Journal of African Law, 65, 2 (2021), 245–266 © SOAS University of London 2021. Published by Cambridge University Press on behalf of SOAS University of London
doi:10.1017/S0021855321000127 First published online 5 April 2021



# Towards A Directors' Competition Disqualification Regime in Nigeria: Lessons from the UK

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## Abstract

This article argues that Nigeria should introduce a competition disqualification regime for company directors as a deliberate strategy to foster corporate compliance with the Federal Competition and Consumer Protection Act 2018. It contends that the custodial and financial sanctions provided for under the act may not sufficiently deter directors from engaging in anti-competitive behaviour. It seeks to demonstrate that the "threat" of incarceration, which would ordinarily have a strong deterrent effect, is rarely imposed, as courts tend to prefer imposing fines on directors and individuals who breach competition law. For that reason, the article proposes that Nigeria should adopt a strategy of disqualifying directors who oversee companies that breach competition law, or who are complicit in that regard, as a means of complementing existing sanctions. In order to achieve its objective, the article examines the competition disqualification regime in the UK in order to extract valuable lessons that Nigeria can emulate.

### Keywords

Competition law, deterrence, individual sanctions, directors' disqualification, cartel offence

## INTRODUCTION

In 2018 Nigeria enacted the Federal Competition and Consumer Protection Act (FCCPA). This act is the country's first serious attempt at comprehensive regulation of market competition. It was enacted in a bid to prohibit anti-competitive activities in the country and to advance consumer welfare in general. Before the FCCPA, competition in Nigeria was largely unregulated,

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save perhaps for a few sector-specific measures that were not exhaustive and were largely ineffective.[1] In effect, little was done to open Nigeria's economic space to unrestrained competition. For the most part, state owned enterprises (SOEs), which were largely inefficient and moribund, monopolized or dominated crucial sectors such as rail, telecommunications and aviation.[2] Nigeria returned to democratic governance in 1999 after almost 25 years of military rule[3] and immediately set in motion a number of measures aimed at liberalizing its economy and privatizing some of its SOEs.[4] The FCCPA can be viewed as a culmination of a long line of initiatives targeted at economic liberalization in Nigeria. The act has had a somewhat chequered history. It is in fact the result of several bills tabled before the National Assembly dating back to 2002.[5]

The FCCPA regulates anti-competitive behaviour and aims to create an environment where businesses can thrive on the basis of their capabilities and performance, without being stifled by the unsavoury practices of a few unscrupulous persons. Its provisions, which significantly penalize acts and agreements that have trade distorting consequences, elaborately reflect best practice in competition regulation. However, while conceding that the development of a free-market environment is essential for Nigeria to attain its economic goals, this article contends that it is even more imperative that a reasonable level of corporate compliance be reached for the act to achieve its objectives. Among other things, this will require the strategic imposition

1 See for instance: Nigerian Communications Act of 2003, sec 92; Competition Practices Regulation of 2007; Telecommunications Network Interconnection Regulations 2007, regs 10–12; Investment and Securities Act 2007, part 12 (now repealed), which, in regulating mergers, had authorized the Securities and Exchange Commission to direct the breakup of monopolies whose activities were in restraint of trade.

2 Some of these SOEs collaborated with privately owned companies that periodically enjoyed state patronage and support. This was particularly prominent in the petroleum sector, where the Nigerian National Petroleum Corporation partnered with international oil companies through joint ventures and production sharing contractual arrangements.

3 There was a brief hiatus from 1979–83 and another in 1993 when the country briefly returned to civilian rule.

4 Keen to improve the performance of these entities, Nigeria passed the Public Enterprises (Privatisation and Commercialization) Act of 1999 and set about either privatizing or commercializing many of its SOEs. During this period, Nigeria liberalized sectors that had previously been closed to private enterprise in order to usher in robust competition. Some of the firms that were either privatized or commercialized include National Fertilizer Company of Nigeria, Nigerian Telecommunications, Nigerdock and Aluminium Smelter Company of Nigeria. See CB Ndubuisi "Economic policy implications of port concession in Nigeria" (2016, Walden Dissertation and Doctoral Studies Collection), available at: <https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=4290&context=dissertations> (last accessed 4 March 2021).

5 Dawar and Ndlovu note that bills had been presented in 2002, 2008, 2011, 2012 and 2015: K Dawar and N Ndlovu "A comparative assessment of competition in Africa: Identifying drivers of reform in Botswana, Ethiopia, and Nigeria" (2018) 6 *Journal of Antitrust Enforcement* 150 at 152.

https://doi.org/10.1017/S0021855321000127 Published online by Cambridge University Press

of individual sanctions on directors of companies and undertakings that engage in anti-competitive behaviour, as a means of inducing compliance and deterring wrongdoing. The article attempts to demonstrate that, laudable as the corporate sanctions imposed for breaching the FCCPA are, particular emphasis needs to be placed on company directors, given that the greatest commercial endeavours in Nigeria are carried out through companies. This implies that directors at the helm of companies are critical, if Nigeria is to achieve significant levels of corporate compliance with the act. Drawing lessons from other countries, with the UK as a primary case study, this article proposes that the Nigerian state should create a regime for the disqualification of directors who are complicit in the violation of competition law by the companies they manage and direct. Furthermore, disqualification of directors for competition breaches (competition disqualification) will serve to bolster the existing sanctions already contained in the act, induce compliance and deter competition breaches by directors.

The article is structured in three main sections, excluding this introduction and the conclusion. The first discusses the importance of competition regulation in general, tracing its history, rationale and the implications for economic development. The next concentrates on the Nigerian framework for competition regulation and holistically analyses the substantive provisions of the FCCPA. It contends that there is particular need to facilitate corporate compliance through the imposition of strategic sanctions that not only target corporate revenues but also impose personal liability on directors in the form of competition disqualification, so as to optimize their commitment to the ideals of the act, dissuade breaches and complement existing sanctions. This section argues that the existing framework for sanctioning directors who breach the act may not sufficiently deter directors from misbehaving due to factors such as prosecutorial challenges. Furthermore that, if Nigerian courts opt to impose fines rather than incarcerate directors who commit competition offences, the intended effect of the criminalization of competition breaches would be considerably reduced. The final section examines competition disqualification in the UK, noting that the criminalization of cartel offences there has been largely ineffective, which all the more justifies disqualifying directors who breach competition law. The conclusion offers further suggestions and recommendations.

## COMPETITION REGULATION: PURPOSE AND RATIONALE

Competition regulation prohibits practices or arrangements that distort or restrict competition and trade. It is carried out with a view to ensuring free and fair trade in the hope that this translates into innovation and economic development.[6] It is widely believed that unrestrained anti-competitive behaviour reduces consumer choice, increases prices and generally denies

6 Id at 155.

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consumers and other excluded producers from benefiting optimally from trade liberalization. This is particularly so in countries where the majority live in conditions of relative poverty.[7] In the absence of regulatory and institutional safeguards, anti-competitive practices may give rise to the commission of cartel offences, such as the entering into of market-sharing agreements among a few firms in a sector, price fixing, limits on production or supply, bid-rigging, and other predatory behaviours that eliminate competition, to the detriment of the economy.[8] Such activities may also result in monopolies and the abuse by firms of their dominant market positions, which may impede growth, engender the artificial scarcity of goods and services, or result in the supply of inferior goods and services. These would in turn adversely impact innovation and negatively affect the development of quality products and services.[9] The latter objective of competition law accounts for why, even where businesses merge, they are discouraged from creating monopolies that may stifle economic freedoms.[10]

Proponents of competition regulation have also suggested that healthy competition is indispensable for effective market reforms, first because it is an economic catalyst, particularly for developing countries, and secondly because it invariably translates into the gradual surrender to private enterprises of government control over poorly managed SOEs.[11] Still others have claimed that liberalization, free trade and free competition tend to translate over time into meaningful increases in cross-border trade and foreign direct investment. As such, countries that are keen to attain market efficiency are "forced" to open their markets to some form of competition.[12]

Competition regulation is not only fair because it allows all parties to operate on an equal footing, it also has the added advantage of strengthening economies while enabling improved service delivery in general. A case in point is the Nigerian telecoms sector, which performed woefully when it was monopolized by the government-owned Nigerian Telecommunications Limited. The sector was eventually liberalized in 2001, with licensed operators (both local and foreign) allowed to compete among themselves in a regulated environment. The phenomenal consequences of the telecoms sector liberalization in Nigeria have been the subject of several studies.[13] Suffice to say that

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7 Id at 151.

8 Ibid.

9 Kim and Choi claim that, as at 2020, over 130 countries had enacted some form of competition law: D Kim and YP Choi "Modernization of competition law and policy in Egypt: Past, present and future" (2020) 64/1 *Journal of African Law* 107 at 109.

10 See RV Bergh *Comparative Competition Law and Economics* (2017, Edward Elgar) at 115.

11 WE Kovacic "Antitrust and competition policy" in BE Hawk (ed) *Transition Economies: A Preliminary Assessment in International Antitrust Law and Policy* (1999, Fordham Corporate Law Institute) 513.

12 See, for example, B Adelaragbe "Are the energy laws of Nigeria sufficient to promote and preserve competition?" (2003) 9 *International Energy Law and Taxation Review* 251.

13 See N Nkordeh et al "The Nigerian telecommunication industry: Analysis of the first fifteen years of the growths and challenges in the GSM market (2001–2016)" (2017) 1 *Proceedings of the World Congress on Engineering and Computer Science* 25, available at:

today the Nigerian telecommunications sector is widely adjudged to be one of the fastest growing telecoms sectors in the world, with the country having over 198 million active phone lines as at July 2020, up by over 28,000 per cent from the mere 700,000 lines operational in 2001.[14]

Today there are very few countries that do not have some form of competition regulation geared towards the creation of level playing fields and the fostering of free markets in a bid to promote economic development and consumer welfare.[15] This rising spread of competition regulation is underpinned by the assumption that countries that uphold standards directed at free competition, tend to perform better than their counterparts that do not prioritize economic freedoms. On this point, the USA and the European Union (EU) are held out as examples of economic blocs that have outperformed other countries or regions that did not prioritize competition regulation.[16]

Keen to optimize the benefits of globalization and develop their economies, developing countries in Africa, the Andean region and Asia have accepted the concept of free trade, at least in theory. Interestingly, several countries in these regions were historically characterized by state monopolization of strategic economic sectors and the absence of strong competition regulation. All that is changing, however, as several developing countries are jettisoning their traditional resistance to free trade in favour of economic liberalization. As noted earlier, one such country is Nigeria, which demonstrated this by enacting the FCCPA. The following analysis highlights the salient provisions of this act and its expected benefits, as well as the sanctions regime put in place to encourage compliance with its provisions.

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contd
<http://www.iaeng.org/publication/WCECS2017/WCECS2017_pp80-84.pdf> (last accessed 30 January 2021).

14 See O Arowolowo and F Folarin "Nigeria's telecommunications industry: Looking back, looking forward" *Inside Tax* (2015, Deloitte), available at: <https://www2.deloitte.com/content/dam/Deloitte/ng/Documents/tax/inside-tax/ng-nigeria-telecommunications-industry-looking-back-looking-forward.pdf> (last accessed 4 March 2021); see also Nigerian Communications Commission "Subscriber statistics" (2020), available at: <https://www.ncc.gov.ng/stakeholder/statistics-reports/subscriber-data> (last accessed 4 March 2021).

15 In fact, the English common law dislike of contracts in restraint of trade can be said to be a precursor to current competition law in the UK. Still, it was only after the Second World War that the Labour government enacted the Monopolies and Restrictive Practices Act of 1948.

16 The USA enacted the Sherman Antitrust Act in 1890 and, in so doing, heralded an era of competition regulation in that country. On the other hand, the EU introduced competition regulation via part 3 of the Treaty of Rome in 1957. See M Dabbah "Competition law and policy in developing countries: A critical assessment of the challenges to establishing an effective competition law regime" (2010) 33/3 *World Competition* 457 at 461.

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## AN OVERVIEW OF THE SUBSTANTIVE PROVISIONS OF THE FCCPA

The FCCPA is largely modelled on EU competition law.[17] As mentioned earlier, it seeks to regulate actions that may impede competition and consumer rights. The act is extensive and elaborate. Its provisions are far reaching and its scope reaches all stakeholders in the country. It applies to all agents of federal, state and local government that are engaged in commercial or economic activities.[18] The scope of the act extends to the activities of Nigerian citizens and corporate bodies incorporated in Nigeria, occurring within or outside the country, as well as to the conduct of persons in relation to the supply or acquisition of goods or services within Nigeria. Lastly, the FCCPA regulates acts outside Nigeria, carried out by any person in relation to the acquisition of shares or other assets that may result in a change in control of a business, or in any assets of a business in the country.[19]

The FCCPA takes precedence over all previously enacted competition or consumer protection laws in Nigeria. It repealed the Consumer Protection Council Act 1992,[20] as well as the part of the Investment and Securities Act 2007 that dealt with mergers and acquisitions.[21] Its objectives include the promotion and maintenance of competitive markets in the Nigerian economy, the furtherance of economic efficiency, and the protection and advancement of the interests and welfare of consumers, by providing them with a wider variety of quality products at competitive prices. Other stated objectives include the prevention of restrictive or unfair business practices that may impede competition or constitute an abuse of a dominant position of market power in Nigeria, as well as the attainment of sustainable economic development.[22]

The FCCPA also seeks to prevent and address anti-competitive practices and to create an environment that encourages entrepreneurs to benefit from their hard work. The FCCPA has 168 sections, divided into 18 parts, with two accompanying schedules. Its scope, objectives and application are covered by part 1.[23] The act contains extensive provisions that prohibit or regulate restrictive agreements,[24] abuse of dominant position,[25] monopolies,[26] prices[27]

17 See O Fayokun et al "A review of the Federal Competition and Consumer Protection Act 2019" (March 2019, Aluko & Oyebode), available at: <https://www.aluko-oyebode.com/insights/review-of-the-federal-competition-and-consumer-protection-act-2019/> (last accessed 30 January 2021).
18 FCCPA, sec 2(2).
19 Id, sec 2(3).
20 Id, sec 165.
21 Investment and Securities Act 2007, secs 118–27.
22 See FCCPA, sec 1 generally.
23 Id, secs 1 and 2.
24 Id, part 8 (secs 59–69).
25 Id, part 9 (secs 70–75).
26 Id, part 10 (secs 76–87).
27 Id, part 11 (secs 88–91).

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and mergers.[28] It also regulates industries[29] and criminalizes specific anti-competitive activities, such as price-fixing, conspiracy, bid-rigging, obstructing the investigation of an enquiry, offences against records (refusing to produce documents or supply information when required), giving false or misleading information, and failing to attend to give evidence before the Federal Competition and Consumer Protection Commission (FCCPC).[30] The FCCPA also makes extensive provision for consumer rights,[31] imposes duties on manufacturers, importers, distributors and suppliers of goods and services,[32] and provides mechanisms for the enforcement of consumer rights.[33] However, this article focuses on the FCCPA as it relates to competition law.

Furthermore, the FCCPA criminalizes and penalizes the contravention of its provisions, presumably to secure compliance and deter wrongdoing by undertakings. The various parts of the act contain prohibitions of anticompetitive conduct, as well as sanctions that may be imposed for contraventions. For example, it is an offence under the act for an undertaking to: enter into an agreement that tends to restrict or distort competition;[34] or persist in an anti-competitive agreement or decision that contravenes a directive of the FCCPC.[35] It is also an offence under the act for an undertaking to abuse its dominant market position,[36] or to contravene the provisions with respect to price regulation,[37] or to implement a merger without obtaining the FCCPC's approval.[38] Other offences contained in the act relate to impeding the FCCPC in its work, by: failing to furnish relevant information when required; providing a false statement, knowing it to be false in any material respect; or recklessly making a statement that is false in any material way.[39] Interestingly, for the majority of these offences, conviction of an individual undertaking attracts a fine or a prison term that may range from between three to five years.[40] In addition, if it is a company, the undertaking would generally be required to pay not more than 10 per cent of its turnover in the preceding business year as a fine,[41] while each of its directors would be liable to be prosecuted as well

28 Id, part 12 (secs 92–103).
29 Id, part 13 (secs 104–06).
30 Id, part 14 (secs 107–13).
31 Id, part 15 (secs 114–33).
32 Id, part 16 (secs 134–45).
33 Id, part 17 (secs 146–55).
34 Id, sec 69(1) and (2).
35 Id, secs 67(1) and 69(3).
36 Id, secs 72(1) and 73(3).
37 Id, part 11 (sec 90(5), (6) and (7)).
38 Id, sec 96(7).
39 Id, sec 80.
40 Id, secs 69(1)(a), 69(3)(a), 107(4)(a), 108(3)(a), 109(3)(a), 111(2)(a), 112(a) and 135(2)(a).
41 Id, secs 69(2)(a), 69(3)(b), 107(4)(b), 108(3)(b), 109(3)(b), 111(2)(b), 112(b) and 135(2)(b). A firm that abuses its dominant market position is liable to pay not less than 10% of its turnover in the preceding year.

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and, on conviction, would be subjected to penalties similar to those imposed on undertakings that are natural persons who are convicted for the same offence.[42]

Cognisant of the need for a specialized adjudicatory process over competition and consumer related matters, the FCCPA established the Competition and Consumer Protection Tribunal (CCPT) and mandates it to hear complaints against undertakings or companies that engage in anti-competitive activities.[43] The CCPT is a quasi-court of record,[44] in which parties have a right to legal representation.[45] It adjudicates over conduct prohibited under the FCCPA, and exercises the powers and authority conferred on it under the act or any other enactment.[46] It also exercises appellate powers over the activities of the FCCPC and sector specific regulators regarding competition or consumer protection matters.[47] It may summon and enforce the attendance of any person before it and may examine a person under oath. It may also compel the discovery and production of documents, receive evidence on affidavit on anything that, in its opinion, is necessary to issue a final and reasoned decision on the merits of the matter before it.[48] The CCPT may also impose administrative penalties on undertakings that carry out a prohibited practice under the act or contravene or fail to comply with any interim order it issues.[49] That said, it may not issue an administrative penalty in excess of 10 per cent of an undertaking's combined annual turnover in Nigeria and exports from Nigeria during the preceding financial year.[50]

Under section 52 of the FCCPA, the CCPT may make an order directing an undertaking to sell any portion or all of its shares, interests or assets if a practice prohibited under the act cannot adequately be remedied under any other provisions of the act, or if the practice substantially repeats conduct by that undertaking previously found by the CCPT to be a prohibited practice.[51] The CCPT's orders, rulings, awards and judgments are binding on the parties before it and may be enforced as a judgment of the Federal High Court.[52] Appeals may however lie from the CCPT's decisions to the Court of Appeal within 30 days from the delivery of the judgment.[53]

42 Id, secs 69(2), 69(4)(d), 90(7), 107(4), 108(3)(c), 109(3)(c), 111(2)(c), 112(c), 135(3) and 155(c). But see also sec 74(2).
43 Id, secs 39–58.
44 Id, sec 53.
45 Id, sec 56.
46 Id, sec 39(2).
47 Id, sec 47(1)(a)–(b).
48 Id, sec 50(2).
49 Id, sec 51(1).
50 Id, sec 51(2).
51 Id, sec 52(1).
52 Id, sec 54.
53 Id, sec 55.

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The enforcement of competition law and the development of a healthy competition culture often entails the direct involvement of a competition regulator.[54] It is in view of this that the FCCPA makes extensive provision for the FCCPC,[55] established under part 2 of the act. This body took over the roles previously performed by the Securities and Exchange Commission in relation to mergers and acquisitions,[56] and replaced the Consumer Protection Council.[57] As the primary competitor regulator, the FCCPC administers and enforces the provisions of the act.[58]

For a country that had never enacted comprehensive competition legislation, the FCCPA is indeed a welcome development. However, the effective enforcement of the act may be a different thing entirely. In this respect it is expedient for policymakers to be cognisant of the fact that the economic implications and ramifications of competition regulation create a strong likelihood that individuals who had operated unhindered under the corporate platform for decades, may attempt to resist the changes that the act attempts to foist on them. Some of these firms, which reigned supreme with the backing of either the government or corrupt elements, are likely to resist the fact that their activities have now been criminalized. Highly connected monopolists with deep pockets, may also attempt to frustrate the act's objectives. In order to forestall this from happening and to promote compliance, a strong sanctions enforcement mechanism needs to be in place. The creation of sufficient incentives for corporate compliance is thus indispensable for effective competition regulation. One of these incentives is the imposition of sanctions (criminal or civil) on firms that breach competition law.[59] These fines are usually levied on the basis of companies' turnover.[60]

Corporate bodies are naturally suited to large business enterprises and they may spawn subsidiaries through which they are able to dominate major

54 Kim and Choi "Modernization of competition law", above at note 9 at 122. For example, there is the Anti-Trust Division of the Department of Justice in the USA, the EU Competition Commission in the EU, the Competition and Markets Authority in the UK, and the Competition and Consumer Commission for Australia.

55 FCCPA, part 2 (secs 3–16) established the FCCPC. Its functions and powers are contained in part 3 (secs 17–18), management and staff are covered by part 4 (secs 19–26), financial provisions are covered by part 5 (secs 23–26), while its enforcement powers are contained in part 6 (secs 27–38).

56 Id, sec 164.

57 Id, sec 165.

58 Id, part 6.

59 See Enterprise Act 2002 (UK); Enterprise and Regulatory Reform Act 2013 (UK); Sherman Act (USA), sec 1; Competition Act, 1985 (Canada), sec 45; The Restrictive Trade Practices Law 1988 (Israel); Monopoly Regulation and Fair Trade Act 2013 (South Korea); Economic Crimes Law No 8, 137/90 (Brazil); The Competition Act (Consolidation Act No 700 of 18 June 2013) (Denmark), sec 22(3); and Corporations Act 2001 (Australia), sec 104.

60 See FCCPA, secs 51(1), 69(1), 73(1), 74, 80(1) and 80(2), for example. The CCPT may also impose administrative fines in certain cases under secs 18 and 51.

economic activities in countries all over the world. This may nevertheless expose them to the temptation to abuse their position, and engage in cartel activities and other anti-competitive behaviours. It is in order to discourage companies from engaging in cartel operations or other anti-competitive activities, that companies are frequently subjected to relatively higher fines than those imposed on individuals. For example, the EU's Competition Commission responds aggressively to anti-competitive practices by imposing mammoth fines on firms that violate competition law.[61] However, the EU is not isolated in this. Countries such as South Korea, France, Brazil and the USA have also been known to hand down stiff corporate fines, where the need arises.[62]

However, companies are artificial entities. They do not have hands, legs or minds. They operate through general meetings, boards of directors and an array of officers, agents and employees, who are their hands, wills and minds.[63] It is therefore reasonable that, in order to foster corporate compliance and deter wrongdoing, sanctions and consequences for corporate competition law breaches are directed not only at firms, but also at the natural persons who control them. Typically, the twin concepts of separate personality and limited liability ought to shield and protect directors, officers and employees from the liabilities and responsibilities of companies.[64] However, these protections can be severely abused by selfish and designing people. It is with the aim of forestalling these tendencies, that courts and legislators

61 In 2020 for instance, it imposed a EUR 1.5 billion fine on Google for antitrust violations in the online advertising market, the third it has imposed on the technology giant since 2017. In 2009, it fined Intel EUR 1.06 billion for giving illegal rebates to some firms on the condition that they buy most of their processors from it. See D Martin "Intel challenges A$1.8 billion fine over antitrust behavior" (11 March 2020) *CRN*, available at: <https://www.crn.com.au/news/intel-challenges-a18-billion-fine-over-antitrust-behavior-539168> (last accessed 30 January 2021).

62 For example, Apple was fined EUR 1.1 billion in 2020 by France's competition authority for orchestrating a distribution cartel with wholesalers that lasted several years, after it was found that the firm had effectively imposed prices on some retailers and had "abused the economic dependence" of some of its premium resellers in France: S Schecner "Apple faces $1.2 billion fine for alleged French distribution cartel" (16 March 2020) *Wall Street Journal*, available at: <https://www.wsj.com/articles/apple-faces-1-2-billion-fine-for-alleged-french-distribution-cartel-11584370369> (last accessed 30 January 2021). Further, in 2020, Brazil's Administrative Council for Economic Defence fined five companies for their involvement in an industrial cartel: JL Kessler and SW Waller *International Trade and US Antitrust Law* (2nd ed, 2006, Thomson Reuters). Also, in 2016, South Korea fined Qualcomm Inc, a US chip maker, the equivalent of $854 million for unfair business practices in patent licensing and modem chip sales: SY Lee and S Nellis "South Korea fines Qualcomm $854 million for violating competition laws" (28 December 2016) *Reuters*, available at: <https://www.reuters.com/article/us-qualcomm-antitrust/south-korea-fines-qualcomm-854-million-for-violating-competition-laws-idUSKBN14H062> (last accessed 30 January 2021).

63 *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705.

64 See generally, P Subai "Between tort creditors and shareholders of closely held companies: Another look at the doctrine of shareholder immunity" (2015) 12 *Nigerian Law and Practice Journal* 6.

https://doi.org/10.1017/S0021855321000127 Published online by Cambridge University Press

occasionally "lift the veil of incorporation" where necessary, to enable them to impose liability on unscrupulous persons who hide behind companies to perpetrate fraud or offend statutory provisions.[65]

This "disregard" for corporate personality, although traditionally situated in company law, has been extended to competition regulation in countries such as the USA, Brazil, Chile, South Korea, Japan, South Africa, the UK and Australia, particularly in relation to directors and other corporate officers. Directors are the brains of companies. They determine overall corporate policy, and executive directors are usually involved in the day to day running of companies. Directors are thus strategically positioned largely to determine whether a country attains significant corporate compliance with its competition law. This accounts for why, along with companies, they are increasingly being targeted with sanctions for corporate breaches of competition law. In fact, in several countries directors[66] may be imprisoned[67] or fined for being complicit in corporate competition breaches.[68] Targeting directors with personal liability also induces them to formulate internal strategies geared towards competition compliance.[69] Another justification for targeting directors is that, whereas corporate fines may harm "innocent" shareholders, imposing sanctions on directors is regarded as placing the "blame" squarely where it should be: on the persons who direct those companies.[70] Furthermore, achieving a deterrent by relying on fines is difficult because of legal and practical (insolvency) constraints, and also because fines imposed on the principal (company) may not necessarily deter corporate agents (directors) from engaging in wrongdoing.[71]

In a similar vein, the FCCPA imposes personal liability on directors of companies that are in breach of competition law in certain instances.[72] For

65 *See Gilford Motors v Horne* (1933) Ch 935; *Adeyemi v Lan and Baker (Nigeria) Ltd* (2000) 7 NWLR (pt 663). See also MT Moore "A temple built on faulty foundations: Piercing the corporate veil and the legacy of *Salomon v Salomon*" (2006) 3 *Journal of Business Law* 180.

66 Some of the sanctions imposed on directors may also extend to other corporate officers and advisers, such as managers, secretaries, auditors and solicitors. However, this article focuses on company directors, while noting that the suggestions made may apply to these other positions as well.

67 See Enterprise Act 2002 (UK), sec 188; Enterprise and Regulatory Reform Act 2013 (UK); Sherman Act (USA), secs 1, 2, 3 and 13; Competition Act, 1985 (Canada), sec 45; The Restrictive Trade Practices Law 1988 (Israel); Monopoly Regulation and Fair Trade Act 2013 (South Korea); Economic Crimes Law No 8, 137/90 (Brazil); The Competition Act (Consolidation Act No 700 of 18 June 2013) (Denmark), sec 22(3); and Corporations Act 2001 (Australia), sec 104.

68 Sherman Act, secs 1, 2, 3 and 13; French Commercial Code, art L 420-6, sec 298.

69 For instance, see FCCPA, secs 74(2), 90(7), 107(4)(c), 108(3)(c), 109(3)(c), 111(3)(c), 112(3)(c), 135(3) and 155(c).

70 See JM Connor and RH Lande "Cartels as rational business strategy: Crime pays" (2012) 34 *Cardozo Law Review* 427 at 444–45.

71 See WPJ Wils "The European Commission's 2006 guidelines on antitrust fines: A legal and economic analysis" (2007) 30 *World Competition* 197.

72 FCCPA, sec 69(1).

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instance, the directors of a company that enters into an agreement in contravention of the act, are all liable to be prosecuted and, on conviction, may be fined as much as five million naira.[73] Similarly, the directors of a company that refuses to desist from abusing its dominant market position, shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine of not more than 50 million naira, or to both a fine and imprisonment.[74]

While the criminalization of companies and their officers for competition breaches is widespread, some countries also disqualify directors who are complicit in corporate competition breaches.[75] As a result, competition regulators in these countries have three main strategies for enforcing or securing corporate compliance with competition law. First, they may proceed against the revenues of errant companies. Secondly, they may institute criminal or civil proceedings against the individuals behind these companies, notably their directors. Lastly, they may also seek to disqualify those directors from directing companies for a defined period.

Although of relatively recent origin, the disqualification of company directors, who by their conduct prove themselves unworthy to be at the helm of corporate concerns, is now established as part of the company law of a number of countries.[76] In the Commonwealth, directors' disqualification was first mooted by the Cohen Committee of 1962. However, it took the Companies Directors Disqualification Act 1986 (CDDA), in adopting the recommendations of the Cork Committee of 1982, to make directors' disqualification part of UK law.[77] Despite being originally focused on directors who were involved in wrongful or fraudulent trading in insolvency, directors' disqualification is widening in scope and application. In fact, in the UK, New Zealand, Australia and India, a person can now be disqualified from directorship if he oversees a company that habitually contravenes company law.[78] It is

73 Id, sec 69(4).

74 Id, sec 74(2). See also secs 90(7), 107(4)(c), 108(3)(c), 109(3)(c), 111(3)(c), 112(3)(c), 135(3) and 155(c).

75 They include the UK, Argentina, Australia, Brazil, Canada, Colombia, Czech Republic, Hong Kong, Indonesia, Lithuania, Mexico, Russia, Slovenia and Sweden.

76 In countries including South Africa, France, Germany, India, New Zealand, Australia, Nigeria, Hong Kong and the UK, directors are increasingly being disqualified for their misdeeds and breaches. Moreover, see S Caliskan and P Subai "A comparative study on disqualification of company directors in the UK and Nigeria: Lessons for Turkey" (2020) 27 *Journal of Financial Crime*, available at: <https://doi.org/10.1108/JFC-12-2019-0159> (last accessed 30 January 2021).

77 The report of the Review Committee on Insolvency Law and Practice (Cork Report) made extensive recommendations for the review of insolvency law in the UK, among which was disqualification of directors in certain instances: J Loughrey "Smoke and mirrors? Disqualification, accountability and market trust" (2015) 9/1 *Law and Financial Markets Review* 52.

78 See CDDA, sec 3; Corporations Act 1993 (New Zealand), sec 383(1)(c)(i); Corporations Act 2001 (Australia), sec 206E; and Companies Act 2013 (India), sec 164.

also becoming increasingly possible for the disqualification of a director in one country to render him unfit to become a director in another country.[79]

Generally, the disqualification sanction is aimed at protecting the public from persons who may abuse the privileges associated with limited liability.[80] It also aims to minimize the extent to which such persons may repeat their omissions or misconduct.[81] By banning unfit persons from directorship, the sanction also seeks to prevent the recurrence of their misbehaviour and, by so doing, offers some protection to the public from their misdemeanours.[82] Directors' disqualification therefore serves to forestall corporate opportunism, while strengthening corporate governance.[83] This is possible because disqualification on the ground of unfitness comes with attendant negative publicity, which may damage a director's reputation and ability to secure future work, especially in an internet age where such measures are increasingly having transnational implications.[84] Furthermore, a disqualified director may invariably be ineligible to join in the formation, promotion or management of companies,[85] or practise as a receiver, administrator or liquidator.[86]

As with the UK and most of the Commonwealth, directors' disqualification already exists in Nigerian company law, although it has not been applied strenuously.[87] The question is whether Nigeria should adopt a competition disqualification approach as a means of inducing corporate compliance with the FCCPA, or whether the existing sanctions for competition breaches contained in the act are sufficient for that purpose. To resolve this issue, the following section draws lessons from the UK.

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79 For example, in the UK and New Zealand, the grounds upon which a person may be disqualified from being a director may apply to persons who commit such acts overseas as well. See CDDA, secs 2, 3, 5, 6, 8, 10, 12, 16, 22 etc; and New Zealand Corporations Act, sec 383(1)(ca). Similarly, in Australia, the court may disqualify a person who is already disqualified under a foreign jurisdiction, provided the court is satisfied that their disqualification under that law is justified: Australian Corporations Act, sec 206EAA.

80 R Williams "Disqualifying directors: A remedy worse than the disease?" (2007) 7 *Journal of Corporate Law Studies* 213 at 214.

81 KTW Ong "Disqualification of directors: A faulty regime?" (1998) *Company Lawyer* 1.

82 Williams "Disqualifying directors", above at note 80 at 219.

83 Although the word "unfit" was not used in the Companies and Allied Matters Act 2020, it was referred to in the Investment and Securities Act 2007, sec 13(bb), although even there it was not defined. Unfitness generally refers to disqualifying a person from directing companies by reason of their misconduct or incompetence.

84 In the UK, New Zealand and Australia, a person can now be disqualified from being a director on the basis of his wrongdoing committed in another country: CDDA, secs 2, 3, 5, 6, 8, 10, 12, 16, 22 etc; New Zealand Corporations Act, sec 385(10); and Australian Corporations Act, sec 206E.

85 See Companies and Allied Matters Act, sec 280(5); Australian Corporations Act, sec 9; CDDA, sec 4; and New Zealand Corporations Act, sec 126.

86 See Companies and Allied Matters Act, secs 20, 257, 258, 387 and 509.

87 See Caliskan and Subai "A comparative study", above at note 76 at 11.

https://doi.org/10.1017/S0021855321000127 Published online by Cambridge University Press

## LESSONS FROM THE UK

Although fines or prison sentences for cartel offences existed under the Enterprise Act 2002 (Enterprise Act),[88] since 2003 the UK has also made directors' competition disqualification part of its sanction regime through section 9A and 9B of the CDDA as a means of stimulating corporate compliance.[89] Competition disqualification was considered the path to legitimizing individual sanctions and as being the most viable option available to the Competition and Markets Authority (CMA) in sanctioning individuals who breach competition law.[90] It is to that end that section 9 of the CDDA authorizes the CMA to enforce two types of competition disqualification: competition disqualification orders (CDOs)[91] and competition disqualification undertakings (CDUs).[92]

Under section 9A of the CDDA, courts may be moved by the CMA (or, in certain circumstances, any other specified regulator) to declare as unfit and to disqualify from directorship, a person who was a director of a company that contravened competition law.[93] The section provides elaborate conditions that must be satisfied before CDOs can be imposed. The first is that an undertaking of which a person is a director must have breached competition law[94] and the court must consider that his conduct as director of that company makes him unfit to be concerned in the management of a company.[95] Subsection 4 provides further guidance on how the courts may ascertain when a company has breached competition law. Under that subsection, a company breaches competition law if it engages in conduct that infringes either chapter 1 or 2 of the Competition Act of 1988, or articles 101 or 102

88 Enterprise Act, secs 188–90.

89 This was done via the Enterprise Act, sec 204, which amended the CDDA by inserting sec 9A–E. The UK is not alone in applying competition disqualification. For instance, a person in Australia who manages an undertaking that breaches competition law may be disqualified from directing a company: Australian Corporations Act, sec 206EA; see also Australia's Competition and Consumer Act 2010, sec 286E. Australian corporations and company legislation was established on the basis of the principles of UK company law, from which it departed significantly through enacting the Corporations Act 2001. Part 2D.6 of this act introduced a number of grounds and three types of disqualification (automatic disqualification, disqualification on application and disqualification by a regulator). The majority of disqualifications in Australia are made by the Australian Securities and Investment Commission, which does not require a court order for that purpose. Between 2009 and 2015, 369 of 420 directors were disqualified by the commission. See T Blackie and JN De Koker "Australia" in JJ Du Plessis and JN De Koker (eds) *Disqualification of Company Directors: A Comparative Analysis of the Law in the UK, Australia, South Africa, the USA, and Germany* (2017, Routledge) 69 at 69.

90 For further discussion, see J Galloway "Securing the legitimacy of individual sanctions in UK competition law" (2017) 40/1 *World Competition* 121.

91 CDDA, sec 9A.

92 Id, sec 9B.

93 This section was added by the Enterprise Act to extend directors' disqualification to breach of competition law.

94 CDDA, sec 9A(2).

95 Id, sec 9A(3).

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of the Treaty on the Functioning of the European Union (EU Treaty).[96] In concluding whether or not a person is unfit to be concerned in the management of a company, subsection 9A(5) of the CDDA provides additional rules regarding to what the court must or may have regard, and to what it must not have regard. First, the court *must*[97] have regard to whether or not subsection 9A(6) applies to the director. This subsection in effect applies to a director whose conduct contributed to the company's breach of competition law.[98] Even where his conduct did not contribute to the breach, the court must nevertheless consider whether the director had reasonable grounds to suspect whether the conduct breached competition law, but nevertheless took no steps to prevent it.[99] Even if he did not know, it would still have to consider whether he ought to have known.[100] Secondly the court *may*[101] have regard to the conduct of the person as a director of a company in connection with any other breach of competition law. It *must not*[102] however, have regard to the matters mentioned in schedule 1.[103]

In contrast to the CDO, the CDU is essentially an out-of-court procedure in which, in order to avoid litigation, a person who has breached competition law in his capacity as a director of a company agrees or undertakes not to act as a director of a company for a specified period of time.[104] CDUs are essentially an alternative to judicial proceedings, which may be costly and time-wasting, and may come with attendant loss of confidentiality and negative publicity.

In practice however, there have been relatively few competition disqualifications in the UK. Caliskan notes that the number of disqualification proceedings so far instituted by the CMA is extremely low, when compared to other actions instituted by the agency against companies for other breaches of

96 Competition Act, chap 1 and the EU Treaty, art 101 contain prohibitions on agreements that prevent, restrict or distort competition; Competition Act, chap 1 and the EU Treaty, art 102 contain prohibitions on the abuse of a dominant market position.

97 Emphasis added.

98 CDDA, sec 9A(6)(a). In this respect, sec 9A(7) makes it clear that it is irrelevant that the director did not know that the conduct amounted to a breach of competition law.

99 Id, sec 9A(6)(b).

100 Id, sec 9A(6)(c).

101 Emphasis added.

102 Emphasis added.

103 Sched 1 deals with matters to be taken into account in all cases of directors' disqualification. They include: the extent to which the person was responsible for the causes of any material contravention by a company or overseas company of any applicable legislative or other requirement; where applicable, the extent to which the person was responsible for the causes of a company or overseas company becoming insolvent; and the nature and extent of any loss or harm caused (or potential loss or harm that could have been caused) by the person's conduct in relation to a company or overseas company.

104 CDDA, sec 1A.

https://doi.org/10.1017/S0021855321000127 Published online by Cambridge University Press

competition law.[105] In fact he observes that only two CDOs[106] and four CDUs[107] have been made in more than 15 years since competition

105 S Caliskan "Directors' disqualification in UK competition law: Has the dog started barking?" (2020) 41/10 *European Competition Law Review* 509.

106 The first set of CDOs arose from an action that was instituted against three company directors: D Brammer and B Allison (both of Dunlop Oil and Marine Ltd) and P Whittle (of PW Consulting) in *R v Whittle* (*Marine Hose*) [2008] EWCA Crim 2560. In that case, the three accused directors had formed and carried on a marine hose cartel between 2003 and 2007. They were subsequently found guilty, fined and disqualified from acting as company directors for periods of between five to seven years. In the second case, relating to the supply of precast concrete drainage products (ref CE/9705/12), Barry Kenneth Cooper, chief executive of Stanton Bonna Concrete Ltd, was disqualified in 2017 from acting as a company director for seven years for breaching the Enterprise Act, sec 188; this was in addition to a two-year suspended prison sentence. The penalty was issued as a result of the fact that Stanton Bonna Concrete Ltd, FP McCann Ltd and CPM Group Ltd were involved in an anti-competitive agreement and were fined more GBP 36 million following their voluntary admission of guilt. See "Supply of precast concrete drainage products: Criminal investigation" (15 September 2017, CMA), available at: <https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-products-to-the-construction-industry> (last accessed 30 January 2021).

107 The four CDU cases concerned: Trod Ltd, available at: <https://www.gov.uk/government/news/cma-issues-final-decision-in-online-cartel-case> (last accessed 4 March 2021); Abbott and Frost Estate Agents Ltd, available at: <https://www.gov.uk/cma-cases/residential-estate-agency-services-in-the-burnham-on-sea-area-director-disqualification> (last accessed 4 March 2021); Stanton Bonna, available at: <https://www.gov.uk/cma-cases/supply-of-precast-concrete-drainage-products-director-disqualification> (last accessed 4 March 2021); and JLL and Fourfront, available at: <https://www.gov.uk/cma-cases/design-construction-and-fit-out-services-director-disqualification> (last accessed 4 March 2021). The Trod case followed a finding by the CMA in 2016 that Trod Ltd and GB Eye Ltd (which were competing sellers on Amazon) had connived to implement a mechanism that would have had the effect of avoiding price competition by using automated re-pricing software to monitor and adjust their online prices, thereby ensuring that neither was undercut by the other. Following this finding, Daniel Aston, a director of Trod Ltd, requested a disqualification undertaking, which was accepted, and he was disqualified from acting as a director for five years; see S Szlezinger et al "Director liability for competition law breaches: The CMA's first UK director disqualification" (2 December 2016, DLA Piper), available at: <https://www.dlapiper.com/en/uk/insights/publications/2016/12/director-liability-for-competition-law-breaches/> (last accessed 30 January 2021). Similarly, in 2018, Abbott and Frost participated in a cartel with six other estate agents to fix a minimum level of commission fees in Burnham-on Sea. David Baker and Julian Frost, who were directors of Abbott and Frost, had been personally involved and failed to take steps to stop the practice. They consequently offered disqualification. Their requests were accepted and they were disqualified for three and three-and-a-half years accordingly. In addition, following the institution of disqualification proceeding by the CMA against Graham Thompson (a former director of Saxons PS Limited, The Property Group Limited and Warne Investments Limited), he also offered himself to be disqualified and was disqualified for five years. In the Stanton Bonna case, in addition to the disqualification order imposed on Barry Kenneth Cooper, two other directors, Philip Michael Stacey and Robert James Taylor Smillie, former directors of CPM Group Limited, offered disqualification undertakings, which were accepted for seven-and-a-half and six-and-a-half years, respectively. Last but not least, in the JLL and Fourfront case,

disqualification became part of UK law. This is in direct contrast to a total of 2,041 cases that have been instituted for other related breaches of competition law. That said, it may appear that the number of competition disqualifications in the UK is gradually increasing. This fact, which may be borne out of a recent realization that directors' disqualification is a viable tool for competition law enforcement, perhaps explains why most of the CDUs that the CMA has received so far, actually only commenced in 2016.

The question then is, why have competition disqualifications been so few in a country that introduced the sanction as a means of complementing the criminal sanctions available against directors? Again, Caliskan identified resource challenges as well as a lack of clarity in the concept of fitness or unfitness of directors as being among the most prominent factors militating against the effectiveness of competition disqualification in the UK. On the other hand, Stephan suggests that the "immunity" enjoyed by companies through leniency programmes may also have remotely or directly been responsible for why there have been so few competition disqualifications in the UK.[108]

The authors are of the view that Nigeria, like the UK, also needs a CDO regime and that the omission of competition disqualification from the FCCPA is a major drawback for a country that has grappled with monopolies and the dominance of crucial economic sectors by few players.[109] It is

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chap I of the Competition Act 1998 was infringed by JLL and Fourfront, Loop, Coriolis, ThirdWay and Oakley. Following the investigation, the CMA received disqualification undertakings from Robb Simms-Davies, Trevor Hall, Oliver Hammond, Clive Lucking, Aki Stamatis and Sion Davies, who were disqualified for five years, two-and-a-half years, two years, four years and nine months, two years and nine months, and one-and-a-half years, respectively.

108 See S Caliskan and S Oner "Individual sanctions of competition law: Comparison between the UK and Turkey" (2020) 28/1 *European Review* 154 at 161; see also S Caliskan "Individual behaviour, regulatory liability, company's exposure to risk: Deterrent effect of individual sanctions in UK competition law" (2019) 10/6 *Journal of European Competition Law & Practice* 386 at 389; A Stephan "Disqualification orders for directors involved in cartels" (2011) 2/6 *Journal of European Competition Law* 529 at 535.

109 Of note is the Dangote Group, which has a de facto monopoly of Nigeria's cement industry and looks set to monopolize the oil refining sub-sector as well. See "Breaking down barriers: Unlocking Africa's potential through vigorous competition policy" (2016, the World Bank Group), available at: <http://documents.worldbank.org/curated/en/243171467232051787/Breaking-down-barriers-unlocking-Africas-potential-through-vigorous-competition-policy> (last accessed 30 January 2021). See also F Fawehinmi "Africa's richest man has a built-in advantage with Nigeria's government" (11 October 2017) *Quartz Africa*, available at: <https://qz.com/africa/1098137/africas-richest-man-has-a-built-in-advantage-with-nigerias-government/> (last accessed 30 January 2021). Although Nigeria liberalized its telecoms sector in 2001, the absence of a viable competition regime has given rise to allegations of anti-competitive practices, with some firms creating artificial barriers to entry in a bid to monopolize the market. For example, dominant firms like MTN, Glo and Airtel have been alleged to use their market powers to engage in cross-subsidization of services, while refusing to

therefore suggested that, in order to induce further corporate compliance with the FCCPA and to deter wrongdoing, Nigeria should adopt a directors' competition disqualification mechanism. There are some advantages to adopting a competition disqualification regime in Nigeria. First, competition disqualification will complement the criminal sanctions that already exist under the act. Secondly, because disqualification procedures are civil in nature, all that would be necessary to disqualify a director would be to establish his wrongdoing on a balance of probabilities. This means that establishing the facts to ground the disqualification of a director would be quicker and easier to establish when compared to securing a conviction for competition offences, which requires proof beyond reasonable doubt.[110] Competition disqualifications would be even faster if the FCCPC were authorized to disqualify directors, as is the case in Australia,[111] or if it were empowered to receive disqualification undertakings in a similar way to the situation in the UK.

One of two courses of action is therefore recommended for Nigeria. The first, similar to strict tort liability, is for the CCPT to be authorized automatically to disqualify directors of companies that breach the FCCPA, unless there is proof that those directors were not directly involved in carrying out the actions that amounted to the breach in question or were justifiably absent from meetings where decisions relating to the breach was taken, or that they did all that could reasonably be done to avoid the breach. This means that, when it is established that a company is in breach of competition law, all its directors should be rendered liable to be disqualified from managing companies, unless they can prove that they were not complicit in the breach. Such a measure would place the burden for securing corporate compliance with competition law on corporate management. It would thus incentivize all directors, executive and non-executive, to play more active roles in monitoring the affairs of companies and in seeing that internal self-regulating mechanisms are put in place to prevent competition breaches. The disadvantage in this approach is that it may dissuade some competent persons from agreeing to act as directors of companies, since doing so may expose them to the risk of being automatically disqualified if the companies they manage are convicted of contravening competition law. Their position would be more precarious, since directors may not always have direct control over what their delegates do and, even where they take measures to promote internal

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interconnect and grant other firms access to their towers. See W Ubochioma "Regulation of competition in Nigeria's liberalised telecommunications market: A case for complementing sector specific regulation with a general Competition Law Commission" (2013) 19/6 *Computer and Telecommunications Law Review* 184.

110 See Evidence Act (Nigeria), sec 135; and 1999 Constitution of the Federal Republic of Nigeria, as amended in 2011, sec 36(5).

111 The Australian Securities and Investment Commission does not require a court order to impose a competition disqualification: Competition and Consumer Act 2010, sec 286E.

compliance, they cannot guarantee that persons working under them would comply with such measures.

In the light of the challenges with the "automatic disqualification approach" highlighted above, a second and better suggestion is that Nigeria should adopt an approach similar to that of the UK as contained in section 9A of the CDDA. It should thus authorize the CCPT to disqualify directors of companies that breach competition law by abusing their dominant position, entering into restrictive agreements, rigging bids or being involved in cartels, once it is established that their conduct renders them unfit to be concerned in the management of a company. In this respect, the CCPT, in determining unfitness, should be guided by rules aimed at ensuring that only culpable persons are disqualified. In this respect, it is proposed that Nigeria should emulate and apply rules similar to those provided for under section 9A of the CDDA, as discussed earlier in this section. In effect, the CCPT should have to consider whether the conduct of a director contributed to corporate competition contraventions, and, even where it did not, whether, on having reasonable grounds to suspect that the conduct of the entity in question amounted to a breach, the director did not take adequate steps to prevent it from occurring. Lastly, even where a director was unaware that a company was acting contrary to the FCCPA, the CCPT should still be able to determine whether or not he ought to have known that particular conduct breached the act. From the perspective of the directors, the advantage of this approach is that it avails directors of the opportunity to establish their innocence on any case instituted against them before the CCPT. It will also curtail regulatory or judicial arbitrariness by offering clear guidance to the FCCPC and the CCPT on the steps to take when companies infringe competition law.

As it stands, the FCCPA does not authorize the CCPT to adjudicate over matters instituted against directors, rather it provides for the institution of criminal prosecutions against them, presumably before the Federal High Court.[112] What this means is that the CCPT may only issue administrative sanctions against undertakings under section 51 of the FCCPA, but cannot disqualify directors. In this respect, it is suggested that the FCCPA be amended in order to authorize and empower the CCPT, at the instance of the FCCPC or a specified regulator, to impose CDOs on directors who are found to have been complicit in corporate contraventions of the act. Authorizing the CCPT rather than the Federal High Court to have oversight over the imposition of CDOs has two advantages. First, being a specialized adjudicator over a highly technical area of law, the members of the panel who are experts in competition and consumer matters,[113] would be more versed and experienced in competition law than the regular judge who, while having general knowledge of competition law, may not be an expert in that field. Secondly, disqualification

112 FCCPA, secs 69(2), 69(4)(d), 90(7), 107(4), 108(3)(c), 109(3)(c), 111(2)(c), 112(c), 135(3) and 155(c).

113 Id, sec 40.

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matters would be more quickly attended to if handled by the CCPT rather than regular courts, where litigants often face undue delays due to the fact that most courts are overburdened with unusually large numbers of cases.[114]

A contrary argument to competition disqualifications in Nigeria may be that the FCCPA already imposes sufficient criminal sanctions on directors and so introducing competition disqualification may be stretching directors' personal liability beyond what is necessary to incentivize them to steer their companies towards compliance with the act. In theory, the authors might agree with this line of thinking since the prospect of imprisonment for any length of time ought to be sufficient to dissuade directors from involvement in cartel offences and other breaches of competition law.[115] Adding disqualification may amount to overregulation, which may at least in theory also discourage some capable persons from agreeing to "serve" as company directors. While there may be some merit in this line of argument, in practice the experience of several countries has demonstrated that criminalization of competition breaches alone has done little to discourage corporate wrongdoing. This is because criminalizing competition breaches will only deter wrongdoing if attendant sanctions are diligently enforced. However, securing competition convictions is not very easy, due to the highly technical nature of competition law and to the fact that guilt must be proved beyond reasonable doubt.

Even where convictions are secured, courts tend to hand down fines rather than incarcerate directors,[116] which would normally have a stronger deterrent effect.[117] This option of settling for fines is due to a general perception that competition offences are "white collar" crimes for which incarceration may be harsh for what may not be unambiguously and inherently seen to be criminal.[118] This milder view of competition offences is widespread, despite the fact that the very foundations of competition regulation were rooted not in civil, but in criminal law.[119] In fact, perhaps with the exception of the USA and Canada, very few countries consistently incarcerate directors for breaching competition law.[120] The UK for example, which criminalized cartel

114 See JG Frynas "Problems of access to courts in Nigeria: Results of a survey of legal practitioners" (2001) 10 *Social and Legal Studies* 397.

115 See GJ Werden et al "Detection and deterrence of cartels: Using all the tools and sanctions" (2011) 56 *Antitrust Bulletin* 207 at 216.

116 See C Beaton-Wells and C Parker "Justifying criminal sanctions for cartel conduct: A hard case" (2013) 1/1 *Journal of Antitrust Enforcement* 199; Z Cronin "The competitor's dilemma tailoring antitrust sanctions to white-collar priorities in the fight against cartels" (2013) 36/2 *Fordham Law Review* 1687.

117 See Werden et al "Detection and deterrence", above at note 115 at 216.

118 See Beaton-Wells and Parker "Justifying criminal sanctions", above at note 116 at 201.

119 RA Cass "Competition in antitrust regulation: Law beyond limits" (2010) 6 *Journal of Competition Law and Economics* 129.

120 See Cronin "The competitor's dilemma", above at note 116. See also DL Baker "Why is the United States so different from the rest of the world in imposing serious criminal sanctions on individual cartel participants?" (2013) 12 *Sedona Conference Journal* 300 at 306.

offences in the hope of reproducing the successes recorded by the USA in its long history of enforcing the Sherman Act 1890 and other relevant laws,[121] has only successfully prosecuted five persons in over 15 years since it criminalized cartel behaviour.[122] The UK is not alone in this respect. Evidence from a study suggests that, as of 2016, there were an average of only two cartel prosecutions annually in France in the first two decades after the offence was introduced by article L420-6 of the French Commercial Code.[123] Germany on the other hand, only criminalizes "bid rigging", with other related competition breaches sanctioned under administrative law.[124] One take away from the experiences of the UK, France and Germany is that reliance on criminal prosecution alone may not sufficiently dissuade directors from breaching competition law.[125]

## CONCLUSION

The long-term effect of prolonging the existence of unregulated markets or having inadequate competition protection is that "a deep-rooted business culture of non-regulation is fixed in the minds of the general public, generation after generation, ranging from the educated and uneducated small consumers to the businessman and even, notably, the lawmaker".[126] This has been the experience in Nigeria, which, in seeking to overturn such a situation and open up its markets, enacted the FCCPA. In so doing however, Nigeria's legislators perhaps did not go far enough because they ignored the fact that other countries, such as the UK and Australia, have adopted competition disqualification strategies aimed at deterring directorial wrongdoing and spurring corporate compliance. As such, the thesis of this article has been that Nigeria should promote corporate compliance with the FCCPA by disqualifying directors, whose conduct contributes to corporate competition breaches, from being concerned in the management of companies. This call is further justified on the basis that the country may not have the necessary regulatory capacity to enforce the penalties contained in the FCCPA effectively, although prosecutorial capacity may be developed over time. Another issue is that,

121 The Federal Trade Commission Act and the Clayton Act 1914.

122 Enterprise Act, sec 188 (which was actually introduced in 2003) makes it an offence for a person to agree to enter into arrangements that would amount to price fixing or that may limit or prevent the supply of a product or service, or limit or prevent the production of a product. It also criminalizes arrangements that would amount to dividing customers among undertakings or that would amount to bid-rigging. See also R Sallybanks "The cartel offence: Has a lack of enforcement contributed to a lack of awareness" (October 2018, BCL), available at: <https://www.bcl.com/the-cartel-offence-has-a-lack-of-enforcement-contributed-to-a-lack-of-awareness/> (last accessed 30 January 2021).

123 See WP Florian et al "Individual sanctions for competition law infringements: Pros, cons and challenges" (2016) 2 *Concurrences Review* 14.

124 German Criminal Code, sec 298.

125 See Caliskan and Oner "Individual sanctions", above at note 108.

126 M Luis "Competition regulation in Ecuador" (2013) 9 *Journal of Competition Law and Economics* 755 at 756.

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even if directors are successfully prosecuted, they will rarely be incarcerated if the experience of other countries is a guide. In effect, as long as the alternative of a "fine" remains available to Nigerian courts, directors will rarely be imprisoned for competition offences; competition disqualification by the CCPT will therefore complement the criminalization of competition offences, or serve as an alternative.

In adopting a competition disqualification framework, however, it is necessary for the law to be properly drafted and for its scope to be sufficiently broad to limit the possibility for technical loopholes. For example, directors who are subjected to competition disqualification should equally be barred from acting as shadow directors and from dominating firms, either in their capacity as majority shareholders or as advisers. To that end, disqualified persons should also be banned from being involved in the management of any company directly or indirectly, during the period of their disqualification.[127] Furthermore, the consequences for breaching disqualification orders or undertakings should be stringent so as to discourage misbehaviour not only by disqualified directors but by other directors as well. Competition disqualifications should also be publicized to protect the public further. Furthermore, persons who are subjected to competition disqualification outside Nigeria should also be prohibited from directing companies in Nigeria, provided there is evidence that they were justifiably disqualified in those countries.

## CONFLICTS OF INTEREST

None

127 See Australian Corporations Act, sec 206A for instance.

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