

A CRITICAL REVIEW OF THE FEDERAL COMPETITION AND CONSUMER PROTECTION ACT (FCCPA) 2019*

ABSTRACT

Competition law shields and protect both consumers and producers in any economy by ensuring the production of quality goods and efficient services and also ensuring that no monopoly exists in the market to undermine any producer. Where competition is lacking, consumers' right of choice is threatened, the quality of goods and services is washed down, and dominant producers make an undue profit to the detriment of consumers and other producers in the market. Nigeria had been long overdue for comprehensive competition law to regulate and rectify anti-competitive trade practices in its market. After prolonged agitation and unsuccessful attempts, the Federal Competition and Consumer Protection bill was accented to by the President in January 2019. The paper takes a careful look at the FCCPA 2019 by giving a detailed summary of all the parts of the Act. The work also highlights the green and red lights in the Act. The work also examines in detail the functions of the authorities established by the Act (The Federal Competition and Consumer Protection and the Consumer and Competition Protection Tribunal). The work concludes by suggesting recommendations that can ensure that the Act is effective to combat the current challenges to competition that exists in the Nigerian market.

Keywords: Competition law, Consumer's Rights, Anti-Competitiveness, Nigerian Economy

INTRODUCTION

Before the enactment of The Federal Competition and Consumer Protection Act 2019 (FCCPA), there were a plethora of advocacies for Nigeria to have a comprehensive competition legal regime to protect consumers and ensure a fair and competitive market within the Nigerian economy. The Consumer Protection Council Act (CPCA)Cap 25, LFN, 2004 as well as regulations of specific sectors of the Nigerian economy governed market activities and sought to protect consumer rights, howbeit in piecemeal. The FCCPA when enacted became a comprehensive and handy competition law that regulates all sectors of the Nigerian economy.

The FCCPA repealed the CPCA dissolving the Consumer Protection Council and established the Federal Competition and Consumer Protection Commission (FCCPC). The FCCPA is the major legislation guiding the Nigerian market to ensure the promotion of fair, efficient, and competitive activities in the economy as well as ensuring consumer protection. It was assented to by President Muhammadu Buhari on the 30th of January, 2019.

The Act is divided into 18 parts, consisting of 168 sections. It is important to point out that the Act is properly referred to as FCCPA 2019 and not FCCPA 2018 because it was accented to in 2019.

The objectives of the Act are highlighted and the main goal of the Act is to promote a competitive market and ensure that the rights of consumers are protected in the consumption of goods and services in Nigeria. The Act establishes the Federal Competition and Consumer Protection Commission (FCCPC) as well as the tribunal to adjudicate matters arising from the operations of the Act. The tribunal is empowered to handle appeals from the decision of the Commission and any sector-specific regulatory authority. The constitution, power, and functions of the Commission are explained.

The Act prohibits restrictive agreements and any such activity that distorts healthy competition in the market. It addresses the abuse of a dominant position in the market, identifying the activities that constitute such a dominant position with the stipulated punishment for refusal to give up a dominant position by any undertaking. The Act empowers the President of the country to determine the prices of certain goods and services in the market in a bid to facilitate competition.

Mergers are heavily regulated by the Act to eliminate domination by two undertakings coming together. This is achieved by the SPLC (substantially prevent or lessening competition) test as well as the efficiency test. The SPLC is the first stage. A merger that fails this test can still be approved by the efficiency test. The efficiency test is passed if it can be deduced that approving a merger could result in technological efficiency and other pro-competitive advantages.

The rights of consumers have been well spelled out as well as the duties of Manufacturers, Importers, Distributors, and Suppliers (MIDS) of goods in the market. How a consumer can enforce rights are mentioned. The FCCPA seeks to make consumers its very object as it partners with every sector-specific industry to ensure that the rights of consumers are protected.

The FCCPC was commissioned in March 2021 to commence operation. The FCCP Commission is currently active under the leadership of Emeka Nkwanpa (Board Chairman) and Babatunde Irukera as the CEO.¹

OVERVIEW OF THE ACT

The FCCPA is divided into 18 parts, consisting of 168 sections. The summary of each of the parts is given below;

Part I²

This part highlights the objectives and scope of the act. The objectives of the act are to; maintain competitive markets, promote economic efficiency, promote the interest and welfare of consumers by ensuring their ability to choose from a variety of products/services, prohibit unfair business activities and contribute to the sustainable development of the Nigerian economy. The act applies to all commercial activities within or outside, affecting Nigeria (Corporate establishments, government agencies, and all business undertakings geared towards profit-making).

Part II³

It highlights the establishment of the Federal Competition and Consumer Protection Commission (FCCPC) referred to as “the Commission”. It states the functions, powers, and obligations of the Commission and identifies the headquarters of the commission to be situated in FCT, Abuja. It makes provision for the establishment of the Commission’s governing body, the number, composition, qualification, and criteria for appointment of members (all board members are called Commissioners). It provides for the voluntary resignation of a commissioner as well as the grounds for suspension or removal of a commissioner and how vacancies in the board can be filled. It highlights the functions of the Executive- Vice Chairman and empowers the Commission to make rules regulating its proceedings. It states clearly that no member of the commission shall have interest in any matter brought before the commission. It provides for the Commission to set up one or more committees to carry out some of its functions as the need may arise. It also states that the seal of the commission shall be authenticated by the signatures of the Executive-Vice Chairman

***Dominic Obilor Akabuiro**, PhD (NWU) SA, ACI Arb (UK), AoA (SA), Arbitrator and Mediator, Notary Public, Senior Lecturer, Lead City University, Ibadan, Nigeria, domakattorney@yahoo.com, 08037276455

¹About the People: FCCPC. < <http://www.fccpc.gov/about/people>. > Accessed 12 June, 2021

²Section 1-2, FCCPA

³Section 3-16, FCCPA

or any other person authorized by the commission and any document that is duly executed under the seal of the commission, shall be received in evidence.

Part III⁴

This part explains in detail the functions and powers of the Commission. The cardinal function of the Commission is the administration and enforcement of the provisions of the act as well as other enactments that bothers on competition standards and consumer protection. Its major power is to create specialized departments that are necessary for the effective discharge of its functions.

Part IV⁵

This part bothers on the functions of the management and staff of the Commission. It explains the role, qualification, and tenure of the Executive-Vice Chairman, who is the CEO of the Commission. Provision is made for the appointment of a secretary to the commission who is expected to be a lawyer with at least 10 years of post-call experience, with the Secretary's functions clearly stated. The commission is given the power to decide remunerations paid to staff upon consultation with the National Salaries and Wages Commission as well as regulations to guide the conduct of staff (disciplinary measures, conditions of service, etc.).

Part V⁶

There is provision for the establishment of a fund for the Commission to receive all allocations and payments due to it, which it uses to meet its expenditures e.g salary payment, allowances, consultancies, etc. The Commission is expected to remit the excess of its revenue yearly to the Consolidated Revenue Fund of the Federation. The commission is required to submit not later than 30th September of every financial year, its estimated income and expenditure for the following financial year to the National Assembly (NA). They are also required to submit a report of their activities in the preceding year to the President and the NA not later than 30th June every year. The commission is allowed with the consent of the Minister of Finance to borrow sums of money as it may require in the discharge of its duties. They are also permitted to gifts, grants, and aid from national, bilateral, and multilateral

⁴Section 17-18, FCCPA

⁵Section 19-22, FCCPA

⁶Section 23-26, FCCPA

organizations provided that the gifts are not inconsistent with the objectives and functions of the Commission.

Part VI⁷

This part addresses the Commission's power to enforce warrants and request information in the process of carrying out its functions. Through an authorized agent (with an issued warrant), the Commission procures documents, articles, etc., under the control of persons to ascertain whether an undertaking has engaged in any activity that contravenes the provision of the Act. The Act also stipulates that the hearings of the Commission shall be done in public. The Commission is also given the power to issue summons to anyone to give evidence at its hearings. It also stipulates punishments for intruders during the hearing sessions. Appeals from the decisions of the Commission lie to the Tribunal established under the Act.

Part VII⁸

This part provides for the establishment of a Competition and Consumer Tribunal (CCT), states its functions and powers, highlights the composition of the members of the tribunal (Chairman and six other members), their qualifications, term of office (5 years), conditions for disqualification from the tribunal. It also provides for the establishment of the office of a tribunal registrar performing the same function just as a court registrar. The tribunal is empowered to hear appeals or reviews from the decisions of the Commission in course of implementing any of the provisions of the Act. It states the limits of the tribunal's powers in the imposition of penalties and allows a dissatisfied party to appeal to the Court of Appeal within 30 days after the award or judgment is given. Provision is also made for the establishment of a tribunal fund to be used to achieve the functions of the tribunal.

Part VIII⁹

This part addresses the prohibition of agreements/activities by undertakings that restrict and distort healthy competition in the market, stipulating appropriate penalties for contravention. It provides that the Commission, upon determining that an agreement/decision contravenes the Act, is empowered to serve an order on the parties concerned. It also stipulates that

⁷Section 27-38, FCCPA

⁸Section 39-58, FCCPA

⁹Section 59-69, FCCPA

anyone who has suffered as a result of a restrictive agreement can make a direct complaint to the commission for appropriate actions.

Part IX¹⁰

This part explains domination and the abuse of a dominant position in the market. The Commission is charged with the responsibility of publishing the size of market share that may constitute a dominant position in particular markets. The criteria for identifying the relevant market and the activities that constitute the abuse of a dominant position in the market are highlighted. Penalties are equally stipulated for undertakings that refuse to cease abusive practices after receiving an order from the Commission to that effect.

Part X¹¹

Where the Commission believes that a monopoly situation exists in the market, the Act empowers it to investigate to determine the extent of the situation. It states the situation to be considered to determine the existence of a monopoly. The Commission is empowered to gather information from anyone and refusal to furnish the Commission with the information required or the giving of wrong information is punishable. Any person, agency of the government, state, or Local government can request a monopoly investigation by the government.

Part XI¹²

This part gives the President of the Country the power to order that the prices of certain goods and services be controlled by the provisions of the Act to facilitate competition. Upon this order, the Commission has obligated an authorized price of regulated goods and services. Penalties are equally stipulated for a person or body corporate that violates the published order. Undertakings that supply regulated goods/services are expected to keep accounting and costing records of such supplies.

Part XII¹³

This part addresses mergers, types, instances that constitute control over another undertaking, and factors that the Commission will consider to approve a merger. It also provides for the SPLC test and the efficiency test before the approval of mergers. The SPLC test is the first

¹⁰Section 70-75, FCCPA

¹¹Section 76-87, FCCPA

¹²Section 88-91, FCCPA

¹³Section 92-103, FCCPA

stage of ascertaining whether a merger will substantially prevent or lessen competition in the market. If the Commission's answer is in the affirmative, then, the efficiency test will be taken to determine whether or not the merger will be approved. There is also a provision for the Commission to revoke its approval of a merger based on several things e.g incorrect information, approval by deceit, etc. Parties aggrieved by the decision of the Commission in the approval of the merger can apply to the Commission tribunal and if it is about the Tribunal, then, the CA.

Part XIII¹⁴

Here, the Act states clearly that in matters relating to competition and consumer protection, it is supreme. The Act recognizes any agency whose objective is to promote competition and consumer protection as a government agency for that purpose. It charges undertakings that have contravened provisions of the Act to prove that such contravention was ordered by a regulatory agency possessing jurisdiction in that regulated industry. Upon this, the Commission may issue a cease-and-desist order prohibiting further contravention.

Part XIV¹⁵

This part provides for the prohibition of certain anti-competitive acts. Undue price-fixing and refusal to supply goods, limitation of facilities for transportation, production, and storing of goods are prohibited activities under the provision of the Act. The Act equally prohibits bid-rigging. It sets out the penalty attracted by the contravention of this part of the Act as well as penalties for obstruction of the investigation of these anti-competitive activities both for natural persons and corporate bodies.

Note: Bid rigging occurs when the party calling for a bid is oblivious of the fact that two or more competitors have agreed not to compete for the bid.

Part XV¹⁶

Here, consumers are given the right to receive information in plain and understandable language. Undertakings are not permitted to display goods without displaying their prices (this ensures that consumers do not pay more than the displayed prices), apply good descriptions that are misleading, and use misleading marketing strategies. Undertakings are charged to disclose to consumers the conditions of the goods being offered for sale. This

¹⁴Section 104-106, FCCPA

¹⁵Section 107-113, FCCPA

¹⁶Section 114-133, FCCPA

portion of the act provides consumers with the right to choose their suppliers, cancel bookings at a reasonable charge by the supplier, inspect goods before purchase, return unsafe and defective goods, and timely performance and quality delivery of goods and services. Consumers are not liable for damage to any good displayed by the supplier except if such damage is occasioned by the negligence of the consumer.

Part XVI¹⁷

This part of the Act highlights the duties of Manufacturers, Importers, Distributors, and suppliers of goods and services (MIDS). MIDS is expected to label goods in a manner that can be easily traced to them, notify the public of unforeseen hazards on any product and withdraw such goods from the market. Penalties are stipulated for contravention of these duties. Any consumer that suffers injury as a result of noncompliance by MIDS is entitled to compensation.

Part XVII¹⁸

This portion of the Act highlights how a consumer may seek to enforce any right under the Act. This could be by referring the matter to the undertaking that supplied goods, the Commission, or an applicable industry sector regulator. When an industry regulator determines that the issue is beyond it, it may terminate the process, then, the parties can file a complaint to the Commission. Where the Commission has observed that a particular undertaking has persisted in a course that is detrimental to the interest of consumers, the Commission will obtain a written assurance from the undertaking to refrain from such course. Where the undertaking fails to observe such assurance, the Commission will cause a proceeding to be commenced in court against such undertaking.

Part XVIII¹⁹

This miscellaneous part of the Act provides for a limitation of suits against employees of the Commission and Tribunal; this means that the Public Officers Protection Act protects them. It stipulates those notices to be given by the Commission must be in writing, under the seal of the Commission, signed by the Executive Vice Chairman or by one or more members of the Commission. Notices or documents to be served are deemed to be served by delivering such to a person's usual or last known place of residence/business or at the place specified by such

¹⁷Section 134-145, FCCPA

¹⁸Section 146-155, FCCPA

¹⁹Section 156-168, FCCPA

person. Penalties for non-compliance to a notice given are stated in this part of the Act. The Commission by the Act can delegate its power to anyone it deems fit on any matter but such must be an officer in the Commission. Other regulations with similar provisions of the Act must be read with necessary modifications to bring them in conformity with the Act. The Commission is empowered by the Act to make regulations that would aid its operations. This part provides for the definition of terms used in the Act as well as the short citation of the Act.

INSTITUTIONS ESTABLISHED BY THE ACT

There are two institutions created by the Act; the federal Competition and Consumer Protection Commission (FCCPC) and Competition and Consumer Protection Tribunal (CCPT). These bodies were established to set the Act in motion.

The Federal Competition and Consumer Protection Commission

It is the foremost competition and consumer protection authority in Nigeria established by the Act. The FCCPC is referred to as the ‘Commission’²⁰. The Commission was established by the Federal Competition and Consumer Protection Act (FCCPA) 2019 to, among others, develop and promote fair, efficient, and competitive markets in the Nigerian economy, facilitate the access by all citizens to safe products, and secure the protection of rights for all consumers in Nigeria.²¹

The Commission’s vision is to have a market that is a model for ease, innovation, dynamism, responsiveness, and satisfaction. Its mission is to promote a fair and vibrant market while ensuring consumers are the core of, not ancillary to business. Its core values; are competence, responsiveness, ethics, sensitivity, transparency, and stability.²²

The Commission is the body with the most responsibilities. Section 17(a-z) of the Act sets out 26 functions of the Commission. The powers of the Commission are also set out in section 18(a-h). From the provision of the Act, the success or otherwise of the Act rises and falls on the Commission. Asides from the implementation of the Act, Regulation and policy

²⁰Section 3(1) FCCPA

²¹The Commission. <<https://www.fccpc.gov.ng/about/commission/>>. Accessed 28 February 2022

²²Ibid.

formulations, and enforcement and advisory roles among others, the Commission also is empowered to resolve disputes arising from regulatory compliance issues. commission shall;

“Resolve disputes or complaints, issue directives, and apply sanctions where necessary”²³

In resolving disputes, the Commission acts as a court of the first instance. All disputes must first be heard by the Commission before they can be taken to the Tribunal.

The Competition and Consumer Protection Tribunal

This is the body next to the Commission when it comes to regulation and enforcement of the Act. The CCPT is referred to as the Tribunal.²⁴ It assumes an appellate jurisdiction, as it only entertains appeals from the decision of the FCCPC according to the provision of the Act.

Subject to regulations made by the Commission, appeals from any decision of the Commission shall lie to the Tribunal established under section 39 of this Act.²⁵

Unlike the Commission, the Tribunal’s major role is to adjudicate over conduct prohibited under the Act. It is more direct than that of the commission.

CRITICAL REVIEW OF THE ACT

No doubt, the FCCPA 2019 is a step in the right direction to promote healthy competition in the Nigerian economy. However, there is a certain provision of the Act that needs to be reconsidered if it must realise its purpose.

There exists a concern about political interference in the implementation of the Act. The power allocated to the President by sections 88 to 91 which make up Part XI of the Act provides for price regulation of some select goods and services upon an order of the President published in the Gazette negates the objective of the Act in promoting a free and competitive market system where the forces of demand and supply should determine the price of commodities. Allowing political authorities to determine the prices of commodities is tantamount to political interference which impacts the independence of the Commission.

²³Section 17(h) FCCPA

²⁴Section 31(1) FCCPA

²⁵Section 38(1)

It is argued that this power given to the President in sections 88-91 by the Act ought to reside with the FCCPC to guarantee its independence and insulate it from political interference. From experience, decisions by political actors even in the economic sphere, tend to be driven by political considerations and undertones.²⁶ This already suggests a downfall for the Act if it is not reconsidered.

Given its over 26 functions, the Commission appears from the provision of the Act to be overburdened with responsibilities. Thus, efficiency is compromised on the altar of a multiplicity of functions. It is my considered view that the Commission should be relieved of adjudicatory functions. Adjudication should be faced squarely by the Tribunal since the Act points out adjudication as the sole responsibility of the Tribunal. It will go without saying also that appeals that lie from sector-specific regulators should not also lie to the Commission but should be transferred to the Tribunal.

Also, there exist some overlapping functions. Some of the functions of the Commission in section 18(1) appear to be similar to core mandates of other governmental agencies like the Standards Organisation of Nigeria (SON), and the National Agency for Food and Drug Administration (NAFDAC), and the Control and Nigerian Customs Service. These agencies also have consumer protection powers under their respective enabling Acts and may see FCCPC as a rival encroaching into their statutory mandates. This poses a question of whether these agencies will respond favorably to any approaches made by the FCCPC to them under the provisions of Section 105(4) Act.²⁷

It is also in doubt whether FCCPC is a supreme competition regulator under the FCCPA. This confusion arises when comparing Section 104 which makes the FCCPA supreme to any other law on competition and consumer protection, with Sections 47(2) and 105(4), (5), and (6) (a) (b) which recognises sector-specific regulators established under the relevant sectoral law. Even though Sections 47(2) and 105(6) (c) acknowledge the leadership position of the FCCPC when dealing with sector-specific regulators, recognizing these sector-specific regulators established by other laws and mandating the FCCPC to negotiate agreements with

²⁶Eyinnaya C. A Critique of The Nigerian Federal Competition and Consumer Protection Act (FCCPA) (2019). <<file:///C:/Users/Opeyemi/Downloads/CritiqueofTheNigerianFederalCompetitionandConsumerProtectionActFcpa2019.pdf>> Accessed 28 February 2022

²⁷Eyinnaya C.U, The Nigerian Federal Competition and Competition Protection Act 2019: Lessons from South Africa (2019). <<https://www.afronomicslaw.org/2019/09/25/the-nigerian-federal-competition-and-competition-protection-act-2019-lessons-from-south-africa/>> Accessed 28 February 2022

them²⁸ is clearly in contradiction with the intention of section 104 which presents the Commission as a sole regulator of competition in Nigeria.

Furthermore, is a future challenge that may be associated with judicial processes under the FCCPA. Competition law cases are business-related, and in business, time is of the essence and efficient allocation of resources is very critical. One can safely assume that the Tribunal may be efficient and decide cases at a faster pace than the regular Nigerian courts. However, the FCCPA ought to have considered the delays in the Nigerian judiciary which can make some cases under certain circumstances linger for over 10 years, and impose timeframes for the hearing of appeals and delivery of judgments on competition cases at the Appeal Court. It has been argued that such time frame allocation determining appeals at the Tribunal would have been in tandem with the 2018 amendment to the Nigerian Constitution for pre-electoral cases.²⁹

CONCLUSION

Competition law is germane for a healthy economy in a free market system. It protects consumers and promotes Foreign Direct Investment. It also creates order and prohibits the abuse of the dominant position. From the foregoing, the importance of competition law cannot be over-emphasized. The institutional frameworks as provided by the Act are key to an effective and efficient implementation of the Act.

It is recommended that the Commission creates awareness about the Act and the functions of the Commission to stakeholders in the market. Although this is clearly stated as a function of the commission in sections 17(1)(f) and 18(2) It is true that the commission only commenced operation 11 months ago but it must ensure that proper education is given to people to make informed choices in the market.

It is also recommended that the Commission should truly maintain its integrity and transparency as stated as part of its core values by ensuring that it avoids political interference in order to serve consumers and producers without fear or favor.

With the burden of work on the Commission, it is important that it has adequate human resources to achieve its aim. It should also be stated that only qualified personnel with

²⁸Section 105, FCCPA

²⁹Op cit.

requisite knowledge and capabilities should be employed and deployed for effective implementation of the Act

Finally, to deliver on their mandates, both the Commission and the Tribunal should avoid corruption like a plague.