



Paul Usoro & Co
LEGAL PRACTITIONERS



IMPLEMENTATION OF THE FEDERAL COMPETITION AND CONSUMER PROTECTION ACT, 2019

THE NEED FOR INTER-AGENCY COLLABORATION
AND HARMONY

BRIEF OVERVIEW OF THE FCCP 2019

Historically, there has been a dearth of a comprehensive antitrust and competition legislation in Nigeria. Prior to the enactment of the Federal Competition and Consumer Protection Act, 2019 (“**FCCP Act**” or the “**Act**”), the Investment and Securities Act, 2007 (“**ISA**”) had some anti-trust provisions which gave the Securities and Exchange Commission (“**SEC**”) power to regulate competition in Nigeria.¹ Before the FCCP Act, the ISA had wide antitrust provisions (when compared with other sector-based antitrust legislations) which mostly regulate SEC’s grant of consent to mergers between business entities.² SEC could refuse consent to a merger, acquisition or takeover, on the ground that it is inimical to competition. It could, on the other hand, order the breakup of a company if its activities substantially lessen or prevent competition.³ Another instance of sectorial legislation with antitrust provisions is the Electric Power Sector Reform Act, 2005 which regulates the power sector. In addition, certain sector-specific regulations are also in force to govern competition within various sectors.⁴ However, to provide for an all-encompassing and comprehensive legislation to regulate competition and protect the interests of consumers across all sectors, the FCCP Act was enacted.⁵

Generally, the Act seeks to promote healthy competition in the Nigerian markets by eliminating monopoly,⁶ protecting consumers from the abuse of a dominant market position,⁷ and generally prohibiting other restrictive trade and business practices. Interestingly, the Act applies to all undertakings and commercial activities that take place within, or have effect in Nigeria.⁸ As a result, the activity of a foreign company having effect in Nigeria will automatically be subject to the provisions of this Act.

1. The repealed section 118 - 128 of the ISA.

2. The repealed section 121 of the ISA.

3. The repealed section 128 of the ISA.

4. For example, the Competition Practices Regulations, 2007 issued by the NCC.

5. The FCCP Bill was assented to by the President of the Federal Republic of Nigeria on 6 February 2019.

6. Part X, FCCP Act.

7. Part IX, FCCP Act.

8. Section 2, FCCP Act.

Notably, the FCCP Act repeals the Consumer Protection Council Act (“CPC Act”)⁹ and sections 118 – 128 of the ISA¹⁰. Following the repeal of these sections in the ISA, SEC no longer has power to approve mergers, acquisitions or business combinations between companies, except takeovers. The Act establishes the Commission¹¹, which replaces the previous Consumer Protection Council, as the new enforcement agency, with wide powers geared towards enforcement of consumer rights and regulation of competition in Nigeria. Therefore, to ensure certainty, the FCCP Commission (the “Commission”) will have to issue regulations to prescribe the applicable thresholds, list the documents required to obtain approvals, among others. However, as the Commission is yet to be operational, and the Act is silent on any transitional period, there seem to be a lacuna. To fill this gap, the SEC has indicated that there will be a three (3) month transition period where they will entertain applications until their completion.

The Act also establishes the Competition and Consumer Protection Tribunal (the “Tribunal”¹² to handle issues and disputes arising from the operations of the Act. It is worthy of note that appeals against any decision of the Commission lie to the Tribunal¹³. A ruling, award or judgment of the Tribunal shall be binding on all parties and shall be registered with the Federal High Court for the purposes of enforcement only¹⁴. An aggrieved party may appeal to the Court of Appeal.¹⁵

The primary purpose of the FCCP Act is to promote and maintain competitive markets in the Nigerian economy. It also seeks to protect and promote the interest and welfare of consumers by providing them with competitive prices and product choices.

9 CAP C25 Laws of the Federation of Nigeria (“LFN”) 2004.

10 CAP I24 LFN 2004.

11 Section 3, FCCP Act.

12 Section 39, FCCP Act.

13 Section 38(1), FCCP Act

14 Section 54, FCCP Act

15 Section 55, FCCP Act

RELATIONSHIP BETWEEN THE FCCP ACT AND OTHER SECTOR-SPECIFIC REGULATIONS

Among other things, the enactment of the FCCP Act is commendable as it kick-starts a comprehensive competition regime in Nigeria. However, the question which comes to mind is; what is the status of other sector-specific regulations vis-à-vis the FCCP Act? Section 104 answers this question by providing as follows:

“Notwithstanding the purposes 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.”

This section effectively places the Act over and above every other law, as it relates specifically to competition and consumer protection, save the provisions of the Constitution of the Federal Republic of Nigeria (as amended).¹⁶ Particularly, section 105(2) of the FCCP Act further provides that -

*In so far as this Act applies to an industry or sector of an industry that is subject to the jurisdiction of another government agency by the provisions of any other law, in matters or conducts which affect competition and consumer protection, this Act shall be construed as establishing a concurrent jurisdiction between the Commission and the relevant government agency, with the **commission having precedence over and above the relevant government agency**¹⁷*

In summary, the FCCP Commission shares concurrent jurisdiction with any government agency overseeing any industry or sector that deals with competition and consumer protection issues. For example, in the communications sector, the FCCP Commission will have concurrent jurisdiction with the Nigerian Communications Commission (“**NCC**”); in the aviation sector, concurrent jurisdiction will be shared with the Nigerian Civil Aviation Authority (“**NCAA**”) whilst in the power sector, FCCP Commission will share

16 Cap C23 LFN 2004.

17 Emphasis ours. Also note that Section 105(3) defines a government agency as any government or regulatory agency whose mandate includes enforcement of competition and consumer protection law or principle.

concurrent jurisdiction with the Nigerian Electricity Regulatory Commission (“NERC”). It then takes it a step higher by granting the FCCP Commission precedence over the relevant government agency. In the foregoing examples, the FCCP Commission will take precedence over the NCC, NCAA, NERC and other sector-specific regulators as regards their respective powers to regulate competition and address consumer-related concerns in those sectors.

CONSUMER PROTECTION AND COMPETITION IN THE AVIATION INDUSTRY: MATTERS ARISING FROM THE SUPREMACY OF THE FCCP ACT

In discussing the possible jurisdictional, sector-specific competition and consumer protection issues that may arise from the over-arching antitrust regulatory powers of FCCP Commission, we would use the NCAA as a case study. The NCAA is the apex regulatory body of the Nigerian aviation industry. Part 19, Consumer Protection Regulations of the NCAA Regulations 2015 addresses consumer protection issues, including compensations for denied boarding, delays and cancellations of flights. The Consumer Protection Department of the NCAA is particularly charged with protecting consumers’ interests.

As a result of the supremacy of the FCCP Act as outlined in Section 104, certain issues may have come to light and we seek to address them below:

Non-understanding of the Peculiarity of the Aviation Sector

In view of the peculiarity of the aviation sector, the Legal Adviser and Head of Compliance of the NCAA recently faulted the FCCP Act.¹⁸ He described it as being dominant on regulatory bodies and the failure of the FCCP Commission to fully understand the aviation industry might lead to the death of the Nigerian aviation industry as a whole. He buttressed his claim by stating that the penalty imposed by the CPC, in 2013,

18 NCAA Faults new Consumer Protection Act <https://punchng.com/ncaa-faults-new-consumer-protection-act/>

against Aero contractor for cancellation of flights, reflects the CPC's lack of understanding of the aviation industry, and if such path is towed by the FCCP Commission, it may lead to the death of the Nigerian aviation industry.

This concern is understandable in the sense that the FCCP Commission oversees consumer protection in all sectors and industries in Nigeria. To effectively perform this function, it is expected that the Commission understands the subtleties and intricacies of each sector and therefore understand that a one-size-fits-all approach may breed inefficiency.

One may, however, argue that to avoid the "*jack of all trades, master of none*" syndrome, the Act provides a way out in the provision of Section 104(4) to wit:

"The Commission shall negotiate agreements with all government agencies whose mandate includes enforcement of competition and consumer protection for the purpose of coordinating and harmonizing the exercise of jurisdiction over competition and consumer protection matters within the relevant industry or sector, and to ensure the consistent application of the provisions of the Act."

The aforementioned section provides a negotiation mechanism for the FCCP Commission and any sector-specific regulatory agency to make use of in order to minimize conflicts in the area of protecting consumers' interests.

However, it is clear that the FCCP Commission has a stronger bargaining power as the provisions of the Act enshrine their supremacy. It is therefore recommended that during the negotiation process, the FCCP Commission should recognize the technical expertise and experience of sector-specific regulators and find a way to balance the interests of the consumers with ensuring the commercial viability of the relevant sector. This is important because if a sector is not commercially viable in the first place, then there will be no customer to protect.

Extra-Territorial Application of the FCCP Act

In taking steps to seek the review of the FCCP Act, the Legal Adviser of the NCAA was also quoted to have stated that the extra-territorial application of FCCP Act also contravenes Article 6 of the Chicago Convention¹⁹ (the "Convention").

Article 6 of the Convention provides as follows:

19 Convention on International Civil Aviation done at Chicago on the 7th Day of December 1944.

“No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.”

The effect of the foregoing provision is that the applicable law shall be that of the territory of operation. Since Nigeria has ratified the Convention,²⁰ she is expected to adhere to its provisions. As such, no Nigerian domestic law is expected to contradict the provisions of the convention. Moreover, Article 1 of the Chicago Convention states that *“The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.”*

Meanwhile, Section 2 of the FCCP Act generally provides that the Act shall apply to all undertakings and all commercial activities within, or having effect within, Nigeria. In other words, in determining the applicability of the Act, the residence of a person is immaterial. Therefore, the Act can be said to have extra-territorial application.

Stemming from the foregoing, where the commercial activities of a foreign airline have effects within Nigeria, the foreign airline would have to comply with the relevant provisions of the Act. Whereas going by the provisions of the Convention, the foreign airline should not be subject to domestic laws, provided its operations occur outside the country's territory. It is in this scenario that the contradiction may arise. The line must however be drawn to show that the contradiction may only arise where it borders on competition and consumer protection activities. As stated earlier, in instances of contradiction, the FCCP Act will take precedence, subject only to the Constitution.

In resolving any fallout, it is pertinent as we have noted above that both the FCCP Commission and the NCAA (or any other regulatory agency) can take advantage of the negotiation mechanism provided for in the FCCP Act and ensure that there is harmony in the implementation of the FCCP Act vis-à-vis other sector-based antitrust legislations.

²⁰ Status of Nigeria with Regard to International Air Law Instruments https://www.icao.int/secretariat/legal/Status%20of%20individual%20States/nigeria_en.pdf

CONCLUSION

We have, in the foregoing paragraphs, identified key provisions of the FCCP Act particularly as it affects the existing sectorial legislation on antitrust. Implicit is the possible inter-agency disharmony that may arise as a result of the all-encompassing nature of the powers of the FCCP Commission on competition and consumer protection issues. As we have noted, there exists a leeway-provision in the Act which allows harmonious collaboration and interplay amongst the agencies to ensure that the objectives of the Act is achieved. Thus, despite the superiority of the FCCP Act on issues of competition and consumer protection, the FCCP Commission is encouraged to leverage on the technical expertise and experience in the regulated sectors such as banking and financial services, aviation, power, telecommunication, oil & gas, amongst others, to ensure inter-agency harmonious relationship. Furthermore, the FCCP Commission should bear in mind the peculiarity of each sector and strive to avoid actions that will negatively disrupt the operations of the regulated sectors.

Additionally, the FCCP Commission could also set up departments, which would comprise of experts or create a provision for an ad hoc committee of expert advisors from each sector, whose guidance would ensure that the implementation of this Act would not negatively disrupt the sector in question.

It therefore remains to state that the Act with its laudable provisions has heralded a comprehensive competition regime in Nigeria, and will go a long way in promoting competitive practices among commercial parties. One cannot overemphasize the importance of healthy competitive practices and consumer-friendly ecosystem in any economy. It is hoped that the new regime of competition regulation and consumer rights protection will not only deepen economic activities but also make the players accountable for their harmful actions and inactions. Ideally, this would attract investments, lead to increase in quality of goods and services, and consequently engender economic growth and a better standard of living. At the end, with proper implementation of the FCCP Act and the suggested inter-agency harmonious relationship, consumers will be better for it and businesses will evenly compete to win the consumers with an array of quality products and services.

ABOUT US

Paul Usoro & Co. ("PUC") is a leading full-service law firm, providing top-notch legal services to both local and international clients.

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