

The Emeka Nnubia Case

Revisiting Judicial and Legislative Actions on Dual Regulatory Oversight Between the FCCPC and Sector Regulators on Competition matters

OALP Mergers, Acquisition and Private Equity Practice Newsletter

INTRODUCTION

Since 2019 when the Federal Competition and Consumer Protection Act 2018 (FCCPA) took effect, the jurisdiction of the Federal Competition and Consumer Protection Commission (FCCPC) has been subject to further legislative and judicial interventions. These interventions have either limited or reaffirmed the role of the FCCPC from different sectoral perspectives. The most recent intervention is a judgment delivered on 7 February 2025 in Suit no: FHC/L/CS/1009/2024 – Emeka Nnubia v Minister of Industry, Trade & Investment and Others (The Emeka Nnubia case). In this article, we have discussed the Emeka Nnubia case as it affects the FCCPC's jurisdiction to investigate and monitor compliance with competition laws in the telecommunications sector. We have also discussed the role (if any) of the FCCPC as competition regulator the banking and insurance sectors. Furthermore, we examine the overlapping roles between the FCCPC and the SEC in connection with public companies.

THE EMEKA NNUBIA CASE AND COMPETITION AND CONSUMER PROTECTION REGULATION IN THE TELECOMMUNICATIONS SECTOR

On 11 June 2024, Emeka Nnubia, a shareholder in MTN filed a court action to challenge an inquiry initiated by the FCCPC against MTN on the ground that the FCCPC's inquiry violated Nigerian data protection laws and that the Nigerian Communications Commission (NCC) had exclusive powers to enforce, administer, and monitor MTN's compliance with competition laws instead of the FCCPC. Emeka Nnubia

argued that sections 12, 17, 18, 72, and 108 of the FCCPA, which outlines the functions and powers of the FCCPC, must be read in conjunction with section 90 of the Nigerian Communications Act (**NCA**) 2003. He submitted that section 90 of the NCA grants the NCC exclusive oversight over competition matters concerning MTN and, therefore, limits the powers of the FCCPC to investigate MTN. Section 90 of the NCA provides that *"Notwithstanding the provisions of any other written law, the Commission shall have exclusive competence to determine, pronounce upon, administer, monitor and enforce compliance of all persons with competition laws and regulations, whether of a general or specific nature, as it relates to the Nigerian communications market."*

The FCCPC argued on the other hand that:

- a) section 104 of the FCCPA overrides section 90 of the NCA;
- b) that no law exists which curtails, overrides, or extinguishes the application of the FCCPA or the powers of the FCCPC in competition matters; and
- c) the FCCPC is the primary and superior authority responsible for regulating anti-competitive practices in Nigeria.

For context, Section 104 of the FCCPA provides that *"Notwithstanding the provisions of any other law but subject to the provisions of the Constitution of the Federal Republic of Nigeria, in all matters relating to competition and consumer protection, the provisions of this Act shall override the provisions of any other law."*



In resolving the issue between the conflicting provisions of the NCA and the FCCPA the Court applied a long-standing principle of interpretation that a latter law overrides a previous contrary law and held that the FCCPA prevailed over the NCA, stating that *“from the language of Section 104 of FCCPA, it is clear that the legislator has taken into consideration the provision of Section 90 NCA in enacting section 104 FCCPC Act, 2018 and intends from its clear wordings that the provision of the later overrides the provision of section 90 of the NCA as it relates to the issue of exclusive regulation of competition and consumer matters in the communication or telecoms sector.”* The Court held further that in line with section 105 of the FCCPA, a concurrent jurisdiction exists between the FCCPC and the NCC on competition and consumer protection matters as it relates to the telecoms sector – with the FCCPC having precedence. If the NCC, or other sector regulators empowered by their enabling law to regulate competition and consumer protection within their industries, intend to activate their jurisdiction, they must first commence negotiation of agreements with the FCCPC – such agreements, if concluded, would be the basis of the NCC or such other regulators exercising their competition and consumer protection jurisdiction.

Notably, after the court resolved the Emeka Nnubia Case, the FCCPC and the NCC have negotiated and signed a Memorandum of Understanding (MoU) to address how competition and consumer protection matters in the telecommunications sector will be regulated and enforced.

SUBSEQUENT LEGISLATIVE ACTIONS SINCE THE FCCPA WAS ENACTED

While the Courts typically interpret and apply the law as it is, laws are usually varied through subsequent legislative reforms. After January 2019 when the FCCPA came into effect, critical business laws relating to banking and financial institutions, petroleum, electric power, insurance and public

companies generally, have been enacted with each approaching the jurisdiction of the FCCPC to regulate competition and consumer protection matters from different perspectives.

Exclusion of the banking and financial sector from the FCCPC’s jurisdiction

The Banks and Other Financial Institutions Act (the **BOFIA**) was enacted in 2020, specifically precluding the FCCPC from exercising its powers in relation to transactions involving banks and other financial institutions. Section 65 of the BOFIA provides that:

- a) the provisions of the FCCPA shall not apply to any function, act, financial product, or financial services issued or undertaking, and transaction howsoever described by a bank or other financial institutions licensed by the CBN;
- b) the provisions of sections 92 (1), (2) and (3), 94 and 98 of the FCCPA shall apply to a merger, acquisition or other form of business combination which involves a bank, specialised bank or other financial institution, to the extent that all references to the FCCPC in the specified sections shall be deemed and construed as a references to the CBN.

The effect of Section 65 of BOFIA is to make CBN the exclusive competition authority with respect to Mergers and Acquisitions (M&A) transactions involving banks, specialised banks, or other financial institutions licensed by CBN. The overriding jurisdiction of the CBN over the FCCPC on matters of competition and consumer protection in the financial sector has received judicial backing in the case of *Lamfat Gas Nig. Ent. Limited v Kuda Microfinance Bank*,¹ filed in 2023, where the High Court held that the provisions of section 65(1) of BOFIA expressly excludes the application of the FCCPA to the banking industry. Even with the clear provisions of Section 65 of BOFIA and the judicial authority interpreting BOFIA, a grey area still exist. It is, not clear whether the FCCPC can seek to extend its jurisdiction on competition matters to transactions involving at least one entity who is not licensed by the CBN.

Recognition of the FCCPC’s jurisdiction under the Petroleum Industry Act 2021 for upstream petroleum transactions

In 2021 when the Petroleum Industry Act (PIA) was enacted to regulate the petroleum sector, the PIA adopted a different approach from BOFIA by recognising the FCCPC’s jurisdiction and making compliance with the provisions of the FCCPA a

1. (Suit No.: LD/6869GCM/2023)

condition for the approval of mergers and acquisitions in the petroleum sector. Section 95(11)(d) of the PIA provided that the ministerial consent for mergers and acquisitions in the upstream petroleum sector would be subject to the parties' compliance with the provisions of the FCCPA. Therefore, where the Minister grants consent to any merger or acquisition transaction in the upstream petroleum sector and the FCCPC refuses to approve the transaction, the transaction cannot be implemented, and the ministerial consent would not be enforceable. Typically, the FCCPC would require proof of sectoral approval from the NUPRC when assessing mergers and acquisitions transactions in the upstream petroleum sector.

Silence on FCCPC's jurisdiction in transactions in the midstream and downstream petroleum sector:

Section 117 of the PIA, which empowers the Nigerian Midstream and Downstream Petroleum Regulatory Authority (NMDPRA) to approve mergers and acquisitions in the midstream and downstream petroleum sector, was silent on the role of the FCCPC in such transactions unlike the case in the upstream petroleum sector, where compliance with the FCCPA was made a condition for ministerial approval under section 95(11)(d) of the PIA. The Assignment or Transfer of Licence and Permit Regulations 2023 enacted by the NMDPRA was also silent on the role of the FCCPC for M&A transactions in the midstream and downstream petroleum sector. It is our view that in the absence of any express contrary provisions in the PIA and the midstream and downstream regulations against the jurisdiction of the FCCPC, section 104 of the FCCPA, which gives extensive powers to the FCCPC to scrutinise all mergers and acquisition transactions would be applicable. Typically, the FCCPC would require proof of sectoral approval from the NMDPRA when assessing M&A transactions in the midstream and downstream petroleum sector.

The Electricity Act 2023 envisages that NERC would invoke section 105 of the FCCPA and be directly responsible for competition and consumer protection matters in the electric power sector

In 2023 when the Electricity Act 2023 (Electricity Act) was enacted to regulate the electric power sector, the approach was to confer jurisdiction on competition and consumer protection regulation, including merger anti-trust approvals in the electric power sector on the Nigerian Electricity Regulatory Commission (NERC). However, the jurisdiction of the NERC was made subject to section 105 of the FCCPA



which provides concurrent jurisdiction between the FCCPC and sector regulators and mandates the FCCPC and relevant sector regulator to enter into a collaboration arrangement on the implementation of the FCCPC's guidelines and technical requirements in addressing competition and consumer protection concerns in the relevant sector.

Specifically, section 121(3) of the Electricity Act provides that *subject to section 105 of the Federal Competition and Consumer Protection Act, the NERC shall have the responsibility to consider, in respect of services in competitive markets, the prevention or mitigation of abuses of market power which includes market concentration, in its decisions and orders regarding matters such as... whether or not to approve a merger, acquisition or affiliation.*

We note that the FCCPC and the NERC have an existing MoU to collaborate and ensure that the standards applied in scrutinising transactions in the electric power sector are consistent with the FCCPC's standards.

Shared authority under the Investments and Securities Act 2025 where Public Companies are involved in mergers and acquisitions

The Securities and Exchange Commission (SEC) is the apex regulatory authority in the Nigerian capital market primarily responsible for regulating public companies under the Investments and Securities Act 2025 (ISA). Section 140(1) of the ISA 2025 provides that without prejudice to the powers of other regulators, including the FCCPC (emphasis ours), no public company shall implement a merger or acquisition without the prior approval of the SEC. In 2021, after the enactment of the FCCPA, the SEC had introduced regulations containing provisions on mergers involving public companies primarily for the purpose of ensuring the shareholders are treated fairly, similarly, and equitably and are provided with sufficient information in respect of the proposed transactions. While there is now a requirement for public companies to obtain dual prior approval from both the FCCPC and the SEC, it should be noted that both regulators have different focus and considerations when scrutinising M&A transactions. While the FCCPC examines the competition and market ramifications of a merger, the SEC assesses the equitability and fairness of the transaction to the shareholders and in line with capital market rules.



Shared authority under the Nigerian Insurance Industry Reform Act (NIIRA) 2025 where Insurance Companies are involved in mergers and acquisitions

Section 107(1) of the NIIRA 2025 provides that no insurance company shall implement a merger or acquisition without the prior approval of the National Insurance Commission (NAICOM). Section 109 of NIIRA 2025 further provides that the provisions of NIIRA 2025 as it relates to mergers and acquisitions will be applicable notwithstanding the provisions of any other law. The use of the word ‘notwithstanding’ suggests that the NIIRA would take precedence over the provisions of the FCCPA which are inconsistent with or contradictory to the provisions of the NIIRA.² The NIIRA does not expressly state that NAICOM would consider competition issues when reviewing merger applications. One cannot assert that both the NIIRA and the FCCPA are conflicting in this regard. To this end, we are of the view that both the FCCPC and NAICOM will need to grant prior approval for mergers and acquisitions involving insurance companies. NAICOM’s merger review will, focus on insurance compliance, reporting and documentation requirements under NIIRA, while the FCCPC will scrutinize the transaction from a competition perspective. Approval from both the FCCPC and NAICOM must be obtained for any M&A transaction. Typically, the FCCPC would require applicants to show evidence of sector regulator approval from NAICOM before it grants its approval. Where any of the transaction parties is a public company, the prior approval of the SEC must be obtained before the transaction is implemented.

At the time of writing this article, there is no publicly available information indicating that NAICOM and FCCPC have entered into a collaboration agreement setting out the parameters for reviewing M & A transactions involving insurance companies.

PROS AND CONS OF CONCURRENT JURISDICTION AND COLLABORATION BETWEEN THE FCCPC AND SECTOR REGULATORS

There are advantages and disadvantages associated with concurrent or shared jurisdiction in respect of mergers and acquisitions regulatory approvals. The FCCPC and the sector regulator(s) can benefit from each other’s expertise when scrutinizing M&A transactions. The FCCPC is an expert in competition law and policy generally whereas the sectoral regulators have broader knowledge of their respective industries. The FCCPC can benefit from the regulators’ access to industry-specific information, expertise in industry dynamics, and insight into the market and its participants. Interaction between the agencies may be particularly helpful in defining markets, obtaining industry statistics, and articulating theories of competitive harm.

On the other hand, concurrent or shared jurisdiction increases transaction costs and timelines for completing M & A deals. Shared jurisdiction can also lead to inconsistent outcomes. While this is rare given that the FCCPC usually adopts the approach of requesting transaction parties to submit evidence of sector regulator approval, there is also a possibility that irrespective of the sector regulator approval, the FCCPC may decline approval based on competition concerns. There could also be instances where transactions which would typically not raise competition concerns and which may be easily approved by the FCCPC, are refused approval by the relevant sector regulator.

Section 105 of the FCCPA underscores the critical importance of coordination and collaboration between the FCCPC and other sector regulators. This provision mandates that the FCCPC engage in negotiations with all relevant government bodies to establish formal collaboration agreements aimed at harmonizing jurisdictional authority and ensuring consistent enforcement of the FCCPA’s provisions. Any sector regulator that already exercises jurisdiction under existing laws in a particular sector is required to initiate these negotiations with the FCCPC and to conclude them within one year.

CONCLUSION

Apart from the provisions of BOFIA which prescribes that CBN will be the competition regulator for M & A transactions relating to banks and other financial institutions, subsequent legislative interventions have either expressly or tacitly

2. In *GTB Plc v. Obosi Micro Finance Bank Ltd.* (2022) 4 NWLR (Pt. 1821) 455, the Supreme Court held that the word “notwithstanding” means despite or in spite of. When the word is used in a section of a statute, it is used to exclude an impinging or impeding effect of any other provision of the statute or subordinate legislation, so that the said section may fulfill itself. Therefore, the word “notwithstanding” is used to show the legislature intends that no other provision of the Constitution or any other statute shall be capable of undermining, impinging, or impeding the effect of the provisions of the section.

preserved the jurisdiction of the FCCPC over competition and consumer protection matters in Nigeria. The role of sector regulators in the petroleum, electricity and insurance sectors, as well as for public companies, in M&A transactions has also been reinforced in subsequent legislations enacted after the FCCPA. This approach is more beneficial as the FCCPC and the sector regulator can benefit from each other's expertise when scrutinizing M&A transactions. In line with section 105 of the FCCPA, it would be most beneficial for sector regulators and the FCCPC to enter into collaborative MoUs to avoid duplicity and encroachment in the course of their regulatory oversight on competition and consumer protection matters. If the approach taken by the banking sector had been replicated in other sectors and Emeka Nnubia's argument had succeeded, the legislative intent behind the enactment of the FCCPA would have been whittled down or defeated entirely.

At Olaniwun Ajayi LP, we continue to guide clients leveraging our market-leading expertise in mergers, acquisitions, and regulatory advisory to help clients navigate this new era with confidence.

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