Briefing Note: Nigeria's Federal Competition and Consumer Protection Bill 2018

On Wednesday, December 5, 2018, the Senate of the Federal Republic of Nigeria announced its reconsideration and passage of the Federal Competition and Consumer Protection Bill 2018 (the "**Bill**"). A similar bill was passed in 2017 but was not granted Presidential assent following some observations by the Presidency of the Federal Republic of Nigeria. The Bill is due to be presented to the Presidency for assent or veto. This briefing note provides summaries and remarks on the key provisions of the Bill as revised.[1]

A. Features of the Bill:		
Short Title:	Federal Competition and Consumer Protection Act 2017.	
Long Title:	A Bill for an Act to repeal the Consumer Protection Act, CAP C25, LFN 2004[2]; establish the Federal Competition and Consumer Protection Commission and the Competition and Consumer Protection Tribunal for the development and promotion of fair, efficient and competitive markets in the Nigerian economy, facilitate access by all citizens to safe products, secure the protection of rights for all consumers in Nigeria and other related matters.	
No. of Sections:	169	
Type:	House Bill	
Sponsor:	Name:	Rt. Hon. Yakubu Dogara
	Constituency:	Bogoro/Dass/Tafawa Balewa Federal Constituency, Bauchi State
	Political Party:	All Progressives Congress

[1] As at press time, we were yet to obtain a copy of the Bill in the manner in which it is to be transmitted to the Presidency as we worked with the report of the text of the approved and passed recommendation of the Committee of the National Assembly that was saddled with the responsibility of the revision of the Bill.
[2] The "Act".

B. Summary and Remarks on Significant Provisions of the Bill:

S/N	Subject	Reference	Synopsis of Provision	Remarks
1.	Objective	Section 1	Specific objectives of the Bill include to: a. promote and maintain competitive markets in Nigeria; b. provide consumers with *wider variety of quality products at competitive prices*; c. prohibit restrictive business practices *or unfair business practices* which prevent, restrict or distort competition or constitute an abuse of a dominant position of market power in Nigeria.	The revised Bill introduced the italicised words which do not materially depart from the context of the earlier bill. Significantly the Bill has lumped the functions of consumer protection and anti-competition regulation in one. The reference to "products" in the Section does not exclude the regulation of the services industry from the functions and powers of the regulating Federal Competition and Consumer Protection Commission (the "**Commission**") as it is expressly empowered to regulate the services sector as well.
2.	Scope and Supremacy	Sections 2, 105 and 106	Unless expressly excluded, the Bill applies to all businesses and commercial activities within, or having effect within, Nigeria. All other laws on competition and consumer protection within the Federal Republic of Nigeria, save for the Constitution of the Federal Republic of Nigeria 1999, are subordinate to the Bill. The Commission will however have a concurrent jurisdiction with all other Government agency or sector regulator.	The Bill retains the exact provisions as in the earlier bill. This provision potentially brings within the scope of the Bill, foreign businesses whose commercial activities have effect within Nigeria. Both the scope and express provision of the Bill will make it one of the single most consequential business legislation in Nigeria. The revised Bill changed the relationship of the Commission with other Government agencies or sector regulators from hierarchical (in favour of the Commission) to concurrent; with the sector regulators exercising primary jurisdiction and the Commission exercising secondary jurisdiction.

3.	The Federal Competition and Consumer Protection Commission	Sections 3, 4, 17 and 18	The Bill replaces the Consumer Protection Council established by the Act (the Council), with the Commission. Specific functions and powers of the Commission include to: a. initiate broad based policies and review commercial activities in Nigeria to identify anti – competitive and restrictive business practices, as well as consumer rights abuses; b. carry out investigations or inquiries into business conduct in Nigeria or other matters considered necessary or desirable and initiate actions to redress violations of the Bill for example by declaring the business practice as abuse of a dominant position of market power and prohibiting the same; c. eliminate anti-competition agreements, misleading, unfair, deceptive or unconscionable marketing, trading and business practices for example by prohibiting the making of certain agreement or arrangements or ordering the termination of any agreement or arrangement already made; d. resolve disputes or complaints and issue directives and sanctions where necessary in furtherance of which it can summon and examine witnesses, call for	From a minimum 42-members of the Consumer Protection Council, the Bill has created a 7-member[3] Commission with consumer protection and anti-competition regulation mandates that include far-reaching functions such as: a. Prohibition of agreements or arrangements it considers anti-competitive (Restrictive/Restricted Agreements). b. Determination and redress of what it considers to be the dominant position of a business. c. Determination and elimination of monopolies. d. Regulation of the prices of goods and services. e. Merger/business combination controls. The Commission is empowered on each of these areas and more to formulate policies; certify goods and services; investigate cases; impose and collect fees, levies, fines and penalties; and resolve disputes. The wide and far-reaching powers of the Commission portends a lot for the ease of doing business in Nigeria as it layers the

[3] Excluding the Secretary; see Section 19 of the Bill.

			and examine documents or returns and administer oaths; e. authorize, with or without conditions, prohibit or approve mergers of which notice is received; f. prevent the circulation of goods and services which constitute or (*or likely to constitute*) is an imminent public hazard and cause offenders to replace such goods and services with safer and more appropriate alternatives or ensure proper redress for consumers; g. seal up any premises on reasonable suspicion that such premises contain or is being used to produce or disseminate goods or services that are fake, substandard, hazardous or inimical to consumers' welfare; h. publish list of goods and services as well as the suppliers of such goods and services whose consumption and sale have been banned, withdrawn, restricted or not approved by the Federal Government or foreign governments; i. access data on registration of imported goods from appropriate government agency; and j. develop and issue appropriate rules, guidelines and regulations to ensure the effective implementation of the Act	regulatory landscape with perhaps the greatest strictures in the history of the free market economy in Nigeria. The centralisation of the Commission's-stated functions, in one organisation, the Commission, rather than the sector regulator-based approach hitherto obtainable in Nigeria does not only seek to reinvent wheels with the part-emasculation of such organisations as the Securities and Exchange Commission (SEC), the National Office for Technology Acquisition and Promotion (NOTAP), Standards Organisation of Nigeria (SON), the National Agency for Food and Drug Administration and Control (NAFDAC) to name a few; but a deliberate attempt to create a new Czar, perhaps, the biggest regulator that the Nigerian business class is yet to know. The members of the Commission are required to be appointed by the President of the Republic of Nigeria. This function expresses the bid for autonomy. However, and from an administrative practicability viewpoint, it may be unnecessarily burdensome for the President, particularly where the Commission will have to work with a supervising Federal Ministry, the Federal Ministry of Industry, Trade and Investment (the "**Ministry**").

			including regulations on the charging and collection of fees, levies, fines and the imposition of administrative penalties. The President shall, subject to the confirmation of the Senate, appoint 7 full-time Commissioners for the Commission and designate one of them as the Executive Chairman.	The Bill has not seized the opportunity to reduce the burden of the President in the Act. It has rather increased it with the removal of the need for the recommendation of the Minister.
4.	Consumer Protection Tax	Section 23(2)(h)	The Commission shall be partly funded by 0.5% of the profit after tax of all companies operating in Nigeria (Consumer Protection Tax or CPT). CPT is payable within 30days of the end of company's accounting year end. CPT shall be used for the management of the Commission and the provision of full or partial reimbursement of losses to victims of abuse by businesses or individuals in circumstances where the offender cannot adequately compensate the victim.	This is the most significant introduction to the revised Bill as the provision was not in the earlier bill. The earmarked tax is without justification[4] both in terms of the funding of the Commission and the subjective social security fund for the compensation of consumers.
5.	The Tribunal	Sections 39 -59	The Bill newly introduces the Competition and Consumer Protection Tribunal (the Tribunal) and subordinates it to the Federal High Court of Nigeria (FHC) in the following words: "Any party to a proceeding dissatisfied with a ruling, award or judgment of the Tribunal may	It may be significant that the Bill does not use the conventional expression of an appeal rather than its employed judicial review. In the circumstance that the Tribunal is empowered to determine its practice and procedure, such document if and when

[4] We note that we have not seen the Federal Ministry of Finance's policy documentation justifying the introduction of this earmarked tax.

			apply for judicial review to the Federal High Court". The Chairman, who shall be a lawyer, and 6 other Tribunal members, who need not be lawyers, are to be appointed by the President on the recommendation of the Minister of Industry, Trade and Investment (Minister). Section 43(1)(a) on the resignation and removal of Tribunal members allows the National Judicial Council (NJC) to undertake inquiry on allegations of misconduct by a Tribunal member and make recommendations to the President of the Federal Republic of Nigeria.	released may throw light on the appellate procedure from the Tribunal to the FHC. Similar to the constitution of the Commission, it may be unnecessarily burdensome for the President to appoint the Chairman and Tribunal members, howbeit with the recommendation of the Minister. Similar to such Tribunals as the Tax Appeal Tribunal, the Minister should be able to statutorily relieve the President of such task. The responsibility accorded the NJC to investigate and make recommendations on non-judicial officers does not appear to be supported by precedents and may need to be reviewed before assent is given to the Bill.
6.	Restrictive Agreements / Arrangements	Sections 60 - 70	Except as authorized by the Commission, any agreement among businesses, which purports to or is likely to restrict, prevent or distort competition in any market (Restrictive Agreements) is unlawful and void. Restrictive Agreements include agreements to: a. fix prices; b. divide markets by allocating customers or territories; c. limit or control production or distribution of any goods or services, technical development or investment; d. engage in collusive tendering; or e. subject the conclusion of the agreement to acceptance of supplementary obligations which have no commercial connection to the current agreement.	

			Expressly prohibited business practices include: a. requesting another business not to sell or purchase any goods or services with the intention of harming another business; b. agreeing with another business to either withhold supplies of goods and services from dealers who resell such goods and services or sell to some dealer(s) on less favourable terms and conditions compared with others; c. save in the case of a patent licence or assignment, stipulating as opposed to recommending a minimum price to be charged on the resale of goods and services in Nigeria. The Commission may authorize Restrictive Agreements in the following instances, that is, where the Restrictive Agreement: a. contributes generally to economic and technical improvement while allowing consumers have a fair share of the resulting benefit; b. is indispensable to achieve the objective in (a); c. does not afford the relevant businesses the opportunity of eliminating competition in a substantial part of the goods and services concerned.
7.	Dominant Positions	Sections 71 - 76	Abuse of dominant position is expressly prohibited by the Bill. A business is in a dominant position if it: a. is able to act without taking account of the reaction of its customers, consumers or competitors; b. enjoys a position of economic strength which enables it to prevent effective competition in the relevant market. It must have capacity to behave independent of its competitors, customers and consumers. The Commission will periodically publish the size of market share that may constitute a dominant position.

			The following conducts constitutes abuse by a company in a dominant position: a. charging of excessive price to the detriment of the consumer; b. refusing a competitor access to an essential facility or refusing to supply the competitor with scarce goods even though it is economically feasible to do so; c. engaging in an exclusionary anti-competitive act; d. restricting a customer or supplier from dealing with a competitor; e. forcing a buyer to accept a condition unrelated to the object of the contract; f. selling goods below their marginal or average cost. g. buying up scarce supply of intermediate goods or resources required by a competitor. A business that abuses its dominant position shall, upon conviction, be liable to a fine not exceeding 10% of its turnover in the preceding business year or such higher percentage as the court may determine. A director of an undertaking that fails to cease an abusive conduct after receiving an order of the Commission is liable upon conviction to a maximum term of imprisonment of 3 years or payment of a fine of ₦50,000,000 (Fifty Million Naira), or both.
8.	Monopolies	Sections 77 - 88	Monopoly situations may exist in relation to the production, distribution, import or export of goods or services of any description. Where it appears to the Commission or on the report of anyone that a monopoly exists, it shall initiate an investigation into the relevant sector of the economy or into the relevant agreements/arrangements that informed the monopoly. The Commission shall refer the report on its investigation to the Tribunal, who may, on the basis of the Commission's finding, make orders it considers necessary to remedy or prevent the adverse effect stated in the Commission's report. Such orders include an order: a. declaring an agreement as unlawful; b. requiring a party to terminate an agreement within a set time: c. requiring a supplier to publish a list of its prices; d. prohibiting or restricting the acquisition of a business; e. dividing a business by the sale of its shares, assets, etc. f. for the transfer or vesting of property rights, liabilities or obligations;

			g. directing the formation, winding-up or alteration of the constitutional documents of a business or association of professional bodies.
9.	Price Regulation and Regulated Industries	Sections 89 - 92, 106 – 107	The President of the Federal Republic of Nigeria may in the following instances publish in the Federal Gazette, a declaration that the prices of mentioned goods and services (Regulated Goods and Services) shall be controlled in a manner as to be stated in the Gazette; that is, where: a. competition is limited in the market where the Regulated Goods and Services are supplied or acquired and in which case the declaration may be of a limited period and or scope; or b. price regulation will be in the best interest of users, consumers or suppliers.
10.	Mergers	Sections 93 – 104	A merger is an acquisition or control by one business over the whole or part of the business of another through any manner including through a purchase or lease of shares; an amalgamation or other combination; or, by joint venture. Subject to notification thresholds to be determined by the Commission and stipulated by regulations, a proposed merger shall not be implemented unless it has first been notified and approved by the Commission. A party to a small merger is not required to notify the Commission of that merger unless required to do so by the Commission; whereas, a party to a large merger shall notify the Commission in a prescribed manner and form. An business that is a party to a large merger and who fails to notify the Commission is liable, upon conviction, to a maximum fine of ten percent of its turnover in the preceding business year. When considering a proposed merger, the Commission shall determine whether or not the merger is likely to substantially prevent or lessen competition. The Commission may direct any of its officers to investigate a merger and may require any person or business to provide information in respect of the merger.

			Upon enactment of the Bill and subject to the notification thresholds to be set by the Commission, a Nigeria company will be required to inform the Commission in a prescribed manner of any merger where it is a party.
11.	Specific Offences against Competition	Sections 108 – 114	The following are prescribed as specific offences against competition: a. price fixing; b. conspiracy to limit, prevent, reduce, restrain or injure competition in any manner c. bid-rigging, for example an agreement between businesses not to submit bids or to submit a bid agreed between themselves; d. obstruction of investigation or inquiry; e. offence against records; f. giving of misleading or false information, and g. failure to attend or give evidence.
12.	Consumers' Rights	Sections 115 – 134, 147	The Bill sets out an outline of rights of the consumer which include, the rights to: a. information in plain and understandable language; b. disclosure of prices of goods and services; c. proper labelling and trade descriptions; d. disclosure of re-conditioned or second-hand goods; e. be provided with written record of purchased goods or services; f. select supplier and the particular goods or services to be purchased; g. cancel advance reservation, booking or order; h. choose or examine goods; i. return goods and receive a full refund of any consideration paid for those goods; j. fair dealing; k. quality and timely performance and completion of services or timely notice of unavoidable delay; l. receive safe and good quality goods with an implied warranty of quality; Producers and or marketers of goods and services are prohibited from making false misleading or deceptive representation of the goods and services being sold.

			Businesses should also refrain from unfair, unreasonable or unjust contract terms. Exclusionary clauses, especially of liability, must be drawn to the consumer's attention in a conspicuous manner. A consumer seeking to enforce the rights under the Bill may refer the matter to the business; file a complaint directly with the Commission or directly approach a court of competent jurisdiction. It is noteworthy that Section 147 does not mention the Tribunal as a for a for the enforcement of the consumer's right.
13.	Duties and Liabilities of Manufacturers, Importers, Distributors and Suppliers of goods and services.	Sections 135 – 146	The Bill imposes certain duties on manufacturers, importers, distributors and suppliers of goods and services including the duties to: a. label goods properly in a manner that can identify the manufacturer, importer or distributor; and b. withdraw hazardous goods from the market and inform the public of the risk or danger associated with the goods. The Bill also imposes liabilities on the manufacturers, importers, distributors and suppliers for supplying defective goods, misrepresentation and for breach of statutorily implied obligations. These obligations cannot be restricted or excluded by contract. Where it is alleged that goods and services are defective, the onus of proof that the goods are not defective is on the business that supplied the goods and services.
14.	General penalties for contravention of consumer rights.	Section 156	Save as provided for under the Bill, a natural person who contravenes any consumer rights is liable on conviction to a maximum term five years imprisonment with or without the option of a ₦10,000,000 (Ten Million Naira) fine. A body corporate is liable upon conviction to the higher of a fine of a ₦100,000,000 (One Hundred Million Naira) or 10% of its turnover in the preceding business year and each director of the body corporate will be liable to the penalties applicable to a natural person.

The Bill, if and when it becomes law, will become the single most important business legislation in Nigeria. Other than its introduction of the Consumer Protection Tax, the extensive codification of consumer rights enhances consumer-related litigation/claim risks for businesses. The regulation of inter-business arrangements or agreements also creates a new landscape of what will and will not qualify as anti-competitive actions. Consumers and organisations operating in Nigeria should keenly watch and interest themselves in the development of the Bill, seeing its far-reaching implications on the development of free enterprise in Nigeria.

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