CHALLENGES AND PROSPECTS TO THE IMPLEMENTATION OF THE NIGERIAN FEDERAL COMPETITION AND CONSUMER PROTECTION ACT, 2018

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ABSTRACT

Competition and consumer protection law has become an important legal tool as it plays a significant role in preventing different forms of anti-competitive behaviours and ensures fair competition in the market. Therefore, examining the administrative and operational difficulties as well as the challenges and prospects of competition and consumer protection law can help policy makers address the numerous difficulties accompanying the implementation of competition policies. To this end, this research will use the doctrinal method in analyzing the Nigerian Federal Competition and Consumer Protection Act, 2018 in order to discover the extent to which the Act will guard against anti-competitive practices and promote competitive markets for the benefits of the consumers and the Nigerian economy. This research finds that although the Nigerian Federal Competition and Consumer Protection Act, 2018 provides for the regulation of competition in Nigeria, there is needed to effectively tackle the challenges to the implementation of the Act while considering the prospects on the other hand. This research concludes that effective implementation of competition law in Nigeria will help protect consumers and create a conducive environment for economic growth, development and protection of consumers from anti-competitive practices.

Keywords: Consumers, Nigeria, Law, Development, Economy, Protection.

INTRODUCTION

Competition law also known as the Antitrust Law in the U.S.A. is that branch of law that promotes or maintain market competition by outlawing anti-competitive conducts by businessmen and companies engaged in business (Albers, 2002). 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 (Burnside & Crossley, 2005). The Nigerian government has done this by enacting the Federal Competition and Consumer Protection Act, 2018 (FCCPA). The FCCPA established two institutions for purposes of enforcing its provisions. These are 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 FCCPA introduces significant changes to the

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Nigerian law including the repeal of the merger provisions in the Investments and Securities Act 2007 and the Consumer Protection Act 2003. The FCCPA makes provisions that impact on a broad spectrum of the Nigerian economy including: (i) Merger control (ii) prohibition of agreements that prevent, restrict or distort competition in the Nigerian market (iii) Prohibiting of any abuse by undertaking of a dominant position in the market (iv) prevention of monopoly (v) Price regulation and (vi) enforcement of consumers rights to safe goods and services. Finally, the FCCPA stipulates that in matters relating to competition and consumer protection, the provisions of the FCCPA will override the provisions of any other law, subject to the provisions of the constitution of the Federal Republic of Nigeria.

Before the enactment of the Federal Competition and Consumer Protection 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.

History of Competition Law in Nigeria

Competition law has a long history which can be traced to the first competition Legislation in Canada passed in 1889 known as Wallace Act, which was followed by the U.S.A Sherman's Act of 1890 (Clark, 1940). Other Countries later keyed in and adopted the law. The proliferation of competition law is undoubtedly linked to the wave of neo-Liberal economic reforms which was introduced in the 1980s (Grewhlich, 2001) and in particular, as a result of privatization programmes which many nations embraced in the last three decades (Cook, 2004). It is also part of the broader proliferation of Liberal democracies and market-oriented economies becoming the dominant ideological models in the wake of the collapse of the communist bloc (Cook, 2004). Other motivating factors include the increased potential for cross-border anticompetitive practices, the fairly recent global waves of mega-mergers, the ascendancy of economic integration with the World Trade Organization (WTO), and lastly the radical shift in the policy of international institutions that now encourage and emphasize the adoption of competition law in developing countries and endorse its vital role in the process of development (Dimgba, 2021).

Presently, over 120 countries have a competition law (Dabbah, 2010), with Nigeria being one of the latest countries to join the league upon the signing of the Federal Competition and Consumer Protection Bill into law by the President on January 30, 2019. The new law came seventeen years after the first idea for a competition law in Nigeria was touted in December, 2002 when the former Director-General of Bureau for public Enterprises (BPE), and the present governor of Kaduna State, Malam Nasiru El-Rufai announced that the Nigerian government was going to enact a competition law that would guard against the incidence of foreign companies dumping their products in Nigeria and making it extremely difficult for the Local companies in Nigeria to compete. The above announcement was later followed by the release of a draft competition bill to the public in early 2003 for comments by a consultant (ECU Associates) engaged by the government for that purpose (Dimgba, 2003). The ECU Associates draft was a

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good document which could have been made to work with a couple of fine-turnings, but nothing was heard of the ECU draft for many years (Kolasky, 2004).

In 2006, a new draft Competition Bill was introduced. The said Bill was drafted by a different consultant under the auspices of Attorney General Bayo Ojo's Federal Ministry of Justice (FMOJ). From 2006 to 2015, several bills were introduced for consideration and passage in every subsequent National Assembly, but all these efforts yielded little or no results due to several factors which might be unconnected with the overbearing influence of vested interest like owners of vast business empires who saw the emergence of competition law as a threat to their businesses (Akinbola & Uwadi, 2021).

Despite the prolonged delay in the passage of the bill, a handful of results were achieved by competition law advocates. A key achievement was the introduction of competition law and its principles via empowering some sector-specific regulators, especially those that were established post 2002 with competition regulatory functions. These agencies includes the Nigerian Communications Commission (NCC) which has the powers to regulate competition in the communication sector pursuant to Sections 4 and 90 of the Nigerian Communications Act, 2003; the Nigerian Civil Aviation Authority (NCAA) which regulates unfair business practices in the Aviation Sector by virtue of Section 30(4) of the Civil Aviation Act, 2006; the National Insurance Commission (NAICOM) which regulates mergers in the insurance sector under Section 30 of the Insurance Act, 2003; the Securities and Exchange Commission (SEC) which is empowered under Sections 121 to 128 of the Investment and Securities Act (ISA) 2007 to regulate and approve mergers in Nigeria among other competition law pretences, the Nigerian Electricity Regulatory Commission (NERC) which has the mandate to regulate competition in the power sector pursuant to Sections 30, 31, 82 of the petroleum products pricing regulatory Agency Establishment (Amendment) Act 2004.

The delay in the passage of the bill led to the clothing of the above mentioned agencies with competition law powers. However, it is hoped that with the enactment of the Federal Competition and Consumer Protection Act, 2018, the nature and extent of the statutory powers of the abovementioned sector regulators as it relates to competition law are now subject to the Federal Competition and Consumer Protection Act, 2018 (Uwadi, 2019).

Key Provisions of the Federal Competition and Consumer Protection Act, 2018

The Federal Competition and Consumer Protection Act, 2018 (FCCPA) is applicable to all commercial activities within or having effects in Nigeria. The FCCPA establishes two institutions for the purposes of enforcing its provisions. These are the Federal Competition and Consumer Protection Commission (the Commission) and the Federal Competition and Consumer Protection Tribunal (the Tribunal). The FCCPA saddled these two institutions with the responsibility of promoting competition in the Nigerian market by eliminating monopolies, prohibiting abuse of a dominant position and penalizing other restrictive practices.

The FCCPA repealed Sections 118 to 127 of the Investments and Securities Act 2007 which empowered the SEC to regulate and approve mergers, and assigned this role to the Federal Competition and Consumer Protection Commission. The Provisions of the FCCPA applies extraterritorially to any prohibited conduct by a Nigerian citizens or a person ordinarily resident in Nigeria; a corporate body registered in Nigeria or carrying out business within Nigeria; any

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person in relation to the supply or acquisition of goods or services by that person into or within Nigeria; or any person in relation to the acquisition of shares or other assets outside Nigeria resulting in the change of control of a business, part of a business or any asset of a business in Nigeria.

The provisions of the FCCPA applies and is also binding on all government departments and state owned corporations, and all commercial activities aimed at making profit and targeted at satisfying demands from the public.

The Federal Competition and Consumer Protection Commission are composed of a Board made up of a Chairman, the Chief Executive who shall also be the Executive Vice-Chairman, two Executive commissioners and four non-executive Commissioners. These board members are to be appointed by the President subject to the confirmation by Senate. The Federal Competition and Consumer Protection Tribunal on the other hand is composed of a Chairman who shall be a Lawyer with 10 years post-qualification, and experienced in Competition law, Consumer protection Law, Commercial and Industrial Law, six other members with 10 years professional experience in either of competition and consumer protection law, commerce and industry, public affairs, economics, finance, or business administration.

The tenure of office of the members of the Federal Competition and Consumer Protection Tribunal (FCCPT) is five years from the date of confirmation or upon the attainment of seventy years, whichever comes first. The procedure for appointment of members of the FCCPT is the same with that of the FCCPC. The FCCPT hears appeal or reviews any decision of the commission taken in the course of the implementation of any of the provisions of the FCCPA and also reviews any decision from the exercise of the powers of any section of specific regulatory authority in a regulated industry in respect of competition and consumer protection matters, after the FCCPC had first considered the appeal.

The judgment of the FCCPT is to be registered at the Federal High Court for the purpose of enforcement only, and appeals on the FCCPT's decisions, goes to the Court of Appeal within 30 days after the date on which the ruling, award or judgment was given. Notwithstanding the provisions of any other law but subject to the provision of the constitution of the Federal Republic of Nigeria, in all matters relating to the competition and Consumer Protection, the provisions of the FCCPA shall override the provisions of any other law. To 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 main policy areas of the FCCPA include (i) Cartels (ii) Unilateral Conduct and (iii) Mergers. The provision of these policy areas will be highlighted below:

Cartel

The FCCPA stipulates offences against competition under part XIV. Cartel activities prescribed under the FCCPA includes price-fixing, conspiracy, Bid rigging, giving of false or misleading information. On price-fixing, the Act forbids any undertaking from influencing or attempting to influence the price at which another undertaking supplies or offers to supply goods and services, by means of agreement, threats, promise of any other means. Companies are also

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not allowed to refuse to supply or discriminate against another company because the latter's pricing policy. This however does not apply to companies that have a principal agency relationship.

On conspiracy, companies are prohibited from conspiring to unduly limit the facilities for the transportation, production, manufacturing or dealing or supply of any goods and services or to unreasonably enhance the price of any goods and services. The Act however permits an arrangement which relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public in the practice of a trade or profession relating to the service or in the collection and dissemination of information relating to the service.

On bid-Rigging, no two or more undertakings are allowed to enter into any agreement whereby one or more of them, agree not to submit a bid in response to a request for tenders. Undertakings are only allowed to enter into such pre-bid agreement when they are affiliates of each other.

The FCCPA holds a very strong anti-cartel position and criminalizes cartel activities. The penalty upon conviction is a fine not exceeding 10% of the annual turnover in the preceding business year for a corporate body. Where the violator is a natural person, the penalty upon conviction is a prison term not exceeding three years and/or a fine not exceeding ten million naira. Moreso, each director of the violating corporate body is liable in person, and upon conviction, be dealt with in accordance with the above penalty prescribed for a natural person.

Anti-Competitive Agreements and Abuse of Dominant Position

A firm is considered to hold a dominant position under the FCCPA if it holds a vantage economic position and can act without taking into consideration the reaction of its consumers, competitors and customers. The FCCPA did not specify the percentage of market shareholding that constitutes a dominant firm. The FCCPA does not forbid a dominant position, but the abuse of such a position by charging excessive prices to the detriment of consumers, denying access of an essential facility to a competitor when it is economically feasible to do so; engaging in any exclusionary conducts whose anti-competitive effect outweighs technological efficiency or pro-competitive gains. The exception to the above provision which may also be a form of defense for the undertaking concerned is if it can show any technology efficiency or pro-competitive gain to be enjoyed by the consumers which outweighs the anti-competitive effect of the abuse.

Another provision which is similar to the one above is the provisions of Section 77 of the FCCPA which empowers the FCCPC to investigate monopolies. Where an abuse of monopoly position is established in accordance with the regulations made by the FCCPC, it refers its report to the FCCPT which has a wide variety of powers to exercise, including the power to order a breaking up or winding up of the undertaking.

Merger

Sections 92-103 of the FCCPA deals with the merger provisions which were formerly under Sections 118–128 of the Investment and Securities Act (2007). A merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking. An undertaking has control over the

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business of another undertaking if it 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.

The Act empowers the commission to make regulations in determining the threshold for small and large mergers and the method for calculating the annual turnover to be applied in relation to the threshold. Subject to a notification of threshold, a proposed merger shall not be implemented unless it has first been notified and approved to the commission. When considering a merger or a proposed merger, gain or if it can or cannot be justified on substantial public interest grounds. Parties to a small merger are not required to notify the commission of the merger. However, within six months after the implementation of such small merger, the commission may require the parties of such merger to notify it of such merger if in the opinion of the commission, the merger may substantially lessen competition. It should be noted that the parties to a small merger may voluntarily notify the commission of such merger at any time.

Challenges to the Implementation of the Federal Competition and Consumer Protection Act, 2018

The FCCPA provides rules to minimize market distortions across all sectors. It also ensures that fair play is respected. It prohibits unfair business practices that are likely to reduce competition and lead to higher prices, reduced quality or levels of service, or less innovations. But there are some issues that could affect the FCCPA's efficiency.

1. First among the challenges is the threat to the independence of the Federal Competition and consumer protection Commission, which is a government agency under the supervision of a political appointee who is the minister of trade. This political interference may be a challenge to the enforcement of the provisions of the FCCPA where a state owned institutions engage in anti-competitive conducts like abuse of dominance. Global best practices in competition regulation is that the competition authority is established as an independent, non-ministerial department, subject only to the law, like the competition and market Authority of UK and the South African Competition Commission in order to insulate it from external influence of political actors.
2. Second is the potential challenge of the slow judicial system in Nigeria. Competition law cases are business related, and in business, time management is of essence. The FCCPA ought to have considered the delays in the Nigerian Court system which make cases linger for over 10 years and impose time frames for the hearing of cases at the Commission, Tribunal, and at the Nigerian Court of Appeal.
3. Shortage of local technical skill and expertise in competition law is another potential challenge. The FCCPA which converts the CPC to FCCPC does not automatically bestow competition competence on the member of staff, who may be rightly described as old wine in new skin. There is urgent need to employ trained competition law experts in order to bridge the knowledge gap and build capacity among the staff of the FCCPC and FCCPT for effective implementation of the FCCPA. More so, there is need for law firms to build new capacities, hire expert trained in competition law and support their staff to acquire this specialist knowledge since lawyers are going to be involved in resolving competition cases, and representing their clients.
4. Another potential challenge is the issue of funding of the new regulatory regime. Rather than depending exclusively on budgetary allocation, a better way of funding could have been through a combination of different sources such as general revenues, fees or fines. This would make it more difficult for any single source of funding to dominate the budget and influence the commission's activities.
5. The non-adoption of the leniency program while criminalizing cartel is another potential challenge to the implementation of the FCCPA.

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6. The FCCPA provides that the Act is applicable to certain conduct outside Nigeria. This could bring up questions about whose laws apply. To clear up any ambiguity, Nigeria should publish the procedure for applying its competition law internationally as the above provisions could pose challenges to the implementation of the law.
7. The FCCPA is silent on whether the decisions of the Appeal Court on Competition and Consumer Protection are final or whether it can be further appealed to the Supreme Court. This creates another challenge of interpretation as some cases in Nigeria terminate at the Court of Appeal while others at the Supreme Court.
8. Another potential challenge is the domination of the FCCPA over sector specific competition legislation. The advantage is that it brings a uniform perspective and jurisprudence to competition issues in Nigeria. On the other hand, some competition issues are sector based. This is why various government agencies have standards and laws for regulating competition in their specific sectors. For example, the Nigerian Electricity Regulatory Commission regulates the electricity sector while the Nigerian Communications Commission deals with the Telecommunications Sector. The Securities and Exchange Commission regulates the capital market and the Central Bank of Nigeria oversees banking. The domination of the FCCPA over sector specific legislation has the tendency to create an overlap and interfere with the roles and functions of these agencies.

Prospects of Implementing the Federal Competition and Consumer Protection Act, 2018

The importance of the legal framework for competition regulation in Nigeria cannot be over emphasized. An unregulated economy leaves the economically disadvantaged at the mercy of the rich and the powerful. Therefore, an effective implementation of the FCCPA will guarantee a competitive environment in the Nigerian economy and ultimately lead to the attainment of the following gains:

1. Source of revenue generation to the government: This is a prospect of effective implementation of competition law. And this can be achieved via fines handed down to firms engaging in anticompetitive practices. The EU recently fined Google 5 billion dollars in 2018 for anti-competitive conduct (Zarzalejos, 2021). Similar fines include the 20. 2 million Euros fine handed of Ford Motors by the Spanish antitrust body in 2015, and the 1899 Million Euros fine of Microsoft by the EU in 2007. Nigeria missed the opportunity to generate revenue from anticompetitive conduct in 2006 when the NCAA's over $200 million US dollars fine on both British Airways ($135 million Dollars) and Virgin Atlantic Airways ($100 Million Dollars) for anticompetitive practices was dismissed by a panel led by Justice Oguntade. The said panel did not absolve the airlines of the wrongdoings but was of the opinion that the fine by the NCAA was retrospective and held that the NCAA could not use the Civil Aviation Authority Act of 2006 to take action against British Airways and virgin Atlantic Airways for infractions committed between 2004 and 2006. The above scenario shows that effective implementation of the FCCPA will generate revenue from fines over anti-competitive conducts.
2. Job Creation: The FCCPA will lead to the creation of more jobs both in the private and public sectors. The FCCPC and the FCCPT will employ hundreds of staff for the effective implementation of the FCCPA. The private firms will need the services of competition law experts, universities will need the services of competition law teachers while government agencies will need the services of competition law experts in the legal department, and by so doing, a competitive environment will lead to business growth and expansion which will definitely result in the creation of more jobs (Roberts, 2004).
3. Restructuring: Another prospect of competition law is that it fosters restructuring in sectors that have lost competitiveness. It is usually difficult for governments to determine which sectors of the economy need to be restructured, which firms in those sectors should cease to exist or remain, and the best time to engage in such restructuring. The competitive process brought by the FCCPA will make the restructuring process unbiased as decision will be based solely on the market forces. In that process, the weak and uncompetitive firms will lose their market power to the strong and competitive ones naturally.

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4. Spawns Innovations: Competition promotes innovation. Without competition, there will be little pressure to introduce new production methods and new products. An economy will lag behind others and will lose international competitiveness without this pressure. The FCCPC in this case will drive domestic firms to become innovative to enable them compete globally.
5. Increase in Efficiency and productivity levels: The FCCPA provisions for healthy competition between competitors will result to firms endeavoring to offer quality goods and services at lower prices because of the knowledge that their competitors are equally adopting new measures to reduce costs and improve quality of their goods and services to gain a competitive advantage. This is another prospect as firms are forced to adopt efficient measures to become more productive when faced with competition.
6. Promotion of corporate governance: The FCCPA protects domestic medium and small firms from unfair market practices of the dominant firms like predatory pricing. To remain relevant in a competitive environment, dominant firms must adopt acceptable internal measures in line with corporate governance rules to meet competition demands. This is a prospect of implementing the FCCPA because in time past, dominant firms had operated in a somewhat lawless market place, crushing the upcoming and potentials rivals.

CONCLUSION

The Federal competition and Consumer Protection Act, 2018 have become a major instruments to regulate competition and prevent anti-competitive practices in the Nigerian market. Despite the challenges to the implementation of the law above identified, many benefits can be achieved through the proper implementation of the FCCPA, and this can only be achieved through effective implementation of the FCCPA. After examining the FCCPA, several findings and issues have been revealed which may impede the implementation and attainment of the aims and objectives of the FCCPA. This includes first, issues of overbearing political interference in the FCCPA. Second, some provisions of the FCCPA clash with the statutory powers of some regulatory agencies like NAFDAC, SON, Nigerian Custom Service, etc. Third, the provision of Section 38 offends the natural principle of nemojudex in causasua. Fourth are the provisions of sections 156(2) of the FCCPA which fails to provide full judicial immunity from litigation connected with the performance of functions by members of the FCCPT. Fifth is the failure to adopt leniency programs in cartel activities. And the last has to do with the typographical errors, conflicting provisions, and wrong placement of some sections of the FCCPA as seen when comparing the provisions of Sections 167 (1) (b) with section 168 of the FCCPA. Based on the findings and observations from this research, this research concludes with the following recommendations for improved consumer protection and implementation of the FCCPA in Nigeria.

1. From the concerns raised and the challenges discussed in this article, an amendment of the FCCPA is imminent in order to meet up with the tenets of globalization and address the raised concerns, correct the errors and conflicting provisions for effective implementation of the FCCPA.
2. This research recommends that time frames on duration of appeal should be imposed to ensure quick dispensation of justice as well as the establishment of a specialized court to be known as and called Federal Competition and Consumer Appeal Court (FCCAC).
3. This research recommends the establishment of domestic institutions for competition and consumer protection law training. Similarly, competition and consumer protection law should be introduced as subjects in primary and secondary schools for early understanding.
4. On cartels, it is recommended that leniency programmers and whistle-blowing policy be introduced to encourage firms take advantage for a reduced penalty.

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5. Government should provide funding for the FCCPC and FCCPT and ensure that their budgetary allocation is sufficient.

To conclude, a successful and efficient implementation of the FCCPA is possible if the identified challenges are overcome.

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Received: 13-Oct-2021, Manuscript No. JLERI-21-8982; **Editor assigned:** 15-Oct-2021, PreQC No. JLERI-21-8982(PQ); **Reviewed:** 29-Oct-2021, QC No. JLERI-21-8982; **Revised:** 11-Feb-2022, Manuscript No. JLERI-21-8982(R)**; Published:** 18-Feb-2022

Citation Information: Enyia, J.O., & Udoudo, N.U. (2022). Challenges and prospects to the implementation of the Nigerian federal competition and consumer protection act, 2018. *Journal of Legal, Ethical and Regulatory Issues, 25*(3), 1-9.