ALP ADVOCATES

ALP LAW REVIEW SERIES
Article No 2/2021

August 13, 2021

COVID-19 and Price-Gouging by Private Medical Facilities: An Urgent Need for a Competition Law in Uganda.

Introduction

COVID-19 has continued to hold sway as a pandemic on public health and healthcare. While other parts of the globe were into fourth and fifth waves as of mid-2021, Uganda was hit with its second wave of the pandemic that resulted in country-wide lockdown (and shelter-in-place) measures from June 26, 2021 to July 30, 2021. However, the talking-point has not been the lockdown (and with it, attendant restrictions on people movement) as with the rise in hospitalizations that followed an increased number of infections. In the fortnight leading to the lockdown, June 11-25, 2021, Uganda witnessed 19,613 new cases (from testing) and 422 deaths (with deaths amounting to more than a doubling of the previous figures since the onset of the pandemic in March 2020). A few days to the lockdown, as of June 23, 2021, the Ministry of Health statistics showed 1,099 COVID-19 patients were admitted in hospitals across the country. With more hospitalization required, the media has been awash with reporting of high costs of admission and treatment in private medical facilities.[1] Patients are required to pay upfront admission fees and a daily fee is billed for treatment that can last for 14-30 days. This state of COVID-19 healthcare resulted in public outcry over what is viewed as exorbitant and exploitative medical fees and charges.

This article assesses the state of the health sector in Uganda in the light of the high costs of COVID-19 treatment and care. It addresses the regulatory framework, or lack thereof, in addressing what is evidently excessive pricing—or worse, price-gouging—and profiteering. In doing so, it explores what may also amount to undesirable practices and abuse of dominant position on the part of the private medical facilities. And, in that regard, it addresses the question whether it is high time for Uganda to enact and put in place a *competition* law and regulatory framework.

Uncovering Uganda's regulatory framework for pricing and protection of patients

The public health facets of the COVID-19 pandemic are now well-understood, defined by primarily prevention, mitigation and containment measures—in terms of sanitizing, face-masks, and social distancing. Further, it has been defined by COVID-testing (which has served to inform the extent of spread and medical diagnosis) and quarantine and isolation. At the tail-end, for severe COVID-19 cases, this had been defined by hospitalizations for treatment and care.

Notably, Uganda has not faced concerns over the cost of sanitizers and face-masks—for apart from initial instances of hoarding of sanitizers at onset of the pandemic in 2020, prices have been within reach of average Ugandans. Therefore, it has not had to deal with the concerns over hoarding and excessive prices for hygiene products and masks—other countries such as Botswana, Mauritius, Malaysia, Nauru, Pakistan, and so on have had to invoke various regulatory frameworks, including *price-control, consumer protection,* and *anti-hoarding*.[2] While there have been concerns about the cost of COVID-19 testing, this has not resulted in as much public outcry as the cost of COVID-19 treatment and care.

---

[1] Abet, T., 'Hospitals charge Shs5m per day to treat Covid-19', *Daily Monitor*, June 16, 2021; Muhumuza, R., 'As virus surges in Uganda, hospitals accused of profiteering', *AP News*, June 26, 2021. Notably, the situation in Uganda was not unique, as neighbouring Kenya had already faced a similar outcry and concern: Oketch, A., 'Hospitals demanding exorbitant deposits for Covid-19 patients', *Nairobi News*, April 2, 2021.

[2] See e.g., *Essential Supplies and Services (Availability of Supplies at Fair Price) Regulations* SI No 57/2020 (Botswana) (March 27, 2020); *Consumer Protection (Consumer Goods) (Maximum Mark-Up) (Amendment) Regulations* GN No 59/2020 (Mauritius) (March 20, 2020); *Price Control and Anti-Profiteering (Determination of Maximum Price) (No 2) (Amendment) Order* PU(A) 107/2020 (Malaysia) (March 27, 2020); *Prices Regulation (Prohibition of Hoarding and Price Inflation) Order* SL No 5/2020 (Nauru) (May 21, 2020); *COVID-19 (Prevention of Hoarding) Ordinance* No II/2020 (Pakistan) (April 20, 2020).

As a context, it is to be understood that pricing of goods (sanitizers, masks, PPE, etc.) and services (healthcare) is taking place in a liberalized, free-market economy that has been the mainstay of Uganda's economic environment since 1990s. It is in this free-market economic environment that COVID-19 treatment and care is being managed. The private hospitals are pointing to high cost of essential medicines and drugs, PPE and ventilators, care providers (specialists, nurses, etc.) and, as several claim, infrastructure (in outfitting medical facilities with ICUs, beds, etc.).[3] As much as this might be the case, the same is no justification for the price-gouging in hiked fees for admission of 5-10m/=, separate from daily charges of 2-5m/=.

The second wave of COVID-19 pandemic found the country in a situation where private medical facilities are, for various reasons, preferred to government facilities by the elite and middle-class. The government facilities, which attract a majority of the country's low class population, continue to face under-staffing, shortage of specialists, equipment, and drugs. This has painstakingly forced even the low income-earners to resort to private medical facilities that have assumed, in the wake of the pandemic's second wave, a dominant position in the provision of health services.

The existing regulatory framework has, by and large, enabled private medical facilities to charge high admission and treatment fees. Given the free-market environment, there are no satisfactory price control and consumer protection regulatory measures to address the situation. The *Public Health Act*, as the regulatory framework for healthcare in the context of disease prevention and control, grants the health minister rule-making authority for "regulation of hospitals used for the reception of persons suffering from an infectious disease",[4] but this may not be inferred to include regulation of healthcare fees and charges. On its part, the *Medical and Dental Practitioners Act* allows health practitioners to demand "reasonable charges" for medical treatment, appliances, and prescribed drugs.[5] The reasonableness of healthcare charges, as provided by legislation enacted in 1998, reflects the free-market economy in Uganda at the time and since then. With the demand for admission outstripping bed-space, the free-market economics has enabled private medical facilities to charge admission fees of 5-10m/=. In the wake of the public outcry over the healthcare fees, the High Court issued in a civil matter—*Moses Mulumba & Another v Attorney General & 2 Others*—orders of mandamus against the health minister and the Medical and Dental Practitioners Council to make "regulations on fees chargeable by hospitals for the management and treatment of patients suffering from COVID-19" and the council to "make recommendations to the Minister of Health on reasonable fees chargeable for persons seeking and accessing COVID-19 treatment in hospitals."[6]

Need for competition regulatory framework—experiences from other common law countries

From a more fundamental regulatory perspective, the outcry over COVID-19 treatment and care costs is the result of the lack of a comprehensive *competition* law. As noted, the second wave of COVID-19 found the country with a number of private medical facilities in a sense occupying what may be regarded as a dominant position in provision of health services. The question is: are they engaged, in the hiked COVID-19 treatment and care costs, in acts of abuse of dominant position or excessive pricing and profiteering?

Notably, as a Partner State of the East African Community (EAC), Uganda is required to enact a *competition legislation* and establish a *regulatory authority*. It is 15 years since enactment of the *East African Community Competition Act* 2006, and other EAC Partner States, with the exception of Uganda and South Sudan, have enacted national competition laws. Uganda has had a draft *Competition Bill*, 2004 that till to-date has not been passed into law, although the Ministry of Trade, Industry and Cooperatives developed a national competition and consumer protection policy in 2016.

Competition law is primarily concerned with behaviour of enterprises in the market place, as it aims to create a market in which producers and suppliers compete freely on the quality of products and services they offer and the prices they charge rather than through the *improper exercise of market power*. On the consumers' end, competition law helps ensure not only quality goods on the market but to address issues of customer exploitation from exorbitant price increases. Presently, Uganda only has sector-specific laws that address competition regulation in particular sectors of

[3] Abet, T., 'Covid treatment: Hospitals defend Shs5m per day bill', *Daily Monitor*, June 23, 2021-

[4] *Public Health Act* Cap 281, s 29(k)-

[5] *Medical and Dental Practitioners Act* Cap 272, s 42(1)-

[6] *Moses Mulumba & Another v Attorney General & 2 Others*, Misc. Cause No 198/2021 (order dated July 8, 2021).

the economy (financial services, insurance, petroleum supply, communication, etc.).[7] Yet a more comprehensive competition law would have allowed a competition regulatory authority to address anti-competition practices that are evident in the country's COVID-19 treatment and care crisis.

The significance of a *competition law* in the context of healthcare during the COVID-19 pandemic is evident in the approaches several common law countries have taken, including Kenya, Namibia, South Africa, and the United Kingdom.

On its part, South Africa passed Competition regulations related to COVID-19 (on consumer and customer protection)[8] and its Competition Tribunal issued rules for COVID-19 excessive pricing complaint referrals.[9] Additionally, it issued a COVID-19 "block exemption" for the healthcare sector.[10] The block exemption is to enable healthcare actors to cooperate on ensuring that there is adequate capacity and stocks at healthcare facilities throughout the country in order to respond to the COVID-19 national disaster. The exemption is to enable private and public healthcare service providers to cooperate and provide the necessary treatment and care (save it does not extend to agreements in respect of prices to be charged (i.e. price-fixing)). The healthcare actors covered by the exemption include hospitals or healthcare facilities, medical suppliers, medical specialists or radiologists, pathologists, laboratories, pharmacies, and healthcare funders. It is to be noted South Africa's Department of Health is central to the cooperation between various healthcare actors, in that it can issue a request for such cooperation where, presumably, specific areas of coordination are identified (e.g. on the basis of limited capacity, lack of stock, etc.) and is also to coordinate with the relevant healthcare actors.

In an approach similar to South Africa, Kenya's Competition Authority issued block exemptions guidelines for certain priority sectors (including private healthcare), which call for collaborations by healthcare actors (manufacturers, distributors, etc.) and in the procurement of various COVID-19 consumables and pharmaceuticals.[11] The guidelines also call for the health sector's collective engagement with the financial and insurance sectors in relation to credit and insurance claims.

The United Kingdom's approach is not dissimilar—in issuing "public policy exclusion" orders under its 1998 competition law, it excludes certain agreements that relate to information-sharing, staff-sharing and deployment, joint-purchasing, sharing facilities and division of activities between independent healthcare providers.[12] The objective was to allow healthcare companies to ensure the continuity of supply of essential healthcare products and services to the National Health Services as it battles the COVID-19 pandemic. As with South Africa's exemptions, the exclusion does not extend to any form of information sharing in relation to "costs" and "pricing" and this is expressly not permitted.

Given the concerns raised by proprietors of Uganda's health facilities in a meeting with the Prime Minister—procuring essential supplies, cost of PPE, setting up oxygen plants, rationalization of drug use and regulation of high-frequency drugs, etc.[13]—these would, in light of South Africa and UK approaches, be addressed under a competition regulatory framework. Further, collaborative arrangements, as envisaged under South Africa and Kenya block exemptions and the UK's public policy exclusions, address the "supply-chain" concerns Uganda's private medical facilities provide as excuses for the high-priced cost of COVID-19 treatment and care.

---

[7] See, e.g. *Uganda Communications (Competition) Regulations* SI No 93/2019- The regulations are one of 18 regulations issued in 2019 by the regulator as part of broader measures to ensure *fair competition* in the communications sector.

[8] *Competition Act: Regulations related to COVID-19 on Consumer and Customer Protection* GoN No R350/2020 (March 19, 2020).

[9] *Competition Tribunal Rules for COVID-19 excessive pricing complaint referrals* GoN No R448/2020 (April 3, 2020).

[10] *COVID-19 Block Exemption for the Healthcare Sector* GoN No R349/2020 (March 19, 2020). The exemption was later amended: *COVID-19 Block Exemption for the Healthcare Sector Amendment* GoN No R456/2020 (April 18, 2020). South Africa issued similar block exemptions for the hotel industry and the banking and retail property sectors. Recently, in the wake of the civil unrest and to respond to disruptions to supply chains for essential goods, the country issued another block exemption: *Block Exemption for the Security of Supply of Essential Goods* GoN No 616/2021 (July 15, 2021). In the context of COVID-19, the essential goods include, among others, medical and hygiene supplies (including pharmaceutical products). Similar to the 2020 health block exemption, this exemption does not apply to agreements or practices involving price-fixing or collusive tendering and the suppliers of essential goods are subject to the COVID-19 competition regulations (n 8 above).

[11] *Block Exemption Guidelines on Certain COVID-19 Economic Recovery Priority Sectors* 2021 (February 3, 2021).

[12] The exclusions were issued in respect of England and Wales: *Competition Act 1998 (Health Services for Patients in England) (Coronavirus) (Public Policy Exclusion) Order* SI No 2020/368 (March 28, 2020); *Competition Act 1998 (Health Services for Patients in Wales) (Coronavirus) (Public Policy Exclusion) Order* SI No 2020/435 (April 21, 2020).

[13] Abet, T., 'Covid treatment: Hospitals defend Shs5m per day bill', *Daily Monitor*, June 23, 2021-

Significantly, competition authorities (as well as other regulators) in common law countries have shown efficiency (and swiftness) in dealing with anti-competition practices during the pandemic. In South Africa, the country's Competition Tribunal handled a complaint in respect of face-masks sold at particularly high prices in the midst of the pandemic, and considered the prices unjustified and to amount to "excessive pricing" and "abuse of dominant position" since the existing COVID-19 situation conferred "market power" on the errant company over its customers.[14] The high-priced cost of treatment and care in Uganda's private health facilities—especially the admission fee of 5-10m/=—is in that sense an abuse of dominant position that they have acquired as the result of the demand for treatment and care by severely sick patients. In Kenya, the Competition Authority in March 2020 penalised a supermarket for raising the price of hand sanitizers and treated the matter as unconscionable conduct contrary to the *Competition Act* 2010.[15]

On the other hand, in Namibia, a medical aid funds' regulator issued a notice declaring a practice of curtailing the use of benefits that members are entitled to—in requiring members to pay upfront for a COVID-19 test or refunding members for upfront payments only if the COVID-19 test result is positive—as an "undesirable practice." The regulator noted: "[t]his practice is not in the interest of the public."[16] If Uganda had a competition regulatory framework in place, comparable practice of requiring upfront admission fees of 5-10m/=—as well as hassles over members accessing NSSF contributions to meet COVID-19 medical costs—could be sanctioned as undesirable practice.

Some concluding observations

In light of the overview of Uganda's regulatory framework on price control and consumer protection (or lack thereof) as against the regulatory approaches adopted by other common law countries to COVID-19 and healthcare, it is evident the country needs to adopt certain legal and regulatory measures. As an immediate measure and response, the Ministry of Health needs to develop *ad hoc* arrangements for collaboration between the various healthcare actors to address procurement and distribution of medical supplies (drugs, oxygen, PPEs, etc.) care providers' costs (e.g. specialists). More importantly, in light of the orders of the High Court in the *Mulumba* case, the Minister needs, after consultations with the medical practitioners council, to issue regulations on "reasonable" COVID-19 healthcare fees.

As for a more long-term measure, Uganda needs to *urgently* enact a comprehensive *competition law* and establish a *competition regulatory authority*.

Christine Byaruhanga
Associate, Integration & Cross-Border Transactions Department cbyaruhanga@alp-ea.com

Ann Namara Musinguzi
Head, Regulatory & Compliance Department anamara@alp-ea.com

ALP Advocates, Lotis Towers, 5th floor, 16 Mackinnon Rd, P.O. Box 28611 Kampala.
Tel: +256 414 671 997. E-mail: info@alp-ea.com

[14] *Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa* [2020] ZACAC 7 (South Africa CAC)- For exposition of other businesses sanctioned for COVID-19 excessive pricing in relation to hygiene products—sanitizes, masks, surgical gloves—but settled by consent agreements with the Commission: Boshoff, W.H., 'South African competition policy on excessive pricing and its relation to price gouging during the COVID-19 disaster period' (2021) 89(1) *South African J of Economics* 112, 134-6.

[15] Amadala, V., 'Cleanshelf Supermarket ordered to refund customers for overpriced sanitisers', *Star*, March 16, 2020-

[16] *Declaration of Undesirable Practice in terms of section 4(9) of the Medical Aids Funds Act 1995* GeN No 129/2020 (April 3, 2020)- The notice was issued by the Namibia Financial Institutions Supervisory Authority.