The Nigerian Federal Competition and Competition Protection Act 2019: Lessons from South Africa

By:

Enyinnaya C. Uwadi

September 25, 2019

The Nigerian Federal Competition and Consumer Protection Act (FCCPA), which is modelled after the South African Competition Act, established two institutions for the purposes of enforcing its provisions. These are the Federal Competition and Consumer Protection Commission (FCCPC) and the Competition and Consumer Protection Tribunal (CCPT). It saddled them with the responsibility of promoting competition in the Nigerian market by eliminating monopolies, prohibiting abuse of a dominant position and penalizing other restrictive trade and business practices.[1]

The FCCPA repealed the Consumer Protection Council Act,[2] and established the FCCPC[3] in the place of the Consumer Protection Council (CPC). It also repealed Sections 118 to 127 of the Investments and Securities Act (ISA) 2007 which hitherto empowered the Securities and Exchange Commission (SEC) to

regulate and approve mergers, and assigned this role to the FCCPC.[4] The FCCPA is applicable to all commercial activities within, or having effect in Nigeria.[5] Its provisions are also binding on all government departments and state owned corporations, and indeed all commercial activities aimed at making profit and targeted at satisfying demand from the public.[6] It equally applies extraterritorially to any prohibited conduct by a Nigerian citizen or a person ordinarily resident in Nigeria; a corporate body registered in Nigeria or carrying out business within Nigeria; any person supplying or acquiring goods or services into or within Nigeria; any person in relation to the acquisition of shares or assets outside Nigeria which results in the change of control of the business, part of the business or any asset of the business in Nigeria.[7]

The FCCPC is composed of a Board made up of a Chairman, the Chief Executive of FCCPC (Vice-Chairman of the Boards), two Executive Commissioners and four non-executive Commissioners.[8] These Board members are to be appointed by the President subject to confirmation by Senate.[9] Likewise, the CCPT is composed of a Chairman who shall be a lawyer with 10 years post-qualification, and experienced in competition law, consumer protection or commercial and industrial law; six other members with 10 years professional experience in either of competition and consumer protection law, commerce and industry, public affairs, economics, finance, or business administration.[10] The tenure of office of the members of the CCPT is 5 years from the date of confirmation or upon the attainment of 70 years, whichever comes first.[11] The procedure for appointment of the members of CCPT is the same with the FCCPC. The CCPT adjudicates over conduct prohibited by the FCCPA, entertain appeals from and reviews any decision of the FCCPC,[12] hear appeals on the decisions of sector-specific regulators on competition and consumer protection matters, after the FCCPC had first considered the appeal.[13] The decision of the Tribunal is to be registered at the Federal High Court for enforcement purposes only,[14] while appeals on the Tribunal’s decision goes to the Nigerian Court of Appeal.[15]

In the context of existing legal framework, the provisions of the FCCPA override that of any other law in all matters relating to competition and consumer protection. This implies that the FCCPC has precedence over and above any other sector-specific regulator in matters or conducts which affect competition and consumer protection.[16] To ensure a cordial relationship and guard

against power tussle between sector-specific regulators and the FCCPC, the FCCPC 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.[17]

The above presents a fair representation of the institutional structures and their responsibilities under the FCCPA. As I noted earlier, the Nigerian competition law is modelled after that of South Africa with some variations here and there, as some of the provisions therein are replicas of that which is obtainable in the South African regime. My thinking is that South Africa was adopted as a reference because its competition regime stands out as a model of competition law implementation for developing countries.[18] It equally appeals to them due to the fact that the general philosophy which guides the South African Competition regime is the idea of using the law as a vehicle for the attainment of national economic and social objectives. Eleanor Fox and Mor Bakhoum in their book Making Markets Work for Africa (OUP, 2019) call this 'harnessing markets to make them work for the people'. Furthermore, its impact is felt regionally within Africa through emulation and diffusion by learning, as well as internationally via its synergy with other developing countries on the platform of BRICS.[20]

However, notwithstanding the sophistry of the regime in South Africa when compared to Nigeria, the former's regime has not had an easy sail in its implementation of the competition law due to some enforcement and sometimes procedural related challenges. The general lesson here for new competition regimes in developing countries like Nigeria is that the adoption of competition law is not an end itself, but a means to an end. To put in other words, it is the first step in the unending journey of competition regulation. Some of the provisions in the FCCPA which could be a clog in the wheels of enforcement and the lessons from South Africa which could be adopted to address these challenges will be discussed as follows:

Threat to the independence of the regulator via political control and regulatory capture. For example, the provisions of Part XI of the FCCPA on price regulation is made subject to an order of the President, a political actor. It is argued that

the power to make such an order ought to be vested in the FCCPC and not a political actor who may prioritise political calculations over economic decisions. Most times, governments tend to backtrack from necessary economic decisions with long term benefits, especially if unpalatable in the short term, for fear of an unfavourable reaction in the polity which could jeopardise their political interests and popular support. The lesson Nigeria needs to learn from South Africa is to insulate its competition regime from undue political interference in the enforcement of its competition regime. This potential for political interference may be a challenge to the enforcement of the provisions of Section 2 (2) (a) (b) of the FCCPA where state-owned institutions engage in anti-competitive conduct like abuse of dominance. Global best practices in competition regulation is that the competition authority is established as an independent, non-ministerial department, subject only to the law of the land, like the South African Competition Commission and the UK's Competition and Markets Authority, in order to insulate it from external influence of political actors, as well as powerful multinational firms, as the latter may threaten the independence of the FCCPC via regulatory capture as is often the case of new competition authorities in developing countries.

There is also the overzealous approach in the wording of some sections, for example the extraterritorial provision which applies to a Nigerian carrying on business in any part of the world in Section 2(3)(a). Inasmuch as the extraterritorial provisions under Section 2(3) are commendable, one is left to wonder how this provision of subsection 3a whose basis of application is the mere fact that the conduct in question was committed by a Nigerian citizen, will be successfully implemented.[21] A further concern is the criminalisation of cartels which although is quite commendable may prove to be an overzealous approach where the expertise and resources to successfully investigate and prosecute cartels are not in place.The lesson here is that the FCCPA needs to be amended to expunge this impracticable overzealous provision to the extent that it relates to a conduct by a Nigerian in another country, where the effect of the conduct has no bearing on Nigeria. On the criminalisation of cartels, Nigeria can borrow a leaf from South Africa and introduce a leniency program for cartels, due to the difficulty in detecting, investigating and prosecuting cartels. This will encourage firms engaging in cartels to take advantage of the friendly gesture in return for a reduced penalty. Indeed, competition authorities

from developed countries with their expertise and funding still have some difficulties in detecting cartels. This led to the adoption of the leniency programs in the fight against cartels. South Africa recorded tremendous success in cartel prosecution following the adoption of the leniency program in 2004,[22] but experienced a downward trend upon the criminalization of cartel in 2016. This should be a lesson for the FCCPC. The FCCPC should adopt a one step at a time approach in implementing the FCCPA. It should not succumb to the pressure of engaging in a wild goose chase by going after big firms without investigation and gathering sufficient evidence, in order to gain public acceptance and credibility. A single successful enforcement will send a strong signal to the public, which is far better than hurriedly going after multiple firms at the same time and failing to record a single success.

Another concern relates to some of the provisions of the FCCPA which appears to clash with the statutory powers of other agencies like Standards Organisation of Nigeria; the National Agency for Food and Drug Administration and Control and Nigerian Customs Service. These agencies also have consumer protection powers under their respective enabling Acts may see FCCPC as a threat and consider it to be encroaching into their statutory provinces, where they have developed considerable expertise. This poses a question on whether these agencies will respond favourably to any approaches made by the FCCPC to them pursuant to the provisions of Section 105(4) Act.

There is also confusion on whether or not the FCCPC is actually 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 recognizes sector-specific regulators established under the relevant sectoral law. Notwithstanding the fact that 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 them[23] is clearly in tension with Section 104 which starts with the supremacy phrase, ‘Notwithstanding the provision of any other law but subject to the Constitution of the Federal Republic of Nigeria…..” The problem here is whether these sectoral regulators will perform their duties pursuant to their establishing Act, the FCCPA or the negotiated agreement.[24]

The above dilemma shows that an amendment of the FCCPA is imminent in order to avoid a situation of having the FCCPC inundated by jurisdictional tussle to the detriment of competition regulation. Following the example of the South African regime, institutional roles need to be clearly defined and streamlined in the FCCPA. It is my view that sector-specific regulators ought not to interfere with competition matters and should focus on their areas of core competence pursuant to the supremacy clause. This would help to avoid jurisdictional clashes and more importantly, the under-regulation of competition in those sectors, following from the experience Nigeria had with the SEC when it was empowered with some competition law powers under the ISA. According to Dimgba,[25] the SEC focused more on its traditional role as a securities regulator to the detriment of competition law and regulation, as a result of its lack of expertise in the field.

Another potential challenge is the associated and potential problem with the judicial process under the FCCPA. Competition law cases are business related, and in business, time management and efficient allocation of resources are very important. I want to assume that the CCPT will 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 a case linger for over 10 years, and imposed timeframes for the hearing of appeals and delivering of judgement on competition cases at the Appeal Court, in the same manner provided in the 2018 amendment to the Nigerian Constitution for pre-electoral cases which are time bound.[26] Equally, it is worth noting that the FCCPA is silent on whether the decision of the Appeal Court on competition and consumer protection is final or can be further appealed to the Supreme Court. This creates another challenge of interpretation as some cases in Nigeria terminate at the Court of Appeal while others at the Supreme Court.

Going further, notwithstanding my earlier position that sector-regulators should hand-off competition matters, another concern with the FCCPA is the intermediate appeal procedure where the decision of sector regulators are to be first reviewed on appeal by the FCCPC before being appealed further to the CCPT. This procedure does not resonate well with me because of the time constraints and financial implication it has on the overall appeal process. Also,

it is my view that the FCCPC ought not to be overburdened with so many responsibilities at this early stage to the extent that it loses focus of its core mandate of competition regulation.[27] I believe that the CCPT will be a proper forum for appeals from the decisions of a sector regulators, for efficient management of time and allocation of scarce resources.

Following the competition regime in South Africa, strong and competent pro-competition institutions should be established in order to safeguard the competition process to ensure the attainment of the objectives of the FCCPA. There is therefore the need to establish a specialised court to be called Competition and Consumer Appeal Court (CCAC) in the place of the Court of Appeal as the appellate and final court in competition and consumer protection matters. The importance of having a specialized court in competition matters is that the expertise of judges in both legal and economic concepts enables them to hear and understand expert evidence and argument, and make decisions that are legally and economically sound, having regard to the impact upon the system as a whole. Any further appeal on the decision of the CCPT should be to the Supreme Court only on point of law, and subject to the leave of the Supreme Court. Timeframes on the duration of appeal should equally be imposed in order to ensure speedy dispensation of justice.

Conclusion

In conclusion, while this write-up is not advocating for a slavish adoption of the South African competition regime, it is making a case for Nigeria to not only adopt the relevant provisions of the South African Competition Act, but also for it to pick a few lessons in the implementation and enforcement of its regime from the experiences of an older regime from a developing African country. This will ensure that Nigeria avoids and overcomes some of the likely challenges in the implementation of the new competition regime, in order to ensure the attainment of the objectives of the FCCPA, and also the promotion of a pro-competitive national markets for the good and betterment of its citizens, which is in line with the idea of Fox and Bakhoum in ‘Making Markets Work for Africa’.

---

[1] Explanatory Memorandum, FCCPA.

[2] Cap C25 LFN 2004; See Section 165, FCCPA.

[3] Section 3, FCCPA.

[4] Section 93 of the FCCPA

[5] Section 2.

[6] ibid.

[7] Section 3.

[8] Section 4.

[9] Section 5.

[10] Section 40.

[11] Section 41.

[12] Section 47 (1)(a).

[13] Section 47 (2).

[14] Section 54.

[15] Section 55 (1).

[16] Section 104.

[17] Section 105 (4) (5) (6).

[18] Azza Raslan, 'Mixed Policy Objectives in Merger Control: What Can Developing Countries Learn from South Africa?' (2016) 4 World Competition 39, Kluwer Law International, 625.

[20] Jim O'Neill, 'Dreaming with BRICs: The Path to 2050' (2005) Global Economics Paper no. 99 http://www.macropolis.org/oriente/BRICS.pd>faccessed 23 April, 2019; Natalya Mosunova, 'Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects' (2017) 4 BRICS L.J. 156.

[21] See Enyinnaya Uwadi., 'Prospects and Challenges of Implementing Competition Law in Developing Countries: A Review of the Nigerian Federal Competition and Consumer Protection Act 2019' (LLM Dissertation, University of Reading September 2019).

[22] 'Cartels in South Africa', Interview with Pieter Steyn (Getting the Deal Through July 2018) < https://gettingthedealthrough.com/intelligence/172/article/6247/cartels-south-africa> accessed 25 July 2019.

[23] Section 105

[24] See Uwadi n 21.

[25] Nnamdi Dimgba, 'The Changing Landscape: Federal Competition And Competition Protection Act' (Keynote Address Delivered at the Jackson, Etti & Edu in Partnership with Norton Rose Fulbright Conference On Competition Law, 18 June 2019) 4.

[26] Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration No 21) Act 2018.

[27] William E. Kovacic & Marianela Lopez-Galdos, 'The Lifecycles of Competition Systems: Observations on the Evolutionary Paths'(2016) 1 CPI Antitrust Chronicle 1, < https://www.competitionpolicyinternational.com/wp-content/uploads/2016/04/Kovacic-Lopez.pdf> accessed 23 September 2019.

View online: The Nigerian Federal Competition and Competition Protection Act 2019: Lessons from South Africa

Provided by Afronomicslaw