

## **THE CHALLENGES OF FEDERAL COMPETITION AND CONSUMER PROTECTION ACT; HANDLING MONOPOLY ISSUES**

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It is no doubt that competition in every commercial milieu promote innovation and efficiency which fashion an enabling atmosphere for economic expansion and also create employment opportunities. An economy where there is a competitive market usually attracts foreign direct investments due to improved quality, lower prices and wide range of varieties of goods and services in the market.

Many developing market economies today are vulnerable to practices which discourage, distort or even eliminate competition. The risk associated with an unregulated market economy includes the elimination of smaller companies, formation of market entry hurdles, promotion of domineering, unfair trade practices, etc. which practices inhibit open, free and fair market competition to the detriment of the consumer and the larger economy, hence reduce innovation, quality, efficiency and output in the market. This has a devastating effect in the production and distribution channels of goods in the society. Consumers are therefore forced to pay so much for so little and less quality products by these greedy vendors.

To assuage the horror of consumers and to protect the market, many countries in the world have enacted competition laws to meet the desires of the society. The Federal Competition and Consumer Protection Act (“FCCPA”) is one of such recent legislations.

Consumer protection is the key objective of Federal Competition and Consumer Protection Act (“FCCPA”). It is an attempt by government to provide regulatory framework to protect and enforce the rights of people who pay for goods and services.

The Federal Competition and Consumer Protection Bill was signed into law on the 6th of February, 2019. The Act repealed the Consumer Protection Council Act, dissolving the Consumer Protection Council, and in its stead, established the Federal Competition and Consumer Protection Commission<sup>1</sup> (‘FCCPC’) and Consumer Protection Tribunal. Prior to the passage of the Federal Competition and Consumer Protection Act 2018 (the FCCPA), the legal and regulatory framework on competition in Nigeria was fragmented. Previously existing laws on competition such as the Investments and Securities Act 2007, the Electric Power Sector Reform Act 2005 and the Nigerian Communications Act 2003 were largely sector-regulated. The FCCPA introduced a consolidated legal regime for

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<sup>1</sup> Section 3 FCCPA 2018

competition in Nigeria. Unlike the defunct CPC, the FCCPC's oversight extends beyond just consumer protection issues, and covers all entities in Nigeria - whether they are engaged in commercial activities as bodies corporate, or as government agencies and bodies<sup>2</sup>.

The objectives of the Act include; the promotion and maintenance of a competitive market in Nigeria; promotion of economic efficiency; protection of consumers' interests and welfare; prohibition of restrictive and unfair business practices; and the development of the Nigerian economy<sup>3</sup>. In line with its objectives, the provisions of the FCCPA have an overriding effect on other regulations dealing with competition and consumer protection matters in Nigeria<sup>4</sup>.

## **Regulatory Framework**

The FCCPA established the Federal Competition and Consumer Protection Commission (FCCPC) as an independent body. The fundamental functions of the FCCPC include the regulation of competition issues generally<sup>5</sup>; approval/authorization/prohibition of mergers & acquisitions<sup>6</sup>; conducting market definitions and regulation of dominance<sup>7</sup> and monopolies<sup>8</sup>, price regulation<sup>9</sup>; designation of certain industries as "regulated" and issuance of necessary regulations and directions as may be required<sup>10</sup>.

The powers of the FCCPC include the declaration of any business practice as abuse of a dominant position of market power and prohibition of same;<sup>11</sup> broad powers to issue cease and desist orders<sup>12</sup>; acting through the FCCPT issue orders for the division of any undertaking that it considers a monopoly<sup>13</sup> into smaller entities or the sale of its shares or assets, if it considers same necessary etc.

The FCCP Tribunal is also an independent body established under the FCCPA and saddles with the responsibility to adjudicate and determine matters on statutorily prohibited, anti-competition and anti-consumer protection practices. The Tribunal have power to impose administrative penalties for breaches of the Act, and oversee forced divestments, partial or total, of investors from companies. This Tribunal also have the

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<sup>2</sup> Section 2(2) FCCPA 2018

<sup>3</sup> Section 1 FCCPA 2018

<sup>4</sup> Section 104 FCCPA 2018

<sup>5</sup> Part VIII FCCPA, 2018

<sup>6</sup> Part xii FCCPA, 2018

<sup>7</sup> Part ix FCCPA, 2018

<sup>8</sup> Part x FCCPA, 2018

<sup>9</sup> Part xi FCCPA, 2018

<sup>10</sup> Part xiii FCCPA,2018

<sup>11</sup> S. 18 of the FCCPA, 2018

<sup>12</sup> Section 67, 73, 75 FCCPA 2018

<sup>13</sup> Section 86(1) FCCPA 2018

jurisdiction to determine appeals from the FCCP Commission and other Consumer Protection Regulatory Authorities.

Appeals against the decisions of the FCCP Tribunal lies directly to the Court of Appeal and thereafter an unsatisfied party may proceed to the Supreme Court. The decisions of the FCCP Tribunal are registerable at the Federal High Court for enforcement purposes.

## **Legal and Regulatory Issues**

### **Restrictive Agreements**

The Act prohibits and voids restrictive agreements between business entities. The Act provides that,

*“Any agreement among undertakings, or the decision of an association of undertakings that has the purpose of actual or likely effect of preventing, restricting or distorting competition in any market shall be unlawful and, subject to Section 61 of this Act, void and of no legal effect whatsoever”<sup>14</sup>*

The description of restrictive arrangements which are likely to prevent, restrict or distort trade is very extensive, and includes prohibition of minimum resale, direct or indirect price fixing, collusive tendering, withholding supply of goods and services from a dealer, exclusionary contractual provisions, etc.<sup>15</sup> However, some of the prohibited arrangements may be approved by the Commission, if the Commission is satisfied that they are fair, do not eliminate competition and improve the production or distribution of goods and services.<sup>16</sup>

### **Abuse of Dominant Position**

This is enshrined in part ix of the Act. The Act clearly prohibits the abuse of a dominant position in any market by any business undertaking<sup>17</sup>. The Act provides that a corporation may be nominated as a dominant firm in the market where the corporation is able to act without taking into consideration, the reaction of its customers, consumers and competitors.<sup>18</sup> The penalty for an unruly abuser is not less than 10% of the previous year’s turnover upon conviction by a court<sup>19</sup>. It is noteworthy that the Act referred to “court”, and not the FCCP Tribunal. The essence of the provisions on dominant position

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<sup>14</sup> Section 59 (1) FCCPA

<sup>15</sup> Section 59 (2) FCCPA

<sup>16</sup> Section 60 FCCPA

<sup>17</sup> Section 72 (1) FCCPA

<sup>18</sup> Section 70(1) FCCPA

<sup>19</sup> Section 74(1) FCCPA

is to make large firms extremely considerate and cautious of the effects their acts or decisions on the consumers, customers or the competitors in the same market and within the same geographical location while making decisions and carrying out its business acts.

## **Monopolies**

A monopolistic market has been defined as is a theoretical construct that describes a market where only one company may offer products and services to the public.

The Commission's powers extend to investigation of monopolies. Section 76 of FCCPA provides that,

*"Where it appears to the Commission that there are grounds for believing that a monopoly situation may exist in relation to the production or distribution of goods or services of any description, or in relation to exports of goods or services of any description from Nigeria, it shall cause an investigation to be held into a particular sector of the economy or into a particular type of agreements across various sectors to determine the extent of the situation in relation to the market."*

It need be pointed out that the Commission's oversight over monopolies is not restricted to those arising in Nigeria, if the undertaking is of Nigerian origin.

## **Regulation of Mergers**

Merger under FCCPC occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking<sup>20</sup>. The act further proceeds to explain the when a merger is achieved to include: the purchase or lease of the shares, an interest or assets of the other undertaking in question; the amalgamation or other combination with the other undertaking in question; or a joint venture.<sup>21</sup> The Act provides that, "when considering a merger or a proposed merger, the commission shall determine whether or not the merger is likely to substantially prevent or lessen competition."<sup>22</sup> This shall be done by assessing the strength of competition in the relevant market and the probability that the undertakings in the market, after the merger, will behave competitively or co-operatively, taking into account, any factor that may be relevant to competition in that market, including, the ease of entry in the market, the level and trends of collusion, the level of countervailing power in the market, among other considerations.

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<sup>20</sup> Section 92(1)(a) FCCPA

<sup>21</sup> Section 92(1)(b) FCCPA

<sup>22</sup> Section 94(2) FCCPA

The power to approve mergers is vested in the Commission, instead of the Securities and Exchange Commission (“SEC”). As previously applicable, small merger partakers need not need notify the Commission, unless the Commission specifically requests that they do so within six months of deal close.<sup>23</sup> The Act also prescribes rules for large mergers as the only other type of mergers.

## **Challenges**

From the foregoing, it is obvious that the whole essence for the enactment of FCCPA is to promote and maintain competitive markets in the Nigerian economy and ensure welfare of consumers by providing consumers with product choices at competitive prices, amongst other functions that are ancillary and incidental to consumer protection and competition. The question now is, has FCCPA protected Nigerian consumers in all the sectors of the economy?

The Act defines a consumer as an individual, who purchases, uses, maintains or disposes of products or services.<sup>24</sup> This paper shall focus on consumer protection in two major sectors of the economy, to wit: the power sector and the telecommunication sector.

## **The Nigerian Power Sector**

Unarguably, the power sector is one of the most important sectors in every nation’s economy. For many years, the Power sector was plagued by a plethora of problems ranging from low capacity generation of power, crumbling facilities, corruption, poor and indiscriminate power distribution, illegal disconnection, over billing, insensibility and unresponsiveness to consumer complaints, etc. The monopoly exercised by NEPA through the Electricity Act and NEPA Act came with its defects of inefficiency, poor service delivery and poor customer service response. However, in 1999 a reform program commenced which brought about the inauguration of the Electric Power Implementation Committee (EPIC), culminating in the drafting of the National Electric Power Policy 2001; the enactment of the Electricity Power Sector Reform Act 2005; and establishment of Power Holding Company of Nigeria (PHCN). The new Act revolutionized the sector, bringing into existence the current independence and private status of the generation and distribution chains in the Nigerian Power Sector. The Act facilitated the end of the monopoly of NEPA (Nigeria Electricity Power Authority) and laid out the framework and guidelines for NEPA's privatization through the eventual formation of companies to

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<sup>23</sup> Section 95 FCCPA

<sup>24</sup> Section 167 FCCPA

take over its functions, assets, liabilities and staff in a bid to make the electricity market more competitive.

The reform also resulted in the establishment of Nigerian Electricity Regulatory Commission (NERC) to regulate the entry and operations of the private operators in terms of tariff and service delivery.

Irrespective of the privatization of the power sector, the consumers right have persistently remained abused just like in the days of NEPA, consumers are pounded with excessive bills, mass disconnection, nonregulation of the voltage, inadequate customer response system, indiscriminate distribution of power and so on.

### **The Nigerian Telecommunication Sector**

In recent time, Nigeria has one of the fastest growing telecommunication sectors in the world with about 139.1 million lines recorded at the end of 2014 and a tele-density of over 99.39.13 These however, are not without its challenges to consumers.

The Nigerian Communication Act (NCA) came into force in 2003 and repealed the Nigerian Communications Decree 1992 and other subsidiary regulations on consumers protection. The Act is established the Nigerian Communication Commission and empowered it to achieve its goal of ensuring good telecoms service delivery in Nigeria.

The NCC gazette Consumer Code of Practice Regulation in 2007 which is a reference document for both consumers and the operators in the sector. Each licensee was mandated to produce and submit a Code of Practice which has to be scrutinized and approved by the Commission. The Code of Practice stipulates Service Level Agreements, the responsibilities and rights of each party, and procedure for resolving disagreements whenever they arise between parties. Irrespective of this, NCC and the Consumer Protection Commission have not done enough to protect consumers of telecom services in Nigeria as most of their efforts are either concentrated in the urban areas with very little or no protection is made available to rural consumers. The consumers in these areas still suffer poor services despite the high and extortive tariffs the consumer is charged. These come in form of absence of service resulting from network failures, deductions for un-rendered services, extortive call charges, interrupted calls, using of the networks as a platform for unsolicited and offensive ringtones and unwanted text messages etc. As a result of these inefficiencies, an average consumer is swayed to carry more than one phone with different networks at every given time.

In conclusion, the provisions of FCCPA are all-inclusive as it provides for both competition regulations as well as consumer protection. The challenge remains on the administration of the commission in the implementation and enforcement of the Act in

all sectors of the Nigerian economy as well as in all parts of the country. The commission will need to be manned by professionals who are knowledgeable in competition laws, economics, intellectual property and representatives of the various sectors of production. It is essential that all necessary bodies are carried along for a productive dispensation of competition policy in Nigeria.