

Cartels

Enforcement, Appeals & Damages Actions

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Nigeria

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Overview of the law and enforcement regime relating to cartels

The Federal Competition and Consumer Protection Act 2018 (“FCCPA” or “the Act”) is the primary legislation that governs and protects the rights of consumers and competition in Nigeria. The FCCPA established the Federal Competition and Consumer Protection Commission (“FCCPC” or “the Commission”). The Commission replaced the Consumer Protection Council, which was created under the Consumer Protection Council Act (“CPC Act”); the CPC Act was also repealed by the FCCPA. The function of the Commission includes, amongst others:

- (a) protecting and promoting consumers’ interest and welfare by providing consumers with a wider variety of quality products at competitive prices; and
- (b) prohibiting restrictive or unfair business practices that prevent, restrict, or distort competition or constitute an abuse of a dominant position of market power in Nigeria.

In 2022, the FCCPC also issued the Restrictive Agreement and Trade Practices Regulations, which set out principles and rules that aid the FCCPC in analysing restrictive agreements.

In addition to the above, certain regulators such as the Nigerian Civil Aviation Authority, the Nigerian Electricity Regulatory Commission and the Nigerian Communications Commission also prohibit collusive behaviour by entities within their respective sectors. For example, Section 91 of the Nigerian Communications Commission Act (“NCC Act”) provides that holders of licences under the NCC Act are prohibited from engaging in any conduct that has the purpose or effect of substantially lessening competition in any aspect of the Nigerian communications market.

Overview of investigative powers in Nigeria

The FCCPA authorises the FCCPC to carry out investigations or inquiries considered necessary or desirable in connection with any matter falling within the purview of the Act. The FCCPC is also empowered to summon and examine witnesses and call for documents in the discharge of its functions.

The FCCPC may, for the purpose of ascertaining whether any undertaking has engaged, is engaging or is likely to engage in conduct constituting or likely to constitute a contravention of this Act, require an authorised officer to: (a) enter and search any premises; and (b) inspect and remove from the premises any article, document, or extract in the possession or under the control of any person.

Generally, the above powers may only be exercised by an authorised officer of the FCCPC under the authority of a warrant issued by a Judge. However, where the FCCPC has grounds to believe that a civil or criminal violation of the provisions of the Act, or regulations made

under the FCCPA, was, is being or will be committed, it may take any interim measure, including authorising an officer to exercise the powers stated above pending the issuance of a warrant to that effect.

Overview of cartel enforcement activity during the last 12 months

Most of the FCCPC's activities are at the investigation stages, and there are few reported cases of enforcement of sanctions/penalties.

For example, on October 24, 2021, the FCCPA published a notice with respect to the launch of cartel and other anti-competitive conduct investigations into the shipping and freight forwarding industry – particularly on five companies. We are, however, not aware of any penalties that have been imposed on the targets of these investigations. Also, on December 14, 2022, the FCCPC published a notice with respect to the commencement of a broad investigation into certain segments of the importation, manufacture, assembly, and distribution of generators (“December Notice”). In the December Notice, the FCCPC stated that it has obtained a search warrant and order of the Federal High Court after sufficiently convincing the court that there is probable cause and *prima facie* evidence of infringement of the FCCPA. Further to this, the FCCPC called for feedback or experiences with respect to dealings related to pricings, multiples or duplicitous equipment models, import and/or consumer clearing practices amongst three companies identified in the notice.

Key issues in relation to enforcement policy

Whilst the FCCPA permits the FCCPC to enter and search any premises, inspect and remove from a premises any article, document or extract in the possession or under the control of any person in contravention of the FCCPA, the FCCPC's powers to conduct such searches may be challenged in a court of law where the power is improperly used. For example, we are aware of pending cases where a dawn raid by the FCCPC has been challenged.

Key issues in relation to investigation and decision-making procedures

A key issue that affects the investigation and decision-making procedure under the Act is that the FCCPA does not stipulate a specified timeline for an investigation but provides that an investigation by an inspector should be carried out as practically possible. The FCCPA also provides that the FCCPC is committed to providing speedy redress to valid complaints and puts its redress time between one to 45 days. Nonetheless, this is determined on a case-by-case basis and could exceed the given timeframe.

Leniency/amnesty regime

The Commission is empowered under the Act to make regulations for leniency programmes. Further to this, in 2022, the FCCPC issued the Federal Competition and Consumer Protection Leniency Rules 2022 (“Leniency Rules”). The Leniency Rules essentially provide guidance with respect to how the FCCPC considers leniency requests/applications and also seeks to enhance the FCCPC's investigation and enforcement action by encouraging undertakings that have engaged in conduct that violates Parts VIII (Restrictive Agreements) and XIV (Specific Offences against Competition) of the Act to cooperate in investigations and enforcement action in exchange for partial or full immunity and/or reduced penalties, monetary or otherwise.

Pursuant to the provisions of the Leniency Rules, the FCCPC may either grant a conditional leniency to an undertaking or a full/total/permanent leniency. A conditional leniency will be

granted where an undertaking applies for leniency to the FCCPC and the FCCPC is satisfied that the applicant has provided material information that will assist its investigations, fundings, decision and/or subsequent proceedings.

Additionally, an applicant seeking the benefit of leniency shall be required to meet the following conditions:

- (a) Cease to have further participation in the cartel or restrictive agreements from the time of its disclosure.
- (b) Provide vital disclosure in respect to certain provisions of the FCCPA.
- (c) Cooperate genuinely, fully, continuously and expeditiously throughout the course of investigation and proceedings before the FCCPC.

Section 5 of the Leniency Rules also provides that an applicant may be granted immunity of any penalty that would have ordinarily been imposed on the entity, if: (a) the applicant is the first to make a vital disclosure by submitting evidence of a cartel that enables the FCCPC to carry out a targeted investigation regarding the existence of a cartel and establishes a violation of Parts VIII and XIV of the Act (or Sections 59, 61 and 62 of the FCCPA for individual applicants); or (b) at the time of the application, the FCCPC did not have sufficient evidence to carry out the investigation or establish such a contravention.

It is important to also note that where an individual or corporate entity has been granted immunities from penalties in connection with a cartel in question, no other applicant will be granted immunity in respect of such cartel.

Administrative settlement of cases

Whilst there are no explicit provisions on the administrative settlement of cases under the FCCPA, Section 7 of the Administrative Penalties Regulations 2020 provides that in making a review of the penalty payable by an undertaking, the FCCPC shall have due consideration to specific factors including the undertaking or individual's desire to timeously reach a settlement with the FCCPC before prosecution or dissipation of the FCCPC's resources on investigation activities. Parties may also explore the dispute resolution mechanisms (such as arbitration, negotiation and mediation) available in Nigeria.

Third-party complaints

In addition to the investigative powers vested on the FCCPC in the FCCPA, investigations can also be triggered based on a complaint filed by an aggrieved consumer, an accredited consumer protection group and an industry sector regulator. Section 67 of the FCCPA specifically provides that any person who has suffered a loss as a result of any restrictive agreement or decision may make a complaint to the FCCPC and the FCCPC may, if it is satisfied that the circumstances of the case so warrant, exercise any of the powers granted to it under the FCCPA as it deems fit, including making interim orders mandating the cessation of the restrictive agreement pending the conclusion of investigation.

Civil penalties and sanctions

The FCCPA does not contain a clear provision on civil penalties and sanctions against cartels. However, it criminalises specific cartel activities such as price-fixing, conspiracy, and bid-rigging. Sections 67(2) and (3) and 146 provide a legal basis for private action for damages in relation to restrictive agreements and consumer rights, respectively. Sections 67(2) and (3) give the right of complaint to the FCCPC by anyone who has suffered loss as a result of any

restrictive agreement, and the FCCPC, if satisfied with the circumstances, may exercise any of its powers under the Act, inclusive of an interim cease and desist. Thus, a private person may rely on the provisions of the Section to institute an action for damages in connection with cartel activities involving restrictive agreements. Pursuant to Section 146(2) of the FCCPA, aggrieved consumers can directly approach the court to seek redress and enforce any right under the FCCPA, under a transaction or an agreement, or in relation to any dispute with an undertaking for supply of goods and services. In effect, a consumer directly affected by cartel activities may rely on the provision of the Section to seek specific redress in court.

Furthermore, Section 149(3) of the FCCPA empowers the FCCPC to issue a consent order to entities under investigation. The terms of the consent order may include an award of damages to the complainant. The FCCPC may, in the course of investigating cartel activities, make consent orders against the entities being investigated and such consent orders may include award of damages in favour of the relevant complainants. The Competition and Consumer Protection Tribunal (“CCPT”) established under the FCCPA is empowered to make certain orders and may also impose administrative penalties, which shall not exceed 10% of the target’s annual turnover and its exports from Nigeria during the preceding financial year. In 2020, the FCCPC issued the Administrative Penalties Regulations 2020, which provide administrative penalties that may be imposed by the Commission for violation of the provisions of the FCCPA. The administrative penalties are typically proportions of the annual turnover of the defaulting company, a statutory fine, or a fixed amount.

Right of appeal against civil liability and penalties

The FCCPA established the CCPT to, amongst others: (i) hear appeals from the review of any decision of the Commission taken in the course of implementation of the Act; and (ii) hear appeals from or review any decision from the exercise of the powers of any sector-specific regulator in a regulated industry in respect of competition and consumer protection matters. A person aggrieved by administrative penalties and sanctions imposed by the FCCPC may appeal the decision to the CCPT. Where a party is dissatisfied with the ruling, award or judgment of the CCPT, such person may appeal to the Court of Appeal within 30 days after the date on which the ruling, award or judgment was given.

The FCCPA requires that all appeals or requests for review of the exercise of the power of any sector-specific regulator shall first be heard and determined by the Commission before such appeals can lie before or be determined by the CCPT.

Criminal sanctions

Cartel activities (such as price-fixing, conspiracy, and bid-rigging) are criminalised by the FCCPA, and the penalty upon conviction is a fine not exceeding 10% of the annual turnover in the preceding business year for a corporate body. Where the offender is a natural person, the penalty upon conviction is a prison term not exceeding three years or a fine not exceeding 10 million naira, or both. Also, each director of the defaulting corporate body is liable to be proceeded against in person and, upon conviction, be dealt with in accordance with the penalty prescribed for a natural person.

Cooperation with other antitrust agencies

Section 105(4) of the FCCPA empowers the FCCPC to, amongst others, negotiate agreements with government agencies whose mandate includes enforcement of competition and consumer protection for the purpose of coordinating and harmonising the exercise of jurisdiction over

competition and consumer protection matters within the relevant industry or sector and to ensure consistent application of the provisions of the FCCPA. Further to this provision, the FCCPC often enters into cooperation arrangements with sector-specific regulators in investigating anti-competitive conducts in regulated industries. To effectively enforce extraterritorial application of the provisions of the FCCPA, the Commission also negotiates and enters into a memorandum of understanding (“MOU”) with antitrust agencies outside Nigeria.

Cross-border issues

The FCCPA has extraterritorial application in relation to certain conducts outside Nigeria. In this regard, Section 2(3) of the FCCPA provides that the provisions of the Act shall apply to conduct outside Nigeria by:

- (a) a citizen of Nigeria or a person ordinarily resident in Nigeria;
- (b) a body corporate incorporated in Nigeria or carrying on business within Nigeria;
- (c) any person in relation to the supply or acquisition of goods or services by that person into or within Nigeria; or
- (d) any person in relation to the acquisition of shares or other assets outside Nigeria resulting in the change of control of a business, part of a business or any asset of a business, in Nigeria.

Whilst the foregoing provisions prescribe that the Commission can validly sanction infractions of the FCCPA committed outside Nigeria, there have been challenges on the enforcement process for such conducts. In recent times, the FCCPC has negotiated and entered into an MOU with antitrust agencies outside Nigeria to enhance extraterritorial enforcement of the provisions of the FCCPA. For example, in a public notice issued on February 2, 2023, the FCCPA informed the public of the execution of an MOU with the Egyptian Competition Authority. The MOU is to address crucial issues that seek to progress both agencies’ engagements through joint investigation, capacity development, sharing of information and experiences to ensure that consumers and businesses derive the protection and benefits that are inherent in the economic expansion that the engagement enhances.

Developments in private enforcement of antitrust laws

Please see our response in the “Civil penalties and sanctions” section.

There is no publicly available case of private enforcement of antitrust laws in Nigeria.

Reform proposals

It is proposed that the FCCPA be amended to include express provisions on regulation of cartel activities. It is expected that the amendment should clearly set out what constitutes cartel conducts and specific penalties against cartels, and further provide a clear framework for civil actions/damages against cartel activities.

Furthermore, there have been arguments for the powers of the CCPT to be extended to authorise the Tribunal to impose criminal sanctions. Whilst the FCCPA empowers the CCPT to hear appeals from the decisions of the FCCPC, the Act limits the penalties that the CCPT may impose to administrative penalties. The implication is that the CCPT cannot validly determine criminal cartel activities and impose criminal sanctions. Although, it has been argued that criminal infractions of the provisions of the FCCPA can be tried at the Federal High Court in view of the provisions of the Constitution of the Federal Republic of Nigeria

1999, which grants exclusive criminal jurisdiction to the Federal High Court over corporate issues relating to industrial monopoly, government revenue, operation of companies under the Company and Allied Matters Act, banking, financial regulation and a number of other related commercial issues. Notwithstanding, to avoid any potential jurisdictional conflict, it may be prudent to extend the powers of the CCPT to impose penalties to also include imposition of criminal sanctions. This would ensure that civil and criminal breach of the provisions of the FCCPA can be heard by the CCPT, which is constituted by experts knowledgeable in antitrust matters.

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