RELATIONSHIP BETWEEN COMPETITION LAW AND RESPONSIBLE BUSINESS PRACTICES*

Abstract
Responsible Business Conduct imposes a responsibility on businesses to take cognizance of the economic, social and environmental impact of their respective activities in order to achieve sustainable development. This means that in a bid to meet their current production needs, businesses should not in any way compromise the ability of generations to come to meet theirs. Competition law on the other hand prohibits activities by firms in form of collusion and concerted practices amongst firms which is targeted at distorting the market. While RBC entails collaboration amongst firms, competition law prohibits such collaborative activities such as price fixing, cartel activities and all forms of agreement which distort the equilibrium in the market and adversely affect the consumers. Competition law can be used as a tool in entrenching good business conduct by deploying and harnessing the available natural resources through productive and dynamic efficiency for the satisfaction of consumers. RBP in terms of sustainable consumption can also be deployed in terms of high quality products fit for the consumer.

Keywords: Competition Law, Business Practices, Relationship, Responsible

1. Introduction

Responsible business conduct is derived from the sustainable Development goals more particularly, goal 12 which focuses on sustainable consumption and production.[1] This implies that businesses should take cognizance of the economic, social and environmental impact of their respective activities in order to achieve sustainable development. This means that in a bid to meet their current production needs, businesses should not in any way compromise the ability of generations to come to meet theirs.[2] In furtherance of the sustainable development goals, it is important that businesses adopt safer modes of operations in order to alleviate the negative impacts of their activities on the economy, the society as well as other businesses. Economic development should be carried out without depleting the environment.

Responsible Business Practices stem from the need to protect the environment as well as the imperative of ensuring that natural resources are preserved. An in-depth focus on the preservation of the environment will ensure boost in economic growth by ascertaining that development is enhanced. The essential needs of the present and future generations in the area of water, energy, sanitation, as well as jobs, will be met through the inclusion of RBP. It focuses on the alignment of environmental, social and technological needs, fusing them with the need to manage attendant risks. National and transnational companies are encouraged not only to adopt practices that are sustainable but to also integrate these practices in their reporting system. This implies that firms should inculcate the SDG goals in their financial, environmental and social spheres of their respective businesses and this should be evidenced in their yearly reports. The inclusion of SDG should be a factor that distinguishes a business and can be adapted as a tool for lobbying.[3]

Competition laws are laws aimed at regulating business activities, most especially trade and commerce, enacted by the government at various levels. The main focus of competition law is to promote competition amongst firms by eliminating conducts which distort the competition process. Price fixing, agreement amongst undertakings, all forms of unlawful restraints and business conducts which enable monopoly are some of the prohibited conducts.[4] Competition law aspires towards motivating the manufacture of goods and services into the delivery of the finest quality at affordable prices in a bid to establish safeguards for the welfare of the citizens to ascertain that the needs of consumers are adequately provided for at prices which they can afford.[5] Competition law is not an end in itself as it is a tool for the economic advancement of the citizens who are the consumers.[6]

2. Prohibited Conduct under Competition Law

Competition law prohibits activities by firms in form of collusion and concerted practices amongst firms which is targeted at distorting the market. Some of these conducts are:

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[1] Sustainable Development Goals < https://www.undp.org/sustainable-development-goals > assessed on May 14, 2024
[2] J Nowag, Sustainability, Competition Law and Policy OECD Directorate for Financial and Enterprise Affairs Competition Committee 5
[3] (n 2) 5
[4] T Voorhees, The Role of Measurement of Quality in Competition Analysis < https://www.oecd.org/daf/ competition > assessed 15 March 2024.
[5] H Qaqaya H and G Limpimile, The Effects of Anti-Competitive Business Practices on Developing Countries and their Development Prospects <https://www.unctad.org> accessed 25 April 2024.
[6] N Reich, The Courage Doctrine; Encouraging or Discouraging Compensation for Antitrust Injuries <https://acle.uva.nl>accessed 19 April 2024.

Cartels

Competition law prohibits the activities of cartels. This is an arrangement whereby manufacturers or vendors collude amongst themselves with the intention to regulate and supervise the quantity and nature of goods produced and to further assign prices to such products and services.[7] When firms come to an agreement not to compete against each other, the result is the formation of cartels.[8] Cartels engage in activities that restrict the supply of goods and services, which leads scarcity as well as high cost of goods and services. Cartel is the coming together of independent entities to promote bid rigging, price fixing, market sharing, and control of production and supply of goods and services, all in a bid to control the market in order to maximize profit.[9] Cartel activities are antithetical to competition law as these activities adversely affect consumers.[10] The activities of these cartels cause inefficiency in the market, and ultimately, consumers are adversely affected by such activities as prices are increased above the normal levels obtainable in a competitive market.

Bid Rigging

Different governments procure goods for their various agencies through public procurement. This process involves the submission of tenders followed by a bidding process in order to determine the best possible cost since the goods are procured using tax-payer's money. Bid rigging occurs when firms actively work together to influence the end result of a purchasing procedure that involves the submission of bids.[11] There are several forms of bid rigging, where firms collude to have the bidding process done before the scheduled period, where firms decide amongst themselves on who will have the lowest bid or totally boycott the bidding process. Similarly, bid rigging is said to exist where firms decide to share the contracts amongst themselves; in cases where there are a good number of contracts requiring bids, firms can decide to share the contracts amongst themselves.[12] Rigging of bids distorts the bidding process, which ordinarily should be done in a fair, un-prejudicial and transparent manner and open to public scrutiny. When the right approach is adopted in a bidding process, the competition process is enhanced; that way; the government gets good value for the goods supplied. It has been said that bid rigging thrives where there are large concentrations of industries.[13]

Horizontal Agreement

Horizontal agreements are agreements between actual or potential competing firms operating on the same level of production.[14] Again, a horizontal agreement is said to arise when competitors reach an agreement not to compete with each other even when there are obvious elements of actual or potential competition. These horizontal agreements directly, obviously and intentionally eliminate competition.[15]Competitors usually enter into horizontal agreements to manipulate the competition process. Some examples of horizontal agreements include; agreements aimed at market allocation, agreements to tie products, agreements to fix prices, agreements aimed at boycotting other competitors, monopolies and others.[16] Another example of a horizontal agreement is where an entity engaged in the supply of goods enters into an agreement with a distribution firm, whereby the parties to the said agreement will not deal with any other firm that is not a party to such an agreement.[17] It was held in *Dansk Pelsdyravlerforening* v *Commission*[18] that the decision of a trade association in Denmark which prevented its members from selling their goods to other Member States but only to a subsidiary of the association was illegal.

Vertical Agreement

In the chain of distribution, manufacturers of goods usually seek ways to distribute their goods in order for such goods to effectively get to the consumers. When a firm carries out the services of manufacturing, sales, and distribution which may be achieved by the firm by setting up retail outlets, internet sales or through the use of distributors, the firm is said to be vertically integrated.[19] This process usually guarantees extreme coordination and organization than

[7] B A Garner, *Black's Law Dictionary* (9thedn, Thomson Reuters Business, 2009).243.
[8] OECD, 'Cartels and Anti-Competitive Activities' < https://oecd.org > accessed 6 June 2021.
[9] Y Okojie and L Ikuomda, 'A Review of Contemporary Legal Trends in Nigeria Law' in Ajibade B and others (eds) *The Role of Competition and Antitrust Law in Nigeria's Economic Development* (LexisNexis, 2017) 423.
[10] *Ibid.*
[11] S M Colino, *Vertical Agreements and Competition Law: A Comparative Study of the EU and US* (Hart Publishing 2010) 1.
[12] (n 11) 1
[13] S E Weishaar, *Public Procurement Law and Economics: Approaches to Bid Rigging* (Edward Elgar Publishing Company, 2013).29.
[14] W Frenz, *Handbook of EU Competition Law* (Springer Heidelberg 2016) 565.
[15] D Gerber, *Law, Markets and Globalization* (Oxford University Press 2010) 129.
[16] K Kadian-Baumeyer, 'Horizontal and Vertical Agreements that violate the Sherman Act' < https://study.com > accessed March, 2024.
[17]R Whish R and D Bailey, *Competition Law* (7thedn, Oxford University Press, 2012) 550
[18] *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II 1931.
[19] Whish and Bailey, (n 17) 618.

where third parties render such services.[20] In the alternative, a firm may decide to engage the services of third-party firms in carrying out such services that ensure that the manufactured goods reach the target consumers. For instance, the manufacturer of beverages can engage the services of other independent entities to distribute and retail its beverages. Firms may sometimes enter into vertical agreements in order to cut costs and maximize profit. A vertical agreement is said to arise where there is any arrangement between undertakings which operate at one level of production for an act relating to the purchase, sales and resale of goods and services which involves other undertakings operating at a different level of production.[21] Vertical agreements are usually entered into by firms engaged in different levels of production in order to complete the distribution chain. Such vertical agreements are not generally frowned upon under competition law; however, where such agreements are entered into by two or more firms which have a dominant position in the relevant market or where such an agreement has links with other similar agreements, it may become a subject for competition law investigation.[22] In this case, the vertical agreement may distort competition by restricting market efficiency, thereby, negatively impacting consumers.

Concerted Practice

Concerted practices include various forms of harmful correlated and unlawful activities targeted at gaining unlawful advantage, which independent firms engage in. These are practices and collusive behaviours which some undertakings engage in with a view to downplaying market uncertainties.[23] For this conduct to be established the elements of a contract need not be present; rather, such conduct can be inferred from the coordinated activities evidenced by the behaviour of the parties to the concerted practice.[24]Concerted practices can take the form of direct or indirect informal agreements targeted at stalling market efficiency, influencing market conduct, or predicting future market trends to competitors.[25] From the above, parties to a concerted practice do not need to enter into an agreement *stricto sensu*; the agreement to enter into such an anti-competitive practice can be done orally or inferred from the comportment of such entities.

3. The Nature of Agreement under Competition Law

Competition law frowns at agreements entered into by cartels which are aimed at restricting competition. Cartels mostly enter into price-fixing agreements which harm competition. As such, their activities are prohibited under several domestic laws and on the global scene, their activities are aggressively prosecuted.[26] For instance, in the US, heavy fines are imposed on cartels, while in other jurisdictions, cartel activities attract terms of imprisonment. In 2017, the European Court of Justice upheld the fine imposed by the general court in the Philips and LG cathode ray tubes cartel. The court held that the group together with its parent company constituted a single undertaking engaged in vertically integrated cartel activities.[27]The US Sherman Act 1890[28] prohibits every contract in restraint of trade while TFEU[29] makes illegal agreements and concerted practices between undertakings to fix prices expressly or impliedly.

On the subject of anti-competitive agreements, it is only natural for undertakings to enter into all forms of agreements in the course of their business and to analyze these documents in line with the requirement of competition law is an arduous task as one agreement can capture an assortment of conducts. Parties may enter into agreements for the exchange of ideas, for the purposes of efficient business transactions, for strategic alliances, to promote research and development and so on. According to him, there has to be a test or guidelines put in place to scrutinize these agreements to determine whether these agreements are anticompetitive or otherwise, and this scrutiny requires an individual analysis.[30] It was held in *Arizona* v *Maricopa County Medical Society*[31] that huge costs are incurred in all efforts to determine the fairness and practicability of every agreement. These analyses usually involve a complex litany of legal action, and in most cases, the judges lack the expertise required to determine the convoluted economic impact of such agreements.

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[20] *Ibid.*
[21] Whish and Bailey, (n 17) 180.
[22] Office of Fair Trading, 'Vertical Agreements: Understanding Competition Law' <https://assets.publishing.service. gov.uk> accessed 9 March, 2024.
[23] Concerted Practices < https://lexisnexis.co.uk > assessed 10 April 2024.
[24] Whish and Bailey, (n 17) 567.
[25] European Commission, Glossary of Terms used in EU Competition Policy <https://ec.europa.eu> assessed 1 June, 2021, Concerted Practices, Concurrent Antitrust Publications and Events < https://concurrences.com > accessed 14 May, 2024.
[26] J Duns and Others, 'Comparative Competition Law' in A. Hay (ed) *Anti-Competitive Agreements; The meaning of Agreements* (Edward Elgar Publishers 2017) 56.
[27] Court of Justice Upholds Fine Imposed on Philips and LG Cathode Ray Cartel
< https://www.stibbelexology.com> accessed 16 April 2024.
[28] Sherman Act 1890, s1.
[29] Treaty of the Functioning of the European Union (TFEU), art 101.
[30] Duns and Others, (n 26) 80.
[31] (1982) 457 US 332.

Since firms regularly enter into various agreements in the course of running their businesses, there is a need for such firms to be properly directed for all the stakeholders to get the best out of competition agreements. Consequently, there is a need to strike a balance between having agreements that are beneficial to everyone and the need to have assurances in business transactions. Firstly, there needs to be a system of classification and characterization of agreements to determine which agreements are prohibited under competition law and which are allowed. Secondly, measures need to be put in place to appraise agreements. Agreements need to be appraised to determine whether they conform to the antitrust standard, and proper criteria for such evaluation must be set out. One of the overriding necessities for evaluation is determining the predominant goal of competition law within the jurisdictions as several states have varying goals that they attribute to competition law.[32] In the business world, various forms of agreement exist, and these agreements govern and define various existing relationships while imposing varying obligations on parties. However, some of these agreements create contractual obligations known as vertical restraints. Vertical restraint is seen in agreements where a dealer agrees with a supplier not to sell goods to other distributors within a particular geographical region. It is also evident where a franchise agreement is entered into with a clause not to sell goods and services to any supplier who is not a party to the franchise agreement.[33]

The distinct nature of the horizontal and vertical agreements is that both categories of agreements have the propensity of upsetting the competition process in an unpropitious manner. Irrespective of the form of an agreement, once the potential to harm the competition process is perceived, the machinery of competition law is set in motion in order to nip every adverse consequence in the bud.[34] In the case of *Consten Grundig v Commission*,[35] the court held that the provisions of the TFEU envisage both horizontal and vertical agreements. As such, the provision applies to all agreements engaged in by parties with the likelihood of disrupting the competition process within the relevant market. Conversely, in the U.S, certain conducts are tagged illegal at face value, and this dispenses of the need for any further inquiry into the nature of such agreements, while at other times, further enquiry is embarked on by competition authorities to determine the illegality or otherwise of such agreements. This is known as the rule of reason, and this rule has gained traction over the years. In the EU, illegality is readily attributed to horizontal agreements, whereas the rule of reason is readily applied to vertical agreements. Presently, the practice is to assess every conduct on a case-by-case basis, as it has been deduced over time that the aftermath of a vertical agreement can be anti-competitive as well as pro-competitive.

4. The Nexus between Competition Law and Good Business Conducts

In reality, there is need for interdependence amongst businesses. Competition law is not averse to these interactions and agreements amongst businesses as a general rule. However, agreements amongst businesses which tend to restrict competition are prohibited by competition law. Some of the restricted agreements are cartel agreements. as these agreements mostly tend to restrict competition. It is assumed that information relating to production, prices, distribution are such that is private to a firm. However, when firms come together to discuss information regarding to quantity of goods to produce, prices, market allocation, quality of products and distribution mechanisms to adopt, such agreements and arrangements are anticompetitive in nature. Thus, competition steps in to ensure that these agreements do not see the light of the day as they will upset the efficiency in the market and affect the consumers adversely.[36]

For an agreement to be prohibited by competition law, the impact of such agreement must be such that is contrary to at least some of the parameters set by competition law. Some of such parameters which may be adversely affected include; innovation, product quality, product heterogeneity, and output amongst others. Usually, in analyzing an agreement, the nature of the agreement in terms of the intention of the parties to the agreement as well as the extent of their plans to collaborate is examined. Again, the relationship between the parties resulting in the agreement to collaborate is also a factor to be considered. The circumstances culminating in the exchange of information in the first place as well as the market strategies deployed more particularly as private information regarding prices and quantity of goods will be penalized as they are tantamount to cartel activities. All these determine if there is a need for competition authorities to step in or otherwise.[37]

The restrictive effect of all other information exchanged by competitors will be adjudged on a case-by-case basis. For instance, the very nature of the information will be assessed as per its level of confidentiality as certain information should not be exchanged amongst competitors. Again, information that will likely make it possible for competitors to predict the next step to be taken by the other party enabling that party to adjust accordingly is prohibited. That is

[32] Duns and Others, (n 26) 81.
[33] V Verouden, 'Vertical Agreements and Impact' (2008) (3) (1813) *Competition Law and Policy* 1813.
[34]B Saddique, 'Horizontal and Vertical Deal Structures, Legal Distinctions' (2018) *Researchgate* <www.researchgate.net/ publications > accessed 16 August 2021.
[35] *Consten Grundig* v *Commission* [1966], ECR 299.
[36] Weishaa (n 13)26
[37] Ibid 11

to say, the more the volume of information exchanged, the higher the probability of the parties to predict each other's next move. Competition authorities believe that information which is likely to predict the future actions of competitors is more worrisome than information relating to past dealings. Again, the frequency of information exchange creates a higher possibility of competitors mirroring each other's activities, thereby, inadvertently engaging in anti-competitive conducts. It has also been noted that competitors are able to get into these concerted agreements in markets which are more concentrated. Similarly, where there is no innovation in terms of large range of product availability, it is easier for competitors to enter into concerted agreements.[38]

Responsible Business Conduct requires collaboration and corporation amongst various enterprises. These collaborations may require these enterprises to have discussions on sustainable consumptions and production, coming together to find ways of having eco -friendly products and distribution process. The exchange of information may be shared directly or through a neutral party. Information can be exchanged regarding cost saving measures for both the firms and the consumers. Information may be shared amongst firms using the same suppliers to ensure that the suppliers also engage in responsible business conducts. The challenge however, is that this information if not properly scrutinized and censored may degenerate into anti-competitive conducts as they may subtly or inadvertently arm competitors with business strategies adopted by competitors. However, competition authorities may not object where the essence of the collaboration is purely to promote responsible business conducts.[39]

In another vein, competition law can be used as a tool in entrenching good business conduct by deploying and favorably harnessing the available natural resources through productive and dynamic efficiency for the satisfaction of consumers. Where a manufacturer in achieving dynamic and productive efficiency adopts the principle of dynamic consumption, while another manufacturer does not factor in this principle and the products manufactured are sold at the same price, it is assumed that the consumers will choose the product which has been sustainably manufactured. RBP in terms of sustainable consumption can also be deployed in terms of high quality products fit for the consumer. Sustainability consideration should play a huge role in merger cases. This can be streamlined using the theory of harm. For instance, in the case of *Aurubis/Metallo*,[40] the parties were copper scrap purchasers. The European Commission expressed its reservation stating that the proposed merger will result in a drop in the price of copper scrap, thus resulting in the higher emissions of CO2 due to deterioration in the production cycle. In another case *Bayer/Monsanto*, [41]the EC put into consideration, the development of better quality product as an incentive for considering a proposed merger.[42] Again in *Bayer/Monsanto* [43], the EC opined that the proposed merger if allowed would alter the diversity of the seed available to farmers leading to use of herbicides and pesticides derived from fossil fuel.[44]

5. Conclusion

While RBC is aimed at sustainable consumption and production by businesses and requires collaborative efforts by firms, competition law prohibits collusive conducts amongst firms aimed at restricting market efficiency. However, the two concepts can co-exist through collaborations so long as the said collaborations are not targeted at the promotion of conducts which disrupt the competition process such as; price fixing, cartel activities, bid rigging, abuse of dominant position and other concerted practices. Businesses in furtherance of sustainable development goals should adopt environmentally friendly ways in the production, manufacture and distribution of goods. Competition authorities are encouraged to incorporate sustainable development goals in competition law enforcement and in giving approval for mergers.

[38] Weishaa (n 13) 12
[39]Sustainable Development Goals < https://www.undp.org/sustainable-development-goals > assessed on May 14, 2024
[40]]2020] Case m>9409
[41] *Bayer/Monsanto* C/2018/1709 [2018] OJC 459/10
[42] The Role of Sustainability in Merger Control < https://www.oxera.com/insights/agenda/articles/the role- of -sustainability-in-merger-control/ >
[43] *Bayer/Monsanto* C/2018/1709 [2018] OJC 459/10
[44] *Ibid*