

# A CRITICAL EXAMINATION OF THE FCCPC'S AND FCCPT'S INSTITUTIONAL DESIGN MODEL

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# **A CRITICAL EXAMINATION OF THE FCCPC'S AND FCCPT'S INSTITUTIONAL DESIGN MODEL**

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## **ABSTRACT**

A nation's competition law and policy are only as good as the effectiveness levels of the regulatory body in charge of fulfilling the goals and objectives set out in the legislation. There is a nexus between task achievement and institutional design, the latter being a reference to the organisational blueprint upon which the manpower deploy resources in executing the rules, aims and objectives of the competition law and policy. Increasing spotlight is placed on institutional structures of competition agencies as they are seen as impacting on the competition authority's efficiency, either positively, or otherwise. The research methodology deployed was essentially doctrinal as the Federal Competition and Consumer Protection Commission Act of 2019 was analysed for the determination of the type of competition authority model adopted. This was done, upon due consideration of the different types of models adopted in designing competition agencies, with emphasis on their selling points and their weaknesses. Consequently, the examination of Nigeria's Federal Competition and Consumer Protection Commission and the Tribunal, was done in order to ascertain the powers appropriated to each with particular interest in the Tribunal's adjudicative powers as a specialised competition court in accordance with the provisions of section 39(2) of the Act. The examination revealed that, in 2 (two) years since the signing of the Act which created the two bodies into law, no recourse has been made to the Tribunal particularly for the purpose of

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instituting proceedings, despite the fact that there have arisen cases over which it has the legal capacity to assume jurisdiction. The provisions of the Act have not been complied with as the Federal High Court has been the court before whom competition and consumer protection matters have been brought. This paper therefore recommended that the FCCP Tribunal should be made to assume its responsibility as a full-fledged quasi-judicial body through the institution of proceedings in respect of matters over which the Act conferred it with jurisdiction, by the deliberate action of the Commission in referring cases on competition and consumer protection to it. A further amendment to the provisions of the law should be considered for the purpose of creating a stand-alone court with jurisdiction to preside over competition and consumer-protection cases. This qualitative research work relied heavily on journal articles, judicial decisions and statutes.

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*Keywords: Antitrust, Competition Regulation, Institutional Design, Administrative Model, Prosecutorial Model, Dominant Position*

## **INTRODUCTION**

Institutional design with regard to Competition Law and Policy refers to the systemic framework with which the Agency embarks on the task of regulation and implementation of laws of competition and regulatory interface with every stakeholder. It deals with the areas of governance

and strategies for carrying out same.<sup>3</sup> It encompasses competition authorities' goals, their status (whether autonomous or dependent), the tools of enforcement (i.e. sanctions, fines, injunctions, etc), the functions and the types of competition agencies (administrative/integrated agency or prosecutorial/judicial (bifurcated judicial or bifurcated agency) models).<sup>4</sup> The models adopted are deployed for enforcement of competition law and policy.

The structure adopted for an antitrust agency may be inspired by several factors ranging from historical as seen in the case of the South African Commission created in order to ensure that more black South Africans have greater ownership in its economy, as compared to what obtained before;<sup>5</sup> to the need to unite the continent of Europe with unified policies, evident in the creation of the European Competition Network. The organisational structure of a competition body is key to the productivity and efficiency of same. In determining and even actuating the effectiveness, of an authority, it is recognised that intermittent evaluation of the activities of the Commission or Agency is relevant.<sup>6</sup> The fusion of disparate roles into one body is one challenge that may negate the good intentions of the agency. Another one might be the model adopted in handling competition cases brought before it, eliciting calls for a review or change. The framing of the agency's design provokes certain questions whose answers determine the type of model subsequently conceived and adopted.<sup>7</sup> These questions are:

1. The responsibility for investigating and initiating proceedings lies with whom?

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<sup>3</sup> Annetje T. Ottow (2014) Erosion or Innovation? The Institutional Design of Competition Agencies-A Dutch Case Study Vol. 2 Issue 1, Journal of Antitrust Enforcement. Retrieved from academic.oup.com on the 19<sup>th</sup> of September, 2020

<sup>4</sup> Frederic Jenny (2015) The Institutional Design of Competition Authorities: Why does it matter? International Debates and Trends LIDC Congress, Stockholm

<sup>5</sup> Preamble to the Competition Act No. 89 of 1998

<sup>6</sup> Trebilcock M.J. Iabucci E.M (2010) Designing Competition Law Institutions: Values, Structure, and Mandate Loyola University Chicago Law Journal p.456

<sup>7</sup> Trebilock & Iabucci page 457

2. Which body is to be charged with adjudicating competition proceedings which are contested?
3. In relation to number two question, what process it to be followed?
4. Is there a totally autonomous adjudicative body or would adjudication be included in the responsibilities of the body which enforces?

While there are essentially 3 (three) categories of models adopted by the various competition regimes of the world, there are oftentimes variances of these models or a fusion of two, or rarely, three types. The categories of competition models are; the integrated agency model or the administrative model, the bifurcated judicial model or the prosecutorial model, and thirdly, the bifurcated agency model which is a variant of the prosecutorial model.

### **THE CONCEPT OF AN INTEGRATED AGENCY/ADMINISTRATIVE MODEL**

It is easier to describe an integrated agency/administrative model than define same. With this type of design, the competition agency combines the functions of investigation, enforcement, and adjudication.<sup>8</sup> The decisions which emanate from the agency are consequently subjected to judicial review by a higher court. The designated court may either be one with general competency to review judicial decisions or a special court with the skilled ability to analyse the relevant issues in a competition matter.<sup>9</sup> In Jenny Frederic's opinion,<sup>10</sup> this model has become the first choice for

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<sup>8</sup> Trebilcock M.J. Iabucci E.M Op cit p.463

<sup>9</sup> Jenny F. (2015) The Institutional Design of Competition Authorities: Why does it matter? International Debates and Trends p.15 LIDC Congress 2015 Stockholm

<sup>10</sup> Ibidem

countries designing their competition authority and the reason for this is anchored on four forces which are:

1. The need for an integration of economics and law in competition law enforcement;
2. The multiplication of competition laws in developing nations whose judicial systems are feckless and ineffective;
3. The executive arm of government's desire to extend its arm of control in respect of the process of enforcing competition law; and
4. The uncertainty about the country's courts' competency to comprehend sufficiently, issues of the economy.

While the above might account for the increasing number of developing countries who adopt this model, numbers 2 and 4 do not justify why some developed countries adopted the model as their choice. Quite a number of European countries for instance, operate the administrative/integrated agency model. The United States Federal Trade Commission also runs on this design.<sup>11</sup> Trebilcock and Iabucci explained that it results in an increase in expertise of all staff and commissioners who engage in the day to day running. This expertise is relied on in policy formulation and creation of guidelines. Perhaps, this was the factor which necessitated the choice made by countries like France, or Mexico. The structure of this model may either be administration by a sole commissioner or board of commissioners.

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<sup>11</sup> Jenny F. (2016) *The Institutional Design of Competition Authorities: Debates and Trends* p.20

## **THE PROSECUTORIAL MODEL- THE BIFURCATED JUDICIAL MODEL AND THE BIFURCATED AGENCY MODEL.**

This model allows the competition agency to initiate its proceedings before a court of competent jurisdiction, thereby shifting the burden for decision making on to the court, rather than the competition agency.<sup>12</sup> Countries such as Sweden, Ireland and Austria adopted this model for use. This breeds specialisation by the court before which competition matters are brought. The United States is a perfect example for the prosecutorial model. USA'S Department of Justice through its Antitrust Division initiates proceedings before federal courts, an opportunity which, according to Tribilcock and Iabucci results in the said courts imbibing some level of understanding of competition matters.<sup>13</sup>

The variant of the bifurcated judicial model is the bifurcated agency model in which the commission carries out investigative and enforcement functions with complaints formally instituted before specialized courts of competent jurisdiction such as tribunals or competition courts which take on the adjudicative process subject to appeal before a court of appeal<sup>14</sup>. South Africa's regulatory body is a prototype of this model. The Competition Commission is empowered to investigate and enforce matters that deal with dominant position, restrictive covenants, excessive pricing, cartels and mergers with monopolistic tendencies. The Competition Tribunal is principally endowed with powers to adjudicate in respect of cases brought before it. Furthermore, there is the Competition Appeal Court which takes on appeals flowing from judgments which

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<sup>12</sup> Ibidem

<sup>13</sup> Ibidem

<sup>14</sup> Tribilcock and Iabucci at p. 462

originated from the Tribunal.<sup>15</sup> Nigeria's FCCPC was also created to operate with this organisational design.

## **THE BENEFITS AND DRAWBACKS OF THE ADMINISTRATIVE/INTEGRATED AGENCY MODEL**

One of the gains of the administrative model is the avenue it provides for the staff of the commission and the appointed members of the commission board to develop specialisation and expertise in antitrust law administration. This aids the formulation of guidelines and policies in respect of same. It has been noted that this model tends to foster administrative competency particularly in making decisions in relation to the components of competition such as mergers.<sup>16</sup> Also, the administrative model is less expensive to operate because the functions are combined, rather than executed by different bodies as obtainable in USA with the Federal Trade Commission. In addition, by reason of the fact that competition authorities are structured to deploy their knowledge and expertise in respect to competition matters which are by nature, complicated, they place utmost priority and importance on the cases they attend to. This ensures speedy dispensation of justice.<sup>17</sup>

The main disadvantage of the model is that the fused functions of investigation and adjudication carried out by one single body, makes execution of duties, cumbersome. Another insightful disadvantage is that the opportunity to be partial in a proceeding abounds more with an administrative model. It is however argued that since the judgments of the Commission are

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<sup>15</sup> Ibidem at 461

<sup>16</sup> Ibidem at page 464

<sup>17</sup> Jenny Frederic Op cit at p. 22



appealable to a tribunal which is impartial, it cannot be said that they fail to meet the standards of “an independent and impartial tribunal.”<sup>18</sup> Also, an administrative model gives room for a behavioural tendency known as confirmation bias which makes facts that are relevant to be distilled out as they don’t agree with prior knowledge. It is a situation where the tendency to consider information or interpret facts before the Commission is inclined towards finding basis of support for the pre-conceived beliefs and notions held before the matter was brought before it.

## **THE ADVANTAGES AND DISADVANTAGES OF THE PROSECUTORIAL/BIFURCATED JUDICIAL AND BIFURCATED AGENCY MODEL**

This model emphasises a separation of the disparate functions of investigation and adjudication, which secures a fairness and impartiality of proceedings.<sup>19</sup> Usually in the administrative model, by reason of the fact that the same body investigates and sits in judicial capacity in respect of the proceedings before it, it is almost impossible to guarantee that justice is effectively done.

Secondly, instances of confirmation bias are not usually prevalent given that roles are separate. One paramount reason why prosecutorial model is preferred is the transparency of the proceedings which confers credibility on the judicial outcomes. Finally, it is stated that this type of model guarantees less appeals on judgments of the court.

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<sup>18</sup> *Le Compte, Van Leuven and De Meyere v. Belgium* (Application No. 6878/75;7238/75) Judgment delivered on 23<sup>rd</sup> June, 1981 Cited in Jenny Frederic Ibidem at p.21

<sup>19</sup> Ibidem at page 20

## AN EXAMINATION OF THE FCCPC'S STRUCTURAL DESIGN

Empirical evidence necessitated the need for a competition policy inclusive of a sound regulation and regulator, in Nigeria. Flowing from the federal government's liberalization of the economy and divestment of its holdings in major sectors such as telecommunication and oil and gas, there arose an increasing demand for a competition regime which would curb the several excesses of dominant firm profiting from the liberalization campaign of the government.<sup>20</sup> Companies were practicing predatory pricing, and cartels solidified their stakes and dominant positions in markets with indiscriminate price increases.<sup>21</sup> Attending this need was the widespread promulgation of competition laws by several countries, including developing economies. With Nigeria being one of the emerging markets in the globe, it was perceived an anomaly when the country persisted without a competition regime. The federal government eventually bowed to the demanding pressure and passed the Federal Competition and Consumer Protection Commission Act. The FCCPC Act was enacted for the establishment of the Commission and the Tribunal in order to develop and promote "fair, efficient and competitive markets".<sup>22</sup> The Act equally applies to consumer protection matters but for the intent of this article, the focus is on the competition regulation part of the FCCPC Act. Part Two creates the Commission and vests it with independent powers to undertake the tasks assigned to it by the Act. Section 1 highlights the objectives of the Act:

- a. *Promotion and maintenance of competitive markets in the Nigerian economy;*
- b. *Promotion of economic efficiency;*

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<sup>20</sup> Oluwafunmilayo Adesina-Babalogbon (2018) Non Passage of the Federal Competition and Consumer Protection Bil: The void in Nigeria's Economy Vol. 2 No, 1.Obafemi Awolowo University Law Journal ISSN: 0795-8714 p.107

<sup>21</sup> Ibidem at page 118

<sup>22</sup> Long title of the Act

- c. Protection and promotion of consumers' interests and welfare by provision of more variety of quality products to them at competitive prices;*
- d. Prohibition of restrictive or unfair business practices which prevent, restrict or distort competition or constitute dominant position, abuse of market power in the country; and*
- e. Contribution to the sustainable development of the Nigerian economy.*

Section 3 underlines the independence of the Commission in executing the functions conferred on it under the Act while section 4 enumerates its composition of 8 commissioners<sup>23</sup> who shall be four non-executive Commissioners, two executive commissioners, a Chief executive who serves as the executive vice-chairman and a chairman, all of whom are appointed by the President with due consideration to the six geo-political zones, subject to confirmation of the appointment by the Senate.<sup>24</sup> With the exception of the Vice-Chairman who is the Chief Executive and the two Executive Commissioners, the rest of the Board are meant to be part-time officers.<sup>25</sup>

The qualifications of the Board range from Law, to Financial Accounting, Antitrust, Consumer Affairs, Information Technology, and social science degrees such as Economics.<sup>26</sup>

Section 18(4) empowers the Commission to do the following:

- a. Witness summon and examination;*
- b. Request and examination of documents;*
- c. Administration of oaths;*
- d. Requirement of verification of every submitted document by way of deposition to affidavit;*

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<sup>23</sup> Section 4(2)

<sup>24</sup> Section 5

<sup>25</sup> Section 5(2)

<sup>26</sup> Section 6(1)

- e. Requirement of furnishing of returns or information as may be required during such period stipulated by notice; and*
- f. Adjournment from time to time of investigation or inquiry.*

The Act mandates the Commission to conduct its hearing proceedings in public, though it may conduct in secret where there are circumstances that require a preservation of trade secrets of the business entity involved in the hearing,<sup>27</sup> In a situation where a person upon whom summons was issued for the purpose of attendance and giving of evidence fails or refuses to attend without sufficient reason, he is deemed to have essentially committed an offence and would be liable on conviction to a ₦ 20,000,000 or imprisonment or a combination of both.<sup>28</sup> An authorized member of the Commission may administer oath on any party or witness in a matter before it.<sup>29</sup>

In respect of matters heard and consequently decided by the Commission, an appeal may lie to the Competition and Consumer Protection Tribunal.<sup>30</sup> The Tribunal, whose membership is composed of seven persons, shall be chaired by a legal practitioner whose 10 years of post-call experience must be in the field of competition law, consumer protection, among other related areas of law.<sup>31</sup> The other members must have gathered experience for a decade in fields such as economics, consumer protection and competition law, commerce, finance, business administration, etc. The appointment of the Tribunal members is made by the President while their confirmation is done by the Senate.<sup>32</sup>

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<sup>27</sup> Section 33(2)

<sup>28</sup> Section 33(3)

<sup>29</sup> Section 34(3)

<sup>30</sup> Section 38(1)

<sup>31</sup> Section 40(1)(a)

<sup>32</sup> Section 40(2)

The scope of the Tribunal's appeal jurisdiction is not limited to appeals or decision reviews in respect of the Commission but extends to appeals and decisions from any sector specific regulatory authority where the decision to be reviewed or the appeal is on competition or consumer protection matters.<sup>33</sup> Consequent to its appeal powers, the Tribunal has the power to make orders or rulings in respect of matters brought before it.<sup>34</sup> In a situation where any of the parties feel dissatisfied with the decision, judgment or award of the Tribunal, it may, upon notice given to the Tribunal secretary within 30 (thirty) days, appeal to the Court of Appeal after the ruling or decision or award had been given.<sup>35</sup> The eight-member Commission has inter alia, the responsibility of presiding in respect of matters over which the Act confers it the right to act upon by investigating, calling witnesses and requesting for documents, and also administering oath. All of these procedural matters are to be conducted in public except with the justifiable reason provided in section 33(2). This part gives a general insight into the provisions on the working of the FCCPC.

## **THE FCCPC AND THE FCCPT: A BIFURCATED AGENCY MODEL OR A BIFURCATED JUDICIAL MODEL?**

A careful consideration of the provisions of the Act would reveal the powers vested in the Commission inter alia are investigative and enforcement-related. Under Part III, section 17(a) and (e) appropriate administrative, enforcement and investigative powers in line with the provisions of the Act or matters which fall under the range of vision of the Act. It does not allocate adjudicative role to the Commission, as this is conferred on the Tribunal by virtue of section 39(2). Hence, this

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<sup>33</sup> Section 47(1)(a)(b)

<sup>34</sup> Section 47(c)(d)

<sup>35</sup> Section 55(1)

ordinarily informs the inclination to classify the Agency's design as prosecutorial, specifically a bifurcated agency, which is a model that empowers the Commission to have enforcement and investigative powers only with the adjudicative powers exercised by a special court. As noted earlier, the Tribunal hears appeals in respect of decisions of the Commission and other regulatory body in other sectors. The language of the legislation implies the Tribunal mainly functions when appeals lies from decisions of the Commission as it fails to specify how the Tribunal shall hear competition-related cases which are at first trial level or the process that shall be adopted for the initiation of fresh competition-related proceedings which the Commission has concluded investigations on, before the Tribunal. It does not state how matters are to be commenced.

This is in contrast to its South African counterpart which empowers the Commission through the 1998 Competition Act to refer matters to the Tribunal for adjudication, or to appear before it whenever it is required of it.<sup>36</sup> This establishes a basis for the Tribunal to exercise its jurisdiction to hear fresh matters on Competition. This is not provided for under the FCCPC Act. The danger of not having a similar provision in the FCCP Act is that it gives the Commission and Tribunal too much leeway to determine how matters over which it has jurisdiction may be initiated, or before which judicial or quasi-judicial body cases may commence. In reality, the Commission has been instituting actions at the Federal High Court with the Vice-Chairman, leading the legal team from the Commission.<sup>37</sup> An argument in favour of this could be the provision of section 20(2) which empowers the Agency to have its legal practitioner represent it before any court or commission. There is however no provision in the Act which vests jurisdiction in the Federal High Court to

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<sup>36</sup> Section 21 of the Competition Act of South Africa, 1998

<sup>37</sup> On 3<sup>rd</sup> of July, 2020, the FCCPC arraigned a plastic surgeon in court over failed surgery. This was reported in Vanguard news and retrieved from [vanguardngr.com](http://vanguardngr.com) on 18<sup>th</sup> September, 2020. Also, some pharmaceutical companies were taken to court for price gouging. This Information retrieved from the FCCPC Twitter handle on the 2<sup>nd</sup> of October, 2020

hear matters on competition or consumer protection as the Tribunal is given the power of adjudication. An instance where the Federal High Court may be resorted to would be in situations where the Commission applies for search warrants for the purpose of carrying out its responsibilities as provided for in section 27; or registration of the Tribunal's decision by the FHC for the purposes of enforcement of same.<sup>38</sup> What then is the purport of section 39(2) which states the Tribunal "shall adjudicate over conducts prohibited under" the Act?

## **A CASE FOR THE FCCP TRIBUNAL- CONCLUDING REMARKS AND RECOMMENDATION**

While from intention of the legislation, the Competition Agency operates a bifurcated agency model, where actions are to be initiated before the Tribunal, which is a specialised quasi-judicial body whose decisions can only be reviewed by the Court of Appeal, the Commission in reality initiates its proceedings before the Federal High Court. The implications of this are, firstly, the Tribunal appears to be redundant, existing only on the pages of the Act, without the Commission making recourse to it in respect of matters requiring adjudication. It cannot be seised of matters by its own discretion as it is designed to have matters brought before it. This prevents the Tribunal from honing its expertise on competition and consumer protection cases. This invariably limits the enhancement of jurisprudence in such areas of law. Flowing from this is the illegality of instituting proceedings before a court that has no jurisdiction whatsoever conferred on it under the Act with respect to competition-related matters.

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<sup>38</sup> Section 54(b)

Secondly, the non-application of the provisions of the Act in respect of the Tribunal leaves more room for controversy and needless speculation and this fails to augur well for an Act whose enactment had been much anticipated and desired. Ostensibly, the Commission has been busy attending mainly to consumer protection-related matters. However, adhering strictly to the provisions of the law that established it would overall emphasise effectiveness and competency, rather than a disregard for the provisions establishing the Tribunal. Until a subsequent amendment to the law is made, and the current reality is reflected in the provisions, continuous disregard for the Act underlines a systemic breach of institutional design.

The laudable merits of the prosecutorial model make it the preferred choice for the Nigerian system. The FCCPC should however review its current processes and apply the provisions of the Act *stricto sensu* by bringing its cases before the Tribunal, thereby enhancing the latter's mastery and knowledge of the complex concept of competition, particularly. This invariably increases the people's awareness about the ills of antitrust.

Alternatively, where a review by the Commission reveals that the Tribunal may not be the preferred choice for the Commission, the Tribunal may be elevated to a stand-alone specialised court to hear strictly, competition and consumer protection-related matters. This will have the full status of a court and the judges appointed to such courts must have been lawyers with experience in competition law, unlike the members of the Tribunal who are drawn from different disciplines, apart from law. The National Industrial Court was created for labour-related matters. The Competition Court could also turn out to be a versatile version of the Court which presides over employment matters in Nigeria.



These recommendations draw attention to an avenue that makes the FCCPC and the Tribunal more functional than they presently are, particularly in respect of their competition deliverables. Given that the first objective of the Act establishing the Commission is promoting and maintaining competitive markets in the Nigerian economy<sup>39</sup>, emphasis and resource should be targeted at fulfilling same. The powers it enjoys are too numerous and this undermines the opportunity for specialisation, given that staffing might also be a challenge. The Commission presently carries out functions similar to the National Agency for Food and Drug Administration and Control (NAFDAC) and the Standards Organisation of Nigeria, among other numerous roles and responsibilities. This creates function overlap issues when what is really needed is concentration of efforts and time on being a competition regulator. Bearing in mind that the designs opted for by competition agencies are strategic to the effectiveness, success or otherwise of the regulator, it is needful for the Tribunal's powers to be fully utilized. Otherwise, the FCCP Act would be another law bereft of purposeful implementation.

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<sup>39</sup> Section 1 of the FCCPC Act