

## CRITICAL ANALYSIS OF THE EXTENT OF THE FEDERAL COMPETITION AND CONSUMER PROTECTION ACT 2019 VIZ-A-VIZ PROMOTING COMPETITION IN NIGERIA

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### Abstract

*This paper analyzed how the Federal Competition and Consumer Protection Act, 2019 has promoted competition in Nigeria since its enactment. It examined several Nigerian laws regulating competition in Nigeria such as the Federal Competition and Consumer Protection Act, 2019, the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the Central Bank of Nigeria Act, the Companies and Allied Matters Act, 2020 and other laws. These laws contain provisions that protect consumers in the Nigerian economy by ensuring the production of quality goods and delivery of efficient services. The specific objectives were to examine how the Act has promoted competition in Nigeria, how the enforcement mechanisms provided by the Act has helped to ensure competition, the policies adopted by other jurisdictions to ensure competition and how those policies can help Nigeria. The doctrinal research methodology was adopted in this paper. Competition policies of the United Kingdom and the United States of America were also reviewed and some lessons that could be applied in Nigeria were identified such as ensuring the independence of the Federal Competition and Consumer Protection Commission and the regulators. It was discovered that the Act promotes a competitive market and makes provisions to ensure that the rights of consumers are protected. To achieve this, the Federal Competition and Consumer Protection Act, 2019 established several mechanisms to enhance consumer welfare and entrench competition in the market such as the consumer complaint mechanism, the Federal Competition and Consumer Protection Commission, the Competition and Consumer Protection Tribunal, enforcement by Civil Rights Groups, relevant sector regulators, the courts, amongst others. Considering the above, the paper recommended that the Federal Competition and Consumer Protection Commission should be provided with adequate resources, training and personnel to effectively enforce the FCCPA, 2019 across the country. It was further recommended that public education campaigns be carried out to increase the awareness about the FCCPA, 2019 and acquaint consumers and individuals with their rights and the mechanisms for seeking redress in the event of breach. Also, to ensure rapid development of Competition law in Nigeria, the dissertation recommended that the FCCPC should diligently build a strong case law through consistent enforcement and court decisions so as to establish clear precedents and interpretations of the Act.*

**Keywords:** Consumer, Protection and Competition

### 1.0 Introduction

Competition law shields and protects both consumers and producers in any economy by ensuring the production of quality goods and efficient services and also ensuring that no monopoly exists in the market to undermine any producer. Where competition is lacking, consumers' right of choice is threatened, the quality of goods and services is compromised, and dominant producers make undue profit to the detriment of consumers and other producers in the market. Nigeria had been long overdue

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for comprehensive competition law to regulate and rectify anti-competitive trade practices in its market. After prolonged agitations and unsuccessful attempts, the Federal Competition and Consumer Protection bill was assented to by the President in January 2019.<sup>2</sup>

A central concern of competition advocacy, and in turn competition policy, is that certain corporations with market power have the ability, in various ways, to harm consumer welfare and or destabilize competition. The primary purpose of the competition law is to remedy some of the situations in which the free market system breaks down. This argument was made in the House of Lords debate during the passage of the UK Competition Act, 1998 that 'competition law provides the framework for competitive activity. It protects the process of competition; as such it is of vital importance'.<sup>3</sup> Thus, while Adam Smith believed in the self-regulating forces of the market and the 'invisible hand', he also realized that market forces, if left without regulations, would be encouraged to reduce competition.<sup>4</sup> This would be to the disadvantage of consumers and the general society. Consequently, competition law seeks to protect competition for the benefit of the society as a whole, but this does not necessarily mean protecting individual competitors.

An empirical research carried out in 2008 which studied competition regimes in 117 countries between 1995 and 2005 showed massive economic growth in countries with competition regimes when compared with countries without competition regimes.<sup>5</sup> This could be the reason why many developing countries are adopting competition law based on this belief that it will lead to their economic development.<sup>6</sup> Although the core of the above view on the role of competition in economic development is valid, it suffers from a flaw in its application. This is because it overlooks the role of effective implementation of law and places much emphasis on its adoption only. Implementation of competition law comes with several challenges which require high level of technical skill and expertise to address,<sup>7</sup> therefore a law that is neither properly implemented nor implemented at all will most likely fail in achieving its purpose.

Before the enactment of The Federal Competition and Consumer Protection Act 2019 (FCCPA),<sup>8</sup> there were a plethora of advocacies for Nigeria to have a comprehensive competition legal regime to protect consumers and ensure a fair and competitive market within the Nigerian economy. The Consumer Protection Council Act (CPCA) Cap 25, LFN, 2004<sup>9</sup> as well as regulations of specific sectors of the Nigerian economy governed market activities and sought to protect consumer rights, howbeit in piecemeal. The FCCPA when enacted became a comprehensive and handy competition law that regulates all sectors of the Nigerian economy. The Federal Competition and Consumer Protection Act,

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<sup>2</sup> Federal Competition and Consumer Protection Act, 2019

<sup>3</sup> UK Competition Act, 1998

<sup>4</sup> A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Dublin: Whitestone, 1776).

<sup>5</sup> K Franz, 'Effectiveness of Competition Law: An Empirical

Analysis', <<https://www.researchgate.net/publication/237250308>> accessed 21 February 2024.

<sup>6</sup> B Akinbola and E Uwadi, 'Antitrust as a Panacea for Economic Development in Nigeria' [2017] (11)(2) *Ife Juris Review*; 16; S J Evenett, 'Links between Development and Competition Law in Developing Countries'

<<https://www.alexandria.unisg.ch/22161/1/dfidpaper.pdf>> accessed 21 February 2024.

<sup>7</sup> D Gale and H Sabourian, 'Complexity and Competition' [2005] (73) *Econometrica*, 739.

<sup>8</sup> FCCPA, 2019

<sup>9</sup> Consumer Protection Council Act (CPCA) Cap 25, LFN, 2004



enacted in 2019,<sup>10</sup> represents a significant step forward in promoting competition and protecting consumers in Nigeria. It establishes a comprehensive legal framework that goes beyond previous piecemeal efforts and introduces powerful tools for the Federal Competition and Consumer Protection Commission (FCCPC) to address anti-competitive practices.

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>11</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 consumer protection.<sup>12</sup>

The FCCPA repealed the Consumer Protection Council Act,<sup>13</sup> established the FCCPC<sup>14</sup> in place of the Consumer Protection Council and also establishes the Competition and Consumer Protection Tribunal (CCPT). It also repealed Sections 118 to 127 of the Investments and Securities Act 2007 which hitherto empowered the Securities and Exchange Commission (SEC) to regulate and approve mergers, and conferred this role to the FCCPC.<sup>15</sup> The FCCPA is applicable to all commercial activities within, or having effect in Nigeria.<sup>16</sup> Its provisions are also binding on all government departments, all state owned corporations, and indeed all commercial activities aimed at making profit and targeted at satisfying demand from the public.<sup>17</sup> It equally applies extraterritorially to any prohibited conduct by a Nigerian citizen or a person ordinarily resident in Nigeria; a corporate body registered in Nigeria or carrying out business within Nigeria; any person supplying or acquiring goods or services into or within Nigeria; any person in relation to the acquisition of shares or assets outside Nigeria which results in the change of control of the business, part of the business or any asset of the business in Nigeria.<sup>18</sup> The FCCPA is often described as one of the most important and forward-looking pieces of legislation in Nigeria in the last two decades as it totally overhauled the institutional framework for consumer rights and protection and created a competition law<sup>19</sup> as part of Nigeria's overarching trade policy to make the country a more competitive and attractive destination for doing business. It is described as a seminal piece of legislation that will for a long time be referenced point with regard to competition and consumer rights protection matters.<sup>20</sup>

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<sup>10</sup> FCCPA, 2019

<sup>11</sup> Cap N33 Laws of the Federation of Nigeria 2004

<sup>12</sup> FCCPA, 2019 s 104

<sup>13</sup> *Ibid*, s 165

<sup>14</sup> *Ibid*, s 3

<sup>15</sup> FCCPA 2019 s 93

<sup>16</sup> FCCPA 2019 s 93

<sup>17</sup> *Ibid*.

<sup>18</sup> *Ibid*, s 3

<sup>19</sup> B E Osayomowanbor, 'How Effective Can the New Nigeria Competition and Consumer Protection Agency Be' *Business Day Newspaper* (May 8<sup>th</sup> 2019).

<sup>20</sup> S Tavuyanago, 'The Interface between Competition Law and Consumer Protection Law: An Analysis of the Institutional Framework in the Nigeria Federal Competition and Consumer Protection Act of 2019' [2018] (25)(2) *South African Journal of International Affairs*, 2.

The objectives of the Act are highlighted and the main goal of the Act is to promote a competitive market and ensure that the rights of consumers are protected in the consumption of goods and services in Nigeria. The Act's other provisions such as the regulation of mergers, prohibition of dominant position, the regulation of prices, and the prohibition of monopolistic agreement will be examined below. The new Federal Competition and Consumer Protection Act, 2019 has totally changed the regulatory and legal framework for mergers and acquisitions in Nigeria. Previously, mergers and Acquisition were regulated by the Investment and Securities Act of 2007 ('ISA'), the Securities and Exchange Rules and Regulations ('SECRR') and the Companies and Allied Matters Act ('CAMA'), but with the emergence of the Federal Competition and Consumer Protection Act, 2019, that has now changed.<sup>21</sup>

Under the FCCPA, a merger occurs when a firm directly or indirectly takes control over another business in part or in full, through the purchase of shares, amalgamation or joint venture.<sup>22</sup> Control is established when a firm owns more than half of the shares or assets of the undertaking; or is entitled to cast a majority of votes or has the capacity to control the voting pattern; or can appoint or veto the appointment of the majority of the directors/trustees; or is a holding company and the other firm is the subsidiary.<sup>23</sup> The Act classifies mergers into small and large mergers. Section 93(1) of the FCCPA provides that subject to the notification threshold guideline, the FCCPC must be notified of every large merger for consideration and subsequent approval, failure of which the merger is deemed void.<sup>24</sup> On the other hand, parties to small mergers are not required to notify the FCCPC unless they choose to.<sup>25</sup>

When considering a proposed merger, the FCCPC has to first determine if the merger is likely to substantially lessen competition by assessing the level of import competition, ease of entry and doing business, concentration trends, level and the history of collusion, among other related factors in the relevant market.<sup>26</sup> If the FCCPC comes to the finding that the merger is likely to substantially lessen competition, it will block the merger unless a greater technological, efficiency, pro-competitive or PIC benefit can be derived from such a merger.<sup>27</sup> The PIC in Nigerian merger review considers the impact of the merger on a particular industrial sector, employment, ability of national firms to compete in the global market, and the ability of small and medium firms to become competitive.<sup>28</sup>

## **2.0 Critical Analysis of the Extent of the Federal Competition and Consumer Protection Act 2019 Viz-A-Viz Promoting Competition in Nigeria**

Since the first introduction of merger regulation in the Nigerian legal system in 2007 under the supervision of the SEC till 2019 when the FCCPC took over the mandate from SEC, there was no

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<sup>21</sup> O O C Chukwuocha, 'Competition Issues in Mergers and Acquisitions in Nigeria and Competition and Consumer Protection Act 2019' [2019] (3)(2) *African Journal of Law and Human Rights*, 162.

<sup>22</sup> FCCPA 2019, s 92(1)

<sup>23</sup> FCCPA 2019, s 92(2)

<sup>24</sup> FCCPA 2019, s 96(5)

<sup>25</sup> *Ibid*, s 95(1)

<sup>26</sup> *Ibid*, ss 94(1)(a) and (2)

<sup>27</sup> *Ibid*.

<sup>28</sup> *Ibid*, s 94(4)



reported case of a merger prohibition by the SEC. The reason for this according to Dimgba<sup>29</sup> is because SEC being a traditional securities regulator struggled with competition law competence and tended to focus more on its area of expertise in merger regulation (which is to ensure that the shareholders were treated fairly) to the extent that some mergers which appeared to have lessened competition were approved as long as the undertakings paid the requisite application fees. It is therefore hoped that the same story will not be told of the FCCPC in the near future.

Fairness issues are increasingly playing a greater role in merger litigation as compared to competition issues. In *Oando Plc v Securities and Exchange Commission (SEC)*,<sup>30</sup> Oando challenged SEC's approval of its merger with ConocoPhillips, citing inadequate consideration for minority shareholders. The Court of Appeal agreed with Oando, ruling that the SEC's approval was unlawful due to insufficient evaluation of the merger's impact on minority shareholders and unfavourable terms for Oando shareholders. In the case of *BGL Plc v Finbank and Ors*,<sup>31</sup> the FHC was invited to determine whether, by virtue of certain provisions of CAMA, a proposed scheme of merger arrangement was oppressive, or unfairly prejudicial to or unfairly discriminatory against the Plaintiff and therefore illegal, null and void. Additionally, in *Dr. Kuku & Ors v Dr. Geoffery Ohen & Ors*,<sup>32</sup> the Court on May 7, 2018 declared the takeover bid as illegal for failure to comply with the provisions of the ISA.

Merger despite its numerous advantages is something to be approved with care. This is because mergers and acquisition has the tendency of creating a monopoly in a sector or industry. Mergers has the tendency to create a oligopolistic structure in an industry where only a few companies/ institutions dominate and dictate quality and prices of products and services offered to consumers. It is instructive to note that when companies merge, the number of players will reduce and hence, the intensity of competition. This might have implications for the prices, products and quality of services offered to buyers.<sup>33</sup>

The FCCPA prohibits the abuse of a dominant position in any industry by player (s) in a dominant position.<sup>34</sup> 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 anticompetitive effect.<sup>35</sup> The Act also introduces parameters for the assessment of market dominance such as market share of the undertaking or undertakings concerned in the relevant market; its or their financial power; its or their access to supplies or markets; its or their links with other undertakings; legal or factual barriers to market entry by other undertakings; actual or potential competition by undertakings established within or outside the scope of application of this Act; its or

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<sup>29</sup> N Dimgba, 'The Changing Landscape: Federal Competition And Competition Protection Act' (Keynote Address Delivered at the Jackson, Etti & Edu in Partnership with Norton Rose Fulbright Conference On Competition Law, 18 June 2019) 6.

<sup>30</sup> Suit No. FHC/L/CS/965/2019

<sup>31</sup> Suit No. FHC/CS/L/1367/2011

<sup>32</sup> FHC/L/CP/25/12

<sup>33</sup> Chukwuocha (n 3)

<sup>34</sup> FCCPA 2019 s 70

<sup>35</sup> *Ibid*, s 72(2)(a-d)

their ability to shift supply or demand to other goods or services; and the ability of the opposite market side to resort to other undertakings.<sup>36</sup>

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 ₦50,000,000.00.<sup>37</sup> 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.<sup>38</sup>

## **2.1 Regulation of Prices**

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.<sup>39</sup> 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.<sup>40</sup> Orders so made are to be narrowly designed both in terms of its duration and to the goods and services to which it applies.<sup>41</sup> 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.<sup>42</sup> The penalty for non-compliance with a price regulation is a crime punishable by a fine not exceeding ₦50,000,000.00 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 ₦50,000,000.00.<sup>43</sup>

## **2.2 Prohibition of Monopolistic Agreements**

The Commission's powers extend to investigation of monopolies.<sup>44</sup> A monopoly situation is taken to exist in relation to the supply of goods or services of any description or import and export of goods and services of any description from Nigeria, to the extent that it has an effect on competition in a market in Nigeria, as may be prescribed in regulations made by the Commission.<sup>45</sup> Where any monopoly is found to exist, the Tribunal's remedial efforts may include prohibition of an transaction on acquisitions,

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<sup>36</sup> *Ibid*, s 72(3)(a-i)

<sup>37</sup> *Ibid*, s 74(2)

<sup>38</sup> FCCPA 2019 s 75

<sup>39</sup> FCCPA 2019, s 88(1)

<sup>40</sup> *Ibid*, s 88(3)

<sup>41</sup> *Ibid*, s 88(2)(c)

<sup>42</sup> *Ibid*, s 91(1)

<sup>43</sup> *Ibid*, s 90(5)

<sup>44</sup> FCCP Act 2019 s 76

<sup>45</sup> *Ibid*, s 77



demand for business breakup or restructuring, demand publication of price lists, et cetera.<sup>46</sup> Also, the Commission's oversight over monopolies does not seem restricted to those arising in Nigeria, if the undertaking is of Nigerian origin.<sup>47</sup>

The Commission in the exercise of its powers as contained under the Act is empowered to obtain information as it may consider necessary for the purposes of conducting investigation relating to issues of monopoly.<sup>48</sup> Where a report is made by the Commission in respect of issues of monopoly, after investigation, within the time frame of report on a monopoly investigation, the Commission is obliged to refer the report to the Tribunal with the conclusions of the Commission whether or not monopoly situation exists and its adverse effect on public interest.<sup>49</sup> The Tribunal is to make such orders as it considers necessary for the purpose of remedying or preventing the adverse effects specified in the report.<sup>50</sup>

Although the FCCP Act is a plus and advancement in consumerism in Nigeria, Nigeria is miles away from her Eldorado in consumer protection, particularly, as the Act arrived with a number of teething issues. There has been some concern about the overbearing political interference in the FCCPA as exemplified by some powers granted to the executive in several provisions of the Act, a feature that is considered to be antithetical to the independence of the FCCPC, and could make the Commission an appendage of political actors. For example, sections 88 to 91 which make up Part XI of the Act provide for price regulation of some select goods and services upon an order of the President published in the Gazette. This power it is argued ought to reside with the FCCPC to guarantee its independence and insulate it from political interference, and not with the President. The concern is that a power such as this, sitting in the context of competition enforcement, ought to rest on the FCCPC itself without reference to any political actor including the President, because of the high tendency to prioritize political calculations over economic decisions.

### **3.0 Enforcement Mechanisms under the Federal Competition and Consumer Protection Act 2019**

In ensuring competition in any state, there is the need for a body tasked with the responsibility of acting as the regulator and administration of the relevant competition law. In order for competition law to efficiently tackle anti-competitive behavior, not only must the laws be strong enough to catch evolving anti-competitive practices but there must also exist effective mechanisms to ensure enforcement.<sup>51</sup> Some of the enforcement mechanisms under the Act include:

#### **3.1 Consumer Complaint Mechanism**

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

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<sup>46</sup> *Ibid.* s 86

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.* s 78

<sup>49</sup> *Ibid.* s 84

<sup>50</sup> *Ibid.* s 86(2)

<sup>51</sup> A Omeiza, 'The Adequacy of the Federal Competition and Consumer Protection Act, 2019 in Ensuring Healthy Competition in Nigeria' <[https://www.academia.edu/104364644/THE\\_ADEQUACY\\_OF\\_THE\\_FEDERAL\\_COMPETITION\\_AND\\_CONSUMER\\_PROTECTION\\_ACT\\_2019\\_IN\\_ENSUREING\\_HEALTHY\\_COMPETITION\\_IN\\_NIGERIA?uc-sb-sw=42949136](https://www.academia.edu/104364644/THE_ADEQUACY_OF_THE_FEDERAL_COMPETITION_AND_CONSUMER_PROTECTION_ACT_2019_IN_ENSUREING_HEALTHY_COMPETITION_IN_NIGERIA?uc-sb-sw=42949136)> accessed 3 March 2024.



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.<sup>52</sup>

A consumer shall file a complaint with the Commission in the prescribed manner and form, alleging that an undertaking has acted in a manner inconsistent with the provisions of this Act.<sup>53</sup> Once the FCCPC receives any complaint, a notice of non-referral to the complainant is issued when it is clear that the complainant has not made out any case or that his allegations are frivolous. If the case is valid it may be referred to an industry sector regulator for investigations, or an inspector will be appointed to investigate the complaint as quickly as possible.<sup>54</sup>

After the FCCPC has received a report of the investigations, it may issue a notice of non-referral, make an order, or issue a compliance notice. After the investigations by the FCCPC, with an agreement between the Commission and the respondent of the proposed order, it becomes an order of the FCCPC, and the Commission may register the order in a competent court within jurisdiction.<sup>55</sup> The FCCPC may issue a compliance notice against the defaulting party stating that they have engaged in a prohibited conduct, this notice shall remain enforceable unless it is set aside by a court, or the FCCPC issues a compliance certificate when it is satisfied that the compliance order has been complied with.<sup>56</sup>

### **3.2 Enforcement of Consumer Protection by Civil Rights Groups**

Every society has a group of individuals who come together as a group to protect certain interests. In the area of consumer protection, the FCCPA recognizes certain associations and also works in tandem with these civil society groups in order to support, facilitate and collaborate with the activities of such groups to ensure protection of consumers. This entails engaging in rendering advice, education, enlightenment and making publications, research, and surveillance, monitoring of consumer markets and reporting prohibited activities. In order to promote the rights of consumers, and also offering representations in court, alternative dispute resolution and participating in conferences, workshops, and both local and international associations that cover consumer issues.<sup>57</sup>

Consumer groups that are accredited for consumer issues, usually protect consumer interest either individually or collectively subject to the FCCPA. These groups are to intervene in issues relating to consumer protection, all accredited groups may directly report to the FCCPC any concern or matter within the FCCPA.<sup>58</sup> The FCCPC accredits interest groups if they function for the purpose of representing the interests of consumers, and are fully committed to achieving the purposes of the FCCPA, or carries out actions and functions that promote and advance the overall interests of consumers. The FCCPC usually imposes reasonable conditions for such interest groups to be granted accreditation, and closely monitor these interest groups and also ensure full compliance by providing correct information for the monitoring purposes.<sup>59</sup>

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<sup>52</sup> FCCPA 2019 s 146(1)(a-c)

<sup>53</sup> *Ibid*, s 148(1)

<sup>54</sup> *Ibid*, s 148(3)(a)-(c)

<sup>55</sup> *Ibid*, s 149(1)-(3).

<sup>56</sup> FCCPA, s 150(1)-(3)

<sup>57</sup> *Ibid*, s 151(1)(a)-(f)

<sup>58</sup> *Ibid*, s 151(2)

<sup>59</sup> FCCPA, s 151(5)



### **3.3 Enforcement by Relevant Sector Regulators**

In issues pertaining to consumer protection, every product or service is regulated by various sectors. For example, for drugs or pharmaceutical products, the ministry of health in conjunction with state ministries of health also plays a major role of enforcement of consumer protection legislation, and also works in collaboration with the FCCPC and National Agency for Food and Drugs Administration and Control (NAFDAC) as regarding the sale and distribution of pharmaceutical products around Nigeria. NAFDAC partners with private stakeholders to ensure compliance to laid down laws on consumer protection.<sup>60</sup>

### **3.4 Consumer Protection Enforcement through the Courts, FCCPC and CCPT**

The courts are also fully involved in the enforcement of the laws and protection of consumer through judgments and compensation orders. Part VII of the FCCPA empowers the Competition and Consumer Protection Tribunal (CCPT), which has the power to adjudicate over all conducts prohibited under the FCCPA, and also exercise jurisdiction, powers and authority conferred on it under the FCCPA.<sup>61</sup> The CCPT is empowered by the FCCPA to hear appeals from the FCCPC, and also empowered to review decisions of the FCCPC which were taken in the process of implementation of any of the provisions of the FCCPA which may be referred to it by the FCCPA.

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<sup>62</sup> only and also appeals from the CCPT shall lie at the Court of Appeal, and anyone not satisfied shall give a written notice to the registrar of the Court of Appeal within 30 days of the order, ruling or judgment.<sup>63</sup>

The Act provides different avenues for the consumer to enforce his rights when breached. The effectiveness of these mechanisms relies heavily on the capacity and resources available to the FCCPC and other involved institutions. Building a strong case law through consistent enforcement and court decisions is crucial for establishing clear precedents and interpretations of the Act. However, one wonders how accessible these avenues of redress are to the consumer in terms of proximity. Most of the sector regulators are located in the metropolitan cities far away from the ordinary citizen who may have suffered from the substandard goods and shoddy services.

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 appear to be restricted to the imposition of administrative penalties. The question then is under what circumstance a business entity can be convicted for any anti-competitive behaviour and by whom.

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<sup>60</sup> 'National and International Food Safety Governance: Nigerian Perspective' 7th –8th of February, 2017

<sup>61</sup> FCCPA s 39(2)

<sup>62</sup> FCCPA s 54(1)(a-b)

<sup>63</sup> *Ibid*, s 55(1)

#### **4.0 Analyzing Competition and Consumer Protection Laws and Policies vis-à-vis Promoting Competition in Other Jurisdictions**

This section makes a comparative analysis of the perspective of competition law in the UK and US. Although the competition law systems of the two jurisdictions have developed out of varied, concerns such as the need to prohibit contracts that restrain trade, creation of a common market still persists.

##### **4.1 The United Kingdom**

The United Kingdom has a robust framework of competition and consumer protection laws and policies designed to promote fair competition in the market and safeguard the interests of consumers. These laws are enforced by various regulatory bodies, including the Competition and Markets Authority (CMA) and sector-specific regulators.<sup>64</sup> The CMA shares its consumer protection law enforcement powers with a large number of other bodies, notably local authority Trading Standards Services (who have lead responsibility for the majority of consumer enforcement in the UK, and enforce product safety standards) and the various sectoral regulators (for example in the financial services, telecoms, utilities and travel sectors). The CMA normally expects the sectoral regulators to take enforcement action at least in the first instance, where problems arise in their areas.<sup>65</sup>

In this regard, the UK government introduced a wide range of legislation covering various aspects of the basic needs of consumer interests such as The Consumer Protection from Unfair Trading Regulations 2008 (CPRs), the Consumer Protection Act, 1998, the Consumer Rights Act 2015, and so many others.<sup>66</sup> The Competition Act 1998<sup>67</sup> is the primary legislation governing competition law in the UK. It prohibits anti-competitive agreements, mergers that significantly impede competition, and certain types of market dominance abuse. The Consumer Rights Act 2015<sup>68</sup> consolidates a number of existing consumer protection laws, including those relating to unfair trading practices, misleading information, and product safety. While the Consumer Protection from Unfair Trading Regulations 2008 prohibit a wide range of unfair commercial practices, such as misleading advertising, aggressive selling, and hidden charges.<sup>69</sup>

The Consumer Protection from Unfair Trading Regulations 2008 (CPRs), implement the Unfair Commercial Practices Directive (UCPD) which is designed to harmonise the legislation across the European Union preventing business practices that are unfair to consumers. This will make it easier for traders based in one Member State to market and sell their products and services to consumers in other Member States. It will also give consumers greater confidence to shop in the UK, and across borders, by providing a high common standard of consumer protection.<sup>70</sup> The CPRs apply to any act, omission

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<sup>64</sup> Competition and Markets Authority (CMA)—Written evidence  
<<https://committees.parliament.uk/writtenevidence/80732/pdf/>> accessed 3 March 2024.

<sup>65</sup> *Ibid.*

<sup>66</sup> M A Khan, 'The Origin and Development of Consumer Protection Laws in United Kingdom',  
<<https://www.aarcentre.com/ojs3/index.php/jaash/article/view/127/342>> accessed 3 March 2024.

<sup>67</sup> The Competition Act 1998

<sup>68</sup> Consumer Rights Act 2015

<sup>69</sup> Consumer Protection from Unfair Trading Regulations 2008

<sup>70</sup> Office of Fair Trading, 'A quick guide to competition and consumer protection laws that affect your business',  
<<https://assets.publishing.service.gov.uk/media/5a759a6ced915d506ee80176/oft911.pdf>> accessed 4 March 2024.

and other conduct by businesses directly connected to the promotion, sale or supply of a product (the definition of which includes services) to or from consumers; whether before, during or after a contract is made.<sup>71</sup> A sufficiently close connection with the supply of a product or services to consumers may fall within the scope of the CPRs, even if you do not deal directly with consumers.

Also, the Office of Fair Trading (OFT) had played an important role in consumer protection and implementation of competition law in the UK.<sup>72</sup> The OFT has extensive powers to investigate suspected breaches of competition law and take action. Penalties can include fines of up to 10 per cent of a company's annual worldwide turnover. The OFT can also assess whether an abuse may affect trade between EU Member States.<sup>73</sup>

#### 4.2 The United States of America

The US antitrust law regime is one of the most influential regimes in the world. There are various laws in the US which are relevant to competition law though not all share the same degree of significance.<sup>74</sup> The three main federal competition laws: the Sherman Act of 1890, the Clayton Antitrust Act 1914 (hereinafter the 'Clayton Act') and the Federal Trade Commission Act 1914. The US Sherman Act adopted in 1890 is regarded as the first modern statutory system of competition law. However, the roots of competition law lie much deeper. Accordingly, Senator Sherman was of the view that the bill did 'not announce a new principle of law but applies old and well-recognized principles of the common law to the complicated jurisdiction of our state and Federal Government'. Accordingly, the Sherman Act was viewed largely as a codification of existing common law principles.

The Sherman Act was enacted in the era of "trusts" and of "combinations" of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The goal was to prevent restraints of free competition in business and commercial transactions which tended to restrict production, raise prices, or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury. In the case of *American Banana Co. v United Fruit Co.*,<sup>75</sup> the American Banana Company brought a suit against the United Fruit Company for allegedly conspiring with the Costa Rican militia to monopolize the production and exportation of bananas from Central American to the United States.<sup>76</sup>

The decision was also different in *U.S v Pacific and Artic*<sup>77</sup> in contrast to American Banana, four years after American Banana. The jurisdiction of the Sherman act was not restricted to the U.S.A territory alone. In *Pacific Artic*, the defendant, who included a U.S corporation and a Canadian corporation engaged in a combination and conspiracy restriction of trade and commerce with one another. They

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<sup>71</sup> *Ibid*, s 3(4)

<sup>72</sup> Khan (n 48)

<sup>73</sup> Office of Fair Trading (n 52)

<sup>74</sup> Sherman Act of 1890; Wilson Tariff Act of 1894; Clayton Act of 1914; Federal Trade Commission Act of 1914.

<sup>75</sup> 221 U.S. 106 (1911)

<sup>76</sup> R P Alfred, 'The Extraterritorial Application of the Anti-trust Laws: The United States and the European Community Approaches' [1992] (33)(7) *Journal of International Law*, 201.

<sup>77</sup> 228 U.S (1913) 87

succeeded in destroying competition in their line of business in the U.S and Canada. The United States Federal Trade Act on the other hand created the Federal Trade Commission (FTC) on September 26, 1914. The Commission serves as the principal consumer protection agency and administers a wide variety of consumer protection laws, like the Telemarketing Sales Rule and the Equal Credit Opportunity Act. The overall goal is to afford consumers a deception-free marketplace and to maintain competition by preventing anticompetitive business practices. Specifically, Section 5(a) of the FTC Act prohibits ‘unfair or deceptive acts or practices in or affecting commerce.’ The Act specifies that deception occurs when there is a material representation, omission, or practice that is likely to mislead a consumer who is acting reasonably under the circumstances.

The FTC also functions as an investigative and enforcement authority, with powers to uncover deception, unfair activities, or violation of any statute under which it has authority. Seven divisions of the Bureau of Consumer Protection carry out the FTC’s mandate to protect consumers against unfair, deceptive, or fraudulent practices.<sup>78</sup> These divisions include: Advertising Practices, Financial Practices, Marketing Practices, Privacy and Identity Protection, Planning and Information, Consumer and Business Education, and Enforcement.<sup>79</sup> The FTC has the power to bring civil suits in federal court to secure financial compensation and penalties for individuals, or for class-action litigants damaged by violators of applicable laws. Fines and punishments against violators are imposed by the courts, rather than directly by the FTC.<sup>80</sup>

It must be emphasised that in the US, there exists a decentralised nature of consumer protection law and the combined roles of federal, state, local, and private law are fully utilised in deterring, detecting, and punishing deceptive and unfair conduct that injure consumers. There are also federal, state, local, and private litigation options to obtain damages, restitution, and injunctive relief for consumers on an individual and class action basis.<sup>81</sup> Also, attorney generals have the power to bring actions to enforce US antitrust laws, regardless of whether the FTC and the DOJ have already made different decisions. Fourth, the US system of antitrust permits private parties to take actions for damage suffered. Fifth, the system sets the amount of compensatory damages at three times the actual loss.<sup>82</sup>

#### 4.3 Lessons for Nigeria

Comparing best practices can be beneficial, but direct implementation without considering specific circumstances might not be effective. With that caveat in mind, here are some potential areas where Nigeria could learn from the UK and US.

- i. **Focus on promoting fair competition:** Both the UK and US frameworks emphasize preventing anti-competitive agreements, mergers, and market dominance. Nigeria's Federal

<sup>78</sup> E Akpan, ‘A Comparative Analysis of Consumer Protection Framework in Nigeria, United States of America and South Africa’ [2019] (1)(2) *International Journal of Comparative Law and Legal Philosophy*, 137.

<sup>79</sup> S Waller, J Brady and R Acosta, ‘Consumer Protection in the United States: An Overview’ <[https://www.researchgate.net/publication/228208216\\_Consumer\\_Protection\\_in\\_the\\_United\\_State\\_An\\_Overview](https://www.researchgate.net/publication/228208216_Consumer_Protection_in_the_United_State_An_Overview)> accessed 4 March 2024.

<sup>80</sup> ‘A Short History of the US Federal Trade Commission’ <<https://www.investopedia.com/articles/financial-theory/10/the-us-federal-trade-commission.asp>> accessed 4 March 2024.

<sup>81</sup> Akpan (n 60)

<sup>82</sup> M Dabbah, *The Internationalisation of Antitrust Policy* (CUP 2003) 274; A Neale, *The Antitrust Laws of United States of America* (CUP 1970) 10; R Peritz, *Competition Policy in America, 1888–1992 History, Rhetoric, Law* (OUP 1996) 26.

- Competition and Consumer Protection Act (FCCPA) 2019<sup>83</sup> can benefit from mirroring these core principles while considering its specific economic context.
- ii. **Consumer protection through diverse legislation:** Both nations have a range of laws tackling unfair trade practices, misleading information, and product safety. Nigeria's FCCPA can be strengthened by drawing inspiration from the UK's Consumer Rights Act 2015<sup>84</sup> which consolidates various laws, promoting clarity and ease of enforcement and the US's Federal Trade Commission, 1914<sup>85</sup> which comprehensively address unfair practices, potentially informing similar regulations within Nigeria's FCCPA framework.
  - iii. **Independent enforcement bodies:** The UK's Competition and Markets Authority (CMA) and the US's Federal Trade Commission (FTC) serve as independent watchdogs. Strengthening the independence and capacity of Nigeria's Federal Competition and Consumer Protection Commission (FCCPC) is crucial for effective enforcement. Also, attorney generals have the power to bring actions to enforce US antitrust laws, regardless of whether the FTC and the Department of Justice have already made different decisions. The US system of antitrust permits private parties to take actions for damage suffered and the system sets the amount of compensatory damages at three times the actual loss.<sup>86</sup>

## 5.0 Conclusion

Choosing a platform for Nigerian competition law demands attention to the place of 'efficiency' in anchoring a competition law system. A key element of competition is its tendency to encourage businesses to be productive and efficient. It is no doubt that competition in every commercial environment promotes 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 availability 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 reducing 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 pain 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. The FCCPA is a welcome development in the competition space in Nigeria. It is also an improvement on the previous regime on consumer

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<sup>83</sup> Federal Competition and Consumer Protection Act (FCCPA) 2019

<sup>84</sup> UK's Consumer Rights Act 2015

<sup>85</sup> Federal Trade Commission, 1914

<sup>86</sup> Dabbah (n 64); Neale (n 64); Peritz (n 64).

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.

## **6.0 Recommendations**

The paper therefore recommends as follows:

- i. Overall, the FCCPA has the potential to be a powerful tool for promoting competition in Nigeria. However, its effectiveness hinges on strengthening the human capacity of the FCCPC. This includes providing adequate resources, training, and personnel to effectively enforce the Act across the country. Prior to the FCCPC, staff of the defunct CPC were mostly versed in consumer protection and may not have commensurate qualification, skills and expertise in competition law. It would be beneficial to the competition cause to bridge the knowledge gap among the staff of the FCCPC and FCCPT to enable them effectively discharge their duties under the Act. It is further believed that the FCCPC will function better as an independent, non-ministerial department subject only to the Act as opposed to being an agency under the Minister of Trade. This will eliminate potentials for bias or difficulty in enforcing the Act in instances where state-owned institutions are in direct breach of the Act.
- ii. To enhance the effectiveness of the FCCPC, there is need to ensure adequate funding for its activities. Thus, instead of sole reliance on budgetary allocations, it might be necessary to provide for additional means of generating funds for the Commission such as fees that can accrue to the Commission or funds generated from fines.
- iii. To ensure a robust competition law regime in Nigeria comparable to the frameworks available in the United Kingdom and United States of America, it is recommended that the FCCPC should build a strong case law through consistent enforcement and court decisions which is crucial for establishing clear precedents and interpretations of the Act. There is also the need to review and potentially simplify the procedures for filing complaints, conducting investigations, and issuing sanctions to ensure efficiency and timely resolution of cases. Competition law cases arise from business transactions and there is need to eliminate delays. It is recommended that future reviews of the Act should consider imposing time frames for determination of cases at the FCCPC, the FCCPT and the Courts.
- iv. The FCCPC should conduct public education campaigns to raise awareness about the FCCPA, consumer rights, and the channels for reporting violations. This empowers individuals to become active participants in protecting their rights and promoting a fair market environment. Further, the Commission should make a case for inclusion of the subject in the curriculum for law degrees in Nigeria. This will empower lawyers with specialist knowledge in the subject that can help resolve competition law cases and advance the subject in Nigeria. Implementing the above recommendations will encourage innovation and economic development, improve consumer protection and ultimately strengthen competition policy in Nigeria.