ENFORCEMENT MODELS IN COMPETITION LAW: COMPARATIVE PERSPECTIVES AND IMPLICATIONS FOR NIGERIA*

Abstract
One of the main objectives of competition law is to forestall inordinate acquisition of market power by firms as well the management of such powers in situations where they already exist. The essence of competition regulation is to ensure that all the benefits which competition law provides for, such as proliferation of choices for consumers, affordability of goods and services; outstanding quality of products and services are achieved. Institutions play a huge role in every sector as they form the mechanism for the establishment of rules and procedure which determine the standard of behavior. Several modes of institutional enforcement structure exist in the field of competition law. Irrespective of how elegantly drafted a competition legislation may be or how grand the goals of a competition law system may appear, it is of no moment if there are no effective regulatory and enforcement mechanism in place, more so, an institution that is well designed with the requisite structures in place will ultimately discharge its duties effectively. This therefore implies that competition law institutions are an integral part of competition law and policy. This work examined the various institutional models of competition law, their advantages as well as their disadvantages. It further highlighted the position of the competition law terrain in Nigeria. It was recommended that The FCCPC and other sectoral regulators should operate with greater autonomy, free from political interference, through clear legal protections and that the process of appointment and dismissal of the heads of the agencies should be transparent and devoid of political undertones.

Keywords: Competition Law, Enforcement Models, Comparative Perspectives, Implications, Nigeria

1. Introduction

One of the main objectives of competition law is to forestall inordinate acquisition of market power by firms as well the management of such powers in situations where they already exist. The essence of competition regulation is to ensure that all the benefits which competition law provides for, such as proliferation of choices for consumers, affordability of goods and services; outstanding quality of products and services are achieved.[1] Competition otherwise known as antitrust is regulated at the various states by competition regulatory bodies through the power vested on them by the government. In some cases, the competition authorities are solely vested with antitrust regulation and enforcement while in other cases; there is sectoral regulation in addition to the antitrust roles which the enforcement bodies are saddled with. These sectoral regulators compliment the activities of the antitrust regulatory bodies.[2] Institutions play a huge role in every sector as they form the mechanism for the establishment of rules and procedure which determine the standard of behavior.[3] Several modes of institutional enforcement structure exist in the field of competition law. Irrespective of how elegantly drafted a competition legislation may be or how grand the goals of a competition law system may appear, it is of no moment if there are no effective regulatory and enforcement mechanism in place, more so, an institution that is well designed with the requisite structures in place will ultimately discharge its duties effectively. This therefore implies that competition law institutions are an integral part of competition law and policy. There is no perfect model of institutional design, states however, endeavour to adopt the structure best suited to their peculiar political, social, economic and legal environment with the aim of achieving effectiveness in the workings of the relevant market. Over the years, competition authorities have been burdened with how to adopt an efficient model of institutional arrangement as this to a great extent impacts on the overall effectiveness of a competition authority.[4] The various forms of competition institutional design are discussed hereunder.

2. Various forms of Competition Institution

Various competition law regulatory models have been adopted by various states based on the peculiarity of their systems. These will be discussed hereunder.

Multifaceted Competition Authorities

This is a system where the competition authority of a state is saddled with other responsibilities in addition to its competition functions. In this case, the competition authority is assigned other policy roles ranging from regulation of other sectors, consumer protection functions, technical regulations and public procurement functions *inter alia*. Quite a number of states have their competition laws merged with consumer protection laws especially as one of the main goals of competition law is the protection of the interest of consumers. It is therefore common place to find competition authorities which serve multiple functions; competition enforcement, sectoral regulation as well as consumer protection roles.[5] The fusion of these roles in a singular entity may be beneficial and in other cases, counterproductive and this is largely dependent on the nature of additional functions.[6] It has been stated that in evaluating the effectiveness of any competition institution, the evaluation measure must emanate from a legal process in accordance with the provisions of the relevant laws. Similarly, the process must be autonomous, devoid of any form of political influence or any influence from the market. Whatever measure adopted for the evaluation must

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[1]OECD, Interactions between Competition Authorities and Sector Regulators OECD Competition Policy Roundtable Background Note 7.
[2]OECD (2019), Independent Sector Regulators and their Relationship with Competition Authorities < http://www.oecd.org/daf/competition/independent-sector-regulators.htm.> assessed on November 12, 2024
[3] J Malinauskaite, *Harmonization of EU Competition Law Enforcement Law Enforcement* (Switzerland, Springer Nature 2020) 139
[4] A R Pisarkiewicz and M Bott, NCA's 'Institutional Design and Enforcement Strategies' 2016, *European University Institute* March 2.
[5] *Ibid* 3.
[6] *Ibid*

make room for inputs from all the affected stakeholders in an unambiguous manner while inculcating the rules of fair hearing. It is imperative that the course taken in the evaluation is systematic and geared towards achieving the intended purpose while the authorities remain accountable for whichever measure adopted by them.[7] The multifaceted approach is faced with the task of amalgamating the various divergent functions into a singular control as well as the interaction and interchange of ideas and information between the various components.[8] Similarly, this method of control largely minimizes the influence of the competition authority as other contending interests need to be satisfied and there is the challenge of dividing staff functions along the lines of competence. This also raises the challenge of specialization since the staff of the agency can be called upon to act in other capacities and conflict of interest cannot be ruled out. Additionally, adopting the multifaceted competition authority approach is fraught with the risk of political bias and interferences such as the issuance of price control by the government.[9]

Advantages of the Multifaceted Approach of Competition Regulation
This particular method of competition regulation has certain advantages. Some of these advantages include:

Flexibility: This method allows for flexibility of the staff to switch from one policy area to another. Thus the staff are able to garner a wide range of expertise across the various fields which is embodied in the system thereby enhancing their specific competence. This enables the authority to minimize high staff turnover. It has however been argued that this particular benefit is well suited for smaller economies.[10]
Cost Effectiveness: Since all the functions of the competition authority are integrated in a single institution, it makes for cost effectiveness and facilitates the ease of transfer of staff. This makes it possible to utilize a few hands to carry out multiple functions. Overhead and administrative costs usually associated with running multiple institutions are eliminated.[11]
Synergy: The multifunctional approach results in synergy of operations as in most cases the function integrated complement each other. A better understanding of the market may be achieved with the integration of roles from different areas of the institution. This may ultimately lead to better a deeper understanding of the issues that give rise to the challenges experienced in the market as the different sectors are able to interact seamlessly. This however may lead to conflicts if not handled effectively.[12]
Information Transmission: Since some of the policies complement each other, it is easier and cheaper to share information in a multifunctional institutional setting. Information received by one section may be utilized in another. However, this has to be done within the limit prescribed by the law.[13]
Effective Organization: The multifunctional approach makes for a more effective internal organization. Functions that are inter-related are detached and administered distinctly while the non-related ones are organized accordingly. Consequently, staff are assigned roles and responsibilities along such divides.[14]

3. Independence from the Government
Another form of institutional approach is one where the competition authority is devoid of any political influence and is at liberty to exercise its powers in accordance with sound competition provisions of the enabling law, in consideration with the prevalent economic exigencies.[15] Here the agency is a distinct entity which is not integrated into another but is self sufficient. Thus, the competition authority can adapt to changing circumstances easily without the rigours of interfacing with any other body or any political influence.[16] This system creates equilibrium and makes for predictability, thus, all the stakeholders involved in the process are assured of a credible process. However, any deviation from the safeguards put in place for the realization of autonomy will defeat the purpose for which the authority is set up. Independence from the government is not achieved through a particular process; it is as a result of a deliberate political, cultural and historic awareness towards achieving such independence. This autonomy is apparent in the mode of appointment and dismissal of the head of the competition agency as well as other staff of the agency. This is mostly achieved through a clear and transparent process devoid of any political connotation. Independence also means that due process is followed in the dismissal of the officers especially the head of the organization and that the dismissal is not done at the whims of the head of government.[17] This independence can also be compromised directly or indirectly. Where the central government through any of its agencies constantly interferes in the determination of the course of a case by passing down instructions to the competition agency or where the government uses its political influence to discountenance the decision of a competition agency, it is tantamount to a direct form of control. On the other hand, government can meddle in the activities of a competition agency through the appointment and removal of the head

[7] Pisarkiewicz (n 4) 3
[8] *Ibid*
[9] J Molestina, *Regional Competition Law Enforcement in Developing Countries* (Springer-Verlag GmbH Germany) 179
[10] Molestina (n 9) 180
[11] *Ibid*
[12] *Ibid*
[13] Molestina (n 9) 180
[14] Organisation for Economic Co-operation and Development, Summary Record: Annex to the Summary Record of the 123rd Meeting of the Competition Committee Held on 15-19 June 2015 Key points of the Roundtables on Changes in Institutional Design 2
[15] *Ibid*
[16] E Kovacic and M Mariniello, 'Competition Agency Design in Globalised Markets' (2016) *International Center for Trade and Sustainable Development* 3
[17] Kovacic and Mariniello (n 16) 3

of the agency and in such cases, the officer appointed by the government will owe allegiance to the appointing authority. Budgetary allocation to a competition agency is another form of indirect control.[18]

The availability of independent source of funding devoid of any political connotation is another pointer to the independence of a competition commission. The competition authority is not swayed by subtle or obvious threats of withholding of funds by the government. The independence of the competition authority in some cases is provided for in the enabling law by inserting clauses which highlight non interference by the government expect in cases of overriding public interest. However, the main avenue for challenging the decision of a competition authority remains judicial reviews. The autonomy of competition authorities extends to its source of funding. In this case, a separate budget is allotted to the competition body which they are liberty to disburse in accordance with the needs of the organization. There is also room for the competition body to consolidate its fund through the imposition of fees and penalties in addition to funds generated from merger applications. The competition authority's independence is not undermined by the state's allocation of funds.[19]

Another issue which is germane to the independence of a competition authority is the recruitment of the right personnel; staff with the right qualification in the field of competition law. It is also crucial that the management of the competition authority ensures that prudent management of its resources for the smooth running of the commission. This also entails proper monitoring and supervision of the staff of the competition authority and ensuring that the authority is generally run in accordance within the limits set by the enabling law. In a bid to ensure accountability, it is advisable that there is a quarterly or annual report to the government as well as submission of reports to oversight bodies put in place by the competition authority. It is also pertinent to engage in various level of consultations with the government and other stakeholders with respect to the programs and activities of the organization in addition to publishing the commission's yearly programs. The expenditure of the agency should be subjected to an audit by the government or a relevant authority authorized by the government. Guidelines should also be published periodically regarding the enforcement activities of the agency.[20]

4. Enforcement Authority

In terms of enforcement of competition law, the question arises as which system is best suited under any given circumstance; an institution charged with only competition enforcement or one where different agencies have the responsibility of competition enforcement. The different enforcement options are discussed hereunder.

Single Institution Exclusive Enforcement Authority: Here the responsibility of the enforcement of a state's competition law is ascribed to a single competition agency to the exclusion of all other sectoral enforcers. A single competition authority is more focused on its responsibility and is able to employ the category of staff that are focused, effective and efficient in the discharge of their enforcement responsibilities. It is a cost saving measure for the government unlike the multiple competition enforcement models where resources are allocated by the government to all the duplicate agencies. It disposes with duplicity of functions associated with the other forms of enforcement institutions. However, the single institution enforcement entity may be plagued with all manner of political interferences, corruption and close mindedness.[21]

Multiple Competition Enforcement Model: here, more than one agency has the responsibility of competition law enforcement. This method of enforcement ensures that no competition law violation escapes the notice of the competition agency. The other agencies as the case may be, provide an added form of scrutiny. Where a single agency may not have enough manpower to handle a particular issue, a second agency or agencies fills that gap by providing additional man power to get the job done efficiently. Similarly, a multiple agency is able to consolidate its financial resources for the effective discharge of enforcement responsibilities. This model of enforcement eliminates corruption, bias and political interferences.[22] The United States operates a multiple enforcement system which comprises the Federal Trade Commission and the Department of Justice (Antitrust Division). The state antitrust agencies are also entrusted with competition enforcement responsibilities at the state level. There also exist other sectoral regulators with overlapping responsibilities.[23] Multiple enforcement institution can lead to performance enhancement as all the agencies work assiduously to outdo the other. It also enhances innovation in the field of enforcement. Conversely, running a multiple competition agency is cost intensive as resources are allotted to the various agencies by the government. Again, it could lead to rivalry which might be counter-productive in the long run as the various institutions are likely to focus on enhancing the efficiency and image of their particular institution as against the common goal. In addition, it deprives a state of the opportunity to have a unified voice and perspective in their dealings with other nations. Opposing views may arise from the multiple units in the area of litigation resulting in uncertainties in the competition law enforcement of a state.[24] One way of stemming conflict situations between multi enforcers is through legislative enactment which provide for the extent of the responsibilities of the enforcers including the rules of procedure, cooperation considerations and the expected area of proficiency.[25]

[18] *Ibid* 4
[19] (n 9) 2
[20] *Ibid* 8
[21] Kovacic and Mariniello (n 16) 5
[22] E Kovacic and M Mariniello (n 16) 4
[23] *Ibid* 3
[24] *Ibid* 4
[25] OECD, Institutional Challenges in Promoting Competition Note 3 < www.oecd.org/competition > assessed on October 4, 2024.

5. Law Enforcement or Competition Advocacy

Another model of competition law enforcement is the advocacy and enforcement considerations. Should an agency be saddled with competition advocacy functions as well as enforcement? A broader interpretation of the role of a competition agency includes competition law advocacy. This ensures that through its enlightenment programs targeted at market practitioners, government agencies and other stakeholders, market efficiency in adequately preserved. Competition advocacy also extends to research and development efforts carried out by the agency at various levels on ways to improve efficiency in the market. In a restricted perspective, a competition authority's law enforcement responsibilities are limited to investigating and prosecution roles. Advocacy roles include lobbying the relevant arms of government with a view to influencing them to adopt policies that promote competition and ensuring that adequate funds are allotted towards the promotion of competition law and policies. Competition advocacy, however, if not properly directed may result in undue political interference.[26]

6. Laws Regulating Competition in Nigeria

There are a few laws which regulate competition. Some of these laws are restricted to certain sectors like the telecommunications, electricity inter alia. However, there is a central law which regulates competition and consumer protection in Nigeria.

The Federal Competition and Consumer Protection Act

The Federal Competition and Consumer Protection Act [27] was enacted to ensure that a competitive market is promoted and maintained. It also ascertains the promotion of an efficient market in Nigeria. The FCCPA is further aimed at protecting the interest of the Nigerian consumers by prohibiting unfair practices by business owners which inhibit competition. The Act is positioned to promote sustainable development in the Nigerian economy.[28]

In Nigeria, under the Federal Competition and Consumer Protection Act[29] activities of firms in respect of competition are regulated by the Federal Competition and Consumer Protection Commission.[30]

Electricity Regulations Act 2023

The Electricity Regulation Act[31] was enacted to provide a comprehensive legal and institutional framework for the generation, transmission, distribution of electricity in Nigeria as well as the enforcement of the rights of electricity consumers in Nigeria.[32]

Nigerian Communications Act

The NCA[33] is aimed primarily at providing and creating a framework that regulates all activities in the telecoms sector in Nigeria. It provides for the implementation and modification of the policy of telecommunications and serves a framework which effectively and independently regulates the telecommunications industry. Additionally, it provides for easy, trustworthy and assessable communications services all over the country.[34]

7. Competition Regulatory Bodies in Nigeria

The FCCPA provides for the duties of the FCCPC which includes; initiating policies and reviewing of economic activities in a bid to identify anticompetitive practices; giving guidance to the government on national policies relating to competition and consumer protection including reports on market practices and its effect on the consumer;[35] organizing seminars, workshops and researches aimed at creating public awareness.[36] They are also mandated to ensure that all matters relating to the protection of the consumers are given adequate attention and unscrupulous acts perpetuated by firms against the consumers receive adequate redress.[37] For the effective implementation of their functions under the Act, the FCCPC is also empowered to set up and set up departments and units. Additionally, their powers extend to the curtailing the spread of goods and services which constitute or likely to constitute a hazard to the public.[38] That way, they compel obedience to the provisions of the Act from manufacturers and service providers.[39] The Nigerian Communications Act[40] on the other hand, established the Nigerian Communications Commission.[41] The Commission is charged with the responsibility of regulating competition solely within the telecommunication sector and the protection of the interest of consumers against unfair practices.[42] The Act is comprehensive in scope and covers subjects such as formulation of national policy on frequency management; requirements for and class of licenses; powers and procedures of the Commission; investigations for the purpose of administration of the Act; information gathering; regulations and guidelines; competition practices; interconnection; consumer protection and quality of service;

[26] OECD, Institutional Challenges in Promoting Competition Note 3 < www.oecd.org/competition > assessed on October 4, 2024
[27] Federal Competition and Consumer Protection Act 2018 (FCCPA)
[28] FCCPA s 1 (a) (b) (c) (d) (e)
[29] Federal Competition and Consumer Protection Act 2018 (FCCPA)
[30]FCCPC
[31] Electricity Regulations Act 2023
[3232] Ibid s 1
[33] (2003) NCA
[34] NCA S 1 (a) (b) (c)
[35] FCCPA s 17 (c)(d)
[36] *Ibid* s 17(o)
[37]*Ibid* s 17 (s)
[38] *Ibid* s 18 (a) (b)
[39] *Ibid* s 18 (e)
[40](2003) NCA.
[41]Hereinafter referred to as the NCC.
[42]*Ibid* Chapter II part 1.

universal access fund; spectrum assignment; technical standards; installation of network facilities, jurisdiction; and actions against the Commission.[43]

The Electricity Regulations Act set up to provide a competitive market in the electricity sector.[44] The Nigerian Electricity Regulatory Commission[45] is saddled with the promotion competition and the participation of the private sector.[46] The Commission is also charged with the provision of electricity services in addition to maintaining appropriate consumer rights and obligations.[47] With all the other sectoral regulators in place, the FCCPA however provides that the provisions of the FCCPA take precedence over legislations relating to competition and consumer protection.[48] That is to say that the FCCPC has overriding powers over all matters relating to competition and consumer protection in Nigeria.

8. Conclusion and Recommendations

Competition law institutions face the challenge of balancing key principles in order to operate effectively. They must remain independent from political influence while being accountable through transparent appointments, budgeting, and performance evaluations. High expertise is essential for analyzing industry data and economic theories, but too much industry involvement can compromise impartiality.[49] Transparency builds public trust, yet protecting confidential business information is equally important. Administrative efficiency requires swift action, especially in time-sensitive cases, but must not override due process rights. Additionally, predictability in legal decisions provides stability, but flexibility is necessary to adapt to changing economic conditions. Managing these conflicting priorities requires careful navigation to ensure effective and fair competition law enforcement. Different countries have adopted and applied the different models of competition enforcement. There is however no perfect model, rather the states have adopted the model that best suits their stage of competition law development and the financial resources available to them. A state can adopt a particular system and switch to another model as the competition law system evolves. What is important is that whatever system that is adopted practices fairness, transparency and accountability. In Nigeria, competition regulation has evolved with the enactment of the Federal Competition and Consumer Protection Act (FCCPA), which establishes a unified framework for competition enforcement. The FCCPC is a multifaceted body that that regulates competition and consumer protection functions. Additionally, it engages in advocacy in order to create awareness about unfair business practices that adversely affect efficiency in the Nigerian market. Despite the existence of other competition regulation and enforcement bodies in various sectors, the FCCPC superintends over the activities of all other such bodies. However, sectoral regulations such as the Electricity Regulation Act and the Nigerian Communications Act create overlaps that may pose challenges in enforcement. Despite these regulatory frameworks, effective implementation remains a critical concern, given issues of political interference, inadequate funding, and capacity constraints within competition regulatory bodies.

To enhance the effectiveness of competition law enforcement and institutional design, the following recommendations are proposed:

Strengthening Institutional Independence: The FCCPC and other sectoral regulators should operate with greater autonomy, free from political interference, through clear legal protections. Again, the process of appointment and dismissal of the heads of the agency should be transparent and devoid of political undertones.

Enhanced Funding Mechanisms: Adequate financial resources should be allocated to competition authorities to enable them to function effectively. The FCCPC should explore independent sources of funding, such as administrative penalties and merger filing fees. This will reduce dependence on government for allocations thereby minimizing political influence.

Harmonization of Regulatory Functions: A clear framework should be established between the various sectoral regulators for collaboration. This will forestall conflicts and duplication of efforts.

Capacity Building and Expertise Development: Training and development programs should be implemented to build the expertise of competition law enforcers and policymakers. Similarly, recruitment of specialized personnel with experience in economics, law and market regulation should be prioritized to enhance enforcement efficiency.

By implementing these recommendations, Nigeria can strengthen its competition law enforcement framework, enhance market efficiency, and promote consumer welfare. A well-designed institutional model, complemented by strong enforcement mechanisms and advocacy, will ensure that competition law serves its intended purpose of fostering fair competition, innovation and economic growth.

[43]F Monye et al, 'Research of the State of Consumer Protection in Nigeria: a Review of Consumer Protection in the Telecommunications Sector in Nigeria' (2014) *Consumer International* 14.
[44] Electricity Regulation Act ERA 2013
[45] *Ibid* s 33
[46] *Ibid* s 34 (2)(a)
[47] *Ibid* s 34 (2) (c)
[48]*Ibid* s 104
[49] M J Trebilcock and E M Iacobucci, 'Designing Competition Law Institutions: Values, Structure, and Mandate' (2010) (3) (41) *Loyola University Chicago Law Journal* 458-459