



Brand Competition Dynamics and the Legal Framework in the Nigeria's Fast-Moving Consumer Goods (FMCG) Sector



Abstract

Characterised by rapid market turnover and intense competition, the FMCG industry in Nigeria presents unique challenges and opportunities for companies. As the industry expands, the need for brand strength has become a critical success factor for the sustainability of these companies, whether indigenous or multinational, as it increases customer loyalty, public perception, and market dominance. However, the dynamics of competition among these leading brands are restricted by regulatory control to avoid unfair competition and abuse of market dominance.

This article examines how companies navigate competitive pressures and the legal environment that governs their operations. By analysing factual illustrations and regulatory developments, the article highlights the interplay between competitive practices and legal constraints, offering insights into how businesses can effectively manage brand competition while ensuring compliance with Nigeria's legal and regulatory landscape.

Introduction

The FMCG sector in Nigeria is a lively and fast-expanding sector that combines demographic opportunity, economic expansion, and regulatory complexity. Nigeria, Africa's most populous nation and largest economy provides a compelling venue for both domestic and international FMCG companies wanting to win market share in a country with so much potential.

However, FMCG companies in Nigeria must employ tactics to cater to Nigeria's diverse population, which includes people of various income levels, cultural backgrounds, and consumer preferences. As the FMCG industry has a low barrier to entry, there is intense competition in the sector, with companies striving to gain market dominance through promoting and protecting their brands.

Overlaying this competitive landscape is a legal and regulatory structure that governs significant areas of the FMCG industry.

The Federal Competition and Consumer Protection Act (FCCPA) 2018 established the Federal Competition and Consumer Protection Commission (FCCPC) and brought new dynamics to the market by outlining monopolistic activities as offences to foster a level playing field for all market participants. As the industry continues to grow, enhanced by shifting consumer preferences, and integration with global supply chains, the need for an in-depth understanding of the legal framework for competition in the industry has never been more relevant.

Brand Competition under the Federal Competition and Consumer Protection Act (FCCPA) 2018

The Nigerian Legislature enacted the FCCPA 2018¹ to promote fair competition and protect consumers and businesses thereby fostering economic growth. The FCCPA prohibits anti-competitive agreements between businesses, such as price fixing, market carving, and abuse of a dominant market position. It also prohibits concerted refusal to supply, which includes agreements to withhold goods or services from dealers who resell them in breach of conditions or to refuse supply except on less favourable conditions.

While these requirements may appear oppressive for some companies, for multinationals, these rules help ensure a level playing field with other businesses, which helps in fostering healthy competition.

This can prevent larger firms from using their market power to gain an unfair advantage over smaller competitors. To achieve a regulated environment that promotes fair competition among companies, the FCCPA also established the FCCPC² and the Competition and Consumer Protection Tribunal³ (CCPT) to promote fair, efficient, and competitive markets. It is noteworthy that the Act encourages brand competition but frowns vehemently at the use of unfair strategies or abuse of dominance by businesses in their competition strategies.

Some other key provisions on brand competition under the FCCPA include:

1 The Federal Competition and Consumer Protection Act (FCCPA) 2018.

2 Section 3 of the FCCPA 2018.

3 Section 39 & 40 of the FCCPA 2018.

1. Prohibition of Anti-Competitive Practices:

The Act prohibits agreements that prevent, distort, or restrict competition in the Nigerian market. Furthermore, one of the main objectives of the Act is to promote and maintain competitive markets in the Nigerian economy.⁴ Likewise, the FCCPC monitors business interactions between partners, wholesalers, and retailers, and investigates anti-competitive practices for possible legal action.⁵ Some of these Anti-competitive practices that attract these legal actions include:

- a. **Bid rigging:** This anti-competitive strategy involves collusion between competitors to fix the outcome of a bidding process, ensuring that a particular company wins a contract. This undermines fair competition and can lead to inflated costs which can impact consumers and businesses in similar markets.⁶
- b. **Price Fixing:** This usually involves agreements between competitors to fix prices, set minimum prices, or maintain price levels at a certain level. This reduces competition and can lead to higher prices for consumers. As with bid-rigging, the FCCPC may, upon the conviction of a company for price fixing, impose a maximum fine of 10% of the company's annual turnover in the preceding business year.⁷
- c. **Conspiracy to reduce competition:** Under the FCCPA, businesses cannot conspire to unfairly limit production, supply, or transportation of goods and services, reduce competition, or raise prices unreasonably.

Such actions are prohibited to ensure a fair and competitive market.⁸

- d. **Obstruction of monopoly investigation:** An obstruction of monopoly investigation prevents regulators like the FCCPC from uncovering and addressing unfair practices and allows the company under investigation to maintain its market power, delay corrective actions, deter new competitors, and undermine trust in regulatory bodies ultimately harming competition and market fairness.⁹ Many undertakings do this by providing false and misleading information which is also punishable by conviction under the FCCPA.¹⁰

Upon the conviction of a company for bid-rigging, price-fixing, and conspiracy to reduce competition, the FCCPC may impose a maximum fine of 10% of the company's annual turnover in the preceding business year and also reserves the right to proceed against each director of the company.¹¹ When a director or member of a company obstructs an FCCPC investigation, such person is liable to two years imprisonment or a fine of ₦ 2,000,000.00 (Two Million Naira) or both, upon conviction.¹²

One of the most notable benefits of these provisions for multinationals is the increase in consumer choice. When multiple companies compete fairly, consumers enjoy a wider range of products and services. Invariably, this provision compels FMCG companies to continuously innovate and enhance their offerings to meet evolving consumer preferences.

4 Sections 1(a) of the FCCPA 2018.

5 Federal Competition and Consumer Protection Commission <https://fccpc.gov.ng/about-us/ourmandate/#:~:text=Anticompetitive%20Practices,actions%20against%20the%20involved%20parties>. Accessed on 7th August, 2024.

6 Section 109(1) FCCPA 2018.

7 Section 107(1) FCCPA 2018.

8 Section 108 of the FCCPA 2018.

9 Section 110 of the FCCPA 2018.

10 Section 112 of the FCCPA 2018.

11 Sections 109 (3), 108 (3), and 107 (4) of the FCCPA 2018.

12 Section 110 of the FCCPA 2018.

2. Prevention of Abuse of Dominant Position:

Under the Act,¹³ companies with significant market power are prohibited from abusing their dominance to the detriment of consumers and other promising businesses.¹⁴ In clear terms, the Act does not forbid a dominant position but the abuse of such a position by charging excessive prices to the detriment of consumers; denying a competitor access to an essential facility when it is economically feasible to do so; engaging in any exclusionary conducts¹⁵ whose anti-competitive effect outweighs technological efficiency or pro-competitive gains.¹⁶ In a bid to eradicate the abuse of dominance, the FCCPC issued a Regulation known as the Abuse of Dominance Regulations¹⁷ to address and regulate anti-competitive practices by companies that hold a dominant position in the market. The Regulation focuses on preventing and penalizing behaviours by dominant entities that could prevent or distort competition. However, to achieve and maintain a dominant position in the Nigerian FMCG market while avoiding the abuse of that dominance, multinationals need to navigate a delicate balance between strategic growth and regulatory compliance.

3. Merger Control: The Act regulates mergers and acquisitions to prevent the creation of monopolies or abusive market dominance that may stifle competition.¹⁸ The FCCPC reviews proposed mergers and acquisitions to prevent anti-competitive practices. This review process ensures that no single entity gains too much market power, which could stifle competition or harm consumers.

By scrutinizing mergers, the FCCPC helps prevent any single brand from dominating the market. Mergers between major brands can lead to increased market dominance by a few players. This concentration of power can undermine competition, making it harder for new or smaller brands to enter the market and compete effectively.¹⁹ Furthermore, the FCCPC has also issued the Merger Review Regulations 2020 under its powers in Sections 17, 18, and 163 of the FCCPA. The Merger Review Regulations 2020 also provides for the First Detailed Review (FDR) to be carried out by the FCCPC to determine whether the merger is likely to prevent or lessen competition.²⁰ Furthermore, FMCG multinationals who intend to merge can leverage the simplified procedures under the Merger Regulations to expedite the review of mergers that do not present significant competition concerns. This procedure shortens review periods and reduces the burden on businesses.²¹

4. Consumer Protection: The FCCPA safeguards consumers and businesses against unfair market practices, including misleading advertising, and false labelling, which companies sometimes use as competitive strategies to topple fellow players in the Market. The provisions of the Act frown at the use of these tactics, physical force, coercion, undue influence or pressure, harassment, unfair tactics, or any other similar conduct against any person in the conduct of business.

13 Section 70(1) FCCPA 2018.

14 Sections 70-75 FCCPA 2018.

15 Competition Law in Nigeria: the New Regime. <https://www.bimakassociates.com/wp-content/uploads/2022/10/COMPETITION-LAW-IN-NIGERIA-THE-NEW-REGIME..pdf> accessed August 2024.

16 Review of the Abuse of Dominance Regulations [https://www.mondaq.com/nigeria/antitrust-eu-competition/1435890/review-of-the-abuse-of-dominance-regulations#:~:text=Introduction-,The%20Abuse%20of%20Dominance%20Regulations%202022%20was%20made%20by%20the,\(the%20%22Act%22\)](https://www.mondaq.com/nigeria/antitrust-eu-competition/1435890/review-of-the-abuse-of-dominance-regulations#:~:text=Introduction-,The%20Abuse%20of%20Dominance%20Regulations%202022%20was%20made%20by%20the,(the%20%22Act%22).). accessed 7th August, 2024.

17 The Abuse of Dominance Regulations 2022 ("Regulations").

18 Section 92 -98 of the FCCPA 2018.

19 Ibid.

20 Regulation 12 of the Merger Review Regulations 2020.

21 Regulation 21 of the Merger Review Regulations 2020.

Recently, the FCCPC uncovered significant transparency and consumer communication breaches by a leading FMCG company in violation of the FCCPA. The FCCPC alleged that the company had breached Section 116 of the FCCPA by applying misleading trade descriptions.

5. Restrictive Agreements: The provision of the Act deems as void any agreement among undertakings or a decision of an association of undertakings that has the purpose of actual or effect of preventing, restricting, or distorting competition in any market.²² Restrictive Agreements under the FCCPA are agreements that prevent, restrict, or distort competition in any market. This can be done through price fixing, market allocation, limitation of production/ distribution of goods and services, and collusive tendering.²³ Agreements that involve any of the above activities are by the FCCPA, unlawful and have no legal effect.²⁴ FMCG companies can circumvent this provision by ensuring that these agreements are made to contribute to the improvement of production or distribution of goods and services or the promotion of technical or economic progress.²⁵

6. Pricing Regulation: Unfair pricing, while often controversial and potentially unethical, can be employed by brands as a competitive strategy in several ways. A common example is **Predatory Pricing** which involves setting prices extremely low, sometimes below cost, to drive competitors out of the market. The idea behind such practices by brands would be to create a situation where smaller or less financially robust competitors cannot sustain their operations due to the unsustainable low prices. Once these competitors exit the market, the brand can then raise prices to recoup losses and increase profitability. The Act intends to protect and promote the interests and welfare of consumers by providing consumers with a wider variety of quality products at competitive prices whilst preventing unfair pricing.²⁶ In a bid to leverage pricing as a brand competition tool, FMCG multinationals can utilize competitive pricing strategies such as value-based pricing to attract customers while avoiding predatory pricing that could harm competitors or distort the market.

Implications of Unfair Brand Competition in the FMCG Sector in Nigeria

Unfair brand competition in the FMCG sector in Nigeria has significant outcomes and implications. When brands engage in practices such as predatory pricing, deceptive advertising, or exploiting loopholes in regulations, it creates an uneven market. For established companies, this unfair competition can erode their market share and profit margins.²⁷

Likewise, dominant companies may drive smaller companies out of the market, decreasing overall competition, and potentially leading to monopolistic practices. Multinational companies can take action to negotiate these problems ethically and in compliance with competition rules.

²² Section 59 of the FCCPA 2018.

²³ Restrictive Agreement and Trade Practices Regulations, 2022 ("Regulations").

²⁴ Competition/Anti-Trust Regulation In Nigeria: Restrictive Agreements: <https://www.mondaq.com/nigeria/antitrust-eu-competition/1231334/competition-anti-trust-regulation-in-nigeria-restrictive-agreements> accessed August 7th August 2024.

²⁵ Competition / Anti-Trust Regulation In Nigeria: Restrictive Agreements <https://www.mondaq.com/nigeria/antitrust-eu-competition/1231334/competition-anti-trust-regulation-in-nigeria-restrictive-agreements> accessed August 8th 2024

²⁶ Section 1(c) of the FCCPA 2018.

²⁷ Report unfair trade practices, agency tells Nigerians <https://nairametrics.com/2024/04/14/report-unfair-trade-practices-agency-tells-nigerians/> accessed 8th August 2024.

First, they should practice transparency. This includes ensuring that all marketing and advertising comply with the Nigerian Code of Advertising Practice, Sales Promotion, and other Rights/Restrictions on Practice Regulations.²⁸

The Regulation²⁹ spells out the principle of unfair competition accepted in business, and of fair comments expected in free human communication. It further provides that stakeholders such as companies should aim to enhance public confidence in advertising and should always be in the interest of the consumer and the wider Nigerian society. Furthermore, compliance with the competition laws will help new

entrants and smaller rivals enter the market by giving them equal access to distribution channels and resources. Investing in research and development to create real innovation, rather than depending on unscrupulous techniques, can help companies keep their competitive advantage.

Summarily, unfair brand competition in Nigeria's FMCG sector disrupts the market equilibrium, negatively impacts both large and small businesses, misguides consumers, and hampers economic growth. Addressing these issues requires regulatory oversight, fair competition practices, and industry.

Challenges Faced by Brands in Navigating the Legal Environment

While there is a welcoming market for FMCG companies in Nigeria, and the Nigerian Government has made considerable efforts to ensure that all market entrants have a fair chance at exploring the opportunities in the FMCG sector, there are some challenges faced by brands in the Nigerian industry which must be understood to ensure profit optimisation and a significant market share. Some of these challenges include:

1. Knowledge Gaps on Regulatory Compliance: A deep understanding of the legal landscape is germane to the success and sustainability of every business. However, the constantly changing nature of regulations, laws, and compliance standards has not made it easy for these brands, as there is a wide range of legal frameworks to underscore and comply with. In addition to the FCCPA discussed above, there are other compliance requirements contained in legislation such as the Standards Organization of Nigeria (SON) Act, and the National Agency for Food and Drug Administration and Control (NAFDAC) Act, as well as Regulations regularly released by these Agencies to ensure compliance.

2. Sanctions and Financial Losses: As mentioned earlier, due to the array of competition laws and policies with which brands are expected to comply, some brands might not meet them, and this will attract fines and other unplanned expenses for these brands. For example, the expenses incurred in recalling products directed by the FCCPC for non-conformity with the laid down regulations and policies will surely affect the balance sheet of the companies in terms of cost and profit margins.

3. Counterfeiting and IP Infringement: The proliferation of brands as a result of the low-barrier entry requirements available in the Nigerian FMCG market has negatively affected brands. In some instances, companies with the original brands have been sanctioned for counterfeit products or for injuries sustained by consumers who unknowingly consume counterfeit products on the belief that the products are those manufactured by the companies. In other words, companies that fail to protect their brands against acts of counterfeiting expose themselves to avoidable liabilities.

²⁸ Nigerian Code of Advertising Practice, Sales Promotion, and Other Rights/Restrictions on Practice Regulations 2012.

²⁹ Nigerian Code of Advertising Practice, Sales Promotion, and Other Rights/Restrictions on Practice Regulations 2012.

Opportunities Within the Nigerian Competitions Framework

Despite the challenges, there are still opportunities within the framework for competition laws in Nigeria including:

- 1. Fair Competition Practices:** One of the opportunities that the competition laws in Nigeria offer is the provision of fair and equal ground for every business to thrive, and for every brand to make their mark without prejudicial gestures from other brands. These laws have created a sky too big for every brand to fly. However, conformity with the laid down principles is essential to enjoy a safe and undisturbed flight.
- 2. Encouragement of Innovation and Creativity:** The prohibition of anti-competitive practices by the FCCPA creates opportunities for every brand to be innovative and show off their creativity while competing fairly with other brands. As such, brands can introduce their unique styles and designs in the market as long as it does not contravene the laws.

- 3. Opportunities to Leverage Brand Value:** The shunning of unfair practices in the marketplace is a nudge ahead in ensuring the protection of the IP rights of businesses. The maintenance of IP portfolio in Nigeria like the registration of trademarks, patents, designs, and other forms of intellectual property, is cheap compared to other jurisdictions.
- 4. Avoidance of Penalties:** Another important advantage of these regulatory frameworks is the clear and precise stipulations of the requirements expected of brands. Brands that understand and work within the framework are likely to avoid penalties including monetary fines, operational restrictions, and even legal action³⁰

Recommendations

Navigating legal and competitive pressures effectively requires a strategic approach that combines compliance, innovation, and agility. Some best practices for managing these challenges include:

- 1. Training:** Brands should regularly underscore and update their knowledge of relevant laws and regulations applicable to their industry, through periodic training by legal experts in this field.³¹

- 2. Enhance Competitive Intelligence:** The continuous monitoring of market trends, competitor activities, and consumer behaviour can never be overemphasised if a brand must stay ahead of the competition.
- 3. Strategic Alliances:** Brands form formidable alliances and partnerships that will metamorphose into competitive advantages. This partnership could be by way of sharing resources, market access, or joint innovations.

³⁰ The Importance of Regulatory Compliance: In a Business Landscape' https://www.linkedin.com/pulse/importance-regulatory-compliance-business-landscape?utm_source=share&utm_medium=member_andriod&utm_campaign=share_via 6th August 2024.

³¹ Sara Phelan 'Navigating Legal Compliance Challenges: Top Hurdles and Best Practices for Small Business Owners' https://www.linkedin.com/pulse/navigating-legal-compliance-challenges-top-hurdles-best-sara-phelan-ojbx?utm_medium=member_andriod&utm_campaign=share_via 7th August 2024.

4. Upholding Transparency and Ethical Values:³² There is a great need for brands to uphold high ethical standards in their dealings and operate following best practices. This will enable them to build trust and mitigate legal risks.

5. Healthy Environmental Practices: Integrating environmental practices into business strategies is one of the trends shaping the Fast-Moving Consumer Goods (FMCG) Sector and ensuring sustainable development.

According to Goods Checker, for FMCG Companies to attract the attention of environmentally conscious consumers, they must actively execute environmentally friendly practices such as the avoidance of single-use packaging and instead, utilize recycled material and energy-saving technologies. Nestle, for instance, has devoted itself to making its packaging recyclable or reusable by 2025 in a bid to achieve its long-term goal of reducing its greenhouse gas emissions to zero by 2050.³³

Conclusion

The Nigerian Government has provided a comprehensive framework for businesses to thrive in a competitive landscape. Likewise, the FCCPC, SON, and NAFDAC have continuously and efficiently discharged their functions, including providing regulations for businesses in the FMCG Sector. By complying with the legislation and regulations, FMCG companies, including existing market players and new entrants can maintain brand strength and customer loyalty. The Nigerian FMCG Sector provides a competitive landscape for all businesses to thrive, irrespective of the companies dominating the markets.

Finally, a comprehensive brand protection strategy will ensure that these companies can compete with other players in the industry and obtain and maintain significant market shares in Nigeria.

³² Sara Phelan 'Navigating Legal Compliance Challenges: Top Hurdles and Best Practices for Small Business Owners' https://www.linkedin.com/pulse/navigating-legal-compliance-challenges-top-hurdles-best-sara-phelan-ojbx?utm_medium=member_andriod&utm_campaign=share_via 6th August 2024.

³³ '8 FMCG Trends in 2024: Cases from TOP Companies' <https://goodschecker.com/blog/5-trends-shaping-fmcg-industry-in-2023/> Accessed on 7th August 2024.

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