

RESEARCH ARTICLE

Integrating Competition and Consumer Protection in Africa: The Law and Practice of Nigeria's Federal Competition and Consumer Protection Commission

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Abstract

In January 2019, Nigeria enacted the Federal Competition and Consumer Protection Act, which provides for a joint legal framework for both competition and consumer protection. This article examines the theoretical and practical rationale for integrating competition and consumer protection, recognizing that, while related, the two may pursue distinct goals and operate under different principles. It provides a lens to review the issues an African country faces following integration, especially in the broader normative discussion of the goals of competition law. Although there is literature investigating the integration of consumer protection and competition, there is still nothing that examines the place of consumer protection in the wider theoretical context of competition for developing countries, particularly how they balance efficiency with other goals of competition. The article also offers the first academic review of the five-year practice of competition law and its application in Nigeria.

Keywords: competition; consumer protection; Nigeria; Africa

Introduction

“We are concerned not simply with the governance framework for markets, but what the markets generate, namely whether they foster growth-promoting competition. It is not about *getting prices right* but about building dynamic comparative advantages. In the context of African countries, this is about the incentives and opportunities for investments in improved production capabilities to achieve technological catching-up.”¹

Despite their proximity, there certainly could be differences between the goals of competition (also known as antitrust) and consumer protection. It might be easy to say that while the concern of competition is apparently to protect competition, consumer protection aims to protect the consumer.

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1 S Roberts “Competition law prescriptions and competitive outcomes: Insights from Southern and East Africa” in D Gerard and I Lianos (eds) *Reconciling Efficiency and Equity: A Global Challenge for Competition Policy* (2019, Cambridge University Press) 173 at 193. Emphasis added.

Of course, a follow-up question in this reasonably simple analysis is whether the protection of competition in markets also protects consumers; the equally simple answer, it seems, will be that while consumer protection protects consumers directly, competition protects consumers indirectly.² The more complicated answer is that, notwithstanding an apparent connection, “competition law and consumer protection law are distinct areas of law with different theories of harm and objectives”.³ An underlying point in explaining this distinction is that consumer protection and competition law often have divergent perspectives on what constitutes the “consumer” and “consumer harm”. Therefore, although the final destination remains the protection of the “consumer”, the process by which both areas of law arrive at that destination could cause, and has caused, tensions.⁴ Consequently, the integration of competition and consumer protection could raise substantive and systemic questions, such as whether seeking the goal of “consumer welfare optimisation through market regulation is consistent with pursuing the same end through regulating transactions [and] whether an agency constituted to advance competition policy can also serve the purpose of protecting individual consumers”.⁵

The discussion is complicated further by the conspicuous lack of clarity in the literature on what are or should be the goals of competition law, and so, given this, arguments for the integration of consumer protection and competition could be conceptually deficient. Nonetheless, this point is also very practical, since states use competition policy to achieve a plethora of different objectives that may include economic and non-economic goals. Economically speaking, while some competition regimes may be guided by a consumer welfare standard (for maximization of consumer benefits) which “focuses solely on the policy gains for consumers and disregards efficiency gains for producers”, competition may also be influenced by a total welfare standard, where there is a focus on efficiency gains for producers as well as consumers.⁶ In the US, it is generally thought that the Supreme Court has accepted the consumer welfare standard of antitrust as the best way to ensure legal certainty and predictability, given that it ensures that any non-economic goals are not factored in in competition analysis.⁷ However, the consumer welfare standard in competition is not generally thought to mean

2 For example, it is argued that “[w]hereas consumer protection rules are built upon the premise that consumers are the weaker party to transactions and should be directly protected for this reason in their dealings with traders by the enforcing of certain consumer rights, competition law only indirectly protects the consumers’ economic well-being through ensuring that the goods and services are produced and priced competitively”; S Nathani and P Akman “The interplay between consumer protection and competition law in India” (2017) 5 *Journal of Antitrust Enforcement* 197 at 198.

3 Ibid.

4 See generally M Huffman “Bridging the divide? Theories for integrating competition law and consumer protection” (2010) 6/1 *European Competition Journal* 7.

5 Id at 8.

6 M Lopez-Galdos “Antitrust in 60 seconds: Is the consumer welfare standard appropriate?” *Disruptive Competition Project* November 2017, available at: <<https://www.project-disco.org/competition/111717-antitrust-in-60-seconds-is-the-consumer-welfare-standard-appropriate/>> (last accessed 27 February 2024).

7 See the Supreme Court case of *Reiter v Sonotone* [1979] 442 US 330 at 343, where the court held that “Congress designed the Sherman Act as a ‘consumer welfare prescription’”. The Court in this case primarily relied on the work by Robert Bork, which was published one year earlier; Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978, Basic Book Publishers). Criticism of Bork has been strong in US scholarship; it relates mostly to the fact that he failed to make a clear distinction between consumer welfare and total welfare in his analysis but identifies economic efficiency disguised as consumer welfare as the sole normative aim of US competition law. In this regard, see for instance DA Crane “The tempting of antitrust: Robert Bork and the goals of antitrust policy” (2014) 79/3 *Antitrust Law* 835. Other cases that have relied on the consumer welfare criterion include, for instance, *Rebel Oil Co v Atlantic Richfield Co* [1995] 51 F3d 1421, 1433 (9th Cir). Recently there has been growing momentum in the US challenging the consumer welfare criterion. In March 2019, the Senate Judiciary Committee opened a debate on whether the consumer welfare standard has become outdated in the era of rapid economic growth. Former Secretary of Labour Robert Reich testified that “[a]ntitrust is – or should be – about more than welfare economics. The problems it should be addressing go far beyond helping individual consumers get the best possible deal for themselves”; testimony of Robert B Reich “Does America have a monopoly problem?”, Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy, and Consumer Rights (5 March 2019), available at: <<https://www.judiciary.senate.gov/imo/media/doc/Reich%20Testimony.pdf>> (last

interventions that benefit individual consumers, but is understood based on the approach that competition law prevents harm to competition and that this maximizes the welfare of consumers.⁸ This is why consumer welfare is closely associated with economic efficiency in competition analysis.

In the European Union (EU), there has been a long and complex argument relating to the normative foundations and justification of EU competition policy in the quest to determine its ultimate goals. Opinions are divided as to whether the normative perspective of EU competition law foresees just one goal or can admit a plurality of objectives.⁹ In this regard, what is commonly at issue is whether EU competition policy should have as its goal the protection of economic freedom or consumer welfare and efficiency, and whether these goals are mutually exclusive, could be sought together or placed in a hierarchy of importance.¹⁰ In line with the ordoliberal roots of EU competition law, the consumer welfare criterion for competition has been shown to conflict with the protection of economic freedom which ordoliberalism predominantly favours.¹¹ It is clear that the goal of consumer welfare and economic freedom could constitute different objectives for competition policy, both economically and even normatively.¹² In the latter's case, a competition policy with goals focused on economic freedom conceives such freedom as a fundamental right and the competitive process as a means of protecting such rights, and holds that this is necessary for the economic liberty of the individual.¹³ Furthermore, it also seems that placing emphasis on rivalry (helping smaller firms compete) to protect competition, with little regard for efficiency, could directly result in the loss of economies of scale by a dominant firm, leading to economically inefficient results that could directly hurt the consumer.¹⁴ This is particularly problematic if the inefficient rival does not generate any efficiency for the benefit of the consumer in the long run. Conversely, consumer welfare as a goal of competition policy takes a utilitarian perspective, in the sense of getting the best deal for consumers in a properly functioning market.¹⁵ Nevertheless (and especially following the modernization of EU competition law), the US and EU have generally converged in their focus on consumer welfare and economic efficiency as the objective of their competition policies,¹⁶ even though their

accessed 21 September 2024). His views are part of what is now regarded as the New Brandeis Movement, which argues against the centralization of private power caused by the consumer welfare standard.

- 8 M Huffman "The integration of competition law and consumer protection" at 3, British Institute of International and Comparative Law, available at: <https://www.biicl.org/files/4553_the_integration_of_competition_law_and_consumer_protection.pdf> (last accessed 25 March 2024).
- 9 I Lianos "Some reflection on the question of the goals of EU competition law" at 3 (University College London Centre of Law, Economics and Society working paper, series 3/2013).
- 10 M Negrinotti "The single market imperative and consumer welfare: Irreconcilable goals? Exploring the tensions amongst the objectives of European competition law through the lens of parallel trade in pharmaceuticals" in D Zimmer (ed) *The Goals of Competition Law* (2012, Edward Elgar Publishing) 295.
- 11 P Akman "Searching for the long-lost soul of Article 82 EC" (2009) 29/2 *Oxford Journal of Legal Studies* 268; L Gormsen, "The conflict between economic freedom and consumer welfare in the modernisation of Article 82" (2007) 3/2 *European Competition Journal* 329.
- 12 Akman, id at 269.
- 13 Gormsen "The conflict", above at note 11 at 330.
- 14 Id at 338.
- 15 Id at 330.
- 16 Following the successful integration of Europe – long considered one of the primary objectives of EU competition law – the European Commission began modernizing its competition policy in the early 2000s, shifting towards a more "economic or effects-based" approach. Amid the prolonged debate during that period about the objectives of EU competition law, the Commission clarified that it adopts a consumer welfare standard, which aligns its approach with that of other jurisdictions, such as the United States. See European Commission, "DG competition: Discussion paper on the application of Article 82 of the Treaty to Exclusionary Abuses" (December 2005), para 4, available at: <https://www.concurrences.com/IMG/pdf/m5496_20090622_20212_en-80.pdf?11277/daa83c8e6636c3336295ca785d1c4567d0565df5027e34a1489c951344465532> (last accessed 24 September 2024). See also the Commission Guidelines on the Application of Article 81/3 of the Treaty [2004] OJ C 101/97, para 13, where the Commission ascribed consumer welfare as the principal goal of Article 81(3): "[T]he objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources." See also Akman "Searching for the long-lost soul", above at note 11. On the historical development of the

conceptions of efficiency and their justifications for market intervention are sometimes remarkably different.¹⁷

For developing countries, any strict focus on consumer welfare and efficiency as the goal of competition would mean that other public interest considerations, such as inequality, unemployment, discrimination or protection of small businesses, are removed from competition analysis.¹⁸ For most developing nations, competition policy must be part of a larger public interest standard to address the prevalent issues of development and inequality.¹⁹ This means that when and if necessary, it must transcend the paradigm of efficiency and assume other important social equity objectives as well. A strict focus on consumer welfare, therefore, may rob developing countries of the ability to use their competition legislation to foster other goals that might be important to them. Nevertheless, it has to be noted that in various jurisdictions, the normative perspectives and foundations may be of limited practical importance for enforcement authorities.²⁰ Arguably, there is sufficient consensus that in practice, competition policies' goals of economic freedom could sit well with consumer welfare and efficiency and even social policy goals as a means-to-an-end approach.²¹ It is also important that the focus of competition policy should ensure a wide net for the application of the principles of competition, so that all market actors, producers and consumers alike, are protected.²² Yet competition authorities, especially newly established ones, must be aware of these tensions and conflicts.²³

goals of EU competition law, see D Gerber, *Law and Competition in Twentieth-Century Europe: Protecting Prometheus* (1998, Oxford University Press) and F Maier-Ragaux "On the normative foundations of competition law-efficiency, political freedom and the freedom to compete" in Zimmer (ed) *The Goals of Competition Law*, above at note 10.

- 17 See generally E Fox "US and EU competition law: A comparison" (1999) Institute of International Economics, available at: <https://www.piie.com/publications/chapters_preview/56/10ie1664.pdf> (last accessed 24 September 2024); European Economic and Marketing Consultants "Differences in school of thought on protecting competition: Chicago School and European School" (Competition Competence Report, autumn 2016/2), available at: <https://www.ee-mc.com/fileadmin/user_upload/Different_schools_of_thought.pdf> (last accessed 24 September 2024). The differences in approach have been significant in how both jurisdictions have handled big tech monopolies. For a review see C Rogers "Competition law and the EU and US approaches to dominant markets: Will the gap narrow?" (Dedman School of Law Legal Studies, research paper no 559, 2021), available at: <<https://ssrn.com/abstract=4178276>> (last accessed 24 September 2024).
- 18 Eleanor Fox has done extensive work on the need for a balance between equity and efficiency in developing countries. See, for instance, E Fox and M Bakhom *Making Markets Work for Africa* (2019, Oxford University Press); E Fox "Economic development, poverty and antitrust: The other path" (New York University Law and Economics, working paper 07-26, 2007); E Fox "South Africa, competition law, and equality: Restoring equity by antitrust in a land where markets were brutally skewed" (2019) 3/1 *CPI Antitrust Chronicle* 1.
- 19 M Bakhom "A dual language in modern competition law? Efficiency approach versus development approach and implications for developing countries" (2011) 34/3 *World Competition* 495. Bakhom argues that although "efficiency is very relevant in the context of developing countries, it should be applied in a broader context, taking into account non-economic goals such as redistribution and inclusiveness in order to achieve an 'efficient development'"; id at 495. See also the extensive work of E Fox referenced above. For another review, see EL Okiche and AB Okiche "The balance between equity and efficiency: Reflections on the goals of the new Nigerian Competition Law" (2020) 46/2 *Commonwealth Law Bulletin* 331 at 363.
- 20 Maier-Ragaux "On the normative foundations", above at note 16. Lianos also contends that a normative perspective to the goals of EU competition law may prove meaningless, since goals are "intermediated through the mechanism of institutional choice"; "Some reflection", above at note 9 at 1.
- 21 For example, in the case of the EU, the Bundeskartellamt (the German Competition Regulator) contends that "the economic freedom model is based on the belief that in the long run both goals [economic freedom and consumer welfare] are not in conflict as safeguarding of a vivid competition process will enhance consumer welfare"; "A Bundeskartellamt / Competition Law Forum debate on reform of Article 82: A 'dialectic' on competing approaches" (2006) 2 *European Competition Journal* (special issue) 211 at 218.
- 22 D Zimmer "On fairness and welfare: The objective of competition policy" in CD Ehlermann and M Marquis *European Competition Law Annual* (2007, Hart Publishing) 103 at 107.
- 23 In this regard, the OECD warns that multiple objectives for competition law "increas[e] the risks of conflicts and inconsistent application of competition policy. The interests of different stakeholders may severely constrain the independence of competition policy authorities, lead to political intervention and, in a relatively minor way, compromise and adversely affect one of the major benefits of the competitive process, namely, economic efficiency"; OECD Global Forum on Competition "The objectives of competition policy" (CCNM/GF/COMP 20033, 29 January 2003)

It is against this background that we examine the Nigerian Federal Competition and Consumer Protection Act (FCCPA or the Act), which was signed into law on 30 January 2019. The Act repeals the Consumer Protection Council Act 2004 and provides a joint legal framework for both competition and consumer protection in the Nigerian economy. The journey to the enactment of Nigeria's first *ex post* competition law has been very tortuous.²⁴ However, now that the long-awaited Act is in place, the Federal Competition and Consumer Protection Commission (FCCPC) must make the right determination and delineation of the goals of its competition and consumer protection programme. It is vital that the enforcement mechanisms provided by the Act align with these determined goals and overall reflect the nation's peculiar economic and political realities. Clarity on the complementary or divergent roles of competition and consumer protection in the context of the unique characteristics of developing countries could help in performing this task.

Seen in this light, the aim of this article is to analyse the possible challenges that arise following the integration of competition and consumer protection by developing (African) countries. This objective is set within the broader context of analysing the law and practice of Nigeria's FCCPC over its five-year history to date. Notably, this article represents the first comprehensive academic effort to undertake such an examination. The debate surrounding the relationship between competition law and consumer protection, and whether both should be governed under a single regulatory framework given their distinct objectives, holds significant importance in the literature. However, this has never been examined conceptually from an African perspective.

Focusing on Africa, particularly Nigeria, is highly relevant, as many African nations (like Nigeria) are still in the process of developing and refining their approaches to competition and have very little competition law experience. The possible variations in policy approaches across the continent underscore the relevance of examining how these regulatory systems are being integrated. The article therefore offers a valuable contribution to the field by exploring these critical issues in depth. We will begin by examining the normative objectives of competition and consumer protection, and will then assess their complementarities and potential conflicts. Further, we examine these normative conflicts in the context of developing (African) countries that follow (or should follow) a different paradigm from conventional competition policy. The last section reviews the five-year law and practice of the FCCPC, seeking to find out how the enforcement body has balanced harm to consumers and to competition in its enforcement measures and priorities.

The different missions of competition and consumer protection

Competition

While competition has become increasingly mainstream in the economies of most nations, there is still no satisfactory definition of what it is. This to a large extent seems ironic, since the aim of most national competition laws is to preserve competition.²⁵ As with many other concepts, a description of competition often suffices, but even this will vary depending on the context and, most importantly, will be influenced by the system of competition policy in force in the jurisdiction and the goals of such policy.²⁶ While the goals of competition law have been extensively debated

at 9; available at: <https://www.oecd.org/content/dam/oecd/en/publications/reports/2003/05/oecd-journal-of-competition-law-and-policy_g1gh31ba/clp-v5-1-en.pdf> (last assessed 16 March 2025).

24 See generally NO Dimgba "The need and challenges to the establishment of a competition law regime in Nigeria", available at: <https://www.academia.edu/8822080/The_Need_and_the_Challenges_to_the_Establishment_of_a_Competition_Law_Regime_in_Nigeria> (last accessed 25 March 2024).

25 In his celebrated treatise on competition law, Bork remarked that the US Sherman Act, despite being operational for many decades, "has not arrived at one satisfactory definition of competition"; *The Antitrust Paradox*, above at note 7 at 61.

26 For example, an economist conceives competition differently from a lawyer or policy-maker. While competition may assume other social goals depending on the jurisdiction (eg the promotion of the single market in Europe), an economist

in the literature, often reflecting diverse and sometimes conflicting perspectives,²⁷ it is clear that its main mission revolves around the nature and structure of the twin notions of “markets” and “economic efficiency” and how they operate to advance “consumer welfare”, often broadly defined. An economist normally conceives competition in terms of a “market structure where products are priced at marginal cost and consumer welfare is optimally maximised through the internal efficiency of the market”.²⁸ Of course, the basis of and the case for competition lie fundamentally in the belief in a free-market economy and the ability of the market system to perform amazing feats of organization – “bringing together large numbers of inputs to produce complex products ‘efficiently’, bringing those products to market in the correct amounts and distributing them to consumers”.²⁹ This internal or economic efficiency is best understood by referring to the three splinter efficiencies that competition brings to the market, namely allocative, productive and dynamic efficiency.

Allocative efficiency occurs when economic resources are distributed to consumers at a price they are willing to pay and in quantities that meet the market demand. This is achieved when the price equals marginal cost. Productive efficiency occurs when goods are produced at the lowest possible cost. Economists argue that in a perfectly competitive market, firms that are inefficient in production are outcompeted by those that can produce the same goods at lower cost. As a result, every firm is motivated to minimize its production costs; failure to do so leads to being priced out of the market by more efficient competitors, who aim to maximize profit by keeping costs as low as possible. Dynamic efficiency focuses on innovation and the market’s ability to develop new products that align with consumer needs. While not scientifically proven, it is argued that competition encourages producers to innovate and create new products as they continuously adapt to changing consumer preferences and demands.³⁰

Thus the mission of competition is to make markets operate efficiently; this is why economic efficiency is normally regarded as the only true goal of competition law in and of itself. It is therefore no surprise that the underlying principle of competition policy in all jurisdictions often revolves around the right market definition for goods and services. Unless markets are rightly defined, the mission of economic efficiency becomes truly fruitless, since price elasticity, at least, becomes difficult to measure, and also because the harm done to other competitors may be truly unrepresented. Market definition, therefore, being the difference between the regulation of markets and the regulation of transactions, could be regarded as the overriding distinction between competition and consumer protection.³¹ This is because competition policy, unlike consumer protection, will not define markets in relation to the parameters of individual transactions but in a much broader sense, since its aim goes beyond the protection of consumers and of competitors (competition) as well. If a consumer is defined more broadly in competition, this presupposes that the nature of consumer harm will also be different.

always conceives competition in relation to economic efficiency. In this regard, Wolfgang Kerber remarks: “each country should be free to assign specific goals to its competition law and to interpret economic efficiency concepts according to its pre-occupations”; “Should competition law promote efficiency? Some reflections of an economist on the normative foundations of competition law” in J Drexler and J Monger (eds) *Economic Theory and Competition Law* (2009, Edward Elgar) 119.

27 See the contribution of the Academic Society of Competition Law (ASCOLA) in Zimmer (ed), *The Goals of Competition Law*, above at note 10.

28 W Kolasky “What is competition? A comparison of US and European perspectives” (2004) 49/1–2 *The Antitrust Bulletin* 29 at 31.

29 R Blair and D Kaserman *Antitrust Economics* (2nd ed, 2009, Oxford University Press) at 2–3.

30 See generally R Whish and D Bailey *Competition Law* (10th ed, 2021, Oxford University Press) at 8; A Jones and B Sufrin *EU Competition Law: Texts, Cases and Materials* (5th ed, 2023, Oxford University Press) at 8; S Bishop and M Walker *The Economics of EC Competition Law: Concepts, Application and Measurement* (2010, Thomas Reuters) at 25.

31 J Goyder and A Alboris-Llorens, *Goyder’s EC Competition Law* (5th ed, 2009, Oxford University Press) at 9.

Consumer protection

Consumer protection regulation generally “denotes a body of law designed to protect a consumer’s interests at the level of the individual transaction”.³² In line with social contract theory, the law from its inception has always sought to be on the side of the weaker and more vulnerable party. The reason for this is to eliminate the survival of the fittest and to make sure that the strong does not prey on the weak. Consumer protection rules are “built upon the premise that consumers are the weaker party to transactions and should be directly protected for this reason”.³³ Consequently, consumer protection policy fights the systemic disparities and inequalities found in the consumer–supplier relationship.³⁴ According to the United Nations Committee on Trade and Development (UNCTAD), the vulnerability of the consumer stems from three factors, ie the disparities in bargaining power, knowledge and resources between him / her and the manufacturer / provider.³⁵

In terms of bargaining power, it is more likely that the consumer (who is always an individual, as corporate consumers usually do not come under the purview of consumer protection laws) cannot match the clout of the supplier or producer, who most of the time are corporate organizations. Moreover, manufacturers and service providers are more likely to organize and speak as a body, thereby making them a force to be reckoned with, unlike consumers, who are geographically dispersed and often not organized cohesively. There are also asymmetries in knowledge between consumers and producers. In this regard, the average consumer often suffers from misleading information or from advertising and labelling defects (normally within the control of the producers) which prevent them from making an informed choice.³⁶ This asymmetry in information is reflected in a general distaste for standard form contracts in consumer protection circles. Lastly, consumers are also limited in resources compared to producers.

Consequently, the normative basis for consumer protection has often rested on equity and social justice, since it serves to enhance “the bargaining equality between consumer and producer interests [by] alleviating the problems of those who are particularly vulnerable in the marketplace”.³⁷ Interestingly, distributive justice has also been placed as one of the normative rationales for consumer protection. In this respect, UNCTAD has argued that consumer protection can and should be a legitimate method of achieving the redistributive goals of society.³⁸ However, the concept of the economic analysis of consumer protection (which is a wide and sophisticated area in competition) is also developing rapidly.³⁹

In all, the most important goal of consumer protection laws is making sure that the very vulnerable consumer is not harmed by the manufacturer or service provider and that there is redress if and when harmful conduct occurs.⁴⁰ Such conduct could include the supply of substandard products or services, inadequate information (or warnings) when relevant, charging excessive prices, etc. Conceptually, however, the precise nature of consumer harm is not easy to define, especially if it conflicts with other efficiency goals that are beneficial to society and which may also advance consumers in the future.

32 Huffman “Bridging the divide?”, above at note 4 at 7.

33 Nathani and Akman “The interplay”, above at note 2 at 198. However, it is essential to note that in specific sectors, such as insurance, consumers may withhold information, potentially giving them more substantial bargaining power compared to producers.

34 BB Kanyip *Consumer Protection in Nigeria: Law, Theory and Practice* (2005, Rekon Books) at 29.

35 United Nations Committee on Trade and Development (UNCTAD) “Manual on consumer protection” at 2, available at: <https://unctad.org/system/files/official-document/ditccplp2017d1_en.pdf> (last assessed 26 March 2024).

36 E Okiche “The bar and the bench as agents of consumer advocacy in Nigeria” (2002–2010) 9 *Nigeria Juridical Review* 92.

37 UNCTAD “Manual on consumer protection”, above at note 35 at 3.

38 Ibid.

39 JK Pappalardo “Economics of consumer protection: Contributions and challenges in estimating consumer injury and evaluating consumer protection policy” (2022) 45 *Journal of Consumer Policy* 201.

40 Okiche “The bar and the bench”, above at note 36 at 92.

General issues: Competition and consumer protection as complements and antagonists

On a simple level, a common observation from the analysis so far is that while consumer protection advances and protects consumers directly, competition does so indirectly.⁴¹ In such broad terms, this could be further understood in the sense that while consumer protection makes sure that the demand side of the economy operates optimally, it is complemented by competition, which performs a similar function for the supply side of the market.⁴² Rivalry between firms sees to it that consumers are supplied with the most effective and innovative products at the best possible price. Of course, this is because the economic efficiency that is guaranteed by competition ensures that lower-quality products are constantly giving way to both much superior and lower-priced ones. It is no surprise, therefore, that competition and consumer protection are constantly linked together in many jurisdictions. In the EU, for instance, competition is defined as concerning a market structure that seeks to ensure low prices, high quality and innovative products for consumers by establishing a system through which rival firms compete with one another.⁴³ In South Africa, competition law exists to make sure consumers “have competitive prices and product choices”.⁴⁴ However, the nature of consumer harm and questions of enforcement reveal some divergence or antagonism between the two areas, which are examined below.

Defining a consumer and the nature of consumer harm

A technical analysis of what constitutes a “consumer” and the nature of “consumer harm” reveals different points of conflict. The most obvious, it seems, would be the different conceptions that exist in both areas of who a “consumer” is. In this regard, it is common to see the promotion of consumer welfare as one goal of competition legislation. However, the consumers that are normally envisaged by competition policy are not only individual end users but generally any entity that has a dealing with the undertaking in question, including, possibly, other competitors.⁴⁵ As noted above, these different conceptions of a consumer are a necessary consequence of the objective of both areas, one existing to protect competition and the other to protect transactional consumers. In this regard, Akman has argued that the elevation of the “consumer welfare standard” as the ultimate objective of competition, without an acknowledgement of the differences between the notion of the consumer in competition law and in consumer law, creates an illusion and confusion for competition agencies and may often lead to end users being removed from competition analysis.⁴⁶

41 Nathani and Akman make this point in relation to India. They note that the Consumer Act “addresses consumer disputes against traders directly, while the Competition Act addresses consumer welfare indirectly by ensuring that efficiencies are promoted and more choices are available to consumers”; “The interplay”, above at note 2 at 10.

42 UNCTAD “Manual on consumer protection”, above at note 35 at 3.

43 European Union Council Guidelines 2004/C/31/03 of 5 February 2004 on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings [2004] OJ C31/5, art 8.

44 South African Competition Act No 89 of 1998, sec 2(1). The preamble of the Act further states that one of its purposes “is to provide for markets in which consumers have access to and can freely select the quality and variety of goods and services they desire”.

45 P Akman notes that “‘consumer’ as used in EC competition law simply means ‘customer’, including competitor, namely anyone who deals with the undertaking(s) whose practice is in question”; “‘Consumer’ versus ‘customer’: The devil in the detail” (University of East Anglia, Centre for Competition Policy, working paper 34, 2008) at 8, available at: <<https://ueaeco.github.io/working-papers/papers/ccp/CCP-08-34.pdf>> (last accessed 5 April 2024). See also P Akman “‘Consumer welfare’ and Article 82EC: Practice and rhetoric” (University of East Anglia, Centre for Competition Policy, working paper 25, 2008,) available at: <<https://ueaeco.github.io/working-papers/papers/ccp/CCP-08-25.pdf>> (last accessed 5 April 2024).

46 Akman notes further: “Although the term ‘customer’ includes ‘consumers’ in the real sense – if the undertaking directly deals with the end users – it also includes other undertakings that are acting for purposes of business, trade or profession. In other words, the latter will not necessarily be ‘consuming’ the products / services purchased, but will be using them for their own commercial purposes. This has implications for both competition law and consumer law since their usage of the same term for different concepts creates confusion and perhaps an illusion. It creates confusion since two interrelated branches of law refer to different concepts by using the same term and this is misleading in itself. It creates

The varying interpretations of the “consumer” are directly linked to how harm or abuse is defined in both areas. On the surface, abusive or harmful conduct may not be seen as a competition issue (even if it harms competitors or consumers), unless it affects the market structure or competition *per se*. In common law jurisdictions, this distinction often hinges on what is categorized as an unfair business practice versus a restrictive trade practice.⁴⁷ Thus while an unfair or harmful business practice might constitute an appropriate area for consumer protection analysis, it may present no direct issues to competition.⁴⁸ Huffman’s analysis of the different theories of harms in competition and consumer protection shows that harms like deception and behavioural manipulation, which are clearly consumer protection matters, may not present any issue for competition agencies.⁴⁹ Other harms, like charging excessive prices (as the analysis below will show), may only be a competition issue, depending on the jurisdiction.

Questions of enforcement and institutional structure

Following the analysis above, the next issue is to ascertain whether a policy that enhances competition on its merits also advances end-user consumers; this represents the biggest dilemma in how a regulatory body should channel the enforcement of competition policy. In this regard, Huffman writes:

“It is possible that integration of a scheme designed to regulate markets nation- or worldwide with a scheme designed to regulate atomistic transactions, which consumer protection does, is neither realistic nor desirable. Likewise, protecting consumers in individual transactions with a scheme designed to ensure competition is preserved may miss the mark. It is harder to explain why an agency with a divided mission should be preferable to one with a single purpose.”⁵⁰

Competition enforcement the world over is predicated on two identifiable theories of harm; it considers harm to both consumers and competition as pivotal. The association of consumer welfare and protection of competition often requires the competition regulator to re-prioritize enforcement measures – at times in the interests of consumers and at times in the interests of businesses. This is sometimes a matter of law. For example, Article 101 of the Treaty on the Functioning of the European Union allows some anti-competitive conduct if consumers are allowed a fair share of the resulting benefit.⁵¹ Given that EU competition law is the most transplanted competition legislation in the world, a similar provision exists in many national legislations.⁵² Therefore another practical distinction between competition enforcement and consumer protection is that competition enforcement necessitates a balancing act between two competing interests, while a body dedicated solely to consumer protection focuses exclusively on consumers and transactions involving private individuals.

However, scores of jurisdictions around the world have an integrated competition and consumer protection body and generally seek to unite the legal rules and enforcement of these different areas.

an illusion since the ‘consumer’ is perceived as the beneficiary of both branches of law, although by including other undertakings in its conception of ‘consumer’, competition law does not always in effect serve the interests of consumers since the interests of other undertakings will not always be aligned with those of end-users”; “‘Consumer’ versus ‘customer’”, *id* at 8. According to Akman, this is normally referred to as the Chicago trap, illustrating the conflation of the consumer welfare standard of competition law with the total welfare standard and the fact that “the Chicago School indeed promoted ‘total welfare’ by calling it ‘consumer welfare’”; *id* at 9.

47 See generally *ibid*.

48 However, even in mature jurisdictions, differentiating between unfair trade practices and anti-competitive practices remains a complicated issue.

49 See generally Huffman “Bridging the divide?”, *above* at note 4.

50 *Id* at 22.

51 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

52 See FCCPA, sec 60(a); Competition Act of the United Kingdom, sec 9(1)(a).

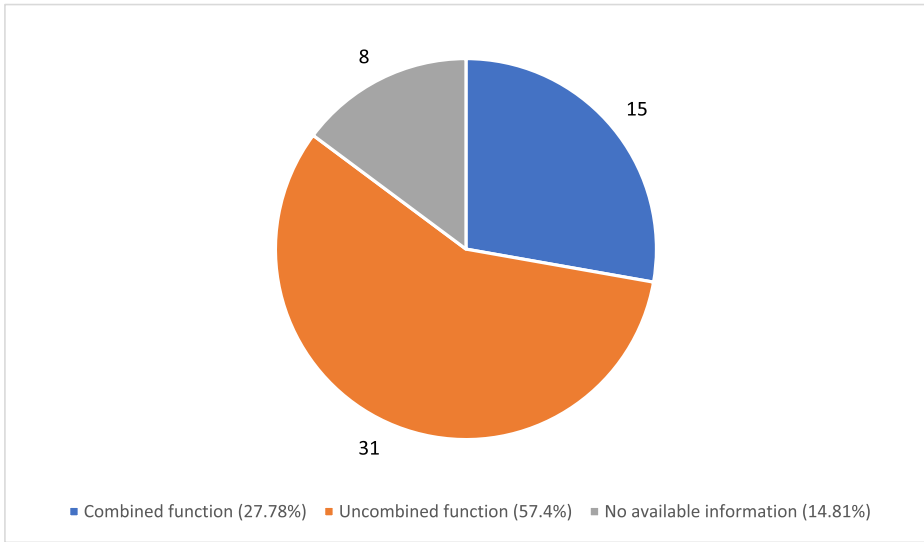


Figure 1. Combination of competition promotion and consumer protection functions in African regulatory agencies.
Source: Authors' research data.

There are of course many management efficiencies and benefits that could be achieved from integration. In the quest to explore the most optimal relationship, some countries (such as the UK) that hitherto had integrated institutions now pursue both goals in different departments, even if this is in the same institution. Even in countries that have an integrated body (like the Federal Trade Commission in the US), it is the case that the competition and consumer protection arms do not necessarily work together, since they are motivated by different objectives. Of the 54 African countries we investigated, 15 had an integrated agency while 31 had separate agencies for both arms.⁵³ We found no information on the remaining eight (see Figure 1).⁵⁴

It is also important to consider the place of private enforcement for both systems. Given the public nature of the efficiency goals of competition and the fact that private litigants may be wrongly incentivized, there is a compelling case that competition should consistently remain a matter of public interest. This is notwithstanding the fact that private enforcement has been the bedrock of some competition regimes (eg the US). However, it seems reasonable to suggest that a legal scheme for private enforcement is better suited to consumer protection matters. This is because “the harm sought to be remedied by the legal scheme is the harm in the individual transaction, so there is a perfect alignment of interests between the consumer plaintiff and the legal scheme”.⁵⁵

53 The 15 with an integrated agency are Botswana, Burkina Faso, Djibouti, Ethiopia, Eswatini (Swaziland), Kenya, Mali, Mauritania, Nigeria, Seychelles, Sierra Leone, Tanzania, Togo, Uganda and Zambia. The 31 with separate agencies are Algeria, Angola, Benin, Burundi, Cabo Verde, Cameroon, Central African Republic, Chad, Comoros, Congo, Democratic Republic of the Congo, Côte d'Ivoire, Egypt, Equatorial Guinea, Gabon, Gambia, Ghana, Lesotho, Madagascar, Malawi, Mauritius, Morocco, Mozambique, Namibia, Rwanda, Senegal, South Africa, South Sudan, Sudan, Tunisia and Zimbabwe.

54 Eritrea, Niger, Somalia, Sao Tome and Principe, Libya, Liberia, Guinea and Guinea Bisau. Our research did not reveal any reasons why African countries may choose to have a body that combines both functions or not. We imagine that it is because most African countries have very little competition enforcement experience that allows for an opportunity to draw inferences on which method is better. Except for maybe South Africa, Africa does not have well-developed competition law jurisprudence or enforcement practice. Considering the limited financial resources in many African countries, it appears economically practical to establish a single entity that performs both functions.

55 Huffman “Bridging the divide?”, above at note 4 at 25.

Generally, in developed economies such as the US and EU, the assumption is that when markets run efficiently, individual consumers are indirectly protected. Thus in the US, some regulation sceptics have argued that market forces entirely obviate the need for consumer protection.⁵⁶ In the same vein, the EU Commission notes that “the creation and preservation of an open single market promote an efficient allocation of resources throughout the Community for the benefit of consumers”.⁵⁷

Integration problems and the special case of developing (African) countries

Competition authorities in developing countries often face peculiar integration problems. Both the understanding of competition and the general issues of integration highlighted above contemplate competition as existing under the normative objective of efficiency and the efficient markets of developed countries. However, the goals of developing countries can and should be different. In this regard, competition law in African countries must balance efficiency and other (equity) goals of competition. We noted in a previous article that

“In the equity and efficiency debate ... Nigeria like other developing countries has little choice, competition policy should respond to contextual and societal problems and competition rules should be made amenable to greater development objectives ... Most African nations need a competition policy that ‘assists’ in tackling the huge issues of development, poverty and inequality. Nonetheless ... it is argued that competition must remain welfarist meaning that efficiency should remain its top goal. This means that any compromise on economic efficiency as the goal of such law must be accommodated only to the extent that basic principles of a market-driven competition are not harmed.”⁵⁸

Further, one of the ways to start actualizing this balance is to include equity goals in the competition legislation as part of its objectives. Although Nigeria did not do this in its competition law, there are examples of African countries that have.⁵⁹ The gold standard of reference is normally the Competition Act of South Africa, which includes the increase of the ownership stakes of historically disadvantaged persons as part of the objective of its competition policy. Namibia follows the example of South Africa and includes a similar provision in its competition policy.⁶⁰ In Kenya, the object of their act is to enhance the welfare of the people by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout the country, in order to “promote the competitiveness of national undertakings in world markets”.⁶¹ This may mean the encouragement of indigenous export cartels that help the Kenyan economy, an action that will normally be regarded as anti-competitive.

56 Ibid. The US belief in the market’s ability to fight various kinds of inefficiencies is discussed below.

57 European Commission “Guidelines on vertical restraints” [2010] OJ C 130/1, para 7. In addition, it has been consistently argued that EU competition law aims to protect “not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such”; *GlaxoSmithKline Services Unlimited v Commission and Others* [2009] ECR I-9291, case C-501/06, para 63. See also *T-Mobile Netherlands and Others* [2009] ECR I-4529, case C-8/08, paras 31, 36 and 38–39.

58 Okiche and Okiche “The balance between equity and efficiency”, above at note 19 at 334. The article relies heavily on the extensive work done in this regard by E Fox and M Bakhoum, above at notes 18 and 19. However, reconciling equity and efficiency in competition law is also increasingly on the agenda of developed countries. See JB Baker and SC Salop “Antitrust, competition policy, and inequality” (2015) 104/1 *Georgetown Law Journal* 1; I Lianos “The poverty of competition law: The long story” (University College London, Centre for Law, Economics and Society (CLES), research series 2, 2018), available at: <https://www.ucl.ac.uk/cles/sites/cles/files/cles_2-2018.pdf> (last accessed 13 March 2024).

59 There are other ways the Nigerian Competition Act balances equity and efficiency, but generally, equity goals are not included as part of the objectives of the Act. For a review, see Okiche and Okiche “The balance between equity and efficiency”, above at note 19.

60 Namibia Competition Act No 2 of 2003, sec 2.

61 Kenya Competition Act No 12 of 2010, sec 3.

Consequently, given the peculiar nature of markets in Africa, the policy thrust and enforcement action of an African competition body (ACB) should therefore include goals such as the protection of small businesses, the protection of minorities or disadvantaged groups, the enhancement of international competitiveness and the reduction of poverty.⁶² Nevertheless, even though a balance is desirable, market-driven competition should, as much as possible, not be harmed, and inefficient firms should not be compensated indefinitely.⁶³ This is an extremely important point in the context of African nations. However, the non-efficiency objectives of ACBs could further complicate the integration of consumer protection and competition for developing countries. We highlight this in the succeeding sections in two ways: (a) monopolies and the charging of excessive prices, and (b) price-fixing.

Monopolies and the charging of excessive prices

In the US, the overbearing influence of the Chicago School of Economics since the 1980s has led to the belief that markets are efficient, rewarding efficient firms and punishing non-efficient ones; therefore the approach of the government to markets has mainly remained non-interventionist. In light of this, competition law in the US is generally thought to be “extremely laissez-faire with respect to ... monopoly violation” because of the presumption of regularity and efficiency afforded to businesses and large corporations.⁶⁴ Hovenkamp notes that “firms ... determine their own output and set prices ... [N]one of these behaviours is even presumptively suspicious.”⁶⁵ Thus the acquiring of monopoly power and the charging of high prices, a necessary consequence of such power, is considered an incentive for new entrants into the market, and therefore not generally thought to be a concern of competition law.⁶⁶ Even though there are now critics of this regulatory approach, there are still good arguments to suggest that it aligns well with the nature of markets and the prominence of the competition culture that exists in the US.⁶⁷ It is, after all, responsible for the creation of very successful and largely efficient monopolist companies, such as Google, Apple, Microsoft, etc, which continue to significantly advance individual consumer welfare.

How would an ACB that has integrated competition and consumer protection matters approach a largely efficient monopolist that charges (or may charge) high prices that citizens can barely afford? Of course, a competition consideration should, as much as possible, promote the efficient company, especially if it wants to encourage it to be able to export to other markets (which of course is another goal of competition for developing countries and one of the ways they balance equity and

62 Markets in Nigeria follow the general nature of markets in most of Africa. They are highly concentrated and unequal, with high barriers to entry. Corruption further shrinks the possibility of market participation based on merit. In these ways, the markets of African countries are different from those of developed economies; Fox and Bakhom *Making Markets Work*, above at note 18 at 1.

63 Okiche and Okiche “The balance between equity and efficiency”, above at note 19 at 333.

64 E Fox “Competition policy at the intersection of equity and efficiency: The developed and developing worlds” (2018) 63/1 *The Antitrust Bulletin* 4 at 4. This position was made very explicitly in the US case of *Verizon v Trinko* [2004] 540 US 398. See also E Fox “The modernization of antitrust: A new equilibrium” (1981) 66/1 *Cornell Law Review* 1140; L Khan and S Vaheesan “Market power and inequality: The antitrust counterrevolution and its discontents” (2017) 11 *Harvard Law and Policy Review* 235.

65 H Hovenkamp *The Antitrust Enterprise* (2005, Harvard University Press) at 108–109. According to him, this is because “the costs of monitoring every unilateral act, even by dominant firms, would be extraordinarily high, for both government observation and the chill it would place on innovation and competition”; *ibid*.

66 This is insofar as there is no evidence on the part of the monopolist to sacrifice long-term profits to harm the competitor (predatory pricing) or to irrationally harm the competition. See the US case of *Novell, Inc v Microsoft Corp* [2013] 731 F 3d 1064 (10th Cir). The EU reached a different decision in the comparable *Google (Shopping)*; see European Commission Decision (27 June 2017) case AT 39740 *Google Search (Shopping)*. Thus in the EU, some unilateral conduct of a dominant firm may be unlawful in view of its dominance and lawful or harmless for firms that are not in a dominant position.

67 Critics include, for instance, V Roberston “Antitrust, big tech and democracy: A research agenda” (2022) 67/2 *The Antitrust Bulletin* 25.

efficiency).⁶⁸ But how would a focus on consumer protection help individual consumers who are suffering in the short term from high or excessive prices? This is especially relevant because there is a “general reluctance to condemn a monopolist price in competition policy”.⁶⁹ In comparison with the US, which has been successful in the creation and development of efficient monopolies, and given the conventional orthodoxy that competition is never against companies with dominant positions but against the abuse of such a position, how should an integrated ACB encourage competition and consumer protection? Of course, the underlying question is whether an institution could or should do both simultaneously.

Some of these issues are relevant in relation to the newly established Dangote Refinery in Nigeria. The refinery is the largest single-train refinery in the world; when fully operational, its supply capacity will exceed Nigeria’s daily requirement for refined fuel, and it will have a considerable surplus for exports.⁷⁰ The ability to meet Nigeria’s total demand for refined petroleum products enables the company to exert control over the pricing and supply of these products, to the detriment of other competitors who desire to import such products or who own modular refineries. Furthermore, the possible adoption of a vertical integration of services potentially enables Dangote to acquire a dominant position across the midstream and downstream sectors in relation to different business activities, such as the transportation and supply of crude oil to the refinery, the transportation of refined petroleum products for retail, and, in the downstream, the retailing of refined petroleum products to final consumers. In the first two instances, the company will have an upper hand in determining terms and conditions for other transportation and distribution service providers.

Nevertheless, if the company decides to venture downstream to the retailing of refined petroleum products to final consumers, then it can arguably have absolute control of both the midstream and downstream sectors. Since it is most likely that it will be singlehandedly setting the price of refined products, it can supply its new network of petroleum stations at a price that other petroleum station companies may find difficult to compete with. Inevitably, the efficiency of a vertical integration affects the pricing of Dangote Refinery’s products and services and the profitability of other service providers in the midstream and downstream sectors. Although the concerns about abuse of dominance will be multifaceted and could appear in different ways, one obvious issue will be the charging of an excessive price.⁷¹

Price-fixing

The tension between consumer protection and competition in developing countries also arises in the similar issue of price-fixing. Agreements that fix prices or divide markets (horizontal agreements) are considered the most dangerous for competition.⁷² In the EU, there is no requirement to show that horizontal agreements cause any harm to the market because they have as their object the restriction of competition.⁷³ In the US, given the strong orthodoxy against intervening in markets

68 See the example of Kenya above.

69 Fox and Bakhoun famously ask “How do we know when the price is too high? Too high compared with what? Compared with the firms costs ... or compared with a favourable benchmark in a competitive market?”; *Making Markets Work*, above at note 18 at 105.

70 B Akinyemi “Nigeria only OPEC member that imports 95% of refined petroleum products” (20 January 2022) *Nigeria Tribune*, available at: <<https://tribuneonline.ng.com/nigeria-only-opec-member-that-imports-95-of-refined-petroleum-for-domestic-use/>> (last accessed 28 October 2023).

71 For a review of the competition issues that arose following the establishment of the Dangote Refinery, see CC “Dangote Refinery: Solution or problem?” (29 May 2023) *The Alvin Report*, available at: <<https://thealvinreport.com/dangote-refinery-solution-or-problem/>> (last accessed 28 October 2023).

72 Whish and Bailey *Competition Law*, above at note 30 at 122; Jones and Sufrin *EU Competition Law*, above at note 30 at 660. This has been expressly acknowledged by the jurisprudence of the Court of Justice of the European Union; see for instance *Allianz Hungaria Biztosító*, case C-32/11, EU:C:2013:160, para 43.

73 *Consten and Grundig v Commission* [1966] ECR 301. However, the distinction between competition by object and effect has consistently caused controversy. For a recent analysis, see S Enchelmaier “Restrictions ‘by object’ after Generics, Lundbeck, and Budapest Bank: Are we any wiser now?” (2023) 11 *Journal of Antitrust Enforcement* 72.

and the maintenance of a belief in the efficient strategies of American business, price-fixing is even more condemned. The American Sherman Act provides the basis for this practice since, unlike in the EU, price-fixing agreements are irrefutably deemed anti-competitive since they fall under the *per se* rule that is not subject to the “rule of reason”.⁷⁴

Since flexibility in pricing should be the main objective of competition policy, what should be the right approach for ACBs towards price-fixing arrangements? Certainly, ascertaining the right course of action becomes more complicated if the ACB is integrated with consumer protection. Again, the question is: how is competition protected, or, more precisely, how should competition (and efficiency) be protected and balanced in the context of the markets and how should consumer protection also be promoted? In this regard, it is instructive (even if ironic) that the Nigerian FCCPA allows for price regulation for some select goods and services. For the purposes of regulating and facilitating competition only, section 88 of the FCCPA allows the president of the Federal Republic of Nigeria to regulate the prices of goods and services in the interest of users, consumers and suppliers. Arguably, this could have been one way the legislation allows for a balance between efficiency and other goals of competition, but how does one reconcile it conceptually with the promotion of consumer protection?⁷⁵ Below, we examine in more detail some of these issues in the Nigerian context.

Examining the law and practice of the FCCPC after five years

As previously mentioned, the FCCPA establishes the FCCPC to replace the Consumer Protection Council, Nigeria’s former consumer protection agency. With the integration of competition and consumer protection under the FCCPA, the FCCPC is now tasked with both safeguarding consumer rights and eliminating anti-competitive practices in Nigeria.⁷⁶ The FCCPC has made notable progress in these areas by conducting investigations and issuing enforcement orders to promote competition and protect consumers. Additionally, it has reviewed mergers and acquisitions falling within its jurisdiction to ensure that competition remains robust in the Nigerian economy.

According to the FCCPC’s Annual Report for 2019, the Commission received and reviewed 37 merger and acquisition notifications, addressed one anti-competition case and handled 9,258 consumer complaints. However, the FCCPC has not released official annual reports detailing its activities in the subsequent years. To fill this gap, we conducted empirical research during March and April 2024 on the Commission’s activities. During this research, we received an unofficial report covering the FCCPC’s activities over a 31-month period, from January 2019 (when the FCCPA came into force) until September 2022.⁷⁷ Additionally, the FCCPC regularly updates its website and social

74 I Kokkoris and C Lemus “Price fixing agreements” *Concurrences Antitrust Publications and Events*, available at: <<https://www.concurrences.com/en/dictionary/price-fixing-agreement>> (last accessed 11 April 2024).

75 This provision might have been made to protect poor farmers and guarantee them a source of income, which is a good thing in the context of the peculiarities of the Nigerian markets. See Okiche and Okiche “The balance between equity and efficiency”, above at note 19 at 353.

76 Sec 1 of the FCCPA states that the objective of the Act includes promoting and maintaining competitive markets in the Nigerian economy, promoting economic efficiency, and protecting and promoting the interests and welfare of consumers by providing consumers with a wider variety of quality products at competitive prices. Sec 17(a–z) provides for the functions of the FCCPC. The functions of the FCCPC in the FCCPA seem to include more consumer protection duties than competition. Nevertheless, the competition part of the law is covered under parts 7–12 of the statute. It seems, however, that the most pressing issue is whether it is possible for one body to cover all the 26 functions listed in sec 17.

77 We observed from the report that the FCCPC has approved about 219 mergers. The report shows that the FCCPC has conducted dawn raids in the tobacco and shipping industries and has investigated various gun-jumping and restrictive agreements, including cartels. It has also conducted investigations in various industries, including oil and gas, aviation, tobacco, shipping, technology, and the wheat-based consumer food market. With respect to criminal prosecutions, the report indicates that the FCCPC has prosecuted alleged offenders for price gouging, with one plea bargain reached and three cases still pending.

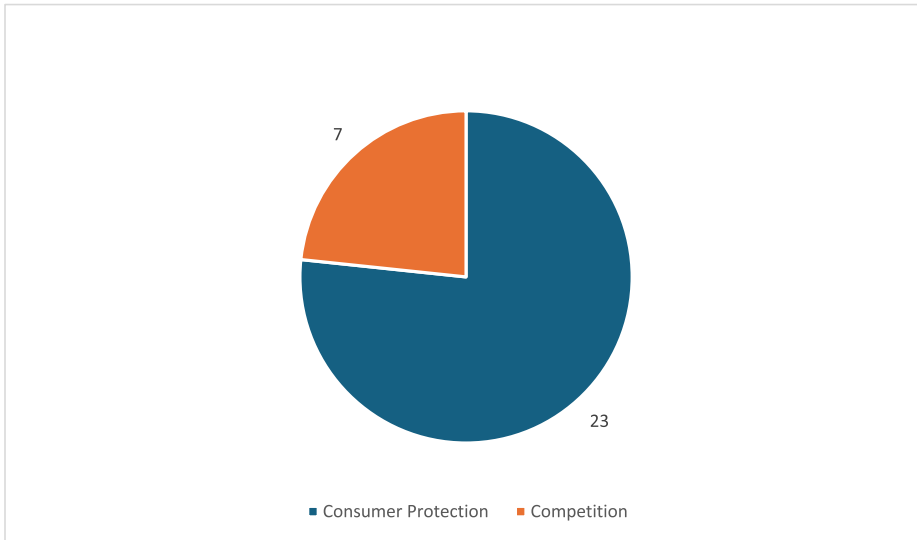


Figure 2. Number of investigations started by the FCCPC over five years.

Source: The FCCPC.

media platforms with news of its enforcement actions related to both consumer protection and competition (see Figure 2).⁷⁸

Competition cases under the FCCPC

Enforcement action against British American Tobacco Nigeria Limited for abuse of market dominance

In August 2020, the FCCPC launched an investigation into British American Tobacco Nigeria (BATN) over allegations of anti-competitive practices. At the time, BATN held a commanding 78.6% share of Nigeria's tobacco market.⁷⁹ It was accused of abusing its dominant market position by engaging in exclusionary practices, including penalizing retailers who sold their competitors' products.⁸⁰ Initially, BATN filed an action before the Federal High Court of Nigeria, seeking to prevent the FCCPC from proceeding with its investigation.⁸¹ However, both parties later reached a plea bargain arrangement, resulting in a consent order after BATN agreed to pay a USD 110 million fine. It appears that the fine was reduced due to BATN's cooperation with the FCCPC's investigation, in accordance with the Commission's Cooperation and Assistance Rules and Procedure 2021.⁸² Despite this outcome, no report has been provided detailing the economic or non-economic rationale behind the

78 The data in Figure 2 came from press releases of the FCCPC website and the FCCPC Facebook and Twitter social media, which are very active in providing information to the public on their various actions. We were concerned with specific investigations and cases that the FCCPC has started dealing with specific individual companies or industries, and not with their activities more broadly.

79 Tobacco Control and Data Initiative "Nigeria", available at: <<https://nigeria.tobaccocontroldata.org/en/home/industry-interference/tobacco-market-structure>> (last accessed 12 April 2024).

80 M Dzirutwe "Nigerian competition watchdog fines British American Tobacco \$110 million" (27 December 2023) *Reuters*, available at: <<https://www.reuters.com/business/retail-consumer/nigerian-competition-watchdog-fines-british-american-tobacco-110-mln-2023-12-27/>> (last accessed 12 April 2024).

81 *Federal Republic of Nigeria v British American Tobacco* suit no FHC/L/CS/1350/2020; FCCPC "Court strikes out BATN's suit against FCCPC", available at: <<https://fccpc.gov.ng/court-strikes-out-batns-suit-against-fccpc/>> (last accessed 12 April 2024).

82 FCCPC "British American Tobacco Nigeria Limited and affiliated companies: Investigation into possible violations of Federal Competition and Consumer Protection Act 2018, and other relevant tobacco laws / sundry regulations and

FCCPC's decision to go after BATN. Such a report would have offered valuable insight into the methods used by the regulatory body to reach its decision, thereby providing greater clarity for Nigerian businesses. This transparency could serve as a guide for firms to better understand the FCCPC's decision-making process, helping them align their practices with regulatory expectations and avoid similar infractions. Additionally, it would enhance confidence in the consistency and fairness of the Commission's enforcement actions.

Abuse of dominance: Festus Onifade / Coalition of Nigeria Consumers v Multi-Choice Nigeria Limited

Festus Onifade / Coalition of Nigeria Consumers v Multi-Choice Nigeria Limited highlights a significant moment in Nigeria's competition and consumer protection history, marking the first anti-competitive case brought before the Federal Competition and Consumer Protection Tribunal (FCCPT).⁸³ The claimants filed a complaint against MultiChoice Nigeria Limited, a dominant supplier of pay TV services in Nigeria, accusing the company of frequent and excessive price increases that allegedly amounted to an abuse of its dominant market position. Dissatisfied with the FCCPC's handling of the matter, the claimants escalated the issue to the FCCPT. Consequently, the crux of the case revolved around whether MultiChoice's history of price increases constituted an abuse of dominance under sections 70 and 72 of the FCCPA. Section 72(2)(a–d) outlines practices that would qualify as abuse of dominance, including “char[ging] excessive prices to the detriment of consumers”.⁸⁴

The Tribunal ruled that the claimants failed to establish that MultiChoice had abused its dominant position; it emphasized that Nigeria operates a free-market economy in which consumers have the freedom to purchase the goods and services of their choice. It further held that the FCCPA does not grant the FCCPC the power to regulate prices, noting that such powers rest solely with the president of Nigeria, as stipulated in section 88 of the FCCPA. The ruling underscores the challenges in regulating dominant players in a free-market economy while balancing consumer protection and competition concerns. The outcome suggests that in Nigeria, claims of excessive pricing by dominant firms must meet a high evidentiary threshold to prove abuse of dominance.

Uniform tariff arrangements: The Association of Mobile Money and Bank Agents in Nigeria

One of the most notable actions by the FCCPC was its investigation into alleged price-fixing by the Association of Mobile Money and Bank Agents in Nigeria (AMMBAN). AMMBAN represents about 1.5 million Nigerians who act as agents for banks and mobile money operators, providing essential financial services such as cash withdrawals and deposits through point-of-sale devices.⁸⁵ These agency banking services are often offered alongside other small-scale businesses, such as kiosk or roadside trading, and are crucial to low-income communities. On 30 June 2023, AMMBAN's Lagos chapter publicly announced plans to increase and standardize the fee structure for all agency banking transactions within Lagos. This proposal raised concerns with the FCCPC, as it constituted

directives”, available at: <<https://fccpc.gov.ng/wp-content/uploads/2023/12/bat-releases.pdf>> (last accessed 12 April 2024).

83 *Festus Onifade / Coalition of Nigeria Consumers v Multi-Choice Nigeria Limited*, suit no CCPT/OP/1/2022.

84 Id at 60. The Tribunal “erroneously” held that the conditions of sec 72(2)(a–d) FCCPA were cumulative. Izuogu, in his analysis of the case, correctly notes that any of the practices stipulated in the section are sufficient to sustain a claim of abuse of dominant position; see CE Izuogu “How the claimant and the Federal Competition and Consumer Protection Tribunal erred in the abuse of dominance case against Multi-Choice” (November 2022) *SSKÖHN Notes*, available at: <<https://sskohn.com/wp-content/uploads/2022/11/How-the-FCCPT-Erred-in-Multichoices-case.pdf>> (last accessed 16 April 2024).

85 M Oladunmade and G Oloruntade “Nigeria's agent banking association will move ahead with price-hike as fintechs consider legal action” (17 July 2023) *The Tech Cabal*, available at: <<https://techcabal.com/2023/07/17/pos-agents-increase-price/>> (last accessed 12 April 2024).

potential price-fixing, which is prohibited by the FCCPA. On 5 July 2023, the FCCPC issued a cease-and-desist order against the implementation of any uniform fee structure.⁸⁶ Despite the warning, the FCCPC indicated that AMMBAN appeared determined to proceed with the tariff arrangement.⁸⁷

Nevertheless, the approach taken by the FCCPC in light of the decision by AMMBAN is instructive. The Commission noted that:

“Considering that membership of AMMBAN probably consists mainly of small businesses and creates employment for young and mostly vulnerable citizens, the Commission adopted advocacy and business education as the tool to promote and enforce obedience to the law. This is a prudential, not weak or helpless approach to ensuring compliance, and it underscores the Commission’s proportionality approach to its consequence management system; and interpretation of the law.”⁸⁸

We propose that this approach of the FCCPC (which reflects its enforcement priorities) is correct and one of the ways efficiency is balanced with other goals of competition. The recognition that many of these agency banking operators are poor, and the general reluctance to go against them, is commendable because it shows that the FCCPC understands the nature of the Nigerian market. Nonetheless, the FCCPC made it clear that it does not intend to allow this inefficiency indefinitely.⁸⁹ This approach is further evident in a recent FCCPC notice responding to an unusual Federal High Court ruling that mandated the federal government to fix the prices of certain food commodities.⁹⁰ While the FCCPC acknowledged the clear anti-competitive implications of such a policy, it also hinted that it may allow this measure in extraordinary circumstances, recognizing the pressing issue of food poverty in Nigeria. In such situations, flexibility in enforcing competition laws may be necessary to balance short-term social needs – such as protecting vulnerable populations from skyrocketing food prices – with the long-term goal of promoting market efficiency.

We note that the case of AMMBAN reflects three important issues that an integrated ACB must explore in many cases brought before it. It illustrates that there was a consideration of the various efficiencies a good competition policy will engender (fighting cartels), how to balance this competition policy with other non-efficiency goals (the promotion of small businesses, fighting poverty) and the interests of consumers (preventing excessive or unfair prices). Consequently, an integrated ACB must constantly re-prioritize enforcement measures to meet these sometimes mutual but also divergent interests. The FCCPC has also begun other initial investigations into various anti-competitive practices in other cases, namely a coordinated price increase in airfares by domestic airlines (2022) and cartels and other anti-competitive conduct in the shipping and freight-forwarding industry (2021).⁹¹ However, there are no details as to the progress of these other investigation efforts.

86 FCCPC “Potential anticompetitive conduct in association of POS operators’ statement of setting prices for services” (FCCPA press release, 5 July 2023), available at: <<https://fccpc.gov.ng/potential-anti-competitive-conduct-in-association-of-pos-operators-statement-of-setting-prices-for-services/>> (last accessed 13 April 2024). Sec 107 of the FCCPA provides that “an undertaking shall not directly or indirectly – (a) by agreement, threat, promise or any other means, attempt to influence or conspire to influence upward or discourage the reduction of, the price at which any other undertaking supplies, offers to supply or advertises any goods or services”.

87 FCCPC “Update on potential anti-competitive conduct in association of POS operators’ statement of setting prices for services” (FCCPC press release, 24 July 2023), available at: <<https://fccpc.gov.ng/update-on-potential-anti-competitive-conduct-in-association-of-pos-operators-statement-of-setting-prices-for-services>> (last accessed 13 April 2024).

88 Id at 1.

89 The Commission notes that “[w]hile the Commission continues to provide consideration to, and for small businesses, enforcing the law must remain non-negotiable”; id at 2.

90 FCCPC “Upholding market integrity in the food chain sector” (FCCPA press release, 9 February 2024), available at: <<https://fccpc.gov.ng/upholding-market-integrity-in-the-food-chain-sector/>> (last accessed 13 April 2024).

91 FCCPC “Interim statement regarding coordinated increase in air fares by certain scheduled domestic airline operators” (FCCPC press release, 3 March 2022), available at: <<https://fccpc.gov.ng/interim-statement-regarding-coordinated-increase-in-air-fares-by-certain-scheduled-domestic-airline-operators/>> (last accessed 7 November 2023);

Mergers

When considering a merger or a proposed merger, the FCCPC is required to determine whether or not the merger is likely to substantially prevent or lessen competition or otherwise to determine whether it can or cannot be justified on substantial public interest grounds. Where it appears that the merger is likely to substantially prevent or lessen competition, it could still be approved based on considerations provided in section 94 of the FCCPA: (a) whether or not the merger or proposed merger is likely to result in any technological efficiency or other pro-competitive advantage which will be greater than, and offset, the effects of any prevention or lessening of competition, “while allowing consumers a fair share of the resulting benefit”, and (b) whether the merger or proposed merger can or cannot be justified on substantial public interest grounds by assessing certain factors prescribed by the FCCPC.⁹² Public interest factors include (a) a consideration of the effects of the merger on a particular industrial sector or region, (b) employment, (c) the ability of national industries to compete in international markets, and (d) the ability of small and medium-scale enterprises to become competitive.⁹³ These are, of course, different ways developing countries balance efficiency with other goals of competition.

In furtherance of the powers of the FCCPC to issue regulations, guidelines and notices for the effective implementation of the provisions of the FCCPA on the assessment of mergers,⁹⁴ it issued the Federal Competition and Consumer Protection Act Merger Review Regulations 2020 and the Federal Competition and Consumer Protection Act Merger Review Guidelines 2020. Paragraph 8.2 of the Guidelines notes that in determining the anti-competitive effects of mergers, the FCCPC will recognize the significance of all the objectives provided in the merger review provisions of the FCCPA. This indicates that the FCCPC does not lose sight of the nuanced objective set out in the FCCPA, which entails the joint pursuit of competition promotion and consumer protection goals, as indicated above. By designating consumer benefits as trade-off exceptions where it appears that a merger is likely to substantially prevent or lessen competition (section 94 of the FCCPA), the entire legal framework of mergers reinforces the complementary roles of competition and consumer protection within the overall context of the peculiar nature of the Nigerian markets (public interest considerations). How the FCCPC balances these different priorities, however, remains to be seen.

The FCCPC's consumer protection activities

The FCCPC's 2019 Annual Report reveals a proactive and multifaceted approach to consumer protection, focusing on three main areas: raids and seizures, consumer complaints resolution, and monitoring of sales and promotions. Raids and seizures were conducted in the food and beverage industry, where the FCCPC seized substandard products worth over NGN 210 million from malls, supermarkets, open markets, shops and warehouses. The FCCPC also intervened in the electrical and electronics sector by raiding different markets and outlets to confiscate substandard electrical and electronic products valued at NGN 55 million. According to the report, these enforcement operations were conducted using data gathering, data analysis and market-trend intelligence. Regarding consumer complaints, the FCCPC implemented an automated complaint redress system on a web portal and mobile apps to complement existing consumer complaints channels (such as email, in person, hotlines and social media platforms). The types of consumer complaints received by the FCCPC varied significantly across sectors, with the monetary value of

FCCPC “Federal Competition and Consumer Protection Commission launches cartel and anti-competitive conduct investigation into shipping and freight forwarding industry” (FCCPC press release, 24 October 2021), available at: <<https://fccpc.gov.ng/federal-competition-consumer-protection-commission-launches-cartel-and-other-anti-competitive-conduct-investigation-into-shipping-and-freight-forwarding-industry/>> (last accessed 18 April 2024).

92 FCCPA, sec 94(3).

93 Id, sec 94(4).

94 Id, sec 163.

resolved complaints amounting to NGN 172.5 million. The FCCPC also monitored and approved sales promotions by various producers and service providers to ensure that they were neither deceptive nor exploitative. According to the report, the FCCPC approved and monitored 50 sales promotions.

Aside from the 2019 Annual Report, we also reviewed a series of investigations, enforcement actions and regulatory initiatives reported by the FCCPC in the past five years. We observed that one of its focus areas has been the financial sector, where it investigated allegations of unauthorized account opening by a digital bank known as Opay, ordered Google to remove unregistered digital money-lending companies from its app store, and ordered other payment systems and telecom and tech companies to immediately cease and desist from providing services to unregistered lenders or lenders under investigation.⁹⁵ Other activities include the sealing of the offices of Soko Lenders due to violation of consumer privacy and unfair lending practices,⁹⁶ and the issuing of the Limited Interim Regulatory/Registration Framework and Guidelines for Digital Lending 2022, which creates a registration regime for digital lenders in Nigeria.

In respect of healthcare and medical services, the FCCPC investigated cases of medical malpractice, patient rights violations and substandard healthcare services. Some of these include an investigation into alleged non-compliance with the Patients' Bill of Rights, which led to the death of a patient at the Maitama District Hospital, and alleged violation of patient and consumer rights under the FCCPA and extant laws in the provision of appropriate emergency and continuing medical services by Mayfield Specialist Hospital.⁹⁷ The FCCPC, in collaboration with the National Agency for Food Administration and Control, also conducted a raid at a popular skincare facility in Surulere, Lagos, and ordered the interim suspension of its operation and the use of unapproved products or chemicals and procedures.⁹⁸ In the retail sector, the FCCPC conducted a targeted enforcement operation at Garki Modern Market to investigate claims of deceptive weights and measurements for rice.⁹⁹ It also investigated allegations of discrimination against a disabled person, gender-based discrimination at fast food restaurants, and deceptive pricing at a fast-moving consumer goods store in Abuja,

95 T Jaiyeola "FCCPC to grill Opay over unauthorised account openings" (4 October 2023) *Punch Newspapers*, available at: <<https://punchng.com/fccpc-to-grill-opay-over-unauthorised-account-openings/>>; FCCPC "Registration of digital money lenders under the inter agency joint task force's limited interim regulatory / registration framework and guidelines for digital lending 2022" (FCCPC press release, 2 August 2023), available at: <<https://fccpc.gov.ng/registration-of-digital-money-lenders-under-the-inter-agency-joint-task-forces-limited-interim-regulatory-registration-framework-and-guidelines-for-digital-lending-2022/>>; FCCPC "Further update: Further and continuing investigation of rights violations in money lending industry; and release of interim regulatory framework" (FCCPC press release 26 August 2022), available at: <<https://fccpc.gov.ng/further-update-further-and-continuing-investigation-of-rights-violations-in-money-lending-industry-and-release-of-interim-regulatory-framework/>> (all last accessed 24 September 2024).

96 D Okon "FCCPC to telcos: Don't provide service to digital lenders under investigation" (18 August 2022) *The Cable*, available at: <<https://www.thecable.ng/fccpc-to-telcos-dont-provide-service-to-digital-lenders-under-investigation/>> (last accessed 24 September 2024).

97 FCCPC "Criminal attack on Ms. Greatness Olorunfemi and subsequent medical attention and fatal outcome. Re: Maitama District Hospital" (FCCPC press release, 30 September 2023), available at: <<https://fccpc.gov.ng/criminal-attack-on-ms-greatness-olorunfemi-and-subsequent-medical-attention-and-fatal-outcome-re-maitama-district-hospital/>>; FCCPC "Possible violations of patient / consumer rights under the Federal Competition & Consumer Protection Act, 2018; and extant laws in providing appropriate emergency / urgent intervention and continuing medical attention" (FCCPC press release, 7 July 2023), available at: <<https://fccpc.gov.ng/possible-violations-of-patient-consumer-rights-under-the-federal-competition-consumer-protection-act-2018-and-extant-laws-in-providing-appropriate-emergency-urgent-intervention-and-continuing/>> (both last accessed 24 September 2024).

98 "FCCPC, NAFDAC raid skin care facility in Lagos" (8 December 2019) *The Nation*, available at: <<https://thenationonline.net/fccpc-nafdac-raid-skin-care-facility-in-lagos/>> (last accessed 24 September 2024).

99 FCCPC "FCCPC busts deceptive rice weight claims in Garki Modern Market, Abuja" (FCCPC press release, 28 March 2024), available at: <<https://fccpc.gov.ng/fccpc-busts-deceptive-rice-weight-claims-in-garki-modern-market-abuja>> (last accessed 24 September 2024).

as well as allegations of misleading branding and labelling practices by Coca-Cola and the Nigeria Bottling Company.¹⁰⁰

From the foregoing, it appears that the FCCPC's regulatory ambit with respect to consumer protection matters is quite extensive and covers a wide range of sectors and subject matters. This raises concerns about possible conflicts with the powers of sector-specific regulatory authorities and the FCCPC's lack of efficiency in cases where it lacks industry-specific knowledge. However, the difference in the volume of the FCCPC's anti-competition enforcements compared to that of consumer protection matters can be explained by the fact that anti-competition enforcement involves systemic issues that affect industries and requires complex and extensive investigation that can be time-consuming, while consumer protection enforcement usually involves immediate and individual-focused issues that require less time for resolution.

Conclusion

In this article, we have explored the divergent and complementary roles between consumer protection and competition. We noted that although both areas of law seek to protect the consumer, how they achieve this aim can cause some tension, particularly in relation to the different conceptions of consumers and consumer harm that may exist in both subject areas. However, an investigation of these tensions is not new in global competition law; even in Africa, there has been some work that has examined the desirability of integrating consumer protection and competition from an institutional perspective.¹⁰¹ What is lacking in the literature, however, is a more conceptual or theoretical examination of these tensions and conflicts from the perspective of developing African countries. In this regard, we have shown that an integrated ACB must consider the interest of efficiency, must sometimes balance efficiency with other goals of competition, and must also consider the interests of final consumers. Nonetheless, there is no need to place these considerations in any hierarchy, but an awareness of their different importance and a well-thought-out methodology for approaching them is vital.

Examining Nigeria's integrated competition and consumer protection landscape using this fulcrum reveals very few results, even though there seems to be an appreciation of these issues (eg the AMMBAN decision). This is because one notable shortfall of the FCCPC is the absence of detailed and publicly accessible reports that provide clear economic reasoning behind the organization's decisions, particularly in competition law cases. In other countries with advanced competition law frameworks, reports offer economic analysis and justifications for decisions, which not only increase transparency but also help businesses and consumers understand the implications of competition policies. This level of detail is critical for building trust and encouraging compliance with competition policy. Of course, while companies' confidential information should be protected, non-confidential reports and summaries should be made publicly available.

100 FCCPC "FCCPC strongly condemns discrimination incident at KFC outlet, Lagos airport" (FCCPC press release, 28 March 2024), available at: <<https://fccpc.gov.ng/fccpc-strongly-condemns-discrimination-incident-at-kfc-outlet-lagos-airport/>>; C Onyewuchi "FCPC makes official release on allegation of gender-based discrimination against Harzoyka Restaurant" (15 November 2020) *Lawyard*, available at: <<https://www.lawyard.org/news/fcpc-makes-official-release-on-allegation-of-gender-based-discrimination-against-harzoyka-restaurant/>>; FCCPC "FCCPC acts on deceptive pricing at fast-moving consumer goods store" (FCCPC press release, 17 February 2024), available at: <<https://fccpc.gov.ng/fccpc-acts-on-deceptive-pricing-at-fast-moving-consumer-goods-store/>>; FCCPC "A report of the Federal Competition and Consumer Protection Commission's investigation into misleading branding and labelling practices and allegations of anticompetitive conducts by Coca-Cola Nigeria Limited and the Nigerian Bottling Company Limited" (29 July 2024), available at: <<https://fccpc.gov.ng/wp-content/uploads/2024/07/Report-Investigation-of-Coca-Cola-Nig-Ltd-and-NBC-Business-Practices.pdf>> (all last accessed 24 September 2024).

101 S Tavuyanago "The interface between competition law and consumer protection law: An analysis of the institutional framework in the Nigerian Federal Competition and Consumer Protection Act of 2019" (2020) 27/3 *South African Journal of International Affairs* 391.

One last point to note is that the FCCPC appears to have functioned more as a consumer protection body than as a competition regulator in the past five years. This seems understandable given the immediate, visible benefits of consumer protection efforts, such as raids, seizures of sub-standard products and the resolution of consumer complaints. However, the more complex and time-consuming nature of competition investigations may have led to less resources or attention being paid to promoting competition. Developing a fully functional competition regime requires technical expertise, economic analysis and significant resources, which are often lacking in African countries, including Nigeria. Nevertheless, there must be a greater recognition that promoting competition is crucial for a vibrant economy and can bring significant economic benefits to Africa's largest market. For Nigeria to fully realize these advantages, increased funding is necessary to support effective competition enforcement and ensure long-term economic growth. In this regard, it is sensible to closely consider again the wisdom of having separate agencies for competition and consumer protection.

Competing interests None