THE PUBLIC COMPETITION ENFORCEMENT REVIEW

Twelfth Edition

Editor
Aidan Synnott

THE LAWREVIEWS

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TWELFTH EDITION

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PREFACE

In the reports from around the world collected in this volume, we continue to see international overlap among the issues and industries attracting government enforcement attention. This year, we read with particular interest the discussions of activity in many jurisdictions regarding digital platform competition issues.

We also continue to see the evolution and refinement of general approaches to competition law enforcement in several jurisdictions. For example, The International Competition Network, which is a group of national and multinational competition authorities, adopted a Framework on Competition Agency Procedures, and 62 agencies have signed on. Mexico adopted 'regulations related to client–attorney privilege protection in the context of antitrust investigations'. Japan has also introduced an 'attorney–client privilege [which] will apply to administrative investigation procedures against' cartels, and the discussion in that chapter of how this privilege will be applied will be of interest to many. The chapter from Belgium discusses that country's newly modified competition law, and in this edition we welcome to the *Review* a new chapter from Nigeria, which provides an informative overview of that country's new competition law. Before this law was enacted, our authors write, 'Nigeria had no comprehensive competition legislation that dealt with antitrust, abuse of dominant position and merger control issues'.

In the past year, antitrust compliance featured prominently on several enforcers' agendas. In 2019, the US Department of Justice (DOJ) notably focused on encouraging compliance efforts: the agency announced a new policy allowing, under certain conditions, companies to receive credit for antitrust compliance programmes when the DOJ considers criminal charges. Elsewhere, the Taiwan Fair Trade Commission has made efforts in the past year to assist Taiwanese business organisations in their antitrust compliance efforts. Poland implemented an online whistle-blower platform and Brazilian authorities issued a whistle-blower protection ordinance.

The policing of cartels remains a focus of competition agencies around the globe. The chapter from Greece notes an increase in cartel enforcement activity in 2019. Authorities there conducted their largest dawn raid yet, and they have also updated the manner in which they prioritise particular cases. The authors of that chapter note that 'it appears that the [Hellenic Competition Commission] has taken a turn toward more pre-emptive action against cartels, by emphasising dawn raids and *ex officio* investigations and by acting swiftly on complaints and news publications about price increases in specific sectors'. Portuguese authorities are reported to have imposed their largest fines to date. The contribution from Japan notes an aggregate level of penalties that is higher than in recent years, which, the authors note, is partly attributable 'to the record-breaking surcharge imposed in the asphalt cartel case' there.

That country is implementing a revised leniency programme. Meanwhile, the chapter from Mexico notes a decline in the number of leniency applications there.

As noted above, online platforms – and the 'digital economy' more generally – continue to be the subject of regulatory scrutiny, including in Brazil, France, India, Japan, Mexico, Poland and the United States. For example, both United States competition enforcement agencies are investigating large platforms, and the UK Competition and Markets Authority (CMA) has launched a market study of online platforms and digital advertising. Taiwan has also begun to prioritise this area. In addition to platform issues, there have been several other notable developments in the areas of restrictive agreements and dominance. Authorities in Canada concluded an inquiry into several pharmaceutical companies without taking action but 'confirmed that healthcare remains a top enforcement priority'. The United States authorities remained active in this area. In addition, Belgian authorities conducted a dawn raid in the pharmaceutical sector. Several jurisdictions took enforcement actions against resale price maintenance (RPM) practices: the UK's action involved guitars; an action in Poland involved online sales of printers and was the result of a whistle-blower complaint; and Japanese authorities took action against manufacturers of various baby products. China concluded four RPM matters.

Merger review and enforcement activity remains robust. The chapters that follow note activity in many sectors. The chapter from Argentina discusses the Antitrust Commission's new merger control guidelines and the chapters from France and India report on streamlined merger control procedures there.

Once again this year, the chapter from the United Kingdom is particularly informative. In addition to describing a busy year of merger and conduct enforcement activity for the CMA, the chapter discusses the effect of Brexit on the competition enforcement regime there, including the transition period and how competition law may factor into the negotiation of a trade agreement between the UK and the EU. Our contributors discuss the future of the CMA and potential consequences of various possible future scenarios. We will continue to watch with interest to see how competition enforcement in the United Kingdom evolves in the year to come.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
March 2020

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NIGERIA

Oludare Senbore, Ayodeji Oyetunde, Temitope Sowunmi, Kareemat Ijaiya and Oluwatamilore Oluwalaiye[1]

I OVERVIEW

On 30 January 2019, the President of the Federal Republic of Nigeria assented to the Federal Competition and Consumer Protection Act[2] (the FCCP Act). Prior to the enactment of the FCCP Act, Nigeria had no comprehensive competition legislation that dealt with antitrust, abuse of dominant position and merger control issues. The regulation of merger control in Nigeria was historically subject to the regulatory oversight of the Securities and Exchange Commission (the SEC), being the apex regulator of the securities market in Nigeria while other competition law issues such as abuse of dominant position were regulated by sector-specific bodies. The FCCP Act[3] has, however, repealed[4] the provisions of the Investments and Securities Act[5] on mergers and acquisitions as well as the Consumer Protection Council Act,[6] and as the primary competition law legislation in Nigeria, it overrides any other legislation that purports to deal with competition law issues, the FCCP Act also has extraterritorial jurisdiction with respect to foreign mergers that have an impact on the Nigerian market.

As part of the reforms introduced by the FCCP Act, the Federal Competition and Consumer Protection Commission (the Commission)[7] was established as Nigeria's primary regulator of mergers (which now includes mergers and acquisitions), abuse of dominant position and antitrust matters and the protection of consumer rights.

While the establishment of a regulator charged with enforcing competition related issues in Nigeria is laudable, a key concern of industry players and the general public is the enforcement of the competition and antitrust provisions as this will require robust subsidiary legislation that will assist in the proper application and enforcement of the statute, adequate training and appointment of experienced and knowledgeable staff to manage the affairs of the Commission and enforce the provisions of the FCCP Act.

1 Oludare Senbore and Ayodeji Oyetunde are partners and Temitope Sowunmi, Kareemat Ijaiya and Oluwatamilore Oluwalaiye are associates at Aluko & Oyebode.

2 Federal Competition and Consumer Protection Act, Act No.1 of 2019 Federal Republic of Nigeria Official Gazette, NO.72 Vol. 106, 2019.

3 Section 165.

4 Cap I24 Vol.8 Laws of the Federation of Nigeria 2004.

5 The Investment and Securities Act regulates securities market in Nigeria.

6 Cap C25 Vol.4 Laws of the Federation of Nigeria 2004.

7 Section 3.

II CARTELS

i Significant cases

At present there are currently no cases, disputes or matters arising from the cartel provisions of the FCCP Act.

ii Trends, developments and strategies

Under the FCCP Act, agreements, activities and conduct among undertakings that have the effect of preventing, restricting or distorting competition in any market are prohibited.

In particular, Section 59(1) of the FCCP Act provides that any agreement among undertakings or decisions of associations of undertakings that cause or are likely to result in the prevention, restriction or distortion of competition in any market shall be unlawful and void. The FCCP Act particularly prohibits the following activities, which may be considered as cartel behaviour amongst undertakings:

a the direct or indirect fixing of the purchase or selling price of goods or services;

b division of markets by allocating customers, suppliers, territories or specific types of goods or services;

c limiting or controlling the production or distribution of goods or services, markets, technical development or investment;

d engaging in collusive tendering; andmaking the conclusion of an agreement subject to acceptance by other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject.[8]

Furthermore, the FCCP Act prohibits terms or agreements for the sale of goods or services where the purpose is to establish or provide for the establishment of minimum prices to be charged on the resale of goods or services.[9]

The Commission is empowered under the FCCP Act to make regulations, guidelines and notices relating to leniency programme.[10]

iii Outlook

The biggest challenge facing Nigerian regulations was the lack of clear statutory powers to investigate and prosecute potential price-fixing and cartel arrangements that might have existed in certain sectors of the Nigerian market. The enactment of the FCCP Act has now given the Commission the requisite powers as well as the requisite tools for it to establish an appropriate leniency programme as well as incentives and protection for the whistleblower. We look forward to when the Commission issues regulations that establishe such programmes, rewards or protection.

8 Section 59(2).

9 Section 65.

10 Section 163(2)(g).

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The provisions of the FCCP Act regulating restrictive agreements in Nigeria are similar to those provided for under Article 81 of the European Commission Treaty. As discussed in Section II, under the FCCP Act, undertakings are precluded from entering into agreements in relation to price-fixing, market-sharing and customer allocation, production limitation and distribution agreements by which suppliers impose prices of goods on resellers.

While the FCCP Act prohibits any restrictive agreement among undertaking that is likely to distort competition in any market, it exempts certain types of agreements form being construed as restrictive in line with international practices. Thus, under the FCCP Act, the following will not be construed as restrictive agreements:

a combinations or activities of employees for the reasonable protection of employees (i.e., trade unions);

b arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing minimum terms and conditions of employment;

c activities of professional associations designed to develop or enforce standards of professional qualifications;

d contract of service of or a contract for the provision of services in so far as it contains provisions by which a person, not being a body corporate, agrees to accept restrictions for work, whether as an employee or otherwise, in which that person may engage during or after the termination of the contract and this period shall not be more than two years;

e contract for the sale of a business or shares in the capital of a body corporate carrying on business in so far as it contains a provision that is solely for the protection of the purchase in respect of the goodwill of the body corporate; or

f any act done to give effect to a provision of a contract, or an arrangement referred to in items (a) to (f) above.[11]

A contravention of the provisions of the FCCP Act on restrictive agreements is a criminal offence, and any person or undertaking that commits such a breach will be liable upon conviction to:

a in the case of an individual, to a term of imprisonment not exceeding five years, or to a fine not exceeding 5 million naira or both the fine and imprisonment; and

b where the offence is committed by a corporate body, the company will be liable to a fine not exceeding 10 per cent of its turnover in the preceding business year. The directors will also be personally liable and subject to the penalties applicable to individuals.

Note that parties who have suffered losses as a result of such breaches may seek redress by lodging complaints with the Commission. The Commission may, if satisfied that the circumstances of the case so warrants, exercise any of the powers granted to it under the FCCP Act as it deems fit, including making interim orders mandating the cessation of the restrictive agreement pending the conclusion of the investigation. Prior to the enactment of the FCCP Act, the ability of parties to enforce or seek protection against an agreement that purported to restrain trade was premised on the principles of common law and the reasonability of the agreement. The courts considered factors such as the length of the

11 Section 68(1).

restraints and geographical limits, among others. The FCCP Act, however, now expressly prohibits all forms of agreements among undertakings creating a monopoly and stifling competition in Nigeria, save for certain express exemptions provided for under the FCCP Act. The implication of this is that Nigerian courts in deciding whether or not to enforce a restrictive agreement are to have recourse to the provisions of the FCCP Act, which now provides the circumstances where certain restrictive agreements should be upheld. Thus, while Nigerian courts may still consider the reasonability of a restrictive clause in an agreement in deciding whether to enforce the agreement, the provisions of the FCCP Act will serve as the first guide of the court in reaching a decision.

Abuse of Dominant Position in Nigeria

Abuse of dominant position occurs 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 of the consumers'.[12] The term 'relevant market' includes:

a the geographical boundaries that identify groups of sellers and buyers of goods or services within which competition is likely to be restrained;

b goods or services that are regulated as interchangeable or substitutable by the consumer by reason of their characteristics, prices and the intended uses; and

c suppliers to which consumers may turn to in the short term, if the abuse of dominance leads to a significant increase in price or to other detrimental effect upon the consumer.[13]

The provision of the FCCP Act in relation to abuse of dominant position is essentially similar to what is provided for under Article 82 of the European Commission Treaty, although it appears to be more extensive with respect to the types of conduct that amount to an abuse of dominant position when compared with the examples provided for under the European Commission Treaty, which are essentially limited to imposition of unfair purchase or selling price, limitation of production and application of dissimilar conditions to equivalent transactions.

The FCCP Act prescribes acts that will be construed as an abuse of dominant position. These acts include: excessive pricing,[14] predatory pricing,[15] buying scarce supply of intermediate goods or resources required by a competitor,[16] refusing to give a competitor access to essential facility when it is economically feasible to do so,[17] requiring or inducing a supplier or customer not to deal with a competitor,[18] refusing to supply scarce goods to a competitor when supplying the good is economically feasible, selling goods or services on condition that the buyer purchases separate goods or services or forcing a buyer to accept a condition unrelated to the object of a contract.[19]

12 Section 70(2).

13 Section 71.

14 A pricing may be considered as excessive where there is no economic justification for it.

15 Section 72(2)(d)(iv).

16 Section 72(2)(d)(v).

17 Section 72(2)(b).

18 Section 72(2)(d)(i).

19 Section 72(2)(d)(iii).

An undertaking that is found guilty of abusing its dominant position will be liable upon conviction to a fine not exceeding 10 per cent of its turnover in the preceding business year or to a higher percentage that the court may determine given the circumstances of each particular case.[20] The FCCP Act also imposes a penalty on the directors of any undertaking found guilty of abusing dominant position within a market. To this end, directors of an undertaking found guilty of abuse of dominant position shall be required to pay a fine not exceeding 50 million naira or a term of imprisonment not exceeding three years.

i Significant cases

As at the date of publication of this chapter, there has been a dearth of reported cases or suit that have been brought either by the federal government or by a civil action pursuant to which an abuse of dominant position was sought to be punished or stopped or whereby a declaration that the agreement or business arrangement was deemed to be illegal or on the ground that it is anticompetitive.

However, in 2018, a civil suit[21] was brought by the Attorney General of the Federation (AGF), pursuant to the provisions of the erstwhile Consumer Protection Council Act (CPC),[22] against MultiChoice Nigeria (Nigeria's largest digital satellite television company and a dominant player in the broadcasting sector). MultiChoice Nigeria was accused of allegedly increasing the monthly subscription fees excessively as a result of the dominant position it enjoyed in the market. The matter was brought before the Federal High Court, Abuja under the provisions of the erstwhile CPC Act.

The AGF, sought a restraining order to restrain MultiChoice by itself, agents or representatives howsoever described, from continuing any increased subscription rates that were being charged to their customers.

Though the civil suit was successful and the restraining order was obtained, MultiChoice however proceeded with the price increase. Due to the fact that the CPC had no power to regulate competition related issues such as abuse of dominant position or to regulate monopolistic businesses or undertakings, the CPC and the court were limited to giving orders touching on the protection of the consumers rights.[23] The MultiChoice case essentially stressed the need for the country to ensure that it had in place a comprehensive competition law policy to address issues like abuse of dominant position in the market.

ii Trends, developments and strategies

The FCCP Act in line with international best practices recognised the need for contract of service to contain provisions that restricts an employee's right to accept employment from other undertakings during or after the termination of the contract of service, provided the period stipulated in the contract of service does not exceed two years. Prior to the enactment of the FCCP Act, the enforceability of a contract of service containing restrictive clauses as regards the right of an employee was subject to the decision of the court.

20 Section 74(1).

21 Federal Republic of Nigeria v. Multichoice Nigeria Limited FHC/ABJ/CS/894/2018.

22 Cap. C25, Laws of the Federation of Nigeria, 2004 .

23 Summary of order by FCCPC in the Investigation into Multichoice Compliance with the order of February 2016: http://fccpc.gov.ng/news-events/releases/2019/06/13/investigations-into-the-compliance-with-the-councils-order-by-multichoice-nigeria/.

iii Outlook

The FCCP Act no doubt has introduced a much needed regime to the Nigerian market by ensuring that adequate antitrust provisions are in place to tackle issues related to predatory pricing, monopoly, restrictive agreements and other antitrust-related practices that are intended to stifle competition in the Nigerian market. It is left to be seen how the Commission will tackle issues arising from antitrust practices in the coming years.

We believe that there will be more activities within the Nigerian market, especially as it relates to enforcement of the FCCP Act, in view of the fact that there is now an existing competition law and an active Commission willing to enforce the provisions of the law.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

As at the date of publication, the Commission is yet to make any pronouncement or exercise its regulatory powers on among others, antitrust and cartel prohibition. In addition, of the sectoral regulators that had competition regulatory powers, none have to date exercised their powers.

ii Trends, developments and strategies

While Nigeria had no comprehensive competition law framework in place prior to 2019, a number of regulated sectors had competition law provisions embedded into their governing legislation or regulations. Thus, legislation such as the National Communication Commission Act 2003 and the Electric Power Sector Reform Act 2005 – and their provisions geared at prohibiting anticompetitive practices within their sector – ensured that the duty of enforcing these provisions was that of the relevant agency or commission regulating the sector. While the FCCP Act does not seek to do away with the existing sector-specific competition provisions or bar the relevant agency charged with regulatory oversight of the relevant sector from enforcing these provisions, the statute makes the existing sector-specific legislation subject to the provision of the FCCP Act, and gives the Commission concurrent jurisdiction with other governmental agencies in matters or conduct relating to competition or antitrust practices within their sectors. The Commission is required to negotiate agreements with relevant government agencies whose mandate includes enforcement of competition provision for the purpose of coordinating and harmonising the exercise of jurisdiction over competition matters within their sectors. The FCCP Act further provides that where it is alleged that an undertaking is in violation of any provision the FCCP Act, and such an undertaking demonstrates that it had taken this action based on an order of a regulatory agency possessing jurisdiction over the regulated industry, the Commission may, subject to the agreement reached with the regulatory agency, issue a cease-and-desist order prohibiting the undertaking concerned from further violation of the FCCP Act. Thus, pursuant to the provisions of the FCCP Act, the FCCP Act and indeed the Commission occupy a supreme position in matters relating to competition over and above sectorial competition law provisions.

iii Outlook

In view of the powers conferred on the Commission with respect to regulatory oversight on competition matters in the Nigeria, it is expected that the Commission will collaborate with other regulators of specific industries to curb antitrust practices within the market. Where the Commission is able to effectively work with other sector regulators, the mandate of enforcing competition related issues within a sector should be seamless.

V STATE AID

i Significant cases

As at the date of publication of this chapter, there have been no decided cases on state aid by the Commission in Nigeria.

ii Trends, developments and strategies

The FCCP Act is silent with respect to the regulation of state aid in Nigeria. The Economic Community of West Africa State (ECOWAS) passed the Supplemental Act of 2008[24] (the 'Supplemental Act'), which regulates state aid among regional states. The Supplemental Act applies to all agreements, practices, mergers and distortions caused by member states[25] likely to have an effect on trade within ECOWAS. In view of the fact that Nigeria ratified the ECOWAS treaty in 1975, it is subject to the provisions of the Supplemental Act.

The Supplemental Act prohibits any aid granted by a member state or through state resources in any form whatsoever that distorts or threatens to distort competition by favouring certain enterprises or the production of certain goods.[26] The Supplemental Act further sets out activities that will be deemed compatible with the common market and other acts that may be deemed compatible with common markets.

Activities that will be deemed compatible with the common market and are not prohibited are:

a aid having a social character, granted to individual consumers, provided that the aid is granted without discrimination related to the origin of the products concerned; and

b aid to remedy the damage caused by natural disasters or exceptional occurrences.[27]

Aid activities that may be considered as compatible with the common market are also provided for under the Supplemental Act; and they are:

a aid to promote the socioeconomic development of areas of the Community where the standard of living is exceptionally low or in which there is serious underemployment;

b aid to promote the execution of an important project of Community interest or to remedy a serious disturbance in the economy of a member state;

c aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

24 A/SA.1/06/08.

25 Nigeria is a member state of the ECOWAS.

26 Article 8 (1).

27 Article 8 (2).

d aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest; and

e such other categories of aid as may be specified by a decision of the authority of heads of State and government on the recommendation of the council of ministers acting on a proposal from the ECOWAS competition authority.

In addition, the Agreement establishing the African Continental Free Trade Area (the Agreement) provides for competition policy among member states.

The Agreement recognises the ability of member states to grant state subsidies to domestic service suppliers in relation to their development programme.[28] However, member states shall agree on a mechanism for information exchange and review of all subsidies granted to domestic service suppliers by a member state, and where a member state considers that it is adversely affected by the subsidy of another member state, the affected member state may request consultation, and the request shall be accorded sympathetic consideration.

It is pertinent to note that while the President has ratified the Agreement, it does not have the force of law in Nigeria. Pursuant to Section 12 of the Constitution of the Federal Republic of Nigeria, an international treaty or agreement entered into by Nigeria will not have automatic application in the country unless the treaty or agreement has been domesticated by an Act of the National Assembly.[29]

iii Outlook

It is provided in the Supplemental Act,[30] that its provisions shall enter into force upon its publication and the member states which are signatories shall undertake to commence implementation of its provisions on its entry into force. Also the Supplemental Act is annexed to ECOWAS treaty of which Nigeria is a signatory. Thus, in granting state aid to businesses and undertakings in Nigeria, the expectation is that the federal government, the state government and their agencies will ensure that they adhere to the provisions of the Supplemental Act and apply any state aid or grant in a manner that is fair, non-discriminatory and also promotes competition.

VI MERGER REVIEW

Prior to the enactment of the FCCP Act the SEC had the primary responsibility for merger control in Nigeria. The responsibility of the SEC in relation to merger control extended beyond the determination of the fairness of a merger in relation to the shareholders, but also to determining whether a proposed merger was likely to lessen competition in the market. Where the SEC was of the opinion that such a merger was likely to lessen competition in the market, it had the mandate of deciding whether or not to approve the merger based on certain consideration.

28 Article 17 of the Agreement Establishing African Continental Free Trade Area.

29 *General Sani Abacha & Ors v. Fawehinmi* (2000) NWLR (pt. 660) p. 247.

30 Article 8(2).

In addition to the SEC, there were also a number of sectoral regulators that had responsibilities for merger control within their sectors, namely:

a the Central Bank of Nigeria pursuant to the Banks and Other Financial Institutions Act[31] and the Central Bank of Nigeria's Guidelines and Incentives on Consolidation in the Banking Industry;

b the Nigerian Communications Commission pursuant to the Nigerian Communications Act regulates mergers in the telecommunications sector;[32]

c the Nigerian Electric Regulation Commission pursuant to the Electric Power Sector Reform Act regulates mergers in the electricity sector;[33]

d the National Insurance Commission pursuant to the National Insurance Commission Act[34] regulates merger in the insurance industry; and

e the Minister of Petroleum through the department of Petroleum Resources pursuant to the Petroleum Act.[35]

With the promulgation of the FCCP Act, the general responsibility for merger control is now vested in the Commission as the merger control provision of the ISA were deleted by the FCCP Act.

The FCCP Act is not clear whether the sectoral merger control provisions are still in force and if the approval of the sector regulators are still required for a merger or acquisition or what would happen if the Commission approves a merger and the sector regulator disapproves or vice versa. The collective view at the moment is that the sector regulators still have their merger control powers and that the approval of the Commission and the sector regulator would be required as may be applicable.

The definition of a 'merger' under the FCCP Act is much wider than the definition provided for under the ISA.[36] The definition under the FCCP Act contemplates both mergers and acquisitions as it incorporates the factor of 'control'.

Pursuant to the FCCP Act, a 'merger' is said to occur when one or more undertakings directly or indirectly acquire or establish control over the whole or part of the business of another undertaking.[37] This may be achieved through:

a the purchase or lease of the shares, interests or assets of the other undertaking;

b the amalgamation or other combination with the other undertaking; and

c a joint venture.

An undertaking exercises control over the business of an undertaking if it:

a beneficially owns more than one half of the issued share capital or assets of the undertaking;

b is entitled to cast a majority of votes that may be cast at a general meeting of the undertaking or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;

31 Banks and Other Financial Institutions Act Cap B3 LFN 2004.

32 Nigerian Communications Act, CAP N97, LFN 2004.

33 Electric Power Sector Reform Act, CAP E7, LFN 2010.

34 National Insurance Commission Act, CAP N53, LFN 2004.

35 CAP P10 LFN 2014.

36 Section 119 of the ISA.

37 Section 92(1).

c is able to appoint or to veto the appointment of a majority of the directors of the undertaking;

d is a holding company, and the undertaking is a subsidiary of that company as contemplated under the Companies and Allied Matters Act;

e in the case of an undertaking that a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

f has the ability to materially influence the policy of the undertaking in the manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to (a) to (f) above.

The FCCP Act categorises mergers into small and large mergers. Under the FCCP Act, a large merger will require the prior notification and subsequent approval of the Commission while parties to a small merger may notify the Commission voluntarily or where the Commission formally requests that they do so. The Commission issued a Notice of Threshold for Merger Notification[38] pursuant to the FCCP Act that sets out circumstance when mergers shall be notifiable and calculation of annual turnover to determine threshold. This threshold is a general threshold that applies to all sectors and industries, but the Commission has indicated that it will issue guidelines that will provide industry or sector specific threshold.

In furtherance of its mandate, the Commission recently issued Guidelines on Process for Foreign-to-Foreign Mergers (the Guidelines). The Guidelines makes provision for the information required regarding the merging parties, supporting documentation to be provided and the applicable fees.

i Significant cases

Arguably, one of the biggest acquisition deal that has been executed under the FCCPC merger control regime is the US$330 million acquisition of Dangote Flour Mills Plc (DFM), Nigeria's leading wheat milling company by Olam International (Olam) and Crown Flour Mills Limited. Olam is one of the world's largest food and agribusiness companies, operating in over 70 countries around the world.

The acquisition, which was carried out through a scheme of arrangement, is part of Olam's strategy to strengthen its portfolio by investing in businesses in countries where it has consistently performed at the top of the market. The transaction was reported under the FCCP Act regime.

With the acquisition, the entire 4,994,886,771 ordinary shares of 50 kobo each in DFM held by the scheme shareholders of the DFM was transferred to Crown Flour.

The transaction was reviewed and approved by the Commission after being satisfied that the acquisition will not substantially affect or lessen competition in the market. As at the date of this publication, there are no publicly reported decisions of the Commission, where it has decided that a proposed merger or acquisition would lead to a lessening of of competition in the market or where it has approved a merger on the condition that part of the business undertaking or merging entities should be carved out or spun off.

38 Notice of Threshold for Merger Notification (S.1. No. 32 of 2019).

ii Trends, developments and strategies

The Commission, in approving a merger, will determine whether or not the merger is likely to substantially prevent or lessen competition. In making this determination, the Commission will assess the strength of competition[39] based on the following:

a the actual and potential level of competition in the market;
b the ease of entry into the market, including tariff and regulatory barriers;
c the level and trends of concentration, and history of collusion in the market;
d the degree of countervailing power in the market;
e the dynamic characteristics of the market, including growth, innovation, and product differentiation;
f the nature and extent of vertical integration in the market;
g whether the business or part of the business of a party to the proposed merger has failed or is likely to fail;
h whether the proposed merger will result in the removal of an effective competitor; and
i whether the merger is justified on the grounds of public interest.[40]

The provision of the FCCP Act of merger control and what the Commission should consider in determining whether or not to approve a merger transaction is similar to the provision of EU Merger regulations and the South African competition law.

iii Outlook

The FCCP Act fosters healthy competition among businesses while providing for adequate protection of customer and small businesses in the Nigerian market. By this, the FCCP Act has introduced significant changes to mergers and acquisition regime in Nigeria and with effective implementation shall have the potential of stimulating economic growth.

Recently, there is a trend of mergers and acquisition going on in the fintech space. Experts have long seen mergers and acquisitions as the most feasible way that fintech companies in Nigeria and Africa can compete with established traditional financial institutions and big tech companies looking to invest in fintech in Nigeria.

Mergers and acquisitions are vital for Nigeria's fintech space to align with global strategy. The Commission must be mindful to ensure that no merger deal with anticompetitive element cuts through.

The enactment of the FCCP Act was a good start towards achieving the ultimate objective of the FCCP Act. However, the Commission needs to be mindful of the fintech space when issuing its guidelines as fintech has become one of Africa's and start-up acquisitions destinations by investors.

The Commission is also expected to issue extensive merger guideline that will cover all lapses under the previous regime. It is also expected that the recent regulatory changes and recent display of commitment to improve the business environment will likely cause increase in number merger transaction in the business landscape.

39 Section 94(2) of the FCCP Act.
40 Section 94(4) of the FCCP Act.

VII CONCLUSIONS

The FCCP Act is a step in the right direction as it would in the long run create a level playing field in the Nigerian marketplace, and ensure prices and businesses are competitive.

The establishment of the Commission is a positive change to the country's competition and antitrust regime, and the effective implementation of the FCCP Act will foster a dynamic economy by creating a business environment for healthy competition across various sectors.

Generally, competition is an inevitable event in the industry as it plays a vital role in putting the economy and participants therein in check. As such, unregulated competition in the market affects the market, and if the market is a thriving market like the Nigerian market, the effect will be significant.

Appendix 1

ABOUT THE AUTHORS

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Oludare Senbore is a partner in the corporate and commercial, PPP, banking and corporate finance practice/competition and antitrust practices and heads the firm's power team. He also advises on matters such as privatisation, local and foreign currency syndicated lending, leases, transaction/structured project finance, mergers and acquisitions, structured trade finance, due diligence issues, advisory services, compliance, foreign investment advisory services, real estate and the regulatory framework relating to utilities. He has over 17 years' experience in international financial transactions, such as non-recourse and recourse financing, acquisition financing and mezzanine financing.

Oludare Senbore was recognised by *IFLR1000* as a Leading Lawyer in Banking, Mergers & Acquisitions and Project Finance.

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