

## FCCPA: SHOULD WE LITIGATE ON WHERE TO LITIGATE?



The Federal Competition and Consumer Protection Act, 2018 (“FCCPA” or the “Act”) was enacted with the objects of promoting and maintaining competition in the Nigerian economy, protecting and promoting the interests and welfare of consumers and prohibiting restrictive trade and business practices which hamper competition.<sup>1</sup> To realize these objects, the Act vests the Federal Competition and Consumer Protection Commission (the “Commission”) which is established under section 3 of the Act with powers to enforce and implement the provisions of the Act. The Act prescribes procedures and standards on various aspects of business operations with some bearing on competition and consumer rights. Furthermore, the Act prohibits several anti-competitive practices and conducts with the potential of undermining the rights and interests of consumers such as price fixing<sup>2</sup>, bid rigging<sup>3</sup> etc., and creates several offences with varying penalties. In addition, the Act confers substantive rights on consumers which may be enforced by approaching the Commission or a court of competent jurisdiction for redress.

The enforcement powers of the Commission are circumscribed and largely subject to the jurisdiction

of the court. For instance, the Commission lacks the powers to impose any penalty for a breach of the provisions of the Act. Rather, the court is conferred with jurisdiction to determine infractions of the Act and impose appropriate penalties upon conviction. The Commission is therefore, required to initiate criminal proceedings against violations of the Act before a court of competent jurisdiction and secure a conviction before enforcing the relevant provisions of the Act against any defaulting individual or entity. The effectiveness of enforcement and implementation of the Act therefore depends on the adjudicatory powers of the Court.

Despite the pivotal role of the Court in the realization of the lofty objectives of the Act, there is an uncertainty on the court with jurisdiction to entertain disputes arising from breaches of the Act whether commenced by the Commission or an aggrieved consumer. This uncertainty has created a fundamental jurisdictional challenge which could be exploited by persons and entities in breach of the provisions of the Act to avoid liability under the Act.

In this article, we will argue that as presently drafted, there is no court with jurisdiction over competition and consumer protection disputes under the Act and that except the Act is amended to remedy this deficiency, the provisions of the Act are practically unenforceable.

### Jurisdictional Regime under the Act

The Act provides that “Court” means “Court of Appeal”<sup>4</sup> and there is no reference to any other Court under the Act. This means that only the Court of Appeal and no other Court has jurisdiction over disputes arising from the Act. The Act also establishes the Competition and Consumer Protection Tribunal (the “Tribunal”) with jurisdiction to hear appeals from or review any decisions of the Commission<sup>5</sup>. The Court of Appeal is vested with jurisdiction to hear

<sup>1</sup> See section 1 of the FCCPA.

<sup>2</sup> Section 107 of the FCCPA.

<sup>3</sup> Section 109 of the FCCPA.

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<sup>4</sup> Section 167 of the Act.

<sup>5</sup> Section 47 of the Act

appeals against decisions of the Tribunal.<sup>6</sup> The Court of Appeal is thus vested with jurisdiction to function as a court of first instance and as an appellate court. The question, however, is whether the Court of Appeal has powers to act as a court of first instance.

### Jurisdiction of the Court of Appeal

As the name implies, the Court of Appeal is generally an appellate court with jurisdiction “to hear and determine appeals from the Federal High Court, the High Court of the Federation Capital Territory, Abuja, High Court of a State, Sharia Court of Appeal of the Federal Capital Territory, Abuja, Sharia Court of Appeal of a state, Customary Court of Appeal of a state and from decisions of a court martial or other tribunals as may be prescribed by an Act of the National Assembly.”<sup>7</sup>

However, Section 239 of the Constitution also confers a limited original jurisdiction on the Court of Appeal to “determine any question as to whether – (a) any person has been validly elected to the office of President or Vice-President under this Constitution; or (b) the term of office of the President or Vice-President has ceased; or (c) the office of President or Vice-President has become vacant.”

It is clear from a combined reading of sections 239 and 240 of the Constitution that while the National Assembly may expand the appellate jurisdiction of the Court of Appeal to include appeals from tribunals, there is no such margin of expansion of the original jurisdiction of the Court of Appeal. It is a cardinal rule of interpretation that the express mention of a thing means the exclusion of others.<sup>8</sup> This has been reiterated by the courts in a litany of precedents.<sup>9</sup> In effect, section 239 of the Constitution excludes any matters not specifically mentioned therein from the

original jurisdiction of the Court of Appeal. Thus, in the eyes of the Constitution, the Court of Appeal can only act as a ‘trial court’ or ‘court of first instance’ with respect to those matters mentioned in section 239 of the constitution and none other.

The law is settled that the Constitution is supreme and any law which is inconsistent with the Constitution is to the extent of the inconsistency void.<sup>10</sup> To the extent that the Act purports to confer original jurisdiction on the Court of Appeal to entertain disputes on competition law emanating from the Act in the absence of any provision of the Constitution conferring any such expanded jurisdiction on Court of Appeal, the Act is inconsistent with the Constitution and void to that extent.

While there is no judicial decision at the moment on the original jurisdiction of the Court of Appeal over competition and consumer protection disputes under the Act, we are of the view that the Court of Appeal does not have the original jurisdiction to entertain competition law disputes and any suit commenced at the Court of Appeal by the Commission for the enforcement of the provisions of the Act or commenced by a consumer for redress may be defeated on a preliminary objection against the jurisdiction of the Court of Appeal.

Notably in 2020, the Commission brought several actions against certain businesses at the Federal High Court, and not the Court of Appeal to enforce the provisions of the Act.<sup>11</sup> This resort to the Federal High Court is not without other jurisdictional problems. First, section 251(1) of the Constitution circumscribed the jurisdiction of the Federal High Court to the

<sup>6</sup> Section 55 of the Act

<sup>7</sup> Section 240 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)

<sup>8</sup> This rule is expressed in the maxim, *expressio unius est exclusio alterius* which means that the express mention of words in a list is to the exclusion of those items not mentioned.

<sup>9</sup> Udoh v. O.H.M. B (1993) 7 NWLR (Pt. 304) 139 at page 148 paras F-H. See also the cases of AG Bendel v. Aideyan (1989) 4 NWLR (Pt. 118) 646; Ogbuanyinya v. Okudo (1979) 6-9 SC 32;

Military Governor of Ondo State v. Adewunmi (1988) 3 NWLR (Pt. 82) 280

<sup>10</sup> See Section 1(3) of the Constitution.

<sup>11</sup> The Commission commenced criminal proceedings in 2020 at the Federal High Court, Abuja against Prince Ebeano Supermarket, H-medix Pharmacy and Stores, FAXX Stores, and Bakan Gizo Pharmacy for alleged breaches of the Act.

subject matters specifically listed therein and<sup>12</sup> competition is not listed as one of the matters under the jurisdiction of the Federal High Court. The law is settled that jurisdiction must be expressly conferred on a court and it cannot be exercised by inference or assumption.<sup>13</sup> In the absence of express reference to competition law in section 251 of the Constitution, the Federal High Court will not have jurisdiction over disputes arising from the Act.

Where does that leave us? Can the Commission or consumers approach the State High Courts for the enforcement of the provisions of the Act?

Section 272(1) of the Constitution provides as follows:

“Subject to the provisions of section 151 and other provisions of this Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings where the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.”

The above provisions of the Constitution confer general jurisdiction on the State High Courts over civil and criminal proceedings. The reverse argument may be that the express conferment of jurisdiction on the Court of Appeal under the Act precludes the High Court from exercising jurisdiction over proceedings arising from the Act. The strength of these arguments is yet to be tested in court and it is uncertain if the courts will uphold the jurisdiction of the High Court over proceedings arising from the Act.

## Conclusion

The Act as presently drafted, is mired in jurisdictional uncertainty. This uncertainty afflicts the Act with a

vulnerability that could be exploited by individuals and entities to avoid liability for breaches of the Act. Without a definite resolution of the jurisdictional issues discussed above, enforcement of the Act will be daunting, if not impracticable.

While the jurisdiction of the High Court could arguably be extended to proceedings arising from the Act, objections to the jurisdiction of the High Court cannot be ruled out given the express conferment of jurisdiction on the Court of Appeal under the Act. In the circumstance, it is imperative to resolve these jurisdictional issues through an amendment of the Act to expressly confer original jurisdiction either on the Federal High Court or State High Court to entertain proceedings arising from the Act.

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<sup>12</sup> Section 251 of the Constitution.

<sup>13</sup> Boko v Nungwa (2019) 1 NWLR (Pt. 1654) 395 SC, Sulaiman v FRN (2020) 18 NWLR (Pt. 1755) 180 SC.

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