

COMMUNIQUE ON THE ROUNDTABLE ON A CASE FOR COMPETITION LAW IN NIGERIA

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INTRODUCTION:

Competition law also known as antitrust law in the United States refers to those laws which promote or maintain market competition by regulating anti-competitive conduct by companies. Antitrust results from the 'trusts' or cartels which existed in the United States in the 19th Century and which controlled the railroads, telephone and chemical industries.

The main objective of such legislation is the promotion of competition as a means of assisting the creation of market responsive to consumer signals, thus ensuring the efficient allocation of resources in the economy and efficient production with incentive for innovation. It is aimed at facilitating the provision of fair and equal competitive conditions for all market participants, promotion of allocative efficiency and the maximization of consumer welfare, amongst other goals.

Nigeria as a country needs competition, which has become unavoidable. This in view of the numerous anti-competitive activities that abound in the market place, some of these existing anti competitive practices in the Nigerian economy include cartels, price fixing, entry barriers by trade associations, bid rigging in government procurement systems and tied selling.

In view of the foregoing, and in furtherance of its determination to bring contemporary issues to public discourse and proffer practical recommendations that will move the nation forward, the Nigerian Institute of Advanced Legal Studies organised a one-day Roundtable aimed at drawing up a road map for the effective implementation of a competition policy.

Perspectives at the Roundtable included

- An overview of competition law
- Challenges of implementing competition law and policy
- Electricity and deregulation in the downstream oil and gas sector.
- Competition policy and intellectual property; balancing competition and their reward.
- Abuse in dominance in transition economic.
- The effect of competition law on economic growth.
- Competition ,Consumer Welfare and Social Consequences of monopoly
- Privatizing and Deregulation of the Downstream Oil and Gas Sector.

Observations:

The Roundtable made the Following Observations

1. Nigeria is committed to market liberalization through its privatization and commercialization programme which will end government monopolies in certain sectors of the economy and transfer ownership and control to private players. In this

regard, the government constantly touts the availability of choice and lower consumer prices accruing to Nigerians from the cancellation of natural monopolies.

2. The main objective of competition law is the promotion of competition as a means of assisting in the creation of markets responsive to consumer signals, thus ensuring the efficient allocation of resources in the economy and efficient production with incentives for innovation.
3. Competition law is aimed at facilitating the provisions of fair and equal competitive conditions for all market participants, promotion of efficiency and the maximization of consumer welfare, amongst other goals.
4. There is limited access to business resources such as business intelligence and financing which means the Nigerian economy is currently controlled by a small minority of corporate individuals. This has resulted in the economy being characterised by weak competition and persistently high prices that impair industries and consumers alike.
5. In the aviation sector, the recent feud between British Airways, Virgin Atlantic and the Nigerian Civil Aviation Authority over the airlines' alleged abuse of dominance on the Lagos-London route by fixing prices, abusing fuel surcharges and generally taking advantage of passengers is another instance of seemingly anti-competitive behaviour.
6. Though Nigeria has no Competition Law, it would be wrong to say that she does not operate a competition regime, or has no competition policy.
7. The Nigerian Communications Commission is constituted under the Nigerian communications Act 2003 and its functions include the promotion of fair competition in the communication industry and the enforcement of compliance with competition laws and regulations which relate to the Nigerian communications markets.
8. The electricity sector is regulated by the Nigerian Electricity Regulatory Commission established under the Electricity Power Sector Reform Act 2005. The Commission is responsible for the prevention of the abuse of market power within the electricity sector and a merger and acquisition or any other form of investment in the sector requires the Commissions prior approval.
9. In the air transportation sector the Nigerian Civil Aviation Authority established under the Civil Aviation Act 2006 has the power to investigate unfair methods of competition and to make regulations prohibiting and or discouraging anticompetitive practices.
10. Currently, merger control, an important aspect of any competition policy, has been embodied in the investment and securities Act (ISA), which grants to the Securities and Exchange Commission (SEC) the power under the Act and General Rules and Regulation of SEC 2011 to order the breakup of a company, where it determines that the business practices of that company substantially lessens competition.
11. On the issue of merger control, the Investment and Securities Act 2007 in the absence of a competition law took it upon itself to regulate mergers along the lines of ensuring that a merger does not result in restriction of competition.

12. The law does not indicate whether parties to a larger merger should notify their respective trade unions or employees as in the case of an intermediate merger. This would appear to be an oversight on the part of the draftsman
13. it was also felt that Securities and Exchange Commission is adequately equipped to deal with mergers and the time has come for our courts not to be overburdened with small and intermediate mergers .However with large mergers, SEC is required to refer the notice of merger to the court and to indicate its approval or otherwise .This means that the court sanctions large mergers.
14. Although there are other legislations that may touch on competition law and policy, the Investment and Securities Act (ISA) is at the fore front by virtue of its extensive provisions on merger control.
15. However these provisions are not sufficient to cover all aspects of monopoly conduct and have not, been tested in practical application.
16. One argument against 'monopolies and mergers' commission is the alleged need for specialized knowledge of the workings of certain industry sectors. Industry specific regulation of competition, it is said, results in a focused response to alleged anti-competitive behaviour, based on in depth industry knowledge.
17. Nigeria has engaged itself with the development of a competition policy since 2002 when the BPE engaged some consultants to draft the Federal Competition Bill 2003. A major feature of competition law is to protect the economic integrity of the nation and to protect the consumer from monopoly.
18. The Bill never became law and several bills have been prepared and presented to the National Assembly since then, but no law has been passed till date.
19. The lack of a Competition Law is a missing aspect in Nigeria's arsenal to attract direct foreign investment, as this is one part of a country's legislative framework that foreign investors review carefully when investment decisions are being made.
20. There is the danger of government deregulation exercise without a functional competition law to support the system. A deregulated economy without Competition Law creates free jungles rather than free markets.
21. That Competition Law is advantageous does not mean that in free market economy every sector should be left open to competition .Some areas such as health services or basic amenities may be subject to government control and different countries may have different views about how far the market should be tempered or supplemented by a social component.
22. That in the absence of a Competition Law establishing a Competition Commission and Tribunal, Securities and Exchange Commission (SEC) is the most appropriate body to undertake the responsibility particularly regarding mergers and acquisitions not just because of regulatory roles over mergers and acquisition in terms of granting approvals but also because certain mergers and acquisition may have negative impacts on the market where left uncontrolled.
23. It is widely accepted that there is a strong correlation between socio-economic development and the availability of electricity.
24. from inception, the National Electricity Power Authority (NEPA) operated as a wholly and vertically integrated monopolistic entity responsible for generation,

transmission and distribution of electric power in Nigeria .As is the case, these monopolies come with the usual baggage of inefficiency and poor service delivery which NEPA was no exception in the end, NEPA was plagued by many of the problems which afflict state-run facilities all over the world. Resources were not utilised efficiently and managers not accountable to either the government or consumers.

25. Investment was determined by how much the Federal Government could afford to invest in the sector in the midst of competing claims on its revenue rather than by a commercial rationale to satisfy demand profitably. Due to the combination of poor planning, inefficiency, waste and leakage, Nigeria's available capacity stagnated at about 2,000 megawatts for 15 years prior to 1999. Nigeria has grossly underinvested in the power sector and its investment has underperformed due to poor management.
26. Nigeria's power sector has been plagued with the challenges of inadequate power generation capacity ;insufficient and inefficient transmission and distribution infrastructure, lack of capital investment into the sector, low percentage of access, high incidence of power theft, absence of cost reflective tariffs, high technical losses, vandalization of transmission and distribution infrastructure and inadequate legal and regulatory framework.
27. The Electric Power Sector Reform Act (EPSRA) anticipated the introduction of private sector participation and the development of a competitive wholesale electricity market.
28. One of NERC'S major responsibilities, as it collaborates with the Bureau of Public Enterprise (BPE) and the Ministry of Power in implementing reform, is to ensure that a competitive market develops and operates in the public interest. The expected outcome is an efficient and effective National Electricity Supply Industries (NESI), in which costs are better managed, investment is increased and sustainable and electricity supply is reliable
29. Competition is however a beneficial force in markets. It has benefits in terms of both promoting the efficiency of companies through better management and technologies and in guiding the deployment of resources towards the most efficient patterns of production and consumption .
30. Where competition in the market is still in the early stages of evolution or the market is structured such that certain players have geographical monopoly, as in the National Electricity Supply Industry (NESI), at these early stages of reform, then regulation must become a proxy for competition.
31. The expansion and strengthening of intellectual property at both national and global spheres, the interaction between the disciplines of Intellectual Property (IP) on one hand and competition law and policy on the other hand has become a subject of renewed interest and importance particularly among policy makers, lawyers, economists and development experts.
32. It is further observed that in today's knowledge based economy a better understanding of intellectual property (IP) in the global, political economy as the global currency is indispensable to informed law and policy making in all areas of development inclusive of competition law.

33. Competition law and policy has evolved to integrate economic thinking into the legal rules for business practices across all sectors of the economy it regulates.
34. Competition law enforces a system of pro-competitive limits on the bargaining powers or the monopolistic tendencies of intellectual property rights holders in at least three broad areas of the IP system, namely; ownership of IPRs, Acquisition/Transfer of IPRs and enforcement of IPR.
35. The point of nexus and the impact of competition law and policy on the IP regime has reflected clearly on the object of IP protection, which is the innovation that IP generally protects and represented by all its branches be it the idea in patents, expression of ideas in copyright or the products of the idea in trademark.
36. It is also observed that the goals of intellectual Property (IP) and competition law and policy are not absolutely irreconcilable no matter how divergent they superficially appear to be.
37. It is observed significantly that intellectual Property (IP) has continued to define its own rules in the context of promoting innovation, to also eliminate monopoly and promote free competition in the market place which has been defined as the cardinal objective of competition law and policy in most jurisdictions.
38. Nigerian intellectual property based industries is rapidly growing in structure and size and invariably its contribution to the economy is getting more defined.
39. Nigeria is going through some investment liberalization, privatization and deregulation. These liberalization measures are established to remove many growth-retarding characteristics embedded in the structure of the economy , which has brought long period of dismal economic performance and has meant that living standards have fallen below world average leading to widespread poverty and increased political agitation, the driving force is the need to restructure and reposition the economy for sustainable growth, which can only be achieved the establishment of a pro-competition regulatory and institutional framework.
40. The political and economic opening of high potential areas in the oil industry previously closed to western investment is creating immense demand on the sources of private western capital. Persistent low oil prices at the dawn of the present decade have also constrained industry funds available for investment in further exploration activities in the industry worldwide.
41. A review of the supply and distribution of petroleum product also reveals that the downstream sector has been operating sub- optimally as result of refineries been eroded; reliance on imported products; deterioration of the storage and pipeline capacity; prevailing cost and price structures that are badly distorted and the monopolistic position of a single player, NNPC.
42. It was the conclusion of the special committee on the review of petroleum supply and distribution (2000) that the sector could still be salvaged by the corrilination of policies which will generate the infusion of funding to restore domestic refining capacity, reduce reliance on import, repair the distribution network and encourage a competitive and efficient network hinged on minimum government control.
43. That Government infusion of fund in the downstream oil sector was desirable in order to restore a semblance of stability and that private investment will need to be attracted

not only to augment Government resources, but also to fund the expansion of capacities in refining, distribution and further downstream activities.

44. That over the years, the source of supply of petroleum product, mainly white product into the Nigerian market had been through NNPC/PPMC. NNPC's source is through the refineries and import. As far back as 2009 the installed refining capacity in the country was 445,000 BPD, while the optimum refining capacity ever achieved was 360,000 BPD.
45. That the committee noted that while the Nigeria petrochemical companies (EPCL & WPCL), the Natural Fertilizer Company of Nigeria (NAFCON), The Aluminium Smelter company of Nigeria (ALSCON) and Nigeria Liquefied Gas Company (NLNG) were established to take advantage of the gas opportunities, some of these organisations had problems due to poor funding, bad management and government interference.

RECOMMENDATIONS:

At the end of deliberations, the Roundtable made the following Recommendations:

1. The existence of a competition law will provide guidelines for corporate behaviour and sanctions for breaches. An antitrust regime will also enhance the emergence of new competitors in the market that will threaten the current monopolistic structure. It is of major importance in the Nigerian context in the light of the current deregulation and liberalization drive by the government.
2. A competition regime is required to control the urge to maximise profits through cartel like behaviour, and the overbearing influence of dominant market positions.
3. The existence of Competition Law will provide guidelines for corporate behaviour, sanctions for breaches and will also enhance the emergence of new competitors in the market that will weaken the current monopolistic structure.
4. Additional reasons for a competition law include the need to encourage foreign investors as more investors would be willing to invest in an effective market. This supports the saying that vigorous competition between firms is the lifeblood of a strong and effective market.
5. Irrespective of the fact that each industry/sector has their individual Competition Laws, a single body should have jurisdiction over all aspects of anti competitive behaviour in the economy.
6. Mergers and acquisition in any industry/sector should be submitted to "monopolies commission" for final clearance after having been cleared by its industry specific regulatory authority. This will ensure that a few individuals or corporations will not dominate specific aspects of the Nigerian economy.
7. Although Nigeria does have a competition policy, as the volume of international trade increases with globalization and the increasing demands for public accountability, there is a need for Nigeria's competition policy to be located within an all embracing competition Law.

8. A well designed and properly implemented competition legislation in Nigeria will aid in the delivery of the economic goals of the present administration by reducing the risks of trade disputes; increase productivity and economic growth and ultimately raising the standard of living of the average Nigerian.
9. There is need to have a legal regime to safeguard the market place, thereby creating unnecessary restraint to trade and competition to the detriment of the masses.
10. Every competition Law should seek to prohibit contracts or agreements that restrict competition.
11. Given the state of the power sector and in line with recent global realities on competition and private sector investment, there is a realistic need to end the natural monopoly in the sector and open it up to competition. This understanding is behind the reform programme recently initiated by the Nigeria government with the goal of liberalising the Nigeria Electricity Supply Industry (NESI).
12. The Federal Government should provide the overall direction for the development of the electricity industry in Nigeria, and ensure the general consistency of electric power policy with all other national policies and specifically with other aspects of energy policy and Federal Government policy on Foreign Investment and Borrowing. This will also prompt the enactment of necessary laws, regulations and other measures required to support the federal policy on electricity.
13. The Ministry of power should have the overall responsibility for formulating electric power policy. The specific functions of the ministry will include to propose policy options and recommendations to government concerning legislation, policy on investment, etc. To monitor and evaluate the implementation and performance of government policy in the industry. Establishment, monitoring and evaluating the performance of policies for increasing the access to electricity, particularly in rural and semi-urban areas. Representing government on electricity matters pertaining to regional and international bodies and organisation, and liaising with the National Assembly on matters concerning the electricity industry.
14. State government should carry out their responsibilities for the development of off-grid electrification and their joint responsibilities with the federal government on the establishment of Electricity Power Stations as set out in the 1999 Constitution. The state roles also include regulation of off-grid non –centrally dispatched electricity operations, which are wholly limited within the state boundaries.
15. There is no doubt that the Intellectual Property (IP) competition relationship, a competition policy approach may be particularly useful to ensure a pro competitive exercise of IPR. For instance, in the global market for technologies this will be useful in redefining the scope of patenting regime for a more beneficial transfer of technology and foreign direct investment to a developing country.
16. Effort must be made to ensure the proper environmental conditions are put in place to realise the full benefit of competition law. This may involve changes in other laws, education and training, measures to ensure independence of regulators, development of economic expertise and protection of regulators from rent seekers and lobbying by entrenched economic interest.

17. Regulators should not penalise firms merely for the possession of market power, particularly where such power has been obtained through legitimate competitive efforts. Competition law should focus on abuses of market power that distort the competitive process, not on punishing successful firms.
18. Administrative and adjudicative functions within the competition regime should be separated to protect the neutrality and impartiality of the investigative and enforcement process.
19. Competition law should establish and enforce a level playing field across an economy. Where exemptions are required to promote other economic policies for example, to encourage investment in specific sectors, such exemptions should be clearly set out and subject to regular review to ensure that they are still necessary.
20. Competition regimes should be regularly reviewed to ensure that it is functioning properly and to determine whether modifications are required to more efficiently fulfil its stated goals and/or to reflect additional legislative goals.
21. An important principle governing competition law is that one size does not fit all, this means that there is no universally applicable harmonised model, domestic competition law should be designed to suit a country's stage of economic development, legal system and enforcement capability.
22. That all stakeholders in the competition process, including government, business, consumers and academia, must understand and support the principles of competition and be actively involved during the process of adopting competition legislation.
23. That government should adopt and implement a 10-year master plan which ensures : that gas development in the country and marketing locally and externally is boosted through a literal implementation of the current fiscal incentives, that the business of downstream gas distribution should be separated from that of upstream gas production and gathering to assure greater focus and accountability, that private venture capital should be encouraged to ease funding and thus assure rapid growth prospects, That there should be rapid implementation of natural gas distribution project to increase the confidence of potential gas to consumers as well as to minimise the dependence of the industries on fuel oil, that the energy policy should be expanded to ensure that gas has its rightful place as the fuel of first choice in the country and That the current deregulation of the gas operations is sustained and expanded.