

***The Need and the Challenges to the Establishment of a Competition Law
Regime in Nigeria***

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Strong competition policy is not just a luxury to be enjoyed by rich countries, but a real necessity for those striving to create democratic market economies¹

I. Introduction

Against the background of the above words of Stiglitz, let me begin by thanking the organisers of this conference for inviting me to present this paper. The theme of this workshop – *Law and Development in a Globalised Economy* – can never be more apt for a conference in an economy in transition as Nigeria’s has been for quite some time. In the same vein, it is not by accident that we should be discussing competition law in a conference whose theme is focussed on development in a global world. Although competition law is primarily concerned with the efficient functioning of the market in an economic sense, however, the peculiarities of a given country could necessitate the tailoring of a competition policy that could be used to promote not just *economic efficiency* in the strict traditional sense in which it is understood, but also to address specific development challenges. Indeed, particularly for developing countries but less for developed ones, it is clear that a robust competition law would only be politically acceptable if the law could be used to address public interest concerns by way of concrete development results beyond market efficiency. As

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¹ Joseph E. Stiglitz, *Competing Over Competition Policy* (Aug. 2001), <http://www.project-syndicate.org/commentary/stiglitz5>.

stated by a commentator, the core focus of economic efficiency at times is tempered by a strong emphasis on development.²

I have always believed in the importance of competition law as an instrument in the liberalisation of a developing economy as Nigeria's,³ and thus have consistently called for the institution of such a legal regime in our country.⁴ At the moment, more than a hundred countries around the globe have now adopted competition laws, of which approximately two-thirds are less-developed and/or transitional economies; many other countries are in the process of adopting this law.

The proliferation of competition laws is undoubtedly linked to the wave of neo-liberal economic reforms introduced since the 1980's and, in particular, to the issues raised as a result of privatisation programmes which many nations embraced in the last two decades.⁵ It is also part of the broader proliferation of liberal democracies and market-oriented economies becoming the dominant ideological models in the wake of the collapse of the communist bloc.⁶ Other motivating factors include the recent global waves of mega-mergers, the increased potential for cross-border anti-competitive practices, the ascendancy of economic integration with the World Trade

² Trudi Hartzenberg, "Competition Policy and Practice in South Africa: Promoting Competition For Development" in *Northwestern Journal of International Law and Business* (2006) Volume 26, No 3, p. 667.

³ Article 45 of the **Cotonou Agreement between the EU and ACP countries** enjoins the state parties to implement national or regional rules to protect competition as part of the general liberalisation of their economies. See also, Simon Roberts, "The role for competition policy in economic development? The effects of competition policy in South Africa, and selected international comparisons.", paper presented at the Trade and Industrial Policy Strategies Annual Forum 2003. See also Damilola Olajide, "The Changing Banking Environment in Nigeria: Emerging Public Policy Issues" Institute of Public Policy Analysis, Nigeria paper; available at http://ippanigeria.org/page.php?instructions=page&page_id=546&nav_id=87.

⁴ See Nnamdi Dimgba, "Nigeria's Competition Law: The Egg that Never Hatches", **The Guardian**, 22 February 2004; "The Urgent Need For Antitrust Law", **ThisDay newspaper**, 3 February 2004. See also the IBA sponsored website: <http://www.globalcompetitionforum.org/africa.htm#Nigeria>.

⁵ Paul Cook, *Competition Policy, Market Power and Collusion in Developing Countries*, in *LEADING ISSUES IN COMPETITION, REGULATION AND DEVELOPMENT* (Paul Cook, et al. eds., 2004).

⁶ *Ibid.*

Organisation (WTO), and lastly the radical shift in the policy of international institutions that now encourage and emphasize the adoption of competition law in developing countries and endorse its vital role in the process of development.

Against this global movement, Nigeria cannot afford to be left behind. Therefore, I would utilise the opportunity offered me today, in this paper, to call once again for the institution of a competition law regime in Nigeria, and to discuss the challenges that would likely be encountered in setting up the law, pre and post introduction. The paper is divided into six sections. Section II is a brief introduction to the law of competition.⁷ The need for this is informed by the novelty of the subject to the average Nigerian lawyer; and I have always done this by way of sensitisation and in the interest of capacity-building. Section III discusses the reasons why competition law is indeed not only desirable but also necessary in Nigeria, in the face of what have been argued to be more pressing social problems. Section IV discusses and traces the efforts made by recent Nigerian governments to establish a competition law system in Nigeria and in the process expresses opinion as to why there has been such a long gestation period in the enactment of the law. Section V discusses the challenges that would be encountered in the process of establishing a competition law system in Nigeria. This would be based on the experience which a number of developing countries have had in the course of establishing their own legal regimes, and also from my observations of the working of the Nigerian legal, social, political and economic environment. In Section VI, I make my concluding remarks and also propose a major recommendation.

II. The Nature and Essence of Competition Law

⁷ For a more extensive treatment of this topic, see Nnamdi Dimgba, 'Introduction to Competition Law: a sine qua non to a Liberalised Economy', paper presented at the Rules Watch workshop, *supra*.

Competition law is a set of rules, disciplines and judicial decisions maintained by governments relating either to agreements between firms that restrict competition or to the concentration or abuse of market power on the part of private firms.⁸ By providing the framework for competitive activity, its aim is to make markets operate more effectively. And by protecting the process of competition, it is believed to be of vital importance.⁹

However, the question is asked as to why the process of competition is so important that it warrants special rules to protect it. The tested assumption is that vigorous competition between firms is the lifeblood of strong and effective markets.¹⁰ Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs and providing incentives for the efficient organisation of production.¹¹

Competition creates three to four distinguishable efficiencies in the market place:¹² *Productive* efficiency ensures that any time a good or service is produced, it is done by using the smallest number of resources possible; *Allocative* efficiency ensures that

⁸ Bernard Hoekman and Peter Holmes (1999), "Competition Policy, Developing Countries and WTO", World Bank Working Paper, Washington D.C.. See also Mohamed Lahouel and Keith Maskus, "Competition Policy and Intellectual Property Rights in Developing Countries: Interests in Unilateral Initiatives and a WTO Agreement", paper presented at a WTO/World Bank Conference in the WTO Secretariat, Geneva Switzerland, 20-21 September 1999; also available at <http://www.redem.buap.mx/rm19.htm> .

⁹ Hansard, House of Lords, 30 October 1997, col. 1156, cited in Mark Furse, *Competition Law of the EC and UK*, p. 1.

¹⁰ See UK government White Paper *Productivity and Enterprise* (Cm. 5233, July 2001), cited in Mark Furse, *supra*. A contrast is usually drawn with the collapse of East European planned economies, and the corresponding prosperity of Western market economies.

¹¹ A similar view is expressed about competition law and competition by Justice Thurgood Marshall in *United States v. Topco Associates, Inc*, 405 U.S. 596, 610, 92 S.Ct 1126, 31 L.Ed.2d 515 (1972): "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete – to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster."

¹² See *Efficiency in Resource Allocation*, <http://www.mrwood.com.au/unit3/resources1.asp> (website visited 20/02/2006).

available resources are used in a satisfactory manner; *Dynamic* efficiency stresses the need for innovativeness, and that firms are able to adapt to meet new needs by searching for and adopting new technologies and methods; and lastly, *Inter-temporal* efficiency ensures that the available resources are used in a sustainable way, taking into account the needs of future members of the population.

The above efficiencies, especially the first three – *productive, allocative* and *dynamic* – are of crucial importance to society and it is for their sake that the law seeks to protect competition. In other words, competition is not an end in itself, but rather is the means by which society can attain those efficiencies. Competition law, therefore, is the story of the above efficiencies. Its goals include chiefly, the promotion of economic efficiency in order to enhance consumer welfare.¹³ It also includes the following: dispersal of economic power,¹⁴ the protection of competitors,¹⁵ though heavily criticised by the Chicago school of antitrust analysis,¹⁶ and a broader range of other goals such as social, employment, industrial, environmental goals.¹⁷ It is typical

¹³ See J Vickers and D Hay, “The Economics of Market Dominance” in D Hay and J Vickers (eds.), *The Economics of Market Dominance* (Oxford University Press, 1987), p. 2. See also Alison Jones and Brenda Sufrin, *supra*, p. 3; Richard Whish, *Competition Law* (5th ed., LexisNexis, 2003), p. 17.

¹⁴ This is often phrased as the ‘promotion of economic equity rather than economic efficiency’. See R Whish, *supra*, p. 18. This argument appears to form the very foundation of the development of antitrust law in the US – the general suspicion to which big business was held in the 19th – 20th centuries. It was under the US antitrust laws that the world’s largest corporation at the time, AT&T, was eventually dismembered. One sees such concerns resonating in the *Microsoft* case. For a highly critical view of the *Microsoft* case generally, see McKenzie, *Antitrust on Trial: How the Microsoft Case Is Reframing the Rules of Competition* (2nd ed., Perseus Publishing, 2001). See also G Amato, *Antitrust and the Bounds of Power* (Hart Publishing, 1997), p. 2-3.

¹⁵ The argument is that “the competition authorities should hold the ring and ensure that the ‘small guy’ is given a fair chance to succeed”. See Whish, *supra*, p.19.

¹⁶ See R Posner, “The Chicago School of Antitrust Analysis” (1979) 127 Univ. Pa. LR. 925. This school of thinking called for less intervention by competition authorities and placed greater faith in the ability of the market itself to achieve economic efficiency and to discipline recalcitrant market participants. Unlike the Harvard School, the foundations of its antitrust analysis were rigorously theoretical rather than empirical. The Harvard School on the other hand believed that the Chicago School had too much faith in the correcting power of the market, but that empirical evidence shows that there are situations where market forces alone are never able to control distortions created by a firm, and that here a competition authority should intervene to straighten things out.

¹⁷ Lahouel and Maskus, *supra*. In the European Union (EU), single market integration is a major goal of competition law, often overriding the goal of market efficiency; see Barry J

for most competition legislations to specify expressly the goals that the law seeks to achieve. Such clear goal provision is a practice that is encouraged since it focuses the mind of the competition authority in setting its priorities.¹⁸ The draft FCC bill contains a clear goal provision.¹⁹ So do the competition laws of jurisdictions such as the EU, South Africa, Canada and New Zealand.²⁰ It must be stated here that while these laws would provide for a number of policy goals, there is always one key goal out of the lot that is usually identified as being of prime importance, often informed by the countries' social and political experiences. It is normally that single policy goal which gives the competition regime its essential character, and may well on occasion trump other conflicting policy goals. In the EU, for instance, it is the integration of the European single market; for South Africa it is the promotion of the interests of historically disadvantaged people.²¹

One thing to note, however, is that competition can also sow the seed of its own destruction; encouraged to compete, successful entrepreneurs may achieve positions where they are able to prevent others from competing and thereby damage the process as a whole. Therefore, the primary purpose of competition law is to remedy some of those situations where the activities of one firm or two lead to the breakdown of the

Rodger and Angus MacCulloch, *Competition Law and Policy in the European Community and United Kingdom* (2nd edn., London, Cavendish Publishing, 2001), p. 13; see also Whish, Jones and Suftrin, *supra*.

¹⁸ See e.g. Michal Gal, *Competition Policy for Small Market Economies* (Harvard University Press, 2003), p. 50 -51.

¹⁹ Section 2 of the Bill provides as follows:

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

²⁰ The New Zealand Commerce Act 2003 has a statement of purpose which says clearly that the purpose of the competition rules is: "to promote competition in markets *for the long-term benefit of consumers.*"

²¹ See section 2 of the South African Competition Act, 1998.

free market system, or to prevent such a breakdown by laying down rules by which businesses can rival with each other.

It must also be stated that the fact, as has been argued, that competition is good and thus ought to be protected, does not mean that in a free market economy every sector is left to unbridled competition. Areas such as health services or the provision of basic utilities may, for example, be subject to governmental intervention or government controls.²² Different countries may have different views about how far the free market should be tempered or supplemented by a social component. In the EU, for example, agriculture is controlled by the common agricultural policy, which employs subsidies, grants, and intervention-buying to manipulate the market and is the absolute antithesis to a competitive system.²³ The justification normally advanced for this is the enormous interest which the EU has in food production and food security for the benefit of European citizens.

In summary, competition laws strive to achieve two things. First, to ensure that where competition already exists, that it would deliver the goods in terms of realising 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.

III. The Need for Competition Law in Nigeria

The fact, as has been argued above that competition is a good thing, does not necessarily make the conclusion inexorable that a country such as Nigeria should

²² Alison Jones and Brenda Sufrin, *EC Competition Law. Text, Cases and Materials* (2nd edn., Oxford, OUP, 2004) p. 1.

²³ *Ibid.*

have a competition law system. In fact, in a developing economy, the possible role of competition law is often difficult to determine. As put forth by Jean-Jacques Laffont:

Competition is unambiguously a good thing in the first-best world of economics. That world assumes large numbers of participants in all markets, no public goods, no externalities, no information asymmetries, complete markets, no natural monopolies or, more generally, convexity of technologies in addition to full rationality of economic agents, a benevolent court system to enforce contracts, and a benevolent government with lump sum transfers to achieve any desirable redistribution. Developing economies are of course very far from this ideal world, and the policy question: ‘Should competition be encouraged in developing countries?’ must be raised in a more realistic framework.²⁴

Unfortunately, Nigeria has all the above-mentioned attributes of such a developing economy, hence the sceptical sentiment expressed also applies to it. Commenting in the same vein, Drexl remarks that: “Whereas richer countries can rely on functioning competition law systems in order to protect their own markets, developing countries are for the most part newcomers to the market economy. With their national economies still in transition, they do not just have to draft laws, they also face problems like a lack of acceptance of the competition idea among local firms, authorities and the general public.”²⁵ In fact, there have been situations in developing countries where worries have been expressed that introduction of competition law would hamper economic development;²⁶ the idea being that mindful of the constraints and checks which the law would put on their activities, the incentive to invest in the economy would be chilled, a risk that a country in urgent need of economic development should not take. In interactions with people in the course of promoting

²⁴ Jean-Jacques Laffont, Competition Information and Development) World Bank ed, 1998), cited in Alice Pham, “The Development of Competition Law in Vietnam in the Face of Economic Reforms and Global Integration”, *Northwestern Journal of International Law and Business* (2006) Vol. 26, No 3, p. 547 at 548.

²⁵ Josef Drexl, “International Competition Law – A Missing Link between TRIPS and Transfer of Technology” Max Planck Institute for Intellectual Property, Competition and Tax Law

²⁶ See Dr. Pijan Wu and Caroline Thomas, “Taiwan’s Fair Trade Act: Achieving The “Right” Balance?” in *Northwestern Journal of International Law and Business* (2006) Vol. 26, No 3, p. 643 at 646.

the idea of competition law in the country, I have also encountered cynicism from individuals that I had assumed would be better informed, as to the uselessness of such an esoteric legal concept for a country like Nigeria with supposedly more pressing ‘real’ problems. In my view, such an attitude reflects in the Senate’s hostile reception of the competition bill during its introduction in September 2006, that forced its withdrawal by the then government.

I have made the above revelations just to show that even as good as competition, and by extension a legal rule to protect it is, it is by no means universally accepted that it is a useful and desirable thing to have in all countries, especially in developing ones. However, my view is that on proper balance, both on the short, medium and long terms, the Nigerian environment is very ripe for a competition legal regime for a number of reasons.²⁷

Firstly, competition law is a necessary part of any liberalisation programme.²⁸ At least there is a consensus on this point, shared even by those who doubt the utility of a competition law system for a developing country. As Pham notes, “an effective competition law, as is now widely recognised, 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

²⁷ See Nnamdi Dimgba, “The Urgent Need For Antitrust Law in Nigeria”, **ThisDay newspaper**, 3 February 2004. See also the IBA sponsored website: <http://www.globalcompetitionforum.org/africa.htm#Nigeria>. See also Nnamdi Dimgba, ‘Introduction to Competition Law: a sine qua non to a Liberalised Economy’, paper presented at the Rules Watch workshop, *supra*.

²⁸ See Article 45 of the **Cotonou Agreement between the EU and ACP countries**. It enjoins the state parties to among others, implement national or regional rules and policies including the control and under certain conditions the prohibition of agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition. See also, Simon Roberts, “The role for competition policy in economic development? The effects of competition policy in South Africa, and selected international comparisons.”, paper presented at the Trade and Industrial Policy Strategies Annual Forum 2003. See also Damilola Olajide, “The Changing Banking Environment in Nigeria: Emerging Public Policy Issues” Institute of Public Policy Analysis, Nigeria paper; available at http://ippanigeria.org/page.php?instructions=page&page_id=546&nav_id=87.

adversely affect economic efficiency and consumer welfare.”²⁹ Therefore, if governments like Nigeria’s which over the past decades have committed themselves to market liberalisation, through privatisations and deregulation of various sectors of the economy, do not have a competition law, they might unwittingly end up creating new dangers.

To illustrate the above point, when we liberalise and deregulate vital sectors of our economy as we have done, ushering in, in place of government monopolies, private players who are not constrained by social interests and whose overriding drive is profit, there is nothing to prevent the new undertakings from engaging in cartel and abusive behaviour such as price fixing, market division, and excessive pricing. Yet, in what would appear to be a bitter irony, in the absence of a competition law, such practices would not be illegal, no matter how much they hurt the economy and the consumers. The moral to be drawn from the above is that half liberalisation could in some cases be worse than no liberalisation at all, since it ends up creating hitherto unknown dangers. Therefore, any market liberalisation programme like Nigeria’s that is designed in such a way as to lack an essential component like a legal regime to regulate competition in the market, is fundamentally flawed and ought to be reconsidered, since competition law is an important complementary support to general liberalisation.

We must further consider the above argument in the light of the recent controversy over the privatisation of the refineries. As we all know, there are four refineries in Nigeria: Eleme, Port Harcourt, Warri and Kaduna (together with 100 percent of the petroleum refining market). In a process that drew heavy flak, the Bureau of Public Enterprises (BPE) transferred 2 of the major refineries (Port Harcourt and Kaduna), together with a share of close to 60 percent of the petroleum refining market to one

²⁹ Supra note 24.

single entity, even when there were other entities interested. The explanation given for this was that the entity was the highest bidder. I have already argued in a paper,³⁰ that what happened during the refineries privatisation saga was a reflection of the enormous deficit created in the Nigerian economic liberalisation programme by the absence of a legal regime to regulate competition. Had there been such a law mandating the BPE to consider the impact on competition before it sells national assets, I doubt very seriously if the BPE would have sold the assets to one single entity given the negative effect it would have on the state of competition in the petroleum refining market. Competition law wisdom dictates that if at all a refinery should be sold to a single private entity, it should be one refinery, not a whole two, given that there were other entities who were also interested in the refineries and could hold them in competition with the one being controlled by some other different private entities.

It should also be stated, in relation to the privatisation programme, that in the absence of a substantive competition law in Nigeria, there is also a deficit in the failure to write within the privatisation legal framework or in the practice of the BPE, an obligation to conduct a Competition Impact Assessment (CIA) test before a national asset is conclusively sold to a bidder. This would appear to be the situation in certain jurisdictions such as Brazil,³¹ and certainly one that should be recommended for Nigeria.

The discussion of the refinery incident takes me to the second reason why competition law is necessary in Nigeria. Such a law and the institutions that it would create would help to promote economic equality in the country, as it has contributed

³⁰ See Nnamdi Dingba, "Privatisation: Why Highest Bid Not Always Best", **ThisDay** newspaper, 31 July 2007.

³¹ See Brazilian Law No. 8884 cited and discussed in Gesner Oliveira and Thomas Fujiwara, "Competition Policy in Developing Countries: The Case Of Brazil", *Northwestern Journal of International Business and Law* (2006) Vol. 26, No 3, p. 619 at 639-640.

to creating in several developing countries where it has been introduced.³² It is accepted that such a law serves to dissipate “rents,”³³ which tend to accumulate among a privileged few in countries where the rule of law is weak and cronyism is widespread. In fact, the accumulation of rents can be particularly detrimental to developing countries that are undergoing rapid economic growth. The concentration of wealth can easily lead to widening income inequality, a major problem facing developing countries such as Nigeria, and that threatens the sustainability of economic growth. More importantly, concentration of wealth often leads to concentration of political power where money matters in political pursuits. This is likely to undermine the budding democracy found in many countries.³⁴

The experience of developing countries such as Thailand, Pakistan and Vietnam shows that once big businesses are able to take the political rein, they can easily entrench their monopoly strongholds by influencing government policy. At this point, where the law is captured by the state and big businesses, the chance of introducing competition in the domestic market would be bleak. It is therefore of utmost urgency that a developing country equip itself with a competition constituency that could counter the formidable (financial and political) strength of incumbent operators that would like to fend off competition in order to secure their own private interests. It would be necessary to strengthen the hands of the competition constituency by means of an enabling legal framework, the reason why, at least in Nigeria, it is not only desirable but necessary to enact such a law.

³² See Gesner Oliveira and Thomas Fujiwara, *supra*.

³³ Rents in economics refer to profits or investment returns that are excessive compared to those available in a competitive market. See Armen Alchian, *Rent*, NEW PALGRAVE: A DICTIONARY OF THEORY AND DOCTRINE 141, 141-43 (J. Eatwell, M. Millgate & P. Newman eds., 1987).

³⁴ *Ibid.*

It is also arguable that the introduction of a competition legal regime would encourage Nigeria's corporations to acquire an awareness of its rules. Given the growing importance of competition law across countries, the law has come to acquire a quite significant cross-border character in the sense of impacting on most commercial transactions that have an international reach. An example that comes to mind, and which I tend to cite in relation to Nigeria is the case of the Nigerian LNG which had issues with the European Commission because some of the terms in its gas supply contracts with its European customers were held to be offensive of EU competition law.³⁵ Having such a law operational in this country would encourage our increasingly growing corporations to be aware of the rules and to acquire in-house or external capacity to deal with it. I should note that in recent times I have been instructed by some major companies desirous of complying with international best practices to review their business agreements and operations and advise on how to comply with competition laws. It would seem therefore, and happily for the commercial lawyers here, that the introduction of such a law promises to open new areas of legal practice and widen firms' revenue base.

In relation to Nigeria, there are public accountability grounds to argue for the institution of a competition legal regime for Nigeria. The National Council on Privatisation (NCP) at huge public expense had at various times in the past several years engaged the services of a number of consultants to draft or redraft a competition

³⁵ One of the many European contracts entered into by NLNG contained a territorial sales restriction, which prevented the customer, in this case the Italian utility company ENEL, from re-selling the gas outside Italy. In the discussions and subsequent settlement with the Commission, NLNG agreed in October 2002 to delete the destination clause from its contract with ENEL and also undertook not to introduce territorial restriction clauses or use restrictions into its future supply contracts. It further confirmed that none of its existing gas supply contracts contained profit-splitting mechanisms affecting the EU markets and that it would not introduce these in future contracts. For a detailed discussion of this case and of destination clauses in gas contracts generally see, 'EU to punish restrictive business practices - An EU competition law perspective on destination clauses in LNG contracts' Herbert Smith, available at http://www.herbertsmith.com/NR/rdonlyres/57514EFE-4A32-42F6-AF96-54F24845BF16/1149/euc_280605.html . See also, Commission settles investigation into territorial sales restrictions with Nigerian gas company NLNG, EC Commission Press Release, IP/02/1869 Date: 12/12/2002.

bill for Nigeria. It is justifiable to make a case for the release of the product of that public expense into the Nigerian legal system in the form of an enacted law, for the benefit of Nigerian consumers and businesses.

Adding to the above are issues of national pride: why should Nigeria, with its big economy and significant status in Africa not have a competition law system, while countries with smaller economies such as Kenya,³⁶ Zambia,³⁷ Namibia and South Africa,³⁸ already have such regimes for years.

Mention must also not fail to be made of the importance of effective competition law as a means of inspiring international confidence in an economy, and thus enhancing the flow of foreign direct investment (FDI) into the economy. Foreign investors would not be willing to commit capital freely in a country where they are not sure of the transparency of the system. The enactment of a competition law assures to international investors that the market is a true market economy and that participants in the economy, local and foreign, would be equally guided by rules which condition the behaviour of firms in the marketplace.³⁹

Finally, from the point of view of developing countries, it is usually difficult without national competition laws to stop anti-competitive behaviour by the local subsidiaries of multinational companies in industrial economies. These multinational corporations may behave competitively in Europe and the US because of the effective competition rules but may indulge in anti-competitive practices in developing countries with no or weak competition laws. In fact, firms can engage, and tend to engage, in cross border anti-competitive behaviour with impunity, especially in

³⁶ The Restrictive Trade Practices, Monopolies and Price Control Act, 1988, cap. 504, Laws of Kenya.

³⁷ The Competition and Fair Trading Act, 1994, cap. 417, Laws of Zambia.

³⁸ The Competition Act, No. 89 of 1998.

³⁹ See the Cotonou Agreement referred to *supra*.

countries that do not have domestic competition law, and developing countries are particularly vulnerable to these practices.⁴⁰ In the same vein, without an effective national competition law and policy, the domestic firms may form anti-competitive alliances to make it difficult for foreign firms to penetrate the local markets, thereby discouraging foreign investment.

For the above reasons therefore, and for more not discussed here, the conclusion is worth making or pursuing that a competition law is a *sine qua non* for Nigeria, which all those with any form of leverage or the other with the political authorities should apply towards getting them do the needful by way of introducing the legal regime in our country.

IV. The Current State of the Competition Bill in Nigeria

Given the views which have been made above on the need for competition law, and the consequent deprecation of its absence, conclusion might be drawn that nothing has been done at all by the government towards enacting the law. That is in fact not the case. Partly in order to set the records straight, and in the hope that doing so would stir the authorities into action, I would in the ensuing pages trace the history of efforts by the government to introduce a competition legislation in Nigeria, up to the point where the lights seem to have gone out.

For Nigeria, the first indication of an interest in introducing a competition law regime was in December 2002 when then Director-General of the BPE, Malam Nasiru El-Rufai, announced that the Nigerian government was going to enact to competition law that would guard against the incidence of foreign companies just dumping their

⁴⁰ See George Lipimile, 'Merger Control in COMESA Member States: Approach and Practice', paper presented at *International Antitrust Law and Policy* conference, Fordham Corporate Law Institute, New York, October 7 & 8, 2004.

products in Nigeria and thus making it extremely hard for local companies to compete.⁴¹ This announcement was followed by the release of a draft competition bill to the public in early 2003 for comments by a consultant (ECU Associates) engaged by the government for that purpose. Apart from certain provisions which I found troubling, and indeed criticized in both newspaper and journal articles,⁴² my impression was that the ECU Associates draft was a good document which could have been made to work with a couple of fine-tunings. However, for reasons that I do not yet know, nothing was heard of the ECU draft for many years, a state of inertia which I also criticized⁴³ and so did other commentators.

In early 2006, an entirely new competition bill was introduced, drafted by an entirely different consultant under the auspices of Attorney-General Bayo Ojo's Federal Ministry of Justice (FMoJ). While this was also in its right a fairly good document, I do not seem to understand what policy measures that informed its preference over the ECU Associates draft, and while the earlier draft could not have been used. Indeed much more than I did of the ECU Associates draft, I found the FMoJ bill very disturbing in terms of the enormous powers which was given to the Minister and the presence of provisions which could lend the competition policy process to overbearing political control. Needless to say, I also criticized the above aspects of this bill as quite anachronistic and against current global trend that favour the creation of independent self-accounting agencies to implement the competition laws.⁴⁴

⁴¹ He apparently confused antitrust with anti-dumping.

⁴² See Nnamdi Dimgba, "Drafting Antitrust Laws: An Appraisal of the Merger Provisions of the Federal Competition Bill", **The Guardian**, 21 March 2003; "Merger Provisions of the Nigerian Federal Competition Bill", (2003) 25 **Comparative Law Yearbook of International Business, Kluwer Law International** 327 – 339.

⁴³ See Nnamdi Dimgba, "Nigeria's Competition Law: The Egg that Never Hatches", **The Guardian**, 22 February 2004.

⁴⁴ See Nnamdi Dimgba, "A Review of Merger Control under the Federal Competition Commission Bill", paper presented on 25 May 2006 at the Rules Watch competition law conference in Lagos, Nigeria; "A Review of Merger Control under Nigeria's Proposed Competition Law", Published in the **Journal of Law and Investment 2007, Vol 1**.

For good or for bad, it was the FMOJ bill that enjoyed governmental endorsement, winning approval from the Federal Executive Council (FEC) on 24 August 2005. This paved the way for its introduction as a government bill to the Senate of the National Assembly. However, in September 2006 during its first reading, the bill met a hostile reception from the Senators partly (and I should say also justifiably), for some of the features of it which I had earlier highlighted, including the extensive powers given to the Minister. It should also be stated here that the hostile reception given to the bill was also partly borne out an insufficient understanding of the nature and essence of the subject by the distinguished Senators.

The result of the above was a tactical withdrawal of the bill by the government through the then Senate majority leader, Senator Dalhatu Tafida. This development forced the government to go back to the drawing board. Between the rejection of the FMOJ bill in September 2006 to March 2007, a team made up of a group of consultants including myself and Chief Anthony Idigbe SAN, and also the BPE legal team led by Mrs Irene Chigbue and Dr Paul Idornigie worked vigorously to revise the bill. The end result, in my assessment, was a new draft bill that addressed not only the criticisms raised by the Senate and other commentators, but that also embodied a number of innovations in areas such as merger control (borrowing from the experience from certain developing jurisdictions where it had worked). Our main objective then was to get a draft that the government would push through in the twilight of their days, in the hope that as had been promised by the last regime, they would have bequeathed a competition law and policy to the country before their departure. Unfortunately, this was not to be as it now seems the government had other pre-occupations in its last days. So far as I know this was where the light went out on the competition bill. I have asked and am yet to get an answer as to how far the BPE succeeded in pushing our redrafted bill to the present government for

passage by the National Assembly, or if in fact the bill has not been left to accumulate dust in some part of the FMoJ cellar.

Because in Nigeria, as in other countries, governments have always got what they wanted, provided that they pushed hard, if there was a genuine desire to have a competition law enacted, that would have been done long before now; and I doubt if the bill would have suffered the fate that it did in the Senate. It is possible to argue that the lack of interest in enacting a competition law should not be seen in isolation. One could draw a parallel between big business domination and exploitation of smaller businesses and consumers that result from the absence of a competition law, with the domination of the political sphere by a single set of people who find themselves in positions of political authority. In the culture of settlement which prevails in this country, it is not far-fetched to speculate that there is a compromise between the ruling business class and the political one, the terms of which allowed each to respect and not to disturb the other's dominion: "so long as you do not interfere with what we do, we shall not interfere in what you do also."

One could further reinforce the above theory by noting that when the last government constituted a Committee to develop competition policy and law for Nigeria, that Committee was made up of big business players. Headed by Mr Bunmi Oni (past MD of Cadbury), it had the likes of Alhaji Aliko Dangote as members. Yet these are the people whose interests are heavily entrenched in the *status quo*. How could they earnestly work for the emergence of a new order that could erode their pre-eminence or at least threaten its unchallenged continuation? On this basis, it seems that the only branch of government that is genuinely interested in the enactment of a competition law is the bureaucratic class, particularly the BPE; but because they can only go so far, little wonder that their efforts have not recorded any concrete result.

As a testimony to the desire of the bureaucratic (as opposed to the political wing) of the executive arm to introduce proper competition rules in Nigeria, notice should be taken of the competition enhancing principles and procedures enacted under the recent Investments and Securities Act, 2007 (ISA 2007), signed into law on 25 June 2007 by President Umaru Musa Yar'Adua. The ISA 2007 in Part XII (Mergers, Takeovers And Acquisitions) has introduced merger control provisions modelled along the lines of the South African competition law. The new Act introduces three categories of mergers (*small, intermediate and large*) falling within different asset and turnover thresholds,⁴⁵ and also enjoying different approval regimes that mirrored those in South Africa. In the main, the Securities and Exchange Commission (SEC) is empowered to approve mergers pre-notified to it where the merger is not likely to substantially prevent or lessen competition, or if it would, where the merger is likely to result in technological efficiency or other pro-competitive gains that would off-set whatever ills it would pose to competition.

While the spirit behind the introduction of the above elaborate competition provisions into the ISA 2007 is noble and indeed worthy of commendation by those who promoted it,⁴⁶ I would like to say that the measure still does not close the gap created in our legal system by the absence of a competition law. In the first place, in so far as the regime for antitrust merger control in Nigeria still rests with the SEC, there is an inherent deficiency because SEC is not suited for the enforcement of competition law. The role of SEC is securities regulation, not antitrust enforcement. It seems therefore that something is lost on both fronts when the SEC gets saddled with the twin, but

⁴⁵ See section 120 ISA 2007.

⁴⁶ The new provisions in the ISA 2007 reflects to a large extent, the new merger control provisions which my team had put into the draft Competition Bill. This is not a surprise since Chief Anthony Idigbe SAN, who was a member of our team of consultants for the draft Competition Bill, was also heavily involved in the drafting of the ISA 2007. In fact, it appears that he drafted Part XII of the ISA 2007 and had used the opportunity afforded him to work on the new ISA to try and fill the gap created in our merger control regime by the insufficient consideration of competition issues.

equally tasking, responsibilities of protecting the integrity of the capital market and also acting as an antitrust watch-dog, at least in matters of merger control. Secondly, the piecemeal regulation of competition which is what the new innovation in the ISA 2007 can only offer our country, cannot go in any significant way towards addressing the structural and behavioural problems which a close observer notices in the market, and which can only be as a result of the absence of a comprehensive competition regime in Nigeria. As should be noted, merger regulation deals with the structural aspect of competition law, and is but one leg out of several that make up a definitive competition law system, including control of cartels and restrictive agreements, control of dominant firms and abuses, regulation of prices in areas of natural monopolies.

Bearing in mind how frustrating we all must feel regarding the never-ending gestation period for Nigeria's competition law, owing to the lack of commitment by the Nigerian government, a process that has been likened to "an egg that never hatches,"⁴⁷ I think it is only fitting that I should remind us of the truism that: "it is not how long, but how well." The long process being taken to establish a competition law system for Nigeria is by no means peculiar to our country. Many countries have adopted competition laws but have never quite managed to successfully enforce them. Thailand enacted its first law in 1979, which was never implemented until 1999 when the law was replaced, and even then the enforcement record remained extremely poor. Egypt took almost a decade to enact a competition law in 2005⁴⁸ since it got a first draft in 1999, and even after adoption, there was no certainty that the law could be implemented effectively. More or less similar situations can be found in countries like Indonesia, Pakistan, Sri Lanka, Malawi⁴⁹ and Namibia.

⁴⁷ Nnamdi Dimgba, "Nigeria's Competition Law: The Egg That Never Hatches", *supra*.

⁴⁸ Law on the Protection of Competition and the Prohibition of Monopolistic Practices, No. 3/2005 (Egypt).

⁴⁹ See Alice Pham, *supra* p. 563.

However, the purpose of the above account is not to say that it is impossible to establish the laws otherwise we should not be having the examples of the US, Europe and Japan and even in Africa, South Africa and Zambia, where the regimes have been successfully established and are running. Beyond demonstrating that we must not be deluded into thinking that the mere enactment of a competition law transforms to instant success, or into failing to appreciate that while a competition law can be passed overnight, an effective implementation will take much longer where local political, legal, institutional, and social environments do not yet support it, what is intended to be brought out is that there are specific challenges to the establishment of a functional competition law system. And only by identifying, analyzing, and understanding them could they be surmounted.

V. The Challenges to the Establishment of an effective Competition Law System for Nigeria

As noted above, and is obvious from the preceding parts of this paper, a developing country intending to introduce competition law faces a number of challenges, which must be carefully weighed and understood so that mechanisms could be put in place to deal with those challenges, if possible at the design stage of the policy and its implementation process. Some of those challenges have been found to apply very much in the Nigerian case, and are therefore collectively responsible for the non-passage of the law till. The challenges are as follows:

(a). Introducing Competition Law and Policy for the First Time

In itself, the challenge of introducing competition law and policy for the first time should not be underestimated. As was noted above, the idea is not universally

accepted that competition is a good thing whose protection should be welcomed. In fact, there are often concerns that competition law/policy would damage rather than promote economic development. There is often a lack of acceptance of the competition idea among local firms, authorities and the general public especially in developing countries which are newcomers to the market economy. Some of these perceptions are rooted in basic ignorance, even among the top echelon of the political authority.

One certainly faces the above hurdle in the process of championing the competition law cause in Nigeria. For the political class, the problem of ignorance and lack of commitment showed itself during the introduction of the competition bill in the Senate in September 2006. Part of the reasons the Senate gave for their hostile reception to the bill were: the fact that there were already too many Commissions in Nigeria dealing with various issues; and that a similar law to the competition bill had been passed before. On casual scrutiny, none of the reasons passes muster at all because: one, the fact of the existence of too many Commissions does not take away the need for an extra one to deal with a specific issue such as the promotion and protection of competition, if that was necessary for national development; and two, there has been in fact no law similar to a competition law existing in our statute books; it is possible that the Senators were confusing the Consumer Protection Act with the proposed competition law, which are two distinct concepts.

In brief, passing a competition law and implementing it is always an uphill battle. This is because the law not only runs against the interests of large and powerful businesses, who in most countries such as Nigeria are well connected to the political class, but it is also often associated with western capitalism or free-market propaganda. It can easily fall prey to nationalistic fervour that is, in some cases, drummed up by local monopolies themselves. The best approach to deal with this

challenge has been through competition policy advocacy, which could be even more important than competition adjudication. A country needs to build a wide competition constituency among the academics and civil society, as well as the media.

(b). The Olsonian⁵⁰ Political Economy Problem

The second major challenge though in a sense a part of the first challenge is the lack of public support for, and interest in competition law. Most NGOs tend to focus mainly on health, environmental and human rights issues where the effects on the public are more clear, visible, and immediate. Competition law, on the other hand, is perceived as being about “business disputes” that did not involve NGOs or of direct concern to the citizens. In contrast to trade policy, no specific groups will benefit from successful antitrust enforcement and gains will be diffused among millions of consumers. In contrast to consumer protection, competition law issues are often distant from the consumers’ experiences. It is a difficult task to “explain” to final consumers how certain discussions of abuse of market power in intermediary and capital goods will affect them. It is therefore not surprising that most NGOs and other political movements have given little attention to competition policy in the context of pressing social problems and high degrees of poverty and inequality.

Given the low awareness and the prevailing scepticism of society on the relevance of competition law to our society, it would help if a mechanism is set up, where possible directly by government, or indirectly by encouraging the setting up of NGOs devoted for that purpose, whose mission should be to familiarise the public with the law, and

⁵⁰ Mancur Olson’s “collective action problem” pointed out that state policies that generated diffuse benefits for a large group of people would not receive as much funds as policies generating concentrated benefits for a small group, as in the latter case it is more difficult for a strong lobby for the policy to occur. See Mancur Olson, *The Logic of Collective Action* (1965).

focusing on the actions that would most likely succeed and will benefit the market, as well as other confidence-building and support-mobilizing measures.

(c). Problem of Political Interference and Corruption

One challenge that has been faced in many developing countries is that of political interference. This occurs after the country would have finally managed to overcome the hurdle of scepticism and apathy and getting its law enacted. The interests which had earlier opposed the emergence of the law are not likely to give up simply because the regime had now been established. A lot of efforts would go into compromising the institution set up for the implementation of the law. For a country like Nigeria where corruption is a real and living issue, this challenge acquires enormous significance. Citing the example of Egypt, a commentator reasons that the entrenched interest of several key businessmen in preserving monopolistic situations after privatisation, and the absence of consumer moves and awareness, result in why competition laws end up as a failure in enacting a fully fledged competition policy in developing countries.⁵¹ The law is often tailored to allow for exceptions and those exceptions are often not shielded from political interference and key interest groups' influence.

To deal with this problem, no effort should be spared in appointing people to man the agency who have the capacity to resist corruption and to stand independent. The leadership of an authority is critical to the effective performance of its mission, and as has been stated: "it is trite but true that the Commission can be no better than its

⁵¹ Ahmed Farouk Ghoneim, *supra*. See also Pascal Lamy (2001), "The Multilateral Trading System and Global Governance after Doha" speech delivered at the German Council on Foreign Relations, Berlin, 27 November, 2001, cited by Ghoniem, *supra*. See also World Bank and OECD (1998), "A Framework for the Design and Implementation of Competition Law and Policy", Washington D.C. and Paris.

leaders”⁵²; and also: “the quality of the members is the most vital single factor in the successful operation of these Commissions.”⁵³ Thus, in a not only developing but also peculiar environment like Nigeria where corruption is endemic, and as such the risk of ‘regulatory capture’⁵⁴ is high, transparency and due process in both the selection of commissioners and the administration of the law is critical to the integrity and the effectiveness of the competition regime.

Beyond ensuring the appointment of credible people to run the competition institution, it would also help if in drafting a competition bill, a relatively detailed competition law should be drafted. This helps to minimise the discretionary power of the administrative authority, in particular when it is prone to political influences.

It is also important to put in place effective check and balances within the system. An appellate body that is independent from the main competition authority helps to ensure impartiality of the decisions of the authority.

(d). The Presence of a Large Informal Sector

Another challenge that affects the introduction or the effective establishment of a competition law regime, especially in developing countries, is the presence of a large informal sector. According to a certain data from the World Bank set out on a country to country basis, Nigeria has an informal sector of 57.9% to the formal sector with 42.1%.⁵⁵ The presence of large informal sectors creates dual markets and may

⁵² Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, reprinted in 58 ANTITRUST L.J. 43, 60 (1989)

⁵³ See Joseph Wilson, “At The Crossroads: Making Competition Law Effective In Pakistan”, Northwestern Journal of International Business and Law (2006) Vol. 26, No 3, p. 565 at 591.

⁵⁴ Regulatory capture describes a situation where a state regulatory body is influenced by the interest of the industry which it regulates. A detailed description of the term can be found in M.E. Levine, Regulatory Capture, 3 NEW PALGRAVE DICTIONARY OF ECON. AND LAW 267, 267-71 (1998).

⁵⁵ See: WorldBank; dataavailableat <http://www.doingbusiness.org/ExploreEconomies/EconomyCharacteristics.aspx>.

distort the analysis authorities conduct for the formal markets. Market power of dominant *formal* firms may be over-estimated due to an under-estimation of the price elasticity of demand. The existence of a large informal sector also creates additional noise in price information, making cartels more unstable and cartel analysis more difficult. There is nothing one can do about this problem, other than to bear that in mind, and be accordingly guided when making analysis and assessments of the strength of dominant firms in the economy, especially in an abuse of dominance inquiry.

(e). Problem of Capacity

Effective competition and regulatory enforcement requires very specific capacities, not only within the enforcement agencies, but also within the private sector, the legal and economics professions, and among consumers. Limited capacity can lead to challenges of regulatory capture by a smaller number of experts, weak enforcement and monitoring of decisions, and can hamper the development of a competition culture.

Thus, given the novelty of competition law, especially for a developing country such as ours, one main challenge to the establishment of the legal regime is that of capacity. This is likely to be an issue both pre and post introduction of the law. Because it is not yet in place in Nigeria, there is little academic knowledge of the discipline. Also, knowledge of industrial organisation which is key to understanding competition issues seems very limited. I am not sure that at the moment there is any university in Nigeria offering competition law, at degree or graduate level. Most Nigerians who go abroad to study settle for specialisations in which there for which immediate need in the country, and justifiably so. A few such as myself who decided to specialise in it took a strategic gamble; and I must admit that sometimes I nearly rue my decision to take this path. For what is the sense in expending huge resources

to acquire a body of knowledge which cannot immediately put food on the table or pick the bills.

Therefore, with extremely limited education in the field, it is no surprise that there is very little research work on competition-related issues and very little comprehension of the subject among policy makers, legislators and law enforcers in the country.

This lack of capacity would therefore affect the effectiveness of the regime when it is finally established. The main reason being that even if a body is set up, as long as it is manned by those who do not have sufficiently adequate knowledge of the subject, there is only so much success that one would expect to record from the regime. This problem of capacity is largely responsible for the weak enforcement record experienced among some developing countries where the laws got enacted but no meaningful progress was made in terms of activity by the competition authority, at least in the early years.⁵⁶

If the competition body manages to overcome the problem of capacity after the initial years, it would still have to face the challenge of attracting and keeping skilled staff. Competition experts who have worked at the competition body, gaining experience and building valuable networks, are likely to become very attractive to law firms, and large businesses. However, it should be stated that while this may be problematic for the body, which invests in training and on-the-job learning only to lose its experts, it may be important to focus on broader, economy-wide effects. The migration of competition expertise from the authority undoubtedly poses significant challenges for the conduct of its functions. However, taking a global view, dissipating its expertise in other sectors of the economy may lead to the development of a better understanding of the role of competition in the economy and in development.

⁵⁶ E.g. Pakistan. See Joseph Wilson, *supra*, p. 594.

To overcome the above challenge, it is important that a lot of resource in terms of time and money is spent towards the development of capacity, even before the regime is established, and also after it is set up. This could begin with the introduction of a module on competition law at the top graduate schools in this country. Happily, the Nigerian Bar Association Section on Business Law has a Committee on Competition Law. That Committee should do all within its powers, alone or in collaboration with educational NGOs and the government, to create capacity on the subject in relevant sectors of the economy, including among members of the legal profession, media, academia, consumers, and also very importantly among small businesses who have a crucial role to play in every successful antitrust system.

The government should also seek foreign technical assistance which has aided a great deal in the establishment of a competition law regime in developing and transition economies. This assistance is available within the Organisation for Economic Cooperation and Development (OECD), the World Trade Organisation (WTO), the International Competition Network (ICN), the International Bar Association (IBA), the United Nations through the United Nations Conference on Trade and Development (UNCTAD). The mature and developed antitrust regimes such as in Europe, the United States, and Asia are also very willing to share their experiences and assist developing countries set up effective antitrust regimes. It should be emphasised, however, that any assistance to be sought should not end with the promulgation of the competition law itself, but that it extends into the community, through assistance to build a competition law and policy constituency among the various non-governmental stakeholders of the economy.

(f). Problem of Jurisdictional Conflict

Jurisdictional conflicts could also pose problems for effective enforcement of competition law. This is a serious issue, particularly where the government maintains a significant role in the economy through sector regulation. The relationship between the sector regulators and the body to be established to promote competition becomes a very delicate one which should be thought out during the design of the law and well defined, otherwise one faces problems of a struggle for supremacy on competition issues between the competition body and bodies set up to regulate the conduct of firms in specific industries. This is likely to be even more acute where the enabling laws for the sector regulators such as, in respect of the Nigerian Communications Commission (NCC), the NCC Act contains competition provisions which they (the sector regulators) are empowered to enforce.

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

VI. Concluding Remarks

Many developing countries are quick to adopt western-style institutional structures and procedures when designing their regulatory regimes; this is the case also in relation to the establishment of a competition law regime. International advisors as well have a tendency to benchmark new competition regimes against those already established in more advanced economies. As I have argued in other forum,⁵⁷ while the key principles of competition law hold good for all economies, a note of caution still needs to be sounded: there should not be one size of shoes to fit all, nor a single model of competition law and policy for all economies. Countries should be careful not to slavishly adopt laws and patterns of enforcement from other, and perhaps older and more experienced jurisdictions, without making a careful analysis of the suitability of those laws and models to their socio-cultural and economic realities. Many developing countries such as Nigeria operate under a very different political, legal, social, and governance environment. Corruption and political intervention may run broader and deeper than what developed countries are accustomed to. Often rules, social and legal sanctions against favouritism and patronage, or conflicts-of-interest in the administration of a law are absent, weak, or lack compliance.

It is very important to understand those realities and situate them in the context of the challenges which they would present, when thinking of establishing a competition law system for a developing country. I believe that in seizing the moment that this conference has afforded me in renewing my argument that Nigeria is in urgent need of a competition or antitrust law, of which every hand must be on deck to ensure its realisation, I have also attempted to demonstrate the challenges that could be faced in the process, in the hope that if well focused on, we could design a system that is built in such a way as to overcome those challenges.

⁵⁷ See Nnamdi Dimgba, “Introduction to Competition Law: A *sine qua non* to the Liberalization of the Nigerian Economy,” *supra*.

In sum, it does give me great disappointment, and I believe this is widely shared, that many years since some appropriate noise was made about the imminence of a competition law regime in our country, we are still where we were. For this reason, given the long delay that we have continued to experience, and in view of some of the likely problems that would be encountered whenever the regime is established, especially on capacity, I am constrained to recommend that perhaps before the competition law is enacted, in order to create consciousness and to begin to groom expertise, both within and without the government, a Competition Promotion Office (CPO) should be created within any relevant government agency (e.g BPE, or to stand independently in the Presidency). This body would take charge of all issues related to competition in the country, and possibly draft all relevant implementation guidelines as may be prescribed under the draft competition bill.

This body would also provide or lead competition advocacy functions for the government. It could lead the sensitization effort, and importantly, act as an official lobby group to the National Assembly that would assist in pressuring the National Assembly to expedite action on the competition bill, assuming the National Assembly is responsible for the delay.⁵⁸ The advantage of this is that as soon as the law is eventually enacted, its operation could take off immediately by succeeding to the infrastructure established of the CPO, which would be collapsed into the new competition body. This, I think, would enable us to make up for lost time, and I should say, contribute to the establishment of a functional, credible and effective competition law system in our country. Vietnam which faced a similar situation to what we face at the moment utilized this process and it worked very beautifully for them.⁵⁹ In the absence of an enabling legal framework, the CPO would restrict itself mainly to advocacy, networking, capacity-building, training and information

⁵⁸ At least the Senate of the National Assembly was responsible for the failure of the bill when it was introduced in September 2006 during Attorney-General Bayo Ojo's time.

⁵⁹ See Alice Pham, *supra*. p. 558.

dissemination. Though unusual, unorthodox and unsupported by any legal framework, it would be a very progressive step to take in the context of the prevailing situation in Nigeria, where to the chagrin of most, our competition law has continued to be: the ‘egg that never hatches.’

Thank You.