Regulating Market Dominance in Nigeria:

Issues Arising from the Federal Competition and Consumer Protection Bill 2017

Thought Leadership | By Frank Okeke July 2018

f.okeke@lelawlegal.com

Introduction

The Federal Competition and Consumer Protection Bill 2017 (*"**the Bill**"*), which was passed by the National Assembly (NA) in December 2017, seeks to cure certain defects and improve the regulatory framework whilst also repealing the ***Consumer Protection Act, Cap. C25, LFN 2004.*** However, the thirty day period specified by the ***1999 Constitution*** for presidential assent has elapsed (the last day for assent was in January 2018. In effect, ***the Bill*** has by default been subjected to presidential veto; and the NA , if it intends to consummate the transmutation of ***the Bill*** into an ***Act***, would have to override the veto by two-thirds majority votes of both Houses (***section 58(5) 1999 Constitution***). Incidentally, there is no time stipulation for the NA to override the presidential veto, so it is possible for the NA to eventually do so.[1]

Where there are numerous sellers/producers servicing the needs of consumers for particular products/services, the sellers/producers respectively adopt strategies that would endear them to the consumers. The producers/sellers compete for the patronage of the consumers. This competition can be in the form of lower prices, better quality products, and/or other value added services. This goes to illustrate the veracity of the saying that *"in a free market economy, the consumer is the king."*

The aim of competition law is not just to ensure that there are many suppliers in the market for goods and services, but to ensure that such suppliers operate according to set rules that would make it difficult for any of the suppliers or the suppliers as a group to lessen or eliminate competition in the market, thereby arm twisting consumers into buying their product. Competition law realises that the mere presence of many suppliers does not automatically result in a competitive market. This is because one of the suppliers may have the market power to undercut the other suppliers and make it difficult for them to operate in the market.

This article seeks to draw out some issues inherent in the ***Bill***, which could even assume greater significance in the event that ***the Bill*** eventually becomes an Act, and entering into Nigeria's statute books.

Competition Laws in Nigeria: Our Journey So Far

Nigeria does not have a comprehensive law addressing competition or antitrust issues. Albeit antitrust issues are very real problems in our business terrain, Nigeria appears ill-equipped to deal with them. However, in different sector specific legislation, there are some antitrust provisions, for instance, in the aviation industry, ***section 30(4) Civil Aviation Act Cap. C13, LFN 2004*** (***CAA***) authorises the ***Nigerian Civil Aviation Authority (NCAA)*** to investigate cases of unfair trade practices or methods of competition, including the prices of airline tickets.

For capital market transactions, the ***Investment and Securities Act***[2] ***(ISA),*** has provisions which require the **Securities and Exchange Commission (SEC)** to prohibit market rigging and manipulation, insider trading and all other forms of unfair and fraudulent trade practices in the Nigerian capital market. Where a business practice prevents or lessens competition, SEC is authorised to in the interest of the public, amongst other things, undertake a Court sanctioned break-up of the infringing company into separate entities, in such a way that its operations do not cause a substantial restraint on competition ***(section 121 ISA).***

For operators in the communications sector, the ***Nigerian Communications Act***[3] ***(NCA)*** seeks to provide some order on competition and consumer protection by establishing the Nigerian Communications Commission (NCC)***. Section 4(1) (b) & (d) NCA*** caters for the powers of ***NCC*** in areas of consumer protection and promotion of fair competition respectively, as follows:

> ***"The Commission shall have the following functions –(b) the protection and promotion of the interests of consumers against unfair practices including but not limited to matters relating to tariffs and charges for and the availability and quality of communications services, equipment and facilities; (d) the promotion of fair competition in the communications industry and protection of communications services and facilities providers from misuse of market power or anti-competitive and unfair practices by other service or facilities providers or equipment suppliers."*** (emphasis supplied)

[1] ***Section 58(4) Constitution of the Federal Republic of Nigeria, 1999 (as amended).***
[2] ***Cap. I24, LFN 2004***
[3] ***Cap. N97 LFN 2004***

Rule 26, NCA Competition Practices Regulations, 2007 governs the powers of the **NCC** to review mergers in the communications sector:

> ***"Further to the powers and functions of the Commission, regarding determinations of substantial lessening of competition and dominant position, and consistent with conditions of licences granted to public network operators, requiring prior notification and Commission approval before any change of shareholding affecting more than 100% of the total number of shares in a Licensee, the Commission may review all mergers, acquisitions and takeovers in the communications sector."*** (emphasis supplied)

To protect consumers of staple and essential items, like sugar, salt, milk, flour, matches, vehicles, motorcycles and bicycles' with their spare parts ("Controlled Commodities"), ***sections 4*** and ***5 Price Control Act***[4] ***(PCA),*** empowers the **Price Control Board (PCB)** to fix the controlled price range for these mentioned essential items. The ***PCA*** is yet to be repealed, albeit arguably ineffective and serially condemned for being draconian and lopsided in favour of the buyer. Though the ***PCA*** has been much maligned due to its perceived anti- free market economy stance, it can be utilised to curb monopolies and anti-competition business strategies.

In ***Bamidele Aturu v. Attorney General of the Federation***[5] the Federal High Court in 2013 declared the deregulation of the downstream sector of the petroleum industry illegal and unconstitutional being in contravention of ***Section 4*** of the ***PCA***. The Court stated that *"by enacting the **PCA** and the Petroleum Act, and providing sections 4 and 6 of those Acts respectively, for the control and regulation of prices of petroleum products, the National Assembly working in tandem with the government has made the economic objective in **section 16(l)(b) of the Constitution in Chapter II** justiciable."* It is the writer's opinion that usage of the ***PCA*** by the ***Consumer Protection Council*** (CPC) in regulating the prices of essential items would ensure that the interests of the consumers are protected.

Review of the Federal Competition and Consumer Protection Bill

Section 3 establishes the **Federal Competition and Consumer Protection Commission (the Commission)** for the administration and enforcement of the provisions of the ***Bill***. The Commission also has the function of eliminating anti-competition agreements, misleading or unfair business strategies.

Powers of the Commission are provided for in ***section 18*** and they include: preventing the distribution of goods that can constitute a public hazard; causing quality tests to be conducted on consumer goods; and seal up any premises on the reasonable suspicion that such premises harbour goods that are fake or hazardous. Since the ***Bill*** seeks to repeal the ***CPC Act***, it would be part of the transitional arrangements that **CPC** will blend into the **Commission**. Historic experience suggests that would be the approach, for instance, the **Nigerian National Petroleum Corporation (NNPC)** succeeded the **Nigerian National Oil Corporation**.[6]

The **CPC** have been valiant in their fight for consumer protection, for example in their cautions to Multichoice (owners of DSTv) on poor quality of service/signals, and allegedly unfair pricing, etc. Though sometimes the CPC appears to go to the extreme in the performance of its functions. For instance, in 2014, it fined Nigerian Bottling Company the exorbitant sum of N100 million for two half-filled cans. The CPC in justifying the fine, claimed that it spent N60 million on investigations, though the fine was subsequently withdrawn.[7] In 2015, the National Agency for Food and Drug Administration in Nigeria (NAFDAC) fined Guinness with the sum of N1 billion for storing up expired raw materials in its warehouse.[8]

Section 39 provides for the establishment of a **Competition and Consumer Protection Tribunal (the Tribunal)**. The Tribunal is expected to adjudicate over every dispute arising from provisions of, or any infraction of the Bill. ***Section 53*** empowers the Tribunal to order an undertaking (defined in ***section 167*** to mean any person involved in the production of goods or the provision of services), to sell its shares or assets if the practice prohibited under the Bill cannot be adequately remedied by any other provision or the undertaking is a repeat offender. A Ruling or Award from the Tribunal is binding on all parties before it and would be registered at the Federal High Court for enforcement. The Tribunal also has powers to hear appeals from, or review any decision of the Commission, taken in the course of implementation of ***the Bill (Section 48(1)(1)).*** This should reduce the scope of regulatory arbitrariness from the Commission in the exercise of its statutory functions..

---

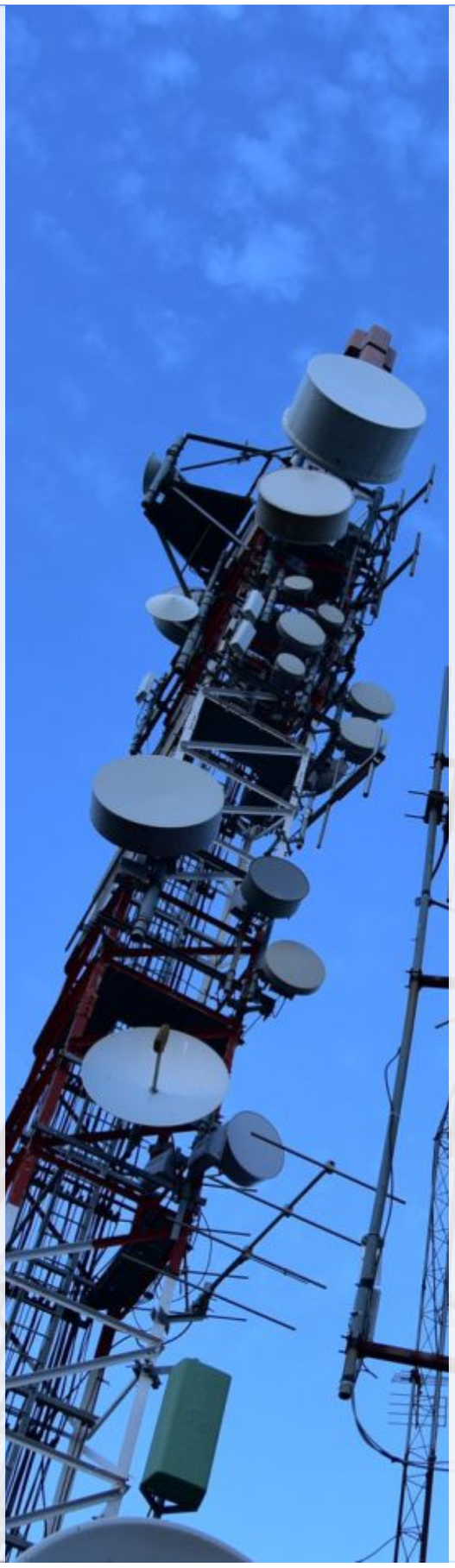
[4] ***Cap. P28 LFN 2004***
[5] ***(Suit No: FHC/ABJ/CS/591/2009)***
[6] ***Long Title NNPC Act Cap. N123 LFN 2004***
[7] https://www.coca-colaafrica.com/press-centre/court-reserves-ruling-in-coca-colas-objection-to-trial-by-cpc <Last visited on 9/4/2018> Coca-Cola's official website, article titled 'Court Reserves Ruling in Coca-Cola's Objection to Trial By CPC'
[8] Though this was subsequently reduced after both parties were able to reach an arrangement https://www.premiumtimesng.com/business/business-news/199996-guinness-nigeria-withdraws-suit-nafdac-pays-n11-4-million-fine.html (Last visited 25/5/2018) Premium Times article titled 'Guinness Nigeria withdraws suit against NAFDAC, pays N11.4 million fine'

Section 60 prohibits restrictive agreements, being agreements which has the effect of preventing or distorting competition in any market. Some of the prohibited acts include: directly or indirectly fixing a purchase or selling price of goods or services; limiting or controlling the production or distribution of any goods or services, markets, technical development or investments; engaging in collusive tendering; etc.

Abuse of dominant position is prohibited under ***section 71***. Dominant position refers to a position where an undertaking is able to act without taking into cognisance the reaction of its customers or competitors. This is very important as it would prevent situations whereby dominant players in an industry hinder active competition through their business strategies. As punishment, ***section 74(3)*** provides for a fine of not less than 10% of its turnover in the preceding business year for any undertaking that contravenes this provision. ***Section 77*** grants the Commission the right to investigate a situation, where it appears that there are convincing grounds for believing that a monopoly situation may exist.

A merger is defined as when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking (***section 93***). ***Section 94*** states that a proposed merger shall not be implemented unless it has been notified to and approved by the Commission. ***Section 95*** grants the Commission the power to determine whether a proposed merger would substantially prevent or lessen competition. Recourse would be made to the strength of competition in the market; the ease of entry into the market; whether the merger would lead to the removal of a competitor etc.

Since ***the Bill*** encompasses all sectors, there is bound to be an overlap of powers amongst regulatory authorities. As stated earlier, some enactments like ***CAA, ISA*** and ***NCA*** grant regulatory bodies such as ***NCAA, SEC, NCA*** and ***PCB*** powers to ensure there is adequate competition/consumer protection in their specific sectors. However, the Commission would have superiority over all other regulatory agency in the exercise of its functions (***sections 105*** and ***106, Bill***).



For ***the Bill*** to be a success, there must be inter-agency cooperation. Where there are breaches of competition or consumer protection rules by an operator in a regulated sector, such a matter should be referred to the ***Commission*** by the relevant agency. Some issues may arise in the workings of this system. For instance in a merger situation, would an applicant be expected to notify both ***SEC*** and the ***Commission*** of the proposed merger?

What would be the solution where ***SEC*** approves a merger but the Commission rejects it or *vice versa*? In South Africa, for instance, the ***South African Competition Commission (SACC)***, created by the ***Competition Act of 1998,*** is the body solely in charge of approving mergers thereby neutralizing the risks of an overlap of powers. This is a similar scenario to Zambian regulatory framework where the ***Competition and Consumer Protection Act***[9] governs mergers and acquisitions (M&A). Ghana, similar to Nigeria, is yet to have a competition law and their SEC also oversights anti-trust aspects of M&As.

South Africa and Zambia have enacted their competition laws so as to avoid any form of inter-agency dispute. In Nigeria for instance, in 2015, the **Central Bank of Nigeria (CBN) and the Financial Reporting Council of Nigeria (FRCN)** were at loggerheads regarding the alleged financial infractions of a multinational bank over accounting treatment of service fees. The FRCN suspended the directors of the bank, and invited the CBN as sectoral regulator, to take further punitive actions. Rather, the CBN declined to so act, questioning the propriety of FRCN's actions in the process. This kind of issue would be avoidable where there is a sole agency with the final authority over matters such as these.

The rationale for the supremacy clause in favour of the Commission is apparently not far-fetched; however an unsystematic procedure may cause embarrassment to the whole process.

The better option is for powers of other regulatory agencies with overlapping

[9] ***No. 24 of 2010***

functions with the Commission (for instance the SEC) to be amended to cater for the superiority of the Commission on antitrust matters.

It has been argued that SEC, being an administrative body, is technically incompetent to apply the test of whether a business combination is likely to create a monopoly. Consequently, the need for an independent but specialist body to monitor the economy whilst determining issues relating to M&As, monopolies and fair trading. SEC's power to approve mergers, for instance, should be made subject to the final approval of the Commission, enabling it to leverage SEC's technical input. This would eliminate the need for each applicant to notify the Commission separately of a proposed merger and also obviate the possibility of conflicting regulatory views on merger applications.

Conclusion

Competition is a very important facilitator of economic development. For us to make progress in protecting our economy (including local businesses and foreign direct investments) we must make adequate provisions for antitrust laws. Its advantages have been seen to cut across economic efficiency, consumer choice boost and protection, removal of entry and exit barriers, protection of small and intermediate firms in the market, improvement of the foreign direct investments (FDI) of countries, while boosting the chances of local firms to compete internationally.

On 18 July 2018, the ***European Union*** imposed a US$5billion fine on Google for giving favourable treatment in its search engine results to its own comparison shopping service. In February 2018, the ***Competition Commission of India*** imposed a fine of US$21 million on Google for abusing its dominant position, and for search bias that causes harm to its competitors as well as users.

Even in the area of consumer protection, ***the Bill*** would be beneficial. In South Africa, the **SACC**, exposed and fined a cartel operating in the confectionery industry that had been colluding for years to control the price of bread. This has been popularly called the *'bread scandal'*.

Nigeria is in dire need for a competition law to create a level playing field for industry players. Recently there was a lot of media coverage of the "battle" between, two major cement producers Dangote Cement Plc and BUA Group over property (mining) rights and access to raw materials (limestone) in Okpella, Edo State. The dispute was viewed as a form of competition because of implications of the outcome for respective party's market share.

In ***Emerging Markets Telecommunications Services (EMTS) v. MTN & Visafone,*** EMTS challenged the acquisition of Visafone by MTN, seeking several injunctive reliefs. The suit was premised on the argument that MTN's acquisition of Visafone and use of Visafone's 800MHz spectrum is will potentially result in a substantial lessening of competition. The matter however did not proceed substantively, as the Federal High Court struck it out for lack of jurisdiction. In the recent acquisition of 9Mobile by Teleology Holdings, it was rumoured that the regulatory authorities did not want telecommunication giants, MTN and Globacom, to bid for the asset because of market dominance concerns.

Another illustration could be found in the 2014 *"cement de-marketing wars"* in respect of grades of cement, even involving allegations of regulatory capture by competitors against a major player, as it appeared a new grade by the former was being touted as antidote to building collapse in the country. The effect would have been the banning of the regular grades apart from the newly introduced (42.5) grade, even though the player was producing the regular (32.5) grade in its South African plant. Apart from industry professional associations unanimously confirming that is not the case, the House of Representatives held a public hearing, even as some concerned stakeholders headed to court to challenge actions of both the regulator and the market leader. Essentially, the entire drama would have been unnecessary in the face of robust anti-competitive framework.

If ***the Bill*** is enacted, the **Commission** will need to be manned by professionals who are knowledgeable in antitrust laws, economics, intellectual property; and other sectoral experts. It is very essential that the FG develops the political will to enforce the provisions of **the Bill** irrespective of whose ox is gored thereby. This will signal that Nigeria is serious about improving the level of competition and furthering fair business practices.

Some of the provisions in the ***Bill***, for instance ***sections 53*** and ***74(3)*** which impose punishments (sale of assets/fine of 10% of turnover) would serve as deterrents for offenders, as was done in South Africa's *"Bread Scandal"*. However, whether Nigeria would have the political might to enforce these provisions remains to be seen.

The ***Bill*** is not a cure all but it is a good place to start; we are already late and we cannot afford not to start in earnest which is why the silence of the **NA** towards the lack of Presidential Assent on ***the Bill*** is baffling to say the least. The sooner the Bill is passed into law, the better for the Nigerian economy.

[10] ***Suit FHC/L/CS/130/2016o. 24 of 2010***