



Association of Licensed Telecommunications Operators of Nigeria

**FEDERAL COMPETITION COMMISSION
ESTABLISHMENT BILL
&
CPC REPEAL/COMPETITION COMMISSION
AND CPC TRIBUNAL ESTABLISHMENT BILL**



ALTON Submission

MAY 2016



Association of Licensed Telecommunications Operators of Nigeria

Executive Summary

The Association of Licensed Telecoms Operators of Nigeria is a body corporate, duly registered under the laws of Federal Republic of Nigeria as an Incorporated Trustee, and officially recognized by the Government of the Federal Republic of Nigeria and the Nigerian Communications Commission as the official industry body for all licensed providers of telecommunications and subsidiary services in Nigeria.

The major objectives of the Association is to foster inter-network cooperation and industry harmony amongst all the operators and the regulator in the country, as well as provide a platform for industry/stakeholders interaction and collaboration for the advancement of the Nigerian telecommunications market. The Association is committed to enhancing growth in the Nigerian ICT sector, whilst ensuring a healthy balance between market growth/profitability for the operators and efficient/affordable service delivery to the subscribers.

We recently received an invitation for a public hearing to hold in the House of Assembly on Tuesday the 31st of May 2016, on two Bills on Competition and Antitrust.

The two Bills are as follows:

- (1) "A Bill for an Act to Establish the Federal Competition Commission and for purposes connected therewith" [HB15.06.01] (HB01) sponsored by Hon. Yakubu Dogara
- (2) "A Bill for an Act to repeal the Consumer Protection Commission Act, Cap L25, LFN, 2004; Establish the Federal Competition and Consumer Protection Commission and Competition and Consumer Protection Tribunal for the development and promotion of fair, efficient and competitive markets in Nigerian economy, facilitate access by all citizens to safe products, secure the protection of rights for all consumers in Nigeria" HB15.07.60] (HB60) sponsored by Hon Uzoma Nkem-Abonta.

Both Bills seek to establish a Competition Commission. However, while HB01 is focused only on Competition regulation, HB60 incorporates consumer protection and seeks to subsume the CPC within the Competition Commission and to repeal altogether the Consumer Protection Council Act.

Because both Bills in principle provide for the same thing, it is not obvious what the focus of the NASS is in this regard.

It might therefore, be advisable for the Bills to be returned to the appropriate house committee to reconcile in line with comments at the hearing and return a reviewed single Bill to the House to progress the same.



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Review

The specific comments on the Bills are:

HB60

- **General:** This Bill is a whole of 105 pages and we only just received a copy giving us very little time to review in detail, however, we have tried to highlight the salient issues, as much as possible.
- **Repeal of CPC Act:** The fact that the Bill seeks to repeal the CPC Act is confusing especially as there is a current Senate Bill (SB.169, sponsored by Senator Engr. Clifford Ordia), proposing amendments to the Act. The critical question here is, does the NASS want to amend the Act or to repeal it?
- **Scope:** The Bill seems to cover not just competition/antitrust law and regulation but has very extensive provisions on consumer protection, spanning from consumer complaint resolution, quality testing to standards regulation etc. (see Section 17, Part 111 of the Bill).
 - The Bill seems quite unwieldy, it is our opinion that there should be a separate law on consumer protection rights from competition, because even though they are related they are two very distinct matters
 - Also even if the consensus is to have one agency oversee the two matters the laws should still be distinct.
 - Also for operational efficiency, especially as the Bill seeks to establish a new agency it might be better to focus on one item for now i.e. Competition and market regulation. In the UK for instance where the two are merged it took many years of operating separately before a decision to merge was effected in 2014. In order to build the requisite efficiencies for an agency of this nature, it is better to operate both agencies separately initially.
- **Power to Cause All Imported Goods to Be Registered for Traceability:**

The Bill proposes to empower the Commission to cause all goods to be registered for traceability.

 - This provision may result in unnecessary delays in the importation process due to the usually bureaucratic bottle necks which characterize the activity of most governmental agencies and parastatals in addition to an increase in the cost of doing business in Nigeria as the Commission will almost inevitably charge fees for such registrations.
 - It is our opinion that this information can be sourced from other governmental agencies that already monitor goods.



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- **Power of the Commission to Seal Up Any Premises:**

The Bill proposes for the Commission to be able to seal up any premises on reasonable suspicion that such premises contain, harbor or are being used to produce or disseminate fake goods or services, substandard, hazardous or inimical to consumers' welfare in collaboration with relevant sector regulators. Section 154 (3) also provides for temporary closure of any premises or facilities reasonably believed to be carrying on in a manner detrimental to the interest of consumers

- There is no requirement for a court order before the sealing up or closing of premises by the Commission, this provision may be liable to arbitrariness and abuse by officers of the Commission.
- We recommend that the Bill should be amended to include a provision requiring the Commission to obtain a court order as a precondition for sealing up premises and a copy of the order must be served on the owner or occupier before the premises is sealed or closed, to prevent possible arbitrariness and abuse by the officers of the Commission.

- **Power of the Commission to Unilaterally Make Regulations Relating to Charges, Fees, Levies, Fines and Administrative Penalties:**

Section 17 (2) (g) and 164 (1) (c) of the Bill, proposes to empower the Commission to make regulations relating to charges, fees, levies, fines and the imposition of administrative penalties.

- This power appears to be too wide and is liable to abuse by the Commission. We suggest that the Bill be amended to introduce a provision requiring stakeholder engagements, as a precondition to making any guidelines relating to charges.

- **Power to Impose Fee for Conducting Investigation into and Resolution of Disputes:**

Section 23 (2) (h) of the Bill empowers the Commission to impose fees for the investigation into and resolution of all disputes brought before the Commission.

- This appears to contradict the practice under the Consumer Protection Act, which, under the current dispensation, does not impose any duty on a Complainant to pay fees for the investigation of and/or resolution of disputes brought before the Commission, and also defeats the purpose of setting up the Commission, as financially disadvantaged persons may not be able to pay the fees imposed by the Commission, thereby depriving them of the opportunity to air their grievances. This creates room for the commercialization of the dispute resolution process and will not advance the course of protecting the consumers as intending by the Bill.

- **Power of the Commission to Authorize its Officers to Enter and Search Premises With or without Warrant:**



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Sections 27 (1 (a) and (b), 27 (2) and 27 (3) of the Bill seek to empower the Commission to authorize its officer, with warrant issued by the Federal High Court, to enter and search any premises where there are issues to do with a possible contravention of the provision of the Act to inspect and remove from the premises, any document or extract therefrom.

However, the provisions exempt the requirement for a warrant where the commission enters a premise as a preemptive action pending the issuance of a warrant.

- The implication of the above provisions is that, where a complaint has been made to the Commission, it can immediately enter into a premise for the purposes highlighted herein without first giving the organization the opportunity to be heard. This is bound to lead to abuse and defeats the purpose of requiring a warrant in the first place.
- There is also no obligation on the part of the authorized officers of the Commission to disclose the details of the complaint made against a business or undertaking and may provide a legal basis for officers of the Commission to have unfettered access to the organization's confidential information.

- **Power of the Commission to Receive Evidence Not Admissible in Court:**

Sections 34 (1) of the Bill confers on the Commission the power to receive in evidence any statement, document, information or matter that may in its opinion assist in dealing effectively with the matter before it whether or not such evidence will otherwise be admissible.

- The power to admit inadmissible evidence can provide a legal basis for the Commission to rely on hearsay evidence in the determination of disputes and is potentially dangerous, given the serious punitive and penal consequences of violating the provisions of the proposed Act.

- **Prohibition of Restrictive Agreements:**

Section 64(1) of the Bill seeks to prohibit restrictive agreement in any manner likely to affect competition.

- There may be need to have further engagement on this provision with sector regulators, as a blanket rule of this nature may end up being counterproductive because in some instances agreements of this nature may be based on regulatory directives which is ultimately for the benefit of consumers.



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- **Imposition of Personal Criminal liability on Directors of a Corporate Body For Offences:**

The Bill imposes personal criminal liability on each director of a corporate body for offences and makes each of them liable upon conviction to imprisonment or fine or to both fine and imprisonment.

- Criminalizing breaches under the Act and the possible imposition of fines up to N50m are generally unreasonable and will increase the risk of doing business in Nigeria.

- **Right of Consumer to Institute Civil Action for Compensation or Restitution:**

Section 13 of the Bill, gives a consumer the right to institute civil action for compensation or restitution in Court in addition to the redress provided by the Commission.

- If the above redress involves monetary compensation given in favour of a consumer, then, compensation given by the Court will amount to double compensation.

- **Supremacy of the Provisions of the Proposed Act over any other Law on Competition and Consumer Protection:**

Sections 105 and 106 of the Bill provide that the provisions of the Act, shall override the provisions of any other law in all matters relating to competition and consumer protection and the Commission shall have precedence over and above any other relevant government agency in these matters.

- The implication of the above provisions is to weaken the powers of sector regulators in matters that have to do with competition. This approach doesn't seem to align with best practice, for instance in the UK the Competition and Markets Authority (similar agency as the one this Bill seeks to set up), has coordinate powers with sector regulators over competition issues that are sector specific.

- **Burden of Proof on Business or Undertaking on allegation of Defective Goods or Services:**

The Bill provides that the burden of proving that a good supplied or services rendered are not defective is on the supplier of goods or provider of the service.

- This goes against the well-established practice in our adversarial system of administrative of justice which places the burden of proving a fact alleged to exist on the person making the allegation. The burden of proving that the good is defective should be on the person alleging that the goods supplied or service rendered is defective.



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HB01

- **Scope:** The Bill provides for the establishment of the Federal Competition Commission and makes extensive provisions on antitrust practices, from supervision and approval of mergers and acquisitions to prohibition of restrictive trade and dominance.
 - It might however, be important to have more details on how dominance and other similar determinations are arrived at. There are examples of practices in the Bill that can be regarded as dominant for instance, but these need to be more specific
- **Citation:** Section 47 of the Bill that cites the Act as “...Competition and Antitrust Bill, 2007” should be reviewed to change the date and change the word “Bill” to “Act”.
- **Telecommunications Regulator:** Section 7 of Schedule 1, which seeks to repeal the NCC Act and other related laws to the extent of provisions that inhibit competition, is vague.
 - It might actually be better to state that the provisions of the Act shall override the provisions of any law on competition matters that conflict with it.

Some notable Similarities/Differences between the two Bills

- **Scope:** HB60 covers Consumer Protection Rights and Competition practices while HB01 is focused on competition practices only
- **Decisions:** HB60- Reviews of Decisions from the Appeal Tribunals lie to the Federal High Court while in HB01, decisions from the Tribunals lie to the Court of Appeal
- **Head of Commission:** HB60 has an Executive Chairman as head of the Commission while HB01 has a Director General
- **Powers (Commission/Sector Regulator):** HB60 provides that on issues of competition the provisions of the Act shall override the conflicting provisions of any other law and that the Commission has superior powers over sector regulators. While HB01 states that the omission shall have coordinate powers with sector regulators on matters within that sector.
- **Supervisory Ministry:** Supervising Ministry for both seems to be Trade.
 - There might be need to review this as it doesn't give the agency the autonomy it requires. In the UK for instant the Competition and Markets Authority (agency responsible for regulation of competition practices) is an independent non-ministerial department and this gives it the autonomy to take decisions on competition practices without undue interference.



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Conclusions

It is not clear what Bill the NASS intends to pass into law as both Bills substantially provide for the same thing and therefore cannot both be passed into law together.

The Bill HB60 seems unwieldy as it seeks to cover so many areas all at the same time. It is best practice to have two separate laws, one for competition practices and another for consumer protection. Even if a decision is taken to have one commission or agency for both competition practice and consumer practice, it might be more practical to first have the two agencies separate and then when efficiencies have been established, they can be merged, as was the case in the UK.

The second Bill HB01 seems fit for purpose at the moment, more than HB60 (which incorporates CPC role), but would still need to be reviewed with a lot more focus and detail. The Act seeks to establish a competition regime in Nigeria for the first time and the matter should therefore, not be taken lightly.

Recommendations

Therefore, the recommendation is that the Bill for an Act to Establish the Federal Competition Commission and for purposes connected therewith" [HB15.06.01] (HB01) sponsored by Hon. Yakubu Dogara seems to address the issues of competition more aptly, even though it would still need further review.

Whatever the case, there should be a single Bill on competition practice and stakeholder should be given sufficient time to send in contributions on that Bill in order to have a very robust document to kick start the competition law framework.

Yours faithfully,

For: Association of Licensed Telecommunications Operators of Nigeria (ALTON)

A handwritten signature in black ink, appearing to read "Gbenga Adebayo".

Engr. Gbenga Adebayo
Chairman

A handwritten signature in black ink, appearing to read "Kazeem Oladepo".

Kazeem Oladepo
Executive Secretary