global economy had undergone wide-ranging changes, involving greater integration of markets and economies. In the light of these developments, it was deemed necessary to update the existing policy regime in India. Furthermore, with India's entry into the World Trade Organization (WTO), a new Competition Law became more necessary. It was argued that the WTO could provide a suitable and much-needed institutional mechanism for an international competition agreement.[6] In the parliamentary debates on the Competition Bill,[7] it was pointed out that existing laws in the country did not promote, foster or entertain competition and that the MRTP Act was no longer an effective instrument. The Statement of Objects and Reasons of the Competition Act 2002 stated that the MRTP Act had become obsolete in the light of international economic developments relating more particularly to competition laws and that there was a need to shift the focus from curbing monopolies to promoting competition. A fresh look at India's competition law was seen to be desirable in the light of these developments. The Act seeks to redress the gaps discussed and also provides for the establishment of a Competition Commission of India with an additional duty to promote competition advocacy. The Competition Act has an overriding effect[8] over

[6] for a detailed elaboration on this point, Martyn Taylor, *International Competition Law: A New Dimension for the WTO?* ( Cambridge University Press 2006). In this book, the author strongly argues that an international competition agreement is desirable as the existing initiatives towards the regulation of cross-border anti-competitive conduct have clear limitations that could be overcome by an international competition agreement. In this sense, he argues that the WTO could provide a suitable institutional vehicle for an international competition agreement. The relationship between international trade law and international competition law can be reconciled at a theoretical level by the concept of market contestability. At a practical level, an international competition agreement could address under-regulation and over-regulation in the trade-competition regulatory matrix, realizing substantive benefits to international trade and competition. Though a multilateral WTO competition agreement would not be politically achievable at the present time, a plurilateral WTO competition agreement would be politically achievable.

[7] 'Considering and Passing of the Competition Bill, 2001' (Lok Sabha, 16 December 2002) <http://164.100.24.208/debate/debtext.asp?slno= 5080&ser=Competition&smode=f> accessed 5 February 2018

[8] Competition Act 2002, s 60.

other laws in the event of any conflict between the Competition Act and any other law.

### 5.2 The Competition Act, 2002: An Overview of the Act and Its Aims

There are several goals of the Competition Act, 2002 some of which are: increased foreign direct investment; economic growth; protection of firms from anti-competitive behaviour; encouraging firms to improve competitiveness in international markets; and providing consumers with improved products at competitive prices.

The Act provides for the establishment of a Competition Commission of India which will be a quasi-judicial body bound by principles of rule of law for the administration of the Act. The Competition Commission of India has all the powers of a civil court for gathering evidence. In line with international trends, there are three major elements in the Competition Act:

- Anti-competitive Agreements (section 3)
- Abuse of Dominant Position (section 4)
- Combinations (section 5 and 6)

#### 5.2.1 Anti-competitive Agreements

Section 3 of the Indian Competition Act 2002 prohibits any agreement relating to the production, supply, distribution, storage, and acquisition or control of goods or services which causes or is likely to cause an appreciable adverse effect on competition within India. Under section 3, any such agreement is considered void. The term 'agreement' is broadly defined and includes any arrangement, understanding or concerted action, whether or not it is formal, in writing or intended to be enforceable by legal proceedings. Thus, the agreement does not necessarily have to be a formal one and may include even what is commonly called a 'gentlemen's agreement'. This definition is similar to the broad meaning given to 'agreement in several other competition jurisdictions.[9] The term 'appreciable adverse effect on competition', used in section 3, is not defined in the Act. However, the Act specifies a number of factors which the Commission must take into account when determining whether an agreement has an appreciable adverse effect on competition, including whether the agreement creates barriers or forecloses competition by creating impediments to entry, or

[9] World Bank/OECD, 'Glossary of Industrial Organization Economics and Competition Law'; *Registrar of Restrictive Trade Agreements v WH Smith & Sons* [1986] All ER 721.

drives existing competitors out of the market. The Commission also must take into account the possible pro-competitive effects of an agreement, that is, benefits to consumers, improvements in the production or distribution of goods or the provision of services, and the promotion of technical, scientific, and economic development by means of production or distribution of goods or provision of services (section 19(3)). Thus, a balanced assessment is required to be carried out of the beneficial and harmful effects on competition. This balancing approach is similar to the 'rule of reason' that prevails in the competition laws of the US and as discussed in the previous chapter

The Competition Act does not use the words 'horizontal agreement' or 'vertical agreement'. However, it treats more harshly certain kinds of horizontal agreements, including cartels, that: (i) directly or indirectly determine purchase or sales prices; (ii) limit or control production, supply, markets, technical development, investment or the provision of services; (iii) share the market or source of production or provision of services by way of allocation of the geographical area of the market, the type of goods or services, or the number of customers in the market or any other similar way; and (iv) directly or indirectly result in bid rigging or collusive bidding. Any such agreement 'shall be presumed' to have an appreciable adverse effect on competition (section 3(3)). This approach is similar, but not necessarily identical to, the per se rule in the US.

The principle of 'shall be presumed' has been explained by the courts in India in numerous cases. In one such case[10], the court observed that 'the words "shall presume" have been used in the Indian judicial lore for over a century to convey that they lay down a rebuttable presumption in respect to matters with reference to which they are used and not laying down a rule of conclusive proof.' The stricter treatment given to certain horizontal agreements in section 3(3) also covers cartels, which are defined in the Act.[11] The definition is inclusive and broad but is confined to collusion among producers, sellers, distributors, traders, or service providers. All agreements, other than those listed in section 3(3), are subject to the rule of reason analysis described in section 3(1), rather than to the 'shall be presumed' rule. This includes five types of vertical agreements listed in section 3(4): tying arrangements, exclusive supply agreements, exclusive distribution agreements, refusals to deal, and resale

[10] *Sodhi Transport Co v State of Uttar Pradesh*, AIR 1980 SC 1099.
[11] Section 2(c) of the Act states that a cartel 'includes an association of producers, sellers, distributors, traders or service providers, who, by agreement among themselves, limit control, or attempt to control the production, distribution, sale or price of, or trade any goods or provision of services.'

price maintenance. Efficiency-enhancing joint ventures are also governed by the more lenient rule-of-reason standard proviso to section 3(3) rather than the 'shall be presumed' rule of section 3(3). The Act gives due recognition to intellectual property rights, stating that the prohibition against anti-competitive agreements shall not restrict the right of any person to restrain any infringement of, or to impose reasonable conditions as may be necessary for protecting, any rights under the Copyright Act 1957, the Patents Act 1970, and certain other laws listed in section 3(5).

Thus, any agreement for the purpose of restraining infringement of such intellectual property rights or for imposing reasonable conditions for protecting such rights shall not be subject to the prohibition against anti-competitive agreements. In practice, there has always been considerable tension between the two bodies of law as intellectual property (IP) law provides for government-granted temporary monopolies, while competition law prevents monopolization. Courts and policy makers need to find the optimal balance between the two bodies of law, so that innovation can be encouraged in the short term, with anti-competitive behaviour kept to a minimum, thereby safeguarding incentives for future inventions. Competition authorities and the courts in the US and the European Union (EU) have given much attention to striking the appropriate balance within their own jurisdictions on the issue of reasonableness of restrictions imposed by holders of intellectual property rights (IPRs). According to courts in the US, both competition law and IP law 'are aimed at encouraging innovation, industry and competition'.[12] Similarly, the European Commission considers that there is no 'inherent conflict between intellectual property rights and the Community competition rules'.[13]

Section 3(5) provides that the section shall not restrict the 'right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him' under a list of Indian legislation relating to IPRs.[14] This essentially implies two things**.** First, it implies that only rights conferred by Indian legislation will attract the provisions of this subsection. That leads to the question of what would happen in cases where the IPR has been conferred by a foreign

[12] *Atari Games v Nintendo,* 14 USP Q2d 1034 (1990).
[13] Notice providing guidelines on the application of Article 81 of the EC Treaty (now Article 101 TFEU) to technology transfer agreements, **(**OJ 2004 C101/02) (Guidelines on Technology Transfer Agreements).
[14] Namely the Copyright Act, 1957, the Patents Act, 1970, the Trade and Merchandise Marks Act, 1958 or the Trade Marks Act, 1999**,** the Geographical Indications of Goods (Registration and Protection) Act, 1999, the Designs Act, 2000, and the Semi-conductor Integrated Circuits Layout- Design Act, 2000.

statute, or in the case of common law rights, trade secrets and confidential information, or rights conferred by other Indian legislation such as the Protection of Plant Varieties Act, 2001. Presumably, the licensing of IPRs conferred by common law, or by legislation in other parts of the world, would be measured against the standard of appreciable adverse effect on competition (AAEC) in subsection (1) or (4).

The second implication is that section 3(5) only entitles the IPR holder to impose reasonable conditions but in no way excludes them completely from the provisions of section 3. A licence agreement containing a restriction which causes an AAEC which the licensee is unable to show is necessary for the protection of his IPR, would fall foul of the Act. Internationally, in most cases, restraints in IP licensing arrangements are evaluated under the rule of reason ( by comparing a restraint's pro- and anti-competitive effects). In the US, the Department of Justice (DOJ) and the Federal Trade Commission **(**FTC**),** have issued IP Licensing Guidelines,[15] which set out safe harbours in which conduct is considered lawful, in the absence of extraordinary circumstances.

### 5.2.2 Abuse of Dominant Position and its Determining Factors

The Competition Act 2002 defines dominant position (dominance) in terms of a position of strength enjoyed by an enterprise, in the relevant market in India, which enables it to: operate independently of the competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour. This definition in turn depends on the definition of relevant market, which is often the critical factor in the determination of an offence under any of the three areas covered by the Act. Thus, for an abuse of dominance finding, it is necessary to first find that the enterprise in question occupied a position of dominance in terms of a particular product market and the demarcation of the geographic market for that product.

The Act does not condemn firms for achieving a dominant position, only the abuse of that position. Dominant position is defined as 'a position of strength, enjoyed by an enterprise in the relevant market in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour.' The definition is similar to those in the competition laws of

[15] US Department of Justice and the Federal Trade Commission, 'Antitrust Guidelines for the Licensing of Intellectual Property' (12 January 2017) <https://www.justice.gov/atr/IPguidelines/download> accessed 5 June 2017.

several other jurisdictions, such as the EU and the UK which have been analysed in previous chapters.

The determination of dominant position requires, first, a determination of the relevant market in which dominance is alleged. Under the Act, the relevant market may be determined with reference to the relevant geographic market or the relevant product market or both. The Act also specifies that the relevant geographic market is determined by considering the following factors: regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences, and the need for secure or regular supplies or rapid after-sales services (section 19(6)).

The relevant product market is to be determined by considering physical characteristics or end-use of goods, the price of goods or services, consumer preferences, the exclusion of in-house production, the existence of specialized producers, and the classification of industrial products (section 19(7)). The possibility of exclusion of in-house (ie captive) production is also to be considered as a factor. After the relevant market has been defined, the Act identifies a wide variety of factors that should be considered in determining whether a firm is dominant, including (i) market share of the enterprise; (ii) size and resources of the enterprise; (iii) size and importance of the competitors, (iv) economic power of the enterprise, including commercial advantages over competitors; (v) vertical integration of the enterprises or the sale or service network of such enterprises; (vi) dependence of consumers on the enterprise; (vii) monopoly or dominant position, whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise; (viii) entry barriers, including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; (ix) countervailing buying power; (x) market structure, and size of market; (xi) social obligations and social costs; (xii) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition; and (xiii) any other factor which the Commission may consider relevant (section 19(4)).

Thus, the Act prescribes a large number of economic, social, and other factors which should go into the determination of the dominant position. Several of these factors are similar to

those considered in EU law and which have been elaborated by the courts in *Hoffmann-LaRoche*,[16] *United Brands*,[17] and *Akzo Chemie*[18].

For determining whether the enterprise has abused its dominant position, the Act gives an exhaustive, and not merely illustrative, list of abusive activities: (i) directly or indirectly imposing an unfair or discriminatory condition or price (including predatory pricing); (ii) limiting or restricting production of goods or provision of services or market or technical or scientific development; (iii) denying market access; (iv) imposing supplementary obligations having no connection with the subject of the contract; or (v) using dominance in one market to enter into or protect another relevant market. The abusive activities covered therefore include both exploitative abuses, such as unfair or discriminatory conditions or prices, as well as exclusionary abuses, such as denial of market access. The listed abuses are similar to those in Article 102 TFEU and reiterated by the courts in such cases as *Hoffmann-LaRoche*, *United Brands* and *Akzo Chemie.*

The Act specifically lists predatory pricing as an abuse, and defines it as 'the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors'. Another abuse listed in the Act is denial of market access, which is usually most serious in the case of essential facilities. However, the Act does not specifically mention the essential facilities doctrine, which has been invoked by the courts in the EU and the US in a number of cases, such as *Commercial Solvents*[19] and *MCI*[20], although in *Trinko*[21], the US Supreme Court questioned the scope and viability of the doctrine. There is no reference to 'appreciable adverse effect on competition' in the 'abuse of dominant position' section of the Act. This suggests that once it has been determined that an enterprise enjoys a dominant position (in the relevant market) and that it has engaged in any of the activities listed in section 4(2), the conclusion follows that it amounts to an abuse of a dominant position without a finding that it causes or is likely to cause an 'appreciable adverse effect on competition'.

[16] Case 85/76, *Hoffmann LaRoche & Co. AG v Commission*, 1979 ECR 461.
[17] Case 27/76, *United Brands Co v Commission*, 1978 ECR 207.
[18] Case C-62/86, *Akzo Chemie BV v Commission*, 1991 ECR 1-3359.
[19] Cases 6/73 & 7/73, *Istituto Chemioterapico Italiano SpA v Commission (Commercial Solvents),* 1974 ECR 223.
[20] *MCI Commc'ns Corp v AT&T*, 708 F2d 1081 (7th Cir 1983).
[21] *Verizon Commc'ns Inc v Law Offices of Curtis V Trinko LLP*, 540 US 398 (2004).

### 5.2.3 Combinations

The Act includes provisions for regulation of combinations. A combination under the Act includes a merger or amalgamation, acquisition, or acquisition of control (section 5). However, the Act sets a threshold below which a merger, acquisition, or acquisition of control is not regarded as a combination and is therefore outside the merger regime of the Act. The threshold is fairly high and is defined in terms of assets or turnover. The threshold varies according to whether the combination is by an enterprise or by a group, and also varies according to whether the enterprise or group has assets or turnover only in India or has these worldwide. Parties are not required to mandatorily notify their transaction to the Commission. However, if notification is given, the Commission must review the combination within tight time limits or else the combination is deemed to have been approved (section 31(11)). The Commission also has the authority to review the combination at any time within one year after it has taken effect. Thus, an enterprise may have to consider seriously whether it would like to pre-notify the combination or instead go ahead without pre-notification and take the risk of the combination being reviewed later by the Commission.

The Act prohibits a combination having an 'appreciable adverse effect on competition within the relevant market in India'. Therefore, the first step in the analysis of a combination is to determine the relevant market in India. This exercise is similar to that for determining the relevant market in the case of abuse of dominant position except that this analysis is forward-looking and the main concern is whether the merger will cause the prices to rise above the prevailing level. Once the relevant market has been defined, it is necessary to determine whether the combination causes or is likely to cause an appreciable adverse effect in that relevant market. The factors to be considered are listed in considerable detail in the Act (section 20(4)): (i) actual and potential import competition; (ii) barriers to entry; (iii) the degree of market concentration; (iv) degree of countervailing power in the market; (v) the likelihood that the combination would allow the parties to significantly and sustainably increase prices or profit margins; (vi) the extent of likely effective competition; (vii) the extent to which substitutes are available or likely to be available in the market; (viii) the market share, in the relevant market, of the persons or enterprises in a combination, individually and as a combination; (ix) the likelihood that the combination would result in the removal of a vigorous and effective competitor in the market; and (x) the nature and

extent of vertical integration in the market. The analysis also includes consideration of whether one of the firms in the combination is a failing business and the nature and extent of innovation. In addition, the Commission must consider the possible benefits that might flow from the combination that would contribute to economic development and whether the benefits outweigh the adverse impact of the combination, if any. These factors are an indication of a rule-of-reason approach.

### 5.3 Remedies

The Act gives the Competition Commission a wide range of remedies in case of an anti-competitive agreement or abuse of dominant position. The Commission may issue a 'cease and desist' order and impose a penalty not exceeding 10 percent of the average turnover during the preceding three years. In the case of a cartel, the penalty could be 10 percent of the turnover or three times the amount of profit derived from the cartel agreement, whichever is higher. Further, the Commission can recommend to the Government that the dominant enterprise be broken up. It can also award compensation to any person who has suffered loss or damage as a result of a violation of the Act concerning anti-competitive agreements, abuse of dominant position, or regulation of combinations. The Commission may also give other orders or directions to the enterprise, including payment of costs, if any, and may also pass such other orders as the Commission may deem fit, which might include orders to entities other than the offending enterprise (sections 27 and 34). No civil court has jurisdiction to entertain any suit or proceeding with respect to a matter which the Competition Commission is authorized to determine and no injunction can be granted by any court or other authority with respect to any action taken pursuant to any power conferred by or under the Act (section 61). Hence, no party can approach a civil court to allege a violation of the Act or to seek relief thereunder.

In the case of a violation by a company, any person who, at the time of the violation, was in charge of the company, is liable to be proceeded against and punished unless that person can show that the violation was committed without his knowledge or that he had exercised all due diligence to prevent the violation (section 48). Similarly, every director, manager, secretary, or other officer of the company may be held liable if it is proved that the violation took place with his/her consent or connivance or is attributable to his/her negligence. The Act makes no distinction between the penalty that can be imposed on a company and on an individual, unlike the laws in several other countries.

To enable effective investigation against cartels, the Act incorporates a leniency program (section 46). If a party to a cartel makes a full and true disclosure concerning the alleged violation and such disclosure is vital, the party may be given a lesser penalty. Under the Act, this leniency would be available only to the first party making such a disclosure, which must be made before the proceedings have been instituted or any investigation has been directed. While it will be challenging to operate such a program in Nigeria, taken that it is hard to detect cartels and its detectors, the existence of such leniency programs may be very effective as it takes advantage of the inherent weakness of the parties to the cartel.

### 5.4 Jurisdiction

The Competition Commission can take action with respect to conduct that has occurred outside India and with respect to parties located outside India provided that the conduct had an appreciable adverse effect on competition in the relevant market in India (section 32). This provision is similar to the 'effects doctrine' in the EU.[22] In support of this provision, the Commission has the power to enter into a memorandum or arrangement with any agency of any foreign country with the prior approval of the Government (section 18). The Commission's jurisdiction extends to all sectors of the economy, including sectors regulated by sector-specific laws, such as telecommunications, electricity, or petroleum. Thus, the Commission can inquire into an anti-competitive activity or combination in any such sector. The Act, however, contains a provision for consultation between the Commission and a statutory authority (including a sector regulator).

The Act applies to enterprises irrespective of their ownership. Thus, private enterprises as well as government-owned enterprises, and even government departments, are covered by the Act. However, it excludes the sovereign functions of the government and activities carried out by the departments of the Central Government dealing with atomic energy, currency, defence, and space[23]. The Act does not elaborate on what constitutes sovereign functions; however, functions such as maintenance of law and order, defence of the country,

[22] According to this doctrine, domestic competition laws are applicable to foreign firms and also to domestic firms located outside the state's territory, when their behaviour or transactions produce an 'effect' within the domestic territory. The 'nationality' of firms is irrelevant for the purposes of antitrust enforcement and the effects doctrine covers all firms irrespective of their nationality. The 'effects doctrine' was embraced by the Court of First Instance in Gencor when stating that the application of the Merger Regulation to a merger between companies located outside EU territory 'is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the [Union]'.

[23] Competition Act, 2002, s 2(h).

and administration of justice have been regarded as sovereign functions. The Act also allows the Central Government, not the Commission, to notify three categories of exemptions, these being any class of enterprises in the interest of security of the state or public interest, any contracts or agreements arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention, and any enterprise that performs a sovereign function. It is suggested that The Nigerian Competition Commission when it has been set up should transplant this provision and have the power to take action with respect to conduct that has occurred outside Nigeria and with respect to parties located outside Nigeria provided that the conduct had an appreciable adverse effect on competition in the relevant market in Nigeria.

### 5.5 Competition Advocacy

The mandate given to the Competition Commission includes competition advocacy.[24] It provides that in formulating a policy on competition, the Indian Government may make a reference to the Commission for its opinion, though the opinion is not binding on the Government. Further, the Act requires that the Commission 'shall take suitable measures, as may be prescribed, for the promotion of competition advocacy, creating awareness and imparting training about the competition issues'. In a country such as Nigeria where the competition culture is relatively weak, competition advocacy acquires a great significance in creating general awareness about the benefits of competition and the role of competition law, as well as in influencing Government policy in a more procompetition direction.

### 5.6 Effectiveness and Current Trends of the Competition Act and the Competition Commission as Determined by Case Law

Indian competition jurisprudence has made remarkable progress in developing the law through its statutory bodies, namely the Competition Commission of India (CCI) and the appellate forum, the Competition Appellate Tribunal (COMPAT)[25]. The decisions by the CCI under section 3 that have gained most significance and have had the greatest impact are

[24] Competition Act, 2002, s 49.

[25] COMPAT has held that penalty on an offending business needs to be determined on relevant turnover and not based on total turnover and this principle has been recently endorsed by the Supreme Court. However the Indian Government through the Finance Act, 2017 dissolved the COMPAT from May 2017. The National Company Law Appellate Tribunal (NCLAT) is to adjudicate the appeals filed against the orders passed by NCLT benches and Insolvency and Bankruptcy orders.

those pertaining to cartelization. Cartels are considered 'the supreme evil of antitrust'.[26] Fighting cartels is one of the most important areas of activity of any competition authority and a clear priority of the CCI. A cartel is illegal per se or by itself. No circumstance can justify the existence of a cartel and no proof of harm is required. Antitrust jurisprudence in the US makes use of procedural techniques such as 'presumption of anti-competitive practices' to supplement the rules of evidence. This automatically shifts the burden of proof on the opposite party. Such presumptions are permitted as tools of administration of antitrust law.[27] The existence of a cartel may be proved by direct evidence, indirect (circumstantial) evidence, or a combination of both. Direct evidence includes a written agreement among cartel members, a statement of a cartel member who attended a meeting and reached an agreement with competitors, a memorandum written within a company to report a meeting with competitors where an agreement was reached, records of telephone conversations with competitors, or a statement of a person who was approached by the cartel to join it. However, getting direct evidence of cartels tends to be very difficult, leading to reliance on circumstantial evidence. This section analyses significant cases dealt with by the CCI and the trends that can be observed within such cases.

### 5.6.1 *Builders Association of India v/s Cement Manufacturer's Association and 11 cement companies*[28] ('Cement Manufacturer Association')

The informant, a society registered under the Societies Registration Act, 1860 was an association of builders and other entities involved in the business of construction. The Opposite Party-1 (OP-1) was an association of the cement manufacturers of India in which both public- and private-sector cement units were members. The informant had submitted that cement manufacturers[29], were members of OP-1 and were the leading manufacturers, distributors and sellers of cement in India. According to the informant, the respondent cement manufacturers under the umbrella of OP-1 indulged directly and indirectly in monopolistic and restrictive trade practices, in an effort to control the price of cement by

[26] Mehta Pradeep, 'Competition and Regulation in India – Leveraging Economic Growth through Better Regulation' <http://www.cuts-ccier.org/icrr2011/pdf/Competition_and_Regulation_in_India-2011_Leveraging_Economic_Growth_Through_Better_Regulation.pdf> accessed 10 October 2017.
[27] S Chakravarthy, 'MRTP Act Metamorphosis into Competition Act' <www.Cuts-international.org/doc01.doc> accessed 10 October 2017.
[28] CCI Case no 29/2010, decided on 20 June 2012.
[29] Associated Cement Co Ltd, Gujarat Ambuja Cement Ltd, Grasim Cement, Ultratech Cement Ltd, Jaypee Cement, India Cements Ltd, J K Cements of Group, Century Cement, Madras Cement Ltd, Binani Cement Ltd, and Lafarge India Ltd

limiting and restricting the production and supply of cement as against the available capacity of production. The CCI found the Opposite Parties (OPs) in contravention of section 3(3)(a) and 3(3)(b), read with section 3(1) of the Act. The CCI imposed a penalty of 0.5 times net profit for the periods 2009–10 and 2010–11 in case of each OP.

The CCI highlighted two issues – whether the OPs acted in violation of sections 3 and 4 of the Competition Act. After an examination of the detailed findings of the DG, the CCI rejected the same as there was insufficient evidence to establish that the OPs had formed a cartel or acted in concert either for the purpose of revenue sharing or controlling the distribution and exhibition of films. Both issues were therefore decided in favour of the OPs.

### 5.6.2 FICCI – *Multiplex Association of India Federation House v/s United Producers/ Distributors & Ors*[30] ('FICCI – Multiplex Association of India')

The informant, FICCI-Multiplex Association of India, alleged that the respondents, namely United Producers/Distributors Forum (UPDF), The Association of Motion Pictures and TV Programme Producers (AMPTPP) and the Film and Television Producers Guild of India Ltd (FTPGI), were behaving like a cartel. The informant alleged that UPDF was an association of film producers and distributors which included both corporate houses and individuals independent film producers and distributors. AMPTPP and FTPGI were members of UPDF. It was further alleged that UPDF, AMPTPP and FTPGI produced and distributed almost 100% of the Hindi Films produced/supplied/distributed in India and thereby exercised almost complete control over the Indian film industry. It was further alleged that UPDF via their notice dated 27 March 2009 had instructed all producers and distributors including those who were not members of UPDF, not to release any new film to the members of the informant for the purposes of exhibition at the multiplexes operated by the members of the informant. It had been further informed that being aggrieved by the decision of UPDF, various members had approached the informant and sought its assistance. The CCI, after considering the contentions of the OPs on merit and after elaborate discussion, ruled that the OPs had contravened the provisions of section 3(3)(a) and 3(3)(b) of the Competition Act. The CCI imposed a penalties on each of the 27 OPs.

### 5.6.3 *All India Tyre Dealers' Federation v/s Tyre Manufacturers*[31] ('Tyre Dealers

[30] CCI Case No 1 of 2009, decided on 25 May 2012.
[31] MRTP Case RTPE No 20 of 2008, decided on 30 October 2012.

**Federation')**

The information in this case was originally filed by the All India Tyre Dealers' Federation (AITDF) against the tyre manufacturers before the Ministry of Corporate Affairs and the same was forwarded by the MRTPC. Consequent upon the repeal of the MRTP Act, the matter stood transferred to the CCI under section 66(6) of the Competition Act. In the said information dated 28 December 2007, AITDF alleged that the tyre manufacturers were indulging in anti-competitive activities. The CCI took into consideration the conduct of the tyre companies/ATMA, and found that on a superficial basis the industry displayed some characteristics of a cartel but that there was no substantive evidence of the existence of a cartel. The CCI held that the available evidence did not give enough proof that tyre companies and associations acting together had limited and controlled the production and price of tyres in the market in India. The CCI found that there was not sufficient evidence to hold a violation by the tyre companies of section 3(3)(a) and 3(3)(b) read with section 3(1) of the Competition Act.

## 5.7 Conclusion

An analysis of competition law in the US and EU shows that one common goal is to protect the freedom to compete. In other words, the goal of competition law is not to promote consumer welfare directly;[32] rather, this is brought about indirectly by protecting the freedom of businesses to compete in markets. The reason for this is that freedom to compete generally leads to competition, and competition leads to an efficient allocation of resources and thus to consumer welfare. Therefore, the goal is to safeguard the competitive process and not the competitors or consumers. This philosophy of modern competition law differentiates competition law from special consumer protection measures, like the Consumer Protection Act.[33] The decisive adjudication principle is undue competition restriction and not consumer welfare. Thus, the expression 'to protect the interest of consumers' in the Act must be interpreted broadly in deciding disputes involving individual consumers.[34] One should not lose sight of the fact that as a specialized body, the CCI, may

[32] Roger Zach and Adrian Kunzler, 'Freedom to Compete or Consumer Welfare: The Goal of Competition Law according to Constitutional Law' in *The Development of Competition Law Global Perspectives* ( Edward Elgar Publishing Limited 2010) 61, 71.
[33] Which has a focused mandate 'to provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected therewith' – Preamble to Consumer Protection Act, 1986.
[34] Note that the Competition (Amendment) Act, 2007 substituted 'receipt of a complaint' in s 19 with 'receipt

not have been created to do the same job for which there is a body already in existence in the form of a Consumer Commission.

The challenge before the CCI is to balance the expectations of consumers in the short term and focus on prohibiting anti-competitive conduct and abuse of dominance, regulating mergers and forestalling market failures, ultimately protecting the interest of consumers. Competition law is a complex mixture of a country's law, economics and administrative action intended to favour competition in the economy. Since competition is seen as critical to economic development, competition law seeks to protect this competitiveness in the economy. The underlying theory behind competition law is the positive effect of competition in an economy's market, acting as a safeguard against misuse of economic power. The link between competition law and economic development seems undeniable, and the need for competition law is the order of the day. The operation of competition law by prevention of anti-competitive agreements, prohibiting abuse of dominant position by firms, and regulation of combinations which might adversely affect competition in the economy, thus seems crucial for India as it is for Nigeria. It is with this in mind that the Indian Parliament enacted the Competition Act, 2002. The preamble and the statement of objects and reasons of the Act also evidence that the broad economic development objectives were a consideration to adopting the Act. With economic activity increasingly transcending national borders, and jurisdictions applying competition laws to firms and conduct outside their borders, achieving at least a reasonable degree of coherence and convergence in the application of competition laws is important for both competition agencies and firms. Even though the Indian competition law is modelled on the lines of EU law, the Competition Commission is in no way bound to interpret similar provisions in the Indian law in the manner interpreted under EU law. However, the Commission is bound by the Preamble of the Act to interpret it in a fashion that promotes economic development of India. This is because the conditions that exist in India are remarkably different than those that exist in the EU and to come to the level where there can be talk of similar interpretation of laws in the two jurisdictions, similar development level would necessarily be a condition precedent.

While the basic principles of competition law remain the same, the objectives or the results cannot be the same for all jurisdictions. In essence, a progressive realization of competition

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of any information, in such manner' to enable the Commission to inquire into any alleged contravention on receipt of any information instead of receipt of a complaint. Thus, the status of the complainant was changed to that of an informant (Competition (Amendment) Act, 2007, §13.

policy goals would be the answer to an effective competition law regime in Nigeria.

While the implementation of competition law even at the early stages of economic development is not bad per se, its blind implementation following the path of the developed countries could kill its very objectives. Thus, competition law is a complex creation of laws which the Indian Government and the Competition Commission should take time to understand in light of the special needs and requirements of the Indian economy and implement it accordingly.

Furthermore, competition law analysis entails complex legal and economic considerations. The CCI decisions discussed above suggest that the CCI has been called upon very early in its existence to determine complex antitrust issues arising from the conduct of enterprises engaged in a complex market. It has shown determination in initiating inquiry against the state-owned enterprises), and there is a steady increase in the amount of information received by the CCI. Informants from various sections of society have come forward to provide the information to the Commission, which indicates awareness about competition law.

In terms of relying on foreign authorities, the CCI tends to rely more on EU authorities, primarily because the Competition Act is fashioned on the lines of TFEU. Thus if Nigeria were to adopt the Indian competition law, it will be same as transplanting the EU competiton law. Analysis indicates certain inconsistencies in the decisions made by the CCI; they have been inconsistent in the application of economic principles in analysing the market and establishing abuse of dominance. Such inconsistent standards in imposing penalties and excessive reliance on circumstantial evidence have also been a major area of concern for the industry.

The Competition Act is a big step in India's competition law framework from the MRTP regime focused on curbing monopolies to promote competition in the market by proscribing practices that have had an appreciable adverse effect on competition. The CCI must be cautious and consistent in its approach in terms of its operations and advocacy exercise. Consistency in the CCI's approach will go a long way in enabling the industry to plan a pro-competitive business strategy within the framework of the Competition Act.

## CHAPTER 6: THE SOUTH AFRICAN EXPERIENCE

### 6.1 The Evolution of Competition Law and Policy in South Africa

The competition policy and law of South Africa were both drafted in 1998 a period known for significant domestic policy and regulatory reform.[1] These reforms were part of the wide-ranging program for the country's economic, social, and political revolution and also its integration into the global economy after decades of inaccessibility under the apartheid regime.[2] In the case of competition policy, concerns about specific development challenges engrained by the previous era of political and economic control had to be mirrored in South Africa's law and policy. It was clear that a robust competition law would only be politically possible if the law addressed public interest concerns. The core focus of economic efficiency had to be tempered by a strong emphasis on development. Thus the competition law, even with its broad objectives, puts economic efficiency as priority. Public interest objectives run alongside the goal of economic efficiency.

South Africa is a relevant system of study in the context of this PhD because South African companies are major players in almost all sectors of the Nigerian economy. The biggest investment by South African companies in Nigeria has been in the telecommunications sector. Other sectors that South Africa is currently involved in include banking, property, retail, media, mining, construction, tourism, agriculture, entertainment, and the fast food franchising. In terms of technology and infrastructure, South Africa has an edge over Nigeria while Nigeria has an advantage of large market potentials for investments over South Africa. This is why there are a lot of South African companies with vast investments in Nigeria. In 1999, the South African and Nigerian governments signed bilateral agreements on trade and investment.which, aimed to increase the amount of trade and investment between South Africa and Nigeria[3]. The signing of these agreements saw (a) improved trade relations between South Africa and Nigeria and (b) South African corporations as big players in the

[1] Rashad Cassim & Dick Ernst Van Seventer, 'Reform of South Africa's Merchandise Trade Since Democracy, An Overview' (2005) (Paper presented at South African Economic Policy Under Democracy Conference: A 10 Year Review, 28-29 October 2005) <http://academic.sun.ac.za/econ/econconf/papers/Cassim.pdf> accessed 10 January 2018.
[2] Competition Act 89 of 1998, Preamble <http://www.info.gov.za/gazette/acts/1998/a89-98.pdf> accessed 10 January 2018.
[3] Sifingo, "South African High Commissioner to Nigeria comments on Business Relations," African Business Journal Issue 13, February – May 2003.

Nigerian economy.

The presence of many South African investors in Nigeria has increased the economies of both counties. This is the result of encouraging bilateral trade relations that existed between the two nations. The South African state has not only opened up Nigeria's economy to South African investments and exports through NEPAD, it has also done so through bilateral agreements and a Bi-national Commission. Both countries established the Bi-national Commission to promote trade and political cooperation in 1999. A Nigeria-South Africa Chambers of Commerce was also established in 2000. The strong relationship between Nigeria and South Africa forms the main reason why South Africa is used as a comparative analysis in this thesis

This chapter examines the 1998 Competition Act ('Competition Act' or 'Act') and the institutions established to enforce the law. It recognizes that the Act marks a significant step in the development of effective market governance in South Africa. A key criticism by the government of the existing South Africa's competition legislation before 1998 was that it did not address the high levels of concentration in the economy – both in terms of ownership and market share.[4] Development concerns featured strongly in the debates on the role of competition policy in addressing both structural features of the economy and corporate behaviour, especially of the large businesses.[5] The challenges of addressing poverty and unemployment were as much a part of the policy discussion as was the promotion of competition and economic efficiency. Similar development concerns are the reason this research suggests that an effective competition law regime should be implemented in Nigeria.

The Competition Act of 1998 reflected the commitment of South Africa's first democratic government to strengthen the competition regime in the context of the country's highly concentrated economy. The Act made provisions to establish the Competition Commission, whose main responsibility would be investigating mergers and anti-competitive conduct, and the Competition Tribunal to rule on most cases. The Competition Appeal Court was also

[4] Department Of Trade And Industry Pretoria, 'The Evolution Of Policy In South Africa: Proposed Guidelines For Competition Policy: A Framework For Competition', Competitiveness And Development § 3.3 (1997) <http://www.compcom.co.za/aboutus/correctevolution/2CorrectThe%20Evolution%20oP/20Policy%20in%20SA.doc> accessed 10 January 2018.

[5] David Lewis, 'The Objectives Of Competition Law and Policy and the Optimal Design of a Competition Agency' (2003) 4 <http://www.oecd.org/dataoecd/57/59/2486466.pdf> accessed 10 January 2018.

established. The mandate of the Competition Appeal Court is to consider any appeal of a decision or review that the Competition Tribunal has made, or to confirm, amend, or set aside a decision or an order that is the subject of appeal or review by the Competition Tribunal. The objectives of the Act were articulated in line with the broad imperative of economic transformation, and are included in section 2 thereof:

> The purpose of this Act is to promote and maintain competition in the Republic in order –
> (a) to promote the efficiency, adaptability and development of the economy;
> (b) to provide consumers with competitive prices and product choices;
> (c) to promote employment and advance the social and economic welfare of South Africans;
> (d) to expand opportunities for South African participation in world markets and to recognise the role of foreign competition in the Republic;
> (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
> (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

The 1998 Competition Act covers all economic activity in South Africa and has extra-territorial reach to the extent that it applies to 'all economic activity within, or having an effect within, the Republic'.[6] The purpose of the Acts emphasis, in addition to the promotion of 'efficiency, adaptability and development of the economy, is the promotion of small business development, greater participation in the economy (especially by previously disadvantaged individuals), and the advancement of a larger spread of ownership. The Act thus attempts to balance efficiency concerns and broader development priorities within the competition framework.

Small and medium-sized enterprise (SME) development is important because of the structure of the South African economy. High levels of concentration and the structure of business in many sectors, from mining to manufacturing to services, are important challenges for small business development in South Africa. The multinational structure of business in South Africa and the strong vertical linkages that exist in many industries can prove to be effective barriers to entry for smaller enterprises. Promoting a broader spread of ownership, especially among historically disadvantaged persons, shows apprehension about the uneven distribution of income and wealth in South Africa.[7] For many decades South Africa had one of the most unequal distributions of income in the world, with strong racial

[6] Competition Act 89 of 1998, ch 1, s 3(1) (amended 2001) < http://www.compcom.co.za/wp-content/uploads/2014/09/pocket-act-august-20141.pdf> accessed 15 January 2018.
[7] Benjamin Roberts, 'Empty Stomachs, Empty Pockets': Poverty and Inequality in Post-apartheid South Africa' in John Daniel and others (eds), *State Of The Nation: South Africa 2004-2005* (HSRC Press 2005) 479.

fault lines through the distribution.[8] Black economic empowerment is now an important cross-cutting policy issue.[9] A more even spread of ownership and SME promotion are important to ensure long-term, balanced, and sustainable development. These specific development challenges are articulated in the public interest issues included in the Competition Act.

The Competition Act provides for extensive jurisdictional coverage, which is important from a developmental perspective. Extra-territorial reach is also provided for, to the extent that the Act applies to 'all economic activity within, or having an effect within, the Republic'.[10] The nature and scope of this extra-territorial reach was tested in a case involving the export of soda ash from the United States to Botswana.[11] Both Botswana and South Africa are members of the Southern African Customs Union (SACU) and share a common external tariff. Hence, imports into Botswana can be expected to have an effect within South Africa. Reference to extra-territorial scope is also found in a consent order, this time looking at the impact on South African exports to the United States.[12] The Competition Commission investigated allegations by South African citrus exporters that the USA Citrus Alliance was indirectly fixing the selling price of citrus in the United States. South African citrus exporters argued that this conduct had an impact within South Africa. These cases point to very important challenges to competition law enforcement in SACU.

### 6.2 South Africa Competition Law Institutions

The South African Competition Act provides for three agencies to enforce and implement competition regulations. The Competition Commission, the Competition Tribunal, and the Competition Appeal Court have exclusive jurisdiction over competition matters. South African competition authorities have ranked among the best from the developing countries, with the World Economic Forum Global Competitiveness Report ranking South Africa 61

[8] Andrew Whiteford and Michael Mcgrath, The Distribution of Income in South Africa (HSRC 1994).
[9] Former President of South Africa Thabo Mbeki, Address at the Second Joint Sitting of the Third Democratic Parliament, Cape Town (11 February 2005) <http://www.anc.org.za/ancdocs/history/ beki/2005/tm0211 .html> accessed 15 January 2018.
[10] Competition Act 89 of 1998, ch 1, s 3(1) (amended 2001).
[11] *Competition Comm'n v Botswana Ash (Pty) Ltd* (2001) Case 49/CR/AprOO and 87/CR/SepOO, Competition Tribunal (S Afr) <http://www.comptrib.co.za/ decidedcases/pdf/49CRAAPROO-2pdf.pdf> accessed 15 January 2018 (ruling on the effect of an American export cartel of soda ash to Botswana).
[12] *Competition Comm'n v USA Citrus Alliance* 2005 Case 67/CR/JuO5, Competition Comm'n & Competition Tribunal, (S. Aft.) <http://www.comptrib.co.za/decidedcases/pdf/67CRJu1O5.pdf> accessed 15 January 2018

out of 137 countries for the effectiveness of its anti-monopoly laws[13]. South African competition authorities play a fundamental role in working with and supporting other competition agencies within Africa, and represent South Africa in the BRICS[14], OECD[15], UNCTAD[16], SADC[17], and ICN[18].

### 6.2.1 The Competition Commission

The Competition Commission ('the Commission') is an autonomous statutory body that monitors competition and market transparency by investigating anti-competitive behaviour.[19] It is empowered to investigate, control, and evaluate restrictive practices and abuse of dominant position, as well as mergers and acquisitions.[20] The Commission is independent from the Department of Trade and Industry, and its decisions may be appealed to the Competition Tribunal and the Competition Appeal Court.[21] This is very different from the situation of the previous Competition Board. The Competition Board, which existed until 1999, functioning under the Maintenance and Promotion of Competition Act of 1979, was an administrative body within the Department of Trade and Industry.[22] The Board could only make recommendations to the Minister of Trade, who would make the final decision on any competition matter. The 1979 Act granted the Board extensive scope to investigate both mergers and restrictive practices. However, with effective decision making resting with the Minister, it was to be expected that political dictates would lead to challenges to credibility and consistency.

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[13] World Economic Forum, *The Global Competitiveness Report* <http://www3.weforum.org/docs/GCR2017-2018/05FullReport/TheGlobalCompetitivenessReport2017%E2%80%932018.pdf>accessed 15 June 2018.
[14] Brazil, Russia, India, China, and South Africa.
[15] The mission of the Organisation for Economic Co-operation and Development (OECD) is to promote policies that will improve the economic and social well-being of people around the world. The OECD uses its wealth of information on a broad range of topics to help governments foster prosperity and fight poverty through economic growth and financial stability. It ensures that the environmental implications of economic and social development are taken into account.
[16] The United Nations Conference on Trade and Development (UNCTAD) was established in 1964 as a permanent intergovernmental body. UNCTAD is the part of the United Nations Secretariat dealing with trade, investment, and development issues.
[17] Southern African Development Community.
[18] International Competition Network.
[19] Competition Act 89 of 1998, ch 4 (amended 2001).
[20] Competition Comm'n, Functions <http://www.compcom.co.za/the-competition-commission-rules/> accessed 5 July 2016.
[21] Competition Act 89 of 1998, ch 4 (amended 2001).
[22] Maintenance and Promotion of Competition Act 96 of 1979 (amended 1996).

### 6.2.2 The Competition Tribunal

The Competition Tribunal ('the Tribunal') is the decision-maker of first instance, deciding matters referred to it by the Commission and by the complainant who, under section 51(3) and (4) of the Competition Act, can refer matters directly to the Tribunal, subject to the Tribunal's rules of procedure, after a decision of non-referral has been made by the Commission.[23] The key functions of the Tribunal are to grant exemptions, authorize or prohibit large mergers[24], and adjudicate prohibited practices and mergers under Chapters 2 and 3 of the Act, respectively. The Tribunal also acts as an appellate body for decisions of the Commission and may grant orders for costs on matters presented to it by the Commission.

### 6.2.3 The Competition Appeal Court

The Competition Appeal Court (CAC) may consider any appeal or review of a decision of the Tribunal. It may confirm, amend, or set aside any decision or order; the CAC can then give any judgment or make any order that the circumstances require. It may consider any appeal from, or review of, a decision of the Competition Tribunal; confirm, amend, or set aside a decision or an order that is the subject of appeal or review by the Tribunal; and give any judgment or make any order that the circumstances require.

The CAC must confirm an order by the Tribunal for the divestiture of assets by parties who have merged in contravention of chapter 3 of the Act.[25] The institutional architecture of South Africa's competition regime, in theory, provides for a much more robust implementation of competition law. Effective enforcement arises if the competition institutions, as well as promoters and beneficiaries of competition, can inform the competition authorities of anti-competitive practices, and participate effectively in enforcement processes. This includes the sector regulators, which share responsibility for

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[23] *Nationwide Poles v Sasol (Oil) Pty Ltd* (2005) Case 72/CR/DecO3, Competition Tribunal, (S. Afr.) <http://www.comptrib.co.za/decidedcases/html/72CRDec03.htm> accessed 15 January 2018(describing a case of alleged price discrimination referred by a complainant to the Tribunal after a non-referral decision by the Commission); also, *Sasol Oil (Pty) Ltd v Nationwide Poles CC* (2005) Case 49/CAC/AprO5, Competition Tribunal, 38-41 (S. Afr.) <http://www.comptrib.co.za/AC/Sasol%20Nationwide%2049CACAprO5.pdf> accessed 15 January 2018 (overturning the Competition Appeal Court).

[24] The Commission has first-instance jurisdiction over smaller mergers: Competition Act 89 of 1998, ch 4, s 21 (amended 2001).

[25] Competition Commission South Africa, 'The Competition Court Appeal Rules' <http://www.compcom.co.za/the-competition-appeal-court-rules/> accessed 15 January 2018.

competition matters in specific sectors.

### 6.3 Competition and Regulation

In addition to the discussion on competition policy during the early phase of South Africa's new democratic era, there was a strong emphasis on other features of regulatory reform. Sector regulation, the establishment of sector regulators, and specific provisions reflecting development concerns, such as access to telecommunications and energy services, were on the regulatory reform plan.

The 1998 Competition Act, prior to the amendments of 1999, 2000, and 2001, did not include acts subject to or authorized by other legislation.[26] A proposed merger between two large players in the financial services sector (Nedcor and Stanbic) brought to the forefront the consequences of this exclusion.[27] The Supreme Court of Appeal (not the Competition Appeal Court) reached the conclusion that the proposed merger transaction was not subject to the jurisdiction of the competition law as a consequence of this provision. As a result of this case, the Act was amended to provide for concurrent jurisdiction between the competition authorities and sector regulators.[28] In the interest of consistent application of the Competition Act across all sectors, the functions of the Commission were also broadened by the Competition Second Amendment Act of 2000.[29] In order to promote cooperation between sector regulators and the competition authorities, the amendment requires that the Commission enter into agreements with the other sector regulators and make provision for the exercise of concurrent jurisdiction.[30]

#### 6.3.1 Sector Regulators

This section considers the Independent Communications Authority of South Africa (ICASA) and the National Energy Regulator of South Africa (NERSA) These are comparable to the Nigerian Communications Commission (NCC) and the Nigerian Electricity Regulatory

[26] Competition Act 89 of 1998, ch 1, s 3(1)(d) (amended 2001).
[27] Trudi Hartzenberg, 'Competition Policy and Practice in South Africa: Promoting Competition for Development Symposium on Competition Law and Policy in Developing Countries' (2005-2006) 26 Nw J Intl L & Bus 667.
[28] Competition Act 89 of 1998, ch 1, s 3(1)(e), 3(1A)(a).
[29] Competition Second Amendment Act, No 39 of 2000 <https://www.comptrib.co.za/assets/Uploads/The-Act/Competition-Amendment-Act-1-February-2001.pdf> accessed 15 April 2018
[30] ibid ch1, s 3(1A)(b).

Commission (NERC).

#### *6.3.1.1 The Independent Communications Authority of South Africa*

The Independent Communications Authority of South Africa (ICASA) is the official regulator of the South African communications, broadcasting, and postal services sectors. It formulates regulations for these sectors, issues licences to telecommunications and broadcasting service providers, monitors licensee compliance with rules and regulations, plans and manages the radio frequency spectrum, and protects consumers against unfair business practices and poor-quality services.[31]

ICASA aims at guaranteeing that the public have access to basic communication services at affordable prices. ICASA gets its authority from four statutes: ICASA Act 2000[32]; the Electronic Communications Act, Act No 35 of 2005, as amended; the Postal Services Act No 24 of 1998; and the Broadcasting Act No 4 of 1999 for the regulation of electronic communications, broadcasting and the postal sectors in the public interest. The legislation empowers ICASA to grant licences, monitor licensee compliance with licence terms and conditions, develop regulations, plan and manage the radio frequency spectrum, and protect consumers. It may also receive complaints from the public about poor services provided by telecommunications, broadcasting, and postal services licensees. It enables the resolution of these complaints or refers them to the Complaint and Compliance Committee. ICASA was established in July 2000 as a merger of the South African Telecommunications Regulatory Authority (SATRA) and the Independent Broadcasting Authority (IBA).

The ICASA and the Commission signed a Memorandum of Understanding (MOU) which establishes how the parties interact with regard to the investigation, evaluation, and analysis of mergers and acquisitions, and complaints involving telecommunication and broadcasting matters.[33] If a merger requires the approval of both regulatory authorities, then parties are required to submit separate and concurrent applications to each authority.[34] Individual authority will make independent determinations based on their legal requirements, though

[31] ICASA's website <https://www.icasa.org.za/pages/about-us-1> accessed 15 April 2018.
[32] Independent Communications Authority Of South Africa Act, 2000 (Act No 13 of 2000).
[33] Memorandum of Agreement Entered into Between the Competition Commission of South Africa and the Independent Communications Authority of South Africa, GN 1747 of 16 September 2002 <http://www.info.gov.za/gazette/notices/2002/23857.pdf> accessed 8 June 2018.
[34] Independent Communications Authority of South Africa Act No 13 of 2000.

they may consult during the process. With respect to complaints, the jurisdictional boundaries identified in the MOU provide that the Commission deal with horizontal and vertical restrictive practices, as well as the abuse of a dominant position. The MOU also specifies rules of procedure in cases of concurrent jurisdiction that ensure that the recipient regulator will inform the other of any complaint and inform any complainant that the matter will be discussed jointly with the other regulator.

#### *6.3.1.2 The National Energy Regulator of South Africa*

The National Energy Regulator (NERSA) is a regulatory authority established as a juristic person in terms of section 3 of the National Energy Regulator Act, 2004 (Act No 40 of 2004). NERSA's mandate is to regulate the electricity, piped-gas and petroleum pipelines industries in terms of the Electricity Regulation Act, 2006 (Act No 4 of 2006), the Gas Act, 2001 (Act No 48 of 2001), and the Petroleum Pipelines Act, 2003 (Act No 60 of 2003).[35] The Electricity Supply Industry (ESI) of South Africa is dominated by state-owned company Eskom, which operates across the electricity value chain in electricity generation, transmission, and distribution. Eskom generates 95% of the electricity consumed in South Africa with independent power producers (IPPs) representing a much smaller portion of electricity generation.

After the corporatization of Eskom, there were concerns around the dominance of Eskom throughout the ESI, and around the poor performance on a technical level throughout the value chain.[36] Although Eskom was funded by the Government, alternative sources of funding were needed to invest in and develop the ESI. These factors led to developing a hybrid model, in which Eskom on one hand was given the responsibility for immediate new investment, and private IPPs on the other hand were given an opportunity to participate in electricity generation. However, the industry is still dominated by Eskom in terms of the size of its contribution to electricity generation, its ownership and operation of Transmission Network Services (TNS), and its role in distributing electricity. At the distribution level, Eskom distributes around 60% of the country's power, with municipalities distributing the

[35] NERSA website <http://www.nersa.org.za/> accessed 22 May 2018.
[36] Anton Eberhard and Katharine Gratwick, 'Demise of the standard model for power sector reform and the emergence of hybrid power markers'. Transmission and distribution losses averaged 20% compared to the global average of 5%. Eskom was strapped for cash and debt coverage ratios were high. Below-cost tariffs significantly contributed to poor technical and financial performance.< https://www.gsb.uct.ac.za/files/JEPO2936.pdf> accessed 8 June 2018.

balance. Although Eskom distributes more power than municipalities, it serves a fewer number of end users, with long-term contracts with mining companies and other large industry players at more favourable rates.

### 6.3.2 The renewable energy experience[37]

The Renewable Energy Independent Power Producers procurement programme (REIPPP) is a case study which highlights ways in which challenges in the ESI can be addressed through effective regulation which proactively introduces competitive rivalry. The evolution of the renewable energy programme has been a learning curve for stakeholders. The early programmes to facilitate entry by IPPs were designed and administered by Eskom in 2007–2008. In each of these programmes there were no power purchase agreements (PPAs) between Eskom and the IPPs. This made the commercial banks reluctant to finance these as it placed considerable risk solely on the IPPs. Further, there was also reluctance on the part of project developers to participate in the programmes given Eskom's dual role as the dominant industry player and administrator of the process. Changing strategy given the poor results of the initial programmes, NERSA developed a Renewable Energy Feed-In Tariff (REFIT) mechanism which sought to procure power output from qualifying renewable energy generators at predetermined prices. Under this programme, IPPs were to sell renewable energy-based electricity to Eskom (as the exclusive buyer) under a PPA, and were entitled to receive regulated tariffs, based on the particular generation technology.

However, this was also unsuccessful and the feed-in tariff was never implemented as it was considered to be too low by industry. In 2009, NERSA revised the tariffs to allow greater returns on investment, but then subsequently lowered them again in line with international benchmarks. There were significant other initial difficulties with the REFIT programme where, again, it was felt that too much risk was allocated to IPPs. IPPs, developers, and investors requested a PPA guaranteed by the Government to reduce this risk. As a result of this, and other reasons including concerns around NERSA's ability to manage such a system and conflicts with public finance and procurement laws, the REIPP Procurement Programme (REIPPPP),[38] which was a competitive bidding procurement programme, came into being.

[37] Reena Das Nair and Simon Roberts, 'The Interface of Competition and Regulation in Energy, Telecommunications and Transport in South Africa' (1st Annual Competition and Economic Regulation (Acer) Week, Southern Africa (CCRED, UJ) 20 March 2015.

[38] The South African REIPPPP is a competitive tender process that has been designed to facilitate private-sector investment into grid-connected renewable energy generation in South Africa.

This programme is run by Department of Energy (DoE) and the National Treasury (NT). The auction system designed in the REIPPPP encourages both competitive pricing and local manufacturing given local content requirements. The programme has been hailed a success in many parts of the world and the implementation of the system has been recognized to encourage maximization of dynamic returns of competition. The REIPPPP has pioneered renewable energy in South Africa, which is currently overwhelmingly dependent on coal and has also been the frontline for IPPs in the country and has loosened the monopoly hold of Eskom. Since inception, South Africa has achieved more investment in IPPs than in the rest of Sub-Saharan Africa over the past two decades. It offers valuable lessons for Nigeria in terms of designing and running competitive tenders or auctions for grid-connected renewable energy IPPs.[39]

### 6.4 The Role of Competition in Economic Regulation

The above review of the different regulated industries show both similarities and differences in the approach to regulation, particularly with regard to the consideration of competition principles in the implementation of regulatory rules. Lessons from the interface between competition and regulation in these sectors can be drawn which are useful for economic regulators in terms of learning from each other, for engagement between economic regulators and competition authorities, and for policy makers. In terms of structure, in electricity the fully integrated SOE, Eskom, is regulated by independent regulator, NERSA operate within a policy framework determined by a line department. In telecommunications, the main operator has been privatized with a long-established regulator and enforcement actions by the competition authorities.

The reviews in each of these industries has shown that deep-rooted interests have discouraged investments in infrastructure that would have otherwise increased participation in line with government's economic and social objectives. Favourable treatment of prevailing industries and groupings such as mining and metal smelters (justified by short-term financial performance measures) has resulted in similarities in terms of the historic investment patterns which were oriented to these industries. Regulators in many instances have not taken into account diversified users' needs. An exception is in the renewable energy

[39] Anton Eberhard and Raine Naude, 'The South African Renewable Energy IPP Procurement Programme Review, Lessons Learned & Proposals to Reduce Transaction Costs' <https://www.gsb.uct.ac.za/files/EberhardNaude_REIPPPPReview_2017_1_1.pdf> accessed 9 June 2018.

sector, where a proactive and coordinated approach by the state and the regulator in the renewable energy procurement programme led to introducing greater participation in electricity generation by IPPs, the benefits of which are evident in falling tariffs and encouraging local content. While there are also private operators in mobile telephony, the benefits of increased participation have not resulted in the desired outcomes. Entrenched market power of the incumbent has been protected historically and there is a need to regulate more for increased competitive rivalry and participation in the economy. Unlike with other entities, the Government's shareholding in Telkom is held by the Department of Communications which is also responsible for the policy framework. This compounds the conflict of objectives and adds to the inclination to retard the development of ICASA into a strong regulator in the telecoms industry.

What is also evident is that there is limited transfer of learning between the regulators from their respective failed or successful experiences. For instance, useful lessons from the auction system design of the renewable energy programme could potentially be adopted in other regulated industries. One way in which this transfer could be achieved is to consider merging the regulators into a single economic regulator, possibly including even the competition authorities. It is apparent from the sector reviews that effective regulation is necessary to ensure that the competitive space remains open and to govern aspects such as access to critical infrastructure. Even in industries where scale economies would advocate that only one firm operate, regulating that is conducive to creating 'synthetic competition' by ensuring participation by several competitors has shown positive outcomes in terms of the dynamic gains from rivalry.

### 6.5 Effective Implementation of Competition Law in South Africa

Effective competition and regulatory enforcement entails specific capacities within the enforcement agencies and also the private sector. Inadequate capacity can lead to challenges of regulatory capture by a small number of experts, weak enforcement and monitoring of decisions, and can obstruct the development of a competition culture. This is also a possible challenge of competition law in Nigeria

### 6.5.1 Capacity in the Legal Profession and Private Sector

The capacity that has developed in the legal profession is worth noting. Less than a decade ago, very few law firms had any expertise in competition law. Law firms have now acquired significant expertise in this area, and some are even taking on economists as associates. Small businesses still lack awareness of the importance of competition law to their business. Given the high levels of market concentration, the role of small businesses and their ability to compete with larger businesses is a serious concern of competition law. The case of *Nationwide Poles v Sasol* is instructive.[40] This case, involving alleged price discrimination, received a decision of non-referral from the Commission. The managing director of Nationwide Poles then took the case to the Tribunal without legal assistance. The experience of this small business has raised a number of very important issues, including the cost of legal expertise to support a competition case, the specialized knowledge required to meet the high standards of the competition authorities with respect to submissions and participation in proceedings, and the length of time it may take to get a case resolved.

### 6.5.2 Academia, Trade Unions, and Consumer Organizations

Competition expertise in law, economics, and business more generally can contribute to developing awareness of competition issues, compliance, and better enforcement. The response in academia to the development of competition law and regulation has been a significant increase in the number of postgraduate-level courses that include competition law and policy, and sector regulation, both in law and economics, as well as a strong research focus in both disciplines.

Trade unions are taking more interest in competition matters, specifically in regard to mergers. Their interest in the employment impact of mergers is obvious, and therefore their participation in merger proceedings is most welcome. However, with their broad mandate to look after worker interests, restrictive practices investigations could be even more important.

The consumer constituency is weakly organized in South Africa, despite the important role that consumer boycotts played during the apartheid years. This is a particular challenge in view of the role of the still very powerful state-owned enterprises in key sectors of the

[40] *Nationwide Poles vs Sasol (Oil) Pty Ltd* (72/CR/Dec03) [2005] ZACT 17 (31 March 2005).

economy, such as transport, telecommunications, and energy, and the importance of the basic services provided by these enterprises.

### 6.5.3 Skills Constraints in the Competition Commission

The Competition Commission faces the challenge of attracting and keeping skilled staff. Competition experts who have worked at the Commission, gaining experience and building valuable networks, have become very attractive to law firms, consulting firms, and larger businesses. While this is problematic for the Commission, which invests in training and on-the-job learning only to lose these experts, it is important to focus on broader, economy-wide effects. The migration of competition expertise from the Commission undoubtedly poses significant challenges for the conduct of its investigatory function. However, having such expertise in other sectors of the economy may lead to the development of a better understanding of the role of competition in the economy and in development.

### 6.5.4 Challenges Related to Concurrent Jurisdiction

Jurisdictional conflicts could pose problems for effective enforcement. Work remains to develop capacity within the sector regulators. Such capacity would also assist to develop a more workable interface with the competition authorities. In key sectors such as telecommunications and energy, the promotion of a competitive environment through effective enforcement of both sector-specific and competition-related regulation is important. The impact of competitive outcomes in terms of pricing, and access to quality service and consumer choice, on the overall performance of the economy is significant, especially on small business development.

## 6.6 Challenges for the Development of a Competition Culture

In many of its industries and sectors, South Africa does not have a competitive environment that can support economic decisions by firms, investors, and consumers that will aggregate to produce robust and sustainable economic growth. Anti-competitive practices are, arguably, far more prevalent than the record of cases coming before the competition authorities thus far indicates. This is part of the legacy of the apartheid era on South Africa's development, where the state played a significant role both as producer and regulator. The

effects of strong state intervention and participation in markets were magnified by economic sanctions that limited the participation of South African firms in the international economy. Import substitution industrialization was the dominant paradigm both by design and the result of economic sanctions. Consumer choice was constrained by virtual autarky.

Investment options were severely limited and led to investment patterns by firms which supported the development of a conglomerate structure of ownership in the South African economy. The pervasive role of the government in productive economic activities and recent experience with privatization testifies to its important role in the economy. In particular, the protectionist policies, such as import substitution and industrialization supported by exchange controls, compounded by the effects of isolation during the height of apartheid, meant that South African businesses faced very little competition from imports, while also having limited investment opportunities outside the country.

Many firms invested in sectors and industries far removed from their core business because they could not take advantage of investment opportunities abroad. Corporate concentration grew and the conglomerate structure of South African business was consolidated with cross-holdings that characterized ownership structures. The structure of holding companies, which grants effective control over subsidiaries with extremely low ownership stakes, is specific to South Africa and poses interesting challenges when assessing the impact of a proposed merger.[41]

Practices in a range of sectors, from automotive to real estate, have recently come under scrutiny, and more often than not the conclusion that these practices restrict competition has not come as a surprise to consumers. Indications are that a systematic review of key sectors would uncover many more such practices which seemingly raised no concerns with the Competition Board in the previous era.

Developing a competition culture takes time and requires input from many different sources. The Competition Commission can expand its advocacy role, provided that it has adequate resources. There is also a role for greater focus on competition issues in the various government departments. For example, those departments that have been involved in domestic regulatory reform – such as the Communications, Minerals and Energy, and Health

[41] Neo Chabane and others, '10 Year Review: Industrial Structure And Competition Policy' (2003) <https://sarpn.org/documents/d0000875/docs/10yerReviewIndustrialStructure&CompetitionPolicy.pdf> accessed 9 June 2018

departments – need to bolster their expertise in the field of competition. Then those departments can support the development of a competitive environment in their specific industries.

Consumers are both promoters and beneficiaries of competition, and therefore their role in competition enforcement cannot be underestimated. Consumers' awareness and their capacity to play a role in effective enforcement needs to be supported by government, business, and civil society organization initiatives. Consumer organizations are weak in South Africa, and consumers generally are not aware of competition law and policy, and how complaints may be brought to the Commission, and even the Tribunal.This also forms a common challenge for Nigeria as there is no consumer awareness of competition or the role they play in the effective implementation of competition rules.

### 6.7 Raising Awareness

Customarily, the growth of competition law has principally been entrenched in recognized and well-established Western systems of law. This is where modern competition law was established and thus where emerging markets seek out guidance when introducing and implementing this law in their local economies. However, developed country understanding and application of competition law is, at times, disparate with the developmental state that many emerging economies find themselves in. Thus, it can be a threat to the growth agenda when it is not applied carefully. This requires a re-imagining of competition concepts, economic theories, and remedies to suit the unique circumstances and requirements of the developmental state. In South Africa, the Commission has found that its partners in the BRICS competition network, the ACF[42] and SADC, face similar challenges in this regard. The BRICS economies, though in different stages of economic development, face concerns of high unemployment and inequality, necessitating a nuanced application of traditional competition principles to suit each country's unique requirements. Similarly with the members of the ACF and SADC. Together with these partners, the Commission is introducing a new perspective on assessing competition matters and is developing new theories for application by agencies in similar positions. Some of the key events undertaken

[42] The ACF is a network of competition authorities in Africa, comprising 29 national authorities and 4 regional authorities. The ACF was established in 2011 to promote the adoption of competition laws, help build the capacity of new authorities, and assist in advocating for the implementation of competition reforms to the benefit of member countries.

for this purpose and for greater co-operation, in general, among agencies in emerging markets are:

### 6.7.1 BRICS competition authorities pledge to support co-operation in market studies and enforcement

On 19 May 2016, the heads of the BRICS competition authorities signed an MOU on cooperation in the field of competition law which establishes a framework for collaboration between the BRICS competition authorities, including exchanging information, joint studies on markets of mutual concern, and cooperation and coordination in investigations or enforcement proceedings.[43]

### 6.7.2 SADC cooperation agreement to help build capacity

On 26 May 2016, a MOU between nine SADC competition authorities[44] was signed in Botswana. The MOU commits competition authorities to cooperate by sharing information on cases, coordinating investigations, harmonizing rules of procedure, and undertaking joint-capacity building and research activities.

### 6.7.3 Commission supports Nigeria in reforming its competition laws

The Commission was invited by the Nigerian SEC, which currently has limited jurisdiction to review mergers and acquisitions, to meet with various stakeholders in Nigeria on the Competition and Consumer Protection Bill, currently before the House of Representatives. The new law will cover all aspects of competition policy and enforcement. Two Commission staff, as well as two officials of the US Federal Trade Commission (FTC), discussed the proposed Bill with the Director-General of the SEC, a member of the Nigerian Senate, and a member of the House of Representatives as well as with other stakeholders, mainly lawyers. The meetings were followed by a capacity-building workshop for the SEC and other Nigerian regulators charged with reviewing mergers. It was facilitated jointly by the

[43] Memorandum of Understanding <http://www.compcom.co.za/wp-content/uploads/2016/05/MoU-BRICS.pdf> accessed 9 June 2018.

[44] The MOU on inter-agency co-operation in competition policy, law and enforcement was signed by the heads of competition authorities from Botswana, Malawi, Mauritius, Namibia, Seychelles, South Africa, Swaziland, Tanzania and Zambia.

Commission and the US FTC and covered all aspects of merger review and analysis.

### 6.7.4 ACF and World Bank partner to increase knowledge

The World Bank published a report which reviewed the status of competition frameworks and implementation in Africa and reviewed three important sectors for Africa's competitiveness: cement, fertilisers, and telecommunications. More than 70% of African countries rank in the bottom half of countries globally in terms of intensity of local competition and prevalence of fundamental policies for market-based competition[45]. This report was a joint effort between the World Bank and members of the ACF, reflecting a shared vision for promoting competition policy and effective competition law enforcement across Africa. Through this report, the ACF and World Bank sought to understand key risks to competition in vital input sectors, in particular cement, fertiliser, and telecommunications. Competition issues in road freight, air transport, and retail are also explored. The analysis showed that the effects of industry characteristics, regulations, and trade policies shaped the competitive dynamics of these sectors and often spanned borders. There was scope, therefore, for national and regional competition authorities to increase their impact by taking a regional perspective when assessing cases within their jurisdictions.

This report emphasized the importance of strong cooperation between agencies involved in implementing competition policy. The study's findings on the range of competition policy frameworks in place across Africa highlighted the great potential for peer-to-peer learning, both within the region and across regions. The evidence presented in this report showed how competition policy helped African countries boost inclusive growth and sustainable development. The report found that eliminating competition constraints in food markets could lift families out of poverty. For example, a 10% reduction in the prices of principal food staples is estimated to have the effect of lifting approximately 500,000 people out of poverty in three countries. Fundamental market reforms to increase competition in key input services would also boost economic growth. For example, reforming professional services markets would deliver an additional 0.16–0.43% of additional annual growth in gross

[45] The World Bank Group, *Breaking Down Barriers: Unlocking Africa's Potential through Vigorous Competition Policy* (English) (Washington DC, World Bank Group 2016) <http://documents.worldbank.org/curated/en/243171467232051787/Breaking-down-barriers-unlocking-Africas-potential-through-vigorous-competition-policy> accessed 22 April 2018.

domestic product.[46] While the benefits of competition are observable in South Africa, there is considerable effort required to ensure effective implementation of competition laws and policies across the African continent and in Nigeria in particular.

### 6.8 Conclusion

It is challenging to measure the level of awareness, influence, or compliance brought about by the various public engagement tools utilized by the Commission. However, the growing list of enforcement matters filed by the government and ordinary members of the public, as well as the increasing number of invitations and media requests the Commission is receiving, are all indicators of awareness. Several African countries such as Nigeria look to South Africa for capacity building in their efforts to establish or grow competition agencies in their regions. The Commission, through stakeholder engagement sessions has continued to make efforts to raise awareness of competition and, in that way, improve compliance.[47]

South Africa's competition law and policy includes a distinctive focus on specific dimensions of public interest, and this makes it possible to take into account matters such as employment, specific industry development, and small business development, as well as black economic empowerment, which can play a very significant role in the long term process of developing the nation's markets. Making markets work better with appropriate intervention to guide market forces to support broader development priorities, is absolutely essential to developing countries in general, and to South Africa in particular, in light of its particular legacy of economic development. This consists of much more than effective enforcement of merger regulation. The development of a competition culture in South Africa also requires a strong focus on competition advocacy.

The recently adopted Nigerian Federal Competition and Consumer Protection Act FCCPA is modelled after the South African competition law with some variations. It is my opinion that the South African model was adopted as a reference because its competition regime

[46] ibid.

[47] Some examples of recent forums are Business consultative forum on 28 March 2017 held to consult with business on the Commission's draft guidelines on information exchange between competitors, and to highlight the competition risk of information exchange targeted at Business stakeholders; another example is the Annual competition law, economics and policy conference on 6 and 7 October 2016 aimed to keep updated on competition policy developments in South Africa and to create optimal conditions for a stimulating exchange of views targeted at Competition law and economics practitioners, small business and academics; There has also been the Bid-rigging training to senior auditors of the Auditor General SA on 19 to 24 January 2017 to train senior auditors to be able to detect bid rigging in the course of their auditing process.

stands out as a model of competition law implementation for developing countries.[48] Furthermore, the general philosophy which guides the South African Competition regime is the idea of using the law as a means for achieving national economic and social objectives. This has been described as 'harnessing markets to make them work for the people'[49]. Furthermore, its impact is felt regionally within Africa through emulation and diffusion by learning, as well as internationally via its synergy with other developing countries on the platform of BRICS.[50]

The South African competition law regime has not had an easy sail in its implementation of the competition law due to some enforcement and sometimes procedural related challenges. The general lesson here for Nigeria is that the adoption of competition law is not an end itself, but a means to an end. It is the first step in the journey of competition regulation. Some of the provisions in the FCCPA which could negatively affect enforcement and the lessons from South Africa which could be adopted to address these challenges are as follows:

- Threat to the independence of the regulator via political control and regulatory capture. For example, the provisions of Part XI of the FCCPA on price regulation is made subject to an order of the President,. It is argued that the power to make such an order should to be vested in the Federal Competition and Consumer Protection Commission FCCPC and not a political actor who may prioritise political calculations over economic decisions..

The lesson Nigeria needs to learn from South Africa is to protect its competition regime from undue political interference in the enforcement of its competition regime. This potential for political interference may be a challenge to the enforcement of the provisions of Section 2 (2) (a) (b) of the FCCPA where state-owned institutions engage in anti-competitive conduct like abuse of dominance. Global best practices in competition regulation is that the competition authority is established as an independent, non-ministerial department, subject only to the law, like the South African Competition Commission and the UK's Competition and Markets Authority, in order to insulate it from external influence of political actors, as well as powerful multinational firms, as the latter may threaten the

[48] Azza Raslan, 'Mixed Policy Objectives in Merger Control: What Can Developing Countries Learn from South Africa?' (2016) 4 World Competition 39, Kluwer Law International, 625.
[49] Eleanor Fox and Mor Bakhoum; Making Markets Work for Africa (OUP, 2019)
[50] Natalya Mosunova, 'Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects' (2017) 4 BRICS L.J. 156.

independence of the FCCPC through regulatory capture as is often the case of new competition authorities in developing countries.

- A further concern is the criminalisation of cartels which although is quite commendable may prove to be an overenthusiastic approach where the expertise and resources to successfully investigate and prosecute cartels are not in place.

On the criminalisation of cartels, Nigeria can copy the South Africa competition law and introduce a leniency program for cartels, due to the difficulty in detecting, investigating and prosecuting cartels. This will encourage firms engaging in cartels to take advantage of the gesture in return for a reduced penalty.

Following the competition regime in South Africa, strong and competent pro-competition institutions should be established in order to safeguard the competition process to ensure the attainment of the objectives of the FCCPA. There is therefore the need to establish a specialised court to be called Competition and Consumer Appeal Court (CCAC) in the place of the Court of Appeal as the appellate and final court in competition and consumer protection matters. The importance of having a specialized court in competition matters is that the expertise of judges in both legal and economic concepts enables them to hear and understand expert evidence and argument, and make decisions that are legally and economically sound, having regard to the impact upon the system as a whole. Any further appeal on the decision of the CCPT should be to the Supreme Court only on point of law, and subject to the leave of the Supreme Court. Timeframes on the duration of appeal should equally be imposed in order to ensure speedy dispensation of justice.

The following chapter concludes by reviewing the current position in Nigeria and measures necessary to implement an effective competition law regime. The chapter further examines the Federal Competition and Consumer Protection Act (FCCPA). It considers whether this law will be effective in addressing the competition problems in Nigeria, and presents the reasoned conclusion and recommendations for the development of the Nigerian competition law and its execution.

# PART III – POTENTIAL WAY FORWARD FOR NIGERIA'S COMPETITION LAW REGIME

## CHAPTER 7: COMPETITION ADVOCACY AND ESTABLISHING A COMPETITION LAW REGIME IN NIGERIA

### 7.1 Introduction

This chapter considers the Federal Competition and Consumer Protection Bill which has now been passed to Law. The chapter provides a critical overview of the bill and its set requirements. Furthermore, it examines the requirements for the establishment of a competition agency in Nigeria and the possible obstacles to the establishment and its achieving its goals. The chapter further considers the position of competition law in relation to sector regulators and concludes by suggesting benchmarks for the Enforcement of competition law

### 7.2 Critical Overview of the Federal Competition and Consumer Protection Bill 2016[1]

The Bill appears all-encompassing, addressing both competition regulations as well as consumer protection. The danger, however, remains in the management of the Commission if the Bill is passed into law. The Commission will need to be managed by professionals who are knowledgeable in antitrust laws, economics, intellectual property and representatives of the various sectors of production. It is essential that all necessary bodies are involved in order to achieve an effective competition policy in Nigeria.

Competition law and policy has continued to enjoy a remarkable growth rate across the world in recent times. Its advantages have been seen to cut across economic efficiency, boost consumer choice and protection, remove entry and exit barriers, protect of small and intermediate firms in the market, improve the foreign direct investments (FDI) of countries, and boost the chances of local firms to compete internationally. This work has therefore argued that, left unchecked, the unregulated trade practices will continually relegate

[1] The Federal Competition and Consumer Protection Bill 2015 SB 544 (Executive Bill).

Nigerian markets to the background and have extremely adverse effects on economic and trade development and growth in the country.

The following are a few provisions of the Bill concerned with the operation of the Commission which may require further review.

### 7.2.1 Price Regulation

Section 89 empowers the President of the Federal Republic of Nigeria to regulate the prices of certain products/services, and which are to be published in an official gazette. This seems odd, as competition law applies to all products/services, and it follows that the pricing of all products/services are regulated by market forces; this is the basis of competition law. The flawed approach starts in section 1(c), which provides that the aim of the Bill is to '... provide consumers with competitive prices and product choices ...' rather than to 'ensure that consumers are provided with competitive prices and product choices '. It must be understood that competition law and its regulators do not provide competitive prices and products; they merely ensure that consumers have freedom of choice through the availability of competitive prices and products.

The Bill adopts a questionable approach to price regulation (government interference), probably based on the misapplication of the word 'regulate'. Competition law regulates the pricing policy of undertakings operating in a deregulated market (free of government interference). A competition legislation that provides for the regulation of prices by government may appear contradictory.

### 7.2.2 Market Definition

In order to assess whether particular conduct amounts to restrictive business practice, its effect on the other players within the same market is evaluated. This creates the need to define the relevant market. Market definition is very important, as it aids in assessing an undertaking's power within a relevant market, which helps a regulator in deciding whether a specific conduct of an undertaking amounts to restrictive business practice. In the assessment of anti-competitive conduct, competition law is concerned with defining the product market and the geographic market of the concerned undertaking as mirrored in section 72 of the Bill.

The definition of the product market is concerned with demand substitutability (that is, which products are substitutable amongst themselves), while the definition of geographic market is concerned with the realistic locations where consumers can purchase substitute products. For example, A may be willing to go between areas X, Y and Z in search of the best price but not as far as area B. In this scenario the geographic market will be limited to areas X, Y and Z.

Section 72(a) provides for geographic market but fails to recognize the effect that e-commerce has on commercial transactions. e-commerce means commerce without borders; hence, 'geographic boundaries' as employed in section 72 can no longer be the sole determinant in defining the geographic market in competition law. Today, consumers can move easily between supplier websites, browsing for the best purchase price from the comfort of their Internet-enabled devices. The Internet affords the consumer the luxury of having no barriers, locally or internationally, in respect of choice of competitive prices and products. It is advised that section 72 should be amended to replace 'geographic boundaries' with 'accessibility', which aptly covers both physical transaction points and the borderless e-commerce, in the determination of geographic markets.

### 7.2.3 Competences of the Commission

Nigeria currently practises competition regulation on an industry-specific basis, implying that some competences have formed over the years. Consequently, it is imperative to advise that all industry-specific regulators should transfer their competition competences to the Commission. This not only empowers the Commission but provides it with a pool of competent officers who can be transferred to start up the Commission based on their previous competition law experience, under industry-specific regulators. The combination of both competition and consumer protection functions by the Bill seems to be influenced by similar approaches in other established jurisdictions, like the United Kingdom, which evolved over many decades of developing separate competences. Considering the fledgling Nigerian competition law, the capacity of the Commission to effectively regulate competition along with consumer protection obligations is questionable. However, it would be helpful if the competences of the to-be-scrapped Consumer Protection Council are greatly utilized by the Commission.

## 7.3 Establishing a Competition Agency: Requirements for a Competition Agency and Possible Obstacles

The enactment of competition legislation does not by itself guarantee a favourable competition policy outcome; implementation and enforcement are key and it is in this area that Nigeria will struggle. Although some developing countries have a competition law in place, they experience problems in effectively implementing and enforcing the law and carrying out the tasks assigned to the competition authority. The most common problems include resource and capacity limitations, the lack of political will and the absence of an independent competition authority, and a weak competition culture. These issues will be considered in the following sub sections

### 7.3.1 Resource and Capacity Limitations

The issues of resource and capacity constraints are some of the most significant problems facing competition authorities in developing countries and may raise concerns in Nigeria. While the dismal resource base is connected to the fiscal crunch that poses a challenge to most developing economies and the need to balance and prioritize competing demands on the government budget, it is also a reflection of an absence of political backing for competition policy. Given these factors, the following issues arise: first, should competition authorities depend on state funds? and second, can competition authorities be financially independent? Depending exclusively on state funds may have unfavourable impact on the capacity of the competition authority in terms of quality and quantity of staff, opportunities for training and human resource development, and support facilities and infrastructure, while also undermining its independence to a large extent. As deliberated earlier on in this thesis, competition agencies require a considerable degree of skill and competence to address complex issues ranging from how to determine dominance or at what level to set threshold limits, to how to evaluate competition cases using a 'rule of reason' approach. In several developing countries, competition agencies struggle with these issues and are unable to handle their caseload because of a lack of qualified staff. For instance, India's Monopolies and Restrictive Trade Practices Commission (MRTPC) had to struggle with an enormous backlog of cases with only seven professional staff members.

The seeming problems, with depending solely on the government for funding the activities

of the competition agency, bring us to the related issue of whether and how the authority can become financially independent. It is suggested that resources could be raised by way of fines.[2] While this option may be challenged on the grounds that it could create an incentive for the competition agency to charge excessive fines to function as a financially sustainable unit, the establishment of an appellate mechanism would allow a party to contest not only the decision of the authority but also the amount of the fine. An alternative would be for the competition agencies to charge fees for the services they provide to the government and business associations. Another choice would be to introduce a system similar to a court fee whenever firms file complaints against their competitors. The benefit of this method is that it would discourage frivolous complaints. A final option is to look to bilateral and multilateral donor agencies for funding and technical assistance. The most practical solution would perhaps be a mix between state and other sources of finance, with the former option progressively forming less of the agencies' resource base than the latter.

### 7.3.2 Lack of Political Will and Independence

A common feature in most developing economies is the absence of political support for competition policy. This also turns to political interference in the activities of a competition agency, destabilizing its impartiality as a 'watchdog' of competition. Some of the identified criteria that define independence are: legal independence, where the competition agency is not a part of any government department and where members cannot be removed without proper justification; financial independence; and de facto independence where it would have the cooperation of other government agencies in enforcing its decisions.[3] Legal independence does not, however, provide for de facto autonomy, as is evidenced in the case of Pakistan where the government interfered in several cases, most notably that of the cement cartel. The Indian soda ash and cement cases that set a strong lobby group made up of a few big industrial houses against an association of small builders and consumers also indicate the threat to independence from strong business lobbies. The reasons for the lack of political support relate to private-interest maximizing behaviour on the part of politicians, where they protect the interests of those industries from which they derive their votes and with whom they often have mutually beneficial rent-sharing arrangements at the expense of

[2] Ratnakar Adhikari, 'Imperatives of Competition Policy', The Kathmandu Post, 11 March (2002).
[3] CUTS, 'Pulling Up Our Socks: A Study of Competition Regimes from Seven Developing Countries of Africa and Asia: The 7-Up Project' (Jaipur: CUTS 2003).

a widely dispersed consumer population. The absence of political support for competition policy could also stem from the need to prioritize public policy to meet a country's development needs.

Given the premise that some degree of competition policy that is tailored to the specific development needs of an economy is necessary in the context of liberalization, privatization, the international merger wave, and possible negotiations at the multilateral level, it is important that Nigeria develops a strategy to convince the national political leadership of the benefits of competition law and policy. Some practical options for enhancing the independence of the competition agencies would be, for instance: to stipulate that the agency should be accountable to the legislature or to a parliamentary committee; to fix the term of Commissioners for such period as to enable them to receive adequate exposure and experience but not too long so as to run the risk of political or regulatory capture; and to provide for start-up funds from the government budget while leaving the responsibility for generating more funds to the agency through fines, fees or donor support[4].

### 7.3.3 Absence of Competition Culture

While a bottom-up approach (including pressures from groups such as consumer and other civil society organizations that operate outside the government) is particularly relevant in countries that lack the political commitment to competition policy, this appears not to be very prominent in Nigeria. The enactment of a competition law will not be sufficient to develop a competition policy framework that is tailored to suit the development needs of an economy. It is also not enough to prevent undue political interference and regulatory capture, as set out in the previous section. What is required then is broad-based awareness and advocacy work, activities that would speak of the benefits of competition law and policy, and that would highlight the development dimensions of competition policy. Such activities need to be carried out in tandem with civil society entities such as consumer organizations. Moreover, donor assistance is also an option to finance advocacy programmes or to bring competition issues into tertiary education curricula.

[4] Adhikari (n 2).

### 7.3.4 Position of Competition Policy vis-d-vis Other Areas of Public Policy

This section looks at the position of competition policy vis-a-vis other areas of public policy, based on the objectives of competition policy and the rigour with which it is implemented in various countries. Developing a competition policy and law is entirely different from deeming it superior over other economic policies of a nation. Supremacy of policy and law depends not only on the economic and political significance a country attaches to the issue, but also on a host of other factors. For example, the US pursues anti-competitive conduct more vigorously than any other country. It has included the provisions of treble penalty for some anti-trust violations, and regarded some violations as criminal offences.[5] Similarly, the means applied to check anti-trust abuses are so rigorous that competitors are not even allowed to verbally discuss price issues. However, Japanese competition law has intentionally included weak provisions on some of the competition issues (including merger, cartels and collusive conduct), with decision makers giving priority to 'industrial policy' over the application of competition rules. Indeed, Japan's Ministry of International Trade and Industry (MITI) did not shy away from ignoring the basic tenets of anti-trust regulations if they interfered with the export-oriented industrial policy for which it became famous.[6] Similarly, the Taiwanese Fair Trade Law contains a clause that gives explicit precedence to other laws where they conflict with competition law[7]. Often the significance any government assigns to competition policy and law can be seen from the budgetary allocation to the competition authority provided by the government.

It is entirely up to the countries concerned to decide as to where they would like to position their competition policy and law vis-à-vis other areas of public policy, taking cognizance of their political economy. They should decide, for example, whether the policies of poverty

[5] Based on the US federal antitrust law, persons and companies harmed by anticompetitive conduct may seek an award of triple their damages, an injunction, and costs of the action (including attorney fees) against a party that violates federal antitrust laws. For example, price fixing or an agreement among competitors on the price they will charge is considered a per se illegal violation of Section 1 of the Sherman Act, 15 U.S.C.S. § 1, that the government may prosecute as a felony. As a further deterrent to such activity, those harmed by the violation may seek treble damages and an injunction. Section 4 of the Clayton Act, 15 U.S.C.S. § 15, provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue" for treble damages, prejudgment interest, and costs of suit, including attorney fees. State and local governments are considered "persons" permitted to sue under Section 4 for treble damages. Foreign states that do not assert their own antitrust immunity also may sue but for single damages only.

[6] Moises Naim,, 'Does Latin America Need Competition Policy to Compete?' in Moises Naim and S Joseph, Tulchin (eds), *Competition Policy, Deregulation, and Modernization in Latin America* (Lynne Rienner Publishers 1998).

[7] PJ Lloyd, 'Competition Policy in the Asian-Pacific Region' (2000) 14(2) Asian-Pacific Econnomic Literature 1-13.

alleviation, employment generation, and ensuing distributive justice should receive primacy over competition rules. However, they should keep in mind that competition policy can be a strong instrument not only to enhance efficiency of the enterprises and protection of consumers at the micro level, but also as an effective means to achieve equity concerns (such as deconcentration, distributive justice and poverty alleviation) from a macro perspective.

### 7.3.5 Competition Authority versus Sector Regulators

Sectoral regulators and competition authorities could pursue the common goal of safeguarding consumer welfare.[8] Nonetheless, they have different legislative perspectives, which may lead them to reach different outcomes. While sectoral regulators employ ex-ante regulation in a pro-active manner, competition authorities largely use ex-post assessment in a reactive manner.[9] This implies that while competition authorities intervene in the market mechanism in case of a market failure, sectoral regulators intervene to achieve specific statutory outcomes.[10] In other words, competition law aims at protecting competition by checking anti-competitive practices, but sectoral regulation aims at promoting competition by ushering in structural changes.[11] Such a difference in approach can result in divergences between regulations and competition law standards, even when the sectoral regulator takes into account the established jurisprudence while framing competition regulations.[12] The existence of such divergences can imply that compliance with regulation may not necessarily save firms from competition scrutiny, thus resulting in market uncertainty and increasing their exposure to potential liability.[13] This can also lead to duplication of efforts, inefficient use of resources and an increased risk of forum shopping.[14]

Despite massive changes in technology, several segments of infrastructure in developing economies such as Nigeria will remain natural monopolies, because of the limited size of markets and the lack of entrepreneurial zeal to take up risky investments in sectors with high gestation periods. Therefore, sector-specific regulators will continue to play a major role to

[8] Maher M Dabbah, 'The Relationship between Competition Authorities and Sector Regulators' (2011) 70 CLJ 113, 116.
[9] ibid 115.
[10] ibid.
[11] ibid.
[12] ibid.
[13] Margherita Colangelo, 'The Interface between Competition Rules and Sector-Specific Regulation in the Telecommunications Sector: Evidence from Recent EU Margin Squeeze Cases' (2013) 14 CRNI 214, 237.
[14] Paloma Szerman, 'Telecommunications Regulators and Competition Agencies: Their Institutional Setting in Spain, the UK and France' (2015) ENLR 243, 244.

ensure that natural monopolies do not abuse their position in the market. One of the responsibilities of the sector-specific regulators is to maintain price-cap regulation in the sectors under their jurisdiction, an activity that impinges on competition. While simultaneous jurisdiction is not uncommon even in developed countries, this is a source of tension in most developing countries because of a lack of clear-cut demarcation of authorities and responsibilities.

Jurisdictional conflicts may also ensue due to uncertainties in the law as to whether sector regulation or competition law has precedence regarding competition issues. In many cases such as in Nigeria, sector regulators came into existence before the competition authority and they were given responsibility for competition issues. Even in cases where new sector regulators have been created in recent times (for example, after deregulation and privatization have taken place), countries have chosen to assign competition responsibilities to sector regulators as a means of infusing competition principles in the sector-regulatory regime and thus supporting a consistent application of competition policy across the economy.[15]

There are different models which can be used to address the problem of jurisdictional conflict.[16] The first is the exclusivity model, where either of the bodies is granted the exclusive competency to deal with competition issues.[17] The second is the concurrency model, where both the authorities have competency and reach a decision on the exercise of the same through a consultative process.[18] The third is the cooperation model under which competition law enforcement is allocated between the two authorities and consultations mechanisms are developed to decide conflicts.[19] Different states have adopted different models, depending upon their legal traditions, political climate, institutional culture, and competition goals.[20]

In South Africa, sector regulators have concurrent jurisdiction. However, the Competition Act neither explicitly defers to other regulation nor explicitly claims precedence over it. The

[15] United Nations Conference on Trade and Development, 'Best Practices for Defining Respective Competences and Settling of Cases Which Involve Joint Action by Competition Authorities and Regulatory Bodies' (United Nations, 17 August 2006) <http://unctad.org/en/Docs/tdrbpconf6d13rev1_en.pdf> accessed 1 May 2018.
[16] ibid.
[17] ibid.
[18] ibid.
[19] ibid.
[20] Dabbah (n 8).

competition authority is required to negotiate agreements with sector regulators to coordinate the exercise of jurisdiction over competition matters in regulated sectors (in those sectors where the regulator has an explicit mandate over competition matters in their sector – i.e. this does not imply agreements with every sector regulator). At present, the Competition Authority has agreements with regulators in the broadcasting and electricity sectors, and under these agreements the Competition Authority is the lead investigator in concurrent jurisdiction matters[21]

In India, the Competition Commission of India ('CCI') has been vested with a broad mandate under section 18 of the Competition Act, 2002 to 'eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade in markets in India'. This mandate of the CCI, however, overlaps with the competition-related powers that have been conferred on some sectoral regulators in India, constituted both before and after the enactment of the Competition Act.[22]

On the one hand, some sectoral laws only make a broad declaration of competition goals with no specifications. For instance, the Telecom Regulatory Authority of India Act, 1997 ('TRAI Act') mandates the Telecom Regulatory Authority of India ('TRAI') to take measures to 'facilitate competition' and 'promote efficiency in the operation of telecommunications services'[23]. Similarly, the Petroleum and Natural Gas Regulatory Board Act, 2006 requires the Petroleum and Natural Gas Regulatory Board to 'foster fair trade and competition'. On the other hand, some sectoral laws outline this jurisdiction with far greater specificity and by using legislative language identical to that contained in the Competition Act.[24] For example, the Electricity Act, 2003 authorizes the Central Electricity Regulatory Commission to 'issue directions' to a licensee if it 'enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition'.[25] Such laws have made unclear the distinction between ex-ante regulation and ex-post competition assessment, allowing many sectoral regulators to assume

[21] ibid.
[22] Telecom Regulatory Authority of India Act 1997 (TRAI 1997), s 11(1)(a)(iv); Electricity Act 2003 (EA 2003), s 60; Petroleum and Natural Gas Regulatory Board Act 2006 (PNGRB 2006), s 11(a); Insurance Regulatory and Development Authority (Scheme of Amalgamation and Transfer of General Insurance Business) Regulations 2011, F. NO.IRDA/REG/1/55/2011.
[23] TRAI 1997, s 11(1)(a)(iv).
[24] Competition Act 2002, ss 3, 4, 5 and 19.
[25] Electricity Act 2003, s 60.

competition enforcement powers even in the absence of concrete provisions within their governing statutes.[26]

Despite this ostensible overlapping of jurisdictions, the Competition Act is ill-designed to resolve situations of conflict. While section 60 of the Act contains a non-obstante clause giving an overriding effect to the Act, section 62 declares that the Act should be read in harmony with other statutes. The Act, however, makes an attempt to address this issue partially through sections 21 and 21A, which incorporate a mechanism for consultations between the CCI and other sectoral authorities. However, consultations under these sections are neither mandatory nor binding.[27] This voluntary mechanism has, however, not worked in practice on account of the jurisdiction wars that prevail between these governmental authorities.[28] There is, thus, a serious overlap between the jurisdiction of the CCI and that of some sectoral regulators in India, which requires legislative involvement.

In the Indian context, the courts and the CCI have adopted contrasting stances on this issue. Interpreting the scope of its own jurisdiction, the CCI has held that despite the existence of competition mandate within sectoral laws, the power to investigate allegations of anti-competitive conduct continues to rest with the CCI.[29] However, the Indian High Courts have quashed the jurisdiction of the CCI to investigate anti-competitive practices in sectors subjected to competition regulation.[30] For instance, in the Vodafone India case,[31] the Delhi High Court quashed the CCI's probe into cartelisation by incumbent telecom companies on the ground that the issue fell within the exclusive jurisdiction of the telecom regulator, TRAI. This was so held even when the TRAI only has a generic competition mandate under the

[26] Telecom Regulatory Authority of India, 'Regulatory Principles of Tariff Assessment' (Consultation Paper 3, 2017) <http://www.trai.gov.in/sites/default/files/Consultation_paper_03_17_feb_17_0.pdf> accessed 1 December 2017.
[27] Competition Act 2002, ss 21 and 22
[28] Pradeep S Mehta, 'Competition vs Regulation: The Best Way Forward' *The Hindu Business Line* (Chennai, 16 September 2005) <http://www.thehindubusinessline.com/todays-paper/tp-opinion/competition-vs-regulation-the-best-way-forward/article2189381.ece> accessed 19 December 2017; Tanya Thomas, 'Turf War Rages between CCI and TRAI over Telecom Tariffs' *The Hindu Business Line* (Chennai, 27 July 2017) <http://www.thehindubusinessline.com/info-tech/turf-war-rages-between-cci-and-trai-over-telecom-tariffs/article9791247.ece> accessed 1 December 2017.
[29] *Consumer Online Foundation v Tata Sky Ltd* (CCI, 24 March 2011); *Shri Neeraj Malhotra, Advocate v North Delhi Power Ltd* (CCI, 11 May 2011); *M/s HT Media Ltd v M/s Super Cassettes Industries Ltd* (CCI, 1 October 2014).
[30] Press Trust of India, 'Delhi HC Stays CCI Proceedings against Indian Oil, Hindustan Petroleum and Bharat Petroleum' *Indian Express* (Chennai, 22 November 2013) <http://indianexpress.com/article/business/business-others/delhi-hc-stays-cci-proceedings-against-indian-oil-hindustan-petroleum-and-bharat-petroleum/> accessed 1 June 2018.
[31] *Vodafone India Ltd v Competition Commission of India* (Bombay High Court, 21 September 2017).

TRAI Act,[32] which itself excludes matters falling under the Monopolies and Restrictive Trade Policies Act, 1970 (the Act preceding the Competition Act) from the dispute-settlement jurisdiction of the TRAI.[33]

In defining the individual competences of competition authorities and regulatory bodies, most countries have recognized the need to foster close cooperation and policy coherence between these two groups of regulators in the carrying out of their respective mandates. An element of this cooperation is the judicious exchange of information between sector regulators and competition authorities on issues that impact on one another's areas of specialization. A number of jurisdictions have created regulators' forums through which sector regulators and the competition authority keep in regular contact and strengthen and consolidate their cooperation and coordination. In some jurisdictions the competition authority has concluded memoranda of understanding with other regulatory bodies, which typically set out the manner in which the parties will interact with respect to issues that require joint action. South Africa has used this approach.[34]

It is impossible to completely eliminate such a tension even in developed economies; what can be done, however, is to make a clear-cut demarcation of roles and responsibilities of the two authorities and to provide for concurrent jurisdiction by law. According to UNCTAD[35]:competition law and policy and regulation aim at defending the public interest against monopoly power. Although both will provide the Nigerian government with tools to fulfil this objective, they vary in scope and types of intervention. Competition law and policy and regulation are not identical.

### 7.4 Benchmarks for the Enforcement of Competition Law

There is no hard and fast rule on what should be considered a benchmark for the enactment and enforcement of competition rules, as this is largely a subjective issue and depends on a number of factors already elucidated above. The position of competition in relation to other

[32] TRAI 1997, s 11(1)(a)(iv).
[33] ibid s 14
[34] The Memoranda of Agreement between the Competition Authority of South Africa and sector regulators can be viewed at www.compcom.co.za
[35] UNCTAD. (2001), 'Model Law: The Relationships between Competition Authorities and Regulatory Bodies, including Sectoral Regulator', Commission on Investment Technology and Related Financial Issues, Intergovernmental Group of Experts on Competition Law and Policy, Third Session, Geneva, 2-4 July

public policy issues, implementation problems, and competition culture influence the benchmark to be set. However, the following should be considered when setting up a mechanism for the enforcement of competition law.

### 7.4.1 Preventive as Opposed to Curative Measures

Rather than focusing on the curative measures, competition law should be such that would facilitate the prevention of the offence itself. The requirement to register all potential anti-competitive practices with the competition authority, as done under the Indian MRTP Act, is something worth emulating by all competition law enforcement agencies. While competition authorities around the world have been moving towards 'conduct' as the criterion to trigger action, focus on 'structure' could help them adopt preventative measures. The existence of 'market power' in itself and by itself is not anti-competitive, but if the same is not properly watched, market power is a potent tool for 'market exploitation.' For smaller economies, therefore, focus on 'structure' is a better tool to prevent anticompetitive practices from taking place. In order to deter firms from engaging in anti-competitive practices, fines and penalties should be considerably larger than the extra profits that firms anticipate earning through their illegal behaviour. The deterrent effect of penalties may be enhanced considerably if the anti-competitive acts are characterized as criminal, and if individuals as well as enterprises are liable.[36]

### 7.4.2 Separation of Investigative and Adjudicatory Powers

In order to promote specialization and to make an impartial judgement on the existence or non-existence of anti-competitive practices, it is necessary to separate investigative and adjudicatory powers. If not, the competition agency may become the investigator, prosecutor, judge, and jury, rolled into one. Moreover, if both the powers are given to one agency, there could be a tendency in the competition commission to be biased in favour of the investigation report, and the judgment could invariably go against the business enterprises, which have been seen as conducting anti-competition practices as per the report of the investigative agency. Should this happen, business groups will always be against the very existence of the competition authority. If the competition authority does not receive

[36] World Bank and OECD, A Framework for the Design and Implementation of Competition Law and Policy (Washington D.C: The Word Bank and Paris: Organisation for Economic Cooperation and Development 1998).

cooperation from all stakeholders, including government, private sector and consumer groups, it cannot perform its tasks effectively. Even in the case of adjudication, litigation should be used as the last resort and other mechanisms of alternative dispute resolution should be used as extensively as possible. Litigation is not only costly, but also adversarial in nature.

### 7.4.3 Starting an Investigation

It is important that there exists clear standards which trigger investigations so as not to create uncertainty. While too strict an application of competition rules may impede the ability of firms to attain critical size and tax their efficiency, too lax an approach may lead to the entrenchment of monopolistic enterprises in the market.

The problem is further compounded by the fact that there are a number of grey areas in the administration of competition law. For example, a merger need not be harmful as long as it does not result in providing 'market power' to a business enterprise. It is therefore advisable to specify the threshold level of 'market power' for triggering an investigation at the time of designing the law. Similarly, while some business practices (such as cartels) are regarded as illegal in most jurisdictions, some other practices (such as exclusive dealing or mergers) should be examined on a case-by-case basis, applying a rule-of-reason approach where the pro-competitive features of a restrictive business practice will be evaluated against its anticompetitive effects so as to determine whether or not the practice should be prohibited..

### 7.4.4 Private as well as Public Enforcement

A comprehensive competition law in Nigeria will address the concerns of consumers and firms affected by anti-competitive practices. In some countries, private action for the redress of damage resulting from competition law violations may be instituted before an appropriate court or tribunal by people (both private firms and consumers) affected. Such private action supplements and reinforces public enforcement of the competition law, and frees the competition authority from having to obtain such redress on behalf of private parties.[37]

[37] ibid.

### 7.4.5 Prohibition and Remedial Orders

The appropriate remedy for many types of anti-competitive practices is to simply demand that the offending party stop engaging in the conduct, or take other actions to eliminate the effects of the unlawful practices. However, some negative effects of anti-competitive behaviour are not readily obvious to business people, who may have engaged in the conduct initially in good faith. The competition law should empower the competition agency to prohibit the conduct or redress the harm caused by it.

### 7.4.6 Competition Advocacy

Since policy formulation is a dynamic and evolving process, the government is constantly involved in revising, reviewing and updating its policy space. While some policy decisions, such as tariff reduction or removal of non-tariff barriers, could contribute towards enhancing competition in the marketplace, some other decisions such as granting exclusive dealership for the distribution of cement to a public enterprise, could contribute towards reducing competition. Hence the competition authority should have the power to make recommendations or presentations, and in some situations, get involved when government bodies make decisions affecting competition policy[38]. This makes the government and competition authority more accountable, increases awareness of the costs and benefits of alternative policies, and helps to ensure that government policy objectives do not work at cross purposes.

[38] ibid.

## CHAPTER 8: CONCLUDING RECOMMENDATIONS

### 8.1 Introduction – Designing an Effective Framework-

Nigeria has the duty of determining the necessary guidelines suitable to its markets and stage of development. It has been suggested that Nigeria needs to develop her own home-grown competition law. However, if Nigeria may need rules and standards different from the EU and US, what should those rules and standards be? Is it practical to adopt alternative rules? Is it worth, or not worth, the costs of diversion from a more or less single perspective for the world? This section provides possible choices for competition law models in general. They are suggested only as benchmarks for a perspective from which Nigeria might draw ideas.

As analysed in previous chapters, the US model of antitrust is a tool for efficiency including consumer welfare in itself or as a proxy, with the strong presumption that business freedom of even dominant firms produces efficiency.[1] This model demands minimal antitrust law except for law against cartels which it proscribes. A model Nigeria may adopt is the general principles of the US model but amend the rules and standards to be in line with Nigeria's market realities. Thus, while US law describes predation as rarely successful and bases its predation rule on these assumptions, Nigeria would consider its relevant conditions and may decide, for instance, that a rule that deters only promising challengers in a monopolized market is more important than a rule that safeguards dominant firms' freedom to engage in low-pricing,[2]. Alternatively, Nigeria may choose to protect the low prices for consumers, however transient. In any event, the country would adjust the descriptions of markets, behaviour, and probable effects to the condition of her markets.

Another model it may adopt is EU competition law and adjacent law, including not only the special regard for openness and access but also the suspicious stance toward competition restricting state action and rules against discrimination in state procurement. Nigeria may also choose to combine the law of certain developing countries that already have developed

[1] This model prescribes antitrust enforcement only where the plaintiff proves that the challenged activity limits output, subject to some shortcuts and proxies. See E Fox, 'The Efficiency Paradox' in R Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (Oxford University Press 2008) 77.
[2] I Stelzer, 'Some Practical Thoughts About Entry', in Pitofsky (n 1) 24.

a compass. This would prominently include South African case law, which is the most developed body of developing-country competition case law and which reflects the jurists' struggle to integrate feasible enforcement in view of scarce resources of the authority, well-endowed adversaries and historically privileged dominant firms with the need to formulate and apply sound principles that promote competition and do not handicap efficiency.[3] The decisions of the South African Competition Tribunal, a number of which have been overturned by the appellate court on technical and interpretive grounds, are worthy of study by nations trying to construct a model sympathetic to inclusive development in a nation with an exclusionary, privileged, statist heritage.[4] This model would include the EU focus on openness and access as a means to produce and sustain efficient, dynamic markets. It would also combine aspects of EU law that limit abuses by the state and state-privileged firms. It could include the effort to create markets where they are blocked by corruption and privilege. Model 5 would explicitly introduce the value of fairness to local market actors. It would reflect wariness of the deep pockets and leverage of powerful multinational corporations. The model might conflate notions of competition and unfair competition, recognizing how the Nigerian economy has been shaped by colonizing, As a final alternative, Nigeria could invent its own model in view of its own needs, taking into account values and methodologies especially of the suggested models.

Choosing a platform for Nigerian competition law demands attention to the place of 'efficiency' in anchoring a competition law system. A key element of competition is its tendency to encourage businesses to be productive and efficient. According to recent non-cartel US antitrust jurisprudence, 'laissez-faire' antitrust may lead to these outcomes. This is a viewpoint that is not necessarily true,[5] nor the best rule to accomplish more robust markets in evolving economies. Scholars have argued that concern for safeguarding competition, openness of markets, access to markets and rivalry is more likely to lead to

[3] This thesis is not considering here South Africa's special regard for the long-discriminated-against majority in the years of apartheid; but if a jurisdiction chooses to accept into its antitrust law a value of equity for its own historically disadvantaged population, it is likely to find much merit in South Africa's methodology for integrating this concern. For a summary of South Africa's case law and practice, see 'Ten Years of Enforcement by the South African Competition Authorities: Unleashing Rivalry (1999-2009)' (Competition Commission and Competition Tribunal of South Africa 2009) <http://www.comptrib.co.za/Publications/Reports/unleashing%20rivalry.pdf> 37-69.

[4] *Harmony Gold Mining Company Ltd v Mittal Steel South Africa Ltd*, Case No 13/Cr/Feb04, p 46, rev'd, *Mittal Steel South Africa Limited & Others v Harmony Gold Mining Company Limited*, Durban Roodepoort Deep Limited, Case No 70/CAC/Apr07 (29 May 2009) p 27.

[5] D Rubinfeld, 'On the Foundations of Antitrust Law and Economics', in Pitofsky (n 1).

efficient outcomes than is US laissez-faire, even for developed economies.[6] The indeterminacy as to how to reach efficiency, combined with the fact that the US model is based on market conditions quite different from those in developing countries, suggests that parts of the US jurisprudence may not fit the needs of Nigeria. Accordingly, Nigeria may be reluctant to adopt the US model without modification.

The second choice would follow the EU model. Whereas US law looks first and essentially to whether the dominant firm's conduct, merger, joint venture or agreement will lessen output and raise price thus leading to inefficiency, EU law looks centrally to whether the market actors are 'sealing off the market' and restricting access and entry. Moreover, EU law adds a valuable perspective on state acts and is more likely to catch state obstacles to competition.[7]

The third choice, based on the case law of South Africa combined with EU focus on openness and access and to anticompetitive blockage by the state, provides a different perspective. South African case law is tailored to the goal of inclusive development. This choice would shift burdens of proof on certain critical but minimal showings of dominance, of discrimination, and of excessive pricing. It would do so regarding conduct for which the US law provides no remedy or requires sophisticated economic analysis that only mature competition authorities can handle. The jurisprudence has built-in checks to guarantee that the enforcement is efficient and serves the people. It has a good fit with the goal of legitimacy. Of all bodies of competition law, the case law of the South African Tribunal may have the best fit with the Spence principle of efficient inclusive development.[8]

The fourth choice, again, alters the baseline, especially as compared with the other suggested models. It focuses on equity for and participation of the people.[9] It extends antitrust beyond

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[6] Stelzer (n **2**. Stelzer writes: 'I have always believed that the free market system can be defended in the long run only if it provides fair and open opportunity to all comers, that its principal virtue is its contribution to social mobility, and that anti-competitive practices by dominant firms, and abuses created by . . . the ability of managers to pursue their own rather than their shareholder-owners' enrichment . . . are the greatest threat to the capitalist free market system.'

[7] A part of EU law's effectiveness is attributable to its internal 'trade' law, which complements its competition law, and to its regional character. Even if EU trade law and competition law cannot easily be adapted to national competition law, the EU model suggests goals that can be achieved by regional cooperation and integration.

[8] The fact that the Tribunal has been reversed not infrequently by the Appeal Court is not material to the inquiry of this thesis. The reversals are usually based on legalistic interpretations of words of the statute and do not necessarily illuminate what a good law would be. Nonetheless, the Appeal Court judgments also contain wisdom and bear study. Indeed the interplay between the Tribunal decisions and the Appeal Court judgments sharply focuses the issues and values at stake

[9] Note that some competition law systems introduce certain fairness concerns by way of a provision against

helping markets work efficiently. This model may appeal to jurisdictions in which local populations have been systematically excluded from doing what they can do best—as in Taimon Stewart's examples of the tourism industry in the Caribbean, where exclusive contracts by the big hotel, leisure and travel chains excluded local independent hotels, drivers and others, even while competition among the chains themselves might assure a competitive product to consumers. Some existing bilateral competition agreements already support entrepreneurial opportunities of the developing partner to the agreement, as is the case of the partnership agreement between the European Union and CARIFORUM (the Caribbean countries and the Dominican Republic) with respect to tourism. However, to the extent that antitrust rights for small and indigenous businesses would undermine benefits to consumers, the competition and equity paradigm falls outside of the realm of most contemporary versions of antitrust in developed countries.

A possible final choice is for Nigeria to invent its own wheel. The idea is, however, overreaching. In a world of a growing mass of international standards, no alternative to the dominant developed world standard can be expected to gain traction as a recognized alternative. Whatever the choice of model, the choice should not be constraining. Indeed, it is more a choice of baseline. It is a platform or perspective – a coherent organizing point around which context-tailored competition law and policy is formed. Nigeria could benefit from a coherent perspective adopted by a critical mass, especially in a world in which 'international standards' are growing, all authorities of the world are being asked to sign on, and authorities in developing countries might signal their acceptance they want to be counted as playing by international standards without analysis as to what is best for them.

### 8.2 Recommendations

Competition policy and law offers developing nations an added tool to manage their affairs. The challenge then is to design a competition policy that fits local realities and meets local needs. This is an aspect that often frustrates many enthusiastic proponents of competition law and policy. A 'one size fits all' approach may be inappropriate in developing competition policy and law. It is essential to create a distinction between countries at low levels of development and hence inadequate institutional capacity on one hand, and semi-

abuse of a superior bargaining position, as in Japan, and some contain a parallel competence for unfair acts, as in Zambia.

industrialized countries with greater institutional capacity on the other hand.

Further, for competition law and policy to make any meaningful success in Nigeria, allied policies such as privatization, liberalization and commercialization have to be placed on the front burner. Their functional existence shall ease up the market system and usher in competition law and policy. Otherwise it would only make a mockery of the process. Third, any eventual competition law and policy must be wary of falling into the temptation of inundating itself with too many competition goals and objective. Much has been said about the lack of infrastructural capacity and structural facilities in the country, thus blindly transplanting the US antitrust in its entirety or the UK Competition Act may not be appropriate. EU competition law is recommended to the extent that it advocates for opening up of markets. For a country like Nigeria, prohibition of cartel is not so significant and may not necessarily be an objective of the competition law; in its place, emphasis may be laid on the extermination of monopoly, opening up the cement industry for example, focusing on merger activities, and abuse of dominance in significant public services such as power, agriculture, shelter, water and other sectors.

Fourth, government's fettering of competition process must be cautioned by law. Due to vested interest in the markets, and owing to the outrageous level of greed and corruption in developing countries, governments seem to protect the producers (from where their campaign funds emanate from) instead of the consumers. A major reason why competition regimes have not seen the light of day in Nigeria is because the government lacks genuine incentives to create a competitive environment. Most political office holders, legislative members and other public office holders have vested interests in the thriving monopolies ranging from the power sector to the various production industries, water supply and importation activities. The federal government needs to provide overall direction for the development competition in Nigeria. This may include employing capable personnel in the implementation process.

Fifth, there is need to intensify on competition law and policy advocacy in the polity about the benefits inherent in the regime. The markets are perishing due to lack of knowledge of this importation subject. Even worse is the fact that the legislature, which is on the front seat to bring to life this budding Bill, lacks any appreciable knowledge of competition law and policy. It was reported that one of the reasons why the Federal Competition Bill was not sent for the second reading was because the National Assembly were of the opinion that the

country already had a consumer protection agency. It is therefore recommended that a crash course seminar be provided for the public to sensitize them on the imperatives and benefits of this global trend.

The fact that competition policy should contribute towards economic development is more or less an agreed concept; it is largely the barriers to competition that exist that are sources of apprehension. There is need, therefore, for competition culture to prevail in the whole economy to remove distortions. This should start at the helm of administration before it can cascade to the consumer. Political will turns out to be one of the key factors that determine the success of implementation of competition policy and laws. If competition law and policy is to yield all the envisaged benefits, then political will and consensus for reform is a necessary condition.

### 8.3 The Federal Competition and Consumer Protection Act 2019 (FCCPA)

A major knowledge contribution of this research is the recommendation for the adoption of competition law in Nigeria based on the analysis of the position in the examined model jurisdictions. It is imperative to note that after several years of debate and reviews, in 2019, The Federal Competition and Consumer Protection Bill was signed to law.[10]

The enactment of the Federal Competition and Consumer Protection Act 2019 (FCCPA) is a step in the right direction and in line with recommendations of this thesis. If properly implemented, it has the potential to create a level playing field required for medium and small scale enterprises to thrive. The Act aims at promoting a competitive market and protecting consumer rights in Nigeria. The new Act applies to all businesses in Nigeria and supersedes all laws on competition and consumer protection, except the Constitution of the Federal Republic of Nigeria 1999.

The Act prohibits unfair business practices or abuse of dominant market position by any company, as well as any agreement to restrain competition such as agreements for price fixing, price rigging, collusive tendering etc. To regulate and facilitate competition, the President may from time to time, by order published in the Federal Gazette, declare that prices for goods and services specified in the order shall be controlled in accordance with the provisions of the Act. In addition, the Act mandates the Commission to administer the

[10] FEDERAL COMPETITION AND CONSUMER PROTECTION ACT, 2019

provisions of the Act as well as set up the Competition and Consumer Protection Tribunal to adjudicate over conducts prohibited by the Act and exercise jurisdiction in accordance with the Act. However, the Commission must be run professionally and must ensure a level playing field between local and foreign businesses.

Although the enactment of the FCCPA is a good start, certain challenges have been identified. . The way the FCCPC can balance pure competition issues against consumer protection or public interest issues will very well determine its future success. There is a concern that given the bias of its start-off staff for consumer protection regulation, the pendulum would shift to public interest rather than fair competition consideration. Another challenge is the lack of capacity in competition regulation in terms of personnel and corporate experience. This challenge if not adequately tackled may lead to regulatory gap and ineffectiveness of the new regime.

Daniel Sokol argues that the approach of many young antitrust agencies is to focus on the most easily achieved goals of antitrust regulation.[11] He asserts that effective results are more comfortable to achieve, and once an agency gains enough expertise and experience in the low hanging area, it can add others. Easily achievable goals would vary from agency to agency and country to country. FCCPC has acquired SEC's institutional knowledge in merger control. It could, therefore, begin with this area as it starts the regulation of competition, as distinct from consumer protection.

Another area would be competition law advocacy. With an improvement in FCCPC's capacity in merger review and knowledge of necessary competition regulation, it may deal with enforcement actions against monopolies (and regulated industries) and anti-competitive agreements and practices. Besides the recruitment of those with expertise in economics, law and related disciplines with specialization in competition law, the FCCPC should utilize the skill and support of outside consultants procured using World Bank standard procedure. Getting it right may require consistent funding support of the Federal government through appropriations by National Assembly and international organizations through grants and development loans. Those funding options should be aggressively courted.

Regulatory reform which is nothing but the enactment or transplantation of legislation from

[11] Daniel D Sokol, "Limiting Anticompetitive Government Interventions that Benefit Special Interests" (2009) 17 Geo Mason Rev 119 at 144.

a foreign jurisdiction is not likely to be effective. From the analysis of the legislative history of the FCCPA, the process allowed for adjustment of the bill to accommodate the local concerns of the National Assembly and the executive. Perhaps, but for those adjustments, the bill would not have passed and if enacted may not have become operational.[12] However, mere enactment may not be enough for a law to achieve effectiveness. Rigorous implementation and continuous engagement in persuasion and advocacy for the underlying norm behind the law by the norm entrepreneurs and norm leaders to ensure norm internalization by the target norm followers is how the law shall have effectiveness.[13] In the case of the FCCPA, the underpinning norms of encouraging competition and reducing restraints on trade as a means of lowering prices for consumers on the one hand, and protecting the public interest, on the other hand, remain in constant tension. The regulator is, therefore, critical to regulatory success.

## 8.4 Conclusion

In answering one of the key question which this research asks: Is competition law necessary for socio economic growth? It is possible that, at the end of the exercise, one will conclude that divergences from the 'international standard' are not necessary; there are costs of divergences and there are benefits to playing by international rules, such as attracting investment. Many developing countries are quick to adopt western-style institutional structures and procedures when designing their regulatory regimes; this is the case also in relation to the establishment of a competition law regime. International advisors as well have a tendency to benchmark new competition regimes against those already established in more advanced economies.

While the key principles of competition law hold good for all economies, a note of caution still needs to be sounded: there should not be one size of shoes to fit all, nor a single model of competition law and policy for all economies. Nigeria should be careful not to slavishly adopt laws and patterns of enforcement from other, and perhaps older and more experienced,

[12] Equipment and Leasing Act 2015 set up Equipment Leasing Registration Authority and required registration of all leases though it is not operational because the Federal Government was unwilling to set up another agency that would further bloat its bureaucracy

[13] Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 Int Organ 887.

jurisdictions without making a careful analysis of the suitability of those laws and models to their socio-cultural and economic realities. Many developing countries such as Nigeria operate under a very different political, legal, social, and governance environment. Corruption and political intervention may run broader and deeper than what developed countries are accustomed to. Often rules, social and legal sanctions against favouritism and patronage, or conflicts of interest in the administration of a law are absent, weak, or lack compliance. It is very important to understand those realities and situate them in the context of the challenges which they would present, in the implementation of a competition law system for Nigeria.

This research contributes to the illustration of the adverse effects of anti-competitive practices in Nigeria as well as to emphasize the benefits of competition law enforcement. Considering that a competition law has now recently been adopted in Nigeria, periodic amendments and reviews of the FCCP Act are imperative to ensure its effectiveness in preserving a competitive business landscape and consumers' rights, in view of the constantly rapidly evolving market place. This field of research will not saturate any sooner and has the potential to absorb further research.

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