The Cartels and Leniency Review

Third Edition

Editor
Christine A Varney

Law Business Research

The Cartels and Leniency Review

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EDITOR'S PREFACE

Cartels are a surprisingly persistent feature of economic life. The temptation to rig the game in one's favour is constant, particularly when demand conditions are weak and the product in question is an undifferentiated commodity. Corporate compliance programmes are useful but inherently limited, as managers may come to see their personal interests as divergent from those of the corporation. Detection of cartel arrangements can present a substantial challenge for both internal legal departments and law enforcement. Some notable cartels managed to remain intact for as long as a decade before they were uncovered. Some may never see the light of day. However, for those cartels that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from more than two dozen jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. In part due to US leadership, stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

The authors of these chapters are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations, and many have served in senior positions in government. They know both what the law says and how it is actually enforced, and we think you will find their guidance regarding the practices of local competition authorities invaluable. This book seeks to provide both breadth of coverage (with chapters on 34 jurisdictions) and analytical depth to those practitioners who may find themselves on the front lines of a government inquiry or an internal investigation into suspect practices.

Our emphasis is necessarily on established law and policy, but discussion of emerging or unsettled issues has been provided where appropriate.

This is the third edition of *The Cartels and Leniency Review*. We hope that you will find it a useful resource. The views expressed in this book are those of the authors and not those of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication to ensure that what you read is the latest intelligence.

Christine A Varney
Cravath, Swaine & Moore LLP
New York
January 2015

Chapter 23

NIGERIA

Gbolahan Elias and Obianuju Ifebunandu[1]

I ENFORCEMENT POLICIES AND GUIDANCE

Nigerian competition law on cartels is not yet fully developed and has rarely been tested. The possibilities for the future are huge. There is as yet no dedicated general competition law regulator. We do not have a general regulation prohibiting cartels in Nigeria. Most of the recent activity has been in sector-specific regulation rather than in general regulation. There are broad statutes and regulations on the subject, but there is not much detail in them and there is little detailed practice.

Some of the broad statements apply across more than one sector of the economy. Others are confined to particular sectors (e.g., electricity, telecommunications, insurance and banking). Several proposals for law reform have been made. None of them are as detailed on the issue of cartels as they should be or are likely to become law in the near future.

The lack of detail in the law may be attributed to several reasons. One of them is that growth in economic production has outpaced the refinement of business law. Another is that in practice there has not been much of a problem with cartels in Nigeria. Leadership in most of the key sectors of the economy has tended to be either monopolistic (as with the telecommunications, upstream oil and gas, electricity and aviation sectors) or deeply fragmented (as with the financial services, electric power and oil marketing sectors) rather than oligopolistic.

For example, in the oil industry, in the downstream sector no company has up to 20 per cent of the market share. The upstream sector is dominated by the federal government, which owns 60 per cent of the sector with the leading international oil companies sharing the balance.

1 Gbolahan Elias is a partner and Obianuju Ifebunandu is an associate at G Elias & Co.

Nigerian law calls for the prior notification to and approval by the regulator of mergers, acquisitions and business combinations among companies in every sector of the economy (the Investment Securities Act 2007 (ISA) Section 118(1)). The application of this rule to mergers and acquisitions is controversial but a subject of everyday practice. Its application to business combinations is as yet untested.

'Business combination' is not defined in the ISA or the rules made pursuant to the ISA. There is no record either published or known to us in which the regulator has addressed the question of defining a business combination or of applying the law to a cartel situation. It is unlikely that a business combination among companies does not catch cartels.

The definition in the ISA does not insist that the combination must restrict or be likely to restrict competition. Every business combination is caught. It is not clear whether an agreement amounting to a contract in law is needed for there to be a 'business combination' within the statute.

The regulator in this area is the Securities and Exchange Commission (SEC). It is both a general competition law regulator and a securities law regulator. The statute and regulations do not catch business combinations among individuals or trusts, or other vehicles that are not companies, but they do apply to partnerships.

There are no rules setting out the considerations that the regulator is to address in deciding whether to grant approval to a business combination. There is every likelihood, however, that the regulator will extend to cartels the same reasoning that it is mandated by law to apply to mergers.

A key consideration for determining whether to grant approval is whether the merger is likely to:

> *[...] substantially prevent or lessen competition or is likely to result in a pro-competitive gain which will be greater than and offset the effects of any prevention or lessening of competition that may result in a merger or is likely to result from the merger and would not likely be obtained if the merger is prevented or can or cannot be justified on substantial public interest grounds.*

In determining whether a merger may substantially prevent or lessen competition, the SEC is empowered in Section 121(2) of the ISA to 'assess the strength of the competition in the relevant market and the probability that the company in the market after the [combination] will behave competitively'.

In considering whether a merger should be allowed on public interest grounds, the SEC is required to consider its effect on competition by small businesses and the ability of national industries to compete in international markets.

The SEC may, as punishment for a mistake, deceit, misrepresentation or breach of condition, revoke its approval for a proposed merger. The SEC may investigate a concluded merger if it believes that the merger may 'substantially prevent or lessen competition or cannot be justified on public interest grounds.' The SEC may break up the merged entity 'into separate entities in such a way that its operations do not cause a substantial restraint of competition.'

The SEC is specifically empowered by the SEC Rules 2013 to break up, on public interest grounds, a company that 'constitutes a restraint to competition or creates a

monopoly in a particular industry.' The SEC Rules are silent on whether the company must have been involved in a merger or acquisition transaction.

To break up a company, the SEC must give it an opportunity to be heard and must forward its decision to the court for sanctioning. The SEC Rules give guidance on what amounts to a restraint of competition: price fixing, market sharing, limiting supply and tying arrangements.

i Sector regulation

Telecommunications

The Nigerian Communications Commission Act (the Act) and the regulations made under it in the Policy and the Competition Practices establish a sector-specific regulator, the Nigerian Communications Commission (NCC), and prohibit cartels in Nigeria.

Holders of licences under the Act are prohibited from engaging in any conduct that has 'the purpose or effect of substantially lessening competition in any aspect of the Nigerian communications market (the Act Section 91(1)). The Act also specifically prohibits licensees from entering into any agreement or arrangement, whether legally enforceable or not, that provides for rate fixing, market sharing or boycotts (Section 91(3)).

However, the NCC may grant exemptions to a licensee to engage in conduct that substantially lessens competition but only in instances where the national interest so warrants – a term undefined and as yet untested (the Act, Section 93).

It is unclear whether the general provisions on cartels apply to the Nigerian communications market because the NCC is established in the Act as the exclusive regulator of competition law in the Nigerian communications market (Section 90).

Electricity

The regulator for the electric power sector is the Nigerian Electricity Regulatory Commission (NERC). The Electric Power Sector Reform Act 2005 (EPSRA) has two provisions against cartels. The first prohibits anyone holding a licence from the NERC to cede its undertaking or any part thereof without the consent of the NERC (EPSRA Section 69(1)). An agreement to divide a local market has been held to violate this Section (*Petadis v. HFP Properties* Case No: NERC/10/0011/08).

The second says that no person holding a licence from the NERC may, without the NERC's consent, be affiliated with the undertaking of another person who is in the business of generating, transmitting, distributing or trading electricity. This provision is as yet untried (EPSRA Section 69(2)).

According to the EPSRA Section 82(5), the NERC has the responsibility to consider, in respect of services in competitive markets, the prevention or mitigation of abuses of market power in its decisions regarding the setting of prices and tariffs; and whether to approve a merger, acquisition or affiliation. To do so, the NERC may require information from licensees, undertake inquiries and establish or contract with an independent entity to provide monitoring services.

In a case where the NERC determines that the EPSRA's Section 82(5) is violated, it may issue cease orders or levy fines not exceeding 50 million naira.

The rules governing bids on the ongoing and wide-ranging privatisations of the electricity sector also aim to prohibit the formation of cartels. Those rules prohibit any one bidder from buying more than two companies. Eleven distribution companies and 16 generation companies have been privatised already. A further 10 generation companies are set to be sold off in the first quarter of 2014.

Aviation

The Nigeria Civil Aviation Regulation 2012 Economic Regulations (the CA Regulation) made pursuant to the Act makes it unlawful for two or more parties in the civil aviation industry to enter into any contract, arrangement, understanding or conspiracy that acts as a 'restraint of competition' unless such agreement is authorised by the Nigerian Civil Aviation Authority (the NCAA).

The CA Regulation proscribes price fixing; division of the market allocating customers, passengers, suppliers, slots, territories or specific types of products or services; involvement in collusive actions; and limitation or control of development or investment in capacity, slots and any other market or operational factor.

The CA Regulation also prohibits the application of dissimilar conditions to equivalent transactions with other service providers thereby placing the other party at a competitive disadvantage and making the conclusion of an arrangement, understanding or contract subject to acceptance by the other parties of supplementary obligations and which, by their nature or according to commercial usage, have no connection with the subject of the contract.

Furthermore, the Civil Aviation (Repeal and Re-enactment) Act (2006) (the Aviation Act) Section 30(4)(g) requires every Nigerian carrier to file a true copy of every contract or agreement relating to the establishment of transportation fares, charges or classifications, or eliminating destructive, oppressive or wasteful competition or for any other cooperative working arrangement.

The NCAA is empowered to impose penalties and sanctions such as the suspension or revocation of certificates, licences and authorisations; fines; and imprisonment for a term of not less than six months (the Aviation Act Section 30(9)). The NCAA may prescribe the payment of compensation to any person adversely affected by a violation of the Act and the CA Regulation.

There have been recent hearings involving British Airways, Virgin Atlantic Airways and the NCAA. The NCAA indicted them and found them guilty of collusion and abuse of dominance on the Lagos–London route by arbitrarily fixing prices, imposing abusive fuel surcharges, taxes, fees and charges. However, the NCAA could not fine them because the legislation in force at the relevant time did not provide for a fine or penalties for the breach of anti-competition rules. This has been corrected in the legislation currently in force.

The NCAA may authorise a cartel that contributes to the improvement of availability or distribution of products and services or the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit; or imposes on the airline, service providers or operators concerned only such restrictions as are indispensable to the attainment of objectives referred to above; or does not afford such airline, service providers or operators the possibility of eliminating competition in respect of a substantial part of the products and services concerned.

II COOPERATION WITH OTHER JURISDICTIONS

There are not yet any detailed rules or cases concerning cartels with a foreign element. In our view, cartels with foreign elements are business combinations within the ISA for two reasons. First, prior to 2007 the ISA competition law provisions applied only to Nigerian companies. Since then, the provisions have not been confined to Nigerian companies and the ISA suggests that they apply to foreign companies. Second, it is difficult to believe that a foreign cartel, the economic impact of whose policies or conduct will be felt in Nigeria, will not be subject to Nigerian law.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

No general exemptions have yet been developed to the requirement of prior notification and approval. Small mergers (with a value below US$2 million) are exempted by law from review. The SEC is likely to extend this dispensation to business combinations.

Surprisingly, there is no general exemption for cartels sponsored by the federal government. Such an exemption was explicitly rejected in the ISA (2007) Section 118(4). There was such an exemption in the earlier ISA (1999) Section 99(4). The 2007 statute supersedes the 1999 statute.

A general exemption for intra-group transactions for mergers is in effect. The statute is silent on whether there is one for cartels. It is likely that the SEC will extend the reasoning on mergers to cartels.

IV LENIENCY PROGRAMMES

The Federal Ministry of Justice, headed by the Attorney-General, does not do competition law work, but nothing in the general law prohibits it from doing so. We do not have any regulations on leniency programmes offering reduced sanctions for conspirators who report to the law enforcement authorities on their own cartel activities or those of their co-conspirators.

V PENALTIES

The penalty for non-notification that is established in the ISA is a fine of no less than 100,000 naira and a further daily fine of 5,000 naira for as long as the infraction continues. The penalties are very light. It is also believed that such a combination will be void by law. There is as yet no clear judicial decision on the effect of the lack of prior notification for mergers or cartels. A judicial decision on prior notification and approval requirements in another context (for foreign investment) but under the same statute and with the same regulator indicates that the agreement to form the cartel will be void (*Faloughi v. Faloughi* (1995) 3 NWLR (Pt. 384) 434).

VI 'DAY ONE' RESPONSE

There are no rules and there has been no practice on day one responses.

VII PRIVATE ENFORCEMENT

The general regulator has not put out any policy or guidance statement on private enforcements.

VIII CURRENT DEVELOPMENTS

At the time of writing there are several bills before the federal legislature on competition law matters.[2] In Nigeria, only the federal government, not the states, can legislate on competition law matters.[3]

More than half the bills were introduced more than five years ago. It is far from clear whether any of them will become law in the near future. There are many bills for the legislators to review and little political urgency to pass a new statute in the near future.

None of the bills focuses exclusively on cartels, but many of them have specific provisions directed at cartels.[4]

A number of the bills aim to set up a regulatory agency devoted exclusively to competition law.[5] Others are calculated to strike at varieties of anti-competitive conduct that cartels may engage in, but deal with such conduct even where the actor in question is not a cartel.

2 The general competition law bills before the National Assembly are: the Federal Competition Bill (2002); the Nigerian Trade and Competition Commission Bill (2008), which was represented in 2012; the Federal Competition and Consumer Protection Bill (2009); the Federal Competition Commission Bill (2011); and the Restrictive Trade Practices, Monopolies and Price Control Bill (2011). The Petroleum Industry Bill 2012 is also before the National Assembly.

3 1999 Constitution Schedule 2 Part 1 (Commercial and industrial monopolies, combines and trust).

4 The Federal Competition Bill (2002) and the Federal Competition and Consumer Protection Bill (2009).

5 Nigerian Trade and Competition Commission and the Federal Competition Commission.

Appendix 1

ABOUT THE AUTHORS

GBOLAHAN ELIAS

G Elias & Co

Professor Gbolahan Elias is the presiding partner at G Elias & Co, one of Nigeria's leading business law firms. He is also a visiting professor of law at Babcock University, Ilishan where he teaches shipping, petroleum and arbitration law. He has published widely on a range of both historical and topical legal matters and served on numerous law reform committees, university administration boards and law journal editorial boards.

He read law at Magdalen and Merton Colleges, Oxford. He has DPhil, BCL (first-class honours) MA and BA (first-class honours) degrees from Oxford University. He was called to the New York Bar in 1990. He was an associate at Cravath in New York at the time and has been a senior advocate of Nigeria since 2005. He is a member of the Chartered Institute of Arbitrators.

He has advised on numerous privatisation transactions, including the sales of by far the largest insurance business (NICON) and the largest hotel business (the Abuja Hilton) in Nigeria at the relevant times.

He has also advised on the largest debt securities offering (Asset Management Corporation of Nigeria (AMCON) – 3 trillion nairas), largest equity securities offering (Ecobank Transnational), global depository receipt and Eurobond offerings. In the field of mergers and acquisitions, he recently advised on the largest spin-off in Nigerian history (by one of the leading banks) and on the largest acquisitions to date of electricity generation and distribution companies. He advised AMCON on the sale of Enterprise Bank to Heritage Bank, Nigeria's first-ever sale of a 'bridge' bank.

OBIANUJU IFEBUNANDU

G Elias & Co

Obianuju Ifebunandu is an associate at G Elias & Co. She read law at the University of Nigeria Nsukka. She also holds a Master of Laws degree in international business

law from University College, London. She is a member of the Young International Arbitration Group.

She has robust experience in various mergers and acquisition transactions and has been involved in several corporate restructurings. She was part of our team on the re-organisation of United Bank for Africa, a leading banking group, to comply with new Central Bank of Nigeria regulations, and the merger of Ecobank Nigeria Plc with Oceanic Bank International Limited. She also advised on one of the largest pre-export finance transactions (US$1.5 billion) in Nigerian history, and advised AMCON on the sale of Enterprise Bank to Heritage Bank, Nigeria's first-ever sale of a 'bridge' bank.

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