

HOW THE CLAIMANT AND THE FEDERAL COMPETITION AND CONSUMER PROTECTION TRIBUNAL ERRED IN THE ABUSE OF DOMINANCE CASE AGAINST MULTI-CHOICE

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In 2019, the Federal Competition and Consumer Protection Commission Act (FCCPA) was enacted into law. The FCCPA is Nigeria's first federal competition and consumer protection statute. The FCCPA also establishes the Federal Competition and Consumer Protection Commission (the Commission) and the Federal Competition and Consumer Protection Tribunal (the Tribunal), respectively, as the enforcer and adjudicator of both competition and consumer protection claims in Nigeria. On 29 March 2022, the Tribunal received its first case challenging among other things the alleged anti-competitive practice of Multi-Choice, the first defendant, a pay-TV provider in Nigeria.

In September 2022, the Tribunal delivered [judgment](#) in this case wherein it absolved Multi-Choice of any liability whatsoever for the alleged anti-competitive act. In this short note, I highlight a fundamental error in the reasoning of both claimant and the Tribunal. I also highlight some key takeaways from this case that

are likely to have an impact on litigating future competition-related claims under the FCCPA. This note draws on several posts I have previously written [here](#), [here](#), [here](#) and [here](#) in respect of competition issues in Nigeria.

Factual Background

The origin of this case can be traced to a complaint dated 19 May 2020 and titled 'Powers of the Commission to Regulate Price; Abuse of Power of Dominance in Market and Impending Price Hike by Multi-Choice/DSTV in Nigeria' made by the claimant against Multi-Choice before the Commission. In this complaint, the claimant alleged among other things that Multi-Choice's 'incessant price increment is repressive, unjustified, unfair and uncalled for'. Unfortunately, according to the claimant, the Commission failed to resolve this complaint in the period leading to the commencement of the case at the Tribunal. In March 2022, Multi-Choice announced another increase in the price for its pay-TV services. According to the claimant, the failure of the Commission to resolve the complaint can ground the invocation of the Tribunal's power as provided for in section 47 of the FCCPA.

The Fundamental Error

After dispensing with several procedural questions, the Tribunal was invited by the claimant to determine the substantive issues, among which was the question of whether Multi-Choice's history of price increases constitutes an abuse of a dominant position within the meaning of sections 70 and 72 of the FCCPA. Section 70, particularly subsections 1 and 2 describes the circumstances in which an undertaking is dominant or has market power in a particular market. Section 72 (1) prohibits the abuse of a dominant position by an undertaking while section 72 (2) provides a list of

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practices that are deemed to be abusive if engaged by a dominant undertaking (or a group of dominant undertakings). Of note here is charging an excessive price to the detriment of consumers provided in section 72 (2) (a), which was the basis of the claimant's case that Multi-Choice price increases constitute an abuse of a dominant position.

In arguing his case, the claimant among other things contended that Multi-Choice 'does not only occupy a [d]ominant position but has consistently abused their [d]ominant position ... on countless occasions unilaterally and independently without recourse to the consumer, customer or even the regulator (sic) increased the prices of its products and services'. The Tribunal in determining this question also stated that 'there is indeed no doubt that [Multi-Choice] occupies a [d]ominant position', and further that 'there is no proof that [Multi-Choice] (though occupies a dominant position) abused her position of dominance' thereby indirectly affirming the claimant's argument that Multi-Choice occupies a dominant position.

It is important to note that in resolving this question, nowhere in the judgment nor in any argument made by the claimant was the relevant market in which Multi-Choice is stated to be dominant, defined or identified. Herein lies the error of this case.

The Importance of Market Definition

The general rule in competition law when assessing dominance or market power is to first define the relevant market in which market power can be inferred. In other words, market definition is fundamental when assessing market power and if an abuse of such power has occurred or is likely to occur. The importance of market definition in a dominance assessment is reinforced by Regulation 5 (1) of the Abuse of Dominance Regulations 2022 (the

Dominance Regulations) which provides that delineating (or defining) the relevant market shall be the first step when determining whether an undertaking is in a dominant position.

In the words of the Commission in Paragraph 1 of the Notice of Market Definition 2021 (the Notice), market definition is the 'necessary first step needed to determine whether an undertaking has market power since there can be no market power without a market', thus market definition is the first step in any dominance assessment. According to Paragraph 2 of the Notice, the relevant market comprises two dimensions, namely the product market and the geographic market. Importantly, Paragraph 3 of the Notice provides 'Whilst it is not an end in itself, the definition of the relevant market in both its product, geographic and temporal dimensions often has a decisive influence on the outcome of a competition case'.

While the relevant product market comprises all those products which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, prices, brand, and their intended use, the geographic market on the other hand is defined in terms of the location of suppliers, and it includes those suppliers that customers consider to be feasible substitutes, which may be local, statewide, regional, national or wider. Therefore, product markets and geographic markets are respectively determined on the basis of consumer choice and supplier location.

In addition, case laws from other competition jurisdictions also support the statement that market definition is important when assessing market power. For instance, in the EU, Case 27/76 *United Brands Company and United Brands Continental BV v.*

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Commission of the European Communities [1978] ECR 207, makes clear that in order to determine market power, it is necessary to first define the relevant market. In extreme cases, the failure to properly define the relevant market can lead to the nullification of the decision of the competition authority as seen in *Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities* [1973] CMLR 199. In the US, the position is the same according to *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) where the US Supreme Court held that the ‘determination of the relevant market is a necessary predicate to a finding of’ an antitrust violation, and in *Queen City Pizza, Incorporated v. Domino’s Pizza Incorporated*, 922 F. Supp. 1055 (E.D. Pa. 1996) where a US District Court held that in order to state an antitrust claim, the ‘plaintiff must [first] identify the relevant product and geographic markets’.

Having established the importance of market definition, it becomes pertinent to note that failure to define the relevant market is fatal to any abuse of dominance case commenced under the FCCPA. This is because the obligation to define the relevant market is mandatory having reference to the use of shall in Regulation 5 (1) of the Dominance Regulations. According to well-established Nigerian case laws, the use of shall in a statute connotes a command that it is imperative, mandatory and admits no discretion. Thus, failure to define the relevant market in determining dominance is likely to render invalid any conclusion resulting from such a determination.

The Takeaways

Some of the key takeaways from the judgment of the Tribunal in this case are:

- i. It is not mandatory for an aggrieved consumer who seeks to enforce his right to first make a

complaint to the FCCPC as he can directly approach the Tribunal in the first instance;

- ii. For an undertaking to be considered as abusing its dominance, it must engage in all the practices listed in section 72 (2) of the FCCPA (Although I disagree with the interpretation of the Tribunal as each of these practices alone is sufficient to sustain a claim that an undertaking is abusing or has abused its position of dominance in the relevant market); and
- iii. To sustain a claim of excessive pricing within the meaning of Section 72 (1) (a) of the FCCPA, the claimant must make a clear showing that the price is either ‘excessive’ or ‘detrimental’ to consumers

Conclusion

Despite the failure of the claimant to define the relevant market, one wonders why Multi-Choice did not challenge this failure in any of its arguments made before the Tribunal on the ground that the claimant has not satisfied the burden of proof required to establish dominance, let alone abusing that position of dominance by engaging in an excessive pricing practice. Even if this standard of proof was met, for the claimant to be entitled to the reliefs sought from the Tribunal, he must establish that Multi-Choice’s alleged abuse of a dominant position resulted in an identifiable ‘injury’ to himself (or to existing competitors of Multi-Choice in the relevant market), rather than a violation of his right as he did before the Tribunal. An identifiable injury exists where there is evidence that the claimant has suffered (or will suffer) some harm as a result of the alleged abusive practice. In other words, there must be a causal link between this identifiable injury and the challenged excessive pricing practice of Multi-Choice. From a consumer-facing perspective, the identifiable injury will include

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the various ways in which Muti-Choice's alleged abusive practice impacts the availability and pricing of pay-TV services within the relevant market.

In any case, even if the relevant market was properly defined, the analysis must convincingly show that Multi-Choice is indeed dominant in that market. And this is no easy feat for pay-TV services when considering the rate of innovation in viewing broadcasting content, consumer choices and the likelihood of non-broadcasters entering the broadcasting market and/or owning broadcasting content, all key factors that must be considered when defining the relevant market in which Multi-Choice is alleged to have abused its dominance. Unfortunately, in this case, the claimant's statement that Multi-Choice is dominant and the Tribunal's confirmation of this statement in its judgment were neither supported by legal reasoning nor rigorous economic analysis but rather on the mere formulaic recital of the provisions in the FCCPA regarding the alleged abusive practice. Understandably, competition law is still nascent in Nigeria and both practitioners and enthusiasts look forward to robust jurisprudence that can help shape and grow this area of practice.

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