Coronavirus and Competition Law - A Commentary on the Nigerian Intervention and Lessons from Around the World

By:

Damola Adediji

May 18, 2020

Since Coronavirus was officially declared a pandemic on 11th March 2020 by the World Health Organization, it has ignited difficult times for individuals, businesses and the global economy in general. There is virtually no sector of the world economy that is not disrupted, most people now work from home, many cities and commercial hubs are on lockdown as part of containment measures. As a result of this unprecedented challenge, people engage in panic buying of the most essential commodities, and the market has provided an incentive for some businesses to engage in anti-competitive conducts like price gouging and price hiking. Aside from price-related breaches of competition law, horizontal coordination measures are now put in place by businesses to provide essential services to consumers in order to keep the economy afloat. Such

coordination, which ordinarily raises competition red flags, is now temporarily permitted in some jurisdictions, especially as the economy now runs on a skeletal basis. As the exigencies of the pandemic seem to have upended market practice, one wonders if competition law rules are fit for this perilous time and ponders on the intervention of the Nigerian Federal Competition and Consumer Protection Authority ("The Commission") in the situation.

Competition law is a set of rules conceived to preserve and protect competition in a free market economy ,i.e., a market controlled strictly by the forces of demand and supply, rather by the state.[1] Competition is touted to be important to such economy because it spurs efficiency, helps in lowering prices, creates more options for consumers, and fosters innovation. All of these are achieved by putting in place rules that frown at anticompetitive conducts like abuse of dominance, price fixing, price hiking, agreements in restraint of trade, competition-lessening business combinations or acquisitions, among other objectives etc.

Starting with a brief introduction of competition law in Nigeria, this piece will appraise the Commission's intervention since the outbreak of the corona virus and draw lessons from other jurisdictions.

Competition Law in Nigeria

After years of legislative perambulating and back-and-forth, Nigeria came late into the comity of countries with an all-encompassing competition law statute in February 2019. Like Australia, Panama, Malta, The Gambia and a host of others, Nigeria fused its consumer protection and competition regimes into one statute by assenting the Federal Competition and Consumer Protection Act (**The Act**). The Act established the Commission, which has since begun operation, is tasked with the responsibilities of enforcing the provisions of the Act.Typical of a standard competition law statute, the Act contains provisions outlawing restrictive covenants, abuse of dominance, and rules on mergers. It also has provisions on specific competition law offences like conspiracy, bid-rigging, price fixing, etc.

As a young regime, it is too early to ascertain what policy approach would

condition competition law enforcement in Nigeria. Is it going to be strictly a pro-business approach with lax antitrust intervention like the United States, where markets are allowed to auto-correct (see here). Or a stricter approach after the order of the European Union? Antitrust thinkers have argued that, the embryonic state of many developing countries competition law regimes present an opportunity to customize their rules in a way that suit their developmental needs and goals. Given the socio-economic context of Nigeria, abuse of dominance, predatory pricing, price hiking and gouging, and other anti-competitive practices are looming issues. Therefore, she appears to need an antitrust regime that takes into consideration non-economic goals like social inclusion, redistribution and fairness.

The Commission's Coronavirus Intervention

An instance that has demonstrated the need for a competition regime that champions both non-economic goals and economic goals is the price gouging and hiking of cleaning products that followed the outbreak of the Coronavirus in Nigeria. Almost immediately after the confirmation of the first case of the pandemic in Nigeria, manufacturers and retailers of hand sanitizers, face masks, gloves, and other products crucial to the prevention of the spread of the viral disease hiked prices of these products. Responding swiftly to this situation, the Commission on 28 February 2020, invoked several provisions of the Act, warned against such practices and threatened to impose necessary sanctions as stipulated by the Act. Aside from this initial response from the Commission, it has continued to issue updated warnings as it continues to receive complaints of anti-competitive and anti-consumer like: arbitrary electricity billing, arbitrary data charges, internet throttling, and delayed signal or restriction of access to payTV services after payment. The manufacturers and retailers of those essential products and providers of services needed to make lockdown less miserable, in strict economic terms, merely responded to the forces of demand and supply. However, the Commission's response is also typical of a developing economy antitrust authority, especially in a pandemic period, when the bargaining power of the consuming public who are mostly poor people is at the sub-zero level. That aside, the Commission is being driven and proactive like its counterparts in other jurisdictions. For example, the Canadian Competition Bureau on 20 March 2020 issued a similar statement

against deceptive market prices. Also, in Italy where the battle against coronavirus seems to be the toughest outside China, the *AutoritàGarantedellaConcorrenza e del Mercato (*The Italian Competition Authority) has opened investigations against unreasonable price hiking by online sales platforms selling hand sanitizers, and disposable respiratory protection masks.

Aside from its proactive and commendable intervention against price hiking and gouging of the most essential commodities, the Commission has released an official statement on March 27 via its official twitter handle indicating that only time sensitive and urgent notifications for merger review would be attended to during the pandemic. This is a step in the right direction as merger review requires an intensive coordination which requires sometimes physical meetings. The communication by the FCCPC is also in line with practices from other jurisdictions. For example, in the face of the outbreak the European Commission has updated its merger guidance informing all parties to delay merger notifications until further notice. As a young regime, the worry is only whether the Commission has the resources to deal remotely with all the notifications. It has been observed that the Commission's counterparts in other jurisdictions have been able to deal with some urgent notifications during this pandemic. For example, the Chinese State Administration for Market Regulation (SAMR) has so far completed 45 merger reviews during this pandemic.

However, the Commission seems to have remained silent in other areas that might raise antitrust concerns. For example, the position of the Commission is not known on horizontal coordination that may be necessary to supply essential commodities during this pandemic time. It is therefore unclear whether special exemptions will apply as the pandemic situation requires. Competition authorities in other jurisdictions are providing blocked exemptions for essential coordination amongst competitors during this pandemic period. For example, on 19 March, the United Kingdom's Competition and Markets Authority (CMA) temporarily relaxed its competition law rules to allow supermarkets collaborate on feeding the nation during this ongoing pandemic. The move will allow to food suppliers and retailers to share data on stocking, and keep shops open as everyone is on lockdown. There is also a similar arrangement in Australia where the Australian Competition and Consumer Commission gave an interim

authorization to Australian banks to collaborate on implementing a business relief package for small businesses affected by the Covid-19 pandemic. This authorization shields the participating banks from any litigation bothering on conduct that might otherwise raise competition concerns.

Conclusion

For a very young regime in a developing nation, the Commission is not doing badly in its regulatory oversight in this pandemic. Its intervention on unreasonable and unfair pricing during this uncertain time is worthy of commendation, even though one is uncertain if it has the technical resources required for effective remote working like its counterparts in other jurisdictions.

Lastly, it would be helpful for businesses if the Commission broke its silence on whether rules on horizontal coordination would continue to apply or there would temporary exemptions to meet the exigencies of this pandemic period. We hope to get clarity on its position this area and other important areas of competition law in the coming days.

---

*'Damola Adediji, LL.M (Max Planck, MIPLC), a DAAD scholar in IP & Competition Law, is an Associate at Olaniwun Ajayi LP, Banana Island, Lagos. This article represents his opinion only. The author is grateful to Vellah Kedogo Kigwiru of the Technical University of Munich, and Iseoluwa Akintunde, Mo Ibrahim Foundation Academy Fellow, Chatham House, London, for their useful and very insightful comments on the draft of this work. All errors remain mine.

[1]Alison Jones and Brenda Sufrin, EC Competition Law, Text, Cases and Materials, Pg.2, 3rd ed. Oxford University Press (2008) (Hereinafter known as "Jones & Sufrin".)

View online: Coronavirus and Competition Law - A Commentary on the Nigerian Intervention and Lessons from Around the World

Provided by Afronomicslaw