CONTRACTS, ARRANGEMENTS AND RESTRICTIVE PRACTICES UNDER THE FEDERAL COMPETITION COMMISSION BILL.

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1. The Meaning of "Anti-trust"

The Federal Competition Commission Bill is, to use the American term, an 'anti-trust' Bill. The term 'Anti-trust' is defined in Blacks Law Dictionary as "Federal and State Statutes to protect trade and commerce from unlawful restraints, price discriminations, price fixing and monopolies …. The principal federal anti-trust acts are: Sherman Act (1890); Clayton Act (1914); Federal Trade Commission Act) 1914); Robinson – Patman Act, 1936."[1]

The Nigerian Bill describes itself as an Act to promote the balanced development of the National economy, welfare and interest of consumers, maintain and encourage competition by prohibiting restrictive business practices that substantially lessen competition, prevent abuse of dominant positions of market power in Nigeria and matters connected therewith. It can thus be seen that the Bill is an anti-trust law.

2. Origins of the Concept

i. U.S. Anti-Trust Law

After the American civil war (1861 – 65) clever businessmen realized that if they could bring competing firms into a single organization they could reduce the costs of producing their goods and services, and also control prices. The primary instrument for achieving this purposes, was the corporation. This was followed by the pool and then the 'trust'. "The trust was in effect a combination of corporations whereby the stockholders of

[1] Fifth Ed, p. 86

each corporation would place their stocks in the hands of trustees who would manage the business for all. In time the term "trust" came to mean any large business combination. The advantage of trusts were obvious. "They made possible any large business combination, centralized control and administration, the elimination of less efficient units, the pooling of patents and by virtue of their capital resources, power to expand, to compete with foreign business companies, to bargain with labour and to exact favourable terms from railroads …."[2]

The pioneering trusts were (i) Standard Oil Company 1882, Cotton Seed Oil (1884), Linseed Oil (1885), Whisky trust (1887) the Match trust (1889), the Tobacco trust (1890) and the Rubber trust in 1892.

The negative effect of these developments were many. (i) It concentrated economic power in a few hands who were able to control the fortunes of millions of people. It created new aggregations of capital powerful enough to influence production, prices, distribution of goods and services, and even state policies. It was in an effort to curb these negative effects of trusts that anti-trust legislations like the Inter State Commerce Act 1887, the Sherman Anti-trust Act 1890 and the Clayton Anti-trust Act (1914) were made by Congress. Whilst the Sherman Act prohibited all contracts, combinations or conspiracies in restraint of trade, and all monopolies, the Clayton Act carefully defined a number of malpractices, prohibited discriminations in price which might tend to create monopolies, forbade the tying together of large corporations by "interlocking directorates" and made corporation directors personally liable for infractions of the anti-trust laws.

(ii) At Common Law

The English Common Law recognizes and suppresses contracts in restraint of trade and restrictive trading agreements. A restrictive trade

[2] See A Pocket History of the United States by Allan Nevins and Henry Steele Commager, 9th ed, 1992.

agreement includes any negative obligation, whether express or implied, in which a party to the agreement accepts some limitation on his freedom to make his decisions about prices (e.g., re-sale price agreement) charges or any other matters affecting the supply and acquisition of goods and services.

On the other hand, a contract in restraint of trade is one in which a party covenants to restrict his future liberty to exercise his trade, business, profession in such a manner and with such persons as he chooses.[3] Prima facie, such contracts are void. But where it can be established that such restrictions are justifiable in the circumstances as being reasonable from the points of view of the parties and the public, they are valid and binding. There are four types of restraints within this category. These are:

i) restraints imposed on employees by employers;

ii) restraints imposed on the vendor of a business by the purchaser of that business;

iii) restraints arising from combinations for the regulation of trade relations, e.g., the regulation of supplies or production;

iv) restrictions accepted by distributors of merchandise.

There are, however, many other types of restraints outside the above categories. These are restraints which are not prima facie void, and which, therefore, do not need to be validated by proof that they are reasonably justified from the points of view of the parties and public. Such restraints are, therefore, prima facie valid. There were identified by Lords Pearce and Wilberforce in the House of Lords in Esso Petroleum Co. Ltd. V. Harper's Garage (Stourport) Ltd.[4] As follows:

i) *The brewery* cases: Contractual clauses tying a leased public house to the lessor's beers such that the person who leases the

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[3] Cheshire and Fifoot, Law of Contract, 12th ed. by Furmston, p. 351

[4] [1968] A.C. 269, [1967] 1 All E.R. 699. See in particular, pp. 328 – 329 (Lord Pearce) and pp. 333-337 (Lord Wilberforce) in [1968] A.C.

public house or bar or restaurant, is bound to sell only the stipulated brand of beer exclusively.[5]

ii) Covenants restricting trade in leases generally: Thus, a lessor or even outright seller of property may obtain a covenant from the lessee or purchaser, as the case may be, not to trade at all or carry on particular trades or activities on the property leased or sold.[6]

iii) Contracts[7] for sole agency and contracts by which persons bind themselves for good consideration to supply their customers with goods obtained from a particular merchant exclusively.

When it became clear that the common law principles were not sufficiently effective to check the abuses inherent in restrictive trade practices and re-sale price maintenance agreements, in the U.K. legislative intervention became inevitable.

(iii) Statutory Intervention

State regulation of such practices in U.K. is effected by the Restrictive Trade Practices Act 1976, amended by the Restrictive Trade Practices Act 1977 and the Competition Act 1980. By this Act, all restrictive trading agreements must be registered by the Director-General of Fair Trading and he must then refer the agreement to the Restrictive Practices Court. Such agreements are registrable when in relation to the supply of goods or services, such an agreement is subject to restrictions on such matters as the prices to be charged for goods or services, the terms or conditions of supply or the persons to or for whom the goods or services are to be supplied, or the areas or places to which they are to be supplied.

With regard to Resale Prices Agreements, such agreements have been prohibited by the Re-Sale Prices Act, 1964, re-enacted in the Re-sale

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5 See Catt v. Tourle (1869) LL.R 4 Ch. App. 654, and Clegg v. Hands (1890) 44 Ch. D. 503.

6 See Thompson v. Harvey (1688) Cpmb. 121 at p. 122, Newton Abbott Co-operative Society Ltd. V. Williamson & Treadgold Ltd [1952] Ch. 286; 1 All E.R. 279.

7 Bouchard Servins v. Prince's Hall Restuaurant Ltd. (1904) 20 T.L.R. 574; W.T. Lamber & Sons v. Goring Brick Co. Ltd. [1932] 1 K.B. 710; British Oxygen Co. Ltd. V. Liquid Air Ltd. [1925] Ch. 383 at p. 392.

Prices Act 1976. The Act prohibits suppliers of goods, which do not qualify for exemption from establishing minimum prices at which those goods may be re-sold or from seeking to compel dealers to observe such prices, whether by discriminatory action or the withholding of supplies. All such agreements are void.

Due to its membership of the European Union the competition rules of the community now also applies to the U.K. as it does to the other 24 members of the E.U. By article 85 of the Treaty of Rome, the rules apply to all members.

> "The following shall be prohibited as incompatible with the common market: all agreement between undertakings, decisions by associations of undertakings and concerned practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling or any other trading conditions;
>
> (b) Limit or control production, markets, technical development, or investment;
>
> (c) Share markets or sources of supply;
>
> (d) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

The application of these rules to the Microsoft domination of the PC soft ware market will be discussed later.

3. The Objectives of the Federal Competition Commission Bill

With the background of its American origins and the British and European experiences in tackling restrictive trade practices and monopolies, we are in a better position to appreciate the Nigerian Bill. The objectives of the proposed Act are stated in Part III of the Bill. The Commission is to:

> "(a) promote the efficiency, adaptability and development of the Nigerian economy;
> (b) provide consumers with competitive prices and product choices;
> (c) promote employment and advance the social and economic welfare of Nigerians;
> (d) ensure that small and medium enterprises have an equitable opportunity to participate in the Nigerian economy; and
> (e) protect Nigerian industries from unfair trade practices."

The correlation between Section 8 of the Bill and Subsection 16(2) of the Fundamental Objectives and Directive Principles of State Policy, in Chapter II of the Constitution, is obvious:

> "(2) The State shall direct its policy towards ensuring –
> (a) the promotion of a planned and balanced economic development;
> (b) that the material resources of the nation are harnessed and distributed as best as possible to serve the common good;
> (c) that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group; and

(d) that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens."

Subsections (b) and (c) of Section 16(2) of the Constitution appear to be particularly relevant to the subject matter of this paper, namely "Contracts, Arrangements and Restrictive Practices". This is contained in Part VI (Sections 29 – 34) of the Bill.

4. **Contracts, Arrangement and Restrictive Practices Substantially Lessening Competition**

The contents of this part, (Part VI) have been admirably summarized by Professor Yemi Akinseye-George in an earlier bullet point presentation which I reproduce below:

"Prohibition of Certain Contracts

- Section 29 prohibits any contract between persons in Nigeria or outside Nigeria where such contract, arrangement, understanding or a combination thereof has the characteristics of trust or otherwise consists of conspiracy in restraint of trade or commerce
- Such contracts are declared void by S. 30(2)
- All agreements between enterprises which have or are likely to have the effect or preventing, restricting or distorting competition in a market are prohibited and void.
- All decisions by associations, enterprises or concerted practices by enterprises which prevent, restrict or distort

competition are prohibited and no person shall give effect to them."[8]

Section 29(2) illustrates what the draftsman means by a contract in restriant of trade. Such a restraint in relation to a contract, arrangement, understanding or conspiracy means any market in which a party supplies or acquires or is likely to supply or acquire goods or services and shall include acts which:

"(a) directly or indirectly fix a purchase or selling price or any other trading condition;
(b) divide markets by allocating customers, supplies, territories or specific types of goods or services;
(c) involve collusive tendering;
(d) limit or control production, market, technical development or investment;
(e) apply dissimilar conditions to equivalent transaction with other trading parties thereby placing them at a competitive disadvantage; and
(f) make the conclusion of a contract subject to acceptance by the other parties of supplementary obligation and which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

In addition to the above, certain agreements are presumed by the Bill to constitute acts in restraint of trade. If for example, two companies in agreement have a common ownership or management or have some other significant interest in each other, and they are engaged in a restrictive practice, that agreement is prohibited and is void.

8 See "Competition/Anti Trust Bill." A Paper presented at a Lagos Business School/BPE Seminar, March 2006.

Also all agreements between enterprises which have or are likely to have the effect of preventing, restricting or distorting competition in a market are prohibited and void.

Obvious examples of this practice are

(i) restrictive price agreements

(ii) withholding or deliberate reduction of production or supplies

(iii) hoarding

(iv) deliberately reducing prices below cost of production (in order to eliminate weaker competitors from the market).

In all these cases, there must be an agreement between at least two parties. Such actions taken in isolation by a solitary enterprise, no matter how reprehensible, does not come under the provisions of this Section, but could be illegal under Section 38, (abuse of dominant position, or Part XI, (monopoly).

It is important to note that not only is engaging in a prohibited contract, agreement or arrangement null and void, it is also a criminal offence. Any person who makes or enters into a contract or engages in any arrangement, conspiracy, combination declared unlawful in Section 29 shall be guilty of an offence and on conviction shall be liable to 2 years imprisonment, or a fine, six times the amount of profit the person would have made or both.

If the offence is committed by a body corporate, it shall also be guilty of an offence which on conviction carries a fine of not less than one million naira for each director, manager, or officer of the body corporate. Two points need to be made about the sanctions against the offending corporate bodies and their management.

(i) Section 32(i) which prescribes a fine equivalent to 6 times the profit a convicted person must have made or would have made, places an impossible speculative burden on the Judge. What a person would have

earned but did not earn by his involvement in the illegal contract or arrangement, cannot be determined with mathematical accuracy by a commercial or trading expert, much less a Judge.

(ii) Again the punishment of a minimum of one million naira in section 32(1) does not distinguish between the management staff who are guilty or innocent of involvement and those who are senior and in a commanding position of authority and junior ones who merely carry out instructions.

There is also a provision prohibiting contracts and arrangements with ‘exclusionary provisions’. This unusual term turns out in its definition not to be in anyway different from the situations envisaged in Section 29. An arrangement or contract, contains an exclusionary provision if any two or more parties in competition with each other conclude an agreement, the effect of which is to restrict, or limit the supply of goods or services or acquisition of same from any particular class of persons either generally or in particular circumstances or conditions, or if a party is a company, by interconnected or affiliated company.

The penalty for a Section 31 offence (agreements preventing, restricting or distorting competition) is an order from the Commission requiring the culprit to cease the practice and in the case of Section 33, an order to terminate the offending agreement. Any person who has suffered a loss as a result of any anti-competitive agreement or trade practice can apply to the Commission for compensation and if it is satisfied that there is justification for the claim, it will order the guilty party or parties to pay the applicant the compensation.

A person who fails to terminate an anti-competitive agreement on the order of the Commission shall be guilty of an offence and on conviction shall be liable to 2 years imprisonment or a fine of N200,000 or both.

5. Abuse of Dominant Position or Market Power

The question of the abuse of dominant position of market power, which is prohibited by Section 37(1) of the Bill is closely related to the subject restrictive practice.

If (i) one or more enterprises or one enterprise in cooperation with an affiliate, individually or collectively have more than forty percent share of the relevant market or (ii) if it or they have the ability to control prices or to exclude competition or to behave to an appreciable extent independently of competitors, then they are regarded by the Bill (Section 36) as holding a dominant position. Such an enterprise or enterprises are deemed to be guilty of abusing their dominant position, if it or they impede the maintenance or development of effective competition in a market in any of the following ways:

> "(a) restricts the entry of any other enterprise into that or any other market;
>
> (b) prevents or deters any enterprise from engaging in competitive conduct in that or any other market;
>
> (c) eliminates or removes any enterprise from that or any other market;
>
> (d) directly or indirectly imposes unfair purchase or selling prices or other anti-competitive practices;
>
> (e) limits production of products to the prejudice of consumers;
>
> (f) makes the conclusion of agreements subject to acceptance by other parties of supplementary obligations which by their nature, or according to commercial usage, have no connection with the subject of such agreements;
>
> (g) engages in any business conduct that results in the exploitation of its customers and suppliers, including, but not

limited to such conduct as exclusive dealing, market restriction or tied selling."

It can thus be seen that the abuses targeted are similar to those in Section 29, the main difference being that the offender in Section 37 is a, dominant enterprise.

The well known abuse in which a dominant player in the market, deliberately reduces the price of a product to such a level that competitors' goods or services become so unattractive that they are forced out of the market either by an accumulation of unsold stock, or are compelled to sell at a great loss, thus leading to their exit from the market, is a good illustration of abuse of a dominant position.

Exclusive dealing which is one of the practices prohibited for being an abuse of a dominant position is defined (Section 37(3) (g) as the practice whereby a supplier of products as a condition for supplying products to a customer requires the customer to:

i) deal only or primarily in goods supplied by or designed by the supplier or his nominee; or

(ii) refrain from dealing in a specified class or kind of products except as supplied by the supplier or his nominee.

This is similar to the "solus" agreements under which petroleum station owners undertake to sell the products of a single marketer to whom they are tied by agreement. However, since no single marketer controls up to forty percent of the market, these agreements may not be affected by the Act when in place. The element of inducement in Section 375(b) is required in all such transaction, namely, that the dominant party induces the customer to accept being tied to the product by offering more favourable terms of supply than is normally prevalent in the market.

This term is explained by Kevin Marshall in the following lucid terms.

> "In its simplest form, "an exclusive dealing arrangement is a contract between a [supplier] and a buyer forbidding the buyer from purchasing the contracted good from any other seller, or requiring the buyer to take all of its needs in the contracted good from the [supplier]." Related practices such as quantity or market share discount (which reward dealers for selling relatively more of a particular seller's brand) or even covenants not to compete also have the effect of deterring entry. The anticompetitive nature of such conduct lies in the arrangement's propensity to create an artificial barrier to entry. As observed by Professor Hovenkamp and Areeda, :[t]he most frequently given rationale for condemning exclusive dealing arrangements is that they limit the access of upstream rivals to downstream firms, thus reducing upstream competition and creating or perpetuating lower output and higher prices."[9]

In terms of sanctions for abuse of a dominant position, the provisions of the bill are very weak. Where the Commission finds that an enterprise has abused its dominant position, it shall prepare a report indicating the practices constituting the abuse,

i) notify the enterprise or enterprises along with a copy of the report;
ii) direct the enterprise to cease the abuse not later than six months after receipt of the notice.

[9] See Kevin & Marshall, "The Economics of Competitive Injury", paper delivered at Lagos Business School/BPE Seminar, 9-10 March 2006, p. 29.

If the Commission finds that the abusive practice involves exclusive dealing or market restriction (i.e. where a supplier of products, as a condition of supplying them to a customer requires that customer to supply any products only in a defined market) it <u>may</u> prohibit the major supplier of products in that market if the abuse is likely to result in restraint of trade, commerce or competition. Where the dominant enterprise fails or neglects to give effect to measures dictated by the Commission to eliminate the abuse within six months, there is no provision for what sanctions the Commission could impose on the recalcitrant enterprise. The abuse of status by a dominant enterprise is not characterized as a crime, so it cannot be prosecuted and made liable to a fine on conviction, much less imposing terms of imprisonment on the directing brains of the company. The Bill seems to have a soft spot for dominant enterprises and their proprietors.

6. Resale Price Agreements and Individual Minimum Resale Price Agreements

Sections 42 and 43 make collective resale price agreements unlawful whilst Section 45 does the same for individual minimum resale price agreement. The contents of the two provisions can be summarized as follows:

> "**Resale Price maintenance**
> S. 42 prohibits collective agreements by suppliers to withhold supplies of products from dealers who resell or have resold products in breach of any condition as to the price at which those goods may be resold; Similarly, it is unlawful for any two or more enterprises which are dealers in any products to enter into an agreement whereby they undertake to withhold orders for suppliers of goods from suppliers who supply product without imposing a condition."

Regarding individual minimum resale price agreements, any term or condition of an agreement for the sale of any products by a supplier to a dealer is void to the

extent that purports to establish or provide for the establishment of minimum prices to be charged on the resale of those products in Nigeria.

The U.S. Supreme Court pointed out the negative effects of price fixing over 80 years ago in United States v. Trenton Polteries Co.,[10]

> "… for over forty years [Supreme Court] has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense."

It should be noted that it is also unlawful for dealers to withhold orders from suppliers who have been supplying goods or services to other dealers without imposing conditions as to minimum resale prices.

7. **Monopolies**

(i) Provisions of the Bill

Sections 65 and 66 prohibit any attempt to organize a monopoly in any trade or service. This part, Part XV, is the closest to what the original Anti-trust Acts in the United States intended to achieve. A monopoly is defined by Economists as "a market that has only one seller but many buyers"[11]

Sections 65 and 66 provide as follows:

> "**65**. Any person or body corporate who monopolises or attempts to monopolise or combine or conspire with any other person or

[10] 273 U.S. 392 S. Ct. 377 (1926)

[11] Robert s Pindyck and Daniel L. Rubinfeld, Microeconomics 327, 5th Ed., 2001.

persons to monopolise any part of trade or commerce, commits an offence under this Act.

66. – (i) For the purposes of this Part of this Act a monopoly situation shall be taken to exist in relation to the supply of goods of any description in the following cases, if -

a) at least 51 *per cent* of all the goods of that description which are supplied in Nigeria are supplied by one and the same person, or

b) at least 51 *per cent* of all the goods of that description which are supplied in Nigeria are supplied by members of one and the same group of inter-connected bodies corporate or are supplied to members of one and same group of interconnected bodies corporate; or

c) at least 51 *per cent* of all the goods of that description which are supplied in Nigeria are supplied by members of the one and the same group consisting of two or more of such persons as are mentioned in subsection (2) of this section, or are supplied to members of one and the group consisting of two or more such persons; or

d) one or more agreements are in operation, the result or collective result of which is that goods of that description are not supplied in Nigeria at all."

According to Kevin Marshall, a market controlled by a monopolist will produce a lesser quantity of … units at a higher price. Because of resulting higher prices and curtailment of production, monopoly creates a deadweight loss to society, and such loss is of the type the antitrust laws were clearly intended to prevent.[12]

[12] The Economies of Competitive Injury op. cit , p. 21.

With regard to the supply of services, (section 57) control of only 25 percent of the service in Nigeria constitutes it into a monopoly. Conviction for committing the offence of engaging in a monopoly is imprisonment for two years or a fine of N100,000 or both. The punishment is again exceptionally mild.

(ii) Operations of Microsoft Corporation in the E U Countries as an Illustration of a Monopoly.

The European Commission enforces EU competition rules on restrictive business practices and abuses of monopoly power for the whole of the European Union when cross-border trade and competition are affected.

The Commission has the power to force changes in company behaviour and to impose financial penalties for antitrust violations of up to 10% of their annual turnover worldwide.

The dominant position almost amounting to a monopoly of Microsoft Corporation in the market for PC operating systems resulted in major directive by the Commission of Microsoft to take specific steps to loosen its stranglehold in the computer soft ware market in order to enable other players an entry into the market.

According to release issued on 24th March 2004, the Commission stated that Microsoft broke European Competition law by leveraging its near monopoly in the market for P.C. Operating Systems (O.S.) onto the markets for work group server operating systems and media players. According to the European Competition Commissioner, “Dominant Companies have a special responsibility to ensure that the way they do business doesn’t prevent competition on the merits and does not harm consumers and innovation.”

According to the release, the situation had been under investigation for over five years and the final outcome was that Microsoft had violated the EU Treaty's Competition rules by abusing its near monopoly in the PC Operating System contrary to Article 82 of the rules.

"After an exhaustive and extensive investigation of more than five years and three statements of objections, the Commission has today taken a decision finding that US software company Microsoft Corporation has violated the EU Treaty's competition rules by abusing its near monopoly (Article 82) in the PC operating system.

Microsoft abused its market power by deliberately restricting interoperability between Windows PCs and non-Microsoft work group servers, and by trying its Windows Media Player (WMP), a product where it faced competition, with its ubiquitous Windows operating system.

This illegal conduct has enabled Microsoft to acquire a dominant position in the market for work group server operating systems, which are at the heart of corporate IT networks, and risks eliminating competition altogether in that market. In addition, Microsoft's conduct has significantly weakened competition on the media player market.

The ongoing abuses act as a brake on innovation and harm the competitive process and consumers, who ultimately end up with less choice and facing higher prices."[13]

The following remedies were prescribed against Microsoft.

(i) Microsoft was required within 120 days to disclose complete and accurate interface documentation, which would allow non-Microsoft work group servers to achieve full interoperability with Windows

[13] See EUROPA – Rapid – Press Release ref. IP/04/382 of 24th March 2004.

PCs and servers. This would enable rival vendors to develop products that could compete on a level playing field in the work group server operating system market.

(ii) Microsoft was ordered to pay a fine of 497.2 million Euros.

This case is not only a textbook illustration of a dominant position in a market, but also the negative effects of such dominance and the appropriate steps that need to be taken to eliminate the problem. The Microsoft case also demonstrates the fact that there is no real difference between market dominance and monopoly in most cases. There is therefore need to treat both in the same way.

8. **Exemptions**

There are a number of situations in which the prohibitions in the Bill and unlawfulness and voidness do not apply to enterprises in apparent contravention of the provisions of the proposed Act.

By Section 35, the following contracts, agreements or arrangements are exempted from the application as the Bill.

a) A contract or arrangement between partners none of whom is a corporate body in relation to competition between the partnership and a party to the contract while that party is or after ceasing to be a partner.
(This type of agreement protects a partnership from the injuries insider competition of a current or former partner)

b) A contract or an arrangement where the only parties are or will be affiliated firms or companies;

c) A contract of service so far as it contains provisions by which a person, not being a body corporate agrees to accept restrictions as to work in which that person may engage during or after the termination of contract;

d) Contracts for the sale of a business or shares in the capital of a company carrying on business solely for the protection of the purchase of the goodwill of the company;

e) Contracts relating to the remuneration, conditions of employment, hours of work or working conditions of employees;

f) Any act done otherwise than in trade, in concert by users of goods or services against the supplier of those goods or services;

g) Any act done to give effect to a provision of a contract or an arrangement referred to in the above paragraphs;

h) Any act done to give effect to any intellectual property right conferred by the Copyright Act Cap. 68, Patents and Designs Act Cap. 344 and Trade marks Act Cap. 436 LFN 1990."

These exemptions are quite consistent with the common law principles of restraint of trade. An employee of a manufacturing or service company should not be allowed to provide similar services whilst still in the service of his employer or even for some time after learning that service, if his establishment will draw custom form the same environment. Also a person who has sold his factory to another person, should not be permitted to move next door to set up a factory producing the same goods. As Lord Shaw Dunfermline stated in Herbert Morris Ltd. V. Saxelby[14]

> "When a business is sold, the vendor who, it may be, has inherited it or built it up seeks to realize this piece of property, and obtains a purchaser upon a condition without which the whole transaction would be valueless. He sells, he himself agreeing not to compete; and the law upholds such a bargain and declines to permit a vendor to derogate from his own grant. Public interest cannot be invoked

[14] [1916] 1 A.C. 688 HL.

to render such a bargain nugatory: to do so would be to use public interest for the destruction of property. Nothing could be a more sure deterrent to commercial energy and activity than a principle that its accumulated results could not be transferred save under conditions which make its buyer insecure.[15]"

9. **Appropriate Conditions for Achieving Ideal Competition**

In his most enlightening article, Kevin S. Marshall[16] listed the underlying assumptions or conditions precedent for a perfectly competitive environment as follows:

"1. The existence of numerous buyers and sellers each acting independently and rationally;

2. Each buyer and seller consumes or produces such a negligible amount of the total output such that no one buyer or seller can influence price by the amount they either consume or produce;

3. There are no barriers to entry or exit with respect to consumer or producer markets;

4. All market participants, that is all buyers and sellers, are fully informed of all relevant economic and technological data;

5. All products are homogeneous, or rather, constitute interchangeable substitutes for each other, and

6. The forces of supply and demand are free to determine the quantity of output in a relevant market as well as determine a market clearing, competitive price with respect to same."

According to this very learned Writer:

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15 Ibid at p. 713

16 Op cit, pp. 9-10.

> "Microeconomic theory teaches that if these assumptions hold true, or rather, if the above conditions are met, the perfectly competitive model will create efficiencies in consumption, production, and allocation. And it is through the creation of such efficiencies that a perfectly competitive market promises the greatest social opportunity for wealth creation. Or in antitrust parlance, it promises greater output at lower prices.
>
> If the above assumptions (or conditions) must be met in order for the perfectly competitive market to thrive, then (from a purely economic perspective) it follows that any market conduct or activity that impairs, threatens, suppresses or jeopardizes any one or more of such underlying assumptions (or conditions) must be discouraged as a matter of public policy. It is in this context that the referenced underlying assumptions provide a powerful analytical paradigm for identifying market conduct or activity that may likely constitute an unreasonable restraint of trade, an unfair method of competition, as well as *competitive injury*"[17]

Hopefully the Nigerian market should come as close as possible to these ideal conditions, when, this Bill aimed at providing an environment for the institution of a perfectly competitive market becomes law. But there is need to provide it more appropriate and effective weapons for its task.

In my humble view, whilst the Bill is sufficiently comprehensive, its reluctance to deal firmly with powerful offenders, whilst coming down hard on smaller entrepreneurs, gravely weakens it. Furthermore, a perfect or even fair competitive market cannot emerge and thrive in the chaotic, indisciplined and disorganized Nigerian political, economic and social environment.

The Bill is well intended, but a lot still needs to be done outside the purely economic and commercial areas for it to achieve its proclaimed objectives.

[17] At p. 11.