

THE INTERFACE BETWEEN COMPETITION LAW AND CONSUMER PROTECTION LAW: AN ANALYSIS OF THE INSTITUTIONAL DESIGN FOR THE ENFORCEMENT OF THE NIGERIAN FEDERAL COMPETITION AND CONSUMER PROTECTION ACT, 2018

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ABSTRACT

Competition Law and consumer protection law are complementary and mutually reinforcing, though their perspectives may differ, they apply different tools to correct market failures. The consolidation of competition and consumer protection regulation in the Nigerian Federal Competition and Consumer Protection Act, 2018 is not uncommon; however, it raises the question as to whether the approach is practical. To this end, this research will use the doctrinal method in analysing the advantages and disadvantages of the consolidated approach adopted by Nigeria. This research finds that competition law and consumer protection law are two distinct areas of law which require separate application and enforcement, and that the Federal competition and consumer Protection Act, 2018 could have been better off without this consolidated approach as seen in the South African Competition Act of 1989 and South African Consumer Protection Act of 2008. The research concludes with recommendations for the Nigerian Federal Competition and Consumer Protection Act 2018 to be amended to establish separate institutions that will regulate competition and consumer protection separately in the same Act.

Keywords: Competition, Nigeria, Act, Development, Economy, Protection, 2018.

INTRODUCTION

Competition law and consumer protection are intricately connected. It is impossible to talk of one without dealing with the other, as both are complementary and reinforcing. Competition law by preserving and maintaining competition enhances consumer interest while consumer policy strengthens competition between firms (Obayomi, 2019; Hadfield et al., 1998). Both are elements of a broader framework of social welfare, they overlap and intersect at various points reflecting both tensions and synergies.

The general regulation of competition and antitrust matters in Nigeria has historically been subject to the regulatory oversight of the Securities and Exchange Commission, (SEC), and the apex regulator of the securities market in Nigeria. Other sector specific Legislations such as the Nigerian Communications Act, 2003, have also attempted to foster competition and regulate anti-trust issues in Nigeria (Tavuyanago, 2020; Tavuyanago, 2014).

However, on 30 January, 2019 the president of the Federal Republic of Nigeria signed into law the Federal Competition and Consumer Protection Act, 2018 (FCCPA). The FCCPA introduces significant changes to the Nigerian Law (Waller, 2004; Muris, 2003). The aims of the Act are to promote and maintain competitive markets in the Nigerian economy, and promote economic efficiency, protect, and promote the interests and welfare of consumers by providing consumers with comprehensive prices and product choices, prohibit restrictive business practices which prevent, restrict, or distort competition or constitute an abuse of a dominant position of market power in Nigeria, contribute to the sustainable development of the Nigerian economy, and establish the Federal Competition and Consumer Protection Commission (the commission) which has the responsibility of initiating broad based policies, advising the Federal Government on National Policies relating to Competition and Consumer Protection, performing adjudicating roles, eliminating anti-competitive agreements, enforcing provisions of the FCCPA and rules and regulations made pursuant to the FCCPA. The FCCPA also establishes the Federal Competition and Consumer Protection Tribunal (the Tribunal). The Commission and the Tribunal are expected to ensure adequate market regulation, protection of rights for all consumers in Nigeria and promote fair, efficient and Competitive markets in the Nigerian economy (Ramsay, 2006; Shapero, 1983).

In assessing the significance of the newly passed Federal Competition and Consumer Protection Act of Nigeria, this work will analyse the advantages, disadvantages and potential challenges of the consolidation of Competition and Consumer Protection in one Statute and by a single agency, in a developing country like Nigeria bearing in mind that such consolidation of the two has been a success in other jurisdictions like the United States of America, Canada and Australia (Hobbs, 2005; Cseres, 2006).

The Interface between Competition Law and Consumer Protection Law

The Protection of the interests of Consumers is a central aspect of all modern competition laws as well as the direct aim of consumer protection laws. However, despite being complementary in so many ways, competition law and consumer protection law cover different issues and employ different methods to achieve their goals. Consumer Protection Laws are built upon the premise that consumers are the weaker party to transactions and should be directly protected for such reasons (Enofe, 2019; Huffman, 2010). Whereas, competition law only indirectly protects the consumer's economic well-being by ensuring that the markets are subject to effective competition. Many jurisdictions around the world continue to explore the optimal relationship between competition law and consumer protection law. Policy choices are made in some jurisdictions to unite the legal rules as well as the enforcement of these two areas of law as seen in the Nigerian Federal Competition and Consumer Protection Act of 2018. More often than not, choices made at a given point in time are reversed at a later point as seen in the case of the United Kingdom which first combined competition law and consumer powers at the office of fair trading to later divest them when a new competition authority (competition and markets authority) was formed (Howells et al., 2018; Kovacic, 2007).

The above scenario was the same in India where their competition law was combined with its consumer protection law in a single Act which is the Monopolies and Restrictive Trade Practices Act, 1970 which was later replaced with the enactment of the Consumer Protection Act in 1986 and the enactment of the Competition Act in 2002, there was a division both in the rules

and also in the enforcement functions. However, it should be noted that both areas of law are concerned with the interest of consumers though distinct areas of law.

Competition law provides policies that ensure fair competition in the market place. It ensures that competition is not restricted in a manner that is detrimental to society. Competition law aims at structuring the markets for goods and services by providing control mechanisms designed to promote competition within those markets (Odion, 2015; Akpunonu, 2019). Competition enforcement is predicated on two identifiable theories of harm. It considers harm to consumers and harm to competition as pivotal. And this dual association with consumer welfare and protection of competition often requires the competition regulator to re-prioritize enforcement measures.

Consumer Protection Law on the other hand aims at protecting the consumers and enhancing their welfare. Consumer protection law seeks to protect the consumer from unconscionable conduct such as unfair and deceptive marketing, fraud, defective goods, debt collection and consumer credit (OECD, 2008; Armstrong, 2008). Consumer Protection law is not just concern whether consumers are getting what they need but also whether they are getting what they are paying for, whether the consumer is not being charged excessive prices, whether the consumer is being provided with enough information, whether the consumer has a choice and is allowed to freely exercise that choice and whether the consumer is not being supplied with defective goods amongst others. Consumer protection rules are built upon the premise that consumers are the weaker party to transactions and should be directly protected for this reason in their dealings by enforcing certain consumer rights (Ireland & Jenkin, 2018).

Taking the aforesaid into consideration, it is clear that both competition law and consumer protection law embrace the interests of the consumer, albeit in different ways. In summary, the relationship between competition law and consumer protection law is relatively complex. In most cases, they support each other, but they are instances where in practice, they are in tension or conflict.

Consolidated Competition and Consumer Protection in Nigeria: Institutional Framework in the Federal Competition and Consumer Protection Act, 2018

The Federal Competition and Consumer Protection Act, 2018 (FCCPA) created two institutions for the purposes of enforcing its provisions namely; The Federal Competition and Consumer Protection Commission (FCCPC) and the Federal Competition and Consumer Protection Tribunal (FCCPT). It saddled them with the responsibility of promoting competition in the Nigerian market by eliminating monopolies, prohibiting abuse of a dominant position and penalizing other restrictive trade and business practices.

The Federal Competition and Consumer Protection Commission (FCCPC)

The Federal Competition and Consumer Protection Act, 2018 (FCCPA) repealed the Consumer Protection Council Act, and established the Federal Competition and Consumer Protection Commission (FCCPC) in the place of the Consumer Protection Council (CPC). It also repealed Sections 118 to 127 of the Investments and Securities Act, 2007 which hitherto empowered the Securities and Exchange Commission to regulate and approve mergers and assigned this role to the Federal Competition and Consumer Protection Commission (Averitt & Lande, 1997; Brill, 2011).

The Federal Competition and Consumer Protection Commission are composed of a Board made up of a Chairman, the Chief Executive of the FCCPC (Vice Chairman of the Board), two Executive Commissioners and four non-executive Commissioners. These Board members are to be appointed by the President subject to confirmation by the Senate. The Federal Competition and Consumer Protection Commission have precedence over and above any other sector-specific regulator in matters or conducts which affect competition and consumer protection. To ensure a cordial relationship and guard against power tussle between sector-specific regulators and the FCCPC, the FCCPC is mandated to negotiate agreements with sector specific regulators having competition and consumer protection competence to co-ordinate and harmonize the exercise of jurisdiction over competition and consumer protection matters within the relevant industry or sector. The functions and power of the Federal competition and consumer protection commission are as seen in Section 17 and 18 which includes administration and enforcement of the provisions of the Act, Advising the Federal government generally in matters relating to competition and consumer protection, regulation of mergers and acquisitions. Conducting investigations into transgression of the provisions of the Act, resolution of competition and consumer protection disputes; causing quality tests on goods to be conducted; prevention of circulation of goods which may pose a public hazard; undertaking of research and studies with regard to the development of competition and consumer protection.

The Federal Competition and consumer protection commission is tasked with enforcement of both competition law and consumer protection law as seen above. In as much as the establishment of the FCCPC is laudable, this research finds that the functions and powers of the FCCPC are too broad for one body to administer and enforce. And this is due to the fact that the Federal Competition and Consumer Protection Act seek to regulate both Competition Law and Consumer Protection Law instead of focusing on one area of law. This research suggests that it would have been prudent to retain the consumer Protection Council and mandate it with the administration and enforcement of consumer protection related matters and established separate competition authorities.

In the United States of America, both competition and consumer protection are regulated by the Federal Trade Commission Act. The Federal Trade Commission has different enforcement agencies in the Bureau of Consumer Protection and the Bureau of Competition. To consolidate the responsibilities of competition enforcement and consumer protection into one single Act and entrust enforcement in one agency may prove imprudent, possibly reducing the efficiency of the agency instead of increasing protection for consumers. This is because the consumer protection council was an already established body, with expert personnel, resources and years of experience in dealing with consumer protection matters, it seems to make no sense that the consumer protection council is rebranded into the Federal Competition and Consumer protection commission and this raises questions as to whether the new body would be able to handle enforcement of both competition and consumer protection.

The Federal Competition and Consumer Protection Tribunal

The Federal Competition and Consumer Protection Act (FCCPA) establish and empower a competition and consumer protection Tribunal (the Tribunal) to adjudicate and exercise jurisdictions, powers and authority conferred on it under Section 47. The Tribunal has the jurisdiction to (i) hear appeals from or review any decision of the commission taken in the course of the implementation of any of the provisions of the Act; (ii) Hear appeals from or review any

decision from any sector specific regulatory authority in respect of competition and consumer protection matters. (iii) Issue such orders as may be required of it under the Act and (iv) make ruling or such other orders as may be necessary or incidental to the performance of its functions under the Act.

The Tribunal is composed of a chairman who shall be a Lawyer with 10 years post-qualification, and experienced in competition Law, consumer protection or commercial and industrial law; six other members with 10 years professional experience in either competition and consumer protection law, commerce and industry, public affairs, economics, finance or business administration. The tenure of office of the members of the tribunal is 5 (five) years from the date of confirmation or upon the attainment of seventy (70) years, whichever comes first. The procedure for appointment of the members of the Tribunal is the same with the FCCPC.

The Tribunal adjudicates over conducts prohibited by the FCCPA, entertain appeals from and review any decision of the FCCPC; and other functions as seen in Section 47 of the Federal Competition and Consumer Protection Act, 2018. The decision of the Tribunal is to be registered at the Federal High Court for enforcement process only; while appeals on the tribunals decision goes to the Nigeria court of Appeal.

Having said that, it is worth noting that the federal competition and consumer protection Act, 2018 is silent on whether the decision of the Nigeria court of Appeal on competition and consumer protection is final or can be further appealed to the Supreme Court. In other jurisdiction like South Africa, decisions of the Competition Tribunal are appealable to the Competition Appeal Court.

The establishment of a competition and consumer Appeal Court in Nigeria would have been beneficial in two ways. First, it would build and strengthen sound competition and consumer protection jurisprudence as the judges presiding in such courts could have become experts in competition law and consumer protection law cases. From experience, the longer a judicial officer performs his or her duties in interpreting the law, the more experienced he or she becomes second, establishing a competition and consumer appeal court in Nigeria would streamline the appeal or review process and result in a higher throughput of cases. This is because a competition and consumer appeal court would only attend to competition and consumer protection matters.

Advantages of Consolidated Regulation

There are three major advantages of integrating the primary responsibility for competition policy and consumer policy within a single institution. We consider the benefits and then turn to the disadvantages.

Economic efficiency

There are gains from treating competition and consumer policy as instruments that can be flexibly combined and more generally managed within a single portfolio of policy instruments. Consolidated regulation of competition and consumer protection as seen in the Nigerian case may prove to be economically efficient, as one regulatory agency will cost less to run. This interdependence is important because it means that there may be scope for substitution between these instruments. In such cases, competition policies can reduce the work that needs to be done by consumer policies and vice versa.

Shared expertise

In support of the Nigerian approach, consolidated regulation of competition and consumer protection may provide opportunities for professional development in which individuals are exposed to, and develop a detailed understanding of both competition policy issues and consumer protection issues. Shared expertise was one of the reasons why the United State of America favoured the unified approach.

Greater awareness of both policies by consumers

Another advantage here is that there will be wider visibility to the community, and understanding in the community of competition and consumer protection issues. This is very important in Nigeria as competition law is a recent development.

Disadvantages of Consolidated Regulation

Although integration of competition policy and consumer policy institutions can have advantages, it also has disadvantages. The disadvantages arise from the inherent differences in the substance and implementation of these instruments, and the obstacles those differences create in practice to achieving full policy integrations.

Blurring of objectives

The regulation of competition and consumer protection through a single Act and the enforcement by a single Act may lead to consumer protection. Concerns being injected into competition regulation even where the matter has to do with competition law.

Competing interests

One area of law may receive more attention than the other in the course of regulating both competition and consumer protection in one Act and by a single Agency and may result in competing interest. For instance, in Nigeria, since the inception of the Federal Competition and Consumer Protection Act, 2018, Competition matters have received very little attention compared to consumer protection matters. And in this case, consumer protection matters may take precedence over competition law due to lack of expertise in competition law. The Federal Competition and Consumer Protection Commission replaced the consumer Protection Act whose personnel had experience in consumer protection and not competition law.

Critical Issues in the Nigerian Federal Competition and Consumer Protection Act, 2018 (FCCPA)

Lack of immunity for members of the FCCPC and FCCPT

There are concerns with a provision of the FCCPA such as Section 156(2) of the Act which appears to accommodate suits being brought against members of the competition and consumer protection tribunal for any act done in pursuance or default in the execution of the

provisions of the Federal Competition and Consumer Protection Act of 2018, provided the normal three months' notice under the public Officers Protection Act is given. This appears to run against the understanding that the Competition and Consumer Protection Tribunal is a Court of law, if the FCCPT is a Court of law, then it's members ought to enjoy full judicial immunity from litigation connected with the performance of their functions.

The importance of this judicial immunity is very critical in the administration of justice to the extent that even when a judicial officer is accused of acting maliciously and or corruptly in the performance of his duties, he or she is still immune to law suits because it is not for the protection or benefit of the malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions, with independence and without fear of consequences. Therefore by retaining the provisions of Section 156(2) of the FCCPA in the manner it appears in the act, concerns are that the FCCPA made away with the long standing principle of immunity which protects judicial officers from any liability resulting from the performance of their judicial functions.

FCCPC's concurrent jurisdiction with sector regulators

There is confusion on whether the FCCPC is actually a supreme competition regulator under the FCCPA. This confusion arises when comparing Section 104 of the FCCPA which makes the FCCPC Supreme to any other law on competition and consumer protection, with sections 47(2) and 105(4), (5) and 6 (a) (b) which recognizes sector – specific regulators established under the relevant sector law such as the National Agency for Food and Drug Administration Control. The standard organization of Nigeria and the Nigerian Customs Service which are all mandated to protect consumers. This may be seen as an encroachment by the FCCPC and this raises the question of what the attitudes of the regulators may be towards the FCCPC.

FCCPT's power to review industry specific regulators

The provision of Section 38 of the FCCPA appears to subject the right of appeal on the decision of the FCCPC to the regulators made by the same FCCPC, who will certainly be a respondent at the Tribunal. This provision is counterproductive and defeats the overall purpose of justice. Retaining these provisions is a misuse of power by the FCCPC and may have the effect of detracting the FCCPT from its core function, being the hearing of appeals from or the review of decisions of the FCCPC.

Lessons from the South African Competition and Consumer Protection Regulation

Competition regulation in South Africa

The South African Model for competition and consumer protection regulation is bifurcated, thus providing different institutions that can be approached for redress. And by so doing, these two different areas of law receive due attention. The South African regimes provides some valuable insight to the Nigerian Legislature as the institutions responsible for enforcement of competition and consumer protection are separate bodies that work together towards the achievement of consumer welfare.

The institutions responsible for the implementation of competition law in South Africa are the competition commission (Commission), the Competition Tribunal (Tribunal) and the Competition Appeal Court (CAC) as established by the South African Competition Act. The Competition Commission is independent of Executive and political interference and subject only to the South African constitution and legislations with the core functions being investigation and evaluation of alleged contravention of chapter 2, evaluation of mergers, consideration of exemption applications as well as negotiation and conclusion of consent orders. The competition commission in South Africa has limited scope and this ensures that it focuses on a limited number of functions which increases its efficiency unlike the wide powers of the Nigerian Federal competition and consumer protection commission (Leary, 2005; Motta, 2004).

The Competition Tribunal is composed of the Chairman and not less than three to a maximum of ten (10) other members appointed by the president. The functions of the Competition Tribunal includes; To adjudicate on any conduct prohibited under the Competition Act, hear appeals from or review any decision of the Competition Commission and ruling or orders. The Competition Tribunal of South Africa is similar to the Federal Competition and Consumer Protection Tribunal of Nigeria. However, the difference is that the FCCPT is a second level adjudicatory body which is a role played by the Competition Appeal Court of South Africa whereas in Nigeria, the FCCPC is both the investigator and adjudicator. The FCCPC does not concentrate on one core function. In South Africa, the Commission concentrates on investigative and prosecutorial responsibilities, the Tribunal performs the first level adjudicatory functions and the Appeal Court performs second level adjudicatory functions.

In a similar vein, the Competition Appeal Court in South Africa is established under Section 36 of the Competition Act, and has a similar status to a High Court in South Africa. The Competition Appeal Court reviews decision of the Competition Tribunal. The Competition Appeal Court serves as a watch dog for the Competition Tribunal. From the above discussion, there are three (3) dedicated institutions responsible for the application and enforcement of the Competition Act in South Africa which ensures that competition matters receive attention from experts of competition law, thereby making it a model for developing countries both within and outside Africa.

Consumer protection regulation in South Africa

The South African approach to consumer protection is holistically vibrant. Here, Consumer Protection is regulated by the Consumer Protection Act (CPA). The CPA promotes the social and economic welfare of consumers. Sections 8 to 10 of the Consumer Protection Act provides for the fundamental consumer rights. And the enforcement of the CPA is through various fora. The CPA provides numerous platforms that a consumer may seek redress as seen in Sections 69-71 of the CPA. These include approaching the National Consumer Commission (NCC), National Consumer Tribunal (NCT), and Consumer Courts, relevant ombudsmen, equality courts, alternative dispute resolution agents and civil courts.

The National Consumer Commission (NCC) being a juristic body must conduct investigations into alleged contravention of the rights contained in the Act, conclude consent orders or refer complaints to the relevant dispute resolution forum. The NCC ensures that consumers receive cost effective assistance. Once a complaint is made to the NCC, the NCC will investigate and decide on whether to further refer the matter to the most relevant dispute resolution forum or not to proceed with the matter.

The National Consumer Tribunal (NCT) on the other hand is an adjudicative tribunal of record with jurisdiction throughout South Africa. The Consumer Protection Act empowers the NCT to adjudicate on matters where the consumer directly approaches the Tribunal, where a matter is referred to the NCT by the NCC or where the NCT orders that a matter that has been referred to the Consumer Court in terms of Section 73(3) be referred to it. The NCT is one of the avenues available to a consumer whose rights have been infringed upon and not just a complaint forum for the consumers.

The CPA provides that matters may be referred to various courts by a consumer for redress and this increases the number of channels that may be utilized by consumers in seeking redress in South Africa compared to a single agency in Nigeria. These courts include: The Equality Court, Consumer Court and Civil Courts.

CONCLUSION

This paper has examined the mechanisms through which competition law and consumer protection law are enforced and analyses the synergies and the conflicts of allocating enforcement powers in one or two agencies. Competition law and consumer protection law have different enforcement objectives. The main focus of competition law is market failures originating from collusive or exclusionary practices. By prohibiting anti-competitive behaviour, competition law enhances the competitive structure of markets for goods and services. It maintains the availability of consumer choice on the market by lowering prices and widening the range of products and services for consumers. And since the FCCPA is the first Competition Law in Nigeria, it would have been better if the FCCPA focused only on competition law than the way it appears because Nigeria needs a robust competition law that would focus only on the goals of competition.

Consumer Protection Law on the other hand addresses information failures like imperfect information and asymmetries. Its objective is to provide good quality and consumer information and to enable consumers to make well informed decisions. The avenues available to consumers in the FCCPA are the FCCPC and the FCCPT which this paper finds inadequate to address all consumer complaints considering the population in Nigeria. Moreover, there are substantial differences in the substance and implementation of competition law and consumer protection law that would call for separating law enforcement institutions.

This research finds that the FCCPA of 2018 failed to live up to its name with reference to the Consumer Protection element in Nigeria. Sections 114 to 115 of the FCCPA failed to give a detailed explanation of rights and remedies available to the consumer, and in the circumstance, it would have been better for the Nigerian legislature to retain the Consumer Protection Council and then introduce a separate competition law regime.

This paper therefore recommends the amendment of the Federal Competition and Consumer Protection Act to establish separate institutions that will regulate competition law and consumer protection law separately while being empowered by one single Act, by providing consumers with cost effective institutions as seen in the Consumer Protection regulation in South Africa while the competition regulation should be left to the FCCPC and the FCCPT.

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