

KEY TAKEAWAYS

# THE CHANGING LANDSCAPE

Federal Competition and Consumer Protection Act

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## INTRODUCTION

**The signing into law by President Muhammadu Buhari of the Federal Competition and Consumer Protection Act (the FCCPA/Act) on February 5, 2019, birthed a new dimension in the competition and consumer protection law jurisprudence in Nigeria.**

Further to the introduction of the Act, our law firm, *Jackson, Etti & Edu*, organised a one-day seminar on the 18<sup>th</sup> of June 2019 themed: **THE CHANGING LANDSCAPE: FEDERAL COMPETITION AND CONSUMER PROTECTION ACT** to sensitise the business community on the new law and the implications of same on businesses and the Nigerian citizenry.

The seminar which kicked off with a keynote address delivered by Hon. Justice Dr. Nnamdi O. Dimgba, had three panel sessions and a presentation by Mr Mark Griffiths of Norton Rose Fulbright titled “Trends in Competition Laws in other Jurisdictions”.

The discussions provided insights into doing business in Nigeria and with Nigerian companies, particularly from a competition perspective.

Below, we have aggregated the takeaways from each session.

### **A New Sheriff is in Town!**

The enactment of the FCCPA heralds a new era for Nigeria, as the new legislation is set to bring about positive development in the business environment; both by ensuring best practices in competition and in encouraging business growth.

The Federal Competition and Consumer Protection Commission (FCCPC) has been granted wide powers by the FCCPA to ensure compliance with its provisions.

In the words of the Keynote Speaker, Hon. Justice Dr. Nnamdi O. Dimgba, the new Act could be likened to a new riot act, with the FCCPC as the new sheriff to keep everyone in line.

### **Highlights**

- a) At present, over 120 countries have competition law, and Nigeria has recently joined the league upon the enactment of the FCCPA, 17 years after the idea of a competition law was initially conceptualised.
- b) Section 165 of the FCCPA repealed the Consumer Protection Council Act, CAP C25 LFN 2004, and established the Federal Competition and Consumer Protection Commission (FCCPC) in place of the Consumer Protection Council (CPC) to take over the functions of the CPC, and also be the national competition regulator.
- c) The FCCPA repealed Sections 118 to 127 of the Investments and Securities Act 2007 which had empowered the Securities and Exchange Commission (SEC) to regulate and approve mergers and assigned this role to the



FCCCPC. However, the role of the Securities and Exchange Commission in mergers was not entirely dispensed with by the FCCPA but its activities were restricted to its primary duty as a capital market regulator.<sup>1</sup>

- d) Section 39 of the FCCPA established the Competition and Consumer Protection Tribunal (“the Tribunal”) with the power to adjudicate over acts prohibited by the FCCPA or any other enactment, entertain appeals on any decision of the FCCPC, hear appeals from the decisions of sector-specific regulators on competition and consumer protection matters, after the FCCPC itself had first considered such an appeal.

### Takeaways

- a) The SEC no longer has jurisdiction over merger control and same is now exclusively vested in the FCCPC, although the SEC remains the capital market regulator.
- b) The Consumer and Protection Act and the CPC are now defunct.
- c) The provisions of the FCCPA override that of any other law in all matters relating to competition and consumer protection, and the FCCPC has precedence over and above any other sector-specific regulator in matters or conducts which affect competition and consumer protection.

- d) The FCCPC is empowered to sit on appeals to review the decisions of sector-specific regulators.

### Query

Some provisions of the FCCPA clash with the statutory powers of some regulatory agencies like the Standards Organisation of Nigeria (SON); the National Agency for Food and Drug Administration and Control (NAFDAC); Nigerian Customs Service (NCS) in the consumer protection sphere, while some of its powers encroach on the turf of regulators like the Nigerian Electricity Regulatory Commission, the Nigerian Civil Aviation Authority, the Nigerian Communications Commission all of whom have developed sufficient expertise, know-how and practices; this may cause some administrative friction, which could affect consumers and industry players.

### The FCCPC’s Rules and Regulations are key to ensuring investor confidence in Nigeria

The first session addressed the topic ‘The FCCPA and what it means for Business in Nigeria; an Expert’s Perspective’ and was aimed at unravelling the realities the new Act is set to introduce in the business sector.

The topic was addressed from the combined viewpoint of industry specialists, academic specialists and the key regulator. The panel session was moderated by Mr. Adkunle Soyibo, a Partner at Jackson, Etti & Edu, and comprised Mr. Babatunde Irukera (Chief Executive of the Federal Competition

<sup>1</sup> See SEC Circular dated 08/02/2018 titled ‘Notice on the Passage of the Federal Competition and Consumer

Protection Act’ <<http://sec.gov.ng/notice-on-the-passage-of-the-federal-competition-and-consumerprotection-act/>> accessed August 8, 2019.



and Consumer Protection Commission), Prof. Ademola Oyejide (Professor Emeritus, Department of Economics, University of Ibadan), Hon. Justice Dr. Nnamdi Dimgba (Competition Expert and Justice of the Federal High Court) and Ms. Folasade Olusanya, (Industry Specialist and Partner, Jackson, Etti & Edu).

The discussion addressed issues such as how the FCCPC intends to manage the transition into a new competition landscape, the formula for prioritization of the needs for various rules and regulations on different areas of concern. The discussion also considered the Commission's approach to providing regulations and guidelines for various aspects of competition compliance, as well as the options that businesses can exploit towards ensuring compliance with the new Act across the board.

### Highlights

- a) The panel agreed that the enactment of the FCCPA was a step in the right direction even though the development was long overdue.
- b) The FCCPC will take a gradual transitional approach (rather than a disruptive approach) towards restructuring the competition landscape in the country while maintaining a firm grip on the navigation, in order not to overly unsettle business in affected industries. The Commission will be adopting leniency, at its discretion and on per case basis, during this course.
- c) There is an urgent need for rules and regulations of the FCCPC to clarify and regularise various aspects of the FCCPA as well as to indicate the policy

thrust of the Commission. Some of these issues include merger thresholds, the criteria for determining what constitutes restrictive agreements prohibited under the Act etc. The Director-General of the Commission, explained that the Commission would be taking a 'prioritization approach' towards the provision of subsidiary legislations; which would mirror the national economic priorities.

- d) The Act is poised to be significantly impactful, and it would serve the FCCPC to fast track full operationalisation. The provisions on fees for filings and other services of the Commission need to be urgently published, to aid operationalisation and to generate the revenue needed for the running of the Commission.
- e) The FCCPC will focus on eliminating entry barriers. The position at the moment is that the elimination of entry barriers will facilitate the self-correction of the system.
- f) The draft thresholds for merger review would be published shortly. The FCCPC is also currently engaging the Federal Government on the publication of a national competition policy document.

### Takeaways

- a) **Fees as Revenue:** It may not be the correct approach to view applicable fees, penalties and sanction as a means of revenue generation as this may imply higher fees and penalties, and will negatively affect the ease of doing business in Nigeria in terms of costs.



- b) **Sanctions:** The Commission will not adopt a sanction-focused approach to enforcement, but would be looking to create an atmosphere of positive compliance, while still utilizing sanctions as necessary.
- c) **Internal/External Compliance Units:** Businesses need to adopt a proactive approach towards keeping in line with the new Act and can do this by creating competition compliance units or making provisions for outsourcing competition compliance to capable hands, in order not to be caught on the wrong side of the law.
- d) **Double Mandate:** The fact that the Commission is saddled with the double mandate of consumer protection and competition enforcement may be a challenge, as operating optimally in both spaces may be an uphill climb. The DG of the FCCPC, however, noted that the FCCPC has considered the likely challenges and hopes to be able to navigate them properly.
- e) **Synchronization:** The FCCPC would reach an arrangement with other regulators in the competition space to synchronize their workings and ensure smooth regulation in the competition and consumer protection sphere in order to reduce bureaucracy and bureaucratic frictions as well as prevent repetitive compliance procedures. The FCCPA enjoins the Commission to enter agreements for mutual cooperation with Sector Regulators and it is hoped that this will help achieve the intended cohesion between the Commission and Sector Regulators.

## Queries

- a) **Overlays:** The fact that there are so many regulators operating within the same industries unnecessarily increase cost of business, prolong the compliance process, increase the time it takes to conclude transactions and stifle smooth operation. There is a need to ensure that the presence of several regulators would not cause layered processes.
- b) **Indirect Acquisitions:** The regulations to be put in place by the FCCPC would have to answer questions such as when acquisition approvals should be sought and obtained for indirect acquisitions occurring outside Nigeria, whether the approvals obtained from relevant foreign competition authorities would suffice for the purposes of complying with the FCCPA or if additional documentation would be required to be submitted for the approval of an indirect acquisition.
- c) **Clarity on Courts:** 'Court' under the interpretation section of the Act is stated to be the Court of Appeal, however, various sections of the Act make reference to 'court of competent jurisdiction' or 'a court'. These provisions may be interpreted as vesting jurisdiction on Courts other than the Court of Appeal to hear matters emanating from the FCCPA. In addition, there is a need for clarity on which court would be approached for sanction of mergers, as there is no provision for this under the Act, as was contained in the now repealed Investment and Securities Act.



- d) **Fees:** The multiplicity of regulators in the competition space mean more expenses for business as they would have to deal with multiple regulators for the same compliances. It was considered that the regulators in the competition space could adopt a fee-sharing arrangement to prevent double expenses on the same or similar compliance processes.
- e) **Merger Definition:** The definition of Merger under the Act is very broad and captures transactions like group restructuring which may not have any impact on competition. There is need to provide clarity in the regulations as to which type of mergers would be subject to a review by the FCCPC.

### Competition Trends: Is Nigeria adopting the right approach?

The second session was a presentation by competition specialist and cross-jurisdictional competition practitioner, Mr Mark Griffiths on the topic “Trends in Competition Laws in other jurisdictions.”

The presentation highlighted areas of similarities between the FCCPA and the competition laws of other jurisdictions, as well as areas of possible learning from a comparative perspective.

Drawing from trends in other countries, he directed attention to key areas which the FCCPC may be likely to first address in the nascent stages of its operations, such as merger control and cartel enforcement. It was also mentioned that the FCCPC would also be likely to focus first on priority sectors and industries in line with the economic goals and priorities of the country during this period.

### Highlights

- a) The FCCPC should adopt a pragmatic and multi-faceted approach to the operationalization of the competition provisions contained in the FCCPA, so as to ensure that the intendment of the Act is given purposeful implementation.
- b) Going by trends noticed from the competition regime of other countries in the continent, the FCCPC is likely to emphasize more on merger control at the initial stages of its operations. This is in order to get market insight and competition analysis and develop necessary expertise, before diversifying into other areas of competition such as Restrictive Practices, Cartel Enforcement, Abuse of Dominance and Monopoly Situations.
- c) It was noted that the word *concurrency*, in reference to the co-joined mandate of the various regulators in the competition scene (due to the emergence of the FCCPC) is used loosely, as compared to strict international comparative usage, as the regulators do not have replicated mandates per say, but just occasional overlaps on specific matters.

### Takeaways

- a) Nigeria should have an established policy approach with respect to competition in the country to ensure investor confidence.
- b) The FCCPC would need to channel efforts towards priority industries.
- c) Competition regimes have proven across jurisdictions to be very useful



in transforming business in such countries, with South Africa as a ready example.

### Queries

- a) The FCCPC would have to decide whether it intends to make getting approvals for restrictive agreements compulsory or “nice-to-have”; although, trends have shown that it is not optimal to make it compulsory as it would be unnecessarily burdensome. A situation where every contract that has any ‘restrictive’ suggestion would have to go through the FCCPC would negatively affect the time for concluding commercial contracts.

### **The increased compliance burden by the new competition regime may be beneficial to the Nigerian Business Environment in the long run...**

The third session, a panel discussion, considered the implications of the FCCPA from the perspective of industry players. This session was another panel discussion, moderated by Mr. Taiwo Adeshina, a Partner at Jackson, Etti & Edu, and had Mr. Thompson Akpabio (Deputy-Director of NECA) Mrs. Abidemi Ademola (General Counsel, GN and Company Secretary to Unilever Nigeria PLC), Mr. Tobeckwu Okigbo (Executive, Corporate Relations MTN Nigeria), Ms. Olusola Carrena (Head of Corporate Finance, Stanbic IBTC Capital Limited), and Mr. Obafemi Agaba (Partner and FMCG Sector Head, Jackson, Etti & Edu)

Whilst much of the conversation weighed the new reality of multiple regulators in some sectors and the implications for their respective companies, it was agreed that

the new regime could be beneficial, in protecting all concerned players and in ensuring a more robust market.

### Highlights

- a) From a business perspective, the better approach would be for businesses to focus more on understanding the new realities introduced by the Act and reacting only after due comprehension so as not to be unduly agitated or act in the wrong direction.
- b) It was mentioned that the new reality of having several competition regulators in industries, creates a situation where regulated sectors will be exposed to more compliance obligations; However, if properly implemented, the benefits the introduction of the Act would bring to the industry would outweigh the added compliance burden.
- c) Once the companies have understood the obligations imposed by the FCCPA, it is imperative to draw up a roadmap for its compliance with the FCCPA and begin to execute on the same.
- d) The FCCPC should look into having resident police officers that are attached to the Commission to ensure that enforcement actions are more effective.
- e) It is essential to exempt some transactions such as Holdco restructuring under the new regime to avoid being bogged down by applications for review under the FCCPA.



## Takeaways

- a) There is a need for companies to build an understanding of the new competition terrain from a business perspective to ensure compliance.
- b) There is a need for clarity as regards the relationship between the various regulators in the competition space; whether that of a regulator regulating other regulators or regulators operating concurrently.
- c) There is a need for clarity with respect to the framework for the implementation of the FCCPA. It must be articulated simply and clearly and leave no room for speculation.

## Query

- a) **Inter-Agency relationship:** The relationship between the sector regulators and the FCCPC and how it may impact businesses is still uncertain to companies in the private sector.
- b) Clarity is needed urgently to ensure certainty and ensure public confidence in the system.

## Is the FCCPC a Regulator of Regulators?

The fourth session addressed the FCCPA from the viewpoint of sector regulators who had sectoral competition and/or consumer protection jurisdiction. The panel which was moderated by Mr. Okey Nnebedum, a Senior Associate at Jackson, Etti & Edu comprised Mr. Dafe Akpeneye (Commissioner Legal, Licensing and Compliance, Nigerian Electricity Regulatory Commission), Mr. Mfon Bassey (Deputy Director, Mergers and Acquisitions Division of

the Securities and Exchange Commission), and Dr. Terhemmen Andzenge (Head of Strategy and Planning, Bureau of Public Enterprises).

It was considered that the Act, rather than being divisive, was intended to create a complementary relationship between the sector regulator and the FCCPC.

## Highlights

- a) It was highlighted that the unique blueprint of the FCCPC was inspired by a need to create a forum where regulators in the relevant space can come together and work in synergy.
- b) It was agreed that the relationship between the various regulators is complementary, as no single regulator has the capacity to provide for all the intersecting concerns in the competition space. The presence of multiple regulators would make for more robust engagements towards utility for consumers.
- c) It would be important, however, to delineate lines within which each regulator would work to prevent friction and ensure efficiency.

## Takeaways

- a) There is a need to build stronger relationships between the sector regulators and the FCCPC.
- b) There is a need to ensure that focus is not shifted from utility for the consumer to private aggrandisement.



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