

## HIGHLIGHTS OF THE FEDERAL COMPETITION AND CONSUMER PROTECTION ACT

### Background

On the 6th of February 2019, the President of the Federal Republic of Nigeria signed the Federal Competition and Consumer Protection Bill into law. Prior to the passage of the Federal Competition and Consumer Protection Act 2018; (the FCCPA), the legal and regulatory framework on competition in Nigeria was fragmented. Previously existing laws on competition such as the Investments and Securities Act 2007, the Electric Power Sector Reform Act 2005 and the Nigerian Communications Act 2003 were largely sector specific. The FCCPA introduces a consolidated legal regime for competition in Nigeria.

This article highlights the key provisions of the FCCPA and its potential impact on the competition regime in all commercial sectors in Nigeria. It also provides recommendations that may assist the government in achieving the objectives of the Act.

### Highlights of the FCCP Act

Broadly, the key objectives of the FCCPA include promoting and maintaining a competitive market in Nigeria; promoting economic efficiency; protecting consumer interests and welfare; prohibiting restrictive and unfair business practices; and ensuring the development of the Nigerian economy. In line with its objectives, the provisions of the FCCPA have an overriding effect on other regulations dealing with competition and consumer protection matters in Nigeria (Section 104 of the FCCPA). We have considered below the key reforms proposed by the FCCPA and the potential impact of such reforms upon implementation.

- (i) Establishment of the Federal Competition and Consumer Protection Commission

The FCCPA establishes the Federal Competition and Consumer Protection Commission (the Commission) which



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will take over the activities of the Consumer Protection Council. The key functions of the Commission include the issuance of rules and regulations to govern competition and consumer protection matters; conducting investigations and inquiry on matters in relation to the provisions of the FCCPA and the elimination of anti-competitive agreements and misleading, unfair, deceptive or unconscionable marketing and trading business practices (Section 17(g) of the FCCPA ). Some other functions of the Commission are the resolution of disputes or complaints, issuance of directives and the application of sanctions (Section 17(h) of the FCCPA).

We note, however, that the FCCPA is silent on the modalities for eliminating existing anti-competitive agreements. Therefore, the effect of the anti-competitive provisions on existing commercial arrangements remains to be seen.

- (ii) Co-Regulation on Competition and Consumer Protection Matters

The FCCPA grants the Commission concurrent jurisdiction to regulate matters relating to competition and consumer protection with other sector-specific regulatory bodies. The implication of this is that regulators such as the Nigerian Communication Commission and the Securities and Exchange Commission will continue to regulate on competition and consumer protection matters alongside the Commission. While this corresponds with the practice in the United Kingdom (UK) where the Competition and Markets Authority (CMA) shares concurrent powers with sector-specific regulators such as the UK Office of Communications and the UK Civil Aviation Authority ([uk.practicallaw.thomsonreuters.com](http://uk.practicallaw.thomsonreuters.com)), this raises some potential commercial issues.

Firstly, the co-regulation principle may lead to “over legislation” on a specific subject matter by multiple regulators that would typically want to protect their sectorial base against intrusion from other regulators. Secondly, the possibility of companies/investors interfacing with multiple regulators on a specific subject matter in the course of their business transactions may lead to undue delays in the turnaround time for such transactions and consequently increase in the cost of doing business in Nigeria.

However, to address the above concerns, the FCCPA requires the Commission and the respective government agencies to negotiate agreements to govern their relationship as co-regulators (Section 105(4) of the FCCPA). Given the milestones achieved by the government to improve Nigeria’s ranking on the ease of doing business index, the inclusion of this provision appears to prevent over regulation and duplication of regulatory compliance requirements for industry participants in such sectors. However, the Act is silent on how this will be achieved or when this will occur; and until the execution of these agreements, there remains an uncertainty as to which of the relevant regulators, industry participants will have recourse to in the course of their transactions.

In any case, it is noteworthy that the Commission’s decisions on competition and consumer protection matters take precedence over decisions of the other sector specific government agencies (Section 105(2) of the FCCPA). Furthermore, the Commission is empowered to determine appeals or request to review the exercise of power by sector regulators on matters affecting competition (Section 47(2) of the FCCPA ). This implies that the Commission may overturn a decision made by any sector-specific regulator. This again poses a level of uncertainty. Consequently, we expect that the commissioners to be appointed pursuant to section 4(2) of the Act, shall be persons who possess industry-specific

expertise in consumer protection and competition issues.

### (iii) Establishment of the Competition and Consumer Protection Tribunal

The FCCPA establishes a Competition and Consumer Protection Tribunal (the Tribunal) to conduct trials over activities, which are prohibited by the Act. The Tribunal can also hear appeals on decisions made by the Commission (or sector-specific regulatory authorities) and impose penalties for prohibited acts (Section 39(2) and Section 47(1) of the FCCPA). In addition, the Tribunal is foisted with the power to hear appeals from, and review decisions made by, any sector-specific regulatory authority on issues arising from competition and consumer protection (Section 47(1) of the FCCPA). It should be noted, however, that although the Tribunal can hear appeals on decisions made by sector-specific regulatory authorities, the Tribunal may only exercise this power where such appeals or reviews have first been heard by the Commission (Section 47(2) of the FCCPA).

The Act also prescribes that decisions of the Tribunal must be registered at the Federal High Court prior to its enforcement (Section 54(b) of the FCCPA ) and any appeal on such decisions is to be made at the Court of Appeal (Section 55(1) of the FCCPA). Notably, in the UK, the Court of Appeal is the final appellate court for decisions of the Competition Appeal Tribunal; however, such appeals are limited to points of law or disputes on the monetary penalty imposed (Section 49(1) of the Competition Act 1998).

### (iv) Creation of a New Regime for Mergers

The Act repeals Sections 118 to 128 of the Investment and Securities Act (ISA), which deal with mergers and acquisition; and empowers the Commission to prohibit or approve mergers. The implication of this repeal is that the Securities and Exchange Commission (SEC) no longer regulates mergers and acquisitions in Nigeria (The SEC has, however, indicated that it shall continue to regulate mergers and acquisitions effected by or involving public companies and transactions that involve the change of a shareholding of a capital market operator). The key differences in the merger provisions in the ISA and the FCCPA are highlighted below:

- Inclusion of a joint venture as a means by which a merger can occur (Section 92(1)(b)(iii) of the FCCPA). In other

jurisdictions like South Africa and Kenya, the competition laws make no specific reference to joint ventures but if the effect of a joint venture constitutes a merger, the merger control regulations will apply. However, in South Africa, greenfield joint ventures will generally not be classified as mergers ([www.gettingthedealthrough.com](http://www.gettingthedealthrough.com)); and only joint ventures which perform all the functions of an autonomous economic entity for a long duration (usually 10 years or more) are caught by the merger requirements of the Kenyan Competition Act No. 12 of 2010. It would, therefore, be prudent for the Commission to provide clear indices on when a joint venture will be classified as a merger under the FCCPA.

- Intermediate mergers are not contemplated under the FCCPA as it prescribes only two (2) categories of mergers – small and large mergers (Section 92(4) of the FCCPA). The Act does not, however, provide the thresholds for the merger categories. This creates uncertainty as parties to proposed mergers will be unable to determine whether their transactions fall within the Commission’s purview for approval.
- The requirement for court sanction in respect of large mergers is omitted in the Act. Whilst this may appear to have reduced the process and timelines for implementing large mergers, it however raises uncertainties on the process for dissolution and cancellation of shares of the absorbed entity without winding-up.
- Prior to making a determination on the thresholds for mergers, the Commission is required to invite the public to provide written submissions on the proposed threshold for mergers and method of calculation of such thresholds (Section 93 (3) of the FCCPA). This will in effect delay the release of the thresholds for mergers, thus extending the period of uncertainty for proposed merger transactions.
- Where parties to large mergers implement such mergers without the approval of the Commission, such parties shall be liable on conviction to a penalty not exceeding 10% of their turnover in the business year preceding the date of the offence (Section 96(7) of the FCCPA).
- Approval of small mergers will be granted within 20 business days of filing the merger notification (Section 95(6) of the FCCPA); whilst approval of large mergers will be granted within 60 business days following satisfaction of the merger notification requirements (Section 97 of the FCCPA). The Commission is, however, empowered to extend the

timeline for considering mergers by 40 business days for small mergers and 120 business days for large mergers (Sections 95(6) and 97 (1) of the FCCPA). The Act is silent on the grounds for which the Commission may extend the timelines, which leaves room for ambiguity and ultimately result in delays to proposed merger transactions.

- In its decision making, the Commission is required to have special regard to the representations made by the Minister in charge of trade in respect of the effect of a proposed merger on (i) a particular industrial sector or region, (ii) employment, (iii) the ability of the national industries to compete in international markets, and (iv) the ability of small and medium scale enterprises to become competitive (Section 100 of the FCCPA). This creates another bureaucratic layer, which may ultimately cause delays to the process of obtaining an approval for mergers.

From the foregoing, it is evident that some gaps exist on the applicable procedure for merger approvals particularly in the interim period pending the full establishment of the Commission. In an effort to address these gaps, the SEC and the Commission have via a joint advisory and guidance circular provided an interim procedure for merger approvals in which; (i) all merger notifications and filings (including pending applications received by the SEC which are yet to be decided) will be reviewed by the Commission and SEC in accordance with the existing SEC Regulations, Guidelines and Fees; and (ii) all applicable fees will be paid to the Commission and decisions on the applications will be communicated by the Commission.

We expect that at the end of the transition period, the Commission will issue regulations on the applicable thresholds, timelines and procedures for approval of mergers and acquisitions, however, it is yet to be seen whether the Commission may opt to fully adopt the existing SEC regulations, guidelines and fees.

## Recommendations

1. **Concurrent Jurisdiction of the Commission and Industry Regulators:** The concurrent jurisdiction of the Commission alongside other industry regulators may lead to a duplication of regulatory oversight. In order to ensure that there is no conflict or overlap

between the powers of the Commission and the relevant government agency (industry regulators), we recommend that the functions and powers of the Commission and the relevant government agencies should be clearly delineated in a regulation or guideline.

- ii. **Timeline for Approval of Mergers:** We recommend that the Commission should provide clear guidelines on the grounds for which it may extend the approval timeline. Furthermore, to avoid undue delays to commercial transactions and ease business transactions within the country, the extension period should be reduced to a more commercially reasonable timeline.



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### Conclusion

The Federal Competition and Consumer Protection Act is a welcome development and a step in the right direction for putting in place an effective anti-trust legal regime for the country. It is envisaged that the effective implementation of the Act will foster the advancement of the Nigerian economy by creating an enabling business environment for healthy competition in the various sectors and industries across the Nigerian market.

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