



Consumer Protection

Federal Competition and Consumer Protection Act

KPMG in Nigeria

Issue 3.3 | March 2019

The Federal Competition and Consumer Protection Act was enacted by the National Assembly in December 2018, and subsequently signed into law by President Muhammadu Buhari in January 2019. The introduction of a codified set of competition rules into Nigeria's regulatory oversight framework came as a long anticipated change, to ensure that market distortions across all sectors are minimized and rules of fair play are respected in the market place.

Background

The Act repealed the Consumer Protection Council Act, dissolving the Consumer Protection Council, and established the Federal Competition and Consumer Protection Commission ('FCCPC') in its stead. Unlike the defunct CPC, the FCCPC's oversight extends beyond just consumer protection issues, and covers all entities in Nigeria - whether they are engaged in commercial activities as bodies corporate, or as government agencies and bodies.

This Act is poised to introduce ground breaking changes into the Nigerian regulatory regime and the highlights include:

i. Establishment of the Federal Competition and Consumer Protection Tribunal

The Act provides for the establishment of a Competition and Consumer Protection Tribunal ("Tribunal"). The Tribunal is expected to adjudicate over matters which arise from the operation of the Act. Interestingly, the Tribunal is also empowered to hear appeals from, or review any decision from the exercise of the powers of any sector specific regulatory authority in a regulated industry in respect of competition and consumer protection matters.

The Tribunal can impose administrative penalties for breaches of the Act, and oversee forced divestments, partial or total, of investors from companies.

Appeals against the Tribunal's decisions lie directly to the Court of Appeal, although its decisions are to be enforced after registration at the Registry of the Federal High Court (FHC). It is not clear why a process for registration of its decisions should be necessary at all since that suggests that there might have to be recourse to an extant or new protocol at the FHC for this purpose. Procedurally, that would set the FHC up to serve as a review panel for decisions of the FCCP Tribunal.

ii. Voidance of restrictive agreements

The Act prohibits and voids restrictive agreements between business entities. The description of restrictive arrangements which are likely to prevent, restrict or distort trade is very wide-ranging, and includes prohibition of minimum resale prices (even for patented goods), direct or indirect price fixing, collusive tendering, withholding supply of goods and services from a dealer, exclusionary contractual provisions, etc.

However, some of the prohibited arrangements may be approved by the Commission, if the Commission is satisfied that they are fair and do not eliminate competition.

iii. Price regulations

The Act enables the President to declare price regulations for the purpose of regulating and facilitating competition, by an order published in the Federal Gazette. Such regulations are required to be for a stipulated period and narrowly designed.

The Act directs that suppliers of regulated products are required to keep their accounting records for their supply for three years.

iv. Prohibition of abuse of dominant position

The Act prohibits the abuse of a dominant position in any industry by any business undertaking. The acts of abuse of dominance specified in the Act are unreasonably lessening competition and impeding the transfer or dissemination of technology. The penalty for a recalcitrant abuser is prescribed as not less than 10% of the previous year's turnover upon conviction by a court. It is interesting that the Act states "court", and not the FCCP Tribunal. In any event, such penalty may be suspended once the Commission is satisfied that the abuse would cease.

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v. Prohibition of monopolies

The Commission's powers extend to investigation of monopolies. Where any monopoly is found to exist, the Tribunal's remedial efforts may include prohibition of an acquisition transaction, business break-up, forced publication of price lists, etc.

Also, the Commission's oversight over monopolies is not restricted to those arising in Nigeria, if the undertaking is of Nigerian origin.

vi. Regulation of mergers

The power to approve mergers is now granted to the Commission, instead of the Securities and Exchange Commission ("SEC"). As hitherto applicable, the participants to a small merger do not need to notify the Commission, unless the Commission specifically requests that they do so within six months of deal close. The Act also prescribes rules for large mergers as the only other type of mergers.

The definition of mergers under the Act is all-encompassing, and includes acquisitions. Consequently, although the Act did not independently define 'acquisitions', it seems to have extended the term 'merger' to include 'acquisitions'. Disappointingly, the Act does not go far enough to cover the current gap in the Investments and Securities Act (ISA) and SEC Rules around de-mergers, spin-offs, de-consolidations, etc. Consequently, there are still no provisions governing such transactions.

Mergers under the Act are still regulated, using the size designation thresholds. However, the Commission has yet to issue guidelines to delimit the threshold. We envisage that the threshold under the ISA will be modified.

vii. Oversight of regulated industries

The Act gives the Commission oversight powers in every sector, including presently regulated industries. The Act provides that in the event of any conflict, the Commission would share concurrent oversight with the industry specific regulator. The Act mandates the industry regulators to negotiate agreements with the Commission on how the powers of competition and consumer protection would be exercised within their industries.

viii. Offences and stiff penalties

The Act stipulates offences and stiff penalties against competition such as price-fixing, conspiracy, bid-rigging, obstruction of investigation or inquiry, offences against records, giving of false or misleading information, etc.

Matters Arising

The enactment of the FCCP Act is a step in the right direction. If properly executed, it has the potential to unleash the entrepreneurial potential of Nigeria's youthful population by reining in monopolistic tendencies, market distortions, and creating a level playing field required for medium and small scale enterprises to thrive. However, the Commission

must be run professionally and must ensure a level-playing field between businesses of Nigerian and non-Nigerian origins.

In addition to this, the potential challenges highlighted below, may be worth further consideration:

a. Regulation of mergers and acquisitions

- i. One interesting introduction is that the Act now brings all indirect transfers of shares and assets which lead to change of control of a Nigerian business under the Commission's regulatory oversight. The FCCPC's ability to effectively monitor indirect transfers and transfer of beneficial ownership of Nigerian undertakings at the foreign holding company level is doubtful.

Currently, there is no procedure to ascertain or compile in a register, the beneficial ownership of foreign portfolio investors of Nigeria private companies. Therefore, the introduction of the rule on registration of indirect transfers would be an unnecessary clog to transactions that are ordinarily seamless from a Nigerian perspective. In view of the urgent need to stimulate the growth and sustained recovery of the Nigerian economy, the introduction of this step may be counter-productive

- ii. The repeal of the sections of the Investment and Securities Act on Mergers, thereby stripping the SEC of its regulatory oversight in favour of a new, untested agency is concerning. The repeal also implies that the SEC Rules in relation to mergers, acquisitions and external restructuring may be automatically set aside. The skill-set required to oversee such transactions and draw up such specialized rules, is relatively rare in this clime, and it would be interesting to observe how the newly set-up Commission would bridge the skills gap.
- iii. Under the existing regime, the merger process stipulates that a number of court orders should be obtained from the Federal High Court in a regulatory oversight capacity. In reality, due to the dearth of mergers and acquisitions ('M&A') expertise on the FHC bench, the FHC does not independently evaluate the commercial effect of the prayers sought, and typically grants the order once the SEC does not object. With the introduction of the FCCP Tribunal with its M&A expertise, one would have expected the FCCP Tribunal to take over the FHC's

regulatory oversight role, if need be.

- iv. The FCCP Act does not stipulate a sunset period for SEC's oversight of the M&A process, or a transitory period for the new Commission to take over the SEC's powers in that regard. On the surface, this seems to suggest that there is a lacuna which threatens the validity of on-going M&A transactions, until the Commission is set up and fully operational.
- v. The Act stipulates that the FCCP Commission's oversight over mergers extends to joint ventures ('JVs'). This stipulation is unnecessary, at best, and may be potentially disrupting to business arrangements, particularly but not limited to business arrangements in the oil and gas industry where disposal of mining rights in a JV may now require FCCPC approval in addition to the already tough process in place for obtaining ministerial approval.

Where the JV vehicle is incorporated, the vehicle would be construed as an affiliate or subsidiary of the partners, not a merger arrangement. Therefore, the Act's oversight is only in relation to unincorporated JVs ('UJVs'). UJVs are a practical solution to effective business cooperation, and the financial records of such unincorporated JVs are fully captured in the books of the partners. Thus, the statutory obligation to seek approval for UJVs which qualify as large mergers would be a clog to business and a disincentive to investment.

- vi. Also, the extension of the timeframe for approval by the FCCPC in relation to the timeframes established by SEC is troubling, as this automatically protracts the timeframe for completion of deals. Indeed, the provisions of the Act in respect to mergers is an abrupt deviation from what had been the norm and may prove to be a pyrrhic victory on market regulation.

b. The designation of the Commission as a co-regulator with all sector regulators, in relation to competition and consumer protection

- i. The ambit of these powers need to be clearly defined to ensure that conflicting and a multiplicity of regulatory compliance obligations are not created by this provision. Also, the provisions of this Act which dictates its superiority in the event of any conflict with other existing Acts, save the Constitution, may be contestable and

impracticable, particularly with respect to highly regulated industries, such as financial services and telecommunications, having specialized skills and industry-specific legislation.

- ii. The Commission is empowered to arrange for the conduct of tests on products, and seal up any premises where sub-standard products are produced. Ordinarily, one would have expected such tests and retributive administrative action to remain within the remit of the National Office for Food and Drug Administration ('NAFDAC') or the Standards Organisation of Nigeria ('SON').

The Commission seems to have been imbued with powers in many wide-ranging directions, and one may only hope that it would not end up as a jack of all trades which, sadly, fails to master any.

- iii. The Commission is also statutorily empowered to define rules for the regulation of professional bodies as it designates, from time to time. This provision is unduly overarching, as it effectively makes the Commission the determinant of expertise in any profession it chooses to regulate. It also overreaches self-regulatory professional associations, such as the Nigeria Bar Association (NBA), Institute of Chartered

Accountants of Nigeria (ICAN), Chartered Institute of Taxation of Nigeria (CITN), Chartered Institute of Bankers of Nigeria (CIBN) etc.

This is also simply impractical as the concentration of expertise in any field is expected to be in the professional associations, and not the FCCPC. Therefore, the FCCPC is unlikely to be adequately equipped to function in this capacity.

c. **Powers of the Tribunal to review the decisions of industry-specific regulators with regards to competition and consumer protection**

- i. This power may impede the effectiveness of the sanctions of regulators, such as the Central Bank of Nigeria, Nigerian Communications Commission, National Broadcasting Commission etc.
- ii. This provision is likely unconstitutional, as it impliedly enthrones the Tribunal as a super-court of sorts, even in areas specifically reserved for the Federal High Court.
- iii. Also, these provisions essentially constitute the FCCPC as a sort of super-regulator with capacity and power to regulate all and every industry in Nigeria without the oversight, checks and balances currently imposed on sector regulators. The risk of abuse of power in this regard should have to be carefully weighted and safeguards put in place to limit the ability of the FCCPC to set regulatory direction in industries contrary to that which is being pushed by the sector regulator.

d. **Price regulations**

The possibility of re-introduction of price regulations into the Nigerian polity, albeit for competition and consumer protection purposes, in the face of the current challenges in price regulated sectors, is concerning. Whilst it may be somewhat comforting that the Act specifies that such regulations, where introduced, should be for a limited timeframe, the practice can greatly discourage investment and economic growth.

e. **Prescription of a 3-year timeframe for record-keeping of regulated goods and services**

The Companies and Allied Matters Act ('CAMA') and other pieces of legislation typically direct

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companies to keep their records for a period of six years. It is therefore surprising that the Act prescribes only a period of three years at a time when companies may take advantage of cost effective electronic storage solutions, such as cloud services.

f. Inadequate provisions for consumer protection in e-commerce

The United Nations Conference on Trade and Industry ('UNCTAD') issued the United Nations Guidelines for Consumer Protection, a set of best practice principles for consumer protection systems. The UN Guidelines may be distilled into 11 legitimate needs that all consumer protection laws are expected to satisfy. Although the Act conforms in part to the spirit of the UN Guidelines, it does not embody them in totality. A striking example of such a gap in the Act is that it does not adequately address electronic commerce, as prescribed in the UN Guidelines.

Conclusion

Overall, it is important to fix the gaps in the current FCCP Act and, in the interim, decipher ways to harmoniously implement same alongside existing legislation. However, periodic amendments and reviews of the FCCP Act are imperative to ensure its effectiveness in preserving a competitive business landscape and consumers' rights, in view of the constantly rapidly evolving market place.

Also, to achieve its mandate set out under the Act, the Commission would require extensive man hours, with an adequate geographical spread across the Federation. Thus, the Commission should ensure that it maintains the significant manpower and technology needed to satisfy its mandate effectively across the Federation.



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