

THE LEGAL AND INSTITUTIONAL FRAMEWORKS OF PRIVATISATION IN NIGERIA: A DISCOURSE*

Regulation can help protect consumers, workers and the environment. It can foster competition and innovation while constraining the use of monopoly power...making the best use of new options emerging for private provision of infrastructure and social services will also rely, often, on a good regulatory framework.¹

ABSTRACT

This contribution assesses the legal and institutional frameworks of privatization in Nigeria. It examines the constitutionality of the extant legal regime and its impact in effectively and positively facilitating the privatization programme, having regard to the primary objectives which motivated the initiators of the programme for the Nigerian economy. Various institutions directly or indirectly involved in, or affected by, the implementation of this programme are also discussed and their contributions assessed based on the proclaimed objectives of the programme.

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¹ "The State in a Changing World" *World Development Report* (Washington DC: World Bank, 1997), 6; see also generally, Stewart, N.F "Privatisation In Nigeria: Problems, Prospects and Challenges" being unpublished LL.M dissertation supervised by Professor P.Ehi Oshio (2006), Chapter 2.

Introduction: Regulatory Time-Line

The articulation of government policy on Privatisation was concretized in the Structural Adjustment Programme (SAP) embarked upon in July 1986,² during the Ibrahim Badamosi Babangida administration (1985 - 1993). As McGrew has argued, SAP is a neo-liberal development strategy devised by international financial institutions to incorporate national economics into the global market. In his words:

*The vision of a “global market civilization” has been reinforced by the policies of the major institution of global economic government namely up to the mid 1990’s. Underlying them as Structural Adjustment Programmes has been a new-liberal development strategy - referred to as the washing on consensus which prioritizes the opening up of national economics to global market forces and the requirement for limited government intervention in the management of the economy.*³

One of the objectives of SAP therefore, was to pursue deregulation and Privatisation leading to removal of subsidies, reduction in wage bills and the retrenchment of the Public Sector ostensibly to trim the State down to size.⁴

To actualize this objective, in July 1987, the government set up a Technical Committee on Privatisation and Commercialisation (TCPC) which was backed up by the Privatisation and Commercialisation Decree⁵; which categorized all State-owned enterprises and parastatals into four main groups, namely:

- (a) Those to be partially privatized
- (b) Those to be fully privatized;
- (c) Those to be partially commercialised
- (d) Those to be fully commercialised.

Those slated for full privatisation included 13 insurance companies in which the Federal Government had between 25 percent and 49 percent shareholding; 10 medium - to large - scale manufacturing firms; 2 hotels; 4 companies in the transportation sub-sector and 15 agricultural and agro-allied firms. The total value of shares which the government expected to sell in these firms was estimated at about ₦150 million. Enterprises billed for partial privatisation were made up of 27 commercial and merchant banks, 23 major manufacturing firms spanning cement production, truck and car assembly plants, fertilizer factories, newsprint and paper mills, engineering and electricity component plants. They also included three steel rolling mills, newspapers, oil companies, shopping and air line companies, and so on. The total value of government holdings in these firms was put at over 2.1 billion naira. Towards the end of 1989, the four commercial vehicle assembly plants in the country were added to the list of firms to be privatised. About 10 major State Owned Enterprises (SOEs) were to be fully commercialised, and 14 others to be partially commercialised.⁶

² Jerome, A. T, “Privatisation of Public Enterprises in Nigeria: Expectations, Illusions and Reality” in Ariyo. A (ed) *Economic Reform and Macroeconomic Management in Nigeria* (Ibadan: CPPC, 1996), 85

³ McGrew, A “Sustainable Globalization? The Global Politics of Development and Exclusion in the New World Order” in Allen, T and Thomas, A. (Eds), *Poverty and Development Into the 21st Century* (New York: Oxford University Press, 2000) referred to in Igbuzor, A “Privatisation in Nigeria: Critical Issues of Concern to Civil Society “ [<http://www.dawodu.com/unarp1.htm>], 3

⁴ *Id.*

⁵ No. 25 of 1988; later redesignated “Act”

⁶ Statistics derived from Federal Government of Nigeria, *Official Gazette*, Vol. 75, No. 42, 6 July 1988;

There were two Schedules and two parts in the 1988 Act. *Section 3* of the Act provided for the establishment and composition of the Technical Committee. The Technical Committee was assigned certain functions which included:

- (a) Advising the government on capital restructuring needs of enterprises to be Privatised or commercialised in order to ensure a good reception in the stock exchange market.
- (b) Carrying out all activities required for the successful public issues of shares of the enterprises to be privatised including the appointment of Issuing Houses, Stock Brokers, Solicitors, Trustees, Accountants and other experts to the issue.

The Technical Committee adopted three methods in offering the shares of the Privatised Companies to the Public, namely, Public Offer For Sale, Private Placement And Sale Of The Assets of the affected enterprises in cases of inability to sell by other processes.

There was an interesting provision in *Section 5* of the 1988 Act that is not in the current law. This section empowered the Technical Committee to incorporate into a limited liability company under the Companies and Allied Matters Act all enterprises to be privatised where such enterprises are not already incorporated.

By the end of 1989, the TCPC had arranged for the sale of 16 firms, including the Nigerian Flour Mills, 2 Petroleum firms and 13 Insurance Companies. The sales were organised through the Nigerian Stock Exchange.⁷

However, the Current Privatisation Programme (which is the second phase) took off with the promulgation of the Bureau of Public Enterprises Decree⁸. In place of the Technical Committee, the Bureau of Public Enterprises Decree set up the Bureau of Public Enterprises. This enactment had the same schedules like that of 1988.

In 1999 the Abdusalam Abubakar Administration promulgated the Public Enterprises (Privatisation and Commercialisation) Decree.⁹

The Act made provision for the Privatisation and Commercialisation of the Federal Government Enterprises and other enterprises in which it has equity interests. It remains the principal statute governing the Privatisation and Commercialisation of Public enterprises in Nigeria.¹⁰

The Constitutionality of the Privatisation Act of 1999.

It cannot be over-emphasised that the legal framework for a sensitive programme like privatization must be in conformity with the Constitution or basic law of the country. It is therefore imperative to ascertain the constitutionality of the Privatisation Act of 1999 before going ahead to analyse the same.

⁷ Yahaya, S "State Versus Market: The Privatisation Programme of the Nigerian State" in Olukoshi, O. A. (Ed) *The Politics of Structural Adjustment in Nigeria* (London: James Currey Ltd, 1993), 19.

⁸ of 1993

⁹ No. 28 of 1999, Now Public Enterprises (Privatisation and Commercialisation) Act, CAP P38 Laws of the Federation of Nigeria (LFN) 2004. The Decree was deemed to have come into force on the 31st of December 1998.

¹⁰ It is important to note at this point that a harmonized Privatisation and Commercialisation Bill 2001 meant to redress the legal problems of Privatisation is pending before the National Assembly.

The Public Enterprises (Privatization and Commercialisation) Act, 1999¹¹ is an existing law within the meaning of *section 315* of the 1999 Constitution^{12, 13} The Constitution does not contain any provision that specifically refers to privatization. However, as part of the Fundamental Objectives and Directive Principles of State Policy (Chapter II), the 'Economic Objectives' are provided for in *Section 16* as follows:

"The State shall, within the context of the ideals and objectives for which provisions are made in this Constitution-

- (a) *harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy:*
- (b) *control the national economy in such a manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity:*
- (b) *without prejudice to its right to operate or participate in areas of the economy, other than the major sectors of the economy;*
- (c) *without prejudice to the right of any person to participate in areas of the economy within the major sectors of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy.*

Further, *section 16 (4)* provides as follows:

"For the purpose of [section 16(1)]-

- (a) *the reference to the 'major sectors of the economy' shall be construed as a reference to such economic activities as may, from time to time, be declared by a resolution of each House of the National Assembly to be managed and operated exclusively by the Government of The Federation; and until a resolution to the contrary is made by the National Assembly, economic activities being operated exclusively by the Government of the Federation on the date immediately preceding the day when this section came into force, whether directly or through the agency of a statutory or other corporation or company, shall be deemed to be major sectors of the economy;*
- (b) *'economic activities' includes activities directly concerned with the production, distribution and exchange of wealth or of goods and services; and*
- (c) *'participate' includes the rendering of services and supplying of goods."*

Iheme¹⁴ deduces from the foregoing provision¹⁴ that the Nigerian state is constitutionally mandated to (a) 'operate or participate' in sectors of the economy other than the major sectors, and (b) 'manage' and 'operate' the major sectors of the economy. Individuals, however, may 'participate' in economic activities in any sector means that private

¹¹ Hereinafter, The Act.

¹² Hereinafter, The Constitution.

¹³ As it is a law that was in force immediately before the date when the Constitution came into force and shall be deemed to be an Act of the National Assembly.

¹⁴ In his article "Legal Regulation of Privatisation in Nigeria" in *Readings on Privatisation*, Onyekpere, E. (ed.) (Lagos: SERI, 2003), 3.

enterprises can be engaged in any sector. In addition, the state is positively obliged under *section 16 (1) (d)* to 'protect the right of every citizen to engage in economic activities outside the major sectors of the economy'. He submits that these provisions rightly give the government ample room to decide on how to bring the good things of life to the citizens- whether and how far it wishes to operate public enterprises or dismantle them by way of privatization and rely on private enterprises.¹⁵ It follows therefore that by reason of the meaning of the word 'participate', it goes without saying that the participation of core investors¹⁶ and other private individuals in major sectors of the economy has the 'blessing' of the Constitution.

However the above view has been countered by Kalu Onuoha.¹⁷ He argues that a combined reading of *sections 14(b)*,¹⁸ *17(2)(d)*¹⁹, *16(1),(2)and (4)* reveals that the Constitution envisages a situation where the State will continue to manage and operate the major sectors of the economy while protecting the right of the citizens to participate in the same to ensure their welfare and the common good. He further argues that major sectors are by definition those economic activities being operated exclusively by the government of the Federation immediately before the coming into force of the Constitution. It is therefore the expectation of the programme, according to him, that the major sectors remain in the hands of the State and are not to be transferred to private investors.²⁰

However, these arguments are needless because the provision of the Constitution with respect to running the major sectors of the economy is unambiguous.²¹ Allowing individuals participate in the running of the major sectors of the economy is a function of the Government's obligation to manage those sectors. This will be made clear practically when the current privatisation and commercialization programme progresses.

On the whole, however, whether a government maintains public enterprises or privatises them is a question of policy to be addressed by each government in its own wisdom.²²

¹⁵ *Id.*

¹⁶ See *section 4* of the Act

¹⁷ "The Legal Regulation of Privatisation-A Critique" in *Readings on Privatisation supra* n. 12,13

¹⁸ Which provides that the security and welfare of the people shall be the primary purpose of the government.

¹⁹ Which provides that exploitation of human or natural resources in any form whatsoever, for reasons, other than the good of the community, shall be prevented.

²⁰ *Id.*

²¹ Consider *sections 16(1)(d)* and *16(4)(c)* (discussed above)

²² Iheme (*supra*) has substantiated this assertion as follows: The Government of General Ibrahim Babangida (1985-1993) introduced the programme but the government of General Sani Abacha (1993-1998) was very much enthusiastic about it. Abacha sought to address the problems of the public enterprises, not by privatizing them- or even 'commercialising' them as provided for in the Act of 1993, but by seeking to apply the flawed approach of intensifying political and bureaucratic control over them. Towards this end, his government enacted the Public Enterprises Regulatory Commission Act, 1996, a law that curiously remains in the statute books without being implemented. Under the successive governments of Generals Abdusalam Abubakar (1998-99) and Olusegun Obasanjo (1999-date), privatization has been favoured.

The Role of the Legislature in the Privatisation Programme²³

The role of the legislature would consist in, but not be limited to the following:

- *The review of existing body of legislation and the making of new ones where necessary;*
- *Taking active part in the fashioning of the regulations for the sectors and for the entire system;*
- *Discharging of its oversight functions with regard to the implementation and regulatory agencies;*
- *Ensuring the proper management of the privatization process through the budget process;*
- *Helping to relate to Nigerians (through the constituencies) for effective participation in the privatization process, and helping to enlist interest groups like labour.*

Provisions Inconsistent with the Powers of the National Assembly.

In spite of the foregoing argument in favour of the constitutionality (validity) of the Act, it must be noted that the act contains some provisions that are not in conformity with the Constitution. Provisions that empower the Council to change rules and guidelines; review the privatization programme and its effects without reference to anybody, especially the National Assembly. Generally, the Council, with the Chief of General Staff as the Chairman, can exercise a lot of other sweeping powers under the law without reference to any other authority and this is considered dangerous even under military dictatorship. A beneficent Chief of General Staff may cause no problems, but he will certainly not always be there!

First, *section 1* of the Act provides that the National Council on Privatization (NCP) is vested with the power to “alter, add, delete, or amend the provisions of the First Schedule” which contains a list of enterprises slated for privatization. *Section 6* empowers the Council in like manner to make changes to the Second Schedule, which contains a list of enterprises slated for commercialization. It must be observed that some of the enterprises listed in these Schedules, as well as a good number of the other existing public enterprises that the Council may conceivably add to the lists, are statutory corporations while others are limited liability companies set up by the government without the enactment of a special statute. Ihome²⁴ has rightly submitted that to the extent that the privatization or commercialization of an enterprise established as a statutory corporation, will not most probably entail the alteration of some of the provisions of the statute that established the corporation, Council nor even the President of the Federal Republic of Nigeria can validly exercise this power. It is only the National Assembly that can constitutionally exercise the power to repeal a statute.

Again, the establishment of a dedicated Privatization Proceeds Account under *section 19(1)* of the Act is decidedly against the spirit of the Constitution. The provision under *section 19(2)* for its utilization by the Government of the Federation without appropriation by the National Assembly is completely *ultra vires* the same Constitution.²⁵

²³ Duru, N. C “The Legislature in The Privatisation Process” a paper delivered at the Fourth Pan-African Privatisation Summit, Abuja, 19-22 November 2000, 88

²⁴ Note 12 above, 4

²⁵ Thankfully, the Advisory Council established by the proposed law will replace the National Council on Privatisation with most of its powers removed from the realm of absolutism into that of enlightened democratic culture. The chairman of the council shall be appointed (from the public or private sector) subject to approval by the National Assembly.

Thirdly, *section 28(3)* of the Act provides that the ruling of the Public Enterprises Arbitration Panel (PEAP), a creation of the Act, on a dispute brought before it, “shall be binding on the parties and no appeal shall lie from the decision of the panel to any court of law or tribunal.” This provision is clearly in breach of *section 4(8)* of the Constitution²⁶ and therefore invalid. Generally, the court may review the rulings or awards of arbitration panels, especially if an impropriety such as fraud or lack of fair hearing is established.²⁷ By virtue of *section 315(3)* of the Constitution, the court has power to declare invalid any provision of an ‘existing law’ that is inconsistent with any other Act or the provisions of the Constitution.²⁸

The Public Enterprises (Privatisation and Commercialisation) Act, 1999

This Act provides for a total of 95 enterprises, 25 of which are to be fully privatised, 37 to be partially privatised, 24 to be partially commercialised and 9 to be fully commercialised.

Section 1 (1) lists the enterprises to be partially privatised in Part 1 of the First Schedule to include Nigerian Telecommunication Plc, Nigeria Mobile Telecommunication Ltd, National Electric Power Authority, Port Harcourt Refinery I and II, Kaduna Refinery and Petrochemicals, Warri Refinery and Petrochemicals, Eleme Petrochemical Co. Ltd, Pipelines products and marketing Co. Ltd and the Nigerian Petroleum Development Co. Ltd.²⁹

Sub-section (2) of the same section provides for full Privatisation of the listed enterprises in part II of the First Schedule to include: Unipetrol Plc, National Oil and Chemical Co. Ltd, African Petroleum Plc.³⁰

Section 1 (3) empowers the National Council on Privatisation (NCP) to amend the provisions of the Schedules. *Section 2(1)* of the Act provides that an offer for the sale of shares of a public enterprise shall be by public issue or private placement or otherwise depending on the Council’s advice. The Act should have made clear and more detailed provisions regarding dealings in shares by the Bureau, especially with respect to the sale of shares by private placements. There ought to be a provision for periodic publication in the Federal Government Gazette and national dailies of the names of beneficiaries of sale of shares by private placements, the extent of their shareholdings and names and values of the enterprises involved in such sales by private placements. There should also be a provision restricting members of the Bureau from participating in

²⁶ Which provides as follows: “save as otherwise provided by this constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of the courts of law and of judicial tribunals established by law, and accordingly, the National Assembly or a House Of Assembly shall not enact any law, that ousts the jurisdiction of the jurisdiction of a court of law or of a judicial tribunal established by law.

²⁷ Duru, N, C, note 21 above.

²⁸ *Balewa v. Doherty* [1963] 1WLR,949

²⁹ Others include the Federal Super phosphate Fertilizer Co. Ltd, National Fertilizer Co. of Nigeria Ltd, Nigeria Machine Tools Co. Ltd, Nigeria Gas Co. Ltd, Jos Steel Rolling Mill Ltd, Katsina Steel Rolling Mill Ltd, Oshogbo Steel Rolling Co. Ajaokuta Steel Co. Ltd, Delta Steel Co. Ltd, Aluminium Smelter Co. Ltd, Nigeria Coal Corporation and Subsidiaries, Nigeria Mining Corporation and Subsidiaries, Nigerian Uranium Co, Nigeria Iron-ore Mining Co. Ltd, Daily Times of Nigeria Plc and Subsidiaries, New Nigerian Newspapers Ltd, NICON Insurance Company, Nigerian Reinsurance Plc, Federal Airports Authority of Nigeria, Nigerdock Ltd, Nigeria Airways Ltd, Nigerian National Paper Manufacturing Co. Ltd Iwopin, Nigerian Newsprint Manufacturing, Oku Ibokun, Nigeria Paper Mills, Sunti Sugar Co, Lafiagi Sugar Co, and Nigeria Sugar Co. Bacita.

³⁰ Others include Ashaka Cement Co. Plc, Benue Cement Co. Plc, Northern Nigeria Cement Co. Plc, Nigerian Cement Co. Ltd Nkalagu, Calabar Cement Co. Ltd, West African Portland Cement Plc, Afribank Nigeria Plc, Assurance Bank Plc, FSB International Bank Plc, International Merchant Bank Plc, Nal Merchant Bank Plc, Ayip-Eku Oil Palm Co. Plc, Opobo Boat Yard, Nigeria Romania Wood Industries Ltd, Anambra Motor Manufacturing Co. Ltd, Leyland Nigeria Ltd, Nigeria Truck Manufacturing Co, Peugeot Automobile of Nigeria Ltd, Volkswagen of Nigeria Ltd, Steyr Nigeria Ltd, Nigeria Hotels Ltd, and Festac 77 Plc.

the purchase of shares or assets of an enterprise disposed of by public placement to avoid cases of insider dealings. The intention here is neither to impugn the integrity of those who may serve in the Bureau nor to penalize them for undertaking “national service”. On the contrary, prescribing such a rule would serve the purpose of reposing Public confidence in the work of the Bureau.

In *Section 2 (2)*, an offer for the sale of the shares by public issue may be made at the capital market. *Section 2 (3)* of the same section provides for sales of shares through “a willing seller and a willing buyer basis” or “through any other means” subject to the approval of the Council. This provision thus makes it open for all Nigerians to participate in the ownership of the enterprises, which is quite commendable. Anyone who is interested in the shares could just walk up to the Capital Market to source for shares; but the section leaves a lot of discretionary powers to the Council “... through any other means.” And certainly this could be abused.³¹

Section 3 permits the government to divest further its equities in privatised enterprises and that may be through any local or international capital market under the guidelines issued by the Council. The property ownership rights imply that an owner could transfer at any point his rights in an enterprise. Thus, the government is guaranteed the exercise of this right.³²

Section 4 places the management of a privatised enterprise on a participating strategic investor from the effective date of privatisation on agreed terms. Provision is also made for the maximum equity holding of all categories of stakeholders under the Act. In respect of enterprises stated for partial Privatisation, a strategic investor is allowed no more than 40%, the Federal Government, 40% and other Nigerians, 20%.

Section 5 contains three important provisions:

- ❖ *(2) The Shares on offer to Nigerians shall be sold on the basis of equality of states of the Federation and of the residents of the Federal Capital Territory.*
- ❖ *(3) Not less than 1 percent of the shares to be offered for sale to Nigerians shall be reserved for the staff of the Public enterprises to be privatised and the shares shall be held in trust by the public enterprises for its employees.*³³
- ❖ *(4) Where there is an over subscription for the purchase of the shares of the Privatised Public enterprise, no individual subscriber shall be entitled to hold more than 0.1 percent equity shares in the privatised public enterprises.*

Obehi Alegimenlen³⁴ asserts that naturally enough, the applicants do not honour these provisions. Thus, it is common, she says, to find multiple applications, resulting in one person having a large chunk of ownership. In addition, the elite as usual, corner most of

³¹ Onyekpere, E, Chukwuemeka, N *Preliminary Report (Literature Review and Power Mapping) on the Privatisation Programme* (Lagos: SERI, 2003), 30

³² *Id.* There is however no provision for valuing the assets of the affected enterprises and what mechanisms there are for determining the price of the equity of the affected enterprises are far from satisfactory.

³³ By Clause 7 (3) of the 2001 draft, the percentage has been increased to 10. That is not less than 10 percent of the shares to be offered for sale shall be reserved for the employees of the public enterprises.

³⁴ Odiase - Alegimenlen, O, A “An Evaluation of the Current Privatisation Exercise in Nigeria” (2003) 2 Law, Social Justice and Development Journal [http://www2.warwic.ac.uk/fac/soc/law/elj/lgd/2003_2/odiase/]

the shares without being censored. The phrase "...individual subscriber..." does not appear to contemplate corporate subscribers. This ambiguity is potentially dangerous and could be exploited through the formation of companies solely for the purpose of purchasing shares in enterprises to be privatised. To avoid this, there should be compulsory full disclosure of shareholders by every company subscribing or bidding for the share of enterprises to be privatised. This way, the real purchasers of the shares of enterprises will be known and the restriction of this subsection should be made applicable by lifting the corporate veil.³⁵

Again under this subsection, the Act has not made any specific provision for "under subscription".³⁶ In a situation where there is under-subscription or where shares are still available by the operation of *Subsection (2)* an arrangement for under-writing of shares could be made to take care of the situation. Alternatively, there could be some kind of warehousing arrangement whereby appropriate provision is made in the warehousing agreement by which the institutions warehousing these shares are bound to sell them when there are persons willing and able to purchase them.³⁷

The above subsections are laudable provisions aimed at ensuring that the poor and citizens from all parts of Nigeria acquire shares in the enterprises to be privatised, but it is not enough to have these legal provisions; there must also be the political will and commitment on the part of the Council and the Bureau to actually implement the provisions and ensure that the poor participate.³⁸ Considering the high incidence of poverty in the country, the government should adopt the complimentary policies of granting loans to low-income earners especially those in paid employment and the unemployed who wish to acquire shares in the enterprises that are being privatised.³⁹

Section 6 (1) lists the enterprises to be partially commercialised in part 1 of the Second Schedule to include Nigerian Railway Corporation, Cross River Basin Development Authority and Hadeija - Jama River Basin Development Authority.⁴⁰

Section 6 (2) provides for full commercialisation of listed enterprises in part II of the Second Schedule to include Nigerian National Petroleum Corporation, Tafawa Balewa Square Management Committee, Nigerian Ports Authority, Federal Mortgage Bank of Nigeria, Nigerian Industrial Development Bank Ltd, Nigeria Bank for Commerce and Industry Ltd, Federal Mortgage Finance Co. Ltd, Federal Housing Authority, and Nigerian Social Insurance Trust Fund.

Section 6 (3) provides for amendment of enterprises listed in the Second Schedules, so as to alter the category to which any enterprises listed in that schedule shall be classified.

³⁵ See Jawando, G. A "Privatisation and Professionals" (1988) 12 *The Gravitas Review of Business and Property Law*, 36

³⁶ The 2001 bill has not addressed the issue either. It merely provides (in clause 6 (5)) for a situation "where there is no over-subscription" and not specifically for a case of "under subscription"

³⁷ Okoli, K, C "Inadequacies of the Privatisation and Commercialisation Decree 1988" (1989) 4 *The Gravitas Review of Business and Property Law*,

³⁸ Onyekpere, E and Chukwuemeka, note 29 above, 30

³⁹ *Id.*

⁴⁰ Others include Lower Benue River Development Authority, Niger River Basin Development Authority, Ogun-Osun River Basin Development Authority, Upper Benue River Basin Development Authority, Sokoto-Rima River Basin Development Authority, Anambra-Imo River Basin Development Authority, Benin-Owena River Basin Development Authority, Chad River Basin Development Authority, Kainji Lake National Park, Federal Radio Corporation of Nigeria, Nigerian Television Authority, News Agency of Nigeria, Nigerian Film Corporation, Nigerian Postal Services (NIPOST), Old Oyo National Park, Gashaka Gumi National Park, Chad Basin National Park, Yankari National Park, Cross River National Park, Niger Delta Basin Authority, and Niger Delta Development Authority.

Section 7 provides that the NCP shall prepare and submit to the President not later than 30th June in each year a report in such form as the President may direct on the Privatisation and Commercialisation of Public enterprises during the preceding year. This provision gives the President the power to check the activities of the Council and keeps him informed of what is happening with the programme.⁴¹

Section 8 makes special provision relating to commercialised enterprises permitting them to:

- (a) Fix the rates, prices and charges for goods and services it provides;
- (b) Capitalize its assets;
- (c) Borrow money and issue debenture stocks;
- (d) Sue and be sued in its corporate name.

A high point of the Act is the establishment of the National Council on Privatization (the NCP). *Section 9* establishes the NCP, provides for the membership of the Council and allows the latter to co-opt the supervising Minister of an affected enterprise to attend relevant meetings of the Council. However, it appears that *section 9* falls short of certain expectations. Representations from various other interest groups such as labour, civil society groups, the media, and so on, would have been apposite. As it is, all members of the Council represent government's interest. Little wonder, there are controversies in most attempts at privatization.

Section 10 (a) provides that each member of the Council shall hold office for a term of four years in the first instance and may be re-appointed for a further term of four years and no more. *Subsection (b)* defines the terms and conditions of the appointment to be as contained in the letter of appointment.

- (a) *Section 11* and its various subsections contain the powers and functions of the Council.

From the foregoing, it cannot be argued that the NCP is the statutory body empowered to make decisions on what is to be privatized; and is also the supervisory *cum* regulatory body of the privatization and commercialization programme of the Federal Government of Nigeria. It is noteworthy that prior to 1999, the President of Nigeria performed the role assigned to the NCP under the new law. The idea of creating the NCP to undertake roles originally meant for the President has the effect of theoretically removing the privatization programme from the President's desk, unto an independent body of state officials, whose ministries and/or departments have direct relevance to the programme. This would make room for technocrats to supervise the programme in the larger interest of the economy, while they are obliged to still furnish the Presidency with a report of their activities, as well as that of the BPE.

Section 12 (1) of the 1999 Act created the Bureau of Public Enterprises (BPE). The BPE is headed by a Director-General (DG) appointed by the President on the advice of the NCP Chairman, for a term of 4 years and may be re-appointed for another 4 years. The BPE is a body corporate with perpetual succession and may sue and be sued in its corporate name.

⁴¹ If this is so, making the Vice-President the Chairman of the Council is cosmetic and superfluous.

Section 13 (1) stipulates the functions of the Bureau with respect to privatization;

(a) The functions of the Bureau with respect to commercialization as provided for in Section 14.

Section 15 (a) adds a general function to the BPE to include provision of secretarial support to the Council; and (b) positions it to carry out such other duties and responsibilities as may be assigned to it from time to time by the Council.

A close study of the functions of the BPE as spelt out in *Sections 13, 14 and 15* of the Act, shows that it is an implementer *cum* advisory body of the privatization programme. In other words, its role is to carry out the decisions of the NCP and advise it on matters related to the privatization and commercialization exercise. The BPE is thus subordinate to the NCP.

The BPE, under *Section 16* of the Act shall have powers, subject to the overall supervision of the Council, to;

- (a) Acquire, hold and manage movable and immovable property;
- (b) Enter into contracts or partnerships with any company, firm or person which in its opinion will facilitate the discharge of its functions;
- (c) Request for and obtain from any public enterprise statistical and other information including reports, memoranda and audited accounts and other information relevant to its functions;
- (d) Liaise with relevant bodies or institutions locally or overseas for effective performance of its functions; as contained in *Section 16* of the Act.

Workers' Interests

Section 5 of the Act states that not less than 1 *per cent* of shares in privatized enterprises to be offered to Nigerians is to be reserved for staff of the affected enterprises, to be held in trust by the public enterprises for its employees. One major objection to the Act is the fact that it does not contain any provision securing the employment of staff of the affected enterprises, after the exercise is conducted. The new strategic investors are not duty-bound to engage all the former staff of the affected enterprises, considering their need to make profits and reduce operational costs. No mention was made of the payment of gratuities and other severance benefits to workers who lose their jobs consequent upon privatization of their workplace.

The Labour Act, apart from its provision concerning termination of contracts of employment and length of notice required in each case, does not contain any provision that may be resorted to in the situation at hand. However, the International Labour Organization by Convention No. 158 of 1982. and Recommendation No. 166 of 1982 has made provisions relevant to privatization in Nigeria. However, Nigeria is yet to ratify the convention and adopt the recommendations.

Other laws relevant to the Privatisation and Commercialisation of Public enterprises include:

- (a) *Specific laws establishing and regulating the enterprises to be privatised; for example, the Nigeria Ports Authority (NPA) Act,⁴² the Nigeria Railway Corporation Act⁴³ and,*
- (b) *General Laws regulating the businesses and the conduct of publicly owned enterprises such as sector-specific laws like the Nigeria Communications Commission Act⁴⁴, the Minerals and Mining Act, 1999,⁴⁵ the Insurance Act,⁴⁶ Insurance Act and Commercial Laws like the Companies and Allied Matters Act⁴⁷, the Investment and securities Act,⁴⁸ Taxation Laws, competition and Antitrust laws, the Land use Act⁴⁹ and so on.*

The Federal Competition Bill: A Panacea in the Offing.

The total absence of any antitrust law in Nigeria is one of the proofs of the imperative to substantially slow down on the speed of implementation of the privatization exercise until a better developed regulatory framework is firmly in place.

Since there has not been anything like it before in this country, it will be understandable if the appropriate committee on Privatisation and Commercialisation is allowed some time to make adequate comparative studies of developed systems before coming out with something that can address our requirements.

In the above regard, the committee worked closely with some foreign agencies and experts towards developing a solid framework for an antitrust legislation in this country

⁴² Cap N126, LFN 2004

⁴³ Cap N129, LFN 2004

⁴⁴ Cap N97, LFN 2004

⁴⁵ Cap M12, LFN 2004

⁴⁶ Cap I17 LFN 2004

⁴⁷ Cap C20 LFN 2004

⁴⁸ Cap I24 LFN 2004

⁴⁹ Cap L5 LFN 2004

that will address the anticipated post-privatisation market competition problems. In addition, laws under which Nigeria's utilities are presently operating were extensively considered. The bill was first presented to the president by a commission set up for that purpose under the chairmanship of Honourable Justice Akin Olujimi; it was sent back to the commission to be harmonized with other related legislations in the country. The harmonized version of the bill was returned; it passed through the first reading successfully, but was thrown out at the second reading for 'lack of understanding' which arose from lack of adequate sensitization and orientation. It is hoped that this bill will be represented as soon as is practicable, and approved subsequently because of its potential indispensability in tackling the challenge of competition in the privatization programme in Nigeria.

The proposed antitrust law will address the following issues and scenarios characteristic of typical market economies:

(a) Abuse of a Dominant Position (Monopoly)⁵⁰

Monopolistic conditions are easier to determine because of the prominent positions of the firms and the far reaching effects of their atrocities. Under the proposed antitrust law, three basic issues will be addressed:

- (i) the law will seek to control and influence prices charged by dominant firms;
- (ii) the law will make it illegal to harm or take advantage of a competitor;
- (iii) exclusionary behaviour by incumbent firms will be monitored, regulated or punished.

The legal control of firms that will still emerge as monopolies in a post-privatisation Nigeria through a well articulated antitrust legislation represents the most crucial plank in the successful privatization of utilities.

Combinations⁵¹

Combinations or mergers constitute another area of interest in antitrust regulations. Adequate provisions will be included in the proposed enactment to take care of business combinations whose activities may pose anti-competition problems. The major task here is to lay down procedures to be followed before combinations are allowed. This would include requirements for a prior notification of intention of enterprise combinations. The provisions of the Companies and Allied Matters Act, 1990 (CAMA) regarding mergers are adequate for regulating procedures, but it must be clearly stated that CAMA is not interested in competitions and antitrust; as such, the thrust here would be to adopt CAMA's procedural requirement for mergers or combinations while concentrating on making relevant provisions in the proposed antitrust law for possible abuse of market situations by the merging enterprises.⁵² In essence, a dynamic and competitive environment, underpinned by sound competition law and policy is an essential characteristic of a successful market economy. Effective enforcement of competition law and active competition advocacy can also be powerful catalysts for successful economic restructuring; this in turn will foster flexibility and mobility of resources, which in current

⁵⁰ Duru, N. C "The Legislature in The Privatisation Process" note 21 above, 88

⁵¹ *Id.*

⁵² See also sections 100-122 of the *Investment And Securities Act, 1999* Cap I24 Laws of The Federation of Nigeria, 2004.

global business environment are critical elements for the competitiveness of firms and industries in Nigeria.⁵³

The trend of Privatisation and Commercialisation exercise shows that private foreign investors have so far been participating in the exercise and it therefore becomes apposite that the laws governing participation of aliens in businesses in Nigeria, ought also to be taken into account, even though they relate to aliens doing business in Nigeria and not particularly as a result of Privatisation. Such statutes include:

- (a) The Companies and Allied Matters Act⁵⁴
- (b) Nigerian Investment Promotion Commission Act⁵⁵
- (c) Foreign Exchange (monitoring and miscellaneous provisions) Act⁵⁶
- (d) Immigration Act⁵⁷
- (e) National Office of Technology Acquisition and Promotion Act⁵⁸
- (f) Industrial Inspectorate Act⁵⁹

Institutions of Power in the Nigerian Privatisation Programme⁶⁰

The National Council on Privatization

The Council is the foremost governmental agency for privatization in Nigeria. It determines the agencies to be privatized and the mode of privatization. It also determines privatization policies and the legal and regulatory framework for privatization. Its powers are quite enormous as it supervises the Bureau of Public Enterprises. The Council even has powers “to alter, add, delete, or amend the provisions of the first schedule to the Decree”⁶¹

The Bureau of Public Enterprises (BPE)

The Bureau is the governmental agency responsible for implementing the sale and privatization of SOEs. It implements the National Council on Privatization’s policies and performs such other functions as may be assigned to it by the Council from time to time. In many cases, there have been allegations of non-transparency leveled against the Bureau. The Industrial Union leaders all rejected the BPE’s attitude of not negotiating with staff of enterprises before embarking on privatization. Some Unions such as the National Union of Electricity Employees (NUEE), the National Union of Air Transport Employees (NUATE), National Union of Hotels and Personal Service Workers⁶² went to court challenging the attempts of BPE at privatizing enterprises under their various sectors. The then Director General, Alhaji Nasr El- Rufai promised to be more thorough in ensuring that all stakeholders are carried along in the years ahead. He stressed that transparency, due process and accountability will be his tenure’s watchwords⁶³.

⁵³ See Generally Chigbue, I.N “An Overview of The Federal Competition Bill: Which Model?” a paper presented at The Nigerian Bar Association Annual General Delegates’ Conference , Port-Harcourt, 26 August- 1 September,2006,1.

⁵⁴ Cap C20 LFN 2004

⁵⁵ Cap N117 LFN 2004

⁵⁶ Cap F34 LFN 2004

⁵⁷ Cap I1 LFN 2004

⁵⁸ Cap N62 LFN 2004

⁵⁹ Cap I8 LFN 2004

⁶⁰ See generally, Onyekpere, E. note 24 above.

⁶¹ *Section 1 (3)* of the Act; the Act was made as a Decree (now Act) during military rule and appears unconstitutional when pitched against the legislative powers of the National Assembly in *section 4* of the 1999 Constitution.

⁶² See terms of settlement in Appendix 2

⁶³ *Punch Newspaper*, August 6, 2003, P 1.

The National Assembly and its Committees on Privatization and Commercialization

The legislative powers of the Federation are vested in the National Assembly comprising of a Senate and the House of Representatives⁶⁴. The National Assembly has powers to make laws for the peace order and good government of the Federation⁶⁵. The Act is undergoing amendment as a new bill is pending before the National Assembly. Thus the National Assembly has powers to amend, repeal or enact any law to govern the privatization process in Nigeria. The Committees on Privatization and Commercialization are charged with legislative oversight functions over the work of the BPE and are in a position to conduct in-depth investigation on the work of the BPE⁶⁶.

The President

Under *section 315* of the Constitution, the President has quasi- legislative powers by making modifications in texts of any existing law as he considers necessary or expedient for the purpose of bringing the law into conformity with the provisions of the Constitution⁶⁷. This could be applied to the law governing the privatization programme. The President also receives and considers the annual report of the National Council on Privatization under *section 11* of the Act.

⁶⁴ *Section 4 (1)* of the Constitution.

⁶⁵ *Section 4 (2)* of the Constitution - this power is limited to any matter in the Exclusive Legislative List set out in Part 1 of the Second Schedule to the Constitution and also as delimited in *Section 4 (3), (4) and (5)*.

⁶⁶ See *Sections 88 and 89* of the Constitution on the oversight powers of the National Assembly.

⁶⁷ See *section 315 (1), (2) and (4)* of the Constitution.

The Courts

The judicial powers of the Federation are vested in the courts⁶⁸ and individuals and legal persons are entitled in the determination of their civil rights and obligations, including any question or determination by or against any government or authority to fair hearing⁶⁹. A number of industrial unions are in court against the BPE over the way and manner of the privatization of their enterprises⁷⁰. Most of the complaints border on job security and the protection of earned benefits and entitlements.

One crucial and important role of the judiciary in the privatization programme is to ensure that the programme has credibility. Consistency and reliability of government policy is essential to the credibility of any economic programme. Credibility of the programme is impaired, if policy statement is at variance with implementation, or if powers vested in agencies charged with implementation of the programme are abused or unreasonably used.⁷¹ In the same vein, credibility of the programme is impaired if provisions of the enabling act are obscure and are left uninterpreted. The most significant role of the judiciary in privatization programme is in the readiness and preparedness of the judiciary to provide effective protection of law to investors, speedily and efficiently. Any suspicions that the judicial system will be incapable or unwilling to give such protection is fatal to any privatization programme, particularly where the enterprise concerned demands huge injections of investments.⁷²

Thus, the adjudicatory powers of the courts give them a role in the resolution of disputes arising from the privatization programme.⁷³

Others are the Nigerian Communication Commission, the Securities And Exchange Commission⁷⁴ professional associations such as the Nigerian Bar Association, Nigerian Institute of Estate Surveyors & Valuers and the Institute of Chartered Accountants of Nigeria, and other Civil Society Organisations.⁷⁵

Conclusion

The result of the foregoing critical examination would appear to demonstrate that the legal regime of privatization cannot be assessed without reference to the true nature of privatization and its surrounding circumstances. It should be noted that privatization is an intensely political activity with profound socio-economic, political and legal consequences. Accordingly, where privatization legislation is adopted as a basis for privatization, such legislation must reflect this reality.

In particular, it must be emphasized that the desire to privatise public enterprises in Nigeria is borne out of the original objective of government to profit from business

⁶⁸ Section 6 of the Constitution.

⁶⁹ Section 36 of the Constitution.

⁷⁰ Suit No CA/L/412/2000- *Bureau of Public Enterprises v the National Union of Electricity Employees and Anor*, Suit NO FHC/L/CS/1081/2000- *National Union of Printing, Publishing and Paper Products Workers v Attorney General of the Federation and 4 Ors*.

⁷¹ Uwais, M. L. "The Role of The Judiciary In Privatisation of Public Enterprises" a paper presented at the Fourth Pan-African Privatisation Summit, 19-22 November, 2000

⁷² *Id.*

⁷³ In 2001, the BPE met with World Bank officials and the Chief Justice of the Federation in order to discuss issues relating to the establishment of a training programme for the FCT judges on privatization and related matters. The objective of the training programme was to put the courts in a better position to handle cases connected to the privatization programme and to handle such matters in a speedy and efficient manner. (BPE Annual Report, June 2000-2001, 39)

⁷⁴ Which has its functions spelt out in *section 8 (a)-(y)* of the Investment and Securities Act Cap. I24 LFN, 2004.

⁷⁵ Whose chief objective is ensuring that the programme is pro-poor in design and implementation.

enterprises without a corresponding liability of losses emanating from the inefficiency associated with the wholly owned government companies. Consequently, the legal regime for privatisation in Nigeria appears to be premised within this context. The subsequent prognosis of the question, whether or not, an adequate legal regime for privatisation exists in Nigeria, would therefore depend largely on these primary objectives and the developmental needs of encouraging foreign investment.⁷⁶

In the same vein, the overall performance of the institutional framework has to be assessed with reference to these fundamental objectives.

⁷⁶ Akpotaire, V. "The Legal Regime for Privatisation in Nigeria and the Crises of Confidence" (2004) 8 Business Law Review, 3.