

BANWO & IGHODALO

WHY NIGERIA IS RIPE FOR A COMPETITION LAW

Ever since the legendary Scottish economist, Adam Smith, propounded the theory of the ‘invisible hand’ in his 1776 treatise – An Inquiry into the Nature and Causes of the Wealth of Nations – most nations around the world have come to accept the free market enterprise (an economic model founded upon the principles of division of labour, deregulation, and full competition) as the most efficient means of boosting productivity and creating alternative product choices for consumers, as well as a time-tested road to economic prosperity.

Over the years, legal frameworks have been developed to support an enduring and more efficient free market structure which enhances trade liberalization, prohibits monopolies and regulates anti-competitive behaviours; such as the abuse of dominant position in the market place. In a free market economy, inclusive development and economic growth cannot occur in a fair and orderly environment if there are no effective and appropriate Competition and Antitrust Laws.

The move to enact a Competition Law for Nigeria has been on for a while. The first attempt at drafting a law to regulate competition in the country was arguably made by the Bureau of Public Enterprises (“BPE”), the operative arm of the National Council on Privatization (“NCP”), between 2002 and 2003. There have been different versions of the original Bill laid before the National

Assembly since then, without being able to gain legislative approval. The latest version of the bill, introduced August 2015 and tagged **Federal Competition and Consumer Protection Bill, 2015 (“the Bill”)**, is currently before the National Assembly for consideration.

At a time when Nigeria yearns for increased economic diversification and competitiveness to boost national productivity, reflate the economy and bring us out of recession, many believe that the passing of this Bill into law at this time is not only necessary but also urgently needed. It is therefore the aim of this article to look into why a Competition Law is due for the country and the implications of the continuing absence of a valid and competent antitrust legal regime, for an economy like Nigeria seeking to attract foreign investments and striving to become the African economic hub.

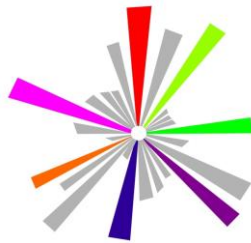
COMPETITION IN THE NIGERIAN ECONOMY

The latest World Economic Forum’s (“WEF”) Global Competitiveness Index (“GCI”) for 2016-2017, released on Wednesday, October 5, 2016 shows that Nigeria has dropped three places from its previous 124th to the 127th position out of 138 countries surveyed. Factors responsible for this poor showing are given as, low productivity, low commodity prices, financial market’s high risks and uncertainty, inadequate education and training, administrative and regulatory bottlenecks, and underdeveloped infrastructure which have critically affected the country’s ease of doing business.



98 Awolowo Road, South-West Ikoyi, Lagos, Nigeria
Afri-Investment House, Plot 2669, Aguiyi-Ironsi Street, Maitama, Abuja, Nigeria
T +234(0) 700LAWYERS F +234(1) 4615205 E banwigho@banwo-ighodalo.com W www.banwo-ighodalo.com

Attorney list at www.banwo-ighodalo.com



BANWO & IGHODALO

To improve Nigeria's Ease of Doing Business and hence economic competitiveness, a number of policy reforms have been initiated and are now being implemented in sectors of the economy such as; banking, insurance, capital market, trade & investment, foreign exchange, services, telecommunications, manufacturing, building & construction, power, and oil & gas.

As the government increasingly divests its interests in public assets and deregulates the entry and exit of private sector players in critical sectors of the economy, it becomes more imperative for a legal framework to be put in place; regulating activities of large corporations and big investor groups capable of using their vantage positions to crowd out small and medium size entrepreneurs; thereby establishing monopolies to the disadvantage of consumers and the utmost detriment of the overall economy.

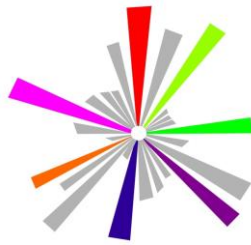
Nigeria has seen the privatization and unbundling of large monopolistic corporations like the defunct Nigerian Telecommunications Limited (NITEL), National Electric Power Authority (NEPA), Nigeria Airways Limited, National Bank etc. There are ongoing implementations of deregulation policies in the downstream petroleum sector, foreign exchange market, foreign participation in business (FDI & FPI), while the government is also encouraging the public-private-partnership ("PPP") model of attracting private sector capital into investing in the economy.

LEGAL FRAMEWORK – COMPETITION REGULATION STILL A SECTOR-BASED ISSUE

Whilst the government has been pro-actively serious about building the various legal regimes necessary for attracting private sector participation in the Nigerian economy, it has however been slow in establishing a special body under a distinct legal regime for regulating fair competition, among all the players that come into the various segments of the market.

Unlike in other advanced and some developing jurisdictions where a Competition Commission exists for administering a distinct Anti-Trust Law for competition issues arising in any segment of the economy, what operates in Nigeria currently is a sector-based approach to competition whereby the laws regulating certain industries contain provisions regulating competition as far as it relates to the specific industries. Specifically, the Investments and Securities Act 2007; the Nigerian Communications Act 2003; the Electric Power Sector Reform Act 2005 among other laws, contain provisions dealing with competition as it relates to matters within the purview of such laws.

There are also legislation which facilitate entry, exit and operations of foreign investors as well as protect private foreign investments (as well as domestic investors) in Nigeria. These include: Public Enterprises (Privatization and Commercialization) Act; Nigerian Investment Promotion Commission Act; Foreign Exchange (Monitoring and Miscellaneous Provisions) Act; and, the Infrastructure Concession Regulatory Commission Act.



BANWO & IGHODALO

As these laws facilitate private sector participation and open the door to increased economic competitiveness among players, genuine concerns emerge as to the mechanism for promoting healthy competition among the market players. It is therefore important that a specific Competition Law (different from the sector-specific laws and which should be administered by a distinct body), be enacted to govern all trade and business practices with the aim of prohibiting anti-competitive practices between firms, such as agreements to fix prices or terms of trade or to carve up markets or customers; discriminate between customers without legitimate basis and; prevent, restrict or distort competition as well as abuse a dominant market position.

WHAT IS THE NEW BILL ABOUT?

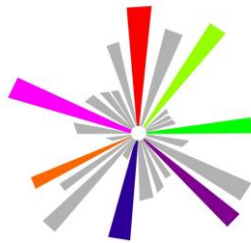
The Bill presently before the National Assembly combines the regulation of Competition and Consumer Protection. Competition law is not, *sticto sensu*, about consumer protection, or trading standards, although both may benefit from the application of competition law. It is therefore a common practice in most jurisdictions to vest in only one agency, the powers to regulate both Competition and Consumer Protection.

The current Bill is for an Act “to repeal the Consumer Protection Act, Cap C25, LFN, 2004 and establish the Federal Competition and Consumer Protection Commission and the Competition and Consumer Protection Tribunal; for the development and promotion of fair, efficient and competitive markets in the Nigerian economy, facilitate access by all citizens to safe products, secure the protection of rights for all consumers in Nigeria and for other related matters” – (see the House of Representatives Bill No. HB. 15.07.60 of 24th August, 2015).

The objectives of the Law as stated in Section 1 of the Bill are to: a) promote and maintain competitive markets in the Nigerian economy; b) promote economic efficiency; c) protect and promote the interests and welfare of consumers by providing consumers with competitive prices and product choices; d) prohibit restrictive business practices which prevent, restricts or distorts competition or constitute an abuse of a dominant position of market power in Nigeria; and contribute to the sustainable development of the Nigerian economy.

The Federal Competition and Consumer Protection Commission (“the Commission”) established in the Bill has superior powers to all other regulatory bodies created under any laws, such as the Securities and Exchange Commission (“SEC”), Nigerian Communications Commission (“NCC”) etc. but subject to the provisions of the Constitution of the Federal Republic of Nigeria; in all matters relating to competition and consumer protection.

Effectively, the Bill regulates all competition-related issues which are of serious concern to market players such as; restrictive agreements (restraint of trade), monopoly, abuse of a dominant position, price regulation, mergers, business combination and the issues concerning consumer rights. Anti-competitive offences are also created; such as price-fixing, bid-rigging, giving of false or misleading



BANWO & IGHODALO

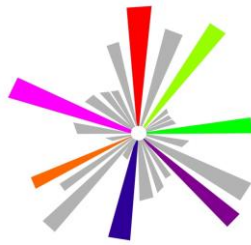
information and failure to attend or give evidence when summoned; and appropriate sanctions and penalties are specified.

The Bill also seeks to create the Competition and Consumer Protection Tribunal (“the Tribunal”) which will be conferred with the powers, authority and jurisdiction to adjudicate over conducts prohibited under the law. The Tribunal shall hear appeals from or review any decision of the Commission made either directly on any issue or indirectly on any decision from the exercise of the powers of the any sector specific regulatory authority in a regulated industry, in respect of competition and consumer protection matters. Further appeals from the decision of the Tribunal lie to the Federal High Court.

THE FUTURE OF COMPETITION IN THE NIGERIAN ECONOMY

Recent economic policy reforms have continued to open the Nigerian economy to private sector participation and by necessary implication, increase competition. The 2004 Consolidation Policy executed in the financial sector by the Central Bank of Nigeria (“CBN”) and the National Insurance Commission (“NAICOM”) policy triggered rounds of mergers and acquisitions (“M&A”) in the banking and insurance industries. This was followed by a similar exercise in the Nigerian Capital Market. There are indications that another round of increase in the capital base requirements for insurance companies operating in Nigeria is imminent. This will certainly trigger further M&A deals in the sector.

The power sector privatization has also attracted millions of dollars of investments into electric power generation and distribution. Nigeria’s favorable demographics and perceived purchasing capacity have attracted investment funds into sectors such as manufacturing, health care, real estate, telecoms, banking, and infrastructure. As the economy rebounds, global growth capital is expected to return into the economy, bringing in additional sector players. It is appropriate that the market conduct of these players is carefully and appropriately regulated.



BANWO & IGHODALO

CONCLUDING REMARKS

Undoubtedly, Nigeria, more than at any other time in its past, requires an efficient, consolidated and seamless legal, regulatory and adjudicatory framework, overseeing market activities. The Bill before the National Assembly therefore deserves the highest level of legislative attention so that it can be passed into law without further delay.

As the government of the United Kingdom stated clearly in its 2001 White Paper, 'Productivity and Enterprise'; "*The importance of competition in an increasingly innovative and globalised economy is clear. Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs and providing incentives for the efficient organisation of production. As such, competition is a central driver for productivity growth in the economy, and hence the UK's international competitiveness*". These assertions, certainly at this time of promoting competitiveness through implementation of economic growth strategies, hold true for Nigeria.

The Grey Matter Concept is an initiative of the law firm, Banwo & Ighodalo

DISCLAIMER: This article is only intended to provide general information on the subject matter and does not by itself create a client/attorney relationship between readers and our Law Firm. Specialist legal advice should be sought about the readers' specific circumstances when they arise.