APPRAISAL OF THE LEGALITY AND EFFICACY OF THE SEC AND FCCPC'S JOINT ADVISORY ON MERGERS AND ACQUISITIONS UNDER THE FCCP ACT

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Abstract

This paper examined the status and efficacy of the statutory framework which empowered the Securities and Exchange Commission (SEC) and the Federal Competition and Consumer Protection Commission (FCCPC) to issue joint advisory on mergers and acquisitions. It was argued that since the SEC was stripped of its powers in the Federal Competition and Consumer Petition Act, 2018 (FCCPC Act), the solution lay in immediate constitution of the FCCPC and the Federal Competition and Consumer Protection Tribunal (FCCPT) for the proper implementation and enforcement of the provisions of the FCCPCAct, bearing in mind the multitude of complaints and litigations that will arise as a result of commercial activities in the course of implementation and enforcement of the FCCPC Act. The paper concluded that constituting the two important institutions established under the FCCPC Act will ensure compliance with international legal standards set by the United Nations Guidelines for Consumer Protection (UNGCP) and the Organisation of Economic Cooperation and Development (OECD).

Keywords: *Transitional Provisions, Competition, Consumer Protection, Mergers and Acquisitions.*

1. Introduction

This paper examines the legality and efficacy of the joint advisory or guidance on mergers, acquisitions and other business combinations issued by the SEC Director-General and the Chairman of the FCCPC.[1] It is pertinent to state that objectives of the Federal Competition and Consumer Protection Act,[2] include to promote and maintain competitive markets in the Nigeria economy; promote economic efficiency; protect and promote the interest and welfare of consumers by providing consumers with competitive prices and product choices; prohibit restrictive business practices which prevent, restrict

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[1] Okafor Endurance, 'FCCPC to Take over Role of SEC in M&As, Other Business Combinations' *Business Day* (Lagos, 6 May 2019). John Austin Unachukwu, 'SEC, Competition Commission Advise on Mergers, Acquisition' The Nation Newspaper (Lagos, 7 May 2019) 25.

[2] 2018 (FCCP Act).

or distorts competition or constitute an abuse of a dominant position of market power in Nigeria; and contribute to the sustainable development of the Nigerian economy.[3]

This paper argues that the repeal of the sections of the Investment and Securities Act on mergers has stripped the Securities and Exchange Commission of its regulatory oversight and empowered the FCCPC with those functions.[4] The repeal tacitly implies that the SEC Rules in relation to mergers automatically set aside.

Notwithstanding the enactment of the FCCP Act, the FCCPC and the FCCPT established in the FCCP Act have not been constituted. In order to fill the vacuum, the SEC and the FCCPC jointly issued an advisory or guidance on mergers, acquisitions and other business combinations. It is the legality and efficacy of the joint advisory or guidance that forms the thrust of this paper.

1.1 Conceptual Analysis

Competition

Sullivan and Harrison defined competition as a body of law that seeks to assure competitive markets through the interaction of sellers and buyers in the dynamic process of exchange.[5] The form of 'assurance' implied in this concept is what Rogers and MacCulloch,[6] also regarded as 'intervention,'[7] of competition in the market place in order to fix any problem affecting the competitive process or when market failures arises.[8]

According to Fredric Scherer,[9] competition is a process of rivalry between two or more persons. Within the context of a market place, this rivalry is directed towards the habits and usages of the people. This definition corresponds with the views of Adam Smith

[3] *Ibid* Preamble, s 1

[4] *Ibid* s 165(1); UtzWeitzel, 'Theory and Evidence on Mergers and Acquisitions by Small and Medium Enterprises' (2012) 14(2/3) *International Journal of Entrepreneurship and Innovation Management.*<https://ssm.com/abstract=2167686> accessed 10 June 2019.

[5] E.T. Sullivan and J.L. Harrison, *Understanding Antitrust and Its Economic Implications* (Network: Mathew Blender and Co. Inc. Lexis Nexis Group, 2003) 1.

[6] B.J. Rodger and A. MacCulloch, *Competition Law and Policy in the European Community and United Kingdom* (London: 3rdedn, Cavendish Publishing, 2004) 1.

[7] Gideon Markman, Peter Gianiodis and Ann Buchholtz, 'Factor – Market Rivalry' (2009) 34(3), *The Academy of Management Review;* 423-441.

[8] *Ibid*.

[9] Fredric Scherer, *Industrial Market Structure and Economic Performance*(Chicago R. and McNally & Co. 1970) 16.

when he describes competition as a rivalry in a race to get limited supplies.[10] Effective competition therefore implies a rivalry process taking place for patronage among independent sellers in a market.[11] Thus, the primary objective of every enterprise and business person in the practical world is to market their goods and services to the whole world and make profit and to control the relevant market.

From the perspective of Adam Smith and some neo-classical economists, economic growth necessarily follows a logical process. They both use economic laws and generalizations to analyze and arrive at conclusions.

Consumerism

Stanton defines consumerism as the actions of individuals and organizations (consumer, government, and business) in response to consumers' dissatisfaction arising in exchange relationships. He opines that consumerism is: protest against perceived business injustices and the efforts to remedy those injustices.

However, Kotler defines consumerism as social movement (under any system) where buyers seek to augment, their rights and powers in relation to sellers."[12] The common feature of these definitions is the organized efforts of consumers, or identifiable consumer groups in any system to right perceived and/or actual wrongs.[13] The groups may have been committed by businesses in countries where the free enterprise system exists, or by government in countries where the government plays an active role in the economic system.[14]Kotler's definition is broadest in that he interprets consumerism as a social movement where a group of people coalesce to accomplish a shared goal. Kotler's model provides a framework for examining and comparing consumerism in different countries. Kotler explains the social factors contributing to consumerism as a social movement. First, there must be present structural conduciveness: An environment conducive to consumerism – an educated group of people, growth of income, and certain problematic issues that require collective behaviour.[15] These factors induce greater

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10 Adam Smith, *'An Inquiry to the Nature and Causes of the Wealth of Nations of Adam Smith'* (1776) <httP://www.adamsmith.org/smith/non-index.htm> accessed 17 September 2018.

11 Christopher Medin, 'Conceptualizing Competition and Rivalry in a Networking Business Market' (2015) 51, *Industrial Marketing Management;* 131-140.

12 P. Kotler, 'What Consumerism Means for Marketers' (1972) *Harvard Business Review*, 50, 48 – 57.

13 Joseph Kehinde, 'Consumerism and its Influence on Food and Drug Marketing in Nigeria' (2006) 8(5), *Multidisciplinary Journal of Research Development* 53-67.

14 William Stanton, *Fundamentals of Marketing* (New York: 6thedn, Mcgraw – Hill Book, 1981), 144

15 *Ibid*.

expectation, which then unfulfilled produce structural strains in the exiting socio-economic system. Theme structural strains contribute to generalized belief that business has not been responsive to society's expectations of performance. This general belief is then ignited by external factors that act as a catalyst or a precipitating factor, professional consumer spokespersons, politicians and the media by way of consumer advocacy mobilize for action to solve the identified problems. Business usually act, but if their actions are perceived as inadequate, some form of legislation or social controls result.

Drucker defined consumerism as 'a social force designed to protect consumer interests in the market place by organizing consumer pressures on business.' Consumerism challenges the very basis of the marketing concept.[16] It aims to eliminate those unfair marketing practices misbranding, spurious products, unsafe products, adulteration, fictitious pricing, planned obsolescence, deceptive packaging, false and misleading advertisement, defective warranties, hoarding, profiteering, black-marketing, short weights and measures.[17]

Merger and Acquisition

A merger is the business combination of two separate entities combining force in equal terms to evolve into a joint corporate entity. The joint company when merged acquires a new identity of one of the companies, while acquisition takes place where a company acquires all substantial interest in another. It is a broader in the FCCP Act.[18] In acquisition, a new company does not emerge when interest is acquired rather in most cases the acquired company ceases to exist and its assets become a part of the acquiring company or the acquired company becomes a subsidiary of the acquiring company.

The definition of merger under the Act includes acquisitions. This is because the Act did not separately define 'acquisition'. It appears to have expanded the term 'merger' to include 'acquisitions'.

1.2 Theoretical Framework

In the course of evaluation and examination of the provisions of the Federal Competition and Consumer Protection Act 2018 as regards to mergers and acquisitions, this paper has

16 P. Kotler, 'What Consumerism Means to Marketers' (1972) 50 *Harvard Business Review* 48-57.
17 S. Fadipe, *Advertising Practice with Nigerian Orientation* (Lagos: Christ Publishing World Wide, 2002).
18 (n2) s 92(1)(9)

identified the positivists or normative theory and the natural law theory as the jurisprudential basis guiding the subject matter of this discourse.

According to the normative approach to law, the relationship between competition law and economics is justified on the basis that in the distribution of the scarce economic resources available, competition law plays a pivotal role in striking a balance between the competing ends. This argument is supported by notable scholars in the field of competition, law and consumer protection such as Posner[19]Hovenkamp,[20]Coase,[21]Guido[22]and Mar kovits. They all argued that in the resolution of the conflict of interests between state intervention in business and contractual obligations, economic considerations ought to play a leading role.[23] They argue that there is need to go beyond the economic cost, but to look into the long term economic analysis of efficiency, more often expressed as all locative efficiency. This view point was expanded by Posner[24] who argued that statutes require to be interpreted by courts in line with common views that prevailed until the end of 1990s, to the effect that the ongoing debate on competition policy, though it might appear over heated, is unlikely to cease, rather the debate on competition ideology has reduced in developed countries. Hovenkamp[25] supports Posners argument, but observed that Posner's argument could possibly be strengthened by the fact that competition issues have phenomenally deep economic roots which constitutes a major part of the fabric of every society; which in effect impacts on the allocation of resources.

Instructively, the chief proponent of the normative approach to law or positivist theory is Bentham who favours a rational basis for the reform of the law. Thus, Bentham ventures into what the law ought to be rather than what the law is.[26] Bentham did not only propose many legal reforms, but also gave moral principles on which they should be in the interest of the people, which is, the greatest good for the greater number of people.

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19 R. A. Posner, *Antitrust* (Chicago: University of Chicago Press 2001) 1.
20 H. Hovenkamp, *The Antitrust Enterprise; Principle and Execution* (Cambridge, Massachussetts: Harvard University Press 2005) 27.
21 R. Coase, 'The Problem of Social Cost' (1960) *The Journal of Law and Economics,* 1-44.
22 C. Guido, 'Some thoughts on Risk Distribution and the Law of Torts (1961) *Yale Law Journal* 70.
23 Maurice Stucke, 'Is Competition Always Good? (2013)1(1), *Journal of Antitrust Enforcement* 162-197.
24 R. Posner, *The Economics of Justice* (Cambridge University Press 1983).
25 n 18.
26 Lawrence Martin, 'Jeremy Bentham: Utilitarianism, Public Policy and the Administrative State' (1997) 3(3) Journal of Management History 272-282.

Correspondingly, when section 1(c) of the FCCP Act stipulates that the objectives of the Act is to 'protect and promote the interest and welfare of consumers by providing consumers with wider variety of quality products at competitive prices', it is merely applying Bentham's theory that law ought to serve the greatest good for the greater number of people.[27] This has also informed the popular norm in competition and consumer protection environment which states that 'it is better to protect consumers of goods and services who are greater in number than to protect the economic interest of few manufacturers or suppliers of goods and services.

Bentham's theory was expanded by Austin, with his legal positivism which posit that rules are general commands applying generally to a class as contrasted with specific or individual commands.[28] "Positive law" according to Austin consists of those commands laid down by a sovereign or its agents.[29] This paper argues that Austin's legal positivism is exemplified in the provisions of the FCCP Act 2018 in respect to functions and powers of the FCCPC, as regards to warrants and request for information; concerning abuse of dominant position and monopolies.

Austin's legal positivism were supported by theorists like Thomas Hobbes with his amoral views of the law as a product of the Leviatham David Hume, with his argument for separating "is" and "ought" principles which worked as a sharp criticism for some natural law theory, which purported to drive moral truths from statements about human nature.[30]

Similarly, within the same period, Adam Smith, the classical economist, describes competition as a process of rivalry between two or more persons.[31] Within the context of a marketplace, this rivalry is directed towards the habits and usages of the people. Thus, effective competition therefore implies a rivalry process taking place for patronage among independent sellers in a market. He sees competition as a law of nature which

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27 RuutVeenhoven, 'Greater Happiness for a Greater Number' (2010) 11(5), *Journal of Happiness Studies* 605-629.

28 Brian Bix, 'John Austin and Constructing Theories of Law' (2015) 24(2).*Canadian Journal of Law and Jurisprudence* 431-440.

29 FedrickSchauer, 'Positivism before Hart' (2015) 24(2) *Canadian Journal of Law and Jurisprudence* 455-471.

30 Mark Murphy, 'Was Hobbes a Legal Positivists?' (1995) 105(4), *University of Chicago Press Journal* 845-873

31 Jonathan Hearn, 'How to Read the Wealth of Nations' (or Why the Division of Labour is More Important than Competition in Adam Smith) (2018) 36(2) American Sociological Association 162-184.

implies, among other consequences, survival of the fittest in a struggle involving individuals as well as groups. Although, Adam Smith's theory of competition as a law of nature is not comparable or gruesome and horrible as that depicted and described by Thomas Hobbes in his theory of the state of nature.[32]

However, both conjectures are regarded as important in the analysis of the positivists and natural law jurisprudence is relation to this discourse.

2. Mergers and Acquisitions under the FCCP Act

This paper contends that the wave of economic restructuring and consolidation that is currently taking place within the banking sector in Nigeria is an indicator of an approaching financial distortion in the Nigerian market.[33] An example, is the merger between Access Bank and Diamond Bank, it is believed that the combined enterprise will be a large diversified bank with an extensive retail footprint. Together they will have about 27 million customers which is basically the largest customer base of any bank in the African Continent, with its natural and attendant consequences involving disputes between individuals and undertakings, abuse of market power by undertaking; breach of merger and acquisition regulations of the FCCP Act by corporate bodies and anticompetitive practices.

When these situations occur, it would appear unconscionable and capricious on the part of government that the FCCPC and the FCCPT has not been constituted to handle the multitude of litigations and complaints that will arise as a result of the commercial activities taking place among stakeholders. Bearing in mind that the FCCPC is empowered under the Act, to be responsible for the administration and enforcement of the provisions of this Act and any other enactment with respect to competition and protection of consumers, and also carry out investigations or inquiries considered necessary or desirable in connection with any matter falling within the purview of the Act.[34] The FCCPT on the other hand is mandated to adjudicate over conducts prohibited under the Act and exercise the jurisdiction, powers and authority conferred on it under the Act.[35]

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32 Hun Chung, 'Hobbes State of Nature: A Modern Bayesian Game – Theoretic Analysis' (2015) 1 (3), *Journal of American Philosophical Association* 425-508.

33 Peter Amire and M. Comfort, 'Restructuring on the Performance of Financial Institutions in Nigeria: A Review' (2016) 1(1) *International Journal of Economics and Financial Modelling,* 1-11.

34 (n2) s 17(a) and (e).

35 *Ibid* s. 29(2).

It is interesting to note that the only mention of regular court involvement in the entire Act is in sections 54 in respect to registration of orders, rulings, awards and judgments of the Tribunal with the Federal High Court for the purpose of enforcement only,[36] and *section* 55(1) of the FCCP Act which provides that any party to a proceedings who is not satisfied with a ruling, award or judgment of the Tribunal may appeal to the Court of Appeal.

This paper argues that a community interpretation of the preceding provisions of the FCCP Act, gives the FCCPT exclusive jurisdiction over matters relating to competition and consumer protection.

Under the new regime, the power to approve mergers is now granted to the FCCPC instead of the SEC, thus, the participants to a small merger do not need to notify the FCCPC, unless the FCCPC specifically requests that they do within six months of the conclusion of deal. The FCCP Act having prescribes rules for large mergers as the only other type of mergers, also provides an expansive meaning to the concept, to also include acquisition as the Act did not provide an independent definition of 'acquisition'. [37]

Importantly, mergers under the Act are still controlled by the process of size designation threshold. However, the Act does not make sufficient provision to cover the existing gap in the Investment and Security Act (ISA) and the SEC Rules concerning de-consolidations, spin-offs and de-mergers. The Act has discontinued the role of SEC in this regard and empowers the competition commission to set, gazette and publish thresholds applicable to all members and combinations, whether small, medium or large.[38] It is been argued that the expertise required to superintend such transactions and draw up such specialized rules is relatively limited in a developing economy like Nigeria.[39] Again, this may have informed the reason why the new and inexperienced FCCPC had to still rely on SEC which have been divested with the powers pursuant to the FCCP Act.

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36 *Ibid* s. 54(b).

37 Scott Moeller, 'An Analysis of Short-Term Performance of UK, Cross-Border Mergers and Acquisitions by Chinese listed Companies' (2016) <https://www.openaccess.city.ac.uk/15988/> accessed 10 June 2019.

38 KerstiNogeste, 'Understanding Mergers and Acquisitions (M&As) from a Programme Management Perspective' (2010) 3(1) *International Journal of Management Projects in Business* 111-138.

39 Warren Kissin and Julio Herrera, 'International Mergers and Acquisitions' (2013) 11(4) *Journal of Business Strategy* 51-54.

Undoubtedly, the legal implication is that since the FCCP Act does not provide a period for SEC to superintend the mergers and acquisition process, or a transition period for the new commission to take over the SEC's powers in that regard, this seems to suggest that there is a defect which challenges the legality, validity and efficacy of any mergers and acquisitions activities, until the FCCPC is properly constituted and functional.[40] To that extent, any form of advisory issued jointly by SEC and FCCPC in respect to mergers and acquisitions will not cure the lacuna that exists in not constituting the 'FCCPC' and its adjudicatory body/the FCCPT'.

Moreover, it appears the extension of the time frame for approval by the FCCPC in relation to the time frames established by the SEC pose great challenge as this automatically delays the period for close of deals. As a matter of fact, the provisions in the Act as regards to mergers is a radical deviation from what had been the practice under the SEC rules. This also may have informed the need for the joint advisory, issued by the SEC and the FCCPC.

3. Federal Competition and Consumer Protection Commission (FCCPC)

The primary objectives of the FCCP Act is to promote and maintain competitive markets in the Nigeria economy; promote economic efficiency; protect and promote the interest and welfare of consumers by providing consumers with wider variety of quality products at competitive prices through prevention and prohibition of restrictive or unfair business practices which distort competition or constitute an abuse of a dominant position of market power, contribute to the sustainable development; and other competition and consumer behaviours that could substantially lessen competition,[41] and as well impact negatively on the economic development of Nigeria, especially in the wake of various liberalization policies taking place in Nigeria.[42] Taking into consideration the focus of the FCCP Act and the duty to administer and enforce the competition and consumer protection standards and microeconomic objectives contained in the FCCP Act, the FCCPC is established and empowered with responsibility for the administration and enforcement of the provisions of the FCCP Act.[43]

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40 Donald Stunda, 'The Market Impact of mergers and Acquisitions on Acquiring Firms int eh US (2014) 16(2) Journal of Accounting and Taxation 30-37.

41 (n2)s. 1(a)(b)(c)(d)(e).

42 P. Marsden, 'A Deregulated Economy without Competition Law: Free Market or Free Jungle' (2008). A Paper Presented at the Third Business Law Conference of the Nigerian Bar Association Abuja Nigeria.

43 (n2) s. 17(1).

Arguably, the implementation of competition and consumer protection law and policy in a developing economy presents diverse challenges other than the fundamental competition and consumer protection concerns that can lessen or distort the process.[44] Admittedly, the other challenges include principally the structural and institutional necessities for the administration and enforcement of a competition and consumer protection law and policy.[45]

Thus, this paper examines the prerequisites needed for an efficient, competitive and consumer protection law and policy in a developing economy like Nigeria. All these shall be evaluated within the context of the provisions of the FCCP Act relating to the composition and powers of the FCCPC.[46] It further tries to respond to the issue of whether or not the FCCPC has the capacity to carry out the objectives of the FCCP Act. Pursuant to this, it advances the view point that competition and consumer protection advocacy, if given adequate attention by government and civil society[47] groups will augment the efforts of the regulatory agency in the implementation and enforcement of the objectives of the FCCP Act.

Unarguably, it is important and prudent for competition and consumer protection enforcement and implementation institutions to be established in other to support and ensure the efficiency of markets, both in developed and developing economies. The World Bank in its Report in 2001 reiterated this point when it said that: "Institutions support markets by helping to manage risks from market exchange, increasing efficiency and raising returns hence reducing the transaction cost arising from inadequate information, incomplete definition and enforcement of property rights."[48]

Thus, the efficiency of a competition and consumer protection policy is dependent on the establishment of an appropriate institutional structure to implement and enforce those

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44 OlaniwunAjayi, 'Federal Competition and Consumer Protection Act, 2018: A New Regulatory Landscape for Mergers in Nigeria. https://www.olaniwunajayi.net.Accessed 10 June 2019.

45 M.C. Lucy, 'The New Irish Competition and Consumer Protection Commission: Is this 'Powerful Watchdog (2015) 6(3) With Real Teeth' Powerful Enough under EU Law? *Journal of European Competition Law and Practice;*185 – 191.

46 (n2) s. 17.

47 P. Kotler, 'What Consumerism Means for Marketers (1972) *Harvard Business Review*; 48 – 57.

48 World Bank, '*Building Institutions for Markers' in World Bank Development Report* (Oxford: Oxford University Press, Published for World Bank 2001) 5.

laws and policies.[49] This paper argues that due to fundamental and socio-political reasons, competition and consumer protection agencies in developing economies encounter various challenges not usually found in developed economies with an established competition and consumer protection culture and discipline. In Nigeria, issues such as conflicting laws and overlapping jurisdictions of regulations; inconsistent domestic business registration process that discourages the promotion of new enterprises; Rent seeking stakeholders; arbitrary taxation regimes, government protected monopolies and government imposed restrictions to entry to imports and direct foreign investment,[50] are some of the challenges that primarily confronts a new competition and consumer protection regime. It is interesting to note that most of the challenges enumerated in the preceding paragraph have been appropriately taken care of by the Act especially the supremacy provisions in *Section* 104 of the FCCP Act.[51]

Fundamentally, the enactment of competition and consumer protection law and policies usually entails structural transformation that requires political affirmation and backing to institutionalize these transformations.[52] If these alterations do not receive the support of the political stakeholders, then its successful implementation and enforcement could be sabotage or frustrated. It appears, this might have informed the delay in the enactment of the Act and the inability to constitute the FCCPC and FCCPT.

Emphatically, arguments from the preceding paragraphs has shown that the greatest strength of a competition and consumer protection agency in a developing economy like Nigeria is derived from an appropriate competition and consumer protection law model, advocacy and a sustainable and robust institutional and structural framework.[53] This paper further argues that the dynamic nature of competition and consumer protection law and policy is reflected in the expansive provisions of the FCCP Act, which established certain visible structures like the competition and consumer protection. Tribunal,[54] and

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49 M. William, *Competition Policy and Law in China, Hong Kong and Taiwan* (Cambridge: Cambridge University Press 2005) 64.

50 W. Kovacic, 'Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Theory and Anti-trust Enforcement (2001) 77*Chicago-Kent Law Review;*301 – 310.

51 (n2)s. 104.

52 Demise Fleck, 'Institutionalization and Organizational Long-Term Success (2007) 4(2) *BAR-Brazilian Administration Review*.<https://dx.doi.org/10.1590/31807-76922007000200005> accessed 8 July 2018.

53 Christine Musselin, 'New Forms of Competition in Higher Education' (2018) 16(3), *Socio-Economic Review;* 657-683.

54 (n2) s. 39(1).

the appellate platform, the Court of Appeal;[55] a supply of qualified staff with potentials for improvement of performance through training and experience on the job.

It has been acknowledged by scholars and commentators that competition and consumer protection law is an interdisciplinary subject, one that must be situated within a broader set of public policies in pursuit of economic and social welfare of a country.[56] Therefore, it will involve legal, cultural and socio-political aspects within which competition and consumer protection law and policy is to be implemented and enforced. The combined effect is essential to ascertain the likelihood of the success of competition and consumer protection policies.[57] In the broader perspective, these public policies are the micro-organisms that conditions the state of competition and consumer protection regulations. Thus, the superior value attached to 'public policies' as against 'economic policies translates to competition and consumer protection policy been placed higher in developing economies like Nigeria than in developed economies.[58] This is because, the higher degree of market disciple and standard and an established competition culture in the developed economies informed this divergence.

It is instructive to note that the adoption of a competition and consumer protection law in Nigeria is merely one of the condition-precedent for the enforcement of the law. However, the dispute resolution and adjudicatory mechanism structures essential for its enforcement shall be examined as well as the overlaps involved in the process.

3.1 Federal Competition and Consumer Protection Tribunal

The Tribunal is established under Part VII, *sections* 39 to 58 of the FCCP Act as an aspect of the institutional framework to handle issues and disputes arising from the FCCP Act.[59]By virtue of the provisions of section 39(2), of the FCCP Act, the Tribunal shall adjudicate over conducts prohibited under the Act and exercise the jurisdiction, powers

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55 *Ibid*, s. 55(1).

56 M. Gal, Prerequisites for Development – *Oriented Competition Policy Implementation' in 'Competition, Competitiveness Development: Lessons from Developing Countries*, (UNCTAD, 2004) 29,

57 I. De Leon, 'The Role of Competition Policy in the Promotion of Competitiveness in Latin America' (2000) 23(4) *Journal of World Competition Law* 115.

58 Evert Lindquist, 'Organizing for Policy Implementation: The Emergence and Role of Implementation Units in Policy Design and Oversight' (2007) 8(4), *Journal of Comparative Policy Analysis: Research and Practice*311-324..

59 (n2) s. 39(1).

and authority conferred on it under this Act or any other enactment.[60] Although the decision of the FCCPC are both administrative and quasi-judicial, appeals from any decision of the FCCPC lies to the Tribunal by way of judicial review,[61] where any party not satisfied with the determinations of the commission may file application with the Tribunal. The composition of the Tribunal shall consist of a chairman, who shall be a legal practitioner with 10 years post call and cognate experience in the field of competition, consumer protection or commercial and industrial law; and six other members, with at least 10 years professional experience in any one or more of the following educational fields: Competition and consumer protection law, commerce and industry, public affairs, economies, finance or business administration or management.[62]

A cursory examination of the powers of the Tribunal as provided in section 47(1)(a) and (b) of the FCCP Act empowers it in the determination of any application for review, to either affirm, amend or reverse the decision or any aspect of it that appears unmeritorious. The Tribunal is also permitted under the Act to exercise any of the powers which ought to have been exercised by the commission in the course of implementation and enforcement of the subject matter before it. Arguably, this section of the FCCPC appears too expansive, particularly, as it permits the Tribunal to function in the same administrative capacity as the FCCPC that presided and administered the hearing. This paper opines that this stance permits the Tribunal to reconsider the application and possibly allow the introduction of new facts and evidence which are not part of record of proceedings before the Tribunal. However, this lacuna has been cured by the proviso to *section* 47(2) to the FCCP Act which provides 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 Tribunal.[63] The provisions of the preceding paragraphs is premised on the principles of judicial review of the FCCPC's decision which are subject to well established rights of review, which could be on grounds of illegality, irrationality or procedural impropriety.

This interface between competition and consumer protection rules on the one hand and sector specific regulation on the other hand was a subject of controversy in both the United States and in the European Union, although with divergent views from the two jurisdictions. In the United States, the Supreme Court's decision was radically distinct

60 (n2) s. 47(1).
61 *Ibid* s. 47(1)(a) & (b).
62 *Ibid* s. 40(1) (a) & (b).
63 (n2) s. 47(2).

from the decisions of the European community.[64] The US Supreme Court in the case of *Verizon Communications Inc v Trinko,*[65] ruled that competition agencies should restrain from enforcing competition regulations where there are sector specific provisions that could be applied to address the situation, taking into consideration the specific industries involved and the circumstances. In the Verizon case the court did not establish a general principle, however, it was not also emphatic that where there is a sector specific regulation structure, that the competition agency should not interfere, rather the decision appears to say in the words of the court, that 'antitrust analysis must always be attuned to the particular structure and the circumstances,' which means that it would not always be the case that competition law should subject itself to sector specific regulation, instead of industry structure.[66] Hence, circumstances and cost benefit of competition intervention must be circumspectly evaluated such that the end result will still be a contribution to consumer welfare. According to Petit, this particular judgment heralds the beginning of 'a pre-emption' or 'exhaustion principles' in the field of antitrust.[67] In other words, where a sector specific resolution mechanism is provided, a private claim in competition matters should to some extent reasonably exhaust that resolution mechanism.

In the UK, where the regulator is entrusted with the enforcement of competition rules, a well designated cooperation mechanism is adopted where by the rule of priority determines which of the regulators or competition agency must deal with the case and reciprocal consultation requirements are set up. Thus, in case of conflict between the two authorities, the Minister decides which authority shall have jurisdiction. Comparatively, the European Union perspective of this issue was properly enunciated in the case of *Deutsche Telecom v Commission*[68] where it was espoused that the EC competition law may still apply even where sector specific legislation existed. However, the commission in most cases refers the matters to the regulators for the resolution of the issue through the sector – specific mechanisms relating to a proceeding under Article 82 of EC.[69]

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64 Petit, 'Circumscribing the Scope of EC Competition Law in Network Industries?A Comparative Approach to the US Supreme Court Ruling in the Trinko Case' (2004), *13 Utilities Law Review* 6.

65 Case – 540 US.398 (2004).

66 Michael Carrier, 'Of Trinko, Tea Leayes, and Intellectual Property' (2006) 31, *Journal of Competition Law,*<https://ssrn.com/abstract=885330> accessed on 8 August 2018.

67 (n65)

68 Case C-280/08 [2010] ECR 1 – 0000.

69 P. Alexiadis, 'Informative and Interesting: *The CIF Rules in Deutsche Telecom v European Commission*' (2008) <https://www.iar.agcm.it.articles>viewfile> accessed on 14 March 2019.

It is instructive to note that the Federal Competition and Consumer Protection Act 2018 in *section* 105(2)[70] adopted the EC competition standard with some modifications where it provides that the Act shall be construed as establishing a concurrent jurisdiction between the FCCPC and the relevant government agency. The
Act further provides in sub-section (4) of *section* 105[71] that the commission shall negotiate agreement with all government agencies whose mandate includes enforcement of competition and consumer protection for the purpose of coordinating and harmonizing the exercise of jurisdiction over competition and consumer protection matters within the relevant industry or sector, and to ensure the consistent application of the provisions of the FCCP Act. This paper argues that it is imperative for the enabling FCCP Act or the specific sector competition and consumer protection rules to be clear and explicit as possible with regard to its control and influence and situations that may occur where there are conflicting concurrent jurisdictions, otherwise these will encourage forum shopping, including forum-shopping by industry players, duplication of scarce resources and inter-institutional conflict, all of which could lead to confusion and distortion of competition, and protection of the consumer. For the avoidance of doubt, this paper pursuant to the spirit and letters of the FCCP Act is inclined to recommend the EU approach to Nigeria because of its clarity.

The Tribunal is also empowered to impose administrative penalties only for prohibited practices under the Act or the contravention of, or failure to comply with an interim order of the tribunal.[72] Such administrative penalty imposed by the tribunal shall not exceed 10% of the undertaking's annual turnover in Nigeria and its export from Nigeria during the preceding financial year.[73]

In addition, and for the good purpose of transparency in the administration of justice, the tribunal is empowered to provide the parties to the proceedings and other members of the public, subject to the rule of confidentiality, access to the records of its proceedings of the Tribunal.[74] As a result of its status and capacity as a superior judicial body, the Act provides that its orders, ruling and awards or judgment shall be binding on the parties[75] and also empowers it to register its decisions with the Federal High Court for the purpose

70 (n2) s. 105(2).
71 (n2) s. 105(4).
72 *Ibid* s. 51(1) (a) and (b).
73 *Ibid* s. 51(2).
74 (n2) s. 53.
75 *Ibid*s.54(a).

of enforcement.[76] However, where any party to the proceeding is not satisfied with the decision of the tribunal, the Act provides that the party may appeal to the Court of Appeal by way of judicial review.[77]

This paper observes the radical nature of the sanction provisions in the Act which it believes is intended to dissuade economic agents from involving in anti-competitive and anti-consumer practices. It is been argued that for the fines/penalties imposed to be efficacious, it must be relatively higher than the benefits economic agents are likely to make from the prohibited conduct, if not they will prefer to carry out the prohibited act against the risk of paying a more lenient fine, if they are caught.

Thus, the Tribunal is empower to charge administrative fines that are commensurate to the amount of damage or potential damage that a restrictive business practice might have on the market or on competitors. In the case of *Intel v Commission*,[78] the applicant submitted that in the light of the court's unlimited jurisdiction to review the level of any penalty, pursuant to the provisions of Article 82 of EC, the fine should be annulled or reduced substantially on the following grounds (i) the level of the fine is manifestly disproportionate (ii) Intel did not infringe Article 82 intentionally or through negligence, (iii) the commission misapplied the 2006 guidelines and to irrelevant considerations into account. The applicant further pointed out that the fine of Euro 1.06 billion is the highest fine ever imposed on a single company for an infringement of the competition rules. It argued that such fines must be proportionate to the scale of their anti-competitive effects and the interests of the consumers or competitors injured thereby. It also cited case the case of *Tetra Pak v Commission*[79]to buttress its arguments. Therefore, this paper argues that it is necessary, in assessing fines, to consider the actual effects of the infringement and the casual link between those effects and the injury to consumers or competitors, regardless of whether actual effects are relevant to the finding of an abuse.

Following from the preceding analysis, the question that interrogates the mind is how and when the tribunal will impose these fines in practical terms and its enforcement in relative terms remains an interesting conjecture. This will then form the basis for the

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76 *Ibid* s. 54(b).
77 *Ibid* s. 55(1).
78 Case – COMP/C-3/37.990 – Intel; (Summary OJ2009) C227, p. 13 (The Decision).
79 Case T-83/91 [1994] ECR 11-755, 240.

evaluation of the attitude of the courts as an adjudicatory framework for the resolution of disputes.

4. Conclusion and Suggestions

Conclusively, it is imperative to address the gaps in the legal and institutional arrangement in the current FCCP Act in order to harmoniously implement and enforce the provisions of the Act with existing competition and consumer protection legislations without conflicts. Thus, this paper suggests that the solution may not lie in the issuing of joint advisory, but by properly and immediately constituting the FCCPC and FCCPT, and also make these institutions functional, then the commission could commence the periodic amendments and reviews of the FCCP Act as to ensure its efficacy in promoting competition and consumer rights in the market place.[80]

This paper reveals that adopting the above procedure will be in compliance with United Nation Guidelines for Consumer Protection, which is accepted and recognised as one of the international legal framework essential for the effective implementation and enforcement of competition and consumer protection laws and policies in developing economy like Nigeria.[81]

The Guideline is accepted by interested member states as a valuable set of principles for setting out the main characteristics of an effective competition and consumer protection legal and institutional framework; redress mechanism; formulating and enforcing domestic and regional laws, rules and regulations appropriate to their respective socio-economic environment as well as international enforcement cooperation among member states and also motivates the sharing of experience in competition and consumer protection models.[82]

Similarly, regulatory reforms in competition has also emerged as an important policy area for OECD and non-OECD countries. However, this paper suggests that for regulatory reforms to be beneficial, the regulatory regime need to be transparent, coherent and

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80 Michael ChristofiErasmiaLeonidon and DemetorisVrontis, 'Marketing Research on Mergers and Acquisitions: A Systematic Review and Future Directions' (2017) 34(5) *International Marketing Review* 629-651.

81 UNCTAD, 'Report on the Implementation of Investment Policy Review in Nigeria' (2019) <https://www.unctad.org> accessed 17 May 2019.

82 C Waddams, 'Reality Bites – The Problem of Choice' (2006) OECD Roundtable on Demandside Economics for Consumer Policy: Summary Report.<https:/ /www.oecd.org /dataoecd/42 /36/22027701pdf> accessed 17 May 2019.

comprehensive, spanning from establishing the appropriate institutional framework to liberalizing network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.[83]

[83] J. Lundsgaard, 'Competition and Efficiency in Public Funded Services' (2002) OECD Economic Studies. <http://www.oecd.org/dataoecd/42/36/2202771.pdf> accessed 17 May 2019.