

A CRITIQUE OF THE FEDERAL COMPETITION AND CONSUMER PROTECTION ACT 2018*

Abstract

The need for a competition law tailored towards the protection of consumers in Nigeria was long overdue to prevent the continued existence of monopolies and other anti-competitive activities in the Nigerian market. The belief being that when there is competition in the market place, the quality of goods and services supplied to the consumer would be high; as each, manufacturer or supplier would work assiduously to outdo the other thereby creating an enabling environment for consumers to make choices.¹ The consumer would not only benefit from improved quality of goods and services, he would also get them on fair and reasonable prices. This paper has shown that the Act has far reaching effects on many sectors of the economy and its effect is considered supreme with overriding effect over other existing law apart from the constitution on matters relating to consumer protection and competition.

Keywords: Federal Competition and Consumer protection Act 2018, Tribunal, Nigeria, Critique

1. Introduction

In a work published in 2014 and captioned, ‘After Two Decades of the Consumer Protection Council Act: The Wilderness’ Journey of Consumer Protection in Nigeria,’ the author x-rayed the now repealed Consumer Protection Council Act 1992,² and concluded by recommending thus: ‘From the issues highlighted in this paper, the age of the Act, the fact that Nigeria has been under civilian governance for almost 16 years now, and the fact that the Act has hardly received any legislative attention since its enactment by way of amendment, it is recommended that the Act be amended to bring it in line with modern realities’.³ The National Assembly made good the recommendation in December 2018 by enacting the Federal Competition and Consumer Protection Bill, and subsequently in January 2019 the Bill was signed into law as Federal Competition and Consumer Protection (FCCP) Act 2018.⁴ *The Act repealed the Consumer Protection Council Act, 1992. Until then, it was generally held that there was no single comprehensive body of consumer protection law in Nigeria.*⁵ Nigeria’s competition laws have been grossly inadequate when viewed against the size and complexity of its economy.⁶ Hitherto, the laws regulating competition and consumer protection in Nigeria have been in pits and pieces, and embedded in various legislation relating to the regulation of different sectors of the economy.⁷ The existence of a comprehensive legal regime for the regulation of competition and consumer protection has been said to be extremely important to the growth of any advanced economy.⁸ The regulations include, National Agency for Food and Drugs Administration and Control⁹ established to control and standardise the manufacture, importation, sale,

*By **Etefia Ekwere EKANEM, LLB, LLM, PhD (Consumers Protection Law) (Nig.), B.L., ChMC**; Senior Lecturer, Department of Public Law, Faculty of Law, Dean of Students, University of Uyo, Uyo, Nigeria; the President, Consumer Rights and Products Safety Awareness Initiative; e-mail: etefiaekanam@uniuyo.edu.ng or etefiaekanam@gmail.com ; and

***Akebong Samuel ESSIEN, LLB, LLM, BL**, Faculty of Law, University of Uyo, Uyo, Nigeria.

¹ Etefia E. Ekanem, and Moji Eseyin, ‘Who Protects the Consumer: Self or the State?’ [2013] vol. 1 *Imo State University Journal of Private and Property Law*, 83, at pp. 91-94.

² *Cap. C25 Laws of the Federation of Nigeria, 2014.*

³ Etefia E. Ekanem, ‘After Two Decades of the Consumer Protection Council Act: The Wilderness’ Journey of Consumer Protection in Nigeria’ [2014] vol. 8 *University of Uyo Law Journal*, 117, at p. 140.

⁴ A Ojekunle, ‘Everything You Need to Know about the Federal Competition and Consumer Protection Act 2018’ available at <www.pulse.ng> accessed 24 October 2019

⁵ A. D. Badaiki, ‘Towards an International Legal Regime of Consumer Protection for Developing Countries: Nigeria as a Case Study’ [1993] 6 No. 4 *Justice Journal*, pp. 43-61; Badaiki, ‘The Legal Regime of Products Liability in Nigeria’ [2001] vol. 5 No. 1 *Modern Practice Journal of Finance and Investment Law*, p. 36; F. N. Monye, ‘Enforcement of Consumer Protection Laws in Nigerian, (2007) vol. 3, No. 1, *Delsu Law Review*, p. 89; Monye, *Law of Consumer Protection*, (Spectrum Books Ltd., 2003); B. B. Kanyip, *Consumer Protection in Nigeria: Law, Theory and Policy*, (Rekon Books Ltd., 2005); Kanyip, *Historical Analysis of Consumer Protection Law in Nigeria* (NIALS, 1997); and E. E. Ekanem, ‘Institutional Framework for Consumer Protection in Nigeria: An Analysis’ [2011] vol. 2, No. 1 *International Journal of Advanced Legal Studies and Governance*, pp. 33-48.

⁶ Y. Okojie and I Bolu, ‘Nigeria: A Review of the Federal Competition and Consumer Protection Bill, 2016, available at <www.mondaq.com> Accessed on 12 September, 2019.

⁷ *Ibid.*

⁸ U Aydin and T Buthe, ‘Competition Law and Policy in Developing Countries: Explaining Variations in Outcomes, Exploring Possibilities and Limits’ 79(1) [2016] *Law and Contemporary Problems*, 4; N Godfrey, ‘Why is Competition Important for Growth and Poverty Reduction?’ (2008) This Paper was submitted in Response to a Call for Papers Conducted by the Organisers of the OECD Global Forum on International Investment. Available at <www.oecd.org/investment/gfi-7> Accessed 24 October 2019; and ‘Competition, Competitiveness and Development: Lessons from Developing Countries’ United Nations Conference on Trade and Development (2004), UNCTAD/DITC/CLP/2004/1

⁹ Established by Decree No. 15 of 1993, now the National Agency for Food and Drugs Administration and Control Act Cap. N1 LFN 2004.

advertisement of regulated products such as food and drugs, the Standards Organisation of Nigeria¹⁰ set up to safeguard product standards, and the Nigerian Communications Commission¹¹ set up to cater for the interests of consumers of telecommunication services, the Utilities Charges Commission¹² established to guard against the exploitation of consumers in the rates charged for public utilities, the National Insurance Commission¹³ set up to cater for the interests of consumers of insurance services, and the Nigerian Tourism Development Corporation¹⁴ set up to encourage the provision and management of tourism amenities including the development, regulation, registration, classification of hotels, and hospitality enterprises.¹⁵ The functions of these agencies are extensive and they relate to setting of standards, control of quality, and the investigation of consumer complaints.¹⁶ Their mandates are basically administrative in nature; they seek to regulate the production, supply and provision of goods and services in Nigeria.

The FCC Act appears to promote competition in the Nigerian markets at all levels by eliminating monopolies, prohibiting abuse of a dominant market positions, and penalising other restrictive trade and business practices,¹⁷ with the objective of ensuring that the consumer is protected. The major objective of this paper therefore is to examine the Federal Competition and Consumer Protection Act with a view of determining whether its provisions better meet the needs of the consumer in the 21st century compared with the laws of other jurisdictions. Importantly, in the face of some other consumer protection-based legislation in Nigeria, it is also the focus of this paper to analyse the provisions of the Act to determine its relationship with such laws, and whether the status of the consumer has been in any substantial way elevated by the application of these multiple laws.

2. The Consumer

The Molony Committee on Consumer Protection in the United Kingdom defines the consumer as ‘one who purchases (or hire purchases) goods for private use or consumption.’¹⁸ Kanyip criticised this definition as being limited on three different grounds, first: in suggesting a contractual nexus between the parties by the use of the phrase, ‘one who purchases’.¹⁹ To him, the definition has completely excluded the non contractual consumer, for instance, the consumer in *Donoghue v. Stevenson*²⁰ principle. Secondly, by the use of the word purchase means that all acquisition of the goods or services must be by ‘purchase’. Thus, goods acquired other than by way of a purchase, for instance by a way of gift or trade sample are not covered and if defective, there may be no remedy.²¹ The last limitation flows from the first and the second. According to him,²² the insistence on a contractual nexus means that contract concepts like invitations to treat, freedom, sanctity and privity of contract will have to apply to the transaction in question. Their application is, in the majority of cases, unfavourable to the consumer as in the American case of *Lasky v Economy Grocery Stores*.²³ Ralph Nader,²⁴ states that the term ‘consumer’ should be equated with the word ‘citizen’ so that consumer protection law will be regarded as an aspect of the protection of civic rights.²⁵ Although, he has been criticised as being fanatical on this score,²⁶ he seems to have been

¹⁰ It was established by the Standards Organisation of Nigeria Decree No. 56 of 1971, now the Standards Organisation of Nigeria Act 1971 Cap. S9 LFN 2004.

¹¹ Set up by Decree No. 75 of 1992, now the Nigerian Communications Commission Act 1992 Cap. N97 LFN 2004.

¹² Set up by Decree No. 104 of 1992, now the Utilities Charges Commission Act 1992 Cap. U17 LFN 2004.

¹³ Set up by Decree No. 1 of 1997, now the National Insurance Commission Act 1997 Cap. N53 LFN 2004.

¹⁴ Established by the Nigerian Tourism Development Corporation Act Cap. N137 LFN 2004.

¹⁵ S. 4 of the Nigerian Tourism Development Corporation Act; by s. 7 of the Act, State Tourism Boards are established for each state of the federation with corresponding functions. Pursuant to this section there is for instance the Akwa Ibom State Hotels and Tourism Board, with a Tourism Board Law, Cap. 132 Law of Akwa Ibom State 2000 in place for the day to day running of the Board.

¹⁶ F. A. Boma, ‘Control of Advertisements as a Consumer Protection Measure in Nigeria’ an unpublished Ph. D. Thesis, University of Calabar, 2008, 179.

¹⁷ The Preamble to the Act.

¹⁸ Final Report of the Committee on Consumer Protection (Cmnd. 1781) 1962, para. 2 HL Deb 14 November 1962 vol 244 cc605-25 <<https://api.parliament.uk>> accessed 18 September 2019

¹⁹ Kanyip, *Consumer Protection in Nigeria Law, Theory and Policy*, op cit 12

²⁰ (1932) All ER Rep. 1

²¹ Kanyip, (n18)

²² *Ibid*

²³ 319 Mass. 224. (1946). A customer in a store could not maintain an action against the proprietor for alleged breach of an implied warranty either of fitness or of merchantability of a bottle of a carbonated beverage which burst and caused the plaintiff personal injuries as he was taking it from a counter in the store, which it appeared that under the system in use in the store, with which the customer was familiar, he was permitted to make his own selection from the counter but there was no transfer of title nor contract for the sale of the goods he selected until he afterwards had taken them to a cashier’s counter and had paid for them.

²⁴ R Nader, *Unsafe at any Speed: The Designed-in Dangers of the American Automobile* (1965) cited by Kanyip, *ibid* at 11

²⁵ As reported in D W Oughton, *Consumer Law: Text, Cases and Materials* (Blackstone Press Limited, 1991) 1

²⁶ *Ibid*.

vindicated when the United Nations unanimously adopted the Guidelines for Consumer Protection via its resolution 39/248 of April 9, 1985.²⁷ The Guidelines seek to raise the rights of the consumer to a level as close to that of fundamental rights of the citizen that requires protection and enforceability.

English jurisprudence provides a further insight into the notion of a consumer. But then, only in respect of transactions relating to the supply of goods and services; if the transaction satisfies three elements, then it is termed a consumer transaction, and the person to whom the goods or services are supplied under that transaction becomes the consumer for purposes of legal regulation. The three elements are; one, that the person, to be a consumer, must be an individual who does not act in a business capacity. Secondly, the supplier of the goods or services must act in a business capacity. Lastly, the goods or services supplied must be intended for private use, not business.²⁸ These three elements give an indication of two types of contracts; consumer contracts, and commercial contracts. For a better appreciation of these three elements, attempt has been made to provide a jurisprudential excursion into the *jural* relations that may possibly arise from these types of contracts.²⁹ When the three elements are juxtaposed on the two types of contracts, the effect is a presupposition that two classes of sellers and two classes of buyers are discernable, which gives rise to four distinguishable personalities being; trader-seller, private-seller, trader-buyer, and trader-seller.³⁰ It appears that only a transaction between a trader-seller and a private-buyer will be considered as a consumer contract.³¹ Section 167(1) of the FCCP Act seems to give credence to this presupposition. According to the now repealed Consumer Protection Council (CPC) Act,³² a consumer means an 'individual who purchases, uses, maintains or disposes of product or services.' The repealed Act had the virtue of having mapped out, even if vaguely, the terrain of consumer protection law in the country. In Section 12, the CPC Act assumes the existence of consumer protection laws (although it did not list them) when it penalised the 'contravention of any enactment for the protection of the consumer.' It, however, gave a hint as to what these laws are, namely, laws relating to transactions of sales or offers for sale of unsafe or hazardous goods, or the provision of services or proffering of information or advertisement which cause injury or loss to a consumer.³³ The FCCP Act put paid to the question, 'who is a consumer?' Section 167(1) of the Act defines a consumer to include:

any person who purchases or offer to purchase goods otherwise than for the purpose of resale but does not include a person who purchases any goods for the purpose of using them in the production or manufacture of any other goods or articles for sale, or to whom a service is rendered.

3. Competition

The repealed CPC Act did not seem to consider competition as a factor in consumer protection, as it was almost silent on it. Competition is a mechanism of the market economy which encourages companies and other market players to offer consumer goods and services at the most favourable terms for the benefits of consumers.³⁴ The British Competition Commission defines competition as a 'process of rivalry between businesses to win over customers,'³⁵ The concept of competition flows primarily from the economic theory of market equilibrium.³⁶

²⁷ As reported in the Consumer of October-December 1992 at 8, cited by Kanyip (n3) at 12. The Consumers' Rights include right to safety, right to Choose, right to information, right to healthy environment, right to redress, right to fair hearing, right to consumer education and right not to be exploited. These rights give to 'consumerism' which contributed a lot to stabilize the market place as most producers and service providers complied with the world best practices of doing business especially in the advanced countries. E. C, Ndubusi, and others, 'Protecting the Nigerian Consumer: An Expository Examination of the Role of Consumer Protection Council' [2016] *Arabian J Bus Manag Review*, 6, 4 at 2

²⁸ Etefia E. Ekanem and Eyakndue R. Eniunam, 'In the Woods in Search of who the Consumer is Within the Precinct of Nigerian Law?' [July 2015] vol. 10 No. 2 *University of Jos Law Journal*, 109, at p. 114.

²⁹ Kanyip, 'Legal Issues in Consumer Protection in Nigeria,' being a paper presented at the Refresher Course for Judges and Khadis, held at Andrew Otutu Obaseki Auditorium, National Judicial Institute, from March 23 to 27, 2009, at p. 5; and Ekanem and Enieunam, *op cit*.

³⁰ These are terms of arts used in consumer law discourse. They are adopted to distinguish a person in commercial capacity and another acting outside business capacity. E.g., a trade-seller is a one who engages in selling as a business, this is distinguishable from a private-seller, who is not engaged in selling as a business, as where one were to sell his television set. The same usage goes for the trader-buyer, whose business is not trading.

³¹ Ekanem and Eniunam, (n27).

³² Section 32 Consumer Protection Council (CPC) Act, LFN 2004.

³³ Kanyip, (n28) 13.

³⁴ E. N. Anthony, 'The Federal Competition and Consumer Protection Bill 2016: A Critical Analysis', a Seminar paper presented Faculty of Law, Postgraduate School, River State University, Port Harcourt, June 2018

³⁵ Competition Commission and Office of Fair Trading, A Quick Guide to UK Merger Assessment, OFT1313, March 2011, London at p.6

³⁶ In a perfect competition, the market produces allocative, productive and dynamic efficiencies with the total welfare (consumer and producer surplus) being at its maximum which price is at its optimal level. In the perfect competitive market, the demand curve and the supply curve meet at the market optimum/equilibrium. In such a case, if a shortage in production occurs, it would lead to higher prices. The higher prices will become an incentive to increase production and or for new

Against the background of competition theory, the question then is, what is the role of competition law? Competition law is an attempt to bring about the benefits of competition by tackling barriers to free entry into the market in the form of cartels, the abuse of a dominant position³⁷ and anti-competitive mergers.³⁸ Competition policy, defined as the application of competition law, can have different aims, these include: Consumer welfare/protection;³⁹ protection of total welfare;⁴⁰ protection of consumer freedom; redistribution; protection of small and medium companies; employment, industrial policy, environmental protection; and single market.⁴¹

4. General Overview of the Act

Part I of the Act provides for the objective and scope⁴² of application which covers all body corporate or agency of government and commercial activities. The objective of the Act is to:

promote and maintain competitive markets in the Nigerian economy; promote economy efficiency; protect and promote the interests and welfare of consumers by providing consumers with wider variety of quality products at competitive prices; prohibit restrictive or unfair business practices which prevent, restrict or distort competition or constitute an abuse of a dominant position of market power in Nigeria; and contribute to the sustainable development of the Nigeria economy.⁴³

Part II provides for the establishment of the Federal Competition and Consumer Protection Commission as a body corporate with perpetual succession,⁴⁴ constitution and composition of the board and appointment and removal of the Commissioner.⁴⁵ Part III outlines the functions and Powers of the Commission.⁴⁶ Part IV provides for the management and staff of the commission.⁴⁷ Part V outlines the funding and the financial estimation and expenditures of the commission.⁴⁸ The Act in section 2 seeks to regulate agreements, and focuses on elimination of monopolies, regulations of mergers, acquisitions and penalizing other restrictive trade and business practices. Its provisions apply to all commercial activities and undertakings conducted or having effect within Nigeria and extends its applicability to conducts outside Nigeria by a citizen or a person ordinarily resident in Nigeria, a body corporate incorporated or carrying business in Nigeria, or any person in relation to them that acquire shares or other assets outside Nigeria resulting in the change of control of business. Although the provisions of the section appear wide, the intention seems to be directed at bringing to an end the activities of unscrupulous businessmen who engage in all sort of shady deals within and outside the country.

4.1. The Federal Competition and Consumer Protection Commission

The Commission is established by section 3 of the Act. Section 18 sets out the functions of the Commission to include making general information available to persons engaged in economic activities and for the guidance of consumers with respect to their rights and obligations under the Act. The powers of the Commission includes but not limited to the prevention of circulation of goods or services which constitutes public hazard, to ensure that quality test is carried out on consumer goods as it deem necessary, seal up premises reasonably suspected to be used to produce fake or hazardous goods, to regulate charges, levies, fines and penalties, to give public notices to general public on health hazards associated with manufactured goods and services among others.

producers to enter the market. The shortage will thus be reduced and the equilibrium would occur again. Thus, in a perfect competitive market, if the producers raise price above the market equilibrium, the so-called hit and run competition would occur. J Stennek, 'The Expected Consumer's Surplus as a Welfare Measure' [1999] 73(2) *Journal of Public Economics* 265 and E Schlee, 'Expected Consumer's Surplus as an Approximate Welfare Measure' [2008] 34(1) *Economic Theory* 127ff.

³⁷ Under the U.S. terminology monopolization.

³⁸ That is merger to monopoly and a dominant position.

³⁹ Which seems currently of the EU and U.S. competition Laws.

⁴⁰ Associated with the laissez-faire approach.

⁴¹This exists particularly in EU where a market without borders between the Members States was created. The competition provisions are in this context seen as safeguarding that private actors do not re-elect these borders. J Nowag, 'An Introduction into Competition Law: The Substantive Provisions of the Malaysian Competition Act in Light of Its European Origins' Available at <<http://ssrn.com/abstract=2237671>> accessed 26 September 2019.

⁴² Section 2 of FCCPA 2018

⁴³ Section 1

⁴⁴ Section 3(3)

⁴⁵ Section 6(2) and 7

⁴⁶ Section 17 and 18

⁴⁷ Section 19 to 22

⁴⁸ Section 23 to 26

4.2. Establishment of the Federal Competition and Consumer Protection Tribunal⁴⁹

The Act provides in part for the establishment of a Consumer Protection Tribunal.⁵⁰ The Tribunal is vested with jurisdiction to entertain matters which arise from the operation of the Act. Interestingly, the Tribunal is also empowered to hear appeals from decisions of the Commission taken in the course of implementing the provisions of the Act or review any decision from the exercise of the powers of any sector specific regulatory authority in a regulated industry in respect of competition and consumer protection matters.⁵¹ The Tribunal has the powers to summon and enforce attendance of any person, require discovery and production of documents, call for and examine witnesses under oath and do anything necessary to issue a final determination of the issue. The Tribunal can impose administrative penalties⁵² for breaches of the Act and oversee forced divestments, partial or total, of investors from companies. Appeals against the Tribunal's decisions lie directly to the Court of Appeal,⁵³ although its decisions are to be enforced after registration at the Registry of the Federal High Court.⁵⁴ It is not clear why a process for registration of its decisions should be necessary at all because that provision suggests recourse to an extant or new protocol at the FHC for this purpose. Procedurally, that would set the FHC up to serve as a review panel for decisions of the FCCP Tribunal that will scrutinise such decision before enforcement. It may however be reasoned that for purposes of enforcement of its decisions, the registry of the tribunal is domiciled in the FHC. Perhaps this is to reduce pressure on the tribunal so that it can concentrate on its core mandate.

4.3. Price Regulations and Mergers

For the purpose of regulating and facilitating competition, section 88 of the Act empowers the President to declare price regulations, by an order published in the Federal Gazette. The Act regulates goods and services to be supplied in accordance with authorised prices.⁵⁵ Such regulations are required to be for a stipulated period and narrowly designed. The Act directs that suppliers of regulated products are required to keep their accounting records for their supply for three years. It is however doubtful how effective price regulation has been in Nigeria. For example, Price of Premium Motor Spirit (fuel) was reported to have been reduced to N123.50 in the month of April,⁵⁶ and later N108 in⁵⁷ per litre in the month of May 2020. In Akwa Ibom State, as is the case in most parts of Nigeria, there is nowhere a litre of fuel is sold less than N125.⁵⁸ The power to approve mergers is now granted to the Commission, instead of the Securities and Exchange Commission (SEC). As hitherto applicable, the participants to a small merger do not need to notify the commission, unless the Commission specifically requests that they do so within six months of deal close. The Act also prescribes rules for large mergers as the only other type of mergers. The definition of merger under the Act is all encompassing and includes acquisitions. Consequently, although the Act did not independently define 'acquisitions', it seems to have extended the term 'merger' to include 'acquisitions'. Disappointingly, the Act does not go far enough to cover the current gap in the Investments and Securities Act (ISA) and SEC Rules around de-mergers, spin-offs, de-consolidations, among others. Consequently, there are still no provisions governing such transactions. Mergers under the Act are still regulated, using the size designation thresholds. However, the Commission has yet to issue guidelines to delimit the threshold. We envisage that the threshold under the ISA will be modified.

4.4. The Act Prohibits the Abuse of a Dominant Position⁵⁹

The Act prohibits the abuse of a dominant position in the relevant market⁶⁰ in any industry by any business undertaking. Section 70(2) of the Act provides:

A dominant position in a relevant market exists where an undertaking enjoys a position of economic strength enabling it to prevent effective competition being maintained on the relevant market and having the power to behave to an appreciable extent independently of its competitors, customers and ultimately.

⁴⁹ Part VII

⁵⁰ Section 39

⁵¹ Section 47 (1) (a) and (b)

⁵² Section 51

⁵³ Section 55

⁵⁴ Section 54 (b)

⁵⁵ Section 90

⁵⁶ Dennis Eresi, 'Nigeria Reduces Petrol Price to N123' *The Guardian* of April 1, 2020

⁵⁷ Chike Olisah, 'NNPC Reduces Fuel Price to N108 per Litre' *Nairametrics* of May 7, 2020, available at <<https://nairametrics.com/2020/05/07/nnpc-reduces-fuel-price-to-n108-per-litre/>> accessed May 17, 2020.

⁵⁸ Even NNPC's Mega Stations sell above the regulated price. NNPC is a Federal Government agency.

⁵⁹ Part IX of the Act.

⁶⁰ Section 70

The acts of abuse of dominance specified in the Act are those that unreasonably lessen competition and impede the transfer or dissemination of technology.⁶¹ Upon conviction of a recalcitrant abuser a fine amounting to a sum not less than 10% of the previous year's turnover is prescribed.⁶² Although from the wordings of section 71(1) it would appear that it is only the 'Court' that may impose such fine, jurisdiction of the FCCP Tribunal does not seem to have been expressly ousted. In any event, such penalty may be suspended once the Commission is satisfied that the abuse would cease.⁶³

4.5. Prohibition of Monopoly

The Commission's powers extend to investigation of monopolies.⁶⁴ A monopoly situation is taken to exist in relation to the supply of goods or services of any description or import and export of goods and services of any description from Nigeria, to the extent that it has an effect on competition in a market in Nigeria, as may be prescribed in regulations made by the Commission.⁶⁵ Where any monopoly is found to exist, the Tribunal's remedial efforts may include prohibition of an acquisition transaction, business breakup, false publication of price lists, *et cetera*.⁶⁶ Also, the Commission's oversight over monopolies does not seem restricted to those arising in Nigeria, if the undertaking is of Nigerian origin.⁶⁷ The Commission in the exercise of its powers as contained under the Act is empowered to obtain information as it may consider necessary for the purposes of conducting investigation relating to issues of monopoly.⁶⁸ Where a report is made by the Commission in respect of issues of monopoly,⁶⁹ after investigation,⁷⁰ within the time frame of report on a monopoly investigation,⁷¹ the Commission is obliged to refer the report to the Tribunal with the conclusions of the Commission whether or not monopoly situation exists and its adverse effect on public interest.⁷² The Tribunal is to make such orders as it considers necessary for the purpose of remedying or preventing the adverse effects specified in the report.⁷³

4.6. Control and Regulation of Mergers

Part XII provides for mergers. Section 92 defines a merger as being a situation where merger occurs. According to the section:

A merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking; and ... it may be achieved in any manner, including through the purchase or lease of the shares, an interest or assets of the other undertaking in question, the amalgamation or other combination with the other undertaking in question or a joint venture.

By the provisions of section 93, the Commission is empowered to approval of mergers subject to the notification threshold to be determined from time to time. Prior to making a determination contemplated in section 93 (2) the Commission is obliged to publish in the Federal gazette, a notice setting out the proposed threshold and method of calculation for purposes of the section and inviting written submissions on that proposal.⁷⁴ Within 60 days of business days after the parties to a large merger have fulfilled all notification requirements referred to in section 96 of the Act, the Commission may extend the period in which it has to consider the proposed merger to 120 business days and issues an extension to all parties to the merger.⁷⁵ The Commission may direct any of its officers to investigate a proposed merger,⁷⁶ and the Commission may revoke its own decision to approve or conditionally approve a small or large merger.⁷⁷

4.7. Rights of the Consumer

Consumer's rights are provided in Part XV of the Act. By section 114, the consumer has the right to information in plain language that he understands. Undoubtedly, the plain and ordinary language used in Nigerian is English

⁶¹ Section 72(4)

⁶² Section 71(1)

⁶³ Section 75 *ibid*

⁶⁴ Part X, Section 76 to 87

⁶⁵ Section 77

⁶⁶ *Ibid.*

⁶⁷ *ibid*

⁶⁸ Section 78

⁶⁹ Section 84

⁷⁰ Section 83 and 84

⁷¹ Section 85

⁷² Section 86

⁷³ Section 86 (2)

⁷⁴ Section 93 (3) (b) *ibid*

⁷⁵ Section 97

⁷⁶ Section 98 FCCPA

⁷⁷ Section 99

language. However, considering the literacy level in the country, it is doubtful how many ordinary consumers are able to read and understand information in the English language on goods and services rendered for sale. The ordinary interpretation of that section will be that the manufactures of goods and provider of services owe the consumer, through their medium of distribution the explanation of information about the goods in the language the consumer understands. How realistic this may be remains hazy and opaque, considering that there are over 520 indigenous languages in Nigeria in addition to several shades of English language spoken in Nigeria⁷⁸. Section 115 provides for the disclosure of price of goods, while section 116 deals with labelling and trade descriptions. The duty of mere ‘disclosure of price’ placed on service providers, businesses and seller, appears to be way off the requirement in European Union countries, which places additional duty on businesses to disclose information on prices of alternatives. For example, by the combined effect of recital 16 in the preamble to Regulation No. 1008/2008 and Article 23 of Regulation No. 1008/2008,⁷⁹ air carriers are obliged to ensure that their air fares and rates should be transparent to enable consumers make their choices. The objective of Article 23 and Recital 16 of the EU Regulation is to avail prospective consumers with all necessary information relating to air fare within the community to enable him make an informed choice. By this objective, airline operators are duty bound to make their fares and those of other industry competitor available to the consuming public.⁸⁰ By section 119, a consumer has the right to select suppliers, cancel advance reservation,⁸¹ choose to examine goods,⁸² and has the right to return goods⁸³ not fit or conform to the description or pertaining to quality and safety of goods and services.⁸⁴ The consumer has right to fair dealing,⁸⁵ without any false misleading or deceptive representations⁸⁶ or unfair, unreasonable or unjust contract terms. For a consumer to make any informed decision with respect to his rights as set out in Part XV of the Act, particularly sections 119 to 30, he requires information not just about, say the price of, the services or goods of the particular seller or business, but those of alternative products and competitors as is the case in the EU. Section 146(1) of the Act provides to the effect that a consumer may seek to enforce any right under the Act or otherwise resolve any dispute with an undertaking that supplied the goods and services to the consumer,⁸⁷ by referring the matter to the applicable industry sector regulator with jurisdiction,⁸⁸ or by filing a complaint directly with the Commission.⁸⁹ The Act provides different avenues for the consumer to enforce his rights when breach. However, one wonders how accessible these avenues of redress are to the consumer in terms of proximity. Most of the sector regulators are located in the metropolitan cities far away from the ordinary citizen who may have suffered from the substandard goods and shoddy services. Secondly, these multiple avenues of redress may give room to forum shopping. Section 152 provides that:

Where upon an investigation by the Commission of a complaint by a consumer, it proved that the consumer’s right has been violated, or a wrong has been committed by the way of trade, provision of services, supply of information or advertisement thereby causing injury or loss to the consumer, the consumer shall in addition to the redress which the Commission may impose, have a right of civil action for compensation or restitution in a court of competent jurisdiction.

It may be contended that this provision is tantamount to a waste of time and resources, for the consumer to pursue a complaint through the Commission particularly against the manufacturer or service provider who is stronger than him financially and at the completion of that process still have the muscle to institution an action in court of competent jurisdiction. As plausible as this may be presented to sound, multiplicity of windows for redress should not be seen as a curse or as constituting hardship on the consumer, it should rather be seen as providing the consumer with options for choice. Upon completion of investigation by the Commission, it behoves on the

⁷⁸‘List of Languages Spoken in Nigeria and their States’ available at

<https://www.google.com/search?q=number+of+languages+spoken+in+nigeria&rlz=1C1CHBD_enNG898NG901&oq=number+of+languages+spoken+in+nigeria&aqs=chrome..69i57j0l7.17866j0j8&sourceid=chrome&ie=UTF-8> accessed on 22 May 2020.

⁷⁹ Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, Official Journal of the European Union, available at <https://www.icao.int/sustainability/Compendium/Documents/EU/CouncilRegulation-EC_No1008.pdf> Accessed on 20/2/2018.

⁸⁰ Etefia E. Ekanem and Ekaobong A. Thomas, ‘Legal Regime for Air Fares Fixture and Information in Nigeria: An Assessment of Consumer’s Rights’ [2018] *Modern Law Journal*, vol. 2 No. 1, 119 at pp. 125 - 126.

⁸¹ Section 120

⁸² Section 121

⁸³ Section 122

⁸⁴ Section 130. The consumer has a right to safe, good quality goods; Section 131

⁸⁵ Section 124

⁸⁶ Section 125

⁸⁷ Section 146(1).

⁸⁸ Section 146(1) (b).

⁸⁹ Section 146(1)(c).

Commission to enforce such right by all means to protect the consumer and promote public confidence on the commission.

5. Criticism of the FCCP Act

Although the FCCP Act is a plus and advancement in consumerism in Nigeria, Nigeria is miles away from her Eldorado in consumer protection, particularly, as the Act arrived with a number of teething issues. Firstly, the Act provides for the transfer of shares and assets as being the responsibility of the Commission set up by it. The simple implication is that Nigerian businesses appear to be now controlled by the Commission's regulatory oversight function. This calls to question the Commission's ability to effectively monitor indirect transfers and transfer of beneficial ownership of Nigerian undertakings at the foreign holding company level.⁹⁰ What this seems to mean is that, the Act transfers various powers regarding the regulations of the activities of companies from all sectors of the economy from Securities and Exchange Commission (SEC) as defined under the Act. The Commission is now saddled with several powers which include determining situations of merger,⁹¹ monopoly,⁹² as well as procedure for price regulation.⁹³ Furthermore, parties to mergers now depend on the Commission to ascertain the propriety or otherwise as it has the discretion to do by virtue of its powers to regulate. Although a person who is aggrieved by the disapproval for merger taken by the Commission has an option to challenge same at the Tribunal, the entire powers of the Commission in this respect seem to have incurred into the purview of the SEC. Considering that SEC is a specialised agency established to manage securities.⁹⁴ Secondly, the power of the Tribunal may impede the effectiveness of the sanctions of regulators, such as the Central Bank of Nigeria, Nigerian Communications Commission, and National Broadcasting Commission among others. The powers of the tribunal appear to impede the constitutional roles of some of these agencies, as the Tribunal is impliedly enthroned as a super-court of sorts, even in areas specifically reserved for the Federal High Court.⁹⁵ Also, these provisions essentially constitute the FCCPC as a sort of super-regulator with capacity and power. Thirdly, the Act gives the Commission the power to enter premises without warrant upon suspicion that an undertaking has violated or is likely to violate any of the provisions of the Act and obtain warrant thereafter.⁹⁶ The rationale for such powers may be to secure and preserve the *res* from destruction by the suspect. However, such unrestrained power is prone to abuse and therefore makes nonsense of the criminal justice procedure. Conferring enforcement powers on the Commission may result in usurpation of the prosecution powers of the police.⁹⁷ Fourthly, the Act provides that the Commission may be funded from fees it charges for carrying out investigations.⁹⁸ This implies that the Commission charges a fee for investigating any report brought before it which is one of its statutory duties under the Act. One wonders where poor and vulnerable consumers whose rights have been breached will have the money to fund such investigation, in the face of his already unequal position with the producer. The implication of this provision should be addressed to engender public confidence in the capability of the Commission as a regulator and not a quasi-commercial entity. Fifthly, in looking at the powers of the Commission as it relates to mergers and acquisitions as provided for by the Act,⁹⁹ certain questions may be raised which regulators must answer before they make decisions as it concerns anti-competitive action or mergers, particularly, in the area of information technology, namely: whether the doctrine of potential competition is sufficient to identify and analyse the competitive effects (if any) associated with the acquisition of a firm that may be a nascent competitive threat and the identification and evaluation of differentiated but potentially competing technologies and of disruptive or

⁹⁰ Ss.86 and 87.

⁹¹ S. 93

⁹² S. 76

⁹³ S. 8(3)

⁹⁴ S. 1 of Investment and Securities Act 2007.

⁹⁵ The CBN Consumer Protection Regulations CPD/DIR/GEN/CIR/01/002 of December 2019, entitled, 'Circular to all Banks and other Financial Institutions', made pursuant to its powers under the Banks and other Financial Institutions (BOFIA) Act cap. B3 LFN 2004. Section 57 of the BOFIA gives the Governor of CBN powers to make Regulations to give full effect regulating the objectives of the Act, while subsection (2) of the same section 57 gives the Governor of CBN powers to make rules and regulations for the operations and control of all institutions under the supervision of the Bank. The powers include punishment for violation of the Rules and Regulations so made. Similarly, section 78 of the Nigerian Communications Act (NCA) 2003, provides to the effect that the decisions of the Commission shall be binding on the parties and the Commission may direct a party to a dispute to abide by the decision of the Commission in the dispute. Section 138 of the NCA provides to the effect that the Federal High Court shall have exclusive jurisdiction over all matters arising from the Act. Consequently, the power conferred on the Tribunal by section 54 of the FCCPA to regulate all sectors of competition and consumer protection seems to impede the effectiveness of the sanctions of specific regulators considering the overriding powers of the provisions of the FCCPA over other laws.

⁹⁶ Section 27 of the FCCPC Act

⁹⁷ Section 18 *ibid*

⁹⁸ Section 23(2)(f)

⁹⁹ Section 93

generational changes in technology and how such technologies can affect competitive effects analysis.¹⁰⁰ Unlike the Investment and Security Act (ISA) that specifically provides for thresholds in determining small and large mergers (pending when SEC¹⁰¹ issues its guidelines on thresholds), the Act does not provide any threshold. Instead, the Commission through a number of steps, including inviting written submissions on proposals from the public, is empowered to determine the threshold.¹⁰² The involvement of the public in the determination of the threshold is laudable.¹⁰³ However, given that no threshold is included in the Act and the Commission is yet to come up with one, it would be difficult for parties to determine if their transaction falls into the category of review and whether the approval of the Commission would be required for any proposed merger. Thus, it is expected that the Commission would be constituted soon and would come up with the relevant thresholds to provide certainty for businesses with respect to proposed merger deals.¹⁰⁴

Sections 123 to 126 of the ISA provide for court sanction of large mergers after the SEC has given approval. However, the requirement for court sanction of a merger is conspicuously missing in the Act. Thus, it appears that a merger may no longer require the sanction of the court and can be implemented once the approval of the Commission is obtained.¹⁰⁵ Typically, the scheme of merger becomes binding on the shareholders upon sanction of the scheme by the court with orders including cancellation of the issued share capital of the absorbed company, transfer of the assets/liabilities of the absorbed company to the enlarged entity and the dissolution of the absorbed company without being wound up. Without a court order in the new framework, Isiadinso and Omoju¹⁰⁶ raised the following posers; how will the absorbed company be dissolved or how will its assets/liabilities be transferred to the enlarged entity? Would the Commission's approval simply suffice for these purposes? Would the parties, as a matter of practice, still approach the court for sanction of the scheme? These are some of the concerns that businesses may have with this new legislation.

Sixthly, by the provisions of section 104 of FCCPA, wherever the provisions of any other law, save the Constitution, conflicts with the provisions of the Act the provisions of the FCCPA prevails over such other law. Competition and consumer protection issues are rightly under the ambit of a generalist enforcement agency. One may reason that as a country, Nigeria should move away from sector-specific competition and consumer protection regulations; because generalist enforcement agencies are resilient to capture, make for more efficient enforcement, and eliminate duplicate efforts across the government.¹⁰⁷ However, there are many exceptions in areas where the expertise and foresight of a sector-specific agency could improve outcomes.¹⁰⁸ For example, in the area of communication technology; while internet platforms are just as capable of anti-competitive behaviour and bad business practices as any other company, the traditional powers available to injured parties and government regulators can handle virtually all actual (as opposed to possible) harms. There is therefore little need at this point for new laws or regulatory actions aimed solely at platforms *per se*. However, in specific cases, such as pricing below marginal cost, regulators will need to adapt standard theory to account for the ways in which platforms add market value.¹⁰⁹

Any regulation on communication technology should also be focused on consumers, and not only on producer welfare. Platforms that provide more choice to consumers and offer a lower price usually lead to some disruption on the producer side. For example, a company like Amazon competes with both small sellers and large sellers.¹¹⁰ But its success or lack thereof comes from its ability to either provide more choice, better consumer experience, like faster delivery or lower prices; however, if that hurts the sellers, that is not an issue for competition policy

¹⁰⁰ R Atkinson and others, 'Competition and Consumer Protection issues in Communication, Information and Media Technology Networks' A Paper submitted by the Information Technology and Innovation Foundation to the Federal Trade Commission of the Washington D.C. U.S.A. during the Public Hearing on Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201, August 20, 2018. Available at 'Hearings on Competition and Consumer Protection in the 21st Century,' Federal Trade Commission, available at <<https://www.ftc.gov/policy/hearings-competition-consumer-protection>> accessed 23 May 2019.

¹⁰¹ Securities and Exchange Commission (SEC) is the apex regulatory institution in relation to merger control. SEC was established by Section 1 of the Investment and Securities Act (ISA) 2007.

¹⁰² S. 94

¹⁰³ O. Isiadinso and E. Omoju, 'The Federal Competition and Consumer Protection Act 2019: Regulatory Implications for Merger Transactions in Nigeria' *Andersen Tax Digest*, Tuesday 19 March 2019.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ Atkinson and others (n99)

¹⁰⁸ *Ibid*

¹⁰⁹ *Ibid*

¹¹⁰ Atkinson, *op cit.*

authorities, unless the company gained that advantage unfairly.¹¹¹ In view of the fact that the digital economy is characterised by rapid technological developments and the combination of economic and digital power, the corresponding unprecedented magnitude of data collection and the indispensability of online platforms for markets and citizens raise challenges for both society and legislators. Currently, the FCCPA is struggling to find appropriate answers. The implication of this is that although the FCCPA provides for the supremacy of its provisions over other laws, certain rules of specific regulations such as the SEC Rules and Regulations on mergers and other business combinations would remain applicable in the interim until further notice.¹¹²

Seventhly, additional regulatory burden for companies has been created. The number of regulatory approvals for merger transactions in Nigeria, especially for regulated companies, appears to have increased with the additional requirement for approval of mergers by the Commission.¹¹³ For example, a listed insurance company would typically require approval or 'No Objection' from the National Insurance Commission (NAICOM) before proceeding with the merger. The FCCPC would also consider the anti-competitive effects of the merger before granting its approval. In addition, listed companies would still require regulatory clearance from the Nigerian Stock Exchange in respect of the merger.¹¹⁴

6. Conclusion and Recommendations

The need for a competition law tailored towards the protection of consumers in Nigeria was long overdue to prevent the continued existence of monopolies and other anti-competitive activities in the Nigerian market. The belief being that when there is competition in the market place, the quality of goods and services supplied to the consumer would be high; as each, manufacturer or supplier would work assiduously to outdo the other thereby creating an enabling environment for consumers to make choices.¹¹⁵ The consumer would not only benefit from improved quality of goods and services, he would also get them on fair and reasonable prices. Flowing from the above, the enactment of the FCCPA is a welcome development. This paper has shown that the Act has far reaching effects on many sectors of the economy and its effect is considered supreme with overriding effect over other existing law apart from the constitution on matters relating to consumer protection and competition.¹¹⁶ Also, the Commission shall have precedence over and above any other relevant government agency in matters related to the Act. This implies that the Act, which is a general enactment, is considered to have overriding effect over specific enactments by specialised agencies that were supposed to be self-regulatory. This initiative quite often takes the form of the control or regulation of the conduct of the members of the industry, trade or professional association. The commonest medium through which this control is exerted is via the code of practice of the group in question, for instance, the Code of Advertising Practice of the Advertising Practitioners Council of Nigeria (APCON) which regulates the conduct of advertising practice in Nigeria.¹¹⁷ Using the APCON illustration as a case study, it is without dispute that self-regulatory laws have more advantages, features, and may have been tailored generally to meet the exigencies of the particular trade or profession in question¹¹⁸ than a general enactment like the FCCPA.

In the final analysis, the FCCPA is still a novel instrument and will need some time for a proper evaluation and assessment of its application. The different organs of the Act are yet to be effectively utilised. Consequently, the following recommendations will be proffered to produce the needed results. As rightly pointed out above, the

¹¹¹ *Ibid*

¹¹² Prior to the enactment of the FCCPA, the SEC was responsible for reviewing notification of mergers pursuant to the Investment and Securities Act (ISA). However, the establishment of the FCCPC has discontinued SEC's role in the regard. The FCCPA also mandates the FCCPC to set, gazette and publish thresholds applicable to mergers and other business combinations. Although the Joint Advisory states that the FCCPC has begun this process, the FCCPC is yet to publish any gazette or threshold in this regard and this has uncertainty as to the process for notification and review of mergers and other business combinations. In a bid to address this address this, issue the SEC and FCCPC have now issued a Joint Advisory stating that both bodies would jointly review all notifications and filings and the FCCPC would convey the decision of such reviews until otherwise discontinued by any further advisory or guidance. The Joint Advisory also states that the SEC Regulations, guidelines and fees, which were in place prior to the enactment of the FCCPA, would apply to all pending and subsequent merger transactions until further notice. Also, all notifications for mergers are to be filed at the FCCPC office or at SEC/FCCPA Interim Joint Merger Review Desk; and all applicable fees are to be paid to the FCCPC. See FCCPC and SEC to Collaborate on Merger Notification Reviews' *Andersen Tax Review* May 9, 2019, available at <https://andersentax.ng> Accessed 25 September 2019.

¹¹³ Isiadinso and Omoju (n 101).

¹¹⁴ *ibid*

¹¹⁵ Etefia E. Ekanem, and Moji Eseyin, 'Who Protects the Consumer: Self or the State?' [2013] vol. 1 *Imo State University Journal of Private and Property Law*, 83, at pp. 91-94.

¹¹⁶ Section 105 and 107

¹¹⁷ Kanyip (n18) at 314

¹¹⁸ *Ibid*.

organs of the Act are yet to be fully utilised. Accordingly, the constitution and proper functioning of the various organs or bodies provided by the Act is advocated such as constitution of the Commission, establishment and appointment of members of the tribunal amongst others. This is because the Act has aroused enormous expectations as well as challenges among the consumers. These expectations can be realised only when the machineries of the enactment are fully functional. It is without dispute that the greatest challenge of consumerism in Nigeria is the low level of awareness and information by the consumer. Proper awareness and sensitization of the masses on their various rights and institutionalising the machineries for redress by establishing redress centres closer to the people at the states and local government levels is recommended. This to a greater extent will involve the role of the government in educating or incorporating the provisions of the Act as part of civic education and equipping agencies in charge of dissemination of information and orientation. As succinctly noted, 'It is patently obvious that consumers are not only the largest economic group but also the pivots of all the economic activities. It is also true that the very consumers are the most unaware or voiceless group in most of the countries of the world.'¹¹⁹ In the words of Dickinson and Shaver,¹²⁰ 'Consumer awareness is the first line of defence against consumer problem.' To be informed, the consumer needs to be educated and enlightened.¹²¹ Additionally, the complexities of goods and services and the way they are marketed today pose more challenges to the consumers.¹²² Ignorant consumers, not being experts, find it difficult to ascertain the quality, standard as well as the performance of these products. This paper advocates for a more vibrant economy that will make the consumer the king and not a pauper.¹²³ The market is full of adulterated goods especially food and other related consumable items. Yet, the attitude of the seller is that of 'take it or leave it', not because the consumer is unaware but he or she lacks the alternative that is within economic purchasing power. Redress procedure should be more consumer friendly, that is, easy to understand, handle and quick disposal of cases and not rigid or complex. This will demand establishment of district forums that apply less technical rules of administration of justice. This paper advocates the amendment of section 23(2)(f) of the Act which implies that complainants, in this case consumers, are charged fees for the Commission to investigate their complaints. The Act prohibits monopoly in any sector of the economy.¹²⁴ However, it seems that monopoly cannot be completely eradicated particularly in a capitalist economy like Nigeria. Consequently, it is recommended that government subsidises the production cost in certain areas of the economy to checkmate substandard production of goods and services. For example, the petroleum sector of the Nigerian economy is very well subsidised to the extent that the cost of production of petroleum products are fully taken up by government and the price of the products are well regulated thereby making it readily available. Accordingly, this can be extended to other essential services of the public consumption in order to regulate price and production and other unwholesome practices.

¹¹⁹ F. Shina, *Consumer Movement in India* (Keemat, 2002) cited by S Sahoo and A Chatterjee, 'Consumer Protection – Problems and Prospects' [2009] *SSRN Electronic Journal* 7(7).

¹²⁰ Cited by Sahoo and Chatterjee *ibid*.

¹²¹ *Ibid*.

¹²² *Ibid*.

¹²³ Ekanem, and Eseyin, (n 114).

¹²⁴ S. 76 of the FCCPA