

CPI's Africa Column Presents:

Wake Up, NIPOST! It's Antitrust O'Clock!

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Background

In a manner reminiscent of the pre-2019 years, the Nigerian Postal Service (“NIPOST”) on July 24, 2020 unilaterally announced an increase to its license fees to be levied on courier service companies operating in Nigeria.² The announcement was met with outrage on social media as many Nigerians viewed this move by NIPOST as stifling businesses which were already struggling to survive during a global pandemic. As gleaned from the comments on social media, some dispatch companies already allegedly cancelled deliveries since the announcement.

To make matters worse, in a rather dramatic twist, the Honourable Minister of Communications & the Digital Economy, Dr. Patami, whose ministry superintends NIPOST, dissociated himself from the announcement, stating that it was not approved. He subsequently proceeded to direct that the implementation be stayed.

Admittedly, this suspension of the decision, as directed by Minister Patami, might just be a temporary relief, but its eventual or ultimate implementation will raise some antitrust red flags, with telling effects on NIPOST’s competitors and consumers. This piece therefore seeks to examine the antitrust implications of the conduct of NIPOST in a market where it operates as a regulator and a competitor.

Enter, Antitrust

Prior to February 2019, the Nigerian business and commercial space was not governed by general antitrust or competition law. What existed were rules regulating certain industries and certain transactions like mergers, takeovers, and other forms of corporate restructuring. Thus, businesses were generally free to conduct their businesses, even when such conduct stifles competition. However, this changed in February 2019 with the passing of the Federal Competition and Consumer Protection Act, 2018 (“FCCPA” or the “Act”) to promote competition in Nigerian markets.

The Act also established the Federal Competition and Consumer Protection Commission (“FCCPC” or the “Commission”) as the first antitrust body tasked with the statutory responsibility of promoting competition in the Nigerian markets. The Commission is vested with a wide range of powers to uncover and sanction anti-competitive practices such as price fixing, unfair pricing, misleading or deceptive representations, and, most importantly for our analysis, abuses of dominant position. It also reviews mergers and other business combinations which could impact competition.

Enter, NIPOST

Unlike the scattered provisions on antitrust that existed pre-FCCPA, the Act has a significantly wider coverage. Most importantly, it covers all aspects of the economy and its provisions bind all businesses including, agencies of the Federal Government or body corporates or agencies of subdivisions of the Federation engaging in commercial activities.³ In that regard, NIPOST comes within the statutory contemplation of the FCCPA. On the basis that it is a 100 percent

Federal government owned body, engaged in commercial activities.⁴ Therefore, its conducts are now subject to antitrust scrutiny and appropriate sanctions can be imposed on it, if found liable.

Moreover, not only is NIPOST engaged in commercial activities, it is also a dominant player (within the meaning of Section 70 of the Act)⁵ in the courier services market. This dominance is established by virtue of NIPOST being an operator in the market on the one hand, while having the power to influence an increase in the license fees payable by its competitors in that space. In essence, it plays the role of regulator and operator, which is a classic case of a government-owned entity abusing its dominant position.⁶ As such, it may (if it so wishes and as it appears to have attempted) distort competition in the market through amending the regulatory landscape to pursue its own economic objectives – most importantly, it may do so without regard to the effect on its customers, consumers, and competitors.⁷

An Antitrust Sinner?

Not so quick. It is important to note that it is not an antitrust sin to be in a dominant position.⁸ What the law frowns at is when a dominant position is abused, which is prohibited under Section 72(1) of the Act. For instance, being able to act independently of, and without regard to, the stakeholders in a market, as well as, being able to prevent effective competition from being maintained in a relevant market, will typically be considered as an abuse of dominant position. The Act actually provides examples: excessive pricing, refusing to grant access to essential facilities, engaging in exclusionary conduct, predatory pricing, etc.

Around the world, state-owned postal services have been caught for abusing their dominant positions, thereby infringing competition rules.⁹ For instance, in Germany, Deutsche Post was found to have behaved anti-competitively by using revenues from a market where it held a monopoly (letter-mail) to subsidise its predatory pricing strategy in a market open to competition (business parcel services).¹⁰ Similarly, in the United Kingdom – and perhaps more relevant to NIPOST – the Royal Mail was recently fined £50,000,000.00 (Fifty Million Pounds Sterling) by the Office of Communications (“Ofcom”) for abusing its dominant position by increasing the prices in its wholesale consumers’ contracts to prevent competition.¹¹

Returning home, we must ask ourselves where the licensing fees introduced by NIPOST would constitute an abuse of its dominant position. In our view, the increased fees could be considered as an exclusionary act (under Section 72(2)(c) of the Act) which could eliminate actual or potential competition in the courier services market. This is because the prices are seen as too high for many courier service companies to afford.¹²

If such companies are unable to pay the license fees, they would exit the market which would soften competition between the remaining players, including NIPOST. As such, we take the view that a credible case can be made that, through the increment, NIPOST has indeed abused its dominant position in the courier services market.

An Antitrust Redemption?

Again, not so quick – there is scope for redemption. Notwithstanding the foregoing conclusion, it is possible for an abuse to be justified under Section 72(3) of the Act, where: (a) it improves the production or distribution of goods or services or it promotes technological or economic progress, while allowing consumers to receive a fair share of the benefit; (b) it is indispensable towards achieving (a); and (c) it does not allow for the possibility of eliminating competition. In that regard, we must ask: (i) if the increment contributes to the improvement of production or distribution of goods or services or promotes technological or economic progress; and (ii) allows consumers to receive a fair share of the resulting benefit.

To this end, it is interesting to examine the claim made by Dr. Pantami that the new license fees are intended to weed out ‘bad eggs’ in the courier service space by raising the barriers to entry which would ultimately protect consumers and improve the overall efficiency of the market. On a plain reading, the justification falls within the purview of being justified by Section 72(3) of the Act.

However, whether consumers will receive a fair share of the resulting benefit is questionable. In the event that players are forced to exit the market, it is not entirely clear that consumers would benefit from the reduced choice, (as an aside, the mere possibility that players may be forced to exit the market forecloses the abuse from being justified under Section 72(3)(c), as noted above).

But the argument could still be made that reduced choice is advantageous for consumers, provided that the overall quality of the remaining options is improved. While this may seem to be a valid point, it does not address the crucial point that consumers are likely to bear the brunt and carry the cost of the increased licensing fees. Players on the market are unlikely to absorb the costs and will instead pass on some (if not most) of the costs to consumers. From that perspective, it is difficult to see how consumers will receive a fair share of the resulting benefit – not only could they face reduced choice, they could also be subjected to increased prices.

In the alternative, one could argue that the license fees are not indispensable towards achieving the legitimate aim of weeding out the bad eggs; as would be required by Section 72(3)(b). It is entirely possible that other less anti-competitive means could have been employed towards achieving the same goal – for instance, enforcing minimum operating standards and imposing fines for non-compliance.

Therefore, we take the considered view that the increment is an unjustified abuse of NIPOST’s dominant position, which would prevent effective competition in the courier services market.

Conclusion

Flowing from the foregoing discussion, two things are clear: (i) NIPOST is in a dominant position in the courier services market; and (ii) it has abused this dominant position with the increased fees which afford it the opportunity to eliminate competitors. Be that as it may, there is a clear solution – one which is already in the works – and this is to unbundle the

elements of NIPOST which compete in the market from the elements which set the rules of the market. An amendment to the Nigerian Postal Service Act, 1992,¹³ to that effect is currently being considered by the Nigerian Law Commission.

If so unbundled, it would enable NIPOST, the competitor, to compete freely and be subject to the necessary competitive pressures; which would improve the efficiency of the market, enhance the competitive forces, and ultimately allow consumers to benefit from *inter alia* lower prices.

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² The proposed license fees are as follows: Companies providing international courier services are to pay ₦20 million for a new license and ₦8 million annually for renewal of the license; national logistics companies are to pay ₦10 million and ₦4 million for renewal; regional logistics companies are to pay ₦5 million and ₦2 million for renewal; logistics companies operate within states are to pay ₦2 million ₦800,000.00 annually for renewal; municipal logistics companies will pay ₦1 million an annual renewal fee of ₦400,000.00; and the 'special SME' logistics companies will start paying ₦250,000.00 and the sum of ₦100,000.00 for annual renewal.

³ Section 2(2)(a) of the FCCPA.

⁴ In 2017, NIPOST made a profit of ₦9 billion. Nigerian Postal Services, <https://bpe.gov.ng/ongoing-transactions/>.

⁵ This provision provides that a dominant position is where a person or an entity involved in the production of, or the trade in, goods or the provision of services (an undertaking) is able to act without taking account the reaction of its customers, consumers, or competitors. To determine this, the Commission will examine *inter alia* the market shares, financial powers, the level of actual or potential competition in the market, etc. See: Section 72(3) of the FCCPA.

⁶ European Commission, "Roundtable on the Application of Antitrust Law to State-Owned Enterprises," ec.europa.eu; Deborah Healey, "Competition Law and State-Owned Enterprises: Enforcement," one.oecd.org; Pradeep S. Mehta, "Tailoring competition laws for state-owned enterprises," www.financialexpress.com; and Lars Kjølbye & Christos Malamataris (Latham & Watkins), "Postal services and competition law," www.lw.com.

⁷ As an aside, it is pertinent to note that licenses in competition law circles are a classic example of a legal barrier to entry. Therefore, the fact that NIPOST is responsible for enacting same further enables it to consolidate its dominant position in the courier services market. See: Concurrences, "Glossary – Barriers to Entry," www.concurrences.com.

⁸ Concurrences, "Glossary – Dominance (Notion)," www.concurrences.com.

⁹ Interestingly, Section 19(4) of the Indian Competition Act, 2002, actually states that whether or not an entity is a Government company or a public sector undertaking is a relevant factor in determining whether the entity enjoys a dominant position. In effect, there is a statutory presumption that state-owned enterprises are dominant. See: The Competition Act, 2002 (12 of 2003), www.cci.gov.in.

¹⁰ Commission Decision 2001/354/EC of March 20, 2001 relating to a proceeding under Article 82 (Case COMP/35.141 – Deutsche Post AG), OJ 2001 L 125.

¹¹ Office of Communication, "Royal Mail fined £50m for breaking competition law," www.ofcom.org.uk.

¹² William Ukpe, "Outrage on social media over NIPOST license fee increment," nairametrics.com.

¹³ Cap. N127, Laws of the Federation of Nigeria, 2004.