

A CRITIQUE OF THE NIGERIAN COMPETITION BILL 2005

Francisca Aihevba*

The development of a law regulating competition in Nigerian business activity has generated quite a lot of interest in recent times. It is a welcome development because competition goes to the very root of our identity as a nation. Under Chapter II of the Constitution of the Federal Republic of Nigeria 1999, which contains the Fundamental Objectives and Directive Principles of State Policy, one of the economic objectives of Nigeria is to ensure that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of a few individuals or of a group.

This article looks at the Federal Competition Commission Bill 2005 and the legislative process towards the regulation of competition in Nigerian business activity. Part 1 looks at the progress made on competition legislation so far. In Part 2, I shall consider some important provisions of the Bill and the issues arising therefrom with a view to assessing the effects of such provisions.

1. The story so far: The journey to an appropriate competition legislation for Nigeria

The need to ensure fairness in economic activity has always been part of Nigerian economic principles. However, no legislative activity has been carried on to achieve this end on an industry wide basis. It would appear that owing to the previous status of public ownership and monopoly over major commercial enterprises and means of production, there was really no point in regulating competition as most public entities enjoyed exclusive or special rights as a result of their nature as government entities. For those sectors where competitive commercial activity existed, sector specific regulators were empowered to prevent anti-competitive practices. For instance, under §99 of the Investment and Securities Act 1999 (ISA), the Securities and Exchange Commission (SEC) is empowered to refuse to approve any proposal for a merger, take-over or acquisition, where such a combination is likely to cause a substantial restraint of competition or tend to create a monopoly in any line of business enterprise.

Subsequent progress under the present privatization and commercialization policy of the Nigerian government has resulted in the divestiture of public entities into private hands. As a result, perhaps, of the perception that the same people or organizations were buying these public entities, it became imperative for a proper legislative enactment to be introduced to regulate competition and ensure that public and private interests in commercial activity are protected.

On 18th June 2001, the Competition and Anti-trust Reform Steering Committee was inaugurated to work with the Bureau of Public Enterprises (BPE) in formulating a Competition Policy for Nigeria. In the exercise of its duties, the Committee engaged the services of a consultant to draft a Competition Law. The said draft law has since been presented as an Executive Bill to the Senate for deliberation and subsequent passing into law.

It is pertinent to mention at this point that the Federal Competition Bill is not the only proposed legislation on competition regulation so far. In 2004, the National Antitrust (Prohibition, Enforcement etc.) Bill sponsored by Hon. Halims Agoda was presented to the House of Representatives. In 2005, Hon. Chidi Duru also sponsored the Competition (Anti-trust) Bill

before the House of Representatives. Though the National Assembly Progression Chart does not provide information on the status of these Bills, there are indications from the BP that the said Bills have been harmonized with the Federal Competition Bill presented by the Executive to the Senate. Accordingly therefore, the relevant competition legislation before the National Assembly is the Federal Competition Bill which is the subject of this discourse.

Also noteworthy is the fact that, following the liberalization drive of the Federal Government, several sector specific statutes have been enacted which regulate competition in the specific sectors to which they relate. They include the Nigerian Communications Act 2003 and the Electric Power Sector Reform Act 2005

2. The Federal Competition Bill

a. An overview of the Federal Competition Bill

The Federal Competition Bill (hereinafter called ‘the Bill’) is made up of 115 sections, 16 parts and 3 schedules. It has as its object, the regulation of competitive activities in every sector of the Nigerian economy. The main thrust of the Bill is the creation of the Federal Competition Commission (hereinafter called ‘the Commission’), a competition regulator empowered to prevent and punish anti-competitive practices, regulate Mergers, Takeovers and Acquisitions, and protect regulated industries in every sector and location in Nigeria. The Commission is also empowered to administer some existing laws such as the Weights and Measures Act.

b. A critique of the Federal Competition Bill

i. Layout

In my view, a major deficiency in the legislation is its layout: the provisions are not sequential in its treatment of various types of anti-competitive practices. As a result, the Bill is difficult to follow. For instance, though Part X i.e. §§48 - 64 of the Bill relates to Mergers, Takeovers and Acquisitions, exclusive dealing is prohibited under §58. Though an anti-competitive practice, exclusive dealing has no correlation with mergers. Our suggestion is that it should be placed under Part VI which relates to agreements and restrictive practices substantially lessening competition. For a Bill which is meant to apply to every sector of the Nigerian economy and to every commercial activity regardless of the level of understanding of the parties involved, clarity is one quality which cannot be compromised. The Bill will be easier to understand if its provisions are laid out in such a way that related issues are placed together in successive parts and sections as necessary.

ii. Language

One of the most important points to consider in any legislative process relates to the language of the proposed enactment. For the Competition Bill which is intended to apply to every sector of the Nigerian economy it is of utmost importance that the language is clear and easily understandable by all parties to be affected by it.

§29(1) prohibits agreements which have ‘*characteristics of trust...*’. Although in the United States, a trust could also mean a cartel which is a combination of undertakings with the main

object of reducing competition, in Nigeria with a legal system based on the UK Common Law, the ordinary and generally accepted meaning of trust is a legal arrangement for a person to hold and deal in the property of another.

One must hasten to point out however, that under the Item 10 of the Exclusive Legislative List the National Assembly is empowered to legislate on matters relating to '*commercial and industrial monopolies, combines and trusts*'. To the best of my knowledge, this is the only Nigerian statute where the word 'trust' is used in that context. In other legal enactments and literature relating to Nigerian law, the word trust is used in the common law context. Where reference is made to anti-competitive combinations, the word 'cartel' is used. It is also interesting to note that the word 'trust' is not used in any other part of the Bill.

iii. Scope of application

§1 of the Bill provides that the Bill shall apply to public utilities, Federal and State Governments and their agencies or corporations, as well as all conducts both within and outside Nigeria by persons resident or carrying business in Nigeria. The Bill is however silent on the status of sector regulators in existence before its coming into force.

By virtue of the ISA, SEC is the regulator of the Nigerian Capital Market. The ISA and the Rules made pursuant to it also contain extensive provisions on the authorization of Mergers, Takeovers and Acquisitions. This is a clear conflict between the two pieces of legislation on the place of SEC with relation to Mergers, Takeovers and Acquisitions.

With regard to public utilities, particularly the telecommunications and electric power sectors, the National Communications Act 2003 provides in § 90 that "the National Communications Commission (NCC) shall have exclusive competence to determine, pronounce upon, administer, monitor and enforce compliance of all persons with competition laws and regulations, whether of a general or specific nature, as it relates to the Nigerian communications market". The import of above section is that only the NCC can pronounce on matters relating to competition in the Telecommunications Sector. In the same vein, the Electric Power Reform Act 2005 provides for the development of competition in the electric power sector, with the creation of the National Electricity Regulation Commission which has as one of its objects, the promotion of competition. This is another area of looming conflict.

Though sector specific regulation of competition is relevant, particularly for technical issues relating to the sector in question, in order for the industry wide competition regulator to be effective in its duties, the regulatory powers of the sector specific regulator should not be absolute as this will result in over-regulation and conflict of interest. There is, therefore, need to amend the provision relating to sector specific regulators in Nigeria.

iv. The Minister

Several provisions of the Bill refer to 'the Minister'. However, the Minister is not defined in any part of the Bill. Owing to the fact that there is no Ministry specifically charged with the regulation of competitive activity in Nigeria, it cannot be assumed that the Minister referred to is

the Minister for Trade and Industry. In order to avoid any conflicts of interest, it will be necessary to expressly define who the Minister is.

v. Penalties

The Bill creates offences in respect of competition and provides penalties for them. It is beyond argument that the main reason for punishing wrongdoing is to prevent a re-occurrence and to serve as a deterrent to others. In order to achieve this objective however, the punishment must be pre-emptive enough to discourage such re-occurrence.

I observe that §32(2) differentiates between an offence committed by a person and that committed by a corporate entity. However, though penalties are laid down in other parts of the Act, there is no other distinction between offences committed by persons and those committed by corporate entities. In order to clarify my opinion on penalties laid down under the Bill and considering that some of the penalties relate to acts of corporations I shall apply the principle of legal personality and assume that the reference to ‘persons’ in the other sections of the Bill refer to individual as well as corporate persons.

I venture to suggest that the penalties laid down by the Bill for offences committed by corporate entities are not pre-emptive enough. The highest financial penalty fixed for any singular offence is ₦1 million. Though this might appear sufficient, it is doubtful whether a fine of ₦1 million will have such a deterrent effect on corporations particularly where such a fine is a tiny fraction of the returns expected from anti-competitive practices. In addition, some penalties laid down are incalculable. As an example, the Bill provides in §32(1) that any person who enters into an anti-competitive agreement shall be liable to a fine ‘...*six times the amount of profit the person would have made*’. This fine is incalculable because it may be impossible to determine the profit that would have been made. The same applies to the §98 which fixes the penalty at six times the value of the anti-competitive transaction in question.

Nigeria should take a cue from the manner in which penalties for anti-competitive practices of corporate entities are handled in industrialized nations. In order to effectively deter prohibited practices, penalties are usually fixed at a percentage of the annual turnover of the defaulting company. In the European Commission, for instance, companies involved in anti-competitive cartels may be fined up to 10% of their annual turnover. This is more pre-emptive as it affects the financial standing of the entity in question regardless of its size.

vi. Thresholds

Competition legislation usually sets thresholds for determining the relevant market and power of entities in the market. However, in order to be effective, it is of utmost importance that the thresholds set are neither too high nor too low as they will defeat the purpose of the law. Several thresholds are set in the Bill for the purpose of defining dominance and monopoly power.

Defining market dominance, §36 of the Bill indicates that an enterprise will be deemed to hold a dominant position if it holds more than 40% of the relevant market or if it has the ability to control prices, exclude competition or behave independently in the relevant market. §39 goes on to state that an enterprise will not be investigated by the Commission except it holds more than

40% of the market. It is pertinent to note that though a threshold may make it easier to define the power of an entity in a market, a suitable threshold will depend on the nature of the market in question and the market shares of other competitors in the same market. Experiences in industrialized nations have shown that a company may hold less than 40% of the market and still be in a dominant position. For instance in the Virgin/British Airways Case, though British Airways held less than 40% of the travel services market it was held to be dominant.

The Bill also sets thresholds for determining when an enterprise will be deemed to be a monopoly. It sets a threshold of 51% for the supply of goods and 25% for the supply of services. Though it is not clear why there are different thresholds for goods and supply markets, I am of the opinion that the thresholds set by the Bill are too low. 51% is more akin to dominance while 25% is even less than the threshold for determining dominance under §36 of the Bill. This in itself is a paradox because an enterprise which will not be judged to hold a dominant position should not be regarded as a monopolist, the nature of the market notwithstanding. The low thresholds set by the Bill will discourage competition because honest players in the market may be treated as monopolists and monitored or investigated constantly.

Conclusion

The proposed competition legislation in Nigeria is in all its aspects, a step in the right direction. Considering the unique point at which the Nigerian liberalization process is, every effort must be made to come up with suitable competition legislation that will facilitate the privatization and commercialization process. However, though there is light at the end of the tunnel it may be too early to rest on our oars as much work still needs to be done to ensure that the Bill is easily enforceable and comparable to the competition legislation of those countries where competition is a daily factor of life.

* Francisca Aihevba is an Associate in the Competition Group of ALEX Legal Practitioners & Arbitrators. She can be contacted by email on faihevba@alex.com