THOUGHT LEADERSHIP INSIGHTS

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VIRTUOUS OR VICIOUS CYCLE?

NIGERIAN MERGERS & ACQUISITION FRAMEWORK UNDER THE FEDERAL COMPETITION AND CONSUMER PROTECTION ACT 2019

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Mergers and Acquisitions (M&As) have largely been beneficial to the Nigerian economy especially in recent times, as banking consolidation amongst others, has shown. Nigeria reportedly had the most active M&A market in Africa in 2018, with a total of 59 deals valued at US$4 billion.[1] The banks that have emerged post the consolidation era, are now on a more competitive footing with their peers in Africa.[2] M&A played a key role in their survival and eventual emergence as notable continental players.

Conversely, mergers may result in a few unfavorable outcomes, including a tendency to stiffen competition, *vide* resulting bigger entities with larger market share. Meanwhile, Nigeria's anti-trust provisions were previously considered inadequate, and efforts to enact comprehensive competition legislation were in the pipeline for decades. However, on 5th February 2019, the ***Federal Competition and Consumer Protection Act No. 1 of 2019 (FCCPA)*** was enacted, with an intent to significantly address some of the antitrust concerns. Incidentally, the ***FCCPA*** itself has given cause for concern to commentators and stakeholders.

1 Fitch Solutions, ***'Dealmakers Wooed By Africa's M&A Potential'***, *03.04.2019*: https://www.fitchsolutions.com/financial-institutions/dealmakers-wooed-africas-ma-potential-03-04-2019, (accessed 12.05.2019).

2 Success I. Kanu, and Felicia A. Anyanwu, ***'Mergers, Acquisitions and Banking Sector Performance in Nigeria: A Post Consolidation Review'***, *Journal of Economics and Sustainable Development, Vol.6, No.22 (2015)*: https://pdfs.semanticscholar.org/e353/1cb97a4ef3e56abebee4af0dbc391d6b6a6a.pdf (accessed 11.05.2019).

Will the enactment of the ***FCCPA*** result in another vicious cycle in Nigeria – is it another potentially ineffective legislation that does not really deal with the pressing issues? In addressing this thematic question, this article provides a brief overview of the pre-***FCCPA*** regulatory framework and analyses the ***FCCPA*** in the light of its M&A provisions,[3] in order to reveal whether the provisions have filled the lacunas inherent under the former regulatory landscape, as exemplified by the ***Investment and Securities Act (ISA).*** [4]

Synopsis: The Pre-FCCPA Regulation of M&As in Nigeria

Prior to the ***FCCPA***, the M&A regulatory framework in Nigeria was constituted largely by two primary legislation: the ***ISA***[5] and the ***Companies and Allied Matters Act*** (***CAMA***).[6] Others are sectoral such as the ***Nigerian Communications Commission Act***[7] ***(NCC Act)*** and ***Petroleum Act (PA)***[8] in addition to other generally applicable statutes like tax legislation, such as ***Companies Income Tax Act (CITA).***[9]

Statutory provisions regulating M&As evolved from provisions of the ***Securities Exchange Commission (SEC) Act 1979***[10] which was repealed by ***SEC Act 1988,***[11] itself repealed by ***ISA 1999.***[12] Finally in 2007, the ***ISA 2007***[13] was enacted. The latter empowered SEC to review, approve and regulate mergers,[14] until the ***FCCPA*** stripped SEC of this role,[15] effective 30th January 2019. Thus, the regulatory oversight for M&As in Nigeria is now vested in Federal Competition and Consumer Protection Commission (FCCPC). Apparently, the purpose of ***FCCPA*** is to harmonize all the sector specific anti-trust provisions,[16] *vide* its own umbrella provisions.

Pre-***FCCPA,*** powers potentially exercisable by SEC to prevent the stiffening of competition include ordering the breakup of existing companies into separate entities where it was determined that the company's dealings will prevent competition and result in monopoly.[17] ***SEC*** was also vested with the power to determine, based on the information available to it, what would be considered anti-competitive, for the purpose of taking requisite action, such as ordering break-up of the subject entity.[18] ***Rule 432(3) SEC Consolidated Rules and Regulations 2013 as amended (SEC Rules)*** describes what will be considered as business practices capable of restraining competition,[19] whilst ***Rule 423 SEC Rules*** requires prior approval of SEC in order to consummate M&A transactions.

The FCCPA: M&A and Anti-Trust Highlights

The ***FCCPA*** introduces a consolidated anti-competition legal regime for Nigeria, to replace hitherto fragmented sector specific laws.[20] It also provides some innovative guidelines for achieving mergers as well as promotes competition, some of which were absent in the ***ISA.*** These include:

Addition of Joint Venture (JV) as an Instance for Creating a Merger

There are now more clearly defined categories of achieving

3 ***Sections 93-103 FCCPA.***
4 ***Cap.I24, Laws of the Federation of Nigeria (LFN) 2004.***
5 ***Sections 118-128 ISA previously*** governed mergers before it was repealed by the ***FCCPA.***
6 ***Sections 538-539 CAMA*** (Arrangement on Sale and Arrangement and Compromise which are corporate restructuring tools that could result to M&As).
7 ***Cap. N97, LFN 2004.***
8 ***Cap. P10, LFN 2004.***
9 ***Cap. C21, LFN 2004.*** Other applicable tax legislation include but are not limited to: ***Capital Gains Tax Act Cap. C1, LFN 2004, Value Added Tax Act Cap. V1, LFN 2004, Stamp Duties Act Cap. S8, LFN 2004.***
10 Originally enacted as ***SEC Decree No. 71 of 1979.***
11 ***Cap. 406, LFN 1990.***
12 For a historic analysis, see Afolabi Elebiju, '***The Investment and Securities Act of 1999: An Overview of Anti-Trust Considerations in the Regulations of Mergers in Nigeria'***, [2001], JIFM273; [2001] ICCLR 230; (2001) 22 BLR 116.
13 ***Cap.I24, LFN 2004.***
14 ***Section 8(1) ISA 1999.***
15 See ***section 93 FCCPA*** which repealed ***(sections 118 - 128) ISA*** M&A provisions.
16 ***Section 1(e) NCC Act*** empowers the NCC to ensure fair competition in all sectors of the Nigerian communication industry; ***Section 82 Electric Power Sector Reform Act, Cap. E7, LFN 2004*** requires the Nigerian Electricity Regulatory Commission (NERC) to have a continuing responsibility to monitor the Nigerian electricity supply industry in regard to its potential for additional competition.
17 Antitrust measures have taken place in the United States (US) where Standard Oil was required to break up into thirty four (34) companies some of which include Exxon Mobil and Chevron etc. See '***Millennium Issue: Antitrust Standard Ogre'***, *The Economist*, 23.12.1999: https://www.economist.com/business/1999/12/23/standard-ogre, (accessed 24.06.2019).
18 ***Section 128 ISA*** provides: *"(1) Where the Commission determines that the business practice of a company substantially prevents or lessens competition, the Commission may in the public interest, order the break- up of the company into separate entities in such a way that its operations do not cause a substantial restraint of competition in its line of business or in the market.(2) Before the break-up order becomes effective, the affected company shall have been notified by the Commission and given a specified time within which to make representation to the Commission.(3) Thereafter the Commission shall refer the order to the Court for sanctioning."*
19 ***Rule 432(3)*** provides: *"The following shall be considered as business practices capable of restraining competition and creating monopoly: a. The entry into agreements with other companies or business undertakings which have as their object or effect the prevention, restriction or distortion of competition in any part of the Nigerian market, and in particular those which: i. Directly or indirectly fix purchase or selling prices or any other trading conditions; ii. Limit or control production, markets, technical development, or investment; iii. Share markets or sources of supply; iv. Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; v. Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. b. The abuse by companies or business enterprises of dominant positions achieved by them in any part of the Nigerian Market irrespective of how such positions of dominance were achieved. Such abuse may, in particular … [be any of four enumerated categories]"*
20 It is unlikely that this will repeal the sector specific M&A provisions like the Nigeria Communications Act and the Petroleum Act. This would simply serve as extra antitrust guards.

mergers. ***Section 92 FCCPA*** provides that: *"(a) a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking; and (b) a merger contemplated in paragraph (a) of this subsection may be achieved in any manner, including through ... a joint venture."* The upside, if at all, is that JVs will now fall under the scrutiny of the FCCPC (Federal Competition and Consumer Protection Commission) and competition checks. However, we believe the downside is weightier.[21]

Omission of Intermediate Mergers

Section 92(4) FCCPA only refers to small and large mergers, as opposed to the financial thresholds under the ***ISA*** for small, intermediate and large mergers.[22] There is currently a lack of clarity as to the financial thresholds of the two merger categories. This is because the thresholds are yet to be stipulated by the FCCPC. *Section 93(3)(b) FCCPA* requires the Commission to invite the public to provide written submissions on the proposed threshold for mergers. The FCCPC should set the thresholds without delay in order to give effect to ***section 95 FCCPA*** on small mergers.

Leeway Given to Small Mergers

By virtue of ***Section 95 FCCPA,*** small mergers need not notify the FCCPC and parties may go ahead to implement the merger without approval. This was meant to reduce bureaucratic requirement for smaller transactions, in furtherance of ease of doing business – especially as small M&A deals presumably have nil or minimal anti-trust impact. Small mergers under the provisions of ***ISA***[23] were excluded from SEC's compulsory pre-merger notification.

Federal High Court vs. FCCPC Role in Merger Review

It appears that the Federal High Court (FHC) no longer has a clear cut role in the merger regulatory process following *inter alia*, repeal of ***ISA's*** M&A provisions conferring jurisdiction on FHC, without ***FCCPA*** re-enacting same. Another dimension is FHC jurisdiction on schemes of arrangement under ***CAMA***. Has this been swept away by implied repeal, given the supremacy of ***FCCPA*** provisions?[24] We discuss these issues in more detail below.

The FCCPC: The Corporate Shield of the Consumer?

The objectives of the ***FCCPA*** are to promote and maintain a competitive market in Nigeria; promote economic efficiency; protect consumer interests and welfare; prohibit restrictive and unfair business practices and ensure the development of the Nigerian economy.[25] According to its explanatory memorandum, the ***FCCPA*** is enacted *"for the*

21 A failure to define the type of JV that would amount to a merger introduces ambiguity. Thus, this needs to be clarified more as there should be parameters that differentiate a regular JV from a JV that would amount to a merger. Ideally, FCCPC ought not to be burdened with oversight over JVs. Giving FCCPC this role may hurt and discourage transactions that would have been optimally structured as JVs and the attendant hitherto minimal compliance requirements. The idea behind the ease of doing business is to enhance sustainable economic growth. Additional bureaucratic requirement for JVs will ultimately detract from this: Nigeria was ranked 146 out of 190 countries in the World Bank's 2019 *Ease of Doing Business* report. (World Bank, '***Doing Business 2019 Training for Reform***': https://www.worldbank.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf, (accessed 25.06.2019)).

22 ***Section 120(4) ISA*** stipulated: *"...the lower threshold shall be N500,000,000, while the upper threshold shall be [N5,000,000,000."* However this thresholds were further clarified by ***Rule 427 SEC Rules*** *"The lower threshold for a small merger shall be below N1,000,000,000.00 of either combined assets or turnover of the merging companies, the intermediate threshold shall be between N1,000,000,000.00 and N5,000,000,000.00, while the upper threshold shall be above N5,000,000,000.00."*

23 ***Section 122 ISA*** *"A party to a small merger is not required to notify the Commission of that merger unless the Commission requires it to do so; and may implement the merger without approval unless required to notify the Commission."*

24 The role of the FHC includes under ***Section 122(6) ISA*** sanctioning of the scheme of merger, court ordered meetings and all other company related issues that arise from ***CAMA*** by virtue of ***Section 251(e) of the 1999 constitution as amended.***

25 See ***Section 1 FCCPA.***

promotion of competition in the Nigerian markets at all levels by eliminating monopolies, prohibiting abuse of a dominant market position and penalizing other restrictive trade and business practices." In essence, the ***FCCPA*** seeks to achieve the dual purpose of monopoly prevention and consumer protection. To achieve these, the ***FCCPA*** established the FCCPC.

Generally, it is believed that *antitrust regulations* are by design, aimed at maintaining availability of options in the market place, thereby creating or enabling a competitive market; while *consumer protection* is about safeguarding the right of consumers to choose from a variety of options not impeded by practices like price fixing and rig bids.[26] One obvious question that arises is whether the FCCPC will be able to combine these two roles of ensuring competition and protecting the interest of consumers.[27] Hopefully, FCCPC will in due course build capacity to enable it creditably discharge these dual roles.

A consumer protection *cum* anti-trust matter with international dimensions was the *"global price-fixing conspiracy"* in which *"at least 22 foreign air carriers"* had *"been subject to 17 federal criminal charges in the United States ... Some have settled, agreeing to pay fines and penalties totaling almost $2 billion"* referenced in the US case of *In* ***Re: Air Cargo Shipping Services Antitrust Litigation.***[28]

The ***FCCPA,*** in addition to having consumer protection provisions,[29] also prohibits the abuse of a dominant position and defines this as an undertaking that does not take into consideration the reaction of its customers or competitors. ***Section 72(2)*** lists instances that amount to an abuse of dominant position.

However, it is surprising that the ***FCCPA*** did not consider taking a cue from the *"separate regulators' model"* run by the USA and the UK, re: consumer protection and anti-trust roles. It remains to be seen how well FCCPC will combine both roles, given the wide-ranging issues and expertise needed. If not properly handled, it may eventually be a case of jack of all trades and master of none.

The FCCPA - A Beacon of Hope or Another Vicious Cycle?

As commendable as the ***FCCPA***'s intent to protect the public (especially consumers' interests) by restricting potentially anti-trust M&As, the legislation is not without flaws.

The FCCPC's roles includes: issuing rules and regulations to govern competition and consumer protection matters, eliminating anti-competitive agreements and misleading, unfair, deceptive or unconscionable marketing and trading business practices,[30] resolving disputes or complaints, issuance of directives and the application of sanctions.[31]

However, the ***FCCPA*** is silent on the modalities for eliminating existing anti-competitive agreements. Thus, the effect of the anti-competitive provisions on existing commercial arrangements remains to be seen.[32] Unfortunately, there are even bigger questions/dilemma occasioned by the enactment of the ***FCCPA*** as identified below. This begs the question, *"is this another vicious cycle?"*

26 Neil W. Averitt and Robert H. Lande, ***'Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law'***, *Loyola Consumer Law Review, Vol. 10 Issue 1:* https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1439&context=lclr (accessed 24.07.2019).

27 The United States (US) has separate consumer and antitrust laws. Three federal antitrust laws, the ***Sherman Act 1890***, the ***Clayton Act 1914*** and the ***Federal Trade Commission Act 1914***, regulate the coordination of businesses and promotion of competition with regulatory oversight in two agencies: Department of Justice (DOJ) and the Federal Trade Commission (FTC). However, in order to avoid the merging entities being subjected to different outcomes by the agencies, ***The Standard Merger and Acquisition Review Through Equal Rules Act 2018 (SMARTER)*** was enacted. This would ultimately ensure that all *"antitrust reviews are conducted under the same government review process regardless of whether the review is done by the DOJ or the FTC"*. There are distinct laws that are tailored to solely cater for consumer protection. An example is the ***Fair Credit Reporting Act 1970(FCRA***) which regulates the control and use of consumer credit information. Others are: the ***Fair Debt Collection Practices Act 1977 (FDCPA***); ***Federal Food, Drug, and Cosmetics Act 2019 (FFDCA)***; and ***Uniform Deceptive Trade Practices Act 1966 (UDTPA)***. While in the United Kingdom (UK), the antitrust laws are the ***Competition Act 1998*** and the ***Enterprise Act 2002***. These laws are regulated by the Competition and Markets Authority (CMA), which also has the jurisdiction to investigate mergers. The UK, like the US, also has a compendium of distinct laws that cater for consumer protection some of which include: ***Consumer Contracts Regulations, Consumer Protection From Unfair Trading Regulations 2008, Consumer Rights Act 2015*** and ***Unfair Terms in Consumer Contracts Regulations 1999***.

28 Unites States Court of Appeal, *No. 11-5464-cv,* https://cases.justia.com/federal/appellate-courts/ca2/11-5464/11-5464-2012-10-11.pdf?ts=1410918510 (accessed 17.07.2019).

29 ***Sections 70 and 72 FCCPA.***

30 ***Section 17(g) FCCPA*** *"The Commission shall... eliminate anti-competitive agreements, misleading, unfair, deceptive or unconscionable marketing, trading and business practices."*

31 ***Section 17(h) FCCPA*** *"The Commission shall... resolve disputes or complaints, issue directives and apply sanctions where necessary."*

32 The Guideline provides that the FCCPC and SEC would jointly review all notifications of mergers and other business combinations until further notice. It is doubtful that this would yield positive results.

The Inter-agency Cooperation Question


Lagos traffic merges

The ***FCCPA*** came with much uncertainties regarding the status of pending applications before SEC, and the way forward for companies who were contemplating new transactions amongst others. To this end, on 3rd May 2019, ***SEC*** and ***FCCPC*** issued a "*Joint Advisory and Guidance on Mergers Acquisitions and Pursuant to* ***FCCPA***".[33] Essentially, the FCCPC will be in the driver's seat and the ***FCCPA*** will prevail over Banks and Other Financial Institutions Act ***(BOFIA)***[34] and the ***Insurance Act (IA)***[35] regarding M&As, despite SEC being involved in these transitional arrangements. The workability of this inter-agency relationship remains to be seen.

Similarly, compliance with regulatory induced mergers like the recent National Insurance Commission (NAICOM) capitalisation directives to insurance and reinsurance companies[36] may raise anti-trust concerns, thereby bringing to fore once again, the question of conflict *cum* cooperation, between the FCCPC and other government agencies/regulators.

This is because insurance companies may resort to M&A deals to meet up with NAICOM requirements, like the banks did following the Central Bank of Nigeria (CBN) directive in 2005 upping banks' minimum paid share capital.[37] Ultimately, forced consolidations may result in concentration scenarios where only a few companies survive and ***FCCPA*** ought to have anticipated this possibility.

Furthermore, the ***FCCPA*** grants the FCCPC concurrent jurisdiction to regulate matters relating to competition and consumer protection with other sector-specific regulatory bodies.[38] It also requires the Commission and the respective agencies to negotiate agreements to govern their relationship as co-regulators.[39] While this may appear to be a welcome development because of the spotlight it sheds on merging companies, the downside is the double work (with cost implications) for merging entities as the two regulators may have different requirements, given their presumptive different focuses. When the bureaucracy associated with governmental agencies is thrown into the mix, the effects may be deleterious.

Furthermore, the ***FCCPA*** gives a leeway for the Commission's decisions on competition and consumer protection matters to take precedence over decisions of the other sector specific government agencies.[40] Also, ***Section 47(2) FCCPA*** implies that the Commission may overturn a decision made by any sector-specific regulator when it empowered the Commission to determine appeals or requests to review the exercise of power by

33 FCCPC and SEC, ***'SEC and FCCPC Joint Advisory and Guidance on Mergers Acquisitions and Pursuant to FCCPA'***, 04.05.19:http://cpc.gov.ng/news-events/alerts/2019/05/04/sec-and-fccpc-joint-advisory-and-guidance-on-mergers-acquisitions-and-pursuant-to-fccpa/, (accessed 07.05.19). The Guidance stipulate that the FCCPC and SEC would jointly review all notifications of mergers and other business combinations until all necessary parameters are put in place by the FCCPC. It also states that SEC's regulations, guidelines and fees will continue to apply until further notice. Notifications for mergers will be filed at the FCCPC office or at SEC/FCCPC Interim Joint Merger Review Desk and all applicable fees will be paid to *the* FCCPC; SEC and FCCPC will jointly review applications and the FCCPC will convey the decision to the applicants.

34 ***Cap. B3, LFN. 2004.***

35 ***Cap I17, LFN, 2004.***

36 NAICOM, ***'Circular on Minimum Paid-Up Share Capital Policy for Insurance and Reinsurance Companies in Nigeria'***, 20.05.19: https://www.naicom.gov.ng/index.php/regulatory-framework/circulars, (accessed 25.06.19).

37 Charles Chukwuma Soludo, ***'Consolidating the Nigerian Banking Industry to Meet the Development Challenges Of The 21st Century'***, *06.07.04:* http://w1219.cbn.gov.ng/OUT/SPEECHES/2004/GOVADD-6JUL.PDF, (accessed 18.02.19). At the end of the exercise, Nigeria's 89 banks were consolidated into 25.

38 See ***Section 105(2) FCCPA:*** *"In so far as this Act applies to an industry or sector of an industry that is subject to the jurisdiction of another government agency by the provisions of any other law, in matters or conducts which affect competition and consumer protection,* ***this Act shall 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.***" (Emphasis supplied)

39 ***Section 105(4) FCCPA*** " provides that 'the Commission shall negotiate agreements with all government agencies whose mandate includes enforcement of competition and consumer protection for the purpose *of coordinating and harmonising the exercise of jurisdiction over completion and consumer protection matters within the relevant industry or sector, and to ensure the consistent application of the provisions of this Act."*

40 ***Section 105(2) FCCPA (supra).***

sector regulators on matters affecting competition. Whilst this may be regarded as ambiguous because the modalities are not clear, the consequent status of FCCPC as a *"super agency"*, compared to sectoral regulators, is clear. What remains to be seen is how this new reality will impact the activities of sectoral regulators.

Competition Tribunal: Another Jurisdiction Debate?

The Tribunal, created by ***Section 39 FCCPA***, is empowered to hear appeals from decisions of the FCCPC ***(Section 47 FCCPA). Section 103 FCCPA*** states that appeals from the Tribunal go directly to the Court of Appeal (CA): *"a person aggrieved by the Commission's decision under this Part may file an application for review before the Tribunal and where the decision relates to a decision of the Tribunal, to the Court of Appeal."*

This appears to be an encroachment on the exclusive jurisdiction of the FHC conferred by ***section 251(1)(e) 1999 Constitution of the Federal Republic of Nigeria as amended***. This could give rise to otherwise avoidable litigation, with high probability that ***section 103 FCCPA*** could be held to be unconstitutional. [41]

Section 103 could be seen as raising a red flag by effectively putting the Tribunal on the same footing as the FHC, *vide* prescribing appeals therefrom to the CA. The problem is not that the Tribunal could not be conferred with jurisdiction to determine ***FCCPA*** disputes, only that it ought to be subservient to the FHC. ***Section 103 FCCPA*** seems to be following the example of ***Section 295 ISA*** which also provides that appeals from the Investment Securities Tribunal (IST) lied to the CA.[42] If the Tribunal can be deemed a "court", rather than an administrative tribunal, such determination would be fatal.

Aside from that, as recognised by the Supreme Court (SC) in ***Kano State Urban Development Board v. Fanz Construction Company Limited,***[43] whilst the courts generally have both the jurisdiction and the duty to settle dispute between parties, statutes could validly make exceptions, otherwise. An example is arbitral panels which have their jurisdiction protected from undue judicial interference by ***Section 34 Arbitration and Conciliation Act.***[44] Our view is that ***section 103 FCCPA*** is not such valid exception, given the supremacy of constitutional provisions: ***section 1(3) 1999 Constitution.***

FHC Jurisdiction in FCCPA M&A Framework

It is worthy of note that under the erstwhile ***(ISA and CAMA)*** regime, the FHC had assigned roles in M&A transactions, in addition to ***Section 251(e) 1999 Constitution,*** which placed issues arising from the operation of the ***CAMA,*** under FHC's jurisdiction. Thus, uncertainties abound as regards the role of the FHC now in light of the Tribunal, since the ***FCCPA*** makes no reference to the FHC at all. It can only be reasonably inferred that the Tribunal will only have jurisdiction over merger

41 ***Stabilini Visinoni v FBIR (2009) 2 CLRN 269*** and ***Cadbury Nig. Plc v. FBIR [2010] 2 NWLR (Pt. 1179), 561*** where the CA held that ***section 20(3) VAT Act, Cap. V1, LFN 2004*** - prescribing that appeals from the VAT Tribunal (VATT) will lie to the CA - was held to be an unconstitutional infraction of ***section 251 1999 Constitution***. Were the VATT to be inferior in the judicial ladder to the FHC, the challenge to VATT's jurisdiction would be weakened by the argument that it is an administrative (inferior) tribunal. For a detailed analysis of the discussion on the ***Stabilini*** and ***Cadbury*** cases, see '*Taxspectives by Afolabi Elebiju:* ***Death Knell For Tax Appeal Tribunals?***', *ThisDay Lawyer, 17.05.2011, p.7;* also available at: http://lelawlegal.com/pdf/Death-Knell-for-Tax-Appeal-Tribunals.pdf, (accessed 24.07.2019).

42 In ***SEC v Kasunmu [2009] 10 NWLR (Pt. 1150), 509,*** the CA held that the Respondent's claims fell within the ambit of ***section 251(1)(r) 1999 Constitution*** (which prescribed that actions involving the Federal Government and its agencies must be heard at the FHC); and further at ***534B*** that *"section 242 of the [ISA] ... cannot oust the constitutionally guaranteed jurisdiction of the [FHC]."* Also, in ***FBN Plc & Ors. v. Ntia & Ors (2014) LPELR-24104 (CA)*** *Mustapha, JCA* (who read the lead judgment), stated at ***37-40 E-B:*** *"The conflict between Section 251 of the Constitution and Section 284 of the ISA, with either section giving* ***exclusive jurisdiction to the [FHC] and the [IST] respectively ought to be resolved in favour of Section 251 of the Constitution; Section 284 is clearly void to the extent of the inconsistency****. It is with this kind of situation in mind this Court held in STABILINI v FBIR (2009) 13 NWLR part 1157 at 226: 'Where the Constitution of the Federal Republic of Nigeria has vested jurisdiction in a Court of law, it cannot be lightly divested. Where it is intended to be divested it must be done by clear, express and unambiguous words, and by a competent amendment of the constitution. Thus, the Courts do frown at any attempt to erode or relegate the power of the Court and or the supremacy of the constitution...thus no authority, act or person can, without due amendment, alter, curtail or seek to restrict the jurisdiction of the Federal High Court.'* ***It seems to me too that to construe Section 284 of the ISA as conferring exclusive jurisdiction to [IST] over and above the [FHC] would do a great violence to the provision of Section 251 of the 1999 Constitution. It would in my view take a more specific provision or more particularly an amendment to have such a far reaching effect which overrides the clear provisions of Section 251 (1) of the Constitution. Any statute which is in conflict with the provisions of the 1999 Constitution must be pronounced void to the extent of such inconsistency****. The lower Court [FHC] was right in the opinion of this Court to have assumed jurisdiction to entertain the action, in the circumstances."* However, in ***Wealthzone Ltd v SEC (2016) LPELR-41808(CA),*** *Oho JCA* variously held respectively that *"The relevant question to therefore address at the instant stage is; how can the exclusive jurisdiction of the [FHC] be reconciled with the exclusive jurisdiction of the Nigerian [IST] conferred by the ISA 2007 under the scheme of things and in the borderline areas which seem to overlap?"* and *"****The clear interpretation of the act of the National Assembly in 1999 when it created the [IST] as a specialist Court simply means that the exclusive jurisdiction of the [FHC] would no longer extend to matters affecting the operations of the Capital and Securities market, but remain limited to matters that may arise from the provisions of BOFIA and CAMA and I so hold.****"* (Emphases supplied). ***Wealthzone*** followed ***Ajayi v SEC [2009] NWLR (Pt. 1157), 1 at 26F-G (per Peter-Odili JCA (as she then was)****: "... Therefore, those provisions [sections 221(4), 234(1) and 236(1) ISA] taken together have rested the adjudication arising from the operation of the ISA with the purview of the IST. The jurisdiction of the IST is not of concurrent application with the [FHC]. It is exclusive to the IST as provided by the relevant specific law in this instance being the [ISA]."*

43 ***[1990] 4 NWLR (Pt.142), 1.***

44 ***Cap. A18, LFN 2004.***

issues in the manner that SEC used to have oversight, while other issues like the sanctioning of the scheme of merger and court ordered meetings, will continue to be referred to the FHC.

M&A Transaction Timelines

Furthermore, delay in timelines and slow completion of mergers could result from some provisions of the *FCCPA*. The FCCPC Board itself is yet to be constituted,[45] this may be a drawback as the FCCPC would not be able to perform its functions in reality.

Sections 95(6), 97 and *100 FCCPA* gave the timelines for approvals of small and large mergers respectively after filing, empowering the Commission to extend the timeline for considering mergers by 40 and 120 business days respectively for them. Also, it requires that in making decisions, the Commission should have special regard to the representations made by the Minister of Trade regarding the effect of a proposed merger on a particular industrial sector or region, employment, the ability of the national industries to compete in international markets and the ability of small and medium scale enterprises to become competitive.

However, the ambiguity here is that grounds for extending timelines are not specified. This may defeat the purpose of the *FCCPA* by deterring new competition from springing up, as time is of the essence in the business community. This due process may present another bureaucratic layer, which may ultimately cause delays to the approval process for mergers.

Public Interest Considerations

The issue of "public interest" as a determinant for approving mergers[46] may be counterproductive, as it seems to suggest that anti-competitive mergers may be approved where it is in the interest of the public and competitive mergers rejected in light of same.

In addition, the definition of mergers although seemingly encompassing, appears to be too extensive. It gives the impression that regular transactions that would not necessary qualify as a merger may end up being sent to the Commission for review.

Conclusion

For the ***FCCPA*** to be a veritable tool in providing the necessary framework for M&As and anti-trust in Nigeria, there is the need for robust guidelines to diffuse all existing uncertainties in respect of its role in mergers control. FCCPC should therefore take prompt action; this is no doubt vital for investor confidence and ease of doing business reasons.

Sectoral regulators may also need to issue guidelines recognizing the current reality under the ***FCCPA***. The jurisdiction of the Tribunal also needs to be reviewed in order to ensure that it effectively serve its antitrust and consumer protection duties. In due course, ***FCCPA*** related litigation will also help to clarify some of the uncertainties.

> "UNFORTUNATELY, THERE ARE EVEN BIGGER QUESTIONS/DILEMMA OCCASIONED BY THE ENACTMENT OF THE FCCPA AS IDENTIFIED BELOW. THIS BEGS THE QUESTION, "IS THIS ANOTHER VICIOUS CYCLE?"

45 ***Section 5 FCCPA.***

46 See ***Section 941(b)(ii) FCCPA. 'Black's Law Dictionary'***, (9th ed., 2009), p.1350 defined "*public interest*" as "*the general welfare of the public that warrants recognition and protection*" or "*something in which the public as a whole has a stake; especially an interest that justifies governmental regulation.*" For a general discussion of public interest in another context see Afolabi Elebiju, et al, ***'Definitions And Developments: Corporate Governance Implications Of Judicial Interpretation Of 'Public Interest Entities' In Eko Hotels Limited v. FRCN FHC/L/CS//1430/2012'*** **LeLaw Thought Leadership Insights, July 2019:** http://www.lelawlegal.com/pdf/PIE%20ARTICLE.pdf.