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Analyzing the Prospects and Challenges in Implementing the Legal Framework for Competition Regulation in Nigeria

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Abstract**—**Competition law promotes market competition by regulating anti-competitive conduct by undertakings. There is a need for a third party to regulate the market for efficiency and supervision, since, if the market is left unchecked, it may be skewed against the consumers and the economy. Competition law is geared towards the protection of consumers from economic exploitation. It is the duty of every rational government to optimally manage its economic system by employing the best regulatory practices over the market to ensure it functions effectively and efficiently. The Nigerian government has done this by enacting the Federal Competition and Consumer Protection Act, 2018 (FCCPA). This is a comprehensive legal framework with the objective of governing competition issues in Nigeria. Prior to its enactment, the competition law regime in Nigeria was grossly inadequate despite Nigeria being the biggest economy in Africa. This latest legislation has become a bold step in the right direction. This study will use the doctrinal methodology in analyzing the FCCPA, 2018 in order to discover the extent to which the Act will guard against anti-competitive practices and promote competitive markets for the benefit of the Nigerian economy and consumers. The study finds that although the FCCPA, 2018 provides for the regulation of competition in Nigeria, there is a need to effectively tackle the challenges to the implementation of the Act and the development of anti-trust jurisprudence in Nigeria. This study concludes that incisive implementation of competition law in Nigeria will help protect consumers and create a conducive environment for economic growth, development, and protection of consumers from obnoxious competition practices.

Keywords**—**Anti-competitive practices, competition law, competition regulation, consumer protection.

I. Introduction

COMPETITION law is mainly geared towards protecting the consumer from economic exploitation. Therefore, on the 5th of February 2019, the Nigerian President, Muhammadu Buhari, assented to the Federal Competition and Consumer Protection Act 2018 [1] (FCCPA or The Act). The objective of the FCCPA 2018 is to develop, aid, and regulate the fairness and competitiveness of the market within the Nigerian economy. It ensures that the goods and services in the Nigerian market are of a high standard so as to safeguard the interest and well-being of consumers as provided under section 1 of the FCCPA [2]. The Act repealed the Consumer Protection Council Act (CPC) [3]; abolished the Consumer Protection Council and set-up the Federal Competition and Consumer Protection Commission (FCCPC) in its stead. It also, under s.165 FCCPA, repealed sections 118-128 of the Investment and Securities Act [4] dealing with merger control. Unlike the defunct CPC, the FCCPC's oversight surpasses consumer protection issues, and covers all entities in Nigeria – regardless of whether they are engaged in commercial pursuits as bodies corporate, or as government agencies and bodies.

Before the enactment of this Act, competition law regime in Nigeria was grossly inadequate compared with the size and complexity of the country's economy. Save for provisions touching on competition issues in various legislations, like the Investments and Securities Act 2007; and the Nigerian Communications Act 2003; amongst other laws, there was no comprehensive law or any coordinated effort towards addressing monopoly, price regulation, abuse of dominant position, and other anti-competition trade practices. This is despite various efforts to enact a national competition law [5]. More so, the government had monopoly over certain commercial enterprises e.g. telecommunications, electricity etc. However, the subsequent privatization of various government agencies as well as companies engaging in 'cartel arrangements' and anti-competition activities such as price fixing, limiting production or supply, collusion to share markets and rigging bids, have made the enactment of the Nigerian competition law of paramount importance as the activities of these corporations negatively affected the consumers, the market and the Nigerian economy [6].

This paper consists of four parts. Following this introduction, part two discusses the legal framework for regulation of competition in Nigeria and part three critiques the regulation of competition under the FCCPA. Part four makes recommendations and concludes the paper.

II. The Legal Framework for Regulation of Competition in Nigeria

The FCCPA 2018 boosts and encourages competition in the Nigerian markets at all levels by putting an end to monopolies, forbidding abuse of a dominant market position and punishing other restrictive trade and business practices [7]. The Act introduced a codified set of competition rules into Nigeria's regulatory oversight framework to make sure that market distortions throughout all sectors are curtailed and rules of fair play are taken into consideration in the market place. The Act covers all undertakings and commercial activities within or

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having effect within Nigeria [1, s. 2(1)]. In effect, the FCCPA applies to all organizations (whether public or private) engaged in an economic or business activity within Nigeria or that has an effect in Nigeria. The FCCPA in a nutshell can be said to have extra-territorial jurisdiction [1, s. 2(2) and (3)].

The FCCPA establishes two regulatory bodies to administer the Act. These are the FCCPC [1, s.3] and the Federal Competition and Consumer Protection Tribunal (FCCPT) [1, s.39 (2)]. The FCCPC is responsible for the administration and enforcement of the provisions of the Act. It prohibits commercial agreements or practices that restrict free trading and competition between businesses and makes sure the goods and services in the Nigerian market are of a certain quality similar to international best practices [12]. The Commission will facilitate access by all citizens to safe products and secure the protection of rights for all consumers in Nigeria [13]. The FCCPT's function is to adjudicate over matters which arise from the operation of the Act and exercise the jurisdiction, powers and authority conferred on it under this Act or any other enactment [8]. More so, where any sector specific regulatory authority in a regulated industry arrives at a decision with reference to competition and consumer protection matters, appeals from, or reviews of the decision can be heard by the Tribunal [15]. The Tribunal can impose administrative sanctions for violations of the Act [1, s.51], and oversee forced divestments, partial or total, of investors from companies [1, s.52]. Furthermore, the FCCPA prohibits unfair business and trade practices that could lead to decrease in competition and increase in prices, reduction in quality or levels of service, or less innovation [10]. Competition is said to exist when price in the market cannot be controlled by any single economic agent, whether buyer or seller. This will happen when each agent's activities in the market constitute only a small part of total market activity; because many other agents are discharging the same roles. New agents can enter the market as they please if they feel there are profits to be made. Price is hence fixed by the market as a whole [11].

The FCCPA prohibits agreements made to restrain competition such as agreements for price fixing [1, s.107], price rigging, collusive tendering etc. (with specific exemptions for collective bargaining agreements, employment, etc.) [12]. Hence, the Act provides against anti-competition trade practices such as restrictive agreements [1, part 8], abuse of a dominant position [1, s.72], and monopoly [1, s.77]. It also provides penalties for contraventions of these [1, s.69, 74, 86]. More so, the Act provides for specific offences against competition and they are price-fixing [1, s.107], conspiracy [1, s.108], bid-rigging [1, s.109 (1)], obstruction of investigation or inquiry [1, s. 110], offence against records [1, s.111 (1)], giving of false or misleading information [1, s.112], and failure to attend or give evidence [1, s.113].

The Act also sets out strategies so as to regulate and facilitate competition. These are price regulation, mergers and regulated industries. The enactment of the Act has made the Act the only legislation that is capable of determining contracts or transactions that do not encourage competition [1, s.104]. For price regulation, the Act empowers the President to state price regulations aimed at regulating and promoting competition through an order published in the Federal Gazette [1, s. 88]. It is required that such regulations should be for a stipulated period and they ought to be narrowly designed. Based on the Act, it is mandatory for the suppliers of regulated products to keep their accounting records for their supply for three years [1, s. 92]. Price Regulation is an interestingly new feature of the Act as it empowers the President to regulate prices aimed at facilitating competition [1, s. 92].

For mergers, the Act introduces a new regulatory landscape with respect to merger control in Nigeria. The Act provides that when one or more undertakings directly or indirectly procure or establish direct or indirect control over the entire or part of the business of another undertaking; a merger has taken place [1, s. 92]. It is worthy of note that the definition of mergers under the Act is comprehensive, and includes acquisitions. Hence, although the Act did not separately define 'acquisitions', it appears to have expanded the term 'merger' to include 'acquisitions' [1, s. 96(7)]. The Act includes examples of how a merger may be achieved and in this regard specific reference is made to joint ventures [1, rules 421-430]. The Act makes provision for penalties of up to 10% of annual turnover for pre-implementation [1, s. 96].

Prior to the enactment of the Act, the Securities and Exchange Commission Rules (SEC Rules) [1, s. 95] was primarily responsible for regulating/reviewing or providing notifications on mergers between undertakings. The FCCPA now makes it mandatory to notify and obtain approval from the FCCP Commission for large mergers before they are implemented [1, s. 94(2)]. Notification is not required for small mergers except mandated by Commission. The Commission may invoke this provision within six months of the implementation of a small merger [1, s.95]. The Act also sets out factors the Commission will consider in determining the likelihood of the merger to substantially put a stop to or minimize competition [1, s.94(2)]. Also, it lists the factors the Commission will determine where it appears that a merger or proposed merger is probably going to significantly put a stop to or minimize competition [1, s.94(3)]; and factors the Commission will consider when determining whether a merger or proposed merger can or cannot be justified on grounds of public interest [1, s.94 (4)]. In addition, although the Act provides for thresholds for small and large mergers to be determined [1, s.92 (4)]; no thresholds have been published yet. As regards the Act, proposed threshold values are to be published for public comment, and this ought to be finalized within two months of such publication [1, s.93]. The Commission has the power to investigate a proposed merger [1, s.98] and to revoke a merger approval [1, s.99].

Finally, the FCCPA gives the Commission oversight powers in regulated industries in every sector, including currently regulated industries. Based on the Act, in the likelihood of any conflict, the Commission would share concurrent oversight with the industry specific regulator in matters affecting competition or consumer protection [1, s.105]. In addition, the Act provides that the Commission shall

have precedence over the industry specific regulator or relevant government agency [1, s.105 (2)]. However, industry regulators are directed by the Act to reach agreements with the Commission on how the powers of competition and consumer protection would be applied within their industries [1, s. 105(4)].

III. Critique of Regulation of Competition under FCCPA 2018

Although the provisions of the Act are commendable, there are issues that need to be resolved to enhance the efficiency of the Act in achieving its desired objectives. These include, Part XI of the FCCPA on price regulation which is made subject to an order of the President. Also, despite the provision of section 3(2) of the FCCPA on the independence of the FCCPC, the President has the powers to appoint the Chairman and the Board of the Commission subject to confirmation by the Senate [1, s.5 (1)], renew the term of each commissioner [1, s.5 (3)], and suspend or remove a commissioner where he contravenes the provisions of Section 8 of the Act. This threatens the independence of the regulator and subjects the regulator to political control. Furthermore, section 105(2) gives the FCCPA predominance over sector specific competition legislation in Nigeria in relation to matters or conducts which affect competition and consumer protection [1, s.104]. Although this could be advantageous because it leads to uniformity in the law regulating competition issues in Nigeria, a disadvantage could be the handing over of all competition issues and regulation to the new and untested FCCPC which may not have enough specialists to tackle these sector specific issues. In addition, the extraterritorial jurisdiction of the FCCPA provided under section 2(3) could lead to uncertainties. It is the view of this paper that the clause was inelegantly drafted and copied from the competition legislation of jurisdictions like US, EU and Canada who apply their competition laws extraterritorially [13]. A better draft should be to the effect that the FCCPA will apply extraterritorially where the effects of the anti-competition practices committed by the Nigerian, Nigerian undertaking or company incorporated in Nigeria outside the country are suffered within Nigeria.

Further, the power to regulate prices of goods and services given to the President under section 88 of the FCCPA is at variance with the price control regime under the section 5 of the Price Control Act [14] which empowers the Price Control Board, appointed by the Minister for commerce with the approval of the President, to fix prices of commodities. A possible solution to these conflicting provisions is that for the purpose of regulating and facilitating competition only, the powers of the President under the FCCPA to regulate prices (that is, to order that the prices of specified goods and services be controlled) supersedes the power of the Price Control Board under the Price Control Act to regulate the prices of commodities, *leges posteriors priores contrarias abrogant* (later laws abrogate prior contrary laws). More so, the Companies and Allied Matters Act (CAMA) and other pieces of legislation typically direct companies to keep their records for a period of six years [15]. It is therefore surprising that section 91 of the Act stipulates only a period of three years at a time when companies may avail themselves of cost effective electronic data storage options, such as cloud services.

The FCCPA permits the FCCPC to issue 'compliance notices' to regulated organizations upon consultation with the sector regulator [1, s. 150] but does not give the sector regulator any powers to protect/defend its regulatory actions leading to the conduct deemed 'prohibited' by the FCCPC. This could cause regulatory issues between the FCCPC and the regulatory body [16].

In the area of mergers, the repeal of the sections of the Investment and Securities Act on Mergers accordingly strips the Securities and Exchange Commission (SEC) of its regulatory oversight in favor of the new and untested FCCP Commission [1, s.17(K)] and this is troubling, to say the least. It could also be deduced from the repeal that the SEC Rules in relation to mergers, acquisitions and external restructuring may be set aside spontaneously. The FCCPC will need to make extra effort to bridge the skills gap as the skill-set needed to oversee such transactions and draw up such specialized rules is relatively unusual in this clime [9, p.3].

The powers of the Tribunal to review the decisions of industry-specific regulators with regards to competition and consumer protection [1, s.47] are probably unconstitutional as it implicitly elevates the Tribunal as a super-court of sorts, even in areas specially set aside for the Federal High Court [9, p.4]. Also, in essence these provisions in a way establish the FCCPC as a super-regulator with capacity and power to regulate every industry in Nigeria in the absence of the oversight, checks and balances currently imposed on sector regulators. This power is enormous and could be abused so safeguards should be put in place to regulate the ability of the FCCPC to set regulatory direction in industries different from that which is being pushed by the sector regulator [9, p.4].

The FCCPA creates the FCCP Tribunal as a superior court of record [1, s.47]. Sections 6(3) and 6(4) of Nigeria's 1999 Constitution (as amended) particularly sets out the Superior Courts of Record in Nigeria and only gives the National/State Assembly powers to create courts inferior to these. Therefore, it can be argued that the Constitution must be amended before additional Superior Courts of record can be created in Nigeria. Even though the FCCPA does not specifically call the Competitions Tribunal a superior court of record, all indications from its provisions seem to submit that this is the case. These provisions prescribe that appeals from the Tribunal should go directly to the Court of Appeal [1, s.55]. The Registrar of the Tribunal must be qualified to be a Registrar of a High Court [1, s.45], and judgments of the Tribunal must be registered at the Federal High Court for the purpose of enforcement [1, s.54]. Based on these provisions, one can only wonder whether the National Assembly can in fact (if not in name) create such a court in the absence of an amendment to Section 6 of the 1999 Constitution.

IV. Recommendations and Conclusion

The FCCPA is without a doubt, a right step in the right

direction in helping Nigeria properly regulate competition and enhance the economy. However in order to facilitate this, necessary steps have to be taken to correct some anomalies which will impede on the efficiency of the FCCPA to achieve its desired objective. These steps include appointment of seasoned professionals to manage the FCCPC and properly enforce the enormous provisions of the Act, carrying along of agencies which appear to have overlapping functions with the Commission so as to ensure the smooth implementation of the law, harmonization of the provisions of the FCCPA with the provisions of other sector specific competition legislation in Nigeria so as to resolve any identifiable inconsistencies in enforcing the FCCPA. In addition, the extraterritorial jurisdiction of the FCCPA should be amended so that it can arise only where the effect of the conduct by a Nigerian or company incorporated in Nigeria in another country has bearing on Nigeria. This will ease the difficulties associated with the implementation of that provision. More so, political interference in the appointment, remuneration and activities of the FCCPC should be greatly curtailed so as to enable the FCCPC carry out its functions. The FCCPA should be independent of political control and subject only to the Nigerian Constitution, also rather than depending exclusively on budgetary allocation, a better way of funding the FCCPC would be through a combination of different sources such as a mix of general revenues, fees or fines. Thus, it will be more difficult for any single source of funding to dominate the budget and influence the Commission's activities.

Having taken a holistic look at the FCCPA, it is believed that with a proper amendment or review of the FCCPA, the FCCPA will be properly enhanced to effectively regulate competition in Nigeria and deliver the gains derivable from the competition regime.

REFERENCES

[1] Federal Competition and Consumer Protection Act No 1 2019.
[2] A. Ogunbanjo and M. Atsenuwa, "A Review of the Federal Competition and Consumer Protection Act 2019" *Odujinrin & Adefulu* (2019) <http://www.odujinrinadefulu.com/content/review-federal-competition-and-consumer-protection-act-2019> accessed 11 January 2020.
[3] Cap C25 *Laws of the Federation of Nigeria* (*LFN)* 2004.
[4] Cap I 24 *LFN* 2004.
[5] G.Etomi and Partners, "Analysis of the Federal Competition and Consumer Protection Act 2018"*Lexology*: Law Business Research (USA, 3 April 2019) <https://www.lexology.com/library/detail.aspx?g=b79d95f5-7c0d-4aad-a838-931d049edf92> accessed 11 of January 2020.
[6] K.Ojelade and E. Osman, "Competition Law and the Control of Monopoly in Nigeria" *Medium* (6 March 2019) <https://medium.com/@ayokunleojelade/competition-law-and-the-control-of-monopoly-in-nigeria-853f6d57886b>accessed 18 January 2020.
[7] Explanatory Memorandum to the Federal Competition and Consumer Protection Act (FCCPA) 2018.
[8] A. Ojekunle, "Everything You Need to Know about the Federal Competition and Consumer Protection Act" *Pulse Nigeria* (2 July2019) <https://www.pulse.ng/bi/politics/everything-you-need-to-know-about-the-federal-competition-and-consumer-protection-act/wlk0211> accessed 12 January 2020.
[9] W. Obayomi, "Federal Competition and Consumer Protection Act" (2019) (3) (3) *KPMG* (21 March 2019) https://home.kpmg/ng/en/home/insights/2019/03/federal-competition-and-consumer-protection-act.html accessed 13 January 2020.
[10] O. Obioma, "How Nigeria's New Competition Law will Benefit the Economy - and What to Watch For" *The Conversation* (14 September 2020] <https://theconversation.com/how-nigerias-new-competition-law-will-benefit-the-economy-and-what-to-watch-for-144379> accessed 8 October 2020.
[11] A. Adeniran, "Competition Policy and Nigerian Commercial Governance" *Cpparesearch*: *Thinking Aloud* (14 March 2018) <http://cpparesearch.org/nu-en-pl/competition-policy-nigerian-commercial-governance/> accessed 13 January 2020.
[12] "Federal Competition and Consumer Protection Bill" *PricewaterhouseCoopers Limited* (February 2018) <https://pwcnigeria.typepad.com/files/pwc-regulatory-alert_competition-bill_feb-2018.pdf> accessed 13 February 2020.
[13] Won-Ki Kim, "US Antitrust Law's Extraterritorial Application and Adoption" (2003] (7) Singapore Journal of International and Comparative law p. 410.
[14] Chapter P 28 Laws of the Federation of Nigeria (LFN) 2004.
[15] Companies and Allied Matters Act 2020.
[16] R. Akapo, "The Impact of the Federal Competition and Consumer Protection Act on Competition Regulation and Consumer Protection in the Nigerian Telecommunications Industry" (2018) Advocaat Law Practice p.3.