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ABUSE OF DOMINANCE

The Multichoice Excessive Pricing Case

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INTRODUCTION / BACKGROUND

In the recently decided and unreported Suit before the Federal Competition and Consumer Protection Tribunal (“**Tribunal**”) **Festus Sanmi Onifade & Anor v. Multi-Choice Nigeria Limited & Anor** before the Competition and Consumer Tribunal (the “**Tribunal**”)¹ the Claimants sought an order inter alia of the Honourable Tribunal to curtail the supposed excessive and arbitrary pricing of Multi-choice Nigeria Limited (the “**1st Defendant/Multichoice**”) in the Nigerian Pay-TV market. The particular reliefs sought by the Claimant include (i) a declaration that the increase in tariffs and products and services of Multichoice of May 2020 and any other subsequent proposed increase of 1st April 2022 is null and void in the absence of a resolution by the Federal Competition and Consumer Protection Commission (“**FCCPC**”) on a petition by the Claimant against Multichoice filed with the FCCPC in May 2020 (“**FCCPC Petition**”) (ii) an order directing and mandating Multichoice to revert to price regime prior to the price and products increase before April 2020; (iii) an order directing the Multichoice to adopt pay-as-you-view model of billing for its products and services.

The crux of the Claimant’s case is that the 1st Defendant has consistently and persistently

abused its dominant position in the Nigerian Pay-TV market by engaging in conducts such as recycling of the 1st Defendant’s content; failure of the 1st Defendant to adopt a Pay-As-You-View billing system in respect its products and services, implemented by the 1st Defendant in other African countries; failure of the 1st Defendant to make local television stations free for Nigerian consumers on its platform; and specifically that the 1st Defendant’s incessant price increment is repressive, unjustified, unfair and uncalled for.

while the Tribunal agreed with the Claimants that the 1st Defendant held a dominant position in Nigerian Pay-TV market, the Tribunal held that the 1st Defendant had not abused its dominant position as the Claimant had not adduced any evidence that the 1st Defendant had abused its dominant position by charging excessive and arbitrary pricing.

The Nigerian Pay-TV Market

The market context of the instant suit is the Pay-TV market wherein the 1st Defendant holds a dominant position. According to Statista, as of December 2019, Africa had over 28.4 million active Pay-TV subscribers, with Nigerians alone representing about 18.5 percent of this subscriber number. By 2025, it is expected that Africa’s total subscriber number will grow to 41.79 million, showing the adoption of the changes that now exist².

¹ *Festus Sanmi Onifade; Coalition of Nigeria Consumers v. Multi-choice Nigeria Limited and Federal Competition and Consumer Protection Commission in the Competition and Consumer Protection Tribunal*

² <https://businessday.ng/features/article/the-revolution-of-pay-tv-business-in-nigeria/> visited 8th November 2022

According to Stears Business, the TV broadcasting players within Africa have an extensive reach, especially within urban areas. Nigeria has the largest Pay-TV market on the continent, with an estimated 4 million Pay-TV subscribers accounting for 76% of the total TV market revenue³.

What is Dominance?

According to the Federal Competition and Consumer Protection Act No. 1 2018 (“**FCCPA**”), an undertaking is considered to dominant if it is able to act without taking account the reaction of its customers, consumers or competitors⁴.

Under the Nigeria Broadcasting Code (the “**Code**”, a broadcaster is in a dominant position when, in the opinion of the Code, that broadcaster is able to act without significant competitive restraint from its competitors⁵.

The point must however be made that being a dominant undertaking in the market does not run contrary to the FCCPA and FCCPA-Abuse of Dominance Regulation (“**Abuse of Dominance Regulations**”). Rather, what the law proscribes is the abuse of such dominant position. While neither the Tribunal nor the Claimant addressed the matrix for determination of dominance, it can be safely submitted that the 1st Defendant is a

dominant undertaking in the Nigerian Pay-TV market has it repeatedly increased the subscription tariffs unconstrained by the competitive forces of competing Pay-TV service providers and consumers.

Furthermore, the Abuse of Dominance Regulations provided further matrix for determination of dominance including but not limited to the following:

- i. **Market Share-** Market share provides the FCCPC with useful information about the structure of the market and the presence or otherwise of market power⁶. With respect to investigation on market dominance, data on market share provides the FCCPC with information on the market position of the undertaking under examination and that of their competitors. Market shares are typically measured in terms of volume, sales, capacity and reserves. The Abuse of Dominance Regulations raises a rebuttable presumption that an undertaking with a market share of 40% or above is presumed to be dominant. For the purpose of this Article, we have assumed in absence of authoritative data that

³ <https://www.stears.co/premium/article/pay-tv-vs-streaming-who-will-win-the-eyes-of-nigerians/> visited 8th November 2022

⁴ Section 70 of the Federal Competition and Consumer Protection Act 2018

⁵ See Section 9.0.11. of the Code.

⁶ Section 5 of the Abuse of Dominance Regulation 2022

- the 1st Defendant controls more than 40% of the market share in the Nigerian Pay-TV market. Indeed, a survey carried out by Economy & Lifestyle showed that seven of every 10 households make use of either DStv or GOtv owned by the 1st Defendant for entertainment and information purposes⁷.
- ii. **Financial Power-** In markets characterized by high investment to enter and/or operate, an undertaking which unlike its competitors have better access to finance may be considered dominant. Unlike many other Pay-TV operator the 1st Defendant is an affiliate of a South African Pay-TV giant with access to considerable financing.
- iii. **Access to Supplies and Markets-** In the instant case, the 1st Defendant enjoys from several contracts with content providers and intellectual property right owners which granted the 1st Defendant exclusive right to a wide bouquet of broadcasting content, especially sport and new programmes.
- iv. **Threats of New Market Entry and Expansion by Existing Competitors- Barriers to Entry-** Generally, if an industry offers high returns, new entrants gravitate towards such industry thereby putting a downward pressure on price towards competitive levels. However, there could be barriers to entry such as (a) Legal/regulatory barriers including licensing regimes and intellectual property rights. In the instant case, a new entrant will be required to obtain licensing from the National Broadcasting Commission which may be quite expensive and time consuming. Furthermore, entry that will be sufficient to compete with the 1st Defendant will require a wide bouquet of license in respect of intellectual property rights for content for which the 1st Defendant already have exclusive rights (b) factual barriers of entry such as where the entry is associated with high sunk cost. When sunk costs are high the incentive for entry is reduced. In the instant case a new entrant will incur substantial

⁷ <https://www.vanguardngr.com/2022/07/rising-paytv-subscription-costs-nigerians-now-go-back-to-dvd/> visited 7th November 2022

sunk costs including costs of obtaining a license, human capital, advertisement, and promotion and purchasing specialized assets which cannot be easily deployed to other ventures should the business fail. Furthermore, for an entry to wield competitive force, the entry must be:

- (a) timely depending on the characterisation of market and the FCCPC typically considers 1-2 years as a timely entry
- (b) likely- depending on the possible profitability of the entry, and profitability may be hindered by the factual barriers discussed above; and
- (c) sufficient- in that the entry must be sufficient to counteract the exercise of market power by the alleged dominant undertaking. That is, the entry must be of such magnitude to deter any attempt to increase price by the 1st Defendant and the entry should be of a large scale and not small scale for example entry into a niche area.

Thus, far there has yet to be a sufficient entry in the Nigerian Pay-TV market capable of competing with the 1st Defendant in recent

years save for the now defunct HiTV which entered the market in the 2000s.

From the above it can safely be argued that the Tribunal was correct in its finding that the 1st Defendant enjoys market dominance.

Abuse of Dominance

On whether Multichoice had abused its dominant position, the Claimant alleged inter alia that Multichoice (i) imposed exorbitant charges and arbitrarily increased fees without justification (ii) disconnected subscribers during valid subscription cycles (iii) failed to activate subscription days and weeks after subscription payment by consumers (iv) failed to adopt the pay as you view package option. The crux of the Claimant's case was predicated on Section 72(2)(a) of the FCCPA that the 1st Defendant had abused its dominant position by charging excessive prices to the detriment of the consumers. The Tribunal however agreed with 1st Defendant that there has been no abuse of dominance on three grounds. Firstly, the Tribunal agreed with the 1st Defendant that Nigeria operates a free market economy wherein customers can pay for goods and services of their choice and it is therefore inequitable for the Claimant to dictate to the 1st Defendant on how to run their legitimate and private businesses which will be prejudicial and detrimental to the economic interest of the 1st Defendant. Furthermore, that there are other satellite service providers in the market which the Claimants can patronize the Tribunal held that the Claimant failed to show that Multichoice

had abused its dominant position as there was no evidence that the 1st Defendant's price increases were either excessive or detrimental to consumers especially in free market economy like Nigeria. Thirdly, the Tribunal held that neither the FCCPC nor the Tribunal have the power to fix or regulates prices of goods and services in Nigeria, which can only be done by the President pursuant to the provisions of Section 88 of the FCCPA.

Excessive Pricing

Pursuant to Regulation 10(1) of the Abuse of Dominance Regulations, the FCCPC will regard a price as excessive where a dominant undertaking takes undue advantage of consumers by using its market position to charge an excessive price either in itself or when compared to competing products. The FCCPC will find an abuse if the following factors characterize the relevant market⁸:

- High barriers to entry- as discussed above, high prices serve as signal to potential market entrants of the business opportunities and the possibilities for supra-normal profits obtainable in the relevant market. Thus, when new entrants gravitate towards markets where incumbents charge excessive prices, there is a downward pressure on price because the new entrants introduce new

capacity, products, and innovation to the market. As discussed above, the Nigerian Pay-TV market is characterized by considerable barriers to entry which may at worst deter or at best delay a timely, likely and sufficient entry.

- Mature Markets- If the relevant market is mature where investment, innovation play a limited role, that is, innovation, technological growth and market expansion is very limited. This is however not the case with the Nigerian Pay-TV market which is characterised by technological growth and innovation. Especially the ongoing argument that there is considerable migration of subscribers from Pay-TV subscription to online streaming of sporting and entertainment contents.
- Lack of credible alternatives- The consumers/customers must lack a credible alternative product to switch to in response to excessive pricing by the dominant company. In view of the exclusive rights which the 1st Defendant enjoys in respect of "must have" sporting and entertainment contents such as the English Premier League, the UEFA Champions

⁸ Reg. 10(2) of the Regulations

League and news rights such as the CNN, BBC and Al Jazeera, one can safely argue that the average Pay-TV consumer lack credible alternatives to the 1st Defendant;

- External factors- The FCCPC will examine whether the price increase is the attendant consequence of an exogenous factor over which companies in the relevant market have no control. For example, increase in the price of raw materials, foreign exchange volatilities, hyper-inflation in the economy, increased taxation etc. Indeed the 1st Defendant attributed the tariff increase to several factors such as increase in the cost of 1st Defendant providing services including rise in the cost of diesel and other costs which have increased astronomically.

Regulation 10(3) of the Abuse of Dominance Regulations provide that is at least one of the market conditions highlighted above is not present, the FCCPC will consider that it is unlikely that very high prices would constitute abusive excessive pricing because the high prices can be regulated by new entrants or innovation. In the instant case, while the Nigerian Pay-TV market is characterised by high barriers to entry and lack of credible alternatives, the market cannot be

considered as matured but technologically dynamic and faces threats of migration of consumers to other technologies such as content streaming. Furthermore, macro-economic factors such as double-digit inflation, foreign exchange volatilities and high cost of doing business may have necessitated increase in price.

Furthermore, when investigating an allegation of excessive pricing by a dominant company, the Commission will inter alia assess the following price-cost differences. That is, the FCCPC will assess whether the price charged by the dominant company exceeds the costs actually incurred in producing the products (“**Price/Cost Difference**”). The price shall only be excessive if the cost/price benchmarks within the relevant market and that of competing products is substantial. The increase in price will be regarded as “substantial” if the price bears no reasonable correlation to the economic value of the product under analysis⁹. Excessive price will be found where the price charged is (i) excessive either in itself; or (ii) the price charged is excessive when compared to competing products in the relevant geographical market¹⁰. Hence, the Commission will inquire about the price that would have been expected to be charged by an efficient

⁹ Reg 10(4)(a)(5)&(6) of the Regulations

¹⁰ Regulation 10(4)(c) of the Regulations

company in a competitive market¹¹. The price charged will be considered excessive when compared with prices in comparable geographic markets. Thus, where a dominant undertaking charge prices that are appreciably higher than those charged in another geographic market and comparison of the prices have been made on a consistent basis, the difference in prices may be indicative of excessive pricing. In such a case, the dominant firm may be required to justify the price differences by reference to objective dissimilarities between the geographic markets¹². In such scenario the Commission will take cognizance of cost structures in the other comparable geographic markets such as taxes, wages, transportation, cost of raw materials and other local features peculiar to the comparable geographic markets¹³.

Regrettably, in the instant case the Claimant failed to adduce any cogent evidence comparing the pricing model of the 1st Defendant in the Nigerian Pay-TV market and the 1st Defendant's pricing model and pay-as-you view regime in other African countries to justify a finding of abuse of dominant position.

Conclusion

Nigeria operates an adversarial judicial system and judicial bodies will predicate its

decision on the facts pleaded and evidence adduced by the parties. As discussed above, the Claimant was unable to adduce cogent evidence of abuse vis-à-vis the provisions of the FCCPA and the Abuse of Dominance Regulations. Hence, the Tribunal's decision appears to be on firm grounds subject to an appeal to the Court of Appeal (if any)

¹¹ Regulation 10(4)(b) of the Regulations

¹² Jones, Sufrin & Dunne "Competition Law: Text, Cases and Materials"

¹³ Eugene Buttigieg



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