



## **NIGERIA'S FCCPC US\$110MILLION FINE ON BRITISH AMERICAN TOBACCO: 9 NOTABLE POINTS ON NIGERIA'S COMPETITION + CONSUMER PROTECTION LAWS**

### **Background:**

Nigeria's Federal Competition and Consumer Protection Commission (the **Commission**) announced on Wednesday, December 27, 2023, the conclusion of its competition and consumer protection infringement investigations into the activities of British American Tobacco Nigeria Ltd and its affiliates (altogether, **BAT**). According to the Commission, the investigations had commenced since August 28, 2020. Summarily, the Commission, with BAT's consent, sanctioned BAT vide a Consent Order, a penalty of US\$110,000,000 (*One Hundred and Ten Million United States' Dollars*) in addition to express strictures on BAT's business conduct and processes, going forward.

While the Commission's press release mentions "a range of infringements" of the Federal Competition and Consumer Protection Act (the **Act**) leading to the Consent Order, it does not disclose BAT's specific violations of the Act while it generally alludes to such Sections as 17(a),(e),(g),(h),(l),(t),(x),(y); 27, 28, 33, 108, 110, 123, 124, 131, 153, of 155 of the Act and some subsidiary legislations to the Act. In this brief, we highlight some of the key points to note on the provisions of the Act and subsidiary legislations alluded to as well as on the larger innuendos in the Commission's press release.

## The 9 Notable Points:

1. **The Functions and General Enforcement Powers of the Commission as underscored by Sections 17(a),(e),(g),(h),(l),(t),(x),(y); 27, 28 and 33 of the Act + Administrative Penalties Regulations:** The Commission is generally empowered to administer and enforce the provisions of the Act and other Nigerian legislations on competition and consumer protection. Accordingly, the Commission can undertake investigations or inquires on any matter bordering on competition and consumer protection. The enforcement powers of the Commission extend to eliminating anticompetitive agreements, as well as misleading, unfair, deceptive, or unconscionable marketing, trading and business practices or strategies and prohibiting the production of consumer-abusive goods or services. To do these, the Commission, can, by a warrant issued by a Judge of the Federal High Court of Nigeria (the **Court**), or without warrant in extreme instances, enter any premises, search, inspect and seize any article document upon reasonable suspicion of the likely or actual violation of any provisions of the Act. This is otherwise known as a Dawn Raid. The Commission may also summon any person to attend and give evidence or produce documents to aid its investigation. Failure to obey the Commission's summons constitutes an offence punishable by imprisonment of a maximum 3 (*three*) years and or a fine of a maximum Twenty Million Naira (circa US\$20,000). Relatedly, the exercise of Commission's power to impose sanctions and penalties under the Act is regulated by the Administrative Penalties Regulation 2020 which prescribes the methodology, factors (mitigating and aggravating), and procedure for the Commission's imposition of penalties.
  
2. **Conspiracy under Section 108 of the Act:** This refers to various practices including collusion among businesses to:
  - 2.1 unduly limit the supply of goods and services through such means as transportation, production, manufacturing, storing, dealing or facilities; or
  - 2.2 unreasonably increase or reduce the price of goods and services; or
  - 2.3 generally reduce competition in the production, manufacturing, purchase, sale, supply or transportation of goods or services; or
  - 2.4 generally restrain or injure competition are prohibited.

Any of these practices constitutes an offence punishable with a fine of maximum 10% (*ten percent*) of the preceding business year's turnover of the offending business; and maximum 3 (*three*) years' and or a N10,000,000 (*Ten Million Naira*) (circa US\$10,000) fine for the Directors of the offending business.
  
3. **Obstruction of Investigation/Inquiry under Section 110 of the Act:** The impediment, prevention or obstruction of the Commission's investigation or inquiry is an offence punishable on summary conviction with a minimum 2 (*two*) years imprisonment and or a fine of a minimum Two Million Naira (circa US\$2,000).
  
4. **General Standards for the Marketing of Goods and Services under Section 123 of the Act:** Punishable under Section 155 of the Act (please see (7) below), producers, importers, distributors, retailers, traders, or service providers are prohibited from directly or otherwise promoting or marketing goods or services through any representation which is:

- 4.1. likely to imply any false or incorrect representation of the goods or services;
- 4.2. reasonably misleading or likely to materially mislead on the nature of the goods or services;
- 4.3. erroneous, fraudulent, or deceptive in any way including in respect of the nature, properties, advantages, use, price, sponsorship, material aspect of, or manner in or condition in which the goods or services may be supplied;
- 4.4. take the form of a statement, warranty or guarantee of performance or durability of a product which is not based on adequate or proper test of the product;
- 4.5. warrants or guarantees replacement, maintenance or servicing without reasonable prospect of fulfilling same;
- 4.6. falsely represents to the public that services are of a particular kind, quality, quantity or standard or are supplied or offered by any business, trade, qualification or skill; or
- 4.7. materially misleading as to the price which a particular goods or services have been, are or will be ordinarily supplied.

It is significant that part of the Consent Order mandates BAT to undertake mandatory public health and tobacco control advocacy in a manner compliant with tobacco control legislation and regulations and satisfactory to the Commission.



5. **Right to Fair Dealings under Section 124 of the Act:** As a protective measure for consumers, the Act prohibits and punishes (please see (7) below) the use of physical force, coercion, undue influence, pressure, harassment, unfair tactics, or any other similar conduct in relation to:
  - 5.1. the marketing of goods or services,
  - 5.2. supply of goods or services to a consumer;
  - 5.3. negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer;
  - 5.4. demand for, collection of, or payment for goods or services by a consumer; or
  - 5.5. the conduct of a legitimate business transaction.

Businesses are additionally prohibited from knowingly taking advantage of a consumer due to the consumer's inability to protect his or her interest owing to physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement or any other similar factors.

6. **Consumers’ Rights to Safe, Good Quality Goods under Section 131 of the Act:** This emphasizes the right of every consumer to receive goods which are reasonably suitable for the purposes for which they are generally required (or specific purpose when known to the supplying business). The goods must be of good quality, in working order and free of defects, usable, durable for a reasonable period, and compliant with applicable standards set by industry or sector regulators. An infraction of this requirement is equally punishable as generally explained in (7) below.



7. **General Contravention of Consumer Rights under Section 155 of the Act:** The Act copiously provides for the protection of consumer rights as evident in such provisions as its Sections 114 to 133. Other than those already discussed in paragraphs (4) to (6) above, protections such as: right to disclosure of price, reconditioned or secondhand goods, fair dealing et.al. are well provided for. A contravention of any of these consumer rights is an offence punishable with a fine of a minimum N100,000,000 (*One Hundred Million Naira*) (circa US\$100,000) or 10% (*ten percent*) of the business’ turnover in the preceding business year. Where the infraction is by a director of the business, the fine a maximum N10,000,000 (*Ten Million Naira*) (circa US\$10,000) and or imprisonment of a maximum 5 (*five*) years.



8. **Obtaining Satisfactory Written Assurances under Section 153 of the Act:** Where a business has persistently acted and carried on a course of conduct to the detriment of its consumers, the Commission reserves the power to, in addition to penalties under Section 155 of the Act (paragraphs (7) above), require and obtain a satisfactory written assurance or undertaking from the business, to refrain from a particular course of conduct. It is significant in this regard that part of the Consent Order mandates BAT to provide this statutory written assurance to the Commission.
9. **The Commission’s Cooperation/Assistance Rules, Procedure + Framework:** While the Commission enjoys full enforcement powers under the Act some of which have been discussed in paragraph 1 above, the Commission reserves the prosecutorial discretion to offer reduced penalties, waiver of prosecution or exercise of prosecutorial discretion in favour of businesses or persons who fully cooperate and or assist the Commission’s investigation under the Commission’s Cooperation/Assistance Rules and Procedure 2021 (**CARP**). The conditions for taking benefit of the CARP include:
- 9.1 unequivocal admittance of guilt;
  - 9.2 full and frank disclosure of information and facts within the applying business’ knowledge;
  - 9.3 in the case of a continued infraction, the cessation of such infraction;
  - 9.4 timely and continuous cooperation and assistance throughout the investigative process; and

9.5 non-concealing, non-destruction, non-manipulation, or non-removal of information relevant to the investigation.

### **Conclusion:**

It is noteworthy that the BAT investigation began on the premise of information made available to the Commission; information which it and the Court found sufficient for the Court to issue a Warrant of Search and Seizure which was coordinately executed on January 25, 2021, at several BAT offices. This process allowed the Commission gather evidence from BAT's records, electronic communications, interrogation, hearings, sworn testimonies et.al., all of which assisted the Commission to establish violations of the Act, the basis of the sanctions and Consent Order. We naturally anticipate this "victory" to be a precursor to many such similar enforcements among relevant industry leaders and accused businesses as the Commission strives to realize its mandate of developing and promoting fair, efficient, and competitive markets in the Nigerian economy to facilitate access to safe products and protect consumer rights.

At AO2LAW, we maintain a foremost Competition Law Practice in advisory, representation, and compliance/enforcement management capacities. Situated within our Commercial and Criminal Law Practice Group (CCLP), our Competition Law Practice additionally brings to bear our expertise in Business Crimes Law to help businesses navigate the complexities of the unique civil and criminal law terrain that Nigeria's Competition Law straddles.

For further information on the foregoing (none of which is a legal advice) or related matters, please generally contact us at [cclp@ao2law.com](mailto:cclp@ao2law.com), or specifically:



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