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# ANTITRUST AS A PANACEA FOR ECONOMIC DEVELOPMENT IN NIGERIA

Akinbola, Bukola R.\* & Uwadi, Enyinnaya C\*\*

## ABSTRACT

*Economic development aims at improving the wellbeing and quality of life of a community by creating and/or retaining jobs, supporting or growing incomes and the tax base. Free trade policies which create a high level of competition in the open market are necessary aids for economic development. On its part, Antitrust is a statutory and jurisprudential provision, through which public authorities preserve general welfare by preventing firms from limiting competition, creating monopolies, and charging excessive prices for their products. It aims to ensure the existence of competitive markets and guarantees that firms operating in the free market economy do not restrict or distort competition in a way to prevent the market from functioning optimally. From the foregoing, this paper examined the Nigerian antitrust regime and its import in the economic advancement of the Nigerian economy. The paper found that in developing countries including Nigeria, there is a paucity of antitrust legislation designed to protect consumers, promote free trade and commerce, and prevent unwholesome and unethical trade practices. With a well operated antitrust framework, Nigeria's economic growth will accelerate and gain better stability as well as increase consumer protection.*

## I. INTRODUCTION

Antitrust<sup>1</sup> is the law that regulates how individuals and firms compete with each other in the liberalised market place in order to prevent anti-competitive

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<sup>1</sup> In this paper, the terms antitrust and competition law will be used interchangeably throughout.

practices. It is a well-known fact that people (firms) put up their best act and antics once there is competition, hence the need to ensure that such will be in the interest of the market and consumers both in the long and short run. Competition, the process of rivalry between firms striving to gain sales and make profits, is the driving force behind markets. Efficient and fair markets are essential for catalyzing private sector development and economic growth. Yet, while markets work fairly well much of the time, effective competition is not automatic, and can be harmed by inappropriate government policies and legislation, and by the anti-competitive conduct of firms.<sup>2</sup>

In early 2016, there was a case of a petrol station that made vehicle owners and motorcycle operators buy a carton of bottled water and a bottle of water respectively as a precondition to sell their petroleum products, just because they were the major players in that location and sold the petrol at the government approved price. Thus, a person who desires to purchase petrol from the station must buy water alongside, not minding if such a person has a spring at home. One can still remember some years back when the major telecommunications operator in Nigeria tied the purchase of its simcard alongside a specified amount of recharge card. This connotes that a buyer of a simcard must buy the recharge card even if such a person doesn't need it, moreso in the case of the former. The above examples which makes the conclusion of a contract subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts is described under antitrust as an abuse of market dominance. The firms above were able to pull such anticompetitive stunts due to the absence of competition law in Nigeria.<sup>3</sup>

## II. CONCEPTUAL AND THEORETICAL FRAMEWORK

According to Brusick, P.,<sup>4</sup> developing and underdeveloped countries are characterised by the following:

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<sup>2</sup>Godfrey, N., "Why Is Competition Important for Growth and Poverty Reduction?", OECD. *Global Forum for International Development VII*. 27-28 March 2008, P?

<sup>3</sup>Dimgba, N., "Introduction to Competition Law: A Sine Qua Non to a Liberalised Economy", Rules Watch: Competition Legislation & the New World Order 24 – 26 May 2006. Lagos.

<sup>4</sup>Importance of Competition Policy and Law: Developing Countries' Perspective. UNCTAD DITC. Retrieved July 9, 2016 from <http://incsoc.net/ppt/ppt02.ppt>

- i. Inadequate infrastructures which are manifested by isle, land-locked states, poor communications which lead to segmented markets and local monopolies; segmented markets are prone to cartel formation, monopolies and reduce efficiency of independent business.
- ii. Low capital formation evident in high interest rates and lack of enterprise culture which ultimately leads to state monopolies & inefficiencies; state or private monopolies with excessive rents distort resource allocation, reduce efficiency and impair growth of small and medium enterprises.
- iii. Asymmetry of information, which infers that consumers are unaware of rights, total lack of competition culture. This leads to lack of entrepreneurial capacity as markets are foreclosed to new entrants by entrenched interests.

Many developing countries now prioritize economic development in their national poverty reduction strategies.<sup>5</sup> Since effective competition is a driver of productivity, antitrust should be an essential component of any development strategy targeted at poverty reduction. Significantly, competition accelerates greater equality of opportunity by eliminating the barriers to fair competition that often help to protect incumbent elites who may be generally efficient.

## **A. ANTITRUST (COMPETITION) POLICY.**

This is the combined effect of all government policies, which influence the level of competition in markets.<sup>6</sup> It is all encompassing as it entails all laws, regulations and institutions that regulate how firms compete with each other in an economy. Many factors influence the level of competition, and a holistic approach is needed to assess it. Barriers to competition stemming from inappropriate government policies or anti-competitive behaviour by firms are common in developing countries.<sup>7</sup> They diminish opportunities for innovation

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<sup>5</sup>*Op. cit.* (note 2)

<sup>6</sup>White, L.J., 2008. The Role of Competition Policy in the Promotion of Economic Growth. *LAW & ECONOMICS RESEARCH PAPER SERIES WORKING PAPER NO. 08 23*

<sup>7</sup>Stewart, T. et al, 2007. *COMPETITION LAW IN ACTION: Experiences from Developing Countries*. International Development Research Centre (IDRC).

and growth, and make consumers worse off. Markets are often dominated by big business with close ties to government, and more effective competition reduces opportunities for corruption and creates more space for entrepreneurs and SMEs to grow. Competitive public procurement increases the effectiveness of expenditure on publicly provided services, such as education and infrastructure. Effective and fair competition is not automatic. Sound competition policy can help markets work better, and is a key part of the investment climate that can help investor confidence, and provide a level playing field for domestic SMEs.

For markets to remain competitive there should be no unnecessary entry barriers, so that new firms can enter when they see business opportunities.<sup>8</sup> Barriers to exit should not be excessive, to allow firms to leave markets when they are unable to operate effectively. An effective competition policy should safeguard the rights of entrepreneurs to enter and to leave markets.<sup>9</sup>

#### **b. Antitrust and Economic Development**

The competitive process and the development process are so knotted as to be indistinguishable.<sup>10</sup> Competitive markets allow a nation's resources to be used to best effect in the production of goods and services. For example, both theoretical and empirical research has emphasised the productive and dynamic efficiency gains from competition.<sup>11</sup> Competition gives firms continuing incentives to make their production and distribution more efficient, to adopt better technology, and to innovate.<sup>12</sup> These sources of productivity improvement lead to development and poverty reduction.<sup>13</sup> The strength of competition is

<sup>8</sup>Dale, S., 2008. Competition and Development: The Power of Competitive Markets 'Case Study of South Africa'. IDRC

<sup>9</sup> *Ibid*

<sup>10</sup>Dube, C. Competition Policy and Economic Growth – Is There a Causal Factor? *Briefing Paper No 4/2008*. CUTS Centre for Competition, Investment & Economic Regulation

<sup>11</sup> Mark, D. and Aydın, H. 1999, Does more intense competition lead to higher growth? CEPR Discussion Paper. See also Nam-Kee, L., 2001, The Role of Competition Policy in Economic Reform - Based on the Korean Experience; Presentation Paper 1st OECD/GFC, Paris. FTC

<sup>12</sup> DIRECTORATE GENERAL FOR INTERNAL POLICIES POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY, 2013. The Contribution of Competition Policy to Growth and the EU 2020 strategy. Retrieved July 9, 2016 from <http://www.europarl.europa.eu/studies>

<sup>13</sup> A recent publication of the UK Office of National Statistics (2007) identified five key drivers of productivity. One was competition, while another, innovation, is strongly influenced by competition. Studies within DFID by Dollar and Kraay (2001) of the World Bank have shown a strong positive correlation between economic growth and poverty reduction.

also likely to influence a country's competitiveness, that is, the ability of its firms to compete in export markets, or against imports in its home market. The existence of a competitive environment in domestic markets is one of the most significant factors promoting the international integration of nations' industries.<sup>14</sup> For high productivity and development, the essential constituent is intense fair competition.<sup>15</sup>

### **C. ANTITRUST AND POVERTY ALLEVIATION.**

Poor people interact with the economy in several ways, thus governments must take responsibility for helping markets to function effectively for the poor, so that they enable choice, encourage innovation and provide goods and services to consumers at the most affordable prices. Since most of the poor are small and medium entrepreneurs, they need a fair and level playing ground to be able to compete effectively in an open market. They will benefit if entry and exit barriers are low. An appropriate competition policy should include measures to address all of these concerns.

Summarily, competition laws strive to achieve two things. First, to ensure that where competition already exists, that it would deliver the goods in terms of realizing all the efficiencies normally associated with it. This it achieves by laying down rules by which firms can compete in the market place. Secondly, that where competition does not already exist, that it would be encouraged to exist, by for instance, instituting structural remedies in a market that is unduly concentrated.<sup>16</sup>

### **III. ANTITRUST AND THE NIGERIAN EXPERIENCE**

Prior to 1990, the major sectors of the Nigerian economy which includes power, telecommunications, aviation, petroleum, railway, were nationalized with monopolistic structures, sole ownership and control residing in the hands of the Government. Unfortunately, these Government monopolies reportedly promoted large scale corruption and inefficiencies which inhibited growth to the detriment of the entire Nigerian economy.

<sup>14</sup>Broadman, H. 2007. *Africa's Silk Road*. Washington: World Bank.

<sup>15</sup>Lewis, W. 2004. *The Power of Productivity*. University of Chicago Press. P. 288

<sup>16</sup>Lipimile, G., *Merger Control in COMESA Member States: Approach and Practice*, paper presented at International Antitrust Law and Policy conference, Fordham Corporate Law Institute, New York, October 7 & 8, 2004; cited by Dimgba, N. *op. cit.*

The liberalization and privatization of some sectors of the Nigerian economy, especially the telecommunications and broadcasting sectors, starting from the 1990s, ushered in some competition from the private sector against previous public monopolies. The legislations which liberalised some aspects of the Nigerian economy also tried to introduce some minimal Antitrust and Consumer Protection Regulations.

Currently, there is no single competition law in Nigeria or a specialized competition authority.<sup>17</sup> What we have is industry-specific laws that seek to curb anti-competitive practices in the respective industries and give competition law powers to the sector regulators. These include: the Nigerian Communications Act (NCA) which empowers the Nigerian Communications Commission (NCC) to regulate competition in the telecommunications sector;<sup>18</sup> The Civil Aviation Act (CAA) which authorizes the Nigerian Civil Aviation Authority (NCAA) to promote competition in the aviation sector<sup>19</sup>; the Electricity Power Sector Reforms Act (EPSRA) which establishes the Nigerian Electricity Regulatory Commission (NERC) and sanctions it with antitrust regulatory power over the electricity sector;<sup>20</sup> the Insurance Act which empowers Nigerian Insurance Commission (NAICOM) to sanctions mergers in the insurance segment of the economy;<sup>21</sup> Securities and Exchange Commission (SEC) is mandated by the Investment and Security Act (ISA) which applies to all companies in Nigeria to determine if a merger approval will substantially lessen competition,<sup>22</sup> SEC is further empowered to order the breakup of a merger if such will distort market operations;<sup>23</sup> and finally the Petroleum Products Pricing Regulatory Agency Establishment (Amendment) Act which authorizes the Petroleum Products Pricing Regulatory Agency (PPPRA) to prevent collusion and restrictive trade practices harmful in the downstream petroleum sector.<sup>24</sup>

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<sup>17</sup>Dimgba N., *The Need and the Challenges to the Establishment of a Competition Law Regime in Nigeria*. Retrieved June 16, 2016, from <https://www.academia.edu/8822080/> *The need and the challenges to the Establishment of a Competition Law Regimen Nigeria/*

<sup>18</sup>S. 4(1) and S (90) of NCA

<sup>19</sup> S. 30 (4) of CAA

<sup>20</sup> S. 82 EPSRA

<sup>21</sup> S. 30 Insurance Act

<sup>22</sup> S. 121 (1) of ISA

<sup>23</sup>Section 128 of ISA

<sup>24</sup>S. 7 (j) PPPRA Act



In analyzing the effect of competition policy on development in the Nigerian economy, the telecommunications sector stands out amongst others, due to the low level of political interference as compared to the others.<sup>25</sup> One hardly needs to recount the revolution that the liberalization of the telecommunications sector has wrought in Nigeria in the past decade. In terms of access to, cost and variety of services available to average person today, there is no basis to compare with the days of Nigerian Telecommunication Limited (NITEL) fixed land lines or the analogue cellular phones. With the removal of NITEL's monopoly and the liberalization of the sector, we saw the advent of what has continued today as a fierce competition among the operators to win more or maintain their existing subscribers.<sup>26</sup> Deregulation without antitrust regulation in the sector heralded the exploitation of consumers by the dominant firms. One can still recall how MTN and ECONET (now Airtel) started with prohibitive prices for mobile phones and simcards with cost of calls per minute fixed at 50 Naira. This led to the introduction of competition to sustain the gains of liberalization of the sector, which heralded the entrance of Glo Mobile who kicked off by introducing the per second billing, crashing the cost of phone calls. Then Etisalat, Starcoms, Multilinks, Visafone, smile, spectranet, came with mouth-watering bonuses and data packages. Today, in spite of the prevalence of poor quality of services across all the operators, we have recorded a giant leap from where we used to be in terms of access to, cost, and variety of telecom services.

Furthermore the NCC in order to promote competition and more investment and development in rural areas developed guidelines under her Competition Practices Regulation which mandated network operators to share facilities in order to share the risk of investment. For example if Glo wants to operate in an area where MTN has already hoisted its mast, Glo can request MTN to allow it use the mast on the payment of a reasonable price, which MTN does not have a discretion to refuse such. By this we have noticed a decrease in the incessant erection of several masts in a location by different network operators. This singular act comes with several benefits which include environmental concerns, shared investment risks and increased investment especially in rural areas.

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<sup>25</sup>Uwadi, E.C., 2016. An Appraisal of the Antitrust Regulatory Framework in the Nigerian Energy Sector. (Unpublished LLM thesis submitted to the University of Ibadan)

<sup>26</sup>*Op. cit.* (note 21)

In furtherance of its mandate to promote an efficient telecommunications sector, the NCC introduced the mobile portability scheme, wherein a dissatisfied customer of a network operator can port to another network and still retain his number. This spawned more competition as network operators started wooing their customers to retain them by giving out special bonuses at regular intervals, reducing the cost of data subscription and increasing the quantity of data for each purchase

In terms of growth, Nigeria is ranked the largest and fastest growing telecom market in Africa and among the ten fastest telecom growth markets in the world, an indication of its robustness to return on investments.<sup>27</sup> From a private sector investment of about US\$50 Million in 1999, the telecom industry in Nigeria has by end of 2009, attracted more than US\$18 Billion in private sector investments, including Direct Foreign Investment.<sup>28</sup> More than N300 Billion has been contributed to the coffers of the Federal Government through Frequency Spectrum sales, enabling government to plough back revenues earned from the sector for provision of development infrastructure at the various levels of government.

The impact of this on the economic growth has become impressive. Telecommunications sector now contributes significantly to the Gross Domestic Product, (GDP) which was hitherto dominated by the oil and gas sector.<sup>29</sup> The percentage share of GDP from the sector rose from 0.06 in 1999 to 3.66 by end of 2009.<sup>30</sup> It may be important to add that the recent devaluation of the naira against the dollar did not substantially affect the uptake of mobile services by the Nigerian subscribers as the monthly growth rate of active subscription averaged at about 1.2 million is still obtainable.<sup>31</sup>

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<sup>27</sup> Juwah, E., 2011. TELECOMMUNICATIONS BUSINESS IN NIGERIA: HOW FAR? Paper Presented by the Executive Vice Chairman of the Nigerian Communications Commission (NCC) Dr. Eugene Juwah, At The International Communications Lecture Organized By The Nigeria/Swedish Chamber Of Commerce, On Friday, April 8, 2011, At The Commerce House, Victoria Island, Lagos.

<sup>28</sup> *Ibid*

<sup>29</sup> *Ibid*

<sup>30</sup> *Ibid*

<sup>31</sup> *Ibid*

The growth in the telecommunications sector has had significant impact in the other sectors of the economy. The financial sector is perhaps, the one whose activities have been deepened much more by telecommunications, than any other activity in recent times. In commercial banking services, the quantum of transactions catalyzed by telecommunications services may yet be captured and it is doubtful if any bank in Nigeria is not a major beneficiary. In the improvement of investment portfolio, the financial sector has done tremendously well as most banks are involved on one loan syndication or another. The recent one being syndication of US\$650 Million by eight Nigerian banks, for the mobile operator, Etisalat in March 2011.

In facilitating banking transactional services, the telecommunications industry has provided the bedrock for the finance industry. Electronic banking facilities such as ATM services, online financial transactions, international credit and debit card facilities, airline ticketing and reservations, are some of the numerous ways that telecommunications industry has aided the growth, sophistication, security and quick transactions in the Nigerian financial sector.<sup>32</sup>

Economists also have been trying to quantify the volume of employments brought about by the telecommunications industry as many skilled and less skilled Nigerians have found succor on direct and indirect employments opened up by the telecommunications industry.<sup>33</sup> With the little capital required for starting a phone repairing, recharge card selling or phone booth operation, millions of jobs have been created by this sector. Looking around the cities, towns and even villages one will hardly walk about two poles without seeing a business center mainly characterized by the use of umbrellas, kiosks and even shops painted with the colors of the mobile service providers. This has provided a means of livelihood for many people who would have been unemployed; some have also learnt the technical aspect of the business by repairing and fixing of mobile phones in their repair shops.

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<sup>32</sup>Emmanuel, O.S and Adebayo, A.A., 2011. ICT's Service Delivery and Operational Performance in Nigerian Banks. A Survey of Empirical Research. An International Multidisciplinary Journal, Ethiopia. Vol. 5 (4). 44-49

<sup>33</sup>Fakandu, A. M. and Kpakiko, M., 2013. Economic Impact of Telecommunications and Poverty Reduction in Nigeria. Journal of Social Sciences and Public Affairs. Vol. 3: No. 2

Furthermore, the impact is also felt in the way businesses are being done these days, it has reduced the risk and cost of traveling long distances, since one can be in his house and actually attain to the business using his mobile phone. This has made everyone ubiquitous. Businesses are being done nowadays at the speed of thought like Bill Gates envisaged. Cooperate Organizations like the banks for example; have integrated mobile phone technology into banking operations known as Mobile banking where a customer has full access to his or her account using the mobile phone or device. Examination bodies and educational institutions have also employed this technology too where candidates check their results on their mobile phones, the internet can also be accessed from the mobile phone and other value added services like picture messaging, music downloads amongst others, giving the users a beautiful experience.<sup>34</sup>

In 2012, NCC carried out an assessment of the level of competition in the communications industry, at the end of the said assessment, NCC issued Determination of Dominance in Selected Communications Market (DDSM) in Nigeria on April 23, 2013.

In terms of the DDSM, the NCC determined that the mobile voice market in Nigeria was not effectively competitive. MTN Nigeria<sup>35</sup> was identified as the dominant operator, as it had about 44% market share of the subscribers. NCC also determined that MTN Nigeria had a wide differential of 300% between on-net and off-net calls with the effect of a likely establishment of a calling club for its subscribers. Pursuant to Section 92(4) and Regulations 25 and 34 of the Competition Regulations NCC resolved that's the difference between the on-net and off-net tariffs be collapsed forthwith, until further review by NCC.<sup>35</sup>

According to a study,<sup>36</sup> telecommunications facilitates economic development as it provides easy and effective communication needed to stimulate and promote trade between Nigeria and its foreign partners in the world. Even at home, it plays a significant role in disseminating government programmes. Above all, it encourages investment which in the long run promotes employment

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<sup>34</sup>*Ibid*

<sup>35</sup> Banwo & Ighodalo. An Analysis of the Competitive Regime in the Nigerian Telecommunications Industry. Retrieved May 31, 2016, from [www.banwo-ighodalo.com](http://www.banwo-ighodalo.com).

<sup>36</sup> Balogun J., 2000. Impact of GSM on Economy and Development. Centre for Culture and Technical Interchange between East and West. Gwagwalada Abuja.

opportunities. Additionally, our social life has also been impacted on, relationships with friends, relatives and loved ones are kept alive through telecommunications revolution in Nigeria occasioned by opening up the sector to antitrust regulation.

#### **IV. COMPARATIVE STUDIES ON ANTITRUST AND DEVELOPMENT**

##### **i. The European Union**

In the late 80's, the EU telecommunications sector was characterized by monopolies. This resulted in high prices for telephony services, lack of consumer choice and very often in an appallingly poor service quality throughout Europe.<sup>37</sup> Consequently, the EU Commission in accordance with the EU Treaty directed member states to open up their markets for, a directive which was unsuccessfully challenged by some member states in the European Court of Justice.<sup>38</sup> This decision resulted in liberalization of the telecommunications sector amongst member states for open access, and by 1998, the telecoms sector of EU states were fully competitive. The resultant effects were massive improvement in interconnectivity, lower call rates, high speed internet, competitive data bundles, as inefficient firms were phased out from the market.

Antitrust however did not solve all the problems, as telecom firms preferred to invest in urban areas which was more cost effective. To arrest the situation, the Commission adopted specific guidelines which mandated member states to provide public subsidies to firms willing to invest in rural areas, and the outcome was hugely successful.<sup>39</sup> This very positive outcome was due to a large extent by the fact that the Commission was able to deploy the full range of instruments at its disposal, coupled with the Commission's supra national authority which empowered it to keep its distance from 'vested interests in the sector',<sup>40</sup> which were mainly state owned monopolies.

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<sup>37</sup> Van der Wee, M., The importance of competition policy for the EU economy. Paper presented at Conference on "Competition Law and Policy & the Business Opportunity" Beijing, 28 November 2011

<sup>38</sup> *Ibid*

<sup>39</sup> *Ibid*

<sup>40</sup> *Ibid*

Generally, the EU does not treat anticompetitive conducts with kid gloves. In doing so, its goal includes open markets and wealth redistribution. Over the years, the Commission in furtherance of its powers heavily investigated and sanctioned erring firms like Microsoft and Google. In the case of **European Union v Microsoft, 2007**, Microsoft was fined \$1.44 billion for making windows media player the default media application, and internet explorer the default application for accessing the internet and this was held by the Commission as an abuse of dominant position in the market. This gave access to smaller firms to develop applications that could also function on Microsoft systems, like Opera, Mozilla Firefox, VLC player etc.<sup>41</sup>

Currently the searchlight of the EU is on Google for abusing its dominant power in the websearch in violation of anti-trust laws. This is the first of its kind in the tech industry.<sup>42</sup> In this manner, the EU has successfully entrenched and imbedded the goals of competition in their economy, thereby making dominant firms to adopt fair measures in their operations and by so doing, open up the market and create more jobs for smaller firms to compete effectively. This overall adds to the GDP of the EU.

## ii. Korea

During the 1960's and 1970's, the Korean economy was led by the government that employed an unbalanced, export-driven growth strategy. As a result, Korea attained remarkable achievements, including a 30-fold increase in the size of the economy and a 20-fold increase in national income over just two decades.<sup>43</sup>

However, those two decades were also characterized by policies that emphasized governmental protection and intervention, rather than competition in the domestic market. On top of that, there was very little foreign competition. The very dearth of competition led to distortions of market functions. Monopolistic and oligopolistic market structures and a concentration of economic power became prevalent.<sup>44</sup>

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<sup>41</sup> Uwadi, E. C & Omozusi A. 2015. The Need for the Introduction of Competition Law in the Curriculum of Nigerian Universities. AL PACI Magazine of CLASFON University of Abuja Vol. 2 p. 29

<sup>42</sup> Helft, M., Retrieved July 9, 2016 from [www.forbes.com/sites/miguehelft/2015/04/15/eu-v-google-what-each-side-is-saying](http://www.forbes.com/sites/miguehelft/2015/04/15/eu-v-google-what-each-side-is-saying)

<sup>43</sup> Nam-Kee, L., 2001, The Role of Competition Policy in Economic Reform - Based on the Korean Experience; Presentation Paper 1st OECD/GFC, Paris. FTC

<sup>44</sup> *ibid*

In order to address those problems, Korea embarked on economic reforms and shifted its policy direction in the early 1980's. The new policy line consisted of three pillars: autonomy, stability, and openness. Autonomy means stimulating competition in the domestic market, while openness refers to introducing foreign competition. It was also during this time that competition laws and the Korea Fair Trade Commission (KFTC) were established in Korea.<sup>45</sup>

KFTC did not limit its role to the traditional scope of competition policy. The KFTC made steady efforts to spread the principle of competition throughout the economy and also assumed the role of competition advocate,<sup>46</sup> so that government agencies would incorporate the principle of competition in their policies. Under the general competition law of Korea, each government agency is required to consult with the KFTC prior to enacting or revising any laws and decrees which could restrain competition. As a result many anti-competitive regulations have been filtered out. For example, in the fiscal year of 2000, 481 legislative measures were examined by the KFTC and 51 were revised upon advice of the KFTC.<sup>47</sup>

Moreover, during the process of the privatization of state owned enterprises, the KFTC acted to increase competition and ensure that privatization did not end up merely changing public monopolies into private monopolies. As such, the KFTC has faithfully carried out economic reform by propagating the principle of competition via enacting and enforcing competition laws, and extending its reach to solidify the market economic system.<sup>48</sup> In addition, the competition authority maintained its independence so that it could enforce competition laws rigorously and consistently within the framework of laws and principles. Furthermore, the KFTC was successful in developing a social consensus on the importance of competition policy throughout the public and private sectors and effectively coped with the conflict and tension that always arises in the course of reform. These achievements were possible because the chairman of the KFTC, is a member of the cabinet, and is entitled to advocate competition perspectives during the process of major policy making.<sup>49</sup>

<sup>45</sup>*Ibid*

<sup>46</sup>Jung, Y and Choi, G., 2015. Recent Developments in Korean Competition Law Enforcement. Retrieved July 9, 2016 from [www.competitionpolicyinternational.com](http://www.competitionpolicyinternational.com)

<sup>47</sup>*Ibid*

<sup>48</sup>*Op. cit.* (note 23)

<sup>49</sup>*Ibid*

**iii. South Africa**

The South African Antitrust regime is tailored in line with the country's historical background where the former apartheid regime imposed rigid barriers that severely limited the economic participation of racial groups categorized as blacks, coloureds, and Asians.<sup>50</sup> The country is bound by the legacy of an economy where, for over a century, power was concentrated in the hands of a few large white-owned firms. The current government is attempting to encourage broad-based ownership of enterprises and an environment of dynamic competition so that its competition law mixes considerations of purely economic efficiency with those of equitable wealth distribution and considers the particular needs of firms that are owned or controlled by previously disadvantaged racial groups.<sup>51</sup>

In this wise, the country's Competition Act adopted a three tier antitrust regulatory cadre namely; a Competition Commission that studies possible threats to open competition and makes recommendations; a Tribunal that weighs the arguments and produces rulings; and an Appeal Court that reviews and can overturn the Tribunal's verdicts.

The core objective of the Act<sup>52</sup> includes to provide all South Africans with the opportunity to participate fairly in the National economy, achieve a more effective and efficient economy in South Africa, provide consumers with competitive prices and product choices, promote employment and advance the social and economic welfare of South Africans.

The Competition Act is also designed to serve social objectives such as "promoting a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons."<sup>53</sup> The Act's public interest provision also allows the Competition Authorities to take into account the impact of mergers on employment, in a country where unemployment rates are among

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<sup>50</sup>This fact is captured in the Preamble to the Competition Act No. 89 of 1998

<sup>51</sup>*Op. cit. (note 8)*

<sup>52</sup>*Op. cit. (note 8)*

<sup>53</sup>S. 2 of the Competition Act

<sup>53</sup> *Ibid*



the highest in the world.<sup>54</sup> This aspect of the Act can be seen as a complement to a broader network of policies and laws known collectively as Black Economic Empowerment (BEE), where the term “black” is used to signify Africans, people of mixed race, and Indians. BEE aims to promote black ownership of businesses (through targets established in industry charters), transfer skills to and aid the advancement of blacks within companies, and encourage employment creation for the black majority.<sup>55</sup>

At first, firms were not taking the antitrust regime seriously as they were unsure of what constitutes and anticompetitive behaviour, but nowadays, they invest a lot of time, money and efforts to ensure they comply at all levels. This is a testimony of how effective the South African antitrust regime has been in generating more revenue for the government, creating jobs and redistributing wealth.

Flowing from the comparative studies of Nigeria, the EU, Korea and South Africa, the overall contributions of competition to national growth and development includes:

- i. **Increase in Efficiency and Productivity:** Companies that are faced with vigorous competition are continually pressed to become more efficient and more productive. They know that their competitors are constantly seeking ways to reduce costs, in order to increase profits or gain a competitive advantage. With that constant pressure, firms know that if they do not keep pace in making efficiency and productivity improvements, they may well see their market position shrink, if not evaporate completely. It is exactly this process of fierce competition between rivals that leads firms to strive to offer higher quality goods, better services and lower prices.

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<sup>54</sup> Forfar, D. and Jaftha, S. 2016. South Africa: Oil & Gas Regulation 2016. *International Comparative Legal Guide to Oil and Gas Regulations 2016*. Ed. A. Falach. London. Global Legal Group Ltd. Retrieved June 16, 2016, from <http://www.iclg.co.uk/practice-areas/oil-and-gas-regulation/oil-and-gas-regulation-2016/southafrica>

<sup>55</sup>*Op. cit.* (note 8)

- ii. **Spawns innovation:** In today's technology-driven world, innovation is crucial to business expansion. Innovation leads to new products and new production technologies. It allows new firms to enter into markets dominated by incumbents, and is critical for incumbent firms who want to sustain their market successes and stimulate consumer-demand for new products. Competition drives innovation. Without competition, there would be little pressure to introduce new products or new production methods. Without this pressure, an economy will lag behind others as a center of innovation and will lose international competitiveness.
- iii. **Restructuring:** Another benefit of competition is that it fosters restructuring in sectors that have lost competitiveness. Often times, it is difficult for governments to determine which sectors of the economy need to be restructured, which firms in those sectors should remain or should cease to exist, and when it is best to engage in such restructuring. Governments are subject to political constraints and pressures, which more often than not lead to sub-optimal decisions. The competitive process, on the other hand, is unbiased. It forces decisions to be based on market factors, such as demand, product uses, costs, technologies, rather than the asymmetric information in the possession of government bureaucrats. The competition for capital and other resources by firms throughout the economy leads to money and resources flowing away from weak, uncompetitive sectors and firms and towards the strongest, most competitive sectors, and to the strongest and most competitive firms within those sectors. In these ways, the very operation of the competitive process makes decisions on restructuring clear, and leads to the strongest and most competitive economy possible.
- iv. Furthermore, antitrust regulation can be a source of revenue generation to the government via heavy sanctions handed down to firms engaging in anticompetitive practices. The EU recently fined Google a record 3 Billion Euros the highest ever in the history of antitrust sanctions. Similar fines includes the 20.2 Million Euros fine handed to Ford Motors by the Spanish antitrust body in 2015, and 1899 Million Euros fine of Microsoft by the EU in 2007. Nigeria missed out on the opportunity to generate revenue from antitrust sanctions in 2006 when the NCAA's over \$200 Million US Dollars fine on both British Airways (\$135 Million Dollars)

and Virgin Atlantic Airways (\$100 Million Dollars) over for anticompetitive practices, was dismissed by the Justice Oguntade led appeal panel to determine the veracity of the fine. However it is worthy to note that the panel did not absolve the airline of the wrongdoings but was of the opinion that fine by NCAA was retrospective. The panel held that NCAA could not use the Civil Aviation Authority Act of 2006 to take action against the airlines for infractions committed between August 2004 and March 2006.<sup>56</sup>

One can imagine the revenue Nigeria will generate from antitrust fines if we had an efficient comprehensive competition policy that covers every sector of the economy, especially the petroleum, electricity, financial sectors amongst others.

It is quite surprising to note that despite the importance of competition discussed above and the economic benefits Nigeria derives from the promotion of competition in the telecommunications sector, she is yet to adopt a fully integrated antitrust that will promote competition in every sector of her economy. Though some might argue that the mere existence for competition law does not guarantee development, the obstacles hindering the development of a comprehensive antitrust regime in Nigeria will be briefly discussed.

## **V. CONSTRAINTS AND CHALLENGES OF ADOPTING COMPETITION LAW AND POLICY IN NIGERIA**

Generally, Nigeria seems reluctant to adopt competition laws. This stems from various challenges faced in adopting these laws. At the outset, enacting competition legislation was not considered a priority on her reform agendas. This is due to the high cost and low returns associated with adopting these rules compared to other reform-oriented policies, such as removing trade restrictions. The costs are related to the need to acquire, reform, or implement lacking administrative apparatuses, effective judiciary and appeal systems, independent investigating authorities, expertise, people with technical and legal skills.

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<sup>56</sup> Retrieved May 31, 2016 from <http://businessnews.com.ng/2012/02/10/panel-dismisses-ncaas-235-million-fine-against-british-airlines-despite-evidence-of-guilt/>

One of the critical challenges that face Nigeria is the high level of government interference in the economy.<sup>57</sup> This includes government-erected barriers to enter or exit the market, government monopolies, the various forms of subsidies granted by governments to loss-making enterprises, and government politicization of the administrative authorities in charge of applying and enforcing the competition rules.<sup>58</sup> In Nigeria, government play an active role in regulating and setting bureaucratic measures to be followed by firms to enter or exit the market, resulting in many instances in rigid barriers that cannot be surpassed. This in turn leads to rent-seeking behaviour, cronyism, corruption and favouritism. The economy is enmeshed in a 'Kafkaesque maze of control'<sup>59</sup> where large family owners often use their influence to limit competition and obtain finances from the government to alter the game in their favour.

To add to these challenges is the lack of data collection, especially necessary to define market shares. This is furthered by the lack of effective Statistic Offices of the public administration that may provide these kinds of information.<sup>60</sup> Also, Nigeria lacks a reliable administrative enforcement system and an independent judiciary, which can enforce the adopted models of competition rules,<sup>61</sup> the process of adjudicating is slow and in some cases almost a decade can pass before a final judgment.<sup>62</sup>

Higher levels of concentration, arguably the most powerful challenge for countries wanting to adopt a competition law, persist in Nigeria and some

<sup>57</sup> Osalor, P., Government Intervention and the Nigerian Economy: Present, Past and Future (Part 2). *Vanguard Newspaper November 13, 2011*. Retrieved June 22, 2016, from [www.vanguardngr.com/2011/11/government-intervention-and-the-nigerian-economy-present-past-and-future-part-2-2/](http://www.vanguardngr.com/2011/11/government-intervention-and-the-nigerian-economy-present-past-and-future-part-2-2/)

<sup>58</sup> Anichebe, J. & Alope, A., Overview of the Nigerian Electricity Industry (Roles, Responsibilities, Structure, Expectation). *Presentation at the Nigerian Power Sector Investment Forum – Lagos, Dubai, London, New York and Johannesburg*. Bureau of Public Enterprises. Retrieved June 22, 2016, from [www.nigerianelectricityprivatisation.com/wp-content/plugins/download-monitor/download.php?id=26](http://www.nigerianelectricityprivatisation.com/wp-content/plugins/download-monitor/download.php?id=26)

<sup>59</sup> Bhagwati, J., 1993. *India in Transition: Freeing the Economy*. Oxford. Clarendon

<sup>60</sup> Papahagi, M. & Sanchez-Ortega, L.A., 2010. Data Collection at the Subnational Level: Lessons from Nigeria, Africa's Giant. *International Finance Corporation SmartLessons, World Bank Group*. Retrieved June 6, 2016, from [www.goingbusiness.org/reports/case-studiessubnational/data-collection-in-nigeria](http://www.goingbusiness.org/reports/case-studiessubnational/data-collection-in-nigeria)

<sup>61</sup> Tobi, N., 1981. Judicial Independence in Nigeria. Heinonline. *International Legal Practitioner* Vol. 6(ii). 62

<sup>62</sup> Davies, A.E., 1988. Independence of the Judiciary in Nigeria: Problems and Prospects. *African Study Monographs*. Vol. 10, Issue 3. 125-136

developing countries. Developing countries have higher levels of concentration than those in industrialized countries.<sup>63</sup> Few firms dominate the energy sector and produce the majority of output. This reality necessarily stands in the way of adopting and enforcing a competition law, especially one that is not favourable towards high concentration levels. The reasons for these high levels of concentration include high barriers to entry and exit low purchasing power which leads to less number of operating firms.<sup>64</sup>

Furthermore, the lethargic journey of the competition bill in the National Assembly is partly borne out an insufficient understanding of the nature and essence of the subject by the distinguished Senators, who rejected the 2006 bill for reasons being that a similar law to the competition bill had been passed before, the fact that there were already too many Commissions in Nigeria dealing with various issues, and justifiably the extensive powers given to the Minister.<sup>65</sup>

Some of these sentiments seem to be shared by others outside the political class who believe that Nigeria has much more important problems that should be addressed. Moreso, the delay in passing the bill might also be as a result of the relationship between the political class and the ruling business class, wherein certain individuals even wear both caps.<sup>66</sup> This can lead one to infer that the government has a hand in encouraging unfair market competition by dancing to the tune of dominant players in the market,<sup>67</sup> offering tariff waivers and tax relieves to a select few, for instance the abuse of import waivers and tax concessions on rice importation given to Dangote and Stallion.<sup>68</sup>

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<sup>63</sup>Cook, P. 2002. *Competition Policy, Market Power and Collusion in Developing Countries*. 33 *Center on Regulation and Competition Working Paper Series*; 3.

<sup>64</sup> Sengupta, R. & Dube, C., 2008. *Competition Policy Enforcement Experiences from Developing Countries and Implications for Investment*. *Global Forum on International Investment*. Vol. 7. OECD. 9 [/item/5647-custom-boss-to-senate-stop-granting-waivers-to-dangote-stallion-and-others](#)

<sup>65</sup> *Op. cit.* (note 36)

<sup>66</sup> Osinowo, T., 2014. *Competition Law in Nigeria*. *This Day Newspaper* October 21, 2014. Retrieved June 3, 2015, from <http://www.vitaveritasllp.com/competition-law-in-nigeria/>

<sup>67</sup> The government succumbed to the threat by Dangote Cements to shut down her Obajana plant some time ago if the government continued to allow another competitor (Ibeto Group) to keep importing cement into the country because, according to the company, there was glut in the market.

<sup>68</sup> Stop granting waivers to Dangote, Stallion and others- Custom Boss. *Perseond News* Thursday, May 19, 2016. Retrieved June 22, 2016 from [www.perseondnews.com/index.php/psn-news/](http://www.perseondnews.com/index.php/psn-news/)

## VI. DOES COMPETITION LAW GUARANTEE COMPETITION?

Given that several studies have demonstrated the links between competition policy and economic development in different countries, does it, therefore, imply that countries that have adopted competition laws are faring better than those without the laws? The answer to this is not likely to be in the affirmative, the reason being that there is nothing concrete on the ground to separate the two sets of countries, in terms of economic performance. Before the absence of this lack of a clear distinction can be attributed to the ineffectiveness of competition policy, it is important to focus on the extent to which the adopted laws and policies are being fully implemented. Adoption of a law is important, but implementation of the law is even more imperative. Thus, the extent to which the implementation process is constrained is the most important issue. A critical assumption that is made on studies on the impact of competition policy on economic development is that competition policy/law adoption leads to competition in the market. But, are markets in all countries with competition laws competitive? This section tries to provide the answer. It has been sadly observed that there are hurdles in countries with competition laws, which render the implementation process less smooth, and most markets are not open to competition. Such hurdles include: policy-induced barriers (government regulations, policies affecting market processes and competition, protectionist approach, etc.);<sup>69</sup> nexus between government and big firms;<sup>70</sup> poorly evolved business environment;<sup>71</sup> actions in the guise of public interest; and clash of regulatory roles

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<sup>69</sup> The Nigerian telecommunications sector still experiences political interference evidenced with the recent case where President Buhari ordered NCC to renegotiate with MTN after the former imposed a fine of N789 billion on the latter for contravening a directive to disconnect unregistered sim cards. Osuagwu, P. and Nwabughio, L., Buhari orders re-negotiation of MTN's N780bn fine. *Vanguard*. March 9, 2016. Retrieved June 17, 2016, from <http://www.vanguardngr.com/2016/03/buhari-orders-re-negotiation-of-mtns-n780bn-fine/>

<sup>70</sup> *Op. cit.* (note 44)

<sup>71</sup> Doing Business Report (2008), World Bank Group.

## VII. WAY FORWARD FOR NIGERIA.

The fact that competition policy should contribute towards economic development is more or less an agreed concept, it is largely the existing barriers to competition that are founts of apprehension. There is need, therefore, for competition culture to prevail in the whole economy, to eliminate all distortions. This should start at the top level, before it can eventually cascade to consumers. Political will turns out to be one of the key factors that determine the success of implementation of competition policy and laws. If competition law and policy is to yield all the envisaged benefits, political will and consensus for reform is a sine qua non. Consolidation of an existing law or adoption of a new one in the absence of such willingness will not help. Political will will further result in an assurance to investors about security and predictability of returns of their investments. Some developing countries, such as Malawi and Bangladesh, have adopted competition laws and policies, but it took ages for the laws or policies to come into effect and for structures to be put in place towards the implementation of the law.<sup>72</sup>

Also related to the political will is the issue of the need for a holistic approach towards competition. Competition law should, generally, be part of a competition policy, if all the desired objectives of competition law are to be achieved. However, even if used as a starting point, the competition law adoption should be followed or accompanied by removal of restrictions on competition from the investment policy, the industrial policy, the consumer policy, the trade policy and other sector specific policies that have an impact on competition. There is need for all the policies and sector law in the economy to be pro-competition as well. This situation is absent in the Nigerian economy, despite their claims about having adopted market reforms and deregulation.

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<sup>72</sup>Mehta, P S, et al. 2007, *Politics Trumps Economics - Lessons and Experiences on Competition and Regulatory Regimes from Developing Countries*, cited in Op. cit.(note 10)

Furthermore, there is need for a platform to ensure that all the different stakeholders with their different expectations and aspirations participate in the process of market reforms. Carrying out awareness campaigns and soliciting views and suggestions from all the crucial stakeholders should, therefore, be part of the competition policy process. Antitrust laws for Nigeria must ensure that the competition law and the accompanying policies are designed not only to facilitate economic development, but also to meet expectations of all stakeholders, rather than being biased towards either business or consumers. Consumer interest issues should be explicitly recognised in the designing of competition policy and advocacy should be included as a tool for awareness promotion among consumers. At the same time, however, the promotion of efficient markets, as a core objective, need not be compromised.

### VIII.

### CONCLUSION

From the discussions above, it is clear that antitrust has a very important role to play in the promotion of economic growth in a modern economy, but that role should neither over-sell nor under-sell. Competition policy is not a magical panacea for anything that ails an economic system; and there are clearly other important influences on the growth rate of a modern economy. Nevertheless, competition policy clearly does play an important role directly, because of competition policy's emphasis on competitive markets and the efficiencies that flow therefrom, which surely encourage economic development; and indirectly, because competition policy promotes efficient financial markets, which in turn encourage savings and efficient investments which are important contributors to growth and development of an economy.

In conclusion, a good competition policy should be flexible to adapt to changing circumstances in order to guarantee the attainment of desired goals.