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# COMPETITION POLICY AND RESOURCE UTILIZATION:

## Challenging Implications for Economic Development in Nigeria

DAVID OLUWADARE ADETORO

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School of Law

Faculty of Law, Business and Social Science

University of Glasgow

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## **ABSTRACT**

The starting point for this thesis is the established position that in free economies, by protecting the operation of demand and supply, competition law and policy (i) maximizes consumer welfare and consumer satisfaction, better than by (a) government controls and regulation or (b) unregulated competition, and (ii) contributes to economic growth and development. Competition is assumed to apply as a necessity, equally to developed as well as developing economies, with Nigeria taken as a proxy for resource-dependent developing economies. The contents of the thesis are underpinned by the question: what is the extent to which competition law and policy could be employed to promote the efficient allocation of resources in resource-dependent developing economies? The submitted views are partly based on an analysis of the objectives of competition law and policy, for determining whether resource-dependent countries have peculiar problems, and if the answer is in the affirmative, whether the general standards in competition policy are sufficient to address them. This analytic approach is the same as the one underlying the draft Federal Competition Bill (FCB) in Nigeria, as an example of an appropriate competition instrument in a resource-dependent country.

The thesis examines some of the standards in the United States of America (USA) and European Union (EU) competition policies, such as those concerning agreements, abuse of dominant position and mergers, to determine whether the same rules could apply in all economic regimes, and which competition model could be best adopted by resource-dependent developing countries, with Nigeria as an example. Competition standards and both primary and secondary competition problems that could distort the process of competition, as well as constraints which may emerge in the competition process in developing countries are explored. Some of these, as problems, include the issue of 'resource curse', rent seeking, corruption, abusive business practices and a few others.

Their examination is in the thesis aligned with the scrutiny of the characteristics of developing countries in contrast to developed countries; again, the economic circumstances of Nigeria, as a proxy for resource-dependent developing countries, are considered for determining whether competition law and policy could be used as a tool for addressing competition problems that may exist in resource-dependent developing countries.

The conclusions of the thesis underline the types of economic problems for which competition law and policy, with the economic development of resource-dependent developing countries in mind, could be used to address, especially restrictive trade practices, abuse of dominant position and mergers that could substantially lessen competition. Furthermore, the (even if limited) role of regulation is argued, that is, in the face of any expected limitations of competition in certain sectors of an economy undergoing liberalization in the wake of current international merger waves. Not least the importance of establishing a competition agency to administer and enforce it is underlined, that is, independently from the influence of the government.

It is argued that for the draft FCB in Nigeria to become an appropriate competition instrument, the power and mandate of the Federal Competition Commission must be reviewed, with sufficient powers for the task, also for promoting the wide objectives anchored in the draft Bill. It is also pointed out that competition cannot on its own directly resolve, in Nigeria, the peculiar socio-economic problems such as rent seeking and corruption, but it is argued that with an active engagement of competition advocacy, along with the adequate implementation of competition law and policy, the problems could be greatly reduced. The thesis highlights, among other recommendations, the need for further research on competition problems relating to resource-dependent countries.

## ACKNOWLEDGEMENTS

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Finally, I dedicate this thesis to God through Jesus Christ my Lord and Saviour.

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## LIST OF ABBREVIATIONS

AJIL	American Journal of International Law
BPE	Bureau of Public Enterprises
BIICL	British Institute of International and Comparative Law
CFI	Court of First Instance
CML	Commercial Law Review
CBN	Central Bank of Nigeria
DOJ	Department of Justice (US)
DFI	Direct Foreign Investment
EA	Enterprises Act
EC	European Commission
ECLR	European Common Law Review
ECMR	European Community Merger Regulation
ECSC	European Coal and Steel Community
EU	European Union
ECJ	European Court of Justice
GDP	Gross Domestic Products
FCC	Federal Competition Commission
FEC	Federal Executive Council
FDI	Foreign Direct Investment
FTC	Federal Trade Commission
MITI	Ministry of International Trade and Industry
NAFTA	North America Free Trade Agreement
OECD	Organisation for Economic Cooperation and Development
OJ	Official Journal
OPEC	Organisation of Petroleum Exporting Countries
RBP	Restrictive Business Practice
R&D	Research and Development
SLC	Substantial Lessening of Competition
WTO	World Trade Organisation
UK	United Kingdom
USA	United States of America
UNCTAD	United Nations Conference on Trade and Development

## **Part One**

### **Chapter One**

#### **1.0 Background to the Thesis**

##### **1.1 Introduction**

The historical nature of antitrust and competition laws and policies are often influenced by social and historical factors, and might respond to quite different objectives.<sup>1</sup> The objectives of each competition law regime is conditioned by its peculiar economic circumstances and political environment which might change with passage of time, changing circumstances in the global economy or shifts in academic thought.<sup>2</sup> Thus as a preliminary matter it is important to set down at the outset the exact nature of the proposition or problem which is being presented, together with an outline of the broad parameters of the study and the methodology adopted in the pursuit of this aim. The identification of these elements is the function of this introductory chapter.

##### **1.2 Statement of Objectives**

The main research problem in this thesis is: to what extent could competition law and policy be employed to promote the efficient allocation of resources and thereby development in resource-dependent developing economies? This problem is to be considered within the context of the objectives of competition law and policy and characteristics of resource-dependent developing economies. Thus this study aims to answer the research question through the following sub-questions:

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<sup>1</sup> M. Motta, *Competition Policy: Theory Practice* (New York: Cambridge University Press, 2004), 17. Motta's observation is a re-echo of Bork's assertion in his book, that for a rational and an effective enforcement of any antitrust law, its objectives must be clearly stated. See R.H. Bork, *The Antitrust Paradox* (Free Press: New York, 1993), 50.

<sup>2</sup> In many cases, like the US and the EU, these objectives are not usually well defined in their competition laws and could only be inferred from the broad legislative provisions, although the objectives in the Japanese and Canadian laws on competition are clearly set out.

- A. Can the same competition law standards be employed effectively in resource-based developing countries?
- B. What are the peculiar problems in resource-based economies?
- C. Could resource-based economies adopt any model of competition law?
- D. To what extent is the proposed Federal Competition Bill in Nigeria (FCB) a credible legislative instrument to promote economic development as set out in Section 2 of the Bill?<sup>3</sup>
- E. Are there other tools or measures that could be included in the proposed FCB to make it more effective?

It is generally agreed that inefficient allocation of resources underlines most economic problems often referred to as market failures and other economic problems. This thesis observes that many resource-based developing countries tend to suffer more economic problems despite their high level of resource endowments. It then argues that this could be due to absence of appropriate competition law and policy although on the surface it is possible to attribute it to other less fundamental factors not directly linked with

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<sup>3</sup> Since 2002 Nigeria's proposed Federal Competition Bill has been before its legislature for review and eventual adoption. I am not sure whether or not the same Bill or a reviewed version will be enacted eventually. However, provisions of section 2 of the proposed Bill is as follows:

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 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
  - (f) prohibit restrictive business practices which prevents, restricts or distorts competition or constitutes the abuse of a dominant position of market power in Nigeria.

competition. These other factors typically include fractional politics, corruption and lack of transparency in the conduct of government business. Therefore definite answers to the research sub-questions could go a long way to resolving the issue of efficiency of competition law and resource abundance in these economies.

A comprehensive study into the whole system of competition laws in terms of rules, institutions and enforcement is not feasible within the ambit of this thesis. As a result, this study must be narrowed down in terms of both the historical antecedents of the subject, its basic standards and how it could impact on a resource-based economy.

In very broad terms, competition policy can be described as all governmental measures that can have an impact on competition within an economy, by directly affecting the behaviour of the economic agents and the structure of an industry. While competition policy is about economics and law, competition law is about legislative intervention in the market aimed at anti-competitive economic behaviours and eventually ‘market failure’.<sup>4</sup>

Competition policy is often aimed at achieving an efficient allocation of resources, promotion of industrial, social, and consumer welfare. It is also a measure often directed to control the concentration and abuse of economic power detrimental to competition and societal welfare.<sup>5</sup> Competition policy is comprehensive; it is about economics, law and

---

<sup>4</sup> B.J. Rodger and A. MacCulloch, *Competition Law and Policy in the European Community and United Kingdom* (London: Cavendish Publishing, 2001), 1.

<sup>5</sup> For detailed arguments on competition and the regulation of concentration of economic power the following references provide useful analyses: See G. Amato, *Antitrust and the Bounds of Power* (Oxford: Hart Publishing, 1997). See also O. Odudu, *The Boundaries of EC Competition Law* (Oxford: Oxford University Press, 2006) and R. Hewitt Pate, ‘Competition and politics’ (Speech made by the Assistant Attorney General

policy. The comprehensive attributes of competition policy indicate that it could be selective and relative to the circumstance of the economy concerned. Thus an examination of the provisions of the proposed Federal Competition Bill in Nigeria will be done in relation to the relevant research question in this thesis. This point will be further examined in the latter part of this thesis.

However, the foregoing description of competition law and policy could be narrowed down into two divisions. The first division gives a view of a set of governmental measures meant to enhance competition or competitive outcomes in the markets, which include industrial policies (such as internal market integration in the EU and promotion of infant industries), liberalization and privatization, conducive market access and greater market discipline in economic decisions. The second division is the adoption or an enactment of effective competition or antitrust laws aimed at anti-competitive economic behaviours, which could either lead to a distortion in a market or restrict competition. These include abusive trade agreements, control of market dominance with potential for abuse, mergers and acquisitions capable of impacting on a market structure to the detriment of consumer welfare.

### **1.3 Scope of the Study**

Competition policy has important implications for development in developing countries and especially in a resource-dependent developing country.<sup>6</sup> These include defining the goals of competition law relative to the economic circumstance of the country, the theory

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Antitrust Division U.S. Department of Justice Presented at the 12<sup>th</sup> International Conference on Competition Bonn, Germany, June 6, 2005).

<sup>6</sup> A. Singh, 'Competition and competition policy in emerging markets: international and development dimensions' (2002) UNCTAD G-24 Discussion Paper Series, 1.

of competition to be adopted, defining the power of a competition agency and the limit of competition in relation to other regulatory frameworks. The economies of most developing countries were largely subject to government regulation before the present introduction of competition principles.<sup>7</sup> In terms of the subject-matter, the scope of the thesis will be confined to the United States antitrust<sup>8</sup> and the European Union (EU) competition models, especially since both models share major similarities and are the most expansive models.<sup>9</sup> It examines competition law standards with a view to determine what degree historical experience impacts on competition in developing countries. This thesis argues that the experiences from these regimes could help to nurture the development of competition laws in developing countries. They offer an opportunity to consider the merit of the consensus in the developed economies that competition, in the long run, offers better results than state regulation considering the current liberalization programs in developing economies.<sup>10</sup>

In simple terms, resource based economies are economies where natural resources account for more than 10 per cent of gross domestic product (GDP) and 40 percent of exports,<sup>11</sup> but in a resource-dependent economy either a single valuable natural resource or a few valuable natural resources account for over 15 percent of its GDP and over 40 percent of its exports.<sup>12</sup> It is not all resource-based economies that are resource-dependent. The United States of America (US), Canada, Australia and Norway are examples of resource-

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<sup>7</sup> See generally, P. Cook et al., *Leading Issues in Competition Policy, Regulation and Development* (ed.) (Gloucester: Edward Publishing Limited, 2004).

<sup>8</sup> Competition law is commonly referred to as 'antitrust law' in the US but the present thesis shall adopt the former in reference to the two.

<sup>9</sup> Both the US and the EU constitute the largest trading partners of Nigeria.

<sup>10</sup> R. Whish, *Competition Law*, 5th ed., (London: Butterworths, 2003), 16.

<sup>11</sup> R. Ahrend, 'How to sustain growth in a resource based economy? The main concepts and their application to the Russian's case' (2004) United Nations Economic Commission for Europe Occasional Paper 7, 3.

<sup>12</sup> K. Chaudhuri, 'Long -run prices of primary commodities oil prices' *Applied Economics*, 2001, 33, Published at <http://www.tandf.co.uk/journals>. Last visited 30th March 2009.

based economies that are not resource-dependent. However this thesis focuses on resource-dependent developing economies, such as Botswana, Angola, Papua New Guinea and Nigeria.

It is generally believed that the level of economic development in many of the resource-dependent economies is not commensurate to their rich level of resource endowments. Most of these economies are often plagued by different economic problems, which could be classified into primary and secondary problems. The basis upon which this classification is founded, resides chiefly on the common consensus that all economies are faced with distinct problems peculiar to their circumstances but they could also be affected with any of the general problems inherent in all economic relationships. The first classification in relation to resource-dependent developing economies includes rent seeking, vulnerability to external shocks, high incidence of corruption, resource curse<sup>13</sup> or the Dutch Disease, while the second classification generally concerns internal and external distortions.<sup>14</sup> The most prominent external threat or distortion that such economies are wary of concerns the issues of restrictive agreements, merger activities, monopoly and abuse of dominant position, weak institutional capability, low level of infrastructural development and effects of globalisation.<sup>15</sup>

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<sup>13</sup> The presence of a natural resource or wealth may somehow have debilitating effects or result in a sectoral misallocation of resources, as well as causing overall macroeconomic imbalances in the economy of a nation and this incidence has often been referred to as either a resource curse or a Dutch disease, a term popularized in the late 1970s to refer to the decline of the manufacturing sector in the Netherlands following its discovery of natural gas in the 1960s.

<sup>14</sup> M. Bruno and J. Sachs, 'Energy resource allocation: A dynamic model of the Dutch Disease' Working Paper No.852 (Cambridge, Mass.: National Bureau of Economic Research, 1982), 3.

<sup>15</sup> 'Globalization' is the term for the increased worldwide interdependence of most economies. Integrated financial markets, the sourcing of the production of components throughout the world, the growing importance of transnational firms and the linking of many service activities through the new information and technologies are some of its manifestations'- R.G. Lipsey & K.A. Chrystal, *Economics*, 10th edn., (Oxford: Oxford University Press, 2004), 677. See also, J. E. Stiglitz, *Globalization and its Discontent*, (London and New York: W.W. Norton Ltd, 2003).

Nigeria is the proxy economy for this thesis. The Nigerian economy is double edged. It comprises a modern sector mainly dependent on revenues derivable from its primary energy resources (oil and hydrocarbon resources) and traditional agricultural and trading sectors.<sup>16</sup> At the moment, the energy sector provides well over 75 percent of the federal revenue and 95 percent of its foreign exchange earnings.<sup>17</sup> It exhibits most of the primary and secondary problems associated with resource-dependent developing economies, which include low level of economic development, rent seeking, high level of corruption, resource curse, collusion between enterprises and concentration and mergers. This thesis argues that some of these problems could be due to a lack of an effective competition law and policy. It aims to consider whether competition law and policy could solve or mitigate these problems.

Primary resources constitute at least 25 percent of global commerce,<sup>18</sup> but export of a limited number of commodities account for the bulk of the export earnings of most of the less developed countries (LDCs),<sup>19</sup> especially, resource dependent developing economies or resource based economies (RBEs)<sup>20</sup> whose percentage of dependence on primary commodities earnings is greater than the global average figure; in fact manufactured goods

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<sup>16</sup> See the development data of world Bank, 'Nigeria at a glance' Published at [http://devdata.worldbank.org/AAG/nga\\_aag.pdf](http://devdata.worldbank.org/AAG/nga_aag.pdf) Last visited on 30th March 2009.

<sup>17</sup> See, The website of the Bureau of Private Enterprises in Nigeria, one of the organizations responsible for advising and implementation of the Nigerian government policies' on privatization and liberalization. <http://www.bpeng.org>. Last visited on 30th March 2009.

<sup>18</sup> P. Cashin et al., 'Does the commodity price shock last too long for stabilization schemes to work?' IMF Journal of Finance Development, 1999, vol 36 No 33, Published at, <http://www.imf.org/external/pubs/ft/fandd/1999/cashin.htm>. Last visited 30th March 2009.

<sup>19</sup> Chaudhuri, note 12, 33.

<sup>20</sup> The characteristics of RBEs shall be examined in detail in the later part of this thesis. Nigeria is a typical RBE.

account for less than 15 per cent of their total export trade:<sup>21</sup> they account for 12 percent in Nigeria.<sup>22</sup>

Development policies are often based on economics, with competition policy, politics and law being co-drivers of reform agendas, although some commentators, for example, Amato and Hewitt Pate have argued that competition should be separated from politics as much as possible and rather politics should be taken into competition through competition advocacy.<sup>23</sup> Although there is no universal definition for competition advocacy, it could be described as a process of creating a culture in favour of competition as well as influencing government policies aimed at the process of competition. According to the Advocacy Working Group of the International Competition Network, competition advocacy could be defined as ‘those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities, by means of non-enforcement mechanisms mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition.’<sup>24</sup> The ambit of competition advocacy is very flexible and further examination of it will be done in chapter 5 of this thesis.

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<sup>21</sup> Chaudhuri, note 12, 531.

<sup>22</sup> See the website of the Manufacturer Association of Nigeria, <http://www.manufacturersnigeria.org/eco.htm>. Last visited on 30th March 2009.

<sup>23</sup> See G. Amato, *Antitrust and the Bounds of Power*, (Oxford: Hart Publishing, 1997). See also O. Odudu, *The Boundaries of EC Competition Law*, (Oxford: Oxford University Press, 2006) and R. Hewitt Pate, ‘Competition and Politics’ (Speech made by the Assistant Attorney General Antitrust Division U.S. Department of Justice Presented at the 12<sup>th</sup> International Conference on Competition Bonn, Germany, June 6, 2005).

<sup>24</sup> See [www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org). Last visited on 30th March 2009.

At present (2009), approximately one hundred economies maintain systems of competition based on law and many other countries are at different stages of introducing one.<sup>25</sup> They operate as part of the structure promoting economic development and growth. It is generally argued and broadly accepted that such competition laws can contribute to improving market efficiency by promoting and safeguarding competition between firms, thus enabling efficient utilization of resources for the public good.<sup>26</sup>

A further trend is to employ competition law as an instrument of industrial policy with defined objectives. This approach is not universally favoured. Some commentators argue that this approach distorts the free operation of the market and is as such inimical to the true purpose of competition and competition law underscores this.<sup>27</sup> Competition regulated by law is expected to enable an economy to achieve objectives at levels of competitiveness, that is, not wasteful to economic performance.

In most developed countries competition laws have been accepted and tested as a tool serving economic development, hence a growing pressure on developing economies to adopt competition laws. Such pressure comes not only from states, such as the US and regional groupings like the European Union (EU), but also from international agencies, including the International Monetary Fund (IMF), the World Bank and the World Trade

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<sup>25</sup> See the website of Global Competition Forum, <http://www.globalcompetitionforum.org>. Last visited on 30th March 2009.

<sup>26</sup> R. Lane, *EC Competition Law* (Essex: Pearson Education Limited, 2000), 1.

<sup>27</sup> See generally, W. Saulter, *Competition Law and Industrial Policy in the EU* (London: Clarendon Press, 1997). One chapter of the book deals extensively with the compatibility of industrial and competition policy, with particular attention on the telecommunications sector in the EC. See also M.S. Gal, *Competition for Small Market Economies*, (Harvard: Harvard University Press, 2003).

Organization (WTO).<sup>28</sup> Further, whether the same regime or rules of competition can be assumed to be or not equally applicable to developed as well as developing economies remains an important consideration.

Consequently, the thesis consists of two parts; the first part is divided into three chapters, which is from Chapter One to Chapter Three while the second part is divided into three chapters, that starts from Chapter Four to Chapter Six.

Chapter one aims at providing background information on Nigeria and the relevance of a competition policy within the context of its growth and development in relation to its level of resource endowments. The chapter also defines the research question, its parameter and scope and methodology. In addition, the chapter presents a brief summary of the conclusions and recommendations made in the thesis.

Chapter two aims at examining the problems peculiar to resource-dependent economies and how these could be solved. It considers characteristics of developing economies, with a view to determining their economic problems and how competition law could be promoted and thereby influence economic development. This prompts the question of the political sources of institutional change and whether appropriate law and economic reforms could be meaningfully implemented without political support and the establishment of an appropriate regulatory structure. The position of this thesis is that appropriate law and economic reforms are necessary but not sufficient; the determining factor in economic

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<sup>28</sup> See R. Parakkal, 'The WTO, competition policy and developing countries: A model of global governance' Paper presented at the annual meeting of the ISA's 49<sup>th</sup> Convention, Bridging Multiple Divides, March 26, 2008, San Francisco, CA, USA.

performance is the state's capacity to implement its law and reform policies.<sup>29</sup> It observes that while resource-dependent developing countries share the same or most of the problems typical of developing countries, they also have to confront a range of additional issues and problems that require tailor-made economic policies and reforms.

It further argues that these problems are the consequences of Nigeria's dependence on primary resources. The most critical among these problems include price volatility, the Dutch disease, rent seeking, access to energy and corruption. The combination of these tends to exacerbate other economic problems particularly restrictive agreements, merger activities, monopoly and abuse of dominant position, weak institutional capability and low level of infrastructural development. The chapter further states that these problems constitute the nucleus of the research problem of this thesis. That is, how competition law and policy could be employed to enhance the efficient allocation of resources and thereby development in resource-dependent developing economies. The thesis however observes that some of these problems, such as corruption and renting seeking, are not peculiar to resource dependent economies and therefore not primarily attributable to lack of a competition policy, but that competition law and policy via market discipline could mitigate their effects. It concludes that an examination and possible resolution of this problem is to be considered within the context of the characteristics, problems of developing economies and peculiar problems of resource-dependent developing countries. Therefore this chapter develops a firm foundation for the analysis in the other remaining chapters and the conclusion of this thesis.

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<sup>29</sup> P. Cook et al., note 10, 30.

Chapter three examines different theories of competition, economic tools and their relevance to the substance of the thesis. This involves an analysis of the aims of competition policy. The chapter argues that competition policy could be used to promote objectives other than the attainment of market efficiency. In the process the historical background of the US antitrust laws, the Sherman Act 1890, is explored in the context of the argument for and against a multiple objectives for competition policy. The chapter also examines the nexus between competition and development and how this could further the maximization of resource utilization in resource-dependent countries.

However, this chapter concludes that a multiple-objective competition law and policy is most probably likely to enhance economic development in resource-dependent countries. This conclusion is supported by the historical development of the EU Competition Policy. Aside from the limitations of economic tools often used in competition, available evidence has shown that gaps exist between competition theories and realities.<sup>30</sup> The chapter concludes that the success of any model of competition law and policy enacted in any economy will be determined by its objective and how well it relates to the economic circumstances of the country in question. The chapter concludes further that in some cases, using Nigeria an example, it will have to work out a balance between competition and regulation, especially since market discipline and regulatory frameworks are yet to be fully established in most developing countries.<sup>31</sup>

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<sup>30</sup> L. Cernat and P. Holmes, 'Competition, competitiveness and development: lessons from developing countries' UNCTAD/DITC/CLP/2004/1, 11.

<sup>31</sup> D.O. Adetoro, 'Can the imposition of a regulator in any liberalized energy market be justified by market behaviours?' (2006) 24(3) *Journal of Energy & Natural Resources Law*, 401.

Chapter four explores the highlights of the provisions in the draft Federal Competition Bill in Nigeria critical to the promotion of efficient allocation of resources and thereby its development as a typical resource-dependent developing economy. It gives a brief general background of the Nigerian economy as the archetype of the characteristics of resource dependent developing countries examined in the preceding chapter. Its focus on Nigeria is meant to explore how competition policy could be effectively implemented within Nigeria's current state of legal, economic, and institutional development. It considers whether the draft Bill is an effective legislative instrument capable of addressing the primary competition problems and other (peculiar secondary economic) problems in resource-dependent countries like Nigeria.<sup>32</sup>

As a result, chapter four examines three standards of competition law - control of agreements, monopoly or abusive conduct, and mergers. This will be considered, with particular attention paid to the impact that such law might have on resource-dependent economies that carry with it particular problems earlier mentioned. This chapter argues that the wave of restructuring and consolidation that recently took place within the banking industry in Nigeria is a precursor of things to come in the Nigerian market.<sup>33</sup> Since there is yet to be any relevant merger activities in the Nigerian economy that could be used as a guide for the other sectors in the present thesis, then the banking sector is taken as an alternative benchmark. This therefore provides a basis for analysing in more depth the merger provisions in the draft FCB as it relates to promotion of economic development. This chapter argues that restructuring and mergers are bound to increase in Nigeria, and it is in its overall interest to enact competition law. The chapter concludes that that the

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<sup>32</sup> These problems were generally examined in chapter 2, but this chapter considers them within the context of Nigeria, surrogate for resource-dependent developing countries.

<sup>33</sup> At the moment there is a Federal Competition Bill before Nigeria's Federal Parliament.

highlighted provisions of the draft FCB is expected to meaningfully contribute to the economic development of Nigeria but its effectiveness as a legal framework for these developmental objectives will be partly determined by the composition and capability of its competition authority, especially its implementation abilities.

Chapter five further explores the importance of competition policy and a competition law for the actualisation of its objectives within the socio-political and legal environment in Nigeria. Thus it argues that certain administrative structures would have to be put in place for its effective implementation. The chapter argues that the fertile conditions needed to grow seeds of competition are a competition culture that places great premiums on both competition enforcement and competition advocacy.

Consequently, chapter six concludes that adopting a competition law and policy is in the overall interest of Nigeria and many other resource-based economies although this will not offer a panacea to their entire economic problems. Rather it will go a long way in contributing to their economic development, as the new competition culture often characterized by increased market discipline will promote the expected development through appropriate regulatory structures. However, the thesis also concludes that while enacting a competition law is necessary, this will not be sufficient to ensure any sustainable development. Rather, it recommends that its competition policy must include and execute the following two goals:

- Provision of good institutional infrastructure that supports transparency in economic conducts, efficient judiciary, clear administrative and regulatory procedure plus a mix of different competition prescriptions aimed at mergers, and

other restrictive business practices.

- Strategic diversification of the economy.

It further concludes that adoption of a competition law in Nigeria would provide a necessary guide and predictable outcomes for both policy makers and investors involved in the Nigerian economy. In addition, while it is hoped that Nigeria will adopt a competition law and policy, it is suggested that its proposed competition Bill should be subjected to public scrutiny or debates. This would give the public, especially, a decent percentage of the stakeholders, an opportunity to contribute to the provisions of the Bill as experienced in the US before the passage of the Sherman Act 1890.

This thesis further shows a relative neglect of the research problem despite continued promotion of competition culture by different development agencies. There is very little in terms of literature on the subject matter of competition policy and resource utilization within the context of resource-dependent-developing economies. Most of the available literatures focus on developed economies and the competition concerns termed ‘secondary problems’ in chapter two. Thus the thesis is important for theory and policy and practice as the dearth of literature on research problem calls for further research that could prove useful for policy makers. The dearth of literature on competition law and policy that deals with resource-based economies is a limitation that the thesis encountered.

#### **1.4 Research Problem and Hypothesis**

The focus of this research is competition law and policy, resource utilization, and

development in resource-dependent countries. It investigates how competition law and policy could be employed to further the efficient allocation of resources and thereby development in resource-dependent developing economies. There are several problems associated with resource allocation; they include rent seeking, abusive trade practices etc. The research problem is to be considered within the context of the objectives of competition law and policy and characteristics of resource-dependent developing economies.

Economic reforms informed the evolution of competition law and policy in developing countries and since competition is about economics and law, economic principles and conclusions are used to build legal framework for considering competition policy. Therefore this thesis approaches and examines a number of policy-related propositions and legal provisions drawn from theoretical literature and competition policy. These are related to resource-dependent developing countries. This is further informed by the broad view of the draft Federal Competition Bill in Nigeria. The thesis further observes that the objectives of the draft Bill are a mixture of industrial policy, trade related issues and the core competition standards like anti-competitive agreements, abuse and dominance and merger control. This is evident from the outset of the draft Bill, particularly its preamble and in section 2 which sets out the objectives of the Bill.<sup>34</sup>

The research problem addressed in this thesis is an amalgam of different issues underlined by competition policy and resources allocation phenomena in resource-based countries. They include growth, development, social responsibility and industrial policy. While trade

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<sup>34</sup> See note 3.

liberalization is globally in the ascendancy and more natural resources are being discovered in most developing countries, familiarity with these countries can but confirm that these countries are seen to be poor, their population is poor and most of the people are impoverished. Although corruption is often cited as a principal cause for the poor state of these economies, the present thesis argues that there are more fundamental reasons for the current state of low development. This situation might be interpreted among others by the absence of or disregard for pure market discipline and accountability in the widest sense. As a consequence, this thesis argues that the issue of allocation of resources significantly contributes to the poor state of the economies of the countries under investigation.

Consequently, this present thesis suggests, additionally, that the adoption of a competition law and policy is an essential requirement for the smooth operation of market forces if an efficient and sustainable economy is to be achieved. It undertakes to explore further the issue of competition and the economic problems that arise in a resource-based developing country.

Furthermore, it explores the possibility of using competition policy through competition laws to address these problems and thereby enhance growth and development in the affected economy. Thus the thesis argues that the success of the proposed FCB will be partly determined by the creation of an effective competition agency that will implement the provision of the Bill but an important task that will need to be handled with tact is how to educate the stakeholders, especially the consumers, on the merits and consequence of the Bill when it comes into force. This could not be achieved by the enforcement provisions in the Bill rather competition advocacy would have to be adopted as a

complementary tool with enforcement.

A brief examination of some of the literatures examined in this study is considered hereunder. These include literature on objectives of competition laws and its nexus with development and resource curse.

#### **1.4.1 Objectives of Competition Law and Policy**

There have been different debates about the goals of competition law. On the one hand the dominant view is that the only legitimate goal of competition law is the efficiency doctrine popularised by Richard Bork whose argument forms part of the major arguments analysed in chapter three that deals with theories of competition and resource utilisation. Proponents of this view suggest that the main objective of competition law should be to achieve efficient allocation of resources via the forces of competitive markets.<sup>35</sup> They argue that allocation and effective coordination of means of production in each industry will produce the greatest benefit to society.<sup>36</sup> On the other hand there are those who argue that competition law could have many objectives. There is some merit in the argument that competition law serves different objectives that even the most critical opponents of a multiple objective competition law must concede that in some instances competition law could accommodate objectives other than efficiency and still contribute optimally to social welfare.

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<sup>35</sup> J.F. Brodley, 'The Economic goals of antitrust: efficiency, consumer welfare and technical progress' (1987) 62 NYUL Rev 1020, 1025.

<sup>36</sup> F.H. Knight, *The Economic Organisation* (Chicago: University of Chicago Press, 1933), 9.

Ordinarily the adoption or enactment of any model of competition law will be influenced by the circumstances of the economy concerned. In this regard an economy will decide on the merit or value whether it want to rely solely on competition law to achieve its target goals or whether it should adopt a combination of competition and cooperation to enhance its economic development. The latter approach was initially taken by Japan between 1944 and 1969.

#### **1.4.2 Links between Competition Law and Policy and Development**

Much of the literature from the perspectives of a majority of development agencies<sup>37</sup> and writers<sup>38</sup> agree that competition contributes to investment<sup>39</sup> and is central to the development process in every economy and particularly in developing economies, but competition is a process not a state of equilibrium.<sup>40</sup> Consequently, competition policy is not reducible to a simple-minded concern with the exploitation of market power and the search for excess profits. It is in its fundamentals a matter of the creativity of an economic system, that is to say, the necessary and sufficient condition for competition and economic

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<sup>37</sup> R. Sengupta and C. Dube, 'Competition policy enforcement experiences from developing countries and implications for investment', OECD Global Forum on International Investment VII 'Best practices in promoting investment for development', 27-28 March 2008, Paris, France.

<sup>38</sup> See L. Lall, 'Building industrial competitiveness in developing countries' (1990) OECD Development Centre and M. Porter, *The competitive Advantage of Nations* (New York: Free Press, 1990).

<sup>39</sup> Sengupta and Dube, note 35, 4.

<sup>40</sup> Although there are two broad concepts of competition but the real world is dynamic and not about equilibrium. The first views competition as an equilibrium in which allocation of resource is expected to result in price reduction and is depicted by perfect competition at one end and monopoly at the other end, while the second theory views competition as a process of rivalry, it is characterized by price and non-price forms of competition. For more detailed analysis on concepts of competition, see, J. Vickers, Concepts of competition ' (1995) Oxford Economic Papers, 47, 1-23 J. Metcalfe, 'Competing concepts of competition and the evolution of competition policy in the UK' (2002), Paper presented to workshop on regulation and government, Manila, The Philippines.

development is an open, experiment oriented and innovative economy.<sup>41</sup> This is confirmed by the increasing level of development in India, which situation reveals that as an economy opens to competition or to more competition, its regulation requires a different set of resources and capabilities to address issues that could emerge from the new structure.<sup>42</sup> Some of those issues will necessarily involve the need for competition laws to deal with anti-competitive trade behaviours like agreements, cartels and emergence of private monopolies in replacement of public monopolies that have been privatised, and a number of others.

Research into the link between competition law and development is relatively small in comparison to research on trade policy reforms, deregulation and privatization.<sup>43</sup> Thus it is not a surprise that there is a dearth of literature on the developmental consequences of competition law in developing countries most of which started to embrace competition law lately. Evenett limited his scope to how the enforcement of competition law has influenced different agent's incentives to invest in developing economies rather than the maximization of the broader developmental impact of competition on developing countries.<sup>44</sup>

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<sup>41</sup>J.S. Metcalfe et al., 'Competition, innovation and economic development', in P. Cook et al., *Leading Issues in Competition Policy, Regulation and Development* (ed.) (Gloucester: Edward Publishing Limited, 88.

<sup>42</sup> T.G. Arun, 'Regulation and competition: emerging issues from an Indian perspective' in P. Cook et al., *Leading Issues in Competition Policy, Regulation and Development* (ed.) (Gloucester: Edward Publishing Limited, 2004), 415.

<sup>43</sup> S.J. Evenett, 'Links between development and competition law in developing countries' Case Study for the World Development Report 2005: Investment Climate, Growth and Power, Oct 28, 2003, UK Dept. for International Development, 3.

<sup>44</sup> Ibid.

While acknowledging that developing countries have some differences, Evenett observed that competition law could equally impact positively on economic development in developing countries in the following ways;

1. Greater competition between firms sharpens incentives to cut costs and to improve productivity through reform, deregulation, and privatization
2. The benefit of trade will not be realized without the potential for active and effective enforcement of competition law.
3. The appropriate enforcement of competition law adds transparency to a nation's commercial landscape, which in turn, attracts foreign direct investment (FDI).
4. Greater competition in product markets stimulates both product and process innovations.
5. Rivalry in the market for future innovations can be protected by the active and appropriate enforcement of merger and acquisition law which prevents, for example, one firm taking over another firm which has a potentially strong, but not as yet fully developed, range of rival products.

Evenett's assertions 2, 3, and 5 point invariably to the issue of developing a robust competition regulatory and enforcement sector as a *sine qua non* for a dynamic economic performance in developing countries which in most cases lack well defined markets and regulatory structures. This is expected to further stimulate local investment, reduce anti-competitive business practices, such as bid rigging. However, he concludes that interest in competition law is not all about creating a conducive business environment to generate economic development. Rather, competition law is all about the promotion of static and dynamic efficiency while the decision on whether to adopt a competition law and which

model or degree of combination should be based on a cost-benefit analysis. This again raises the issue of the debate on the objectives of competition law and the likely constraints developing countries are likely to encounter if and when they adopt a competition law. These issues are further dealt with in chapter five of this thesis, especially where the design and management of a competition authority are examined.

### **1.4.3 Resource Curse**

There is no general agreement yet on the exact cause of the relative poor economic development of most developing countries with substantial resource endowments but research has shown that majority of these countries have performed poorly since 1980.<sup>45</sup> Rigobon and Hausmann in their study pointed out that based on the gross domestic product (GDP) or gross domestic income (GDI), the more resource dependent countries like Nigeria, Saudi Arabia and Venezuela performed poorly compared with those with lower levels of dependency on natural resources.<sup>46</sup> Examples of countries in the latter category include Mexico and Indonesia.<sup>47</sup> This lends credence to the concern that natural resource or specifically oil could be an impediment to economic development and the concern has continued to receive attention which Hausmann and Rigobon examine in their paper. It is common to refer to this state of development as an incidence of 'resource curse'.

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<sup>45</sup> Many writers have conducted research, which show that there is a strong link between resource endowments and developing countries. See, J. Sachs and A. Warner, 'Natural resource abundance and economic growth' mimeo, (1997) Centre for international Development, Harvard University, M. Gavin and R. Hausmann, 'Nature, development, and distribution in Latin America. Evidence on the role of geography, climate, and natural resources', (1998) Inter-American Development Bank Working Paper -378.

<sup>46</sup> R. Hausmann and R. Rigobon 'An alternative interpretation of the 'Resource Curse': theory and policy implications', (2002) National Bureau Of Economic Research Working Paper No. 9424, 3.

<sup>47</sup> Ibid.

While the data in support of the concern has continued to grow, no consensus has been reached as to the cause and solutions to the problem. The most popular and persuasive explanations given so far include the following: the issue might be a consequence of the Dutch Disease, volatility that characterizes resource-based commodity prices, political economic forces buoyed by the presence of rents.

Hausmann and Rigobon however assert that the reasons that have been given to explain the incidence of resource curse in resource developing countries could not be totally justified rather the apparent lack of economic development is more of resource nuances originating from inefficient resource allocation. They attempted to offer alternative interpretation of the issue by first rebutting the reasons other writers have given for resource curse. A brief examination of their analysis and that of Rudiger Ahrend is given below.

#### **1.4.4 The Dutch Disease**

Increase in resource-based incomes prompts a general increase in economic activity. This includes increased demand for import tradable goods and a greater demand for non-tradable goods that are produced locally. The new development often involves shift or re-allocation of resources in the concerned economy, especially to the effect that there might not be suitable structures or policies to manage the sudden resource abundance or specifically oil boom in a case where the resource concerned is oil. This might occasion a shift of resources from sectors such as the manufacturing sector to the construction and services sectors. This was the case in Nigeria when it experienced an oil boom in the early 70s and the level of activity in its manufacturing and agricultural sectors began to decline relatively to the great increase in its construction and service industries.

This type of development is commonly called the Dutch Disease, but this on its own, argue Hausmann and Rigobon, should not lead to any efficiency or welfare loss but only contractions in some sectors relative to expansion experienced in others. Thus since this cannot explain loss in total growth or slow growth, they queried the rationale behind the Dutch disease as a credible explanation. However, it could be argued that if the non-resource tradables play a major role in the growth process then a shift in the allocation of resource can cause a significant loss in economic development. This is so because the non-tradable sector exhibits increasing returns to scale<sup>48</sup> and the resource sector does not, then specialization in the less dynamic sector as a result of sudden resource abundance can strengthen the argument that resource abundance contributes to resource curse.

However, they point out that the argument in the preceding paragraph could be faulted on the ground that the converse is not the case, when the oil price is doing well, an oil dependent economy will be expected to perform poorly and to perform better when oil becomes less dynamic. Rather, most oil dependent economies experienced better growth rates in comparison to the economic performance of others during this period, but started performing poorly when oil revenues declined after 1980.

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<sup>48</sup> M. Parkin, *Economics*, 8<sup>th</sup> edn., (Boston: Pearson Education, Inc., 2008) 213. Economics of scale refers to the phenomenon where the average costs per unit of output decrease with the increase in the scale or magnitude of the output being produced by a firm. Cost of output in the resource sector is not based on the cost per unit rather it is influenced by a host of factors. These factors include the reserve ratio of the deposit, demand for the product and operational strategies of the producer who might belong to group that influences production level in the environment. Organisation of Petroleum Exporting Countries (OPEC), a cartel of twelve countries has a very large influence on world oil prices through its allocation of production quotas to its members who account for more than three-quarters of 36.5 percent of world oil reserve.- (See <http://www.opec.org/home/PowerPoint/Reserves/OPEC%20share.htm>. Last visited 30th on March 2008).

### **1.4.5 Rent Seeking Theory**

The second explanation is that resource abundance makes societies less entrepreneurial. This leads to an increase in more unproductive rent-seeking activities to appropriate wealth rather than to create more wealth.<sup>49</sup> Closely linked with this, are the problems often associated with the sudden discovery of new wealth. These are uncertainties over property rights, resource income and lack of clear rules on how to deal with them. This may lead to slow growth as a result of inefficient prioritising and struggle over resources.

In addition to this is the fact that there might not be appropriate tax measures to regulate the resource income. Coupled with increased demand for a share of the resource income by all constituencies before the income is depleted or exhausted, which could overheat the economy and cause further economic and social problems. Despite this, the authors argued that the presence of resource rent is not sufficient to explain the low economic development in the affected economies especially that rent seeking generally occurs in every economy, albeit at different degrees.

### **1.4.6 The Volatility Story**

The incidence of volatility has also been seriously canvassed as the most likely culprit contributing to the low level of economic development in resource-dependent countries.<sup>50</sup> It is argued that volatility impacts not only on growth but also on investment, education

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<sup>49</sup> Public procurement is an example of rent-seeking or corruption activities with competition linkage and this is a big source of loss of revenue by the government through rent seeking officials and private persons in developing countries.

<sup>50</sup> See M. Gavin, and Ricardo Hausmann, (1998) 'Nature, development, and distribution in Latin America: Evidence on the role of geography, climate, and natural resources' WP-378 and G. Ramey and V.A. Ramey, 'Cross-Country evidence on the link between volatility and growth' (1995) American Economic Review 85, 1138-1151.

and income. Natural resource rents owe their high volatility to the low price elasticities they show. However, on the average, the welfare losses often occasioned by high volatility are not enough to destabilize an economy due to the possibility that other resources in the economy will re-adjust to hedge the risk associated with price fluctuations. Some sectors of the economy, particularly household income, might be more affected with volatility in comparison to the larger economy. To put it more clearly, they argue that if we assume there are three sectors in the economy (a resource or oil sector, a non-tradable and a tradable sector), the effects of price volatility will be felt more in the oil sector whose prices are determined internationally. As a result, the effects of the volatility should be seen more of as a nuisance than a curse, but it must be borne in mind that Nigeria's dependency on oil resources is roughly put as high as 90 percent.

In any case, Hausmann and Rigobon's alternative explanation for the issue of resource curse in resource-dependent countries is premised on the argument that the issue emanates from an interaction between specialization and financial market imperfections. They argue that resource curse is as a result of increase in resource revenue that leads to inefficient specialization and thereby a serious reduction in economic welfare. Inefficient specialization used here is what happens in the absence of a large non-resource tradable sector, prices are not stable because of price volatility in the resource sector. This leads to movement in the allocation of resources and possible disappearance of the non-tradable sector.

Consequently, they argue that rather than treat resource curse as a necessary consequence of resource abundance, a careful consideration of it will reveal this should not impede

economic development. What is required is the use of appropriate policy to improve efficiency and productivity in the market. This policy will include fiscal policies like stabilization and saving policies (first best policies). Trade and financial policies (second best policies) were also advocated as possible panacea to the incidence of resource curse or the low level of economic development in economies faced with resource abundance. Competition policy arguably will be part of the first best policies, which is a range of economic reform policies with competition law and policy as a necessary complement.

In addition, another writer whose research has become significant in the examination of economic development in resource dependent economy is Ahrend. While he acknowledges other works which conclude that there is a link between natural resource endowments and economic development, commonly referred to as a curse, he asserts firmly that the incidence is not fatal and is redeemable by right economic policies and appropriate political structure. According to him, ‘resource based development obviously presents important challenges.’<sup>51</sup> These challenges are indeed serious, but they can be overcome or at least very substantially mitigated with the aid of appropriate institutions and policies. He cites the example of Canada, Australia and the Scandinavian countries where natural resource abundance have been effectively used to promote successful economic development. Thus his argument is predicated on the use of appropriate resource-based development strategies. These strategies must also enjoy the support of a strong civil society and especially in developing countries where in most cases the political structures are yet to mature.

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<sup>51</sup> A. Ahrend, ‘How to sustain growth in a resource based economy? The main concepts and their application to the Russian case’ (2006) OECD Working Paper 478, 2.

Published  
[http://www.oecd.org/LongAbstract/0,2546,en\\_2649\\_37451\\_36074861\\_119684\\_1\\_1\\_37451.00.html](http://www.oecd.org/LongAbstract/0,2546,en_2649_37451_36074861_119684_1_1_37451.00.html) Last visited on 30th March 2009.

Ahrend also points to the need to have an exhaustive resource- based strategy for efficient resource allocation which must cut across all the sectors. This will provide a good mix with appropriate legislative provisions capable of creating a level playing field and reduce anticompetitive behaviours in the market. While the economies of most resource-dependent countries used to be under state control before the present wave of privatization and liberalization policy, the need to develop appropriate competition policy in relation to their economic circumstances and national goals strongly underlies the focus of this thesis.

In fact, this position aligns with the argument of other writers like P. J. Loung who attempt to explain the correlation between resource abundance and the negative economic outcomes in developing countries.<sup>52</sup> He too concludes that the problem lies mostly in the relationship between ownership and regulatory structure specifically whether the resource income is concentrated or dispersed. If the proceeds are highly concentrated within the state apparatus, like the central government or national parastatals, then the state as the first beneficiary might politicise the allocation of the resource abundance. He argues for a dispersed form of ownership as a way of mitigating any negative economic consequence that might result from resource abundance. Thus this thesis argues the dispersed form of ownership advocated by Loung could be well promoted with the enactment of a competition law.

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<sup>52</sup> P.J. Loung, 'Rethinking the resource curse: ownership structure and institutional capacity'

Paper prepared for presentation at the Conference on Globalization and Self-Determination, Yale University, May 14-15, 2004.

Published at [http://www.yale.edu/macmillan/globalization/jones\\_luong.pdf](http://www.yale.edu/macmillan/globalization/jones_luong.pdf). Last visited on 30th March 2009.

## **1.5 Historical Background and Theories of Competition Policy**

The historical antecedent of competition law in the US and EU impacts on the focus and analysis of the issues in this thesis to a large extent. This is for two reasons. First, the US competition laws have a chequered history and this have also impacted greatly on the development of the EU competition law and policy. Second, this offers an opportunity to consider the merit of the consensus in the developed economies that competition, in the long run, offers better results than state regulation considering the various current liberalization programmes in developing economies.<sup>53</sup>

Consequently, an examination of the competition law standards will allow the determination and to what degree these standards could be adopted in resource-dependent developing countries. Thus there will be an analysis of the provisions of the proposed Competition Bill in Nigeria as it relates to the research problem of this thesis.

## **1.6 Parameters of the Present Study**

To set up the context for the forthcoming research, it is necessary to define in more detail the parameters within which the analysis will be conducted. As pointed out earlier, the boundaries of this research are defined by the following:

- a. resource-based economy and characteristics of developing countries,
- b. competition standards,
- c. whether competition law could be employed to solve problems peculiar to resource-dependent countries, and

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<sup>53</sup> Whish, note 10, 16.

d. if the preceding question is answered in the affirmative, then what are the conditions that could enhance an effective competition law and invariably development in a resource-dependent country.

Defining these parameters will provide a proper foundation for establishing a competition policy for a resource-dependent country. An understanding of the competition standards will provide a robust yardstick for analysing some of the essential structure for a competition agency and also some provisions of the proposed Competition Bill in Nigeria.

### **1.7 Methodology**

The theoretical literature concerning competition law and policy in resource-dependent developing countries is still growing compared to its long history in developed countries. Much of the approach in this thesis use economic analysis to highlight the (primary) competition problems and (secondary) socio-economic problems indirectly linked to competition, with attention to policy design. Essentially, the thesis examines the relevance of competition standards in addressing the problem of resource allocation and development in resource-dependent countries; while the link between economics and law will be alluded to in order to analyse the research problems and question, the focus is on the application of economic theory to competition problems within a defined legal framework. This involves the examination of competition standards and principles, and examination of some of the provisions of the proposed Nigerian competition Bill. The fundamental question considered is the effectiveness of the application of competition law and policy to economic problems in a resource-dependent developing economy and how this could impact on its economic development.

Furthermore the study focuses on analyzing both primary and secondary sources in regard to the nexus of competition law and policy on resource utilization, particularly on how competition law can affect economic growth and development in Nigeria. The methods chosen to carry out this research include the use of primary and secondary sources - The primary sources in this thesis comprise mainly US antitrust laws (such as, the Sherman Act of 1890, Clayton Act of 1914, the Robinson- Patman Act of 1936, and the Celler- Kefauver Merger Act of 1980), the EC competition rules contained in Articles 81 to 89 EC and in the Merger Regulation,<sup>54</sup> the proposed Nigerian Federal Competition Bill, cases, and other national legislation relevant to competition policies. The secondary sources include competition law textbooks, textbooks on industrial economics and monographs on competition law, comments from government policy makers and journals.

## **1.8 Conclusion**

Theoretical literature concerning competition law and policy, development and resource allocation in resource-dependent countries is still in its infancy. Most of the available literature has focused on competition policy and development generally in developing countries without any special attention to the macroeconomics of development and competition in resource-dependent economies. Thus this thesis aims to explore and draw attention to the need for more research on competition law and policy within the context of economic circumstances of resource dependent-developing economies.

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<sup>54</sup> See Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] O.J. L24/1 and Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings [2004] O.J. L133/1, as amended by Commission Regulation (EC) No. 1033/2008 [2008] O.J. L279/3.

In conclusion, it is not possible to ascertain with certainty when the Federal Competition Bill in Nigeria will be enacted into law. This thesis argues that if some or the conclusions and recommendations contained in this thesis could be adopted in the draft Bill before it is passed into law then it is likely to become a more credible legislative instrument capable of actualising the wide objectives of the Bill.

## **Chapter Two**

### **2.0 What are the Problems in Developing Countries and in Resource-Dependent Developing Countries?**

#### **2.1 Introduction**

It has been shown in Chapter One that the research problem of this thesis concerns how competition law and policy could be employed to enhance the efficient allocation of resources and thereby enhance development in resource-dependent developing economies. In this chapter, this problem will be considered within the context of the characteristics and problems of developing economies and the peculiar problems of resource-dependent economies. It is broadly recognised that developing countries face quite a lot of issues and problems that impact on their development. These are often an amalgam of political, social and economic issues, but in relation to this thesis it is the economic issues that are more relevant. This thesis classifies the issues into primary and secondary problems. The first classification in relation to resource-dependent economies includes rent seeking, vulnerability to external shocks, high incidence of corruption, access to land, access to energy, resource curse or the Dutch Disease, while the second classification generally concerns restrictive agreements, merger activities, monopoly and abuse of dominant position, weak institutional capability and low level of infrastructural development.<sup>1</sup>

The basis upon which this classification is founded resides chiefly on the common consensus that all economies are faced with distinct problems peculiar to their circumstances but they could also be affected with any of the general problems inherent in

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<sup>1</sup>M. Bruno and J. Sachs, 'Energy resource allocation: a dynamic model of the Dutch disease' Working Paper No.852 (Cambridge, Mass.: National Bureau of Economic Research, 1982), 3.

economic relationships.<sup>2</sup> This might require different approaches and instruments to deal effectively with the problems. This is premised on contemporary development in legal-economic thought on the relationship of law and economics; since the 80s there has been shift a from a predominant view of law as an instrument of state policy to achieve economic development to a vision of law as a framework for market operation and constitutive part of development.<sup>3</sup>

Neoclassical economists argue that the efficient working of a resource market is dependent on two possible factors as follows: prices must reflect market conditions and resources must move relative to changes in these conditions, particularly changes in price. The question now is – does this view explain the problem of economic growth and development faced by the majority of developing countries, especially in the African continent? Economic development could be described as the process of increasing the degree of utilization and improving the productivity of available resources which leads to an increase in the economic welfare of a country by stimulating the growth of its national income.<sup>4</sup>

Most developing countries share similar characteristics and also face similar problems, particularly those relating to economic growth and development. However, circumstances

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<sup>2</sup> An economy encompasses all the financial structures and systems of organisations that govern commerce and commercial transactions. From early times, societies have continued to develop structures and institutional frameworks within which their economic transactions take place.

<sup>3</sup> D.M. Trebek and A. Santos, 'Introduction to the third moment in law and development theory and the emergence of a new critical practice' in D. Trebek and A. Santos, (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University, 2006), 1.

<sup>4</sup> E. Eshag, *Fiscal and Monetary Policies and Problems in Developing Countries* (Cambridge University Press, 2003), 2.

have started to change in the last decade, especially for Africa and Asia (India and China in particular).<sup>5</sup> In the 1960s and 1970s Africa experienced a higher economic growth rate than Asia, for instance Nigeria and Indonesia shared similar oil booms in agricultural-based economies<sup>6</sup>. During this period, Nigeria's economic performance was superior to that of Indonesia but its performance began to fall drastically from the early 1980s.<sup>7</sup> This change in fortune could be explained on the basis of the economic structure and policy in place.

From the perspective of Adam Smith (the classical economist) and some neo-classical economists, economic growth necessarily follows a logical process.<sup>8</sup> They both use economic laws and generalizations to analyse and arrive at conclusions. It is also interesting to note that the growth of China has not really corresponded to the classical economists' expectation.<sup>9</sup> Prior to the twenty-first century, and to date in most developing African countries, governments have been big businesses, and this partly accounts for the way resources are allocated and managed in these countries. It also explains other issues, like their economic structure and why some of them have only a small growth rate.

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<sup>5</sup> For instance, at the moment China is rapidly embracing free market discipline, and empirical evidence will reveal that the situation in China ten years ago is different from what obtains there now. In fact, the recent gradual embrace of some principles of market-based economies by China partly accounts for its remarkable growth and emergence as a world economic power. - See generally, D. Guthrie, *China Globalization*, (Oxon: Routledge Publishing, 2006).

<sup>6</sup> G. M. Meier and J.E. Rauch, *Leading Issues in Economic Development* (New York: Oxford University Press, Inc., 2005), 63.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid., 77.

<sup>9</sup> The Chinese government has been directly heavily involved in steering the growth and pattern of the Chinese economy.

## 2.2 Types and Characteristics of Resources

Resourced-dependent economies are defined as economies in which 10 per cent of their gross domestic products (GDP) and 40 percent of their exports are constituted by natural resources.<sup>10</sup> Resources are basically the factors or means of producing goods and services. They can be grouped into two, namely, labour, or human resources and capital or non human resources.<sup>11</sup> Every society or economy is ‘afflicted’ with the problem of resource scarcity. However, societies differ both in terms of the degree of resource scarcity and in the approaches that governments often use to treat the impact of the scarcity.<sup>12</sup> Some are more endowed with either one or the two types of resources. Some have multiple resource endowments ranging from oil to metallic deposits (for example Canada) and some are even landlocked, a feature that could pose special further economic problems.<sup>13</sup> In some countries, the level of scarcity is mainly affected by the availability and level of natural resources. Nature remains the principal determinant for the location of natural resources, while their definition and use are greatly determined by man.<sup>14</sup> While physical features could greatly influence how a capital resource is defined, man is the planning agent that continually appraises the usefulness of the physical constituents or elements of his environment in order to achieve certain results.<sup>15</sup> The effectiveness of his influence could

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<sup>10</sup> R. Ahrend, ‘How to sustain growth in a resource based economy? The main concepts and their application to the Russian case’ (Feb 2006) OECD Working Paper 478. Published at [http://www.oecd.org/LongAbstract/0,2546,en\\_2649\\_37451\\_36074861\\_119684\\_1\\_1\\_37451,00.html](http://www.oecd.org/LongAbstract/0,2546,en_2649_37451_36074861_119684_1_1_37451,00.html). Last visited on 30th March 2009.

<sup>11</sup> R.O. Eckert and M.D. Leftwich, *The Price System Resource Allocation*, 10<sup>th</sup> edn. (Chicago: Dryden Press, 1988), 6.

<sup>12</sup> Australia, Canada, Norway, Nigeria and South Africa are some examples of countries that could offer a comparative treatment of the issue of resource scarcity.

<sup>13</sup> L. Mackellar *et al.*, ‘Economic development problems of landlocked countries’ Transition Economic Series (2000) 1. Published at <http://www.ihs.ac.at/publications/tec/te-14.pdf>. Last visited on 30th March 2009.

<sup>14</sup> J. Rees, *Natural Resources: Allocation, Economics Policy*, 2nd edn. (London, New York: Routledge, 1990), 12.

<sup>15</sup> S.V. Ciriacy–Wantrup, *Resource Conservation Economics Policies*, (Berkeley, C A: University of California Press, 1952), 28.

also be determined with the available regulatory framework and its enforcement mechanism.

However, there is no absolute definition of what constitutes a ‘resource’, and definitions vary over time, and human development.<sup>16</sup> Nonetheless, there are two essential elements that influence how a resource is defined rather than the physical components of the resource in question.<sup>17</sup> These are the availability of knowledge and technical skill necessary for its extraction and utilization, and the need for the materials or their end products. Both the passage of time and human developments such as technological advancement, and cultural changes have continued to impact on what constitutes a resource.

As a consequence, this difference in valuation has heightened conflicts over the use and management of resources, to the extent that issues like environmental sustainability, corporate responsibilities and other human rights themes now are important contentions wherever the concept of a ‘resource’ is being discussed. For example in Nigeria, prior to the discovery of its offshore hydrocarbon minerals, particularly in the Niger Delta, there were no agitations for resource control by the local population as is now the case.<sup>18</sup>

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<sup>16</sup> E.B. Barbier, *Natural Resources Economic Development* (Cambridge: Cambridge University Press, 2005), 11. For instance, according to Ross the general opinion on the issue of welfare through production of goods and services used to hinge mainly on two factors, the accumulation of physical human and capital but some economist now argue that for a proper functioning of the economic system achievement of total welfare then the list should be widen to include the natural environmental resource endowment, to wit, natural capital. See- M L. Ross, ‘Does oil hinder democracy?’ (April 2001) 53 *World Politics*, 325.

<sup>17</sup> Rees, note 21.

<sup>18</sup> T.E. Mbeke-Ekanem, ‘Understanding the clamour for resource control in Niger Delta region of Nigeria’, Published at [http://www.iseg.giees.uncc.edu/INCEED2005/Abstracts/Abstract\\_ID\\_330.pdf](http://www.iseg.giees.uncc.edu/INCEED2005/Abstracts/Abstract_ID_330.pdf). Last visited on 30th March 2009. The scenario changed with the discovery of oil, the concerns of the indigenes now include

Primary resources include fuels and base metals, and some agricultural products, but this thesis is mainly concerned with primary tradable resources, which are mainly stock resources.<sup>19</sup> The importance of primary resources cannot be overemphasized, especially to resource-dependent economies or resource-based economies (RBEs).<sup>20</sup>

Primary resources constitute at least 25 per cent of global commerce.<sup>21</sup> The export of a limited number of commodities account for the bulk of the export earnings of most of the less developed countries (LDCs), and in Africa, in particular, the percentage of dependence on primary commodities earnings is greater than the global average figure; in fact manufactured goods account for less than 15 per cent of its total export trade.<sup>22</sup> Primary resources generally, are very important for their economic growth, development and overall welfare of developing and emerging economies, but a continuous dependence on them seems to have some debilitating effects. It has also been argued that a relative significant resource endowment could lead to war and other social upheavals.<sup>23</sup> Thus resource dependence has political, social and economic implications, which if not well managed could impact negatively on development and growth in any particular economy. This in essence might boil down to the features or problems often associated with primary

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sustainable development for a larger share of the income accruing from the exploitation of the mineral resources.

<sup>19</sup> D. Sapsford and W. Morgan, 'Introduction' in D. Sapsford and W. Morgan (eds.), *The Economics of Primary Commodities: Models, Analysis Policy* (Hants: Edward Elgar Publishing Limited, 1994), 1.

<sup>20</sup> The characteristics of RBEs shall be examined in detail in the later part of this thesis. Nigeria is a typical RBE

<sup>21</sup> P. Cashin, *et al*, 'Does the commodity price shock last too long for stabilization schemes to work?' (1999) vol 36(33) IMF Journal of Finance Development.

Published at, <http://www.imf.org/external/pubs/ft/fandd/1999/cashin.htm>. Last visited on 30th March 2009.

<sup>22</sup> K. Chaudhuri, 'Long -run prices of primary commodities oil prices' *Applied Economics*, 2001, 33, 531. Published at <http://www.tandf.co.uk/journals>. Last visited on 30th March 2009.

<sup>23</sup> M L. Ross, 'Does oil hinder democracy?' (April 2001) 53 *World Politics*, 325.

resources or commodities. The impact of these features can be exacerbated, especially when a country is solely dependent on them.

Irrespective of any definition that might be adopted, capital resources are generally classified into two groups: stock or non-renewable resources and flow or renewable resources.<sup>24</sup> Stock resources consist of all substances that have been formed after a long process of formation, which often runs into millions of years,<sup>25</sup> and are generally taken as being fixed in supply. Examples of these include all fossil fuels and land. These resources could be further divided into another two categories: those that are consumed by use (for example oil, gas and coal), and recyclable (for example metallic minerals like gold and copper).<sup>26</sup> The distinguishing mark between the two categories is that with the aid of technology, the latter could be used several times without much loss in quality, while the former cannot. As a result, this has generated much debate on how they could be optimally used in order not to jeopardize future use or availability. A flow resource could be defined as a naturally renewable substance; examples of these include air, water and solar energy.

Given that resources are the essential ingredients or factors for the production of goods and services required to meet human needs and desires, one thing that is generally accepted is that at any moment or given time, an economy, a firm or an individual can only satisfy a limited number of needs. Why is this so? Human wants are unlimited; the means of

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<sup>24</sup> Rees, note 21, 14.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.,15

satisfying them are relatively limited or scarce. This is the most notable characteristic of resources but there are two other distinguishing characteristics of resources.

First, resources are versatile. This means that they can be adapted to different uses and could be used for numerous tasks. Labour, for instance, can easily be adapted for different skilled or unskilled functions, though some limitations might be involved or could later set in as the particular resource or labour becomes specialized. For instance, a civil engineer can perform different engineering tasks, albeit to a limited extent, thus the more skilled or specialized a resource becomes then the more limited are its uses.<sup>27</sup> The issue of opportunity cost is also very relevant here with regard to development and resource specialization. At the moment in the UK, it is common knowledge that both medical and computer technology personnel are in great demand, compared with other professionals. As a result, these professions have continued to attract more entrants and many resources are employed to train them. Once they are trained, social prestige and ease of flexibility affect labour mobility. The cost of a particular resource specialization over time will always be at the expense of other kinds, which implies a hindrance or a limitation to the extent to which these resources could be combined.

Second, for any given product, resources can be combined differently. A firm can always use its resources to produce different types of products, depending on the structure of its equipment and the prevailing economic circumstances. The two characteristics jointly

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<sup>27</sup> Eckert and Leftwich, note 18, 7.

allow substitution possibilities, which allow a firm or a factory to switch production factors to meet changes in demand or market circumstances with minimal loss or no loss at all.

### **2.3 Developing Countries: Characteristics of Development; Resource Attention**

Ordinarily, it could be dangerous to assume a blanket generalization for developing and emerging countries because of their wide and diverse cultural backgrounds, political differences and religious inclinations.<sup>28</sup> Other common characteristics among them will allow them to be grouped together for the purpose of analysis without the danger of making any category mistake, especially since these characteristics are tantamount to some of the problems broadly recognised as their defining attributes. Common attributes among developing countries allow them to be grouped together for the purpose of analysis in this thesis. These commonalities include:

1. Low living standard
2. Low productivity level
3. High rates of population growth and dependency burdens
4. High rates of unemployment and underemployment
5. High dependency on primary product exports.
6. Inadequate infrastructure

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<sup>28</sup> M.P. Todaro, *Economics for a Developing World* (Essex: Longman Group Limited, 1982), 65.

### **2.3.1 Low Levels of Living Standard**

In most developing and emerging economies the levels of living standards are very low relative to those of developed countries. Even among these countries, their citizens also tend to have different levels of living. A small percentage are significantly well off in comparative standard to those that exist in developed economies. These are evidenced both quantitatively and qualitatively in different forms that include low income or poverty, high infant mortality rates, poor levels of infrastructural development and distribution, low life expectancy, high degree of import and high unemployment rates.<sup>29</sup> Most of the countries in this category are also grouped as part of the heavily indebted poor countries (HIPC).<sup>30</sup> While it is true that available information on these countries is not absolute because they are based on national aggregates that could contain some serious errors, partly as a result of poor data collection or measurement errors, yet they remain the best estimates for analysis and policy formulation. For instance, there have been different population censuses in Nigeria yet the results have never been devoid of allegations of distortions or inadequate representation in many quarters.

### **2.3.2 Low Productivity Level**

One of the problems present in many developing countries is that they are characterised by relatively low levels of labour productivity. It should be recalled that a feature of resource allocation is how to combine available resources for optimum production that is, the maximization of the available resources, of which labour is one; thus low labour

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<sup>29</sup> Ibid.

<sup>30</sup> See generally the World Bank website for discussion papers on HIPC, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTDEBTDEPT/0html> Last visited on 30th March 2009.

productivity is a serious economic problem. In comparison with developed countries, most of the developing countries have relatively low levels of labour productivity.

The reason for this can be explained by different economic concepts.<sup>31</sup> First, is the concept of diminishing productivity which explains that a constant increase of an amount of a variable factor of production like labour to fixed amounts of other factors (like capital, land etc.) will continue to generate an increase in the level of production. Nevertheless, beyond a particular point, the extra or marginal increase being generated as a result of the increases in the amount of the variable factor will start to decline. However, long run productive growth could be achieved and sustained only by capital accumulation and improvement in total factor productivity via a provision of factor inputs, such as physical capital and proactive management thinking.<sup>32</sup>

Second, if domestic savings could be increased along with a substantial increase or injection of foreign investment, then the productive sector will receive a boost that will be manifested in acquisition of new and modern machines and equipment that could improve production rate and techniques. Since the focus will now be on total factor productivity, further investment in continuous training for both technical or production staff and management might further improve levels of production.

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<sup>31</sup> Todaro, note 28, 73.

<sup>32</sup> D. Mills and A. Scott, *Macroeconomics: Understanding The Wealth of Nations*, (West Sussex: John Wiley and Sons, Ltd., 2005), 50.

Third, the work environment and level of income affect the degree of productivity in developing countries. Regulatory authorities need to adhere to rules and be consistent with how they exercise their powers in order to be efficient and also achieve their regulatory targets.

### **2.3.3 High Rates of Population Growth**

The world population in July 2005 has been estimated at 6.5 billion persons. Less developed countries account for 88 per cent, while the developed countries account for 12 per cent.<sup>1</sup> It is also projected that by 2050 the world population will reach 9.1 billion; 86 per cent of this is expected to be in developing countries. That is, most of this growth – around 2.1 billion persons - would be absorbed by the developing countries, but the developed countries would not be significantly affected. Some of the major reasons for these are the decline in infant mortality and advances in health that have resulted in increased fertility ratio and a significant reduction in the death rates. As a result, most developing countries have a higher dependency burden to bear compared with developed countries. The developing countries have both the under-aged and the aged population to fend for while the developed countries have just the older age group to maintain.<sup>33</sup> In essence, the UN and other developing agencies have continued to argue that the large and growing population of the developing countries constitutes a barrier to their sustainable development. However, this view could be challenged, on the ground that the African continent is not in any way overpopulated in relative terms when compared with most countries in Europe, considering their land mass and resource endowments.

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<sup>33</sup> J. Mbwana, 'Transport infrastructure in sub-Saharan Africa', Africa Notes, November 1997. Published at [http://www.einaudi.cornell.edu/africa/outreach/pdf/Transport\\_infrastrucuture.pdf](http://www.einaudi.cornell.edu/africa/outreach/pdf/Transport_infrastrucuture.pdf). Last visited on 30th March 2009.

### **2.3.4 Inadequate Infrastructure**

Most developing countries have either an inadequate infrastructure or a relatively inefficient infrastructure. The basic infrastructure services include transportation and communication networks. The state of their infrastructure is below the UN minimum standards.<sup>34</sup> These are akin to the oil that lubricates a machine in order to ensure an optimum use or production, so an absence of an efficient infrastructure or the presence of an inefficient infrastructure in an economy tend to hinder development, and, in particular, might deter or discourage both domestic and foreign investments. Businesses will be discouraged if they have to provide an infrastructure network because this could impact negatively on their profits and competitiveness in case they decide to transfer the cost burden for providing the infrastructure to the consumers.

### **2.4 Economic Growth, Development and the Multiplier Effect**

The level of economic growth and development among countries in the world underscores the distinction between developed and developing countries. In relative terms, some are getting richer while others are getting poorer. This disparity has continued to be a disturbing issue among stakeholders, and various reasons have been given for this. Some of these include behavioural and structural deficiencies, which breed corruption and inefficient utilization of resources. The issues of growth, development and the multiplier effect are expected manifestations of every economic system. While the positive impacts of these are often assumed to tilt favourably towards a market economy, it could do better when supported by a robust competition policy. An open economy is meant to be

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competitive, and therefore the rules of commercial transactions and competition policy within and outwith such an economy will be expected to impinge positively upon it. That this will effect some changes both in the short term and in long term should not be in doubt because both structural and behavioural changes would occur.

Moreover, it could be argued that growth is predicated on several factors outwith macroeconomic stability, trade liberalization or labour market flexibility.<sup>35</sup> Some of these other factors consist of the role of institutional structures, along with transparent governance of the market forces that demand more consideration. This will be considered in the section that deals with the nexus between competition policy and regulation.

In addition, before all the issues raised earlier could be reasonably dealt with, this thesis will examine briefly the issues of growth, development and multiplier and their significance in resource allocation and economic policy. This will provide a background to the examination of the concept of 'resource curse', often viewed as a consequence of the misallocation of resources in resource-dependent countries such as Nigeria. According to Ross, 'resource curse' literature implies that oil has a negative multiplier effect<sup>36</sup> and, in support, this thesis argues that the issue of competition policy should feature prominently in any remedy that might be applied to correct the situation.

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<sup>35</sup> H. Borat and R. Cassim, 'The challenge of growth, employment poverty, in the South African economy since democracy: an exploratory review of selected issues' (2004) 21 *Development South Africa*, 7.

<sup>36</sup> M.L. Ross, 'Nigeria's oil sector and the poor' Paper prepared for the UK Department for International Development Trade, May 2003. Published at <http://www.polisci.ucla.edu/faculty/ross/NigeriaOil.pdf>. Last visited on 30th March 2009.

### 2.4.1 Economic Growth

Economic growth has been defined ‘as an increase in the real terms of the output of goods and services that is sustained over a long period of time, measured in terms of value added’.<sup>37</sup> There have been different theories on economic growth, from the classical economists to the neo-classical economists. David Ricardo, a classical economist, stands out as one of the notable writers on growth theories. He postulated that growth is terminal; that is, it is not likely to continue ad infinitum.<sup>38</sup> The neo-classical position is that a growing economy is not inherently terminal or unstable, but with a given technology, an economy would tend to grow with full employment, which could only be limited by the rate of growth of its labour force.<sup>39</sup>

Amidst the different positions on growth theory, the consensus is that economic growth is the major catalyst for achieving long-term increases in living standards.<sup>40</sup> Gains from long-term growth are said to be more beneficial and significantly larger than gains from stabilising business cycles.<sup>41</sup> It is important not to confuse business cycle with economic growth; the former is concerned with the short term fluctuations in an economy, while the latter is concerned with a steady pattern in positive measures which focuses on long-term trends in the economy.<sup>42</sup> Of importance are small differences in growth rates that could also have a strong impact over long-term periods.<sup>43</sup> Since welfare in common parlance is

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<sup>37</sup>P. Chaudhuri, *Economic Theory of Growth* (Hertfordshire: Harvester Wheatsheaf, 1989), 35.

<sup>38</sup> Chaudhuri, note 37.

<sup>39</sup> Chaudhuri, note 37, 66.

<sup>40</sup> R.G. Lipsey and K.A. Chrystal, *Economics* (Oxford: Oxford University Press, 2004), 380.

<sup>41</sup> Miles and Scott, note 32, 36.

<sup>42</sup> Lipsey and Chrystal, note 40, 388.

<sup>43</sup> Miles and Scott, note 32, 50.

simply viewed in terms of living standards, this would be the easiest measure of economic growth for a layperson. This underscores the reason why the present and future levels of growth will continue to either excite or worry everyone. Why should it be so? It is partly because a small increase in the growth rate could really have a significant effect on an economy. What might appear as a small economic growth rate could really have a significant effect in raising living standards over a long period, because growth can continue indefinitely and its impacts could be cumulative.<sup>44</sup>

## **2.5 Peculiar Problems in Resource-Dependent Economies**

Although there is nothing like excess resource endowment, a growing perception among some economists is that rich natural resource endowments are both inimical to development and a hindrance to economic growth.<sup>45</sup> This perception has contributed to the development of concepts such as ‘resource curse’ and ‘precious bane’, which are often used in relation to mineral resource endowments and utilization.<sup>46</sup> This seems like a paradox, because abundant resource deposits should be seen as a precursor to positive developments rather than negative concerns.

Arguments remain whether a ‘resource curse’ exists at all or whether a ‘resource curse’ is only a consequence of imprudent economic management. This could be because there are attendant risks and rewards in resource management; be they primary resources or secondary resources, there would always be risks at all levels of their utilization.

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<sup>44</sup> Lipsey and Chrystal, note 40, 380.

<sup>45</sup> Ahrend, note 10, 1.

<sup>46</sup> Ibid.

Nevertheless, no matter which approach and economic policy is in place, it could significantly affect the ratio of risk to reward in resource utilization.<sup>47</sup>

Given that all developing countries are not alike, either in terms of level of resource endowments or utilization, it could still be argued that most of them that are heavily dependent on earnings from export of primary resources still suffer from the same ailments. These ailments, in particular include price and income volatility, low level of development, internal crises, poor manufacturing sector, civil war, social unrest, rural energy, land tenure, corruption, rent seeking market access and so on. This is as a result of the peculiar features of primary commodities, physical characteristics of developing countries, existing regulatory structures and a few others. For example, some are depletable or non-renewable and some are renewable, which twin characteristics present different concerns such as resource scarcity, optimal depletion, sustainability, external vulnerability, economic volatility, Dutch disease, high level of risk and uncertainty. An attempt will be made to examine the most serious among these problems.

### **2.5.1 Volatility**

One of the consequences of relying on primary commodity is the issue of volatility, that is, demand and price fluctuations. Volatility refers to the feature of a commodity or market which defines how the market fluctuates within a time frame, usually in the short run. Generally the pattern of demand for primary commodities is not stable, which leads to unstable prices and price shocks with grave consequences for development. They make

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<sup>47</sup> See generally, G. Vinter, *Project Finance* (London: Sweet Maxwell, 2005).

development plans more difficult and also generate adverse short-term effects on income, investment and employment.<sup>48</sup> The instability affecting demand and prices of primary resources is otherwise referred to as economic volatility and it impacts on all countries, but it is felt more by countries that are heavily dependent on income from the export of primary commodities.<sup>49</sup>

The result of a study involving 92 countries shows that there is a negative relationship between growth and volatility.<sup>50</sup> Natural resources like oil, gold and platinum have low price-elasticities of supply and as a result are prone to volatility. For example, within first quarter of 2004 and the last quarter of 2005 the price of crude oil was very volatile, although exhibiting a high price to the benefits of export countries and detriment of importers. This resulted in a major shift in the budget balances of most developing and emerging economies that are resource-rich. This prompted the argument that their relationship with international creditors would have to be redefined in order to reflect changes in economic circumstances.<sup>51</sup> They have had to pay high premiums for their borrowings, but with the increasing oil prices, their fortunes have started changing. If the reverse was the case and price of oil starts to fall drastically, this will affect the economy negatively. This underscores why resource revenue could be less attractive to risk-averse international credit lenders. The impact of volatility would be felt more by a country that depended largely on resource revenue; Nigeria is a typical example here. It has been

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<sup>48</sup> Food Agriculture Organization (FAO), 'Dependence on single agricultural commodity exports in developing countries: magnitude trends' Published at <http://www.fao.org/DOCREP/005/Y3733E/y3733e0d.htm>. Last visited on 30th March 2009.

<sup>49</sup> Ross, note 23.

<sup>50</sup> G. Ramey and V.A. Ramey, 'Cross -country evidence on the link between volatility growth' (1995) *American Economic Review*, 1138-1151.

<sup>51</sup> P. Munter, 'Oil revenues lift debtor nations' fortunes,' *Financial Times*, 25 June 2005, 21.

established that 95 percent of Nigeria's foreign income comes from the proceeds of its oil and gas trade, which stands as the most primary resource-dependent country in the world.<sup>52</sup>

Nevertheless, because of sophisticated financial devices like hedging, future contracts and many others, it is possible to guide or manage the impacts of resource price volatility. Hausmann and Rogobon<sup>53</sup> argue that the issue of volatility is an affordable nuisance that could not reasonably be called a curse and might not be fatal as was initially feared.<sup>54</sup> In brief, it could be argued that, with the increasing globalisation of the world economy and its antecedent impacts, it might be difficult to sustain the argument that any significant welfare loss would result from resource price volatility. This might apply to economies which are well defined and supported by the necessary market structure and political discipline, but it is unlikely to expect the same result in most developing and emerging economies that lack the necessary economic and legal framework to manage the shock.

Commodity price movement in the international market largely determines the incomes accruable from primary commodities. This is influenced not only by the level of present demand and supply but also by global politics. For instance, the price of oil since 2006 has been on a record increase, following the war in Iraq and production disruptions in places such as Nigeria and Venezuela. This instability affecting demand and prices of primary resources is otherwise referred to as economic volatility, and it impacts on all countries,

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<sup>52</sup> Ross, note 23.

<sup>53</sup> R. Hausmann and R. Rogobon, 'An alternative interpretation of the resource curse: theory policy implications' Working Paper No.9422 (Cambridge, Mass.: National Bureau of Economic Research, 1982), 10.

<sup>54</sup> Ahrend, note 17, 1.

particularly those that are heavily dependent on income from export of primary commodities.<sup>55</sup> Nevertheless, the severity of the impacts varies from one country to another, depending on the level of that country's dependence and other factors that could help to cushion the effects. These effects could be either negative or positive, or both in some instances. These are often manifested in the quality of governance and the delivery of governmental obligations in the affected societies. Notable examples include various incidences of abandoned projects and projects that took much longer to complete than should have been the case. A common explanation for this has always been that the governments have been unable to meet their obligations because of cash constraints occasioned by continual falls in government revenues. This supports Ross's assertion that 'the volatility of the oil sector also produces volatility in government revenues.'<sup>56</sup>

Volatility affects welfare, and the poor in particular are the most vulnerable to it because they are affected most by all the changes in an economy and governmental policies. Even when the impact of economic volatility is positive in the form of increasing commodity prices for an exporting nation, this could still translate into serious economic problems unless the shocks are prudently managed. In most cases, the windfall or extra revenues could be wasted for one reason or another. One of the reasons is that some governments find it difficult to be effective in the face of increasing revenues because there is a limit to which they can grow in the short run, and the presence of the windfall could lead to laxity in managerial compliance as well as an increase in rent seeking,<sup>57</sup> which could manifest itself in malpractices such as bid rigging, inflation of contract prices and so on. The

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<sup>55</sup> Ross, note 23.

<sup>56</sup> Ross, note 23, 4.

<sup>57</sup> Ross, note 23.

windfall could also encourage political patronage and corruption in an economy system lacking transparent guidelines that monitor its fiscal and monetary policies.

### **2.5.2 The Dutch Disease**

The presence of a natural resource or wealth may somehow have debilitating effects or result in a sectoral misallocation of resources, as well as causing overall macroeconomic imbalances in the economy of a nation.<sup>58</sup> This is often called the ‘Dutch disease’ and it could be compared with the ‘sudden wealth syndrome’. The Dutch disease could happen when the export of natural resources is increasing at a great rate without a corresponding increase in exports from the other sectors of the economy. It has been observed that, since 1980, countries that were dependent mainly on oil or other natural resources have poor economic performance compared with countries that are less dependent on oil or other natural resources.<sup>59</sup> Table 1 below lists some countries in the former group. Saudi Arabia, Nigeria, Venezuela and Zaire are examples of resource –dependent countries on one hand and Indonesia and Australia example of resource-rich countries but with less dependence on resource revenues on the other hand. The economies of the latter group are much more diversified.

#### **(Fuel Exports as a Percentage of Total Exports)**

1	NIGERIA	99.6
2	ALGERIA	97.2

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<sup>58</sup> Bruno and Sachs, note 2, 1.

<sup>59</sup>Haussmann and Rigobon, note 53, 4.

3	SAUDI ARABIA	92.1
4	IRAN, ISLAMIC REP	88.5
5	VENEZUELA, RB	86.1
6	AZERBERJAN	85.1
7	OMAN	82.5
8	TURKMENISTAN	81.0
9	SYRIAN ARAB REPUBLIC	76.3
10	BAHRAIN	71.0
11	TRINIDAD and TOBAGO	65.3
12	NORWAY	65.3
13	KAZAKHASTAN	53.9
14	RUSSIAN FEDERATION	51.3
15	ECUADOR	49.4
16	COLOMBIA	41.4
17	PAPUA NEW GUINEA	28.8
18	INDONESIA	25.4
19	AUSTRALIA	21.9

**Table 1: Twenty Most Oil-Dependent Countries, 2000.**

Source: UNCTAD-TRAINS database (United Nations Conference on Trade and Development Trade Analysis and Information System).<sup>60</sup>

An increase in resource-based revenues or a tradable asset, for example oil, will lead to an increase in demand for all goods including both tradable and non-tradable goods.<sup>61</sup> That is, it would be necessary to import more tradables and to satisfy the demand for non-tradables by domestic production.<sup>62</sup> By implication, this will generate an increase in demand for both types of goods, and the resultant increase in non-tradables will lead to a shift in the home-market equilibrium.<sup>63</sup> In addition, to accommodate the changes, there would have to be a reallocation of resources, factors would be moved out of the tradable sector for utilization in the non-tradable, which will partially meet some rise in demand for non-tradables, while the remaining rise in demand would be offset by a likely rise in the relative price of non tradables. However, the rise in demand for tradables would have to be satisfied by increased imports. This is expected to have a multiplier effect on the economy, particularly as it would lead to a contraction in the non-resource tradable sector as a result of expansion of production for the non-tradable demand increase.<sup>64</sup> This is what has been termed the Dutch disease, and dissenting opinions abound warning us not to refer to the

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<sup>60</sup>This is available at <http://www.unctad.org/trains/index.htm>. Last visited on 30th March 2009. See Ross, 'Nigeria's oil sector and the poor', note 36.

<sup>61</sup>Hausmann and Rigobon, note 53. 4.

<sup>62</sup>Bruno and Sachs, note 1, 4.

<sup>63</sup>Ibid.

<sup>64</sup>Bruno and Sachs, note 1, 4.

phenomenon as a disease.<sup>65</sup> Rather, a careful analysis will reveal this is a consequence of inefficient resource utilization.

### **2.6.3 Rent Seeking Theory**

Another explanation or theory that has been proffered for the slow rate of growth among many resource rich countries is that the emergence or sudden discovery of resource wealth tends to make societies less entrepreneurial.<sup>66</sup> When a society becomes less entrepreneurial, it is not unlikely that its businesses become less innovative, less competitive and are wont to engage in certain types of behaviours that will undermine consumer welfare. It could be argued that, because there is a large amount of new wealth at the disposal of the government, businesses and individuals tend to become less prudent, less management conscious and will engage in rent seeking activities that are debilitating to the economy; ‘appropriating wealth rather than creating wealth’.<sup>67</sup> Some practical examples of this include inflating contract costs, an increase in the incidence of uncompleted projects, engaging in money consuming activities that do not bring commensurate economic value to the economy,<sup>68</sup> having lax regulatory authorities and increasing the commissioning of large capital projects that are often called elephant projects.<sup>69</sup>

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<sup>65</sup> Sweder Van Wijnbergen, ‘The Dutch disease: A disease after all?’ (1984) *The Economic Journal*, 41-55.

<sup>66</sup> Hausmann and Rigdon, note 53, 7.

<sup>67</sup> Bruno and Sachs, note 1, 7.

<sup>68</sup> Examples of this include hosting of large sporting events primarily to showcase the wealth and splendour of the country and socio-cultural events like the Festival of African Arts Culture in Nigeria in 1977.

<sup>69</sup> They are called ‘elephant projects’ because of the enormous costs involved the argument that they are not really necessary to be undertaken.

Further, another problem that has been associated with this issue of rent seeking is ‘the presence of common-pool problems or uncertainty over property rights over the resource income’.<sup>70</sup> It should be recalled that one of the problems that could affect resource allocation is the lack of clear and defined property rights which could lead to conflicts, social unrest and unnecessary agitation. One significant effect of this is that it tends to lead to low growth as a result of inefficient utilization of precious time and resources that will be diverted to conflict management and propaganda in order to keep stakeholders happy. A vivid example of this is the ongoing derivation formula debate on resource income allocation in Nigeria. The inhabitants of the oil producing regions, particularly in the Niger Delta of Nigeria, have for a long time been asking for a larger share in the oil income and for more infrastructures.<sup>71</sup> They claim that the area has been neglected by the government and that the oil firms involved in the area have neither carried out any meaningful corporate responsibilities in the area nor followed the best standard practice in their operations, the effects of which they argue have continued to impact negatively on their environment and lives.

In fact, between November 2005 and March 2006, there was a series of violent acts in the area culminating in the abduction of some of the oil companies’ expatriates by some militants groups in the area. On economic terms, the loss is enormous and might not be easy to quantify. One should consider various cases of intentional destruction of pipelines by restive militant youths, revenue losses occasioned by the various disruptions, loss of

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<sup>70</sup> Bruno and Sachs, note 1, 7.

<sup>71</sup> See for general background I. Oguine, ‘Nigeria’s Oil Revenues the Oil Producing Areas’ CEPMLP Journal Vol 4, 1999, Published at <http://www.dundee.ac.uk/cepmlp/journal/html/vol4/article4-10.html>. Last visited on 30th March 2009.

time in contract execution, which could lead to serious pecuniary damage claims and loss of lives. While this thesis agrees that rent seeking is a distortion that leads to inefficiency in resource allocation, it refrains, however, from subscribing to the notion that rent seeking in this instance portrays an underlying curse; rather, the thesis argues that it is political will and discipline that are lacking. Although this is not peculiar to resource-rich countries only, it is an ill that could affect any society, but the presence of political will and discipline that takes into cognisance prudent managerial and sustainability issues will do well both to protect against and cushion the effects of probable future losses from resource income, and also be able to contend against any root cause of unrest or social discontent towards resource income allocation formulae among stake holders.

#### **2.5.4 Corruption**

Corruption is often defined as ‘a behaviour which deviates from the normal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence’.<sup>72</sup> This definition views corruption as a misuse of public power for private benefit and is a global problem but in developing countries this is seen as one of the major causes contributory to their levels of low economic development.<sup>73</sup> The role actors in corruption in resource-dependent countries comprise the resource field operators, government officials and some members of the public.<sup>74</sup> Although there is no formal statistic to support this assertion, this is a common knowledge shared by many people in

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<sup>72</sup> J.S. Nye, ‘Corruption and political development: a cost-benefit analysis’ (1967) LXI American Political Science Review, 26.

<sup>73</sup> G.J. Yadav, ‘Corruption in developing countries: causes and solutions’ Published at <http://www.patelcenter.usf.edu/assets/pdf/IPSA-Yadav.pdf>. Last visited 30th March 2009.

<sup>74</sup> Thisday Newspapers, ‘Nigeria and other oil-producing countries: A comparative report’ Published at <http://www.thisdayonline.com/OILREPORTNEW.pdf>. Last visited on 4th May 2009.

these areas like Nigeria. Amongst many other cases, a notable incidence in relation to this concerns tax evasion/fraud allegations against Chevron Oil I Company in Nigeria.<sup>75</sup> The problem of corruption is endemic in many of the developing countries that it is not difficult to see its correlation with economic efficiency and development.

A positive correlation of this is a great impediment to economic development, but this thesis argues that there is an urgent need to pay less attention to the economic and political personae involved rather effort should be geared towards building an economic policy system that will promote competitive market discipline and transparency. Achieving a competitive economy requires not just appropriate economic policy that promotes competition but appropriate laws and an effective judicial system are required, else enforcement of contractual rights and sanctions against deviation from the rules would prove difficult in presence of official and judicial corruption. This will invariably impede development. In support of this view is the assertion by Adam Smith that ‘a factor that greatly retarded commerce was the imperfection of the law and the uncertainty in its application’.<sup>76</sup>

### **2.5.5 Land Tenure**

The issue of land tenure is one of the major problems in many resource-dependent developing countries because this defines access to land and the utilization of the resources attached to land. This is also particularly problematic because many of the developing

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<sup>75</sup> M. Oduniyi, ‘Unveiling Nigeria’s \$10.8bn tax saga’ Published at <http://www.gasandoil.com/goc/company/cna53526.htm>. Last visited 30th March 2009.

<sup>76</sup> A. Smith *Lectures on Jurisprudence* (Oxford: Oxford University Press, 1978), 528.

countries do not have well defined property rights that are at a balance with the traditional rights people are wont to exercise over land.<sup>77</sup> This has continued to be a source of economic, political and social friction in many resource-dependent countries. The political problems in the Democratic Republic of Congo have continued to be defined by the issue of access to land and the mineral attached thereto. Efforts to modernize land tenure and ownership in many of the resource-dependent developing economies have met with little success in the last two decades.

However, for developmental purposes, there must be easy access to land which makes it marketable and enhances its utilization by which it can contribute to economic development, especially since small landholdings might not allow entrepreneurs to acquire land at a scale that allows maximum utilization of the other factors of production. As a result every land tenure reform must seek to achieve a balance in access to and use of land by the masses especially for agricultural and industrial use, recognition of traditional land tenure and uniformity in the application of the rules.<sup>78</sup> This will then make land only marketable but allow its maximum utilization.

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<sup>77</sup> L. Armitage, 'Land resource management and customary title in *Papua New Guinea: issues and prospects*, in M. Al-Dabbagh and P. Buschenhofen (eds.), *Proceedings of the 2nd Huon Seminar – Resources for Science and Technology in Development*, PNG University of Technology, Lae, PNG., 194.

<sup>78</sup> In Uganda land marketability was one of the key driving forces in its land reform process in the 90s. Chapter 15 of the Constitution of 1995 on Land and Environment and the Land Act 1998 were developed with one of the major objectives being the enhancement of land in order to promote investment and thereby contribute to the value of the area involved.

### **2.5.6 Access to Energy**

The energy markets in many developing countries do not function efficiently and a considerable portion of their rural population does not have access to electricity, oil and gas.<sup>79</sup> This has continued to impact negatively on the economies of most developing countries because inefficient energy markets hinder economic growth and development, and thereby lead to low living standards. The inadequacy of energy is compounded by the continual growth in the population of developing countries and their heavy dependence on biomass (such as wood and charcoal) which are less efficient than other energy sources such as petroleum and gas. Any desire for a robust competitive economy with active industrial sectors requires an efficient modern energy sector, which can only be sustained with a well-articulated energy policy, efforts are still lagging behind in most developing countries in this regard. How to sustain energy security remains a defining issue in the EU despite the sophistication of its energy markets.<sup>80</sup>

### **2.6 Other Problems**

Given the peculiar problems discussed in the preceding section, resource-dependent countries are more prone to anti-competitive practices. The combination of these problems will aggravate other economic problems particularly restrictive agreements, merger activities, monopoly and abuse of dominant position, weak institutional capability and low level of infrastructural development. Although there is little or no literature to support this claim, the link between the two sets of problems constituting the bane of the low economic

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<sup>79</sup> D.F. Barnes et al., *Tackling the rural energy problem in developing countries* (June 1997) IMF- Finance and Development, 11.

<sup>80</sup> See P. Belkin, *The European Union's Energy Security Challenges* (CRS Report for Congress, January 2008).

development in resource-dependent countries could be deduced from the foregoing examination.

## **2.7 Alternative Explanation and Remedies**

Although there are still other consequences that can arise from a strong dependence on the export of primary commodities, yet there are other remedies or alternative explanations for these consequences. For instance, Hausmann and Rigobon offer an alternative interpretation of the resource curse. They argue that ‘it will arise from an interaction between specialization and financial market imperfections’.<sup>81</sup> The basis of their argument is that on one hand a specialized economy with volatile resource revenue would be prone to a volatile real exchange rate, and on the other, a diversified economy will have a constant real exchange rate. This is because a diversified economy with a significant non-resource tradable sector will be able to withstand shocks more than a specialized economy.<sup>82</sup> Adjusting the structure of production in the former could be a way out, while the latter would have to resort to expenditure switching to absorb the shocks. This explanation reflects to some extent what happened in Nigeria till the late 2006. However, this argument could still run into some problems. One is that the law of comparative advantage could be a reasonable basis for specialization in some economies. Thus achieving the right balance might be what is required to ensure optimal utilization and equilibrium in the economy concerned. Another problem is that, while Hausmann and Rigobon recognise that financial imperfections could lead to the problem of resource curse, they failed to acknowledge in the formulation of their model that there are other factors

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<sup>81</sup> Hausmann and Rigobon, note 53, 14.

<sup>82</sup> Ibid., 32.

that could lead to imperfections in an economy, which would invariably lead to inefficient allocation of resources and thereby cause serious budget imbalances, and also deter growth and development.

In essence, it could be argued that the lack of a clear market regulatory structure and focus on competition policy as a means of driving the economy towards constant level of growth and development seems to account for at least some of the ills associated with natural resource endowment. There must be a clear goal to improve consumer welfare with the available resources. Porter's position aligns with this argument. He argues:

The principal economic goal of a nation is to produce a high and rising standard of living for its citizens. The ability to do so depends not on the amorphous notion of "competitiveness" but on the productivity with which a nation's resources (labour and capital) are employed...It depends on both the quality and features of products (which determine the prices they can command) and the efficiency with which they are produced.<sup>83</sup>

Consequently, promotion of national competitiveness in an economy has been advocated as another way to manage effectively a country with a large resource base. National competitiveness implies promotion of national productivity.<sup>84</sup> National competitiveness requires that businesses in an economy develop capabilities in more and more sophisticated industrial sectors (like pharmaceuticals, petrochemicals, manufacturing of high precision

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<sup>83</sup>M.E. Porter, *The Competitive Advantage of Nations* (With a new introduction, New York: Palgrave, 1998), 6.

<sup>84</sup> *Ibid.*, 11.

materials, mechanical devices, etcetera) and not to concentrate in maximizing the advantages available in the most endowed sector only. It is not difficult to imagine the likely reasons for this. One, economic conditions are not static. Two, sustainable growth and development demand that an economy must regularly upgrade itself.<sup>85</sup> Thus productivity must cut across all sectors of an economy. Germany's success as a developed and rich economy seems to be a result of the productivity of its highly diversified economy.<sup>86</sup>

A further justification is that common empirical evidence will reveal that economic conditions are not static; an economy richly endowed with a particular resource might only be able to enjoy its position of advantage for a relatively limited period. If new technological advances bring about either cheaper methods of exploiting resources that were difficult and earlier considered uneconomical to exploit, or production of synthetic alternatives, then this relative advantage could be lost. This will then have grave consequences, as the literature on resource curse or the Dutch disease suggest, especially among developing countries that rely heavily for a large percentage of their national income on export earnings from primary commodities or natural resources.

Nevertheless, the factual reality of competition laws and policies as either an alternative or remedy to the consequence of resource abundance involves serious implications and challenges for shaping competition law and policy in an a resource-dependent developing economy like that of Nigeria. One such is that the different economic structures and tools

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<sup>85</sup> Ibid., 6.

<sup>86</sup> Ibid , 16.

often used as bases for antitrust or competition analysis (that is, perfect competition, monopoly and oligopoly) are subject to certain limitations.<sup>87</sup> The EC competition policy and USA antitrust law have largely been driven by governmental control of business concentration and economic power, changes in both the economic and legal spheres of life of the affected societies are bound to be reflected in competition law developments. For instance, in the USA, antitrust laws have undergone, since 1890, varying levels of interpretations.<sup>88</sup> Judicial interpretation of competition matters can be consequently be fraught with grave difficulties when the applied interpretations are not situated in an appropriate empirical and economic context or in a context appropriate to them.

## **2.8 Conclusion**

Resource-dependent developing countries, while sharing the same or most of the problems typical of developing countries, also have to confront a range of additional issues and problems that require tailor-made economic policies and reforms. The most critical among these problems include price volatility, the Dutch disease, rent seeking, access to energy and corruption. These problems will further provide fertile soil for other core competitive concerns such as anti-competitive agreements, abuse of dominance and merger related problems especially given that many of these countries have either privatised or begun the liberalisation of their economies. Thus this chapter observes that there is a strong nexus between competition policy and many foundation of economic development and therefore concludes that the particular problems of resource-dependent countries constitute a great

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<sup>87</sup> The use of economic tools in competition modelling or analysis cannot be accepted unconditionally, that is, without some degree of caution. For instance, different economists can analyse and interpret the same set of data in many different ways ; as a consequence, economic generalization can obviously lead to mistakes. In fact, one should be careful not to stick overly to categorization of the Harvard and Chicago school in competition policy jurisprudence.

<sup>88</sup> E.T. Thomas and H. Hovenkamp, *Antitrust Law Policy Procedure: Cases, Materials, Problems*, (Virginia, U: Lexis Law Publishing, 1999), 1.

hindrance to their ability to achieve economic development which undoubtedly calls for a more pragmatic approach that targets not only actors and behaviours inimical to development, rather an approach that focus on a balance between the economic systems and process, and the actors as well as behaviours.

As a consequence, the thesis argues that enacting a competition policy as a complement to other economic reforms is a major requirement toward building a competition culture capable of enhancing sustainable economic development in resource-dependent developing economies. However, this chapter also recognises that enactment of competition law and policy in a resource-dependent country will result in different political and economic challenges which are not unusual as experiences in other matured competition regimes will reveal.<sup>89</sup>

Finally, given that competition law and policy is yet to be fully enacted and practised in any resource-developing country, there is yet to be any formal empirical attempt to assess how effective competition law and policy will impact on their economic development, so this chapter along with the remaining part of this thesis aim to provide some insights into how competition law, and policy will evolve in practice especially in terms of the focus of the laws, institutions involved and policies.

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<sup>89</sup> Ibid.

## **Chapter Three**

### **3.0 Theories of Competition and Resource**

#### **3.1 Introduction**

This chapter aims at exploring different theories and objectives of competition law and policy with a view to determining whether a multiple objective or a single objective competition law and policy is the appropriate legislative instrument within the context of its circumstances and development objectives as highlighted in the research problem. Since it is generally accepted that competition does not create markets but promotes efficient allocation of resources in markets, the question arises as to whether the same standards of competition could be applied in resource-dependent economies and specifically, whether the efficiency goal should be the sole focus of such legislation or should it have a multiple-objectives competition law and policy especially in the absence of efficient markets.

Chapter two has shown that resource-dependent countries have some particular economic problems which contribute to market imperfections and invariably could exacerbate different anticompetitive behaviours that could arise in any economy. As a result, bearing in mind the circumstances of resource-dependent economies and the impact these imperfections, along with other anticompetitive concerns, have on their development, they require specific economic reforms or solutions. Amongst these economic solutions is competition law and policy.

The previous chapter also concluded that in view of the characteristics of these economies it will not be suitable to adopt any standard competition model; rather they must enact competition law capable of fitting into their economic circumstances. This might involve

enacting a broad based competition law and policy, with multiple objectives. Despite the growing importance of competition law and policy globally, there still remains a lack of consensus about its objectives among developing countries. Even among countries with a well established tradition of competition law and policy this issue has continued to elicit further arguments.<sup>1</sup> This provides a basis for a detailed analysis of standards of competition law using Nigeria as a proxy for resource-dependent developing countries. However, an examination of the highlights of the proposed Federal Competition Bill in Nigeria shall be done in the next chapter of this thesis.

In addition, rather than offer definite conclusions at this stage, it aims to explore different approaches to the issue of resource utilization and price system as a platform to both discussing, generally, economic problems and, specifically, competition law and policy as it relates to different objectives within the context of resource-dependent developing countries and their quest for economic development. Thus it examines objectives of competition law and policy from different perspectives and then tries to see how the particular problems of resource-dependent countries could be addressed by any of these objectives especially that a 'one size fits all approach' will not produce the desired result.<sup>2</sup>

Furthermore, this section describes and evaluates the major conceptual linkages between the objectives of competition law and policy, the factors that are thought to influence particular objectives and theories of competition. This will show how economic, political and constituted regulatory factors will interact to define the path of competition in Nigeria.

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<sup>1</sup> OECD, 'The objectives of competition law and policy and the optimal design of a competition agency' (2003) 5(1) OECD Journal of Competition Law and Policy, 4.

<sup>2</sup> Ibid.

Thus from the political perspective, this examination will assist in determining whether competition law and policy should mainly be concerned about promoting economic welfare in such a way that the behaviour of firms guarantee allocative and productive efficiency or that competition law and policy can be used to achieve a multiplicity of goals, such as promotion of employment, promotion of national champions, protection of small firms, amongst others. Often found between these two positions of competition law and policy, it not unusual to find other discrete intermediate positions such as consumer welfare, corruption and transparency issues.<sup>3</sup> From the economic perspective is the issue of those who see competition as being determined either by the structure of the market and those who takes a less deterministic approach; that is, those that argue that the structure of the market is not sufficient to determine how firms will act rather there are other factors to be considered. These groups are often categorised as the Harvard and Chicago school respectively.<sup>4</sup> The last factor is the regulatory factor, the shape and substance of a country's competition agency will go a long way in determining how effective the enforcement of its competition goals will be. This particular issue will be examined in more detail in Chapter Five.

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<sup>3</sup> G. Monti, *EC Competition Law* (Cambridge: Cambridge University Press, 2007), 5.

<sup>4</sup> The crux of the Chicago school argument is that efficiency, that is allocative efficiency, subject to the dictates of the market, should be the sole goal of antitrust. The Chicago school argues that the efficiency goal is non-political and ideology-free: as such it is in the first place rooted in microeconomics. This has been attacked as an ideological claim; not devoid of non-economic concerns but underpinned, as to purpose, by an endeavour to achieve balance of various welfare concerns, such as employment and protection of infant industries. The position of the Chicago school has been additionally criticized for relying overly on too many assumptions and unprovable facts, on preference more on long-term than on short-term effects and for not seeing competition. In contrast the tenets of the Harvard school are concerned with structural rather than behavioural remedies. This is conceptualised as what has been called the S—C—P paradigm, according to which, the structure of the market (S), determines the firm's conduct (C) which in turn also determines, at the level of the market, the performances (P) focusing on profit, efficiency, growth and many others. While the position of the Chicago school has become the most preferred view, the S→C→P paradigm continues to remain an important tool in antitrust analysis.

Before examining theories of competition and its objectives, it is in order to define, describe and consider some of the key concepts and terms relevant to the theme of this thesis. These include resource utilization, efficiency as an objective of competition policy, the price system and a few others.

### **3.2 Definitions, Descriptions and Justifications**

An early clarification of definitional matters can help to prevent what Bork has identified as a ‘fruitless discourse of men talking past each other as a result of the different ways judges have used the word competition’.<sup>5</sup> Cook et al., lend support to this argument, explaining that:

Despite the centrality of the notion of competition in economic theory and its practice, its meaning and the ways in which it is perceived to work and contribute to development, differ widely among theorists, policy-makers, bureaucrats and business people.<sup>6</sup>

Clarification provides a guide for the form and contents of competition law to be enacted. In addition, it is not least important to set properly the ambit of the definition of competition and other concepts such as efficiency, because the depth and weight carried by statutory provisions or rules on competition are not easily discernable, despite the fact that competition rules are usually brief and easily readable compared with clauses in other statutes or enactments.<sup>7</sup> The elimination of theoretical or other probable ambiguities concerning the definition and nature of competition helps prevent confusion in debates as

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<sup>5</sup>R. Bork, *The Antitrust Paradox: A Policy at War With Itself* (New York, 1978, reprinted with a new Introduction and Epilogue: Free Press, 1993), 7.

<sup>6</sup>P. Cook et al., ‘Competition, regulation, and regulatory governance in developing countries: An overview of the research issues’ Published at

<http://competition-regulation.org.uk/downloads/cooketal.pdf>. Last visited 28th March 2009.

<sup>7</sup>R.A. Posner, *Antitrust Law* (Chicago: University of Chicago Press, 2001), 1.

to what should be the goal(s) of competition. Some of the goals in question will be examined in detail after a brief introduction of the concepts in this part of this chapter.

### 3.2.1 Resource Utilization

Resources are generally recognised as the basis for national security, power and wealth<sup>8</sup> and at the most basic level, food production depends on energy resources.<sup>9</sup> As economies develop, the role that resources play becomes more significant, as was the case, for example in Europe during the industrial revolution, and in contemporary China.<sup>10</sup> Resources on their own neither serve any use nor give any utility; they need to be combined towards the production of certain goods and services, but this utilization process is associated with some basic problems.

The first problem is that in every economy either the government or the economic actors determine what it wants and what it can produce, given the level of resources and aggregate demand in that particular economy. The basic issue again revolves around scarcity, since it is recognised that there would never be enough resources to produce or meet the demands. For example every government must prioritise its demands and choose among competing alternatives. The Federal Government of Nigeria may want to decide whether it is better to embark on a rural road network construction in order to open its

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<sup>8</sup> A.V. Kneese, 'The economics of natural resources', in A.V. Kneese, *Natural Resource Economics*, (Hants: Edward Elgar Publishing Ltd. 1995), 3.

<sup>9</sup> The opening paragraph of the G8 Declaration on Global Energy Security titled 'Global energy challenges' made on 16<sup>th</sup> July 2006, lends credence to this argument. The declaration starts as follows : ( 1) Energy is essential to improving the quality of life opportunities in developing nations. Therefore, ensuring sufficient, reliable environmentally responsible supplies of energy at prices reflecting market fundamentals is a challenge for our countries for mankind as a whole.' Published at <http://en.g8russia.ru/docs/11.html>. Last visited on 30th April 2009.

<sup>10</sup> M. Dutta, 'China's industrial revolution: challenges for a microeconomic agenda,' Published at <http://econweb.rutgers.edu/dutta/FinalPekingUniversityLecture8-10.pdf>. Last visited 30th April 2009.

hinterland for further development, or it might opt to modernise the transport system in the cities and large towns as a way of boosting infrastructure for tourist attraction. The two options will definitely contribute to the economy, but at different levels, and they might not satisfy the same welfare and political objectives.

Arriving at a decision involves a value system, and an economic agent must be able to measure this value based on an objective or a predictable standard. The price system is a big component in this mode of measurement. The price system determines the relative value that is attached by the people to those projects or desired products; generally, price levels determine demand levels.

The second problem which is linked with the first is the determination of what to produce at any point in time, the decision on how to organise available resources to achieve the desired production targets that will satisfy the market will also have to be taken. The decision takes different things into cognisance. For example, it accepts that resources are scarce. While taking into consideration areas requiring more attention the needs would be prioritised and resources shifted or moved among the areas.

The third economic problem or economic decision that is usually considered is how to organise production in an efficient manner, which will maximize the resource inputs. Since profit is a primary focus in production this could only be reasonably guaranteed by efficient production of goods and services. According to Eckert and Leftwich, 'resources are to be valued in the market according to their contributions to the production of goods

and services'.<sup>11</sup>

The fourth problem concerns the distribution of goods and services. This is a key issue that underlies economic conduct in every economic system. An inefficient distribution system could adversely affect the profitability of a firm. The price system determines the decision of what to produce, how to produce it and for whom a product would be produced all together. For instance, for an individual or a firm, distribution of products will be hinged on two factors; these are how these resources could be combined (both in terms of quantity and quality) and the probable price to be paid.

Finally, if resource allocation impinges on profitability, then it will necessarily impact on income distribution. Income distribution depends heavily on resource ownership and efficient utilization of the resources. The issue of resources ownership also has a fundamental relationship with property rights. Ownership could pose a serious problem whenever it is not properly defined; for example many secession problems in international law could have been averted, had property rights been well defined and opened to competitive forces.<sup>12</sup> In a situation where rights and control of the use of natural resources are well defined, this will give room to more transparency and accountability in the exercise of those rights. Since every member of the society is not able to exercise these rights individually they act as control valve to the exercise of those rights by either a few elected officials or un-elected government officials. Thus competition policy could reduce

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<sup>11</sup> R.O. Eckert and M.D. Leftwich, *The Price System Resource Allocation*, (Chicago: Dryden Press, 1988), 20.

<sup>12</sup> P. Collier and A. Hoeffler, 'The political economy of secession' (2006) Published at <http://users.ox.ac.uk/~ball0144/self-det.pdf#search=%22The%20Political%20Economy%20of%20Secession%E2%80%99%2C%22>. Last visited 30th April 2009.

the incidence of rent seeking as a result of problems like common pool and resource income allocation formulae. These will be further examined in the latter part of this thesis.

### **3.2.2 Price System and Welfare**

Since welfare is recognised as being essential for the growth, development and sustainable stability of every society, it follows that to achieve an efficient synergy of these factors, the available resources in any given society must be utilized in such a way as to yield maximum contributions or outputs. Yet human history does not tell us that achieving that target is quite simple. There remain forces that might or might not make them realisable. Man has not been known to always follow prudent management agenda independently; rather scarcity, time and necessity have continued to be the conditioning forces.

Common understanding suggests that every economic agent faces challenges in an attempt to make rational choices in the process of resource allocation, which process involves weighing up marginal costs and marginal benefits. However, the issue goes deeper than how choices are made. The consequences of those choices are very important as well. For instance, it is generally accepted that one of the functions of the price system is the resolution of the problem associated with externalities.<sup>13</sup> It is accepted that markets work well when costs and benefits of goods are well reflected in their prices, but this is not usually the case. Thus an ‘externality exists when the production or consumption of a good directly affects businesses or consumers not involved in buying and selling it and when those spill-over effects are not fully reflected in market prices’.<sup>14</sup> This is a common problem in most developing countries because of heavy involvement of governments in

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<sup>13</sup> R. Dorfman, *The Price System* (New Jersey: Prentice-Hall Inc., 1964), 7.

<sup>14</sup> D. Begg, et al., *Economics* (Berkshire: McGraw-Hill Publishing Co., 2000), 48.

business operations and the fact that many state owned companies enjoy government support in form of grants and final subsidies which allow cross-subsidization and invariably inefficient resource allocation. For instance the problem of energy access in Nigeria is due more to the former culture of government support rather than the energy sector being operated on a fully commercial principle that could sustain investment and consumer expectations in the sector.

Moreover, another problem that comes into consideration along with the issue of externalities when dealing with resource allocation is the problem of social cost. Different studies have shown that the rational approach of weighing the effect and the cost of one party's action against that of another person might not give a desirable welfare result.<sup>15</sup> According to Coase, a desirable option will involve considering the total effect which might comprise various social arrangements within the context in which decisions and choices have to be made.<sup>16</sup>

Some of these problems are interwoven and the resolution of one might offer a partial solution to the resolution of the rest. It is not possible that all of these problems could be totally resolved at one point in time, but the price system will go a long way in offering solutions to them, especially when 'bargaining, contracting and enforcement costs are relatively low'.<sup>17</sup>

Those aforementioned problems in essence constitute the first hurdle necessary to be overcome in resource utilization in every economic system and how well they are handled

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<sup>15</sup> R.H. Coase, 'The problem of social cost' (1960) 3 Journal of Law Economics, 1.

<sup>16</sup> Ibid., 23.

<sup>17</sup> Eckert and Leftwich, note 11, 6.

will also influence the level of productivity in any economy, thus the need for a system or framework that favours free market operation. If this is lacking, competitive and other economic problems are likely to come up and especially in resource-dependent countries with their peculiar characteristics and particular problems. As earlier stated these problems are inimical to economic development. For example, bid rigging, rent-seeking and corruption and so on are hindrances to productive investment which is meant to contribute to economic development. According to Lewis, 'it is the habit of productive investment that distinguishes rich nations from poor nations, rather than differences in the respect accorded to wealthy men.'<sup>18</sup> This assertion supports the argument of this thesis that an abundant or high level of resource endowment is not sufficient for growth and economic development, but a successful operation of the price system, sound economic structure and a vibrant competition policy might be the keys required to open the road to growth and development for developing countries.<sup>19</sup> Lewis went further to say that:

The really significant turning point in the life of a society is not when it begins to respect wealth, as such, but when it places in the forefront productive investment and the wealth associated therewith.

It could be argued that most of the extractive industries around the world have always been serious scenes of economic and competition activities in both developed and developing countries, but to date only a few resource-dependent developing countries could be seen to be displaying a commensurate level of economic development. Consider for instance the early stages of hydrocarbon exploration and development in the US and Europe as

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<sup>18</sup> W.A. Lewis, *The Theory of Economic Growth* (London: George Allen Unwin Ltd., 1953), 28.

<sup>19</sup> A brief incursion into the rise of Japan especially from its war ruins to its bubbling status among developed countries could throw more light on this issue. See generally, V. Argy L. Stein, *The Japanese Economy* (London: Macmillan Press Ltd., 1997).

evidenced in Yergin's book, *The Prize*.<sup>20</sup> The book also highlights some of the competition issues and political schemes often involved in natural resource allocation. There is ample evidence to suggest the positive impacts of the resource abundance in these places.

However, wealth creation is not automatic while one is engaged in production. To succeed in adding value to a combination of resources, strategic steps have to be pursued. Although on a small and subsistence level, individuals could manage to utilize or allocate resources to take care of their needs, but this is subject to changes, especially with regard to a whole economy, in circumstances such as population increase and environmental changes. This method has some shortcomings which include increased pressure on available resources as a result of which other problems might arise. Some of these other problems will include how to define and protect individual property rights, anticompetitive business practices and resolution of disputes. The same might be said for societies at large; this problem might have influenced the substance of an article by Hardin.<sup>21</sup> He observed that in order to accommodate the reasonable expectations of the members of a society, along with the need to sustain available resources the same basic rights to or hold on these resources must be given up for more pragmatic methods.

To this extent, it can be argued that the price system alone is not enough to guarantee an effective resource allocation, especially since certain behaviours incidental to the operation of the price system are inimical to the economy or the welfare of the society.

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<sup>20</sup> See generally, D. Yergin, *The Prize: The Epic Quest for Oil, Money Power* (New York: Simon Schuster, 1990). The novel won a Nobel award for its contribution in showcasing the economic and political impact of the oil and gas endowment on both the resource countries and multinational companies involved in the field.

<sup>21</sup> G. Hardin, 'The tragedy of the commons' (1968) 162 *Science*, 1243-1248.

### 3.3 Theories of Competition Law and Policy

There is a rich literature concerning the theories and enactment of competition law and policy but it is possible for the purpose and interpretation of competition policy to change without any significant change in the law itself. This is due to the flexible nature of the legislation which permits an open ended interpretation.<sup>22</sup> As a result competition matters could be said to go beyond the legislative texts and its interpretation but the specific economic and political policies that is behind the law at the time of its enactment. This informs the consideration of theories and objectives of competition law and policy in this chapter. Further at the outset it is necessary to emphasise that competition policy and competition law are not to be mutually confused in policy debates.<sup>23</sup> Competition policy is economic, concerned with economic goals, structures, conduct, effects;<sup>24</sup> certain tools or instruments for its successful implementation are available.<sup>25</sup> One of them is competition law; which is about legislative intervention in the market, aimed at controlling and eliminating anti-competitive economic behaviour and possible ‘market failure’.<sup>26</sup> It is like regulation, another subset of one of the instruments of competition policy. Competition law has been described as ‘a complex and often highly technical subject, which does not lend itself to easy summary or concise clarification’.<sup>27</sup> Competition law focuses in the first

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<sup>22</sup> Monti, note 3, 3.

<sup>23</sup> S. J. Evenett, ‘What is the relationship between competition and policy and economic development’ (2005) Published at [www.evenett.com/chapters/competitionlawandeconomicdevelopment150305.pdf](http://www.evenett.com/chapters/competitionlawandeconomicdevelopment150305.pdf). Last visited on 30th March 2009.

<sup>24</sup> J. Faull and A. Nikpay (eds.), *The EC Law of Competition*, (Oxford: Oxford University Press, 1994), 4.

<sup>25</sup> The nomenclature adopted in any case should not be a limitation to the achievement of the law rather the focus should be how to make the law effective.

<sup>26</sup> B.J. Rodger and A. MacCulloch, *Competition Law and Policy in the European Community and United Kingdom* 3<sup>rd</sup> ed. (London: Cavendish Publishing, 2004), 1.

<sup>27</sup> D.G. Goyder, *EC Competition Law* (Oxford: Oxford University Press, 2003), 3.

place on the behaviour of private economic agents while competition policy deals more with both private and governmental actions.<sup>28</sup>

The requirements of ‘pragmatic’ enforcement and proper management of competition policy underscores the importance of due regard to economics in competition law implementation. Competition policy or antitrust is not primarily concerned with economics but market power.<sup>29</sup> Competition policy is mainly concerned with the manner and effect of using economic power by private persons on one hand, and the role of competition regimes on the other hand. This informs the need to consider various definitions that have been given to the subject and the intended effects of the goals of competition in some competition regimes.

Introducing antitrust law, Richard Posner highlighted the concern about the definition of competition law and its impact on judicial interpretation:

There are federal antitrust statutes, and they are brief and readable compared to the Internal Revenue Code. But their operative terms ‘restraint of trade,’ ‘substantially to lessen competition,’ ‘monopolise’ – are opaque; and the congressional debates and reports that preceded their enactment and other relevant historical materials cast only a dim light on the intended meaning of the key terms.<sup>30</sup>

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<sup>28</sup> B. Hoekman and P.M Holmes, ‘Competition policy, developing countries and WTO’ (Sep.1999) FEEM Working Paper No.66-99.

<sup>29</sup> F. Ross, *Principles of Antitrust* (New York: The Foundation Press, Inc., 1993).

<sup>30</sup> Posner, note 7.

He has additionally argued that courts in the USA have spent many years interpreting or, perhaps more accurately, supplying their own meanings.<sup>31</sup> Posner's argument that statutes require to be interpreted by courts is in line with the common view that prevailed until the end of the 1990s, to the effect that the ongoing debate on competition policy, though it might appear overheated, is unlikely to cease, rather the debates on competition's ideology reduced in developed countries.<sup>32</sup> Such observations necessarily raise queries and serious concerns. Posner's argument could possibly be supported by the fact that competition issues have phenomenally deep economic roots<sup>33</sup> which constitute a major part of the fabric of every society; which in effect impacts on the allocation of resources.

Competition has also been defined as 'a body of law that seeks to assure competitive markets through the interaction of sellers and buyers in the dynamic process of exchange'.<sup>34</sup> The form of 'assurance' implied in this definition is what Rodgers and MacCulloch also regard as an 'intervention' of competition in the market place in order to fix any problem affecting the competitive process or when market failure arises.<sup>35</sup>

Therefore, it could be argued that competition symbolises the fundamental and essential principle of the modern industrial order (capitalism) which, if removed, could either destroy or significantly transform an economic system. If this applies to developed western countries then it will apply to resource-dependent developing countries bearing in mind

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<sup>31</sup> Ibid.

<sup>32</sup> H. Hovenkamp, *The Antitrust Enterprise: Principle and Execution*, (Cambridge, Massachusetts: Harvard University Press, 2005).

<sup>33</sup> R. Whish, *Competition Law* (London: Butterworths, 2004), 91.

<sup>34</sup> E.T. Sullivan and J.L., Harrison, *Understanding Antitrust and Its Economic Implications* (Newark: Matthew Blender and Co.Inc. Lexis Nexis Group, 2003), 1.

<sup>35</sup> Rodger and MacCulloch, note 26.

their particular economic circumstances that have contributed into their low level of economic development.<sup>36</sup> It is of particular importance to examine theories and description of competition in the next sub-sections. This will allow us to determine whether it is every aspect of competition policy that should be enacted and also to allow us to form a reasonable degree of certainty or predictability necessary in any analysis on competition matters, especially by competition and enforcement agencies.

### **3.3.1 Competition as a Process of Rivalry**

A popular theory of competition is that it is a process of rivalry. Competition is generally understood as the act or action of seeking to gain what another is also seeking to gain at the same time, usually under fair or equitable rules and circumstances: business people may define it as a common struggle or rivalry against other businesses or firms for patronage; it may be envisaged on the basis of other strategies and not necessarily as the basis of strategic price differentials.<sup>37</sup> This aligns with the definition given by Adam Smith describing competition as rivalry in a race to get limited supplies,<sup>38</sup> effective competition has been defined as a rivalry process-taking place for patronage among independent sellers in a market.<sup>39</sup>

The theory of competition by Smith sees competition as a law of nature, which implies, among other consequences, survival of the fittest in a struggle involving individuals as well as groups. A probable consequence of the two forms of struggle or rivalry (between (i)

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<sup>36</sup> I.W. Howerth, 'Competition, natural and industrial' (1912) 22(4) *International Journal of Ethics* 399-419.

<sup>37</sup> F.M. Scherer, *Industrial Market Structure and Economic Performance*, (Chicago: R and McNally and Co, 1970), 16

<sup>38</sup> A. Smith, *An Inquiry to the Nature and Causes of the Wealth of Nations of Adam Smith, 1776*, Published at <http://www.adamsmith.org/smith/won-index.htm>. Last visited on 30th March 2009.

<sup>39</sup> Scherer, note 37, 15.

individuals and/or (ii) groups) can be the elimination of competition resulting in possible cooperation expected from intelligent market participants in order to achieve success in a common struggle against nature.<sup>40</sup> On the face of it, this theory fails to provide any criteria that could be used to gauge the level or intensity of the rivalry and its consequences, all considered to be necessary for effective competition under the given circumstances.

As a point of critique, the absence of clear criteria or benchmark invariably leads to ‘the erroneous conclusion that elimination of rivalry must always be deemed anti-competitive or restrictive to competition law’.<sup>41</sup> This has led to a wrong interpretation of ‘competition’ in the US in the not too distant past.<sup>42</sup> While market share may be of prime importance, in the EU cases involving mergers and acquisitions, would not be blocked outright, that is, without a normatively binding economic and legal analysis.<sup>43</sup> The result of the analysis may be to unveil that the merger involves positively convincing benefits for the consumers parallel to better economic performance and less distortion in competition.

The process of rivalry may not be taken as an adequate description of an ideal theory of competition, because economic processes involve, inter alia, research and development (R and D) and the emergence of economies of scale; these generally tend to promote consumer welfare and competition. Such a development may result in the elimination of rivalry as a consequence of competition; legitimate competition is present in every

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<sup>40</sup> Howerth, note 36, 403.

<sup>41</sup> S. Bishop and M. Walker, *Economics of EC Competition Law: Concepts Application and Measurement*, 1st ed. (London: Sweet and Maxwell), Para 2.10.

<sup>42</sup> Bork, note 5, 58. According to Bork this occurred in the case of *White Motor Co v United States* 372 US 253 (1963).

<sup>43</sup> See, Council Regulation (EC) No 139/2004; (2004) O.J.L 24/1.

economic intercourse between productive and able-to-compete enterprises.<sup>44</sup> A resource-dependent economy might want to exclude certain sectors like the labour market, agriculture and R and D from the effects of competitive system, as these sectors are often neglected in preference of other sectors directly related to the resource sectors which also offer a higher rate of dividends on investment.<sup>45</sup> In essence, if the process of rivalry is accepted as a logical part of effective competition, its consequences presuppose then the elimination of some form of rivalry and the promotion of results in the form of advantages. The advantages need not be sanctioned so long as they lie within the limits of established rules and regulations. Rivalry is not an end in itself so it is important not to wholly identified competition with rivalry, a position enhanced by the writings of the Chicago School, the school debunked the old position before the 80s in the US antitrust that concentration is always bad.<sup>46</sup>

### **3.3.2 Competition as an Absence of Restraint**

Effective competition has been defined as the absence of restraints, which is synonymous with absence of any commercial restraints imposed by law, regulations or any form of contract on a firm's economic ventures.<sup>47</sup> However, such a conceptual approach reflects the presence of a flaw, because all contracts, on which economic activities are hinged, necessarily involve one or another form of restraint. Therefore, an absence of commercial

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<sup>44</sup> Bork, note 5, 58.

<sup>45</sup> Articles 32 to 38 of the EC Treaty subject agriculture to a special regime.

<sup>46</sup> Bork, note 5, 58.

<sup>47</sup> *Chicago Board of Trade v United States* 246 US 231 (1918). In fact this was not the general attitude of the courts during the infancy of the Sherman as the court took a different approach in *Standard Oil Co of New Jersey v United States* 221 US 1 (1911). In this case the court recognised that all commercial contacts impose some form of restraints on trade and so it had to devise 'a rule of reason' to determine whether any specific action was legal under its antitrust laws. An action will be adjudged legal if it only had an ancillary consequence of reducing competition.

restraints would not be an acceptable definition of effective competition.<sup>48</sup> Many of the decisions of the Court of First Instance (CFI) show that there are other standards apart from an absence of restraints determining what constitutes effective competition.<sup>49</sup>

### **3.3.3 Competition as a State of Perfect Competition**

Another approach to the theory of competition has been to equate it with a situation whereby a single firm is unable to influence the market price independently.<sup>50</sup> This obviously fits the economic model or scenario of perfect competition. The model envisaged is that in a particular market there are many buyers and many sellers; the product is homogeneous; there is access to perfect information by both buyers and sellers; and there are no barriers to entry and exit from the market. The implications of this model can be valid only to the extent that the assumed characteristics of the market exist as real in the real world. It is however not the case that such conditions are obtainable in the real world;<sup>51</sup> therefore, a theory of competition based solely on the analysis of the model in question would not prove to be very useful and practical for purposes of competition policy.

### **3.3.4 Competition as a State of Affairs that Maximizes Consumer Welfare**

The most popular theory of competition is that which sees competition as designating a state of affairs in which consumer's welfare cannot be increased by moving to an alternative state of affairs through the intervention of competition law, which is a state in

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<sup>48</sup> Bishop and Walker, note 41, para 2.09.

<sup>49</sup> Bishop and Walker, *ibid.* See Case C-234/89 *Delimitis V Henninger Brau AG* [1991] ECR I-935

<sup>50</sup> G.J. Stigler, *The Theory of Price*, 3<sup>rd</sup> edn. (New York: Macmillan, 1966), 87-88

<sup>51</sup> Although it is possible to have one or two of the conditions present in a setting, it is unusual to have a convergence of all those features.

which none of the parties could be made better off without someone being made worse off. This state is often referred to as Pareto optimal, which is solely premised on the concept of productive and allocative efficiency in welfare economics.<sup>52</sup> The types of efficiency make up the total efficiency that determines the level of society's economic wealth otherwise called 'consumer welfare' by the Chicago School.<sup>53</sup> Consumer welfare is often argued to be optimised or maximized by efficient resource allocation. The whole essence of antitrust can mainly be described as an effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or net loss to consumer.<sup>54</sup>

However, consumer welfare is not tantamount to 'consumer well-being' as this suggests ordinarily that it is for the enhancement of consumer interests. Consumer welfare envisaged here is economic efficiency and is not concerned with protection of consumer interests. A close look at many of the competition statutes will reveal that consumer welfare theory does not constitute the only foundation of their statutes.

Consequently, it is very difficult to advocate an ideal competition law based on just one of the above cited definitional perspectives or theories; yet it is clear that competition is based on factors, forces and outcomes all produced by a market characterized by certain features that lend themselves to real life situations and possible regulatory intervention. However, bearing in mind the circumstances of the resource-dependent countries any competition theory or theories favoured must address at least four cardinal issues as follows: First, it

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<sup>52</sup> A. Jones and B. Sufrin, *EC Competition Law: Text, Case, and Materials* (Oxford: Oxford University Press, 2004) 10

<sup>53</sup> See note 4.

<sup>54</sup> Bork, note 5.

must address the need to prevent firms from entering any vertical or horizontal agreements which are likely to restrict competition between themselves or with other parties. Second, it will need to prevent the abusive use of market power by either a private or government monopolist. Third, it will need to ensure that where perfect competition is not attainable there is an alternative workable competition.<sup>55</sup> Fourth, it will need to pay attention to mergers and acquisitions that may affect its market structure. In short these issues will need to be clarified within the context of other issues, which is the need to settle the definite goals or objectives a competition law and policy intend to pursue leaving them to what Bork calls ‘a cornucopia of social values, all of them rather vague and undefined but infinitely attractive.

### **3.4 Objectives of Competition Law**

Objectives of most competition law regimes are not often stated expressly in the statutes rather they are often inferred from the legislative provisions and judicial decisions consequent to them.<sup>56</sup> There are often many inter-country differences in the substance and scope competition law and policy.<sup>57</sup> These are usually revealed by the objectives as contained in the legislative text across countries and the judicial interpretation of these texts. The importance attached to a competition law’s main objective depends on two considerations. The first involves the intermediate and ultimate goals of the law, which is also conditioned by the expected benefits.<sup>58</sup> The intermediate goals are often based on the promotion of efficiency, it could be short term and related solely to economic principles

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<sup>55</sup> For a general review see, J.M. Clark, ‘Toward a concept of workable competition’ (1940) 30 *American Economic Review*, 241-256; S.H Sosnick ‘A critique of concepts of workable competition’ (1958) 72 *Quarterly Journal of Economics*, 380-423

<sup>56</sup> C.D. Ehlermann and L.L. Laudati, (eds.), *European Competition Law Annual 1997: Objectives of Competition Policy* (Oxford: Hart Publishing, 1998), ix.

<sup>57</sup> R. Adhikari and M.Knight-John ‘What type of competition law and policy should a developing country have?’ (2004) *South Asia Economic Journal*, 3

<sup>58</sup> Ehlermann and Laudati, note 56.

while the ultimate goals often comprise economic and non economic factors aimed at general development of an economy and the focus or approach it wants to take. The second consideration is the approach that competition law takes to pursue its objective. This could be a consumer well-being approach or a public interest approach or a total welfare approach. The first approach, consumer well-being approach, prohibits the exercise of market power through collaboration, conducts or transactions that lead to reduction in output and price increase.<sup>59</sup> This model considers seriously and argues against wealth transfer, especially from consumers to producers. The public interest approach is the model that gives consideration to other non-economic factors along with economic efficiency in its assessment and promotion of consumer welfare or competition policy. The last, which is the total (economic) approach, considers the main goal of antitrust as the maximization of wealth by allocating resources primarily based on the market forces. This has become the most dominant model of competition and is exemplified by the EU and the US competition law regimes.

The different variation in the objectives of most countries' competition law suggests that it will be inappropriate to isolate a country's competition legislation from its overall public policy. Thus a country's background and vision will play a significant role on the form and substance of its competition law and policy.<sup>60</sup> For example the historical and political background is very much reflected in the South African Competition Act, the law among other economic concerns aims to promote employment and spread of ownership for the benefit of the historically disadvantaged people. Any policy based on well-articulated goals and objectives will lend itself to easier administration and implementation, in addition to

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<sup>59</sup> R.S. Khemani and R. Schone, 'Competition policy objectives in context of a multilateral competition code' in C.D. Ehlermann and L.L. Laudati, (eds.), *European Competition Law Annual 1997: Objectives of Competition Policy* (Oxford: Hart Publishing, 1998), 187.

<sup>60</sup> The Competition 89, 1998 South Africa.

being amenable to reforms as circumstances may dictate. The issue of goals and objectives of competition law are part of the major difficulties likely to confront a developing country intending to enact competition law.<sup>61</sup> Furse's argument agrees with this view on the challenging role of competition policy and competition law in emerging national economies. He says that 'competition policy being a complex interplay of positive economic theory and normative social-political considerations may result in a policy that may be more or less clearer than alternatives'.<sup>62</sup>

This observation matters for several reasons: (1) it is necessary to know and understand the goal of competition policy in order to know and recognize its consequential benefits; (2) a knowledge of competition policy goals will provide a basis to determine the level of performance or success of the policy, without which it might prove difficult to suggest or carry out any reasonable reform(s); (3) as empirical records on developing countries show, when knowledge about the competitive process increases, the success of the implementation of most policies is partially dependent on the degree of patronage or support from the average citizens who are often suspicious of the motives of their governments; (4) the importance attached to objectives of competition policies has continued to evolve.

Therefore, policy makers in developing countries have to be careful to ensure that the goals and objectives of competition law and policy are well articulated, in a manner that could be easily appreciated by the stakeholders. A balance needs to be struck between the present

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<sup>61</sup> B.A. El Dean and M. Mohieldin, 'On the formulation and enforcement of competition law in emerging economies: the case of Egypt' (September 2001), Working Paper 60, The Egyptian Centre for Economic Studies, Cairo.

<sup>62</sup> M. Furse, 'The role of competition policy' (1996) 4 ECLR 250.

economic status of developing countries and their long-term objectives for sustainable development. The importance of ensuring this balance cannot be overemphasized, as shown by several debates before and since the passage of the American Sherman Act in 1890.

There is broad agreement that the major role of competition law and policy is to advance competition as a factor that delivers benefits to society, but in most jurisdictions there is no unanimity on the goal(s) of competition laws.<sup>63</sup> Thus, Bork's assertion that:

Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law - what are the goals? Everything else follows from the answer we give. Is the antitrust judge to be guided by one value or by several? If by several, how is he to decide cases where a conflict in value arises? Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules.<sup>64</sup>

With reference to the preceding paragraph, the present section proposes to examine the different goals and objectives of competition policy. Some of the arguments that have been used either in support or against different objectives of competition policy will be additionally considered, as particularly important points related to the definition that 'competition law concerns intervention in the market place in order to correct some problems or rectify a market failure'.<sup>65</sup> A related issue is whether market failure, as

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<sup>63</sup> R.H. Lande, 'Wealth transfers as the original primary concern of antitrust: the efficiency interpretation challenged' (1982-1983) 34 *Hastings L.J.* 67.

<sup>64</sup> Bork, note 5, 50.

<sup>65</sup> Rodger and MacCulloch, note 26.

experienced in developed economies, is generically the same as that in developing economies, especially in a resource-dependent or resource-based developing economy (RBE): it will be investigated whether all systems of competition policy have or should have, as common, the same objectives and standards. Rodgers and MacCulloch argue that, at a basic level, competition policy systems do not start with the same objectives and standards. A position confirmed by the World Bank and OECD report.<sup>66</sup>

It is generally agreed that the objectives of competition law are to deliver and maintain benefits accruable from competition in a market, but which are not obtainable from an economy that is not subject to free operation of the laws of supply and demand. According to Vickers and Hays, ‘competition policy is to promote and maintain the process of effective competition so as to achieve a more efficient allocation of resources’.<sup>67</sup> One may be quick to agree with this view and infer from this assertion that the goal of competition policy is primarily economic, but this might not necessarily be so, as submitted below: the phenomenon of resource allocation in resource-dependent developing countries involves political, legal and social considerations as much as economic considerations and goals meant to preserve the competitiveness of the markets.<sup>68</sup>

As a result competition policy would be required to address other secondary and particular problems in resource-dependent countries. These will include the problem of corruption, rent seeking, access to energy, employment, protection of small firms and a few others.

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<sup>66</sup> World Bank and OECD, *A Framework for the Design and Implementation of Competition Law and Policy* (Paris: World Bank and OECD, 1997), 2.

<sup>67</sup>J. Vickers and D. Hay, *Economics of Market Dominance*, in J. Vickers and D. Hay (eds.), *The Economics of Market Dominance*, (Oxford: Oxford University Press, 1987,) 2.

<sup>68</sup> *Ibid.*, 2.

Whether a competition law and policy will be able to address all or some of these problems is dependent on the robustness of its provision and the efficiency of its regulatory agency.

### 3.4.1 Economic Goals

There is a consensus that the primary aim of competition law is always geared towards economic welfare, which could be used as an economic yardstick for measuring of performance in an economy.<sup>69</sup> Generally, welfare can also be defined as the sum of consumer surplus and producer surplus; economic welfare is also referred to as consumer welfare that can be described as an aggregate of allocative efficiency and productive efficiency.<sup>70</sup> The combination of these two types of efficiencies leads to maximization of the total wealth of a society.<sup>71</sup> Many writers, notably Bork, have argued that the sole or primary aim of competition law is economic efficiency that is to enhance consumer welfare.<sup>72</sup> Bork argues that:

The only legitimate goal of American antitrust law is the maximization of consumer welfare; therefore competition for the purposes of antitrust analysis must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree.<sup>73</sup>

He also emphasized the importance of economics in the realization of the only legitimate goal of antitrust. This view has gained significance and primacy in competition policy

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<sup>69</sup> M. Motta, *Competition Policy: Theory and Practice* (New York: Cambridge University Press, 2004), 18.

<sup>70</sup> Whish, note 33, 2.

<sup>71</sup> *Ibid.*, 3.

<sup>72</sup> Bork, note 5, 51.

<sup>73</sup> *Ibid.*, arguing in the same direction, Posner agrees with Bork's position that although populist thoughts run through the vein of almost all the federal antitrust law in the US, the motive and meaning of legislation are different things. He concludes that 'after a century and more of judicial enforcement of antitrust statutes there is a consensus that guidance must be sought in economics' - R.A. Posner, *Antitrust Law* (2nd edn.) Chicago: University of Chicago Press, 2001), 26.

jurisprudence. Although the debates about the goal(s) of competition policy have largely disappeared in developed countries, they could still be resurrected in developing and emerging economies still burdened with some vestiges of a planned economy. The debates, probably on a low key, might continue to be subject to changes and developments.<sup>74</sup> Earlier, the debates about the goals of competition law were given both serious academic and media coverage, for example the Fortune Magazine in 1965 initiated a dialogue on the goals, objectives and methods by which the specific goals may be realized.<sup>75</sup> The debates were however influenced by the positions of the two dominant antitrust schools of thought, namely the Chicago and Harvard schools of competition. At the beginning of the debate, Bork and Bowman raised the alarm that antitrust law and policy were facing a crisis caused by the promotion of considerations other than economic efficiency in antitrust policy and implementation. They argued then that the elevation of these other considerations was a ‘protectionist trend’ favoured by ‘anti-free market forces’ traceable to widespread economic misconceptions as a pretext and welcome opportunity for groups with political power to extract reward from consumers not disposed to command(s) in the market place.<sup>76</sup>

In response to the arguments of Bork and Bowman, Blake and Jones have countered that Bork and Bowman have been using for their argumentation and conclusion, not more than a wrong implement that could not promote access to the right conclusion. They suggest that:

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<sup>74</sup> See generally, J. J. Flynn, ‘Antitrust jurisprudence: a symposium on the economic, political and social goals of antitrust policy’ (1976-1977) 125 University of Pennsylvania Law Rev. 1182.

<sup>75</sup>R. Bork and W. S. Bowman Jr. ‘The goals of antitrust: a dialogue on policy: the crisis in antitrust’ (1965) 65 Columbia L. Rev.365. The dialogue involved Professors Bork and Bowman pitched on one side and Professors Blake and Jones on the opposite side.

<sup>76</sup> Ibid.,, 376.

Trying to measure a three dimensional world with a one-dimensional yardstick must be terribly frustrating. Professors Bork and Bowman measure their way across the antitrust terrain with a rigid ruler of economic efficiency. The trail turns to the right. But their ruler will not bend and snaps in their hands.<sup>77</sup>

Blake and Jones accordingly concluded that there was no crisis in antitrust: law and policy, but rather the reality of antitrust law and policy with multiple objectives,<sup>78</sup> as shown and underlined in the part on legislative history of antitrust laws, in the latter part of this thesis.<sup>79</sup>

However, the maximization of consumer welfare or the attainment of economic efficiency remains the most distinct goal of competition policy among competition authorities. Thus, in the Epilogue of the recent version of his book on antitrust, Bork goes further to say that:

No matter what policy goals or combination of goals one attributes to antitrust, the effectiveness of the law in forwarding those policies will be diminished by other public policies.<sup>80</sup>

One can infer that Bork seems to appreciate lately the potency of criticism of a sole goal for competition law as well as criticism of the level of authority behind arguments for multiple-objectives in competition policy. The arguments for a multiple-objectives competition law will continue to gain support because of the likelihood of policy conflict

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<sup>77</sup> H.M. Blake and W.J. Jones, 'Towards a three dimensional antitrust policy' (1965) 65 Columbia Law Rev. 422.

<sup>78</sup> *Ibid.*, 376.

<sup>79</sup> E.M. Fox and L.A. Sullivan, 'Antitrust-retrospective and prospective: where are we coming from? Where are we going?' (1987) 62 NYUL Rev 936. Fox and Sullivan argue that the objectives of legislation for antitrust include not only consumer welfare in the notion of just 'economic efficiency' but comprise other objectives meant to protect consumers from the exploitive exercise of market power by power trusts and businesses at that time. Both commentators belong to the post-Chicago School of antitrust, while Bork belongs to the Chicago School.

<sup>80</sup> Bork, note 5, 429.

between consumer welfare (as the sole goal of competition law) and other government policies. Such an attitude may be expected mainly from emerging economies in developing countries. This does not foreclose the probability of the occurrence of conflicts of opinions in developed countries too, such as in Australia and Japan. At least in the EC, efficiency as a sole goal has not always been the prevailing standard.<sup>81</sup>

Since economic or total welfare is commonly defined as the aggregate of consumer welfare and producer welfare, the argument that consumer welfare should be the primary or sole goal of competition law has prevailed, not surprisingly, over justifications for other goals of competition policy. Nevertheless, advocates of multiple goals for competition policy have been unrelenting in their arguments and conviction. Thus, Grandy, referring to antitrust in the USA, observes that ‘the legislative history of the Sherman Act failed to support the consumer-welfare hypothesis,’ and suggests that the ‘congress focused its concern on producer behaviours’.<sup>82</sup> He has re-examined the prevailing consumer-welfare hypothesis, making use of American legislative history to build a case for welfare. His arguments rest essentially on the congressional debates preceding the passage of the Sherman Act, particularly the debates on monopolization, price regulation, resort by the Congress to the use of common law language which raised concern on just producers and the economic implication of the American federal political structure.

In the first instance, Grandy conceded that since the inception of the debates on the Sherman Bill, the American Congress has shown preference for consumer welfare as a

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<sup>81</sup> Other policy considerations drive the EC competition policy; this will be examined later. See Jones and Sufrin, note 52, 25.

<sup>82</sup> C. Grandy, ‘Original intent and the Sherman Antitrust Act: a re-examination of the consumer – welfare hypothesis’ (June 1993) 2(53) *The Journal of Economic History*, 373.

major goal of antitrust, but he went further to argue that as debates progressed, this preference was abandoned in favour of other goals.<sup>83</sup> This point suggests that, in the light of Grandy's assertion, Bork may have been selective in his use of the legislative records, to advance the argument that promotion of the efficiency objective has been the intention of the legislators and the same should remain the only legitimate goal of antitrust. In fact, Grandy forcefully argues that both the Bills and the debates preceding the Sherman Act clearly show an independent concern for the preservation of free and fair competition or trade, as a point tantamount to producer-welfare. To support his argument, Grandy relied extensively on Kitner's work.<sup>84</sup>

Grandy has pointed out that the legislative history of the Sherman Act shows that most Congress members were not convinced by the argument that the efficiency of large-scale organizations would promote consumer welfare through an achievement of lower production costs. In fact some legislators have argued for the introduction of an amendment to the original Sherman Bill; the amendment would have permitted combinations to justify their actions directed at eliminating destructive competition, control of output, regulation and maintenance of price on the ground that this would lead to lower production costs. According to Grandy, this argument agrees with Bork's position on productive efficiency.<sup>85</sup> As the route to this 'efficiency' goal would obviously involve price or output regulation, it was ultimately necessary to refer to the Judicial Committee.<sup>86</sup> The final Act, as contained in Sections 1 and 2 of the Sherman Act, as argued by Grandy,

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<sup>83</sup> Ibid., 362.

<sup>84</sup> See, E.W. Kitner, *The Legislative History of the Federal Antitrust Law and Related Statutes* (New York and London, 1978).

<sup>85</sup> Ibid., 365.

<sup>86</sup> Ibid., 367.

suggested a desire to ‘regulate’ business conduct and to promote fair competition in trade and production.

Moreover, Grandy argues that the phrase ‘restraint of trade and commerce’ found in Section 1 of the Sherman Act is a common law concept referring to activities that prevent the unlawful methods of others from producing or selling their goods. He argues that the employment of this common law phrase shows that the Sherman Act is intended to target producer welfare rather than consumer welfare, as advocated by Bork and other commentators.<sup>87</sup>

In support of his position, an examination of the debates on the Sherman Bill, related particularly to Section 2 of the Sherman Act, would reveal that the Congress had more concern for producer welfare than for consumer welfare. The emphasis of the section on the definition of monopoly, according to Grandy, was to show how the activities of one producer would affect another producer. Bork argues that the exemption granted under Section 2 of the Sherman Act is for a monopoly gained as a result of superior skill or efficiency that will promote consumer welfare, although this might also hurt rival producers. Grandy disagrees with Bork’s argument, drawing support from the legislative history’s treatment of the definition of a monopoly. He has submitted that an examination of the debates and the history would reveal that the position of Congress was for the concept ‘monopoly’ to bear a technical meaning,<sup>88</sup> that is, an exclusion of other competitors from the market. The argument of Grandy is supported by other writers, such as Peters, who have also stressed that competition policy in the USA grew out of the

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<sup>87</sup> W.K. Viscusi *et al.*, *Economics of Regulation and Antitrust*, 2nd edn. (Cambridge: MIT Press, 1995), 57.

<sup>88</sup> Kitner, note 84, 315.

concerns and agitations of the populist movement of the 19th century, with arguments on the side of farmer and small scale businesses against the growing powers of large businesses and trusts.<sup>89</sup>

Grandy went further to argue that Section 2 is concerned with the process of competition and the means of acquiring market power with impact affecting other competitors, and not with efficiency which may hurt some competitors. Concerning the phrase 'restraint of trade', Grandy has argued that Congress meant "restraint of trade" to stand for "restriction of output" because the phrase has an established common law origin and involves restriction of output. However, Bork denies that the Sherman Act has any real common law basis. Grandy observes that Bork's denial of this basis is understandable, because originally, common law agreements or combinations in restraint of trade had, for state courts, a meaning irreconcilable with the consumer-welfare hypothesis.<sup>90</sup> In common law, the phrase 'restraint of trade' referred to relations among competitors or producers.<sup>91</sup> Grandy also alluded to the fact that the Judicial Committee that drafted the final Sherman Act was composed of legal experts who knew what restraint of trade in common law exactly means and so its inclusion in the act was intended for pointing to producer welfare.

Lastly, it has also been argued that the jurisdiction concern raised by the Sherman Act called for an antitrust law with a national coverage, because corporations and trusts were hitherto subjected to state legislation and there was no federal law to coordinate or regulate

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<sup>89</sup> B.G. Peters, 'United States competition policy institutions: structural constraints and opportunities' in G.B Doern and S. Wilks *Comparative Competition Policy*, (ed.), (Oxford: Oxford University Press, 1996).

<sup>90</sup> Grandy, note 91, 369.

<sup>91</sup> H. B. Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* (London: George Allen &Unwin Ltd., 1954), 17.

economic activities that cut across state borders. There was therefore a reliance on common law approaches by the states, making it possible to regulate inter-state economic activities. Consequently, Grandy concludes that ‘the common law basis for the Sherman Act undermines the consumer–welfare hypothesis because the common law addressed the behaviour of producers without reference to consumers.’<sup>92</sup>

Another perspective is the economic goal of competition law that further queries the wisdom behind the promotion of efficiency considerations as being either the ‘primary or only (advocated) legitimate goal’. This viewpoint expanded the scope of the debate on the goals of competition law. It is credited to Lande, although he recognizes that the USA Congress passed antitrust laws to promote economic objectives, he argues that the primary objectives of the antitrust laws are primarily distributive rather than efficient in nature.<sup>93</sup>

The target of distributive goals canvassed by Lande is to prevent an unfair transfer of consumer wealth by firms with market power. He has additionally explained that this goal does not mean a process or method of securing the overall fair distribution of wealth in society or to assist the poor, as that would not have any basis in competition law; he says rather that, ‘the Congress merely wanted to prevent one transfer of wealth that it considered inequitable and to promote the distribution of wealth that competitive markets would bring.’<sup>94</sup> Lande also explored American legislative history in order to find justification for his position. He has argued that the relevant legislative history shows what Congress in 1890 had in mind was not the economic notion of consumer in the form of

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<sup>92</sup> Grandy, note 82, 373.

<sup>93</sup> R.H. Lande, ‘Wealth transfers as the original and primary concern of antitrust: The efficiency interpretation challenged’ (1982-1983) 34 *Hastings Law Journal*, 65.

<sup>94</sup> *Ibid.*, 32.

efficiency but consumer well-being in the form of protection of consumers against the exploitative practices of the big businesses and trusts at that time.<sup>95</sup>

However, his argument did not gloss over the central theme of the efficiency goal advocate. It revealed that in the long term consumers stand to benefit more if the goals of antitrust are analysed properly by taking cognizance of the distributive goal as the primary intention of Congress. He puts his argument forcefully into focus as follows:

Incorporation of Congress' distributive goals into antitrust analysis would use the antitrust laws to reach many more mergers and other monopolistic practices than does the present quest for efficiency in antitrust.<sup>96</sup>

This brings back into focus the arguments regarding a monopoly. Concerning its disadvantages, one may recall that the USA Congress has been particularly concerned about the growing power of trust and the effects of monopoly power, eventually prompting the adoption of the Sherman Act.<sup>97</sup>

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<sup>95</sup>The creation of trusts and businesses that copy monopoly at this time created resentment and agitation among the consumers that big business were against the interests of the consumers. They rightly reasoned that trusts and monopolies (in the transport, petroleum, sugar and steel sectors) led to price increases perceived to be unjustified. This gave room for political 'trust busters' like Senator Sherman and President Roosevelt who seized on the opportunity to launch an attack on the growing power of big businesses. See R. Liefmann, *Cartels, Concern and Trusts*, (London: Methuen, 1932).

<sup>96</sup> Lande, note 93, 87.

<sup>97</sup> J. Fejo, *Monopoly Law and Market: Studies of EC Competition Law with US Antitrust Law as Frame of Reference and Supported by Basic Markets* (Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1990) 30. The basic understanding among economists and competition policy makers on one hand is that monopoly pricing reduces consumer's wealth and value through output and price control, and on the other hand, monopoly could positively or negatively impact on the economy without any sound economic reasons or the forces of demand and supply. These attributes of a monopoly are regarded as a misallocation of resources, but there remain many controversies on the latter attributes because of their dual nature. In any case, the latter attributes are more of a subjective judgment.

The crux of Lande's position is that antitrust is more concerned with the unfair transfer of wealth from consumers to monopolists than efficiency preference to consumers, an argument that Bork has said has neither legislative support nor any rational economic justification. Unperturbed about the wave of authorities or opinions in support of Bork's efficiency interpretation of antitrust laws, Lande has pointed out that, at the time the Sherman Bill was introduced in 1890, many economists and legislators did not have any idea of the possible impact or ills of monopoly power and its consequential redistributive effects, a point which raises serious questions.<sup>98</sup>

Moreover, in support of his argument, Lande has referred to several pieces of legislative evidence that condemn trust and monopolistic overcharges in strong moral terms, instead of their efficiency implications.<sup>99</sup> This means that moral consideration too has played a significant role in the craft and intention of the antitrust laws in the USA. A conclusion that could be drawn from Lande's argument is that the paramount consideration in antitrust analysis should not be 'technical efficiency' but rather efficiency in broad perspective hinged on consumer welfare and should be protecting consumers from exploitation in varying degrees. He recognises the importance of 'technical efficiency' as promoted by the Chicago School, but has argued that in the case of conflict between technical efficiency and efficiency in the broad sense encompassing consumer well being, the latter should be upheld.<sup>100</sup>

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<sup>98</sup> Lande, note 93, 87.

<sup>99</sup> Lande, note 93.

<sup>100</sup> E.M. Fox, 'Consumer beware Chicago' (1985-86) 84 Michigan Law Review 1714. Fox also criticised the argument that antitrust is mainly concerned with efficiency and argued that what congress meant is economic welfare which is the sum of producers' and consumer' profits, that is total welfare that protects consumers' interests as well as the producers' interests .

### 3.4.2 Social and other Goals

Several other goals-cum-visions still motivate competition policy under different regimes. Although most of these goals have largely been relegated to the background in countries with a longer-established history of competition law, it is still relevant to discuss these goals and to examine the merits and demerits of the arguments for and against them, especially in the context of EU competition policy. Unlike competition rules in the US, EU competition rules arose out of ‘situations somewhat different’ from the populist movement that gave impetus to the passage of the Sherman Act in 1890.<sup>101</sup> A discussion of the goals in question will contribute to a better understanding of the challenges to meet in emerging and developing economies when envisaging the adoption of a competition policy for addressing not only the issue of efficiency but other trade-related issues, such as market access and protection of new industries.

In general, competition law and policy goals include protection of small firms, industrial policy, promoting market integration, environmental policy, various socio-political objectives. These goals naturally will, and tend to, influence competition law analysis and resolution of disputes arising from enforcement of competition law. For example, in the EU the Commission, obviously on social/political grounds, cleared the joint venture of Ford/ Volkswagen.<sup>102</sup> Some of these other goals of are examined hereunder.

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<sup>101</sup> Frontier-Free Europe, (May 51993)- In 1993, Van Miert, then Competition Commissioner, stated that ‘the aims of the European competition policy are economical, political and social. The policy is concerned not only with promoting efficient production but also with achieving the aims of the European treaties: establishing a common market, approximating economic policies, promoting harmonious growth, raising living standards, bringing Member States closer together etc. To this must be added the need to safeguard a pluralistic democracy, which could not survive a strong concentration of economic power’.

<sup>102</sup> OJ 1993 L20/14. This horizontal agreement was exempted by the Commission on other considerations other than economic efficiency

### 3.4.2.1 Protection of Small Firms

The desire to promote small firms or start-ups has been recognized by both law and policy makers as one of the goals or roles that a competition law should achieve and play, respectively. Start-ups are often viewed as very vulnerable in the business world. The legislative history of the US antitrust laws reveals a deep concern for preserving business opportunities for small firms.<sup>103</sup> Similar sentiment towards or treatment of small firms existed in Germany prior to the enactment of Articles 81 to 89 EC which deals with the implementation of competition policy.<sup>104</sup> Small firms have long been thought to deserve some level or form of protection<sup>105</sup> against the competitive and market power of larger firms; the former are seen to be vulnerable to likely predatory activities of the latter. This view has been given judicial support in the USA, in the famous ALCOA case by Judge Learned Hand; he says:

Congress in passing the Sherman Act was not necessarily actuated by economic motives alone. It is possible, because of its direct social or moral effects, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.<sup>106</sup>

It has been argued that this favourable disposition to small firms is not 'inconsistent' with the objectives of economic welfare if it is limited to protecting the small firms from the abusive practices of large firms, or giving them some support against the pressure of the

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<sup>103</sup> Lande, note 93, 102.

<sup>104</sup> See A.D. Chandler, *Scale and Scope: The Dynamics of Industrial Capitalism* (Cambridge, Mass.: Harvard University Press, 1990).

<sup>105</sup> See, *Chicago Board of Trade v United States* 246 US 231 (1918). In this case Justice Brandeis espoused the multiple goal of antitrust and amongst other issues gave support to the idea that competition is meant to promote small businesses.

<sup>106</sup> *United States v Aluminium Co. of America*, 148F 2d (2 Cir.1945).

economic power of large firms.<sup>107</sup> This is not to suggest that firms not operating on an efficient scale should be given ‘artificial support’. Such support would amount to misallocation of resources, distortion of the market,<sup>108</sup> possibly resulting in high prices.<sup>109</sup> The objective of promoting or defending small businesses is encouraged in the EU with programmes and policies to support small and medium enterprises (SMEs). This support is predicated upon the reasons that SMEs are seen to be more dynamic, quick to innovate and capable to contribute more to employment growth rates than large firms.<sup>110</sup> Such support, as an objective, will most likely be given priority by emerging economies and developing countries, because of the preponderance of small entrepreneurs in the state of the development of their economies.

In addition, the defence of small firms with the aid of competition policy is just an extra measure that will find strong appeal in developing and emerging economies with markets prone to both internal and external distortions. The most prominent external threat or distortion that such economies are wary of concerns the issue of globalisation as a high priority discussion issue in many economic meetings.<sup>111</sup>

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<sup>107</sup> Motta, note 69, 23.

<sup>108</sup> Ibid.

<sup>109</sup> Bork, note 5, Bork argued that the judgement in the ALCOA case was not strictly based on the issue of promoting consumer welfare but on unarticulated social values that led to the breaking down of the firm involved despite its strong position having been achieved through efficiency methods that guaranteed lower practices, which obviously was to the benefit of the consumers rather than the dissolution of the firm.

<sup>110</sup> Innovation is now generally acknowledged to be the major driver of competition in many markets, particularly the high technology sector and biotechnology sectors. This is not an absolute fact because the level of research studies and results on this issue are neither unanimous nor conclusive

<sup>111</sup> ‘Globalization is the term for the increased worldwide interdependence of most economies. Integrated financial markets, the sourcing of the production of components throughout the world, the growing importance of transnational firms and the linking of many service activities through the new information and technologies are some of its manifestations’ - R.G. Lipsey and K.A. Chrystal, *Economics*, 10th edn., (Oxford: Oxford University Press, 2004), 677. See also, J. E. Stiglitz, *Globalization and its Discontent*, (London and New York: W.W. Norton Ltd, 2003).

### 3.4.2.2 Industrial Policy

There is a neo-classical school of thought which argues that competition law and industrial policy are diametrically opposed to each other.<sup>112</sup> This school regards competition policy as one related to economic law characterized by transparent rules, procedures, judicial precedents; a policy normally managed by an independent body mandated to balance individual interests with economic competition by applying those characteristics.<sup>113</sup> For this neo-classical school industrial policy is not principle- and rule-based, concerned only with the structure of the economy and its international competitiveness. It is a policy aiming at achieving different objectives, such as growth, economic integration, and employment.

Another school of economic thought, the post-Chicago school, asserts that competition policy and industrial policy do not conflict; it argues that competition policy is part of industrial policy.<sup>114</sup> The roots and essence of the controversy between the schools in question can be traced to the lack of a general definition of ‘industrial policy’. The conceptual dispute is further complicated by the fact that different countries modelled their respective national industrial policies in accordance with the peculiar circumstances and needs of their individual, non-identical national economies. The resulting situation is reflected by the existence of an assortment of mixed ideas, policies and arrangements using a limited stock of technical terms used for referring to a variety of meanings.

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<sup>112</sup> W. Sauter, *Competition Law and Industrial Policy in the EU* (Oxford: Clarendon Press, 1997), 1.

<sup>113</sup> Ibid.

<sup>114</sup> B.T. Bayliss and A.M. El-Agraa (ed.), ‘Competition and industrial policies with an emphasis on competition policy’ in A.M. El-Agraa (ed.), *The Economics of the European Community* (3rd edn.), (New York: Palgrave Macmillan, 1990), 137.

In the overwhelming majority of economies, the most obvious example of industrial policy as a basic concern underlying competition law and policy is the idea of promoting or encouraging the development of ‘national economic and/or industrial champions’. They can be state parastatals or trading companies or private undertakings. The essential policy objectives can be to provide incentives or financial support to help jump-start the activities of infant industries, or place them in a privileged economic position to enable them to compete with other firms on domestic as well as foreign or international markets. The rationale for such a policy could be based on the following three considerations:(1) markets are global, (2) the targeted enterprises need to rise to a level of particular capacity to compete effectively at the international level, and (3) certain key sectors are considered by the state to be in need of development on the way to competitive security and prosperity. Within the framework of such considerations, it might have been that enforcement of the EC competition policy would have been impracticable without regard to and coordination of other EC’s economic, industrial and commercial priorities.

A different way of looking at industrial policy within the framework of competition law and policy is offered by application of anti-dumping laws. Its rules can help protect domestic firms from the operation of foreign companies trying to exploit the competitive advantages of their low production costs compared with the higher production costs of less efficient domestic firms. It is worth observing that even in the USA, where rigorous antitrust laws apply, and an industrial policy is still in place. For example, the Webb-Pomerene Act 1918 is underpinned by considerations of industrial policy.<sup>115</sup> The Act provides special latitude for export cartels in the USA.

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<sup>115</sup>40 STAT 516(1918), 15 U.S.C No 61-65 (1941). The Act provides a limited antitrust exemption for formation and operation of associations of otherwise competing businesses to engage in collective export sales.

### **3.5 Competition Law and Policy and Economic Development**

To achieve a viable and sustainable economic development in any economy at all demands serious planning and strategic consideration; this is especially true for resource-dependent developing countries such as Nigeria. Its peculiar economic, political characteristics and problems have earlier been examined in Chapter 2 of this thesis. Further there is a need for the correct economic reforms and political will to embark on such reforms to fix these problems. It was also earlier argued that the reforms have to be complemented with an effective competition law and policy to guarantee optimal results. Even when the political will is marshalled, it is not advisable to just copy or adopt any competition law and policy model from those countries with the longest traditions in this field because the field of competition policy in most cases is national. Rather one has to take full cognizance of the affected country's peculiar characteristics, position and relationship with other trading nations apart from other local issues that could affect the success of any policy reform might need to be factored in.<sup>116</sup>

To achieve this, it has been suggested that a thorough comprehensive reform that includes the establishment of all necessary regulatory institutions complementing whatever existing regulatory structure will need to be undertaken. In further support is the need to promote 'competition advocacy'.<sup>117</sup> The relevance and importance of this to a developing country like Nigeria shall be examined in the latter part of this chapter. This is predicated on the

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<sup>116</sup> See N. Theron, 'The economics of competition policy: merger analysis in South Africa' 2005 (69) 4 South African Journal of Economics, 654.

<sup>117</sup> A popular definition of competition advocacy is that given by the Advocacy Working Group of the International Competition Network, as follows: Those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities, by means of non-enforcement mechanisms mainly through its relationships with other governmental entities by increasing public awareness of the benefits of competition. See the website of International Competition Network- <http://www.internationalcompetitionnetwork.org>. Last visited 30th March 2009.

premise that competition law will thrive only in a conducive environment, especially where the competition agency is proactive and recognizes the need to ensure that both the private and public bodies are subject to its rules, and this can only be done meaningfully via competition advocacy. From the conclusions reached in the preceding chapters it has been demonstrated that competition policy is a condition precedent towards a viable and sustainable developed economy.

The effective implementation of any form of competition law and policy that is adopted in any developing country must take account of its potential impact or contributions towards the country's development. To date there is a lack of data on the actual developmental gains and costs of implementing a competition regime in developing countries, but research results have revealed that anti-competitive practices impose heavy costs on developing countries.<sup>118</sup> Other evidence from some developed countries supports the conclusion that competition law and policy has a significant contribution to economic development. There is ample literature to draw from in this instance, particularly the experience of the US, the European Union countries, Japan, Australia and South Korea.<sup>119</sup>

However, against this body of literature, is an important guidance for competition law and policy founded on the economic theory of second best, originally advanced by Laffont as follows:

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<sup>118</sup> R. Anderson and F. Jenny, 'Competition policy, economic development and the role of a possible multilateral framework on competition policy: insights from the WTO working group on competition' in E. Medalla and P. Drysdale, *Competition Policy in East Asia Pacific Region*, (London: Routledge, 2007) 61-64

<sup>119</sup> See D. H. Brooks, 'Competition policy development' (2005) ERD Policy Brief no. 39 Published at [http://www.asiandevbank.org/Documents/EDRC/Policy\\_Briefs/PB039.pdf](http://www.asiandevbank.org/Documents/EDRC/Policy_Briefs/PB039.pdf). Last visited on 30th March 2009.

Competition is an unambiguously good thing in the first-best world of economists. That world assumes large numbers of participants in all markets, no public goods, no externalities, no information asymmetries, no natural monopolies, complete markets, fully rational economic agents, a benevolent court system to enforce contracts, and a benevolent government providing lump sum transfers to achieve any desirable redistribution. Because developing countries are so far from this ideal world, it is not always the case that competition should be encouraged in these countries.<sup>120</sup>

As valid as Laffont's argument above appears, his pessimism should not be taken as absolute for all developing countries; in fact it is debatable whether any developed country could or actually does satisfy all the conditions for a competitive equilibrium; rather, a second best that involves restriction on the competition approach backed with strong regulatory structure is used to enforce competition law along with other policies.<sup>121</sup>

Furthermore, in support of Laffont's position, different alternatives to competition law and policy have been offered as viable options for developing countries where there is a probable lack of ability to implement laws because of some endemic institutional deficiencies such as rent seeking and corruption, most of these problems were examined in chapter two.<sup>122</sup> One of these options is that trade liberalization may act as a proxy for domestic competition policy.<sup>123</sup> Different commentators have argued that trade liberalization can be a fit substitute for domestic competition law in small economies,

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<sup>120</sup> J. Laffont, 'Competition, information, development' (1998) Annual World Bank Conference on Development Economics, 237.

<sup>121</sup> A. Singh, 'Competition policy in emerging markets: international developmental dimensions' (2002) ESRC Centre for Business Research, University of Cambridge, Working Paper No. 246, 15.

<sup>122</sup> Singh, 'Competition competition policy in emerging markets' 15.

<sup>123</sup> L. Cernat, 'The role of competition in the promotion of competitiveness development: Experiences from a sample of less developing countries' (UNCTAD) Paper prepared for the 3rd International CRC Conference, Pro-poor Regulation Competition: Issues, Policies Practices, Cape Town, South Africa, 7-9 September 2004).

because when trade barriers are lowered this process should necessarily increase competition from imports for local firms engaged in the production of tradable goods and services reliant on the domestic market.<sup>124</sup> It is assumed that the competitive pressure from these imports will drive the local firms to be more efficient and thereby lead to a reduction in prices to the benefit of their consumers. It could also be argued in this respect that the reduction of trade barriers and restrictions, such as reduction in tariffs, elimination of quantitative restrictions on exports and imports, afford producers and businesses the opportunity to expand and compete beyond their local jurisdictions or markets with the resultant effects in reduction in prices and improvement in quality of goods and services.

However, as valid as the argument in the preceding paragraph appears, it still stands to reason that it might not be possible to obtain the full benefits of trade liberalization without instituting a competition policy. This is due to many reasons. One obvious reason yet rests on the Adam Smith's famous admonition concerning the need to embrace and protect free competition.<sup>125</sup> He argues that:

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices.

Businesses are wont to take advantage of the situation and would try to engage in anti-competitive practices unless there are clear rules designed to caution and penalise them outside the normal trade regulations which are often insufficient to deter anti-competitive

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<sup>124</sup> See R. Blackhurst, 'Trade policy is competition policy' in 'Cooperation *Economic Development*' (1991) OECD.

<sup>125</sup> A. Smith, *An Inquiry to the Nature and Causes of the Wealth of Nations of Adam Smith, 1776*, Published at <http://www.adamsmith.org/smith/won-index.htm>. Last visited on 30th March 2009.

practices like cartels, abuse of dominant positions and restrictive agreements.<sup>126</sup> Thus in jurisdictions such as Nigeria, reliance on trade liberalization might not yield optimum results as concessions under trade liberalisation are easily susceptible to abuses from both public officials and businesses, but market discipline offered and likely to be impacted by competition law could mitigate these abuses. For instance following liberalisation, some sectors with concentration, like the energy sector, are susceptible to high mark-up prices and other anti-competitive behaviours like collusion and cartel. However, the enactment of a competition law and policy will offer some reasonable level of prevention against these anti-competitive practices.

In addition, it could be argued that the existence of competition law or a competition policy in an economy gives an assurance of a commitment to ensure a level playing field to both local and foreign firms, and therefore, when faced with many choices of states to invest in and the states (especially developing countries) rank relatively on the same level, then an investor will more likely be persuaded to choose a country that has a competition law and policy.<sup>127</sup>

Moreover, it could be argued that benefits accruable from trade liberalization might easily be diminished or even eroded as a result of export cartels organised by the local importers

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<sup>126</sup> High market concentration will continue to be viewed with special attention for the singular reason that this concentration could be used to easily facilitate market abuse, although it does not automatically translate to restriction of competition and lower welfare. Rather, firms will most likely engage in anticompetitive activities where there is restriction on entry barriers, since an indication of higher profits is an incentive for new entrants that could lead to a reduction in the incumbent's market power and lower prices.

<sup>127</sup> M. Gestrin, 'A policy framework for investment: competition policy' Paper presented at an OECD Conference, Investment for Development: Making it Happen, 25-27 October RIO DE JANEIRO, Brazil.

or foreign importers.<sup>128</sup> Unofficial reports in Nigeria abound about price fixing involving cement, iron, sugar, rice and the mobile telephone tariffs by some notable companies in Nigeria, but due to lack of any competition law or an empowered consumer agency to investigate and regulate such activities these reports have gone unconfirmed or checked for a long period. The final consumers will be made to bear the brunt via excessive prices which could affect total welfare and ultimately affect economic development. Most of these developing countries are reliant on imports to sustain a larger part of their economies, especially those that have become resource dependent and have also neglected to develop other sectors of their economies, as was the case in Nigeria before 2000. This prompts the question about the political sources of institutional change, and whether appropriate law and economic reforms could be meaningfully implemented without political support and the establishment of an appropriate regulatory structure in Nigeria. This thesis shows below that appropriate law and economic reforms are necessary but not sufficient; however, the determining factor in economic performance is the state's capacity to implement them.<sup>129</sup>

### **3.6 Conclusion**

This chapter shows that a random examination of objectives of competition laws will point to the conclusion that, along with other objectives, economic objectives are part of the basic foundations of competition law and policy. However, commentators are not unified about the wisdom of enacting pro-competition economic system and thereby advocate

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<sup>128</sup> See N. Dimgba, 'The urgent need for anti-trust law' Published at [www.globalcompetitionforum.org/regions/africa/Nigeria/antitrust%20article.pdf](http://www.globalcompetitionforum.org/regions/africa/Nigeria/antitrust%20article.pdf). Last visited on 30th March 2009.

<sup>129</sup> R. Hilton, *Small Countries, Big Lessons: Governance and the Rise of East-Asia*, (New York: Oxford Press, 1996), 5.

different approaches for the economic problems of resource-dependent economies.<sup>130</sup>

This conclusion in turn introduces other concerns, prompting, not least the question: as to what economic standard(s) should be adopted in the substance of competition law and policy? Should a consumer surplus standard or a total welfare standard be allowed to dominate? When resolving the question, an issue to consider concerns the type of approach to adopt; for instance, when concentrating on a resource-dependent developing country like Nigeria: should the enforcement of the legislative instrument be the main focus or competition advocacy should be adequately combined in furthering the objective of competition law and policy to be adopted?

Since competition law is broadly concerned with three spheres (that is, (i) agreements, (ii) dominance and (iii) mergers.) and disregard to the presence of any of them can threaten competition, this chapter further concludes that the enactment and implementation of competition law and policy would not have the desired developmental impacts on resource-dependent developing countries if they are not considered within the particular context of the economic circumstances involved and the effectiveness of the impacts could reasonably be determined by the approach and types of goals competition is meant to achieve. Thus this thesis argues that for resource-dependent countries their competition laws and policies should be wide enough to include industrial, employment, and other trade related objectives that could either lead to or promote economic development. This approach will give the law or policy a wider public acceptance and opportunity for it to be effectively enforced bearing in mind that enactment of competition law and policy will lead to changes in the market and will probably face some level of opposition at the outset.

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<sup>130</sup> R.D. Cooter, 'The theory of market modernization of law: economic development through decentralized law' in J.S. Bhandari and A.O. Sykes (ed.), *Economic Dimension in International Law: Comparative and Empirical Perspective* (London: Sage, 1998), 225.

The changes envisaged involve an increase in the transparency in the market, reduction in corruption and rent seeking activities along with the requirement to comply with other standard competition principles. Opposition should be expected from erstwhile monopolistic firms and economic agents that have either abused or ignored the principle of free market economy.

A further conclusion is that all the three competition standards might not be appropriate in any particular resource-dependent country; at most it may be sufficient to focus only on restrictive agreements and dominance which are capable of restricting competition. This is because for a market to work effectively the particular political and economic conceptions of competition must first be translated into law.<sup>131</sup> This will then form the legal framework for market operation and development. This is part of the analysis in the next chapter where the appropriateness of standards is considered within the context of the provisions and objectives of the proposed Federal Competition Bill (FCB) in Nigeria.

In addition, while rent seeking and corruption are not the main thrust of competition law and policy, it will not be totally out of place to attempt to address them by the instrument of competition law and policy in resource-dependent countries because introduction of competition standards will enhance market discipline and promote transparency in the economy concerned. The mere fact that stakeholders in both the public and private sectors are conscious of the provisions of the law and possibility of being sanctioned for breach of competition policy will promote the drive for market efficiency and invariably lead to more transparency in the market.

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<sup>131</sup> G. Monti, *EC Competition Law* (Cambridge: Cambridge University Press, 2007)15.

Having recognized that competition law and policy is necessary for efficient resource allocation and achieving economic development in resource-dependent countries, a likely concern is the question of what type or mode of competition policy would be suitable for a developing country like Nigeria, caught in the twin throes of national economic reform and effects of globalization. At least, such competition policy must be able to cater for or guide against three things. First, it must have the power to restrain anticompetitive behaviours by domestic privatized firms or undertakings listed for privatization; second, it should be able to limit the abuse of monopoly power by multinational companies or large corporations brought about by international mergers and acquisitions, and third, it should promote economic development.<sup>132</sup>

Finally, this chapter concludes further that in some cases, using Nigeria an example and the probability of it adopting a multiple objective competition law and policy, there might be a need to strike a balance between competition and regulation. This will help to effectively foster its economic development, especially since the economy is at its formative period of embracing a competition culture following its privatisation and liberalisation policies.<sup>133</sup>

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<sup>132</sup> These firms include African Petroleum PLC., National Oil and Chemical Marketing Co. PLC., Unipetrol Nigeria PLC., Eleme Petrochemicals Company Limited, Nigeria Gas Company Limited, Port Harcourt Refining Company Limited, Warri Refining Petrochemicals Company Limited, Pipelines Products Marketing Company (PPMC), Delta Steel Company, National Iron Ore Mining Company Limited, Nigeria Uranium Mining Company, Oshogbo Steel Rolling Mill Company National Electric Power Authority.

<sup>133</sup> D.O. Adetoro, 'Can the imposition of a regulator in any liberalized energy market be justified by market behaviours?' (2006) 24(3) *Journal of Energy & Natural Resources Law*, 401.

## **Part Two**

### **Chapter Four**

#### **4.0 Competition Policy and Highlights of the Nigerian Federal Competition Bill**

##### **4.1 Introduction**

This chapter aims to examine some of the provisions in the draft Federal Competition Bill (FCB) in Nigeria critical to the promotion of efficient allocation of resources and thereby its development as a typical resource-dependent developing economy. It considers whether the draft Bill is an effective legislative instrument capable of addressing the primary competition problems and other (peculiar secondary economic) problems in resource-dependent countries like Nigeria.<sup>1</sup>

The importance attached to, and interest, in competition law and policy has continued to grow rapidly in most resource-dependent developing countries. In part, it is logically linked to pressure from international agencies on developing countries to enact competition laws and also the countries' desires for efficient competitive markets.<sup>2</sup> Some of the international agencies include the International Monetary Fund (IMF), the World Bank and the World Trade Organization (WTO).<sup>3</sup> Most of the developing countries are characterized by lower degrees of market competition than most of the developed countries. The interest in competition policy is also being driven by the need to attract foreign direct investment (FDI) which partly underpins the proposed FCB in Nigeria.<sup>4</sup> Competition policy is

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<sup>1</sup> These problems were generally examined in chapter 2, but this chapter considers them within the context of Nigeria, surrogate for resource-dependent developing countries.

<sup>2</sup> T. Stewart et al., 'Competition Law in Action: experiences from Developing Countries (Ottawa: International Development Research Centre, 2007), 4.

<sup>3</sup> See R. Parakkal, 'The WTO, competition policy and developing countries: A model of global governance' Paper presented at the annual meeting of the ISA's 49<sup>th</sup> Convention, Bridging Multiple Divides, San Francisco, CA, USA, March 26, 2008.

<sup>4</sup> C.S. Schatan and E. Riveria (eds), *Competition Policies in Emerging Economies: Lessons and Challenges from Central America and Mexico* (Canada: A co-publication with the International Development Research Centre (IDRC) and the UN, 2003) 2.

expected to create an enabling environment for growth and economic development. As a result, a large number of resource-dependent and transition economies have adopted some forms of competition laws and policies in recent times.<sup>5</sup> These are targeted at solving various competitive and macro-economic problems. Further, the ability of economic agents in these countries to influence public policy through different conduct and practices constitutes barriers to entry which hinder development of market competition, a situation made possible by the peculiar problems of resource-dependent economies.<sup>6</sup> These problems are often a combination of political, social and economic issues (micro-economic and competition concerns), but in relation to this thesis it is the economic issues that are more relevant. These are classified into primary and secondary problems. The first classification includes restrictive agreements, merger activities, monopoly and abuse of dominant position, weak institutional capability and low level of infrastructural development while the second classification generally concerns rent seeking, vulnerability to external shocks, high incidence of corruption, access to land, access to energy, resource curse or the Dutch Disease.<sup>7</sup>

Consequently, this chapter focuses on three areas of regulation (as provided in the draft Bill) that may impact on competition and other particular problems in a resource-dependent country. The areas are restrictive agreements, abuse of dominant position and

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<sup>5</sup> See, generally the website of Global Competition Forum, Published at <http://www.globalcompetitionforum.org/gcfpaper.htm>. Last visited on 4th April 2009.

<sup>6</sup> Riveria and Schatan, note 4, 9.

<sup>7</sup> The presence of a natural resource or wealth may somehow have debilitating effects or results in sectoral misallocation of resources, as well as causing overall macroeconomic imbalances in the economy of a nation and this incidence have often been referred to as either a resource curse or a Dutch disease, a term popularised in the late 1970s to refer to the decline of the manufacturing sector in Netherlands following its discovery of natural gas in the 1960s. See, M. Bruno and J. Sachs, 'Energy resource allocation: a dynamic model of the Dutch disease' Working Paper No.852 (Cambridge, Mass.: National Bureau of Economic Research, 1982), 3.

mergers and acquisitions. Thereafter, it further seeks to answer whether the inclusion of micro-economic goals in the draft FCB will lead to any inconsistencies in the application of competition law and policy.

#### **4.2 Background and History to Competition Policy in Nigeria**

In order to fully understand the approach to competition policy in Nigeria, a brief examination of some of its political and economic antecedents is considered necessary. The Nigerian economy between the 1950s and 1980s, like most Latin American countries, 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.<sup>8</sup> Additionally, it was boosted by the abundance of energy resources first discovered in 1956. However, enormous fiscal deficits, rent seeking, restrictive business practices and other associated problems with over dependence on income from its oil resources have brought to a close the growth it attained between this period (1950s and the 1980s) and thereby slowed down its economic development since the late 1990s.<sup>9</sup> Its attempts at different fiscal policies and economic reforms such as privatisation and liberalisation have not been effective in transforming its economy to a truly competitive one.<sup>10</sup>

In addition, empirical evidence from international experience confirms that while economic reforms, particularly trade liberalisation and privatisation, will contribute to improve the competition process in domestic markets, they provide no guarantees that

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<sup>8</sup> P.M. Lewis, *Growing Apart: Oil, Politics and Economic Changes in Indonesia and Nigeria* (Michigan: University of Michigan Press, 2007), 129

<sup>9</sup> N. Okonjo-Nweala and P. Osafo-Kwaako, 'Nigerian economic reforms: progress and challenges' (2007) Working Paper No 6 Brookings Global Economic and Development, 7.

<sup>10</sup>C. Schatan and E. Riveria, 'Markets in Central America and Mexico: what is happening with competition?' in Schatan and Riveria, note 3, 9.

these markets will function effectively without the need for any further regulatory controls against anti-competitive business practices.<sup>11</sup> Therefore, it is not surprising that criticism has followed the liberalisation and privatisation of most of the public enterprises in Nigeria. These exercises were embarked upon in expectation of 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 and policy in Nigeria.<sup>12</sup> They expect this will complement other reform

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<sup>11</sup> L. 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 3<sup>rd</sup> International ICR Conference Pro-Poor Regulation and Competition Issues, Policies and Practices, Cape Town, South Africa, 15.

<sup>12</sup> S.N. Ibeabuchi et al., 'Liberalization and privatisation of public utilities in Nigeria' in O.J.Nnanna et al., (ed.) *Contemporary Economic Policy Issues in Nigeria* (Abuja: Central Bank of Nigeria, 2003), 57.

programmes and also curb or mitigate some of the competitive problems and thereby stimulate or enhance economic development.<sup>13</sup> 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 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.<sup>14</sup>

Nigeria is not only desirous of achieving sustainable development domestically but it wants its domestic firms to be able to compete effectively on the global scene. In addition, the ever 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 exert pressure on developing countries to adopt new approaches to develop their economies into more competitive ones to fit into and benefit from global structures. These approaches thus call for an embrace 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.

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<sup>13</sup> P. 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 9<sup>th</sup>-10<sup>th</sup> 2006.

<sup>14</sup> I.S. Ukpata and G.A. Olukotun, 'The effect of organisational development in the Nigerian economy' (2008) 2(5) African Journal of Business Management, 092.

As a result of the foregoing reasons, Nigeria actively began the process of enacting a competition law and policy around 2001 although the economic reforms that were initiated in the late 1980s also had the economic development in Nigeria as their main focus. The Federal Government of Nigeria in 2001 issued some directives for its banking sector to be restructured. Implicit in the directive is the idea that if the banks were recapitalized they will stimulate development of the other sectors of the economy.<sup>15</sup> This is based on the view that the recapitalisation exercise will involve merger of banks and the new entities will then become more efficient to compete effectively within and outwith the country. This is the only sector that has witnessed some level of significant merger and acquisition activities in Nigeria: thus it will be used as a source of reference in the discussion of merger in this chapter.

However, the directives concentrated on the benefits accruable from the restructuring exercise but failed to fully consider the likely negative effects that mergers could have on an economy. In the instant case there were 89 banks in Nigeria before the restructuring exercise and 10 out of the banks were the dominant banks with huge capital bases while the remaining 79 banks were medium scale banks.<sup>16</sup> In addition the welfare effect in relation to the lending policy of the banks was not properly analysed before the exercise. The majority of businesses in Nigeria are small-scale enterprises and cottage industries which play very important roles in economic development. Apart from the Federal Government, they create the largest percentage of employment opportunities and resource utilization in Nigeria. Following the directive to recapitalize, the number of commercial banks was reduced to 21 as a result of mergers and acquisitions that took place, and this

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<sup>15</sup> See Central Bank of Nigeria, 'Guidelines and incentives on consolidation in the Nigeria banking Industry' 2004. Published at <http://www.cenbank.org>. Last visited on 4th April 2009.

<sup>16</sup> F.K Emeni and C. Okafor, 'Effects of banks mergers and acquisition on small business lending in Nigeria' (2008) (2) 9 African Journal of Business Management, 146.

affected their lending policy. They have now reduced their lending facilities to small and cottage industries. This was partly as a result of the decision to reduce their operational costs by reducing the number of branches they operate and centralization of their operations with modern information and telecommunication technologies.

This development is not unusual. In fact a study conducted by Berger et al., found that when banks merge to become large banking institutions it results in two effects; dynamic and static effects.<sup>17</sup> The dynamic effect is the resultant change in focus to reduce size, transaction costs and financial position while the static effect tends to be a reduction in the supply of small business lending per their asset base. In an economy like Nigeria with limited sources of finance for small businesses the overall effect might be a serious negative impact on the growth and development of the whole economy. Further, the sector is more attractive to the inflow of international investors who will both like to take advantage of the liberalisation of the sector (which offers a great degree of investment potential) and also require clear regulatory rules to safeguard their investment against any fear of changes in governmental policies.

However, the result of the exercise could have been different had there been a substantive competition or merger control law in place. At that time the likely effect of the merger/acquisition was never in issue rather the concern was to strengthen the positions of the banks without any consideration to the effects this would have on the structure of the market, especially that it brought a reduction in the number of competitors, making it easier to form a collusive agreement among the few remaining banks.

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<sup>17</sup> A.N. Berger et al., 'The effects of bank mergers and acquisitions on small business lending' (1988) *Journal of Finance Economics*, 188.

### **4.3 Introduction to the Nigerian Federal Competition Bill**

Following the liberalization and privatisation programme involving many of its publicly owned corporations, the Nigerian economy has continued to experience different forms of market distortions which have led to sharp increases in the price of goods and services. This will invariably lead to more concentration in some sectors of the economy, such as the financial and the energy sectors and possibly create more tension and conflicts in the country as a result of the other particular economic problems in the country. The emergence of the present draft FCB began in 2001 when the government formed a Competition and Antitrust Reform Committee to work with the Bureau of Public Enterprise (BPE) to design a competition policy for Nigeria.<sup>18</sup> This committee later commissioned an American firm to draft a competition law. This draft and other proposed competition law legislation were harmonised in 2005 by the Federal Ministry of Justice in conjunction with the Federal Executive Council (FEC); resulting in the present Federal Competition Bill before the National Assembly.

The main focus of the draft Bill is enshrined in its Preamble and Section 2. The Preamble provides as follows:

An act to establish the federal competition commission, promote the balanced development of the national economy, welfare and interest of consumers, maintain and encourage competition by prohibiting restrictive business practices that substantially lessen competition, prevent the abuse of dominant positions of market power in Nigeria and for matters connected therewith.

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<sup>18</sup>The Bureau of Public Enterprises, Nigeria is the agency established by law and charged with the responsibility of implementing the Federal Government of Nigeria's policies on privatisation and liberalisation. See <http://www.bpeng.org/NR/rdonlyres/D78D9627-8960-43FF-A411-855A9488542A/0/CompetitionBill.doc>. Last visited on 4th April 2009.

Additionally, the objectives of the Bill are set out in Section 2 as follows:

- (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 (sic) enhance the ability of small and medium enterprises to compete effectively; and
- (f) prohibit restrictive business practices which prevents, (sic) restricts (sic) or distorts (sic) competition or constitutes the abuse of a dominant position of market power in Nigeria.<sup>19</sup>

Arguably, the preamble is made very broad to accommodate competition goals, micro-economic goals, as well as other goals that might be connected with the Nigerian economy.

These goals are further listed in Section 2 to underscore their importance. The provisions

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<sup>19</sup> The original Bill as prepared by a consultant has undergone some changes and the current draft FCB is attached in the Appendix but the old draft available on the website of the Bureau of Public Enterprises, Nigeria, (an agency established by law and charged with the responsibility of implementing the Federal Government of Nigeria's policies on privatisation and liberalisation) has not been changed. See <http://www.bpeng.org/NR/rdonlyres/D78D9627-8960-43FF-A411-855A9488542A/0/CompetitionBill.doc>. Last visited on 4th April 2009.

of sub-sections 2 (a), (b), (c), and (f) align with the main goal of competition policy, that is, consumer welfare and economic efficiency but the provisions of other competing values in sub-sections 2 (d) and (e) are micro-economic goals which at first sight might appear capable of leading to inconsistencies in the application of competition policy. In the EU and the US the protection of consumer welfare and efficient allocation of resources form the basis of their competition laws. Thus the assertion by D.P. Wood that the:

Protection of small and medium-sized businesses, codes of fair competitive conduct, macro-economic policies such as employment and anti-inflation measures, have no place in the US antitrust laws.<sup>20</sup>

However, it could be argued that the Nigerian situation is quite different from the US and the EU circumstances, other competing values not catered for in other jurisdiction could be allowed. In fact there is nothing unusual with the focus of its proposed competition Bill. Section 2 of the South African Competition Act 1998 similarly provides for economic efficiency as its main goal alongside other goals. These other goals include promotion of employment, promotion of small enterprises and promotion of ownership and wealth distribution among historically disadvantaged people.

In practice these other competing values are made subject to the main goals associated with competition laws. The South African Competition Act includes a novel feature of public policy that allows competition to address socio-economic problems that are not directly competition concerns but which could impact negatively on the competition process. For instance the section addresses the high level of concentration in the South African

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<sup>20</sup> D.P. Wood, 'International standard for competition law: an idea whose time has not come' (1996) Programme for the Study of International Organisation (PSIO) Occasional Paper Geneva: Switzerland, 18.

economy (in terms of ownership and share) an opportunity for the disadvantaged members of the society to become empowered through different schemes, particularly employment programmes.<sup>21</sup> In some cases, especially merger activities, the fear that these might result in job losses for some section of the society, the provision of this section has had to be balanced with the overall objective of competition policy.<sup>22</sup>

#### **4.4 An Overview of Nigerian draft Federal Competition Bill (FCB)**

The draft FCB under consideration by the Nigerian National Assembly is to be primarily enforced by an administrative body known as federal competition commission (FCC) by way of public enforcement.<sup>23</sup> It contains seventy-six sections, although there are some provisions therein not directly related to competition but related to trade, commerce and industrial policy meant to promote social cohesion.<sup>24</sup> The focus of the Bill is both exploitative and exclusionary abuses. It is an amalgam of the American antitrust laws and the EU approach to competition. Thus it combines some of the substance of the American antitrust provisions and EU competition<sup>25</sup> policy respectively. This is shown, for example, in the wording of the provision of section 29 of the draft FCB which makes it unlawful to enter into any contracts, understanding, combinations and arrangements that restrict or likely to restrict competition in Nigeria. Similarly section 31 prohibits all agreements between enterprises which have or are likely to restrict or distort the competition process in a market in Nigeria. In addition while Part VIII, particularly sections 36 to 47, deal with

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<sup>21</sup> D. Lewis, 'The objectives of competition law and policy and the optimal design of a competition agency' OECD Global Forum on Competition, (10-11 February 2003, Paris), 4

<sup>22</sup> Unilever PLC/Competition Commission v CEPPWAWU [2001-2002] CPLR 336 (CT). This case demonstrates how the public interest concerning protection of employment is considered under the South African Competition Act. Every merger notice lodged with the Competition Commission must be served on trade union or employees' representative involved in the sector concerned and their input could significantly affect any merger decision likely to be reached.

<sup>23</sup> A detailed examination of the function and role of the FCC will be examined in the section that deals with design of a competition authority.

<sup>24</sup> See Section 8(a)-(e), Nigerian Federal Competition Bill.

<sup>25</sup> Sections 1 and 2 of the Sherman Act 1890, and Articles 81 and 82 EC.

conduct which can be abuse Part XI deals with mergers, acquisitions and takeovers, and monopoly respectively.

It has earlier been discussed that the draft Bill is quite expansive. It is arguable that the reason for this is to make it comprehensive enough to catch as many anti-competitive practices as possible. It contains sixteen parts. Part I sets out the preliminary provisions; these include its objectives, the ambit of its application, which comprise all economic conduct within and outside Nigeria by persons resident or carrying on business in Nigeria to the extent that such conduct substantially affects a market in Nigeria. Some of the provisions of this part are both appropriate and instructive. For instance, Section 1 gives a list of activities and persons exempted from the application of the draft law. These include association of employees for their own reasonable protection, collective bargaining agreements by employers and certain services by a group of professional were exempted from the ambit of the draft FCB. In addition this exemption is not closed but will be subject to a periodic review by its designated competition commission. This approach is similar to the past practice that was adopted in the definition of undertaking under Article 81 EC. Given the close similarity in substance and form when the draft Bill is enacted it is probable that its implementation will follow closely the past practice in the EU. The EU adopts a functional approach in the definition of the category of persons and economic activities covered by the application of Article 81 which prohibits agreements, decisions by association of undertakings and concerted practices that distort competition.<sup>26</sup>

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<sup>26</sup> A. Jones and B. Sufrin, *EC Competition Law: Text, Case, and Materials* (Oxford: Oxford University Press, 2004), 129.

The central purpose of the Bill contained in section 2, is very broad and it reveals other aims not totally premised on competition law. It has multiple goals which might hinder the design of a clear framework for its application. It aims to promote the ‘balanced development’ of the Nigerian economy by promoting and protecting the competition process and interests of consumers. The phrase ‘balanced development’ has different meaning in economics and planning. One meaning relates to economic activity and distribution of wealth that allows even access across different sectors of a society in opposition to uneven development.<sup>27</sup> Another meaning is to relate economic development with provision of basic infrastructure rather than redistribution of wealth in a society. It is not yet clear from an initial examination of the Bill how this objective would be actualised. The question that comes to mind is whether these will be carried out with implementation of other fiscal policies and how this would be measured in relative terms remains an interesting conjecture.

However, on the surface, the FCB is intended to foster economic development in Nigeria, but there is nowhere in the Bill where this aim was clarified. A careful look at Section 1(5) of the draft indicates that in certain cases the determination of what is ‘reasonable or desirable’ for the economic development of Nigeria will be subject to the dictates of the President on the advice of the National Economic Council (NEC) and in consultation with the FCC. This might lead to a great confusion and waste of time that could not be afforded in competition matters, especially since the draft did not provide any time frame within which the President might act. This is analogous to the concept of ‘public or national interest’ in competition.<sup>28</sup> This is controversial because both concepts are ambiguous and

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<sup>27</sup>See generally D. Massey, *Spatial Divisions of Labour*, (London: Macmillan, 1984).

<sup>28</sup>Public interest is provided for in Article of the Chinese Anti-Monopoly Act, 2007- Article 1 states: ‘This Law is enacted for the purpose of preventing and curbing monopolistic conduct, protecting fair market

could allow political and other interests to influence competition decisions under the guise of reasonableness or desirability. It could be argued that the provision will allow the government some level of leverage considering the fact that the economy has particular problems and it is undergoing a liberalization process. Its consumers see the government as the best guarantor of their interests, thus the section should be retained for a limited period pending the time that a stable competition culture would have been established in the country.

Furthermore, another major aim of the draft FCB is the promotion of the welfare and interests of consumers through competitive prices and product choices. Achieving this objective would likely prove to be a difficult task for the FCC for two reasons. Firstly, the concept 'interests of consumers' is wide and is more of consumer protection law. This area of law regulates relationships between consumers and business as it relates to product liability, privacy rights, fraud, misrepresentation or misleading advertisement and other unfair business practices targeted at consumers in most cases. Both competition law and consumer law have common roots in economics but there are fundamental differences in focus and how the two laws are implemented.<sup>29</sup> Thus to make this part of the aim of the proposed competition law will not only lead to confusion but uncertainty, especially with regards to consumers' expectations, which are best catered for by laws dealing with consumer protection. Secondly, competition does not create markets rather it seeks to enhance the efficient functioning of markets in order to enhance consumer welfare. This role pre-supposes the availability of an appropriate market structure that is yet to be fully developed in Nigeria.

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competition, enhancing economic efficiency, maintaining the consumer interests and the public interests, and promoting the healthy development of socialist market economy'.

<sup>29</sup> T.B. Leary, 'Competition law and consumer protection law: two wings of the same house' 2004 Published at <http://www.ftc.gov/speeches/leary/0410221earysarticle.pdf>. Last visited on 4th April 2009.

This goal along with the other broad goals is not unusual; it is similar to the initial broad objectives of competition policy in the European Community and the recent approach of the Chinese Antimonopoly Law of 2007.<sup>30</sup> It only shows again that competition statutes often contain goals that are not based entirely on the economic undertone of competition. Market integration was at the heart of the EC competition policy but since the attainment of an internal market the approach has shifted more towards the implementation of economic efficiency, so it should not come as a surprise if the focus of the draft Bill shifts as a result of changes in the economic situation in Nigeria. This is premised on the view that as economic circumstances change the aim of law as an instrument of state policy to achieve economic development shifts to a vision of law as a framework for market operation and constitutive part of development.<sup>31</sup>

However, the draft Bill takes cognizance of the presence of other sectoral regulations for the utility sector. It aims to ensure a balance and possibly a unity of purpose between the application of competition rules and whatever regulation that is in place to regulate the public utilities that have become liberalized. In section 2, it provides that before the FCC takes any action relating to the public utilities, it should first consult with the sectoral regulator involved. This approach will put off any potential conflict or friction between the FCC and any other utility regulator. For example the Nigerian Communication Act 2007 makes provisions for a regulator to ensure fair competition, misuse of market power and

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<sup>30</sup> See also M. Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* (Cambridge: Cambridge University Press, 2005), 178.

<sup>31</sup> D.M. Trebek and A. Santos, 'Introduction to the third moment in law and development theory and the emergence of a new critical practice' in D. Trebek and A. Santos, (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University, 2006), 1.

other anticompetitive practices in the communication sector.<sup>32</sup> Although ‘utilities’ are not defined in the draft Bill, it is not clear whether the draftsman confused utilities with the regulated industries in general. The body responsible for the public utilities mentioned in Section 2 is deemed to be the regulatory agency as defined in Section 114(13). This in any case may not eliminate totally the probability of confusion in future because a careful reading of Sections 84 to 85 along with Section 2 shows that the definition of regulated industry is couched very wide and the FCC is rather given too much flexibility in its powers to designate or determine which industry could be regarded as a regulated industry. Rather it may lead to agencies working at cross purposes and act as disincentive to trade and commerce.

In addition, section 7 gives the jurisdictional scope of the draft Bill. It provides as follows:

This Act shall apply to all conducts within and outside the territory of the Federal Republic of Nigeria by any person resident or carrying on business in Nigeria to the extent that such conduct substantially affects a market in Nigeria.

This is very consistent with application of other competition regimes like the EU competition law and the American antitrust provisions, particularly the Sherman Act,<sup>33</sup> where the effects doctrine among others as a basis of extraterritorial application of competition law is well founded. For example the main provisions of the EU competition law, Articles 81 EC and 82 EC did not expressly provide for extraterritorial application,

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<sup>32</sup> Section 1 Nigerian Communications Act (2003 No. 19) now known as Competition Practices Regulations, 2007.

<sup>33</sup> R.Y. Jennings, ‘Extraterritorial jurisdiction and the United States antitrust laws (1957) 33 British Yearbook of International Law 146. See also, J.P. Griffin, ‘Foreign governments’ reactions to the US assertions of extraterritorial jurisdiction’ (1998) 19 ECLR 64.

but it has continued to found its extraterritorial application on three doctrines, namely the economic entity doctrine, implementation doctrine and the effects doctrine.<sup>34</sup> Whether or not the FCC will be able to enforce its extraterritorial reach will offer interesting analysis when the draft Bill is adopted and comes into operation.

Furthermore agreements and other economic conduct will only be relevant for the purposes of Part 1 of the draft Bill if they are capable of having a substantial effect on a market in Nigeria. Economic transactions concluded outside the shores of Nigeria, but which lack or have no substantial effect on the Nigerian economy will not be regulated by the draft FCB. In most cases, the existence of an agreement is not usually the problem; rather it is whether or not such an agreement restricts or has the potential to restrict competition that lies at the heart of competition authorities' intervention.<sup>35</sup> Although there are some agreements that might impinge negatively on competition, nevertheless, they might not be prohibited or attract any serious concern from competition agencies. This happens in cases where the effects of such agreements are of minor importance. An example of this is the de minimis doctrine in the EU that was first formulated by the European Court of Justice (ECJ) in *Volk v Vervaecke* where it declared that 'an agreement falls outside the prohibition in Article 81(1) where it has only an insignificant effect on the market, taking into account the weak position which the persons concerned have on the market of the product in question'.<sup>36</sup> There are different thresholds to determine the effect of agreements on competition. The

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<sup>34</sup> See D. Geradin et al., Extraterritoriality, comity and cooperation in EC competition law' (July 2008) Published at <http://papers.ssrn.com/sol3/papers.cfm?> Last visited on 4th April 2009.

<sup>35</sup> At least in the EU the term 'agreement' is often treated broadly and objectively. It is not restricted to written formal agreement alone but it includes oral agreement; however, this is prohibited only where there is an element of collusion to hinder competition, as is the case in most cartel agreements. In the lead judgement of the case of *ACF Chemifarma v Commission (Quinine)*, the court found that an unsigned agreement comes under the ambit of agreements prohibited in Article 81 of the EC Treaty. – Cases 41, 44 and 45 [1970] ECR 661.

<sup>36</sup> Case 5/69 [1969] ECR 295.

EU's approach is 'appreciability', while the approach of some other jurisdictions is simply whether the agreement restricts or does not restrict competition, so in the former an agreement that obviously restricts competition might be declared valid if it has only a minimal effect on competition and/or trade.

The express requirement for the effect to be substantial lessening of competition in the draft FCB is good drafting. This was absent in the provision of Article 81 EC. It was the European Court of Justice (ECJ) that gave initial direction on the doctrine before the Commission Notice on Agreements of Minor Importance was published in 2001.<sup>37</sup> However the draft Bill does not have any provisions for some agreements which may not substantially affect a market but which can still hinder or distort competition. Small and medium enterprises are likely to be the ones to be affected by such conduct. This may prove to be a disadvantage and a negation of the intention of the draftsman to enhance the ability of small and medium enterprises to compete effectively.

A prima facie examination of the provision of sections 8 and 9 the draft FCB shows it is more than a mere legal instrument but a broad legal policy framework for a number of reasons. Chiefly among which is the question that section 9 raises, that is whether the draft Bill should serve as an instrument for the purpose of facilitating and developing a competitive market economy or should it be employed based on the understanding that a free market already exist in Nigeria. This is because a teleological interpretation of section 1 is to the effect that competition in Nigeria is aimed at creating and maintaining competition rather than to promote competition. Yet it is impossible to reasonably appreciate the provisions of section 1 without considering the provisions of sections 8 and

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<sup>37</sup> See the Commission Notice on Agreements of Minor Importance OJ [2001] C 368/13.

9. Thus it could be concluded that a joint reading of these sections shows that the goals and objectives contained therein are purposely made wide as well as flexible and meant to be a complete competition policy for the whole economy.

How the Federal Competition Commission will carry out these objectives remains an interesting issue especially that it is not a major government department and its resources and expected budget allocation will be quite limited. For instance, the country needs adequate infrastructure for efficient functioning of its markets in all of its major sectors like electricity and communication sectors. It is not within the powers of the FCC to build or create these infrastructures rather it lies within the expected obligation of governments to provide an enabling environment and build markets to aid their economies. Information asymmetry is often as a result of well-defined markets and competition authorities will not be effective where information and data are difficult to access. A detailed examination of the powers and function of the FCC in view of the role of competition authorities will be done in the next chapter.

Part VII is directed at monopoly and market power, particularly sections 36 to 41 which deals with abuse of dominant position and market power but surprisingly, Part XI, particularly sections 66 to 76, is further designed to deal specifically with monopoly. The joint provision of the two approaches tends toward over-regulation and this could lead to a great confusion for not just the businesses involved who desire clear rules to function effectively but the FCC also is likely to find it difficult to build a solid legacy based on multiple tools without either established staff or successful history of competition administration. Besides this, while sections 36 to 41 make ample provisions for the

treatment of abuses of dominant position in a similar fashion to that of Article 82 EC, they leave many gaps unfilled. For example, the FCB fails to provide any necessary connection between dominance and Nigeria unlike the provision of Article 82 that requires that the dominant position must be held in the ‘common market or a substantial part of it’. There is therefore an absence of the geographical link necessary for the establishment of dominance and one is left to ask whether it is dominance at large that is required or where the dominance is held is irrelevant. This type of lacuna is also evident in Articles 17 to 19 of the Chinese Antimonopoly Law.<sup>38</sup>

#### **4.4.1 Agreements, Contracts, Arrangements and Restrictive Practices**

Within the context of a resource-dependent developing country like Nigeria, certain structural factors (such as high concentration, information asymmetry and lack of entry), price transparency and pricing contracts are continuing economic realities that impact on its economic development. As a result, the need to mitigate or reduce the impact of these factors must have informed the provision of section 114 of the FCB concerning ‘agreements’. It defines ‘agreement’ as contracts, arrangements, or understanding (written or oral) and concerted practices while restrictive practices are defined in the same section to mean practices in restraint of trade or which otherwise hinder competition. Generally the substance of the provisions of part VI is the prevention of collusion between firms or parties which substantially lessen competition or are detrimental to consumer welfare.<sup>39</sup> One precise feature in the draft FCB is that agreements could either be in writing or oral based on some form of consensus likely to undercut the competition process

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<sup>38</sup> The Antimonopoly Law of the People’s Republic of China 2007.

<sup>39</sup> See sections 29 to 31 (1) of the draft FCB in the Appendix.

The meaning of an ‘agreement’ read along the provisions of sections 29, 30 and 31 is that ‘agreement’ is not limited to a formal contract but will include other transactions which are unenforceable at law due to lack of consideration, infringement of public policy, lack of capacity and other factors. What is important is the intention of the parties to conduct themselves in certain ways on the market that will lessen competition. The provisions of this part raise some other issues. First of all, the use of the word ‘parties’ in section 29 is synonymous with the word ‘enterprises’ as used in other parts of the draft FCB to denote anyone involved in business. Thus the Bill will also be applicable to the various Nigerian government parastatals or departments involved in the market. Prior to the privatisation and liberalisation programmes the government’s economic involvement in the economy was through these entities and it still retains substantial levels of interests in most of the sectors particularly in the energy, telecommunication and natural resources sectors. This will provide an open playing field and reduce any incidence of creating entry barriers through governmental influence. Secondly, while the provision of the section seems to be an amalgam of the language of the Sherman Act, EC competition law and the UK’s Competition Act 1998, the overall intention and effect is to prohibit anticompetitive agreements and other forms of conduct between enterprises which are not expressly prohibited for in the draft FCB. The decision to make the definition of an ‘agreement’ very flexible might be in the best interest of the Nigerian economy which is still growing in all ramifications. It does not seem to be a better option to adopt a rigid approach.

#### **4.4.1.1 Elements of Section 29 to 31**

Before a breach of the provisions herein could be found will require the following;

- the existence of parties or undertakings,

- collusion between the parties or undertakings via contracts, arrangements, understanding, agreements, concerted practices or combination thereof
- the collusion has substantial lessening effects on competition
- the collusion has or is likely to have effects within a market in Nigeria.

#### **4.4.1.2 Parties or Undertakings**

The first element of the provision, that is, the concept of ‘parties or undertaking’ is wide but the definition of an undertaking is not expressly provided for in the Bill. Rather from the interpretation section it is referred to as an enterprise, which is also defined as any one involved in business and the Bill defines a business as follows:

‘Business’ means any undertaking that is carried on for gain or reward; or in the course of which goods or services are acquired or supplied; or any interest in land is acquired or disposed of, otherwise than free of charge.<sup>40</sup>

A clearer definition will be preferable to avoid any confusion, although it is probable that its interpretation might follow the approach in the EU where many cases have dealt with the concept and arrived at a distinct characteristic for the concept. However, a party or an undertaking in this context is an economic entity engaged in economic activity irrespective of its legal status or how it is being financed.<sup>41</sup> Thus it could be argued that in view of the additional provisions in section 1(6) the Federal Government of Nigeria, states and local governments or any other parastatals and every natural person and body involved in trade or commercial activity will be regarded as enterprises for the purposes of this draft Bill.

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<sup>40</sup> The Draft Bill, Section 114.

<sup>41</sup> For a more detailed explanation see, Case C-41/90 *Hofner & Elser v Macrotron* [1991] ECR I-1979. 57-98.

#### 4.4.1.3 Forms of Collusion

The draft FCB gives a very wide allowance for the forms of collusion which may be regulated by the FCC. These are basically contacts, arrangements, agreements, understandings, concerted practices or combinations. The wide ambit of the provision suggests that it is meant to both protect the process of competition and the position of the competitors as well considering the facts that most of the competitors in the Nigerian economy are small and susceptible to the likely impact of market power of the dominant firms or merger activities within and outwith Nigeria. Thus it is expected to catch as many restrictive agreements as possible but it is not possible to set a clear list of the agreements that it prohibits. The FCC will need to be firm and objective in assessing the actual or potential impact of an agreement rather than an assumption that agreements that come up under the list should attract sanction. For example some agreements by a large firm with considerable market power might affect the competitive process more than a similar agreement by a smaller firm. This position finds much support from the provision and interpretation of Article 81(1) EC. For example in *Bayer AG v Commission*,<sup>42</sup> the meaning of an agreement was extensively examined, this rests on a subjective element that defines the nature of the concept of agreement. Thus an agreement can be bilateral or multi-lateral and could be a form of consensus or meeting of minds between two or more undertakings on the implementation of a policy or plan on a market.

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<sup>42</sup> Case T-41/96, *Bayer AG v Commission* [2000] ECR II-3383, affirmed on appeal Cases C-2&3/01 P, *Bundesverband der Arzneimittel-Importeure EV and Commission v Bayer AG* [2004] ECR I-23.

#### **4.4.1.4 Effect**

The draft Bill adopts a pro-active approach to deal with collusion. Although anti-competitive agreements restrict competition, in the draft Bill there is no need to show that an agreement has already produced such an effect or that the agreement is already in practice. This may appear to be favourable for easy administration but the introduction of criminal sanction to the enforcement of the prohibition in sections 29 and 31 could create legal technicalities which could lead to delay in justice and further distortion of competition process. Ideally time is of essence in competition matters and if the draft Bill will focus on using only commercial principles and use of civil remedies to deal with anti-competitive agreements then the enforcement and other activities involved will not be slowed down by consideration of criminal principles such as the need to consider the mental state of the parties which could be used as a successful defence in criminal matters.

However, for an agreement or any business practice to be caught by the provision of sections 29 and 30 it must have as its effect 'prevention, restriction or distortion of competition'. The FCB provides a list of examples of agreements targeted; these include price-fixing, market sharing agreements, production control, collusive tendering and a few others. The examples given in the draft Bill are not exhaustive and more conduct could still be caught in line with the criteria in the draft Bill. It is necessary to note that the draft Bill did not mention object of the agreement to be prohibited rather it referred to the effect of an agreement but a careful reading of section 29(1) b will show that parties involved a trust or any conspiracy in restraint of trade normally have an objective of undercutting the competition process. It might be necessary for this to be considered in the amendment

before the Bill is passed into law.

In addition, in cases where the ECJ could not find that that an agreement was intended to restrict or hinder competition, it would go further to examine the effect of that agreement, but examining the effect of an agreement is quite more difficult than determining its object.<sup>43</sup> The former requires robust economic analysis along with the necessary consideration of the legal circumstances of the agreement involved. This points further to the need to have qualified personnel to undertake this form of analysis; this requirement will be treated in depth in the section concerning design of a competition authority in Nigeria.

Although, unlike the provision of Article 81 EC, which states clearly that the effect or object of the provision is restriction of trade within the EC, the draft FCB did not define the jurisdictional boundary of the provision which for all intents and purposes is assumed to be within the Nigerian economy. It is expected that this omission might be corrected before the final passage of the Bill. It could also be argued that since the jurisdictional elements of the draft Bill are dealt with in the requirement that the anti-competitive effect must be impacted in Nigeria, then one can do without the requirement that trade or competition in Nigeria must be affected by the anti-competitive agreement.

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<sup>43</sup> This approach is demonstrated in Case - 306/96- *Javico v Yves St Laurent* [1998] ECR I-1983.

#### **4.4.2 Abuse of Dominant Position or Market Power**

Part VII of the draft FCB deals with abuse of dominant position or market power. The concept of abuse as is recognised globally deals with competition problems that may arise from the unilateral behaviour of businesses possessing economic power. These provisions are modelled after Article 82 EC, but the FCB contains more provisions than the provisions found in the EC Treaty. According to section 37 (1) of the FCB, any conduct on the part of one or more enterprises which amounts to the abuse of a dominant position in market is prohibited.

Section 4 of the FCB deals with the determination of the existence of market dominance and a proper interpretation of this could only be done by having recourse to the provisions of section 36 dealing with the concept of dominant position or market power. This is described as significant market power by one or more enterprises which give them the ability to control prices, exclude competition or affect the competition process in a relevant market independently of their competitors or customers. This provision recognises both individual and collective dominance similarly to the reference ‘to one or more undertakings’ in Article 82 EC.

Measuring dominance is not very easy in practice, although it is all about market power but market power must be in relation to a relevant market. A likely problem for a competition agency in resource-dependent developing country is the issue of information. It is the economic actors that possess privileged information about their activities, especially in terms of efficiency gains, market power and the extent of their relationship with each other. This information is very important to effective implementation of competition policies and

lack of it will pose a great constraint to making well informed decisions. It is arguable that section 36 allows a flexible approach in the wide margin it provides for the measurement of a dominant position in a relevant market given the difficulties that lack of appropriate information might give. It provides that such a position will exist if one or more companies individually or collectively has or have a share of more or than forty percent of the relevant market. It goes further to provide that they can also be in this position if they have the ability to control prices or exclude competition or distort the competition process to an appreciable extent independently of other competitors or customers.

Consequently, the flexible margin given to the measurement of market power and dominance in section 36 is commendable because the draftsman seems to have taken into consideration the peculiar economic circumstances of Nigeria which could make it difficult to determine efficiently a dominant position and its abuse. These economic conditions include fragmented and small nature of economic activities in form of small businesses which makes it difficult to measure their market power and absence of accurate data concerning these small enterprises. As a result, the additional express prohibitions in Part IX, particularly sections 42 to 47, which deal with resale price maintenance, individual resale price maintenance and patented products, appear very strategic to deal with all other forms of restrictive business practices that might not be caught by reference to abuse of an ordinary or collective dominance. In any case, when the Bill is enacted there will still be the need for additional guidance to avoid over-regulation due to the expansive nature of the provisions, and also to enhance the manageable balance of the objects of the Bill along with other issues that may pose as challenges to a new competition authority in a resource-dependent country that used to be characterised with publicly owned companies

It is commendable that the draftsman of the Bill recognised the role that fines can play in dissuading economic agents from engaging in anti-competitive agreements.<sup>44</sup> To serve as an effective tool, fines must really be higher than the profits economic agents are likely derive from the prohibited acts else they will opt to carry out their activities against the risk of paying lesser fines if they were discovered. In the draft Bill, apart from the stipulation of specific amount of penalties likely to be paid, the FCC is also empowered to elect to apply a sanction that is six times the amount of profit made or likely to be made by the offending economic agents. This provides a leeway for the FCC to apply the maximum penalty to a larger company which in the absence of the probability of the risk of a bigger penalty will rather elect to breach the law because it will still been possible to make profit after the fines have been paid. Thus this flexibility given in the sanction process can be quite effective in discouraging anticompetitive behaviours. Further, provision of a leniency scheme in the draft FCB could also prove to be very effective and less expensive in enforcement activities.

#### **4.4.3 Merger Provisions in the Draft FCB**

Nigeria, like other developing countries, has witnessed an increase in economic restructuring and merger/acquisition related activities within the last decade. This is fuelled by the increasing globalisation of the world economy which has prompted the need for developing countries to adopt measures towards attracting more foreign investments and gain maximally from the liberalisation of their economies.<sup>45</sup> These activities conform to

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<sup>44</sup> For example, the Draft Bill, Section 10(10) (b).

<sup>45</sup> W. Carlin and P. Seabright, 'The importance of competition in developing countries for productivity and innovation' (2001) Background paper for World Development Report.

what has been described as the ‘competition culture’ essential for economic development.<sup>46</sup>

An important consequence of these merger/ restructuring activities is always the intention to retain some form of ownership control and depending on the structure of the market before and after the merger this could impact negatively on competition and on economic development. The recent attempts at economic policy reform in Nigeria reinforce this point. This was mainly in its energy, communication and financial sectors.<sup>47</sup> It is arguable, (although not based on any empirical data but from the general feeling in Nigeria) that the presence of a competition law or merger control regime during the recent restructuring and merger activities of the financial sector in Nigeria could have yielded a different result. Thus considerable attention will be given to examination of merger provisions in the draft Bill.

In addition, with privatisation and the liberalisation of its economy Nigeria is likely to witness more influx of foreign investors through international acquisitions/mergers which could lead to increased market power of large multinationals and the potential for abuse of market power. In support of this view is Ajit Singh’s argument that:

Developing countries are clearly affected directly by the monopoly power effects of international mergers when a foreign multinational acquires a

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<sup>46</sup>According to Nicholson, ‘the term has been coined to describe the social political climate for antitrust policy, which could include political will, regulatory expertise, efficient enforcement, control of corruption, sufficient resources dedicated to the task. See, M. W. Nicholson, ‘Quantifying antitrust regimes’ Federal Trade Commission, 2004 Published at

<http://www.ftc.gov/be/workpapers/wp267.pdf> Last visited on 4th April 2009, 5.

<sup>47</sup> ‘Banking consolidation: The making of history’ Financial Standard, 16th January 2006, 2.

domestic firm. However, they are also affected indirectly even when mergers take place outside their jurisdictions, e.g. within advanced countries themselves.<sup>48</sup>

Given the lack of experience of Nigeria with competition law or policy, the draftsman of the draft Bill must have taken this into consideration in the provisions relating to merger and acquisition under the Bill. The draft Bill does not expressly give definition of a merger rather it provides a description of when enterprises cease to be distinct and therefore become a merged entity. This occurs when they are brought under a common ownership or control.<sup>49</sup> Section 49 of the draft Bill further gives a broad list of instances when changes in either ownership or control could qualify as a merger.<sup>50</sup>

The first striking feature in the merger provisions in the draft FCB is the wide and broad definition and description of a ‘merger’ that may be subject to the provisions of the Bill. This will likely bring into focus many transactions that are not usually regarded as mergers. This definition is similar to the definition employed for merger review under the

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<sup>48</sup> A. Singh, ‘Competition competition policy in emerging markets: international developmental dimensions’ (2002) ESRC Centre for Business Research, University of Cambridge, Working Paper No. 246, 12.

<sup>49</sup> The Draft Bill, Section 48(1)

<sup>50</sup> Section 49 (1) For the purposes of this Act, any two enterprises shall be regarded as ceasing to be distinct enterprises, if either (a) they are brought under common ownership or common control (whether or not the business to which either of them formerly belonged continues to be carried on under the same or different ownership or control); or (b) the enterprise ceases to be carried on at all and does so in consequence of any arrangement or transaction entered into to prevent competition between the enterprises.

(2) For the purposes of subsection (1) of this section, enterprises shall (without prejudice to the generality of the words “common control” in that subsection) be regarded as being under common control if they are (a) enterprises of interconnected bodies corporate; or (b) enterprises carried on by two or more bodies corporate of which one and the same person or group of persons have control over it; or (c) enterprises carried on by a body corporate and an enterprise carried on by a person or group of persons having control of that body corporate.

Fair Trade Act UK 1973 (FTA) which was subject to much criticism<sup>51</sup> but following recent reforms provisions of the Enterprise Act 2002 (EA) now govern merger review in the UK. It is assumed that lessons from the UK's experience and recent reform should have guided the drafters of the FCB rather they seem to have taken the UK's former precedent verbatim without any justification or qualification. Before the Bill is passed into law it is imperative that this anomaly might be corrected during legislative debates to avoid any disputes likely arise when this Bill is being implemented.

The second striking feature is the provision for two stages of merger control. The first stage gives the Minister the power to initiate and make decisions on merger applications.<sup>52</sup> The second empowers the FCC to oversee pre-merger approvals and all other matters related to a merger application.<sup>53</sup> This is also very similar to the approach adopted under the UK's Fair Trade Act (FTA) which has now been replaced by the provisions contained in the Enterprise Act. It could be argued that the same defects inherent in the merger review provisions of the FTA will occur in the present FCB in many ways.

First, the position of the 'Minister' in merger review here will bring in a lot of political and public policy consideration into matters that most likely require economic consideration, particularly that the decision to refer any qualifying mergers to FCC for investigation rests with the Minister who might not follow any clear and objective standard in his decision making but may be swayed by political influences to make decisions inimical to the

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<sup>51</sup> For more details, See T. Ellis, 'A survey of the government control of mergers in the United Kingdom' (1971) Northern Ireland Legal Quarterly, 22, 251-299 and 459-497.

<sup>52</sup> The Draft Bill, Section 48.

<sup>53</sup> The Draft Bill, Sections 59 and 60.

competition process.<sup>54</sup> The Minister is not mandated in the Bill to give reasoned decisions but he or she is not unlikely to do so in practice due to the commercial nature of the subject in issue. Even in cases where the Minister decides to refer a merger for investigation, he or she is not under any obligation to follow the recommendation of the FCC. A recommendation from the FCC is only advisory and the Minister is not under any obligation to follow them. Second, it is not clear the particular ‘Minister’ referred to in the draft FCB; is it the Minister for finance, or Minister of justice or Minister for commerce and industry that is in view. There is a need to clarify which Minister is intended especially that the holder of the office is not permanent, the intended Minister is also expected to have a reasonable appreciation of the substance of the issues involved.

However it could be argued that the provision giving power to the minister to refer a merger and the clear omission to specify the ‘Minister’ intended by the draftsman were political ploys that the government will like to make use of in order to have a control over economic changes likely to effect a permanent change of its economic structure. This might be a valid point for a developing economy lacking a robust market framework but the long term cost in terms of consistency and ability to assure investors, particularly foreign investors, might be more than the political benefits to be gained. This is because where the Minister has decided to allow a merger application it is not likely that the FCB could turn around to block it. In addition, any merger authorization or clearance blocked by the FCB could also still be allowed by the Minister. This could lead to a lot of confusion but it will be interesting to, see how this scenario will evolve in practice.

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<sup>54</sup> It is a common assertion though not proven that experience and individual capability are not the major factors often considered for ministerial appointments in Nigeria but political patronage plays a major part. These appointments are not permanent and are often seen as opportunities to share in the national wealth. Therefore this leave room for corruption, rent-seeking and regulatory capture.

The second stage approach requires a mandatory application for a clearance or authorisation to the FCC as provided in sections 59 and 60. While the issue of clearance or authorisation appears novel, it offers the best approach for merger control which is usually best left done by an independent body on objective grounds. Section 59(5) provides that a 'Clearance' relates to a determination in respect of a merger or an acquisition whereby the Commission only considers whether or not the merger, acquisition or takeover in question will result in the prohibited effect. Section 60(6) provides that an 'Authorisation' relates to a determination in respect of a merger, takeover or an acquisition whereby the Commission is requested by the applicant to consider that there exists a factor of public benefit and that such factor justifies the authorisation of a merger, takeover or acquisition, which results in the prohibited effect. It is suggested that having only one stage, preferably the second stage approach which is more objective will be cost effective and will save unnecessary delay especially that in practice the presence of the two levels of merger control could lead to friction at the cost of the consumers welfare.

The second major feature of the draft FCB concerns asset and turnover criteria. Section 48(1) (b) of the draft Bill gives the types of mergers that require ministerial reference and this is based on the book value of the acquired asset in excess of I billion Naira (£4million) of the firm concerned.<sup>55</sup> Clearly, this feature is open to some criticisms. First, it is not clear from the Bill why it favours asset criterion against market criterion, the turnover criteria will comprise vertical, horizontal and conglomerate mergers and this might not reflect the real impact of the merger on the market concerned. Second, the amount of 1billion Naira

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<sup>55</sup> The Draft Bill, Section 48(1) A merger reference may be made to the Commission by the Minister where it appears to him that two or more enterprises, one of which carries on business in Nigeria or by or under the control of a body corporate which is incorporated in Nigeria, have ceased to be distinct enterprises and (a) as a result of that, the condition specified in subsection (2) or (3) of this section prevails, or does so to a greater extent, with respect to the supply of goods or services of any description; or (b) the value of the assets taken over exceeds \_1Billion.

is not objective considering the fact that there are hundreds of firms with smaller assets but with considerable market power who will therefore not be caught by this provision. For example as the draft Bill stands a firm with an asset worth 10 Billion Naira acquiring another firm worth 800 Million Naira will not be caught by the provision while if another firm worth 100 Million Naira desires to acquire a firm worth 1 Billion it will be caught by the provision. This looks absurd and might not be the intention of the drafters. The use of market turnover seems to be the most popular and realistic method in most merger regimes. Asset acquisitions do not often have immediate effect on firms' turnovers.

Another remarkable feature of the Bill is the role of public interest consideration in the text for merger control in Nigeria. Section 48 of the draft Bill mandates the Minister (where it appears to him) to refer qualifying mergers to the FCC for investigation against the test of whether the merger, operates or may be expected to operate, against the 'public interest'. The test of public interest is ambiguous. Would it be interpreted as consumer interest or a national interest? It is not yet discernible from the Bill whether the interpretation of public interest would be geared towards achieving the cardinal or primary objective of the Bill or competition law. The cardinal objective being the overall objectives of the Bill as provided for in the preamble and section 2 while the primary objective is just the economic efficiency objective. It could be argued that the public interest test is actually a complement to the substantial lessening of competition test contained in the general philosophy of the Bill and should not be read in isolation. Thus if the cardinal objectives are achieved through this provision then the Bill will have been successful in addressing both the primary competition problems and other secondary economic related problems.

Furthermore, public interest consideration is not unusual. While some countries like the United Kingdom have abolished it from their competition law, it has started featuring strongly under new competition regimes like China and South Africa.<sup>56</sup> This undoubtedly is linked to differences in economic circumstances. Under the South African Competition Act, before a merger is finally allowed, its Competition Commission not only had to determine whether the merger would substantially prevent or lessen competition but also would consider other public interest issues, as specified in Section 12A(3) of the South African Consolidated Competition Act. The subsection provides as follows:

When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on a particular industrial sector or region; employment; the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and the ability of national industries to compete in international markets.<sup>57</sup>

Moreover, there is nothing in the Bill to suggest that the public interest consideration should not be extended to other issues such as property rights. This is one of the issues that the Nigerian government is grappling with in regards to the minority ethnic group in the Niger Delta. This region produces the bulk of the oil and gas revenue for the country but it suffers from lack of basic infrastructure, unemployment and serious environmental problems due to exploration and development of oil in the area. This has led to very

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<sup>56</sup> For Article 31 of the Chinese Anti-Monopoly Law stipulates that in case of national security, the acquisition of domestic enterprises by foreign operators shall further be subjected to the relevant provisions of the State for national security review in addition to the anti-monopoly review.

<sup>57</sup> South African Consolidated Competition Act, No 39 of 2000.

serious agitations in the area for a change in the determination of the property rights to the resources in their domain. As a result the people are demanding more control over the resources in the region. While this demand has various political and legal implications, this thesis argues that the economic rights of these people could be somewhat enhanced in the competition Bill with provisions analogous to that in section 2 of the South African Competition Act. The section amongst other things stipulates that the Act is to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

While the issue of public interest is very important in merger control for many countries, two things remain very clear in all merger regimes. The first is that the majority of all merger cases are decided on grounds of competition. The second thing is that what constitutes public interest is not static and will continue to be influenced mostly by economic factors rather than politics. Consequently, for effective control, merger rules would need to be complemented by practice guidance in all cases. This is because both the firms and investors in a market need to know within a reasonable range of probability what the effect or outcome of their merger proposal will be in an economy.<sup>58</sup> This degree of certainty would also act as a check on the powers and discretion of the antitrust authorities, and allow them to operate within the ambit of defined objective standards. According to Whish, it is important 'to give an objective meaning to expressions such as a 'substantial lessening of competition or a significant impediment to competition'.<sup>59</sup>

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<sup>58</sup> This finds support in the argument of Jrisy Motis *et al.*, that an essential component of EC merger reform should be how to develop a better understanding of synergies method to evaluate them; see also, J. Motis *et al.*, 'Efficiencies in merger control' in F. Ilzkovitz (ed.), *European Merger Control: Do We Need an Efficiency Defence?* (Gloucester: Edward Publishing Ltd., 2006), 316.

<sup>59</sup> R. Whish, *Competition Law*, 5th ed., (London: Butterworths, 2003), 789.

#### **4.5 The Conflicting Goals of the Draft FCB**

The cardinal objectives of the Bill include the promotion of the balanced development of the Nigerian economy, welfare and interests of consumers, creation of opportunities for domestic enterprise to compete in world markets and to enhance the ability of small and medium enterprises to compete effectively. These objectives appear to be geared towards maximizing the full economic potential of Nigeria. Section 2(c) of the Bill seems to be the most important goal of the Bill, which is to maintain, encourage and enhance economic efficiency in production, trade and commerce. Theoretically, promotion of economic efficiency is expected to lead to efficient allocation of resources and productive efficiency which should translate into competitive price and product choices envisaged in section 2(b). However, it could be argued that the goal to promote economic efficiency will conflict with the other economic/industrial goals meant to protect domestic enterprises. For instance, the balanced development envisaged in the draft Bill is expected at least to address some of the peculiar problems in a resource-dependent country which is a fusion of politics and economics; and this could be quite controversial. For instance it might be patriotic to encourage local enterprises involved in some of the liberalised sectors of the Nigerian economy, such as the energy and telecommunication sectors, but this might discourage entry of foreign firms who might be more efficient to compete and render better services and foreign investors will arguably see the promotion of such industrial objectives as a relapse into protectionism.

Nevertheless, this type of conflict is not unique; it is common in other competition regimes such as in the EU where Articles 82 and 83 EC are used not only to promote consumer welfare but it was used to promote the achievement of the European internal market objective. In fact EU competition policy is never read or implemented in isolation, but

rather in conjunction with other Articles of the EC Treaty, such as Articles 2, 3(g), 4, 5, 10 and 12. In particular, Article 2 EC sets out the objectives of the EU which include the establishment of a common market and monetary union, and implementation of common policies to promote employment and balanced and sustainable development among Member States. Thus, what is required of the competition agency in Nigeria will be to find the right balance between the core competition objectives and other objectives, particularly industrial policy, contained in the draft Bill. Its ability to do this efficiently will be dependent on the level of available resources enforcement powers of the agency. This will be further examined in the next chapter.

#### **4.6 Conclusion**

The draft FCB at the moment is a very broad competition law and policy comprising the major competition law standards and other industrial and socio-political objectives. This will need to be adjusted and tailored to target the basic competition concerns likely to affect a resource-based economy like Nigeria. While the draft Bill will help to improve such issues as access to market, quality and affordability in some cases, it does not seem to have any guarantee to wipe out some of the particular problems of resource-dependent countries, such as corruption, rent seeking, the Dutch disease and property rights raised in the research questions. For instance the draft Bill mandates the FCC to promote the balanced development of the national economy and welfare of the consumers amongst other competitive concerns but there is no further regulatory or fiscal provision empowering the FCC to carry out such a challenging task. In particular, rent seeking and corruption are serious issues that could impact on any economy but the FCC as provided for in the draft lacks any policing or investigative powers that could effectively deter such activities.

Closely linked to the issue of corruption is public procurement, which is a big source of loss of revenue by the government through rent seeking officials and private persons in developing countries.<sup>60</sup>The draft Bill does not have any provision to guide against the continuance of this phenomenon. It is estimated that the government loses an average of N40 Billion Naira (£160million) each year from corrupt practices as a result of lack of transparent monitoring process in the award of public contracts. The provisions in the proposed competition Bill will not totally remove this but they will reduce its incidence and money saved thereby will contribute to the balanced development of the Nigerian economy as envisaged in the preamble of the draft FCB.

However, the draft Bill offers some promise in the realisation of its objective to turn Nigeria into a ‘balanced economy’. This is expected to occur from the cumulative potential welfare effects that will result from a proper implementation of the draft Bill as it concerns anticompetitive agreements, abuse of dominant position and merger control. If the FCC utilizes its powers effectively, it might be able to contribute to employment. For instance, it could use the public policy mandate to either contribute to job creation or save jobs that could be lost as a result of a merger plan. Thus along with other economic considerations as provided for in the draft Bill it may extract commitments from parties to a merger plan before it is approved that there would not be job losses This is particularly important in

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<sup>60</sup> R. Falvey, et al., ‘Competition policy and public procurement in developing countries’ (2007) No 08/07 CREDIT Research Paper, Published at

<http://www.nottingham.ac.uk/economics/credit/research/papers/CP0807.pdf>. Last visited on 9th March 2009.

view of the recent wave of restructuring and consolidation that recently took place within the banking industry in Nigeria, many workers lost their jobs during this process.

In addition, there is an increase in the number of companies entering the energy and other sectors of the economy like the telecommunication and pharmaceutical sectors which have led to a number of acquisitions and restructuring in recent times. These restructuring or mergers are bound to increase, and it is in its overall interest to have a full competition law and policy in place to guide the process, though it is not necessary in most cases for a competition law to include a merger control. These provisions can contribute to the balanced economic development of the Nigerian economy through the potential welfare effect of international mergers. Further, this demands many necessities in order to ensure they deliver maximum benefits to the economy. One such necessity is the need first to develop a proper competition framework or sectoral competition frameworks for different sectors akin to what exists in the communication sector in the US and a merger control properly targeted at the behavioural practices and effects of mergers originating either from within or from abroad. Another necessity is the need for support by a framework of international cooperation, particularly among the countries involved, especially since the Nigerian government wants its economy to be a tangible player in the global market. Consequently, this section of the thesis advances the argument that similar considerations and conclusions might be drawn for other developing countries such as Nigeria in the throes of liberalization and market reforms. Nigeria and other developing countries need to attach more importance to the protection of competition through merger control, which has

been described to 'be the most visible as well the most economically and politically significant part of competition law'.<sup>61</sup>

However, the question remains whether or not the draft Bill is sufficient to achieve its goals. While it is difficult to hazard any definite answer on the overall likely performance of the draft FCB as a regulatory instrument, it is still reasonable to assume that a large portion of some the provisions of the draft FCB when enacted in Nigeria will benefit its economy especially in its ongoing liberalisation process. A defining issue for the Bill will be how to balance the micro-economic goals in the Bill with the major competition goals, and how effective its implementation would be without any political compromise. This is because implementation of competition law will probably raise different problems ranging from resistance from firms hitherto not compelled to observe open market rules to the issue of lack of appropriate enforcement staff. These issues will be further examined in the next chapter where the problems faced by new competition authorities will be examined in relation to Nigeria.

Finally the highlighted provisions of the draft FCB is expected to meaningfully contribute to the economic development of Nigeria but its effectiveness as a legal framework for these developmental objectives will be partly determined by the composition and capability of its competition authority, especially its implementation and enforcement abilities.

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<sup>61</sup> D. Gerber, 'The transformation of the European Community Competition Law', (1994) 34 Harvard International Law Journal, 137.

## **Chapter Five**

### **5.0 Establishing a Competition Agency**

#### **5.1 Introduction**

Three years after the submission of the draft Federal Competition Bill (FCB) to the Nigerian Federal Parliament, it is yet to be enacted into law. However there has been more interest in competition policies, in the expectation that this will improve existing regulations and also help to promote competition in the wake of the different liberalisation policies going on in the country.<sup>1</sup> The principal goal of the draft FCB is to promote and protect the process of competition and consumer rights and interests through prevention and prohibition of anti-competitive agreements, abuse of dominance and other competition abuses that could substantially lessen competition and as well impact negatively on the economic development of Nigeria.

Given the focus of the draft Bill and the obligation to implement the competition standards and micro-economic objectives therein the draft Bill provides for a Federal Competition Commission (FCC), which will have the responsibility for organising, monitoring and enforcing the provisions of the draft Bill.<sup>2</sup> This chapter argues that implementation of competition law and policy in resource-dependent countries presents other problems apart from the basic competition concerns that can distort the competition process as well as add to transaction costs of regulation. These other problems involve mainly the structural requirements for the implementation and enforcement of a competition law and policy. Therefore this chapter explores the conditions necessary for an effective competition law and policy in resource-dependent countries. These shall be analyzed in the light of the

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<sup>1</sup> P. Marsden, 'A deregulated economy without competition law: free market or free jungle' A paper presented at the Third Business Law Conference of the Nigerian Bar Association , Abuja, Nigeria, March 27, 2008.

<sup>2</sup> The Draft Bill, Section 3.

provisions relating to the composition and powers of the FCC. Thereafter, it argues that competition advocacy, if given adequate attention along with enforcement, should equally help in realizing the objectives of the draft Bill. It also seeks to answer whether or not the FCB is suitably empowered to carry out the objectives of the Bill.

It is no longer a subject of debate that appropriate basic institutions are needed to be established to support and ensure the efficiency of markets, whether in developing or developed countries. This argument was strongly emphasized in the World Bank Development Report, which says that:

Institutions support markets by helping to manage risks from market exchange, increasing efficiency and raising returns hence reducing the transaction costs arising from inadequate information, incomplete definition and enforcement of property rights.<sup>3</sup>

The establishment of appropriate institutions to implement competition law and policy in any developing or transition economy defines how effective the policy would be.<sup>4</sup> Institutions are analogous to reinforced foundations that support multi-storey buildings. It has also been further argued that if developing countries continue to adopt a piecemeal approach to economic reform then they can never succeed in achieving truly competitive and prosperous economies.<sup>5</sup> This argument might have influenced the logic behind the comprehensive nature of the draft Bill. However, it remains to be demonstrated whether

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<sup>3</sup> World Bank, 'Building institutions for markets' in *World Bank Development Report*, (Oxford: Oxford University Press Published for World Bank, 2001), 5.

<sup>4</sup> M. Williams, *Competition Policy and Law in China*, Hong Kong and Taiwan (Cambridge: Cambridge University Press, 2005), 64.

<sup>5</sup> See World Bank, note 3.

the FCC would be able to implement effectively the broad objectives contained in the draft Bill. This might have informed the changes to and cautious delay in the adoption of the FCB which was first introduced to the Federal Parliament in 2003.

## **5.2 Structural Requirements for a Competition Agency in Nigeria**

Competition agencies in developing countries face a host of different problems not common in developed countries with an established competition culture; these are both fundamental and political. Examples of these include vestiges of state planning systems such as government imposed restrictions to entry to imports and foreign direct investment, inconsistent domestic business registration processes that hinder the promotion of new enterprises, arbitrary taxation regimes, conflicting laws and overlapping jurisdictions of regulators.<sup>6</sup>

Enactment of competition law and policies often involve structural changes that call for political support to institutionalize these changes. If these changes do not receive the support or backing of the stakeholders then its effective implementation could be hindered or frustrated. These are not unusual difficulties, and they are surmountable. Some of these difficulties will include:

- The realisation that some firms' conduct which may lead to efficiency in one section of the market might distort competition in another. For instance, a merger situation that is justified from the circumstances of the firms involved could lead to higher prices in the short term, but can also carry the benefit of improving efficiency and thereby lead to lower prices in the long term.

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<sup>6</sup> W. Kovacic, 'Institutional foundations for economic legal reform in transition economies: the case of competition theory and anti-trust enforcement' (2001) 77 Chicago-Kent Law Review, 301-310.

- Business practices do not have universal effects; rather, a particular practice might have different efficiency effects depending on which sector of the industry is affected.
- Competition policy could be used to address multiple goals apart from the common efficiency goal. For instance, comparing the efficiency goal in the US Sherman Act with the promotion of the common market in EU competition policy, one is wont to query the avowed wisdom of some economists which says that the only legitimate goal of antitrust should be the promotion of efficiency.
- Competition policy may conflict with other government policies like privatisation and liberalization, and if these are not well managed it could lead to those polices working at cross-purposes to the detriment of the society.
- Market power is essential in competition analysis and determining the degree and acceptable level of market power is not easy, coupled with the problem of lack of reliable data and information asymmetry in developing countries.

However, following from the preceding paragraph, this thesis argues that the main pillars that should support a competition agency in a developing economy are a suitable competition law model, competition advocacy and a robust institutional or structural framework. This support is expected to contribute to the efficiency of the agency and therefore maximize resource allocation in the whole economy. It has been argued that the development of competition policy in any jurisdiction is a work in progress; this is especially true of Nigeria and most developing economies, where economic reforms coupled with other developmental policies have been in a continual flux. As a result, certain structural forms, like an independent judiciary, a pool of seasoned staff,

opportunities for continued education of members of staff among other things, are essential in any competition regulatory design. These conditions could be compared with the requirement for development in the natural world. According to Gal, 'just as ecological conditions determine the ability of a flower to bloom, so do some preconditions affect the ability to apply a competition law effectively'.<sup>7</sup>

Competition law is not a stand-alone regulatory tool, but one that must be situated within a wider set of public policies in pursuit of social welfare.<sup>8</sup> This in most cases will involve specific cultural, legal, social and political dimensions within which competition law and policy is to be implemented. In unity they constitute the necessary keys to determine whether or not pro-competition policies will be successful.<sup>9</sup> These public policies in the real wider sense are the ecology of competition law and policy, or what can also be referred to as the socio-economic ideology that conditions competition regulation. The premium placed on public policies in respect of economic policies such as competition policy should be expected to be higher in developing countries than in developed countries. The lower level of market discipline and the lack of an established competition culture in the latter inform this difference.

It is no wonder that Kovacic also observed that a universal insight about competition rests on the fact that institutional designs strengthen results, which should be a striving for better practice rather than the common understanding that advocates for the adoption of best

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<sup>7</sup> M. Gal, 'Prerequisites for development-oriented competition policy implementation' in 'Competition, competitiveness development: Lessons from developing countries', UNCTAD, 2004, 29.

<sup>8</sup> Ibid.

<sup>9</sup> See I. De Leon, 'The role of competition policy in the promotion of competitiveness in Latin America' (2000) 23 (4) *Journal of World Competition Law*, 115.

practice.<sup>10</sup> Since the adoption of a competition law is only one of the pre-conditions for the enforcement of the law, this thesis shall discuss both the structural conditions necessary for the establishment of competition law and the those conditions necessary for its enforcement. There are several overlaps among these conditions for the two aspects, as the examination below will show.

### **5.2.1 Political Will and Readiness**

Every economy interested in competition, which also wants to experience sustainable growth as well as reap the benefit of a free market system, needs to be rooted in the right soil or social economy ideology; which is tantamount to a competition culture.<sup>11</sup>

As indicated previously, competition as a regulatory tool aims at limiting the role and actions of economic actors that would probably work against the best interest of the society, and these regulations will affect the interest of certain stake holders (these include the incumbents' monopolies, consumers used to subsidized services and products and a few others) in the society who are not likely to take the interference without challenging it but will likely devise means of safeguarding their entrenched interests.

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<sup>10</sup> An argument originally made by T. Murriss, Chairman of the US Federal Trade Commission, cited in W.E. Kovacic, 'Achieving better practices in the design of competition institutions' Remarks before the Seoul Competition Forum, April 2004, Seoul, South Korea. Published at <http://www2.ftc.gov/speeches/other/040420comppolicyinst.pdf>. Last visited on 30th April 2009.

<sup>11</sup> Competition culture as used here indicates that it is not only anti-competitive agreements that hinder competition but such issues as lack of appropriate implementation system, conflicting regulations and political interference.

As a result, competition agencies in developing countries have to fully understand this fact and devise a means of balancing the competing interests involved. Political leaders have decisive influence on a government's role in economic reform. This requires executives with a defined focus, commitment and pragmatic approach to policy and economic management. A valuable tool of effective economic management is the willingness of political leaders to delegate policy authorities to competent technocrats, and to empower and protect the economic institutions within this line of delegation. Such institutions include central banks, ministries of finance and other regulatory authorities.<sup>12</sup> Competition law is not a stand-alone tool: rather it is supposed to be an integral part of a larger dragnet of socio-economic policy and competition culture. For instance, in Nigeria, there is a need to balance competition law with its socio-economic ideology in order to avoid a clash and failure, as was the case with some developing countries that have adopted competition law. For example, prior to the 1980s, the Israeli government and its Antitrust Tribunal gave more regard to other goals that run contrary to the basic competition objectives. These other goals include the promotion of exports, realization of economies of scale, desire to improve the country's balance of payments and others. These goals were promoted without any serious effort to improve competition conditions.<sup>13</sup> Rather, the Tribunal allowed agreements that promoted producers' interests and which also led to increased dominance in the Israeli market and consequent reduction in consumer welfare as a result of increase in local prices.

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<sup>12</sup> H. Stephen, *Pathways from the Periphery*, (Ithaca: Cornell University Review, 1990), 46.

<sup>13</sup>Gal, note 7.

Obviously the Israelis' approach was in line with the prevailing socio-economic ideology fashioned to boost the lot of a newly formed economy. Arguably this action can be defended on many grounds, but this thesis will endeavour to reason that the most logical defence in this instance is that this approach was taken with a view to strike a balance between sovereignty and market. However, governments should limit the application of competition principles only in those situations where such limitations are necessary to promote other societal goals, and especially when it has been assessed or envisaged that the potential benefits accruable from the limitation outweigh the cost of the limitation and potential loss from competition.

A pro-competitive socio-economic ideology, irrespective of its affinity to other social goals, seems to be the right soil to cultivate the seed for the fruition of competition policy. The development in Israel tends to support this view. Since the mid 1980s, developments in Israel have shown a remarkable tilt towards a free market and embrace of competition law discipline, which has resulted in its lowering of governmental barriers to trade, privatisation programme and a pro competition approach in the jurisprudence of its Tribunal and Antitrust Authority.<sup>14</sup> In fact its Supreme Court has reasoned that protection of free competition constitutes the foundation for protecting other rights, and that 'free competition is a basic pillar of any democratic regime, being a prominent characteristic of the individual's freedom to implement his autonomy.'<sup>15</sup>

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<sup>14</sup> See Civil Appeal 2247/95 Director of Competition Authority v Tnuva Inc., 52 Supreme Court Decisions, 213 Published at <http://www.internationalcompetitionnetwork.org/media/library/unitalconduct/questionnaire/IsraelQuestionnaireResponse.pdf>. Last visited on 30th April 2009.

<sup>15</sup> The General Director, Israel Antitrust Authority, Israel questionnaire response' 20<sup>th</sup> November 2006 Published at <http://www.internationalcompetitionnetwork.org/media/library/unitalconduct/questionnaire/IsraelQuestionnaireResponse.pdf>. Last visited on 30th April 2009.

Sections 8 to 18 of the draft Bill contain generally the objectives, functions and powers of the FCC. The draft FCB seems to be a demonstration on the part of the Nigerian government that it possesses the political will to enact a competition law and policy, thus the inclusion of the role of a Minister in the scheme of the draft Bill. This might appear as political interference but the inclusion of a role for the undefined Minister shows the government want to get involved with competition policy as much possible and is unlikely to leave the scene to the dictates of market forces and the FCC. Sections 9(1) (h) and (i) provide as follows:

The Commission shall

(h) carry out such investigation or inquiries as the Minister may request or as it may consider necessary or desirable in connection with any matters falling within the provisions of the Act;

(i) advise the Minister on such matters relating to the operation of this Act including recommendations to the Minister for the review of relevant policies, legislation and subsidiary legislation as it thinks fit or as it may be requested by the Minister.

An examination of section 9(1) shows that the identity of the ‘Minister’ intended by the draftsmen is not disclosed anywhere in the draft Bill. There is also no specific Ministry mentioned to which can be inferred as the designated Minister’s Ministry. Most Acts in Nigeria often indicate expressly or indirectly, at least in the interpretation section, the supervising Minister or Ministry under which the act would be implemented.<sup>16</sup> The

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<sup>16</sup> For example, the Electric Power Sector Reform Act, No 6, 2005, Nigeria, referred to a ‘Minister’ in different sections of the act without any clear indication to the specific Minister intended. However, the interpretation and citation of the act, section 100, sheds light on the identity of the Minister intended by the

omission in this instance could lead to confusion because there are different ministries often involved with economic matters in Nigeria. These are Ministry of Trade and Industry, Ministry of National Planning and Productivity, Ministry of Finance and Ministry of Commerce. Similarly, the Chinese Anti-Monopoly Law (AML) 2008, provides for an anti-monopoly enforcement agency (AMEA) under the State Council, which will be responsible for the enforcement of AML but the Ministry or state department responsible for the AML enforcement is not yet certain from the law.<sup>17</sup> However, from its legislative history and practice three different enforcement agencies have parallel authority to enforce the AML.<sup>18</sup> This type of uncertainty is both inefficient and will also create a lot of confusion. It is better and more cost effective to have a unified enforcement unit although unlike its Chinese equivalent the FCC shall be solely responsible for the enforcement of the draft Bill save for the role of the Minister as defined in the Bill.

In addition it is also not clear from the provisions of the draft FCB whether the Minister's authority or direction is supposed to be superior to that of the FCC or whether he or she will be bound by any advice given by the FCC. For instance, while section 21 of the draft Bill empowers the FCC to make regulations, define terms and conditions of service for its employees, yet according to its sub-section 2 these shall not have effect until approved by the Minister. Although in Nigeria, the general practice is that ministerial approvals are often necessary because Ministers are deemed to have general supervising authority over their ministries and activities pertaining to them. It is however, submitted that it will be better for these issues to be addressed in the Bill in order to avoid any confusion or

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draftsmen. It provides, 'Minister' means the Honourable Minister of Power and Steel or any other Minister as the President may from time to time assign administrative functions in respect of this Act.

<sup>17</sup> Sections 9- 10 Anti-Monopoly Law of the People Republic of China, 2008.

<sup>18</sup> These are the National Commission for Development and Reform (NCDR), the State Administration of Industry and Commerce (SAIC) and the Ministry of Commerce (MOFCOM). See X. Wang, 'Highlights of China' new Anti-Monopoly Law' (2008) 1(75) Antitrust Law Journal, 144.

hindrances to the implementation of the Bill when it is enacted. Competition matters often require timely consideration and should not be subjected to the bureaucratic slow process of the civil service in Nigeria. As a guide the practice in the United Kingdom could be adopted, under the provisions of The Competition Act 1998, the Chairman of its Competition Commission and other panel members are appointed by the Secretary of State.<sup>19</sup>

### **5.2.2 Due Process, Transparency and Fair Enforcement Mechanism**

In developing countries, in order to have a successful and effective competition policy, there is need for reliable, strong and predictable legal institutions along with other infrastructures such as flexible capital markets and a stable banking sector. South Africa and Nigeria seem to be some of the developing countries doing relatively well in this regard in Africa although, unlike South Africa, Nigeria is yet to adopt a substantive competition law; however, it has commenced different economic reforms to promote the competitiveness of its economy, as stated earlier in this thesis. Every competition agency must have a clear set of rules which it has to apply, and not only must these be seen to be applied fairly, it must also be seen that due processes are being followed in its application. The absence of a fair and transparent enforcement system is a disincentive to foreign direct investment (FDI) and most developing economies' reform programmes in recent times are partly directed to attract FDI. Thus, competition agencies at the initial stage will need to be selective and strategic; the choice of cases to be pursued must be carefully decided in order to establish its reputation on a firm basis, and also show to businesses that it can act decisively without fear or favour as this will not only improve its image but also it will allow the law to have a good deterrent effect. A high level of success achieved with the

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<sup>19</sup> Section 45 and Schedule 7, The Competition Act 1998 United Kingdom.

cases it prosecutes will also go a long way to reduce the propensity to engage in any abuses by other businesses undertakings.

In addition, the competition agency should be - and also should be seen as being - transparent in the performance of its duties, especially in its interpretation and enforcement of the provisions of competition law and other substantive laws. There should be a single and similar standard across the board among the industries. This will allow the competition agency to be consistent in its decision-making, and also make its decisions predictable. In fact, this issue of predictability is very important to businesses because it goes a long way to assure and help them to plan, execute and defend their management strategies and decisions.

Sections 10 to 18 containing the general powers and functions of the FCC give detailed guideline on how these powers should be carried out and the limitations of the powers. An examination of some of the provisions reveals that some of the powers do not only require strict compliance but they must be exercised transparently and objectively because any deviations when challenged in court could lead to decisions based therein either to be revoked or set-aside. This could then lead to more damage to competition, a situation the FCC will like to avoid.

#### **5.2.2.1 Powers of Investigation and Enforcement of the FCC**

The Bill generally in section 10 empowers the FCC to conduct investigations and to enforce prohibitions contained in the draft FCB. As a result, the FCC may require the production of specific documents, information and administer oaths. During the investigation process the FCC through its authorised officer(s) may only enter any

premises with a valid warrant during which they may take or extracts documents from the premises as provided in section 11 of the draft Bill.<sup>20</sup> A valid warrant in the instant case could only be issued by a Chief Magistrate or a judge of a Federal High Court. The application for, and grant of a warrant by, the court and its execution call for care and impartiality required in judicial matters.

It is necessary to strictly comply with the rules and display that justice is being done properly in every case in order to win the confidence of stakeholders and society in general. A warrant shall not authorise the detention of any documents beyond 7 days and on entering premises an authorised officer must produce his identity and the authority of the warrant. The Bill provides all the necessary steps and precaution to take in order to make sure that due process is followed. This provision is very important and should be strictly adhered to because it is not unlikely that some unscrupulous person could abuse it to either harass other competitors or just to extort money from businesses.<sup>21</sup>

However, while the Bill makes it an offence to obstruct any authorised officer of the FCC in the performance of the investigative role, it says nothing concerning access to privileged communications between a lawyer and his clients or documents which are made in

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<sup>20</sup> The Draft Bill, Section 11(1) The Commission may for the purpose of ascertaining whether any person has engaged in, is engaging or is likely to engage in conduct constituting or likely to constitute a contravention of this Act, require an authorised officer to (a) enter and search any premises; (b) inspect and remove for the purpose of making copies, any documents or extracts there from in the possession or under the control of the person.

(2) Except as otherwise directed by the Commission, an authorised officer shall only exercise the powers conferred by subsection (1) of this section with a warrant issued under subsection (3) of this section.

(3) Where a Chief Magistrate or a Judge of a High Court is satisfied on information on oath that there is reasonable ground for believing that any person has engaged or is engaging or likely to engage in conduct constituting or likely to constitute contravention of this Act, he, may issue a warrant permitting an authorised officer to exercise the powers conferred by subsection (1) of this section in relation to any premises specified in the warrant.

<sup>21</sup> In the last decade there were some cases of illegal execution of purported court orders.

connection with legal proceedings. This is an aspect of the enforcement procedure that will draw the ire of businesses and is bound to be controversial. Thus this issue needs to be addressed before the Bill is passed into law to avoid unnecessary delay from any dispute or controversy likely to occur.

#### **5.2.2.2 Enforcement Procedure in the Bill**

Part XV (sections 99 to 104) of the draft Bill provides generally for the enforcement procedure of the prohibitions contained in the Bill. This shall be by an administrative hearing.<sup>22</sup> The provisions of section 99 of the draft Bill direct that every complaint shall be made in designated form containing such particulars and this is to be accompanied by payment of specific filing fees to be determined by FCC.<sup>23</sup> These provisions raise some concerns, such as uncertainty about cost, double jeopardy and damage multipliers. It is not clear from this provision whether parties before the FCC, especially those under investigation, will be made to bear the cost of the investigation and the administrative hearing. In cases where the hearing officer reaches an opinion that the provisions of the Bill have been breached, they shall make a determination to that effect and make appropriate recommendations to stop the violation and also to accord the injured party a reasonable remedy. In the first instance, it will be better that the claimants or injured parties are aware of the possible costs of filing a complaint, going through its hearing and the likely amount of compensation they will receive. If the amount of compensation will

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<sup>22</sup> The Draft Bill, section 100.

<sup>23</sup> Section 99 (1) Any person who alleges that he has suffered, or is likely to suffer, an injury as a result of a violation or likely violation of any provision of this Act may file a complaint with the Commission.

(2) Every complaint pursuant to subsection (1) of this section shall be made in such form, contain such particulars, and be accompanied by payment of such fee as the Commission may prescribe.

not cover their cost and the amount of injury suffered, this will deter them from pursuing the complaint and the cost of the injury will continue to be borne by the society.

Nevertheless, the composition of the administrative hearing shall be determined by the Executive Chairman of the FCC subject to criteria set by the FCB. Parties are entitled to appear in person or with a legal practitioner or any other person to assist them. The Bill, specifically section 100(3), provides that the conduct of the hearing should avoid any strict formality and technicality. Thus the hearing officer is empowered to determine the rules suitable for the hearing, making sure that all parties are given reasonable opportunity to explain their position. In addition, the determination of the hearing is fixed to be completed within forty five days. It is commendable that both the flexibility and time limit will prevent any unnecessary delay tactics which could hinder the competition process.

In aid of sections 99 to 104 of the Bill, is section 97 which makes it an offence for any person required by the FCC who fails to provide or appear before it without any reasonable excuse. Such a person is liable on summary conviction to imprisonment for a term not exceeding three years or a fine not exceeding 200, 000 Naira. (£1,000) or both. This provision might aid the enforcement process and could be compared with the provision of criminal sanctions against individuals and companies who fail to cooperate with the investigative process with regards to access to privileged information between solicitor and clients.

### **5.2.3 Independent Judiciary**

An independent judiciary is an essential requirement in every democratic society,

and this is particularly important where the exercise of private economic rights could clash with the sovereign interests of a state and the legitimate expectation(s) of the populace. There appears to be a positive correlation between good governance and an independent judiciary, and the same seems to be the case for most regulatory enforcement agencies and the judiciary.<sup>24</sup> Good governance is partly hinged on the institution of efficient and unbiased judicial system, hence the common assertion that an enduring and prosperous democratic Nigeria is only possible when its judiciary is truly independent and separated from all other governmental arms and pressure from the society.<sup>25</sup> In a society where the rule of law is upheld and the role and duties of the judicial arm of government are rendered without fear or any interference from other arms of the government, rather they give support to uphold the sanctity of the law, then it is very likely the majority of the society, especially the business community, will not be easily inclined to try to influence or disregard the powers of the judiciary.

In essence, an effective judiciary is not only a necessary back-up for most regulatory agencies in the discharge of their duties, it is an effective and strong deterrent for those who might want to breach or derogate from the provisions of the law. Apart from its administrative functions, the FCC will also perform quasi- judicial functions towards the determination of anti-competitive agreements that lessen competition in accordance with

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<sup>24</sup> S.D. Sharma, 'Democracy, good governance, and economic development' (2008) 3(1) Taiwan Journal of Democracy, 31.

<sup>25</sup> In early 2004, the Nigerian government improved upon the welfare conditions available to the judiciary, which move is expected to give them job satisfaction as well as enhance their image in comparison to workers in other sectors of its economy, particularly in the private sector. See K. Zannah, 'The fight against corruption in the judiciary in Nigeria: the journey so far' A paper presented by the Chief Judge, Borno State, during the all Nigeria Judges' conference, Sheraton Hotel & Towers, Abuja, 5- 9 November, 2007. Published at

[http://www.nji.gov.ng/index2.php?option=com\\_docman&task=doc\\_view&gid=86&Itemid=180](http://www.nji.gov.ng/index2.php?option=com_docman&task=doc_view&gid=86&Itemid=180). Last visited 30th April 2009.

the provision of the draft Bill. Further, there might be the need to create special courts or divisions to handle competition matters bearing in mind the sensitive commercial nature of the issues normally involved and that timely and effective resolution will be required for disputes that may arise.

Consequently, it is argued that the function and capacity of the FCC should be in a way that provides for a separation of judicial and administrative duties. The administrative staff should not be involved with the exercise of the judicial functions of the body. Rather both categories should work together within defined scope of duties and objective. For instance the economists or actuaries employed by the FCC should be strictly concerned with economic analysis of facts involved in cases under investigation while the legal team should be able to interpret and harness the work of the economists. This will give the FCC a good opportunity to have well reasoned decision and also make its work appear objective and predictable

### **5.2.3.1 Judicial Review**

The decisions of the FCC are administrative acts and under the 1999 Constitution of Nigeria, decisions, actions and proceedings affecting the validity of executive and administrative public bodies are subject to appeal before Federal High Court to the exclusion of any other courts.<sup>26</sup> As a result, in the instant case where any party is dissatisfied with the outcome of the administrative hearing under the Bill such a party has an opportunity to apply for judicial review by virtue of sections 100(9) to (10). Section 100(9) provides as follows:

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<sup>26</sup> Section 251(10) (r), Constitution of the Federal Republic of Nigeria (Promulgation) Decree 1999.

Where the Commission declines to entertain a complaint duly filed, or finds that no violation of this Act has occurred or that there has been a violation, as the case may be, any party not satisfied with the determination of the Commission may file an application for review with the Court.

As the competent ‘court’ in view here is the Federal High Court as defined in the interpretation section of the Bill and s.251(1)(r) of the 1999 Constitution of Nigeria, any application to any other court will be invalid. This provision removes any confusion that may arise with parties who might want to apply to States’ High Courts for review. While both courts are of equal standing and share some common powers, they still have different jurisdiction in relation to substance of the matter and category of people that can apply to them in both civil and criminal matters.

In addition, no person is able to bring any application for a judicial review before the Federal High Court unless the requirements of section 101 are satisfied. This section specifies the category of persons who have the right to apply for judicial review in relation to the provisions of the draft Bill. The decisions of the FCC are subject to well defined rights of review. These could be on grounds of illegality, irrationality or procedural impropriety. This provision is comprehensive and is commendable because it makes it clear from the outset the categories of people who has jurisdiction before the Court.<sup>27</sup> This

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<sup>27</sup> The Draft Bill, Section 101. The following persons may exercise the right of application for review pursuant to the provisions of this Act:

(a) in the case of an application against a determination of the Commission in relation to an application for an authorisation under section 78 of this Act, the applicant and any person who participated in any conference held by the Commission under section 81 of this Act in relation to the authorisation;

(b) in the case of an application against a determination of the Commission revoking or amending an authorisation pursuant to section (1) of this Act or revoking an authorisation and substituting a further authorisation pursuant to that subsection, the person to whom the authorisation was granted;

(c) in the case of an application against a determination of the Commission under section 59 or section 60 of this Act in relation to a notice seeking a clearance or an authorisation, as the case may be:

will help in saving time that could be lost due to any dispute about the issue of jurisdiction or rights of parties who may approach the Court in respect of any decision of the FCC.

Further, section 102 empowers the Federal High Court in its decision on any application for review, to do any one or more of the following things: (a) confirm, modify, or reverse the determination or any part of it. It further empowers the Court to exercise any of the powers that could have been exercised by the Commission in relation to the matter to which the application relates. This provision is rather too wide, especially as it allows the Court to act in the same administrative capacity of the FCC that conducted the hearing. In essence it allows the Court to revisit the application and probably allow a consideration of new facts and evidence. This may lead to considerable delay and confusion. It is suggested that the provision of section 102(1)(b) that empowers the court to exercise all the administrative power to hear an application should be expunged and section 102(2) which allows it to send back application to the FCC for a fresh administrative hearing should suffice to address any irregularity or procedural impropriety.<sup>28</sup> Although, judges are qualified for monitoring substantive accountability, their autonomy and rules of judicial

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(i) the person who sought the clearance or the authorisation; and (ii) any person whose assets or the shares in a company are proposed to be acquired pursuant to the clearance or authorisation; and

(iii) any person who participated in any conference held by the Commission under section 81 of this Act in relation to the clearance or authorisation.

(d) in the case of an application against a determination of the Commission under section 81 of this Act made on the application of any person who is a supplier of regulated goods or services, the applicant and any person who in the opinion of the Court is a substantial consumer or purchaser of the regulated goods or services to which the determination relates or who represents a substantial group of consumers or purchasers of those goods or services;

(e) in the case of an application against a determination of the Commission under section 81 of this Act made by the Commission on its own motion, any person who is a supplier of regulated goods or services to which the determination relates and any person who in the opinion of the Court is a substantial consumer or purchaser of the regulated goods or services to which the determination relates or who represents a substantial group of consumers or purchasers of those goods or services

<sup>28</sup> The Draft Bill, Section 102(2) Notwithstanding anything in this section, the Court may, in any case, instead of determining any application under that section, direct the Commission to reconsider, either generally or in respect of any specified matters, the whole or any specified part of the matter to which the application relates.

process allow them to be shielded from political pressure or influence better than other regulatory bodies. This then call for extra caution in the way they exercise their powers of review of activates of public bodies. In relation to competition law and policy, because most of the judges in Nigeria are not expert in this field thus they will need to be extra vigilant so that the adversarial judicial process is not exploited by persons seeking judicial reviews to frustrate the work of the regulatory authorities who are expected to be well informed of the issues involved.

However, this thesis opines that to save time and also to allow a rapid development in the determination of cases involving competition matters it is more reasonable to create a special court to handle the review because the Federal High Court is already involved in other commercial matters, such as disputes in the maritime, aviation, communication and energy industries. Apart from the volume of these other matters, it is very important to separate the two because their substance differs and adjudicating between them calls for different principles and approaches that must not be confused with each other. The special court could still be under the jurisdiction of the Federal High Court. Further, while the administrative hearing officer is not obliged by the Bill to give reasoned decisions, though one will expect it to do so, the Federal High Court as a superior court of record shall, in giving any direction to either the FCC and or the parties, give reasoned decisions.

#### **5.2.4 Adequate Funding**

The issue of funding and how best to allocate available resources are germane in every organisation, and either the adequacy or shortage of funds can determine the efficiency of an organisation, especially a regulatory agency whose works include policing, monitoring

and enforcement of rules among corporate organisations. Almost all competition agencies in both developed and developing countries face some form of challenges and difficulties related to adequacy of funding in their effort to promote, implement and enforce competition policies or laws, although developing countries and emerging economies pose ‘unique issues for competitiveness and competition law enforcement’.<sup>29</sup> As indicated in the earlier part of this thesis, some of their features include low level of economic development, lack of adequate institutional design to support competitive markets, government bureaucracy and corruption accompanied with rent seeking from both the politicians and big businesses, all of which create serious challenges for resource allocation in these economies.<sup>30</sup>

In most of these developing countries, apart from local businesses the presence of large multinational companies is a common feature and their activities do give or could at times give competition concerns. These corporate organisations could be so large and efficient to the extent that their budgets are more than that of a nation state. An example is ExxonMobil whose annual income is more than that of many developing countries in Africa; this puts it in a position to influence many decisions if it so desires, and also it commands an intimidating outlook compared with an average regulatory agency. In any case, the level of funding might be dependent on the competition culture and be relative to the economic strength of the country.

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<sup>29</sup> ‘Challenges obstacles faced by competition authorities achieving greater economic development through the promotion of competition’. Contribution from the Fair Trading Commission, Jamaica’s Competition Agency, SESSION II – OECD Global Forum on Competition, 2003 Published at <http://www.jftc.com/newsandpublications/Speeches/Reports/OECD%20SESSION%20II-8-12-03.pdf>. Last visited on 30th April 2009.

<sup>30</sup> Ibid.

Section 24 of the draft FCB provides for a fund to be maintained by the FCC. It shall be given a take-off grant by the Federal Government and subsequently receive annual budgetary subvention from the Federal Government. In addition the FCB is allowed by the draft Bill to receive moneys from other arms of government and aid from other organizations in furtherance of its activities. While the Federal Government will have a noticeable influence on how the FCC is commissioned and thereby affect its operation, it is noteworthy that the draftsmen envisage the importance of giving the agency some form of financial autonomy. Thus it provides in section 24(3) that the FCC shall be in position to manage its fund in accordance with its own internal rules but, of course, in accordance with every other procedure in place to ensure proper record keeping and accountability.

Consequently, the FCC shall need not only to be very prudent but will have to prioritise its activities, especially concerning the need to plan and implement programmes, taking cognisance of the amount and types of resources available to it. It will have to be objectively selective in the types and number of cases to investigate and prosecute, so that if at an early stage it achieves a high degree of success rate, this could possibly increase its credibility and act as a successful deterrent to firms or individuals found wanting and eventually reduce the number of cases it has to handle. Else if it spends its budgetary allocations on cases that were later decided against it, then its competence and consumers' confidence in it will be negatively affected.

Actually, the process of revenue allocation differs from one country to another; in the developing countries in particular, most of the competition agencies receive their allocation from government ministries or establishments which then give a lesser degree of independence. For instance, the Argentine Competition Commission is funded from the

budget of the Ministry of Economy and Production allocated on an annual basis. This does not give it budgetary autonomy.<sup>31</sup> Compared with the Federal Trade Commission (FTC) in the US which has financial autonomy, it would be less efficient and susceptible to governmental pressure and interferences. The provision in the Nigerian draft FCB is commendable. Its competition agency will not be at the mercy of any governmental department rather its budgetary allocation will only be subject to a limited control of the Federal Government which is also subject to the Federal Parliament which have power over the total annual federal budget allocations.

In any case, if a government is really committed to the establishment of a good competition structure then it will be disposed to finance adequately the competition agency, but further assistance and grants could be obtained from international organisations that are also championing the establishment of competition laws by developing and emerging economies. Such organisations include the World Bank, Organisation for Economic Co-operation and Development (OECD) and World Trade Organisation (WTO). Section 26 of the draft FCB expressly empowers the FCC to receive gifts of land, property, money and any other property subject to the condition that the gifts are not inconsistent with its functions as defined under the Bill. For example, while the competition authority of Panama receives a major percentage of its budget from the central government budget, but it is also receives additional financial support through donations and loans from international organisations.<sup>32</sup>

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<sup>31</sup> OECD and the Inter-American Development Bank, 'Institutional challenges in promoting competition' (2004) Published at

<http://www.oecd.org/dataoecd/52/41/32033728.pdf>. Last visited on 30th April 2009.

<sup>32</sup> Ibid.

### **5.2.5 Qualified Personnel**

Having a pool of experienced and qualified staff working in a competition agency is comparable to a nation equipped with an efficient army ready to tackle any threat or invasion within or from outside its jurisdiction. The development of an efficient competition policy in developing countries will involve substantial investment in human resources, particularly the core professionals, who should be able to conduct extensive research as circumstances might demand. As a result, competition agencies need to employ lawyers, economists and other professionals familiar with competition law and trade regulation. It is very important at the initial stage to get the right blend of workers, especially lawyers versed in both civil and administrative procedures. Adequate knowledge of these is very necessary in the successful prosecution of competition matters before courts that are also new to the idea of competition law enforcement. Coupled with this is the fact that the businesses are very likely to afford the best lawyers and professionals in order to defend them.

With regards to Nigeria, these personnel are the regular core staff of the FCC and not the ‘executive’ members to be appointed by the government as provided in sections 4 and 20 of the FCB. These are the FCC members as provided by the draft Bill. It is submitted they are called executive members not because they will be appointed by the executive president of Nigeria, rather it is because they represent the highest management of the agency thus the draft refers to their chairman as an ‘executive chairman’. Among the member of staff is the Secretary who shall be appointed by the FCC. Sections 21 and 22 specify the conditions and terms to be employed by the FCC in the appointment of other core employees for the proper and efficient performance of the functions of the draft Bill. It is commendable that the FCC is given a free hand in the determination of the terms and conditions of service for its employees. This will protect the agency from any unnecessary

delay that could be encountered in the recruitment process in the civil service in Nigeria.

However, experience in development of competition law in Jamaica has shown that it has to be in measured stages, because the most suitable remedy for the mismatch between ambitious substantive commands and weak institutional structures is to embrace a gradualist policy that will roll out a competition policy system in phases.<sup>33</sup> The agency could start with a small, but well educated and motivated, number of staff to pursue the goals of competition policy. There might be a need to have a blend of professionals with good practical experience and others with an academic bias. This is important to prevent their operation being subject to technical frustration, which the multi-background of the agency's staff should be able to envisage and deal with, especially at the initial stages.

A likely problem for Nigeria in this regard is that its proposed competition agency will have to compete seriously with the private sector, especially the financial sector, in attracting the quality of professionals that it may require. The remuneration in the private sector is much more than what is normally offered in the public sectors and therefore economic considerations will play a large role in determining the calibre of professionals that will be attracted to and recruited by the agency.

Consequently, this thesis emphasises the need for an optimal use of both human and capital resources. The latter is necessary to attract the best professionals so that round pegs would

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<sup>33</sup> Inter-American Development Bank , 'Jamaica: Institutional challenges in promoting competition' Latin American Competition Forum, (June 14-15, 2004) Published at

<http://www.iadb.org/res/publications/pubfiles/pubS-202.pdf>. Last visited on 30th April 2009.

be fitted into round holes and not square pegs into round holes. The former also is necessary for maintaining the resources and continued relevance of the agency; otherwise they might become easily susceptible to ‘regulatory capture’.<sup>34</sup>

### **5.2.6 Continuing Education**

There is the need to invest in the education of the staff involved in competition matters both at the competition agency and in the judiciary. With the latter, ordinary legal training is not sufficient towards the appreciation of the technical points of competition law and policy, and in order for judges involved to render fair and objective judgements; they need to be taken through the rudiments and the nature of economics, competitive issues and how these can affect the economy. However, the basic Nigerian legal education curriculum does not provide for any core economic courses unless students on their own initiative decide to do the subjects among their elective subjects. This education has to be as detailed as possible, bearing in mind local circumstances and how to balance them with global economic realities, such as sovereign wealth, impacts of cross-border mergers etc. The designers of the legal academic curriculum in this regard should not adopt precedents from either the US or EU without first subjecting the precedents to critical consideration.

The probability of doing this is high because of the robust materials available on competition jurisprudence and also the chequered history of competition matters in these places. In the same vein, other staff of the competition authority should be exposed to

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<sup>34</sup> For a detailed discussion on regulatory capture see, I. Ayres and J. Braithwaite, ‘Tripartism: regulatory capture empowerment’ Published at <http://www.blackwell-synergy.com/doi/pdf/10.1111/j.1747-4469.1991.tb00291.x>. Last visited on 30th April 2009.

continual education in order to avail themselves of any current regulatory issues and the tools for handling them. Thus it is will be rational for the proposed competition agency in Nigeria to dedicate a specific percentage of its annual budgetary allocation for training purposes. This should not be for the benefit of its staff alone rather others like the judiciary and consumer related pressure groups should be given chances to participate in these training programmes.

### **5.2.7 Independent Agency**

It cannot be overemphasized that, in order to assure its efficiency and reliability, an independent regulatory agency stands in a better position compared with one that is not independent of any direct or indirect governmental control and influence. This will arguably sell it to stakeholders as an objective and fair agency. Further, this is dependent on the attitude of the government to entrenching a better competition culture; also, much depends on the quality and character of the agency's staff and their degree of motivation. This is also dependent, to some extent, on the financial autonomy of the agency. If the budget or financial capability of the agency is tied to the goodwill of the appointing government, then the agency could be endangered by different political groups' ascendancy to power. This is particularly serious in developing economies such as Nigeria, where market discipline is not well established and rent seeking is rife among governmental agencies, as earlier indicated. On the other hand, if competition policy is viewed as a state policy, then the agency might be torn between different pressure groups that might not be convinced of the competition objectives of the state and how the competition authority carries it out.

Consequently, an independent competition authority allows the presumption that to a very large extent the application and enforcement of competition law will not be influenced by political and other reasons not related to the promotion of efficient resource allocation. It is a critical factor that ought to be given serious consideration before a competition authority is created in any country. This could probably reduce the chances of the agency being captured or compromised as a result of any external influence or interest group.<sup>35</sup> Moreover, in developing countries such as Nigeria, this is a feat that could be done only with the understanding and support of the government, that knows full well the long-term benefit of such an approach rather than the immediate benefit of the incumbent government, which might want to use the agency to advance its political ends, especially by favouring its associates in the selection and appointment process into the agency. Thus the appointment and terms of office of the members of the FCC is provided for in the draft Bill. The Bill is clear on the criteria for the appointment of the full time members but that of the part-time members is not made clear. They are expected to be qualified lawyers, economists or from any field of management and must have at least ten years cognate experience. However, all the members will enjoy a fixed tenure and can only be removed subject to the occurrence of certain events as stipulated in section 5 of the draft Bill.

### **5.2.8 Non-Political Appointment of the Executive Chairman**

It is not just the selection criteria of competition authority key officers that matter; rather the mode of appointment or selection of the designee or head of the agency is very important. Professional suitability and credibility should not be sacrificed for political

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<sup>35</sup> Regulatory capture is an ever-probable occurrence in most regulatory and governmental environment. This is especially true due to the fact that regulation provides costs and benefit, however in order to achieve a balance, market-based instruments and independent regulatory bodies are required. The argument amongst others in support of regulation is presented in more detail in D. Helm, 'Regulatory reform, capture and the regulatory burden' (2006) 22(2) Oxford Review of Economic Policy, 174.

expediency, as is widely believed to be the case in many of the developing and emerging economies. However, it is not possible to separate politics from competition policy, as the aim of competition in most cases affects the market power of economic actors who often tend to influence politics and economic decisions in a nation state. The competition authority is thus put in the full glare of the media, and both its good actions and mistakes will continually be under public scrutiny.

The head of the authority should be someone who is widely respected and seen as competent in the face of the consumers and other stakeholders, otherwise it might be rather difficult to sell the authority's vision and enforcement activities to them. The Bill only gives a prescription of professions from which the full time members should be drawn from and does not specify whether the executive chairman should be from a particular field. This is good if the appointees will be spread among these professions but it might be better to limit the profession of the executive chairman to law and economics. Further it will be better to avoid all the members from being chosen from a particular profession. This is necessary to avoid the FCC from being overly influenced by a particular perspective rather having a wide or balanced outlook.

Section 4 of the draft Bill provides for mode of composition of the FCC. It shall be composed of nine members; four full time members and five part-time members. The appointment shall be made by the President of Nigeria. The draft Bill stipulates that the full time members shall consist of an economist, a lawyer and other professionals in the field of management, all of whom must have had at least ten years cognate experience in their respective fields. The Bill is silent on the criteria for the appointment of the part-time

members. This suggests that their appointment could largely be influenced by political consideration. It would have been better to expressly lay down the yardstick for their appointment because competition is complex and requires professionalism. Leaving the yardstick opened to the dictates of the President could give room to avoidable compromise and influence from both the industry and political arena.

Eventually, if the appointed part-time members are members of the ruling political party or with strong industrial connections they might not be able to objectively carry out their duties along with the other full time members. In addition the appointment of the designated executive chairman, that is the head of the FCB, is at the discretion of the President. This gives the President or the government an opportunity to influence the function of the agency, and the probability that they will do so is high. In Nigeria like most other countries ministers hold their office subject to the dictates of the president and amount of political goodwill they command. As a result, it is arguable that this arrangement gives the government a great opportunity to influence ministries and regulatory bodies under the control of different Ministers. The FCC is unlikely not to be subject to this form of influence.

While the independence of the FCC is crucial to the successful implementation of the draft Bill, it is also important to note that if the members of the FCB are of good integrity it will be difficult to influence them. Thus a competition authority needs to get it right from the beginning and this calls for prioritizing its activities from the outset; this takes cognizance of the other problems a new competition authority might face. One suggested issue that could be placed on the top of the priority list of newly formed competition authorities in

developing and emerging economies is competition advocacy. In fact, the ICN argues that competition advocacy should be promoted far above enforcement of competition rules.

### **5.2.9 Empowerment of Consumer Groups and Relationship with Other Agencies**

It might also be appropriate to encourage the formation of consumer watch groups in different sectors, because their existence could serve as an additional check and watchdog over the activities of business. They would also monitor the work of the competition authorities, thereby reducing the incidence of any regulatory capture. For a very long time such groups were absent in Nigeria; the most visible one now is involved with the telecommunications sector. The existence of a consumer pressure group could also help reduce the problem of information asymmetry, because, with their direct link to the consumers (in cases where they are very active), they might be able to supply information to the competition authority. It is also beneficial for the competition authorities to develop a working relationship with other regulatory agencies in the economies as they are also sources of information and are all meant to work towards enhancing the development of the economy concerned. Section 9(2) (c) of the draft Bill is consistent with this argument. It provides that the FCC should cooperate with and possibly assist any association or body of persons in developing and promoting the observance of standards of competition in accordance with the goals of the draft FCB.

However, the Bill fails to define either the form or level of assistance the FCC will render to any of these associations or body of persons. It might also be necessary to specify the limit of the influence that these bodies will have on the operation of the FCC. This is necessary to avoid time wasting and every unnecessary intermeddling by any pressure

group in the implementation of the Bill when it is eventually enacted into law.

As earlier indicated, the agency must be seen as credible, transparent and committed to observing due process in its activities. One important adjunct to this in relation to sharing of information with other agencies and possibly the consumer groups in developing countries is the need for the antitrust authority to maintain a credible data protection and ethical standards, because more often businesses that engage in restrictive practices are big and well connected, and complainants or informants will need the assurance that they will not be unreasonably exposed to them and thereby suffer any repercussion or victimization.

### **5.3 Jurisdictional and Enforcement Problems**

Just as will probably be the case in most circumstances where changes are being effected, established status quo and traditional positions will be affected. The introduction and implementation of competition law and policy in developing and emerging economies has created institutional challenges. Even in jurisdictions where competition law has a chequered history, discretion and legal tact are still coveted in the general administration and management of competition issues. There are many reasons for this scenario. One reason for this could be the multifaceted composition of the subject, which led to the observation of the US Supreme Court that courts of law are not well equipped to deal with the day-to-day enforcement of the remedies they could impose on the basis of competition rules, success of which demands a ‘continuing supervision of a highly detailed decree’.<sup>36</sup>

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<sup>36</sup> See *Verizon Communications, Inc. v. Law Offices of Curtis Trinko, LLP*, 2004, 540 U.S.14.N.

According to the International Competition Network (ICN), another reason, particularly in developing and emerging economies, is the ‘incoherent policies between competition authorities, regulatory regimes and other government agencies’.<sup>37</sup> There is a need for cooperation and a proper coordination between the newly created competition agencies and the government ministries or parastatals which prior to the introduction of competition laws, had earlier (in most cases) the control and regulation of the sectors concerned. Thus there is bound to be tension and conflict among these offices, especially where there are lacunas in the laws relating to conflict or roles and exercise of concurrent jurisdictions over sectors to which the competition laws and sectoral regulations are applicable.

Those types of situations are not unique: they have been dealt with in many countries. For instance, the interface between competition rules and sector specific regulation was recently dealt with in both the US and in the EU, although the two jurisdictions treated it differently. The US Supreme Court’s decision was radically different from that of the EC.<sup>38</sup> The Supreme Court ruled that competition authority should refrain from acting where there are sector specific provisions that could be applied taking cognisance of the industries involved and the circumstances. According to the Court:

(c) Traditional antitrust principles do not justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors. Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. When there is in existence a regulatory structure designed to deter and remedy anticompetitive harm, the

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<sup>37</sup> ICN Competition Policy Implementation Working Group, ‘Lessons to be learnt from the experiences of young competition agencies’ May 3-5, 2006 Capetown, South Africa. Published at [http://www.internationalcompetitionnetwork.org/media/library/conference\\_5th\\_capetown\\_2006/ICNSG2ProjectReportFinal.pdf](http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ICNSG2ProjectReportFinal.pdf). Last visited on 30th April 2009.

<sup>38</sup>See Petit, ‘Circumscribing the Scope of EC Competition Law in Network Industries? A comparative approach to the US Supreme Court ruling in the Trinko Case’ (2004), 13 Utilities Law Review, 6.

additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Here Verizon was subject to oversight by the FCC and the PSC, both of which agencies responded to the OSS failure raised in the respondent's complaint by imposing fines and other burdens on Verizon. Against the slight benefits of antitrust intervention here must be weighed a realistic assessment of its costs.<sup>39</sup>

It is instructive to note that the court did not say whether in all cases where there is a sectoral regulatory structure that the competition agency should be hands off, rather it could be inferred from the court's language, that 'antitrust analysis must always be attuned to the particular structure and circumstances' means that it would not always be the case that competition law should give in to sector specific regulation rather the industry structure; circumstances and cost benefit of competition intervention must be carefully balanced so that the end result will still be a contribution to consumer welfare. This particular judgment, according to Petit, heralds the beginning of 'a pre-emption' or 'exhaustion principle' in the field of antitrust'.<sup>40</sup> That is, a private claim in competition matters should be, to some extent, reasonably exhausted where a sector-specific resolution provision is provided.

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<sup>39</sup> Note 47.

<sup>40</sup> Petit, note 46, 10.

The EU's treatment of this issue, on the other hand, could be seen in the Commission's *Deutsche Telekom Decision*,<sup>41</sup> where it concluded that the competition laws of the EC may apply even where sector specific legislation exists, but in most cases the Commission will refer the cases to the regulators for the resolution of the problems through sector-specific remedies.<sup>42</sup> It is important for the enabling act of parliament or the specific competition rules to be as clear and explicit as possible with regards to its ambit and situations that may occur where there are conflicting concurrent jurisdiction, otherwise these will encourage forum shopping, including forum-shopping by industry players, duplication of resources, and inter-institutional conflict, all of which could lead to confusion and distortion of competition. This thesis recommends the US approach to Nigeria because of its simplicity.

Consequently, it appears daunting the wide powers given to the FCC in section 19 of the draft FCB which empowers it to administer and implement other legislation not directly related to competition policy but consumer protection. These include the Dumped and Subsidised Goods Act, Consumer Protection (Special Provisions) Act 1992 and Weight and Measures Act 1990.<sup>43</sup> It is submitted that the management of the provisions of these other acts will make the work of the FCC too complex and difficult to manage. Though the inclusion could be justified on the principle of pre-emption but this is not advisable for a newly formed competition agency. It is not practicable for the FCC to effectively manage its core objectives along with these other acts whose focus are not exactly the same with that of the draft Bill. It might be a better judgement to leave this legislation under the

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<sup>41</sup> *Deutsche Telekom AG*, 2003 O.J. (L 263) 9. Commission Decision of 21 May 2003 relating to a proceeding under Article 82 EC.

<sup>42</sup> See P. Alexiadis, 'Informative and interesting: the CFI rules in *Deutsche Telekom v. European Commission*' (2008) Published at <http://www.gibsondunn.com/publications/Documents/Alexiadis-GCP-May-08.pdf>. Last visited on 30th April 2009.

<sup>43</sup> 1958 CAP 87 Vol V Laws of the Federation of Nigeria 1990, CAP 66 Laws of the Federation of Nigeria 1992 and CAP 467 Vol XXIV Laws of the Federation of Nigeria 1990 respectively.

authority of government departments previously entrusted with their administration and the FCC could still extend its authority by the provision of section 2 when there is a need to intervene in the sectors where those legislation are applicable.

Nevertheless while the mandate given to the FCC apart from being too wide, seems unlikely to be realisable by an ordinary agency involved with competition, although the mandate could be justified on political grounds. This is because an absolute embrace of competition policy in anticipation of economic development or wealth creation could lead to abuse of economic powers and undermine the social legitimacy of government in a free market economy.<sup>44</sup> This could then call for some measure of government interference to balance competition with regulation whether as a prescriptive regulator or a light-touch umpire.<sup>45</sup> This approach might be opposed by the proponents of the economic efficiency goal as the only legitimate goal of antitrust, but studies have shown that there is a strong correlation between principles of a political system (such as property rights, human rights and political rights) and effective regulatory systems for economic development.<sup>46</sup>

In addition it might also serve good purpose for the proposed FCC and the Federal High Court to have powers to charge fines that are commensurable to the amount of damage or potential damage that a restrictive business practice might have on the market or on competitors, because businesses might be easily deterred by the awareness that they could suffer more pecuniary damages than the likely amount of profit they could make if they are

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<sup>44</sup> M. Neuman, *Competition Policy: History, Theory and Practice* (Cheltenham: Edward Elgar, 2001), 27.

<sup>45</sup> M. Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* (Cambridge: Cambridge University Press, 2005), 413.

<sup>46</sup> See H. Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Elsewhere* (New York: Basic Books, 2000) and M.H. Halperin et al., *The Democracy Advantage; How Democracy Promotes Prosperity and Peace* (New York: Routledge, 2005).

found engaged in any anti competitive practices. In support of this view, the International Competition Network (ICN) lends its support when it argues that:

A measure that will work for all agencies, and may ultimately be the most effective means of developing an awareness of a competition culture, is that advocated by the Netherlands Competition Authority. The NMA indicated that it seeks to achieve greater awareness for the importance of competition by the announcement of its imposition of high fines on undertakings which have infringed the Competition Act. It suggests that companies have become more aware of competition by observing the consequences faced by others that infringe the Competition Act. This is certainly a measure that all agencies can benefit from, and is guaranteed to leave a lasting impression on all similar businesses.<sup>47</sup>

#### **5.4 Competition Advocacy**

It has become a common understanding that the success of competition policy rests on application of different tools. These often include enforcement, litigation aimed at practices that restrict competition and merger review and control. However, another major tool that is a key ingredient, although it is less recognised, is competition advocacy.<sup>48</sup> Although that there is no universally accepted definition of competition advocacy; it has been defined both in terms of its ends and means, but the substance of whatever definition that is adopted is always aimed at the same thing, which is the promotion of a competition

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<sup>47</sup> ICN Competition Policy Implementation Working Group, 'Lessons to be learnt from the experiences of young competition agencies' (May 3-5, 2006) Cape Town, South Africa. Published at [http://www.internationalcompetitionnetwork.org/media/library/conference\\_5th\\_capetown\\_2006/ICNSG2ProjectReportFinal.pdf](http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ICNSG2ProjectReportFinal.pdf). Last visited on 30th April 2009.

<sup>48</sup> T. Zywicki and James C. Cooper, 'The U.S. Federal Trade Commission and competition advocacy: lessons for Latin American competition policy' George Mason University Law Economics Research Paper Series, (2007) Published at <http://www.law.gmu.edu/faculty/papers/docs/07-07.pdf>. Last visited on 30th April 2009.

culture and an enabling environment for its growth.<sup>49</sup> Competition advocacy according to the World Bank can be defined in the following terms:

Competition advocacy refers to the ability of the competition office to provide advice, influence and participation in government economic and regulatory policies in order to promote more competitive industry structures, firm behaviour and market performance. Creating a popular base of support for competition policy is also part of competition advocacy.<sup>50</sup>

Another popular definition is that of the Advocacy Working Group of the ICN, which defined competition advocacy as follows:

Those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities, by means of non-enforcement mechanisms mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition.<sup>51</sup>

The second definition above emphasizes two things: what competition advocacy is not, that is, it is not concerned with enforcement, and the two branches of competition advocacy. The difference between enforcement activities and the advocacy duties of a competition agency is not usually strictly differentiated, because in most cases the two duties are complementary to each other and handled by the same agency. The main theme

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<sup>49</sup> See J. Tavares de Aranjujo and L. Tineo, 'The harmonization of competition policies among Mercosur countries' (1997) Published at [http://www.dttc.oas.org/trade/STUDIES/COMPET/m\\_comp3e.asp](http://www.dttc.oas.org/trade/STUDIES/COMPET/m_comp3e.asp). Last visited on 30th April 2009.

<sup>50</sup> S.J. Evenett and J.L. Clarke, 'Designing and implementing economic reforms in developing countries: what role for competition advocacy?' (2005)

<sup>51</sup> See the website of International Competition Network, Published at <http://www.internationalcompetitionnetwork.org>. Last visited on 30th April 2009.

of competition advocacy is to educate and influence both the government and the public towards a robust competition policy, which in essence lends credence to the fluid nature of most definitions that could be given of competition advocacy, as shown in OECD Peer Review of Chile's competition law. It argues, for instance, that:

There is no single, all-purpose definition of competition advocacy because competition authorities around the world need to use advocacy to deal with a variety of challenges. In general, it means the promotion of competition market principles in policy discussion and regulatory processes. In practice, the scope of advocacy presentations can vary widely. A set of bullet points about basic issues, such as how monopoly harms the public but enriches the monopolist, is advocacy. So is an extended legal and economic argument in a sectoral regulatory process.<sup>52</sup>

What constitutes advocacy is wide enough to cover conference papers, policy papers issued to legislature and the public, court sector, ministries, courts, sectoral regulators, or local governments and other consumer pressure groups. It can also include both peer review articles, report of proceedings organized in benefit of competition policy and other public awareness campaigns such as holding of press conferences and consultative forums aimed at educating the public about the importance and implications of competition law and policy. In a developing country like Nigeria lacking an established, free market framework without well-established competition regimes, promoting competition principles to its citizenry will be a continual process at least for the first five years. It takes

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<sup>52</sup> OECD, 'Competition policy in Chile' Published at <http://www.oecd.org/dataoecd/43/60/34823239.pdf>. Last visited on 30th April 2009

an average of ten years for competition policy to become fully effective in developing and emerging economies.<sup>53</sup>

This tool is very important in developing competition culture in developing countries where various studies have confirmed that the promotion of the principles of competition policy must be a continual process and cannot be put in second place. Public patronage amongst other considerations plays an important role in the success of this. That is also the position of the ICN, which argues that competition advocacy should be preferred to competition enforcement in developing countries. This could be explained by different reasons.

One major reason is that competition law and policy faces enormous threats from both private and public restraints.<sup>54</sup> The latter might sound contradictory because it is easy to take for granted that governments are interested in fostering competition and its resultant advantages, but experience has shown that governments or their functionaries do seek rent just like businesses and thus may engage in practices that may distort or hinder competition. Another reason is that as a result of the privatisation process in most of these developing countries, such as Nigeria, the state assets privatised have given rise to

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<sup>53</sup> J. Preston 'Investment climate reform competition policy and economic development: some country experiences' (2003) Case study commissioned by the Department for International Development, UK. A Contribution to WDR 2005 on Investment Climate, Growth and Poverty. Published at [http://siteresources.worldbank.org/INTWDR2005/Resources/477407-1096581040435/dfid\\_preston\\_10.pdf](http://siteresources.worldbank.org/INTWDR2005/Resources/477407-1096581040435/dfid_preston_10.pdf). Last visited on 30th April 2009.

<sup>54</sup> T. Zywicki, 'How should competition policy transform itself? Designing the new competition policy' (November 20, 2003) Competition Policy Research Center, Fair Trade Commission of Japan Inaugural Symposium. Published at <http://www.ftc.gov/speeches/other/031120zywickijapanspeech.pdf>. Last visited on 30th April 2009.

intensive rule-making processes and different legislation to guide the privatisation process the success of which could be furthered by competition.<sup>55</sup>

Closely related to this is the fact that the level of lobbying and rent seeking activities will naturally increase in any economy that has just been reformed to accept market discipline, especially where old structures supporting monopolies and government dependent parastatals have been changed; therefore competition advocacy will in this instance be used to educate and counter-influence the government against the former beneficiaries of the old regime desiring to claw back some of the lost advantages. Another important reason is the fact that competition advocacy tends to be less expensive and non-adversarial compared with competition enforcement that requires more financial and human resources like skilled competition lawyers, specialised judges and an efficient judicial system; most developing countries cannot boast of a combination of these at any particular time, at least for now.

However, unlike enforcement of competition law that could be seen as malevolent by some businesses, competition advocacy is often given a warmer reception. There is a common understanding and acceptance of its main theme among the antitrust/ competition community.<sup>56</sup> It has been argued that competition advocacy and economic reform are complementary tools and that the former is a necessary means for the continuation of the economic liberalization process.<sup>57</sup> This is especially true for developing and transition

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<sup>55</sup> See the website of the Bureau for Public Enterprises in Nigeria for a brief note on the privatisation programme in Nigeria the amount of new legislation in place- <http://www.bpeng.org>.

<sup>56</sup> S.J. Evenett, 'Competition advocacy: time for a rethink?' (2006) Published at <http://www.evenett.com/articles/CompAdvJan06.pdf>. Last visited on 30th April 2009.

<sup>57</sup> G. Oliveira and G. Vargas, 'Antitrust policy in Brazil: recent trends challenges ahead' (1999) Published at <http://usinfo.state.gov/journals/ites/0299/ijee/brazil.htm>. Last visited on 30th April 2009.

countries, where the possibility of competition being distorted by public policies and institutional structures is high; former public monopolies will also want to transform into private monopolies, or at least take advantage of their dominant status. In these economies the governments are not likely to give absolute control to the market; rather, they still intervene in the markets through regulation, although there could be laudable justifications for this in some instances.

As a result, competition advocacy aims to minimize these distortions and also help in regulatory reform so that the objectives of competition can be realized. The competition agency can carry out its advocacy programme through different forums, but the most strategic ones are the following: seminars, workshops, and road shows, publication of research, documentary and building a competition culture. However, there are basically two popular types of competition advocacy that are often pursued, as indicated earlier in this thesis. One is by influencing government decisions with regard to economic reform and regulation, and the second type is by educating the stakeholders on the merits of competition in the market.<sup>58</sup> More importantly, just like competition enforcement, there are some prerequisites for a successful competition advocacy by a competition authority; these prerequisites include independence from both private and governmental influences, availability of resources and credibility. These go to reinforce the fact that competition enforcement and advocacy are co-drivers necessary for executing competition law and policy and show the advantages accruable in the economy in the long run.<sup>59</sup>

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<sup>58</sup> S.J. Evennet and J.L. Clarke, 'Designing and implementing economic reforms in developing countries: what role for competition advocacy?' (2005) Published at <http://www.evennet.com/working/Deliverable5.pdf>. Last visited on 30th April 2009.

<sup>59</sup> T. Zywicki and J. Cooper, 'The U.S. Federal Trade Commission competition advocacy: lessons for Latin American competition policy' George Mason University Law Economics Research Paper Series, (2007) Published at <http://www.law.gmu.edu/faculty/papers/docs/07-07.pdf>. Last visited on 30th April 2009.

In relation to the goals of the draft FCB and the functions of the FCC, competition advocacy is only given scant attention in the Bill. While sections 8 and 9 dwell extensively on the objective and functions of the FCC, in section 10 that deals with the powers of the FCC, only sub-section 10(1) briefly provides a blank provision which might be interpreted as a flexible provision for competition advocacy. The provision is as follows:

Section 10(1) For the purpose of carrying out its functions under this Act, it shall be lawful for the commission to: (h) do such other things as it considers necessary for the effective performance of its functions under this Act.

It is obvious the draftsmen did not take into consideration the importance of competition advocacy and the need to incorporate it into the draft Bill in order to create an easier way for its integration into the Nigerian economy. This thesis argues that it is better to make express provision in the Bill rather than leave it open or subject it to the interpretation of section 10(1) (h) of the draft FCB. Dabbah supports this position; he argues that the success of a competition system is dependent on both the extent to which competition advocacy is embedded in the competition system and the degree of receptiveness of a domestic system to international developments in other jurisdictions of similar economic circumstances.<sup>60</sup> Thus he advocates that competition law should support competition advocacy directly.

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<sup>60</sup> M.M Dabbah, 'Measuring the success of a system of competition law: a preliminary view' (2000) 21(8) ECLR 369-76. According to him 'Competition advocacy can become a safety valve in a system of competition law that would ensure against not only anti-competitive practices, but also lobbying and economic rent-seeking behaviour by various interest groups, which seem to be common in competition law matters. The desirability of these ends cannot be denied, since they are bound to help achieve greater accountability and transparency in economic decision-making mechanisms and promote sound economic management and business principles in both public and private spheres'.

All the same, while the importance of competition advocacy cannot be over emphasized, yet there seems to be little empirical record to support its efficacy in developing countries; thus it might be wise for Nigeria and other developing countries to adopt a balanced approach that involves competition enforcement and advocacy as much as the resources of the competition agencies will allow. This is not a rebuttal of the position of the ICN that developing and emerging economies should devote more of their time and resources to competition advocacy instead of competition enforcement; rather, this thesis favours a dual approach towards achieving their priorities without necessarily incurring additional costs.

## **5.5 Conclusion**

The success and effective enforcement of competition law arguably as indicated in this chapter does not rest on the provisions of competition laws and competition authorities alone; rather, the whole competition process must be viewed as a system that requires an adequate and balanced nutrient to be nurtured into a robust body that will be able to withstand all the wills and caprices of a market economy. These nutrients include an independent competition agency, non political nomination of the agency's director or substantive head, judicial review and accountability amongst others nutrients. The provisions of the draft FCB in respect of the implementation of the Bill by the FCC when enacted into law is quite wide, but it might not be able to adequately carry out the objectives of the Bill without some adjustment and possibly a reduction in the focus of the Bill.

Moreover, one principal change that should be made concerns some of the wide mandate

given to the FCC concerning the objectives of the Bill. It contains both micro-economic and competition objectives. It is submitted that it should not be part of the mandate of the FCC to promote employment and social welfare of the Nigerian citizens. This mandate should rest with the Ministries of Labour and Employment, and Ministry of Trade, Commerce and Industry.

Closely related to the issue raised in the preceding paragraph is the serious need to ascertain the particular Minister that will be involved with competition law and policy as provided for in the draft Bill. The specific 'Minister' and the limits of its role in relation to the composition of the FCC and the implementation of the draft Bill will need to be clarified before its enactment. The amendment to the Bill must also show that while the body is an independent entity it is a corporate body that enjoys no privilege or immunity. This could act as a check on the exercise of its powers and thereby make it more objective and professionally minded.

In addition, the quasi-judicial function of the of the FCC could be made more expansive by creating a special court, as a special department of the Federal High Court to deal with appeal against the decisions of the board rather than the general provisions in section 101 of the FCB to go before the Federal High Court judicial review. The Federal High Court has a very busy work load that might not allow for quick determination of applications of competition related applications. Thus the creation of this specialized section will not only allow for a quick determination of cases but it will also allow a rapid development of the understanding and judicial expertise of the judges who will be dealing primarily with competition and economic related issues. This should not prevent allocation of other cases

to the specialized section. Some of these cases could be matters involving international trade and financial transactions and regulations.

## **Chapter Six**

### **6.0 Conclusion and Implications**

#### **6.1 Introduction**

The previous chapters have examined and illustrated the concept of competition law and policy, theories underlying it, advantages it involves and the arguments against it, as well as its growing popularity and adoption in the global community exposed to globalization and other factors. The factors in question involve pressures from development agencies and the desire to use competition law and policy as a basis for development and stable economies, particularly in the emerging economies of developing countries.

With the importance of these in mind, the thesis has explored some particular characteristics of the economies of resource-dependent developing countries, using Nigeria as a proxy to situate the types of developing economies and how their specific features could affect Nigeria's economic development, especially with particular regard to its projected gains from a competitive market economy. This point was treated in the light of resource allocation issue in a resource-rich country which Nigeria is considered to be. This thesis submits that it is essential/critical for Nigeria and other resource dependent-developing and emerging economies to define and map out the aim, purpose, and vision for their economic development parallel to whatever economic reform they intend to pursue, giving particular interest to building a sustainable competition culture in the sense that research has shown there is no single sustainable competition culture that 'fits all' economic or political models, that is, as ready-made for adoption. Both circumstances and the peoples involved in them differ.

The required competition law and policy, for most resource-dependent developing countries, especially Nigeria, will consist of an amalgam of some of provisions borrowed from the US antitrust laws and EC competition policy alongside other features. The reason underlying such an approach is that most of the economies are at different levels of economic development with varying institutional and governance capacities.<sup>1</sup> The system in Japan model, combining both competition and cooperation to promote rapid industrialization, may be considered as a model suitable for Nigeria.<sup>2</sup>

## **6.2 Key Findings and Conclusions in this Study**

Starting from Chapter One the thesis sets out the research problems and sub-set research question concerning the extent to which competition law and policy can be employed to promote the efficient allocation of resources and thereby development in resource-dependent developing economies.

Chapter Two concludes that resource-dependent developing countries, while sharing the same or most of the problems typical of developing countries, also have to confront a range of additional issues and problems that require tailor-made economic policies and reforms. The most critical among these problems include price volatility, the Dutch disease, rent seeking, access to energy and corruption. These problems further provide fertile soil for other core competitive concerns such as anti-competitive agreements, abuse of dominance and merger related problems.

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<sup>1</sup> A. Singh and R. Dhumale, 'Competition policy and development in developing countries' Published at [www.southcentre.org/publications/index.htm](http://www.southcentre.org/publications/index.htm). Last visited on 30th April 2009.

<sup>2</sup> See H. Odagiri, *Growth Through Competition: Strategic Management and the Economy in Japan*, (Oxford, New York: Oxford University Press, 1994). This book offers an excellent insight into the argument that because of different economic background and governance capacities different economies need different competition policies.

Chapter Three concludes that along with other objectives, economic objectives are part of the basic foundations of competition law thereby advocate different approaches for the particular economic problems of resource-dependent economies.<sup>3</sup> It also pointed out that there is a necessary positive correlation between competition policy and development. These conclusions in turn introduce other concerns, prompting, not least the question: as to what economic standard(s) should be adopted in the substance of competition law and policy for them.

Chapter Four examined the draft FCB and reached the conclusion that in its present state it is a very broad competition policy comprising the major competition law standards and other industrial and socio-political objectives. This will therefore need to be adjusted and tailored to target the basic competition concerns likely to affect a resource-based economy like Nigeria. While the draft Bill will help to improve such issues as access to market, quality and affordability in some cases, it does not seem to have any guarantee to wipe out some of the particular problems of resource-dependent countries, such as corruption, rent seeking, the Dutch disease and property rights raised in the research questions. For instance the draft Bill mandates the FCC to promote the balanced development of the national economy and welfare of the consumers amongst other competitive concerns but there is no further regulatory or fiscal provision empowering the FCC to carry out such challenging task.

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<sup>3</sup> R.D. Cooter, 'The theory of market modernization of law: economic development through decentralized law' in J.S. Bhandari and A.O. Sykes (ed.), *Economic Dimension in International Law: Comparative and Empirical Perspective* (London: Sage, 1998), 225.

Chapter Five considered the design of the regulatory agency for implementation of competition policy in Nigeria. Its main conclusion is that the success and effective enforcement of competition law arguably as indicated in the chapter does not rest on the provisions of competition laws and competition authorities alone; rather, the whole competition process must be viewed as a system that requires an adequate and balanced nutrient to be nurtured into a robust body that will be able to withstand all the wills and caprices of a market economy. These nutrients include an independent competition agency, non political nomination of the agency's director or substantive head, judicial review and accountability amongst others nutrients.

That competition policy has continued to enjoy a remarkable growth across the world in recent times needs no lengthy discussion: in many countries awareness and continuing acceptance prevail as to the value of competition policy as an important component for building the complex sets of market institutions to support economic growth, development and policy management capability.<sup>4</sup> While there is evidence to show that foreign direct investment, especially through mergers, is necessary for promoting economic progress in developing countries, there is at the same time not much evidence to indicate that mergers will particularly enhance economic efficiency in developing countries. It is generally agreed that international mergers, especially those involving multinational companies incorporated in industrialized countries, are very likely to have negative impacts on competition and the ability of undertakings to compete in developing countries, and thereby stifle economic development. Thus emerging economies and developing countries require a competition policy with due regard to the possible positive or negative impact of

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<sup>4</sup> T. Stewar et al., *Competition Law in action: Experiences from Developing Countries*, (Ottawa: International Development Research Center, 2007) 15.

transnational mergers; and the economic reforms, as well as to the positive or negative impact of privatization, deregulation and liberalization experienced as positive and beneficial in the jurisdictions of developed economies. A further point to consider is that, whatever may be the domestic competition law and policy of a developing country, there is no guarantee as to absolute restraints on anticompetitive behaviour by multinational firms.

Consequently, it appears that Nigeria is not ready to be left out from the category of developing countries embracing rapid economic reforms, as reflected in the light of recent events in the country. In fact, beside much excitement, there are also high expectations from the public about economic reform and the drive towards a truly competitive economy. This is supported by the zeal and amount of interest generated by the populace in the companies earmarked for privatisation. Most of the shares of the public companies floated in recent times were bought in record time, and many people have continued to complain that they were unable to buy into these companies. This tends to suggest an acknowledgement of the consumers' trust in the market or the desire to give the market a fair chance, rather than to continue under the old state frontier where there was in most cases no control, influence or possibility to practically protect consumer's interests.

This thesis further observes that in some countries, particularly in the US and EU, competition policies have been utilized in conjunction with other economic reform programmes in order to jump start their economies on the path to stable economic development. This consideration rides on the back of the argument and experience that all economies are prone to different levels of anti-competitive practices. This therefore reflects on the question whether competition policy could be used to solve the economic

problems ‘peculiar’ to resource rich countries. The present thesis undertook to identify the most primary competition problem to be tackled, such as those concerning restrictive trade practices and abuse of dominant position, are common in most jurisdictions and consequently common standards in competition can be used to address them. However, other secondary problems, such as rent seeking, resource curse and corruption cannot be considered to be directly competition problems; but they could be mitigated only by resorting to a competition process to solve through transparent regulatory structures, such as decisions of the judiciary, an effective law enforcement system, proper management and institution of transparent political accountability.<sup>5</sup>

Additionally, the thesis recognises that a total application of competition and a relevant law are not suitable in some sectors. This is due to features inherent to the sector in question, for example, serious concern that a serious conflict could emerge between sovereign concerns, on the one hand, market and the sectors that supply special goods and services to the citizenry. As a result, the use of regulation as a complement/balance to competition in a liberalised sector is advocated as a possible way of addressing the issue. This can ensure that competition and competition processes are jointly protected to enhance total welfare.

In addition, with the ongoing economic reforms, an expansion or non-expansion of the scope of applicability of competition law and policy is likely to lead an increase in regulatory concerns. The awareness that the rules of the game have changed (market discipline) can breed the expectation of the consumers as to better and more efficient availability of products and services. The emergence of such a situation can generate the

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<sup>5</sup> A detailed examination of how this could be done is not within the ambit of this thesis.

need to ensure better compliance with relevant regulations and laws. If the latter have not been adopted in time and/or earlier, capacity of the involved agencies will be stretched, their levels of inadequacy may be exposed; they may possibly be pitched against businesses that want to maintain the status quo.

Moreover, it should be kept in mind that recent economic reforms and the introduction of competition law and policy in Nigeria should contribute to the promotion of employment. The percentage of the contribution might be very small but in the long run it can have a major positive effect, because most of the additionally employed manpower would have to be suitably qualified or trained to achieve a particular proficiency level. An implication of this is that they would have to be remunerated commensurably. As a complement, the crop of the new staff will boost the quality level of the pool of human resources available to businesses and governments, a fact, which may ordinarily contribute to the efficiency level and, degree of sophistication in society as a whole.

Further, the thesis recognises that, with the level of information asymmetry in Nigeria and an ongoing liberalisation programme, it will be difficult to prevent the new private companies from becoming private monopolies. The absence of precise information on how the firms are managed, especially in relation to cost and liability, might compound the problem. If any pro-active competition agency were to be established, it should be able to reduce any likely incidence of abusive market practices but, as earlier pointed out, such an ability would depend on a host of factors, amongst which to be underlined are political will, a high level of professional integrity of the agency's staff, an independent judiciary and clear enforcement rules.

Another major conclusion is that Nigeria and other developing countries need to continue to improve the level of their infrastructural provisions, such as the sphere of law, enforcement mechanism, empowerment of the consumer etc. Just as in the developed economies, markets in developing economies are in a state of flux and the participants will always want to maximize their profits and naturally will take advantage of any opportunities to improve their respective positions. This view holds as especially true for developing countries, where rent seeking has in recent times been elevated almost to a position of envy occupied mostly by a privileged few politicians, businesses and technocrats.

Another consequence that should be expected from the operation of market discipline and the impact of competition policy on the Nigerian economy can be defined as the issue of regulatory conflicts in respect of duplication of authorities with powers over transactions in the key resource industries. At the moment there are various legislated areas regulating the oil and gas industries, the electricity and communication industry. By the time a competition law is eventually introduced, there will be a need to harmonise the laws in question with the provisions of competition law, although the supremacy of the provisions of competition law in certain cases might be spelt out ab initio. However, the probability of conflicts is not far fetched; it could heat up the economy and thereby have a negative impact on FDI. This is not an unusual problem, as countries with more established traditions in competition have experienced it. It only calls for the need for better advocacy and a better understanding of the tenets of competition policy by all, especially the legal teams on either side of the divide, and the judiciary called to adjudicate on whatever dispute may arise. However, if the issue of conflicts and potential claims likely to arise

from these economic reforms and eventual introduction of competition policy is not addressed from the beginning, the judicial system might not be able to deal with the deluge of cases that may arise. There is thus, preferably before the adoption of the envisaged laws, the need to commence early with the training of required judicial officers. Possible assistance in this regard could be obtained from the OECD, UNCTAD, the WTO, ICN and International Development Research Centre (IDRC).<sup>6</sup>

In addition, the ongoing economic reforms and the eventual introduction of a competition policy and their influence on public services, as to how these public services will be governed, will lead to more transparency and involvement of the masses, given the fact that the market is expected to play a superior role. This possibility is expected to have an impact on the earlier mentioned secondary problems that competition policy might not be able to solve. However, competition agencies and policy makers have to be ever cautious of economic changes, some of which have queried the neoclassical use of the ‘Economic Man’ (homo economicus) in economic analysis. The Economic Man is a willing tool for economic modelling but its major weakness is that s/he does not exist.<sup>7</sup> To avoid neutralising the effects of competition law and policy especially through changes, the competition enforcement agencies will need all necessary resources for the effective enforcement of the rules. The importance of ensuring the independence of the enforcement agencies and giving them political support cannot be overemphasised.

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<sup>6</sup> The International Development Research Centre (IDRC) is a public corporation created by the Parliament of Canada in 1970 to help developing countries use science technology to find practical, long-term solutions to the social, economic, environmental problems they face. Support is directed toward developing an indigenous research capacity to sustain policies technologies that developing countries need to build healthier, more equitable, more prosperous societies’. See, [http://www.idrc.ca/en/ev-1-201-1-DO\\_TOPIC.html](http://www.idrc.ca/en/ev-1-201-1-DO_TOPIC.html). Last visited on 30th April 2009.

<sup>7</sup> C. Lambert, ‘The marketplace of perceptions: behavioural economics ‘ March-April 2006) Harvard Magazine, 50-51. Some behavioural economists at Harvard, Stanford, Berkley, Chicago and other schools of late have been examining the value deregulation in solving real world problems and whether the economics assumption they are based on have generally enhanced consumer welfare or not

### **6.3 Implications for Theory, Policy and Practice**

The experiences of countries with a long and chequered history of competition policy are always instructive as everything that happens in competition policy is a prologue; there are lessons to be learned from the success and mistakes of the past in order to avoid policy failure.<sup>8</sup> As in almost all economic matters, competition policy will continue to be responsive to economic changes, so the preferred approach to competition matters in Nigeria and possibly for most developing countries this should be a flexible approach, although within defined parameters.

One of the major criticisms of policies in developing countries - especially policies that were initiated as a result of the influence of international development agencies and economic institutions, adopted or being initiated by developing and emerging countries - is the argument that most of these policies are not suitable or do not reflect the peculiar circumstances of the adoptee nations. As a result, it is very important, apart from researching into the importance of competition policy in developing and transition economies, also to commit time and money to studies that show how competition is working in comparison to how it has worked and is worked in developed economies. The result from such research will help to improve the understanding of the stakeholders - particularly policy makers, judges and competition agency's staff - and help to shape and steer the agenda of the economy concerned in a manner that will maximize their strengths and weaknesses.

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<sup>8</sup> K.P. Ewing, *Competition Rules for the 21<sup>st</sup> Century: Principles from the American's Experience* (The Netherlands: Kluwer Law International, 2006), 193.

In addition, competition agencies in developing countries will have to start in earnest to address the issue of competition policy and sustainable development; in essence they need to identify how they can achieve a balance between the competition policy and other environmental and economic policies. This has to be done in such a way that will not put them on a collision course with the developed countries. The thesis argued in chapter five that the agencies must properly prioritise the types and number of cases they are involved with. This will help to maximize time and money

Moreover, the issue of information asymmetry identified is a common problem in developing and emerging economies, it poses a serious regulatory challenge in the research problem analysed in the present thesis. It is taken as understood that a competition authority and other regulatory authorities will need to be in place to effect competition policy and economic reforms. Access to information across the concerned industries is a crucial ingredient to their success. For example parallel to merger activities and other economic restructuring activities that have continued to grow in developing countries, country-specific data have become available, but the author of the present thesis is unaware of any concerted efforts to collate and assess cross-country differences in this competition process among developing countries. As a result, the regulatory authorities must devise means of obtaining reliable and accurate information and establish how they could collaborate among themselves; otherwise their assessment and intervention might be tainted and could result in faulty decisions and a further distortion in the market concerned.<sup>9</sup>

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<sup>9</sup> While it has not been possible to adopt an international competition law, cooperation, especially, exchange of data, emergence of network forums like the International Competition Network, bilateral agreements and

Furthermore, given that the trend is tending towards a convergence in competition matters, with increasing knowledge of the competition process, competition policies can now be formulated and implemented to achieve a more efficient global economy,<sup>10</sup> but to achieve such a goal, especially in resource rich developing countries, certain core principles will have to be adopted and enforced as firmly as possible. According to Ewing, the principles in question will include focused, factual and rigorous examination of the competitive process in the light of the particular environment of the process of competition; balancing good and bad effects, and long and short-term interests, with the costs of government intervention and to continuously re-evaluate competition policies and enforcement mechanisms, using empirical data.

Almost all the principles emphasised by Ewing are part of the requirements to deal with while examining the design of a competition agency and the issue of competition advocacy. In short, the principles summarize the essence of what an enduring competition culture entails. However, the last principle, which Ewing has termed an ‘Eleventh Commandment’, is an issue that has continued to receive attention from different commentators. One such commentator is Kovacic, who writes:

When experience in one jurisdiction illuminates superior approaches, such methods ought to become focal points for possible emulation by others...

Rather than promoting ‘best practices,’ it might be more accurate and

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multilateral have continued to produce ‘successful convergence and cooperation and spreading best practice between competition authorities from around the world’. See, Jones & Sufrin, *EC Competition Law*, 1395 and F. Jenny, ‘Competition trade and development before and after Cancun’ in B. Hawk (ed.) 2003Fordham Corporate Law Institute, 631.

<sup>10</sup> Ewing, note 8, 331.

informative to say we are seeking ‘better practices...Envisioning problems of substance or process as having well-defined, immutable solutions may neglect the imperfect state of our knowledge and obscure how competition authorities must work continuously to adapt to a fluid environment that features industrial dynamism, new transactional phenomenon, and continuing change in collateral institutions vital to the implementation of competition policy.<sup>11</sup>

This in essence, is a contribution that the present thesis has given to policy makers in Nigeria; it exposed the need for continuity and continual evaluation of policies without which the country will lack behind in economic development among comity of nations.

In addition, it is hoped that the present thesis will make a contribution to the knowledge of technocrats and enhance the probable introduction and teaching of competition law in universities, with particular comparative reference to the needs of developing economies. The introduction of competition law in schools’ curriculum could be part of a competition advocacy in the context of free market economies in development countries. Although many policy documents and journals have been produced to address different issues touching economic reforms, there have not been any case studies (at least to the knowledge of the author of this thesis) or literature to address the competitive problems likely to be faced by resource-dependent developing countries that have adopted a competition law.

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<sup>11</sup> W. Kovacic, ‘Achieving better practices in design of competition policy institutions,’ Remarks before the Seoul Competition Forum 2004, Seoul Korea, April 20, 2004, 12. Another commentator is D.P. Majoras, the FTC Chairman, in 2005; she says ‘the need to improve our knowledge base and to incorporate that knowledge into enforcement work continues with unequal urgency today. We can take nothing for granted except the need to improve’. – ‘Celebrating the federal Trade Commission: Introductory remarks for the 90<sup>th</sup> Anniversary Symposium,’ (2005) 72 Antitrust Law Journal 755, 758-59.

#### **6.4 Limitations**

A major limitation, though not peculiar to the present research or just to Nigeria as a proxy country for very many most developing countries, is the issue of information asymmetry. The level of information management in developing countries is still low in comparison with the situation in developed countries. As a result, it continues to be difficult to obtain adequate information on key economic issues, especially in relation to the privatisation and liberalisation programmes. For example, in Nigeria there is no definite information on the status of the draft FCB. Thus the lack of wide empirical data to compare the present research theme especially with practices in developed countries with rich traditions of competition policies. This shortcoming thus calls for more research.

Closely related to the preceding limitation is the dearth of literature and empirical research on the application of competition policy specifically to resource allocation in developing countries. While there exists a large body of literature on competition matters concerning, monopoly, mergers, abusive behaviours and others in the USA and the EU, there exists little material in relation to resource allocation in developing countries, although there are some materials available from studies by organisations like WTO and OECD highlighting and promoting the essence of competition law in transition and developing economies. This deficit is mainly due to differences in the political and economic circumstances of the developed countries, on the one hand, and the rest of the world on the other. However, as submitted in the present thesis, competition law can assist in curtailing and also preventing anti-competitive behaviour as well as assist in creating an environment that could mitigate the occurrence of other economic problems not directly related to competition.

## **6.5 Further Research**

Nigeria and most of the other developing countries - especially in Africa - have many lessons to learn from other jurisdictions with rich and long established tradition in competition law and policy, as pointed out in the present thesis. However, one lesson that stands out is that competition policy is complex; for example, in the US the domain of antitrust laws have remained excessively dominated by triple actions, many per se rules and many difficult cases settled with reference to the rule of reason. While in the EU, for a long time achieving a balance between its integration/ common market and efficiency goals caused considerable concern with the enforcement and implementation of its rules. Thus, competition policy is a continually growing (and also evolving) issue; its adoption or non-adoption will have macroeconomic impacts on any economy as the world economy continues to experience the effects of globalisation and other factors inducing economic changes.

Lastly, there is generally much scope and need for additional research in the area relative to the evolution of resource-dependent economies in developing countries. Despite a growing popularity of competition laws and encouragement given by international organisations, such as OECD and the WTO to developing and emerging economies to adopt competition laws, a query that will continue to arise from developing countries and emerging economies, particularly in Africa, is the question how significant the benefit or probably the payoff will be when competition laws are adopted in a manner modelled either after that of the EC competition or US antitrust laws. Accordingly, further research and continuous policy reviews should be expected to the extent that a balance has to be maintained between sovereignty and market exigencies so that a reasonable level of continual economic development could be guaranteed.

Consequently, while recognising that resource-dependent countries have peculiar problems, this thesis concludes that with some level of adaptations competition law standards can be employed effectively in resource-based developing countries. It further concludes that the draft FCB is a credible legislative instrument for the promotion of economic development but it will require some amendments incorporating other tools or measures to guarantee its successful implementation. These amendments should include a provision for competition advocacy, clear definition of the Minister to be involved and the limit of his role, and empowerment of the proposed FCC to be able to independently carry out its mandate as provided for in the draft Bill.

**APPENDIX**

**Nigeria's Federal Competition Bill**

A BILL FOR

AN ACT TO ESTABLISH THE FEDERAL COMPETITION COMMISSION,

PROMOTE THE BALANCED DEVELOPMENT OF THE NATIONAL ECONOMY,  
WELFARE AND INTEREST OF CONSUMERS, MAINTAIN AND ENCOURAGE  
COMPETITION BY PROHIBITING RESTRICTIVE BUSINESS PRACTICES THAT  
SUBSTANTIALLY LESSEN COMPETITION, PREVENT THE ABUSE OF  
DOMINANT POSITIONS OF MARKET POWER IN NIGERIA AND FOR MATTERS  
CONNECTED THEREWITH.

**Commencement.**

BE IT ENACTED by the National Assembly of the Federal Republic of Nigeria  
as follows-

**PART I –PRELIMINARY PROVISIONS**

1. (1) This Act shall not apply to

**Application of this Act.**

(a) combinations or activities of employees for their own reasonable protection as  
employees;

(b) arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing terms and conditions of employment;

(c) subject to section (3), the entering into of an arrangement in so far as it contains a provision relating to the use, licence or assignment of rights under or existing by virtue of any copyright, patent, or trade mark;

(d) any act done to give effect to a provision of any such arrangement;

(e) the entering into or carrying out of such agreement as is authorised by the Commission under Part XIII or the engagement in such business practice as is so authorised;

(f) activities expressly exempted by virtue of any treaty or agreement to which Nigeria is a party;

(g) activities of professional associations designed to develop or enforce professional standards of competence;

(h) such other business or activity declared by the Minister by an Order published in the official Gazette.

(2) This Act applies to public utilities but the Commission shall before it exercises any functions in relation to such utilities, consult with the body responsible for the regulation of the given utility.

(3) With respect to professional services provided by professional associations listed in Schedule I of this Act, the Commission may establish guidelines for the application of certain provisions of this Act to the supply of services or conduct of business by members of such professional associations.

## **Schedule I.**

(4) For the purposes of subsection (3) of the section, the Commission shall from time to time review the list of professional groups to be included in the list in schedule 1 of this Act with the view to determining the groups that are eligible to be accorded privileges and exemption with respect to the application of any provision of this Act.

(5) On the advice of the National Economic Council and upon consultation with the Commission, the President may determine if deemed reasonable or desirable for the development and growth of the Nigerian economy, special exemptions from the application of the provisions of this Act for any sector of the economy and such exemptions shall be published in the gazette.

(6) This Act shall be binding and applicable to

(a) the Federal Government, the government of each of the States of the Federation and the Local Governments as far as the said governments engage in trade or commercial activity;

(b) every body corporate or other agency of the Federal Government, State Government or any Local Government, in so far as such corporation or other agency engages in trade or commercial activity;

(c) every body corporate in which the Federal Government, the government of any state of the Federation, any Local Government or a body corporate referred to in paragraph (b) of this subsection has a controlling interest in so far as it engages in trade or commercial activity.

(7) This Act shall apply to all conducts within and outside the territory of the Federal Republic of Nigeria by any person resident or carrying on business in Nigeria to the extent

that such conduct substantially affects a market in Nigeria.

(8) Part XII of this Act shall apply to the acquisition outside Nigeria by a person (whether or not the person is resident or carries on business in Nigeria) of the assets or shares of a business to the extent that such acquisition substantially affects a market in Nigeria.

2. The objects of this Act are to promote

**Objects of the Act.**

(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

(f) prohibit restrictive business practices which prevents, restricts or distorts competition or constitutes the abuse of a dominant position of market power in Nigeria.

**PART II ESTABLISHMENT OF NIGERIA COMPETITION COMMISSION**

3. (1) There is hereby established a body to be known as the Federal

Competition Commission (in this Act referred to as “the Commission”).

**Establishment of the Federal Competition Commission.**

(2) The Commission(a) shall be a body corporate with perpetual succession and a common seal;

(b) may sue and be sued in its corporate name; and

(c) may acquire, hold and dispose of property whether movable or immovable.

(3) The headquarters of the Commission shall be situated in the Federal Capital Territory, Abuja and there shall be established one or more additional offices as the Commission may from time to time determine.

#### **Constitution of the Commission.**

4.(1) The Commission shall consist of nine members, of whom:

#### **Constitution of Commission.**

(a) Four shall be fulltime members; and

(b) Five shall be part time members.

(2) The fulltime members shall comprise of an economist, a lawyer and other professionals in the field of management.

(3) A person shall not be appointed a full time member of the Commission unless he has at least ten years cognate experience as an economist, legal practitioner or professional in the management field as the case may be.

(4) The members of the Commission shall be appointed by the President.

(5) The President shall appoint the Executive Chairman of the Commission from amongst the fulltime members.

(6) The President shall not appoint a person a member of the Commission unless, in the

opinion of the President, such person is qualified for appointment, having regard to the functions and powers of the Commission, by virtue of that person's knowledge of or experience in industry, commerce, economics, law, accountancy, public administration, or consumer affairs.

(7) The powers of the Commission shall not be affected by any vacancy in its membership, or by any deficiency in the appointment of any member.

(8) The Commission may coopt representatives of sector regulatory agencies to participate in its proceedings as it deems fit and such coopted representatives shall participate in the Commission's proceedings on terms to be specified in the instrument Coopting them.

(9) The Executive Chairman and the other full time members shall be responsible for the day to day administration of the Commission subject to oversight by the Commission, and in this respect the Executive Chairman and the other full time members shall report to the Commission in monthly and other meetings.

(10) The supplementary provisions set out in Schedule II to this Act shall have effect with respect to the proceedings of the Commission and the other matters mentioned therein.

## **Schedule 2**

5.(1) A person appointed

### **Tenure of office etc.**

(a) a fulltime member of the Commission shall hold office for a term of four years in the first instance and may be reappointed for a further term of 4 years and no more;

(b) a part time member of the Commission shall hold office for a term of three years in the first instance and may be reappointed for a further term of three years and no more.

(2) A member of the Commission may resign his appointed by notice in writing addressed to the President and that member shall, on the date of the receipt of the notice by the President, cease to be a member.

(3) The President may, terminate the appointment of a member of the Commission and remove him from office for

(a) inability to discharge the functions of his office (whether arising from infirmity of mind or body or any other cause); or

(b) his being convicted for a crime involving dishonesty or moral turpitude; or

(c) his disqualification by an competent authority from the practice of his or her profession in any part of Nigeria; or

(d) misconduct or gross misconduct as defined under the Public Service Rules.

(4) The President may, pending the termination of a member of the Commission suspend such member from office.

(5) Nothing in subsection (3) shall permit the termination of the membership of any person in the Commission solely on the ground that such person voluntarily withdrew from his profession.

(6) The President may, if he is satisfied that it is not in the interest of the Commission or the public that a member continues in office remove him from office.

6. Where a vacancy occurs in the membership of the Commission, it shall be filled by the appointment of a successor to hold office for the remainder of the term of office of his predecessor, so however that the successor shall represent the same interest as his predecessor.

**Vacancy in membership, Emoluments, etc. of members.**

7. The Chairman and members of the Commission shall be paid such emoluments, allowances and benefits as the Federal Government may, from time to time approve.

**PART III OBJECTIVES AND FUNCTIONS AND POWERS OF THE COMMISSION**

8. The objectives of the Commission shall be to Ojectives of the Commission

(a) promote the efficiency, adaptability and development of the Nigerian economy;

(b) provide consumers with competitive prices and product choices; (c) promote employment and advance the social and economic welfare of Nigerians;

(d) ensure that small and medium enterprises have an equitable opportunity to participate in the Nigerian economy; and (e) protect Nigerian industries from unfair trade practices.

9.(1) The Commission shall Functions of the Commission

(a) formulate measures to increase market transparency including weight and measures administration;

(b) periodically, initiate policy review of commercial activities in Nigeria to ascertain anticompetitive and restrictive practices which may adversely affect the economic interest of consumers;

(c) provide consumers with competitive prices and product choices;

(d) promote employment and advance the social and economic welfare of Nigeria;

(e) ensure that small and medium enterprises have an equitable opportunity to participate in the Nigeria economy;

- (f) protect Nigerian industries from unfair trade practices;
- (g) carry out on its own initiative or at the request of any person, such investigation or inquires in relation to the conduct of business in Nigeria as will enable it to determine whether any person is engaging in business practices in contravention of this Act and initiate actions for such violations;
- (h) carry out such other investigations or inquires as the Minister may request or as it may consider necessary or desirable in connection with any matters falling within the provisions of the Act;
- (i) advise the Minister on such matters relating to the operation of this Act including recommendations to the Minister for the review of relevant policies, legislation and subsidiary legislation as it thinks fit or as may be requested by the Minister;
- (j) eliminate anticompetitive agreements, misleading, unfair, deceptive or unconscionable marketing, trading and business practices;
- (k) resolve disputes or complaints and issue clear directives or apply sanctions were necessary;
- (l) make recommendations to the relevant Ministries, ExtraMinisterial Departments and Agencies regarding relief for an industry seriously injured by increasing import, if it makes an affirmative injury determination;
- (m) give and receive advice from other regulatory authorities or agencies within the relevant industry or sector on consumer protection and competition matters;
- (n) create public awareness through seminars, workshops, studies and make information with regard to the exercise of its functions and powers available to the public; and

(o) perform such other functions or duties as are required to give effect to this Act.

(2) The Commission shall make available to

(i) to persons engaged in business, general information with respect to their rights and obligations under this Act,

(ii) for the guidance of consumers, general information on the rights and obligations of persons under this Act whose activities affect the interest of consumers.

(b) undertake studies and publish report and information with regard to matters that affect the interest of consumers;

(c) cooperate with and assist any association or body of persons in developing

and promoting the observance of standards of conduct for the purpose of ensuring compliance with the provisions of this Act.

(3) Where the Commission is required under this Act to determine whether or not, or the extent to which a conduct or activity or practice will result, or likely result in a benefit to the public, the Commission shall have regard to any economic efficiency that it considers will result or will likely result from that conduct.

10.

(1) For the purpose of carrying out its functions under this Act, it shall be lawful for the Commission to

**General Powers of the Commission.**

(a) prohibit the making or carrying out of an agreement;

(b) order the termination of an agreement;

(c) prohibit the withholding of supplies or any threat thereof;

- (d) declare certain business practices as abuse of dominant positions of market power;
  - (e) prohibit the attachment of extraneous conditions to any transactions;
  - (f) prohibit
    - (i) the recommendation of retail prices, and
    - (ii) discrimination or preferences in prices or other related matters;
  - (g) require the publication of transparent price list; and
  - (h) do such other things as it considers necessary for the effective performance of its functions under this Act.
- (2) Where the Commission considers it necessary or desirable for the purpose of carrying out its functions and exercising its powers under this Act, the Commission may, by notice in writing served on any person, require that person:
- (a) to furnish to the Commission, by writing signed by that person or, in the case of a company, by a director or competent servant or agent of the company, within the time and in the manner specified in the notice, any information or class of information specified in the notice;
  - (b) to produce to the Commission, or to a person specified in the notice acting on its behalf in accordance with the notice, any document or class of documents specified in the notice;
  - or
  - (c) to appear before the Commission at a time and place specified in the notice to give evidence, either orally or in writing, and produce any document or class of documents specified in the notice.

(3) The Commission shall obtain such information as it considers necessary to assist it in its investigations or inquires and where it considers appropriate, shall examine and obtain verification of documents submitted to it.

(4) The Commission shall have power to

(a) summon and examine witnesses;

(b) call for and examine documents;

(c) administer oaths;

(d) require that any document submitted to the Commission be verified by affidavit;

(e) require the furnishing of such returns or information as it may require within such period as it may specify by notice;

(f) adjourn any investigation or inquiry from time to time.

(5) The Commission may hear orally any person who in its opinion will be affected by an investigation or inquiry being carried out by it.

(6) The Commission may require a person engage in business or such other person as it considers appropriate, to state such facts concerning products manufactured, produced or supplied by that person as the Commission may think necessary to determine whether the conduct of the business in relation to the products constitutes an anticompetitive practice.

(7) If the information provided for in subsection

(3) of this section is not furnished to the satisfaction of the Commission, it may make a finding on the basis of information available to it.

(8) A summons to attend and give evidence or to produce documents before the

Commission issued under the hand of the Secretary or any member of the Commission shall be served on the person concerned. (9) Hearings of the Commission shall take place in public, but the Commission may, whenever the circumstances warrant, conduct a hearing in camera.

(10)(a) If a person without sufficient cause, fails or refuses to

(i) appear before the Commission in obedience to a summons, or

(ii) produce a document which he is required by such summons to produce or wilfully

(i) insults any member or officer of the Commission, or

(ii) obstructs or interrupts the proceedings of the Commission;

he shall be guilty of an offence and liable on conviction to imprisonment for 3 years or fine of ₦200,000.00 or both.

11.(1) The Commission may for the purpose of ascertaining whether any person has engaged in, is engaging or is likely to engage in conduct constituting or likely to constitute a contravention of this Act, require an authorised officer to Power of Entry.

(a) enter and search any premises;

(b) inspect and remove for the purpose of making copies, any documents or extracts therefrom in the possession or under the control of the person.

(2) Except as otherwise directed by the Commission, an authorised officer shall only exercise the powers conferred by subsection

(1) of this section with a warrant issued under subsection (3) of this section.

(3) Where a Chief Magistrate or a Judge of a High Court is satisfied on information on

oath that there is reasonable ground for believing that any person has engaged or is engaging or likely to engage in conduct constituting or likely to constitute contravention of this Act, he, may issue a warrant permitting an authorised officer to exercise the powers conferred by subsection (1) of this section in relation to any premises specified in the warrant.

(4) A person who applies for a warrant shall, having made reasonable inquiries, disclose

(a) details of every previous application for a warrant to search the place that the person knows has been made within the preceding twelve months;

(b) the result of the application;

(5) A warrant shall not authorise the detention of a document or documents for more than 7 days.

(6) An authorised officer shall

(a) on entry into any premises pursuant to a warrant, produce evidence of his identity and the authority to enter; and

(b) upon the completion of the search authorised by the warrant, leave a receipt containing a list of documents or extracts there from that are removed for the purposes of this section.

(7) The occupier or person, in charge of any premises entered pursuant to this section shall provide the authorised officer with all reasonable facilities and assistance for the effective exercise of the officer functions under this section.

(8) A person who obstructs or impedes an authorised officer in the performance of his duties under this section shall be guilty of an offence and liable on conviction to imprisonment for 2 years or a fine of \_200,000.00 or both.

12.(1) A warrant issued under section 11 of this Act shall authorise the person named in it and any police officer or public official providing assistance to the person named in it, which assistance shall be at the written request of the person named in the warrant:

**Powers conferred by warrant.**

(a) to enter and search the place specified in the warrant on one occasion within thirty days of the date of issue of the warrant at a time that is reasonable in the circumstances;

(b) to use such assistance as is reasonable in the circumstances;

(c) to use such force for gaining entry and for breaking open any article or thing as is reasonable in the circumstances;

(d) to search for and remove documents or any article or thing that the person executing the warrant believes on reasonable grounds may be relevant;

(e) Where necessary, to take copies of documents, or extracts from documents, that the person executing the warrant believes on reasonable grounds may be relevant;

(f) Where necessary, to require a person to reproduce, or assist any person executing the warrant to reproduce, in usable form, information recorded or stored in a document.

(2) Any police officer or public official assisting the person executing the warrant also has the powers referred to in paragraphs (c), (d), and (e) of subsection (1) of this section.

(3) The warrant shall be executed in accordance with such conditions as may be specified in the warrant when it is issued.

13. A person executing a warrant issued under section 11 of this Act shall:

**Warrant to be produced.**

- (a) have the warrant with him;
- (b) produce it on initial entry and, if requested, at any subsequent time;
- (c) identify himself or herself to the owner or occupier or person in charge of the place if that person is present; and
- (d) produce evidence of his or her identity.

14.(1) A person who executes a warrant issued under section 11 of the Act shall, before completing the search, leave in a conspicuous place at the place searched:

Other duties of the person who executes a warrant.

(a) in the case of a search carried out at a time when the owner or occupier was not present, a written notice stating:

(i) the date and time when the warrant was executed,

(ii) the name of the person who executed the warrant and the names of the person or persons who assisted him; and

(b) in the case of a search where a document or article or thing was removed from the place being searched, a schedule of documents or articles or things that were removed during the search.

(2) If it is not practicable to prepare a schedule before completing the search and if the owner or occupier of the place being searched consents in writing the person executing the warrant:

(a) may, instead of leaving a schedule, leave a notice stating that documents, or articles, or things have been removed during the search and that, within seven days of the search, a schedule will be delivered, left, or sent stating what documents, articles or things have

been removed; and

(b) shall, within seven days of the search:

(i) deliver a schedule to the owner or occupier, or

(ii) leave a schedule in a prominent position at the place searched, or

(iii) send a schedule by registered mail to the owner or occupier of the place searched.

(3) Every schedule shall state:

(a) the documents, articles and things that have been removed;

(b) the location from which they were removed; and

(c) the location where they are being held.

(4) The occupier or person in charge of the place that a person authorised pursuant to a warrant issued under section 11 of this Act enters for the purpose of searching shall provide that person with all reasonable facilities and cooperation in executing the warrant.

(5) The Commission, or any person authorised by the Commission for the purpose, may inspect and take copies of any documents, or extracts from them, obtained pursuant to a warrant issued under section 11 of this Act.

(6) The Commission may exercise any power under the provisions of this Act notwithstanding that any proceedings have been instituted in any Court, except where the Court makes an order to the contrary.

15.(1) For the purpose of carrying out its functions and exercising its powers under this Act, the Commission may receive in evidence any statement, document, information, or matter that may in its opinion assist it in dealing effectively with the matter before it,

whether or not the same would be otherwise admissible in a Court of law.

#### **Power of the Commission to take evidence.**

(2) The Commission may take evidence on oath and for that purpose a member of the Commission or any officer of the Commission duly appointed for the purpose may administer an oath.

(3) The Commission may require the evidence referred to in section 10(c) of this Act to be given on oath, and for that purpose a member of the Commission or any officer of the Commission duly appointed for the purpose may administer an oath.

(4) The Commission may permit a person appearing as a witness before the Commission to give evidence by tendering and, if the Commission deems fit, verifying by oath, a written statement.

(5) Where any person has appeared as a witness before the Commission pursuant to a notice in that behalf, or has given evidence before the Commission, whether pursuant to a notice or not, the Commission may, if it deems fit, order any sum to be paid to that witness on account of his expenses.

16.(1) Subject to subsection (2) of this section, the Commission may, in relation to any application for, or any notice seeking, any clearance or authorisation under Part XIII of this Act, or in the course of carrying out any other investigation or inquiry under this Act, make an order prohibiting the publication or communication of any information or document or evidence which is furnished, given or tendered to, or obtained by, the Commission in connection with the operations of the Commission.

#### **Power of the Commission to prohibit disclosure**

**of information, documents and evidence.**

(2) Any order made by the Commission under subsection (1) of this section may be expressed to have effect for such period as is specified in the order, which shall not be less than two years, but no such order shall have effect:

(a) where the order was made in connection with any application, or notice of interest, relating to any clearance or authorisation under this Act, after the expiry of thirty days from the date on which the Commission makes a final determination in respect of that application or notice, or, where that application or notice is withdrawn before any such determination is made, after the date on which the application or notice is withdrawn;

(b) where that order was made in connection with any other investigation or inquiry conducted by the Commission, after the conclusion of that investigation or inquiry.

(3) Every person who, contrary to any order made by the Commission under subsection (1) of this section, publishes or communicates any information or document or evidence commits an offence and is liable, on conviction, to a fine not exceeding \_1,000,000.00 in the case of a person not being a company, and \_50,000,000.00 in the case of a company.

17. A person who destroys any record likely to be required for an investigation that has commenced under this Act, with intent to mislead the Commission or to prevent or impede the investigation shall be guilty of an offence and liable on conviction to imprisonment for a term of 3 years or a fine of \_300,000.00 or both.

**Destruction of records.**

18.(1) If the Commission at any stage of an investigation under this Act is of the opinion that the matter being investigated or subject to inquiry does not justify further investigation or inquiry, the Commission may discontinue the investigation or inquiry.

Discontinuance of inquiry or investigation.

(2) Where the Commission discontinue an investigation or inquiry, it shall, within 14 days thereafter, submit a report in writing to the Minister and give written notice to the parties concerned in the investigation or inquiry, stating the information obtained and the reason/s for discontinuing the investigation or inquiry.

19. The Commission shall have power to administer and implement the provisions of  
  
Special Powers of the Commission.

(a) Dumped and Subsidised Goods Act;

(b) Safeguards Act;

(c) Consumer Protection;

(Special Provisions) Act; and

(d) Weight and Measures Act,

#### **PART IV STRUCTURE, MANAGEMENT AND STAFF OF THE COMMISSION**

20.(1) There shall be for the Commission, a Secretary who shall be appointed by the Commission.

##### **Appointment of the Secretary.**

(2) The Secretary shall

(a) have such qualifications and experience as are appropriate for a person required to perform the functions of that office under this Act; and

(b) hold office on terms and conditions as may be contained in his letter of appointment.

(3) The emoluments and terms of conditions of service of the Secretary, other than allowances that are not taken into account in computing pensions, shall not be altered to his disadvantage during the period of his tenure in the office of the Secretary.

21.(1) The Commission may, appoint such other staff or employees as, in the opinion of the Commission, may be expedient and necessary for the proper and efficient performance of its functions under this Act.

**Other staff of the Commission.**

(2) The terms and conditions of service (including remuneration, allowances, benefits and pensions) of the employees of the Commission shall be as determined by the National Salaries and Wages Commission.

(3) The Commission shall have power to appoint either on transfer or on secondment from any public service in the Federation, such employees as may, in the opinion of the Commission, be required to assist the Commission in the discharge of any of its functions under this Act, and shall have power to pay to persons so employed such remuneration (including 14 allowances) as the National Salaries and Wages Commissions may determine.

22.(1) The Commission may, subject to the provisions of this Act, make staff regulations relating generally to the conditions of service of the employees of the Commission and without prejudice to the generality of the foregoing, such regulations may provide for Staff regulations.

(a) the appointment, promotion and disciplinary control (including dismissal) of employees of the Commission; and

(b) appeals by such employees against dismissal or other disciplinary measures, and until

such regulations are made, any instrument relating to the conditions of service of officers in the public service of the Federation shall be applicable.

(2) Staff regulations made under subsection (1) of this section shall not have effect until approved by the Minister and when so approved they need not be published in the Federal *Gazette* but the Commission shall cause them to be brought to the notice of all affected persons in such manner as it may, from time to time, determine.

23.(1) Service in the Commission shall be approved service for the purposes of pensions and accordingly, the officers, staff or employees of the Commission shall be entitled to pensions and other retirement benefits in accordance with the provisions of the Pension Reform Act.

Pensions. 2004 No.2.

(2) For the purposes of the application of the provisions of the Pensions Act, any power exercisable under the Act by a Minister or other authority of the Government of the Federation (not being the power to make regulations under section 97 thereof) is hereby vested in and shall be exercised by the Commission and not by any other person or authority.

## **PART V FINANCIAL PROVISIONS**

24.(1) The Commission shall establish and maintain a fund from which shall be defrayed all expenditure incurred by the Commission.

### **Funds of the Commission.**

(2) There shall be paid and credited to the fund established pursuant to subsection (1) of this section(a) the initial takeoff grant from the Federal Government;

- (b) annual budgetary subvention from the Federal Government;
  - (c) such moneys as may, from time to time, be granted to the Commission by the Federal, a State Government or a local government; and
  - (d) all sums of money accruing to the Commission by way of grants in aid, gifts, testamentary dispositions and endowments and contributions from any other sources whatsoever.
- (3) The fund shall be managed in accordance with the rules made by the Commission and without prejudice to the generality of the power to make rules under this subsection, the rules shall in particular contain provision (a) specifying the manner in which the assets or the fund of the Commission are to be held, and regulating the making of payments into and out of the fund; and (b) requiring the keeping of proper accounts and records for the purpose of the fund in such form as may be specified in the rules.

**25.** The Commission shall apply the proceeds of the fund established pursuant to section 24 of this Act to

**Expenditure of the Commission.**

- (a) the cost of administration of the Commission;
- (b) the payment of salaries, fees, remuneration, allowances, pensions and gratuities payable to the members of the Commission and the employees of the Commission, as the case may be;
- (c) the payment for all consultancies, contracts, including mobilisation, fluctuations, variations, legal fees and cost on contract administration;
- (d) the payment for all purchases; and
- (e) undertake such other activities as are connected with all or any of the functions of the

Commission under this Act.

26.(1) The Commission may accept gifts of land, money or other property on such terms and conditions, if any, as may be specified by the person or organisation making the gift.

**Power to accept gifts.**

(2) The Commission shall not accept any gift if the conditions attached by the person or organisation making the gift are inconsistent with the functions of the Commission under this Act.

27.(1) The Commission shall not later than 30 th September in each year, submit to the Minister an estimate of the expenditure and income of the Commission during the next succeeding year.

**Annual estimates and expenditure.**

(2) The Commission shall cause to be kept proper accounts of the Commission in respect of each year and proper records in relation thereto and shall cause the accounts to be audited not later than 6 months after the end of each year by auditors appointed from the list and in accordance with the guidelines supplied by the Auditor General for the Federation.

28. The Commission shall prepare and submit to the Minister not later than 30 th June in each year, a report in such form as the Minister may direct on the activities of the Commission during the immediately preceding year, and shall include in the report a copy of the audited accounts of the Commission for that year and the auditor's report

**Annual Reports.**

**PART VI CONTRACTS, ARRANGEMENTS AND RESTRICTIVE**

## **PRACTICES SUBSTANTIALLY LESSENING COMPETITION**

29.(1) It shall be unlawful to enter into any contract, arrangement, understanding or combination thereof between Prohibition of contracts, agreements, etc. in restraint of trade etc.

(a) two or more parties in Nigeria; or

(b) one or more parties in Nigeria on the one part and one or more parties outside Nigeria or the other part, where such contract, arrangement, understanding or a combination thereof has the characteristics of trust or otherwise consists of conspiracy in restraint of trade or commerce.

(2) For the purposes of this section, restraint of trade in relation to a contract, arrangement, understanding or conspiracy means restraint in any market in which a party supplies or acquires or is likely to supply or acquire goods or services and shall include acts which

(a) directly or indirectly fix a purchase or selling price or any other trading condition;

(b) divide markets by allocating customers, suppliers, territories or specific types of goods or services;

(c) involve collusive tendering;

(d) limit or control production, market, technical development or investment;

(e) apply dissimilar conditions to equivalent transaction with other trading parties thereby placing them at a competitive disadvantage; and (f) make the conclusion of a contract subject to acceptance by the other parties of supplementary obligation and which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

**Conditions showing restrictive practice**

30.(1) An agreement to engage in a restrictive practice is presumed to exist between two or more parties where

(a) any one of the parties owns a significant interest in the other, or they have at least one director or substantial shareholder in common; and

(b) any combination of the parties are engaged in that restrictive practice.

(2) Any contract, arrangement, or understanding which is prohibited under section 29 of this Act is void.

31.(1) All agreements between enterprises which have or are likely to have the effect of preventing, restricting or distorting competition in a market are prohibited and void.

Provisions of agreements that restrict, prevent or distort competition.

(2) The provision of subsection (1) shall not apply to any agreement or category of 17 agreements the entry into which is authorised by the Commission after being satisfied that it

(a) contributes to the improvement of production or distribution of goods and services or the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit;

(b) imposes on the enterprises concerned only such restrictions as are indispensable to the attainment of objectives referred to in paragraph (a) or

(c) does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods and services concerned.

(3) All decisions by associations or enterprises and concerted practices by enterprises which prevent, restrict or distort competition are prohibited under this Act and no person

shall give effect to them.

32.(1) Any person who makes or enters into any contract or engages in any arrangement, conspiracy or combination declared unlawful under section 29 of this Act shall be guilty of an offence and on conviction shall be liable to 2 years imprisonment, or a fine of at least six times the amount of profit the person would have made or both.

Offence and penalty in respect of agreements etc. in restraint of trade.

(2) If the offence is committed by a body corporate, the body corporate shall be guilty of an offence and on conviction liable to a fine of not less than N1 million and each director, manager or officer of the body corporate shall be proceeded against and punished as if himself committed the offence.

33.(1) No person shall

**Agreements containing exclusionary provisions.**

(a) enter into a contract, arrangement or understanding that contain an exclusionary provision;

(b) give effect to an exclusionary provision in an agreement be it contract, arrangement or understanding.

(2) For the purposes of this Act, a provision of an agreement is an exclusionary provision if

(a) the agreement is entered into between or among persons, any two or more of whom are in competition with each other;

(b) the effect of the provision is to prevent, restrict or limit the supply of goods or services to, or the acquisition of goods or services from, any particular person or class of persons, either generally or in particular circumstances or conditions, or, if a party is a company, by

and interconnected or affiliated company.<sup>18</sup>

(3) For the purposes of subsection (2) of this section, a person is in competition with another person if that person or any affiliated or interconnected company

(a) is or is likely to be; or

(b) but for the relevant provision would be or would likely be, in competition with the other person, or with an affiliated or interconnected company, in relation to the supply or acquisition of all or any of the goods or services to which that relevant provision relates.

34.(1) Where the Commission determines that any agreement or trade practice referred to in section 31 and 33 are anticompetitive, it shall

serve an order on the parties stating the reasons for determining and requiring them to

**Action by Commission against anticompetitive agreements, etc.**

(a) cease a practice referred to in section 31; or

(b) terminate an agreement referred to in section 33.

(2) A person who has suffered a loss as a result of any anticompetitive agreement or trade practice may apply to the Commission for compensation and the Commission may, if it is satisfied that the circumstances of the case so warrant, order the parties whose agreement or trade practice is anticompetitive

to pay to the applicant such compensation as the Commission may determine.

(3) A person who fails to terminate the anticompetitive agreement or trade practice within the period agreed with the Commission shall be guilty of an offence and on conviction shall be liable to imprisonment for 2 years or payment of a fine of ₦200,000.00 or both.

## **PART VII EXEMPTIONS OF CERTAIN AGREEMENTS**

35. Nothing in this Part shall prohibit

(a) a contract or an arrangement between partners none of whom is a corporate body in so far as it contains provisions in relation to the terms of the partnerships or the conduct of the partnership business or in relation to competition between the partnership and a party to the contract, arrangement or understanding while that party is, or after that party ceases to be a partner;

(b) a contract or an arrangement where the only parties are or will be affiliated firms or companies;

(c) a contract of service or a contract for the provision of services in so far as it contains provisions by which a person, not being a body corporate agrees to accept restrictions as to the work, whether as an employee or otherwise, in which that person may engage during or after the termination of the contract; (d) contract for the sale of a business or shares in the capital of a company 19 carrying on business in so far as it contains a provision that is solely for the protection of the purchases in respect of the goodwill of the company;

(e) contract or an arrangement in as much as it contains a provision that relates to the remuneration, conditions of employment, hours of work or working conditions of employees;

(f) any act done otherwise than in trade, in concert by users of goods or services against the suppliers of those goods or services;

(g) any act done to give effect to a provision of a contract or an arrangement referred to in

paragraphs (a) to (f) of this section;

(h) any act done to give effect to any intellectual property right, which shall mean a right, privilege, or entitlement that is conferred as valid by or under (i) the Copy right Act Cap 68 LFN 1990

(ii) Patent and Designs Act, and Cap 344 LFN 1990

(iii) Trade Marks Act. Cap 436 LFN 1990

## **PART VIII ABUSE OF DOMINANT POSITION OR MARKET POWER**

36. For the purposes of this Act, one or more enterprises hold a dominant position in the relevant market if, singularly (by itself) (including activities involving an interconnected or affiliated company) or collectively, it or they has or have a share of more than forty percent of the relevant market, or if it or they otherwise has or have the ability to control prices or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers.

### **Dominant position.**

37.(1) Subject to the provisions of subsection

(3) of this section, any conduct on the part of one or more enterprises which amounts to the abuse of a dominant position in a market is prohibited.

Abuse of dominant position.

(2) An enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market and in particular if it (a) restricts the entry of any other

enterprise into that or any other market;

(b) prevents or deters any enterprise from engaging in competitive conduct in that or any other market;

(c) eliminates or removes any enterprise from that or any other market;

(d) directly or indirectly imposes unfair purchase or selling prices or other anticompetitive practices;

(e) limits production of products to the prejudice of consumers; 20

(f) makes the conclusion of agreements subject to acceptance by other parties of supplementary obligations which by their nature, or according to commercial usage, have no connection with the subject of such agreements; (g) engages in any business conduct that results in the exploitation of its customers and suppliers, including, but not limited to such conduct as exclusive dealing, market restriction or tied selling.

(3) An enterprise shall not be treated as abusing a dominant position(a) if it is shown that its behaviour was exclusively directed to improving the production or distribution of products or to promoting technical or economic progress and consumers were allowed a fair share of the resulting benefit;

(b) if the effect or likely effect of its behaviour in the market is the result of its superior competitive performance;

(c) if the enterprise seeks by its action to enforce or seek to enforce any right under or existing by virtue of any copy right, patent registered design or trade mark.

(4) An enterprise may be treated as abusing its dominant position in enforcing or seeking to enforce the rights referred to in subsection (2)(b) of this section, if the Commission is

satisfied that the exercise of those rights(a) has the effect of unreasonably lessening competition in a market; and

(b) impedes the transfer and dissemination of technology.

(5) For the purpose of this Act“ exclusive dealing” means any practice whereby a supplier of products (a) as a condition of supplying the products to a customer, requires the customer to(i) deal only or primarily in goods supplied by or designed by the supplier or his nominee, or

(ii) refrain from dealing in a specified class or kind of products except as supplied by the supplier or his nominee;

(b) induces a customer to meet a condition referred to in paragraph

(a) by offering to supply the products to the customer on more favourable terms or conditions if the customer agrees to meet that condition; “Market restriction” means any practice whereby a supplier of products, as a condition of supplying them to a customer, requires that customer to supply any products only in a defined market or exacts a penalty of any kind from the customer if the customer

supplies any products outside a defined market; 21 “Tied selling” means any practice whereby a supplier of products( a) as a condition of supplying the products (hereinafter referred to as the “tied products”) to a customer, requires the customer to (i) acquire any other products from the supplier or nominee, (ii) refrain from using or distributing, in conjunction with the tied products, any other products that are not of a brand or manufacture designated by the supplier or the nominee; and

(b) induces a customer to meet a condition set out in paragraph (a) by offering to supply the tied products to the customer on more favourable terms or conditions if the customer

agrees to meet that condition.

38.(1) Where the Commission has reason to believe than an enterprise or enterprises holding a dominant position in a relevant market in accordance with section 36 has abused, or is abusing that position, the Commission may, subject to section 40 of this Act conduct an investigation into the matter.

**Actions by the Commission in relation to abuse of dominant position.**

(2) If the Commission finds that an enterprise or enterprises has or have abused or is abusing dominant position and that the abuse has had, is having or is likely to have the effect of lessening competition substantially in a market, the Commission shall prepare a report indicating the practices that constitute the abuse and shall (a) notify the enterprise or enterprises of its findings accompanied by a copy of the report; and (b) direct the enterprise or enterprises to cease the abusing practice forth with or not later than six months after receipt of the notice.

(3) Where the Commission finds that the abusive practice constitute tied selling, the Commission shall prohibit the enterprise or enterprises concerned from continuing that practice forthwith.

(4) If the Commission finds that the abusive practice is exclusive dealing or market restriction, it may prohibit the major supplier of products in a market which is likely to(a) impede entry into or expansion of an enterprise in the market; (b) impede introduction of productions into or expansion of sales of products in the market with the effect of lessening competition.

(5) The Commission may prohibit the supplier referred to in subsection (4) from continuing to engage in market restriction or exclusive dealing or order that supplier to take such other action as in the Commission's opinion is necessary to restore or stimulate

competition in relation to the products.

(6) This section shall not apply in relation to exclusive dealing or market restriction 22 between or among affiliated or interconnected companies.

39. (1) The Commission shall not investigate an enterprise under this section unless it is satisfied that it controls more than forty percent of the market.

**When an enterprise is in dominant position.**

(2) For the purpose of subsection (1) of this section, an enterprise control more than forty percent of a market if, in cases where the market relates to the supply or, as the case may be, the export from Nigeria, of products of any description, more than forty percent of all the products of that description which are supplied or produced in Nigeria are supplied by or to that enterprise or are produced by that enterprise or a group of affiliated or interconnected companies of which the enterprise is a part.

(3) Where the market relates to the export of products, a dominant position shall be taken to exist both in relation to exports of products of that description from Nigeria generally and from Nigeria to each country taken separately.

40.(1) If within thirty days of the receipt of the directive under section 38(1), the enterprise or enterprises concerned submits to the Commission the measure it or they would take to cease the abusive practice and the timetable for giving effect to the measures, and the Commission is satisfied as to those measures, it shall suspend the operation of the directive and give written notice to the enterprise or enterprises of the suspension.

**Suspension of operation of the Order.**

(2) If an enterprise fails or neglects to give effect to the measures mentioned in subsection (1) within a period of six months after the date on which those measures were accepted by

the Commission, the directive issued under section 38(2) shall take effect at the end of that period.

#### **Identification of relevant market.**

41. For the purpose of delineating the relevant market under this Part, the criteria that the Commission shall take into account include (a) the geographical boundaries that identify groups of sellers and buyers of goods and services within which competition is likely to be restrained;

(b) all goods and services which are regard as interchangeable or substitutable by the consumer, by reason of the characteristics of the goods and services, the prices and the intended use;

(c) all suppliers to which consumers may turn in the short term, if the abuse of dominance leads to a significant increase in price or to other detrimental effect upon the consumer.

#### **PART IX RESALE PRICE MAINTENANCE**

42.(1) It is unlawful for any two or more enterprises which are suppliers of products, to enter into or carry out any agreement whereby they undertake to Collective agreements by suppliers.

(a) withhold supplies of products from dealers (whether parties to the agreement or not) who resell or have resold products in breach of any condition as 23 to the price at which those goods may be resold;

(b) refuse to supply products to such dealers except on terms and conditions which are less favourable than those applicable to other dealers carrying on business in similar circumstances;

(c) supply products only to persons who undertake or have undertaken to do any of the acts

described in paragraph (a) or (b).

(2) It is unlawful for any two or more enterprises referred to in subsection (1) to enter into or carry out any agreement authorizing (a) the recovery of penalties (however described) by or on behalf of the parties to the agreement from dealers who resell or have resold goods in breach of any condition described in subsection (1)(a); or (b) the conduct of any proceedings in connection therewith.

### **Collective agreement by dealers.**

43.(1) It is unlawful for any two or more enterprises which are dealers in any products, to enter into or carry out any agreement whereby they undertake to (a) withhold orders for supplies of goods from suppliers (whether parties to the agreement or not) who (i) supply or have supplied products without imposing a condition described in section 43(1)(a); or

(ii) refrain or have refrained from taking steps to ensure compliance with such conditions in respect of products supplied by them; or

(b) discriminate in their handling of products supplied by those suppliers. (2) It is unlawful for any two or more enterprises referred to in subsection (1) to enter into or carry out an agreement authorizing the recovery of penalties (however described) by or on behalf of the parties to the agreement from the suppliers referred to in that subsection or the conduct of any proceedings in connection therewith.

44. Sections 42 and 43 shall apply in relation to an association whose members consist of or include enterprises which are suppliers or dealers in any products or representatives of such enterprises.

**Publication of section 42 and associations.**

**Individual Minimum Resale Price Maintenance**

45.(1) Any term or condition of an agreement for the sale of any products by a supplier to a dealer is void to the extent that it purports to establish or provide for the establishment of minimum prices to be charged on the resale of the products in Nigeria.

**Minimum resale maintained by contract.**

(2) Subject to subsections (3) and (4), it is unlawful for a supplier of products or his agent to

(a) include in an agreement for the sale of products, a term or condition which is void by virtue of this section; 24

(b) require as a condition of supplying products to a dealer, the inclusion in the agreement of any term or condition or the giving of any undertaking to the like effect;

(c) notify to dealers or otherwise publish on or in relation to any products, price stated or calculated to be understood as the minimum price which may be charged on the resale of the products in Nigeria.

(3) Subsection (2)(a) does not affect the enforceability of an agreement except in respect of the term or condition which is void by virtue of this section

(4) Nothing in subsection (2)(c) shall, be construed as precluding a supplier (or an association or a person acting on a suppliers behalf) from notifying to dealers or otherwise publishing prices recommended as appropriate for the resale of products supplied or to be supplied by that supplier.

46.(1) Section 45 applies to patented products (including products made by a patented

process) as it applies to other products.

### **Patented products under sections 45.**

(2) Notice of any term or condition which is void by virtue of section 44 or which would be so void if included in an agreement relating to the sale of such products, is of no effect for the purpose of limiting the right of a dealer to dispose of those products without infringement of the patent.

(3) Nothing in section 45 and this section affects the validity, as between the parties to an agreement and their successors, of any term or condition of

(a) a licence granted by the proprietor of a patent or a licensee under any such licence; or

(b) any assignment of a patent, so far as it regulates the price at which products produced or processed by the licensee or assignee may be sold by him.

47.(1) It is unlawful for a supplier to withhold supplies of any products from a dealer seeking to obtain them for resale on the ground that the dealer

### **Maintenance of minimum resale prices by other means**

(a) has sold products obtained either directly or indirectly from that supplier, at a price below the resale price or has supplied them either directly or indirectly to a third party who had so done; or

(b) is likely, if the products are supplied by that dealer, to sell them at a price below that price, or supply them either directly or indirectly to a third party who would be likely to do so.

(2) In this section, “the resale price” in relation to a sale of any description, means the price

(a) notified to the dealer or otherwise published by or on behalf of a supplier of the products in question (whether lawfully or not) as the price or minimum price which is to be charged on or is recommended as appropriate for a sale of 25 that description; or

(b) prescribed or purporting to be prescribed for that purpose by an agreement between the dealer and any such supplier.

(3) Where, under this section, it would be unlawful for a supplier to withhold supplies of products, it is also unlawful for him to cause or procure any other supplier to do so.

## **PART X MERGERS, TAKEOVERS AND ACQUISITION**

48.(1) A merger reference may be made to the Commission by the Minister where it appears to him that two or more enterprises, one of which carries on business in Nigeria or by or under the control of a body corporate which is incorporated in Nigeria, have ceased to be distinct enterprises and that

### **Merger reference.**

(a) as a result of that, the condition specified in subsection (2) or (3) of this section prevails, or does so to a greater extent, with respect to the supply of goods or services of any description; or

(b) the value of the assets taken over exceeds ₦1 Billion.

(2) The condition referred to in paragraph (a) of subsection (1) of this section, in relation to the supply of goods of any description, is that at least onequarter of all the goods of that description which are supplied in Nigeria or in a substantial part of Nigeria are either

(a) supplied by one and the same person or are supplied to one and the same person; or

(b) supplied by the persons by whom the relevant enterprises (in so far as they continue to

be carried on) are carried on, or supplied to those persons.

(3) The condition referred to in paragraph (a) of subsection (1) of this section, in relation to the supply of services of any description, is that the supply of services of that description, in Nigeria or in a substantial part of Nigeria, is, to the extent of at least onequarter,

either

(a) supplied by one and the same person or supplied for one and the same person; or

(b) supplied by the persons by whom the relevant enterprises (in so far so they continue to be carried on) are carried on, or supplied to those persons.

(4) For the purposes of subsection (1) of this section, enterprises shall be taken to have ceased to be distinct enterprises at a time or in circumstances falling within this subsection, if either 26

(a) they did so not earlier than 6 months before the date on which the merger reference relating to them is to be made; or

(b) they did so under or in consequence of arrangements or transactions which were entered into without prior notice being given to the Commission of material facts about the proposed arrangement or transactions and in circumstances in which those facts had not been made public more than six months before the date mentioned in paragraph (a) of this subsection.

49.(1) For the purposes of this Act, any two enterprises shall be

regarded as ceasing to be distinct enterprises, if either Conditions for enterprises to cease to be distinct enterprises. (a) they are brought under common ownership or common control (whether or not the business to which either of them formerly belonged continues

to be carried on under the same or different ownership or control); or

(b) the enterprise ceases to be carried on at all and does so in consequence of any arrangement or transaction entered into to prevent competition between the enterprises.

(2) For the purposes of subsection (1) of this section, enterprises shall (without prejudice to the generality of the words “common control” in that subsection) be regarded as being under common control if they are

(a) enterprises of interconnected bodies corporate; or

(b) enterprises carried on by two or more bodies corporate of which one and the same person or group of persons have control over it; or

(c) enterprises carried on by a body corporate and an enterprise carried on by a person or group of persons having control of that body corporate.

(3) A person or group of persons directly or indirectly, able to control or materially influence the policy of any person in carrying on an enterprise, but without having a controlling interest in that body corporate or in that enterprise, may for the purposes of subsections (1) and (2) of this section be treated as having control of such policy.

(4) For the purposes of paragraph (a) of subsection (1) of this section, in so far as it relates to bringing two or more enterprises under common control, a person or group of persons may be treated as bringing an enterprise under his or their control if

(a) being already able to control or materially influence the policy of the persons, acquires a controlling interest in the enterprises or, in the case of an enterprise carried on by a body corporate, acquires a controlling interest in that body corporate; or

(b) being already able materially to influence the policy of the persons carrying on the

enterprises, the person or group of persons become able to control that policy. 27

50.(1) The provisions of this section shall have effect for the purposes of subsection (1)(b) of section 48 of this Act.

**Valuation of assets taken over.**

(2) Subject to the provisions of subsection (4) of section 48 of this Act, the value of the assets taken over shall be determined by

(a) taking the total value of the assets employed in or appropriated to the enterprises which ceased to be distinct enterprises, except any enterprises which remain under the same ownership and control or if none of the enterprises remain under the same ownership control, then one of the enterprises having the assets with the highest value; and (b) reference to the value at which, on the enterprises ceasing to be distinct enterprises or (if they have not then done so) on the making of the merger reference to the Commission, the assets standing in the books of the relevant business, less any relevant provisions for depreciation, renewals or diminution in value.

(3) For the purposes of subsection (2) of this section, any assets of a body corporate which, upon a change in the control of the body corporate or any of its enterprises, are dealt with in the same way as assets appropriated to any such enterprise shall be treated as appropriated to the enterprise.

(4) If by acquisition, privatisation or otherwise a person is found by the Commission to have more than 51 *per cent* share of ownership, the Commission shall summon the person to prove that he would not be in abuse of dominant position.

51.(1) Subject to the provisions of this Act on merger reference, the Commission shall investigate and report on the question Different Kinds of merger references.

(a) whether a merger situation qualifying for investigation has been created; and

(b) if so, whether the creation of that situation operates or may be expected to operate, against the public interest.

(2) A merger reference may be so framed as to require the Commission, in relation to the question whether a merger situation qualifying for investigation has been created, to exclude from consideration the provisions of subsection (1)(a) of section 48 of this Act or to exclude, from consideration, paragraph (b) of that subsection or to exclude one of those paragraphs, if the Commission finds the other satisfied.

(3) In addition to the question whether any such result as is mentioned in of subsection (1)(a) of section 48 of this Act has arisen, a merger reference may be so framed as to require the Commission to confine their investigation to the supply of goods or services in a specified part of Nigeria.

(4) A merger reference may require the Commission, where it finds that a merger situation qualifying for investigation has been created, to limit the consideration thereafter to such elements in, or possible consequences of, the creation of that situation as may be specified in the 28 reference and to consider whether, in respect only of those elements or possible consequences, the situation operate or may be expected to operate, against the public interest.

52.(1) Every merger reference shall specify a period not more than six months beginning with the date of the reference within which a report on the reference is to be made and a report of the Commission on a merger reference shall not have effect and no action shall be taken in relation to it under this Act, unless the report is made before the end of that period or of such further period (if any) as may be allowed by the Minister in accordance with subsection (2) of this section. Time limit for report on merger reference.

(2) The Minister shall not allow any further period for a report on a merger reference,

except on representations made by the Commission and on being satisfied that there are special reasons why the report cannot be made within the period specified in the reference.

(3) The Minister shall allow only one of such further period on any one reference and no such further period shall be longer than 3 months.

53.(1) In making the report on a merger reference, the Commission shall include in it definite conclusions on the questions comprised in the reference, together with Report of

**Commission on merger reference.**

(a) an account of its reasons for the conclusion; and

(b) a survey of the general position with respect to the subject matter of the reference and of the development which have led to that position, as in the opinion of the Commission are expedient for facilitating a proper understanding of those questions and of their conclusion.

(2) Where on a merger reference the Commission finds that a merger situation qualifying for investigation has been created and that the creation of that situation operates or may be expected to operate against the public interest or that one or more elements in or consequences of that situation which were specified in the reference in accordance with this subsection so operates or may be expected to so operate, the Commission shall specify in its report the particular effects, adverse to public interest, which in its opinion the creation of that situation (or, as the case may be, those elements in or consequences of it) have or may be expected to have and the Commission

(a) shall, as part of its investigations, consider what action (if any) shall be taken for the purposes of remedying or preventing those adverse effects; and

(b) may, if it thinks fit, include in its report, recommendations as to such action. 29

(3) In paragraph (a) of subsection (2) of this section, the reference to action to be taken for the purpose mentioned in that paragraph is a reference to action to be taken for that purpose

(a) by the Minister; or

(b) by one or more persons specified in the report as being persons carrying on, owning or controlling any of the enterprises which, in accordance with the conclusions of the Commission, have ceased to be distinct enterprise.

54.(1) The provisions of this section shall have effect where a report of the Commission on a merger reference has been sent to the Minister and the conclusions of the Commission set out in the report Order of Minister on report of merger reference.

(a) include conclusions to the effect that a merger situation qualifying for investigation has been created and that its creation or particular elements in or consequences of it specified in the report, operate or may be expected to operate against the public interest; and

(b) specify particular effects, adverse to the public interest, which in the opinion of the Commission, the creation of that situation, or (as the case may be) those elements in or consequences of it, have or may be expected to have.

(2) In the circumstances mentioned in subsection (1) of this section, the Minister may, by order published in the Federal *Gazette*, exercise such one or more of the powers specified in the Schedule to this Act as he may consider necessary to exercise for the purpose of remedying or preventing the adverse effects specified in the report as mentioned in subsection (1) of this section and those powers may be so exercised to such extent and in such manner as the Minister considers appropriate for the purpose.

#### **Schedule.**

(3) In determining whether, or to what extent or in what manner, to exercise any of the

powers, the Minister shall take into account any recommendations included in the report of the Commission in pursuance to subsection (2) of section 53 of this Act and any advice given by the Commission under section 73 of this Act.

55.(1) Where a merger reference has been made to the Commission and does not impose on the Commission a limitation under section 51 of this Act, then, with a view to preventing action to which this subsection applies, the Minister subject to subsection (3) of this section, may by order Interim Order of merger reference.

(a) prohibit or restrict the doing of things which in his opinion constitute action to which this subsection applies; or

(b) impose on any person concerned, obligations as to the carrying on of any activities or the safeguarding of any assets; or

(c) provide for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on such terms and with such powers as may be specified or 30 described in the order) or in any other manner; or

(d) exercise any of the powers which, by virtue of paragraph 12 of the Schedule to this Act, are exercisable by an order under section 50 of this Act.

Schedule.

(2) In relation to a merger reference, subsection (1) of this section applies to any action which may prejudice the reference or impede the taking of any action under this Act, which may be warranted by the Commission's report on the reference.

(3) No order shall be made under this section in respect of a merger reference after whichever or the following events first occur, that (a) the time (including any further

period) allowed to the Commission for making a report on the reference expires without their having made such a report; and (b) the period of forty days beginning with the day on which a report of the Commission was sent to the Minister.

(4) Any person who contravenes the provisions of this section, commits an offence and shall be liable on conviction to a term of imprisonment not exceeding 2 years or to a fine of N100,000 or to both such imprisonment and fine.

56.(1) A merger reference may be made to the Commission by the Minister where he has reasonable grounds to believe that arrangements are in progress or in contemplation which, if carried into effect, shall result in the creation of a merger situation qualifying for investigation.

#### **Reference in anticipation of merger.**

(2) Subject to the provisions of this section, on a merger reference, the Commission shall proceed in relation to the prospective and (if events so require) the actual results of the arrangements proposed or made as it may proceed if the arrangements in question had actually been made and the results in question had followed immediately before the date of the reference under this section.

(3) A merger reference under this section may require the Commission, where it finds that a merger situation qualifying for investigation has been created or shall be created if the arrangements in question are carried into effect, to limit their consideration thereafter to such elements in, or possible consequences of, the creation of that situation as may be specified in the reference and to consider whether, in respect of only those elements or possible consequences, the situation may be expected to operate against the public interest.

(4) In relation to a merger reference under this section, sections 50, 51, 53, 54 and 55 of this Act shall apply subject to the following modifications, that is (a) subsection (1) of

section 49 of this Act shall be construed as modified by subsection (2) of this section;(b) in subsections (2) and (3) of this section, any reference to the question whether a merger situation qualifying for investigation has been created or whether a result mentioned in paragraph (a) of subsection (1) of section 54 of this Act has arisen, shall be construed as including a reference to the question whether such a situation shall be created or such a result shall arise out of the arrangements in question are carried into effect and subsection (4) of that section shall not apply; (c) in subsection (2) of section 55 of this Act and in subsection (1) of section 57 of this Act, the references to subsection (4) of section 49 of this Act shall be constructed as references to subsection (3) of this section; and (d) in subsection (1) of section 54 of this Act, the reference to the conclusion to the effect that a merger situation qualifying for investigation has been created shall be construed as including a reference to conclusions to the effect that such a situation shall be created if the arrangements in question are carried into effect. (5) If, in the course of their investigations on a merge reference under this section, it appears to the Commission that the proposal to make arrangements such as are mentioned in the reference has been abandoned, the Commission shall (a) if the Minister consent, set aside the reference; and (b) in that case furnish the Minister such information as he may require as to the results of the investigations.

57. Any person who is injured in his business or property by failure to comply with this part of this Act may bring an action in the Federal High Court and shall recover damages and the Court may in addition award simple interest on the actual damage from the date of the commencement of the action up to the date of the judgment.

#### **Cause of action in relation to merger.**

58. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise,

machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption or resale within Nigeria or fix a price charged therefor or discount from or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies 32 or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

**Exclusive dealings.**

59.(1) A person who proposes to acquire assets of business or shares of a company shall give the Commission a notice seeking clearance for the acquisition. The Commission shall give clearances for mergers, takeover and acquisitions.

(2) Subsections (1), (2)(a) and (b), (4) and (5) of section 81 of this Act shall apply in respect of every notice given under subsection (1) of this section as if the notice was an application under section 83 of this Act.

(3) Within twenty-one days after the date of registration of the notice, or such longer period as the Commission and the person who gave the notice may agree, the Commission shall either:

(a) if it is satisfied that the acquisition will not result in an effect described in section 36 of this Act, by notice in writing to the person by whom or on whose behalf the notice was given, give a clearance for the acquisition; or (b) if it is not satisfied that the acquisition will not result in an effect described in section 36 of this Act, by notice in writing to the person by whom or on whose behalf the notice was given, decline to give a clearance for the acquisition.

(4) The Commission shall within the period specified in subsection (3) of this section give a clearance for the acquisition or decline to give a clearance for the acquisition.

(5) For the purpose of this section, the term “Clearance” relates to a determination in respect of a merger or an acquisition whereby the Commission only considers whether or not the merger, acquisition or takeover in question will result in the prohibited effect.

60.

(1) A person who proposes to acquire assets of a business or shares of a company shall give the Commission a notice seeking an authorisation for the acquisition. The Commission shall give authorisation for mergers, takeovers and acquisitions.

(2) Subsection (1),(2)(a) and (b), (4) and (5) of section 82 of this Act shall apply in respect of every notice given under subsection (1) of this section as if the notice was an application under section of this Act.

(3) Within sixty days after the date of registration of the notice, or such longer period as the Commission and the person who gave the notice may agree, the Commission shall:

(a) if it is satisfied that the acquisition will not result in an effect described in section 36 of this Act, by notice in writing to the person by or on whose behalf the notice was give, grant an authorisation for the acquisition;

(b) if it is satisfied that the acquisition will result in such a benefit that it should be permitted, by notice in writing to the person by or on whose behalf the 33 notice was given, grant an authorisation for the acquisition; or

(c) if it is not satisfied as to the matters referred to in paragraph (a) or paragraph (b) of this subsection, by notice in writing to the person by or on whose behalf the notice was given,

decline to grant an authorisation for the acquisition.

(4) The Commission shall within the period specified in subsection (3) of this section, grant an authorisation for the acquisition or decline to grant an authorisation for the acquisition.

(5) The Commission shall state in writing its reasons for a determination under subsection (3) of this section.

(6) For the purpose of this section, the term “Authorisation” relates to a determination in respect of a merger, takeover or an acquisition whereby the Commission is requested by the applicant to consider that there exists a factor of public benefit and that such factor justifies the authorization of a merger, takeover or an acquisition, which results in the prohibited effect.

61.(1) A clearance given or an authorisation granted under subsection (3) of section 59 or under subsection (3) of section 60 expires:

(a) twelve months after the date on which it was given or granted; or Provisions applying to applications for clearance and authorisation for mergers, takeovers and acquisitions.

(b) in the event of an application or appeal being made against the determination of the Commission giving the clearance or granting the authorisation, and the determination of the Commission being confirmed by the Court, twelve months after the date on which the determination is confirmed.

(2) Every person who gives a notice under section 59 or section 60 of this Act shall from time to time produce or, as the case may be, furnish to the Commission, with such time as may specify, such documents and information in relation to the acquisition as may be required by the Commission for the purpose of enabling it to exercise its functions under

section 59 or section 45 of this Act.

(3) Notwithstanding section 59 or section 60 of this Act, where the Commission is of the opinion that a proposed acquisition is, for reasons other than arising from the application of any provision of this Act, unlikely to be proceeded with, the Commission may, in its discretion, decline to give a clearance or grant an authorisation under this section .

(4) The Commission shall state in writing its reasons for declining to give a clearance or grant an authorisation under subsection (2) of this section.

(5) A person who has given notice in respect of an acquisition under section 59 or section 60 of this Act may at any time, by notice in writing to the Commission, advise the Commission that it does not wish the Commission to give a clearance or grant an authorisation and the Commission shall accordingly not give a clearance or grant an authorisation in respect of that acquisition. (6) The Commission may consult with any person who, in the opinion of the Commission, is able to assist it in making a determination under section 59 or section 60 of this Act, as the case may be.

62. Nothing in sections 62 or 63 of this Act shall apply to the acquisition of assets of a business or shares if the assets or shares are acquired in accordance with a clearance or an authorisation and while the clearance or authorisation is in force.

Effect of Clearance or authorisation.

63.(1) In giving a clearance or granting an authorisation under section 59 or section 60 of this Act, the Commission may accept a written undertaking given by or on behalf of the applicant or a person who gave a notice under section 59(1) or section 60(1) of this Act, as the case may be, to dispose of assets or shares specified in the undertaking.

The Commission may accept undertakings.

64.(1) Before making a determination under section 59(3) or section 60(3) of this Act in relation to a merger, takeover or an acquisition, the Commission may decide to hold a conference and shall appoint a date, time, and place for holding the conference and give notice of the date, time, and place so appointed and of the matters to be considered at the conference to the persons entitled to be present at the conference.

Conferences in relation to mergers, takeovers and acquisitions.

(2) The provisions of section 81 of this Act shall apply to every conference held under this section as if: (a) every reference in that section to a conference called under section 65 of this Act, were a reference to a conference held under this section; and

(b) the reference in subsection (1)(b) of that section to a person to whom a proposed determination was sent under section 81(2) of this Act were a reference to the person by or on whose behalf a notice was given under section 59(1) or section 60(1) of this Act as the case may be; and

(c) the reference in subsection (6) of that section to a determination in respect of an application, were a reference to a determination under section 59(3) or section 60(3) of this Act as the case may be.

## **PART XI MONOPOLY**

65. Any person or body corporate who monopolises or attempts to monopolise or combine or conspire with any other person or persons to monopolise any part of trade or commerce, commits an offence under this Act.

### **Monopoly.**

66.(1) For the purposes of this Part of this Act a monopoly situation shall be taken to exist in relation to the supply of goods of any description in the following cases, if

Monopoly situation in relation to supply of goods.

(a) at least 51 *per cent* of all the goods of that description which are supplied in

35 Nigeria are supplied by one and the same person, or are supplied to one and the same person; or

(b) at least 51 *per cent* of all the goods of that description which are supplied in Nigeria are supplied by members of one and the same group of interconnected bodies corporate or are supplied to members of one and the same group of interconnected bodies corporate; or

(c) at least 51 *per cent* of all the goods of that description which are supplied in Nigeria are supplied by members of one and the same group consisting of two or more of such persons as are mentioned in subsection(2) of this section, or are supplied to members of one and the same group consisting of two or more of such persons; or (d) one or more agreements are in operation, the result or collective result of which is that goods of that description are not supplied in Nigeria at all.

(2) The two or more persons referred to in subsection (1) of this section, in relation to goods of any description are any two or more persons (not being a group of interconnected bodies corporate) who whether voluntarily or not, and whether by agreement or not so conduct their respective affairs in any way to prevent, restrict or distort competition in connection with the supply of goods of that description, whether or not they are affected by the competition and whether the competition is between persons interested as producers or suppliers or between persons interested as customers of producers or suppliers.

67.( 1) For the purposes of this Part of this Act, a monopoly situation shall be taken to exist in relation to the supply of services of any description in the following cases, that is, if Monopoly situation in relation to supply of services.

(a) the supply of services of that description in Nigeria is, to the extent of at least onequarter, supplied by one and the same person, or supply for one and the same person; or

(b) the supply of services of that description in Nigeria is, to the extent of at least onequarter, supplied by one and the same group of interconnected bodies corporate, or supplied for members of one and the same group of interconnected bodies corporate; or

(c) the supply of services of that description in Nigeria is, to the extent of at least one quarter, supplied by members of one and the same group constituting two or more of such persons as are mentioned in subsection (2) of this section or supplied for members of one and the same group consisting of two or more such persons;

or

(d) one or more agreements are in operation, the result of which is that services of that description are not supplied in Nigeria at all. 36

(2) The two or more persons referred to in paragraph (c) of subsection (1) of this section, in relation to services of any description are any two or more persons (not being a group of interconnected bodies corporate) who whether voluntary or not and whether by agreement or not conduct their respective affairs as in any way to prevent, restrict or distort competition in connection with the supply of services of that description, whether or not they are affected by the competition and whether the competition is between persons interested as persons by whom or as persons for whom services are supplied.

(3) In the application of this section for the purposes of a monopoly reference, the Commission or the person or persons making the reference may, to such extent as the Commission or that person or those persons think appropriate in the circumstances, treat services as supplied in Nigeria, if the person supplying the service

(a) has a place of business in Nigeria; or

(b) controls the relevant activities from Nigeria; or

(c) being a body corporate, is incorporated under the Companies and Allied Matters Act, Cap. C 20 LFN.

68.(1) For the purposes of this Part of this Act, a monopoly situation shall be taken to exist in relation to exports of goods of any description from Nigeria in the following cases, that is, if Monopoly situation in relation to export.

(a) at least one quarter

of all the goods of that description which are produced in Nigeria are produced by one and the same person, or

(b) at least one quarter

of all the goods of that description which are produced in Nigeria are produced by members of one and the same group of interconnected bodies corporate, and in these cases, a monopoly situation shall, for the purposes of this Act, be taken to exist both in relation to exports of goods of that description from Nigeria generally and in relation to exports of goods of that description from Nigeria to each market taken separately.

(2) In relation to exports of goods of any description from Nigeria generally, a monopoly situation shall, for the purposes of this Act, be taken to exist, if (a) one or more agreements are in operation which in any way prevent, restrict or distort competition in relation to the export of goods of that description from Nigeria; and

(b) that agreement is or those agreements collectively are operative with respect to at least one quarter

of all the goods of that description which are produced in Nigeria.

(3) In relation to export of goods of any description from Nigeria to any particular market, a monopoly situation shall, for the purposes of this Part of this Act, be taken to exist, if

(a) one or more agreements are in operation which in any way prevent or

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restrict or distort competition in relation to the supply of goods of that description (whether from Nigeria or not) to that market; and (b) that agreement is or those agreements collectively are operative with respect to at least onequarter of all the goods of that description which are produced in Nigeria.

69.(1) Where it appears to the Commission that there are grounds for believing that General powers of the Commission to require information

(a) a monopoly situation may exist in relation to the supply of goods or services of any description or in relation to exports of goods of any description from Nigeria; and

(b) in accordance with the provisions of this Part of this Act, a person is not precluded from making a monopoly reference to the Commission with respect to the existence or possible existence of that situation, the Commission may, for the purposes of determining whether to make a monopoly reference with respect to the existence or possible existence of that situation, exercise the powers conferred on it by subsection (2) of this section.

(2) For the purposes of the provision of subsection (1) of this section, the Commission may require any person who supplies or produces goods of the description in question in Nigeria or to whom any such goods are supplied in Nigeria or any person who supplies services of any description in Nigeria or for whom any such services are so supplied, to furnish to the Commission such information as the Commission may consider necessary

with regard to

(a) the value, cost, price or quantity of goods of that description supplied or produced by that person, or of goods of that value, cost, price or extent of the services of that description supplied to him or the value, cost, price or extent of the services of that description supplied by the person or of the services of that description supplied for him; or

(b) the capacity of any undertaking carried on by that person to supply, produce or make use of goods of that description or to supply or make use 38 of services of that description; or

(c) the number of persons employed by that person wholly or partly on any work related to supply, production or use of goods of that description, or the supply or use of services of that description.

70.(1) Any power conferred on the Commission by the provisions of this Act to require a person to furnish information shall be exercisable by notice in writing served on that person.

Supplementary provision as to the requirement to furnish informant

(2) Any person who refuses or wilfully neglects to furnish to the Commission information required under this section, commits an offence and shall be liable on conviction to a fine of not exceeding N100,000.

(3) Any person who, in furnishing information required by the Commission under this section, makes a statement which he knows to be false in any material particular or recklessly makes a statement which is false in any material particular, commits an offence and shall be liable on conviction to a term of imprisonment not exceeding two years or to a fine not exceeding ₦100,000 or both such imprisonment and fine.

71.(1) A monopoly reference (a) shall specify the description of goods or services to which it relates;

**General provision as to monopoly references.**

(b) in the case of a reference relating to goods, shall state whether it relates to the supply of goods or to exports of goods from Nigeria or both; and

(c) for the purposes of which the reference consideration is to be limited to a part of Nigeria shall specify the part of Nigeria, to which the consideration is to be limited, and (subject to subsection (2) of this section) shall be framed in accordance with the provisions of section 76 or 77 of this Act.

(2) A monopoly reference may be so framed as to require the Commission to exclude from consideration or to limit consideration to such agreements and practices as are mentioned in or falling within

(a) paragraph (d) of subsection (1) of section 66 or paragraph (d) of subsection (1) of section 67 of this Act (or in either of those paragraphs as modified in this Act); or

(b) subsection (2) or (3) of section 68 of this Act; or

(c) paragraph (a) or (b) of subsection (1) of this section as are specified in the reference.

72. A monopoly reference may be so framed as to require the Commission only to investigate and report on the questions whether a monopoly situation exists in relation to the matters set out in the reference in accordance with section 71 of this Act and, if so, whether Monopoly reference limited to the facts.

(a) by virtue of which provisions of sections 66 to 68 of this Act, that monopoly situation is

to be taken to exist;

(b) in favour of which person or persons, that monopoly situation exists;

(c) any steps (by way of uncompetitive practices or otherwise) are being taken by that person or those persons for the purpose of exploiting or maintaining the monopoly situation and, if so, by what uncompetitive practices or in what other way; and

(d) any action or omission on the part of that person or those persons is attributable to the existence of the monopoly situation and, if so, what action or omission and in what way it is so attributable.

73.(1) On making a monopoly reference or a variation of a monopoly reference, the Commission shall arrange for the reference or variation to be published in the *Federal Gazette* or a national newspaper widely in circulation in Nigeria.

**Publication of monopoly references and variations, and of directions relating to them.**

(2) Where the Commission gives a direction under this Act with respect to a monopoly reference or a variation of a monopoly reference, the Commission shall arrange for the direction to be published in the *Federal Gazette* or in a national newspaper widely in circulation in Nigeria.

74.(1) The Commission shall make a report on a monopoly reference to the Minister.

**Report of Commission on monopoly reference.**

(2) In making the report on a monopoly reference mentioned in subsection (1) of this section, the Commission shall include in it, definite conclusions on the questions comprised in the reference, together with

(a) an account of its reasons for those conclusions; and

(b) a survey of the general position with respect to the subject matter of the reference and of the development which led to that position, as in its opinion are expedient for facilitating a proper understanding of those questions and of their conclusions.

(3) Where, on a monopoly reference, the Commission finds that a monopoly situation exists and that facts found by the Commission in pursuance of their investigations operate or may be expected to operate, against the public interest, its report shall specify those facts and the conclusions to be included in the report, in so far as they relate to the operation of those facts and shall also specify the particular effects, adverse to the public interest, which in their opinion those facts have or may be expected to have.

(4) The Commission (a) shall, as part of their investigations, consider what action (if any) shall be taken for the purpose of remedying or preventing those adverse effects; and

(b) may, if it thinks fit, include in its report, recommendation as to such action.

(5) In paragraph (a) of subsection (4) of this section, the reference to action to be taken for the purpose mentioned in that paragraph, is a reference to be taken for that purpose either

(a) by one or more Ministers or other public authorities; or

(b) by one or more persons in whose favour the monopoly situation in question exists.

75.(1) A monopoly reference shall specify a period within which the Commission is to report on the reference and if a report of the Commission on the reference is not made before the end of the period so specified or if one or more extended periods allowed under subsection (2) of this section is not made before the end of that extended period or of the last of those extended periods, as the case may be, the reference shall cease to have effect and no action or, if action has already been taken, no further action shall be taken in

relation to that reference under this Act.

#### **Time limit for report on monopoly reference.**

(2) Any direction may be given in the case of a monopoly reference made by the Minister with one or more other Ministers and that Minister or those Ministers acting jointly, allowing the Commission such extended period for the purpose of reporting on the reference as may be specified in the direction if the period has already been extended once or more than once by any direction under this subsection, allowing the Commission such further extended period for that purpose as may be so specified.

76.(1) The provisions of this section shall have effect where a report of the Commission on a monopoly reference has been sent to the Minister and the conclusions of the Commission set out in the report

#### **Order of the Minister on report of monopoly reference**

(a) include conclusions to the effect that a monopoly situation exists and that facts found by the Commission in pursuance of their investigations under the relevant sections of this Act operate or may be expected to operate, against the public interest; and

(b) specify particular effects adverse to the public interest.(2) In the circumstances mentioned in subsection (1) of this section, the Minister may exercise such one or more of the powers specified in Parts I and II of the Schedule to this Act as he considers necessary for the purpose of remedying or preventing the adverse effects specified in the report mentioned in subsection (1) of this section and those powers may be so exercised to such extent and in such manner as the Minister considers appropriate for that purpose.

#### **Schedule. Parts I and II.**

(3) In determining whether or not and what extent or in what manner, to exercise any of

those powers mentioned in subsection (2) of this section, the Minister shall take into account any recommendations included in the report of the Commission in pursuance of subsection (3) of section 74 of this Act.

(4) Where, in any such report as is mentioned in subsection (1) of this section, the person or one of the persons specified as being the person or persons in whose favour the monopoly situation in question exists is a body corporate fulfilling the following conditions, that is (a) that the affairs of the body corporate are managed by its members; and (b) that by virtue of any enactment, those members are appointed by a Minister.

(5) The appropriate Minister to make any order under this section in relation to that body corporate (but not for the purpose of making any such order in relation to any other person) in this section shall be the Minister who appointed the members of that body corporate.

(6) In relation to any such body corporate as is mentioned in subsection (5) of this section, the powers exercisable by virtue of subsection

(2) of this section shall not include the powers specified in Part II of the Schedule to this Act.

#### **Schedule. Part II.**

77.(1) This section applies to an order under section 76 of this Act.

(2) Any order under this section declaring anything to be unlawful may declare it to be unlawful either for all persons or for such persons as may be specified or described in the order.

#### **General provisions as to orders.**

(3) Nothing in the order shall have effect so as to apply to any person in relation to his

conduct outside Nigeria, unless that person is (a) a citizen of Nigeria; or

(b) a body corporate which is incorporated under the Companies and Allied Matters Act; Cap. C 20 LFN. or

(c) carrying on business in Nigeria, either alone or in partnership with one or more other persons.

(4) In the case of a person falling within paragraphs (a) to (c) of subsection (3) of this section, any such order may extend to acts or omissions outside Nigeria.

(5) An order to which this section applies may be extended so as to prohibit the carrying out of agreements already in existence on the date on which the Order is made.

(6) Nothing in any order to which this section applies shall have effect as to restrict the doing of anything for the purpose of restraining an infringement of Nigerian patent or so as to restrict any person as to the conditions which he attaches to a licence to do anything the doing of which would, but for the licence, be an infringement of a Nigerian patent.

(7) An order to which this section applies may authorise the Minister making the order to give any directive to a person specified in the directive, or in any company or association

(a) to take such steps within his competence as may be specified or described in the direction for the purpose of carrying out, or securing compliance with the order; or

(b) to do or refrain from doing anything so specified or described which he may be required by the order to do or refrain from doing, and may authorise the Minister to vary or revoke any directives so given. (8) Before making any order under section 76 of this Act, the Minister proposing to make the order shall publish, in such manner as appropriate, a notice

(a) stating his intention to make the order;

(b) indicating the nature of the provisions to be embodied in the order; and (c) stating that any person whose interest are likely to be affected by the order and who is desirous of making representations in respect of it, shall do so in writing (stating his interest and the grounds on which he wishes to make the representations) before a date specified in the notice (that date being not earlier than the end of the period of 30 days beginning with the day on which publication of the notice is completed), and the Minister shall not make the order on the date specified in the notice in accordance with paragraph (c) of this subsection and shall consider any representation duly made to him in accordance with the notice before that date.

## **PART XII AUTHORISATION AND CLEARANCE**

78.(1) Any person who proposes to enter into or carry out an agreement or to engage in a business practice affected or prohibited by this Act, may, subject to subsection (2) of this section apply to the Commission for an authorisation to do so.

### **Grant of authorizations.**

(2) The Commission shall in relation to an application for authorisation under subsection (1)(a) if it is satisfied that the agreement or practice as the case may be, is likely to promote the public benefit, grant an authorisation subject to such terms and conditions as it thinks fit and for such time as the Commission after consultation with the Minister may specify; or (b) refuse to grant an authorisation and shall inform the applicant in writing of the reasons for refusal.

79. While an authorisation under section 78 remains in force, nothing in this Act shall prevent the person to whom it is granted from giving effect to any agreement or any

provision thereof or from engaging in any practice to which the authorisation relates.

**Effect of authorisation.**

80.(1) Every application for an authorisation under section 78 of this Act which shall be made in the prescribed form, shall contain such particulars as may be specified in the form and be accompanied by payment of such fees as may be prescribed.

(2) On receipt of an application that complies with subsection (1) of this section, the Commission shall:

**Procedure for application for authorisation of agreements and restrictive practices substantially lessening competition.**

- (a) record the application in the register to be kept by the Commission for that purpose;
  - (b) give written notice of the date of registration to the person by whom or on whose behalf the application was made;
  - (c) give notice of the application to any other person who, in the Commission's opinion, is likely to have an interest in the application; and
  - (d) give public notice of the application in such manner as the Commission may think fit.
- (3) Any person who has an interest in any application in respect of which a notice is given under subsection (2)(d) of this section may, give written notice to the Commission of that person's interest and the reason/s thereof.

(4) On receipt of an application that does not comply with subsection

(1) of this section, the Commission may, at its discretion, either:

(a) accept the application and take the steps referred to in subsection

(2) of this section in respect of that application; or

(b) return the application to the person by whom or on whose behalf it was made; or

(c) decline to register the application until it complies with subsection

(1) of this section.

(5) Where the Commission declines to register an application under subsection (4)(c) of this section, it shall forthwith notify the person by whom or on whose behalf the application was made.

(6) The person making the application under subsection (1) of this section, and any person on whose behalf it was made, and any person to whom the application relates, shall from time to time produce, or, as the case may be, furnish to the Commission, within such time as it may specify, such further documents or information in relation to the application as may be required by the Commission for the purpose of enabling it to exercise its functions under this Part of this Act.

(7) Notwithstanding anything in subsection (2) or subsection (4) of this section, where the Commission is of the opinion that the matters to which an application relates are, for reasons other than arising from the application of any provision of this Act, unlikely to be proceeded with, the Commission may, in its discretion, return the application to the person by or on whose behalf the application was made; provided that, the person by or on whose behalf the application was made shall have the right to apply to the Court for a review of such determination.

81.(1) Before deciding an application for an authorisation under section 78 of this Act, the

Commission shall prepare a proposed determination in relation to the application.

(2) The Commission shall send a copy of the proposed determination and a summary of the reasons therefore to:

**Commission to prepare proposed determination in relation to contracts, arrangements and restrictive practices substantially lessening competition.**

(a) the applicant;

(b) any person to whom a notice has been given pursuant to section 80(2)(c) of this Act;

(c) any person who has given a notice pursuant to section 80(3) of this Act and who in the opinion of the Commission has such an interest in the application as to justify the Commission sending a copy of the proposed determination to that person; and

(d) any other person who in the opinion of the Commission may assist the Commission in its determination of the application.

(3) The applicant and each other person to whom a copy of the proposed determination is sent shall notify the Commission within fourteen days after a date fixed by the Commission (not being a date earlier than the day on which the notice is sent) whether the applicant or other person wishes the Commission to hold a conference in relation to the proposed determination.

(4) If every person to whom a proposed determination was sent under subsection (2) of this section:

(a) Notifies the Commission within the period of fourteen days prescribed in subsection (3) of this section that such person does not wish the Commission to hold a conference in relation to the proposed determination; or

(b) Does not notify the Commission within that period that such person wishes the Commission to hold such a conference, the Commission may make a final determination at any time after the expiration of that period.

(5) If any person to whom a proposed determination was sent under subsection (2) of this section notifies the Commission, in writing, within the period of fourteen days prescribed in subsection (3) of this section that he wishes the Commission to hold a conference in relation to the proposed determination, the Commission shall appoint a date (not being a date later than twentyone days after the expiration of that period), time, and place for the holding of the conference and give notice of the date, time, and place so appointed to each person to whom a proposed determination was sent under subsection (2) of this section. 45

(6) The Commission may, of its own motion, determine to hold a conference in relation to the proposed determination and shall appoint a date (not being a date later than twentyone days after the expiration of the period referred to in subsection (3) of this section), time, and place for the holding of the conference and give notice of the date, time, and place so appointed to the person to whom the proposed determination was sent under subsection (2) of this section.

(7) Where the Commission is of the opinion that two or more applications for authorisations that are made by the same person, or by bodies corporate that are affiliated with each other, involve the same or substantially similar issues, the Commission may consolidate the applications and treat same as if they constitute a single application, and may prepare a single proposed determination in relation to the applications and hold a single conference in relation to that proposed determination.

82.(1) At every conference called under section 81 of this Act:

Procedure for holding a conference.

(a) the Commission shall be represented by the Executive Chairman or a member or members thereof nominated by the Executive Chairman;

(b) each person to whom a proposed determination was sent under section 81(2) of this Act, and any other person whose presence at the conference is considered by the Commission to be desirable, is entitled to attend and participate personally or, in the case of a company or a firm, be represented by a person who, or by persons each of whom, is a director, officer, or employee of the company or firm;

(c) a person participating in the conference in accordance with paragraph (b) of this subsection is entitled to have another person, who may be a legal practitioner, or other persons present to assist him;

(d) no other person is entitled to be present.

(2) The Commission may require any officer or officers of the Commission to attend a conference called under section 81 of this Act where in the opinion of the Commission that officer or those officers may assist the Commission in the determination of the application and the member of the Commission or the officer (or one of the officers) of the Commission, as the case may be, in attendance, shall preside over the conference.

(3) At every conference called under section 81 of this Act, the Commission shall provide for as little formality and technicality as the requirements of this Act and a proper consideration of the application may permit.

(4) The Commission shall cause such record of the conference to be made as is sufficient to set out the matters raised by the persons participating in 46 the conference.

(5) Any member of the Commission or officer thereof, as the case may be, presiding over the conference may terminate the conference when that member or officer is of the opinion

that a reasonable opportunity has been given for the expression of the views of persons participating in the conference.

(6) The Commission shall have regard to all matters raised at the conference, and may at any time after the termination of the conference make a final determination in respect of the application.

83.(1) Subject to subsection (2) of this section, if at any time after the Commission has granted an authorisation under section 78 of this Act the Commission is satisfied that:

**The Commission may vary or revoke authorisations.**

(a) the authorisation was granted on information that was false or misleading in a material particular;

(b) there has been a material change of circumstances since the authorisation was granted;  
or

(c) a condition upon which the authorisation was granted has not been complied with;

the Commission may revoke or amend the authorisation or revoke the authorisation and grant another authorisation in substitution therefor.

(2) The Commission shall not revoke or amend an authorisation or revoke an authorisation and substitute a further authorisation pursuant to subsection (1) of this section unless the person to whom the authorisation was granted, and any other person who in the opinion of the Commission is likely to have an interest in the matter, is given a reasonable opportunity to make submissions to the Commission and the Commission has considered those submissions.

**PART XI11 – PROVISIONS RELATING TO REGULATED INDUSTRIES**

84.(1) For the purpose of avoiding any confusion between the provisions of this Act relating to the powers and functions of the Commission and the provisions of any other law in force providing for the powers and functions of any other government agency, the Commission may, from time to time, by a ruling, declare that the industries specified in the ruling shall be treated as regulated industries.

#### **Designation of Regulated Industries.**

(2) The Commission shall not make a ruling under subsection (1) of this section unless it is satisfied that:

(a) the industries to which the ruling relates are or will be subject to regulations made by a government agency with authority to regulate the activities of 47 persons operating in such industries or the terms under which goods or services are supplied in such industries;

(b) it is necessary or desirable for such industries to be designated as regulated industries in the interests of users, consumers, or, as the case may be, suppliers;

(c) any such ruling is designed in a manner necessary to minimize confusion as to the powers of the Commission and those of other regulatory agencies; and

(d) any such ruling shall be published by the Commission in the Gazette.

85.(1) Whenever it is alleged that a provision of this Act has been contravened by a person or firm acting or operating within any regulated industry designated pursuant to section 84 of this Act, the person or firm against which such allegation is made may show that the relevant conducts were ordered or required by any regulatory agency possessing jurisdiction over the relevant industry.)

#### **Exemption of Regulated Industries.**

(2) Notwithstanding the provisions of this section, on all matters relating to competition, the provisions of this Act shall override the provisions of any other law.

(3) Notwithstanding the provisions of this Part recognising regulated industries, nothing shall preclude a person dissatisfied with a decision for a regulatory agency from appealing to the Federal Competition Commission.

(4) The fact that a firm operates in an industry affected by an order relating to price regulation pursuant to Part X of this Act is sufficient to make such firm a member of a regulated industry for the purpose of this Part of this Act during the period that the order is in effect.

#### **PART XIV OFFENCES AGAINST COMPETITION**

86.(1) A person who is engaged in the business of producing or supplying products shall not directly or indirectly Price fixing.

(a) by agreement, threat or promise or any like means, attempt to influence upward or discourage the reduction of, the price at which any other person supplies or offers to supply or advertises products;

(b) refuse to supply products to or otherwise discriminate against any other person engaged in business because of the low pricing policy of that person.

(2) Subsection (1)(a) does not apply if the person attempting to influence the conduct of another person and that other person are interconnected companies or, as the case may be, principal and agent.

(3) For the purposes of this section, the publication by a supplier of products, other than a retailer, of an advertisement that mentions a resale price for the products is an attempt to influence upward the selling price of any person into whose hands the products come for

48 resale unless the price is so expressed as to make it clear to any person who becomes aware of the advertisement that the goods may be sold at a lower price.

87.(1) No person shall conspire, combine, agree or arrange with another person to Conspiracy.

(a) limit unduly the facilities for transporting, producing, manufacturing, storing or dealing in or supplying any products;

(b) prevent, limit or lessen unduly, the manufacture or production of any products or to enhance unreasonably the price thereof;

(c) lessen unduly, competition in the production, manufacture, purchase, barter, sale, supply, rental or transportation of any products or in the price of insurance on persons or property;

(d) otherwise unduly restrain or injure competition.

(2) Nothing in subsection (1) applies to a conspiracy, combination, agreement or arrangement which relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public

(a) in the practice of a trade or profession relating to the service; or

(b) in the collection and dissemination of information relating to the service.

88.(1) Subject to subsection (2), it is unlawful for two or more persons to enter into an agreement whereby Bid rigging.

(a) one or more of them agree to undertake not to submit a bid in response to a call or request for bids or tenders; or

(b) as bidders or tenders they submit, in response to a call or request, bids or tenders that are arrived at by agreement between or among themselves.

(2) This section shall not apply in respect of an agreement that is entered into or a submission that is arrived at only by companies each of which is, in respect of every one of the others, an affiliate.

89.(1) A person shall not, in pursuance of trade and for the purpose of promoting, directly or indirectly, the supply or use of products of any business interest, by any means Misleading advertising.

(a) make a representation to the public

(i) that is false or misleading or likely to be misleading in a material respect;

(ii) in the form of a statement, warranty or guarantee of performance, efficacy or length of life of products, that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation;

(iii) in a form that purports to be a warranty or a guarantee of any

49 products of a promise to replace, maintain or repeat an article or any part thereof or to repeat or continue service until it has achieved a specified result, if the form of purported warranty, guarantee or promise is materially misleading or there is no reasonable prospect that it will be carried out;

(b) falsely represent to the public in the form of a statement, warranty or guarantee that services are of a particular kind, standard, quality or quantity, or are supplied by any particular person or any person of a particular trade, qualification or skill;

(c) make a materially misleading representation to the public concerning the price at which

any products or like products have been , are or will be ordinarily supplied.

(2) For the purposes of this section and section 95, the following types of representation shall be deemed to be made to the public by and only by the person who caused it to be expressed, made or contained, that is(a) expressed on a product offered or displayed for sale;

(b) expressed on anything attached to, inserted in or accompanying a product offered or displayed for sale, its wrapper or container, or anything on which the product is mounted for display or sale;

(c) expressed on a display in the place where the product is sold;

(d) made in the course of selling the product to the ultimate consumer;

(e) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner made available to a member of the public.

(3) Where the person referred to in subsection (2) is outside of Nigeria, the representation shall be deemed to be made.

(a) in a case described in subsection (2)(a),(b) or (e), by the person who imported the product; and

(b) in a case described in subsection (2)(c), by the person who imported the display into Nigeria.

(4) Subject to subsections (3) and (4), every person who, for the purpose of promoting, directly or indirectly, the supply or use of any products or any business interest, supplies to a wholesaler, retailer or other distributor of products, any material or thing that contains a representation of a kind referred to in subsection (1) shall be deemed to have made that

representation to the public.

90.(1) A person shall not, for the purpose of promoting, directly or indirectly, the supply or use of any products or any business interest, make a representation to the public that a test as to the performance, efficacy or length of life of the products has been made by any person or publish a testimonial with respect to the products, unless he can establish the matters specified in subsection (2).

**Representation as to test and publication of testimonials.**

(2) The matters mentioned in subsection (1) are that

(a) the representation or testimonial was previously made or published 50 by the person by whom the test was made or the testimonial was given, as the case may be; or

(b) before the representation or testimonial was made or published, it was approved and permission to make or publish it was given in writing by the person who made the test or gave the testimonial, as the case may be, and it accords with the representation or testimonial previously made, published o approved.

91. A person shall not supply any product at a price that exceeds the lowest of two or more prices clearly expressed by him or on his behalf, in respect of the product in the quantity in which it is so supplied at the time of supply

Double ticketing.

(a) on the product, its wrapper or container;

(b) on anything attached to, inserted in or accompanying the product, its wrapper or container or anything on which the product is mounted for display or sale; or

(c) on a display or advertisement at the place at which the product is purchased.

92.(1) For the purposes of this section, "bargain price" means a price

Sale at bargain price.

(a) that is represented in an advertisement to be a bargain price by reference to an ordinary price or otherwise;

(b) so represented in an advertisement, that a person who reads, hears or sees the advertisement would reasonably understand to be a bargain price by reason of the prices at which the products advertised or like products are ordinarily sold.

(2) A person shall not advertise at a bargain price, products which he does not supply in reasonable quantities having regard to the nature of the market in which he carries on business, the nature and size of the business and the nature of the advertisement.

(3) Subsection (2) does not apply if the person who is advertising proves that (a) he took reasonable steps to obtain in adequate time, a quantity of the product that would have been reasonable having regard to the nature of the advertisement, but was unable to obtain such a quantity by reason of events beyond his control that he could not reasonably have anticipated;

(b) he obtained a quantity of the product that was reasonable having regard to the nature of the advertisement, but was unable to meet the demand thereof because the demand surpassed his reasonable expectations; or

(c) after he became unable to supply the product in accordance with the advertisement, he undertook to supply the same product or an equivalent product of equal or better quality at the bargain price and within a reasonable time to all persons who requested the product and who were not supplied therewith during the time when the bargain price applied and that

the undertaking 51 g was fulfilled.

93.(1) A person who advertises products for sale or rent in a market shall not, during the period and in the market to which the advertisement relates, supply products at a price that is higher than that advertised.

**Sale above advertised price.**

(2) This section shall not apply in respect of (a) an advertisement that appears in a catalogue or other publication in which it is prominently stated that the prices contained therein are subject to error if the person establishes that the price advertised is in error;

(b) an advertisement that is immediately followed by another advertisement correcting the price mentioned in the first advertisement.

(3) For the purposes of this section, the market to which an advertisement relates shall be deemed to be the market to which it could reasonably be expected to reach, unless the advertisement defines market specifically by reference to a geographical area, store, sale by catalogue or otherwise.

94. Any person who, in any manner, impedes, prevents or obstructs any investigation or inquiry by the Commission under this Act commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 3 years or to a fine not exceeding 200,000 or to both such imprisonment and fine.

**Obstruction of Investigation or Inquiry.**

95. A person who Offence against records.

(a) refuses to produce any document or to supply any information

when required to do so by the Commission under this Act; or (b) destroys or alters any

such document or causes it to be destroyed or altered, commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 3 years or to a fine not exceeding ₦200,000 or to both imprisonment and fine.

96. A person who gives to the Commission or an authorized officer, any information which he knows to be false or misleading commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 2 years or to a fine not exceeding ₦150,000 or both imprisonment and fine.

**Giving of false or misleading information.**

97. A person who (a) refuses or fails to comply with a requirement of the Commission under this Act;

**Failure to attend and give evidence.**

(b) having been required to appear before the Commission

(i) without reasonable excuse, refuses or fails to appear and give evidence; or

(ii) refuses to take an oath or to make an affirmation as a witness or to answer question put to him, commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 3 years or a fine not exceeding ₦200,000 or both imprisonment and fine.

98. Any person who violates any of the provisions of this Act with intention to make or actually makes illicit profit shall be guilty of an offence and liable to conviction to a fine 6 (six) times of the value of the transactions.

**Penalty for illicit profit.**

## **PART XV ENFORCEMENT, REMEDIES, AND APPEALS**

99.(1) Any person who alleges that he has suffered, or is likely to suffer, an injury as a result of a violation or likely violation of any provision of this Act may file a complaint with the Commission.

### **The Commission may hear complaints of persons.**

(2) Every complaint pursuant to subsection (1) of this section shall be made in such form, contain such particulars, and be accompanied by payment of such fee as the Commission may prescribe.

(3) On receipt of a complaint that complies with subsection (2) of this section, the Commission shall:

(a) record the complaint in the register to be kept by the Commission for that purpose;

(b) give written notice of the date of registration to the person by or on whose behalf the complaint was filed;

(c) give notice of the complaint to the person against whom the complaint was filed and any other person who, in the Commission's opinion, is likely to have an interest in the complaint.

(4) Any person who has an interest in any complaint filed with the Commission may give written notice to the Commission of that person's interest and the reason therefor.

(5) On receipt of a complaint that does not comply with subsection

(2) of this section, the Commission may, at its discretion, either:

(a) accept the complaint and take the steps referred to in subsection

(3) of this section pertaining to that complaint; or

(b) decline to register the complaint until it complies with subsection

(2) of this section.

(6) Where the Commission declines to register a complaint pursuant to subsection (5) (b) of this section, it shall forthwith notify the person by or on whose behalf the complaint was made and shall state clearly the basis for its decision.

(7) The person filing a complaint under this section, and any person on whose behalf it was made, and any person against whom the complaint relates, and any person who has either received a notice from the Commission or who has filed a notice of interest with the Commission shall from time to time produce, or, as the case may be, furnish to the Commission, within such time as it may specify, such further documents or information in relation to the complaint or defences to allegation contained therein, as may be required by the Commission for the purpose of enabling it to reach a final determination regarding the merits of the complaint.

(8) Notwithstanding anything in this section, where the Commission is of the opinion that the matters to which a complaint relates are not covered by any provision of this Act, the Commission shall decline to entertain such complaint.

100.(1) If the Commission is of the view that the matter raised in the complaint are those over which any provision of this Act applies, the Commission shall set the complaint for administrative hearing before a hearing officer, who shall be appointed by the Executive Chairman and shall be of a status to be designated by the Commission.

**Procedure for administrative hearing.**

(2) At every hearing called pursuant to subsection (1) of this section:

(a) the person who filed the complaint, or in whose behalf it was filed, and each person to whom a notice was sent or who has filed a notice of interest under section 99 of this Act, and any other person whose presence at the hearing is considered by the Commission to be desirable, is entitled to attend and participate personally or, in the case of a company or a firm, be represented by a person who, or by persons each of whom, is a director, officer, or employee of the company or firm; (b) a person participating in the conference in accordance with paragraph (b) of this subsection is entitled to have another person, who may be a legal practitioner, or other persons present to assist him;

(c) no other person is entitled to be present.

(3) At every hearing held under this section, the Commission shall provide for as little formality and technicality as the requirements of this Act and a proper consideration of the application may permit.

(4) The Commission shall cause such record of the hearing to be made as is sufficient to set out the matters raised by the persons participating in the hearing.

(5) The hearing officer presiding over the hearing may terminate the hearing when he is of the opinion that every person participating in the hearing has been given a reasonable opportunity to state or explain his or its position.

(6) The Commission shall have regard to all matters raised at the hearing and the records, and shall make a determination within fortyfive days after the termination of the hearing.

(7) Where the hearing officer is of the opinion that no provision of this Act has been violated by the person against whom the complaint was filed, the hearing officer shall make a determination to that effect.

(8) Where the hearing officer is of the opinion that any provision of this Act has been violated, the hearing officer shall make a determination to that effect and make 54 recommendations as he deems fit and reasonable to ensure that the violation ceases and that the injured party is accorded a reasonable remedy for his injury.

(9) Where the Commission declines to entertain a complaint duly filed, or finds that no violation of this Act has occurred or that there has been a violation, as the case may be, any party not satisfied with the determination of the Commission may file an application for review with the Court.

(10) Where, in the opinion of the hearing officer, the interest of justice demands that the person whose complaint is pending before the Commission should be granted leave to file an application promptly with the Court prior to the termination of the administrative hearing, the hearing officer may, in writing, grant such leave.

(11) Where a leave is granted pursuant to subsection (10) of this section, the hearing officer shall suspend the administrative hearing pending the outcome of the application before the Court, and shall terminate same when and if all the issues raised in the complaint are fully resolved by the Court.

(12) Any person who has filed a complaint with the Commission may, at any time before the termination of the hearing, by notice in writing to the Commission, withdraw the complaint. (13) No person shall file an application for review with the Court or otherwise invoke the jurisdiction of the Court in respect of a violation of any provision of this Act, unless such person has complied with the provisions of this section.

101. The following persons may exercise the right of application for review pursuant to the provisions of this Act:

**Persons entitled to file applications for review.**

(a) in the case of an application against a determination of the Commission in relation to an application for an authorisation under section 78 of this Act, the applicant and any person who participated in any conference held by the Commission under section 81 of this Act in relation to the authorisation; (b) in the case of an application against a determination of the Commission revoking or amending an authorisation pursuant to section (1) of this Act or revoking an authorisation and substituting a further authorisation pursuant to that subsection, the person to whom the authorisation was granted;

(c) in the case of an application against a determination of the Commission under section 59 or section 60 of this Act in relation to a notice seeking a clearance or an authorisation, as the case may be: (i) the person who sought the clearance or the authorisation; and

(ii) any person whose assets or the shares in a company are proposed to be acquired pursuant to the clearance or authorisation; and

(iii) any person who participated in any conference held by the Commission under section 81 of this Act in relation to the clearance or authorisation. (d) in the case of an application against a determination of the Commission under section 81 of this Act made on the application of any person who is a supplier of regulated goods or services, the applicant and any person who in the opinion of the Court is a substantial consumer or purchaser of the regulated goods or services to which the determination relates or who represents a substantial group of consumers or purchasers of those goods or services;

(e) in the case of an application against a determination of the Commission under section 81 of this Act made by the Commission on its own motion, any person who is a supplier of regulated goods or services to which the determination relates and any person who in the opinion of the Court is a substantial consumer or purchaser of the regulated goods or

services to which the determination relates or who represents a substantial group of consumers or purchasers of those goods or services.

102.(1) In its decision on any application for review, the Court may do any one or more of the following things:

**Determination of applications for review.**

(a) confirm, modify, or reverse the determination or any part of it;

(b) exercise any of the powers that could have been exercised by the Commission in relation to the matter to which the application relates.

(2) Notwithstanding anything in this section, the Court may, in any case, instead of determining any application under that section, direct the Commission to reconsider, either generally or in respect of any specified matters, the whole or any specified part of the matter to which the application relates.

(3) In giving any direction under this section, the Court shall:

(a) advise the Commission of its reasons for doing so; and

(b) give to the Commission such directions as it deems just concerning the reconsideration of the whole or any part of the matter that is referred back for reconsideration.(4) In reconsidering the matter so referred back, the Commission shall have regard to the Court's reasons for giving a direction under subsection (1) of this section, and the Court's directions under subsection (2) of this section.

(5) Where an application for review is filed under any provision of this Part of this Act against any determination of the Commission, the determination to which the application relates shall remain in full force pending the determination of the application for review,

unless the Court makes an order to the contrary.

103.(1) Without prejudice to the provisions of subsection (2) of section 48 of this Act, in any case where the Court, on the application of the Commission, is satisfied that any person has violated section 48 of this Act, or has been found in any other proceedings under this Act to have violated section 48 of this Act, the Court may, by order give directions for the disposal by that person of such assets or shares as shall be specified in the order; or Court may order divestiture of assets or shares of a company in certain cases.

(2) An application under subsection (1) of this section may be made at any time within two years from the date on which the violation occurred.

104. Where the Commission determines that any provision of Parts VI, VIII or V of this Act has been violated, the Commission may refer the matter to the office of the Attorney General of the Federation for the institution of criminal proceedings against the violator or prosecution thereof or otherwise obtain a fiat from the Attorney General for the institution of such criminal proceedings or prosecution thereof.

#### **Prosecution for offences.**

### **PART XVI MISCELLANEOUS PROVISIONS**

105.(1) Subject to the provisions of this Act, the provisions of the Public Officers Protection Act shall apply in relation to any suit instituted against any officer or employee of the Commission.

#### **Limitations of suit against the Commission, etc. Cap. P41 LFN.**

(2) Notwithstanding anything contained in any other enactment or law, no suit shall lie or be instituted in any court against any member of the Commission, the Secretary or any other officer or employee of the Commission for any act done in pursuance or execution of

this Act or any other enactment or law, or of any public duty or authority in respect of any alleged neglect or default in the execution of this Act or such enactment or law, duty or authority unless (a) it is commenced within 3 months next after the act, neglect or default complained of, or (b) in the case of a continuation of damage or injury, within 6 months next after the cessation thereof.

(3) No suit shall be commenced against a member of the Commission, the Secretary, officer or employee of the Commission before the expiration of a period of one month after written notice of intention to commence the suit shall have been served upon the Commission by the intending plaintiff or his agent.

(4) The notice referred to in subsection (3) of this section shall clearly and explicitly state

(a) the cause of action;

(b) the particulars of the claim;

(c) the name and place of abode of the intending plaintiff; and

(d) the relief which he claims.

106.(1) Any notice given by the Commission under or for the purpose of this Act shall be sufficiently given if it is in writing, under the seal of the Commission or is signed by the Executive Chairman, or by one or more of the members of the Commission, or by any person purporting to act by direction of the Commission, and is served in accordance with section 107 of this Act on the person or persons primarily concerned therewith or on any person or organisation deemed by the Commission to represent the person or persons primarily concerned therewith.

**Notices.**

(2) All documents purporting to be signed by or on behalf of the Commission or to be sealed with the seal of the Commission shall, in all courts and in all proceedings under this Act, be deemed to have been so signed or sealed with due authority unless the contrary is established.

107.(1) Any notice or other document required or authorised to be served on or given to any person for the purpose of this Act may be served or given by delivering it to that person, or by leaving it at his usual or last known place of residence or business or at the address specified by him in any notice, application, or other document made, given or tendered to the Commission under this Act, or by posting it by registered mail to him at that place of residence or business or at that address.

#### **Service of Notices.**

(2) If any such notice or other document is sent to any person by registered mail, then, unless the contrary is shown, it shall be deemed to have been delivered to him when it would have been delivered in the ordinary course of posting a mail unless the contrary is established; and in proving the delivery it shall be sufficient to prove that there is return post office slip showing actual delivery.

(3) Where for any purpose under this Act, a notice or document is required to be served on a firm or company, the notice or document may be served on the secretary, executive officer, manager, or other officer holding a similar position in the association or body, and for the purpose of this Act, service on the association or body shall, unless otherwise directed by the Commission, be deemed to be service on all persons who are members of the association or body or who are represented on the association or body by those members.

108.(1) Subject to the provisions of this Act, no person shall:

## **Offences.**

(a) without reasonable excuse, refuse or fail to comply with a notice under section 106 and section 107 of this Act; or

(b) in purported compliance with such a notice, furnish information, or produce a document, or give evidence, knowing it to be false or misleading; or

(c) resist, obstruct, or delay an employee of the Commission acting pursuant to a warrant issued under section 11 of this Act.

(2) No person shall attempt to deceive or knowingly mislead the Commission in relation to any matter before it.

(3) No person, having been required to appear before the Commission pursuant to section 10 of this Act, shall: 58

(a) without reasonable excuse, refuse or fail to appear before the Commission to give evidence;

(b) refuse to take an oath or make an affirmation as a witness; or

(c) refuse to produce to the Commission any book or document that person is required to produce.

(4) Any person who violates any provision of this section commits an offence and is liable on summary conviction, in the case of an individual, to a term of imprisonment not exceeding three months or to a fine not exceeding N1,000,000 or to both imprisonment and fine, and in the case of a company, to a fine not exceeding ₦10,000,000.00.

109.(1) Any determination, clearance, authorisation, or decision given by the Commission under or for the purpose of this Act shall, be sufficiently given, if it is in writing under the

seal of the Commission or is signed by one or more members of the Commission or by an officer of the Commission authorised for that purpose.

#### **Determinations of the Commission.**

(2) A copy of a determination, clearance, authorisation or decision of the Commission, certified to be a true copy by an officer of the Commission authorised in that behalf to certify copies of determinations, clearances, authorisations or decisions of the Commission, shall be received in all courts as evidence of the determination, clearance, authorisation or decision. (3) A document purporting to be a copy of a determination, clearance, authorisation or decision of the Commission and to be certified to be a true copy in accordance with subsection (2) of this section shall, unless the contrary is established, be deemed to be such a copy and to be so certified.

110.(1) The Commission may delegate its powers subject to such conditions and restrictions as it may think fit, and the delegation may be made either generally or in relation to any particular matter or class of matters and a person to whom such power is delegated shall be either a member of the Commission or an officer thereof.

#### **Delegation by the Commission.**

(2) Subject to any general or special directions given or conditions or restrictions imposed by the Commission, any person to whom any powers or functions are delegated may, exercise those powers or functions in the same manner and with the same effect as if they had been conferred directly by this Act. (3) Every person purporting to act pursuant to any delegation shall, be presumed to be acting in accordance with the terms of the delegation, in the absence of proof to the contrary.

(4) The delegation of any power or function shall not prevent the exercise of that power or

function by the Commission.

(5) Until it is revoked or amended, every delegation shall continue in force according to its terms.

111.(1) No proceedings, civil or criminal, shall lie against the Commission for anything it may do or fail to do in the course of the exercise or intended exercise of its 59 functions, unless it is shown that the Commission acted without reasonable care or in bad faith or with malice.

#### **Proceedings of the Commission privileged.**

(2) No civil proceedings shall lie against any member of the Commission, or any officer of the Commission, for anything that person may do or say or fail to do or say in the course of the operations of the Commission, unless it is shown that person acted without reasonable care or in bad faith or with malice.

(3) A person shall not be excused from complying with any requirement to furnish information, produce documents, or give evidence under this Act, or, on appearing before the Commission, from answering any question or producing any document, on the ground that to do so might tend to incriminate that person or another person.

(4) A statement made by a person in answer to a question put by or before the Commission shall not in criminal proceedings, be admissible against that person, or that person's spouse.

(5) Nothing in subsection (4) of this section shall apply in respect of: (a) Proceedings on a charge of perjury against the maker of the statement; or (b) Proceedings on a charge of an offence against section 111(1)(b) of this Act. (6) No court or person shall be entitled to require any member of the Commission, or any officer of the Commission or any other

person present at any meeting of the Commission, to divulge or communicate any information furnished or obtained, documents produced, obtained or tendered, or evidence given, in connection with the operations of the Commission.

(7) Nothing in subsection (6) of this section shall apply in respect of:

(a) any proceedings referred to in subsection (5) of this section; or

(b) any proceedings to which the Commission is a party.

(8) Anything said, or any information furnished, or any document produced or tendered, or any evidence given by any person to the Commission, shall be privileged in the same manner as if that statement, information, document, or evidence were made, furnished, produced, or given in proceedings in a court.

112. The Commission may, make regulations generally, for the effective implementation and operation of this Act, and in particular prescribing Power to make regulations.

(a) the procedures to be followed under this Act with regard to applications, notices to and proceedings of the Commission; (b) forms of applications, notices and other documents required for the purposes of this Act; (c) fees, penalties, charges or levies and such other related matters;

(d) how information required can be obtained and access to confidential information.

113. Nothing in this section shall be construed to imply the validity of the provisions of the following or any enactment, where such enactment is inconsistent with any of the 60 provisions of this Act:

**Validity.**

(a) National Insurance Corporation of Nigeria Act; Cap 263 LFN.

(b) the Investments and Securities Act; and 1999 No 45.

(c) any other enactment created by law which is inconsistent with the provisions of this Act.

114.(1) In this Act, unless the context otherwise requires:

“Agreement” includes contracts, arrangement or understanding (written or oral) and concerted practices; "Authorisation" means an authorisation granted by the Commission under Part XIII of this Act, or by the Court on application for review or appeal under Part XVI of this Act against a determination of the Commission; “Authorised officer” means any person appointed as such by the Commission for the purposes of this Act; "Business" means any undertaking that is carried on for gain or reward; or in the course of which goods or services are acquired or supplied; or any interest in land is acquired or disposed of, otherwise than free of charge; "Clearance" means a clearance given by the Commission under Part XIII of this Act, or by the Court on application for review or appeal under Part XIV of this Act against a determination of the Commission; “Company” means company registered under Cap. 59, Laws of the Federation, 1990; "Commission" means the Federal Competition Commission established by section 1 of this Act; and includes a member of the Commission, performing any function of the Commission; “Concerted practice” means a practice involving direct or indirect contacts between competitors falling short of an actual agreement; "Court" means the Federal High Court of Nigeria; "Document" means a document in any form whether signed or otherwise authenticated by its maker or not; and includes:

(a) any writing on any material;

(b) any information recorded or stored by means of any tape recorder, computer, or other

device; and any material subsequently derived from information so recorded or stored;

(c) any label, marking, or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any means;

(d) any book, map, plan, graph, or drawing;

(e) any photograph, film, negative, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced; “enterprise” means any person involved in business; “Executive Chairman” means the Executive Chairman of the Commission; “Federal” refers to the Federal Republic of Nigeria; “Function” includes powers and duties; "Give effect to", in relation to a provision of a contract, arrangement, or understanding, includes:

(a) do an act or thing in pursuance of or in accordance with that provision;

(b) enforce or purport to enforce that provision;

"Goods" includes

(a) ships, aircraft, and vehicles;

(b) minerals, trees, and crops, whether on, under, or attached to land or not;

(c) gas and electricity; “Judge” means Judge of the Federal High Court; “member” means a member of the Commission, which shall include the Executive Chairman; “Mergers, Takeovers and Acquisitions” means “mergers” or “takeovers” or “acquisitions” or “mergers, takeovers and acquisitions” and “merger, takeovers and acquisitions” have corresponding meanings; “President” means the President and Commander in Chief of the Armed Forces of the Federal Republic of Nigeria; "Person", includes an individual and any association of persons whether incorporated or not; “Prescribed” means prescribed by

regulations under this Act or by the Commission; "Price", includes any charge or fee or valuable consideration in any form, whether direct or indirect; and includes any consideration that in effect relates to the acquisition or supply of goods or services or the acquisition or disposition of any interest in land, although ostensibly relating to any other matter or thing; "Restrictive practices" means practices in restraint of trade or which otherwise hinders competition; "Sale" includes advertisement for sale, display for sale, and offer for sale, and "sell", "selling", and "sold" have corresponding meanings; "Services" means a service of any description, whether industrial, trade, professional or otherwise; "Share" means a share in the share capital of a company or other body corporate, whether or not it carries the right to vote at general meetings; and includes:

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(a) a beneficial interest in any such share;

(b) a power to exercise, or control the exercise of, a right to vote attaching to any such share that carries the right to vote at meetings of the company;

(c) a power to acquire or dispose of, or control the acquisition or disposition of, any such share;

(d) a perpetual debenture and perpetual debenture stock; "Supply", in relation to goods, includes supply (or resupply) by way of gift, sale, exchange, rent, lease, hire, or hire purchase; and in relation to services, includes provision, grant, or confer and "supply" as a noun, "supplied", and "supplier" have corresponding meanings; and "Trade" means any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land;

(2) In this Act, a reference to engaging in conduct shall be read as a reference to doing or

refusing to do any act, including the entering into, or the giving effect to a provision of, a contract or arrangement.

(3) In this Act:

(a) a reference to the acquisition of goods includes a reference to the acquisition of property in, or rights in relation to, goods in pursuance of a supply of the goods;

(b) a reference to the supply or acquisition of goods or services includes a reference to agreeing to supply or acquire goods or services;

(c) a reference to the supply or acquisition of goods includes a reference to the supply or acquisition of goods together with other property or services or both;

(d) a reference to the supply or acquisition of services includes a reference to the supply or acquisition of services together with property or other services or both.

(4) For the purposes of this Act, any two companies, persons and association of persons are to be treated as affiliated if:

(a) one of them is a company of which the other is a subsidiary as such subsidiary is understood pursuant to the provisions of Cap. 59, Laws of the Federation, 1990;

(b) both of them are subsidiaries (within the meaning of those sections) of the same company; or

(c) both of them are affiliated with companies that, in accordance with paragraph (a) or paragraph (b) of this subsection, are affiliated;

(5) In this Act, "competition" means workable or effective competition in relation to the supply and demand of goods in any given market and unless the context otherwise requires, references to the lessening of competition include references to the hindering or

preventing of competition.

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(6) For the purposes of this Act, the effect on competition in a market shall be determined by reference to all factors that affect competition in that market including competition from goods or services supplied or likely to be supplied by persons not resident or not carrying on business in Nigeria.

(7) For the purposes of this Act:

(a) a provision of a contract or arrangement shall be deemed to have had, or to have, a particular purpose if;

(i) the provision was or is included in the contract or arrangement or is required to be given, for that purpose or purposes that included or include that purpose; and

(ii) that purpose was or is a substantial purpose;

(b) a person shall be deemed to have engaged, or to engage, in conduct for a particular purpose or a particular reason if that person engaged or engages in that conduct for that purpose or reason or for purposes or reasons that included or include that purpose or reason, and that purpose or reason was or is a substantial purpose or reason.

(8) In this Act:

(a) a reference to a contract shall be construed as including a reference to a lease of, or a license in respect of, any land or a building or part of a building, and shall be so construed notwithstanding any express reference in this Act to any such lease or license, but shall not mean a reference to the memorandum of association or articles of association of a company;

(b) a reference to making or entering into a contract, in relation to such a lease or license, shall be read as a reference to granting or taking the lease or license; (c) a reference to a party to a contract, in relation to such a lease or license, shall be read as including a reference to any person bound by, or entitled to the benefit of, any provision contained in the lease or license.

(9) For the purposes of this Act, any contract or arrangement entered into shall be deemed to have been entered into by all the persons who are members of the association or body;

(10) Nothing in subsection (9) of this section shall apply to:

(a) any member of a firm or company who expressly notifies the association or body in writing that he disassociates himself from the contract, or arrangement or any provision thereof and who does so disassociate himself;

(b) any member of a firm or company who establishes that he had no knowledge and could not reasonably have been expected to have had knowledge of the contract, arrangement, or understanding.

(11) In this Act, reference to:

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(a) Federal Government means the Government of the Federal Republic of Nigeria;

(b) State Government means the Government of one or any of the States that constitute the territories of the Federal Republic of Nigeria, as recognized by the Constitution of Nigeria, 1999;

(c) Local Government means the authority and the territories relating to one or any of the

local government recognized by the Constitution of Nigeria, 1999.

(12) Every reference in this Act to the term 'market' is a reference to a “relevant market” in Nigeria for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them and the meaning of the term “relevant market” shall be based on examination of demand substitutability, supply substitutability and potential competition.

(13) For the purpose of this Act, the term:

(a) “Regulatory Agency” shall mean any government agency established to regulate the terms and conditions for demand and supply of goods and services in any given industry and in this respect, the regulatory agency in question is one established either by Federal or any State Government;

(b) “Regulated Industry” shall mean an industry which is designated as such by the Commission and which is under the regulatory authority of a regulatory agency.

(14) For the purpose of this Act, the term “Professional Association” shall mean associations mentioned in Schedule 1 of this Act.

115. This Act shall be cited as the Federal Competition Act 2005. Short title.

SCHEDULE I *section* 11(3)

## **PROFESSIONAL ASSOCIATIONS**

The following associations and their governing bodies as established by relevant laws are professional associations for the purposes of this Act:

(a) Architects: Architects (Registration, Etc) Act, Cap. 20, Laws of the Federation of

Nigeria, 1990;

(b) Chartered Accountants: Institute of Chartered Accountants Act, Cap. 185, Laws of the Federation of Nigeria, 1990;

(c) Dental Technologists: Dental Technologists (Registration, Etc) Act, Cap. 96, Laws of the Federation of Nigeria, 1990;

(d) Engineers: Engineers (Registration, Etc) Act, Cap. 110, Laws of the Federation of Nigeria, 1990;

(e) Estate Agents: Estate Surveyors and Valuers (Registration, Etc) Act, Cap. 111, Laws of the Federation of Nigeria, 1990;65

(f) Legal Practitioners: Legal Practitioners Act, Cap. 207, Laws of the Federation of Nigeria, 1990;

(g) Medical Practitioners: Medical and Dental Practitioners Act, Cap. 221, Laws of the Federation of Nigeria, 1990;

(h) Nigerian Institute of Marketing Act;

(i) Nurses and Midwives: Nursing and Midwifery (Registration, Etc) Act, Cap. 332, Laws of the Federation of Nigeria, 1990;

(j) Pharmacists: Pharmacists Act, Cap. 357, Laws of the Federation of Nigeria, 1990;

(k) Quantity Surveyors: Quantity Surveyors (Registration, Etc) Act, Cap. 383, Laws of the Federation of Nigeria, 1990;

(l) Surveyors: Surveyors' Registration Council of Nigeria Act, Cap. 425, Laws of the Federation of Nigeria, 1990; Cap. I 23 LFN

(m) Town Planners: Town Planners (Registration, Etc) Act, Cap. 431, Laws of the Federation of Nigeria; 1990.

(n) Veterinary Surgeons: Veterinary Surgeons Act, Cap. 464, Laws of the Federation of Nigeria, 1990;

(o) Builders: Builders (Registration, Etc.) Act, Cap 40 Laws of the Federation of Nigeria, 2004;

(p) any other professional association created by any law and designated as such by the Commission, provided that, any designation of an association as a professional association pursuant to section 16(2) shall be published by the Commission in the *Gazette*.

#### SCHEDULE II Section 4(10)

#### SUPPLEMENTARY PROVISIONS RELATING TO THE COMMISSION

##### Proceedings of the Commission

1.(1) Subject to this Act and section 27 of the Interpretation Act, the Commission may make standing orders regulating its proceedings or those of any of its committees.

(2) The quorum of the Commission shall be the Chairman, or the person presiding at the meeting and 4 other members of the Commission, and the quorum of any committee of the Commission shall be determined by the

Commission.

2.(1) The Commission shall meet not less than four times in each year and subject thereto, the Commission shall meet whenever it is summoned by the Chairman and if the Chairman is required to do so by notice given to him by not less than 4 other members, he shall summon a meeting of the Commission to be held within 28 days from the date on which

the notice is given. 66

(2) At any meeting of the Commission, the Chairman shall preside

but if he is absent, the members present shall appoint one of their number

to preside at that meeting.

(3) Where the Commission desires to obtain the advice of any person on a particular matter, the Commission may co-opt him to the Commission for such period as it deems fit, but a person who is in attendance by virtue of this subsection shall not be entitled to vote at any meeting of the Commission and shall not count towards a quorum.

#### Committees

3.(1) The Commission may appoint one or more committees to carry out, on behalf of the Commission, such functions as the Commission may determine.

(2) A committee appointed under this paragraph shall consist of such number of persons as may be determined by the Commission and a person shall hold office on the committee in accordance with the terms of his appointment.(3) A decision of a committee shall be of no effect until it is confirmed by the Commission.

#### Miscellaneous

4.(1) The fixing of the seal of the Commission shall be authenticated by the signatures of the Chairman or any person generally or specifically authorised by the Commission to act for that purpose and the Secretary.

(2) Any contract or instrument which, if made or executed by a person not being a body corporate, would not be required to be under seal, may be made or executed on behalf of the Commission by the Secretary or any person generally or specifically authorised by the

Commission to act for that purpose.

(3) Any document purporting to be a document duly executed under the seal of the Commission shall be received in evidence and shall, unless and until the contrary is proved, be presumed to be so executed.

5. The validity of any proceedings of the Commission or of a committee shall not be adversely affected by (a) a vacancy in the membership of the Commission or committee; or

(b) a defect in the appointment of a member of the Commission or committee; or

(c) reason that a person not entitled to do so took part in the proceedings of the Commission or committee.

6. Any member of the Commission and any person sitting on the Commission or committee, who has a personal interest in any contract, arrangement or matter to be considered by the Commission or committee thereof shall forthwith disclose his interest to the Commission or committee and shall not vote on any question relating to the contract, arrangement or matter. 67

SCHEDULE III Sections 76(2) & (5) and 54(2) & 55(1)

## POWERS EXERCISABLE BY ORDERS

### PART I

#### Powers Exercisable in all Cases

1. An order made under section 76 or 77 of this Act (in this Schedule referred to as an “order”) may declare it to be unlawful, except to such extent and in such circumstances as may be provided by or under the order, to make or to carry out any such agreement as may

be specified or described in the order.

2. An order may require any party to any such agreement as may be specified or described in the order, to terminate the agreement within such time as may be so specified, either wholly or to such extent as may be so specified.

3. An order may declare it to be unlawful, except to such extent and in such circumstances as may be provided by or under the order, to withhold or to agree to withhold or to threaten to withhold, or to withhold, from any such persons as may be specified or described in the order, any supplies or services so specified or described or any such supplies or services (whether the withholding is absolute or is to be effectual only in particular circumstances).

4. An order may declare it to be unlawful, except to such extent and in such circumstances as may be provided by or under the order, to require, as a condition for the supplying of goods or services to any person ( a) the buying of any goods; or  
(b) the making of any payment in respect of services other than the goods or services supplied; or (c) the doing of any other such thing as may be specified or described in the order.

5. An order may declare it to be unlawful, except to such extent and in such circumstances as may be provided by or under the order (a) to discriminate in any manner specified or described in the order between any persons in the prices charged for goods or services so specified or described; or (b) to do anything so specified or described which appears to the Minister to amount to such discrimination, or to procure others to do any of the things mentioned in subparagraph (a) or (b) of this paragraph.

6. An order may declare it to be unlawful, except to such extent and in such circumstances as may be provided by or under the order (a) to give or agree to give in other ways any such preference in respect of the supply of goods or services or the giving of orders for

goods or services, as may be specified or described in the order; or

(b) to do anything so specified or described which appears to the Minister to amount to giving such preference or to procure or to do any of the things 68 mentioned in subparagraph (a) or (b) of this paragraph.

7. An order may declare it to be unlawful, except to such extent and in such circumstances as may be provided by or under the order, to charge for goods or services supplied with prices differing from those in any published list or notification or to do anything to amount to charging such prices. 8. An order may require a person supplying goods or services to publish a list of or otherwise notify prices, with or without such further information as may be specified or described in the order.

9.(1) Subject to the following provisions of this paragraph, an order may, to such extent and in such circumstances as may be provided by or under the order, regulate the prices to be charged for any goods or services specified or described in the order.

(2) The power conferred by subparagraph

(1) of this paragraph shall not be exercised in respect of goods or services of any description, unless the matters specified in the relevant report as being those which in the opinion of the Commission operate or may be expected to operate against the public interest relate or include matters relating to the prices charged for goods or services of that description.

(3) In this paragraph, “the relevant report” in relations to an order, means the report of the Commission in consequence of which the order is made, in the form in which it is made.

10. An order may declare it to be unlawful, except to such extent and in such circumstances as may be provided by or under the order, for any persons, by publication or

otherwise, to notify to persons supplying goods or services, prices recommended or suggested as appropriate to be charged by those persons for those goods or services.

11.(1) An order may prohibit or restrict the acquisition by any person of the whole or part of the undertaking or assets of another person's business or the doing of anything which shall or may have a result to which this paragraph applies or may require that if such an acquisition is made or anything is done which has such a result, the persons concerned or any of them shall thereafter observe any prohibition or restrictions imposed by or under the order.

(2) This paragraph applies to any result which consists in two or more bodies corporate becoming interconnected bodies corporate.

(3) This paragraph applies to where an order is made in consequence of a report of the Commission under section 57 or 58 of this Act to any result (other than the one specified in subparagraph

(2) of this paragraph) which, in accordance with section 55 of this Act consists in two or more enterprises ceasing to be distinct enterprises.

## PART 69

### Powers Exercisable Except in Cases falling within Section 76 (6) of this Act

12. An order may provide for the division of any business by the sale of any part of the undertaking or assets or otherwise (for which purpose all the activities carried on by way of business by any one person or by any two or more interconnected bodies corporate may be treated as a single business) or for the division of any group of interconnected bodies corporate and for all such matters as may be necessary to effect or take account of the

division, including

- a) the transfer or vesting of property rights, liabilities or obligation;
- (b) the adjustment of contracts, whether by discharge or reduction of any liability or obligation or otherwise;
- (c) the creation, allotment, surrender or cancellation of shares, stock or securities;
- (d) the formation or winding up of a company or other association, corporate or unincorporated or the amendment of the memorandum and articles or other instruments regulating any company or association;
- (e) the extent to which and the circumstances in which provisions of the order affecting a company or association in its share capital, constitution or other matters may be altered by the company or association and the registration under any enactment of the order by companies or associations so affected;
- (f) the continuation with any necessary change of parties of any legal proceedings.

13. In relation to an order under section 54 of this Act, the reference in paragraph 12 of this Schedule to the division of a business as mentioned in that paragraph shall be construed as including a reference to the separation by the sale or any part of any undertaking or assets concerned or other means of enterprises which are under common control otherwise than by reason of their being enterprises of interconnected bodies corporate.

EXPLANATORY MEMORANDUM

This Bill seeks to provide, among other things, for the establishment of Federal Competition Commission, promote competition in trade and commerce among the several States of the Federal Republic of Nigeria and with foreign nations by controlling existing monopolies, discouraging the abuse of dominant market position and other restrictive trade and business practices.

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