

# THE CHANGING LANDSCAPE:

FEDERAL COMPETITION AND CONSUMER  
PROTECTION ACT

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# An Overview of the Federal Competition and Consumer Protection Act 2019

Wednesday, January 30, 2019 produced a watershed moment in competition and consumer protection law jurisprudence in Nigeria, as this was the day President Muhammadu Buhari, the President of the Federal Republic of Nigeria signed the Federal Competition and Consumer Protection Act (the FCCPA/ the Act) into law. With a stroke of the President's pen, there came to life a comprehensive and all-encompassing law on competition and consumer protection in Nigeria.

Below, we examine key provisions of the Act.

## OBJECTIVES

The objectives of the FCCPA fall in 3 categories: competition, consumer protection and economic development.

From the competition perspective, the Act seeks to promote and maintain competitive markets by eliminating restrictive or unfair business practices that prevent or distort competition or constitute an abuse of a dominant position. It also seeks to promote

economic efficiency. In relation to consumer protection, the FCCPA is expected to protect consumers interests and welfare as well as facilitate the access to a wider variety of quality products. Sustainable development of the Nigerian economy is the third leg of the objectives of the Act.<sup>1</sup>

## COVERAGE-TERRITORIAL AND EXTRA-TERRITORIAL REACH

The scope of the FCCPA appears wide-ranging. Its provisions impact on:

- All sectors of the economy: all businesses fall within the scope of the Act. Even sectors that have specific regulations in relation to competition or consumer protection fall within the purview of the Act;
- All economic and commercial activities, undertakings and arrangements undertaken within Nigeria: whether undertaken by individuals or corporates and includes

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<sup>1</sup>Section 1 FCCPA

production and trade in goods as well as provision of services;

- Extra-territorial arrangements and conduct: all acts, undertakings, arrangements, economic and commercial activities having an effect within Nigeria, change of control transactions involving acquisition of shares or other assets in Nigeria by individual or corporates as well as conducts outside Nigeria carried on by a Nigerian citizen or body corporate registered in Nigeria are within the ambit of the Act;
- Commercial activities of government agencies: at both Federal, State and Local level.

In summary, all sectors and businesses fall under the scope of the Act. This includes all offshore arrangements which have an effect in Nigeria, all business transactions occurring in Nigeria as well as asset acquisition which changes control in a Nigerian business.

The FCCPA currently, does not apply to professional services that are subject to the regulation of a professional body.

## REGULATORY FRAMEWORK

The FCCPA appears to provide a superior<sup>2</sup> and all-encompassing framework as the provisions of all other laws and subsidiary legislation relating to competition and consumer protection must be read in conformity with its provisions.

The Federal Competition and Consumer Protection Commission (the Commission), which replaces the Consumer Protection Council, is responsible for implementation of the Act and all other laws relating to

competition and consumer protection. The Commission is to be run by an eight-member Governing Board. The Governing Board is made up of a Chairman, an Executive Vice-Chairman and 6 Commissioners, two of which will hold executive positions. The Executive Vice-Chairman is responsible for the day-to-day operations of the Commission.

The Commission is empowered to conduct investigations, undertake inquiries, enter and search premises with a warrant issued by the Court, request for information and documents, summon attendance to take evidence or produce documents, issue directives, make orders and declarations, undertake hearings and reach decisions.

Regulation-making powers are conferred on the Commission and these can be exercised in relation to restrictive agreements, abuse of dominant position, monopoly investigations, assessment of mergers, market definition, leniency programmes, consumer protection amongst other matters. The Commission can also issue guidelines, notices as well as procedural and enforcement rules.

The Act confers concurrent powers on the Commission and sector specific regulators. The Commission is expected to enter into agreements with sector specific regulators within one year of the FCCPA on harmonising the exercise of jurisdiction by establishing efficient procedures and consistent application of the provisions of the Act.

## ADJUDICATIVE PROCESS

The Act establishes a Competition and

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<sup>2</sup>Section 104 FCCPA gives supremacy of the FCCPA over other sectoral laws dealing with competition and consumer protection.

Consumer Protection Tribunal (The Tribunal) to hear appeals from or review any decisions of the Commission as well as sector specific regulators in the area of competition and consumer protection. However, decisions from sector specific regulators must first be heard and determined by the Commission before such appeals can be heard by the Tribunal.

The decisions of the Tribunal, to be enforceable, must be first registered with the Federal High Court. Appeals from the decisions of the Tribunal lie to the Court of Appeal.

## **ANTI-TRUST**

The Act introduces ground-breaking changes into the Nigerian competition regulatory regime by extending anti-trust provisions that were previously only applicable in some sectors to the entire economy as follows:

### **a) UNAUTHORISED & AUTHORISED RESTRICTIVE AGREEMENTS**

The Act outlaws and voids restrictive agreements between business entities and classifies such restrictive agreements as arrangements which are likely to prevent, restrict or distort trade in any market. Such agreements include any arrangement that allows direct or indirect price fixing, collusive tendering, withholding supply of goods and services from a dealer, exclusionary contractual provisions with intention to harm an undertaking, etc.

The Commission however has the power to authorise some of the prohibited arrangements, where the Commission is satisfied that such agreements improve the distribution of goods and service and does

not seek to eliminate competition with respect to a substantial part of goods and services.

The above provisions do not extend to agreements which protect employees, and which create minimum terms and conditions of employment; activities of professional bodies designed to enforce professional standards; arrangements in relation to terms of a partnership to mention a few.

A violation of these provisions is an offence with a fine or term of imprisonment where found guilty.

### **b) PROHIBITION OF THE ABUSE OF DOMINANT POSITION**

The FCCPA prohibits the abuse of a dominant position in any industry by player (s) in a dominant position. Acts of charging excessive prices, refusal of competitor access to essential facilities, engaging in exclusionary acts are anti-competitive unless such acts can show technology efficiency and gains that outweigh the anti-competitive effect.

The Act also introduces parameters for the assessment of market dominance such as market share of the business in its sector of operation, its financial power, access to supplies and its target market, ties to other businesses, barriers to market entry, ability of the business to cause a shift in supply or demand of goods and service etc.

The penalty for an act of abuse of dominant position upon conviction is a fine, not exceeding 10% of an entity's turnover in the preceding business year or such higher percentage as a Court may determine. In

addition, each director of the corporate entity is also liable for the offence and may face a fine not exceeding N50,000,000.00.

Continuous acts of abuse after being served with a cease order by the Commission is also punishable upon conviction. However, where upon being served with the cease order, the defaulting entity submits measures it has taken or proposes to take to address the abuse, the Commission if satisfied with same, can take a decision not to proceed to institute an action against the abuser.

### **c) MONOPOLY**

The Commission's powers extend to investigation of monopoly situations where there are grounds to believe that monopoly exists in relation to the production, distribution (including importation and exportation) of goods and services. A monopoly investigation may be referred to the Commission by a person, body corporate, the Court of law or a government agency and such request must be accompanied by an affidavit of fact.

Reports on monopoly investigations are to

be submitted to the Tribunal by the Commission and where any monopoly is found to exist, the Tribunal may make orders to remedy or prevent the adverse effect. Such orders may include declaring an agreement unlawful, order termination of agreement by a party, mandatory publication of price list by supplier, prohibition of an acquisition transaction, division of a business entity by sale of part of its assets and or shares, amendment of constitutional documents, winding up etc. The Commission also has extra-territorial powers over monopolies where such monopolies are originated by a Nigerian citizen or business entity of Nigerian origin.

### **d) PRICE REGULATION**

The President is empowered to control the prices of the goods and services for the purpose of regulating and facilitating competition, by an order published in the Federal Gazette. The President's order is based on a report of the Commission further to a detailed assessment of the relevant sector and the goods and services. Orders so made are to be narrowly designed both in terms of its duration and to the goods and services to which it applies.



The provisions do not detail the way the prices for the regulated products are determined – it appears that this responsibility may fall on the Commission as the President is only conferred with the power to declare that the prices should be controlled. Suppliers of goods and services covered by the price regulations made by the President, are required to keep accounting and costing records for such goods and services up till a period of three years from the date of the revocation or expiration of the order of the President.

The penalty for non-compliance with a price regulation is a crime punishable by a fine not exceeding N50,000,000.00 for an individual and for a corporate entity to a fine upon conviction, not exceeding 10% of its turnover on the year preceding the date of the offence. In addition, each director of the corporate entity is also liable for the offence and may face a fine not exceeding N50,000,000.00.

## **e) MERGER CONTROL**

Merger control under the purview of the Act is administered by the FCCPC. The application of the FCCPA therefore repeals all aspects of the provisions of the Investments and Securities Act of 2007 (“ISA”), which empowered the Securities Exchange Commission as the principal merger regulating authority. The Act is now the principal statute for all mergers, acquisitions and joint ventures, with the assistance of any regulations and guidelines issued by the Commission from time to time. Sector specific legislation such as the Nigerian Communications Commission Act of 2003 and the Electricity Power Sector

Reform Act of 2005 are disempowered where competition regulation is concerned. Whilst it retains certain aspects of the preceding legislation such as definitions and thresholds, the Act is more comprehensive and consolidates all relevant fees, offences and penalties relating to merger notification across all sectors. The Act maintains the distinction of notifiable and non-notifiable mergers of ISA. The Act does so by defining “small mergers”, as those not requiring notification as they fall short of the threshold whilst “large mergers” are notifiable as they fall within the threshold. Transacting parties to any large merger, cannot implement any transaction without first filing a merger notification and obtaining approval from the Commission. Any contravention deems the transaction illegal and attracts a penalty of up to 10% of the business’ turnover.

All merger transaction assessments follow the formal channels and procedures set out by the Commission, hence there is no room for an accelerated process, only standard timelines apply. The Commission publishes its decisions in the government gazette and any grievances may be taken up to the Tribunal for determination.

## **CONSUMER PROTECTION**

The Act repeals the Consumer Protection Council Act of 2004 (the “Consumer Act”) to create a hybrid system which houses both competition control and consumer welfare under one roof. The Commission takes over the Consumer Protection Council’s (the Council) mandate to safeguard consumer rights, fight consumer exploitation, ensure mechanisms for speedy redress of complaints as well as policing product safety. The Act creates three routes of redress for

consumers; (a) the consumer can approach the sector regulator (b) the consumer can file a complaint directly to the Commission. (c) the consumer can directly approach a court with appropriate jurisdiction to seek redress.

Where option (a) is elected and leaves the consumer unsatisfied by the decision of the sector regulator, the consumer has right of appeal to the Commission and to the Tribunal thereafter.

As expected, the Act is more comprehensive. Unlike the Consumer Act, it defines clearly who constitutes a consumer, what their rights are, who a retailer is and what their obligations are, the route to recourse, remedies and penalties. The Act provides for such rights as the “right to information in plain and understandable language”, the “right to fair dealings”, the “right to select suppliers” and the “right to choose and examine goods”. In a separate part, the Act also specifically empowers the

President to regulate prices for goods and services both to encourage fair competition and fair dealing in the interests of consumers. The effect of this cocktail of measures is that more prominence is given to the welfare of unsuspecting consumers under this new regime which is expected to deter retailers from unfair consumer contracts. Another welcome addition is the introduction of “accredited consumer protection groups”. These are independent civil society organisations that champion the course of consumers in Nigeria. This provision ensures more effective representation of consumers, rights advocacy and assist in building the capacity of the Commission.

Consumers should expect such remedies as full compensation or restitution. In addition, the Act provides for criminal sanctions against violators in the form of imprisonment of up to five years or fines of N10 million for a natural person and N100,000,000 or 10% of business turnover. Directors of corporations should also be warned that they can be held personally liable for violations and subject to prosecution.

## ENFORCEMENT

With respect to breaches of Competition related provisions of the Act, the





Commission may, on the strength of facts before it, proceed after an offender. Acts of the Commission can be reviewed by the Tribunal which also has powers to hear an appeal of the decision of the Commission. The decision of the Tribunal shall be registered with the Federal High Court for the purpose of enforcement only. It would appear that the breach of competition law does not give the consumer a right of action against the offender under the FCCPA.

With respect to the breach of a consumer's right under the FCCPA, the enforcement options for a consumer include:

- referring the matter to the person/business entity that supplied the good or service
- referral of the breach to the applicable industry sector regulator
- filing a complaint with the Commission or approaching the Court to seek redress by way of a civil action.

These options operate independent of each other. As such, the consumer is at liberty to choose the most suitable option to enforce his/her rights. The Court can also convict an entity/person who breaches a consumer right, and may in such criminal proceedings, make an order requiring such a person or business entity to pay compensation to the consumer for any personal injury, loss or damage resulting from the offence.

The Act also sets out the modalities for the conduct of investigation in the event of complaints or referral to the Commission. At the end of the investigation, the Commission may make certain orders as it deems fit. Where there is agreement to such an order by the Respondent, the Commission may register the order in a

Court of competent jurisdiction as a consent order.

## CONCLUSION

The FCCPA is a welcome development in the competition space in Nigeria. It is also an improvement on the previous regime on consumer protection. It is believed that the law will lead to visible development in the Nigerian economy if properly implemented. The expected outcome of the FCCPA notwithstanding, there exists lacunas, if not properly addressed by the regulator in the form of guidelines, will defeat the intention of the draftsman. For instance, the FCCPA defines "Court" to be the Court of Appeal, and the Court of Appeal is also the appellate court on the decision of the Tribunal. Court was also used as the adjudicatory authority for the purpose of conviction and subsequent imposition of penalty (fines and terms of imprisonment) where an abuse of dominant position occurs.

Similarly, the FCCPA did not expressly confer criminal jurisdiction on the Tribunal, neither did it empower the Tribunal to impose criminal sanctions on business entities that engages in any anti-competitive conduct. The Tribunal's powers as provided under the FCCPA appears to be restricted to the imposition of administrative penalties. The question then is, under what circumstance can a business entity be convicted for any anti-competitive behaviour and by whom?

We hope that these issues amongst others be resolved by the Commission through Regulations to enable the law to achieve its objectives.



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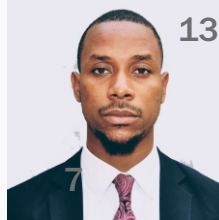


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