

# THE CHANGING LANDSCAPE:

FEDERAL COMPETITION AND CONSUMER  
PROTECTION ACT

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# SECTORAL REGULATION VIS-À-VIS COMPETITION LAW IN NIGERIA – THE WAY FORWARD

The importance of a robust legal framework for competition to the Nigerian economy cannot be over-emphasized. A sound legal and institutional framework for competition prevents the existence of monopolies in the market; ensures high quality of goods and services are supplied to consumers; and that consumers get products choices at competitive prices.

The goals of competition legislation include the following: to encourage free and open markets, to provide fair and equal competitive opportunities to all market participants, to maximise consumer welfare and to establish transparency and fairness in the regulatory process<sup>18</sup>.

It is against this background that stakeholders have welcomed the laudable enactment of the Federal Competition and Consumer Protection Act ("FCCPA" or "the Act") which establishes the Federal Competition and Consumer Protection

Commission (FCCPC) and the Federal Competition and Consumer Protection Tribunal. The FCCPA will no doubt significantly change the landscape on competition in Nigeria.

Prior to the enactment of the Act, there was no comprehensive piece of legislation regulating competition in Nigeria. Competition provisions could be found in several pieces of legislation such as the Investment and Securities Act 2007 (ISA), the Civil Aviation Act 2006 (CAA), the Electric Power Sector Reform Act 2005 (EPSRA) and the Nigerian Communications Act,<sup>19</sup> amongst others. It is important to note that whilst some of these sectoral laws make a broad declaration of their competition goals, others detail the mandate of the regulator with respect to competition. However, this position has changed with the advent of the FCCPA which provides clearly that the provisions of the Act will override the provisions of any other law in all matters relating to competition and

<sup>18</sup>See N. Dimgba, "The Need and the Challenges to the Establishment of a Competition Regime in Nigeria" 1-32 available at <http://www.competition-law-in-nigeria.html> accessed on 23/12/2012 | <sup>19</sup>Cap N33 Laws of the Federation of Nigeria 2004

consumer protection<sup>20</sup>.

This article analyses the scope of the powers of the sector-specific regulators in the context of the FCCPA and attempts to chart a way forward.

**The approach of a sector specific regulator in contradistinction to an overall competition authority**

It would be useful to distinguish between the sector specific regulator and an overall competition authority.

Firstly, the regulatory approach relies on ex-ante prescriptive business conduct because regulators would usually take a forward-looking view of business conduct and place restrictions on certain conduct whilst the competition approach usually operates ex-post and would generally not issue restrictions on business conduct (except with respect to certain unlawful behaviour), however businesses could be penalised if found in contravention of competition laws<sup>21</sup>.

Secondly, sector regulators are specialised

by sectors and are often better informed about the business of the sector incumbents than the competition authority due to frequent interventions<sup>22</sup> and longer relationship with the undertakings in their sector. On the other hand, the competition authorities have expertise on issues relating to market structures and technologies and are generally specialised on issues relating to abuse of dominant position, monopolies, cartels, merger controls amongst others. They receive information and assess business conduct after an anti-competitive behaviour has been alleged or there is reason to suspect same<sup>23</sup>.

Furthermore, competition law and sector regulation also differ in the type of remedies imposed. Competition law remedies are to a large extent addressed to a specific conduct or behaviour and generally do not include extensive future monitoring of the conduct of the undertaking. However, sectoral regulatory remedies are usually detailed conduct remedies that would require extensive monitoring<sup>24</sup>.

Sector-Specific Regulator	Competition Authority
Imposes restriction on certain business conduct from time to time.	Imposes restriction on business conduct only where there is an allegation or suspicion of anti-competitive behaviour.
Sector specialised	Market and competition specialised
Access to more information about the business of the undertaking due to frequent routine filings	Receives information usually in the course of investigation
Closer relationship with the undertaking	Distant relationship with the undertaking

<sup>20</sup>Section 104 of the Federal Competition and Consumer Protection Act 2019  
<sup>21</sup>See Pierre-André Buigues "Competition versus Regulation" Issues in Competition Law and Policy Volume 1  
<sup>22</sup>UNCTAD Best Practices for defining respective competencies and settling of cases which involve Joint Action by Competition Authorities and Regulatory Bodies accessed from [https://unctad.org/en/Docs/tdrbpconf6d13rev1\\_en.pdf](https://unctad.org/en/Docs/tdrbpconf6d13rev1_en.pdf)  
<sup>23</sup>See Pierre-André Buigues "Competition versus Regulation" Issues in Competition Law and Policy Volume 1  
<sup>24</sup>Ibid

In view of the above differences, the question would then be whether it is preferable to vest exclusive jurisdiction on either the sector regulators or the overall competition authority. Or, whether there is a better approach to the issue of competition jurisdiction for regulated companies?

## Sectoral Regulators

To answer the question posed above, it is important to look at some sector-specific regulators and the extent of their mandate with respect to competition issues in Nigeria prior to the enactment of the FCCPA.

### Aviation

The CAA grants the Nigerian Civil Aviation Authority (NCAA) the powers to investigate and to determine whether any entity in the aviation sector has been or is engaged in unfair or deceptive practices or unfair methods of competition in the aviation industry and order such person to desist from such practices<sup>25</sup>.



Further to its powers to provide regulations on anti-competitive practices<sup>26</sup>, the NCAA issued the Nigerian Civil Aviation Regulations 2015 (the NCAR) which prohibits undertakings in the aviation industry from entering into any contract, arrangement, understanding or conspiracy that constitutes a restraint of competition without authorisation from the NCAA<sup>27</sup>. Under the NCAR, restrictive practices and abuse of dominant position are also prohibited.

In addition to the above, the NCAA has powers to decide whether to approve a merger and to receive notifications in respect of joint ventures and other acquisitions of control, although the threshold for notification and/or approval is unclear.

Under the NCAR, the NCAA has the powers to impose penalties that could be as high as twice the amount of profit the offending party would have made on the route or transaction.

### Telecommunications

One of the objectives of the Nigerian Communications Act (NCA) is to ensure fair competition in the Nigerian communications industry and encourage the participation of Nigerians in the ownership, control and management of communication companies and organisations<sup>28</sup>.

The Nigerian Communications Commission (NCC), which is the sector regulator established under the NCA is required to promote fair competition in the communications industry and protect undertakings from misuse of market

<sup>25</sup>Section 30(4) Civil Aviation Act 2006 | <sup>26</sup>Section 70 Civil Aviation Act 2006

<sup>27</sup>Clause 18.15 Nigerian Civil Aviation Regulations 2015;

<sup>28</sup>Section 1 Nigerian Communications Act Cap N33 Laws of the Federation of Nigeria 2004

power or anti-competitive and unfair practices by other undertakings<sup>29</sup>. In formulating its licensing procedures, and in the issuance of its licences, the NCC is guided at all times by the need to promote fair competition and investment in the communications industry.<sup>30</sup>

By virtue of the NCA, the NCC has exclusive competence to determine, pronounce upon, administer, monitor and enforce compliance of all persons within its competition laws and regulations as it relates to the Nigerian communications market.

The NCA prohibits undertakings from engaging in any conduct that has the purpose or effect of substantially lessening competition in any aspect of the Nigerian communications market except as authorised by the NCC.<sup>31</sup> Flowing from this, the NCC can review agreements or practices to determine whether they have the purpose or effect of substantially lessening competition.

In line with its powers under the NCA, the

NCC issued the Competition Practices Regulations<sup>32</sup> to provide clarity on anti-competitive conduct; whether an undertaking has dominant powers; and what constitutes an abuse of dominance. It is apparent from the above, that the NCC has detailed provisions on competition regulation for undertakings in the communications and telecommunications industry.

## Banking

Although there are no competition provisions in the Banking and other Financial Institutions Act<sup>33</sup> (BOFIA) for the banking sector, the Central Bank of Nigeria (CBN) relied on its mandate under the Central Bank of Nigeria Act 2007 (CBN Act)<sup>34</sup> and issued a Consumer Protection Framework (CPF) to ensure the protection of consumer rights.

The CPF encourages the promotion of competitive markets to encourage innovation, diverse range of financial products and services, excellent service delivery and to ensure that consumers benefit from the practice of competition.<sup>35</sup>



<sup>29</sup>Section 4(1)(d) Nigerian Communications Act Cap N33 Laws of the Federation of Nigeria 2004 | <sup>30</sup>Section 33 Nigerian Communications Act Cap N33 Laws of the Federation of Nigeria 2004 | <sup>31</sup>Ibid Section 90 | <sup>32</sup>2007 | <sup>33</sup>Cap B3 Laws of the Federation of Nigeria 2004 | <sup>34</sup>Section 2(d) provides that the principal objects of the Central Bank of Nigeria include to promote a sound financial system in Nigeria | <sup>35</sup>See generally Clause 2.8 Consumer Protection Framework



The CPF requires the CBN to discourage anti-competitive practices such as price-fixing, market allocation, abuse of dominance and tied selling.

### **Is it preferable to vest exclusive jurisdiction on either the sector specific regulator or the FCCPC?**

Having examined the scope and extent of the powers of some sector regulators, it is submitted that vesting exclusive competition jurisdiction on either party may be problematic because not all the sector regulators in Nigeria have properly outlined their competition objectives and distinguished same from their other regulatory goals. A good number of the sectoral laws do not provide clear guidelines on competition-related issues and dispute resolution mechanisms. There is also a real possibility that the regulators may rely more on their regulatory powers and take the latitude of imposing burdensome intrusive obligations instead of allowing competitive trends in the market to flourish organically and this may result in market distortion<sup>36</sup>.

On the other hand, the FCCPC is not likely to understand the regulated sectors and its needs in the manner the sector-specific regulator would. Although it is expected that the FCCPC will possess the necessary expertise on anti-competitive issues, the FCCPC will still require the specialised technical support of regulators (such as the NCAA and the NCC) to address the issues in those sectors adequately.

### **Possible approaches to tackling the jurisdictional overlaps between the sector specific regulators and the FCCPA**

There are three different models that have been proffered to address the problems of jurisdictional overlaps between the sector regulators and the competition authority to wit: the exclusivity model; the concurrency model; and the co-operation model.<sup>37</sup>

Under the exclusivity model, either of the regulatory bodies is granted exclusive competence to deal with competition issues. As earlier discussed, this might pose a problem for both the sector and the market.

<sup>36</sup>Paridhi Poddar "Sectoral Regulation, Competition Law and Jurisdictional Overlaps: Tracing the most viable solution in the Indian context accessed from [http://competitionlawblog.kluwercompetitionlaw.com/2018/05/24/sectoral-regulation-competition-law-jurisdictional-overlaps-tracing-viable-solution-indian-context/#\\_ftn9](http://competitionlawblog.kluwercompetitionlaw.com/2018/05/24/sectoral-regulation-competition-law-jurisdictional-overlaps-tracing-viable-solution-indian-context/#_ftn9) 11/06/2019

<sup>37</sup>Ibid

The concurrency model suggests that both regulatory bodies would enjoy competence and reach a decision on the exercise of competence through a consultative process<sup>38</sup>. In the United Kingdom for instance, sector-specific regulators have concurrent powers with the Competition and Markets Authority (CMA) to enforce competition rules and there are provisions in place that address how the sector-specific regulators and the CMA decide which party is competent to handle a matter amongst others.<sup>39</sup> This model may not apply in Nigeria as our governmental agencies may be more focused on protecting their respective turfs rather than the needs of the market/sector, although there have been instances of collaboration.<sup>40</sup> Also, the financial implications of this model can be significantly huge and may become problematic in the long run.

With respect to the co-operation model, competition law enforcement is allocated between the two regulatory bodies and consultation mechanisms are devised to resolve any conflicts.

The FCCPA appears to have combined the concurrency and co-operation models. In matters relating to competition and consumer protection, the Act establishes concurrent jurisdiction between the FCCPC and sectoral regulators with the FCCPC having precedence over and above the sectoral regulators.<sup>41</sup> The Act provides that the FCCPC should negotiate agreements with all government agencies whose mandate includes enforcement of

competition and consumer protection for the purpose of co-ordinating and harmonising the exercise of jurisdiction over competition and consumer protection matters within the relevant industry practice, and to ensure the consistent applications of the FCCPA. This process is required to be concluded within a year and the sectoral regulator may assume competition jurisdiction on the basis of such agreements. This agreement which must be published in the Federal Government Gazette is expected to cover the following:

- Efficient procedures for management of concurrent jurisdiction;
- Promote cooperation between the regulator and the FCCPC;
- Preserve the co-ordinating role of the Commission;
- Provide for exchange of information and protection of confidential information.

Where the negotiations between the sector regulator and the FCCPC are inconclusive, the areas of disagreement would be referred to the Attorney-General of the Federation.

Furthermore, one of the functions of the FCCPC under the Act is to give and receive advice from other regulatory authorities or agencies within the relevant industry or sector on consumer protection and competition matters.

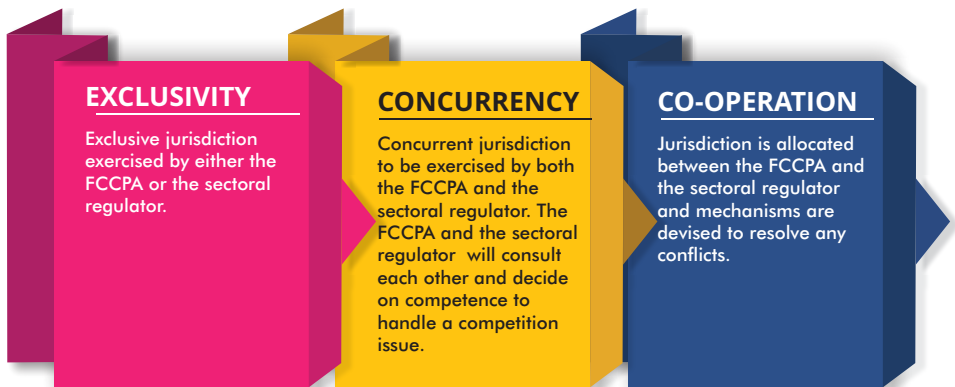
With proper implementation, the combination of the concurrency and

<sup>38</sup>Ibid | <sup>39</sup>The Competition Act 1998 (Concurrency) Regulations 2014 | <sup>40</sup>The defunct Consumer Protection Council entered into an agreement with the NCC for a joint investigative committee for consumer issues in the telecommunications industry. One of the objectives of the agreement was to ensure regulatory clarity and eliminate jurisdictional duplicity in the telecommunications industry. | <sup>41</sup>Section 105(2) Federal Competition and Consumer Protection Act 2019

<sup>42</sup>UNCTAD Best Practices for defining respective competencies and settling of cases which involve Joint Action by Competition Authorities and Regulatory Bodies accessed from [https://unctad.org/en/Docs/tdrbpconf6d13rev1\\_en.pdf](https://unctad.org/en/Docs/tdrbpconf6d13rev1_en.pdf) 12th June 2019

cooperation approach may be the most appropriate for Nigeria because the sector-specific regulators and the FCCPA have different legislative mandates and different

approaches and can play complementary roles in ensuring fair competition and consumer protection.<sup>42</sup>



## Recommendations

Firstly, it is important that clarity is always provided to the market. In the course of negotiating agreements with the sector regulators, the FCCPC and the relevant sector regulator should give direction by way of circulars, notices, guidelines and regulations at every stage to ensure that the market is carried along. This would boost investor confidence as well as ensure market stability.

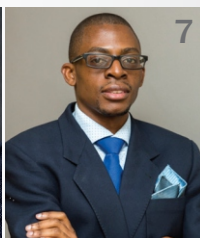
Secondly, in negotiating an agreement on competence to address competition issues, both the FCCPC and the sector regulator should factor in the cost to the undertakings in the market. An agreement that vests competition jurisdiction in both the FCCPC and the sector-specific regulator should make provision for a fee-sharing

formula among the regulatory bodies to avoid imposing burdensome costs on the undertakings in the relevant sector. Flowing from this, the duration for treating applications should also be factored into the agreement. The agreements should make provisions that would mitigate undue delay in treating applications where such applications are to be made to both the FCCPC and the sector-specific regulator.

On a final note, the importance of continual stakeholder engagement cannot be overemphasised. The FCCPC and sector-specific regulators are enjoined to create avenues for interacting with and engaging the undertakings in the relevant sector throughout the process of co-ordinating and harmonising jurisdiction.

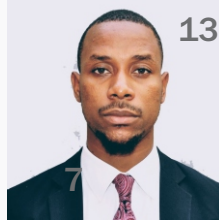


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