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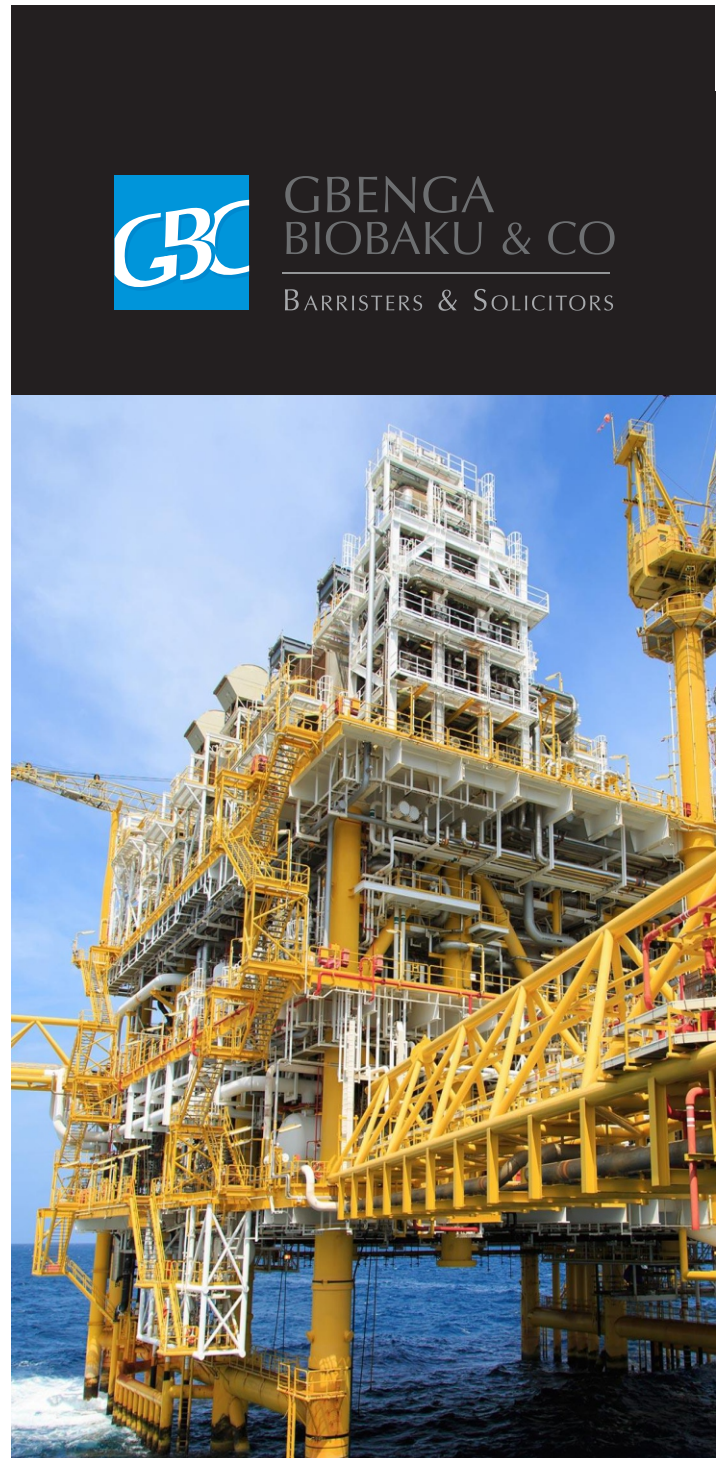
The Federal Competition and Consumer Protection Act 2018:

A giant stride in the right direction.



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Executive Summary of the Federal Competition and Consumer Protection Act 2018.



Before the Federal Competition and Consumer Protection Act (2018) (the "FCCP Act"), several attempts were made to create a legal framework for the regulation of competition in Nigeria none of which were successful until the FCCP Act was assented to by the Nigerian President earlier this year. It is noteworthy that Nigeria joined a regional competition authority-the ECOWAS Regional Competition Authority, in July 2018 before establishing its own national competition law.

The Federal Competition and Consumer Protection Commission (the "Commission") was established by the FCCP Act for the purpose of administering the Act and reviewing economic activities in Nigeria. Whilst the Competition and Consumer Protection Tribunal (the "Tribunal") was created by the FCCP Act to handle issues and disputes arising from the operations of the Act.

The FCCP Act also prohibits agreements in restraint of competition such as agreements for price fixing, price rigging, collusive tendering etc. (with few specific exemptions for collective bargaining agreements, employment, and soon).

What constitutes a dominant position is defined under the FCCP Act which goes on to outline the factors to be taken into consideration in assessing market dominance. The Act further provides for the consequences and penalties of the abuse of such dominant position.

In curtailing monopoly, where the Commission has any reason to believe that a monopoly situation exists, it has the power to investigate the sector of the economy concerned. Upon the conclusion of its investigation, it is to furnish the Tribunal with its findings and reports on the investigation. The Tribunal upon the receipt of such findings may make orders for the purpose of preventing or remedying the adverse effects of the monopoly situation. Prior to making any order, the Tribunal should publish a notice stating its intention to do make the order; indicating the nature of the provisions of the order and requesting any person or body corporate whose interest would likely be affected by the order to notify the Tribunal in writing

within Thirty (30) days from the date of publication.

The responsibility for the regulation of mergers now lies with the Commission and no longer the Securities and Exchange Commission ("SEC"). The Act does this by repealing the provisions of the Investment and Securities Act relating to mergers. The FCCP Act makes extensive provisions for the rights of consumers and sets out ways of enforcing such rights.

The FCCP Act gives supremacy to its provisions thereby making it subject only to the Constitution on all matters relating to consumer and competition protection. While the Act is to be construed as establishing a concurrent jurisdiction between the Commission and any government agency with jurisdiction over an industry to which the Act applies, the Commission will be deemed to have precedence over and above the relevant agency. However, the Commission shall negotiate agreements with all relevant government agencies involved in the enforcement of competition and consumer protection for the purpose of harmonizing the exercise of jurisdiction over such matters within the relevant sector.

Some industry watchers are of the opinion that competition laws can produce negative results, one of which is the protection of competitors who fall below industry standards, and more so, they argue that there is nothing wrong in having monopoly in some sectors of the market as this will encourage new businesses to provide even better services. In spite of the likely pitfalls, the FCCP Act will bring about major positive changes to the economy in terms of its provisions which seek to prohibit anti-competitive practices. Therefore, the implementation and enforcement of competition law is a very welcome change.

It is worth noting that without a functional Commission responsible for identifying the acts that can be classified as anti-competitive and the Tribunal responsible for handling issues that may arise from the application of the policies, the law effectively has little or no practical consequence.

The Nigerian Government enacted the Consumer Protection Council (CPC) Act in 1992 (amended in 2004) in order to prevent the exploitation of consumers and to eliminate hazardous products from the markets. The shortcomings of the CPC Act included its lack of the rights of the consumers and any provisions setting out the remedies available to an aggrieved consumer.

In order to improve consumer protection, competition law is essential to curtail arbitrary prices of goods. However, a codification of a set of rules to promote competition in Nigeria was non-existent up until recently and this could be attributed to the government's monopoly over several sectors. Recent privatization of some of these sectors brought about the competition of companies trying to appease consumers by bringing down the prices of goods and services.

There had also been several attempts made at drafting a bill to regulate competition law. In August 2015, the Federal Competition and Consumer Protection Bill, 2015 was introduced by the National Assembly and successfully, on the 5th of February 2019, President Muhammadu Buhari assented to the Federal Competition and Consumer Protection Act 2018 ("FCCP Act") which repealed the Consumer Protection Council Act (CPCA) (Cap. 25, Laws of The Federation 2004) as well as Sections 118-128 of the Investment & Securities Act 2007.¹

The FCCP Act seeks to develop and promote fair, efficient and competitive markets in the Nigerian economy, facilitate access by all citizens to safe products and secure the protection of rights for all consumers in Nigeria. We have summarized the major provisions of the Act below:

1. Establishment of the Federal Competition and Consumer Protection Commission

Section 3 of the FCCP Act establishes the Federal Competition and Consumer Protection Commission (the "Commission") which is charged with, amongst other things, the responsibility of initiating broad based policies and reviewing economic activities in Nigeria to identify, anti-competitive, anti-consumer protection and restrictive practices which may adversely affect the economic interest of consumers and makes rules and regulations.² The Commission is also empowered to eliminate anti-competition agreements, misleading, unfair, deceptive or unconscionable marketing, trading and business practices under the FCCP Act.³

2. Establishment of the Competition and Consumer Protection Tribunal

Section 39 of the FCCP Act also introduces and establishes the Competition and Consumer Protection Tribunal (the "Tribunal") to handle any issues that arise from the application of the Act and try violations. The Tribunal is also empowered to hear appeals and review decisions of the Commission taken in the course of implementing any of the provisions of the FCCP Act. An order of the Tribunal shall be binding on the parties involved and be registered with the Federal High Court for enforcement purposes. A party that is dissatisfied with a ruling, award or judgement of the Tribunal may appeal to the Court of appeal for judicial review upon giving notice to Secretary to Tribunal within Thirty (30) days after the ruling, award or judgment is given.⁴

3. Prohibition of Agreements in Restraint of Competition

Section 59 of the FCCP Act specifically prohibits agreements in restraint of competition. This provision states that "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 is unlawful and, subject to Section 61 of this Act, void and of no legal effect."

Some of the prohibited acts include direct or indirect fixing of purchase and selling price of goods and services, dividing markets, limiting and controlling production or distribution of any goods or services. Section 60 outlines the exceptions to restrictive agreements in form of authorized agreements which are allowed by the Commission such as agreements that improve the production or distribution of goods and services while allowing consumers a fair share of the resulting benefits. Section 68 also lists out the exceptions to restrictive agreements as follows:

- (a.) Combinations or activities of employees for the reasonable protection of employees;
- (b.) Arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing minimum terms and conditions of employment;
- ©.) Activities of professional associations designed to develop or enforce standards of professional qualifications;
- (d.) A contract or an arrangement amongst partners in so far as it contains provisions in relation to the terms or conduct of the partnership or in relation to competition between the partnership and a party to the Contract;
- (e.) A contract of service in so far as it contains provisions by which a person agrees to accept restrictions as to 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 (2) years;

- (f.) A 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 solely for the protection of the purchases in respect of the goodwill of the body corporate.

4. Prohibition of Minimum Resale price maintenance

Under the FCCP Act, the fixing of terms or conditions in an agreement for the sale of any goods and services is void to the extent that it purports to establish minimum prices to be charged on the resale of goods and services in Nigeria⁵. However undertakings and associations are not precluded from notifying dealers or publishing prices recommended as appropriate for the resale of goods and services supplied or to be supplied by that undertaking. Section 64 of the Act also specifically states that patented goods or goods made by a patented process will come under the purview of the provisions of Section 63. The Section⁶ provides that the notice of any term or condition which is void under Section 63 of the FCCP Act would be of no effect for the purpose of limiting the rights of a dealer to dispose of patented goods without infringement of the patent. However, the provisions of the FCCP Act will not affect the validity of an agreement involving a licence granted by the proprietor of a patent or a licensee under such licence or any assignment of a patent so far as it regulates the price at which goods produced or processed by the licensee may be sold by him.⁷

5. Abuse of Dominant Position

By the FCCP Act, a dominant position in a dominant position exists in a market where an undertaking enjoys a position of economic

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Quoted from Prohibition of Agreements, on Page 5

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strength enabling it to prevent effective competition being maintained on the relevant market and having the power to behave to appreciable extent independently of its competitors, customers and ultimately consumers.⁸ An undertaking is also considered to be in a dominant position if it is able to act without taking account of the reaction of its customers or competitors.⁹ Other factors which may be taken into account in assessing market dominance include financial power, access to supplies or market, linkages with other undertakings, legal or factual barriers to market entry by other undertakings, actual or potential competition, ability to shift supply or demand to other goods or services and the ability of the opposite market side to resort to other undertakings. The abuse of a dominant position is prohibited under Section 72 of the FCCP Act such abuse occurs when an undertaking in a dominant position:

- (i.) Charges an excessive price to the detriment of consumers;
- (ii.) Refuses to give a competitor access to an essential facility when it is economically feasible to do so;
- (iii.) Engages in an exclusionary act if the anti-competitive effect of that act outweighs its technological efficiency and other pro-competitive gains;
- (iv.) Engages in any of the following exclusionary acts such as:
 - (a.) Inducing a supplier or customer not to deal with a competitor;
 - (b.) Refusing to supply scarce goods to a competitor when supplying the goods is economically feasible;
 - (c.) Selling goods or services on the condition that the buyer purchase separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;
 - (d.) Selling goods or services below their

- marginal or average cost; or
- (e.) Buying up a scarce supply of intermediate goods or resources required by a competitor.

It should be noted that an undertaking or firm in a dominant position may engage in the exclusionary acts listed in (a) - (e) above where it can show that the technological efficiency of such acts and other pro-competitive gains outweighs the anti-competitive effects of such acts. Sections 73-74 outline the consequences and penalties of the abuse of a dominant position which inter alia include:

- a) A fine of not less than 10% of an offending company's turnover in the preceding business year or such higher percentage as the court may determine under the circumstances of the particular case;¹⁰ This penalty is applicable to a company that fails to cease an abusive practice even after receiving an order of the Commission to that effect.¹¹
- b) Imprisonment for a term not exceeding three (3) years, or to payment of a fine not exceeding N50,000,000.00 or both for any Director of a company found liable of the continuous abusive practice upon conviction.¹²

6. Power of the Commission to investigate a monopoly situation

Where it appears to the Commission that there are grounds for believing that a monopoly situation may exist in relation to the production or distribution or export of goods or services of any description in Nigeria, it shall 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.¹³ Section 77 deals with how the Commission determines what constitutes a monopoly and the extent to which it

8. Sec 70(2) of the FCCP Act
9. Sec 70(1) of the FCCP Act
10. Sec 73(3) of the FCCP Act

11. Sec 74(1) of the FCCP Act
12. Sec 74(2) of the FCCP Act
13. Sec 76 of the FCCP Act

has an effect on competition in a market in Nigeria. A person or body corporate may make a request for a monopoly investigation to the Commission which request shall be accompanied by an affidavit deposing to the fact giving rise to the request. A monopoly investigation may also be referred to the Commission by a court, federal, state or local government agency.¹⁴ Upon investigation, the Commission shall furnish to the Tribunal reports on completed monopoly investigations at such times or intervals as maybe agreed from time to time between the Tribunal and the Commission.¹⁵ The FCCP Act further outlines the powers of the Tribunal in relation a report on a monopoly.¹⁶

7. Price Regulation/Declaration of Price

In order to regulate and facilitate competition only, the president may from time to time by order published in the Federal Gazette, declare that the prices for goods and services specified in the order shall be controlled in accordance with the provisions of the Act. However, an order shall not be made by the President prior to the submission by the Commission of a report assessing the state of competition in the relevant market and providing recommendations on the desirability and likely effects of implementing price regulations or other remedies.¹⁷ An order by the President shall identify the goods and services to which it pertains by the description of the goods and services, the kind of class for the said goods, the market to which the said goods belong and the sector of the economy affected or likely to be affected by the order.

8. Mergers

Sections 92-103 of the FCCP Act deal with the merger provisions which were formerly under Sections 118-128 of the Investment and Securities Act (2007). 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.¹⁸ A merger contemplated in this sense can be achieved through (1.) the purchase or lease of the shares, an interest or assets of the other undertaking and/or (2.) the amalgamation or other combination with the other undertaking in question and/or (3) a joint venture.¹⁹ For the purpose of the Act, an undertaking has control over the business of another undertaking if it:

- (a.) Beneficially owns more than one half (more than fifty percent) of the issued share capital or assets of the undertaking;
- (b.) Is entitled to cast a majority of the votes that may be cast at a general meeting of the undertaking;
- (c.) Is able to appoint or 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.) Has the ability to materially influence the policy of the undertaking.²⁰

The Act empowers the Commission to makes regulations in determining the threshold for small and large mergers and the method for calculating the annual turnover to be applied in relation to the threshold.²¹ Subject to a notification threshold, a proposed merger shall not be implemented unless it has first been notified and approved to the Commission.²² When considering a merger or a proposed merger, gain or if it can or cannot be justified on substantial public interest grounds.²³

Parties to a small merger are not required to notify the Commission of the merger unless the Commission the same. However within six (6) months after the implementation of such small merger, the Commission may require the Parties of such merger to notify it of such merger if in the opinion of the Commission, the merger may substantially lessen competition.²⁴ It should be noted that parties to a small merger may voluntarily notify the Commission of such merger at any time.²⁵

14. Sec 82 of the FCCP Act

15. Sec 84 of the FCCP Act

16. Sec 86 of the FCCP Act

17. Sect 88(3) of the FCCP Act

18. Sec 92(1)(a) of the FCCP Act

19. Sec 92(1)(b) of the FCCP Act

20. Sec 92 (2) of the FCCP Act

21. Sec 93(2) of the FCCP Act

22. Sec 93(1) of the FCCP Act

23. Sec 94(1)(a) & (b) of the FCCP Act

24. Sec 95(3) of the FCCP Act

25. Sec 95(2) of the FCCP Act

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The Act empowers the Commission to make regulations in determining the threshold for small and large mergers and the method for calculating the annual turnover to be applied in relation to the threshold.

Quoted from Mergers, on Page 10

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On the other hand, Parties to a large merger are mandated to notify the Commission of the merger.

²⁶ The notification of the merger shall be published by the Commission within Five (5) business days after receipt by the Commission. The parties to a large merge are not allowed to implement the merger unless it is approved by the Commission.²⁷ The Commission also has the discretion to revoke its own decision approving a proposed merger or it may conditionally approve a small or large merger if the decision was based on wrong information for which a party to the merger is responsible or if the approval was obtained by deceit or if the parties fail to implement the merger within Twelve (12) month after approval or if the parties involved breach an obligation attached to the approval of the merger.²⁸

A person who is aggrieved by the decision of the Commission on a merger may file an application for review before the Tribunal and where a decision relates to a decision of the Tribunal, can appeal to the Court of Appeal.²⁹

9. Regulated Industries

The FCCP Act does not specifically list out the industries to which the Act applies but states that the operation by an undertaking in an industry subject to the authority of a regulatory agency set up by an Act of the National Assembly or Laws of a State is sufficient to make such an undertaking a member of a regulated industry under the purview of the FCCP Act. the Commission shall determine if it is likely to substantially lessen competition and in doing this, the Commission shall consider the whether or not the merger will result in any technological efficiency or other pro-competitive. Under Section 105(2) of the FCCP Act, in so far as the Act applies to an industry that is subject to the jurisdiction of another government agency by the provisions of any other law, in matters which affect competition and consumer protection, the FCCP Act is to be construed as establishing a concurrent jurisdiction between the Commission and the

relevant government agency, with the Commission having precedence over and above the relevant government agency. The Commission gives recognition to the government agencies regulating specific industries for the avoidance of conflicts between the powers and functions of the Commission and the powers and functions of the said government agencies.³⁰ The Commission must negotiate agreements with any government agency whose mandate includes enforcement of competition and consumer protection in order to harmonise issues of jurisdiction over competition matters within the relevant industry.³¹ The relevant government agency is also mandated to commence negotiation of agreements with the Commission and conclude within a year to determine who may exercise jurisdiction by way of such an agreement.³² If negotiations are inconclusive, or no agreement is reached, the areas of disagreement shall be referred to the Attorney-General and the Minister of Justice in the case of a large merger, for advice on public interest grounds.

10. Specific Offences against Competition

The FCCP Act stipulates offences against competition under Part XIV.³³ Some such offences include Price-fixing, Conspiracy, Bid-Rigging, giving of false or misleading information.

i. Price-fixing³⁴

The Act forbids any undertaking from influencing or attempting to influence the increase the price at which another undertaking supplies or offers to supply goods and services, by means or agreement, threats, promise of any other means. Companies are also not allowed to refuse to supply or discriminate against another company because of the latter's pricing policy. This however does not apply to companies that have a principal-agency relationship.

26. Sec 96(1) of the FCCP Act
27. Sec 96(4) of the FCCP Act
28. Sec 99(1) of the FCCP Act
29. Sec 103 of the FCCP Act
30. Sec 105(3) of the FCCP Act

31. Sec 105(4) of the FCCP Act
32. Sec 105(5) of the FCCP Act
33. Sec 107-113 of the FCCP Act
34. Sec 107 of the FCCP Act

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The Commission gives recognition to the government agencies regulating specific industries for the avoidance of conflicts between the powers and functions of the Commission and the powers and functions of the said government agencies.

Quoted from Regulated Industries, on Page 12

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ii. Conspiracy³⁵

Under the FCCP Act, companies are prohibited from conspiring to unduly limit the facilities for the transportation, production, manufacturing or dealing or supply of any goods and services or to unreasonably enhance the price of any goods and services. The Act however permits an arrangement which relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public in the practice of a trade or profession relating to the service or in the collection and dissemination of information relating to the service.

iii. Bid-Rigging³⁶

No two or more undertakings are allowed to enter into any agreement whereby one or more of them, agree not to submit a bid in response to a request for tenders. Undertakings are only allowed to enter into such pre-bid agreements when they are affiliates of each other.

11. Consumer Rights

Part XV of the FCCP Act makes provisions for the rights of consumers, some of which are:

- (a.) Right to information in plain and understandable language;³⁷
- (b.) Right to disclosure of price of goods or services;³⁸
- (c.) Right to proper labelling and trade description;³⁹
- (d.) Right to disclosure of re-conditioned or second-hand goods;⁴⁰
- (e.) Right to cancel advance reservations, bookings or orders;⁴¹
- (f.) Right to examination of goods⁴²
- (g.) Right to return goods which are defective or unsafe or unsuitable for the purpose for which they are bought);⁴³
- (h.) Right to fair dealing;⁴⁴
- (i.) Right to reasonable and fair contract terms of the supply of goods and services;⁴⁵
- (j.) Right pertaining to quality and safety of

goods and services (timely performance and goods free of defects);⁴⁶

- (k.) Right to Safe and good quality goods (goods suitable for their intended purpose; in good working order and free of defects, durable goods);⁴⁷
- (l.) Implied warranty of quality (Fit for purpose, free of defect and durability).⁴⁸

It is noteworthy that the former Consumer Protection Council Act does not enlist these consumer rights as specified under the FCCP Act. The FCCP Act is therefore a regulatory response to a market failure whereby individuals and corporations are required to deal fairly in a free market where consumer is king and competition is allowed to thrive.

12. Duties of Manufacturers, Importers Distributors and Suppliers of Goods and Services

Part XVI of the FCCP Act covers the duties of Manufacturers, Importers Distributors and Suppliers of Goods and Services which include the duties to label goods properly and withdraw hazardous goods from the market.⁴⁹ The FCCP Act also imposes liabilities for the supply of defective goods, liability for the breach implied obligations by law and liability for misrepresentation.⁵⁰ The Act places the onus of proof for the supply of defective goods or services on the supplier by stating that "where it is alleged that the goods or services are defective, the onus of proof shall lie on the undertaking that supplied the goods or services."⁵¹ This appears to negate the general principle of law that "he who alleges must prove" or "the necessity of proof always lies with the person who lays charges". The implication of the combined provisions under consumer rights is aimed at safeguarding and protecting consumer rights and interest, ensuring public health and safety in the market place.

35. Sec 108 of the FCCP Act

36. Sec 109 of the FCCP Act

37. Sec 114 of the FCCP Act

38. Sec 115 of the FCCP Act

39. Sec 116 of the FCCP Act

40. Sec 117 of the FCCP Act

41. Sec 120 of the FCCP Act

42. Sec 121 of the FCCP Act

43. Sec 122 of the FCCP Act

44. Sec 124 of the FCCP Act

45. Sec 127 of the FCCP Act

46. Sec 130 of the FCCP Act

47. Sec 131 of the FCCP Act

48. Sec 132 of the FCCP Act

49. Sec 134-135 of the FCCP Act

50. Sec 136-140 of the FCCP Act

51. Sec 145 of the FCCP Act

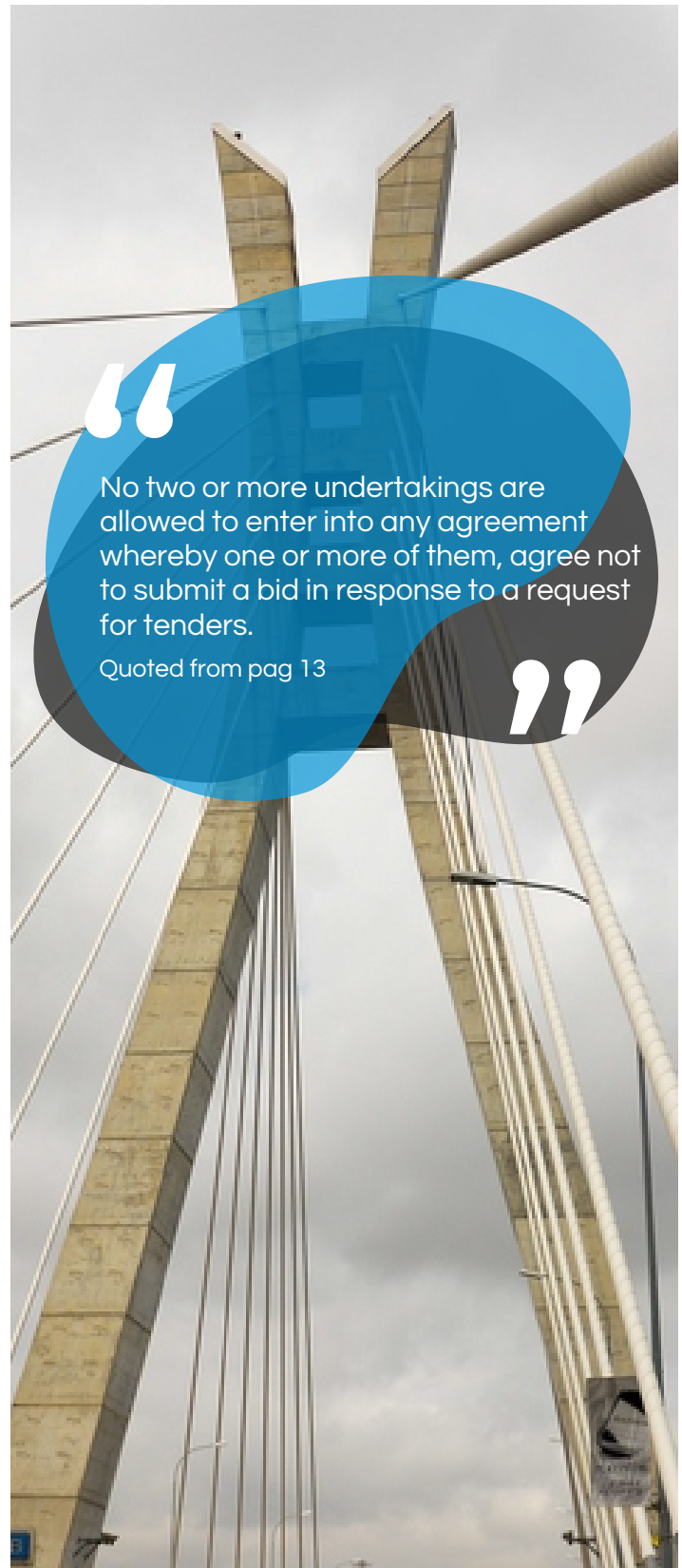
13. Enforcement

A consumer may seek to enforce any right or settle any dispute with a supplier that supplied the goods or services by (1.) referring the matter directly to the supplier of the goods or (2.) referring the matter to the applicable industry sector regulator with jurisdiction (3.) filing a complaint directly with the Commission.⁵² An aggrieved consumer is also allowed to approach a court with appropriate jurisdiction to seek redress.⁵³ Where an industry regulator concludes that there is no reasonable possibility of the parties resolving their dispute through the process provided for in its code, the industry sector regulator may terminate the process by notice to the Parties and the party that filed the complaint may refer the matter to the Commission.

Where a matter has been investigated and handled by the Commission, and a decision is reached on the proposed terms of an appropriate order, the agreed terms shall be made on the order of the Commission and the Commission, may, if it deems fit, register the order in a court of competent jurisdiction and the court may thereafter, confirm the agreement as a consent order.⁵⁴ Such consent order may include an award of damages to the complainant.⁵⁵

14. Supremacy of the FCCP Act

Section 104 of the FCCP Act gives supremacy to the provisions of the Act by stating "notwithstanding the provisions of any other law but subject provisions of the Constitution of Nigeria, in all matters relating to competition and consumer protection, the provisions of this Act, shall override the provisions of any other law."



52. Sec 146(1) of the FCCP Act
53. Sec 146(2) of the FCCP Act
54. Sec 149(1) of the FCCP Act
55. Sec 149(3) of the FCCP Act

15. Conclusion

"...trade is a social act. Whoever undertakes to sell any description of good to the public, does what affects the interest of other persons, and of society in general; and thus his conduct, in principle, comes within the jurisdiction of society ...both the cheapness and the good quality of commodities are most effectually provided for by leaving the producers and seller perfectly free, under the sole check of equal freedom to the buyers for supplying themselves elsewhere."⁵⁶ Like all competition laws such as the UK Competition Act 1998 and Enterprise Act 2002 and the US Sherman Act 1890 and Clayton Act 1914, the main task of the Federal Competition and Consumer Protection Act 2018 (apart from consumer welfare and public interest), amongst others, is to make provisions that prohibit agreements or practices which restrict free trading and competition, ban abusive behaviour by firms or companies dominating a market e.g. predatory pricing, control monopolies, supervise mergers and acquisitions of large corporations including transactions that are considered a threat to a competitive process. The FCCP Act gives the Commission and the Tribunal enormous powers also similar to that of the Competition and Markets Authority which enforces competition laws on behalf of the public in the United Kingdom. It is hoped that the FCCP Act will strategically position Nigeria as a country where the concept of "free trade" will thrive amongst world markets.

Disclaimer

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