

**PRICE CONTROL AND ITS EFFECTS ON COMPETITION: A CRITICAL REVIEW  
OF PRICE CONTROL LEGISLATIONS AND HOW THEY AFFECT THE  
COMPETITIVENESS OF THE MARKET**

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**Supervised by**

**JUDGE DAVIS DENNIS**



**This thesis presented for the approval of Senate in partial fulfilment of  
the requirements for the degree of Master of Laws in Commercial  
law Department of Commercial Law.**

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**I do hereby declare that I have read and understood the regulations governing submission of a Master of Laws dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.**

**MK KIGOMO 22/02/2015**

**KIGOMO MICHAEL KARIUKI**

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## ABSTRACT

Pricing in the market is the most sensitive part of trade. It is through pricing where the buyers are able to acquire goods and it is through it also that the sellers get their profit. Pricing of commodities can be said to be the lifeline of trade and also the lifeline of competition.

Competition law, in addition to other factors such as quality of goods and their availability, also deal with the issue of pricing of goods. It is touted that competition law has a strong inclination to supervise pricing of commodities and how the conduct of market players influence pricing of goods. Competition law does this by making the market as competitive as possible in order to prevent any firm from dictating prices. In short, it strives to make the firms in the market to be price takers and not price setters as a way of reigning in on high prices in the market. However, in certain circumstances the competition laws become unable to supervise the market. In times such as those, the governments have been forced to intervene through other laws and policies in order to protect the market from possible abuse.

This study looked at government intervention in the market through price control legislation. Price control legislation is a legislation that gives the government powers to artificially set prices of commodities. This is done in those dire circumstances where the market out of unforeseeable circumstances, is unable to be competitive. Examples of such instances include national crises, innovations and legal huddles.

Price control legislations unlike the traditional competition laws are not created to promote competition *per se*. They are created on the back of competitive conduct to provide a safety net to consumers from exploitative activities of producers in instances where the influence of competition laws is ineffective. Price control legislations are there to make sure that when all competition laws and interventions are unable to protect consumers from the condition of the

market and the exploitative actions of the producers, then there are certain laws created as a safety net to the consumers. Price control is used to mitigate the circumstances that make it impossible for the market through competition to control pricing of commodities.

Currently, price control is becoming a prevalent way of taming prices in many jurisdictions. A policy used in the medieval times in simple markets, with little or no inclination towards the market, has now become more imposing even in the most sophisticated markets. Price controls in areas like Canada and the European Union are being used together with competition laws to cater for areas where the governments feel that the market is not competitive enough and competition laws are not effective. In other areas such as Zimbabwe, it is being abused for political purposes to influence prices against a competitive market and the competition laws.

What is clear and true is that price control having both an immediate impact and being effective, is one mechanism that has far reaching and substantial effects on the competitiveness in the market. With its target being the most sensitive area of trade, this makes it a very important policy issue that competition lawyers should not ignore. Price control ability of superseding the market mechanism of supply and demand, to impose prices and the way it is implemented gives it the power to reduce and even kill competition in a particular market. That is why it is imperative to understand this safety net as competition lawyers in order to know whether it is needed and if so how we can limit its negative effects in the market.

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## LIST OF ABBREVIATIONS

EU	European Union
EC	European Commission
US	United States of America
NRC	National Redemption Council
AFRC	Armed Forces Revolutionary Council
NLC	National Liberation Council
PNDC	Provisional National Defense Council
IFPRI	International Food Policy Research Institute
AAMP	American Association of Meat Processors
COMESA	Common Market of East and Southern Africa
MSU	Michigan State University
DC	District of Columbia
NYU	University New York
CAC	Competition Appeal Court
ZACA	South Africa Court of Appeal
IMF	International Monetary Fund
SAP	Structural Adjustment Programs
GDP	Gross Domestic Product
PhRMA	Pharmaceutical Research and Manufacturers of America
OPEC	Organization of the Petroleum Exporting Countries

# CHAPTER ONE

## 1. INTRODUCTION

The main aim of this study is to illuminate the importance of price control in competition. This is done by showing the effects price control has on the conduct of competitors in the market and how this ultimately affects the competitiveness of the market. The dissertation discusses the price controls regimes, their enactment, how they are used to control prices in the market and how this ultimately affects the competitiveness of the market. It looks at both the positive and negative effects of price control in the market. From the study the determination of the need of price control is highlighted.

The first chapter provides an introduction to the study. It looks at the background of the whole study and tries to illuminate the information that prompted the study to be instituted. Then it goes on to provide the reasons why the study was actually conducted while at the same time show the perspective of the study. This is done by illuminating on the questions the study intended to answer. Finally, it points towards how the study is logically arranged in order to fully paint the picture of the study.

### 1.2. Introduction to price controls

Over the years countries have used price control legislation as a way of taming prices of goods and services.<sup>1</sup> This occurs when firstly, countries are faced by certain internal or external shocks that might lead to prices in commodities to hike above people's purchasing power e.g. price

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<sup>1</sup> N Minot *Price controls in food markets Presented at the COMESA policy seminar "Food price variability: Causes, consequences, and policy options"* on 25-26 January 2010 in Maputo, Mozambique under the COMESA-MSU-IFPRI African Agricultural Markets Project (AAMP)

controls in America during the Second World War.<sup>2</sup> Secondly, price controls can occur in instances of market inefficiency e.g. the market being uncompetitive; it leads the government to rely on price controls in order to prevent sellers from using this situation to charge exploitative prices.<sup>3</sup> A good example here might be the pharmaceutical price controls in Europe.<sup>4</sup> However, the use of such legislative actions has seen dire direct and substantial consequences meted to the market. This part provides a discussion of price controls and their effects on competition.

Price control is usually not categorized as a competition law or policy. However it substantially affects the competitiveness of the market which makes its study by competition lawyers very important. This study undertakes to look at price controls and their effects on competition from a competition law perspective. Price controls in definition can be said to be the process by which governments set prices by which goods may be bought or sold at in the market.<sup>5</sup> It is a social-political and socio-economic policy that the government uses when it believes that the competition policies that are in place are incapable of dealing with price determination effectively or the competitiveness of the market economy is not effective. There are different types of price controls depending with the need and reason for them.<sup>6</sup> There are different ways also that price controls are implemented as discussed in the subsequent chapters of the dissertation.<sup>7</sup>

This dissertation discusses jurisdictions that have been using and are still using price controls legislation. It discusses what precipitated the creation of price controls in the first place, how

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<sup>2</sup> P Krugman & R Wells, *Module 8 Supply and Demand Price Controls (Ceilings and Floors) Macroeconomics 77-87*

<sup>3</sup> D Connaughton "Pharmaceutical Price Controls in the European Union, Their Impact, and Potential Remedies" 2009 Writing Competition Berkely Technology Law Journal

<sup>4</sup> Connaughton 2009 Writing Competition Berkely Technology Law Journal

<sup>5</sup> Connaughton 2009 Writing Competition Berkely Technology Law Journal

<sup>6</sup> Minot Price 25-26 January 2010

<sup>7</sup> Minot Price 25-26 January

they are being implemented and most importantly what have been the effects of price controls in the competitiveness of the market.<sup>8</sup> It is of great importance to understand the effects of price control on competition in the market in order to be able to know whether it is an advisable policy to take in tackling challenges in pricing of products which would be best gauged by knowing both the positive and negative effects it has on the market.

### **1.3. Rationale and Background of the study**

What cannot be ignored is the great role that competition plays in the economies of countries especially in their quest to industrialize and develop. This is because a competitive market creates the environment suitable for production of needed products which creates the need for industries. The creation of industries, on the other hand, creates the need of social necessities such as water, housing and infrastructure. It also widens the tax bracket for governments in order for them to get money to finance their social responsibilities. Hence, competition is to a certain extent the backbone of the economy. It should be safeguarded at all costs.

However, among the various problems in the market, one is high prices of commodities. High prices of essential commodities lead to the need for government intervention. The question that arises is how to do this without interfering with healthy competition. So far many methods have been used to deal with the issue of excessive prices that concentrate on the structure of the market and redistribution of resources in order to reduce the cost of production and enable the producers to charge lower prices. Both actions are very important in dealing with high prices. However, other governments out of desperation are driven to result to price control laws as a solution. This is where governments artificially set prices with due or undue regard to the cost of

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<sup>8</sup> S Morton "The Problems of Price Controls" 2001 (24) 1 Cato Review of Business and Government

production. This has been seen to have the impact of killing competition and entrenching corruption as is discussed in the subsequent chapters.<sup>9</sup>

In 2010, Kenyan parliament wanted to take the citizens down a familiar route that the other countries have trespassed when it tried to enact a law that would have seen the government have immense powers of controlling prices of food commodities. The prices of these food commodities were actually spiraling out of control at the time due to inflation.<sup>10</sup> This action however was shot down by the government of the day which was headed by a seasoned economist then. However, the president never succeeded in shooting down all the legislations pertaining to price control. The action failed in the area of oil and energy. This was after an Act of parliament that provided for the energy regulation commission, tasked with managing the pricing of energy and fuel products, was successfully enacted.<sup>11</sup>

The Act has however, not borne any fruits in relation to fully bringing down the high prices of Kenya's energy sector. It has only ended up concentrating more powers on the government and killing the private sector investment and innovation and derailing competition in that area with further strength to the already created powerful players in the industry while making the small retailers close shop.<sup>12</sup> The government can be said to have either unintentionally or intentionally created an energy cartel in Kenya. This push has put fear to a great many in the Kenyan community of economists and industrialists alike who were seeing that history is about to repeat itself. They had fought so much to attain market independence only for it to be taken away after 9 years.

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<sup>9</sup> Ansa-Asare "Legislative History of the Legal Regime of Price Control in Ghana" 1985 *Journal of African Law*, (29) 2

<sup>10</sup> Price Control (Essential Goods) Bill of 2010

<sup>11</sup> Energy Act 12 of 2007 Kenya

<sup>12</sup> Best explained in the following news article found in the internet as stated below  
<http://www.petroplaza.com/news/industry/MiZlbiYxMTE2OCYmMQ>

This has not been the case with other African countries. Kenya can be said to be lucky because the push for government interference in price setting to a large extent has failed. In other African countries, including Zimbabwe and Liberia, those have used this method to reign down on prices of a variety of essential commodities, have experienced a myriad of challenges on the competitiveness of their markets.<sup>13</sup> What has been seen is the death of retail sector of trade and the reduction of production of the said commodities. This has led to artificially caused shortages and further loss of revenue due to importation of the said commodities in order to prop up supplies. These effects have been attributed to the issue of price control policies of the government that do not seem to factor in the need of businesses to make profit.

Ghana is a good example of a country that has had the experience of both worlds. It had price controls since independence only to remove them during the structural adjustment programs in the 1980's. This study illuminates further on the Ghanaian experience in order to fully illustrate the effects of price control on competition and how it is an unnecessary venture in healthy markets.<sup>14</sup>

The same policy of price control legislation is also taking momentum in developed countries. Earlier, price control legislation was being used mostly during calamities and national crises. It was used during this time because the circumstances rendered certain markets uncompetitive. National calamities such as droughts and floods coupled with market impairment such as oil embargos and monopolies force governments to rely on price control legislations. It is because the government is placed in a situation where they have no other choice and people need help hence resulting to price control legislation.

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<sup>13</sup> P Miller The "Extreme Effects of Price Controls - Zimbabwe is One Big Underground Economy" December 20 2008 at 08:03 AM *Economics* | [Permalink](#)

<sup>14</sup> Ansa-Asare, 1985 *Journal of African Law* (29) 2

However, the trend seems to be changing. In its new use, it is being used in markets that the government recognizes to be uncompetitive. This applies to goods that are not substitutable but are essential. A good example is the pharmaceutical industry. In America, the populace is complaining that the price of healthcare is spiraling out of control and that the government should do something about it.<sup>15</sup> This has led to a renewed debate as to whether the American government should resort to price controls in the pharmaceutical industry or not.<sup>16</sup> The common people are arguing that the price of healthcare is out of people's reach and that the government should do as the EU has done; create price control mechanisms.<sup>17</sup> However, others have argued that this will result to killing of competition and the advantages that accompany it, such as, investments in research and development.<sup>18</sup> Europe can be said to have had mixed fortunes as it shall be discussed in the subsequent chapters.

#### **1.4. Understanding the relationship between price controls and competition**

In order to understand the direct influence that price controls have on competition, one has to understand the relationship between prices, and their influence in the mechanics of the market.<sup>19</sup> Competition can basically be said to entail the mechanics of the market where market participants compete to gain the most from the resources available in the market. On the other hand competition law and policy is the mechanism used to improve the market processes in order to create a good environment for competition to thrive.<sup>20</sup> Where competition thrives in the market, maximum use of resources is achieved. When there is maximum use of resources,

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<sup>15</sup> F. Thies "America's First Wage and Price Controls" 2000 *The Mises Institute monthly*, (18)3

<sup>16</sup> J Golec & J Vernon *European Pharmaceutical Price Regulation, Firm Profitability, and R&D Spending*, finance Department School of Business University of Connecticut National Bureau of Economic Research.

<sup>17</sup> Connaughton 2009 Writing Competition Berkely Technology Law Journal

<sup>18</sup> Connaughton 2009 Writing Competition Berkely Technology Law Journal

<sup>19</sup> D. Hildebrand, The Role of Economic Analysis in the EC Competition Rules *Competition Theory Law and Business* 3 ed Wolters Kluwer 95-171

<sup>20</sup> R Whish *Competition Law* 6 ed (2008) Oxford 1-19

production and pricing become consumer friendly. Hence, this becomes the responsibility of the government to make sure that there is efficient distribution of resources to support competition.<sup>21</sup> Further, competition law has responsibilities to both the sellers and the buyers.<sup>22</sup>

The issue of prices as a common denominator of competition cannot be disputed and also the fact that competition law has a way of dealing with prices is also not in question. However, sometimes it is unable to supervise pricing of commodities effectively. This may be because of the situation the government is in<sup>23</sup> or due to the competitive position the market might be in<sup>24</sup>. Since time immemorial, one way of controlling prices has been through price controls.<sup>25</sup> It has been seen to be very effective in driving down prices of commodities.

However, its effects on the competitiveness of the market so far have been negative. Price control has an impact on the competitiveness of the market because anything that has a substantial effect on profitability of firms participating in a particular market also has an impact on the behavior of the firms in the market. This policy has come under sharp criticism from economists who argue greatly against it. The economists argue that price control mechanisms should not be a default policy that governments should go to whenever prices of commodities go up as some developing countries are doing.<sup>26</sup>

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<sup>21</sup> Hildebrand *The Role of Economic Analysis in the EC Competition Rules Wolters Kluwer Competition Theory Law and Business* 95-171.

<sup>22</sup> Wolfgang Kerber *Should Competition Law Promote Efficiency? - Some Reflections of an Economist on the Normative Foundations of Competition Law*

<sup>23</sup> P Krugman & R Wells, *Module 8 Supply and Demand Price Controls (Ceilings and Floors) Macroeconomics* 77-87

<sup>24</sup> Connaughton 2009 *Writing Competition* Berkely Technology Law Journal

<sup>25</sup> R L Schuettinger *Forty Centuries of Wage and Price controls: How Not To Fight Inflation 2002* Heritage Foundation 513 C. St NE Washington DC

<sup>26</sup> Ansa-Asare 1985 *Journal of African Law* (29) 2

Most economists place great faith on markets to govern themselves especially on the issue of prices. According to Adam Smith<sup>27</sup> the market has the wisdom to regulate and supervise itself; a notion he calls the 'power of the hidden arm'. He argues that the power should be accorded to them to determine prices for themselves. According to pure capitalists, a competitive market has the power to bring down prices by itself. With proper government policies whose aim is to promote competition, this can be successfully achieved. In the other side of things, social-political players argue that in certain circumstances competition law also fails to deal with prices. They argue that when this happens, the government must have a way out and hence argue that price control is a good policy that ensures prices come down when needed.<sup>28</sup>

Wolfgang Kerber<sup>29</sup> provides what he believes best deals with the issue of pricing without killing competition in the market by proposing the theory of market efficiency as the best method. He provides that economists in this day and age are inclining towards the notion that competition should look at the distribution of resources as a way to effect the greatest efficiencies into the market with maximum use of resources. He goes on to say that efficiency does actually include the look at the interest of all players in the economy including the interest of the consumer. The interest of the consumers falls into three categories namely:

1. An option to choose what one wants; with many producers in the market, the consumer has a choice of where to buy what he wants.
2. Quality of the goods available: here it practically says that when the market has many producers producing the same goods with the same access to the market, and consumers

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<sup>27</sup> Adam Smith, *Wealth of Nations* 1704 5 ed London : Methuen and company limited

<sup>28</sup> N Stern *Effects of Taxation, Price Control and Government Contracts in Oligopoly and Monopolistic Competition* 1985 London School of Economics

<sup>29</sup> W Kerber *Should Competition Law promote Efficiency? Some Reflection of an Economist on the Normative Foundation of Competition Law*

having all information create a situation where innovation is promoted to improve the goods in order to attract customers and keep the ones that one has. This keeps the goods circulating in the market always of good quality. This is because on normal occasions the buyer will not buy goods of poor quality if he can avoid it.

3. Prices of the goods sold: in order to attract new customers and continue keeping those you have, the producers are bound to sell their goods in the lowest price possible. Hence bringing the commodity prices as low as possible.

In reality this does not always work out as smoothly as it is stated above. Due to many factors affecting the market, the prices of commodities tend to go up.<sup>30</sup> This has led to the government being forced to interfere with the machination of the market in order to remedy those effects. Price control is one among those remedies. However, a good number of countries are abusing this policy. They are using it on healthy markets that do not necessarily need it. A good example is Zimbabwe and earlier on in Ghana.<sup>31</sup> Hence, it is imperative for us to make sure that price control legislations should be used when needed and not when the government feels like. This is because, even though it is a fast way of reigning on prices, the negative implications which it comes with are vast and severe.<sup>32</sup>

Price controls should happen in situations where due to certain dynamics in the market the prices of certain essential products become higher than what common people can afford hence the need for the government to come in and rescue the people by lowering the prices of the said

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<sup>30</sup> P Krugman & R Wells *Module 8 Supply and Demand Price Controls (Ceilings and Floors) Macroeconomics (2009) 2 ed 77-87*

<sup>31</sup> Ansa-Asare 1985 *Journal of African Law* (29) 2

<sup>32</sup> J Golec & J Vernon *European Pharmaceutical Price Regulation, Firm Profitability, and R&D Spending*, Finance Department School of Business University of Connecticut, National Bureau of Economic Research

commodities.<sup>33</sup> The high prices might occur in due regard to the current cost of production of the said product or in total disregard of it thereof. It is created through acts of parliament and enforced by governments. The instances that constitute the use of price control legislation include:

- The goods being sold are limited and not easily produced e.g. Pharmaceutical products<sup>34</sup>
- Protection of investments by IP laws which sometimes hinder the influence of competition laws<sup>35</sup>
- Goods are essential and are not easily substitutable<sup>36</sup>
- Circumstances that are beyond the market grasps such as calamities and crises<sup>37</sup>
- Sometimes abused by governments for political reasons<sup>38</sup>

So the argument as how to balance the two aspects of competition that is investment and profits on one side with prices on the other side, in order to create a better and competitive market is very important. It creates a problem for price control policies to balance the two because firstly, the main way of enforcing price controls is to assume that the products will remain static and innovation through investment in research and development will not or is not occurring. This creates a problem because innovation is a basic component of the market and if it is ignored or curtailed, then everything in the market including competition is at risk. Secondly, the question arises as to how to factor in the profitability of companies when pricing. The biggest problem of identifying profitability of companies is that one is not able to get all the information about the company. This includes investments from production to distribution and from research and

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<sup>33</sup> P Krugman & R Wells, *Module 8 Supply and Demand Price Controls (Ceilings and Floors) Macroeconomics 77-87*

<sup>34</sup> Connaughton 2009 Writing Competition Berkely Technology Law Journal

<sup>35</sup> Connaughton 2009 Writing Competition Berkely Technology Law Journal

<sup>36</sup> Connaughton 2009 Writing Competition Berkely Technology Law Journal

<sup>37</sup> Connaughton 2009 Writing Competition Berkely Technology Law Journal

<sup>38</sup> Ansa-Asare 1985 *Journal of African Law* (29) 2

development to advertisement, all of which are important. Thirdly is the question of how the government will recognize shortcomings of the market in order to enact this legislation.

Fourthly, is how far should the government go when implementing the price control legislation in order to prevent competition in the market from collapsing and also what other precautions should accompany this legislation in order to cushion the market from its negative effects.

In this study, I identified the need of price control by comparing its positive and negative effects. This is to acknowledge whether through comparison we can deduce its tolerability. If it is able to be tolerated, then how it should be limited and its negative effects on the market reduced in order to prevent extreme consequences becomes a key concern.

The study provides the reasons why price controls are becoming more influential whereas in certain situations the laws are unable to deal with exploitative or excessive pricing. Excessive pricing or exploitative pricing has been so far well covered by competition laws and policies all over the world both in developed and developing countries.<sup>39</sup> It is mostly done by governments by dealing with the symptoms of the problems which includes dealing with the anti-competitive conducts that facilitate the producers to have the powers to charge exploitative prices.<sup>40</sup> However still in certain instances we see that the government's highly intrusive action of setting prices directly is still needed; a good example is in the European healthcare system.<sup>41</sup> The main argument is that the competition policies and laws being used now to deal with high prices are not effective in all circumstances. This is mostly hampered by the stringent requirements the

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<sup>39</sup> Whish *Competition Law* pg. 1-19

<sup>40</sup> EU Competition Law article 81

<sup>41</sup> J Golec & J Vernon European Pharmaceutical Price Regulation, Firm Profitability, and R&D Spending, Finance Department School of Business University of Connecticut, National Bureau of Economic Research

courts have placed on deciding whether a firm is charging exploitative prices or not<sup>42</sup> and on the other hand the nature of market and sensitivity of the goods are also a factor.

The push for price controls is well supported from one angle by an article written by professor Bwisa when he argues that the notion that price controls will affect competition is a fallacy created by the economist. He argues that, that is not always the case. According to him he states, “*Yes entrepreneurship and economics may be twins but they are not identical twins...*”<sup>43</sup> This however might be highly disputed. This is because what comes out clearly in the market is that profits make the core need of investment. This is because no profit making firm enters into the market for any other thing except to make profit. Hence the argument that anything that affect profitability of firms will not ultimately affect competition seems a farfetched argument. The dissertation takes a further look into this in the subsequent chapters. From another angle it is recognized as a policy needed in imperfect markets where the conditions of the market are bad and the government has to do something about it.<sup>44</sup>

The study of price controls from a competition lawyer’s perspective is needed. I agree that *per se* competition law is not widely regarded as a competition policy. However, it is the high time the study of price control and its effects on competition are included in the study of competition law and policy. This is because even if it was created to deal with prices alone devoid of competition concerns, it has the following association and direct connection to competition:

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<sup>42</sup> *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009)

<sup>43</sup> Proff Bwisa, “Price controls are healthy for Kenyans” *Monday Nation* 7<sup>th</sup> December 2009

<sup>44</sup> Stern *Effects of Taxation, Price Control and Government Contracts in Oligopoly and Monopolistic Competition* 1985 London School of Economics

1. It is created to deal with a market deficiency i.e. the ability to prevent firms charging excessive prices<sup>45</sup>
2. It is created to facilitate or control a certain aspect of competition conduct i.e. excessive prices<sup>46</sup>
3. Lastly it has a great bearing on the competitiveness of products in the market since it has a great influence on the profitability of commodities and in investment in their research and development<sup>47</sup>

To fully grasp its universal effects, the study looked at it from two main perspectives; from a developing world perspective by looking at Ghanaian price controls history and a developed world perspective through the pharmaceutical price controls in Europe. This is discussed in order to uncover how these two jurisdictions conduct the process and the effects so far of their price control actions. Also discussed is whether either the developed or the developing countries have come up with a solution that might just see the balance of price controls and competition coexisting in harmony. Also the need of having price controls, how to control their destructive effects in the competitiveness of the market is also discussed.

### **1.5. Questions in the dissertation**

The main question of the dissertation is what are the effects of price controls on the competitiveness of the market? The main areas tackled from that question include:

1. What is price control?

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<sup>45</sup> Stern *Effects of Taxation, Price Control and Government Contracts in Oligopoly and Monopolistic Competition* 1985 London School of Economics

<sup>46</sup> Stern *Effects of Taxation, Price Control and Government Contracts in Oligopoly and Monopolistic Competition* 1985 London School of Economics

<sup>47</sup> J Golec & J Vernon *European Pharmaceutical Price Regulation, Firm Profitability, and R&D Spending*, Finance Department School of Business University of Connecticut, National Bureau of Economic Research

2. Types of price controls? Here the types of price controls that exist are discussed
3. What are the reasons that price controls come into play? Discussed here are the reasons that precipitated the government to see that the policy is needed.
4. How far the government has gone in controlling prices? Here I discussed how the governments are controlling prices and which areas they are concentrating on.
5. What are the instruments used in order to control prices? Here I looked at the legal and political instruments that the governments are using in order to enact and control prices. How effective they are whether they are legal and issues of human rights when they are implementing the government's price policy are looked into.
6. How effective are the price controls? Here I looked at whether the price controls are actually helping and if so how.
7. What is the aftermath of price controls to the mechanics of competition in the market? Here is where I looked at the effects of price controls by the government. I looked at both the negative and the positive effects of price controls on competition in the market and what can be kept and what should be discouraged.

#### **1.6. Topic arrangements in the dissertation**

In order for a better research and proper presentation of the arguments in this dissertation I believe there should be a proper arrangement of the topics hence the topics are arranged as follows:

#### **Chapter one**

Introduction

This constitutes chapter one. The main contents are the introduction to the topic being discussed. This includes such areas such as what I am talking about in the dissertation, what is the background behind the topic and why the topic was chosen for the particular dissertation. This is in order to give a clear preview of what to expect in the coming chapters.

## **Chapter two**

### Literature review

This basically deals with the literature that has been written on the area of study. I embarked on the activity of learning from early authorities on the subject matter and understanding where they have come from, what they passed through and how it affected them in order to come to the conclusions so far argued. I explore whether the said conclusions can be inferred in our current situation.

## **Chapter three**

### Comparative study

Here I have looked at the countries that have government price control and illustrated their experience. I have used two examples that give us a proper experience. They include Ghana and the European Union. I have looked at why they chose this principle or policy in order to reign on increased prices and what has been their experience so far.

## **Chapter four**

### Conclusion and recommendation

Here, I conclude what I have seen so far in the area of price controls. This includes a conclusion on the good and bad effects and whether it is the right cause of action. Then I provide

for what I believe to be a solution on this new conundrum called price controls and what can work to be preserved and protected and what cannot to be expunged and forgotten.

## **CHAPTER TWO**

### **2. LITERATURE REVIEW**

#### **2.1. INTRODUCTION**

This chapter examines the literature in relation to price controls and their effects on competition in the market. First the nature of price controls is canvassed. Then the types of price controls are described together with their purpose. Thereafter the chapter seeks to understand what leads countries to price control as an option in the marketplace to control prices and how price control affect the conduct of competitors in the market. The main aim of the study is to look at price control as a mechanism that has a substantial and direct influence on the conduct of the competitors in the market. In the process, its relationship to competition will become apparent.

#### **2.2. INTRODUCTION TO THE LITERATURE BEHIND THE EFFECTS OF PRICE CONTROLS ON COMPETITION IN THE MARKET**

Price control is a topic that has mostly been studied or researched exclusively as a price regime; that is to mean that studies look at it as a policy that is a price setter away from competition law. However, this is an erroneous way of studying price control. As much as its intentions have been only to deal with prices, the substantial and direct effects it has had on the conduct of competitors in the market greatly push it towards the competitive law domain. From whatever angle the price control regime is studied we will always find it necessary to mention the impact on the competitive conduct in the market.

Price control is a very contentious topic. It pits two major groups of people in a collision course. On one hand the government's policy makers argue that the market is sometimes unable to deal with certain situations that arise out of its limitations. The government considers that in such

circumstances it is forced to go an extra mile to protect the people from the excess of the market; hence the recourse to price controls.<sup>48</sup> On the other hand many economists consider that price control is a dangerous and detrimentally defective policy, whose main effect is to kill the institutional workings of the market hence causing a downward spiral of competitive conduct in the market.<sup>49</sup>

Price control has been used in the recent past by both the developed and developing worlds. It has been used as a solution to the defects of the market that lead to excessive prices<sup>50</sup> and due to the situation of the country that cause the prices of commodities to be high. In this study, price control is important because of the direct and substantial effect it has on competition in the market. It affects conduct from production to distribution and finally to the retail side of the market. This study shows that it is a domain in which it is erroneous for competition lawyers to consider as an exclusive price regime because one cannot study price control without mentioning its effects on the market.

### 2.3. WHAT IS PRICE CONTROL?

A good description of what price control entails, tend to come from the writing in Krugman's macroeconomics module 8 where it states:

*"Buyers would always like to pay less if they could, and sometimes they can make a strong moral or political case that they should pay lower prices. For example, what if the equilibrium between supply and demand for apartments in a major city leads to rental*

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<sup>48</sup> Krugman & R Wells, *Module 8 Supply and Demand Price Controls (Ceilings and Floors) Macroeconomics 77-87*

<sup>49</sup> Krugman & R Wells, *Module 8 Supply and Demand Price Controls (Ceilings and Floors) Macroeconomics 77-87*

<sup>50</sup> Stern *Effects of Taxation, Price Control and Government Contracts in Oligopoly and Monopolistic Competition* 1985 London School of Economics

*rates that an average working person cannot afford? In that case, a government might well be under pressure to impose limits on the rents landlords can charge.*

*Sellers, however, would always like to get more money for what they sell, and sometimes they can make a strong moral or political case that they should receive higher prices. For example, consider the labor market: the price for an hour of a worker's time is the wage rate. What if the equilibrium between supply and demand for fewer skilled workers leads to wage rates that yield an income below the poverty level? In that case, a government might well be pressured to require employers to pay a rate no lower than some specified minimum wage.*

*In other words, there is often a strong political demand for governments to intervene in markets. In addition, powerful interests can make a compelling case that a market intervention favoring them is "fair." When a government intervenes to regulate prices, we say that it imposes price controls. These controls typically take the form of either an upper limit, a price ceiling or a lower limit, a price floor.<sup>51</sup>*

Krugman explains price controls as a market-oriented law and policy whose main aim is to surpass the main machination of the market.<sup>52</sup> It is done in two ways. Firstly, it is done through reduction of prices of commodities in order to make the buyers with lower reservation price have access to the commodities.<sup>53</sup> Secondly, it is also done by increasing the buying price of other

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<sup>51</sup> Krugman & R Wells, *Module 8 Supply and Demand Price Controls (Ceilings and Floors) Macroeconomics* 77-87

<sup>52</sup> Cheun 1974 (14)1 *Journal of Law and Economics*

<sup>53</sup> Minot Price 25-26 January 2010

commodities in order for the sellers to get the most from their commodities.<sup>54</sup> Its main aim is to supersede the market rule of supply and demand mostly for political or social-economic reasons.

Nicolas Minot, on the other hand, starts by defining competition law as; "Law passed by the government which dictates a price for a good or service"<sup>55</sup> This is to say that price control is a way in which government decides how much companies should sell their goods or buy them. Hence in both instances it is the direct way of controlling prices without following the market rules of demand and supply.<sup>56</sup>

According to Minot, unlike Krugman, there are different types of price control. He does not limit himself to the two that Krugman stated but he goes further to provide other types of price controls that include:

1. "Ceiling prices (upper limit)
2. Floor prices (lower limit)
3. Price band (upper and lower limit)
4. Fixed price"<sup>57</sup>

Each of the price control types is created in a different way and has a different method of implementation. This is because price controls is a wide topic that encompasses every activity or action whose main intention is to deal with the issue of prices without depending on competitive conduct in the market such as supply and demand.

According to Minot, there are different ways of enforcing price controls, and they include:

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<sup>54</sup> N Minot Price 25-26 January 2010

<sup>55</sup> N Minot Price 25-26 January 2010

<sup>56</sup> Cheun 1974 (14)1 *Journal of Law and Economics* 54.

<sup>57</sup> N Minot Price 25-26 January 2010

1. Legal enforcement (e.g. fines). This is the main traditionally recognized way of effecting price control regimes. This is where the government set prices and expects everyone to abide by them failure to which, sanctions are meted to the offender of the law. I have discussed it more in the next chapter while looking at price controls in Ghana.<sup>58</sup>
2. Government purchases and sales (buffer stock).<sup>59</sup> This is another way by which price controls are implemented. This is where the government takes an active role in mitigating effects of price controls by cushioning the market from price controls regime. When the government starts to implement price control legislations and policies, certain negative effects tend to accrue in the market. Hence, the government participates in the market to mitigate this. This is usually practiced in the markets that do not greatly rely on sanctions as a way of effecting price control laws. This is studied further in the next chapter while I look into pharmaceutical price controls in the European Union.

#### 2.4. WHAT LEADS TO PRICE CONTROLS?

In the study of basic competition law, it comes out clearly that the market has a way of controlling the prices. In order to understand pricing in the market, one has to understand basic antitrust theory. In the study of basic competition theory, one has to look at it from two main elements of competition, and that is price theory and industrial organization.<sup>60</sup> Price theory deals with the issue of prices of commodities. This is to say the company's decision on how much to make and how much to charge on the goods thereby made. On the other hand industrial

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<sup>58</sup> Ansa-Asare, 1985 *Journal of African Law* (29) 2

<sup>59</sup> Connaughton 2009 Writing Competition Berkely Technology Law Journal

<sup>60</sup> Hildebrand *The Role of Economic Analysis in the EC Competition Rules Wolters Kluwer: Competition Theory Law and Business* 95-171.

organization deals with the issue of the firm, in that it looks at how it is structured and how that is affected by the market.<sup>61</sup>

In order to have a perfect competition the following must be fulfilled:-<sup>62</sup>

1. All sellers make homogeneous products, that is to say that the product created does not differ both in substance and quality so that the customers have no reason to care where to buy them
2. Each seller should have a small share of the market that the decisions they make either to increase production or prices or vice versa does not influence the actions of the other members of the market
3. The buyers have perfect access to the information as to all the firms and the products including prices in the market.

However, this notion of perfect competition is an illusion that has not yet or is not or cannot be achieved in the near future.<sup>63</sup> Many issues affect this notion or have created the notion that this cannot be achieved, and they include: <sup>64</sup>

1. Economies of scale<sup>65</sup>
2. Innovation created in the beginning monopoly that affect the issue of competition
3. Government intervention sometimes leads to monopoly or just price fixing
4. Lack of access to information or unequal access to information among others

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<sup>61</sup> Hildebrand *The Role of Economic Analysis in the EC Competition Rules* Wolters Kluwer: *Competition Theory Law and Business* 95-171

<sup>62</sup> Hildebrand *The Role of Economic Analysis in the EC Competition Rules* Wolters Kluwer: *Competition Theory Law and Business* 95-171

<sup>63</sup> Whish *Competition Law* 1-19

<sup>64</sup> Jones & Sufrin *EU Competition Law* 4 ed (2011) Oxford

<sup>65</sup> R Whish, *Competition Law* 4 ed Butterworths 1993 pg 1-21

5. Product differentiation where products created however similar in function vary in quality hence affecting competition
6. In real competition the transaction cost are assumed not to be there, however in reality they are a huge factor in terms of calculating cost
7. Price discrimination whereby in perfect competition it is assumed that people want to pay the same price for the same product, however this is not possible.
8. Barrier to entry occurs whereby perfect competition assumes that entry to the market is easy, however, it is not.
9. Legal barriers such as the law of patent that prevent other companies from making the same product hence creating a sense of legal monopoly.

However the notion that perfect competition does not exist does not negate the need to understand what it entails and what it is intended to achieve<sup>66</sup>. Perfect competition model is used to create a situation as to what government should be projecting to achieve in order to deal with the menace of inflation without killing business and innovation. So in order to understand this, the understanding of the notion of supply and demand and how they affect prices is important.<sup>67</sup>

#### **2.4.1. Supply and demand in perfect competition**

For every product, customers are willing to pay a different price. The products might be created from same raw materials, but the demand may affect the prices of the final product. A good example is shown in the following scenario

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<sup>66</sup> Hildebrand *The Role of Economic Analysis in the EC Competition Rules* Walters Kluwer: *Competition Theory Law and Business* 95-171

<sup>67</sup> Cheun "A Theory of Price Control" 1974 (17)1 *Journal of Law and Economics* 54.

*Take a goof ball and an artificial heart. Both are created from plastic. The plastic creating the product is sold at lets say 1\$ a unit. The plastic ball might be sold at 20\$ after it being created because that is what people are willing to pay for it. On the other hand, a plastic artificial heart coming from the same raw material might go at 200,000\$. This is because the need for the plastic heart is so high and cannot be substituted.<sup>68</sup>*

Hence, what is clear is that demand and need props up the prices of commodities. So if the producer of the plastic decides to sell the plastic at 200\$, then the goofball factory might have to close because no one will be willing to buy the product as high as that. While on the other hand if the price of the artificial heart is increased substantially still this will not have a huge impact on the artificial heart factory. This is because it is of high necessity and high demand and requires a higher reservation price from its customers.<sup>69</sup>

This brings about another major issue in competition theory called the reservation price. This is the price that customers are willing to reach in order to acquire a particular good. A good example is the above situation. What comes out clearly is that the reservation price of a particular product differs from one product to another even if the products are from the same raw materials. This may be due to:

1. The need for the material: Every product has different needs. Some are a vital product that is of necessity such as the artificial heart or food commodities or drugs, while others are for leisure e.g. the goofball some types of foodstuff among others. If something is essential, then the reservation price is higher but if it leisure and one can survive without it then it attracts a low reservation price.

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<sup>68</sup> Antitrust theory: *Price theory and industrial organization*

<sup>69</sup> *Whish Competition Law*. 1-19

2. The substitution ability of the material or what we call the elasticity of the market in relation to a particular product. Most products can be substituted in that when they become too expensive than what one can afford then one can opt to buy another product that can do the same thing that the first product can do. The products that are highly substitutable tend to attract a very low reservation price while those that cannot be easily substituted attract a very high reservation price.

What cannot be wished away is the issue of the cost. Cost is the amount used in order to produce a particular product and the amount therefore accrued as profits in order to maintain the business. It is the basic start in order to calculate the price of a particular product. No company begins production with the intention of selling at a loss. Hence in order for it to survive the issue of cost is of utmost importance to understand.<sup>70</sup> The cost of output increases with the amount of goods produced.<sup>71</sup> This is because the first output will take advantage of the cheapest and best material. The quality of material reduces and the cost increases as production increases.

Another theory to understand in the issue of supply and demand is the theory of equilibrium. It provides that in order to state how a market reaches equilibrium the supply and demand must be perfectly balanced.<sup>72</sup> However, this is affected by monopoly profits. Monopoly profits attract increased output as long as profits remain high. As long as profits are high the following is expected to happen

1. Firms produce more so as to earn more

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<sup>70</sup> Hildebrand *The Role of Economic Analysis in the EC Competition Rules* Wolters Kluwer: *Competition Theory Law and Business* 95-171.

<sup>71</sup> Hildebrand *The Role of Economic Analysis in the EC Competition Rules* Wolters Kluwer *Competition Theory Law and Business* 95-171.

<sup>72</sup> Hildebrand *The Role of Economic Analysis in the EC Competition Rules* Wolters Kluwer *Competition Theory Law and Business* 95-171.

## 2. New companies will enter the market

This will continue until supply curve and demand curve intersect from which an increase in production leads to increased cost that will eat into the firm's profit margin. In equilibrium setting the following must be understood: In market equilibrium, the supply and demand will not change unless the market experiences shock by some form of external forces.

Equilibrium is determined by marginal buyer and marginal seller in the market.<sup>73</sup> Marginal buyer is the one with the lowest reservation price; that he is willing to pay. On the other hand, a marginal seller is one with the highest cost that is capable of staying in the market.

Another issue is consumer surplus and producer surplus. There is usually a difference most of the time between the reservation price of a customer and the price that he is paying for the goods.

The price might be lower than the reservation price. The difference that occurs is what is termed as consumer surplus. On the other hand sometimes the producer might have a low cost and sells the goods at higher price than the cost of producing the product the difference between cost and prices is what we call producers surplus.

### 2.4.2. Output decision of companies

#### **Perfect competition**

In a perfect competition model, the company is a price taker in that it has no power to decide on the prices it will charge for its products. It can sell all it wishes in the prices set by the market. If it decides to add any price on top of it, then it will lose customers to the other companies that will be selling the same goods at a lower price. On the other hand, if they produce more than required then they will incur more cost and lose profits while if they sell fewer goods then they

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<sup>73</sup> Hildebrand *The Role of Economic Analysis in the EC Competition Rules* Wolters Kluwer Competition Theory Law and Business 95-171

will ultimately lose profits. However, none of these actions will greatly affect the market practices because others will just fill in if needed.

In the issue of output, the firm has no power to decide how much output to produce. Each has a share of the market. If one produces more than required, the cost increases and profits reduce. This is because there is no more market for the products produced. At the same time, if it produces less than it loses profit. What is clear is that an individual firm in perfect competition always produces at the level of output at which the market price equals the marginal cost.

### **Monopoly**

It is only in monopoly situations where firms have the power to make unilateral decisions that are not controlled by the markets in relation to output and prices.<sup>74</sup> There are usually two types of monopolists;

1. De facto monopolist; these are monopolists not created by law hence not protected by it either. Most come from innovation or government privatization programs.<sup>75</sup> In any case, they are mostly worried about their position in the market. This is because new firms can still join the market hence they do not enjoy the freedom of price fixing as de jure monopolists enjoy. This does not mean they cannot increase prices while reducing production. They must do it strategically in order, not to attract the need for others joining in the market nor make it easy for others to join in and find ready customers.
2. De jure monopolist: this type of monopolist is created by the law. Mostly they include government run companies or those created through concessions where the government

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<sup>74</sup> Whish *Competition Law* 1-19

<sup>75</sup> *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009)

gives a private company the monopoly to run a particular section of the market alone.

They usually have the following advantages:

- 1) they are the only firms in the market
- 2) They do not need to worry about new entry in the market

However, one thing should be noted that even though they have the power to set prices they cannot bypass the reservation price of the people. This occurs in that the higher the prices, the lower the number of people willing to pay. Hence, they have to balance their output with the prices they set. So they can reduce output so that they can increase prices. This can go on until the point where if output is reduced any further they will suffer losses.

The social cost of a monopoly is the net loss to society caused by existence of monopoly in the economy. However, we should not confuse it with wealth transfer. The mere payment of money from one person to another is assumed not to make the society any poorer or richer than it was before as one person is wealthier and another poorer by the same amount.<sup>76</sup> It should be noted that monopolies have the following effects on the market:

1. Wealth transfer becomes irregular in that the consumer surplus is reduced as the producer's surplus increases. The wealth transfer does not change the society; it remains the same, but the consumer has lost in that their surplus has reduced while the producer has become wealthier.
2. There occurs a dead weight loss. This occurs when the number of consumers who would have bought the product at competitive prices reduces as prices increase. As a result, consumer surplus reduces but at the same time; the producers gain nothing in that they

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<sup>76</sup> Hildebrand *The Role of Economic Analysis in the EC Competition Rules Wolters Kluwer Competition Theory Law and Business* 95-171.

make no profits from the unsold goods. This amounts to a net social loss and hence the society loses by the amount of the dead weight loss.

### **2.4.3. Industrial organization**

This is the study of company structure. It is important because it will:<sup>77</sup>

1. Help us understand the market near perfect competition model and those not there
2. Help us understand firms' actions that have an impact on competition such as mergers and vertical integration.

Another aspect to understand the structure is the issue of the economy of scale. This occurs in the situation where cost reduces with the increase in production. This can lead to a situation of natural monopoly. This occurs where the economy of scale may be so substantial that it makes the market be operated more cheaply if only a single firm controls it. This as usual will amount to firms operating and charging monopoly prices. To those concerned with efficiency this might be a problem.

From the study of basic competition and the look at the market, one thing is clear; that the market by itself has a way by which it controls prices. In relying on the market, one can be assured that prices will be controlled. However, what is true in practice is that most times, the market is not in what is termed in the market theory, a state of perfect competition. Hence, this creates a situation where the government has a greater responsibility for supervising the market towards the state of perfect competition. This supervision is through laws and policies that are termed as competition laws or policy. There are usually traditional competition policies whose main aim is not to directly control the firms participating in the market, but to deal with what

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<sup>77</sup> Whish *Competition Law* 1-19

competition lawyers' term as anti-competitive conduct.<sup>78</sup> These are conducts that the law recognizes to have a negative effect on the market hence hampering the achievement of having a perfect competition in the market.

However, price control seems to deviate from the normal competition policies. Price control tends to deal directly with the market in its price setting function unlike the other competition law and policies which mainly deal with the anti-competitive conducts. I believe this is why it is not traditionally regarded as a competition law or policy. However, what it shares with the other competition law and policies is that it has a substantial and direct effect on competition conduct. Price controls, however, come to play because of many reasons chief of which are political necessity<sup>79</sup> and sometimes due to certain market imperfections that the government believes competition law or policies cannot cure.<sup>80</sup>

The use of traditional competition law as the way of controlling prices is not in dispute. However in practice, traditional competition laws are not always effective. As Eleanor Fox and Michal Gal<sup>81</sup> provides, even countries with price controls that have been updated over time to make sure that they conform to modern norms and practices tend to sometimes find themselves having price control legislation. This may be because they still find them falling short in taming prices in the market as they are expected. Questions as to why price control legislations are arising include:

1. The issue of legal rights in certain circumstances places the government in a particularly uncomfortable position. A good example is the pharmaceutical industry in the European

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<sup>78</sup> Whish *Competition Law* pg 1-19

<sup>79</sup> Ansa-Asare 1985 (29)2 *Journal of African Law*

<sup>80</sup> Stern *Effects of Taxation, Price Control and Government Contracts in Oligopoly and Monopolistic Competition* 1985 London School of Economics

<sup>81</sup> E Fox and M Gal "Drafting Competition laws for Developing Jurisdiction: Learning from Experience" 2014 (14-11) *NYU Law and Economic Research*

Union. The competitive control of the market by the government is greatly hindered by the greatly needed right accorded to the pharmaceutical industries that is the right to patent their work or discovery. This is because in the pharmaceutical industry as we shall see, it takes much investment to discover a drug but it is so easy to replicate one when it has been discovered. In order to protect and promote investment in the pharmaceutical industry, innovators have to be able to protect their work from being copied or replicated. This, however, creates another situation. The discovered new drug tends to have the monopoly to cure a previously incurable disease. This enables the manufacturers to have a monopoly of the market. Due to patent law, no other company is supposed to replicate the same drug. The drug manufacturer may control the market for a while until another drug to cure the same ailment is discovered.

This created a conundrum for the government since the market now cannot control the prices of the product. As the study shows, this leads to the firm charging high prices. Since there is no other firm to compare the prices with in order to know whether it is overcharging, the government is left to directly control the prices by which the said product is to be sold. In the case of Mittal Steel<sup>82</sup> it is sometimes argued that price controls can be used to manage such a situation. However, if one looks at the circumstances well enough, they would notice that circumstances that were used to determine whether a particular action was excessive pricing are not shared here. Hence, the courts hands are tied as to deal with the issue of pricing. In the decision of the case, one thing comes out clearly; that the courts are not very enthusiastic to control or set prices. Hence, it seems that the traditional approach to dealing with prices through

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<sup>82</sup> Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009)

competition laws and policies will not work here. These are among the few situations that give the government the need to resort to price control measures or policies.

2. The laws tend not to be home grown. They are either imported to satisfy certain requirements to receive donor funding or mostly through the enactment or ratification of international conventions and treaties. This now brings about the issues such as: <sup>83</sup>
3. Most of the time, people who are supposed to implement them do not seem to understand them
4. The laws enacted mostly are not tailor made to deal with the problems that the market suffers
5. Due to their lack of interest and understanding they do not invest enough towards the implementation of the said laws
6. Others have come out loudly to argue that due to the problems created by the issue of innovation, government and the consumers in the market are sometimes placed in a very precarious position. A good example is the issue that the EU tried to deal with that was created by the Microsoft case. <sup>84</sup> In this case we see that dominant firms tend to have the powers to control the market disadvantageously for their selfish aim. Most of the time governments are caught unawares, and the only option left is high-handed control of the market for the greater good of the participants of the market as was seen in the decision of the case. Another instance is seen in the case of Mittal on the issue of exploitative

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<sup>83</sup> Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009)

<sup>84</sup> Microsoft Corp. v Commission of the European Communities T-201/04

prices.<sup>85</sup> This gave the tribunal a very tricky situation of balancing between free market and the need of greater government intervention to deal with the issue of prices.

Many economists, however, have come out clearly to defend and support the economic free market mechanics of controlling prices. They argue that so far, the market has greatly been able to control the prices and bring them as low as it is competitively possible without actually defeating the goals of reasonable profits for the market players. The issue of excessive prices cannot be ignored. Even with those protections and mechanics of the market, still some manage to have the power to control prices. This is due to their dominance in the market, and this is one of the weaknesses precipitating the governments to get involved more actively in the market.

While dealing with prices, the question of excessive pricing in itself is problematic to define and prove. This is because what amounts to excessive pricing is a contentious issue. This is because there is a question on what or how excessive prices are measured. Another contentious issue is the information that is being factored in and the information that is ignored.<sup>86</sup> The question of whether price controls are going to cure the underlying issue that is believed to be the one causing the whole problem such as monopoly or whether it is going to create another set of problems such as:

1. Creation of anti-competitive concerted undertakings through agreements created under the auspice of consultation by governments to set prices. This occurs when the government calls a stakeholder's meeting to decide on prices. That round table

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<sup>85</sup> *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009)

<sup>86</sup> *Whish Competition Law* 709

consultation will lead to the creation of practices that are termed as concerted actions. It is according to Article 81 of the EC competition laws<sup>87</sup>

2. This will also lead to the creation of cartels
3. This encourages market sharing and later on discriminatory choice of whom to sell to.
4. It may also create a situation that makes it hard for others to join the market

Richard Whish<sup>88</sup> argues that it would be unscientific to try and compare monopolistic prices and hypothetical competitive prices. These major anticompetitive activities emanating from such nefarious actions may lead to other effects such as:

1. Making it hard for other businesses from joining the market
2. Reduce the need for innovation to attract customers and create and maintain market power
3. Reduce the need of investment in order to attract customers such as investment in advertising, proper distribution among other competitive activities.

The above scenario creates a problem for the government to reign in on high unexplainable prices hence leading the government to rely on price control policies.

## 2.5. TYPES OF PRICE CONTROLS

Price controls are of many different types. Each is created to cure a certain specific problem. It is what governs the type of price controls to be used. Below I have looked at types of price controls and what promotes their creation.

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<sup>87</sup> F Ghezzi & M Maggolino "EU CONCERTED PRACTICES & US CONCERTED ACTIONS: BEYOND WILLIAM H. PAGE'S PROPOSAL" July 29, 2013 (92302535) Bocconi Legal Studies Research Paper 2302535

<sup>88</sup> Whish *Competition Law* 709

### 2.5.1. Ceiling prices

Ceiling prices is the price control where the government provides unto the market what it believes should be the highest price a particular good should be sold. It mostly looks at the purchasing power of the people who are its citizens and to a certain extent what it assumes is the production cost. Then it goes on to set what it assumes to be the particular product's highest price if it is properly sold in the market. It is usually done by governments during situations where a particular commodity of great importance is being sold at high price. This might be due many factors as discussed below.

#### a. National crises

Krugman provides that a common occurrence that can bring about price ceilings is national crises. He goes on to say that price ceilings are typically imposed during crises, wars, harvest failures and natural disasters. These events often lead to sudden price increases that hurt many people but produce big gains for a lucky few. Examples include The U.S. government imposed ceilings on many prices during World War II: <sup>89</sup> the war sharply increased demand for raw materials, such as aluminum and steel, and price controls prevented those with access to these raw materials from earning huge profits. Price controls on oil were imposed in 1973, when an embargo by Arab oil-exporting countries seemed likely to generate huge profits for U.S. oil companies. Price controls were imposed on California's wholesale electricity market in 2001, when a shortage created big profits for a few power-generating companies but led to higher electricity bills for consumers. <sup>90</sup> However, most of these are removed after the crisis ends.

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<sup>89</sup> Krugman & Wells, *Module 8 Supply and Demand Price Controls (Ceilings and Floors) Macroeconomics 77-87*

<sup>90</sup> Krugman & Wells, *Module 8 Supply and Demand Price Controls (Ceilings and Floors) Macroeconomics 77-87*

At one time or another, governments suffer a sharp rise in inflation, a major loss of jobs and the reduction of purchasing power of its citizens. A good example is the recent recession. This led to a political clamor by the people to see the reduction of prices of goods and commodities especially the necessities such as food and drugs. After trying all cost reduction measures of production and left with no other option, most countries reverted to price controls to tame inflation and spur activities in the market. Most of the times, this is done out of goodwill to deal economically with inflation while in other instances it is a mechanism that governments use to gain political mileage. In any case, price controls seem to be a shot in the government's arm in dealing with inflation.

**b. Break “psychology” of inflation**

This is meant to deal with the mentality of the market producers to inflate prices.<sup>91</sup> This is where government use price controls to put the highest amount it believes a good should fetch. It is to make sure that if a particular company has market power, it will not use it to inflate prices. The government brings price controls into the market to ensure that prices are brought to manageable levels.

**c. Legal monopoly**

This occurs where the law enables a firm to be the only producer who is offering the particular good or service. This occurs from two main areas:

1. Law creates the firm to be the only institution to provide the goods e.g. state-owned companies

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<sup>91</sup> Minot Price 25-26 January 2010

2. Law gives a firm a right that protects its innovation hence giving a monopoly since no other firm can replicate its work e.g. patent in the pharmaceutical industry

Due to the underlying circumstances the government is forced or led to rely on price control to regulate prices. It is because the market here is a little bit disabled from doing it. By ignoring the circumstances, then one will also be causing a great injustice to the market since it is disadvantaged, and no one is doing anything to alleviate the problem.

### **2.5.2. Floor prices (lower limit)**

This form of price control is different in that it deals with the issue of the lowest a particular good should fetch.<sup>92</sup> It mostly occurs on issues of production where the produce of the raw material seems to have a volatile price regime. Sometimes governments intervene to push market prices up instead of down.<sup>93</sup> Price floors have been widely legislated for agricultural products, such as wheat and milk, as a way to support the incomes of farmers. In this case, it occurs where there is a proper fear that the particular commodity sometimes acquires a lesser price in the market than the cost of production.<sup>94</sup> It mostly happens in third world countries where they deal with the production and exportation of raw materials, the most volatile of all being agricultural products. In order to incentivize people to continue producing the product, the government sets the lowest prices that that good should be bought in order to:

1. Protect farmers from low prices after bumper harvest<sup>95</sup>
2. Ensure farmers a "fair" price that covers costs<sup>96</sup>

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<sup>92</sup> Minot Price 25-26 January 2010

<sup>93</sup> Minot Price 25-26 January 2010

<sup>94</sup> Minot Price 25-26 January 2010

<sup>95</sup> Minot Price 25-26 January 2010

<sup>96</sup> Minot Price 25-26 January 2010

### **2.5.3. Price band (upper and lower limit)**

Price band occurs where the government sets both the highest limit a particular good should be bought and lowest price that it should be bought.<sup>97</sup> This is to deal with the issue of volatility of prices in the market. It is to incentivize people to produce and at the same time to deal with the issue of inflation.

## **2.6. EFFECTS OF PRICE CONTROLS**

After price control legislation has been instituted in relation to the prices of commodities what follows next is a change of behavior of the players in the market. Such change of behavior is what I have looked at in this section.

### **2.6.1. Ceiling price**

Now let us take a situation; suppose the government decides this price is "too high" and fixes a ceiling price below the market price. The product's demand will be greater than product supply.<sup>98</sup> It will occur because the lower the price, the more people can buy, and this will lead to increase in demand. This demand since it is mostly sharp and producers are unprepared for it will most of the time become more than the supply. Hence, if ceiling price is enforced, then there will be rationing of food or shortage of the said product from the market.<sup>99</sup>

Another issue Krugman provides is the issue of miss allocation of resources. He says that those that do not need it much and can only pay a small reserve price will get the resources while those who needed it a lot and were willing to pay a larger price will be disenfranchised since the others

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<sup>97</sup> Minot Price 25-26 January 2010

<sup>98</sup> Minot Price 25-26 January 2010

<sup>99</sup> Morton 2001 (24) 1 Cato Review of Business and Government

have already taken the resource. It leads to an inefficient way of allocating resources to consumers.<sup>100</sup>

Another issue Krugman provides is what he calls wastage of resources. He goes on to say that people will be forced to spend money, effort, and time to cope with the shortages caused by the price ceiling.<sup>101</sup> Back in 1979, U.S. price controls on gasoline led to shortages that forced millions of Americans to spend hours each week waiting in lines at gas stations. The opportunity cost of the time spent in gas lines—the wages not earned, the leisure time not enjoyed—constituted wasted resources from the point of view of consumers and the economy as a whole.<sup>102</sup> To add on that, it also leads to poor quality of goods. This is because due to price ceilings the producers tend not to have the incentives to invest in improving their goods or services.

Other effects of price ceiling include:

1. Commodity disappears from shops.<sup>103</sup> This is because people will want to earn profits, not losses, and the only way to do that will be through the new black market
2. Vendors sell only to selected customers those that will be willing to buy secretly and in high prices.<sup>104</sup> Beating the need of the system in the first place
3. Black market appears with price above ceiling and possibly above market price.<sup>105</sup> This will be due to a rise in demand the incursion of risk leading to them selling at even high prices higher than the market prices

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<sup>100</sup> Minot Price 25-26 January 2010

<sup>101</sup> Minot Price 25-26 January 2010

<sup>102</sup> Minot Price 25-26 January 2010

<sup>103</sup> Minot Price 25-26 January 2010

<sup>104</sup> Ansa-Asare, 1985 *Journal of African Law* (29) 2

<sup>105</sup> Ansa-Asare, 1985 *Journal of African Law* (29) 2

4. Resale by consumers able to buy at official price.<sup>106</sup> This will be done at the market prices. In addition, to make matters worse, it might lead to exportation of the said produce mostly through black market hence creating a shortage in the market
5. Lastly, it will help in fueling the culture of corruption.<sup>107</sup> This will be through the payment of bribes to officials implementing the law in order to for them not to follow the ones not abiding by the price control rules. Since the money is running through unofficial channels, it will be hard to capture the people hence, entrenching the culture of corruption.

#### 2.6.2. Floor price

On the other hand, suppose the government decides this price is "too low" and fixes floor price above the market price. The product supply will become greater than its demand. This is because people will be incentivized to produce more and more. If the price is enforced, then there will be surplus i.e. unsold quantities of products.<sup>108</sup> This will now have to force the government to use the money that was supposed to go for development to buy the surplus goods.<sup>109</sup>

However, if the government buys the surplus, the floor price can be maintained.<sup>110</sup> If the government does not buy the surplus, producers will be forced to try to sell at price that may be below the market price. The main effect of a floor price is that buyers are usually reluctant to purchase at the said prices, particularly in remote areas leading to the sellers being disenfranchised.

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<sup>106</sup> Minot Price 25-26 January 2010

<sup>107</sup> Ansa-Asare, 1985 *Journal of African Law* (29) 2

<sup>108</sup> Krugman & Wells, *Module 8 Supply and Demand Price Controls (Ceilings and Floors) Macroeconomics* 77-87

<sup>109</sup> Morton 2001 (24) 1 *Cato Review of Business and Government*

<sup>110</sup> Minot Price 25-26 January 2010

In his conclusion, Nicholas Minot brings out clearly what he believes are the main advantages and disadvantages of price controls in the market.<sup>111</sup>

#### **Advantages of price controls in the market**

1. Quick response to extreme prices.<sup>112</sup> They deal with the issue of prices, in faster way, unlike the other competitive actions.
2. Satisfies political pressure to "do something".<sup>113</sup> Politics needs a fast response to people's problems and it works best for the one who seems to be doing something.
3. Alleviates burden of extreme price for some households.<sup>114</sup> Through the quick reduction of prices consumer needs are met
4. No cost to government, unless it "defends" price with purchase/sale.<sup>115</sup> It is among the cheapest competition policy since it does not require investment such as a skilled money minting taskforce to implement it.

#### **Negative effects of price controls on the market**

1. Creates shortage or surplus of commodity.<sup>116</sup> This is because sellers or buyers who wanted to join the market will not join because they are not assured of the profitability of their commodity.
2. Often leads to black market activity.<sup>117</sup> It will occur mostly after shortages of commodities start biting. The ones with the commodities will not sell them through the

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<sup>111</sup> Minot Price 25-26 January 2010

<sup>112</sup> Minot Price 25-26 January 2010

<sup>113</sup> Ansa-Asare, 1985 *Journal of African Law* (29) 2

<sup>114</sup> Minot Price 25-26 January 2010

<sup>115</sup> Minot Price 25-26 January 2010

<sup>116</sup> Minot Price 25-26 January 2010

<sup>117</sup> Minot Price 25-26 January 2010

proper channel but will sell them through unofficial channels mostly double the prices they would normally be sold and to the connected few.

3. Benefits well-connected or lucky rather than poor.<sup>118</sup> Hence the connected corrupt few will be the ones who partake of the profits through payment of bribes and by buying them cheaper away from the normal prices especially if they have confiscatory powers over the sold products.
4. Disrupts signals to motivate storage, shipments, and production.<sup>119</sup> A loss making venture does not incentivize importers to import more. It actually forces them to stop importation business completely hence forcing the government to do the importing.

## 2.7. CONCLUSION

I believe it is safe to say price control legislations are a group of legislation that is of great importance in the study of competition law. This is because although per se it has never been categorized as competition law its effects on the competitive conduct of the players in the market are unquestionable and immediate. A Price control as we have seen is actually created for the market. Its main aim is to deal with the prices of commodities in the market which is a basic component of competition in market. It is created to deal with the defects of market pricing that the government needs to address and it believes that competition law does not have a solution or it just needs a quick fix solution to the conundrum of high pricing in the market.

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<sup>118</sup> Minot Price 25-26 January 2010

<sup>119</sup> Ansa-Asare 1985 *Journal of African Law* (29) 2

In the earlier study of the market we saw that the market have always had a way by which the participants and their conduct have been able to fulfill all that the consumers are looking for and that includes:

1. Quality goods
2. Information on the said goods
3. Lower prices to competitive levels

However in practice, we have observed that some market players try to cut corners and try making more money by either driving their competitors out of the market or by making it hard for new competitors joining the market. Such conducts have negative effects on the function of the market or its competitiveness. These conducts are what have been termed as anti-competitive conducts. Competition law is usually created to limit and control such conduct in order to promote and protect competition in the market.

However, most economists and lawyers have argued that price controls do not qualify to be categorized as competition law. This is because according to their argument, price controls are not created to deal with the conduct in the market or specifically to deal with the anti-competitive conduct in the market. It is usually not created to even promote competition *per se*. It is not found also in competition law legislation and, most of the times or in most countries, it is not used. This is because those countries do not believe in price controls as a way of controlling prices or are not in a position where they see it necessary to use price controls to tame prices. As we have seen, most times than not, price controls have dire and negative effects on the competitiveness of the market and hence most policy makers avoid it like plague. However as we shall see later, price controls sometimes become a necessary evil, where due to the position the government find itself, the best or only solution is to result to price controls. We cannot ignore

that in other circumstances it is just used as a political policy in order to prevent revolutions and gain political mileage as we shall see later on while studying the price control experience in Ghana.

What cannot be ignored is that price controls have both substantial and direct effect on the competition in the market and even though not created to promote competition, it is created in relation to competition in the market as we have seen above. Also in the same tone, price controls even though they have different legislation from competition law and most times competition lawyers do not advocate it as a competition policy solution due to its negative effects, it still has the impact, though mostly negative, that competition law has in the market. This to me makes it an important and a crucial area of study for competition lawyers. It is like saying that they are in different sides of the same coin. The reason I believe it is a crucial and important area of study as part of competition law is that the study of it may help us a lot because:

1. By bringing it in the competition law foray, we may just be able to understand the legislation and how it comes to play; why it is created and how its effected
2. Through this, we will be able to contain its effects since by knowing the circumstances where it is needed; it will help us understand how in those circumstances it can be created. In such a way, it will be used to promote and protect competition in the market unlike the way it is being done now.

From the above study what comes out clearly also is that price controls regime is a very destructive legal regime whose effects most times than not have negative effects on the competitiveness of the market. Price control has created a situation where as much as it controls pricing it has led to anti-competitive conduct finding its way into the market. However what

cannot be ignored is sometimes having price control regime is a necessary evil. This is because of the problematic situation the countries may find themselves in. However, I believe that even if needed, price control regimes should not be left to stand by themselves. In that, they should come with a lot of qualification and supporting competition law and policies so as to reduce the negative impact price control has on competition in the market. This I believe, will help a lot in taming some of the negative effects price control has had on the market as we have seen above.

## CHAPTER THREE

### 3. COMPARATIVE STUDY OF EFFECTS OF PRICE CONTROL

#### 3.1. Introduction

This chapter examines countries that have applied price control legislation and it explores circumstances which pushed them to enact price control. The study begins by assessing the type of price controls which the studied countries have instituted and the implementation procedures. Finally, the research evaluates the effects of price controls on the competitive conduct of the participants in their market. The study critically analyzes two jurisdictions, that is, Ghana and the European Union. Both jurisdictions have had price control for different purposes and they implement them differently. The study of these two countries provides a practical understanding of the different reasons and ways price control is created and implemented; hence showing how it affects competition.

#### 3.2. PRICE CONTROL IN GHANA

Price control in Ghana has been a hot button issue which among other issues has caused governments to be toppled as has been illustrated herein. Price control has also survived each successive government before and after independence.<sup>120</sup> It carries with it problems such as its scope and implementation. It was started in 1949 by the colonial government and was used up to the late 1980's when structural adjustment programs were instituted by the Jerry Rawlings administration. It survived the communist era of Kwame Nkrumah to the early liberal years of Jerry Rawlings.<sup>121</sup> However, it did so by improving and undergoing metamorphosis as governments changed depending on the situation that the government faced at that particular

<sup>120</sup> Ansa-Asare 1985 *Journal of African Law* (29) 2

<sup>121</sup> Ansa-Asare 1985 *Journal of African Law* (29) 2

moment. In order to fully understand price control in Ghana, the study must look at its institutions through the different epochs of governance that the country has been through. As a result creating an understanding into the process of price control in Ghana and whether it was successful in its endeavor. In addition to this, the study looks into what made the government to see it fit to institute the said measures.

### 3.2.1. Colonial era

Price control in Ghana is neither a modern concept nor is it created out of a modern problem. Instead, it was started during the colonial era through the enactment of Control of Prices Ordinance of 1949.<sup>122</sup> Its main objective was to deal with the issue of prices of goods that was spiraling out of control. The high prices of commodities were attributed to the scarcity of goods caused by world shortage of shipping as well as consumer goods.<sup>123</sup> This pushed the colonial government to enact the price control legislation due to lack of other options. At the time, the government had no other way of dealing with the issue of prices because the sharp rise of prices was out of the markets' control. Consequently, price control was relied on as an emergency measure to fix the problem that was growing bigger every day.

However, what followed this action turned out to be more destructive than expected. A number of problems started to arise as a result of this action. Some of the challenges included:

1. Due to the ability of more people to afford the products caused by lowering of prices through price control, the shortages increased.<sup>124</sup> The system of black market began because the demand was high and the supply was low.

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<sup>122</sup> Number 25

<sup>123</sup> Ansa-Asare 1985 Journal of African Law (29) 2

<sup>124</sup> Ansa-Asare 1985 Journal of African Law (29) 2

2. A system of petty retail trade that exaggerated the rise of prices worsened the already existing problem of high prices.<sup>125</sup>

### 3.2.2. Kwame Nkrumah epoch

Kwame Nkrumah was the first President of the Ghanaian republic after the attainment of independence in 1959.<sup>126</sup> Nkrumah's government found the 1949 ordinance on price control in place. Nevertheless, he made the decision to continue with the ordinance because the issue of prices was still very crucial.<sup>127</sup> The ordinance continued until 1962. Nkrumah encouraged the *laissez-faire* practices that were being practiced by the former colonial government to continue. With regard to importation of goods, he decided to place the imported goods into an open general license. The rationale behind this policy was that the marginal import elasticity of income of Ghana was rising. "Thus, for instance, between 1954 and 1961, the volume of imports rose by 88 per cent or by over 8/2 percent per annum as against the average growth rate of the economy at 5-51/2 per cent per annum"<sup>128</sup>.

The legislation that was created to protect the little foreign exchange that the government had in its reserves, to control prices and to bring down the high cost of living that the country was plagued with turned out to be detrimental. The implementation of it was done so badly that instead of actually allowing the flow of consumer goods to pass smoothly it actually led to periodic shortage of the said goods. As usual, this was followed by a sharp rise in prices of the said goods.<sup>129</sup> Now the government being cornered to the wall decided to take more stringent

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<sup>125</sup> Dennis Austin "Politics in Ghana 1946-1960" 1970 *Oxford* 60-67.

<sup>126</sup> Dennis Austin "Politics in Ghana 1946-1960" 1970 *Oxford* 60-67.

<sup>127</sup> Ansa-Asare 1985 *Journal of African Law* (29) 2

<sup>128</sup> Ghana Seven-Year Development Plan, 1963/64 to 1969/70 *Ministry of Information* p. 219

<sup>129</sup> Ansa-Asare 1985 *Journal of African Law* (29) 2

measures to ensure that it curbed the rise in prices by criminalizing the activities associated with the breach of the price control laws. Hence, the introduction of a new price controls Bill.

The Bill was captured by the finance minister's statement while introducing the Bill to parliament when he argued "*...of the need to bring the prices of the commodities needed by the masses within the reach of everybody, adding that if the Bill was passed into law, it would ensure that "the people were not deprived of decent<sup>130</sup> inexpensive living by any privileged claims...".* The Bill was passed in February 1962, and it was referred to as the Control of Prices Act.<sup>131</sup> It repealed the 1949 Ordinance.

The new Act was enacted to:

1. Enable the Minister of Trade to make orders, by executive instrument, fixing the maximum prices at which consumer goods of any description specified in the Order might be sold. Section 2(1) of the Act made it a crime to sell goods above the controlled price. The penalty for contravening a price control order was imprisonment not exceeding twelve months or a fine not exceeding one hundred pounds or both,<sup>132</sup> on summary conviction.
2. Provide for an imprisonment if one is guilty, or payment of fines or both in the event of a conviction.<sup>133</sup>
3. A twist was created whereby if one committed an offence in this act, then he was to pay a price set by the court to the aggrieved party.<sup>134</sup> In section 2(5) instances were given when a situation would amount to a sale, and they included:

<sup>130</sup> Parliamentary Debates (First Series), (2b) 12th Feb. 1962 Column 300-301.

<sup>131</sup> Number 113

<sup>132</sup> Section 2(1)(a) control of prices act of 1962

<sup>133</sup> Section 2(1)(b) control of prices act of 1962

- a. the exposing of goods for sale,
  - b. the publication of a price list,
  - c. The furnishing of a quotation or any other act or notification whatsoever by which willingness to enter into any transaction of sale was expressed.<sup>135</sup>
4. Create an inspectorate whose function was to implement the provisions of this Act. The inspectorate was said in section 3(2) to be: "*An inspectors hall, for the said purposes have power at all reasonable times on production of a certificate of his appointment: (a) to enter any premises occupied for the purposes of a trade or business which he has reason to believe includes the selling of goods: (b) to inspect any goods found on the premises.*"<sup>136</sup> The police was also included. Their functions were to make sure that the goods were sold as expected or provided for to the consumers.
  5. Section 7(1) of the Act<sup>137</sup> provided that there was need to create further legislation to supplement the implementation of the current legislation.
  6. Also in the issue of keeping records, the sellers were expected to provide documents to the customers who stated the maximum prices. Lack of which was a criminal offence punishable under section 2(1) (a) and (b).<sup>138</sup>

As much as the Act was created for the interest of the buyer, it rarely succeeded in that endeavor.

This is in relation to sections 2 and 4 which provided for defenses in instances where one was prosecuted under the Act.<sup>139</sup> Most businessmen were able to hide behind such provisions of the law after perpetuating their nefarious activities. The other problem was the creation of toothless

<sup>134</sup> Section 2(4) of the control of prices act of 1962

<sup>135</sup> Ansa-Asare 1985 Journal of African Law (29) 2

<sup>136</sup> Control of Prices Act of 1962

<sup>137</sup> Control of Prices Act of 1962

<sup>138</sup> Control of Prices Act of 1962

<sup>139</sup> Control of Prices Act of 1962

enforcers. The Act had created a provision for the existence of volunteer price inspectors. The volunteer price inspectors had no arresting, or prosecutor powers hence they were not taken seriously. In other instances, these powers were used to solicit bribes, instead of reducing prices.<sup>140</sup> Hence, in very few instances was the price reduction felt.

Thinking it was the failure of the law to fully deal with the issue of high prices, the government decided to institute further stringent measures. In 1965, a myriad of amendments was introduced that included:

- Criminalizing the action of hoarding of goods<sup>141</sup>
- Refusal to sell was now termed as an offence.<sup>142</sup> Also, it stipulated as what situations amounted to the refusal to sell<sup>143</sup>
- Buying goods that were quantities of immediate requirements was also an offence<sup>144</sup>

However hard the government tried, it was never able to deal with the issue it was trying to address. The players in the market continued with their illegal activities.

### **3.2.3. National Liberation Council epoch**

Nkrumah was toppled in the 1966 coup d'état by the National Liberation Council (NLC).<sup>145</sup> NLC came in with big promises among them the improvement of the economy and its stabilization.

Among its first actions was the further limiting of importation of commodities with the intention

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<sup>140</sup> Ansa-Asare 1985 Journal of African Law (29) 2

<sup>141</sup> Control of Prices Act of 1962 S 4A(1)

<sup>142</sup> Control of Prices Act of 1962 S 4A(2)

<sup>143</sup> Control of Prices Act of 1962 S 4A(3)

<sup>144</sup> Control of Prices Act of 1962 S 4A(5)

<sup>145</sup> Ansa-Asare 1985 Journal of African Law (29) 2

of promoting national industries and businesses.<sup>146</sup> This further exacerbated the already worse situation leading to further shortages and higher inflation.

In addition, as was the practice it seems, they brought on even more stringent measures in relation to price control. Hence in 1966, they enacted further amendments to the existing laws. These amendments provided that, “any police officer below the rank of inspector and in the army below the rank of sergeant was now a price control inspector”.<sup>147</sup> They were given the power of arresting to curb the previous problems faced by their predecessors. This also failed because the black market practices continued, and very few people were arrested or even prosecuted mainly due to corruption that now was becoming endemic. Due to this, the Government had no other choice but to import more in order to fill the empty shops that had now become a concern. It is significant, however, to note that between 1968 and 1969 the government was able to maintain stable prices without using legislation provisions.

NLC handed over the government to a civilian government of Dr. Kofi Abrefa Busia.<sup>148</sup> The new government inherited the problems that had accumulated over the years. The new government inherited a country reeling with an unfathomable amount of debt that it was not in a position to pay. Hence, its creditworthiness was very bad. Owing to the situation they were in, they needed to export more in order to acquire more foreign exchange hence they devalued the cedi by 48.3 per cent. This led to increase in prices and due to that, the Busia regime only lasted a few weeks after the devaluation had occurred on 27 December 1971. They did not enact any new price control legislation hence it is difficult to speculate whether or not legislation would have been able to control prices.

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<sup>146</sup> Ansa-Asare 1985 *Journal of African Law* (29) 2

<sup>147</sup> Control of Prices Act of 1962 S 2A of 1966

<sup>148</sup> Control of Prices Act of 1962

## THE NATIONAL REDEMPTION COUNCIL (NRC) epoch

In 1972 coup d'état brought in a new government under the leadership of Colonel I. K. Acheampong.<sup>149</sup> The government came in and abolished first in its list the general license. However, they introduced a list of commodities that could not be imported into the country. This led to further shortages of the said goods. They also defaulted on the payment of their debt leading to exporters refusing to export goods to the country.<sup>150</sup> This led to an increase in prices in Ghana. The earlier success that led to the stabilization of prices came to an end. Government tried to implement the price control legislation but still trade malpractices continued to weaken the influence of the legislation.

As the narrative seems to go, in 1972 a price control decree was enacted.<sup>151</sup> It provided for the same issues as the ones amended, yet, the difference was on the implementation. The price control inspectors got more powers. Now under the new legislation, they had the power to confiscate the hoarded goods. Most of the offences now were to be summarily dealt with providing a fast conviction. Further monetary penance was introduced to curb the offences. This was to act as deterrence for future actions. The scope of hoarding offences was widened. New offences such as smuggling and speculations were also now included.<sup>152</sup> However, the implementation of the said stringent provisions was the issue. This is because notwithstanding prosecution of some of the people, a huge number of people still continued to violate the law. Another law was enacted to try and widen the scope of the price control, thinking that this might help. The Government passed the Commercial Houses and Supermarkets (Sale of Specified Goods) Decree, 1976. The results seemed to have remained the same.

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<sup>149</sup> Ansa-Asare 1985 Journal of African Law (29) 2

<sup>150</sup> Ansa-Asare 1985 Journal of African Law (29) 2

<sup>151</sup> Price Control Decree, 1972.

<sup>152</sup> S 8 of Price Control Decree, 1972.

### 3.2.4. THE A.F.R.C. (ARMED FORCES REVOLUTIONARY COUNCIL) ERA UP TO THE PRESENT DAY

The AFRC came into power after a coup d'état in 1979 led by Flight Lieutenant Jerry Rawlings.<sup>153</sup> They came with the same accusation similar to the earlier coup d'états, that the former government was not doing enough to punish those that were enriching themselves through corruption. After coming to power they went to what they called a "house cleaning exercise". They went after the middlemen, government officials, private formal sector enterprises, and market traders.<sup>154</sup> Even though the law did not extend to local food stuff, during this time it was extended to that area. Gracia Park paints us a proper picture of what happened below:

*"The AFRC began by punishing those who had offended against existing price and import controls on essential commodities. Their first target was the Makola #1 Market in Accra, renowned as the premier marketplace in the country for wholesaling imported and manufactured items, including cloth. This was looted the day of the coup, closed down, and eventually blown up by dynamite. Although it was, the seat of wholesaling, Makola #1 also included many retailers and traders in unregulated goods.*

*In Kumasi, price control enforcement also began with traders in imports and manufacturers. The day after the coup, military officers in Kumasi entered the main Kumasi Central Market and sold off the stocks of traders in the provisions section at control prices. Sometimes the proceeds were given to the trader; sometimes they were kept in the "government chest." On the next day, soldiers broke open stalls in the adjacent cloth section and sold off the cloth, or confiscated it. Owners of confiscated*

<sup>153</sup> Ansa-Asare 1985 Journal of African Law (29) 2

<sup>154</sup> Ansa-Asare 1985 Journal of African Law (29) 2

*goods could go to the barracks later, if they dared, to bargain with the soldiers about the "control" value which they would be paid. After they finished, a mob that had collected to buy cloth and watch the proceedings crossed the street to loot stalls in the main lorry park.*<sup>155</sup>

The implementation of the price controls through the strong arm tactics was very destructive because after the initial legitimate implementation, people took advantage and started looting. Violence began and stayed for some time. The news agencies did not help because they also fueled the fire. Among the popular rhetoric, the news peddling at the time was that they could not understand how uneducated vegetable sellers, who were mostly ladies, could earn more than their educated and employed male counterparts.<sup>156</sup> This kind of sentiments caused men to overreact and go on a looting spree. Such actions led to the sellers avoiding the market hence further shortages. Those few that went sold their goods at exorbitant prices. Hence, it was a very counterproductive action taken by the government. The AFRC however ruled for a very short period. During their time they did not institute new legislation pertaining price control since they saw that legislation alone never worked. They resulted more in the forceful implementation of the current laws.

In the same year they handed over power to a civilian government on 24 September 1979. In this time the prices of goods escalated. The government never stayed for long because in 1981 it was overthrown by Jerry Rawlings who set up PNDC.<sup>157</sup>

The second time was not a charm. Owing to their promise on the issue of economic stabilization and development, prices of commodities were to be lowered. They resulted in their earlier ways

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<sup>155</sup> G Clark Price "Control of Local Foodstuffs in Kumasi, Ghana" 1979 University of Michigan

<sup>156</sup> G Clark 1979 University of Michigan

<sup>157</sup> Ansa-Asare 1985 Journal of African Law (29) 2

of forceful sales where they forced people to sell their goods in the market. They enforced the price control legislations with much zeal and conviction.

### 3.2.5. Economic reforms

However, things from early 1980's took another turn. Ghana decided to venture into the IMF structural adjustment programs.<sup>158</sup> It was among earlier African economic reformers, with a series of reforms beginning in 1983.<sup>159</sup> These reforms included the abolition of price controls, the opening of capital markets, reductions in import tariffs, and privatization of many state-owned enterprises. Since then, Ghana has exhibited strong and sustained economic growth and reduction of poverty levels in the country and has now reached middle-income status. This was because the problems that came about with government market control that had become more of a vindictive exercise were now being rolled back. Now the people became more trusting in the market and due to that more and more people started investing in the market.

Ghana decided to undertake one of Africa's most ambitious structural adjustment programs in the late 1980s. That included *inter alia* the removal of subsidies and price controls, state enterprise divestiture, improved public-sector management, and banking reform.<sup>160</sup> Since then, major successes have been achieved. It is because the programs were followed by a sustained economic growth. The contribution of the industry sector recovered from a low of 7 percent to a massive 26 percent.<sup>161</sup> Before the SAP programs began, the influence of agriculture on the GDP was so high because of the decline in manufacturing industries. However, with the recovery in the nonagricultural sectors after 1983, the influence of agriculture on GDP had gradually

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<sup>158</sup> S Kolavalli et al Economic "Transformation in Ghana where will the path take us" February 2012 IFPRI Discussion Paper 01161

<sup>159</sup> S Kolavalli et al February 2012 IFPRI Discussion Paper 01161

<sup>160</sup> S Kolavalli et al February 2012 IFPRI Discussion Paper 01161

<sup>161</sup> S Kolavalli et al February 2012 IFPRI Discussion Paper 01161

declined steadily. This was not because agricultural industry was declining but because the manufacturing industry was improving in a very fast rate hence reducing the influence of agriculture on the GDP. It still remained on good levels. The growth in the agricultural sector has also seen the increase in household income.<sup>162</sup> The removal of price controls on goods played a major role on this success. More players entered the market as they can reap from their investments. The industrial sector has also experienced growth due to the improved profitability levels of enterprises.

### **3.3. Summary of the Ghanaian experience**

The study of the history of price control in Ghana seeks to illuminate the reasoning supporting every law ever enacted in relation to price control. From the reasoning behind the legislations, one can deduce whether price control was for the right intentions or not. Even if it was for the right intentions, it also enables us to determine whether its implementation was properly executed.

In Ghana, the reasons behind the price control legislations were not good enough to warrant their creation. Firstly, there were other competitive ways the prices could be reduced, and secondly it was done against the mechanics of the market and without due considerations of its effects on the market. As illustrated, after Flight Lieutenant Jerry Rawlings took over and instituted structural reforms without price control, the problem of high prices was tackled.<sup>163</sup> Unlike price control legislations that carried with them destructive effects on the competitiveness of the market, the

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<sup>162</sup> S Kolavalli et al February 2012 IFPRI Discussion Paper 01161

<sup>163</sup> S Kolavalli et al February 2012 IFPRI Discussion Paper 01161

reforms instituted by Jerry Rawlings, which greatly supported competition, helped both price wise and development wise.<sup>164</sup>

The effects felt in the area of competition in the market after the enactment of price control legislations were because pricing is among the most critical components of competition in the market. It is because pricing determines conduct of the competitors in terms of investment distribution and sales. Due to this, it turns to be the most challenging part of competition both for the firms in the market and the competition bodies. It is because of these factors that market dynamics should be looked into to come up with what one may term as competitive pricing. In the situation of Ghana, these market dynamics were greatly ignored. Firstly, the firms were not given a chance to decide on the prices they would have liked to sell their products. Secondly, even when the government was pricing the commodities, their decisions were greatly skewed against the firms' interests to the advantage of the consumers. This led to the producers suffering major losses.<sup>165</sup>

The main aim of companies is to make profits. When they started getting losses, they either had to leave or look for other ways to make a profit. Hence, this meant that they were looking for profits through hook and crook leading to certain areas dealing with the profit making ability of the competitors being affected. The hook and crook methods that were employed in order for the companies to make profit had a great impact on the competitive conduct in the market and the areas affected included:

1. Black market

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<sup>164</sup> S Kolavalli et al February 2012 IFPRI Discussion Paper 01161

<sup>165</sup> Ansa-Asare 1985 Journal of African Law (29) 2

Price control in Ghana caused the creation of black market.<sup>166</sup> Black market is a parallel illegal market created whose main intention is to circumvent the laws. This market does not follow competition policies or rules, and most of the times perpetuate well known anticompetitive actions such as the charging of excessive prices. This is because black markets are done away from the legal institutions. Black market came into being in the Ghanaian experience when the sellers were prevented from making profits, and they needed to make profits.

## 2. Excessive pricing

Excessive pricing occurs when the commodities that are being sold are sold at exorbitant prices that they cannot be able to attract in a competitive market.<sup>167</sup> In the Ghanaian experience, due to the practice and the creation of black markets, the goods started being sold very expensively more than they usually attracted in a normal competitive market. These prices were not set according to competitive pricing since they were not subjected to competition, and since they were not monitored by the law.

## 3. Corruption

Price control enabled corruption to grow mainly because only through corruption could the producers get profits from their products.<sup>168</sup> Corruption was in order to create and support the black markets. These black markets are basically created and sustained by corruption. Corruption is a market problem because where it exists, enforcement of the law is also affected. It leads to anti-competitive conduct. In the Ghanaian experience, among other factors, corruption was also occasioned during the implementation of price control legislation. Price control created a situation where the enforcers were bribed in order to allow the sellers to sell their goods through

<sup>166</sup> Ansa-Asare 1985 *Journal of African Law* (29) 2

<sup>167</sup> Ansa-Asare 1985 *Journal of African Law* (29) 2

<sup>168</sup> Ansa-Asare 1985 *Journal of African Law* (29) 2

black market. They were expected to ignore the illegal conduct committed by the sellers because even the executors of the law-through that privilege of enforcement and the practice of corruption-would get goods cheaply. In Ghana, it became so endemic that even the implementation of the simple price control laws was affected. Hence even the proper laws that were to help in the implementation of price control were also greatly affected.

#### 4. Reduction in production and impairment of industrialization

Price control created a situation where the incentives of production were impaired. It was because the little that was being produced was controlled to the extent that very few, if any, actually enjoyed profits from their venture. Those few were those that were able to access the black market. As was seen later after the liberation of prices the production increased greatly. Production came hand in hand with industrial growth.<sup>169</sup>

#### 5. Reduction in investment

It is a common side effect of price controls. Price control creates a situation where investment is futile. It is because price control greatly impairs the ability of one to make additional profit from additional investment made. This is because however much you invest to improve your product, you are forced to sell it at the same price as the one that has not improved his. In Ghanaian experience, profit was not a huge factor when pricing goods under price control legislation hence most of the time people incurred losses. It created a situation where there was little to no investment in certain areas of the economy. It became evident after liberalization of the market when we saw more investments on certain areas of the economy. The biggest benefactors were the agricultural and industrial sectors both of which had been affected by price controls.

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<sup>169</sup> Ansa-Asare 1985 *Journal of African Law* (29) 2

## 6. Shortages

In Ghana, we have seen that after the price control legislation was enacted, shortages of commodities started to be experienced.<sup>170</sup> This is because when one institutes price controls, and the profitability of products is affected, the said producers of the product tend to exit from the market. Investment in the said product reduces and hence the product either is eliminated from the market completely, or, it is transferred to another market mostly the illegal black market hence leading to shortages. This happened in Ghana as we saw in the above discourse. This was another show of why this was from the beginning a bad way to deal with the prices of commodities.

The Ghanaian experience turns out to be an example of the type and reasoning behind price control that should be avoided like plague. Due to the mere reason that price control was not created with the competitive intention of dealing with pricing, it leads to an entirely destructive way of dealing with prices in the market. As seen earlier, when the government repealed the process, competitiveness in the market returned leading to economic progress. The competitiveness of the markets later on reduced the prices. At the same time both consumers and producers gained a lot with the increase in market activities that created both economic growth and development. Hence, what we can conclude from the Ghanaian experience is that high prices are alone not a reason enough to institute price controls. In order to institute price control, one has to be sure that there is no other economic policy or competitive law that can be used to deal with the situation. If all economically oriented competition policies are proved to be ineffective in dealing with prices, that is when one can institute price control legislation. It should be done with the clear reasoning that its effects on the competitiveness of the market should be minimal.

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<sup>170</sup> Ansa-Asare, 1985 *Journal of African Law* (29) 2

### 3.4. PHARMACEUTICAL PRICE CONTROLS IN THE EUROPEAN UNION

E.U. has the practice of setting pharmaceutical prices artificially low. This is because the pharmaceutical market tends to give competition policy makers a bit of a hard time. The character of the goods being sold and the legal rights surrounding invention and manufacturing of the drugs, most notable being patents laws, make competition in the basic form a little bit difficult to enforce. The patent laws create a situation of legal monopoly that creates problems for competition policy makers to supervise and control.<sup>171</sup> Hence they tend to force countries to rely on price controls in order to tame prices because in their experience, competition law finds it hard to do so.

However, price control in the pharmaceutical market has not always been received with wide acclaim. It has attracted a lot of criticism from people who argue that even with the distinct character of the pharmaceutical market, as illustrated herein, the market can still control prices without using price control legislation as America claims to have done so far. Among the prominent researchers who argue against price controls is David Connaughton. He provides a clear picture of why not to adopt this path:

*"In nearly every developed country in the world, with the exception of the United States, pharmaceutical prices are artificially set at a low level. This price controlling directly result in inflated prices in the United States (US), fewer pharmaceuticals coming to the market, and reduced availability worldwide. Reduced pharmaceutical availability particularly impacts developing and least developed countries. This shortsighted practice fails to consider social and economic implications and is structured to circumvent domestic patent laws and international treaties.*

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<sup>171</sup> N. Stern *Effects of Taxation, Price Control and Government Contracts in Oligopoly and Monopolistic Competition* 1985 London School of Economics

*Controlling the price of pharmaceuticals has the short-term local effect of lowering drug prices in a particular country. This may be a reasonable practice on a small scale in developing countries where low-income levels make full price payment nearly impossible. This paper takes issue with price controls in developed countries, where full price payment is possible, yet a government imposes pricing restrictions to allow citizens to pay less than their fair share.”<sup>172</sup>*

So according to David Connaughton price controls seem only to have a short-term success of lowering prices in those countries that have imposed this legislation, however, the success is narrow and pyrrhic if I understand his argument. According to David Connaughton, price control comes with other detrimental effects. Such includes the issue of discouragement of production of new drugs, reduction in the investments of firms into discovering and producing new drugs, and lastly it shifts pricing from the countries that are using price control to those not using it. It should be noted that these are the basic characters of what holds the competitiveness of a market. However, as discussed hereunder, pharmaceutical industry is not as simple as we might be made to imagine by David Connaughton in his arguments above.

#### **3.4.1. Distinct characteristics of Pharmaceutical products**

Pharmaceuticals have two distinct characteristics that are very important to understand, firstly is that they are chemical compounds created to have an impact on the human body and secondly they take a lot of money and time to manufacture.<sup>173</sup> With them being chemical compounds, it is so easy for other scientists and researchers to copy an already created drug. All that it is needed is a lab and lab equipment, and it is copied. Now this makes it a very dangerous venture hence

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<sup>172</sup> Connaughton 2009 Writing Competition Berkely Technology Law Journal

<sup>173</sup> Pharmaceutical Research and Manufacturers of America (PhRMA) "FOREIGN GOVERNMENT PHARMACEUTICAL PRICE AND ACCESS CONTROLS" July 1, 2004 Department of Commerce

the need of a tough and efficient application of patent laws to protect inventors from malicious preying of their product.

Patent laws are enacted to make sure that one person's discovery will not be preyed upon by lazy people even if it is for the greater good. I know many people might be observing that the issue of inventing drugs is counterproductive because it is making it more of a business venture than a humanitarian venture. Well, this is not true. Certain issues must be looked into in order to understand the whole situation. Firstly, the development of a particular drug takes a long period to create. Secondly, it involves much chemical supplies and trials. Thirdly, due to the potential risk of injury to human beings it has to undergo a number of trials and tests before it can be given a go ahead for it to be sold in the market. Such makes it very expensive to manufacture pharmaceutical products. It is estimated that, in order to come up with a particular drug, it takes about \$800million to \$1.2 billion just in order to create a particular drug.<sup>174</sup> This amount used has to be recovered and profits created in order for the investors to continue investing either in improving the said drugs or inventing new ones.

Due to this, there need to protect the inventors who are also investors from malicious preying of their product. The government takes upon itself to create proper patent laws. The same applies to the area of prices. America as an example, has undertaken not to limit prices in order to allow the said investors to make proper profits and be able to invest more in the market. In 2011, Obama signed into law the America Invents Act, Overhauling the patent system to promote and encourage invention and even create more protection to the inventors. This was a law that provides stringent protection to patented products. However, this protection in relation to price has a down side as indicated herein.

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<sup>174</sup> Connaughton 2009 Writing Competition Berkely Technology Law Journal

Patent laws provide for a situation where there is a threat of the creation of monopolies. It can be seen in the instances where the drug being manufactured becomes the only one being used to cure the specific illness. With the patent laws, the drug invented cannot be copied hence we have to wait for another drug to be invented which cures the same illness so that the first drug can get some competition. This creates a situation in which before the new drug is invented the first one has the monopoly of the market and can charge monopoly prices. Hence leading to a situation where the drug is sold at high prices far away from the reach of ordinary consumers. With pharmaceutical products being essential products that are not easily replaced with other products, the government is forced to find solutions to lower the prices. Hence, the government results to creating price control legislation.

#### 3.4.2. Enforcement of pharmaceuticals price control

The action of price controls in the European Union as David Connaughton puts it is a process through which the government circumvents the patent holder's right of setting his prices.<sup>175</sup> In another angle, it can be said to be the government legal action of setting prices according to its choice of method. Price control in the European Union is done in the following ways:

- Some countries use the system of referencing, where they set their price based on the price paid in other countries.<sup>176</sup>
- In other countries, the price of a drug may be negotiated between the government and a drug company resulting in lengthy, inefficient and tense discussions.<sup>177</sup>
- Profit, volume, and margin controls are also common.<sup>178</sup>

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<sup>175</sup> Connaughton 2009 Writing Competition Berkely Technology Law Journal

<sup>176</sup> K Kyle "Pharmaceutical Price Controls and Entry Strategies" 7, 2007 (88) 92-93 *Review of Economics & Statistics*

<sup>177</sup> Kyle Feb. 7, 2007 (88) 92-93 *Review of Economics & Statistics*

- Another action that is not a direct price control but has the same effect as price control is the parallel importing rule.<sup>179</sup> It is where in the EU drugs sold in one country can be imported to the other without charging taxes on the goods. In practice, each country does not sell drugs at the same price. In certain less developed countries in the EU, drugs are sold cheaper than the developed countries of the EU. It is because by selling them cheaper in the developing countries, they make it more accessible to more people and since in the other countries they are developed they can be able to pay the full profit price.
- Demand-side controls such as capping the total cost of drugs a doctor can prescribe, or a pharmacist can sell, may result in lower prices for consumers, but may also result in less drug access.<sup>180</sup>
- The fixed pricing or the cap on reimbursement policies is another method of dealing with price controls. It is set to create a situation where the bodies paying the prices of the drugs are set to pay a certain amount in prices as the responsibility price as to a particular healthcare system and no more.<sup>181</sup> It is set to be in theory an incentive for the physicians and the patients to consider drug prices in their decision-making. It is because any price above the said amount is borne by the patient. Hence, this promotes the practice of substituting the expensive drugs with the cheaper ones. Creating a situation where even drug manufacturers will have to lower their prices or make drugs at a more efficient cost range hence reducing the cost of healthcare.

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<sup>178</sup> Kyle Feb 7, 2007 (88) 92-93 *Review of Economics & Statistics*

<sup>179</sup> M Grossman & C Lai Parallel Imports and Price controls

<sup>180</sup> Kyle Feb 7, 2007 (88) 92-93 *Review of Economics & Statistics* 92-93

<sup>181</sup> Kyle Feb 7, 2007 (88) 92-93 *Review of Economics & Statistics* 92-93

- Finally, many countries set a price floor on generic drugs (drugs that replicate off-patent drugs). This price floor supposedly promotes generic drug production, but results in much higher generic drug prices than in an uncontrolled (i.e. “US”) market.<sup>182</sup>

Each of the above ways of implementing price control depends on the situation of the country and also what they see as most appropriate and effective in the said country. Each type is distinct and efficient depending on how they are enforced and created. In most countries in Europe, health care is publicly funded.<sup>183</sup> That is to say, that the governments foot a huge bill of the people's healthcare needs. However, the practice is not an accepted practice universally.

It should be noted however, that Europe has used price control with an eye to its effects on competition. The issue of profitability of the franchise is usually factored in when they are trying to calculate the prices and the reimbursement of the said products. Jacoline Bouvy and Sabine Vogler in their paper on pricing tend to give a proper look at how it is done and their proposition on how it can be improved for the welfare of the patent holders. They say that the categorization of drugs into groups that can be looked from a pricing perspective is a good way of making sure that the pricing and reimbursement policy is equitable enough to cater for each drug appropriately. They provide that:

*“...Medicines that reach the market can be classified in many different ways: by patent status (patented medicine or generic medicine), indication (high volume indications, Orphan indication, or stratified medicine), or by molecular structure (first-in-class or me-too). Different policies might be needed for different types of medicines, and policy aims might vary for different types of medicines as well. Throughout this background paper, the effects*

<sup>182</sup> Kyle Feb 7, 2007 (88) *Review of Economics & Statistics* 92-93

<sup>183</sup> Connaughton 2009 *Writing Competition Berkely Technology Law Journal*

*and challenges of policies according to the type of medicine will be distinguished, and the following classification of medicines has been used: first, it is recognized that patented medicines require different pricing and reimbursement policies than off-patent medicines (generics). Generic medicines are discussed separately in this section. For patented medicines, medicines with added therapeutic value and medicines without added therapeutic value are distinguished between. 'Added therapeutic value' is defined below. In addition, it is recognized that policy makers tailor policies to deal with high volume medicines and low volume (but the high cost) medicines (orphan medicines and stratified medicines). The 'ideal' reimbursement policy, for this reason, is one that sufficiently rewards innovation while securing value for money for the healthcare system and ensuring equitable and timely access to medicines...*<sup>184</sup>

### **3.4.3. Why are price controls enforced**

In the area of pharmaceutical products, both developing and developed countries see it fit to regulate the prices of the product. However, it is more of a common practice in developed countries to control drug prices. It is because there is a common conception that the value of Medicare in most developed countries is exorbitant and way above the reach of common citizens of the said countries. It is believed that, since the rule of patent creates a situation where the inventor of the drug has the legal monopoly of the said product, they abuse this privilege by selling the drugs at exorbitant prices. However, David Connaughton argues that this is a misconception of the basic truth. He argues thus:

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<sup>184</sup> Update on 2004 Background Paper, BP 8.3 Pricing, and Reimbursement Policies written by Jacqueline Bouvy and Sabine Vogler updated by David Henry, Danielle Lang and Suzanne Hill pg8.3-8

- a. In the issue of legal monopoly in relation to drugs created through the law of patent does not capture the true story. He argues that a particular ailment can be cured by different types of compounds hence no monopoly. A good example is that like in Kenya we have two types of drugs that can cure headaches and they are Panadol and Headex both of which are effective<sup>185</sup>
- b. Secondly the issue of charging exploitative and exorbitant prices is unlikely to occur because as we have seen, the investment into research and development of drugs is very expensive.<sup>186</sup> Since the investors need to make a profit they have to charge according to the amount they think would make them enough profit in order to act as an incentive for them to continue investing in the said area. He argues that other firms make more money than them comparing them as follows:

*“2008 operating incomes (Operating Income = Operating Revenue minus Operating Expenses; a simple measure of profit excluding interest and taxes) of Pfizer, GlaxoSmithKline, Verizon, and AT&T in 2008 Pfizer and GlaxoSmithKline had operating incomes of \$9.7 Billion and \$7.1 Billion, respectively. Meanwhile Verizon and AT&T reaped operating incomes of \$16.9 Billion and \$23 Billion, respectively.<sup>28</sup> Thus, it is clear that the profits of major drug companies while high, are near, or less than the profits of other large corporations.”<sup>187</sup>*

The truth and falsity of the argument is a matter of proper mathematical calculation. What is true is that the prices of drugs are high, and the need to deal with the situation is eminent and how to

<sup>185</sup> Connaughton 2009 Writing Competition Berkely Technology Law Journal

<sup>186</sup> Connaughton 2009 Writing Competition Berkely Technology Law Journal

<sup>187</sup> Connaughton 2009 Writing Competition Berkely Technology Law Journal

deal with it is the issue and the reason for concern. It is because whatever method one chooses consequences are bound to be there.

#### 3.4.4. Effects of price controls

What should be noted is that price controls can be felt at either the production level or the stakeholders' level; that is the distribution level and retail level. Each level apparently tends to behave differently if affected as illustrated herein.

##### a. Diminished profitability of the venture and hence reduction of investment capital

Price control is said to reduce the profitability of the venture done. At this particular instance, it is said that the price control mechanisms of the European pharmaceutical market is lower than the American one. It is because the price control mechanisms tend to be, most of the time, tagged along the profit margin of the pharmaceutical firm's profit. It is sometimes said that the market goes to lose the profit created to an extent that other ventures without the same amount of investment and need make more profits than them. A good example is in 2008 operating incomes (Operating Income = Operating Revenue minus Operating Expenses; a simple measure of profit excluding interest and taxes) of Pfizer, GlaxoSmithKline, Verizon, and AT&T In 2008 Pfizer and GlaxoSmithKline had operating incomes of \$9.7 Billion and \$7.1 Billion, respectively. Meanwhile Verizon and AT&T reaped operating incomes of \$16.9 Billion and \$23 Billion, respectively.<sup>188</sup> It can be argued that this is a good thing because they are unable to make massive profits since the government has been able to tame their thirst for charging excessive prices, and I concur. There is also another aspect of this, and that is the investment capital needed to create new drugs. Pharmaceutical industry is said to be both time-consuming and capital-intensive both of which need a lot of monetary investment and patience. Hence, if the

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<sup>188</sup> Connaughton 2009 Writing Competition Berkely Technology Law Journal

profitability of the firm is lowered to the extent that it cannot be able to re-invest in the creation of new drugs, then there will be a problem in the pharmaceutical industry. I believe that pharmaceutical industry is a business and that profit should not be the only benchmark of success especially due to its sensitive nature. However, if one want more drugs, more money is needed and that part is what I term as necessary evil.

Another issue concerns the profitability of the hospitals administering the drug. Why should hospitals make profits and why should it be of our concern? In the first place no one wants to hear that hospitals make profit. The question being asked is who wants a hospital whose main intention is to make profit. Well, this is a viable way to look at things but what about the other side of things. Hospitals are as much profit making companies as they are sickness curing and caring places. They carry both the business side of a firm as much as a humanitarian side of the firm. The profitability of the hospital is as crucial as it is its caring aspect. This is because it is from its profits that it is able to buy state of the art equipment to treat patients well. It is also able to acquire the best doctors to treat patients and above all it is able to create well-equipped labs to test and treat patients. Now, if the profits are not able to cater for this, then what we have is a hospital without a lab, with aging equipment and a hospital that lacks proper and permanently employed doctors. In this case, it is important to make sure that hospitals also make profit. It is to cater for their continued sustainability and existence. Price controls have an effect on the lab making process as indicated hereunder.<sup>189</sup>

b. Lack of investment incentives

In a paper wrote by Jacoline Bouvy and Sabine Vogler a lucid introduction on investment in drug production is given. They refer to it as the Eroom law. It has been discovered that the investment

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<sup>189</sup> Connaughton 2009 Writing Competition Berkely Technology Law Journal

in production of drugs is halving every nine years.<sup>190</sup> This law was only provided for the situation in America. However the same effect is also said to be in Europe. It is found that the price of creating a drug is so high and has been increasing every year hence, now it is very high. On the other side, very few disease curing molecules are being discovered, and fewer even see the market. From the ones that see the market, very few recover their cost hence, the need for them to accrue good compensation in order to encourage further innovation in creating new drugs. David Connaughton, on the other hand, provides that due to price controls more and more research companies are becoming more worried of investing in research and development of new drugs. A question of why one should invest up to \$1 billion if he is not assured of investment returns begs. According to him he says:

*"...Another direct result of price controls is a limitation of innovation via substantially decreased R&D funding. Innovative pharmaceutical companies (and any other company that does business by selling innovative products) reinvest the vast majority of their profits into research and development. This money goes to hire more people to work to find the next big thing: cancer drugs, AIDS vaccine, diabetes treatments, and so on. Price controls are estimated to reduce drug industry R&D investment by \$5-8 billion annually as of 2004. Without these controls, the industry could introduce at least three to four new drugs annually. Currently, there are approximately 30 new drugs approved each year, meaning that there could be a 10%- 13.3% increase in drug innovation per year. Fewer new drugs result in a lowered quality of life on a worldwide scale..."<sup>191</sup>*

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<sup>190</sup> J Bouvy & S Vogler "Update on 2004 Background Paper, BP 8.3 Pricing and Reimbursement Policies" updated by D Henry D Lang & S Hill 23 may 2013 (8.3-6)

<sup>191</sup> Connaughton 2009 Writing Competition Berkely Technology Law Journal

From the above the argument of David Connaughton, there is a need to look at the profit making need of the companies which is as important as the price reduction of the drugs. This is because the drug making company's need is as important as the need for everyone to have access to affordable drugs. However, the quest of reducing prices for an affordable health care should not be ignored. Hence, other methods should be checked.

b. Transfer of price to other countries

According to David Connaughton prices in America, are high because prices in EU are low. Pharmaceutical companies sell their products worldwide apart from their country of origin. In this instance, their prices are regulated in Europe and not in America. Since the companies have to make a profit in one way or another, they will charge an extra amount in America so that they can start making profits. However, he does not provide or the argument does not provide a situation where due to increasing profit share the prices in America will go down. Hence, this argument does not seem to make much track. This is because according to practice the more companies make profits, the more they invent not reduce prices. However, it also might be true that America is shouldering most of the price discrepancies. He also argues that since their profits are curtailed, then they have no incentives to reduce their prices in lower-income countries. It is because this will deal a great deal on their profit margin that is already threatened by the price controls in the developing countries<sup>192</sup>.

The transfer of pricing also affects drugs sold to developing countries. The argument here is that since the pharmaceutical companies cannot make profits in the developed countries due to the instituted price control regime, they cannot subsidize their drugs while selling it to the underdeveloped countries. Hence, this creates a situation in which prices in the underdeveloped

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<sup>192</sup> Connaughton 2009 Writing Competition Berkely Technology Law Journal

world becomes more expensive for most of the people to acquire medicines hence causing unnecessary deaths.

c. Discouraging new players from joining the market

According to David Connaughton, more investment could be attracted to the pharmaceutical market. This can only be done if the venture is profitable and the profitability of the venture is stable and predictable. However, this cannot be said in relation to countries that practice price controls. Price control makes the recuperation of profits a tall order. This is because most of the time when government is implementing pricing policies, even though they might factor in profits, most of the time the profits they calculate while setting prices are not synchronized with the issue of the venture recuperating its investment. Hence as is argued by David Connaughton, most pharmaceutical ventures do not actually get back the money they invested on a particular drug. This creates a situation where it becomes hard for other new players to join the market.

### **3.5. Experience of price control in the European Union**

An observation made is that price control in the EU is a little bit different from the Ghanaian one. The Ghanaian one is created out of the socio-political reason while the EU pharmaceutical price control is created from a socio-economic reason. This as we have seen, gives it a much distinct and different way of creation and implementation. In the Ghanaian one, it was created for a political purpose hence the market impact is greatly ignored resulting to its substantial negative effects on the competitiveness in the market. On the other hand, in the EU experience, it is mostly created because of a market difficulty. I mean the situation that market is in, making the impact on the competitiveness in the market not as dire as the one felt in Ghana.

As it was earlier intimated in the previous chapter there are situation where price controls can be used and accepted as a necessary evil. The pharmaceutical industry is such one industry. It is because as was stated earlier, pharmaceutical industry needs the protection of certain laws to survive, the main being the patent laws. However, on the other hand the same laws corner the governments in certain areas of economic supervision. A good example is the patent law that even though created to protect the manufacturers from being exploited, it also makes it hard for other players in the market from joining in. Hence, as we saw it creates a situation of monopoly in the market or creates a situation where one firm becomes more dominant than others in the market. This enables the dominant firms to start charging exorbitant prices, and since there is little or no competition in the market, one is unable to tell whether these are competitive prices or not.

The issue of using excessive pricing regulations as a way of controlling their prices is also one way that it is nearly impossible to use in this circumstance. It is because before one can prove that the firms are behaving in an uncompetitive way by charging excessive prices, stringent rules have to be followed<sup>193</sup>. It makes it near impossible to control their pricing through competition law. Due to this, price control comes into play as a safety net. It is among the few options left and the main effective way of reigning on the prices set by the manufacturers. However, it should be noted that it comes with a lot of negative effects on competition in the market. It should be therefore done with much care in order to minimize the negative impact it can have on competition in the market.

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<sup>193</sup> *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009)

## CHAPTER FOUR

### 4. CONCLUSION AND RECOMMENDATION

#### 4.1. INTRODUCTION

The main aim of the study was to show the relationship between price control and competition by summarizing the study and highlighting where competition and price control intersect. The relationship between price control and competition was shown by putting into context and piecing together the research done. The research provides an understanding on price control and its effects on competition by highlighting how it alters the competitive conduct of players in the market. This further enlightens us on whether price control is needed or not. If needed what are the circumstances that warrant its enactment and how it should be done. The value of the study is to get a better understanding of the importance of studying price control legislation and policies by a competition lawyer. The chapter shall start by giving us the conclusion of the whole study. That will be done through stating reasons why price control is created, what it is created to cure and its success so far. Finally, the chapter shall conclude by providing recommendations in relation to price control policies and laws.

#### 4.2. Conclusions

Price control is one policy that is increasingly being used by countries in their markets. A policy once recognized as harmful to competition currently is being used together with competition law to supervise competition in the market<sup>194</sup>. Its influence has grown to the point where countries that once would not have considered it as an option in their market oriented policies are increasingly adopting it to their market policies. The use of price control legislation is usually not

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<sup>194</sup> Kyle Feb 7, 2007 (88) *Review of Economics & Statistics* 92-93

done as a default policy in the market. Its use is prevalent in certain specific circumstances. Such circumstances include:

A. national crises

Paul Krugman recognizes the importance and prevalence of using price control during national crises and disasters<sup>195</sup>. This is because national crises have a way of undermining the competitiveness of the market. He does so by giving three good examples

- a. He highlights the situation experienced by America during the Second World War.

During the Second World War there was a shortage of some essential commodities<sup>196</sup>.

The shortage was caused by the reduction of the imported goods owing to the disturbance of the sea routes causing the hiking of prices. This forced the government to resort to price control as a means of bringing down prices. Competition law was found to be ineffective because it concentrates on anti-competitive conducts and in this instance the price hike was not caused by anti-competitive conduct in the market. Price control was used as a safety net to protect consumers from the defects in the market caused by the Second World War.

- b. The other example was the oil embargo. There was a time the member countries of OPEC decided to artificially cause shortage of oil<sup>197</sup>. This consequentially caused the prices of oil in America to shoot up. With oil being an important commodity in the market, the government had the responsibility of finding a way to lower prices. Since their competition laws were incapacitated to deal with cartel like behavior which was far from

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<sup>195</sup> Krugman & Wells *Module 8 Supply and Demand Price Controls (Ceilings and Floors) Macroeconomics 77-87*

<sup>196</sup> Krugman & Wells *Module 8 Supply and Demand Price Controls (Ceilings and Floors) Macroeconomics 77-87*

<sup>197</sup> Krugman & Wells *Module 8 Supply and Demand Price Controls (Ceilings and Floors) Macroeconomics 77-87*

their jurisdiction and having no other way of lowering prices, the government enacted price control legislation.

- c. Another example that comes out clearly is during disasters<sup>198</sup>. This occurs in such times as when a country faces drought and floods. Due to these disasters the country finds itself facing certain shortages of commodities. Such shortages cause the prices of the affected commodities to go up. Since the rise in prices is due to the impact of commodity shortages in the market and not the actions of the players, competition law is unable to remedy the situation. Hence, in such circumstances, the government is forced to result to price control legislations.

#### B. Uncompetitive markets

However these are not the only reasons that make countries rely on price control legislation.

There are other situations where due to market problems competition is impaired and competition laws have little effect. These instances are as follows:

- a. Price control has now gotten some notoriety in the pharmaceutical industry<sup>199</sup>. It is found in countries such as Canada and members of the European Union. They argue that in their circumstances due to the sensitivity of the commodities in question and their great dependence on innovation and discovery the market is usually more times than not incapacitated to deal with prices. This is further exacerbated by Intellectual Property laws that tend to even further affect the influence of competition law.  
Drugs are a chemical compound created in the labs through a process of trial and errors. Owing to their sensitivity in nature there is very strict guideline on how they are to be created and tested. These guidelines make it very expensive hence the pharmaceutical

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<sup>198</sup> Krugman & Wells, *Module 8 Supply and Demand Price Controls (Ceilings and Floors) Macroeconomics 77-87*

<sup>199</sup> Connaughton 2009 Writing Competition Berkeley Technology Law Journal

industry requires a lot of investment. When a drug is created there are very strong patent laws to protect the discovery. This is to protect the investments from copying since it is very easy to recreate an already discovered drug. Hence, in order for another drug to be created, they have to go through this long and tedious process. Owing to this, the original drug has the monopoly of the market until a new one is created. Consequently, the former hikes its price as it likes. The countries that produce drugs see it proper to enact price control legislation to protect the market players from being charged high monopoly prices owing to the sensitivity of the goods and the fact that these goods are not substitutable.

- b. Nicholas stern introduces another concept in relation to the need of price control. He argues that in certain instances countries are plagued with the situation where their markets are controlled by monopolies and oligopolies<sup>200</sup>. These firms might be either government or private owned and ran. These monopolies incapacitate the markets<sup>201</sup>. However, due to the nature of the markets, these two strains to the market are unable to be prevented or destroyed or may take longer for them to be destroyed. At the same time, the government wants to reign in on high prices of essential products produced by such firms. Price control has been used as a solution instead of competition because it is an easier and faster way of reducing the prices of commodities<sup>202</sup>. In some instances the country finds its competition laws incapable and hence uses price control as a safety net until when a proper system is found. In other circumstances piece control is just abused because the government does not want to invest on the creation and proper implementations of the competition laws.

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<sup>200</sup> Stern *Effects of Taxation, Price Control and Government Contracts in Oligopoly and Monopolistic Competition* 1985 London School of Economics

<sup>201</sup> Cheun 1974 (14)1 *Journal of Law and Economics*

<sup>202</sup> Stern *Effects of Taxation, Price Control and Government Contracts in Oligopoly and Monopolistic Competition* 1985 London School of Economics

Price control is a policy that is very dangerous to a healthy market. In real sense price control is not a default market policy and should not be used as one. It should be noted however, that price control can either be used or abused. The use and abuse of price control is explained below:

1. The price control laws are well used when they are created for a particular purpose that they are suited for. Price control is well used when it is created out of the incapacity of the market. The incapacity should be out of circumstances away from the market's control. This incapacity enables prices to go up. Competition law in those instances is unable to deal with the prices because the causes of the high prices are away from the control of the market<sup>203</sup>. It should be used as a safety net and not a default policy.
2. The laws can also be abused when it is enacted for selfish reasons or to cure situations where it is not suited to intervene as illustrated in the Ghanaian experience. This is where market problems which can be tackled with proper competition policies are actually tackled by price control legislations. In such instances price control becomes a destructive policy and should be avoided by all cost<sup>204</sup>.

Price control is prescribed only to countries facing the first situation. This is because price control comes with huge effects on the competitive conduct of players in the market. It is only supposed to be used as a safety net in situations where the market is incapacitated. Price control is used as safety net for both the consumers and producers. It is a safety net for the producers because it protects their interest by raising prices of commodities that suffer fluctuating prices that sometimes go lower than the cost of production. To the consumers, it helps in situations where prices go above most people's purchasing power especially in relation to goods that are essential. Price control comes with both positive and negative effects. And they include:

<sup>203</sup> Krugman & Wells, *Module 8 Supply and Demand Price Controls (Ceilings and Floors) Macroeconomics* 77-87

<sup>204</sup> Ansa-Asare 1985 *Journal of African Law* (29) 2

### Positive effects of price controls on the market

5. Quick response to extreme prices<sup>205</sup>. They deal with the issue of prices, in faster way, unlike competitive laws. This is because unlike competition laws which try to supervise conduct in order to get a good final result, price control jumps directly into dealing with the final result.
6. Satisfies political pressure to "do something"<sup>206</sup>. Politics needs a fast response to people's problems and it works best for the one who seems to be doing something. Price control reduces political pressure because it has an immediate and effective impact.
7. Alleviates burden of extreme price for some households<sup>207</sup>. This is achieved because through price control the government is able to lower prices of consumer goods immediately hence enabling the needs of consumers to be met. This allows the consumer through the lower prices to acquire what they need.
8. No cost to government, unless it "defends" price with purchase/sale<sup>208</sup>. It is among the cheapest competition policy since it does not require a lot of investment such as a skilled money minting taskforce to implement it.

### Negative effects of price controls on the market

5. Creates shortage or surplus of commodity<sup>209</sup>. Shortages come into play because no one wants to invest on something that does not have profits. Hence people shy away from producing such and shortages begin. Surplus is experienced when the government

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<sup>205</sup> Minot Price 25-26 January 2010

<sup>206</sup> Ansa-Asare 1985 *Journal of African Law* (29) 2

<sup>207</sup> Minot Price 25-26 January 2010

<sup>208</sup> Minot Price 25-26 January 2010

<sup>209</sup> Minot Price 25-26 January 2010

decides to increase purchasing price people. This incentivizes suppliers to produce more and hence this leads to surpluses.

6. Often leads to black market activity<sup>210</sup>. It will occur mostly after shortages of commodities start biting. The ones with the commodities will not sell them through the proper channel but will sell them through unofficial channels mostly at double the prices they would normally be sold at and to the connected few.
7. Benefits well-connected or lucky rather than poor<sup>211</sup>. The connected corrupt few will be the ones who partake of the profits through payment of bribes and by buying the commodities cheaper away from the normal prices especially if they have confiscatory powers over the products being sold.
8. Disrupts signals to motivate storage, shipments, and production<sup>212</sup>. This is done by importers in order to force shortages. Shortages have the political influence of forcing governments to incentivize importers hence making them increase the selling price. It also has the effect of increasing the selling price in the black market.

The success rate of price control is what brings these policies into much controversy. This is because the experience so far felt by the market in relation to price control has always been negative. That is to say that price control has the effect of actually reducing the competitiveness of the market as a whole. Hence, in normal circumstances the government is actually highly advised to keep away from price control legislation like a healthy man from plague. To those that use it against a healthy market the effects are as seen in the Ghanaian experience; that is to say that the productiveness of the market will reduce, investment to the market will be discouraged

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<sup>210</sup> Minot Price 25-26 January 2010

<sup>211</sup> Minot Price 25-26 January 2010

<sup>212</sup> Ansa-Asare 1985 *Journal of African Law* (29) 2

and the few investors who remain will sell their goods through black markets and the prices will be double or triple what the product will fetch in a healthy normal market<sup>213</sup>.

However experience shows that price control also has some positive effects. Price control is sometimes needed as a safety net in circumstances where competition law is found to be incapable to control prices. That is to mean that in certain circumstances, the need to use it supersedes its negative effects. That is to say that it comes as a protection policy both to consumers and producers alike to protect them from the incapacity of the market. One is seen during crises and calamities where competition is lacking and competitive policies do not help to remedy the situation

A good example is seen in the pharmaceutical industry in the EU where the pricing of pharmaceutical products is seen to be skewed against the consumers. This is because according to the legal position and the character of the goods monopolization is inevitable<sup>214</sup>. Nevertheless, it does not mean that the monopolization of the market is bad *per se*. However, a monopoly price is the one that should be discouraged<sup>215</sup>. That is where price control legislation comes into play. In this instance price control is needed in order to allow the producers to maintain the right to be monopolies-created through innovation, research and development-while at the same time prevent the consumers from being exploited.

#### 4.3. Recommendations

First and foremost, I do not fully subscribe to the notion that any country should result to price control if the country's main aim is to promote and protect its market and if the markets are

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<sup>213</sup> Ansa-Asare 1985 *Journal of African Law* (29) 2

<sup>214</sup> Connaughton 2009 *Writing Competition Berkely Technology Law Journal*

<sup>215</sup> Stern *Effects of Taxation, Price Control and Government Contracts in Oligopoly and Monopolistic Competition* 1985 London School of Economics

healthy and running normally. Healthy markets need healthy policies and price control legislation is as unhealthy a policy as it can get. This is because of the following reasons:

1. It has the effect of actually reducing and further discouraging production of commodities<sup>216</sup>
2. It reduces the incentives for investments in the products under price control legislation<sup>217</sup>
3. Due to reduction of investment, innovation and research in the products is greatly affected<sup>218</sup>

Due to these three reasons price control is problematic. However, in certain circumstances countries have no other option. This is especially when the market needs a safety net due to the condition of the country that limits competition in the market and the competition laws are not effective.

Price control comes only in dire circumstances when the normal competition law and policy provisions are unable to protect and promote competition in the market by reducing the prices of commodities. It basically bypasses the basic rule of supply and demand in price setting in order to lower or increase prices. These dire conditions include; during national rises and during natural disasters<sup>219</sup>. This is because at these times shortages occur in the market and the shortages cannot be remedied by competition laws hence; price control legislation is used to act as a safety net for consumers not to be disadvantaged. Another instance is when the market is in such a condition that there is prevalence of monopolies. In this instance, the government has to control

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<sup>216</sup> Ansa-Asare 1985 *Journal of African Law* (29) 2

<sup>217</sup> Connaughton 2009 *Writing Competition Berkely Technology Law Journal*

<sup>218</sup> Connaughton 2009 *Writing Competition Berkely Technology Law Journal*

<sup>219</sup> Krugman & Wells *Module 8 Supply and Demand Price Controls (Ceilings and Floors) Macroeconomics* 77-87

prices<sup>220</sup>. A good example is the pharmaceutical industry that due to the nature of commodity and the protection from IP laws monopoly is prevalent. So the only way to control prices is by using price control policies.

However, even though I recognize the need of actually having price control mechanism in such dire circumstances this does not mean that its negative consequences will not follow it. Negative consequences to the market caused by price control legislation are inevitable. Nevertheless, its importance to such critical circumstances in the market price control is needed. However, certain safeguards are needed to cushion the market from its effects. Such safeguards are as follows:

1. Price control legislation must be market friendly. That is to say that when enacting price control legislation the players of the market should be involved. Assessment of the impacts of price control should be considered and evaluated. This is to protect unilateral decisions that most times than not are skewed against one market player for the advantage of the other. This is in order to allow both sides of the divide, even if to a small extent, to benefit from the laws.
2. Price control legislation should be supplemented with other legislative frameworks. This is to say that price controls also should be subjected to other laws. These laws should greatly involve competition laws. This is to allow the competition laws thereby created to protect competition in the market and also limit the negative effects price control legislation may have on the competitiveness in the market
3. Price controls if created out of calamities and national crisis should be time barred according to the period and the effects of the calamities. This is in order to prevent the notion that price control should be a never ending policy-from creeping up in the

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<sup>220</sup> Stern *Effects of Taxation, Price Control and Government Contracts in Oligopoly and Monopolistic Competition* 1985 London School of Economics

deliberation of the policy makers. Price controls created to cushion the market from effects of calamities should not be encouraged to continue after the calamity is dealt with because its negative effects will continue even when it is not necessary.

Hence the process of instituting price controls is supposed to be avoided. If instituted it should be done in specific circumstances as a safety net and it should be controlled and supervised under competition laws and policies to cushion the markets from the negative impacts it causes. If this is not done, then price control legislation will continue having the same extensive and substantial negative consequences it currently has with no value attached to it.

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