The Impact of the Federal Competition and Consumer Protection Act on
Competition Regulation and Consumer Protection in the Nigerian
Telecommunications Industry

Background

The President of the Federal Republic of Nigeria signed into law the Federal Competition and Consumer Protection Act (the FCCPA) in February 2019. The FCCPA was enacted to promote and maintain competitive markets in the Nigerian economy; promote economic efficiency; and protect and promote the interests and welfare of consumers by providing access to a wider variety of quality products at competitive prices. To this end, the FCCPA creates the Federal Competition and Consumer Protection Commission (FCCPC) and the Competition and Consumer Protection Tribunal (FCCPT).

With its introduction, the FCCPA repeals Sections 118 – 128 of the Investment and Securities Act which hitherto formed the premise of the Securities and Exchange Commission’s (SEC) regulation of mergers and acquisitions, takeovers and related competition issues. All such regulatory functions are now vested in the new FCCPC thereby creating a multi-sector regulator with jurisdiction over all economic sectors and companies incorporated in Nigeria under the Companies and Allied Matters Act. The creation of a multi-sector competitions regulator is a notable development in Nigeria, principally because (unlike telecoms) most sectors of the economy lack well-developed competition regulation frameworks.

Powers of the FCCPC

The FCCPA charges the FCCPC to prohibit restrictive or unfair business practices which prevent, restrict or distort competition or (which) constitute an abuse of a dominant position or market power in Nigeria; and to contribute to the sustainable development of the Nigerian economy. The core functions of the FCCPC therefore are to include regulation of

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1 Section 1 FCCPA
2 Sections 3-16 and 39-58
3 Cap 124 LFN 2004
4 Section 17 of the FCCPA
5 Section 2
6 With particular reference to the telecommunications sector, these are essentially the objectives of both the NCA 2003 (see Ss. 1(c),(e),(g); 4(1) and 90-95) and the Competition Practices Regulation, 2006).
competition issues generally; approval/authorization/prohibition of mergers & acquisitions; conducting market definitions and regulation of dominance and monopolies; price regulation; designation of certain industries as “regulated” and issuance of necessary regulations and directions as may be required.

Other powers of the FCCPC include the declaration of any business practice as abuse of a dominant position of market power and prohibition of same; broad powers to issue cease and desist orders; acting through the FCCPT issue orders for the division of any undertaking that it considers a monopoly into smaller entities or the sale of its shares or assets, if it considers same necessary etc;

**Competition Regulation and Consumer Protection under the Nigerian Communications Act (NCA).**

**Competition Regulation:** The NCA designates the NCC the sole and exclusive competitions regulator for the telecommunications industry, thereby making the NCC both the technical, and commercial regulator of the industry and this is “notwithstanding the provisions of any other written law”. The NCA was however forward-looking enough to recognize the pivotal role that competition plays in the development of an efficient telecoms market and makes the entrenchment of fair competition “in all sectors of the Nigerian communications industry” a primary objective of the Act.

Furthermore, one of the core functions of the NCC is “the promotion of fair competition in the communications industry and protection of communications services and facilities providers from misuse of market power or anti-competitive and unfair practices by other service or facilities providers or equipment suppliers.”

Specific aspects of the NCC’s functions (such as its licensing, interconnection, universal access provision powers) must be undertaken with the aim of facilitating competition in relevant markets. Given that competition regulation is in itself a specialized undertaking, the NCC in 2007 and pursuant to its powers to issue subsidiary instruments, issued a Competitions Practices Regulation with very detailed competition and market regulation rules. In the performance of this role, the NCC has conducted at least two major market/competition evaluations and interventions.

**Consumer Protection:** Consumer protection is one of the cardinal objectives of the NCA. Several of its provisions therefore mandate the NCC to protect the interests of consumers against unfair practices. The NCA treats Quality of Service (QoS) as a consumer protection issue, and even the market/competition regulation responsibilities highlighted above arguably inures for the protection of the consumer. Matters such as the provision of cost-efficient consumer information and dispute resolution mechanisms, tariff transparency, equipment standardization, number portability, etc. are all

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7 Part VIII of the Act  
8 Part XII  
9 Part IX  
10 Part X  
11 Part XI  
12 Part XIII. These are all economic regulation powers specifically conferred on the NCC by Chapter VI of the NCA, 2003 and detailed in the CPR, 2007  
13 S. 18 of the FCCPA, 2018  
14 67, 73, 75, etc.).  
15 S, 86(1)]  
16 Section 90  
17 Section 1(e)  
18 Section 4 (d)  
19 See Section 33(2)(d)  
20 See section 97(1)(b)  
21 See section 113  
22 The NCC has so far carried out two Market Competitiveness Assessments/Studies for the industry respectively in 2010 and 2013, and it is understood that another study is now ongoing. The Commission has also made a number of case-by-case interventions. For more details see at [https://www.ncc.gov.ng/licensing-regulatory/legal/determinations](https://www.ncc.gov.ng/licensing-regulatory/legal/determinations)  
23 see for instance Sections 4, 104 to 106, etc
directed at consumer protection. Finally, Chapter VII of the NCA empowers the NCC to require its licensees to prepare Consumer Codes for their customers. Pursuant to this provision, the NCC has issued a Consumer Code of Practice Regulation and introduced several initiatives in fulfilment of this obligation.

**Potential Legal and Regulatory Issues**

In making the FCCPC the primary regulator of competitions and consumer protection across all sectors, the FCCPA introduces some revolutionary provisions which, if not properly managed, might complicate the competition regulation framework for the telecommunications industry in Nigeria and may lead to significant legal and regulatory issues for the industry. Key provisions in this regard are the following:

a. **Superiority of the FCCPA over all other Enactments:** the FCCPA requires that provisions of all other enactments relating to or connected with consumer protection and competition regulation “...be read with such modifications as are necessary to bring them in conformity with the provisions of the Act”. Furthermore, the Act asserts its supremacy over all other laws relating to competition and consumer protection, stating as follows: “Notwithstanding the provisions of any other law but subject to the provisions of the Constitution of the Federal Republic of Nigeria, in all matters relating to competition and consumer protection, the provisions of this Act shall override the provisions of any other law”. The section further declares that all industries/sector regulated by any agency established by an Act of the National Assembly or State legislature shall be deemed to be regulated sectors under the FCCPA. These provisions effectively make the provisions of all other existing legislation (such as the NCA) subordinate to the FCCPA as regards competition regulation and consumer protection.

b. **Power of the FCCPC to enforce establishment Acts of Sector Regulators:** the FCCPA empowers the FCCPC to enforce the FCCPA and any other enactment, and also to review policies and economic activities pursuant to rules and regulations made under the FCCPA, and any other enactment with respect to competition and the protection of consumers. The wording of these provisions suggests that the FCCPC can take over the enforcement of the NCC’s regulations relating to competition and consumer protection.

c. **Requirement for Sector Regulators to Negotiate Powers with the FCCPC:** Ostensibly to avoid regulatory conflict, the Act states that the FCCPC shall be deemed to have precedence over and above any government agency exercising jurisdiction over Consumer Protection and Competition issues in any industry, regardless of the provisions of the Act establishing such agency. Such agencies (which would, by definition include the NCC) are specifically required to meet with the FCCPC within one (1) year of the establishment of FCCPC to negotiate an agreement to, inter alia, “identify and establish efficient procedures for the management of areas of concurrent jurisdiction”. Such Agreements must however “preserve the coordinating and leadership role of the

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24 Section 106(2) in particular
25 See section 104-106
26 S. 164
27 S. 104
28 S. 17(a) (b), (e)
29 S. 105
FCCPC in such matters\textsuperscript{30}. In addition, the Act permits the FCCPC to issue “compliance notices” to regulated organizations upon consultation with the sector regulator\textsuperscript{31} but gives the sector regulator no powers to protect/defend its regulatory actions which may have led to the conduct that the FCCPC deems as “prohibited”.

d. \textbf{Appellate Jurisdiction of the FCCPC over Sector Regulator Decisions:} Although the FCCPA establishes a Tribunal to adjudicate issues of competition and consumer protection,\textsuperscript{32} it provides that parties must first approach the FCCPC for review of the decisions of specific sector regulators before approaching the Tribunal.\textsuperscript{33} This directly controverts Section 88 of the NCA which specifically provides that only the Federal High Court can review the NCC’s decisions, and that the conditions-precedent specified in Sections 86 and 87 must be complied with before such juridical review. Similarly, Section 147 permits consumers to escalate their complaints to the FCCPC if unsatisfied with the resolution by the sector regulator (e.g. NCC).

e. \textbf{Power to Override Regulatory Approvals from Sector Regulators:} The FCCPC is empowered to issue a “cease and desist” order prohibiting any conduct that it deems to be in violation of the FCCPA even where the organisation concerned can prove that such conduct was approved by its sector regulator.\textsuperscript{34} This would most likely apply to sales promotions and other activities in the telecoms industry.

f. \textbf{Tariff Regulation Powers of the FCCPC:} the FCCPC can request the President to declare that the prices of specified goods and/or services be controlled by the FCCPC for the purpose of “regulating and facilitating competition only”. The FCCPC can initiate the process by submitting a competitions assessment report to the President. It can be argued that this is an anomaly which should be discouraged in an economy that has adopted free market principles – it is of particular concern for private-sector led markets like the telecoms sector where pricing principles have been extensively developed over the years and carefully enforced by the sector regulator.

g. \textbf{Creation of the FCCPT as a Superior Court of Record:} Sections 6(3) and 6(4) of Nigeria’s 1999 Constitution specifically lists the Superior Courts of Record in Nigeria and only empowers the National/State Assembly to create courts inferior to these. The argument can therefore be canvassed that the Constitution must be amended before additional Superior Courts of record can be created in Nigeria. Although the FCCPA does not explicitly call the Competitions Tribunal a Superior Court of Record, all indications from its provisions seems to suggest that this is the case. These provisions require that

- appeals from the Tribunal are to go directly to the Court of Appeal\textsuperscript{35};
- Registrar of the Tribunal must be qualified to be a registrar of the High Court\textsuperscript{36};
- judgements of the Tribunal must be registered at the

\textsuperscript{30} S. 105(6) Where negotiations are inconclusive, S. 105(7) requires that the matter be referred to the Attorney-General and Minister of Justice
\textsuperscript{31} Section 150
\textsuperscript{32} S. 39(1)
\textsuperscript{33} S. 47(2)
\textsuperscript{34} S. 106(2)
\textsuperscript{35} (S. 55),
\textsuperscript{36} (S. 45),
Federal High Court for the purpose of enforcement’;\(^{37}\)

These provisions therefore beg the question as to whether the National Assembly can in fact (if not in name) create such a court without an amendment to Section 6 of the 1999 Constitution.

**Conclusion**

Several other jurisdictions – such as the US\(^{38}\), the EU and South Africa\(^{39}\) have separated technical and commercial regulatory functions and maintain multi-sectoral competition regulators. This is designed to enable the industry regulator concentrate on technical regulation, innovation and growth, while allowing an independent multi-sectoral competition regulator to evaluate the impact of the sectoral regulator’s decisions and the industry’s market dynamics on the overall economy.

The FCCPA in its present form creates the potential for multiple and contradictory regulations, forum shopping and confusion for the industry. The provisions of Section.105 which requires sector regulators like the NCC to negotiate regulatory authority with the FCCPC may have been intended as a device to minimize these negative potentials, but it is doubtful if any statutory body can legally conclude such agreements with the FCCPC, as it would effectively mean surrendering its statutory functions and self-amending its enabling statutes.

It appears that because the FCCPA was initially drafted at a time when there were no competition regulation structures in any sector of the economy, it adopted a model which assumes zero-level regulation/regulatory capacity. It therefore fails to take cognizance of the comprehensive range of regulations, high-impact enforcement, avoidance of consumer harm, and the high level of regulatory capacity built over the years by the NCC on issues of consumer protection and competition regulation. For the purposes of stability and continued growth of the telecoms industry in Nigeria we must seek international best practices on the management of the relationship between multi-sectoral competition regulators and industry specific regulators.

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\(^{37}\) [S. 54(b)]

\(^{38}\) In the US, the Federal Trade Commission and the Department of Justice Antitrust Division are commercial regulators, while the sectoral interstate regulator is the Federal Communications Commission

\(^{39}\) In South Africa the competition regulator is Competition Commission of South Africa while the sectoral regulator is the Independent Communications Authority of South Africa (ICASA)
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