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A REVIEW OF THE FEDERAL COMPETITION AND CONSUMER PROTECTION BILL, 2016

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1. INTRODUCTION

The existence of a comprehensive legal regime for the regulation of competition is extremely important to the growth of any advanced economy. Nigeria's competition laws have been grossly inadequate when viewed against the size and complexity of its economy. Hitherto, the laws regulating competition in Nigeria have been embedded in various pieces of legislation relating to the regulation of different sectors of the economy. A few prominent examples are the Investments and Securities Act 2007; the Nigerian Communications Act 2003; the Electric Power Sector Reform Act 2005 amongst other laws. These laws all contain provisions that deal with competition as it relates to the specific sector they regulate. The passing of the Federal Competition and Consumer Protection Bill, 2016 ("Competition Bill" or "the Bill" or "the proposed Act") by the National Assembly³ brings Nigeria closer to having a codified set of laws governing competition in the market place.⁴

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³ See PWC Tax Matters Blog, Federal Competition and Consumer Protection Bill.

⁴ http://pwcnigeria.typepad.com/tax_matters_nigeria/2018/02/federal-competition-and-consumer-protection-bill.html

See Leadership Newspaper, "Senate passes Federal Competition and Consumer Protection Bill", June 8, 2017 available at <http://leadership.ng/2017/06/08/%E2%80%8Esenate-passes-federal-competition-consumer-protection-bill/> accessed on 9th August 2017.

1.1 Objectives of the Proposed Act

The Competition Bill seeks to repeal the Consumer Protection Act;⁵ and establish a Federal Competition and Consumer Protection Commission for market regulation and protection of small businesses. It seeks to avoid monopolies and abuse of dominant market positions⁶; and to establish a Federal Competition and Consumer Protection Tribunal (“the Tribunal”) for the development and promotion of fair, efficient and competitive Markets in the Nigerian economy. Lastly, it seeks to facilitate access by all citizens to safe products; secure the protection of consumers’ rights in Nigeria; and other related matters.

1.2 Scope of Application

The proposed Act when passed into law will apply to all undertakings and all commercial activities within Nigeria.⁷

2. REVIEW OF THE PROPOSED ACT

2.1 Establishment of the Federal Competition and Consumer Protection Commission

Section 3 of the Bill creates the Federal Competition and Consumer Protection Commission whose functions range from the administration and enforcement of the proposed Act to developing rules, guidelines and regulations that would ensure its effective implementation. The functions and powers of the Commission provided for in sections 17 and 18 of the Bill are wide and far-reaching, giving the Commission a free hand to carry out its functions. The Commission will have a broad discretion in carrying out its duties. It will be empowered to make regulations: prohibiting anti-competitive agreements, misleading, unfair, deceptive or unconscionable marketing, trading and business practices;⁸ authorizing, with or without conditions, prohibiting or approving of mergers of which notice is received.⁹ Other powers conferred upon the commission include; the power to make regulations relating to the charging and collection of fees, levies, fines and the imposition of administrative penalties;¹⁰ as well as the power to

⁵ CAP C25, LFN, 2004.

⁶ Section 3 (1) of the bill.

⁷ Section 2 (1) of the Bill.

⁸ Section 17 (1) (g).

⁹ Section 17 (1) (k).

¹⁰ Section 18(1) (i).

prohibit the making or carrying out of an agreement or arrangement which relates to the Act in appropriate cases.¹¹

2.2 Establishment of the Competition and Consumer Protection Tribunal

Section 39 of the Bill establishes the Tribunal whose primary purpose is to adjudicate on conduct prohibited under the Act. The Tribunal has the power to hear appeals or review decisions of the Commission. Under the proposed Act, the Tribunal also has the power to hear appeals or review decisions from the exercise of the powers of any sector-specific agency in a regulated industry in respect of competition and consumer protection matters.¹² However section 48(2) provides that all appeals or requests for review of a sector specific authority shall first be heard and determined by the Commission before such appeals can be filed with the Tribunal.¹³ The Act further states that an order, ruling, award or judgment of the Tribunal shall be binding on parties and shall be registered with the Federal High Court for enforcement purposes only.¹⁴

If a party to a proceeding is dissatisfied with a ruling, award or judgment of the Tribunal, then the party may apply to the Federal High Court for judicial review, upon giving notice in writing to the secretary of the Tribunal and within thirty (30) days of the ruling, award or judgement of the Tribunal.¹⁵

There is a potential problem with the jurisdiction the proposed Act seeks to confer on the Tribunal. This arises from a possible conflict with the exclusive jurisdiction conferred on the Federal High Court by section 251(r) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). Section 251(r) confers exclusive jurisdiction on the Federal High Court in respect to “... *any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies...*”. The Commission being an agency of the Federal Government, it could be argued that the jurisdiction the proposed Act seeks to confer on the Tribunal to review decisions of the Commission is in conflict with the exclusive jurisdiction conferred on the Federal High Court.

¹¹ Section 18 (3) (a).

¹² Section 48 (1) (b).

¹³ Section 48 (2).

¹⁴ Section 55 (1) (2).

¹⁵ Section 56.

2.3 Restrictive Agreements

Sections 60-70 deal with Restrictive Agreements, which is defined as:

“...Any Agreement among undertakings or a decision of an association of undertakings that has the purpose of actual or likely effect of preventing, restricting or distorting competition in any market shall be unlawful and subject to section 61 of this Act, void and of no legal effect whatsoever.”¹⁶

Prohibited acts include fixing of selling and purchase price;¹⁷ dividing markets;¹⁸ limiting or controlling production or distribution of any goods and services;¹⁹ engaging in collusive tendering;²⁰ making the conclusion of an agreement subject to the acceptance of supplementary obligations which are not connected with the subject of the agreement.²¹ The Bill further expands on what these prohibitions entail in its provisions. The Bill provides an outline for authorized agreements, which are authorized by the Commission and do not fall under the restricted agreements provisions.

2.4 Abuse of Dominant Position

Section 73 of the Bill prohibits the abuse of a dominant position and lists factors that are taken into account in assessing market dominance. These factors include: the market share of the undertaking or undertakings concerned;²² financial power;²³ access to supplies or markets;²⁴ linkages with other undertakings;²⁵ legal or factual barriers to market entry by other undertakings;²⁶ actual or potential competition;²⁷ ability to shift supply or demand to other goods or services;²⁸ and the ability of the opposite market

¹⁶ Section 60 (1).

¹⁷ Section 60 (2) (a).

¹⁸ Section 60 (2) (b).

¹⁹ Section 60 2 (c).

²⁰ Section 60 2 (d).

²¹ Section 60 2 (e).

²² Section 73(2) (a).

²³ Section 73 (2) (b).

²⁴ Section 73 (2) (c).

²⁵ Section 73 (2) (d).

²⁶ Section 73 (2) (e).

²⁷ Section 73 (2) (f).

²⁸ Section 73 (2) (g).

side to resort to other undertakings.²⁹ Sections 74-76 outline the consequences and penalties of the abuse of a dominant position.³⁰

2.5 Monopoly

Where the Commission has grounds to believe that a monopoly situation might exist in relation to the production or distribution of goods and services of any description or in relation to the export of goods or services of any description from Nigeria, it will cause an investigation to be held into the sector of the economy or into particular types of agreements across various sectors to determine the extent of the situation in relation to the market. The monopoly provisions in the Bill, deal with how the Commission determines what constitutes a monopoly. They give the Commission the power to obtain information on monopolies, and also imbue the Commission with powers to order investigations into monopoly situations and outline the Tribunal's role in relation to the investigation of a monopoly situation.

2.6 Price Regulations

To regulate and facilitate competition, the President may from time to time, by order published in the Federal Gazette, declare that prices for goods and services specified in such order shall be controlled in accordance with the provisions of the Act.³¹

2.7 Mergers

Sections 93 - 104 cover the merger provisions under the proposed Act. The definition of Mergers is comprehensively addressed under section 93, subsection (1)(a) of which stipulates that *“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....”*. Section 93(1)(b) complementarily provides that mergers can be achieved by the purchase or lease of the shares, an interest or assets of the other undertaking; the amalgamation or other combination with the other undertaking in question or by joint venture. Subject to a notification threshold, a proposed merger shall

²⁹ Section 73 (2) (h).

³⁰ Where the Commission finds that an undertaking has abused its dominant position, it would prepare a report indicating the abuse and notify and direct that the undertaking immediately cease the abusive practice. The abuse of dominant position in a market is an offence under the Bill and the infringing undertaking shall upon conviction be liable to a fine of not less than ten per cent of its turnover in the preceding business year or such higher percentage as the court may determine under the circumstances of the particular case. A director of an undertaking found liable for an offence under subsection (1) of this section shall on conviction be liable to imprisonment or fine or both.

³¹ Section 89.

not be implemented unless it has first been notified to and approved by the Commission. When considering a merger or a proposed merger, the Commission will determine if it is likely to substantially prevent or lessen competition.³² Parties to small mergers are not required to notify the Commission unless the Commission requires them to do so or the parties of their own accord notify the Commission.³³ Parties to a large merger are required to notify the Commission of the Merger in the prescribed manner and form.³⁴ The Bill does not provide the threshold of small or large mergers, however section 93 (4) provides that it shall be stipulated by the Commission through Regulations. The Commission may direct any of its officers to investigate a merger.³⁵ The Commission also has the discretion to revoke its own decision approving a proposed merger or may conditionally approve a small or a large merger as the case may be.³⁶ A person aggrieved by the Commission's decision on a merger may file an application for review to the Tribunal and where it relates to the decision of the Tribunal, can appeal to the Federal High Court.³⁷

2.8 Regulated Industries

Although the Bill does not directly list the industries which it regulates, it broadly describes regulated industries as any undertaking that is affected by an order³⁸ relating to price regulation under the Bill.³⁹ This is basically all undertakings that deal with the provisions of goods or services in Nigeria.⁴⁰ The Commission is also empowered to routinely publish a ruling declaring the industries that will be regulated by the Bill, for avoidance of conflicts between the powers and functions of the Commission and the powers and functions of any other government agency.⁴¹ The Commission must ensure that it coordinates with any government agency identified in its ruling to harmonise

³² Section 95 (1).

³³ Section 96(1).

³⁴ Section 97.

³⁵ Section 99.

³⁶ Section 100.

³⁷ Section 104.

³⁸ Section 89 of the Bill empowers the President of Nigeria to periodically publish in the Federal Gazette an order declaring the controlled pricing of goods and services for the regulation and facilitation of competition only.

³⁹ Section 106(1). One of the concerns with this provision is that as the order will not be made contemporaneously with the proposed Act, this can potentially create a lacuna and will introduce uncertainty.

⁴⁰ Section 2(1) of the Bill provides that it applies to all undertakings, and within or having effect in Nigeria.

⁴¹ Section 106(3).

issues of jurisdiction over competition matters within the relevant industry and ensure uniformity with the provisions of the Bill.⁴²

In the event that there is a conflict regarding jurisdiction between the laws regulating a government agency and the provisions of this Bill, the said government agency and the Commission will commence negotiations and conclude within a year to determine who may exercise jurisdiction over the contested subject matter.⁴³ If a government agency and the Commission are able to reach an agreement, then the agency may exercise its jurisdiction based on the agreement. On the other hand, if the negotiation breaks down and no agreement is reached, the areas of disagreement will be referred to the Tribunal for resolution and such resolution shall be binding on the parties, the relevant government agency and the Commission.⁴⁴

An undertaking that is directly under the supervision of any regulated industry must not contravene the provisions of the Bill even if its provisions are in conflict with a regulating agency possessing jurisdiction over the regulated industry.⁴⁵ An undertaking that contravenes any provisions of the Bill must show that the conduct in question was ordered by a regulatory agency possessing jurisdiction over the regulated industry and the Commission may proceed to issue a cease-and-desist order prohibiting the undertaking concerned from further violating the provisions of the Act.

2.9 Consumer Rights

Part XV of the Bill lists an array of consumer rights ranging from but not limited to: right to information in plain and understandable language, right to disclosure of prices of goods and services, right to proper labelling and trade description, right to disclosure of re-conditioned or second hand goods, right to cancel advance bookings, right to examine goods, right to return goods and implied warranty as to quality.

2.10 Duties of Manufacturers, Importers, Distributors and Suppliers of Goods and Services

Part XVI of the Bill deals with the duties of manufacturers, importers, distributors and suppliers of goods and services. The Bill imposes duties to label goods properly and duty to withdraw hazardous goods from the market. It is obvious from the provisions of

⁴² Section 106(6).

⁴³ Section 106(7).

⁴⁴ Section 106(8).

⁴⁵ Section 107 (1).

the Bill that the protection and enforcement of consumer rights is of paramount consideration. The Bill does not only provide for the duties of manufacturers, importers and distributors but also imposes liabilities for supplying defective goods and for misrepresentation. Furthermore, the Bill departs from the general principle of law that *“he who alleges must prove”* and places a higher burden of proof on the supplier with a provision that where it is alleged that the goods supplied are not defective the onus of proof shall lie on the supplier.⁴⁶

The combined implication of the provisions of the Bill regarding consumer rights and duties for manufacturers is the creation of a free market where emphasis is placed on the consumer’s ability to choose from a range of goods or services based on quality. Individuals and corporations are generally inclined to invest in a free market where the consumer is the king and healthy competition is allowed to thrive.

2.11 Enforcement

An aggrieved consumer may settle any dispute with a supplier either by directly referring the matter to the supplier, referring the matter to an industry regulator, referring the matter to the Commission or by approaching a court of competent jurisdiction.⁴⁷ If the industry regulator concludes that it cannot reasonably resolve the matter between the parties, it may then file a complaint with the Commission. Where a dispute is handled by the Commission and a decision is reached, the decision can be registered in a court of competent jurisdiction as a consent order. This consent order may include an award of damages to the complainant.⁴⁸

2.12 Supremacy of the Act

By sections 105 and 107, the provisions of the Bill are supreme and shall override any other existing law (apart from the Constitution)⁴⁹ on matters relating to consumer protection and competition and the Commission shall have precedence over and above any other relevant government agency in these matters.

⁴⁶ Section 146.

⁴⁷ Section 147.

⁴⁸ Section 150.

⁴⁹ The Nigerian Constitution (Promulgation Act) 1999 CAP C 23 LFN 2004.

3. CONCLUSION

The Bill has encountered serious push back from existing government agencies as its provisions of necessity encroach on already existing laws currently being implemented by these agencies in relation to competition matters.⁵⁰ Although there is resistance from existing government agencies to the supremacy of the proposed Bill, we are hopeful that this comprehensive regulation will be passed into law, as it will have a positive impact on the Nigerian economy. In competitive markets, there is a level playing field and this will ensure that prices are driven down, that there is wider choice for consumers leading to an improvement in quality of goods and services and consequently to an increase in investments with the inflow of superior products. If the Bill is eventually passed into law and its policies are implemented, then it is anticipated that the increased scrutiny in the Nigerian competition space will yield positive effects such as curbing monopoly, price fixing etc.

The proposed Act gives the Commission and the Tribunal enormous decision-making powers, and in order to protect the economy, it is essential that the provisions relating to appointments to these offices are scrutinised and strengthened to ensure that only persons of established integrity, capacity and standing fill these posts and that the positions are adequately remunerated to remove any incentive for abuse.

On the whole, the Bill is quite promising and will position the country as a more formidable competitor in the world markets.

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⁵⁰ Section 107 (2).