Covid-19, Trade and Competition Law in Africa

By:

Vellah Kedogo Kigwiru

May 19, 2020

The impact of Covid-19 on Trade

Working as a research assistant with CoronaNet Research Project, which traces all the government responses towards Covid-19, has enhanced my interest in understanding how governments in developing countries and specifically Africa can continue trade with their trading partners and at the same fight Covid-19. The impact of Covid-19 on trade is already being felt and the most affected sectors include the hospitality, health and airline industries. Businesses and governments have been forced to take drastic measures to ensure the supply and demand of goods and services are met, in response to the measures undertaken by government to curb the spread of the Covid-19 pandemic. These measures have suppressed trade or in some cases, trade occurs in a fraction.

The closure of non-essential businesses has forced most businesses not to operate at all. Curfews on the other hand have made businesses not to operate

at the optimal level. The restriction on travel and the suspension of international flights has halted supply chains. While governments have limited these measures to the provision of essential goods and services, the future of non-essential businesses which run most of the economies remains uncertain.

Global chains have been disrupted. As Baldwin and Mauro note that, Covid-19 is unique in many ways. One of these impacts is that unlike previous pandemics which affected less dominant economies, Covid-19 has to a large extent affected dominant economies which play a significant role in global trade. The authors warn that, 'to paraphrase an especially apt quip: when these economies sneeze, the rest of the world will catch a cold'. To developing countries who rely heavily on imports of essential commodities from these global chains to fight Covid-19, these leaves them in a limbo. As Baker Mackenzie observes that:

> Economically, the effects have already been felt in that demand for Africa's raw materials and commodities in China has declined and Africa's access to industrial components and manufactures goods from the region has been hampered. Adding to the supply chain challenges are the travel restrictions that have been imposed by several African countries.

Yet, despite the impact of Covid-19 on trade, commercial trade must contain. As Arif Huasin, the World Food Programme Chief Economist, observes:

> It is critical that commercial trade continues to flow regardless of anything else taking place around it. Because if that stops, the humanitarian work cannot happen. Quite simply, millions of people's lives depend on the flow of trade, and the impact of disruption of people's food security is hugely concerning.

One of the pertinent questions on the minds of majority of the stakeholders is how governments and corporations can maintain trade during and post Covid-19 pandemic. Trade experts have already warned that; global trade will fall tremendously. The World Trade Organization (WTO) projects that, world trade will 'fall by between 13% and 32% in 2020 as the COVID 19 pandemic disrupts normal economic activity and life around the world'. These projections are

underpinned on the durability of the pandemic, which is uncertain and the post Covid-19 recovery process.

Trade experts have indicated that, trade policies can be helpful in fighting the Covid-19 pandemic. These trade policies as Guinea, observes should include the removal of tariff on imports of medical supplies. The WTO Pharmaceutical agreement (the Pharmaceutical Zero-for Zero Initiative) as an instrument can be used during this period to eliminate tariffs on pharmaceutical products by WTO's signatory countries on a Most Favoured Nation Basis.

Countries have been called upon to refrain from imposing export restrictions on medical supplies. Yet, in order to maintain local supplies of essential commodities, many countries have had to realign their trade policies resorting to export ban. This has affected developing countries and capabilities of developing countries to fight pandemics such as Covid-19 has once again come to limelight. No country is an island in the fight against Covid-19. This is what Biancotti and others, members of Bank of Italy Covid-19 monitoring group have argued. Theoretically, it seems feasible. Unfortunately, in practice it invokes a number of concerns for poor and developing countries with no strong institutions to sustain them.

There has been calls from various organizations and key policy makers arguing that, countries must adopt effective trade policies and measures that should seek to maintain the trade during the crisis. So what is the way forward for Africa? As a competition law and policy analyst, I would like to now turn my attention to the role competition agencies in Africa are playing to maintain trade during the Covid-19 pandemic.

Competition agencies and their role in maintaining trade during the Covid-19 pandemic in Africa

The link between competition law and trade cannot be overemphasized. Competition agencies at both national and regional level in Africa, play a key role in promoting trade in the region, through approving mergers, ensuring anti-competitive conduct do not occur and protecting consumers from exploitation.

So far a number of competition agencies across the globe have taken measures that seek to enhance trade and competition in the market. These measures include the relaxation of competition law in certain sectors, exemption of certain sectors for a specific period of time, providing guidance on when businesses can collaborate and the extension of such coordination and the use of virtual platforms to enforce competition law. This is only allowed to the extent that, the measures undertaken by the businesses benefit consumers, are necessary and proportionate, are not unilaterally undertaken and are temporary.

The United Kingdom (UK) was the first country to relax its competition law, allowing retailors to share information with the aim of feeding the nation during the pandemic. In Africa, the measures undertaken by competition agencies in response to Covid-19 are varied. I will focus on consumer protection, businesses collaboration during Covid-19 crisis and merger applications.

a. Consumer protection

Most of the competition agencies in Africa have taken a strict stand on consumer protection against price gouging, excessive pricing and deceptive advertising. The Malawi Competition and Fair Trading Commission, (CFTA), has so far carried out inspections after allegation of excessive and unreasonably high prices for essential goods needed in the management of Covid-19. The CFTC ordered 22 pharmacy shops to cease and desist from the practice or face stiffer penalties.

Botswana Consumer and Competition Authority, issued a precautionary notice against deceptive practices during the corona virus outbreak. Namibian Competition Commission has urged the public to report price hiking during the lock down. This is following a market analysis by the competition agency where it found that the prices of immune boosters, hand sanitisers and 3ply facemasks had increased during the lockdown.

The Competition Authority of Kenya (CAK), issued a cautionary notice against illegal hoarding and excessive pricing of essential goods. CAK has also carried out investigations on excessive pricing. CAK found that, Cleanshelf supermarket

was engaging in price gouging by unconscionably adjusting the prices of Tropikal brand hand sanitizers in contravention of section 56(1) of the Competition Act. CAK ordered the supermarket to contact and refund all the customers who had purchased the hand sanitizers.

South Africa adopted the 'Regulations and Directions: Consumer and Customer Protection During Coronavirus Covid-19 Lockdown'. The objective of this regulation was to protect consumers and customers from unconscionable, unfair, unreasonable, unjust and improper commercial practices during the Covid-19 crisis. This is the first detailed regulation on consumer protection to be adopted by an African country, and South Africa should be applauded for this. It enhances the predictability and certainty to the businesses community. So far, South Africa has charged pharmaceutical company for inflating prices of essential hygienic products during the Covid-19 crisis between February 2020 and March 2020.

b. Can Businesses Coordinate and Collaborate during the Covid-19 Crisis in Africa?

While consumer protection is critical during the Covid-19 crisis, competition authorities in Africa should not forget their mandate of ensuring that competitive trade continues during this period. Consumers cannot be protected if they cannot access the essential commodities. Covid-19 has affected both the demand and supply of goods and services at the local and global level. In extreme measures, businesses have to coordinate and collaborate with competitors or through trade associations in order to provide goods and services to the consumers.

Whereas a number of competition agencies outside Africa, have provided guidance on how businesses should operate during this period including the grant of block exemption to certain critical sectors, in Africa the reaction has been minimal. South Africa is the only country in Africa to grant block exemptions in the health sector. This exemption is only limited to the extent that it seeks to respond to the Covid-19 pandemic and benefits consumers. South Africa has also granted block exemptions in the banking sector, retail property sector and hotel industry. These block exemptions seek to promote

trade of essential services and goods.

Mauritius is the only country in Africa that has issued guidance assuring the business community that, they can coordinate and collaborate with competitors to the extent that it is necessary and benefits consumers. On 9th April 2020, Mauritius provided that:

> The Competition Commission wishes to provide assurance that the competition law enforcement would not unduly constrain or impede necessary and critical cooperation, which are in consumers and public interest and which does not go further or last longer than what is necessary. But at the same time, the Competition Commission is making it clear that it will not tolerate commercial conducts on part of dominant suppliers which opportunistically seeks to exploit the crisis to the detriment of consumers. [Emphasis mine]

In Egypt, the Egyptian Competition Authority (ECA) has developed an initiative where it provides free legal advice and economic consultations to businesses including companies, employees and their legal advisors on the extent on which they can confront the implications of Covid-19 on their business and at the same time comply with competition law. ECA has called upon the business community to comply with competition law as it is and seek guidance when necessary. This type of informal guidance is fundamental in providing clarity.

Competition Authority of Kenya has not issued any guidance or block exemption so far. However, on 20th March 2020, it issued a cease and desist order to manufactures and distributors of essential commodities such as maize flour, wheat flour, edible oils, rice, sanitizers, and toilet papers from taking advantage of the Covid-19 pandemic and entering into exclusive agreements. CAK has advised the business community to seek authorization through application of exemptions. I discuss examples of these in the next section.

Competition agencies should be encouraged to issue guidance to the business community. Not issuing guidance on what competition agencies expect from the business community, exacerbates the situation and hinders trade.

c. Mergers Applications During the Covid-19 Crisis in Africa

Mergers and acquisitions promote trade and investment. So far, no competition agency in Africa has provided guidance on merger applications during this crisis even when they are necessary in promoting trade in goods and services. Merger applications have been affected to a large extend with the measures undertaken by government to curb Covid-19 which include lock downs, curfews and social distancing. This is because, these measures have forced most of the government agencies to move their services online as their employees also work remotely. In response, the public is required to limit physical access of government offices and instead use its virtual platforms such as websites, emails and social media content.

Provision of public service delivery online by government is not a new concept. Due to technological advancements and globalization, governments across the globe have been encouraged to make use of web-based applications in delivering services to the public. Although Africa has lagged behind, the concept of e-government which emerged in the 1990s, refers to the use of information and communication technology (ICT) and its application by the government for the provision of information and public services to the people.

According to Obaidat, e-government provides 'a non-stop government information service. The goal is to create a friendly *easy-to-use tool* for the public and businesses to *locate information* and *use services* made available on the net by the government agencies. It aims to provide a large spectrum of public information, authorise a greater and better access to this information, and give more convenience to government services'. A successful website must ensure, accessibility, usability and security remains the cornerstone of its service delivery. An effective website should also provide online information, online services and security in a user friendly manner. Adukaite et al, 165, observe that a website is a self-service product 'where no instruction manual or seminar is provided: users face the website alone, only with experience guiding them.'

In Africa, not all competition agencies have websites. Only Botswana, Egypt, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Nigeria, Seychelles, South Africa, Eswatini, Tanzania, Gambia, Zambia and Zimbabwe competition agencies have websites. A close analysis of these websites shows that, they

only provide the public with online information relating to their enforcement activities and contact details.

The Botswana Consumer and Competition Authority closed its offices and suspended all its operations, and required members of the public to access it through its virtual platforms such as email address and social media contacts from 2nd April 2020 subject to the government lockdown directive. On 24th March 2020, the Morocco Competition Council, following the Covid-19 pandemic, requested applicants to make use of e-filing as filing of documents in paper format, by hand or by power, could not be possible. This could only be possible via its email address. Any communication from the agency could only be done remotely and if the agency required original documents, then it would organize for such delivery. It does not have electronic service portal.

The measures adopted by Botswana and Morocco, requiring firms to make applications through emails is highly unadvisable, unless the confidentiality and security of the information is assured and protected. Information relating to competition matters contain highly confidential and sensitive information, and therefore the security of this information is highly paramount.

CAK has the most advanced web based application in Africa. It allows the public to make filings through its public portal. During the Covid-19, CAK reminded the public to make use of its online platforms as a form of interaction. This includes e-filing of merger, filing exemptions, service complaint and the public can file a consumer complaint. CAK also has a user manual which provides the user with information on how to register an account and use the portal.

CAK also has a privacy policy. CAK will continue to provide lessons to other competition agencies on how effective the electronic service portal has been useful during the Covid-19 pandemic. Studies have shown that, the adoption of a website does not always translate into its usability by the public. We look forward to CAK providing us with information on the usability of its public portal during the Covid-19.

Conclusion

This blog post has shown that indeed competition agencies have a vital role in maintaining and promoting trade during the Covid-19 pandemic. The suspension of operations as a result of government measures towards curbing Covid-19, should not be encouraged. Competition agencies must remain vigilant in protecting vulnerable consumers with no bargaining power from unscrupulous businesses. Further, while cartel conduct is per se illegal, it is the responsibility of the competition agencies to provide the business community with guidance on how they can operate during the crisis and at the same time comply with competition law. Covid-19 has also proved to us that, competition agencies need to reinvent their enforcement including the adoption of digital technologies such as artificial intelligence and investing in the security and privacy concerns of the people. Integration of technology is no longer a choice. It is a must.

View online: Covid-19, Trade and Competition Law in Africa

Provided by Afronomicslaw