

THE CHANGING LANDSCAPE: FEDERAL COMPETITION AND CONSUMER PROTECTION ACT

**KEYNOTE ADDRESS BY HON. JUSTICE (DR.) NNAMDI O. DIMGBA AT THE JACKSON,
ETTI & EDU (IN PARTNERSHIP WITH NORTON ROSE FULBRIGHT) CONFERENCE ON
COMPETITION LAW, HELD ON JUNE 18, 2019 AT FOUR POINTS BY SHERATON,
VICTORIA ISLAND, LAGOS.**

1. INTRODUCTION

I wish to commend our host law firms, Jackson Etti & Edu (JEE) and Norton Rose Fulbright (Norton Rose) for creating a platform for this engagement, which is of a great importance to the Nigerian and African business environment, and perhaps to the world too, giving the size of Nigeria's economy and its potential global weight, if things are gotten right. The theme of this conference is very apt, and of great significance in view of the recent enactment of the competition legislation in Nigeria. Needless to say, the passage of the Competition Act marks the crossing of a great milestone. Like everything novel, this requires a great deal of adaptation, and good preparation too. This engagement sets the right tone, and again I commend the organisers for thinking of this.

Given its novelty in our jurisdiction, and the somewhat relative lack of familiarity of Nigerian lawyers and businesses with this concept, I believe it is not out of place to quickly offer an explanation of what today's main subject is all about. Competition law is the law that regulates how firms compete with each other in the market space, with the ultimate goal of enhancing consumer welfare. It prescribes the accepted conduct for firms vying for market shares and custom of consumers, outlaws and penalises unaccepted market behaviours and conducts.

In some jurisdictions, it is referred to as anti-monopoly law and in the United States as antitrust law giving its roots in the legal response against trusts in the early 19th

century that was seen to be inimical to the interest of consumers in the United States. To achieve its objective of guaranteeing a competitive market, competition law relies on the enforcement of the tripod provisions on merger control, cartel prohibition, and regulation of unilateral conducts (abuse of market power by dominant firms or business players).

2. HISTORY OF COMPETITION LAW IN NIGERIA

Globally, Competition Law has a long history which can be traced to the first competition legislation passed by Canada in 1889 known as Wallace Act, which was quickly followed by the US Sherman Act of 1890. Over time, several other countries keyed in and adopted the law. The proliferation of competition laws is undoubtedly linked to the wave of neo-liberal economic reforms introduced since the 1980s and, in particular, as a result of privatisation programmes which many nations embraced in the last three decades.¹ 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.² Other motivating factors include the fairly recent global waves of mega-mergers, the increased potential for cross-border anticompetitive practices, the ascendancy of economic integration with the World Trade Organisation (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.³

¹ Paul Cook, *Competition Policy, Market Power and Collusion in Developing Countries*, in *LEADING ISSUES IN COMPETITION, REGULATION AND DEVELOPMENT* (Paul Cook, et al. eds., 2004).

² *ibid.*

³ Nnamdi Dimgba, 'The Need and the Challenges to the Establishment of a Competition Law Regime in Nigeria' <[https://www.academia.edu/8822080/The Need and the Challenges to the Establishment of a C ompetition Law Regime in Nigeria](https://www.academia.edu/8822080/The_Need_and_the_Challenges_to_the_Establishment_of_a_Compensation_Law_Regime_in_Nigeria)> accessed June 12, 2019.

At present, over 120 countries have a competition law,⁴ with Nigeria being the latest country to join the league upon the signing of the Federal Competition and Consumer Protection Bill (the bill) into law by the President on January 30, 2019. This came 17 years after the first idea for a competition law in Nigeria was touted in December 2002 when the former Director-General of the Bureau for Public Enterprises (BPE), and 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 just dumping their products in Nigeria making it extremely hard for local companies to compete.⁵ This announcement was 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. Apart from certain provisions which I found troubling, and indeed criticized in both newspaper and journal articles,⁶ my impression was that the ECU Associates draft was a good document which could have been made to work with a couple of fine-tunings. However, for reasons that I do not yet know, nothing was heard of the ECU draft for many years, a state of inertia which I also criticized⁷ as did other commentators.

In early 2006, a new draft competition bill was introduced, drafted by a different consultant under the auspices of Attorney-General Bayo Ojo's Federal Ministry of Justice (FMOJ). While this was also in its right a fairly good document, I do not seem to understand what policy measures that informed its preference over the ECU Associates draft, and why the earlier draft could not have been used. Indeed much more than I did of the ECU Associates draft, I found the FMOJ bill very disturbing in terms of the enormous powers which were given to the Minister and the presence of provisions which could lend the competition policy process to overbearing political

⁴ Maher M. Dabbah, *International and Comparative Competition Law and Policy* (CUP 2010).

⁵ He apparently confused antitrust with anti-dumping.

⁶ See Nnamdi Dimgba, "Drafting Antitrust Laws: An Appraisal of the Merger Provisions of the Federal Competition Bill", *The Guardian*, 21 March 2003; "Merger Provisions of the Nigerian Federal Competition Bill", (2003) 25 *Comparative Law Yearbook of International Business*, *Kluwer Law International* 327 – 339.

⁷ See Nnamdi Dimgba, "Nigeria's Competition Law: The Egg that Never Hatches", *The Guardian*, 22 February 2004.

control. Needless to say, I also criticized the above aspects of this bill as quite anachronistic and against current global trend that favour the creation of independent self-accounting agencies to implement competition laws.⁸

From 2006 till 2015, several versions of the bill 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 not be unconnected with the overbearing influence of vested interests like owners of vast business empires who saw the emergence of competition law as a threat to their businesses.⁹ Other reasons for the delay I will not be able to cover in this keynote address due to constraint of time and space.

However, it is worthy to note at this juncture that 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 subtle introduction of competition law and its principles via empowering some sector-specific regulators, especially those which were established post 2002 with competition regulatory functions. These agencies include the Nigerian Communications Commission (NCC) which has the powers to regulate competition in the communications 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

⁸ See Nnamdi Dimgba, "A Review of Merger Control under the Federal Competition Commission Bill", paper presented on 25 May 2006 at the Rules Watch competition law conference in Lagos, Nigeria; "A Review of Merger Control under Nigeria's Proposed Competition Law", Published in the **Journal of Law and Investment 2007, Vol 1**.

⁹ Bukola Akinbola and Enyinnaya Uwadi, 'Antitrust as a Panacea for Economic Development' (University of Ibadan Law Conference, Ibadan, September 2016)

Regulatory Commission (NERC) which has the mandate to regulate competition in the power sector pursuant to Sections 30, 31, 82 of the Electric Power Sector Reforms Act 20015; the Petroleum Pricing Regulatory Agency (PPRA) which has the mandate to prevent collusion and restrictive trade practices in the downstream petroleum sector, by virtue of Section 7 (j) of the Petroleum Products Pricing Regulatory Agency Establishment (Amendment) Act 2004.

The delay in the passage of the bill led to the clothing of these agencies with competition law powers, being sectors of national and strategic importance that cannot be left totally unregulated, competition-wise, especially in the wake of the massive surge towards privatisation and globalisation in the early 2000s. Whether these agencies achieved their competition regulation mandate or not is an issue open to debate, although I had expressed some reservations about them, especially with the competition law competence given to the SEC.¹⁰ My impression has always been that in a jurisdiction such as Nigeria where sector regulators struggle with a competence such as competition law, they tend to focus more on their core competence which are familiar territory and tend to neglect competition. For example, although the ISA in Section 128 gave the SEC competition law powers, including the power to order the break-up of companies, in the 12 years in which the ISA 2007 has been in operation, I am yet to see a single case where the SEC has exercised or even threatened to exercise this power, much less query any company on the grounds of anti-competitive conduct. In respect of merger control, I am yet to see any single merger disapproved by the SEC on grounds of competition. It will appear that all merger applications get approved by the SEC so long as the necessary fees are paid. Although the criteria of effect on competition exists in the ISA and in the SEC guidelines, I am concerned that the focus has always been on the fairness of

¹⁰ Nnamdi Dimgba "The Regulation of Competition Through Merger Control: Case Under the Investments and Securities Act 2007" being paper presented at the Nigerian Bar Association (NBA), Section on Business Law (SBL) Conference, April 16, 2009, at Transcopr Hilton Hotel Abuja, Nigeria; available at www.globalcompetitionforum.org.

the merger deal on the various shareholders, and which is the traditional role of a securities regulator such as the SEC, and less on the impact of the merger on competition. All the above said, it is hoped that with the enactment of the Federal Competition and Consumer Protection Act (FCCPA), the nature and extent of the statutory powers of the above sector regulators as it relates to competition law are now subject to the FCCPA, and that competition considerations will take a prime position.¹¹

3. THE CHANGING LANDSCAPE

3.1 An Overview of the Key Provisions of the Federal Competition and Consumer Protection Act 2019

The FCCPA heralded a new dawn in the Nigerian legal space. According to Section 2 of the FCCPA, the Act is applicable to all commercial activities within, or having effect in Nigeria. Its provisions are binding on Federal and State government corporations and parastatals, and indeed all commercial activities aimed at making profit and targeted at satisfying demand from the public. Some of the key provisions of the Act will be highlighted below.

Firstly, the FCCPA in Section 165 repealed the Consumer Protection Council Act, Cap C25 LFN 2004, and established the Federal Competition and Consumer Protection Commission (FCCPC) in the place of the Consumer Protection Council (CPC) to take over the consumer protection functions of the CPC, and also be the national competition regulator. The general competition regulatory function of the FCCPC is the promotion of competition in the Nigerian markets through the prohibition of monopolies, abuse of market dominance, and cartels. The specific functions and powers of the Commission are contained in sections 17 and 18 of the FCCPA. Similarly, the FCCPA also repealed Sections 118 to 127 of the Investments and

¹¹ Enyinnaya Uwadi, 'Competition Law In Nigeria: A Brief Overview Of The Federal Competition And Consumer Protection Act 2019' (Unpublished).

Securities Act 2007 which had empowered the SEC to regulate and approve mergers, and assigned this role to the FCCPC.¹² However, it should be noted that the FCCPA did not repeal Section 121 (i)(d) of the ISA, which therefore means that the role of the SEC in mergers was not entirely erased by the FCCPA, but was restricted to its primary duty as a capital market regulator whose duty it is to ensure that where a merger activity involves a public company, the shareholders are treated fairly and their interest are protected.¹³

Secondly, Section 39 of the FCCPA established the Competition and Consumer Protection Tribunal (CCPT) with the power to adjudicate over conducts prohibited by the Act or any other enactment, entertain appeals on any decision of the FCCPC,¹⁴ hear appeals from the decisions of sector-specific regulators on competition and consumer protection matters, after the FCCPC itself had first considered such an appeal.¹⁵ The decision of the Tribunal is to be registered at the Federal High Court for enforcement purposes only,¹⁶ while appeals from the Tribunal's decision lies to the Court of Appeal.¹⁷ The above implies that the Tribunal arguably stands as a court of coordinate jurisdiction to the Federal High Court, though I believe this will be a matter of some controversy.

Thirdly, in the context of existing legal framework, the provision of the FCCPA overrides that of any other law in all matters relating to competition and consumer protection. This means that the Commission has precedence over and above any other sector-specific regulator in matters or conducts which affect competition and consumer protection.¹⁸ It equally sits on appeal to review the decisions of sector-

¹² Section 93 of the FCCPA

¹³ See SEC Circular dated 08/02/2018 titled 'Notice on the Passage of the Federal Competition and Consumer Protection Act' <<http://sec.gov.ng/notice-on-the-passage-of-the-federal-competition-and-consumer-protection-act/>> accessed June 12 2019.

¹⁴ Section 47 (1)(a) of the FCCPA

¹⁵ Section 47 (2) of the FCCPA

¹⁶ Section 54 of the FCCPA

¹⁷ Section 55 (1) of the FCCPA

¹⁸ Section 104 of the FCCPA

specific regulators.¹⁹ To ensure a cordial relationship and guard against power tussle between sector-specific regulators and the Commission, the Commission 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.²⁰ This provision is very important and commendable as it is meant to guarantee a smooth and efficient transition of competition regulatory powers between the sector regulators and the Commission. The recent joint press release by the FCCPC and SEC dated 3rd of May, 2019 titled *Joint Advisory and Guidance on Mergers, Acquisitions and Other Business Combinations Notifications Pursuant to FCCPA* is an outcome of one of such negotiations.²¹

3.2 CONCERNS

There are also some areas of concern. First, there has been some concern of what is seen as overbearing political interference in the FCCPA as exemplified by some powers granted to the executive in several provisions of the Act, a feature that is seen as being antithetical to the independence of the FCCPC, and could make the Commission an appendage of political actors. For example, sections 88 to 91 which makes 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. This power it is argued ought to reside in the FCCPC to guarantee its independence and insulate it from political interference, and not on the President. The concern is that a power such as this, sitting in the context of competition enforcement ought to rest on the FCCPC itself without reference to any other person including the President of the country

¹⁹ Section 47(2) of the FCCPA

²⁰ Section 105 (4,5&6) of the FCCPA

²¹ Endurance Okafor, 'FCCPC to take over role of SEC in M&As, other business combinations' (*Business Day of May 6 2019*) <<https://businessday.ng/companies/article/fccpc-to-take-over-role-of-sec-in-mas-other-business-combinations/>> accessed June 10 2019.

being a political actor, because of the high tendency to prioritise political calculations over economic decisions. From experience, decisions by political actors even in the economic sphere, tend to be driven by political considerations and undertones. Most times, governments may shy away or backtrack from necessary economic decisions, especially if unpalatable in the short term, for fear of an unfavourable reaction in the polity.²²

A further concern is that some provisions of the FCCPA clash with the statutory powers of some regulatory agencies like the Standards Organisation of Nigeria (SON) in Sections 17(m)(u)(w)(y) and 18 (1)(d), (1)(e)(i); the National Agency for Food and Drug Administration and Control (NAFDAC) in Section 18 (1) (b) (d) and (e); Nigerian Customs Service (NCS) in Section 17 (q). These other agencies whose mandate also includes protection of consumers may see the FCCPA to be encroaching into their statutory provinces, and where they have developed sufficient expertise. This raises questions as to whether these agencies will respond favourably to any approaches to be made by the FCCPC to them pursuant to the provisions of Section 105(4) Act. We would have to wait and see.

There is also some concern with a provision such as in Section 156(2) of the Act which appears to accommodate suits being brought against members of the Tribunal for any acts or neglects done in the performance of their duties, provided the normal 3 months notice under the Public Officers Protection Act is given. This appears to run against the understanding that the Tribunal is a court of law. If the Tribunal is a court of law, then its members ought to enjoy full judicial immunity from litigation connected with the performance of their functions. By retaining that provision in the manner it appears in the Act, concerns are that the FCCPA made away with the longstanding principle of judicial immunity, a form of immunity that protects judicial officers and employees from any liability resulting from the performance of their

²² For example, the reversal of the removal of fuel subsidy by the administration of President Jonathan in 2012

statutory judicial functions. The importance of this judicial immunity is very critical in the administration of justice to the extent that even when a judicial officer is accused of acting maliciously and corruptly in the performance of his judicial functions, he is still immune to lawsuits because *it is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.* **(See Scott v. Stansfield, L. R. 3 Ex. 220, 223 (1868)).**

In my opinion, it is a judge's duty to decide all cases before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not be scared that an unsatisfied party may hound him with litigation by charging malice or corruption. Imposing such a burden on judges will not contribute to principled and fearless rulings but to intimidation, as in the case of the FCCPA. This provision is one which ought to be repealed immediately, because there is a process of dealing with an alleged official misconduct as provided in Section 43 (2) and (3) of the FCCPA, which empowers the President to remove such an officer upon the recommendation of the National Judicial Council. This is equally in line with the 3rd Schedule of the 1999 Constitution of the Federal Republic of Nigeria.

4 CONCLUDING THOUGHTS

The enactment of the FCCPA is a climax of all the efforts deployed by competition law advocates to make Nigeria join the league of competition law countries.

With the advent of the FCCPA, we expect a lot of changes in the way businesses are conducted in Nigeria. First, businesses had hitherto operated in a somewhat lawless market place. With the enactment of the Competition Act, one can say that the Riot Act has been passed, and the sheriff in the form of the FCCPC is in town to enforce it,

and everybody must fall in line. Firms must begin to acculturate themselves to the competition idea, and to the principles embodied in the law. Pursuant to this, there is every need for organisations to begin to establish a competition compliance department or unit within themselves. This department will be responsible for ensuring that the organisation complies with competition law and standards, and promote compliance among members of staff.

Secondly, competition advocacy must continue and should not cease, because there is a tendency that the law may just offer a false promise. The enactment of the FCCPA is just the beginning, and continuous advocacy is needed to get the buy in of key business players, and equally create the needed public awareness amongst the citizenry. It is one thing to have a law, and another for the citizens for whose interest the law was enacted, to become aware of its existence and to utilise it for remedy. Advocacy may also lead law reform needed even to clarify or redress some provisions of the legislation. A few are worth mentioning. The Act explicitly provides that there will be an Executive Vice Chairman who will be the Chief Executive Officer of the Commission, with two other Executive Commissioners and then four non-executive commissioners and a Chairman of the Board. While the Chairman is just an ordinary chairman in some sections, other sections refer to the Chairman as an Executive Chairman. This creates potential problems. The ascription of the word "Executive" to the Chairman in some sections of the Act might create the impression that although the Executive Vice Chairman is the Chief Executive Officer, the Chairman himself retains veto power as the ultimate authority in the Commission. I do not think that this is the intent. Clarity is also needed as to whether the Commission's power to control anti-competitive conducts is limited to issuing cease and desist orders and does not extend to fining powers, or if the power to impose administrative fines is one shared with the Tribunal or is the exclusive preserve of the Tribunal. In the same vein, I do not understand the necessity of parties dissatisfied with the decisions of sector regulators in competition and consumer protection matters having to first appeal to

the FCCPC for a decision before they can approach the Tribunal. Questions exist as to whether it is not just more efficient to appeal directly to the Tribunal rather than first having to appeal to the FCCPC. This intermediate appeal procedure at first glance and even deeper reflection does not offer much positive value.

Thirdly, law firms need to take advantage of the FCCPA as it has created a new revenue generating line of business. This new business opportunity demands that law firms should build new capacities, hire experts trained in the field, and support their staff to acquire this specialist knowledge. I do not think that any law school in Nigeria, apart from the Centre for Petroleum, Energy Economics and Law (CPEEL), University of Ibadan, teaches competition law, and there is therefore a serious knowledge gap. This is an area I believe international law firms such as Norton Rose Fulbright, as well as established competition authorities in other countries should come to the assistance of Nigeria to breed a new generation of experts in this field, and to build capacity. This can be done by providing the platform for Nigerian lawyers and economists, especially those undertaking related postgraduate studies both within and outside Nigeria to undertake internship placements in their facilities to complement their theoretical knowledge. The FCCPC and CCPT staff need to be trained too and should be among the beneficiaries of any internship programmes to be arranged as advocated above.

As I wind down on this keynote address, may I remind all of us here that it is not yet *uhuru*. Now that we have the law, the focus should be on how to overcome the challenges usually faced by developing countries in the implementation of competition law, in order to guarantee effective and efficient implementation. Some of these challenges are institutional while others are procedural, namely; shortage of technical skill and expertise in competition law, problem with the national judicial system and shortage of judges at the appellate courts with expertise in competition law (most of the decisions of the CCPT will be appealed), likelihood of non-cooperation by sector regulators, absence of a competition culture in the national sphere and

polity, threat to independence of the Commission via political interference, and funding gaps. With the right approach, technical expertise, effective and efficient implementation, continuous advocacy, and legislative reforms, these challenges can be overcome.

I thank you all for listening.

Hon. Justice Nnamdi Dimgba