

COVID-19: COMPETITION AND CONSUMER PROTECTION

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INTRODUCTION

In these unprecedented times arising from the COVID-19 outbreak, nations around the world have had to tackle the effects of the pandemic on market practices and consumers—alongside combating the spread of the disease and fortifying their healthcare systems.

As people attempt to maintain good personal hygiene and protect themselves from COVID-19, the demand for essential medical products (such as, masks, gloves, and hand sanitiser) has increased astronomically across the world. Nations have also implemented lockdown policies to ensure social distancing and prevent the spread of COVID-19. Inadvertently, this has resulted in people stocking up on essential goods and even 'panic buying' large quantities of essential products—such as, foodstuffs and toiletries. Unfortunately, amidst this pandemonium, certain businesses are taking advantage of the increasing demand and are engaging in exploitative practices. One example being price gouging: an arbitrary increase to an unreasonable amount by the seller of essential goods, in response to an emergency.¹

With the increase in the prices of these personal protective items and essential goods, across the world, agencies responsible for competition and consumer protection have deemed it fit to intervene against these exploitative practices.²

1. Zwolinski - *The Ethics of Price Gouging*.

2. See: (x) United States of America: Justice Department Cautions Business Community Against Violating Antitrust Laws in the Manufacturing, Distribution, and Sale of Public Health Products; (y) Greece: Investigation in healthcare materials; (z) France: France caps price of hand gel, manufacturers struggle to meet demand; (xx) Italy: Italy Probes Amazon, eBay Over Price Hikes Over Coronavirus; and (yy) Turkey: Turkish Competition Authority Responses To The COVID-19 Outbreak.

COMPETITION AND CONSUMER PROTECTION IN NIGERIA

The enactment of the Federal Competition and Consumer Protection Act 2019 (**FCCPA** or the **Act**) last year was welcomed by all. For the first time in Nigeria, there was a robust regulatory framework for competition law. The Act repeals the Consumer Protection Council Act,³ and seeks to protect consumers by establishing consumers' rights and prohibiting unfair practices. The FCCPA also established the Federal Competition and Consumer Protection Commission (**FCCPC** or the **Commission**) as the body charged with the responsibility of the administration of the Act.

In relation to the exploitative practices occasioned by COVID-19, the provisions of the Act state that the functions of the FCCPC include, inter alia: (x) eliminating anti-competitive agreements, misleading, unfair, deceptive or unconscionable marketing, trading, and business practices;⁴ (y) protecting and promoting consumer interests;⁵ and (z) ensuring that consumer's interests receive due consideration at appropriate fora and provide redresses to obnoxious trade practices, or the unscrupulous exploitation of consumers.⁶ Furthermore, it is an offence under the FCCPA to "offer to supply, supply, or enter into an agreement to supply, any goods or services at a price that is manifestly unfair, unreasonable or unjust" (emphasis added).⁷

Where it appears to the Commission that a person or an entity involved in producing or trading goods or providing services (an **undertaking**) has, in the course of its business, engaged in conduct which is detrimental to the interests of consumers, the Commission shall endeavour to obtain a written assurance from the undertaking to refrain from such detrimental conduct.⁸ Where the Commission is unable to obtain such assurance, or the undertaking fails to observe such assurance, the Commission shall commence a court action and may order a temporary closure of any premises or facilities operated in a manner detrimental to the interest of consumers.⁹

Additionally, a natural person who violates the rights of a consumer is liable to an offence punishable by imprisonment for a term not exceeding five years, or to the payment of a fine not exceeding ₦10,000,000.00 (Ten Million Naira only) or to both a fine and imprisonment. While a corporate body shall be liable to a fine of not less than ₦100,000,000.00 (One Hundred Million Naira only) or 10% of its turnover for the preceding business year, whichever is higher.¹⁰ The Act further provides for personal liability for each director of a corporate body found guilty of contravening any consumer's rights, in line with the sanction for individuals.¹¹

3. Cap C25 LFN 2004.

4. Section 17 (g) of the FCCPA.

5. Section 17 (l) of the FCCPA.

6. Section 17 (s) of the FCCPA.

7. Section 127 (1) of the FCCPA.

8. Section 153 (1) of the FCCPA.

9. Section 153 (2) and (3) of the FCCPA.

10. Section 155 of the FCCPA.

11. Section 155 of the FCCPA.

Consumers are empowered to enforce their rights under the FCCPA through various avenues. In particular, there are four mediums, to wit: (x) direct referral of the matter to the undertaking that supplied the consumer with goods or services;¹² (y) referral to a sector specific regulator;¹³ (z) filing a complaint with the Commission;¹⁴ and (xx) seeking legal redress in court.¹⁵

Worthy of note is that redress by the Commission does not prevent a consumer whose rights have been violated under the Act, from instituting a civil action in court for compensation or restitution against the offender.¹⁶

There are therefore sufficient provisions under the FCCPA protecting the Nigerian consumer as well as empowering the Commission to act in response to COVID-19.



WHAT IS THE FCCPC DOING?

Commendably, the FCCPC has been proactive in protecting Nigerian consumers. On 1 March 2020, the FCCPC issued a press release stating that practices which “[abuse] citizens’ sensitivity, apprehension, anxiety and vulnerability, especially during emergencies” are a violation of law.¹⁷ In the press release, the Commission specifically stated that price gouging was prohibited. The press release was followed by the Commission prosecuting four supermarkets in Abuja for allegedly arbitrarily hiking the prices of essential products such as sanitisers, hand-wash liquids, and disinfectants.¹⁸

12. Section 146 (a) of the FCCPA.

13. Section 146 (b) of the FCCPA.

14. Section 146 (c) of the FCCPA.

15. Section 152 of the FCCPA.

16. Section 152 of the FCCPA.

17. FCCPC (Press Release) - Price Gouging, Unreasonable and Arbitrary Increases in Prices of Protective and Hygiene Products on Account of COVID-19 (Corona-virus) Concerns.

18. Udo (Premium Times) - Nigerian govt sues H-Medix, Faxx Stores, others over hike in prices of sanitizers.

The steps taken by the FCCPC has led certain establishments to adjust market practices accordingly. In fact, Jumia reportedly delisted 390 products belonging to 168 sellers from its platform, as their prices were considered to be exploitative.¹⁹

Despite this warning, several businesses persisted in the practice of price gouging and this led the FCCPC to issue an updated press release on 23 March 2020 with a further warning stating, inter alia, that: "Although many have exercised circumspection...periodic monitoring and reports still show that some...continue to take undue and opportunistic advantage of citizens...".²⁰

The lockdown order by the President of the Federal Republic of Nigeria, applicable in the Federal Capital Territory, Abuja, Lagos, and Ogun States (further to the COVID-19 Regulations 2020) have necessitated the FCCPC, like other businesses, to introduce remote working to its operations.²¹ In this light, the FCCPC has encouraged consumers to be vigilant, and report unreasonable, arbitrary, or exploitative price increases or trade practices to the Commission by telephone or by email.

These practices by Nigerian businesses and the response by the FCCPC is not unique to Nigeria, as in the past few months, competition and consumer protection agencies have taken actions to protect consumers from exploitative acts. In this vein, the UK Competition and Markets Authority (CMA) issued an open letter to pharmaceutical companies and food and drink retailers, stating that it would eliminate non-essential collusion, unjustified price increases, and misleading information on products.²² In Greece, the Hellenic Competition Commission sent questionnaires to producers and retailers of masks, gloves, and other medical supplies to investigate alleged anti-competitive price increases and availability shortages.²³



19. FCCPC (Press Release) - Jumia delists 390 products on account of FCCPC warning over hike in prices of protective & hygiene products, assures Commission of co-operation.
20. FCCPC (Press Release) - Price gouging, unreasonable arbitrary increases in prices of hygiene products and certain medications, panic-buying on account of Coronavirus (COVID-19) concerns.
21. FCCPC (Press Release) - Limited Operations and prioritization during Covid-19 Emergency and Response.
22. Competition and Markets Authority (Open Letter) - CMA open letter to pharmaceutical and food and drink industries.
23. Hellenic Competition Commission (Press Release) - Investigation of the HCC into price increases and output restrictions in healthcare materials and other products.

CO-OPERATION (OR COLLABORATION) BETWEEN COMPETITORS

While price gouging in the words of the Director General of the FCCPC, “violates both moral codes and extant law”, there are co-operative practices between competitors, though anti-competitive *stricto sensu*, that are necessary in these times to combat COVID-19 and ensure the availability of essential goods.

By virtue of Section 59 of the FCCPA, agreements or decisions among undertakings or an association of undertakings which have the purpose of actual or likely effect of preventing, restricting, or distorting competition in any market are illegal, unlawful, and void. A breach of this provision is an offence under the FCCPA and an offender, in the case of a natural person, is liable to imprisonment for a term not exceeding five years, or to the payment of a fine not exceeding ₦5,000,000.00 (Five Million Naira only) or to both a fine and imprisonment. Where a corporate body is the offender, a fine not exceeding 10% of its turnover in the preceding business year. Further, each director of the corporate body can be found guilty of contravening any consumer’s rights, in line with the sanction for individuals, being a term of imprisonment and/or a monetary fine.²⁴

Accordingly, agreements by competitors towards: (x) the joint provision of goods and services; (y) sharing employees; (z) sharing production and distribution facilities; or (xx) joint research and development for a cure, vaccine, or treatment will be *prima facie* illegal, unlawful, and void.

However, we must note that the FCCPA contains a saving provision for agreements which contribute to the improvement of production or distribution of goods and services or the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit.²⁵ Under such circumstances, undertakings are empowered to approach the FCCPC to authorise such agreements. As a result, the relevant agreement will not be in breach of the Act. In the absence of explicit guidance in relation to agreements for the purpose of tackling COVID-19 (i.e. those stated in the preceding paragraph), we expect that the FCCPC will rely on these provisions while assessing agreements between undertakings.

However, other competition authorities have provided explicit guidance here. The CMA recently announced that it was relaxing competition enforcement on supermarkets to enable them “...join forces to feed the nation”.²⁶ Specifically, supermarkets in the UK are permitted to share data with each other on stock levels, co-operate to keep shops open, share delivery vans, and pool staff. However, the CMA has noted that it will not tolerate any non-essential collusion and has issued guidance to interested parties.

24. Section 69 of the FCCPA.

25. Section 60 (a) of the FCCPA.

26. GOV.UK (Press Release) - Supermarkets to join forces to feed the nation.

In South Africa, the Minister of Trade, Industry, and Competition issued various regulations granting block exemptions to the private healthcare sector to co-operate on ensuring adequate capacity at healthcare facilities.²⁷ Similarly, block exemptions have been granted to the banking sector to enable the development of common approaches to debt relief and other necessary measures during the COVID-19 crisis.²⁸ The retail property sector and the hotel industry have also seen block exemptions.²⁹

In addition to undertakings in the healthcare sector and supermarkets, there are certain other sectors where co-operation may be beneficial and not merely geared towards restricting competition. For instance, it would benefit most employers to exchange information on best practices for protecting their employees and customers; more so where these employers are in the same sector or industry, i.e. if they are competitors.

At present, the FCCPC seems to be pro-collaboration for the benefit of consumers. This is seen in the FCCPC's positive response to the collaboration between Jumia and Reckitt Benckiser to provide hygienic products (such as, soap bars, disinfectants, and liquid hand wash) at affordable pricing. The Commission stated that it encourages similar consumer-centred dynamism which provides value to consumers and society at large.³⁰

However, it remains to be seen whether the FCCPC will relax competition enforcement towards co-operation amongst competitors—as several requests for exemption will inundate the Commission. We expect that, in the near future, the FCCPC will issue similar guidelines to those issued by the CMA and other competition authorities. Until then, undertakings must carefully consider whether collaboration is reasonable and necessary and must obtain the FCCPC's prior approval before entering into such collaborative agreements. In applying for the Commission's prior approval, it is important to present sufficient facts to demonstrate the economic benefit of such collaboration and how consumers will benefit directly. To this end, it is imperative to have trusted legal advisers who can advise on the competitive effects of a collaboration (in accordance with the provisions of the FCCPA) and to review relevant agreements and other documents to ensure their compliance with the FCCPA.



27. *Conco and Mafuma (All Africa) - Minister Mkhize Is Responsible for Coordinating With Private Sector.*

28. *Curson (Moneyweb) - Block exemption for the banking sector.*

29. *Curson (Moneyweb) - Block exemption for the retail property sector; and Naidu et al (Independent Online) - African competition authorities respond to crises.*

30. *Okonji (ThisDay) - Jumia, Reckitt Benckiser Partner against Covid-19.*

CONCLUSION

Thus far, the FCCPC's attitude suggests that anti-competitive conduct will be prosecuted—in particular, price gouging. This is consistent with a press release by the Commission dated 28 March 2020 that it will prioritise COVID-19 related complaints/issues and would intervene where appropriate and necessary—either now or at a more auspicious time.³¹ It is however left to be seen the effectiveness of the clamp down measures, put in place by the Commission, in other parts of the country other than the Federal Capital Territory.

We also expect that the FCCPC will provide guidance on how undertakings can co-operate towards providing essential goods and services to the Nigerian populace—enabling them to combat and cushion the effects of COVID-19.

In the meantime, you can keep up to date with the ongoing COVID-19 related developments and their legal implications on our dedicated [COVID-19 Resource Centre](#).

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31. See note 21 above.