

RELATIONSHIP BETWEEN COMPETITION LAW AND INTELLECTUAL PROPERTY LAW*

Abstract

Competition law regulates the market to ensure that one or more individuals or firms do not have an economic advantage in form of a monopoly which stifles competition by conferring exclusive powers on them to carry on a particular business or trade thereby resulting in high cost of goods and services. Competition law is an essential tool in safeguarding the free market against practices which distort the market. It is necessary in preventing all forms of monopolistic practices, ensuring optimum allocation of resources which in turn ensures that consumers are rewarded with fair prices for goods and services. Intellectual property on the other hand is an aggregate of creative and innovative works and ideas emanating from the human mind. In order to ensure that these rights are protected, laws are enacted by various law-making bodies which assign these rights to individuals or organizations who are the inventors of these ideas conferring them with exclusivity on the said inventions. The nature of IPR is akin to a monopoly owing to its characteristics that excludes competitors from replicating the patented product whereas competition law prohibits the wielding of monopoly powers by firms. Competition law and IPR are drivers of innovation and technological advancement which plays a major role in the establishment of a free market economy and also of immense benefit to the consumers. Both competition law and IPR ensure that resources are effectively allocated in the relevant market. Competition law and IPR harmoniously support the creation of novel products and services as well as technological advancement. In most cases, consumer welfare is enhanced through the development of innovative goods and services or the improvement of the quality of already existing ones which are readily available and affordable. In Nigeria, the FCCPA prohibits monopoly, abuse of dominant position and some other conduct which is the preoccupation of IPR. The provision of FCCPA is a great stride in regulating the free market, however there needs to be guidelines in place which govern the extent of the application of these two seemingly conflicting areas of law; competition law and IPR.

Keywords: Competition Law, Intellectual Property Law, Relationship, Nigeria

1. Competition Law

Competition means rivalry. It is an act of contest between two or more people where one party tries to outdo its counterpart. As rivalry is a natural process in every sphere of human endeavor, competition law sets the ground rules to ensure fair dealings among the various competing interests. Competition laws are enacted by the government of various nations for the smooth control and regulation of commerce. As such competition law ensures that monopolies, price fixing and unlawful restraints of all kinds are eliminated. It is aimed at encouraging businesses to produce high quality goods at minimal prices, it encourages competition amongst various and ensures that the needs of consumers are met and products are affordable.¹ Competition laws therefore are laws or combination of laws that regulate the rivalry process to ensure that the process involved in commercial activities does not degenerate into anarchy. Competition law prohibits and sanctions the abuse of dominant position by firm which occurs when a firm or a group of firms uses its superior position in a relevant market in a way that exploits and excludes its competitors.² Most often than not, a firm abuses its dominant position by the imposition of unfair prices, use of predatory pricing, imposition of limited production as well as the imposition of barriers to entry.³ Again, abuse of dominant position is said to occur when a firm engages in activities that unreasonably lessens competition in a particular market or where the activities of such a firm negatively affects the transfer of technology or innovation.⁴

Similarly, competition law regulates the market to ensure that one or more individuals or firms do not have an economic advantage in form of a monopoly which stifles competition by conferring exclusive powers on them to carry on a particular business or trade thereby resulting in high cost of goods and services.⁵

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¹ Competition law legal definition of Competition law < <https://legal-dictionary.thefreedictionary.com/competitionlaw> > assessed on January 14th 2021

² Abuse of Dominant Position - Meaning, Determination and Case Laws (legalbites.in) < <https://www.legalbites.in/abuse-dominantposition-competition-law> > assessed on January. 20, 2021

³ *Ibid*

⁴ Federal Competition and Consumer Protection Act 2018, s73 (4) (a) (b)

⁵<<https://legal-dictionary.thefreedictionary.com/monopoly> > assessed on January 21 2021

Competition law is an essential tool in safeguarding the free market against distortions. It is necessary in preventing all forms of monopolistic practices, ensuring optimum allocation of resources which in turn ensures that consumers are rewarded with fair prices for goods and services and ensuring that practices which distort the competition process are adequately penalized.⁶ Thus Competition law ensures that there is a level playing field for everyone, that larger corporations who possess the financial wherewithal do not run the smaller ones out of the process. They are statutes developed to protect consumers from the greedy conducts of business owners by making it unlawful for businesses to compete in unfair ways. Competition law regulate business practices so that national or regional markets are not dominated by only large multinationals but rather ensure that markets are open to all players on a somewhat level playing field. In other words, competition law consists of rules that set limits on business practice for the purpose of ensuring fair and ethical participation in business.⁷ They are a set of statutes developed to regulate competition between companies, mainly to ensure that businesses engage in fair competition in order to protect consumers from covetous business owners. In other words, competition laws consist of rules that set limitations on business practices for the purpose of ensuring fair and ethical participation in business.⁸ Usually, competition law is part of a country's policy which usually contains other laws and policies as part of a more comprehensive strategy to regulate business practices.⁹ The competition policy of a country creates an enabling environment for business participation and competition so that the market is not dominated by a small group of powerful business people. While competition law comprises a set of directives that constrain the strategies available to firms by laying down rules for competitive rivalry, competition policy refers to all governmental measures that can influence the intensity of competition in the national markets or bear on an economic entity's freedom to trade.¹⁰

Competition law establishes, regulates as well as sustains the free market. They are used by various governments, firms and individuals to measure and at the same time punish public and private actions that interfere with the free flow of market interactions.¹¹ The presence of a competition law gives room for consumers to have a wide variety of options and businesses to patronize. As such, businesses are constantly under pressure to produce the highest quality o goods and services at affordable prices.¹² Generally, the competition policies of any government are a culmination of its actions which enable firms to operate and thrive within the business environment. Some of these policies include; trade regulations, investment policies and decisions, intellectual property rights, regulation on product distribution and service provision, bankruptcy and insolvency laws and a host of others contingencies.¹³ Competition law ensures that all forms of restrictive agreements among enterprises are eliminated. It also ensures that other conducts such as abuse of dominant positions by firms, mergers and acquisition which have the tendency to adversely affect domestic and international markets and generally limit access to markets are prohibited.¹⁴

Competition law seeks to impact the totality of the economic cycle by ensuring that the various goods and services produced and rendered the prices and the quality of such goods and services are a natural outcome of actual competition among enterprises.¹⁵ It is the central law which works jointly with other relevant laws to sustain the free market. They are used by government, firms and individuals to measure as well as punish activities in the private and public sector which interfere with the free flow of market interactions. It is therefore germane that countries adapt their competition laws to achieve political, economic and social relevance.¹⁶ The resultant effect of an effective competition law is that businesses constantly strive at all

⁶A. Pham, 'Competition and Intellectual Property Rights; Controlling Abuse or Abusing Control' [2008] (25) CUTS International 2

⁷George Etomi, *An Introduction to Commercial Law in Nigeria: Text, Cases and Materials* (Lagos: MIJ Professional Publishers Ltd 2014) 476.

⁸(n 7) 476

⁹*Ibid.*

¹⁰Simon J. Evenett, 'Links between the Development of Competition Law in Developing Countries', A paper Commissioned by the United Kingdom's Department for International Development as Part of a Series of Case Studies for the World Development Report 2005 Investment Climate, Growth and Poverty, 4-5.

¹¹Nnamdi Dimgba, 'Introduction to Competition Law: A *Sine qua Non* to a Liberalized Economy.' A paper delivered at a seminar organized by Rules Watch: Competition Legislation and the New World Order May 2006.

¹²Competition in the European Union EUROPA <<https://europa.eu>> accessed on 22nd of January 2020

¹³Simon J. Evenett, 'Links between the Development of Competition Law in Developing Countries', A paper Commissioned by the United Kingdom's Department for International Development as Part of a Series of Case Studies for the World Development Report 2005 Investment Climate, Growth and Poverty, 4-5.

¹⁴United Nations Conference on Trade and Development Model law on Competition <[https://UNCTAD.org](https://unctad.org)> accessed on February 17, 2020

¹⁵Competition Law and Responsible Business Conduct <<https://mneguidelines.oecd.org/text>> accessed on February 19, 2020

¹⁶Evenett (n 13)

times to produce the best quality of goods and services at affordable prices. Competition law removes impediments such as; restrictive agreements or agreements among enterprises, it supervises mergers and acquisitions or market power which limits access to markets or which overly restrains competition and is a disadvantage to the domestic and international market.¹⁷ Generally, competition law lays down the ground rules for businesses in a bid to ensure that an enabling environment is created for all the various groups of people participating in all the sectors of the economy. It gives room for innovation thereby ensuring that end users have a wide range of goods and services to choose from.

2. Intellectual Property Rights.

Intellectual property refers intellectual creations in form of inventions, works of literature, and artistic works.¹⁸ Intellectual property is an aggregate of creative and innovative works and ideas emanating from the human mind. In order to ensure that these rights are protected, laws are enacted by various law-making bodies which assign these rights to individuals or organizations who are the inventors of these ideas conferring them with exclusivity on the said inventions. These rights are assigned by law on non physical properties such as musical, literary, and artistic works; discoveries and inventions; words, phrases, symbols, and designs. These rights also extend to designs, images, names used in commerce¹⁹ Intellectual Property Rights are created specifically to protect all manner of innovative ideas, creative endeavours as well as expressions which are creatively invented and which members of the public are ready to accord the status of a property just like in the case of a tangible property.²⁰ The protection of IPR rewards innovators and creators of patent, trademarks or copyright with various benefits for their ingenuity. The reward is aimed at fueling all forms of human endeavor in the innovative realm.²¹ It has been said that innovation is usually an economic transformation that is triggered off by inventors as opposed to innovation triggered by the needs of the consumers.²² Innovation can take various forms; for instance, where new goods or new quality of goods are introduced, there is product innovation. Product innovation widens the choices available to consumers thereby increasing the demand for the goods and services created. In the same vein, where a novel production or manufacturing method is introduced, there is process innovation. This enhances productivity and increases production opportunities.²³ When it comes to innovation, the inventor plays a key role. Therefore he needs the instrumentality of the law to enhance his innovation through the system of IPR.²⁴ Innovation fosters growth in every economy; therefore government as well as relevant public institutions has a great role to play in entrenching the culture of innovation.²⁵ The main legal instruments for protecting Intellectual property Rights are patents, copyright, Industrial designs, Geographical Indications (GI), trade secrets and trademarks. Some special forms of protection include; utility models, plant breeders, plant breeder's rights and integrated circuits. These rights specifically address the needs of knowledge producers.²⁶

The most common economic justification for Intellectual Property protection is that when intellectual property rights are accorded with property rights, it ensures that the economic value of these rights are not lost due to the activities of copy cats. It also promotes innovation which works for the good of the consumers. This particularly applies to patent and copy right laws.²⁷ The rationale for the protection of trademarks and industrial design is that it increases the impetus for not just any kind of innovation but quality and creative innovation.²⁸ Laws are enacted by various jurisdictions to protect intellectual property in order to provide a legal backing which protects and enhances the moral and economic rights of inventors and also to confer certain rights to the public in order to utilize such innovations. Similarly, protection of intellectual property rights spurs creativity which in turn translates to quality goods and services for consumers as well as contribution towards improved trade, economic development and social welfare.²⁹

¹⁷ UNCTAD Model Law on Competition Part 1 < <https://unctad.org> > accessed on February 19, 2020

¹⁸ What is Intellectual Property < <https://www.wipo.int/about-ip/en> > accessed on March 4 2020

¹⁹ V. Apetrogie, Intellectual Property Rights in developing Countries-Impact and Consequences < www.academia.edu > assessed on January 21, 2020

²⁰ R.H Bork, *The Antitrust Paradox* (Free Press 1993) 259

²¹ What is intellectual property < <https://www.wipo.int> > accessed on March 3,2020

²² Ioannis Lianos, *Competition Law and Intellectual Property Rights; Promoting Innovation* (Fort Hart Publishers 2017) 3

²³ Lianos (n 22) 4

²⁴ *Ibid*

²⁵ *Ibid*

²⁶C. A Barga, 'Trade-Related Intellectual Issues: The Uruguay Round Agreements and its Economic Implications' *The Uruguay Round and the Developing Countries* (1996)342.

²⁷A. Pham 'Competition Law and Intellectual Property Rights: Controlling Abuse or Abusing Control?' [2008] *CUTS International* 37

²⁸ *Ibid*

²⁹ N.K Vats "Intellectual Property Rights versus Competition Law" *Kuruksheta Law Journal* (1) (2011) 192

Forms of Intellectual Property Rights

- (a) Trademark: This is a distinguishing mark on goods and services produced or provided by a company or an individual. The protection offered by trademark ensures that those who registered the mark have and enjoy exclusive right for the identification of such goods. Before this right can be granted in respect to an invention, the invention must satisfy the under listed criteria:
 - i. Innovation must be an inventive step
 - ii. It must be of practical use with an element of novelty
 - iii. Trademark consists of letters, numbers or a combination of both. It may also include drawings, symbols and other distinguishing features.
- (b) Copyright: This is the right granted under the law over literary works and other works of art. This right covers music books, paintings, advertisements, newspaper, movies, drawings and so on. It also protects all forms of musical and theatrical performances, producers of phonograms as well as broadcasting organizations.
- (c) Patent: This is the right granted to an inventor which enables him to decide how others can use his work and consequently availing them of some technical information regarding the work available in a patent document in exchange for this right.³⁰
- (d) Geographical Indications: Where goods are of a specific geographical origin, bear certain, quality and reputation associated with a geographical location, this right will be granted. It consists of signs which will distinguish such goods.
- (e) Industrial Designs: This right embodies the ornamental or aesthetic aspect of a product. It includes shapes, lines, colour, pattern and surface of such an article. The beauty and attractiveness conferred by this right adds to commercial value. Registration of this right guarantees exclusive right and protection against unauthorized imitation by third parties.

3. The Relationship between Competition Law and Intellectual Property Rights

A crucial element of growth in every market is through the process of innovation which is the reason why agencies of government strive towards the creation of a market environment which fosters innovation and ingenuity. This has led to the development of IPR.³¹ The grant of IPR is the most rewarding avenue through which the government can compensate individuals and organizations who engage in any kind of creative endeavor.³² When an invention is triggered by the creative ability of inventors to bring about an economic transformation, an innovation is said to have taken place. This presupposes that innovations originate from entrepreneurs though it can be argued that innovation can come up as a response to the need of consumers. Whatever be the case, these inventive ideas are protected through the instrumentality of IPR as a means of boosting the innovation.³³ The grant of IPR bestows certain exclusive rights to the bearer. This means that the owner can exclude every other individual or organization from reproducing the patented goods or process for a certain number of years. In the case of a registered trade mark, other firms are restrained from using the name or a mark on their products as the trademark grants a level of distinctiveness to the product which is the subject matter of the registration. The nature of IPR is akin to a monopoly owing to its characteristics that excludes competitors from replicating the patented product. However, there are usually other products in the market which certain consumers may prefer above the patented product.³⁴

Competition law is essentially a study of markets to ensure that the market is free from activities which stifle or distort competition; IPR on the other hand grants exclusive rights to holders which excludes others from the use of such rights. This seems to be contradictory to the goals of competition law.³⁵ Over time, it has become clearer that the two concepts reinforce each other as their objectives in the long run are one and the same. Competition law and IPR are drivers of innovation and technological advancement which plays a major role is the establishment of a free market economy and also of immense benefit to the consumers. Again, both competition law and IPR ensure that resources are effectively allocated in the relevant market.³⁶ In most cases, consumer welfare is enhanced through the development of innovative goods and services or the improvement of the quality of already existing ones which are readily available and affordable. The grant

³⁰ What is Intellectual Property < <https://www.wipo.int/about-ip/en> > accessed on March 4 2020

³¹ I Lianos, ' Competition Law and Intellectual Property Rights' in I Lianos and V Korah *Competition Law; Analysis, Cases and Materials* (Hart Publishers 2017) 3

³² A Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (Oxford University press, 1976) 754.

³³ Lianos (n 31) 3

³⁴ R Whish and D Bailey, *Competition Law* (7th edn, Oxford University Press 2012) 770

³⁵ *Ibid* 769

³⁶ European Commission Technology Transfer Guidelines 2011, para 7

of IPR sets the pace for the promotion of competition as firms strive to outdo themselves in terms of innovative products that meet the needs of consumers.³⁷

Competition law and IPR harmoniously support the creation of novel products and services as well as technological advancement. While the focus of IPR is on the grant of unshared legal rights to inventors for period of time, competition law ensures that conducts which distort market efficiency are eliminated. It is also important to note that the aim of IPR is not to confer market power or monopoly power on a firm or individual. IPR should be seen in the light of every other property rights even though for IPR, the rights are intangible. Unlike physical goods which can be easily disposed of and value easily gotten, intangible goods need to be protected under the law to enable the inventor to reap the benefits of his creative endeavor. This legal protection is also necessary in order to encourage innovators to keep innovating as this ensures that a wide range of products and services are available to the consumers.³⁸

IPR merely excludes third party from the use the protected right for a specific period as opposed to market power where firms engage in price fixing and sustain such conducts for a period of time. With the grant of IPR, there are still alternatives for consumers in the market which acts as a check on the possession of market power. The possession of market power by firms is an anticompetitive conduct which results in price fixing, predatory pricing as well as tying and bundling. Where the grant of an IPR results in the creation of market power, it may be attributed to the innovation, creativity and hard work which may not adversely affect competition. This is opposed to the possession of market power which comes as a result of engagement in anticompetitive conducts.³⁹ The exclusivity conferred on the holder of an IPR is merely the freedom to contract which involves the freedom of choose one thing over another in ordinary law of contract involving both physical and non physical property, therefore the grant of IPR does not exclude such transaction from the scrutiny of competition law.⁴⁰ Competition laws does not directly play any part in the grant of IPR however competition law ensures that these rights operate within the limits of the autonomy granted by the intellectual property laws.

IPR has been seen as playing a huge role in eroding the free playing field for firms which competition law seeks to establish. In actual fact however, IPR establishes limits within which legal exclusivity may be exercised by competing firms in terms of their inventions. The grant of IPR creates dynamic competition which has the potential to create market power but the rights conferred by IPR do not necessarily create market power.⁴¹ IPR can only be said to be monopolist when there are no alternatives in the market for consumers to fall back on in any relevant market. Monopoly is not out rightly prohibited under competition law especially when it is achieved through hard work, skill and diligence. Monopoly is only unlawful when it is acquired through anticompetitive means. It has been said that competition is not ordinarily a natural occurrence in the market but has evolved from one form to another over the years firstly from a system of reproducing goods and services to one of outright creativity and innovation. The frequency of innovation has created the need for the protection of IPR which help to create dynamic competition in the market. Therefore IPR is never at cross roads with competition law.⁴² The ever increasing forms and numbers of IPR titles, the elevation of standards of protection and the territorial broadening of the scope of protection only mirror in law the diversity of the goods actually offered in competition, and reveal the normality of such competition. To put it simply, IPRs policy protects the IP based products and processes that firms use as inputs in the dynamically competitive process in the marketplace, and thus is nowhere near being in contradistinction or in conflict with the ultimate goal of competition law.⁴³

4. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

The TRIPS⁴⁴ is an international multilateral agreement which came into force in 1995. It addresses various aspects of IPR such as copyright, trademark, geographical indications, industrial designs and others. The

³⁷ N K Vats, 'Intellectual Property Rights versus Competition Law' (2011) (1) *Kurukshetra Law Journal* 204

³⁸ *Ibid* 205

³⁹ Vats (n 37) 207

⁴⁰ A Pham 'Competition Law and Intellectual Property Rights: Controlling Abuse or Abusing Control?' (2008), *CUTS International* 11

⁴¹ *Ibid* 3

⁴² Pham (n 40) 5

⁴³ *Ibid*

⁴⁴ Marrakesh Agreement Establishing the World Trade Organization, Annex C,1869 (1994)

TRIPS embody the minimum protection which state parties are expected to provide with respect of the various IPR addressed under the instrument with other provisions on general principles, civil and administrative procedures as well as dispute settlement mechanisms. The TRIPS recognizes and advocates strict compliance with the WIPO Convention, the Paris Convention on the protection of Industrial Property as well as the Berne Convention on the Protection of Literary and Artistic Work.⁴⁵ The TRIPS came into force in recognition of the need for the apposite protection of intellectual property rights by ensuring that the right action is taken toward the enforcement of IPR as a means to lessen the inhibitions and other challenges associated with international trade, more so to ascertain that the grant of IPR do not constitute an obstruction to international trade.⁴⁶ Certain IPR practices have the potential to restrict free trade which competition law advocates and which ultimately will stall technology transfer and negatively impact competition. Member states in their national legislations should outline the practices and condition relating to licensing of IPR products which adversely impact competition and which constitute a negative use of rights granted under IPR. Having identified such negative practices, member states should adopt measures in line with the provisions of TRIPS to mitigate such offending practices. State parties are encouraged to enter into consultations with any member state who requests for such assistance and who believes that a national of the state to which the request for consultation is addressed is violating the IPR laws of the requesting state and who wishes to seek measures to bring an end to such violations. The state which is being consulted shall provide the much needed co-operation through the supply of relevant information.⁴⁷

5. Licensing of IPR

Firms may enter into licensing agreements with holders of IPR for a wider reach of the protected goods and services which will in turn promote competition. Any element of restriction in a licensing agreement will be such as agreed on by the parties to the agreement.⁴⁸ One of the steps taken by firms in the course of business combinations is the execution of instrument of transfer of IPR which usually highlights the terms of the use and transfer of the IPR as well as the licensing of such rights. Usually, there is a strong likelihood for these provisions to embody conditions which have the tendency to restrict competition. Where a particular licensing provision is an integral part of the agreement, it is likely to restrict competition. On the other hand, one of the ways of circumventing the anticompetitive effects of a merger is the obligations created in various licensing agreements.⁴⁹ Licensing of IPR contributes greatly in the spread and wider use of the protected right which is a remedy for the temporary preclusion of third parties from the use of the protected rights. Furthermore, the decision by an IPR holder to license the rights is a means of generating further revenue for himself as most times, the decision to license is usually taken when the income from licensing has the potential to exceed that made from just the exclusion of third parties from the use of the rights which is an added motivation to for IPR holder to keep inventing.⁵⁰ Licensing of IPR is of immensely beneficial to the competition process. For instance, when holders of IPR are permitted to license their rights, it serves as an incentive to keep up the innovative process and the consumers are better off for it. Again, licensing of IPR eliminates the action of third parties who benefit from the innovative endeavours of others without sharing in the cost also known as free riding. Similarly, one of the benefits of licensing of IPR is the continuity of the production of superior goods and services as well as the limiting of cost involved in introducing the products into the market. The process of licensing enhances productive and dynamic efficiency in the market.⁵¹

6. Legal Framework for Competition law in Nigeria

The Federal Competition and Consumer Protection Act⁵² regulate Competition Law in Nigeria. The objectives of the Act amongst others include the maintenance and promotion of competitive market and the promotion of market efficiency.⁵³ The provision of the Act applies to all commercial activities within Nigeria as well as those whose impact is felt within Nigeria.⁵⁴ It further established the Federal Competition and Consumer Protection Commission⁵⁵ as the oversight body.⁵⁶ The Act prohibits monopoly and empowers the

⁴⁵ WTO Intellectual Property; Overview of the TRIPS Agreement < <https://www.wto.org> > assessed on Jan 10, 2022

⁴⁶ (n 45)

⁴⁷ *Ibid* Article 40

⁴⁸ *Ibid*

⁴⁹ A Pharm (n 40)21

⁵⁰ OECD, Licencing of Intellectual Property Rights and Competition Law June 2009 114

⁵¹ *Ibid*

⁵² 2019 hereinafter referred to as FCCPA

⁵³ (n 52) s 1 (a) (b)

⁵⁴ *Ibid* s 2 (1)

⁵⁵ Hereinafter referred to as the Commission

⁵⁶ (n 52) s 3 (1)

commission to carry out investigations where a monopoly situation appears to exist.⁵⁷ Monopoly is said to occur where in a particular market, one or a few companies have exclusive control over goods produced and services rendered. Monopolies are illegal and tend to exploit the market unfairly through exclusionary and predatory conducts.⁵⁸ The FCCPA did not define the term monopoly, however it states that monopoly situations shall be taken to exist in relation to the supply of goods and services or in the import of goods and services irrespective of the description in Nigeria or to the extent that it affect competition in the Nigerian market. It further provides that any person or corporation may make a request to the commission for a monopoly investigation⁵⁹ and that an order for monopoly specify the description of goods and services in question, whether it relates to supply, import and export of goods and services as well as the part of the country to which the investigation is limited.⁶⁰ Price fixing is also prohibited under the FCCPA. Price fixing is an attempt or conspiracy to influence upward review or discourage the downward review of prices of goods and services either by mutual agreement, force or threat. Price fixing also occurs where a person or an undertaking refuses to supply goods or services or refuses to have dealings with an undertaking as a result of their pricing policy.⁶¹ However, where the attempt to fix price occurs between interconnected undertakings or between a principal and an agent, it will not be deemed to be price fixing. The penalty for price fixing is a term of imprisonment not exceeding three years or a fine of ten Million naira or both for a natural person. Where the offence is a body corporate, it is liable to ten percent of its annual turnover for the preceding year while each director is subject to the penalties applicable to a natural person who commits the offence.⁶² Similarly conspiracy in form of arrangement or agreement to unduly limit production, transportation, manufacturing, storing of goods and services; or to unduly increase the price as well as conspiracy to limit competition in the stated areas is punishable by three years imprisonment or a fine not exceeding ten million Naira or both for individuals and ten percent of turnover in the preceding business year for an offending body corporate.⁶³

A firm is said to be in a dominant position where it maintains a strong economic power which allows it to act independently of its competitors, customers and consumers in a relevant market. Some acts that constitute a dominant position include: where an undertaking denies a competitor access to an essential facility when it is economically feasible to grant such an access; where exorbitant prices are charged for goods to the detriment of consumers and where an undertaking engages in acts that excludes other competitors especially where the consequences of such acts overshadows its underlying benefits.⁶⁴ Furthermore, where a firm influences a supplier or customer from dealing with a competitor, refuses to supply goods to a competitor, sells goods and services below the cost price, intentionally buys up scarce goods with the intention of excluding a competitor without showing its technological advantages and how it affects competition positively, such conduct will be construed by the law as an abuse of dominant position.⁶⁵

The provisions of the FCCPA prohibit monopoly, abuse of dominant position and some other conduct which on face value, IPR seem to encourage. However, from the forgoing, it has been established the competition law and IPR mutually coexist to promote dynamic competition which results in the provision of a variety of options for the consumers as well as ensure effective allocation of resources in the market. The FCCPA ideally ought to ensure that the rights created under the IPR operate within the limits of the exclusivity conferred under the intellectual property laws. Without the instrumentality of IPR, there may not be the drive for certain manufacturer to innovate rather, they may engage in the act of copying and imitating goods produced by other manufacturers. IPR gives the owner exclusive right and obtains commercial value for innovative venture. The FCCPA prohibits the conducts which sets minimum prices for goods and services also known as minimum price maintenance. This prohibition applies to patented goods. However, the provision on the prohibition of resale price maintenance shall not apply to agreements between the proprietor of a patent and a licensee or any assignment which regulates the price which a licensee or an assignee shall sell such goods.⁶⁶ Furthermore, the FCCPA regulates all forms of business combinations which take place in Nigeria. This can be done through one of the many ways recognized under the Act; acquisition or lease of shares by one firm from another; through the fusion of one or more undertakings to become one or through

⁵⁷ *Ibid* s 76

⁵⁸ What is monopoly < <https://www.classlawgroup.com/antitrust/unlawful-practices/monopoly> > accessed on March 5 2020

⁵⁹ (n 52) s 82

⁶⁰ *Ibid* s 81

⁶¹ (n 52) *Ibid* s 107 (1) (a) (b)

⁶² *Ibid* s 107 (4) (a) (b) (c)

⁶³ *Ibid* s 108 (1) (2)

⁶⁴ *Ibid* s 72 (2) (a) (b) (c)

⁶⁵ (n 52) s 72 (d)

⁶⁶ *Ibid* s 63, s 64

a joint venture. A merger is said to occur where one firm expressly or impliedly take over the ownership of all or a part of another business.⁶⁷

In cases of mergers and acquisitions, it is not uncommon for a licensor to be concerned that his innovation may end up with a competitor or the reality of having to disclose some confidential information to such competitors. If such concerns are not properly addressed through various forms of agreements, there is a tendency for the licensor to face loss of economic benefits which should accrue from his innovation and consequently loss of the drive for continued innovation. Additionally, the value of the acquired company may drop where there is no prior agreement regarding ownership of IPR.⁶⁸ The provision of FCCPA is a great stride in regulating the free market, however there needs to be guidelines in place which govern the extent of the application of these two seemingly conflicting areas of law; competition law and IPR. The guideline will provide for the extent of the application of each of these areas as well as the administrative and legal measures on how to handle cases of conflict and overlap. This will guide the enforcers of competition law and IPR on the right decision to make in cases where IPR is used by firm to perpetuate a dominant position and invariably, distort the competition process. It is also believed that in the nearest future, the Federal Competition and Consumer Protection Council and the Tribunal will have to make pronouncement on the relationship which exist between these areas of law as these pronouncements will create a better understanding of the interplay within the Nigerian context. Similarly, the FCCPC while approving mergers and acquisition should ensure that the reason for the merger by any of the merging companies is not to acquire the IPR of the other that will enable it wield market power in the relevant market. The FCCPC should look into the various licensing agreement entered into by parties to a merger to ensure that the condition therein are not geared towards the acquisition of a dominant position by any of the parties.

⁶⁷(n 52) s 92 (1) (a) (b)

⁶⁸ D McIntosh and E Tallmadge, Mergers and Acquisition Considerations in Licensing and Collaboration Agreement Thomas Reuters < <https://www.ropesgray.com> > assessed on January 13 2022