

**TOWARDS A CONSOLIDATED COMPETITION LAW IN NIGERIA
AND ITS EFFECT ON FOREIGN DIRECT INVESTMENT INFLOW**

By

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Trade and Investment Law in Africa, in the Faculty of Law at the
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Dedication

To Almighty God, for making this feat a successful one.

Acknowledgement

I thank Almighty God for being with me in the course of the program.

I thank my entire family for being a pillar of support. My parents for their constant prayers. My brother Kunle Adeniyi, for always being a rock.

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Layi Obayan for introducing me to the course and acting as a constant guide through the process he had earlier experienced,

Tosin Adetula, for always having a listening ear.

All my classmates in the LLM program.

List of Acronyms

FDI	Foreign Direct Investment
WTO	World Trade Organization
ECOWAS	Economic Community of West African States
UNCTAD	United Nations Committee on Trade and Development
CBN	Central Bank of Nigeria
BPE	Bureau of Public Enterprises
NCAA	Nigerian Civil Aviation Authority
BA	British Airways
VA	Virgin Atlantic
US	United States of America
EU	European Union
ICN	International Competition Network
CPC	Consumer Protection Council
ECA	ECOWAS Competition Authority
NCA	Nigerian Communications Act 2003
NCC	Nigerian Communications Commission
NCPR	Nigerian Competition Practices Regulation
NERC	National Electricity Regulatory Commission
EPRSA	Electric Power Sector Reform Act 2005
SEC	Securities and Exchange Commission
ISA	Investment and Securities Act
FEC	Federal Executive Council
NGO	Non-Governmental Organisation
GDP	Gross Domestic Product
NCCN	National Competitiveness Council of Nigeria

NOA

National Orientation Agency

GCC

Gulf Cooperation Council

CAA

Civil Aviation Act 2006

Table of Contents

Chapter One

General Introduction.....	1
1.1 Introduction.....	1
1.2 Research problem.....	2
1.3 Research question.....	3
1.4 Thesis statement.....	3
1.5 Justification.....	4
1.6 Literature review.....	4
1.7 Research methodology.....	7
1.8 Overview of chapters.....	7

Chapter Two

An Overview of Competition Law and Policy.....	9
2.1 Introduction.....	9
2.2 Competition policy.....	9
2.3 Competition law.....	11
2.4 A brief history of competition law.....	12
2.5 Functions of competition law.....	13
2.6 What competition law covers.....	15
2.6.1 Mergers and acquisitions.....	15
2.6.2 Abuse of dominance.....	17
2.6.3 Cartels.....	18
2.7 Advantages and dangers of competition law.....	17
2.8 Enforcement of competition law.....	20
2.8.1 Public enforcement.....	20
2.8.2 Private enforcement.....	20
2.9 Conclusion.....	22

Chapter Three

The Administration of Competition Policy and Law in Nigeria

3.1 Introduction.....	23
3.2 Background to competition in Nigeria.....	23
3.3 Administration of competition law in Nigeria.....	23
3.3.1 Telecommunications.....	24
3.3.2 Electricity.....	25
3.3.3 Aviation.....	25
3.3.4 Capital market.....	25
3.3.5 Consumer protection.....	27
3.4 Attempts at enacting a consolidated competition law.....	27
3.4.1 Federal Competition Bill 2002.....	28
3.4.2 Federal Competition Bill 2006.....	29
3.4.3 Nigerian Trade and Competition Commission Bill 2008/2012.....	29
3.4.4 Nigerian Antitrust (Enforcement, Miscellaneous, Provisions etc.) Bill 2008.....	30
3.4.5 Restrictive Trade Practices, Monopolies and Price Control Bill 2011.....	30
3.5 Attempts at Competition policy within the WTO framework.....	31
3.6 Challenges of enacting a new competition law.....	31
3.6.1 Introduction of competition law and policy as a new concept.....	32
3.6.2 Lack of proper awareness.....	33
3.6.3 Associated cost.....	34
3.6.4 Presence of large informal sector.....	34
3.6.5 Lack of capacity.....	35
3.7 Effectiveness of piecemeal legislation.....	36
3.8 The way forward, role of competition advocacy.....	37
3.8.1 National Competitiveness Council of Nigeria.....	37
3.9 Conclusion.....	38

Chapter Four

The Need for a Consolidated Competition Law in Nigeria.....

4.1 Introduction.....	39
4.2 Privatization and deregulation needs an accompanying competition policy.....	40
4.3 Prohibition of cartels and other anticompetitive practices.....	41
4.4 Revenue prospects.....	44

4.5 Coherence and effective enforcement.....	44
4.6 Seasoned professionals to effectively administer competition law.....	46
4.7 Enhanced consumer protection.....	47
4.8 Regional competition authority.....	48
4.9 Attraction of FDI.....	49
4.10 Competition advocacy.....	50
4.11 Enacting a competition law.....	51
4.12 The South African Experience.....	52
4.13 However, one size does not fit all.....	53
4.14 Conclusion.....	54

Chapter Five

The Effects of a Consolidated Competition Law on FDI Inflow to Nigeria.....55

5.1 Introduction	55
5.2 The link between competition law and FDI.....	55
5.3 The rule of law.....	56
5.4 The rule of law and FDI.....	57
5.5 The rule of law in Nigeria.....	59
5.6 How competition rules undermine rule of law in Nigeria.....	60
5.7 Nigeria’s competition rules and FDI.....	64
5.8 Conclusion.....	65

Chapter Six

Conclusion and Recommendations

6.1 summary of findings.....	67
6.2 Conclusions.....	68
6.3 Recommendations.....	6

CHAPTER 1

GENERAL INTRODUCTION

1.1 Introduction

Nigeria is an emerging economy of about 180 million citizens.¹ The country is largely dependent on oil revenue which has made it vulnerable to global price fluctuations.² As a result, Nigeria has long aspired to grow additional sectors of its economy in order to diversify, spread wealth and insulate against booms and busts.³ The overarching aim of this aspiration is to enhance the local market economy, improve efficiency and competitiveness of the local industries and to attract Foreign Direct Investment (FDI).

To achieve this, Nigeria has largely started operating an open market economy as can be seen in the liberalization of its trade and investment sectors; this is quite evident in its membership of multilateral and regional bodies where certain commitments are made such as the World Trade Organization (WTO) and Economic Community of West African States (ECOWAS) which recently became a Customs Union as the region recently adopted a common external tariff.⁴ Privatization of key government business interests such as telecommunications and power sectors which were formerly operated as government monopolies has opened the doors to both local and foreign private participation in public industries.

1. The need to ensure fairness in economic activity in its new market economy has always been part of Nigerian economic principles. However, no legislative activity has been carried out to achieve this end on an industry wide basis.⁵ The activities of

¹ <http://www.population.gov.ng/index.php/84-news/latest/106-nigeria-over-167-million-population-implications-and-challenges> (accessed 23 January 2016).

² IDA –Analysing employment and growth for better economic policy
<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/IDA/0,,contentMDK:22294367~menuPK:4754051~pagePK:51236175~piPK:437394~theSitePK:73154,00.html> (accessed 23 January 2016).

³ (n 2 above)

⁴ <http://www.ictsd.org/bridges-news/bridges-africa/news/west-africa%E2%80%99s-new-common-external-tariff-and-the-individual-wto> (accessed 23 January 2016).

⁵ F Aihievba –A critique of the Nigerian Competition Bill 2005

participants in a free market economy need to be regulated because the absence of free and fair competition eludes the stakeholders the benefit of competition.⁶

There is no doubt that the enactment of a competition law and the creation of a specialized agency to enforce it are key conditions for the development of a favourable economic environment in any country.⁷ Competition creates greater efficiency in the domestic market which in turn benefits consumers. However, these benefits will not accrue if competition is not validly regulated within the market. Competition law and policy has evolved to integrate economic thinking into the legal rules for business practices across all sectors of the economy it regulates.⁸

1.2 Research problem

The liberalization of the Nigerian economy has recorded increased participation in various affected sectors. Liberalization is meant to bring about economic advancement and industrial efficiency which in turn will bring about the competitiveness of Nigerian industries locally and on the global scene. There are various regulatory bodies that are ascribed with the regulation of competition in Nigeria but enforcement of an industry-wide competition law has been elusive due to the non-existence of a law to enforce. The absence of competition law in the country has been detrimental to the evolving of functional markets and also hurts consumers.⁹

It is safe to say that even though Nigeria has no competition law, it has a competition policy.¹⁰ There are various industry specific laws and regulations that basically address competition issues in Nigeria. However, there is no consolidated body of competition law that address all competition issues in Nigeria which has made effective administration and enforcement not realizable. Beside various arguments that competition laws will ensure market efficiency, fairness and dissuade anti-competitive practices in Nigeria, it is assumed that competition law will also have a far reaching implication on economic advancement through the confidence the certainty of the laws guiding investment and trade in the country gives to investors. It is assumed that the lack of a consolidated competition law in Nigeria

⁶ L Ani -Rethinking Competition Law and Policy: Building a Framework for Implementation in Nigeriaø <http://www.nials-nigeria.org/journals/Laura%20Anibus.pdf> (accessed 24 January 2016).

⁷ E Motta & H Correa -Competition policy in Mexicoø in D. Lewis (eds) *Building New Competition Law Regimes* (2013) 3

⁸ Ani (n 5 above)

⁹ National Stakeholders meeting on competition issues -Nigeria disadvantaged due to no competition lawø23 September 2008

¹⁰ (n 9 above)

amounts to uncertainty of the laws guiding competition and in turn this will be a red flag to both local and foreign investors.

This proposed study will make a case for the need to have a consolidated competition law in Nigeria by identifying the lacuna created by the absence of a consolidated competition law and alluding to the ineffectiveness of the piecemeal approach of regulating competition by industry specific regulatory bodies. The legal and economic implications of such a consolidated competition law on the country and its impact on FDI will also be interrogated.

1.3 Research question

The broad question which this study will seek to answer is: what would be the implications of a consolidated industry-wide competition law on Nigerian economy, especially the FDI inflow?

In answering the broad research question, this investigation will address the following sub - questions in this study:

- i. What is the nature and context of competition policy and competition law?
- ii. How has the competition policy and law evolved and administered in Nigeria?
- iii. What are the implications of having a consolidated industry-wide competition law in Nigeria?
- iv. What would be the effects of a consolidated industry-wide competition law on FDI inflow in Nigeria?

1.4 Thesis statement

This study will contend that the piecemeal approach to regulation of competition in Nigeria is ineffective and therefore make a case for enactment of a consolidated industry-wide competition that will ensure its certainty and enforcement, the realization of market efficiency and consumer welfare, and ultimately stimulate FDI inflow into Nigeria.

1.5 Justification

Nigeria has experienced waves of liberalization of trade, deregulation of the oil and gas sectors and also privatization of key utilities sectors that were ran as government monopolies; this has made for the rise in participation of both foreign and local entities in the local market.

In a situation where different players are allowed to compete, there is an efficiency of the local market and the competitiveness of the products of the local market on the global scene

while ensuring a fair and level playground for the participants in the market. The activities of these players should be subject to effective regulation of competition so that the consumers will benefit from the liberalization of the economy.

The significance and relevance of this study is necessitated by the need for Nigeria to protect the spirit of the market economy in order to ensure the participation of investors on a level playing field.

1.6 Literature review

The focus of this study is to argue for a consolidated competition law in Nigeria as a complementing factor to liberalization and realization of economic efficiency and drawing lessons from the competition regime in a jurisdiction like South Africa with clear cut competition law and administration. A prescription will be made on how to go about this. Also, the study will make attempt to ascertain what effect a consolidated competition law will have on FDI in Nigeria drawing on the peculiarities of the Nigerian market.

The liberalization of trade and investment in Nigeria has seen the gradual removal of barriers to trade and sectors previously monopolized legally by state owned enterprises are now open to private participation. This move has elements of competition policy but it may not be totally to the benefit of consumers as it can lead to private monopolies.¹¹

At a meeting of national stakeholders on competition issues in Abuja,¹² it was quite evident from the discussions that the government has employed a protectionist approach to trade liberalization in the country, imposing strict restrictions on import and export of various products. This is in spite of the fact that one of the main objectives of the national trade policy is improvement of competitiveness of domestic firms. Further, instead of improving the level of competition in the markets and bringing down prices of goods and services, privatization in the country has resulted in the concentration of economic power in the hands of few big private firms.¹³

¹¹ Ani (n 8 above)

¹² (n 9 above)

¹³ (n 9above)

Competition law is a concomitant requirement to market-based reforms and as such, law aims to limit unnecessary interventions and activities that will adversely affect economic efficiency and consumer welfare.¹⁴

In buttressing the above statement, Dimgba, a foremost competition expert argues that for Nigeria to have engaged in liberalization for a very long time and be without competition law might create new dangers.¹⁵ To illustrate his point, Dimgba says as Nigeria has liberalized and deregulated vital sectors of the economy, new participants are ushered in to replace government monopolies. The overriding interest of these participants is profit making and nothing will prevent them from engaging in anti-competitive practices to achieve their aim. He contends that in the absence of competition law, these anti-competitive practices will not be illegal no matter how it hurts the economy or the consumers. In essence, if there is no competition law to guide competition in a liberalized economy, it will amount to half liberalization which is worse than no liberalization as it will bring in dangers to the market and to the consumers.¹⁶

Motta and Correa argue that in building a competition regime, the removal of trade and investment barriers could not assure competition if private barriers spring up instead. Hence, a key element in government economic reform was the adoption of a general competition law and an independent enforcement agency.¹⁷

In the 1997 World Investment Report by United Nations Committee on Trade and Development (UNCTAD), it was noted that by increasing competition in local markets, FDI has had a major influence on market structures in several countries of Central and Eastern Europe. The report stated that were many examples of FDI liberalization contributing to a healthier competitive market and that FDI, particularly in small and medium-sized enterprises, had helped to de-monopolize markets and stimulate competitive behaviours.¹⁸

¹⁴ A Pham "Development of Competition Law in Vietnam in the Face of Economic Reforms and Global Integration, The Symposium on Competition Law and Policy in Developing Countries" (2006) 26 *Northwestern Journal of International Law & Business*

¹⁵ N. Dimgba "The Need and the Challenges to the Establishment of a Competition Law Regime in Nigeria"

¹⁶ (n 14 above)

¹⁷ Motta & Correa (n 7 above)

¹⁸ UNCTAD "World Investment Report 1997 Transnational Corporations, Market Structure and Competition Policy" one of the major issues analyzed is The implications of the interaction between foreign direct investment, market structure and competition for investment and competition policies at the national, regional and global levels.

However, it is in the opinion of the WTO that while adopting a wide range policy changes, developing countries still have the concern that investment liberalization could lead to unfair competition or monopolization by capital intensive companies seeking to enter the market.¹⁹ It further says that the policies on privatization and deregulations adopted by the developing countries are of great effect on the affected sectors. These policies will only be successful and accepted if government could inject and uphold sound competition to the liberalization regime.²⁰

On the entrance of new participants into the liberalized regime in Nigeria, Ani says there are no measures put in place to prevent anti-competitive agreements amongst these industries that may have formed cartels. She goes further to say there is an endless list of the presence and emergence of new cartels in Nigeria which has simply been ignored due to lack of enforcement frameworks or criminal regimes, consequently there are no reported cases, fines imposed or imprisonments to deter such abusive market behaviours.²¹

To address the concerns of the likes of Ani, the WTO posits that a legal and administrative framework to guarantee sound competition can help set proper conditions for a successful implementation of liberal trade and investment policies.²² This position is premised on the argument that foreign companies place a high premium on the country that has the most advanced legal regime in the protection of investment, reduces administrative burdens and addresses distortion of competition. A stable framework of competition rules will attract foreign investment by strengthening the regulatory fabric of the economy and confidence in the stability of policy.²³

As seen from above, many literature have been written on why Nigeria should have consolidated competition law. Also, different reports have been made in an attempt to create a nexus between competition law and investment policy. Despite these developments, no actual prescription has been made on how the suggested consolidated competition law in Nigeria is to be formulated and what form the administration of the regime should to take.

¹⁹ WTO Working Group on the Relationship between Trade and Investment öcommunication from the European Community and its member statesö (12 November 1998)

²⁰ (n 17 above)

²¹ Ani (n 8 above)

²² Ani (n 8 above)

²³ Ani (n 8 above)

1.7 Research methodology

The research in this study is desktop and library based and will rely books, articles and papers written by authors in the competition field. The approach will however be analytical, descriptive, comparative and prescriptive. Reference will be made to the administration structure of South African competition regime vis a vis the prevalent situation of competition policy, law and practice in Nigeria. The rationale for using the South Africa competition Act is that even though one of its major aims is to address the issue of economic inequality across all racial divides, it embodies the traditional fundamental element of advancing economic efficiency and consumer welfare, the goal of Nigeria's liberalization policy. Furthermore, South Africa arguably has the most advanced system of competition administration on the continent.

1.7 Overview of chapters

Chapter 1

This chapter introduces the research paper and outlines the research problem, research questions to be answered, the research methodology and the significance of the study.

Chapter 2

In this chapter, the nature and context of competition policy and law will be interrogated; importantly, its basic tenets, history, functions and benefits will be discussed.

Chapter 3

Chapter 3 discusses the evolutionary trend and administration of competition policy, law and practice in Nigeria. The problems of implementation and enforcement of the competition law in extant will be highlighted.

Chapter 4

Here, the discussion will focus on the argument for the enactment of competition law in Nigeria and the effects on the economy in general.

Chapter Five

In chapter 5, the implications of a consolidated industry-wide competition law on FDI inflow into Nigeria will be investigated.

Chapter 6

This concludes the discussions in the study and make recommendations.

CHAPTER TWO

AN OVERVIEW OF COMPETITION LAW AND POLICY

2.1 Introduction

Since the close of the twentieth century and with resonance till this present day, there has been an evident policy shift in the economies of the world as different governments that were originally communist and protective of their markets have embraced liberalization which means opening their markets up to different participants both local and foreign. These market-based reforms became more widespread after the final collapse of the soviet model of economy in the twilight of the twentieth century. This wave of liberalization swept through countries in various stages of development with different levels of market sophistication. However, most of these countries are poor countries.¹

With the emergence of market-based economies came the issue of competition within the market. Each government has different approach to the regulation of conducts that affect its economy as there are peculiarities of all sorts present in each and every economy. No different is the case with competition. As it stands, the issue of competition is a peculiar concept to every market-based economy and the manner in which the government chooses to deal with it vary from one jurisdiction to another. It is however noteworthy that with the various economic theories and schools of thought that have churned out opinions on the role of competition in an economy, one truth has been upheld that competition is aimed at ensuring consumer welfare and market efficiency.

This chapter discusses competition policy, the role of competition law in an economy highlighting the advantages and possible disadvantages while making brief reference to the existing schools of thoughts that form the basis of modern day competition law.

2.2 Competition policy

In the simplest form, competition can be defined as a contest or an event in which participants fight or struggle to gain supremacy or come out victorious.² In the market,³

¹ BM Owen -Competition Policy in Emerging Economiesø (2005) Stanford Institute for Economy Policy Research Paper 04-10

² T Das & U Kummall -Competition Law and Policy made easyøCUTS Centre for International Trade, Economics & Environment (2001)

competition is taken as a process whereby firms fight against each other in order to secure customers for their products by adopting any means (fair or unfair).⁴ The issue of competition is a packaged deal that comes with a market-based economy which is characterized by deregulation of vital sectors of the economy that were formerly run as monopolies by the government or government approved entities. Competition policy is essentially understood to be measures taken by government to directly affect the conduct of firms and the structure of the market.⁵ Deregulation, which is a government measure, sees the ushering in of different players into a market at different levels.

Fundamental microeconomic theories advanced that markets work better when it is devoid of any governmental intervention. Niamh Dunne in describing this general position says:

Adam Smith's striking vision of the invisible hand of the market underlines a widely accepted tenet of the functioning of market systems: namely, that markets work best when unencumbered by government intervention.⁶

Many economic scholars have also advanced evidence to support this statement that markets work best and will produce more beneficial result when left to its own devices rather than when there is intervention from the authorities.⁷

The above notion has been seen not to be obtainable as even the best laid down market structures tend to fail if not well regulated. Both recent and distant history, tells us that neither markets nor economists are infallible in this respect.⁸ Market failures from the great depression down to the more recent global economic meltdown validly allude to this fact. Governments thus not infrequently intervene in dysfunctional markets in order to correct persistent market failures or to advance alternative non-economic goals.⁹

In Microeconomic theory, it is perceived that competition is the primary driver that ensures the promotion of an efficient economy.¹⁰ However, according to Henning-Bodewig¹¹ *“where there is competition, there is also unfair competition”*. The hope that freedom of competition

³ M Taylor *International competition law: a new dimension for the WTO* (2006) 8 Taylor defines market as an abstract concept describing the range of actual and potential transactions between producers and consumers.

⁴ Taylor (n 3 above)

⁵ Das & Kummall (n2 above)

⁶ N Dunne *Competition law and economic regulation* (2015)

⁷ M Furse *Competition law of the EC and UK* (2008)

⁸ Dunne (n 6 above)

⁹ Taylor (n 3 above)

¹⁰ Taylor (n 3 above)

¹¹ F Henning-Bodewig *International Handbook on Unfair Competition* (2013) 1

in the market will also amount to fairness of competition in the 19th century free trade Europe was found to be an illusion.¹² This illusion was brought to light by the reality that firms engage in diverse anti-competitive behaviours to achieve supremacy within the market. Naturally, market economies had to develop some sort of safeguard against these behaviours and balance it towards the principle of economic freedom.¹³

The quintessential form of a competent and realistic competition policy should have both elements of economic policies that enhance competition in a market (deregulation, privatization) and competition law (measures that regulate anti-competitive practices by firms and unnecessary governmental intervention in a market).¹⁴ The privatization of key government businesses and the deregulation of the economy have characterized the economic policies of a lot of countries in the world. This no doubt conveys the true intent of competition policy as privatization and deregulations opens up the market to different participant in a market. The complementary element should be the presence of an effective competition law to drive and ensure the effectiveness of the competition policy.

2.3 Competition Law

There are diverse anti-competitive practices that threaten the balance of the market as it stands. If these practices are not regulated, then the aim of market efficiency and promotion of consumer welfare will amount to naught and the market will be a failure. The need to curb and regulate these anti-competitive practices brings to fore the necessity of competition laws.

Competition law is a set of rules that are put in place to regulate the process of competition within the market in order to maximize consumer welfare.¹⁵ Competition law is also intended to regulate against the aggregation of market power.¹⁶ The knowledge that competition law promotes and maintains competition for the benefit of the society is widespread.¹⁷ Competition law can also be seen as a mechanism put in place to supervise market failures and specifically, monopoly.¹⁸ The laws are targeted at promoting and protecting a transparent and competitive market from unjust and unfair business practices.¹⁹

¹² Henning ó Bodewig (n 11 above)

¹³ Henning ó Bodewig (n 11 above)

¹⁴ Das & Kummall (n2 above)

¹⁵ R Whish & D Baily *Competition Law* (2012)

¹⁶ Taylor (n 3 above)

¹⁷ Taylor (n 3 above)

¹⁸ Dunne (n 6 above)

¹⁹ <http://www.competitionlawinsight.com/practice-and-procedure/a-very-useful-tool--1.htm> (accessed 14 April 2016)

The nature of its operation is to discourage and prevent anti-competitive practices within the market, only this way would competition law will be seen to have achieved its goal. Practices such as price fixing, restrictive exclusive contracts, predatory pricing, abuse of dominant market position, conspiratorial pricing between some competitors against other competitors, hoarding and price discrimination have all been seen to hinder the true nature and intent of a free market operation, stifle and inhibit healthy competition to the detriment of the consumer and the economy at large, hence the introduction of a proper regulatory instrument to curb these practices and promote a healthy and competitive market.²⁰

In light of the foregoing, one can conveniently say that the fundamental rationale of competition law is in the proposition that competition yields social benefits which are lost through diverse anticompetitive practices and the legal control can mitigate the harshness of the damage done.²¹

2.4 A brief history of Competition law

Even though a lot of research has been done in this area,²² there has been no satisfactory single history of competition law. However, since the medieval ages, before the modern market economies emerged, existing governments have used laws to control anti-competitive practices within the markets that existed back then.²³ There were roman legislations that predate Christ which were promulgated to protect the grain trade. The earliest record of attempts made by the government to control competition in the market can be traced back to roman legislation in 483 A.D.²⁴ Back then Emperor Zeno provided for confiscation of property and banishment for any trade combination or joint action of monopolies private or granted by the Emperor. He (Zeno) rescinded all previously granted exclusive rights.²⁵

After the civil war in America, the government adopted a free market enterprise policy devoid of any overreaching government interference. Consequently, The American Sherman

²⁰ (n 42 above)

²¹ J Agnew *Competition Law* (1985)

²² Furse (n 7 above)

²³ Various Saxon kings had taken action against a range of trading practices, including, for example, the purchase of commodities before they reached their designated market place in order to enhance the price, and make a profit on a later sale, known as the crime of foresteal, or forestalling, which is referred to in the Domesday Book (1086).

²⁴ <http://www.diffusioneweb.it/GallottiLawFirm/87/Antitrust%20-%20Competition%20law.pdf> (accessed 14 April 2016)

²⁵ (n 47 above)

Act 1890 which is taken as the starting point of modern competition law,²⁶ was enacted to curb and out rightly criminalize any restraint to free trade especially monopolistic practices.

In the UK, there have been traces of regulations against anti-competitive practices and this can be traced back to the common law doctrine of restraint of trade which was defined by Lord Diplock²⁷ as:

í one which a party (the covenantor) agrees with any other party (the covenantee) to restrict his liberty in the future to carry on trade with any other person not parties to the contract in such manner he chooses.

The first recorded case regarding this doctrine is the Dyer Case²⁸ of 1414 where a certain John Dyer made an agreement to with another dyer not to carry on the business of dying in the same town with him for half a year. The judge held in that case that the agreement was against the provision of common law. The doctrine did not come without its conflicts as common law recognizes the freedom of trade and freedom of contract. However, the doctrine evolved to have a less rigid approach when the test of public policy was applied to it in the 18th century²⁹. It was resolved that while restraint of trade are generally void as they are against public policy, they may be allowed in circumstances where they are reasonable and they don't run against public policy.³⁰

Most of the modern competition regimes in existence today drew their laws from the U.S antitrust laws and the UK, EU competition laws. That is the reason why most of these laws bear striking semblance to each other.

2.5 Functions of Competition Law

There has been a long standing debate on what competition policy and laws should be used to achieve. Various schools of thought have presented opposing views³¹ on what the

²⁶ Furse (n 7 above)

²⁷ **England:**

Petrofina (Great Britain) Ltd v Martin [1996] 1 Ch 146, 180

²⁸ *John Dyer's* case (1414) YB 2 Hen 5 (of. 5, pl. 26)

²⁹ In *Horner v Graves* (1831) 131 ER 284, the judge brought the doctrine close to the modern day when he held that -we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is not so large as to interfere with the interests of the public

³⁰ Agnew (n 21 above)

³¹ The utilitarian and deontological theories present two conflicting ideas as to the purpose of competition law. The key differences between these two approaches was summarised by Oles Andriychuk as ñresult-oriented views on the role of competition between consumer welfare or total welfare are always seen as utilitarian, whereas perception of competition as an independent societal value are taken to be deontological. See O

outcomes of competition within a market should be. As opposing as these views might be, it is should be noted that competition law, even though having an underlying similarity in its application, is adopted in various jurisdictions for different reasons. As the adoption of competition laws has gained a widespread traction, evident in over 100 countries at varying degrees of development around the world, it is safe to say that these countries will have different concerns.

In the heart of the Chicago school's use and function of competition law is consumer welfare.³² Consumer welfare or consumer surplus concerns the price which an individual is willing to pay in comparison to the amount that the individual actually has to pay.³³ The function of competition law as a tool of social and economic welfare is grounded in utilitarian ethical approach which finds justification in that which brings most happiness to the largest number of people. In competition law this approach is principally concerned with what is the greatest benefit to the consumer and in turn society as a whole.³⁴ One of the most important uses of competition law is perhaps the prevention of private restrictive business practices and public policies that may unnecessarily impede the redeployment of scarce resources from lower to higher valued uses.³⁵ This can still be linked to consumer welfare in an economic parlance as competition law ensures that resources get to the consumers who value it at an optimal cost on the part of the producer and the consumer gets value for money. Competition law has been argued to enhance market efficiency

It is however important to note that even though the need for consumer welfare and market efficiency have major influence on the formation and implementation of competition law in different jurisdictions, competition law have been used to pursue other policy objectives that are not directly related to consumer welfare.³⁶ Premised on microeconomic theory, competition law may be perceived as a policy instrument in which the government intervenes

Andriychuk "The Dialectics of Competition Law: Sketching the Ordo-Austrian Approach to Antitrust" <http://www.kluwerlawonline.com/abstract.php?area=Journals&id=WOCO2012022> (accessed 14 April 2016)

³² B Hulme "The Goals of European Competition Law: Utilitarianism and Deontology" <https://sites.google.com/site/349924e64e68f035/issue-6/the-goals-of-european-competition-law-utilitarianism-and-deontology> (accessed 14 March 2016)

³³ Hulme (n 33 above)

³⁴ Hulme (n 33 above)

³⁵ RS Khemani "Application of Competition Laws: Exemptions and Exemptions" 2002 http://unctad.org/en/Docs/ditclpmisc25_en.pdf (accessed 30 May 2016)

³⁶ Bailey & Whilsh (n 15 above)

in the economy to enhance market efficiency by correcting market failures.³⁷ Policy makers draw justification on this perception in that if government did not intervene in the market, competition will not be realized at an optimal level and this will in turn lead to inefficient operation of the market.³⁸

Another objective of competition law is the dispersal of economic power and equity redistribution of wealth in a given economy.³⁹ This objective targets equity rather than economic efficiency. This objective of competition law is borne out of the perception that aggregation of resources in the hands of a few individuals or entities is a threat to the very notion of democracy, individual freedom of choice and economic opportunity.⁴⁰ Closely related to the fore is the use of Competition law as a tool of regulating against the aggregation of market power;⁴¹ a situation which arises as a result of imperfect competition, and can ultimately lead to market failure.⁴² The possession of market power can make a participant influence the market price for maximizing their profit and thereby damaging market efficiency.

2.6 What Competition law covers?

It is imperative to note that anti-competitive practices within a free market take diverse forms and goes to different extents. There are also markets activities that can be carried out legitimately but if not properly regulated can lead to anti-competitive practice or lessen competition within the market. These practices and activities can also be done by individual or through collaboration between two or more entities. Competition law is concerned with these activities and to either curb or regulate these anti-competitive behaviours and they include;

2.6.1 Mergers and acquisitions

Perhaps the most sensitive act that competition law covers, due to the nature of its effect upon completion, is mergers. A merger is the fusion of two companies either by one company acquiring substantial shares in a target company that will enable it assume control or by two undertakings coming together to form an entirely new entity. A merger is carried for diverse reasons from the business point of view. It has been said that a merger between two

³⁷ Taylor (n 3 above)

³⁸ Taylor (n 3 above)

³⁹ Bailey & Whilsh (n 15 above)

⁴⁰ Bailey & Whilsh (n 15 above)

⁴¹ Taylor (n 3 above)

⁴² Taylor (n 3 above)

companies can bring about increased efficiency in the company to be formed, increase market share and even encourage innovation as the new entity gets access to more funds and can carry out extensive research and development. Competition law is however concerned with the effect a merger will have on consumer welfare when the merger can possibly result in a market being less competitive.⁴³

Mergers can take diverse forms depending on the level of market it takes place. A merger can either be horizontal, vertical or conglomerate.

A merger is said to be horizontal when it takes place between two or more competing companies in the same market that offer substitute product or service. For instance the merging of two companies that produce soft drinks e.g. Coca cola and PepsiCo is a horizontal merger. The 2005 merger between GlaxoWellcome and Smithkline Beecham, two pharmaceutical giants, to form GlaxoSmithKline⁴⁴ is a perfect example of a horizontal merger. This type of merger undergoes serious scrutiny from the competition authority as it has the inherent risk of lessening competition in the market.

A vertical merger takes place between two firms at different levels of market production and supply chain⁴⁵ but have complementary materials for the creation of a final product. Vertical mergers are commonly undertaken by firms as they seek to consolidate their production operations.⁴⁶ For instance if a car manufacturing company decides to merge with a tire manufacturing company, that would be a vertical merger as the final product of the tire company is used as an input the car manufacture company to create a final product. A real life example of a vertical merger is the Time warner incorporation a major cable operator merging with Turner corporation that produces CNN and other programming.⁴⁷

A conglomerate merger is the fusion of two or more companies that have nothing in common and operate in different markets. In this type of merger, the product of one company is not used an input in the production or manufacturing of the other company's product or service. For instance, if a car manufacturing company merges with a soap manufacturing company, it is seen as a conglomerate merger. This type of merger does not inherently lessen competition

⁴³ Bailey & Whilsh (n 15 above)

⁴⁴ <http://www.wsws.org/en/articles/2000/01/glax-j22.html> (accessed on 22 April 2016)

⁴⁵ Competition law and policy made easy, CUTS

⁴⁶ http://www.amosweb.com/cgi-bin/awb_nav.pl?s=wpd&c=dsp&k=vertical+merger (accessed on 22 April 2016).

⁴⁷ <http://www.nytimes.com/1995/09/23/us/turner-to-merge-into-time-warner-a-7.5-billion-deal.html?pagewanted=all> (accessed on 22 April 2016).

as the newly formed entity is still faced with the same level of competition that exists before the merger

The merging of companies can lead to the acquisition of market power, abuse of dominance and engaging in some other anticompetitive agreements and practices. These will be considered in turn below.

2.6.2 Abuse of Dominance

Abuse of dominance occurs when a dominant firm or a group of firms that have dominance in a market engage in conducts that intend to or targets the elimination of a competitor or prevent the entry of new competitors into the market with the resultant effect of preventing or substantially lessening competition.⁴⁸ Most competition authorities do not prohibit the dominance of a firm within a relevant market per se; it is the abuse of such dominance that can result from having dominance in the first instance that is frowned upon. Market dominance can be achieved through competition itself. Many firms have achieved dominance through innovative products, efficiency and being able to supply consumers at a competitive price. The threshold for market dominance is decided by the competition regulatory authority in a given market and it varies from one jurisdiction to another. In some jurisdictions, a firm is said to be dominant when it has 35% of market share.⁴⁹ In others, the threshold can be 40% or 45%.

In deciding whether a firm has engaged in abuse of dominance, there are certain elements that have to be proved by the competition regulatory authority. This is because having dominance does not necessarily constitute its abuse. In proving there is abuse of dominance, it must first be established that the firm or a group of firms have dominance in the relevant market. This is subject to the deciding measure used by the relevant completion regulatory authority. Secondly, it must be established that the firm has engaged in anti-competitive practices, and lastly, the anti-competitive practice engaged in by the firm must be capable of eliminating or substantially lessening competition in the relevant market or have the tendency to do so in the future.⁵⁰

⁴⁸ <http://www.oecd.org/competition/abuse/> (accessed 20 April 2016)

⁴⁹ In Canada, the competition bureau only starts to have concerns about the abuse of dominance by firms when the firm has 35% or more of the market t share. Also, In the case of a group of firms, a combined market share exceeding 60% generally raises concerns and prompts further examination by the Bureau.

<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02820.html> (accessed on 23 April 2016)

⁵⁰ (n 55 above)

Examples of abusive practices typically include:⁵¹

- predatory pricing
- loyalty rebates
- tying and bundling
- refusals to deal
- margin squeeze
- excessive pricing

2.6.3 Cartels

Cartels are formal agreements between firms operating in the same industry to raise price, gain market control or otherwise act like a monopoly and restrict competition.⁵² These are anti-competitive practices that occur when firms in a horizontal operation collude instead of actually competing.⁵³ Hard core cartels are a serious violation of competition law as they result in injury to consumers in the sense that prices of products are raised thus it becomes unavailable to some people and extremely unaffordable to others.⁵⁴ Some of the activities carried out by cartels include price fixing, output restriction, market allocation and bid rigging.

It has proven to be a big challenge for competition authorities to detect cartels within a market.⁵⁵ This is due to the nature in which their operations are carried out and the fact that it takes a group of firms to form a cartel.

The most effective way of sniffing out cartels is by the leniency programs⁵⁶ put in place by the competition authorities to reduce the sanctions on cartelists or provide them with immunity if they cooperate with the competition authority and whistle blow on the cartel.⁵⁷

⁵¹ (n 55 above)

⁵² http://www.amosweb.com/cgi-bin/awb_nav.pl?s=wpd&c=dsp&k=cartel (accessed on 23 April 2016)

⁵³ (n 58 above)

⁵⁴ <http://www.oecd.org/competition/cartels/> (accessed on 24 April 2016)

⁵⁵ (n 60 above)

⁵⁶ Under the European Union Competition law, for a company to be eligible for leniency it must be the first to report the undetected activities of the cartel to the commission and must also provide sufficient information to help the commission launch a proper investigation in the offices of the cartel.

<http://ec.europa.eu/competition/cartels/leniency/leniency.html> (accessed on 26 April 2016).

⁵⁷ (n 62 above).

2.7 Advantages and dangers of competition law

There are numerous advantages that can be linked to the presence of competition law in a market and they include the encouragement of free and fair competition within a market. This is achieved through the structure and guidelines that is prescribed by the competition law to tailor the activities of the market participants. Also, competition law regulates the conduct of market participant against anti-competitive practices within the market. This can be tied to the deterrent effect that the presence of competition law has on prospective or intending violators of the law. Furthermore, competition law upholds one of the fundamental intent of competition policy which is consumer welfare. Competition law seeks to protect the consumer from anti-competitive practices within the market that can otherwise be injurious to the consumer. Competition law is also seen as a means of raising tax revenue for the government

There has been some agitation for the abolishment of competition law by some writers and economist saying it comes with too many disadvantages. Part of the argument of these writers include that competition law might be used as a tool to target big companies on the mere suspicion of engaging in anti-competitive practices. This can be translated into using competition law as a tool of political pressure when a big company has become unpopular in a market.⁵⁸ Another disadvantage is brought up in the sense that competition law is a set of complex and vague provisions that can be used to criminalize any business operation.⁵⁹ The manner in which the US anti-trust provision is worded, a firm might not know when it has gone against the law or not. This is what obtains in the text of much competition law all around the world.⁶⁰

2.8 Enforcement of competition law

The enforcement of most competition laws is approached basically from two angles. These are private enforcement and public enforcement.

2.8.1 Public enforcement

Public enforcement of competition law entails a government agency being established and vested with special powers to be administered through a special procedure in enforcing the

⁵⁸ G Hanks -The Disadvantages of Antitrust Lawsøhttp://www.ehow.com/info_8743136_disadvantages-antitrust-laws.html (accessed 20 April 2016)

⁵⁹ E W Younkins <http://www.quebecoislibre.org/000219-13.htm> (accessed 20 April 2016).

⁶⁰ (n 66 above).

law.⁶¹ The established agency inherently has the power to investigate suspicious anti-competitive business conducts. Public enforcement of competition law generally entails two stages which are the detection stage and the intervention stage. In the detection stage, the competition agency needs to separate suspected anti-competitive business conducts from precompetitive business conducts of the firms.⁶² In achieving this separation, there are two different approaches that are used and they are the *per se* approach (which checks whether the firms have actually engaged in actually prohibited anti-competitive business conducts e.g. horizontal price fixing) or the *rule of reason* approach (which measures the anti-competitive conduct against its actual anti-competitive effect).⁶³

In furtherance to the choice of strategy to be used by the competition agency, there is also the need to know the particular time and stage to engage apply these strategies. The agency is faced here with the ex-ante approach (which means applying the strategy before the anti-competitive business conduct is carried out by the firm) or ex-post approach (which mean applying the strategy after the anti-competitive business conduct has been carried out by the firm).⁶⁴ Ex ante approach can be applied in form of publishing a blacklist of anti-competitive business conducts, regulation of the communication between horizontal market participants, merger control and the threat of punishment. Ex post approach will include detection, intervention (fines, damages, imprisonment).⁶⁵

After the detection of suspicious business conducts, which also embody investigation,⁶⁶ comes intervention. Intervention stage is characterized by the penalization of the anti-competitive business conduct.⁶⁷ Intervention generally takes the form of fines, behavioural remedy and structural remedy.⁶⁸ A fine is normally an amount of money levied on the firm to pay or prison time for individuals who are found guilty. Remedy on the other hand is

⁶¹ K Huschelrat & S Peyer "Public and Private Enforcement of Competition Law A Differentiated Approach" <http://competitionpolicy.ac.uk/documents/8158338/8235394/CCP+Working+Paper+13-5.pdf/86d76261-eda5-4de7-af2a-51d9684e0c45> (accessed 15 April 2016)

⁶² Huschelrat & Peyer (n 68 above).

⁶³ Huschelrat & Peyer (n 68 above) There are some competition laws that allow otherwise anti-competitive practices that don't lessen competition or harm consumers.

⁶⁴ Huschelrat & Peyer (n 68 above)

⁶⁵ K Huschelrath "Public and Private Enforcement of Competition Law in Europe Legal and Economic Perspectives"

⁶⁶ Huschelrat & Peyer (n 68 above)

⁶⁷ Huschelrat & Peyer (n 68 above)

⁶⁸ Huschelrat & Peyer (n 68 above)

positioned to cure, correct or prevent these unlawful anti-competitive business conducts.⁶⁹ The main aim of public enforcement of competition law is to create a deterrent effect.

From the above, one can draw inference on the level of discretion that the competition authority will have to use in administering the law and determining each case of anti-competitive conduct on basis of its peculiarity.

2.8.2 Private enforcement

Private enforcement of competition law happens when the injured party of an infringement individually institutes an action in court to remedy the infringement suffered. Where groups of people or a group of injured parties collectively institute such action, it becomes a class action. If the instituted action is successful, the court orders some sort of civil sanctions in form of damages, injunctions or interim reliefs.⁷⁰ Private enforcement differs from public enforcement in the sense that individuals actually stand a chance to be compensated for any injury suffered. Their recourse is to the court of law. The aim of private enforcement is to also have a deterrent effect on intending offenders in that the sanctions meted out by the court in form of damages will make intending offenders adhere to the law.⁷¹

2.8.3 Role of the judiciary

The judiciary is one of the organs of government with the typical role of interpreting the laws promulgated by the legislative arm. In the enforcement of competition policy, the judiciary is vested with the function of applying the substantive principles of the competition law as well as ensuring due process.⁷² The court thus holds a significant and sensitive role because it is used for a tool of enforcement for economic policy.⁷³

In enforcing competition law, the court has to ensure that the procedural safeguards are adhered to as they are prerequisite for an effective competition policy.⁷⁴ The safeguards of fair hearing and protection of sensitive or confidential business information should be ensured.

The court in enforcing competition law should also be seen as transparent, impartial and independent of the executive and legislative arms of the government. The competition

⁶⁹ Huschelrat & Peyer (n 68 above)

⁷⁰ Huschelrat & Peyer (n 68 above)

⁷¹ Huschelrat & Peyer (n 68 above)

⁷² -Judicial Enforcement of Competition Lawø

<http://www.oecd.org/daf/competition/prosecutionandlawenforcement/1919985.pdf> (accessed 20 April 2016).

⁷³ (n 81 above)

⁷⁴ (n 81 above)

authority must also be accountable in order to promote its credibility with the public. This will in turn promote the confidence of the public in the competition authority.⁷⁵

2.9 Conclusion

From the discussions above, competition policy and competition law are noted as complementary elements of a liberalization and privatization regimes. The open market nature of trade and investment liberalization is meant to allow different participants to compete in the market in order to ensure market efficiency and consumer welfare. To this effect, competition in the market should be protected in order not to lose the benefits of liberalization to anticompetitive practices such as cartels and abuse of dominance. Competition law is used to achieve the objectives of competition policy in a free market economy. It is otherwise seen as a tool or a driver of competition policy.

In the wake of globalization, without an international agreement on the regulation of competition, for a country operating an open market not to have competition laws at all may spell foreseeable and unforeseeable doom on its local markets from within and without. The absence of national competition law might mean the lack of regulation of international competitive practices that can adversely affect the local market.

⁷⁵ (n 81 above)

CHAPTER THREE

THE ADMINISTRATION OF COMPETITION POLICY AND LAW IN NIGERIA

3.1 Introduction

In concluding the preceding chapter, we see that competition law and policy are essential elements of a market based economy. Furthermore we see that competition law is used to achieve market efficiency and promote consumer protection.

This chapter will assess the status of competition law in Nigeria pointing out the nature of administration of competition law in Nigeria and also trace the attempt made by the government to enact a consolidated and encompassing competition law to cover the entire economy. The challenges of enacting a consolidated competition in the country will also be accessed.

3.2 Background to competition in Nigeria

Since the return to democracy on 29 May 1999, Nigeria has adopted a host of economic reforms which culminated in the open market approach of privatization, liberalization and deregulation of the market to allow new participants operate in key economic sectors that were formerly ran as government monopolies. Inherent in this open market approach is competition policy. Competition policy is aimed at the facilitation of competition amongst market participants in order to promote allocative efficiency, competitiveness of the industries, and consumer welfare amongst other goals. In the spirit of the Nigerian competition policy is also creating a fair and level playing ground for all participants in order to bring about innovation, efficiency and ensure consumer welfare.

However, there is no harmonized system of competitions law in Nigeria. In other words, there is no special legal system or body dealing with competition policy and administration of competition law in the country. What obtain on ground are different piecemeal industry specific bodies dealing with competition issues in specific industries. There has been a lot of clamour by professionals, stakeholders and captains of industries from different quarters for the enactment of an all-encompassing competition law that will deal with the issues of competition of in Nigeria with a holistic approach.

3.3 Administration of competition law in Nigeria

Competition matters in Nigeria are regulated by agencies set up by the government to regulate the business and operational activities of entities within specific industries. In other words these agencies are set up to monitor and regulate the activities of participants in different sectors of the economy while they are saddled with varying degrees of responsibility of regulating competition in their respective sectors. The competition regulation responsibility is always simply worded in the legislations that empower the sector specific agencies to carry out their duties. For the purpose of this research, the writer shall be limiting the scope of this section to some sectoral regulation of competition as they are discussed below.

3.3.1 Telecommunications

The Nigerian Communications Act (NCA) was enacted in 2003 to create a regulatory framework for the Nigerian Telecommunications industry. The act established The Nigerian Communications Commission (NCC), an independent National Regulatory Authority for the telecommunications industry in Nigeria.¹ NCC is responsible for creating an enabling environment for competition among operators in the industry as well as ensuring the provision of qualitative and efficient telecommunications services throughout the country. Another objective of the commission is to encourage both local and foreign investment in the Nigerian communications industry.² The commission is saddled with the objectives of ensuring fair competition in the various sectors of communication industry in Nigeria, the protection and promotion of consumer interest of consumers against unfair practices including but not limited to matters relating to tariffs and charges for and the availability and quality of communications services, equipment and facilities³. Furthermore, the commission aims to encourage the participation of Nigerians in the ownership and control of communication companies and organizations operational within the boundaries Nigeria.⁴ To this effect, in 2007 NCC drawing power conferred on it by the NCA, promulgated the Nigerian Competition Practices Regulation (NCPR). NCPR its name suggests is to basically deal with the issues of competition within the telecommunications industry in Nigeria. The scope of coverage of the regulation include merger and acquisition control within the different levels of the industry,

¹ <http://www.ncc.gov.ng/> (accessed 14 February 2016)

² (n 1 above)

³ -ICT Laws In Nigeria: Planning And Regulating A Societal Journey Into The Futureø(2014)

<http://www.saflii.org/za/journals/PER/2014/4.html> (accessed 14 February 2016)

⁴ (n 3 above)

3.3.2 Electricity

In order to create a competitive electricity market amongst a host of other reasons,⁵ The Electric Power Sector Reform Act (EPSRA) 2005 was enacted. The act provided for the establishment of the National Electricity Regulatory Commission (NERC) in the same year with the mandate to monitor and regulate the electricity industry. This is to include issuance of licenses to market participants and ensuring compliance with market rules and operating guidelines.⁶ It is also noteworthy that the EPSRA was the legal vehicle used for divesting the government's interest in the then National Electric Power Authority (NEPA) which was a long standing government monopoly. The competition function of NERC is stated in one of the goals of the commission which is to encourage private sector participation by developing and implementing regulations that will encourage profitable pricing and effective competition among market players.⁷

3.3.3 Aviation

Nigerian Civil Aviation Authority (NCAA) is the regulatory body for aviation in Nigeria. It became autonomous with the passing into law of the Civil Aviation Act 2006 by the National Assembly and assent of the President of the Federal Republic of Nigeria.⁸ The autonomy granted NCAA is to enable it carry out its functions of aviation safety and other oversight functions⁹ without government interference and in line with international standard. NCAA is also saddled with the function of economic regulations in the aviation industry of Nigeria. Amongst its numerous responsibilities, NCAA is also charged with balancing the economic interest of operators, users of aviation services as well as the general public and the nation as a whole. This is the point at which one draws inference that NCAA acts as a competition authority in the aviation sector.

3.3.4 Capital Market

The Securities and Exchange Commission (SEC) is the government agency mandated to regulate and develop the Nigerian capital market.¹⁰ Typically, the regulatory function of SEC includes the registration of securities and market intermediaries, inspection and surveillance

⁵ Electricity Sector Reforms Act 2005

⁶ (n 5 above)

⁷ <http://www.nercng.org/> (accessed 14 February 2016)

⁸ <http://www.ncaa.gov.ng/about-ncaa/about-us/> (accessed 14 February 2016)

⁹ The Civil Aviation Act 2006 gives NCAA the oversight function over other agencies related to the Nigerian aviation sector like Nigerian Airspace Management Authority (NAMA), Nigerian Meteorological Agency (NMA) and Federal Airports Authority of Nigeria (FAAN)

¹⁰ <http://sec.gov.ng/about/what-we-do/#tab-what-we-do> (accessed 16 February 2016)

of capital market operators and the trading system, investigation into any alleged breach of the rules governing the capital market and enforcement of appropriate sanctions where it is found that such rule has been breached and lastly making rules to guide operations in the capital market in order to be up to par with international standards in the market.¹¹ In its function to develop the market, SEC collaborates with relevant stakeholders and market participants to introduce new products and processes. SEC also encourages increased participation of investors through organizing seminars and workshops, sensitization through print and electronic media and introduction of capital market based course in academic curriculums of tertiary institutions.¹²

In the absence of a harmonized competition law and a competition authority in Nigeria, the Investment and Securities Act 29 of 2007 (ISA), which is the main regulator of merger control regime in the country, empowered SEC to be both a securities and competition regulator for the purpose of merger control.¹³ The provisions of merger control in the ISA are influenced by, and thus bears significant semblance to the merger control provisions of South African Competition Act 89 of 1998. The classification of mergers with different thresholds and notification requirements of mergers in ISA are imports from the South African Act.¹⁴ Section 128 of ISA gives SEC the authority to break up a company in to different entities where it is determined that the business activities of that company will substantially lessen competition.

It is however pertinent to note that all other government agencies that embody sector specific power of regulating competition through merger control, (e.g. Nigerian Competition Practices Regulation promulgated by the NCA in the telecommunications sector) still have to get final approval from SEC, thus making SEC the highest authority on the control of competition in Nigeria.

3.3.5 Consumer protection

¹¹ (n 10 above)

¹² (n 10 above)

¹³ http://www.jacksonetiandedu.com/lawfirm/associates/wp-content/uploads/sites/3/2015/01/GLOBAL-LEGAL-INSIGHTS-MERGER-CONTROL_Nigeria_v3.pdf (accessed 23 March 2016)

¹⁴ The South African Competition Act 89 of 1998 classified mergers into small, medium and large categories with different financial thresholds. Also, small mergers are not meant to be notified unless the competition commission requires it to. The merger provisions are contained in sections 11-15 of the Act.

The Consumer Protection Council (CPC) is a parastatal of the Federal Government of Nigeria, under the supervision of the Federal Ministry of Trade and Investment.¹⁵ CPC is established under Consumer Protection Council Act, Cap 25, 2004 Laws of the Federation of Nigeria, to promote and protect the interest of consumers over all products and services. The core mandate of CPC include; elimination of hazardous products from the market, provision of speedy redress to consumers complaints, enhancement of consumer awareness and encourage trade, industry and professional associations to develop and enforce in their various fields quality standards designed to safeguard the interest of consumers.¹⁶ CPC is positioned to use every legal means to protect against the abuse of consumer rights in the Nigerian market. In other words, CPC is the only government agency designed to protect the right of consumers from unbecoming business behaviours on the part of producers and service providers.¹⁷

Based on the very nature of its operations and mandate of protecting consumer rights, CPC has the power to scrutinize the activities of participants in sectors that are otherwise regulated by other sector specific authorities.¹⁸ Even though these other sector specific regulators like NCC and NCAA have the role of ensuring consumer satisfaction, they are more concerned with the growth of their sectors. CPC is the only agency with the sole mandate of protecting the right of consumers on the demand side.¹⁹

3.4 Attempts at enacting a consolidated competition law

The need for a consolidated competition law has been identified and postulated by different stakeholders in the Nigerian economy. This has led to numerous clamouring for the enactment of an all-encompassing competition law that will deal with the economic and regulatory lacuna that exists in the piecemeal legislations that administer the seeming but inadequate competition provisions. There have various attempts to enact a consolidated competition law but for one reason or another, none of the various bills that have made it to

¹⁵ http://cpc.gov.ng/?page_id=865 (accessed 16 March 2016)

¹⁶ (n 15 above)

¹⁷ KB Bello et al -Perspectives on Consumerism and Consumer Protection Act in Nigeriaø(2012) 4 *European Journal of Business and Management* 72

¹⁸ -Consumer Protection And Competition Highlightsø (The Nigerian Situation) presentation made by Mrs Dupe Atoki, Director General of CPC at Fifth Annual African Dialogue Consumer Protection Conference Livingstone Zambia 10-12 September 2013

¹⁹ (n 18 above)

the national assembly have recorded any success in being passed into law.²⁰ Notable amongst the bills are stated below.

3.4.1 Federal Competition Bill 2002

In 2001, the Competition and Antitrust steering Committee was inaugurated to work with BPE in formulating a competition policy for Nigeria.²¹ To this effect, the services of consultant ECU Associates was engaged to draft a competition law for Nigeria. BPE under the leadership of Mallam Nasir El Rufai announced the enactment of an all-encompassing competition law by the government of Nigeria²². The need for competition law in the country was identified as a tool to check the dumping of foreign goods into Nigeria, a practice that was unchecked by any law and is otherwise making it difficult for Nigerian companies to compete.²³ The draft bill that was released to the public in early 2003 highlights the functions, objectives and coverage of the proposed competition law. This is evident in its preamble which states thus;

A Bill to provide the necessary conditions for market competition and to stimulate creative business activities, protect consumers, and promote the balanced development of the national economy; by prohibiting restrictive contracts and business practices that substantially lessen competition and regulating the abuse of dominant positions of market power and anticompetitive business combines, and to establish the Federal Competition Commission for the effective implementation and enforcement of this Bill and for matters connected therewith.²⁴

The bill was presented as an executive to the senate for deliberation and subsequent passing into law. It is noteworthy that some stakeholders raised concerns regarding the merger

²⁰ T Osinowo "Competition law in Nigeria" <http://www.vitaveritasllp.com/competition-law-in-nigeria/> (accessed 20 March 2016)

²¹ F Aihvba "A Critique of the Nigerian Competition Bill 2005" <http://www.aalex.com/media/archive/A%20CRITIQUE%20OF%20THE%20NIGERIAN%20%20COMPETITION%20BILL%202005%20revised.pdf> (accessed 16 February 2016).

²² N Dimgba "The need and the challenges to the establishment of a competition law regime in Nigeria"

http://www.academia.edu/8822080/The_Need_and_the_Challenges_to_the_Establishment_of_a_Competition_Law_Regime_in_Nigeria (accessed 20 April 2016).

²³ Dimgba (n 23 above).

²⁴ Federal Competition Bill 2002.

provisions contained in the bill,²⁵ however, there was no documented reason as to why the draft bill was not passed into Law.

3.4.2 Federal Competition Bill 2006

In 2006, a new competition bill was proposed by the Federal Ministry of Justice was introduced to the Senate. The bill, even though drafted by an entirely new consultant, bore very significant similarity to the bill proposed by BPE. The 2006 bill enjoyed a lot of political and governmental backing and was presented to the Senate by the Federal Executive Council (FEC) as a government bill.

The bill was met with serious hostility at the senate owing to the extensive power that it gave to the Minister of Justice.²⁶ This was against the global trend of creating an independent authority to administer competition law devoid of any political or government interference in the administration of its duties. Also, the legislators were of the view that there were already enacted laws and established commissions that deal with issues of competition and that attention should be given to other pressing issues.²⁷

3.4.3 Nigerian Trade and Competition Commission Bill 2008/2012

As evident in its title, this bill was proposed to establish a trade and competition commission in Nigeria with the objective of promoting efficiency, adaptability and development of the Nigerian economy, provide consumers with competitive prices and product choice, promote employment and advance the social and economic welfare of Nigerians and protect Nigerian industries from unfair trade practices.

The text of the 2008 bill is completely the same with the 2012 bill. The only difference is that the bill was sponsored at two different senatorial dispensations by two different senators. The bill was sponsored in 2008 by Senator Joel Danlami while it was sponsored in 2012 by Senator Magnus Odion Ugbesia.

²⁵ Aihevba (n 22 above) .

²⁶ Dimgba (n 23 above)

²⁷ Dimgba (n 23 above)

3.4.4 Nigerian Antitrust (Enforcement, Miscellaneous, Provisions etc.) Bill 2008

Amongst all the bills presented to the senate, this bill is by far the most explicit in its text stating the anti-competitive practices that the bill tends to cover. Its preamble reads thus;

An act to prohibit monopolies to trade, commerce or industry, to regulate the business activities of combines and trusts with regards to restraint in trade or commerce, to establish the antitrust division for the purposes of enforcing the provisions thereof and to foster the sustenance and development of a free market system and secure the practice of a fair and open market economy based on free competition between varied enterprises operating in the federation and to provide for other matters connected herewith.²⁸

The bill provided for the establishment of an antitrust division within FMOJ for the enforcement of anti-competitive offences as defined in the bill. The bill seeks to regulate monopolies, cartels, mergers and other anti-competitive business practices that restraint trade and lessen competition. Another key feature of this bill is that it provides for the private enforcement of competition law. The bill was sponsored by the duo of Senator Heineken Lokpobiri and Senator F.K Bajomo.

3.4.5 Restrictive Trade Practices, Monopolies and Price Control Bill 2011

This bill also targets specific anti-competitive practices detailing monopolies, cartels, bid rigging and collusion. The states thus;

An act to encourage competition in the economy by prohibiting restrictive practices, controlling monopolies, concentration of economic power and price for connected purposes.²⁹

The bill is a bit different from the previous bills in the sense that it made provision for the appointment of a commissioner who is answerable to the Minister of trade, thus making the Minister the highest authority in competition law. Furthermore, the bill provided for the establishment of a Restrictive Trade Practices Tribunal for the hearing of appeals from parties

²⁸ Draft Nigerian Antitrust (Enforcement, Miscellaneous, Provisions etc.) Bill 2008

²⁹ Draft Restrictive Trade Practices, Monopolies and Price Control Bill 2011

that have been punished by the commissioner. Further appeal can be made to the High Court for if a party is still unsatisfied with the findings of the tribunal.

3.5 attempts at Competition policy within the WTO framework

In 1948, the Havana Charter that sought to create the International Trade Organization included a chapter that dealt with Restricted Business Practices.³⁰ The chapter's goal was to counteract business restraints that lessen competition and unfavourably influence international trade.³¹

With the Havana charter actually never entering into force, there were several proposals to include the issue of competition within the framework of WTO.³² These were met with stiff oppositions on the grounds that competition within the WTO framework will not be in the best interest of developing countries that have ranking priority of developing their local industries and lack the resources and technical capability to effectively pursue competition policies.³³

However, at the Singapore WTO Ministerial in 1996, a compromise was reached and a WTO Working Group on Trade and competition Policy (WGTCPP) was set up.³⁴ The mandate of the WGTCPP was to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework.³⁵

At the 2001 WTO Doha Ministerial conference, the ministers agreed that negotiations will take place at the Fifth Session of the ministerial conference after they identified the need to have a multilateral framework on competition in order to enhance the contribution of competition policy to international trade and development, and also the need to enhance technical capacity building in this sphere.³⁶ The WGTCPP was instructed to focus on the clarifications of some core issues³⁷ until the Cancun Ministerial conference in 2003.³⁸

³⁰ S Bilal & M Olarreaga 'Competition Policy and the WTO: Is there a need for a multilateral agreement?' (1998) Working paper 98/W/02 European Institute of Public Administration.

³¹ Bilal & Olarreaga (n30 above).

³² Bilal & Olarreaga (n30 above).

³³ S Woolcock 'International Competition Policy and the World Trade Organization' Paper for the LSE Commonwealth Business Council Trade Forum in South Africa.

³⁴ Woolcock (n33 above)

³⁵ https://www.wto.org/english/tratop_e/comp_e/history_e.htm#singapore

³⁶ (n35 above)

³⁷ Issues for clarification included core principles, including transparency, non-discrimination and procedural fairness, provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building.

At the Cancun Ministerial Conference of 2003, no consensus could be made on the modalities for negotiation; however, the ministers reaffirmed their Doha declaration and decisions while recommitting themselves to its full and faithful implementation.³⁹ In 2004, the WTO general council decided that it will exclude competition policies from the issues up for negotiation in the Doha round.⁴⁰ This ultimately rendered the WGTCP inactive.⁴¹

3.6 Challenges of enacting a new competition law

There are challenges that arise when trying to establish and enforcing a new competition regime in a developing country. These challenges account for delays, antagonistic comments and even sabotage in the quarters where its enforcement might be very vital to the welfare of the consumers and detrimental to those who engage in anti-competitive practices. These challenges must be carefully analysed in order to proceed for a successful designing, planning and implementation of competition law drawing on the peculiarities of a developing country.

Nigeria as developing country is also faced with these challenges as it is evident in the several unsuccessful attempts at enacting a competition law is for the country. Below are some of the peculiar challenges that pose a threat to the enactment and subsequent enforcement of competition law in a developing country and by all means in Nigeria as well.

3.6.1 Introduction of competition law and policy as a new concept

Introducing competition law to a developing country (that is relatively new to the open market policy) for the first time might not gain widespread acceptance amongst the local companies, authorities and other market stakeholders and thus will be met with stiff

³⁸ (n35 above)

³⁹ (n35 above)

⁴⁰ (n35 above)

⁴¹ (n35 above)

resistance.⁴² Competition law in itself has been argued to be of detrimental effect to an economy rather than beneficial.⁴³

The political class, who have the responsibility of making laws for the country might not be well versed, educated and otherwise enlightened on competition law matters. Hence they tend not to see the need for the enactment of such law and turn to other seemingly pressing issues for the government to deal with.⁴⁴ Also the market participants who have been used to transacting without protection or promotion of competition will lack the understanding of what benefits will accrue when competition is promoted and enforced in an economy, thus there is stiff opposition to the proposition and enactment of competition law.⁴⁵

In Nigeria, this challenge is quite evident as there have been numerous attempts, as highlighted above, to enact a competition law but the lawmakers strongly opposed the 2006 Federal Competition Bill sighting reasons such as proliferation of commissions in Nigeria and the existence of laws that deal with the issue of competition in Nigeria. They must have mistaken the Consumer protection Council for a body that administer and enforce competition law. Whereas, inasmuch they bear semblance, the concept of consumer protection is distinct from concept of competition.⁴⁶ Since the opposition to the 2006 Bill, only one bill has made it pass the first reading stage at the senate or National Assembly.⁴⁷ This is a display of ignorance on the part of the lawmakers as there is no such law enacted to deal with competition on an industry wide basis.

Furthermore, the enactment of competition law in a developing country might run against the interests of the powerful business class who in most cases are well connected to the political class. In some instances, one might belong to both classes. These powerful businesses will work against the enactment of competition law as it will halt them from engaging in any anticompetitive practices that has been driving their profits but to the detriment of consumers.

⁴² Dingba (n 23 above)

⁴³ RA Levy -The Case Against Antitrust <http://www.cato.org/publications/commentary/case-against-antitrust>
see also E Younkins -Antitrust Laws should be abolished <http://www.quebecoislibre.org/000219-13.htm>
(accessed 2 May 2016)

⁴⁴ Dingba (n 23 above)

⁴⁵ Dingba (n 23 above)

⁴⁶ Dingba (n 23 above)

⁴⁷ In 2008, a bill for an Act to provide for the establishment of the Nigerian Trade and Competition Commission and other matter was presented. This bill had passed through its first reading since April 23 2008; second reading on November 6, 2008; and was, thereafter referred to the joint committees on establishment and Public Service Matters, Judiciary, Human Rights and Legal Matters and Commerce, this bill has stalled till date. See also <http://thenationonlineeng.net/web2/articles/> (accessed 2 May 2016)

3.6.2 Lack of proper awareness

Closely related to the aforementioned challenge is the lack of awareness amongst the people that the proposed competition law is to protect, those that are meant to administer the law and ultimately those that are meant to enact the law. This lack of awareness literally translates into lack of public support for the enactment of competition law.⁴⁸ Dimgba, in making reference to the Olsonian⁴⁹ political economy said most Non-Governmental Organisations (NGOs) would rather put their weight behind health, human rights and environmental causes where its effects will be felt and visible to the public whereas the benefits of competition law is diffused amongst millions of consumers.⁵⁰

This position is true with Nigeria as most NGOs are health oriented specifically dealing with causes like the prevention and elimination of HIV/AIDS, Malaria, and welfare for widows and orphans amongst many other causes. It is quite challenging to explain the adverse effects of anticompetitive practices to the final consumers so NGOs generally distance themselves from such.⁵¹

The absence of competition advocacy, which is meant to be a tool of public awareness on the pertinent issues of competition in Nigeria, does not help the situation. Competition advocacy is a means of pushing a competition agenda through proper sensitization of the public and all other stakeholders to see the need and benefit for a competition law in the country. The concept of competition advocacy will be discussed at a later part of this chapter.

3.6.3 Associated cost

The cost attributed to setting up an effective and efficient competition law administering body is of great importance and this poses to be a great challenge especially in a developing country where there are limited resources and other pressing social and economic issues to attend to. There is the need to enact the law, set up an administering body, training of

⁴⁸ Dimgba (n 23 above)

⁴⁹ Drawing on the work of Marcus Olsen in "The logic of collective Action" Dimgba explained that policies that generate diffuse benefits for a large group of people will not receive funds as much as policies that target a small specific group of people.

⁵⁰ Dimgba (n 23 above)

⁵¹ Dimgba (n 23 above)

personnel and awareness programs to enlighten the public of the benefits and need for the regime.

In Nigeria, the major source of government revenue is from the sale of crude oil which is vulnerable to global price fluctuations.⁵² These fluctuations see the dwindling of government income from time to time. There is the need for the country to allocate funds to a lot of immediate pressing issues which range from development to security. For instance, for the past seven years, the north eastern part of the country has been plagued with the terrorist activities of Islamic jihadist killing thousands of people and displacing millions more. Needless to say, the attention of the government will be directed to a security situation rather than the enactment of a competition law.

3.6.4 Presence of large informal sector

Another challenge in the establishment of a competition regime is the presence of large informal sectors. A lot of developing countries are characterized by large informal sectors and most of the trades carried on here are done without the restraint of licensing and registration, health and safety policies. Due to the nature of trade being negotiated on ad hoc basis, there is no formal means of monitoring or regulating prices and trading conditions.⁵³

According to different data, the informal sector in Nigeria makes up for about 59% of the Gross Domestic Product (GDP) of the economy.⁵⁴ Dimgba says the existence of a large informal sector creates a dual market which makes the analysis of the formal sector quite challenging. In highlighting this, he said;

Market power of dominant *formal* firms may be over-estimated due to an under-estimation of the price elasticity of demand. The existence of a large informal sector also creates additional noise in price information, making cartels more unstable and cartel analysis more difficult.⁵⁵

⁵² The price of crude has dipped from \$100 per barrel in 2012 to \$40 per barrel in 2016.

⁵³ L. du Plessis et al -Competition legislation and policy ó is it necessary in a developing economy?ø Fifth Annual Competition Law, Economics and Policy Conference 4 & 5 October 2011. See also <http://www.compcom.co.za/wp-content/uploads/2014/09/FINAL-PAPER-2011.pdf>

⁵⁴ The Nigerian Federal Ministry of Budget and Planning puts the informal sector as 58% of the economy. See <http://www.nationalplanning.gov.ng/index.php/news-media/news/225-nigerian-informal-sector-has-great-potential-contributes-58-to-economy> (accessed 4 May 2016) See also <http://www.doingbusiness.org/data/exploreeconomies/economycharacteristics> (accessed 4 May 2016) for World Bank data.

⁵⁵ Dimgba (n 23 above)

Sadly, there is no proper way of dealing with this challenge rather to make a careful analysis and dominant firms with regards to abuse of dominance.

3.6.5 Lack of capacity

Assuming the government can muster the funds to enact a competition law and establish a competition regulating and enforcement authority, effective administration still largely depends on the capacity of legal and economic practitioners, private sector and ultimately the consumers.⁵⁶ This challenge will manifest itself both pre and post establishment of a competition regime.

Competition policy and law is a relatively a new concept in Nigeria with the first attempt of enactment only recorded as recent as 2002. This has not given room for development of academic knowledge and existence of trained and seasoned practitioners, academics and industrial organizations that know what competition issues are all about.⁵⁷ Needless to say, if or when a competition regulating authority is finally set up, the lack of seasoned legal and economic practitioners to deal with complex competition law concepts in the administration of the regime will pose a challenge to its effectiveness and overall success.⁵⁸ The lack of seasoned practitioners to deal with complex competition law issues can also mutate into the misapplication of competition law, the event of which can have an adverse effect on the economy.⁵⁹

From the highlighted challenges above, it can be deduced that the albatross of enacting and subsequently enforcing competition law in Nigeria centers around it being a novel concept that is not understood and accepted, cost of setting up such regulating authority and the corruption present in the system. These challenges can be dealt with and the first step to dealing with the issue through proper awareness of the stakeholders. Awareness of competition policy and law should be projected through competition advocacy.

3.7 Effectiveness of the piecemeal legislation

⁵⁶ Dingba (n 23 above)

⁵⁷ Dingba (n 23 above)

⁵⁸ Du Plessis (n 46 above)

⁵⁹ Du Plessis (n 46 above)

As it was mentioned earlier in this chapter, competition is regulated in Nigeria through piecemeal sector regulation. These sector regulators are more concerned with the development of the sectors they regulate and are more competent in that regard. The sector regulation of competition also does not see the best professionals in the field of competition handle competition issues. The issue of competition is not at the forefront of their mandates hence this leads to ineffective regulation of competition within these specific sectors.

As mentioned in the previous chapter, the case of BA and VA on charges of price fixing and overcharging of customers on the Lagos ó London route exposed the limited power of NCAA to handle such competition matters to an enforceable point. Although the NCAA as a sector regulator with competition law powers could be said to be a competition authority for the aviation sector, experience with sector regulators with competition law powers such as the Securities and Exchange Commission (SEC), Nigerian Communications Commission (NCC), the Nigerian Electricity Regulatory Commission (NERC) shows that sector regulators with competition law powers tend to be jacks of all trades but not master of the competition matters, which tend to be buried or forgotten or misapplied in deference to the core technical sectoral competence of these regulators.⁶⁰

Furthermore, the absence of an encompassing competition law has created a lacuna in the prohibition of some anticompetitive practices such as cartels, which are detrimental to the fair functioning of a market economy.⁶¹

3.8 The way forward, the role of competition advocacy

As seen from the previous and this chapter, one of the main challenges hindering the enactment of a consolidated competition law in Nigeria is the low level of knowledge by the political class and other stakeholders have on the matter. This necessitates the need for competition awareness in the country but in the absence of a competition authority to carry out advocacy function of awareness, Nigeria will have to do with what is available as considered below.

⁶⁰ N. Dingba -Competition Law And Current Issues in The Pricing Of Travel by Foreign Carriers in Nigeriaø Nigerian Bar Association, Section on Business Law, 6th Annual Business Law Conference, 17 ó 20 June,2012, Lagos Nigeria (Aviation Committee Session)

⁶¹ See chapter 2 of this thesis on cartels and abuse of dominance.

3.8.1 National Competitiveness Council of Nigeria

Following approval by the Federal Executive Council in 2012, the National Competitiveness Council of Nigeria (NCCN) was inaugurated on February 4th 2013 by Dr. Goodluck Ebele Jonathan, GCFR, President of the Federal Republic of Nigeria. NCCN is a public-private sector partnership that aims to boost Nigeria's business competitiveness and ability to attract local and international investment. The Council's major role is to drive the process by which will improve Nigeria's competitiveness.⁶² NCCN is largely driven by the private sector and has among its roles is to Generate and sustain a national conversation around competitiveness, develop and implement initiatives that will enhance competitiveness and educate and inform on competitiveness and positively influence policy decisions relevant to competitiveness.⁶³

In the absence of a competition authority to carry out advocacy functions in Nigeria, NCCN is strategically positioned to engage in making the public aware of the benefits of competition as this is in line with its mandate of promoting competitiveness of Nigerian industries. This will go a long way in preparing the mind of the stakeholders and foster a competition spirit before the law is finally enacted.

3.9 Conclusion

As against former government and private monopolies, the liberalization regime in Nigeria has seen the introduction and involvement of various participants in the new open market. This has in turn necessitated the adoption a competition policy and competition law to protect and ensure the realization of the benefits of liberisation of market efficiency and consumer welfare.

In the absence of a competition law, industry specific regulators have been saddled with the responsibility of regulating competition within the industries they regulate. This approach has proven to be ineffective in that these regulators don't have competition as their overriding mandate in the regulation of their specific industries. Hence there are no seasoned professionals to effectively administer competition law, no proper framework to regulate a lot of anticompetitive practices and enforcement cannot be carried out. Furthermore, this has caused a delay in the growth of competition culture in the economy.

⁶² <http://nccnigeria.org/> (accessed 11 May 2016).

⁶³ <http://nccnigeria.org/our-vision-and-mission/> (accessed 11 May 2016).

There have been various attempts at enacting a consolidated competition law in Nigeria but achieving success from these attempts have proven to be very challenging and till the present day Nigeria has no competition law. The challenges hindering the enactment of competition law in Nigeria include those that are typical and peculiar to most developing countries trying to enact or have enacted competition law.

CHAPTER FOUR

THE NEED FOR A CONSOLIDATED COMPETITION LAW IN NIGERIA

4.1 Introduction

In concluding the preceding chapter, it has been noted that competition policy and competition law are necessary elements that should be present in a market economy due to its complementary effects on promotion of fair competition, and also the realization of the benefits economic efficiency with consumer welfare within a liberalization regime.

However, it is pertinent to note that different jurisdictions enact competition law for different purposes.¹ In some instances competition law is enacted in order to right some social and economic wrongs that exist in the local market of the enacting jurisdiction, others enact the law in a bid to achieve development of the economy and in a lot of cases, competition law is enacted by developing countries based on international pressures.² Jacques Laffont said;

Competition policy assumes large number of participants in all markets, no public goods, no externalities, no informational asymmetries, complete markets, no natural monopolies or, more generally, convexity of technologies in addition to full rationality of economic agents, a benevolent court system to enforce contracts, and a benevolent government with lump sum transfers to achieve any desirable redistribution. Developing economies are of course very far from this ideal world, and the policy question "Should competition be encouraged in developing countries?" must be raised in a more realistic framework.³

From the above, it is noteworthy that even though competition law and policy is a concept that benefits an economy and different jurisdiction draw on different reasons for enacting such law, it cannot be concluded that it will benefit a country such as Nigeria without alluding reasons for its enactment.

This chapter will examine the need for Nigeria to have a competition law enacted.

¹ http://lsr.nellco.org/cgi/viewcontent.cgi?article=1378&context=nyu_lewp

² DI Waked "Competition Law in the developing world: The why and how of adoption and its implications for international competition law" <http://www.icc.qmul.ac.uk/docs/gar2008/144726.pdf> (accessed 29 April 2016).

³ A Pham "Development of Competition Law in Vietnam in the Face of Economic Reforms and Global Integration, The Symposium on Competition Law and Policy in Developing Countries" (2006) 26 *Northwestern Journal of International Law & Business* 548.

4.2 Privatization and deregulation needs an accompanying competition policy

In the last two decades, Nigeria has undergone significant market reforms, evident in its adoption of privatization and deregulation policy as part of its economic reforms. This is a key feature of a market based economy. Privatization of key sectors such as telecommunications and electricity has seen an influx of new participants operating in these sectors. Privatization in its true nature is to take away the monopoly that the government has over these sectors and validly transfer it to different participants in order to encourage efficiency and optimal running of the facilities. However, if there is no effective competition regime in place, there is nothing stopping these new players from engaging in anticompetitive practices that can otherwise hinder the fruit of liberalization. To strengthen the above statement, Pham put it succinctly and said;

An effective competition law, as is now widely recognized, is a concomitant requirement for market-based reforms. Such a law aims at limiting unnecessary interventions or abuses of power in the marketplace by the State or by private sector enterprises that adversely affect economic efficiency and consumer welfare. Moreover, an effective competition law enables the government to keep a check on the concentration of economic power and rent-seeking behavior. It strengthens economic democracy and social cohesion by providing market participation opportunities through the prevention of anti-competitive practices by dominant firms, and lowers the barriers to entry faced by individual entrepreneurs, and small and medium sized businesses.⁴

As Dimgba argued, the transfer of key government assets without an effective competition regime in place might create a scenario where government monopoly will give rise to private monopoly.⁵ The new players in a market economy have profit as their main aim and so nothing will stop them from going the distance in achieving their aim even at the detriment of the consumers.

Putting the above argument in perspective, we see the 2007 sale of two out of four of the local refineries (Port Harcourt and Kaduna) in Nigeria to a single entity,⁶ Blues Star Consortium in the twilight of President Olusegun Obasanjo's administration. This sale was

⁴ Pham (n 3 above)

⁵ N Dimgba "The need and the challenges to the establishment of a competition law regime in Nigeria" http://www.academia.edu/8822080/The_Need_and_the_Challenges_to_the_Establishment_of_a_Competition_Law_Regime_in_Nigeria (accessed 20 April 2016)

⁶ <http://uk.reuters.com/article/nigeria-refinery-idUKL2854224220070528> (accessed 06 May 2016)

done even with the presence of other bidders but it was said that the highest bidder got the sale. This sale was a recipe for monopoly in the Nigerian downstream sector as the combined capacity of both refineries will bring about dominance of an entity which can further lead to its abuse. This situation would not have emerged if there was an effective competition regime in place to check the impact of such sale on competition and also the effect on the economy as a whole. As a matter of fact, there were concerns raised regarding the transparency of the entire process as carried out by Bureau of Public Enterprises (BPE) and in the early days of President Musa Yar'Adua, the sale was reversed. With the presence of an effective competition regime, the sale would not have been sanctioned in the first place and there would not be any need for a reversal of sale.

Also, the recent deregulation of the Nigeria oil and gas downstream sector with the Federal Government removal of fuel subsidy⁷ will see the independent oil marketers having to source for foreign exchange for the importation of fuel into Nigeria as against getting foreign exchange from Central Bank of Nigeria (CBN). The deregulation is targeted at increased supply of fuel, competition and further driving down pump prices.⁸ Given the nature of corrupt practices that has been witnessed from these oil marketers,⁹ there is nothing to stop them from engaging in price fixing, hoarding and other anticompetitive practices in order to maximize their profits to the detriment of competition and consumer welfare. Having competitive regime in place to regulate the practices of these oil marketers is highly desirable in order for the benefits of deregulation to accrue to consumers.

4.3 Prohibition of cartels and other anticompetitive practices

Nigeria needs an effective competition regime in order to make some anticompetitive practices actual offenses under the law. The array of sector regulating bodies of competition in Nigeria does not cover offences such as abuse of dominance and cartel activities. Price fixing is a major a major practice of cartels and this can turn out to be injurious to consumers. As earlier noted cartels operate in such a way that raises prices and restricts output. There is

⁷ The Federal Government announced the removal of subsidy on petroleum products on 11 May 2016. See <http://dailypost.ng/2016/05/11/breaking-fg-finally-removes-fuel-subsidy-petrol-to-sell-for-n145litre/> (accessed 12 May 2016).

⁸ (n 6 above).

⁹ The independent oil marketers are said to take subsidy on petroleum products imported into Nigeria without actually bringing in any product into the country. They divert these products to other countries for sale after taking subsidy from the Nigerian government. See NNPC Threatens Marketers Over Products Diversion <http://allafrica.com/stories/201507220445.html> (accessed 12 May 2016).

no doubt that this will have a negative effect on consumers. The real sad story here is that market participants carry out these anticompetitive practices and they get away with them because technically, they have not broken any law.

There had been instances where violation of traditional competition offenses was let go because there was no legal basis for imposing any penalty due to the absence of competition laws in Nigeria. For example, in 2011, after extensive investigation by the Nigerian Civil Aviation Authority (NCAA), British Airways (BA) and Virgin Atlantic (VA) were fined \$130 million and \$100 million respectively for fraudulent fuel surcharges on tickets for the Lagos-London route between 2004 and 2011. A panel set up to look into the imposition of the fine set aside the fine on the grounds that the NCAA did not have the power to impose such fine. Meanwhile, for the same offence, both airlines have already pleaded guilty and have been fined in the United States (US) as they were in breach of antitrust laws¹⁰. VA was exempted from paying the fine in US because they blew the whistle on the price fixing arrangement. In their defense, both BA and VA said they have not broken any Nigerian law.

From the above incident, it is evident that the absence of competition law and a competition authority to effectively deal with such anticompetitive practices often result in the hurting of Nigerians and otherwise cause national embarrassment.

Closely related to the above illustration is the danger that can arise from the anticompetitive practice from the other side of the border. As there is no international framework for the enforcement of competition law on a global level, countries resort to national competition laws as a tool of checking these anticompetitive practices that can originate from one jurisdiction and have its detrimental effect in another. Commenting on this situation, Laura Ani said;

Nigeria is evidently a safe haven for international cartels, being that we have no competition law policy in effect. How do we engage in bilateral agreements with foreign counterparts when we have no law in force. It is obviously a free jungle of anti-competitive agreements, where offences can go simply unpunished. There is an urgent need for a reorientation on the benefits of competition law policy as ignorance has been the lurch for the implementation of an effective policy.¹¹

¹⁰ British Airways and Virgin Atlantic to pay \$200m in fuel cartel lawsuit *The Telegraph* 16 February 2008 2. See also

<http://www.telegraph.co.uk/finance/newsbysector/transport/2784475/British-Airways-and-Virgin-Atlantic-to-pay-200m-in-fuel-cartel-lawsuit.html> (3 May 2016).

¹¹ L Ani "Rethinking Competition Law And Policy: Building A Framework For Implementation In Nigeria" <http://www.nials-nigeria.org/journals/Laura%20Anibus.pdf> (accessed 24 January 2016).

Given the rise in globalization and cross border nature of business in recent times, there is no doubt that anticompetitive practice will also have a far reaching effect across the borders. Having a competition regime in place is actually expedient to address the effects of such cross border anticompetitive practices.

Furthermore, there have been concerns raised by regulators and stakeholders of the cement industry in Nigeria of possible infringement by the major cement producers in the country. Nigeria has four major cement producers namely Dangote, Lafarge, Ibeto and BUA cement. Dangote has a market dominance of 60% of the cement industry, Lafarge has 30% and both Ibeto and BUA have a combined market share of 10%.¹² The absence of competition law in Nigeria have not created a proper framework of for the investigation and prosecution of any infringement done by these players but the trend in the world shows that there is a high level of collusion, price fixing, market sharing and restriction of output amongst cement producers.¹³ Lafarge has been fined in over four countries for engaging in anticompetitive conducts.¹⁴ What is to stop them from committing such in a jurisdiction that has not out rightly prohibited these competition lessening conducts? Moreso, even though it has not been proven, the stakeholders are of the opinion that cement price in Nigeria is way higher than what it should normally be.¹⁵ The presence of competition law in the country would serve as a tool to right any wrong that might abound in any particular industry given the powers that are attached to the competition regulation authority.

4.4 Revenue prospects

Another closely related link is the revenue generation prospect of having a competition law and competition authority in place. One of the ways and in fact the most popular way competition authorities punish offenders is by levying of fines. In 2014, competition authorities across the world levied a total of \$5.3 billion dollars.¹⁶ These fines are principally levied on cartels that engaged in one form of collusion and price fixing. In the EU, fines that

¹² C Osagie 'Of Regulators and Operators' Infractions in Nigeria's Cement Industry' <http://west.totally-concrete.com/news-and-media/media-centre/news/item/of-regulators-and-operators-infractions-in-nigeria-s-cement-industry> (visited on 15 May 2016)

¹³ (n11 above)

¹⁴ (n 11 above) Lafarge and three other companies were fined in Europe for de-marketing and anticompetition offences. Lafarge and three other cement companies were also fined \$1.4 billion in Brazil for engaging in cartel activities that cost the consumers over \$6 billion.

¹⁵ (n 11 above)

¹⁶ C Binham 'Global fines for price-fixing hit \$5.3bn record high' 6 January 2105 <http://www.ft.com/cms/s/0/83c27142-95a8-11e4-b3a6-00144feabdc0.html#axzz48xp4ehqZ> (accessed 30 April 2016)

have been levied on cartel conducts as at 6 April 2016 runs to ₦ 142 983 000 with a cumulative of ₦ 5 737 514 000 from 2012-2016.¹⁷

The fines levied against the cartels is a source of revenue for the government and monies realized from such fines can be used by the government to further enhance the capability of the competition authority and make the competitive regime work better. Also these monies can be used to fund other parts of the economy. The sole decision of what to do with the funds lie with the government, the main point is that funds were realized by levying cartels and that is only made possible by having a fully functional and efficient competition regime and competition authority in place.

With Nigeria not having a competition regime in existence, there is no doubt that the cartels are getting away with anticompetitive practices and the fact that they go unpunished hurt the consumers, it also translates into loss of revenue for the government. In the instance of BA and VA sighted above, the government could have recorded \$230 000 000 in revenue from fines. The funds could have been used for a host of developmental purposes but alas, with the absence of a proper competition regime in place to make this possible, the consumers were hurt by having to pay more than they should normally have, the culprits went unpunished and the government lost revenue in the process.

4.5 Coherence and effective enforcement

As discussed above, having a competition law and competition authority will spell out the anticompetitive practices that are prohibited by the competition regime. This will in turn facilitate the enforcement of the competition law that exists in the adopting jurisdiction. Having a consolidated competition law will spell out the anticompetitive practices that the law prohibits making the law coherent and thereby not giving violators room to raise a defense of ignorance. In South Africa, the competition act clearly spells out the prohibited practices and the extent of coverage the act has.¹⁸ This has made it possible for the competition authority to investigate, prosecute and penalise different companies that were in violation of the law.¹⁹

¹⁷ EU cartel statistics <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> (accessed on 17 May 2016)

¹⁸ South Africa Competition Act 89 of 1998 Chapter 2 lists the prohibited practices to include restrictive horizontal and vertical practices, abuse of dominance and price discrimination.

¹⁹ On 7 August 2012 The Competition Tribunal imposed a penalty of R449 000 000.00 on Telkom SA Limited for abusing its dominance in the telecommunications market between 1999 and 2004, a period in which Telkom was a monopoly provider of telecommunications facilities. See http://www.comptrib.co.za/cases/complaint/retrieve_case/1448 (accessed 10 May 2016)

As noted in the case of BA and VA above, both airlines were able to get away years of price fixing and collusion without being penalised. Both airlines were fined in the US for the same offense. One can say, the investigation of NCAA into the matter denotes the fact that price fixing and collusion should normally be offences in the Nigerian market. Even with the NCAA finding both airlines guilty and imposing a fine, the absence of competition law and competition authority made it impossible for the fine to be enforced. The judicial panel's findings that said NCAA does not have the power to impose a fine exposes a lacuna that needs to be filled by the enactment of a competition law which will facilitate its enforcement.

Furthermore, having a competition law and a competition authority will provide for the private enforcement of competition law. The practice in jurisdictions such as the US and South Africa provides for private enforcement whereby individuals or a class of individuals that have suffered injuries due the anticompetitive conducts of companies make recourse to the court of law to institute a civil action against the companies.²⁰ The relief granted to the plaintiffs is normally in form of damages, restitution, nullity, injunctions and interim reliefs.²¹ Private enforcement serves as a means of redress to the injured individuals that public enforcement cannot achieve as damages awarded in such legal actions accrue to the litigants and not the government. Private enforcement is also meant to serve as a deterrent factor to companies or entities that are engaging or intending to engage in anticompetitive practices due to the huge sum of awards given in such cases. In the US, the courts are empowered to make "treble damages" award which in essence means the courts can award up to three times the amount it would normally have if a party is found guilty of violating antitrust laws.²² In South Africa, the courts are not allowed to award punitive damages but damages could be awarded in excess of 10% of the turnover of the respondent as stipulated by the Competition Act's administrative penalty.²³ More so, parties claiming civil damages can only do so after the competition authority have ruled on their findings on the matter.²⁴

²⁰ K Huschelrat & S Peyer Public and Private Enforcement of Competition Law A Differentiated Approach <http://competitionpolicy.ac.uk/documents/8158338/8235394/CCP+Working+Paper+13-5.pdf/86d76261-eda5-4de7-af2a-51d9684e0c45> (accessed 15 April 2016)

²¹ (n 15 above)

²² (n 15 above)

²³ K Moodaliyar et al "The Relationship between Public and Private Enforcement in Competition Law - A Comparative Analysis of South African, the European Union, and Swiss Law" <http://www.compcom.co.za/wp-content/uploads/2014/09/The-Relationship-between-Public-and-Private-Enforcement-of-Competition-Law-SA-EU-CH.pdf> (accessed 29 March 2016)

²⁴ (n 18 above)

The absence of competition law and competition authority in Nigeria does not give room for private enforcement of competition law which is deemed to have a deterrent effect on cartel participants and above all provide compensation for the injured parties of cartel activities.

4.6 Seasoned professionals to effectively administer competition law

The establishment of a competition authority to administer an enacted competition law will see the engagement of seasoned professionals specifically trained in competition matters to run the authority and therefore be effective in dealing with competition matters. Legal practitioners, economists and other administrative staff well versed in competition issues will be employed to do the bidding of the competition authority thereby ensuring the effectiveness of the competition regime.

Furthermore, the enactment of a competition law and establishment of a competition authority will avail Nigeria membership of international competition bodies such as International Competition Network (ICN), where a lot can be gained in form of information sharing and the trend on international best practices in competition matters all around. ICN is a virtual network of competition authorities all over the world that come together to discuss competition policy and enforcement issue with regards to best international practices.²⁵ The organization also presents a platform for convergence and cooperation with the aim of promoting effective enforcement in the global antitrust community.²⁶ The organisation has 132 members from 119 jurisdictions who come together to find practical solutions to competition policy and enforcement issues.²⁷

Nigeria will definitely benefit from having a competition agency membership in the ICN as it will help foster relationship with other competition agencies around the world and compare notes on practical ways of dealing with competition issues locally. More so, there will be a greater deal of cooperation with other competition agencies from other jurisdictions that has a market participant engaging in anticompetitive conduct in both jurisdictions. This will speed up investigation processes and provide evidence of cross border anti-competitive conducts.

²⁵ <http://www.internationalcompetitionnetwork.org/about.aspx> (3 May 2016).

²⁶ (n 24 above).

²⁷ Membership of ICN is comprised of competition agencies all around the world from both developed and developing jurisdictions. <http://www.internationalcompetitionnetwork.org/members/member-directory.aspx> (3 May 2016).

4.7 Enhanced consumer protection

Consumer protection and competition law are both sides of the same coin as both concepts though distinct, ultimately have the same aim of consumer welfare.²⁸ Both consumer protection and competition seek to ensure that the consumer is provided with an array of competitively priced goods and services in the market.²⁹ The relationship between consumer protection and competition law is further evident in that consumer protection aims to protect consumers' ability to choose among the options, unimpeded by artificial constraints like deception or withholding of material information while in the same vein competition law to preserve a range of options in the marketplace, undiminished by artificial constraints like price-fixing or anticompetitive mergers.³⁰ In some jurisdictions, the same body administers competition law and consumer protection functions.³¹

In Nigeria, the Consumer Protection Council (CPC) is charged with the overall role of protecting the interest of consumers from the demand side. However, there are other various sector legislations that regulate competition and are supposed to ensure consumer protection,³² the situation abounds that these sector specific regulators are more concerned with the development and functionality of their respective sectors and the issue of consumer protection does not totally rank in priority. To this effect, the Director General of CPC noted that the disjointed approach to the regulation of competition by sector specific agencies will not have consumer protection as its guiding principle.³³ As government has noted that competition is a panacea for a wide range of anticompetitive conducts and also consumer welfare, hence competition law is necessary.³⁴ Having a competition law and competition authority will further ensure consumer protection because this is one of the underpinning aims of competition.

²⁸ N. Dimgba -Is There a Need for Competition Law in the interest of Nigerian Consumers? G.O Sodipo Memorial Lecture 1 December 2014 Lagos.

²⁹ (n 27 above).

³⁰ (n 27 above).

³¹ In the US, the strategic goal of Federal Trade Commission include: Protect Consumers: Prevent fraud, deception, and unfair business practices in the marketplace and Maintain Competition: Prevent anticompetitive mergers and other anticompetitive business practices in the marketplace. <https://www.ftc.gov/about-ftc> (accessed 12 May 2016), In the UK the Consumer and Markets Authority have the role of regulating competition and protecting consumer welfare in the market.

<https://www.gov.uk/government/organisations/competition-and-markets-authority> (accessed 12 May 2016)

³² Other sector regulators include NCAA for aviation, NCC for telecommunications, NERC for electricity and SEC for capital markets.

³³ D. Atoki -Consumer Protection and Competition Highlights (The Nigerian Situation) Fifth Annual African Dialogue Consumer Protection Conference Livingstone Zambia 10-12 September 2013.

³⁴ (n 31 above)

4.8 Regional competition authority

The Economic Community of West African States (ECOWAS) in a bid to further its commitment of regional integration through harmonization and coordination of socio economic policies as contained in Article 3 of the Revised ECOWAS Treaty,³⁵ adopted two additional Acts³⁶ on competition policy at the Conference of Heads of States and Governments of ECOWAS, at its thirty-fifth regular session held in Abuja on 19 December 2008.³⁷

Even though at the heart of the ECOWAS competition policy is regional integration,³⁸ the nature of operation of the competition authority is cooperative with national competition authorities.³⁹ In the administration of the ECOWAS competition policy and carrying out its duties, Article 3 of the Act provides for the ECOWAS Competition Authority (ECA) to cooperate with existing national competition authorities of member states.⁴⁰ Furthermore in the same Article, the ECA is to contribute to the training of the staff of national competition structures and provide them with support notably in the management of investigations, creation of a competition-related data base, advocacy on competition and consumer protection.⁴¹

From the above, we see that it is expedient for Nigeria, as a leading member of ECOWAS, to have a competition law and competition authority in order to be fully aligned with the provisions of the ECA. The situation of fragmented approach to the regulation of competition in Nigeria does not necessarily make a single entity available to interface with the ECA. Mention must also be made of the benefits that will accrue to Nigeria as a nation in that the ECA provides training to the personnel of the national competition authority and will share information on anticompetitive conducts of firms that even though might originate outside the border, will have effect within the country.

³⁵ Article 3 of the Revised ECOWAS Treaty provides for the harmonization and coordination of National Policies in the area of trade as a means of maintaining and enhancing economic stability within the sub region.

³⁶ The additional Acts are A/SA.1/12/08 adopting the Community competition rules and their application within ECOWAS and A/SA.2/08 establishing responsibilities and operation of the Regional Competition Authority of ECOWAS.

³⁷ African Competition Forum Newsletter issue 3, July 2014. See also http://www.africancompetitionforum.org/sites/default/files/docs/ACF_Third_Newsletter_English.pdf

³⁸ M. Ngom -Regional integration and competition policy in the Economic Community of West African States (ECOWAS) region in J. Drexel (eds) Competition policy and regional integration in developing countries (2012) 118

³⁹ Article 3(f) ECOWAS supplementary Act A/SA.2/12/08

⁴⁰ (n 37 above)

⁴¹ Article 3(k) ECOWAS Supplementary Act A/SA.2/12/08

4.9 Attraction of FDI

It is a generally accepted view that competition law inspires international confidence in an economy and thus attracts foreign direct investment (FDI) to that economy.⁴² Foreign investors will have confidence in an economy that has a coherent competition law in the sense that they will be assured of operating on a fair ground and that their investment will not be hindered, among other things, by anticompetitive conducts of local firms.

One of the policy aims of Nigeria in liberalizing the investment sector is to attract FDI. However, there have been concerns that despite the huge resource potential of the country it has not attracted a commensurate FDI inflow to match this potential.⁴³ Mr. Yuichi Ishimaru, Senior Vice President/Director of Marubeni Corporation and Member of the Honorary Presidential Advisory Council on Investment in Nigeria had identified, among other factors, unstable regulatory and institutional environment as major obstacles to economic growth and the flow of FDI to the country.⁴⁴ The possible effects of competition law on FDI inflow into Nigeria will be examined in the next chapter.

The enactment of a competition law will go a long way in ensuring certainty and transparency in the rules that guide the market conducts of both local and foreign investors in an economy.⁴⁵

4.10 Competition Advocacy

One of the functions ascribed to a competition agency in modern day is competition advocacy. As defined by the International Competition Network (ICN), competition advocacy is "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 to the benefits of competition."⁴⁶ Besides the role of regulating and enforcing competition, the competition agency also engages in activities such as scrutinizing the legislation for policies that might bring about or is responsible for distortion of competition in the market, promoting awareness on competition by conducting outreaches to the public by

⁴² Dingba (n 4 above)

⁴³ J. Bala "The challenges and opportunities of the investment environment in Nigeria" Paper Presented At The International Meeting For The Promotion Of Investment To Africa Organised By The Ministry Of Foreign Affairs Of Japan, At Mita, Tokyo, On 26 February 2003.

⁴⁴ (n 41 above).

⁴⁵ (n 40 above).

⁴⁶ SJ. Evenett "Competition Advocacy: Time for a Rethink" Symposium on Competition Law and Policy in Developing Countries (2006) 26 *Northwestern Journal of International Law & Business* 496

means of seminars, trainings, newsletters and media, also acquainting the judges and legislators about matters that are related to competition policy.⁴⁷ The reality competition advocacy deals with is that as much as market participants engage in anticompetitive conducts, government might also embark on policies that can disrupt competition in the market. The rationales advanced for the importance of competition advocacy includes the fact that intervention of government in market place can hinder the competitive process the market. Furthermore, competition advocacy also seeks to curb the influence of private organizations that seek government regulations that will serve their personal interests. Also connected with this is the prevention of enactment of anticompetitive regulations by discouraging lobbyist in the first place. This can reduce the risk of regulatory capture.⁴⁸

Without a competition law or competition authority in Nigeria, advocacy function is largely lacking. The lack of awareness of the stakeholders and the political class on matters of competition explains the reason the county is yet to enact a competition law till date. Government might continue to embark on policies that disrupt the competition process in the market, private entities will continue to make sure of this in order to serve their interest and consumers will be the ones to bear the brunt.

From the above, we can see the need for Nigeria to enact a competition law and establish a competition authority to effectively administer the competition law will go a long way in making the nation's competition policy coherent, transparent and largely enforceable.

4.11 Enacting a competition law

Enacting a proper competition law and establishing a competition authority would take more than just a legislative exercise. If a law is enacted but it is not seen to be fair in its administration and has no effective enforcement then the purpose of that law is defeated. One of the major challenges that face laws and policies in developing countries is its effective enforcement.⁴⁹

For a competition law and competition agency to be effective in Nigeria, it needs all the support from the government and also the stakeholders. The political will of the government should be evident in driving the legislation to be passed pursuant to the economic policies of the country. Furthermore, resources should be made available to the competition agency to

⁴⁷ Evenett (n 45 above) 497

⁴⁸ Evenett (n 45 above) 498

⁴⁹ OECD -Investment policy reviews: Nigeria(2015) 221.

help in making its mandate a success.⁵⁰ Resources in this regard include financial resources as the agency will need funds for its investigative and administrative functions, human resources in the sense that the authority will need seasoned legal, economic and administrative personnel for effective running of the agency.⁵¹

The competition agency should also be an independent body in order to ensure transparency, effective enforcement and interference from government in the administration of its duties. The transparency and independence of the agency will inspire confidence in the public, both local and foreign investors alike.⁵²

4.12 The South African experience

The South African competition regime is seen to be one of the most effective on the African continent and even in the world.⁵³ The competition regime came as a policy reform on the backdrop of South Africa's new democracy coupled with the need to enhance economic growth.⁵⁴ Furthermore, it is meant to pave way for better inclusion of historically disadvantaged South Africans in the economy by breaking market concentration and redistribution of wealth.⁵⁵ Ultimately, the competition regime is targeted at ensuring economic efficiency and consumer welfare.⁵⁶

The Competition Act 89 of 1998 (the Act) was enacted in 1998 and it took effect in 1999.⁵⁷ The Act deals mainly with two areas which are prohibited practices⁵⁸ and mergers.⁵⁹ In the Act, prohibited practices are further distinguished as restrictive practices (vertical and horizontal practices) and abuse of dominant positions.⁶⁰

In order to ensure its effectiveness and smooth administration, the Act provides for the establishment of three bodies that deal with investigation, hearing of competition matters and an appellate body that has the nature of a High Court.

⁵⁰ OECD (n 51 above) 222.

⁵¹ OECD (n 51 above) 223.

⁵² OECD (n 51 above) 224.

⁵³ R. Munshi -South Africa in global top 10 for competition policy *Financial Mail* 18 September 2013. See also <http://www.bdlive.co.za/business/2013/09/18/south-africa-in-global-top-10-for-competition-policy> (accessed 11 May 2016).

⁵⁴ OECD -South Africa-Peer review of competition Law and policy (2003) 17

⁵⁵ South Africa Competition Act 89 of 1998 (preamble)

⁵⁶ (n 56 above)

⁵⁷ (n 56 above)

⁵⁸ Sections 4 & Section 5 of the Act defines restrictive practices.

⁵⁹ Section 12

⁶⁰ Section 6

The summation of the policy goals of the Act is that it seeks to promote a greater spread of business ownership so as to increase access to it by historically disadvantaged people.⁶¹ It also sets for itself the task of promoting employment so that the social and economic welfare of South Africans may be improved. It further seeks to provide consumers with competitive prices for goods and services. It prohibits trade practices which undermine a competitive economy. The underpinning element is economic efficiency and consumer welfare.

The structure of the South African competition regime ensures its independence from government interference and effective enforcement which is seen to be transparent, just and fair.

4.13 However, one size does not fit all

Developing and transitioning countries are perceived to have an advantage in the sense that they can imitate developed countries.⁶² The perception is that for a law or an institution to be successful in one jurisdiction that means that law or institution must be efficient. However, this practice of legal or institutional transplant should be approached with caution.⁶³ This is because there is always the inherent risk of a transplant effect where there is a divergence between the social institution and the socioeconomic matrix of the recipient country.⁶⁴ A law or an institution that is successful in one jurisdiction is a product of its history and idiosyncrasies tailored to address specific issues.

Experiences from the adoption of competition regimes all over the world shows that the most successful ones are those that are enacted to deal with issues that are peculiar to that particular jurisdiction that is adopting a competition policy.⁶⁵ The unique challenges and needs of the recipient nation should be targeted with the enactment of such competition law.⁶⁶ The situation subsists that the recipient nation is at a varying degree of development from the original nation.⁶⁷ Furthermore, the recipient nation might have different policy goals from that of the originating nation.

⁶¹ Competition Commission of South Africa v Senwes Ltd 2012 7 BCLR 667 (CC)

⁶² G Garzarelli & K Lloyd 'All that glitters is not gold: An essay on a competition law transplant' <http://www.compcom.co.za/wp-content/uploads/2014/09/garzarelli.lloyd.mandela.draft.pdf> (accessed 15 May 2016)

⁶³ Garzarelli & Lloyd (n 66 above)

⁶⁴ Garzarelli & Lloyd (n66 above)

⁶⁵ Waked (n 1 above)

⁶⁶ Waked (n 1 above) 80

⁶⁷ Waked (n 1 above) 81

In light of the above, competition law should be tailored such that it fits the legal culture and idiosyncrasies of the recipient nation in order to facilitates its acceptance and ensure it compliance and enforcement.⁶⁸

4.14 Conclusion

The liberalization of the Nigerian economy lacks the concomitant competition policy and competition law to protect competition and ensure the resultant benefits of an open market policy. From the discussion above, it is obvious that enacting a competition law in Nigeria will not only bring about market efficiency and consumer welfare but other benefits such as revenue generation and the promotion of competition culture in the country through development of seasoned professionals and competition advocacy.

The South African competition regime has proven to be effective in its administration and enforcement hence Nigeria will be well off to borrow a leaf from South Africa in enacting a competition law and establishing competition authority to effectively administer the competition law.

However, care should be taking in merely transplanting the South African competition law or any other competition law for that matter in order to avoid transplant effect. In enacting a competition law for Nigeria, the peculiarities of the Nigerian industries, culture and idiosyncrasies should be factored in to the process as one size does not fit al

⁶⁸ Waked (n 1 above)

CHAPTER FIVE

THE EFFECTS OF A CONSOLIDATED COMPETITION LAW ON FDI INFLOW TO NIGERIA

5.1 Introduction

In concluding the previous chapter, we see that administration of competition law in Nigeria is fragmented, evident in the piecemeal legislations that saddle sector specific regulators with the responsibility of such administration. This approach has been found to be largely ineffective. The previous chapter further highlights the attempts that have been made to enact a consolidated competition law in Nigeria and also the challenges that can be encountered before and after enacting a competition law and establishing a competition regulating authority drawing on its peculiarity as a developing country.

This chapter will access the link between competition law and FDI and further check the effect of having a consolidated competition law on the inflow of FDI in Nigeria.

5.2 The link between competition law and FDI

Literature suggests that there is a link between FDI and competition laws. Noland finds that barriers to FDI stem from general economic conditions and specific governmental policies that facilitate anti-competitive conduct of private actors.¹ Such finding suggests that government competition policies can both constrain or trigger anti-competitive conduct which has an impact on FDI. The impact of competition policy on FDI was also studied by Oliveira, Hochstetler and Kalil. The authors studied how Brazil's competition policy affects FDI. They found that there is a positive association between the development of competition policy and FDI inflows.² The result is consistent with Clarke's finding according to which there is a positive correlation between the existence of competition law, its enforcement and FDI.³

¹ M Noland "Competition Policy and FDI: A Solution in Search of a Problem?" (1999) Institute for International Economics Working Paper.

² G Oliveira, R Hochstetler and C Kalil "Competition Policy and FDI: Possible Relationships Based on Brazil's Experience" (2001) 10 (1) *Transnational Corporations* 69, 87.

³ JL Clarke "Competition Policy and Foreign Direct Investment" In Fifth meeting of the European Trade Study Group in September.

Cook and Elliott explain the link between competition law and FDI. According to the authors competition law that deters domestic companies from concerted actions designed to reserve the entire home market for themselves would encourage foreign investors that intend to use the host economy not only as an export platform.⁴ Kennedy further develops this point. The author elucidates that when there are regularly enforced competition laws, potential investors will have instruments to fight local monopolies and cartels which abuse their position.⁵

In a word, the research suggests that there is a link between existence and comprehensive enforcement of competition laws and FDI inflows. There is, however, limited research on how exactly the character of competition law affects FDI. In this chapter the author argues that desultory and piecemeal competition law like in Nigeria does not properly contribute to attracting FDI in the country. The author thus attempts to show the necessity of adopting of a consolidated and harmonized competition law to establish transparent and predictive regime of competition to attract more foreign investors.

5.3 Rule of law

Prior to discussing the necessity for consolidated and harmonized competition law, one should turn his or her attention to a more generic concept of rule of law. The point is that clear and transparent legislation is one of the principles on which the concept of rule of law stands. According to Raz, the rule of law stands upon the following principles: (1) prospective character, openness and clearness of all laws; (2) relative stability of laws; (3) particular law-making should be subject to open, stable, clear, and general rules; (4) the guaranteed independence of judiciary; (5) observance of principles of natural justice; (6) easy access to courts; (7) crime-preventing agencies should not be allowed to pervert the law.⁶

In the context of the present paper, the principle of prospective character, openness and clearness of all laws is especially relevant. Raz explains the openness of law in the following manner. The author writes that "the law must be open and adequately publicized"⁷ He further elucidates why it is important to have open and publicized law: people should be able to find out what the law is.⁸ He adds that the meaning of the law should be clear.⁹ Raz points out that

⁴ SJ Evenett 'Links Between Development and Competition Law in Developing Countries'(2003) Manuscript, Oxford University.

⁵ KC Kennedy 'Foreign Direct Investment and Competition Policy at the World Trade Organization'(2000) 33 *The George Washington International Law Review* 585, 599.

⁶ J Raz 'Rule of Law and its Virtues'(1977) 93 *Law Quarterly Review* 195.

⁷ Raz (n 6 above).

⁸ Raz (n 6 above).

⁹ Raz (n 6 above).

vague and obscure law is likely to confuse or even mislead those ones who are to be guided by it.¹⁰

At this point one must heed to the requirement that people should be able to find out what the law is. This is, however, challenging when some phenomena, such as competition, is governed by the array of different laws. It can be the case that different aspects of a phenomenon are regulated by different laws. An average person may not be able to find out all the relevant rules. One may object that there are people whose profession is to deal with various aspects of laws, the lawyers. However, laws are not written only for lawyers. They are written for all people. Hence, according to the principle of openness and clearness, as stated by Raz, law should be so clear and open that an average reasonable person could find it out and comprehend it.

In a word, desultory and piecemeal legislation deters the rule of law. The reason is that such legislation makes the law more difficult to find out and understand. Moreover, it makes the law prone to inconsistencies. Clear and understandable law is one of the principles on which the concept of the rule of law stands. Juxtaposing this notion to the area of competition law, one may infer that it is impossible to establish the rule of law in competition without enacting clear and understandable laws. At the same time, competition legislation cannot be considered to be clear and understandable when they are not consolidated but rather represent an array of desultory rules.

5.4 Rule of law and FDI

There is a body of research that suggests that there is a positive association between the rule of law and FDI. Staats and Biglaiser studied determinants of FDI in Latin America. The scholars found that the rule of law is an important determinant of FDI. Specifically, they found that the countries with greater judicial strength and the rule of law receive higher inflows of FDI.¹¹

The data from the World Bank also shows that there is correlation between the rule of law and FDI. The following countries, among others, are indicates as having high level of the rule

¹⁰ Raz (n 6 above).

¹¹ JL Staats and G Biglaiser "Foreign Direct Investment in Latin America: the Importance of Judicial Strength and Rule of Law (2012) 59 (1) *International Studies Quarterly* 193, 202.

of law: Canada, the United States, Australia, and the UK.¹² All these countries enjoy high inflow of FDI. The amounts of FDI received by these countries in 2014 accordingly are (in US dollars): 57 billion, 132 billion, 46 billion and 45 billion.¹³ The following countries, among others, display low estimate of the rule of law: Argentina, Nigeria, Bolivia, and Afghanistan.¹⁴ In these countries the level of FDI is quite low. In 2014, Argentina received \$ 6 billion, Nigeria ó \$ 4.5 billion, Bolivia ó \$ 73 million, and Afghanistan - \$ 49 million.¹⁵

In a word, empirical evidence demonstrates that the rule of law is a significant factor in promoting FDI. It is interesting then to reflect on why the rule of law is important for FDI. Rule of law often means the strength and impartiality of legal system.¹⁶ Impartiality is essential for foreign investors. It signals that in a country with impartial legal system they will not be unduly discriminated. Furthermore, rule of law implies better legal institutions.¹⁷ The quality of such institutions (eg courts, tribunals etc) is also important for investors. These institutions may become instruments in investorsø attempts to protect their rights in a host country. The level of protection of rights is crucial because it determines whether and how an investor will collect the earned profit in a host country. If the level of protection is low, an investor would be likely to abstain from investing because of the high risks involved. Conversely, if the level of protection is high, an investor would feel that he has good chances to collect the profit earned and to do it in an efficient manner.

In simple terms, the relationship between FDI and the rule of law can be described as follows. Although the rule of law is not a vital determinant of FDI, it is a significant one. Its significance is supported by various empirical researches. The reason why the rule of law factor appears to be significant is that it has to do with a risk, which is important consideration when it comes to FDI. Few businesses would invest in highly risky environment. Lower risks attract investment. The higher the level of the rule of law is, the lower are political risks. Law shapes institutions and thus, strengthens the overall political environment. Finally, the higher level of the rule of law affords better protection to investors and thus, lowers other risks.

¹² World Bank -Worldwide Governance Indicatorsø
<http://databank.worldbank.org/data/reports.aspx?source=worldwide-governance-indicators>.

¹³ World Bank -Foreign direct investment, net inflows (BoP, current US\$)ø
<http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD>.

¹⁴ World Bank (n 17 above).

¹⁵ World Bank (n 18 above).

¹⁶ Y Kinoshita and NF Campos -Why does FDI go where it goes? New evidence from the transition economiesø (2003) William Davidson Institute Working Paper Number 573.

¹⁷ Kinoshita and Campos (n 21 above).

As it has been pointed out, one of the principles on which the concept of rule of law stands is the principle of openness and clearness of all laws. In fact, Raz indicated it as the first principle. Without clear and open laws it is impossible to attain reasonable level of the rule of law. It holds true for country's environment in general and for certain areas specifically. As far as specific areas are concerned, it means that it is impossible to achieve reasonable level of the rule of law in competition sphere without open, clear and understandable competition laws.

5.5 Rule of law in Nigeria

Earlier it has been mentioned that according to the World Bank data Nigeria occupies low ranking when it comes to the rule of law. Unfortunately, the shift from military rule to democracy did not significantly enhance the overall situation with the rule of law. Akanbi and Shehu cite numerous instances of abuse of the rule of law in the country: exercise of power without constitutional authorizations and unconstitutional interference with legislative and judicial branches of government.¹⁸ Furthermore, John observes that many public servants in Nigeria tend to regard themselves as being above the law. The author goes so far as to state that Obasanjo's regime became an embodiment of executive lawlessness in the country.¹⁹ In addition, John points out that government often takes arbitrary decisions and defies the settled rules.²⁰ He exemplifies that in 2005 in the course of implementation of the Appropriations Law executive government essentially applied the Law as it saw fit without resort to Nigerian legislators.²¹ Among other instances of the abuse of the rule of law illegal arrests, detentions, harassment of civil rights campaigners are cited.

There is, however, periodic improvement with the rule of law. The World Bank's report on Nigeria indicates that the aggregate indicator of the rule of law increased in the period between 1996 and 2000 from 10.5 to 14.8.²² Then in 2002 the indicator fell sharply to 4.3. The period of recovery then followed: in 2008 the indicator rose to 14.4.²³ Next, there is a period of decline. In 2014, the indicator was 11.5.²⁴

What is surprising when it comes to literature on the rule of law in Nigeria is the lack of inquiry into the reasons of such state of affairs. Indeed, authors mainly focus on instances of

¹⁸ MAA Akanbi and AT Shehu "Rule of Law in Nigeria" (2012) 3 *Journal of Law, Policy and Globalization* 1, 7.

¹⁹ EO John "Rule of Law in Nigeria: Myth or Reality" (2011) 4 *Journal of Politics and Law* 211, 212.

²⁰ John (n 24 above), 213.

²¹ John (n 24 above), 213.

²² World Bank "Country Data Report on Nigeria 1996-2014" <<http://info.worldbank.org/governance/wgi/index.aspx?fileName=c161.pdf>>.

²³ World Bank (n 27 above).

²⁴ World Bank (n 27 above).

the abuse. There is no thorough investigation of why the rules are neglected. One may assume that one of the reasons could be that the rules are not clear and open. The ambiguity of the rules may allow government to interpret and apply them as it sees fit. In other words, it could be the case that an important factor that contributes to deterioration of the rule of law in Nigeria is that the principle of open and clear laws is neglected.

5.6 How Nigeria's competition law undermines the rule of law in competition sphere

According to the first principle of the rule of law, as pronounced by Raz, there must be open and clear general laws. As far as competition is concerned, in Nigeria there is no general law whatsoever. The absence of such law is utter violation of the principle.

To recall, the third principle of the rule of law stated by Raz stipulates that particular law-making should be subject to open, stable, clear, and general rules. The author further explains that there are two kinds of general rules that create framework for the enactment of particular laws. The first kind is the set of rules which vest necessary authority for making valid orders. The second kind is the set of rules that define the manner in which power-holders must exercise their power. Raz emphasizes that both set of rules are important in establishing a stable framework for creation of particular legal regimes.

Now look at existing competition laws in Nigeria. When one turns an eye at Nigeria's competition law, he or she cannot escape noticing the absence of any general legal framework. Competition rules are dispersed across industry-specific laws. Thus, some competition rules are contained in the Nigerian Communications Act 2003 (NCA), in the Electric Power Sector Reform Act 2005 (EPRSA), the Civil Aviation Act 2006 (CAA) and the Investment and Securities Act 2007 (ISA). However, there is no any general antitrust framework in Nigeria. Therefore, there is a situation when particular-law making is not subject to open, stable, clear, and general rules, since there are no general rules.

The absence of the general antitrust legislation undermines the rule of law in competition sphere in the following way. First, one must bear in mind that the nature of competition in any industry is the same. Businesses compete to maximize their profits. They can adopt various strategies. For instance, they may increase their market share by merging with other businesses. Also, they can set prices below the reasonable level so as to drive competitors from the market and then, after competitors have left, to occupy dominant position in the market and take advantage of such a position. Such practice is usually referred to as predatory pricing. The effect of some of the strategies is that they reduce the overall competition at the

relevant market. This is the point at which the law should intervene. In Nigeria, due to dispersed nature of antitrust rules, competition is treated differently in different industries. In other words, there is an odd situation. While competition is the same in any industry, it is yet treated in different, industry-specific ways.

Compare competition provisions in the NCA and the CAA. NCA prohibits anti-competitive conduct, although in very vague terms. Specifically, section 91 (1) states that a holder of communications license should not engage in any conduct which has the purpose or effect of substantially lessening competition in any aspect of the Nigerian communications market. The CAA does not contain any direct prohibition of anti-competitive conduct, even in vague terms. Yet, the Civil Aviation Authority is authorized to investigate and determine whether an air carrier in "unfair methods of competition in air transportation"²⁵ Furthermore, the Civil Aviation Authority is entitled to require an air carrier to submit a copy of every contract for leases, pooling or apportioning earnings and resources in order to prevent or eliminate "destructive, oppressive or wasteful competition"²⁶ It follows from these provisions that anti-competitive conduct is clearly a concern, but it is not directly prohibited as it is in the NCA. It appears it is the ultimate prerogative of the Civil Aviation Authority to decide whether the conduct is anti-competitive. In a word, there are two industries, communications and air transportation, in which competition is treated differently. As far as communications are concerned, anti-competitive conduct is directly prohibited. In air transportation, no such direct prohibition exists. Only indirectly, from the provisions regulating powers of the Civil Aviation Authority, it follows that anti-competitive conduct potentially can be subject to punishment.

A closer look at competition-related provisions in both acts reveals the utter violation of the openness and clearness of law principle. As far as the prohibition of anti-competitive conduct in NCA is concerned, it is unclear what constitutes "substantially lessening competition in any aspect of the Nigerian communications market" Section 91 (2) of NCA provides that the Communications Commission may from time to time publish regulations that clarify meaning of the "substantially lessening of competition" There are, however, uncertainties with publishing. To recall, Raz emphasized that it is important for the rule of law that people who are to be guided by it should be able to easily find the law. For this reason, there is

²⁵ Civil Aviation Act of 2006, sec 30 (4) (I).

²⁶ Civil Aviation Act of 2006, sec 30 (4) (g).

requirement for publication of laws. In the NCA, it is said that regulations made by the Commission are to be published on its website and at least in two widely circulating newspapers.²⁷ The first problem is that the newspapers in which the rules are to be published are not clearly determined. Wide circulation is a relative notion. In one region of the country newspaper A can be considered as widely circulating, while in another region newspaper B is widely circulating and A enjoys only marginal circulation. One may object that the provisions of the NCA mean that the rule is to be published in both A and B. However, there can be a region, where neither A nor B are widely circulating newspapers. Again, one may object that the law refers to national newspapers. Yet, such reference does not guarantee that in some region any of the two newspapers is widely circulating, despite being national. Another objection that can be made is that there is reference to the Commission's website. In the age of information technologies it seems to be odd to rely on newspapers. However, one must heed to the reality in which Nigerian people live. According to Internet World Stats, Nigeria belongs to low internet access countries.²⁸ Only half of the country's population uses the Internet.²⁹ It means that, as far as access to legislation is concerned, half of Nigerians have no other source but newspapers. The absence of clear determination of newspapers in which the rules of the Commission are to be published makes it difficult to discover and read the rules. Moreover, there can be an issue with timing. As it has been mentioned before, Raz argued that the laws should be prospective. Prospective character of law means that it should govern relations or aspects which emerge after the law has been enacted. The rationale behind such requirement is clear: the necessity of prediction. Suppose the legislators enacted the law prohibiting sale of alcohol after 10 PM. If the law had retrospective character, it would mean that anyone who sold alcohol before the law was enacted are in danger: they would be subject to sanctions for violating the prohibition. However, it is obvious that such a person could not foresee such a prohibition and thus it would be utterly unfair to impose punishment on her or him. The link with publication and prospective character of the law is that, as a rule, the law comes into force after publication. If the law is published in two newspapers, one is issued earlier than another, it becomes the moment when the law came into force is blurred. It is unclear whether it comes into force with the very first publication or with the last one. It may seem as technicality. Yet, this technicality may have dramatic impact on one's life. Turn to the earlier example with the prohibition of alcohol. Suppose the prohibition is published in two newspapers. One newspaper publishes the prohibition two hours earlier than another one.

²⁷ Communications Act of 2003, sec 157.

²⁸ List of Countries by Digital Access Index <http://www.internetworldstats.com/list3.htm>.

²⁹ Nigeria <http://www.internetworldstats.com/africa.htm#ng>.

It is known that the prohibition comes into force with publication, without any other clarifications. Some people may believe that the prohibition comes into force with the first publication, while others that it is enacted after the second one. Both points may be valid. At the same time, the unclarity is dangerous. The seller who sold alcohol after the first publication is in danger of being prosecuted, especially when there is an oppressive government.

Going back to the provision of the NCA which states that the Commission shall publish clarifications as to the meaning of "the substantially lessening of competition" one cannot escape seeing that inadequate publication rules do not make the process of regulation of the matter open and clear. Another violation of the first principle is vagueness set forth in the expression "any aspect of the Nigerian communications market". In general, the word "any" should be used in legislation with great care because it signals all-inclusiveness. The phrase "any aspect" renders extremely broad coverage. Virtually any matter can potentially fall under the concept of "any aspect". For instance, the sale of copper can be an aspect of Nigerian communications market: copper is used in wires which are part of equipment employed by telecommunication companies. Although the link between sale of copper and communications market is very remote, the concept of "any aspect" still covers even such remoteness. Therefore, the Commission may potentially regulate the sale of copper.

That the Commission potentially has long arms is confirmed by the provision set forth in s 91 (2) of the NCA. According to the provision, the Commission's guidelines may include references to the relevant economic market. Essentially, it means that the Commission is entitled to interfere not only to the communications market but also to the other relevant markets. Moreover, the Commission has the authority to make reference in its guidelines to any matter which it deems relevant. Hence, potentially no market is protected from the Commission's interference. All this makes the rules of competition extremely ambiguous.

To sum up, the existing competition rules in Nigeria undermine the rule of law in competition area in the following way. First, they utterly violate the principle of open and clear laws. As it has been demonstrated, competition provisions in the NCA and in the CAA are far from being clear. They are vague and ambiguous and leave wide room for conflicting interpretations. Second, they infringe the third principle according to which particular rules are subject to open, clear and stable general rules. The rules in the NCA and the CAA are particular rules. However, they are not subject to any general rules, save clear and stable general rules. The reason is there is simply no general antitrust framework.

5.7 Nigeria's competition rules and FDI

Earlier it has been established that the rule of law is a significant determinant of FDI. Hence, by undermining the rule of law in competition sphere, the existing antitrust rules deter the flow of FDI in Nigeria. There is, however, another way in which the absence of a consolidated and clear competition law deters foreign investment. Since there is no single legislative framework of antitrust law, there is also no single regulator that would take care of anti-competitive conduct. Instead, there are several regulators, including the Communications Commission and the Civil Aviation Authority. Each of the regulators has rather broad discretionary powers. The clear rules as to how these powers must be exercised are absent. Recall the authority of the Communications Commission. It may interfere in any market it considers relevant to the communications market. At the same time, the law does not place any limit for such interference. In other words, there are no clear rules determining the manner in and the extent to which the Commission is entitled to regulate other relevant market. Wide discretionary power coupled with the absence of clear rules of exercise of such a power is the invitation for corruption. It is widely known that corruption is one of the most pressing problems in Nigeria. The institutional roots of corruption can be found in legislative framework as it seen from the provisions of the NCA and the CAA. For instance, the Civil Aviation Authority has extremely wide discretion over air carriers. As it has been mentioned before, it is entitled investigating whether any air carrier uses unfair methods of competition. At the same time, the rules for such antitrust investigations are not set forth. Moreover, the Civil Aviation Authority is entitled to disapprove any contract ÷for leases, pooling or apportioning earnings, losses, traffic, service or equipment or relating to establishment of transportation fares, charges or classifications³⁰ The rules for disapproval are equally absent. Hence, there are plenty of opportunities for corruption. There is almost nothing that would constrain the Civil Aviation Authority for approving a pooling contract in exchange for some assets from an airline.

The existence of several regulators, their wide discretionary powers and absence of clear rules of exercise of the powers breeds corruption. Corruption in its turn has a negative impact on FDI. Al-Sadig finds that a one-point increase in the corruption level leads to a reduction in per capita FDI inflows by about 11 percent.³¹ Clearly to enhance the FDI inflow Nigeria must fight corruption. As far as competition is concerned, it should be done through adoption of a general antitrust framework with clear and unambiguous rules.

³⁰ Civil Aviation Act of 2006, sec 30 (4).

³¹ A Al-Sadig ÷The Effects of Corruption on FDI Inflows ÷(2009) 29 *The Cato Journal* 267, 268.

5.8 Conclusion

The research suggests that there is a positive association between competition laws and FDI. However, literature is mainly silent on how the nature and character of laws may affect FDI. In this chapter the author illustrated the link between FDI and the character of competition laws through the concept of the rule of law.

The first principle of the concept of the rule of law is that general laws should be prospective, open and clear. As far as regulation of competition in Nigeria is concerned, there no general laws whatsoever. There are only industry-specific rules set forth in such legislation as the Communications Act 2003, the Civil Aviation Act 2006, the Electric Power Sector Reform Act 2005 and the Investment and Securities Act 2007. The absence of the general framework of antitrust law is an obvious violation of the first principle. Moreover, the analysis of antitrust provisions in the Communications Act and the Civil Aviation Act reveals vagueness and ambiguity of the law. This is yet another violation of the first principle.

The third principle of the concept of the rule of law holds that particular legal regimes must be subject to clear and open general rules. Again, since there are no general rules of antitrust in Nigeria, the principle is infringed. The competition rules contained in the Communications Act and the Civil Aviation Act represent a particular regime. Yet, they are not subject to clear and general rules, since there are no such rules.

Finally, the desultory and piecemeal nature of competition rules breeds corruption. In the absence of a single regulator, there are several regulators that enjoy wide discretionary powers. Clear rules of exercise of such powers are absent. Hence, there is a large room for abuse and thus, plenty of opportunities for corruption.

Both the lack of rule of law and corruption adversely affect the inflow of FDI. The rule of law is important for investors to feel protected against various risks. Low corruption would mean that there would not be excessive burden and expenditure for foreign investors. Since competition rules as they stay now undermine the rule of law and breed corruption, they deter the inflow of FDI. Obviously, to change the situation Nigeria needs adopting a general framework of antitrust law with clear and unambiguous rules.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 Summary of findings

As a recap, this study revolves around the need for Nigeria to have a consolidated competition law that applies to every sector of the economy and also check the effect of having or not having such consolidated competition law on the inflow of FDI into the country. This is because Nigeria has adopted a host of economic reforms that is evident in the liberalisation of trade and investment; deregulation of vital sectors like oil and gas and telecommunications, and privatisation of key government assets that were formerly ran as government monopolies. The inflow of FDI is also a target of Nigeria's trade and investment liberalisation regime.

As noted, competition law is very essential in protecting competition and ensuring a fair and level playing ground for participants in a market economy. This will further ensure the realisation of the benefits of an open market which include economic efficiency and consumer welfare.

Furthermore, this study shows that the sector specific regulation of competition in Nigeria has proven to be ineffective as compared to other jurisdictions that have an all-encompassing competition law. This is because the sector specific regulation in Nigeria does not cover anticompetitive practises such as cartels and abuse of dominance on an industry wide basis. The lacuna created by the absence of an all-encompassing competition law has its adverse effect both on consumer and economic welfare.

Also in the wake of globalisation, anticompetitive practices have taken a cross boundary nature. In the absence of an international framework for regulation of competition, countries resort to national competition laws to tackle international anticompetitive practices that take place in their local markets.

In the absence of a competition law and competition authority in Nigeria's market economy, the country is a ground for anticompetitive practices that will create new dangers that might hinder optimal benefits of the liberalisation regime.

Chapter 2 talks generally on competition policy and competition law, how competition policy is the lifeblood of a liberalisation regime and how competition law is a tool of projecting competition policy. The history of competition law is briefly discussed, its functions in a

market is accessed while making to reference to advantages and possible dangers that it poses. Furthermore the major anticompetitive practices covered by competition law are discussed, and types of enforcement used by leading competition jurisdictions were discussed.

Chapter 3 examined the administration of competition in the Nigerian market through sector specific regulation. The regulating bodies of the electricity (NERC), aviation (NCAA), telecommunications (NCC) and capital market (SEC) sectors were accessed. Furthermore, the various attempts made at enacting a competition law in Nigeria were discussed; also the challenges that face Nigeria as a developing country to enact a competition law was discussed

Chapter 4 examined the peculiar needs of competition law in Nigeria. The chapter highlighted the need for a liberalisation regime to have a concomitant competition law, the revenue prospects; the prohibition of anticompetitive practices that the present sector specific regulations don't cover; the coherence of law and the enforceability of competition laws. Furthermore the chapter examined the role of advocacy in enacting and administering competition law. Finally, the chapter made reference to the structure of competition law administration in South Africa as a possible jurisdiction to emulate.

Chapter 5 attempted to create a nexus between a consolidated competition law and FDI and access the effect if lack of competition law on inflow of FDI to Nigeria. Here, the piecemeal nature of administration of competition in Nigeria was subjected to the concept of rule of law that provides for a body of law to be clear, precise and unambiguous. Furthermore, the chapter discussed the piecemeal and desultory nature of administration of competition law in Nigeria coupled with the large discretionary powers given to the sector regulators of competition as a possible means of breeding corruption.

6.2 Conclusions

This study has highlighted the fact that competition policy and competition law are essential elements required to facilitate the realisation of the benefits of a liberalisation regime. The role of competition in a market is to ensure economic efficiency and consumer welfare.

Nigeria lacks a consolidated competition law to effectively deal with anticompetitive practices that exist within its local market. This is seen to be risky in the sense that with the budding deregulation and privatisation regime in the country, entities that were formerly ran as government monopolies will end up in the hands of a few individuals and will create private monopolies. Furthermore, anticompetitive practices such as cartel behaviours and

abuse of dominance are technically not offenses in Nigeria as there is no law to curb them. This however does not mean that these anticompetitive practices do not continue to persist and continue to hurt consumers.

The discourse on the effect of competition law on inflow FDI into Nigeria shows that the sector specific regulation of competition in Nigeria has been found to be ambiguous and ineffective due to its desultory and fragmented approach. The large discretionary power given to the sector regulators is also a recipe for corruption. This has been found to have a deterrent effect on the inflow of FDI as investors are wary of corruption and ambiguous laws that concern their investments.

The conclusion is that Nigeria should waste no further time in enacting a consolidated competition law that will validly address all competition issues in the country as this is a very necessary component of the liberalisation regime in Nigeria. Citing the most recent liberalisation of the Nigerian downstream sector, the need to regulate competition is pressing in order to realise the associated benefits of an efficient industry and lower prices. This ultimately translates to consumer welfare. Furthermore, a consolidated competition law will curb anticompetitive practices such as cartels, which persist in the market and also allow for effective enforcement of the law. Finally, having a consolidated competition law in Nigeria will give foreign investors an advanced level of confidence in injecting capital into the Nigerian market.

6.3 Recommendations

In order for Nigeria to enact an effective and all-encompassing competition law that will cover all anticompetitive practices in the market and will ensure its effective enforceability, the following must be considered:

1. **Competition promotion:** There should be the establishment of a competition promotion office that will carry out the advocacy function of sensitising and educating the public; and equally lobbying the legislative on the uses and benefits of competition law within the market. This office should be made up seasoned legal practitioners, economist and administrative staff that are well versed in the field of competition. In final event of enacting a competition law, the competition promotion office can easily be converted into the competition authority. This will save a lot of time and start-up expenses and will enable the competition authority to hit the ground running.

2. **Inclusion in policy making:** In enacting the competition law, all the stakeholders should be represented in the policy decision making process. A policy document on competition law should first be drafted. In this process, the government, the businesses and the consumers should duly represented and should have had their concerns factored into the decision as this will make it have a smooth sailing when a bill is presented to the legislative house. Furthermore, when the law is eventually passed, it would have a high level of acceptance as a form of competition culture would have been instilled in all the stakeholders.
3. **Structure of the competition authority:** eventually when a competition law is passed and a competition authority is established, the structure of the competition authority must be set up in a way to guarantee independence from government interference and ensure effective enforceability of the law. To achieve this, Nigeria should emulate the structure of the South African competition regime. Just as competition is dealt with in South Africa, Nigeria should have a competition authority that will have three arms operating independently of each other.
 - a. Firstly, a competition commission should be established and vested with the function of investigating anti-competitive practices. This should see the engagement and training of legal practitioners and economists in the field of competition to effectively carry out their duties.
 - b. Secondly, a competition tribunal should also be established and vested with the adjudication of competition matters stemming from the competition commission. In achieving this, the minister of Trade and Investment should recommend seasoned economists and legal practitioners to be appointed as members of the tribunal where the members will have clearly stated years of service.
 - c. Finally, a competition appeal court should be established and be vested with the function of treating matters that are on appeal from the competition tribunal. The competition appeal court should have jurisdiction all over Nigeria like a regular Court of Appeal. Furthermore, there should be a program where judges would be trained and familiarized with competition issues in order to make them experts on such matters.

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