Regulation of Cartels in Emerging Economies: Optimal Enforcement Options for Nigeria

By

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1. Abstract

Prior to the return of democracy in 1999, the Nigerian economy was characterised by government sponsored monopolies and subsidies in key sectors of the economy. This led to concentration of market power in the hands of few firms. Post 1999 marked a departure from that norm and the commencement of a new policy direction towards a free market economy, with successful attempts made at deregulating the economy. However, the country continued to suffer from the anticompetitive practices of these few dominant firms, owing to the absence of a competition law regime.

With the enactment of the Federal Competition and Consumer Protection Act (FCCPA) 2019, and the establishment of a competition regulator, this article undertook critical analysis of the provisions on cartels, especially, the leniency and settlement procedures. It made a comparative study of the 20-year-old regime in South Africa (SA), an emerging economy which has recorded giant strides in cartel regulation, and argued that notwithstanding the criticisms and disadvantages of the leniency program and settlement procedure, their benefits outweigh the setbacks. In sum, the article identified a number of murky areas of cartel regulation in the new Nigerian competition law, made appropriate recommendations, and suggested best optimal enforcement models.

2. What is a "Cartel"

Cartel, also known as conspiracy and collusion, is defined in several ways. One definition sees cartel as a group of similar companies who agree prices between themselves in order to increase profits and limit competition.[1] Cartel is a collection of otherwise independent

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[1] Cambridge Business English Dictionary (CUP 2020) <https://dictionary.cambridge.org/dictionary/english/cartel> accessed May 5 2020.

businesses or countries that act together as if they were a single producer and thus can fix prices for the goods they produce and the services they render, without competition.[2]

These definitions establish the common features of a cartel to wit: a group of independent competing firms within an industry, who come together in secrecy to manipulate prices and output through means which include price-fixing, market sharing and bid rigging, for their personal gain. Cartels are considered illegal in most jurisdictions due to the commercial harm they inflict on consumers and the negative impact of their activities on the economy.

Cartel activities are regarded by scholars, courts and policy makers as one of the most grievous offences in competition law. A number of reasons abound for this unilateral position. The first is that the undertakings involved in the cartel are already aware that their conducts are unlawful, hence they go to a great extent to maintain secrecy and avoid detection. Secondly, due to the great difficulty, cost and time it takes competition authorities to detect the cartel arrangement due to its secretive nature.

2.1 How are Cartels Detected?

As earlier mentioned, the formulation of cartels and the cartel agreement is entered in secrecy, making its detection an enormous task. Since their detection creates a lot of dilemma, it is therefore not fortuitous that competition authorities in various jurisdictions have devised several strategies for detection. Measures adopted in the detection of cartels include the following:

a. **Mistake of cartel members**: As common with every human endeavour, mistakes are bound to happen. Unfortunately for cartels, a simple mistake by a member could unmask their secrecy and reveal their existence. For example, an association of bicycle retailers in South Africa advertised the existence of their cartel on its website.[3]
b. **Dawn Raid:** As the name implies, this refers to a raid which is conducted very early before the commencement of the business of the day in order to recover an important information or item which is vital in an investigation. The importance of dawn raids which is backed by law[4] is that it involves an element of surprise which is essential in recovering evidence of the cartel arrangement. The raid allows the competition regulator to invade the privacy of one or more than one member of the cartel by going

[2] Chen James, 'Cartel' (Investopedia 2020) < https://www.investopedia.com/terms/c/cartel.asp> accessed May 5 2020.
[3] David Lewis, *Thieves at the Dinner Table: Enforcing the Competition Act* (Jacana 2012) 209.
[4] This is usually through an order of the court obtained by an ex parte application.

through their correspondences like email exchanges and diary entries where correspondences relating to the cartel may have been logged.

c. **Price War Signals:** Price war refers to a situation where competitors repeatedly reduce the price of goods below that which is offered by co-competitors and vice versa. To serve as an illustration, this article will adopt A, B and C as the names of three gas stations who collude to form a cartel in the market for gas for a particular area. If all of a sudden, A reduces the price of gas below that which is contained in the cartel agreement, B and C will see this as an attempt by A to gain more customers, because where competitors offer homogenous products of same quality, rational customers will always go for a cheaper product. B and C will most likely retaliate by reducing their own prices to a level below that of A, which could also make A to match their offer. This repeated cycle is what is referred to as price war.

   Therefore, a sudden occurrence of price war in a market which has been relatively stable could be an indication that a cartel is finding it difficult to maintain the collusion or that it is trying to punish an erring member, since the cartel agreement being illegal is unenforceable in law. This indication though not a conclusive one based on sufficient evidence could be a signal to the competition authority about the existence of a cartel, and prompt them to carry out further investigation.

d. **Whistle Blowing:** Whistle blowing refers to a scenario where a member of staff of one of the cartel undertakings exposes the cartel to competition authorities. This can be done with or without revealing the identity of the informant. However, in emerging markets, this strategy of detection exists more in theory than in reality because of the immediate consequences to the informant who may suffer individually or collectively with the firm. As an individual, he can be fired from the job and may be unable to get another job due to the high rate of unemployment or because his reputation as an 'spy' will quickly spread among other firms in the industry. Collectively, he may suffer from pay cut or be made redundant to cover for the loss incurred by the firm if it is successfully prosecuted and fined. Whistle blowing by employees has recorded tremendous success in detecting cartels in developing jurisdictions like South Korea where the Korean Fair Trade Commission (KFTC) introduced the policy in 2002. The KFTC offers an amount of reward to the informant from a percentage of the fines

levied on the cartels. This reward could be huge to an extent that senior managers could be tempted to take the option of whistle blowing as a retirement plan.[5]

e. **Self-Reporting / Snitching on the Cartel:** Very similar to the preceding strategy, self- reporting slightly differs from whistle blowing because the former involves self-reporting by an undertaking involved in the cartel through a leniency program. The difficulty in detecting cartels could lead to the establishment of a leniency program by the competition authorities in several jurisdictions. This program provides immunity for the first member of the cartel who provides information about the cartel and cooperates with the competition authority to secure the conviction of the other members of the cartel. By offering immunity to the first applicant, the leniency program provides an avenue for the competition authority to break the ranks of the cartel. Subsequent applicants from the cartel who cooperate with the competition authority received reduced sentences under the settlement procedure.

2.2 The Leniency Program and Settlement Procedure Compared

The leniency program has recorded tremendous success in several jurisdictions like the EU where two thirds of the cartel investigations completed since 2001 were revealed by a cartel member who in return received immunity from fines.[6] The program is applauded because it deters cartel activity by creating a situation of mistrust among the cartelists who will be under a continuous threat of *snitching* on others or being *snitched* upon. Also, the cooperation of the leniency applicant in providing all information and vital evidence is very valuable because it speeds up the process, and saves the time and resources of the commission. The predictable nature of the penalties under the procedure enables potential applicants to weigh their options before deciding to break the cartel bond.

Conversely, it suffers from setbacks which include the criticism that the program offers a reward for the bad conduct by way of immunity for the applicant. This immunity also deprives the state of revenue which ought to have been generated from the fines. Furthermore, the early admission of guilt by an applicant firm could impact on the evidence which ought to have been discovered as to the extent of its participation in the cartel. This could be a setback for victims of the cartel to bring follow-on action for damages.

[5] Daniel Sokol and Andreas Stephan, 'Prioritizing Cartel Enforcement in Developing World Competition Agencies' in Daniel Sokol and others (eds), *Competition Law and Development* (Stanford University Press 2013) Ch 8.
[6] Athanassios Skourtis, 'Competition Law Module Seminar on Cartels' (University of Reading, 2019).

The crux of the settlement procedure is that at a certain stage in the cartel investigation, having seen the evidence at the disposal of the commission, the parties to the cartel accept their participation and admit liability. To reward them for cooperation and in return to their gesture for not wasting the time and resources of the commission any further, the commission reduces the fine that it would otherwise have imposed on the cartel by a certain percentage which usually does not exceed 10%. It should be noted that the commission cannot impose settlement on the parties, and also the parties are not entitled to settlement as of right. Hence settlements procedure does not entail a negotiation between the cartel and the commission on the existence of the infringement or the amount of the penalty to be levied. The procedure is applauded because it leads to quicker conclusion of cases since there will most certainly not be any appeal on the settled decision, which saves the time and resources of the commission. A major criticism of the settlement procedure which is similar to that of leniency is that it entails a lesser degree of factual analysis which makes it difficult for the victims of the cartel to bring follow-on claims for damage claims.

In sum, notwithstanding the criticisms and disadvantages of the leniency program and settlement procedure, this article argues that their benefits outweigh the setbacks. This is because in their absence, most cartels may never be detected or the competition regulator may not have all the evidence needed to successfully prosecute a detected cartel, as a result of the sophistry of the members. The point to note is that one of the cardinal objectives of competition law is to prohibit cartels and not necessarily to generate revenue via fines and penalties. The leniency program deserves all the accolades so far it enables cartels to be detected and successfully prosecuted.

2.3 How are Cartels Regulated?

There are two ways of regulating cartels. These are public and private enforcements.

Public Enforcement entails regulation by the competition regulator or prosecuting authority, pursuant to a competition legislation, which empowers the authority to detect, investigate, sanction or prosecute firms and individuals who engage in prohibited cartel activities. This could be in the form of fine based regulation like the EU; outright criminalisation; or a mixed approach of fine and criminalisation which obtains in several jurisdictions like South Africa, UK, US and Canada. Public enforcement is very fundamental and indispensable in the regulation of cartels because with the instrumentality of state coercive powers and resources, competition regulators are able to point corporate behaviour, public perception and culture to pro competition ideals.

On the other hand, private enforcement refers to litigation instituted in the court or tribunal by private individuals or firms who suffered damages arising from the existence and conduct of a cartel. The essence of the claim is for the recovery of damages and/or the imposition of injunctive reliefs. Although private enforcement could be triggered by a stand-alone action prior to public enforcement, in most jurisdictions, it usually exercised post public enforcement because the facts established during public enforcement and the evidence of conviction weighs heavily in favour of the claimant. The idea behind private enforcement is that restitution on the private individual who has suffered harm owing to the cartel's unlawful activities. Also, the success of huge damage claims against cartels,[7] contributes to the strengthening and maintenance of the enforcement of competition rules against cartels, by serving as a deterrent in their formation and continued existence. Hence private enforcement of competition law against cartels exist to complement policies and efforts geared towards public enforcement.[8]

3. Example from an Emerging Economy (South Africa)

The institutions responsible for the implementation of competition law in SA are the Competition Commission (Commission), the Competition Tribunal (Tribunal), and the Competition Appeal Court (CAC) as established by the SA Competition Act.[9]

The Commission which is independent of executive and political interference and subject only to the SA constitution and legislations,[10] is headed by a Commissioner and at least one Deputy Commissioner to be appointed by the Trade and Industry Minister.[11] The enforcement powers of the Commission are wide, encompassing a broad range of responsibilities geared towards the protection of consumers and promotion of a free market.[12]

[7] For example, the Vitamins Cartel; See also Empagran S.A. v. F. Hoffman-LaRoche, LTD, 315 F.3d 338 (DC Cir 2003)

[8] See C-453/99 [2001] ECR I-6297 Courage Ltd v Crehan, where the ECJ established the right to damages by private individuals. In this case the court held that the full effectiveness of Article 101 TFEU and, in particular, the practical effect of the prohibition laid down in Article 101(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

[9] Competition Act, act no. 89 of 1998 (amended in 2019 upon the presidential assent given on 13 February 2019); See also Eleanor Fox and Mor Bakhoum, *Making Markets Work for Africa: Markets, Development and Competition Law in Sub-Saharan Africa* (OUP 2019) 92.

[10] Competition Act s 20(1)(a).

[11] Section 19.

[12] Section 21; See also *Competition Commission v. Pioneer Foods (Pty) Ltd*. 2010 (91/CAC/FeblO) ZACAC 2 (S. Afr.).

The Tribunal is composed of the Chairman and not less than three to a maximum of ten other members, appointed by the President,[13] and has jurisdiction over any matter that is prohibited under the Competition Act.[14] It equally hears appeal from and reviews the decision of the Commission.[15] In a similar vein, the CAC is established under Section 36 of the Act, and has a similar status as a High Court in SA.[16] It is composed of three judges appointed by the President from the pool of High Court judges, of whom one of the three appointees is designated as the Judge President.[17] The CAC reviews the decisions of the Tribunal referred to it in terms of the Act, and also entertains appeals arising from the decisions of the Tribunal.[18]

The above three enforcement bodies play key roles in the implementation of competition law in SA.

3.1 Regulation of Cartels in SA

The Competition Act prohibits cartel activity in SA in the form of restrictive horizontal practices to fix prices, allocate markets or collude in the tendering of contracts, as provided under section 4 (1) (b) of the Act. The Commission holds a strong anti-cartel position which they are very committed in enforcing.[19] Cartel behaviour under the Act could lead to administrative sanction in the form of a fine of up to 10% of the firm's annual turnover,[20] or a criminal sanction of imprisonment or fine being imposed on the offending company and directors,[21] similar to the cartel regime of the UK,[22] US[23] and Canada[24]. Private enforcement against cartelists is also permitted in SA should the Commission decide not to prosecute a complaint. The original complainant can prosecute the matter before the Tribunal at his own

[13] Section 26 (2).
[14] Section 27.
[15] ibid.
[16] Section 36 (1) (a).
[17] ibid Subsection 2.
[18] Section 37.
[19] Sasha-Lee Afrika and Sascha-Dominik Bachmann, 'Cartel Regulation in Three Emerging BRICS Economies: Cartel and Competition Politics in South Africa, Brazil, and India - A Comparative Overview' (2011) 45 Int'l Law 975.
[20] Section 59 (2)
[21] Section 74.
[22] Enterprise Act, 2002, s 188.
[23] Sherman Antitrust Act of 1890, 15 U.S.C. Section 1 (2004)
[24] Competition Act, R.S.C. 1985, c. C-34 S 45(2) (Can.)

cost[25], while customers who may have suffered harm as a result of the cartel activity may also claim damages from the undertakings involved.[26]

In SA, collusive bidding and price fixing are the key cartel offences being prosecuted by the Commission, followed by market division cases.[27] Due to the damaging effect of cartels on the economy generally and consumers in particular, the prosecution of cartels under the Act is based on a per se rule, and there is no further need for the definition of the relevant market. To put simply the Act presumes the anticompetitive effects of the cartel[28] and once the cartel agreement/arrangement or the mere existence of the cartel is established, the offence is proved. This erases the burden on the commission to conduct a more in depth economic analysis to determine the effect of the cartel on the relevant market.

The Commission recorded tremendous success in cartel prosecution following the adoption of the Corporate Leniency Policy (CLP) and dawn raids.[29] The CLP was first adopted in 2004[30] owing to the difficulty of investigating and prosecuting cartels in developing countries of which SA is one. Various scholars noted the indispensable role played by the CLP in the detection and regulation of cartels in SA and argued that its adoption led to the successful prosecution of several key cartel cases of which the Bread Cartel[31] is chief among them.[32]

The Bread Cartel case which is a locus classicus in cartel investigation and prosecution, helped in instilling a competition culture in SA.[33] Other cases where the CLP led to its success includes the Pipes and Construction Cartel[34] and the Milk Cartel[35]. The CLP is guided by a number of principles and procedures. First is the 'first to the door' principle which ensures that only one member of the cartel, and usually the first to 'snitch' on the cartel and corporates with the Commission to secure the conviction of other cartelists, benefits from the immunity. Although, the CLP does not provide any incentive for subsequent acts of cooperation by other cartelists, the Commission has the discretion to

[25] 'Cartels in South Africa', Interview with Pieter Steyn (Getting the Deal Through July 2018) <https://gettingthedealthrough.com/intelligence/172/article/6247/cartels-south-africa> accessed 25 July 2019.
[26] Section 65 of the Competition Act.
[27] Steyn (n 25)
[28] Chantal Lavoie, 'South Africa's Corporate Leniency Policy: A Five-Year Review' (2010) 33 World Competition 141
[29] Lewis (n 1).
[30] Dennis Davis and Lara Granville, 'South Africa: The Competition Law System and the Country's Norms' in Eleanor Fox and Michael Trebilcock (eds), *The Design of Competition Law Institutions* (OUP 2013) Ch7.
[31] *Competition Commission v. Pioneer Foods (Pry) Ltd*. 2010 (15/CR/FebO7) (S. Afr.)
[32] Lavoie (n 28); Lewis (n 3); Fox and Bakhoum (n 9).
[33] Fox and Bakhoum, (n 9).
[34] *Competition Commission v. Cobro Concrete* 2009 (23) CR I (CT) 1 2.1 (S.Afr.).
[35] *Competition Commission v. Clover Indus. Ltd. et. al*. 2006 (103) CR 1 (CT) 1 34 (S.Afr.)

negotiate the terms of the leniency for them on an ad hoc basis. The second principle is that which ensures that an applicant must admit to the infringement of Section 4 (1) (b) of the Competition Act before being offered an immunity in an act of reciprocity. This is because in the absence of such an express admission, the Commission may find it difficult in proceeding against the other cartelists.[36] The third principle is that the information provided by the first applicant should be one relating to a cartel conduct which the commission is not aware; or aware of but does not have sufficient information or started an investigation; or has opened an investigation but does not have sufficient evidence to commence prosecution.[37] The fourth principle is that the immunity will be granted on a conditional basis to ensure the full cooperation of the applicant throughout all the stages of the investigation until the final determination of the case at the Tribunal or CAC as the case may be. This full cooperation will require the applicant to make a full disclosure of all material facts and evidence at its disposal, expeditiously cooperate with the Commission, and promptly stop any further participation in the cartel.[38] A breach of any of these three conditions will led to the revocation of the conditional immunity.

However, the successes recorded from the adoption of the CLP suffered a setback with the criminalization of cartel conduct in May 2016,[39] because the directors of a successful leniency applicant firm were not certain of personal immunity from prosecution.[40] This is because the Commission was unable to guarantee personal immunity to the directors and managers of leniency applicants because the power of prosecuting them was given the National Prosecuting Authority (NPA), which is not bound by the Commission's recommendations.[41]

In essence, the criminalisation of cartels under the SA regime restricts the powers of the Competition Commission to civil and administrative fines and penalties, while the criminal aspects lies with the National Prosecuting Authority.

4. Nigerian Experience

The FCCPA created two institutions for the purposes of enforcing its provisions namely; the FCCPC and the Competition and Consumer Protection Tribunal (CCPT). It saddled them with the responsibility of promoting competition in the Nigerian market by eliminating

[36] Lavoie (n 28) 147.
[37] See Paras 5.5 and 10.1 (b) of the CLP.
[38] Para 10.1(a) Of the CLP.
[39] Section 73(A).
[40] Steyn (n 25).
[41] Section 73(A).

monopolies, prohibiting abuse of a dominant position and penalizing other restrictive trade and business practices.[42]

The FCCPA is the first comprehensive legal regime on competition law which is applicable to all commercial activities within, or having effect in Nigeria.[43] Its provisions are also binding on all government departments and state owned corporations, and indeed all commercial activities aimed at making profit and targeted at satisfying demand from the public.[44] It equally applies extraterritorially to any prohibited conduct by a Nigerian citizen or a person ordinarily resident in Nigeria; a corporate body registered in Nigeria or carrying out business within Nigeria; any person supplying or acquiring goods or services into or within Nigeria; any person in relation to the acquisition of shares or assets outside Nigeria which results in the change of control of the business, part of the business or any asset of the business in Nigeria.[45]

The affairs of the FCCPC are managed by a Board made up of a Chairman, the Chief Executive of FCCPC (Vice-Chairman of the Board), two Executive Commissioners and four non-executive Commissioners.[46] The FCCPC has a wide range of anti-competition and consumer protection responsibilities under the Act[47] which are geared towards the development and promotion of fair, efficient and competitive markets in the Nigerian economy to facilitate access by all citizens to safe products and secure the protection of rights for all consumers in Nigeria.

The CCPT, on the other hand, is composed of a Chairman who shall be a lawyer with 10 years post-qualification, and experienced in competition law, consumer protection or commercial and industrial law; six other members with at least 10 years professional experience in either of competition and consumer protection law, commerce and industry, public affairs, economics, finance, or business administration.[48] The CCPT adjudicates over conducts prohibited by the FCCPA[49] excluding criminal violations,[50] entertain appeals from and reviews any decision of the FCCPC,[51] hear appeals on the decisions of sector-specific

[42] Explanatory Memorandum, FCCPA.
[43] Section 2.
[44] ibid.
[45] Section 3.
[46] Section 4.
[47] Section 17.
[48] Section 40.
[49] Section 39 (2).
[50] This is deduced from Section 51(1) which restricts the Tribunal to impose only administrative fines. This provision robs the Tribunal of jurisdiction in criminal cases.
[51] Section 47 (1)(a).

regulators on competition and consumer protection matters, after the FCCPC had first considered the appeal.[52] The decision of the Tribunal is to be registered at the Federal High Court for enforcement purposes only,[53] while appeals on the Tribunal's decision goes to the Nigerian Court of Appeal.[54]

4.1 Regulation of Cartel in Nigeria.

Cartel activities proscribed under the FCCPA include price-fixing, conspiracy and bid-rigging.[55] An undertaking is prohibited from conspiring directly or indirectly by agreement, threat, promise or any other means to influence upwards or discourage the reduction of the retail price of other undertakings, unless the undertakings are interconnected undertakings as defined under the Act.[56]

Similarly, an undertaking is prohibited from conspiring with another undertaking to limit, prevent or unduly reduce competition in the production, purchase, sale, supply, rent or transportation of any product, except where such was made in relation to the provision of a service via the practice of a profession, where the maintenance of standards of competence are necessary in the protection of the public.[57]

Likewise, where more than one undertaking agrees not to compete against each other in response to a bid, or make a bid submission based on agreement with one another, except where one of the undertakings is an affiliate or agent of the other, a case of bid-rigging will be established.[58]

Cartel activities are criminalised by the FCCPA, and the penalty upon conviction is a fine not exceeding 10% of the annual turnover in the preceding business year for a corporate body. Where the violator is a natural person, the penalty upon conviction is a prison term not exceeding 3 years and/or a fine not exceeding 10 million naira.[59] Also, each director of the violating corporate body is liable to be proceeded against in person, and upon conviction, be dealt with in accordance with the above penalty prescribed for a natural person.

[52] Section 47 (2).
[53] Section 54.
[54] Section 55 (1).
[55] Part XIV.
[56] Section 107.
[57] Section 108.
[58] Section 108.
[59] Sections 107-109.

Similar to the regime in SA, cartel offences are per se violations and cannot be justified under the rule of reason test. This implies that the undertakings involved cannot leverage on any pro-competitive effect of their conduct to raise a defence. All that needs to be proved to secure a conviction is the existence of the cartel arrangement.

Unlike the case of SA, the FCCPA does not contain a clear provision on private action for damages against cartels. However, section 67(2) and (3) provides what could have been a legal basis for private action except that it suggests that the right exists pre FCCPC's regulatory powers. The section gives the right of complaint to the FCCPC by anyone who has suffered loss as a result of any restrictive agreement, and the FCCPC if satisfied with the circumstances may exercise any of its powers under the Act, inclusive of an **interim** cease and desist. It gives a further right of appeal to the CCPT if the person is not satisfied with the decision of the FCCPC. The language of this section suggests that the complaint is targeted at a restrictive conduct which is yet to be investigated and prosecuted by the FCCPC. This provision does not meet with the requirements of a private action in damages which usually comes after the admission of guilt by or conviction of the cartelists.

However, when the above section is read in conjunction with Section 146 and 149 (3) it appears to allow for private action for damages against cartelists because it empowers a person to enforce **any right** under this Act, a transaction or agreement, or otherwise resolve any dispute with an undertaking that supplied the goods or services by referring the matter to either the undertaking, sector regulator, FCCPC or Court for determination. In resolving the dispute, the FCCPC is empowered to award damages in favour of the complainant. In any event, the position of this article exists as an opinion pending a judicial interpretation.

In contrast with the case in SA, the criminalisation of cartels under the FCCPA does not restrict the powers of the FCCPC, rather the former expands the latter's enforcement powers to a wide range of anticompetitive conducts covering both civil and criminal infractions. The power to impose criminal sanctions on cartels is the sole responsibility of the FCCPC, however, it may refer the refer such violations to the office of the Attorney-General of the Federation and Minister for Justice (AGF) for prosecution and imprisonment.[60]

On leniency, the FCCPA empowers the FCCPC to make regulations on a number of policies for the effective implementation of the Act of which includes leniency.[61] To the credit of the

[60] Section 113 (2).
[61] Section 163 (2) (g)

FCCPC given its limited resources, it has published a number of regulations on some other aspects of competition regulation, however, the regulation on leniency is yet to be published as of today.

4.2 Real and Potential Murky Areas of Cartel Regulation in Nigeria

It is common knowledge that no legal legislation no matter how well-crafted is perfect. New developments will always identify a lacuna, and necessitate judicial, legislative or administrative intervention to address. These interventions are usually instigated by legal arguments, lobbying and scholarly writings. For a new competition regime, judicial and legislative intervention seems very unlikely in the immediate. This leaves the responsibility of shaping the murky areas of the regime at its infancy stage on the Commission via administrative interventions like the development of regulations; and scholars via publishing erudite opinions via articles like this one. This section of the article will point out some murky areas of cartel regulation under the FCCPA with the view of making recommendations for the efficient regulation of cartels in Nigeria.

4.2.1 Jurisdiction Dilemma

Jurisdictional uncertainty appears to be a murky area in the prosecution of both civil and criminal infractions under the FCCPA. Although the Section 39 (2) empowers the CCPT to adjudicate over all prohibited conducts under the Act and exercise the jurisdiction, powers and authority conferred on it under the Act or any other enactment, Section 51 (1) restricts its powers to the imposition of only administrative penalties only for prohibited practices and violation of its interim orders. Contextually, the absence of powers to impose criminal penalties on prohibited conducts implies that the CCPT lacks the power to sit over criminal infractions under the Act generally and in particular, the provisions on the criminalisation of cartels. If this is the case, the next question to ask is how will the criminal aspects of cartel regulation be enforced? Section 113 (2) provides a guide. It provides that 'the Commission may prosecute or refer violations of criminal offences created under this Act to the office of the Attorney-General of the Federation and Minister for Justice for prosecution and imprisonment'. This section also creates a problem because it failed to mention the court where such an infraction may be prosecuted.

Although the Act defines Court as 'Court of Appeal',[62] its powers are only limited to appellate judicial review of the decisions of the CCPT. In the absence of a clear provision on

[62] Section 167 (1).

the appropriate court to prosecute criminal violations under the Act, this article is of the opinion that the general constitutional provisions of Section 251 of the 1999 Constitution of the Federal Republic of Nigeria (CFRN) which grants an exclusive civil and criminal jurisdiction to the Federal High Court (FHC) in a number of competition related issues will apply. Two arguments support this position. Firstly, Section 251 of the CFRN grants an original and exclusive criminal jurisdiction[63] to the FHC over a wide range of corporate issues relating to industrial monopoly, government revenue, operation of companies under the Company and Allied Matters Act, banking, financial regulation and a number of other relates commercial issues. Applying the ejusdem generis rule will most definitely bring competition law within its jurisdiction. Secondly, criminal cases relating to Section 251 of the CFRN have always been prosecuted at the FHC by federal government agencies like the FCCPC, and the office of the AGF. It is therefore inconceivable that either the FCCPC or the office of the AGF will prosecute criminal infractions of the FCCPA before any other court beside the FHC, although in some cases where the criminal infraction is one which relates to simple contract like price fixing and restrictive agreements, the State High Court could assume jurisdiction.

In sum, a combined reading of Section 113(2) of the FCCPA and Section 251 of the CFRN leads to the irresistible conclusion that the FHC retains the jurisdiction for the prosecution of general criminal offenses and particularly, in relation to cartel under the FCCPA. It should be noted however that the criminal jurisdiction of the FHC with regards to the FCCPA may not be exclusive. In any event, future legal fireworks and arguments on these jurisdictional tussles will set the right tone for a definite judicial pronouncement.

A further potential jurisdictional tussle could arise from the powers of the CCPT over civil cases, and that of the FHC. As already highlighted above, the Section 251 of the CFRN gives the FHC exclusive jurisdiction over an extensive corporate provision of which some relate to 'commercial and industrial monopolies … standards of goods and commodities and industrial standards'[64]. The potential of the conflict comes to the fore with the provision appears to equate the status of the CCPT to that of a high court by providing that appeals over the decisions of the CCPT lies directly to the Court of Appeal, in a manner similar to appeals over decisions of the FHC. A precedent for this is found in the Investments and Securities Act (ISA) 2007 which makes the decisions of the Investments and Securities Tribunal (IST)

[63] Section 251 (3) CFRN.
[64] Section 251 (1) (f)

appealable to the Court of Appeal, an arrangement that has raised some legal controversies over the years, having generated two opposing decisions from the Court of Appeal.

In the first case[65] the Court of Appeal held that the provision of the ISA which confers jurisdiction on the IST cannot override the jurisdiction conferred on the FHC by the CFRN because the former is not a creation of the Constitution. However, in a more recent case[66] the decision of the Court was that in enacting the ISA, the legislature expressed a clear intention to carve out from the extensive corporate jurisdiction of the FHC and assign an exclusive jurisdiction over the operations of the capital and securities market to the IST as a specialist Court.

I tend to agree with the second decision of the Court of Appeal because in enacting these specialist laws like the FCCPA and ISA, the legislature established specialist tribunals to deal with the disputes arising from these laws which are technical in nature and requires a higher level of expertise, above the regular corporate related cases handled by the FHC. Further, the members of these tribunals are subject to further professional expertise and qualifications. For example, further to the 10 years post qualification experience as a lawyer required of FHC judges, the FCCPA requires the chairman of the CCPT to be experienced in competition and consumer protection law and industrial law, while other members of the tribunal should have a minimum of 10 year experience in at least one area of consumer protection law, commerce and industry, public affairs, economics, finance and business administration.[67] Furthermore, a panel of the CCPT is composed by a minimum of three member of which one member must have requisite legal training, experience and good knowledge of competition and consumer protection matters.[68]

In contrast with the FHC which is composed by a single judge who may or may not be skilled in competition law, the legislature demonstrated a clear intention to delineate civil causes in this area of law and hand it over to CCPT. Notwithstanding the above reasonings and decisions, there exists a high probability that the dilemma which played out in the jurisdictional tussle between the FHC and IST will also manifest over the constitutionality of the CCPT as encroaching on the powers of the FHC. It is therefore suggested that future legislative intervention in this area should clear the air so that the new regime will not be characterised by unnecessary jurisdictional uncertainties.

[65] SEC v Kasumu [2009] 10 NWLR (Pt. 1150) 509 at 535 paras A-C
[66] Wealthzone Ltd v. SEC [2016] LPELR-41808(CA).
[67] Section 40 (1).
[68] Section 48 (1) (2) and (5a).

4.2.2 Political Interference

Where the FCCPC assigns the prosecutorial powers to the office of the AGF, it could open doors to political considerations and agency inaction. In many emerging economies like Nigeria, a small number of elites with political connections, and state owned enterprises (SOEs) control large sections and strategic industries of the domestic economy respectively. This could lead to enforcement inaction against these cartels and SOEs. [69] For example, the AGF is a politically appointed office held at the pleasure of the President. He may be fired, or his office may lose funding if it prosecutes cartels involving politically well-connected entities. This potential challenge also comes to the fore when considering the constitutional powers of the AGF to enter a *nolle prosequi* over any criminal proceeding instituted by his office or any other authority.[70] Therefore, where the office of the AGF or even the FCCPC decides to prosecute these politically connected cartels and SOEs, the AGF or Director General (DG) of the FCCPC could come under an immense pressure to discontinue the case especially where the evidence weighs heavily against the defendants. Knowing that he could be fired, and his replacement will do the same bidding, the AGF may likely cave into pressure to save his job. On the other hand, the DG of the Commission whose office comes with a statutory flavour could face the threat of retaliatory action by the state which could be in various forms like the limiting of the commission's powers, reduction of the budgetary allocation, or outright overriding the powers of the commission like it happened a few years ago in Columbia. The Columbia experience represents an extreme case of political interference where the President of the country circumvented the competition commission's opposition to the merger between the state owned Avianca and ACES Airline on the ground that it will create a monopoly situation, and approved the merger, after which the head of the Competition Commission resigned in protest.[71]

4.2.3 Inconsistency of Cartel Regulation with Prevalent Social Norms

Prior to the enactment of the FCCPA, an opposing view stood against the criminalisation of cartel provisions. This view argued that prevalent social norms within the Nigerian context opposes the idea of cartel criminalisation, and therefore will be a clog on the wheels of

[69] Sokol and Stephan (n 5) 8.
[70] Section 174 (1) CFRN.
[71] Andrés Palacios Lleras, 'Competition Law in Latin America: Markets, Politics, Expertise' (DPhil Thesis, University College London 2016) 149; ICN Curriculum Project, Developing Countries & Competition, YouTube (Feb. 26, 2014), <www.youtube.com/watch?v=ZBBFNty2hsk> accessed 22 January 2020.

enforcement.[72] I tend to agree with this proposition. In developing countries like Nigeria, close family ties are prevalent, and in several cases, family relatives and close friends control a number of related businesses. Hence, it appears normal for them to relate with one another and exchange business information as it is not be practically possible to stop them from doing so. In fact, this close relationship between business rivals rarely attract any stigma and some sections of the general public view the camaraderie with admiration. With the prohibition of cartels and its criminalisation these 'normal' activities by friends and family relatives could come under the definition of concerted practices, and amount to a conspiracy against the general public. This situation could be a set-back for a leniency policy because in such an environment 'snitching' on a business partner could be perceived to be more appalling than the unlawful act itself, as it may be viewed as an attempt to ruin peoples' businesses rather than doing the right thing. Thus, a potential self-reporter could be deterred by the fear of social and extra-legal repercussions of *snitching* which could range from isolation within social and family circles, physical harm or death[73] in extreme cases.

Furthermore, the importance of social norms in law enforcement cannot be undermined because its alignment with the law complements with enforcement and makes it more effective. However, the reverse appears to be the case with the criminalisation of cartels in Nigeria. There is therefore an urgent need for public enlightenment and reorientation on the damaging effects of cartels on consumers and the general public. In this way, the FCCPC will be able to modify the current norm of apathy towards cartel behaviour and secure the cooperation and support of the public towards the enforcement of provisions on cartel criminalisation. Also, since the specialist CCPT lacks the jurisdiction to try criminal cases, the judges of the state and federal high court who will be sitting over these criminal cases need to be trained on competition law, to ensure that maximum sentences applied upon conviction and not deliberately avoided.

4.2.4 Clarification of the Exemption

Section 108(2) creates an exemption from liability form cartels on conduct which relates only to a service and to standards of competence and integrity that are reasonably necessary for the **protection of the public** in the practice of a trade or profession relating to the service or in the collection and dissemination of information relating to the service. This is a very vital

[72] Enofe Bob, 'Developing Countries, Nigeria, and Cartel Criminalisation: of Transplantation and Desirability' (Socio-Legal Studies Association Annual Conference, Lancaster University, April 2016).
[73] Sokol and Stephan (n 5)

provision in the regulation of cartels because it can be a tool both in the hands of the regulator (to withhold enforcement) and the cartels (as a defence). This article notes that importance of having a guideline which clearly defines what qualifies as 'protection of the public' since its definition is missing from the FCCPA. This is to avoid arbitrary use and subjecting the phrase to abuse.[74]

5. Optimal Enforcement Options for Nigeria

The restriction of the fine on cartels to a single year's turnover (10% turnover of the preceding business year) appears to be insufficient to command full compliance with the prohibition. It is generally accepted that fines ought to have an adequate deterrent effect, not only to sanction the undertaking involved, but also to deter others from engaging in a similar conduct. This provision could be a pat on the back where the cartel is one that has been ongoing for a period of time, which means that its effect would have permeated and affected the market negatively and caused injury to consumers over a long time. For example, a firm that is involved in a cartel for a period of 10 years with an annual turnover of 1 million dollars for that duration will find it very easy to pay the single year turnover fine which is 10% of a million dollars, rather than when the fine is pegged at 10% of the annual turnover for each of the years it participated in the cartel. Also, the insufficiency of the fine could also be a clog in wheels of a leniency program, because the single year turnover fine may be too insignificant to pressurize one of the cartelists to *snitch* on others and apply for leniency.

To guard against a challenge of the dawn raid procedures on appeal, which could lead to discountenancing the evidence obtained and setting aside decision of the FCCPC based on technicalities, the commission should ensure that the raids are carried out in compliance to the law and procedures. This is because appellate courts will usually give more considerations to the fairness of the procedure rather than the anticompetitive effects of the cartel,[75] a reasoning which is in line with the established principle in the *locus classicus* of *Macfoy v UAC*[76] where Lord Denning held that 'you cannot build something upon nothing and expect it to stand'. With the amount of time and resources involved in detecting and prosecuting cartels, it will be a big blow to the FCCPC if its decisions are set aside because of

[74] For more details on the public interest debate see, Enyinnaya C. Uwadi (2020, forthcoming) 'A Case for Public Interest Considerations in Merger Control Analysis with Reference to Competition Law Enforcement in Developing Countries: The Example of South Africa' (TDM, ISSN 1875-4120) April 2020 www.transnational-dispute-management.com.
[75] Lewis (n 1) 233.
[76] Macfoy v UAC (1961) All ER 1169.

technicalities, as this could result in loss of vigour, negative publicity, and loss of political capital.

Furthermore, inasmuch as the strong anti-cartel position of the FCCPA in criminalizing cartel is commendable, there is a high possibility that if a leniency program is not quickly adopted by the FCCPC, detecting cartels could be an uphill task. This is because the Commission at the moment may not be at a vantage position to discover, investigate and prosecute cartels, owing to the challenges of it being a new agency with a shortage of technical expertise and funds, while operating in a developing country with a weak competition culture.[77] Indeed, competition authorities from developed countries with their expertise and funding still have some difficulties in detecting cartels. This led to the adoption of the leniency programs in the fight against cartels. As discussed earlier, South Africa recorded tremendous success in cartel prosecution following the introduction of the leniency program, but experienced a downward trend upon the criminalization of cartel in 2016. Having highlighted the various benefits of the leniency program and how it helped countries like SA as a central cartel enforcement tool, this article believes that the SA CLP model portends several benefits which are worthy of emulation for the Nigerian regime.

Recommendations

With the supposition that the FCCPC will introduce the leniency program as provided under S 163 (2) (g) of the FCCPA, I will proceed with recommendations on the best approach for its implementation. The first undertaking to self-report should receive conditional immunity only on the condition that it cooperates with the FCCPC at all stages of the investigation and prosecution by providing evidence and testifying against other members of the cartel. Then the immunity shall be made unconditional. However, where it only self-reports, and drags foot on further cooperation, the conditional immunity should be revoked. Subsequent members of the cartel who admits guilt and cooperates with the FCCPC by providing additional evidence of significant value to that which is already in the possession of the commission should receive reduced fine according to the order of their reporting. Where an investigation is opened against a cartel and undertakings own up and plead guilty to the allegations before a formal charge is filed, then the settlement procedure should avail them.

[77] George Lipimile, CCC Leadership Perspective: Nudging Uganda And Nigeria Towards Competition Enforcement' <https://africanantitrust.com/category/nigeria/> accessed 29 August 2019.

Additionally, since the cost of whistle blowing by the informant outweighs the benefit of remaining silent, measures should be taken while developing the leniency guidelines to ensure adequate financial incentive and protection for the whistle blowing employee of cartelists. This will provide a sufficient incentive for the informant to come forward rather than remain silent. Due to the dangers of being an informant, it is suggested that the incentive should be sufficient to enable the informant to relocate to a safe environment. The money for this could be realised from the fines imposed on the cartelists. South Korea is an example of a country which has successfully prosecuted cartels and changed the widespread anticompetitive corporate culture by increasing the amount of reward for corporate whistle blowers who provide information to the KFCT.[78]

Collaboration with the judiciary is another area of importance in the regulation of cartels. With the criminal adjudicatory powers of offences in the FCCPA falling under the jurisdiction of the state and federal high courts, it is imperative for the FCCPC to liaise with the leadership of these courts for the purpose of designating a number of judges to preside over competition law cases. These judges will need further training on competition and consumer protection law so that they can properly appreciate competition law technicalities, arguments and submissions of parties, and dispense sound economic justice in line with the spirit and letters of the Act.

Furthermore, it is important to guard against political influence in the activities of the Commission, like it happened in Columbia, as it will negatively impact and stall every effort and progress made towards the institutionalisation of a competition culture in Nigeria. To address the problem of political interference as well as social norms, cartel enforcement priorities of the FCCPC should be on conducts which are of public interest to the members of the public and has the potential of generating wide and positive media coverage. Successful prosecution and imposition of penalties have the potential of putting the Commission in the good books of the public, which is a step towards changing the prevalent social norm of apathy on cartel behaviours. Also, the benefits of enforcement in terms of revenue generated from fines could build political capital for the Commission and get the political class on its side. May I add a caveat that the primary purpose of competition law enforcement is not revenue generation, but to promote competition for the general benefit of the public. However, evidence of successful enforcement and revenues generated from fines is important because it justifies any request for increased funding before the Parliament. With the ruling

[78] Sokol and Stephan (n 5) 11.

class on its side, the FCCPC could then proceed against the hitherto politically connected cartels as well as those involving SOEs.

From the argument on the restriction of the fine on cartels to a single year's turnover, this article recommends its amendment to cover the period of the duration of the cartel in order to command a sufficient deterrence, and also to make it attractive for any participating firm to *snitch* on the rest the of the cartelists in line with leniency regime.

Finally, dawn raids should be planned and strictly carried out in accordance to legislative provisions and procedural rules. The FCCPC should ensure that it does not act in haste, and first obtain an order from a court of competent jurisdiction before any raid, which should be carried out in strict compliance with the court's order, including the procedural guidelines.

6. Conclusion

This article concludes that cartel regulation is an aspect of competition law enforcement that portends huge potentials and rewards in an emerging economy like Nigeria, and also for a new competition regulator with limited resources like the FCCPA. This is because cartels are per se violations of competition law which does not in essence require an in-depth economic analysis to prove the alleged offence.[79] Unlike other aspects of competition law which requires the definition of the relevant market, its prosecution only requires the competition commission to have a wide range of investigatory powers to get hold of sufficient evidence.[80]

In essence, the article has identified a number of murky areas of cartel regulation in the new Nigerian competition law which includes jurisdictional dilemma and potential tussle for jurisdiction over competition law disputes; political interference; inconsistency of cartel regulation with prevalent social norms; non-clarification of the criteria for exempted cartels on public interest grounds. This article suggested best optimal enforcement models and made appropriate recommendations which includes broadening the restriction of the fine on cartels from a single year's turnover, to cover for the total number of years the cartel existed; strict adherence to the rule of law and procedural guidelines on dawn raids; immediate unveiling of the leniency regime which should also provide adequate protection and incentive for the *snitching* cartelist; prioritisation of enforcement to cases which involve public interest and attracts positive media coverage in order to build social capital; collaborating with the judiciary in the development of a sound competition law jurisprudence.

[79] Fox and Bakhoum, (n 9).
[80] Frederic Jenny, 'Cartels and Collusion in Developing Countries: Lessons from Empirical Evidence' (2006) 29 World Competition 109 at 135.

In sum, this article recognises the challenges and peculiarities of competition law enforcement generally and cartel regulation particularly in Nigeria. In all modesty, it strongly advocates for the consideration of the various issues unveiled by this article which it believes will be resourceful not only to the competition regulator, but to all relevant stakeholders in the unending journey of competition regulation.