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ENFORCEMENT OF LABELLING AND ADVERTISING REGULATIONS AS TOOLS FOR CONSUMER PROTECTION IN FOOD AND DRUGS IN NIGERIA

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ABSTRACT

The unequal position the consumer occupies vis-à-vis the producers of goods, particularly in the food and drugs category, has generally necessitated the active involvement and intervention of government through laws, regulations, standards and guidelines directed, although at both parties, but principally at the producer, to bring its practices and actions in conformity with acceptable norms; and in the event of deviation, to apply within the framework the copious provisions for enforcement of the laws, regulations and guidelines, to protect the consumer. This paper examined the roles played by the provisions of the laws and regulations on labelling and advertising in protecting the consumer and critically appraised the regulatory regimes for enforcing these laws and regulations in favour of the consumer. While there is a need to review and harmonise some of these laws and to enhance the effectiveness of the pecuniary and penal consequences for breaches by violators, the paper found that there is an abundance of laws and regulations in Nigeria's statute books. What became clear in considering all the legal and regulatory regimes for their enforcement is the effectiveness, or lack of it, of the regulatory institutions and legal regimes created by law in performing their functions to enforce these laws and regulations and in applying these tools in defence of the consumer. The paper recommends the review and harmonisation of the duplicative laws and regulations, as well as the custodial sentences, fines, and penalties, to ensure the consequences fit the infraction.

Keywords: *Advertisement, Consumer Protection, Food and Drugs, Labelling, Regulations.*

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1. INTRODUCTION

The consideration of the regulatory regime for the enforcement of consumer rights in food and drugs through labelling and advertisements requires a brief consideration of the institutional framework for consumer protection in the sector, particularly as it relates to laws, standards and regulations on product advertising and labelling and the applications of these tools for the protection of the consumer. This paper considers enforcement under the broad headings of the regulatory/administrative regime, the criminal regime, and the civil/ private law regime. Largely, this exercise is the examination of the government's paternalistic role and intervention on the side of the consumer against the producer,[1] in the regulated sector of processed and packaged foods and manufactured drugs category.

The legal regime for the enforcement of consumer rights generally in the foods and drugs regulated sector is the laws, subsidiary legislation, regulations, guidelines, and standards relating to the protection of the consumer, while the regulatory framework refers to the core institutions set up by these statutes and subsidiary legislation and endowed with the functions and power to administer the provisions of these statutes for the purpose of achieving the objects of the enactments. These institutions, or sector-specific regulators or agencies of government, are often established, sometimes by the same statutes,[2] or are created by another statute[3] mainly to administer another statute or are agencies or principal organs of government already in place,[4] being creations of the Nigerian Constitution and often primarily involved in adjudication, enforcement and resolution of disputes related to the consumer protection legislation.[5] These agencies are often conferred with extensive functions and powers relating to setting standards, control of quality and investigation and redressing, administratively and judicially, consumers' complaints.[6] particularly on laws and regulations related to sales promotion, regulation of advertisement and labelling, and the protection of the consumer.

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[1] B.B Kanyip in his seminal book, *Consumer Protection in Nigeria Law Theory and Policy.* Rekon Books Ltd, Abuja, 2005, p.301, sees government role in this regard as calling in mind the ideology of paternalism and see regulation as a philosophical basis for consumer protection.

[2] The Federal Competition and Consumer Protection Commission and the Competition and Consumer Protection Tribunal are creations of ss. 3 and 39 of the Federal Competition and Consumer Protection Act, 2018

[3] The National Agency for Foods & Drugs Administration and Control is an agency of government created under NAFDAC Act Cap N1 LFN 2004, endowed with the power to administer the Food and Drug Act, Cap. F32, LFN, 2004.

[4] The Nigeria Police and the Judiciary arm of government are both creation of the Police Act and the 1999 Nigeria Constitution, Chapter VII.

[5] Obumneme-Okafor N.J*; Op.cit.*at p.1.

[6] This is the same theme briefly highlighted by Odion. J.O; An Appraisal of the Regulatory Framework for the Protection of Consumers in the Communication Sector in Nigeria. *Journal of Law and Conflict Resolution*, vol. 8(2) p.15-25 and access online at <www.academicjournals.org/JLCR> on 24th 05 2021.

Although generally, the Regulatory agencies created by the relevant legislation are often sector-based and exist in every critical area in which majorities of consumers interface with producers of goods and services in the marketplace, for food and drugs the legal and regulatory regimes are found in the National Agency for Food and Drug Administration and Control Act (NAFDAC)[7] and the Federal Competition and Consumer Protection Act (FCCPA), which set up the Federal Competition and Consumer Protection Commission (FCCPC).[8] Other impacting regulatory laws are the Standard Organization of Nigeria Act,[9] which as the name reflects, is an agency of government responsible for setting standards for products and processes and for ensuring compliance with government policy on standards and quality control for manufactured goods made locally or imported; the Food and Drugs Act,[10] the Counterfeit and Fake Drugs Act,[11] the Weights and Measures Act,[12] Drugs Related Products (Registration) Act,[13] the Advertising Regulatory Council of Nigeria Act (ARCON Act)[14] which repealed and replaced the Advertising Practitioners (Registration Etc) Act[15] (the APCON Act), with its hitherto, but now debatable, self-regulatory enforcement framework under the Nigerian Code of Advertising Practice.[16]

Under the ARCON Act and Advertising Code, NAFDAC retains its supervisory oversight when it comes to advertisements and promotion of food and drugs. Other impacting legislative and regulatory regimes are the National Broadcasting Commission Act,[17] the Criminal Code[18] and the Penal Code[19] and the Trade Malpractices (Miscellaneous Offences) Act.[20] Since subsidiary legislation, guidelines, regulations, and standards (particularly under the NAFDAC and SON Acts) were made under some of these legislations, these regulations and standards on labelling and advertisements are also very important tools for the protection of the consumer in the food and drugs category.

[7] NAFDAC Act Cap N1 LFN 2004.
[8] FCCPA 2018.
[9]SON Act, 2015.
[10]The Food & Drug Act, Cap F.32 LFN 2004.
[11] The Counterfeit & Fake Drugs and Unwholesome Processed Foods (Miscellaneous) Act, Cap.C.34, LFN, 2004.
[12] Weight & Measures Act, Cap.W3, LFN, 2004.
[13]The Food, Drugs Related Products (Registration Act), Cap.F33, LFN, 2004.
[14] Advertising Regulatory Council of Nigeria Act, 2022.
[15] The APCON Act, Cap A7, LFN, 2004.
[16]The Nigerian Code of Advertising Practice, Sales Promotion and Other Rights Restrictions on Practice (5th Edition) No. 106, Vol. 99 of 2012.
[17]NBC Act, Cap N11, LFN 2004.
[18] The Nigeria Criminal Code Act, Cap.C.38, LFN, 2004.
[19] The Penal Code (Northern States Federal Provisions) Act.
[20]Trade Malpractices (Miscellaneous) Offences Act, Cap.T12, LFN, 2004.

2. THE REGULATORY REGIME FOR ENFORCEMENT.

To be examined under this heading are both the enforcement provisions and regime of all the relevant legislation,[21]subsidiary legislation and the relevant labelling and advertising Regulations made under the legislation.

2.1 Regulatory Enforcement Regime under FCCPA

The FCCPA, because of its premier coverage, applies to all manners of goods and services, including food and drugs, but recognises the role of other sector regulators, which are statutory regulatory agencies created by other laws; therefore, the FCCPA Act[22] conferred on these sector regulators (NAFDAC, SON, NBC, NCC, ARCON) the status of co-regulators with concurrent jurisdiction with the FCCPC, in respect of each agency's area of coverage, but the Act nevertheless provides that the FCCPC shall have precedence over and above the relevant government agencies, meaning that the Commission's decision shall prevail, in the event of conflict with the decisions of any of the relevant agencies.[23]

It is also important under this heading of regulatory or administrative enforcement under the FCCPA to distinguish regulatory or administrative enforcement measures from the role played by an organ created under the Act, the Competition and Consumer Protection Tribunal (CCPT)[24], which is purely judicial, in an adversarial setting and whose decision on any complaint before it is enforceable as a decision of the High Court (after registration at the Federal High Court),[25]and appealable only to the Court of Appeal.[26]

Having set the above boundaries, it is worthy of note, that the FCCPC, have as its primary function the "responsibility for the administration and enforcement of the provisions of the Act and other enactments with respect to competition and protection of the consumers,"[27] and carries out investigations or inquiries considered necessary or desirable in connection with any matter falling within the purview of the Act[28], resolve disputes or complaint (administratively),[29] issue its directives and applying sanctions where necessary to prevent the

[21] FCCPA 2018, NAFDAC Act, Cap NI LFN 2004, Counterfeit and False Drugs and Unwholesome Processes Foods (Miscellaneous Offences) Act Cap 14 LFN 2014. Standard Organization Act, 2015, Weight and Measures Act Cap W.3 LFN 2004, Advertising Practitioner Registration Etc. Act A.7 LFN 2004 Food and Drugs Act Cap 32, LFN 2004, Food Drugs and Related Products (Registration ETC) Act Cap 33 LFN 2004, National Broadcasting Commission Act Cap N.11, LFN 2004 The Criminal Code Act Cap 38 LFN 2004 Trade Malpractices (Miscellaneous Offences) Act Cap T12 LFN 2004.
[22] s. 105 of FCCPA 2018.
[23] s. 105 (2) ibid.
[24] The Competition and Consumer Protection Tribunal ss. 39, 47, 58 of the FCCPA.
[25] s. 54 FCCPA 2018.
[26] s. 55 FCCPA 2018.
[27] s.17 (a) FCCPA 2018.
[28] s. 17 (e) FCCPA 2018.
[29] s. 17 (h) FCCPA 2018.

circulation of goods or services which constitute a public hazard[30] or an imminent public hazard, with powers to seal off, any premises on reasonable suspicion that such premises contains, harbour or is being used to produce or distribute goods that are fake, substandard, hazardous or injurious to consumers welfare.[31]

The Commission, in performing its function under the Act, has powers to,[32] summon and examine witnesses, call for and examine documents, administer oaths, and require any document submitted to be verified by affidavit. The commission equally has powers to make regulations relating to charging and collection of fees, levies, fines, and the imposition of administrative penalties.[33] and in the above regard, section 27[34] of the Act provides for mandatory inspection of premises and the enforcement powers of the Commission, both with or without a court warrant as an interim measure, and to remove from the premises any article, document, or extract in the custody of any person.

It is important to note that it constitutes a criminal offence (rather than an administrative infraction) attracting upon conviction by court (not the Commission or CCPT) a term of imprisonment, a fine or both,[35] for any person who obstructs or impedes inspection by an authorised officer of the commission or refuses to attend upon a summons to attend to give evidence or produce a document before the commission or obstruct the proceedings of the commission.[36]Administratively, section 106 of FCCPA also empowers the commission to issue a 'cease-and-desist order' against any violator of the Act.

The Commission's power to order recall of any unsafe or hazardous good is further reemphasised in section 133[37], with additional power to order recall of unsafe goods sold to a consumer and order, in exchange, either repair, replacement, or refund. The Commission can also make an order or issue a compliance notice against a manufacturer/ importer/ seller violator after conducting an investigation (through its Inspectors) upon a complaint under sections 149 and 150,[38] and such order, including a consent order, may set out an award of damages by way of compensation to the complainant (which is enforceable upon registration

[30] s.18 (1) (6) FCCPA 2018.
[31] s. 18 (I) (f) FCCPA 2018.
[32] s. 18 (4) FCCPA 2018.
[33] s. 18 (I) (h), FCCPA, 2018.
[34] s. 27, 28, 29 FCCPA 2018
[35] s.28 (5) provides that a person who obstructs or impedes are authorized officer in the performance of his duties under this section commits an offence in accordance with the relevant laws and liable on conviction to imprisonment for a term not exceeding ₦5,000,000 or to both fine and imprisonment.
[36] S.33 (3) of the FCCPA 2018.
[37]s.133 FCCPA 2018.
[38] s. 149, 150 FCCPA 2018.

in court) and set out an administrative penalty that may be imposed on the violator if the terms of the compliance notice are not fulfilled by the violator.

The Commission could, as part of its administrative enforcement regime, where the complaint, upon investigation, has been positively confirmed that a consumer right has been violated or a wrong has been committed by the supply of information and advertisement,[39] thereby causing injury or loss to the complainant consumer, then in addition to other steps for redress available to the consumer, the Commission also have power to obtain a "satisfactory written assurance" that the violator will refrain from further continuation of such acts leading to the violation of consumer rights.

Upon failure to provide the assurance or comply, the Commission may order a temporary closure of any premises or facilities reasonably believed to be carrying on in a manner detrimental to the interest of consumers until the Commission is satisfied otherwise or pending the commencement of a court action by the Commission against the violator.[40]

2.2 Administrative and Regulatory Enforcement Under NAFDAC Act, Food, Drugs and Related Products (Registration Etc.) Act. The Regulations and Guidelines

These two legislations, from a regulatory perspective, represent the same coin and, for convenience, are treated together. The National Agency for Food and Drug Administration and Control, created under the NAFDAC Act, is also the agency empowered to regulate and administer the provisions of the Food, Drugs and Related Products (Registration) Act;[41] and virtually all the Regulations made over the years by the agency have always drawn as their basis both sections 5 & 30 of the NAFDAC Act and section 12 of the Food, Drugs and Related Products (Registration Etc) Act.[42]

Section 4 of the Food, Drugs and Related Product (Registration etc.) Act confirms the role of the agency,[43] by providing that the agency may suspend or cancel the registration of a processed food and drug product if the grounds on which the processed food or drug product were registered turn out to be false or the circumstance in which the registration took place no longer exists, or upon contravention of any of the conditions for such registration or where the standard or quality, safety or efficacy as prescribed in the documentation for registration is not being complied with.

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[39] s. 152 FCCPA 2018.
[40] s. 153 (3) FCCPA 2018.
[41] s.1 NAFDAC Act Cap NI LFN 2004 and s.1 (2) & 13 Food, Drugs Related Products (Registration Etc) Act cap F 33, LFN Act.
[42] Ibid.
[43] Under section 1 of the NAFDAC Act, the body establish under the Act is otherwise referred to as the "Agency".

The Act further provides that, when suspension or cancellation by the agency is exercised as a regulatory or administrative enforcement tool, on the food or drugs product, the agency has powers to order the withdrawal from circulation of the food or drugs product and shall publish the suspension or cancellation by way of notice in the National Gazette.[44]

The power to suspend or cancel registration of a product by the agency for regulatory enforcement is also implied in section 5(f) of the NAFDAC Act and section 5(o), which lists as one of the functions of the agency the power to 'issue guidelines on, approve and monitor the advertisement of food and drugs…'[45]. This power to cancel or suspend the registration of drug products is also stated in section 7 of the Drugs and Related Products Registration Regulations, 2021[46] and section 7 of the Food and Related Product Registration Regulations 2019[47] both in respect of drug and food products, respectively. The Food Products Advertisement Regulations 2021[48] empowers and requires that the agency grant approval for the advertisement of any pre-packaged food, section 8,[49] empowers the agency to withdraw the approval for an advertisement because the approval was granted based on false or incomplete information or that the advertisement contravenes any of the conditions under which the approval was granted.

2.3 Regulatory/ Administrative Enforcement Regime under Standard Organization of Nigeria Act.

The regulatory and administrative enforcement tools available under the Act to the agency and its Director General include:

i. Power to recall[50]
ii. Power to stop and search
iii. Power to seal up premises: under section 29,[51] of the Act
iv. Destruction of violative goods.

[44] s.4 (2) Food Drugs Related Product (Registration Etc) Act Cap F33 LFN 2004.
[45] Ibid.
[46] Drugs and Related Product Registration Regulation, 2021.
[47] Food and Related Products Registration Regulation 2019.
[48] Food Products Advertisement Regulations 2021.
[49] s.8 Food products advertisement regulations 2021.
[50] s. 46 SON Act 2015.
[51] s. 29 (1) (a) (e) SON Act 2015.

2.4 Regulatory Enforcement under the Weight and Measures Act

In the area of administrative and regulatory enforcement of the Weight and Measures Act, it is clear from the provisions of the Act that it is based on an inspectorate system, allowing the inspectors appointed under the Act,[52] who are empowered to inspect and approve the weighing instruments and are subject to the production of a valid identification credential upon request, to carry out an inspection at all reasonable times, to inspect and test any weighting and measuring equipment used for trade. The Inspectors also have the power to inspect any goods to which any of the provisions of the Act, or Regulation applies, with power to enter any premises in which an inspector has reasonable cause to believe that there is any equipment or goods as aforesaid, not being premises used only as a private residence. The Inspectors are also empowered under the Act to seize and detain any article which they have reasonable cause to believe is liable to forfeiture under the Act, including any documents and labels displayed with any goods as evidence of price or quality of the goods.

2.5 Regulatory and Administrative Enforcement under the ARCON Act and the Code of Advertising Practice and Sales Promotion

The now repealed APCON Act, now replaced by ARCON and the Code, presents a unique experiment of government paternal instinct at protecting the consumer and the idea of self-regulation by members of an industrial sector with government supervision through the Minister for Information.[53] The Act, before its repeal, received less than favourable interpretation as to its scope and coverage, and there were a number of judicial decisions limiting the operation and jurisdiction of the Act and the Code to members of the advertising profession only.[54]

These decisions, coupled with the limitation in section 1(d) requiring the approval of the Minister of Health (through NAFDAC) in respect of all regulations in respect of sales and promotions concerning foods and drugs, all but rendered lame the effectiveness of the Act and Code, and ultimately, the experiment as far as industrial sector self-regulation is concerned. The ARCON Act preserved the Code as well as recognised the role of NAFDAC in regulating advertisements of food and drug products.

2.6 Regulatory and Administrative Enforcement under The National Broadcasting Commission Act and The Nigeria Broadcasting Code

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[52] s.11 weight & measures Act, cap W. 3 LFN 2004.

[53] Under s.7 of Advertising Practitioners (Registration etc) Act, (APCON) the Minister may give directives of a general character or relating generally to particular matters and shall be the duty of the council to comply with the directives.

[54] MIC Royal Ltd v APCON (2018) LRLR 45314 (C A) and in APCON v the Registered Trustees of International Covenant Ministerial Council &Ors (2010) LRL 3630.

Although the Act and the Code made pursuant to it have limited application to the overall subject under consideration except perhaps to the airing or broadcasting of advertisements made on the radio, television, and online, the Act and Code present a similar attempt at regulation or administrative enforcement through self-regulation, with the approval and supervision of the Minister. It does set out in the Code different classes of infractions and groups them into A, B, and C depending on the gravity of the breach of the Code.

3. CRIMINAL ENFORCEMENT

It is worthy of note, to recognize that a violative act of a manufacturer or any violator could form the basis for enforcement under different heads of administrative, Civil and Criminal measures, and the option to pursue usually lies with the consumer. The Criminal Code Act[55] preserved such rights by providing that the provisions of the Act criminalising any act or omission and the prosecution under it as an offence shall not affect the right of action which anyone would have had against the offender, if the Criminal Code Act has not been passed, nor shall the omission from the Code of any penal provision, which constitutes an actionable wrong, affect the right as in this case, of the consumer to proceed to enforce this right and obtain remedies in a civil court.

3.1 The Criminal Code Act

Although the Criminal Code Act[56] and the Penal Code[57] represent the principal Nigerian criminal legislation on general and specific offences, it does not cover the fields in respect of all crimes and most legislation, as a matter of course, creates several offences under each law, which are equally enforceable under the law and carry various penalties, including jail time, fines, forfeiture, etc., or a combination of such penalties. Indeed, the provisions of the Criminal Code in respect of specific offences with regard to food and drugs are few and limited in application and have indeed been criticised as a duplication of the more robust and detailed provisions of the sector-specific legislation,[58] such as FCCPA[59], NAFDAC Act[60], SON Act,[61] and the Food and Drugs Act.[62]

The above notwithstanding, the Criminal Code Act in section 243 provides that:

> Any person who sells as foods or drink or had in his possession with intent to sell it as food and drinks, any article which has been rendered

[55]See also section 146 (2) FCCPA 2018.
[56] Criminal Code Act Cap C.38 LF2 2004.
[57] The Penal Code (Northern States) Federal Provisions Act Cap P3 LFN 2004.
[58] F. Monye, *Law of Consumer Protection*. 2005 Spectrum Books Ltd, p.70.
[59] FCCPA 2018.
[60] NAFDAC Act Cap NI LFN 2014.
[61] SON Act 2015.
[62] Food and Drugs Act Cap F32 LFN 2004.

> or has become noxious or is in a state unfit for food or drinks, knowingly or having reason to believe that the serve is noxious as food or drinks or is in a state unfit for food or drinks is guilty of a misdemeanour and is liable to imprisonment for one year.[63]

The Act further provides that:

> Any person who adulterated any article of food or drinks, to make such article noxious as food or drinks intending to sell such article as food or drink or knowing it to be likely that the same will be sold as food or drink, is guilty of a misdemeanour and is liable to imprisonments for one year.[64]

3.2 Offences under FCCPA

Since FCCPA covers all areas of consumer protection, most of the offences are general in nature, with certain specific offences directed at labelling and advertising. The most general of the offences created under the FCCPA is contained in section 155[65] which provides that:

> Except where otherwise provided for in this Act, any person who contravenes any consumer right commits an offence under this Act and;
> (a) In the case of a natural person, is liable on conviction imprisonment for a term not exceeding five years, or to payment of fine not exceeding ₦10,000,000.00 or both the fine and imprisonment.
> (b) In the case of a body corporate, is liable on conviction to a fine of not less than ₦100,000,000.00 or 10 % of its turnover in the preceding business year, whichever is higher and
> (c) In the case of a body corporate referred to in paragraph (b) of this section, each director of the body corporate is liable to be proceeded against and dealt with as specified in paragraph (a)

Part II of the FCCPA deals with criminal offences against the investigative powers of the FCCPC. Section 33 of the FCCPA[66] criminalises refusal to attend to a summons to give evidence or tender documents at a hearing before the Commission, with an offence upon conviction attracting a term of imprisonment not exceeding three years or a fine not exceeding Twenty million Naira or both. The same terms of imprisonment and a fine of Twenty million Naira are imposed on a convicted offender who wilfully obstructs or interrupts the proceedings of the Commission. In section 134 of the Act.[67]

Specific offences are created for failure to properly label a product (including foods and drugs).[68] The Act imposes a mandatory duty on the manufacturer, importer, or distributor

[63] s.243 Criminal code act.
[64] s. 243 (2) Criminal Code Act.
[65] s. 155 FCCPA 2018.
[66] s.38 FCCPA 2018.
[67] s. 134 FCCPA 2018.
[68] Underlined for emphasis.

of goods to label and describe the goods in a manner that will be easily traceable to the manufacturer, importer or distributor. The Act also imposes heavy penalties upon criminal conviction for violating this provision as to labelling, with section 135(2) and (3) imposing a fine upon conviction of a natural person of a sum not more than ₦10,000,000 or an imprisonment not exceeding three years or both. Where the undertaking is a body corporate, it is liable on conviction to a fine not exceeding 10% of its turnover in the preceding business year.

3.3 Offences and Criminal Enforcement under the NAFDAC Act and Regulations and The Food, Drugs and Related Products (Registration Etc) Act.

NAFDAC Act empowers the agency to make regulations under section 5 and section 30 of the Act, without providing in the body of the Act modalities for criminal and civil enforcement of the provisions of the Act.[69] The only offences created under the Act were in section 25 of the NAFDAC Act: the offence of obstruction under section 24 and the general offence of contravention of the provisions of the Act and the Regulations created pursuant to the Act. It provides that upon conviction, an offender is liable to the penalties specified in the Regulations and, where no penalty has been specified, to a fine of ₦50,000 or imprisonment not exceeding one year or to both a fine and imprisonment of ₦100,000. It further provides that, if the offence was committed by a body corporate and is proved to have been committed with the consent, connivance or attributable to any neglect on the part of any Director, Manager, secretary, or anyone acting in such capacity, he shall as well be deemed to have committed the offence and shall on conviction, be liable to a fine of ₦100,000.

However, substantial provisions on the offences in relation to its function as the principal regulatory agency in charge of food and drugs were left to the various Regulations[70] made under the Act and the limited offences created under the penal law of the Food, Drugs and Related Product (Registration, etc) Act.[71] Under the NAFDAC Act, and the regulations made under it, NAFDAC and its staff have the exclusive power to enforce the provisions of

[69] S. 25 of the NAFDAC Act.

[70] Drugs and Related Products Registration Regulation 2021 vol 108 National Gazette 10th August 2021, Drug & Related Product Advertisement Regulations 2021, vol 108, National Gazette 9th August 2021, Food Product Advertisement Regulations 2021 vol 108 National Gazette, 1st September 2021, Prepackage Food, Water and Ice Labeling Regulation, 2019, Drug and Related Products Labeling Regulation 2021 Herbal Medicine and Related Products Labeling Regulation of 2021, Soft Drink Regulations 2021, etc.

[71] Cap F 33 LFN 2004. Section 6 of that Act titled 'offences' provides that any person who contravenes a provision of the Act or a regulation made under it is guilty of an offence and is liable on conviction (a) in case of an individual to a fine not exceeding ₦50,000 or to a term of imprisonment not exceeding two years or to both such and imprisonment and (b) and in the case of a body corporate to a fine not exceeding N100,000.

the Regulations, including prosecution of the offences,[72] while the Federal High Court has exclusive jurisdiction to try offences under the NAFDAC Act.[73] The offences and penalties are almost the same, and for brevity, two Regulations are considered below:

i. Drugs and Related Product Labelling Regulations 2021:[74]This NAFDAC Regulation which applies to all Labelling of drugs and related products, manufactured, imported, exported, sold, distributed, or used in Nigeria, created under its section 22 titled 'offences and penalties', for any person who contravenes the regulations, section 22 provides that any person who contravenes any of the provisions of these Regulations commits an offence and is liable on conviction, in the case of (a) an individual, to imprisonment for a term not exceeding one (1) year or to a fine not exceeding ₦800,000.00 or to both; and (b) a body corporate, to a fine not exceeding ₦5,000,000.00.

ii. Food Products Advertisement Regulations 2021[75]: This NAFDAC Regulation applies to all advertisements of food products manufactured, imported, distributed, sold and used in Nigeria and prohibits the advertisement of food products unless it has been registered with NAFDAC and the advertisement approved by the agency[76] and provides that any person who contravenes any of the provisions of these Regulations commits an offence and is liable on conviction, in the case of (a) an individual, to imprisonment for a term not exceeding 1 year or to a fine not exceeding ₦800,000.00 or to both.

3.4 Offences and Penalties under The Food and Drugs Act

Section 17 of the Act created the offences and penalties on contraventions of any provision of the Act or Regulations made under it or failure to comply with any requirement imposed by a notice under section 4 (1). Such a person shall be guilty of an offence and liable upon conviction to a fine of not less than fifty thousand Naira or a term of imprisonment not exceeding two years or to both such fine and imprisonment. It is provided further that, where an offence under section 15 is committed with the consent or connivance of, or to be attributable to any neglect on the part of any director, manager, secretary or other similar officer or any person purporting to act in any such capacity, he as well as the body corporate, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

[72] section 26 of NAFDAC and the provisions of the various regulations created under the Act.
[73] s. 25 (5) NAFDAC Act Cap N I LFN 2004.
[74]Drugs and Related Products Labeling Regulations 2021.
[75] Food Products Advertisement Regulations 2021.
[76] s. 2 (a) (b) Food Products Advertisement Regulation 2021.

3.5 Offences under Trade Malpractices (Miscellaneous Offences) Act

Section 1 of the Act provides that no person shall:

> (a) labels, packages, sells, offers for sale or advertises[77] any product in a manner That is false or misleading or is likely to create a wrong impression as to its quality, character, brand name, value, composition, merit or safety:
> or (g)in connection with the sale or the exposing or offering for sale of anything. makes any misrepresentation howsoever or does or omits to do any act, matter or thing calculated or likely to mislead the seller or purchaser or prospective seller or purchaser, as the case may be, as to its weight or measure or as to the number to be sold or offered for sale; or advertises or invites subscription for any product or project which does not exist,[78]commits an offence under this Act and is liable on conviction to a fine of not less than ₦50,000.

It is clear from the provisions of the Act that no custodial or prison sentence is recommended for the offences under the Act. This is clearly mind-boggling, considering the grievous nature of the offences that include fraud, misrepresentation and obtaining by false pretences. However, it is the fine payable of a minimum of N50,000 by the offender in today's value that tips the scale into absurdity and is grossly inadequate considering the weight of the crime.[79]

3.6 Offences under the Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act

This Act prohibits the sale and distribution of counterfeit, adulterated, banned or fake, substandard, or expired drugs or unwholesome processed food. The Act further prohibits the sale of drugs in certain premises or places. Section 1 deals with the general prohibition of sale of counterfeit and fake drugs and unwholesome processed food and covers producers, importers, manufacturers, sellers, distributors, or any other person in possession of such products. It extends to the sale or display for the purpose of sale, or aids or abets the seller, manufacturer, distributor or the person who displays such drugs or food for the purpose of sale. If an offence is committed under this section, the offender shall upon conviction be liable to a

[77] Underlined for emphasis.
[78] Ibid.
[79] The criticism of F. Monye; *Law of Consumer Protection* op cit at p69 although well placed, the penalties and fine were expressed as the minimum rather than maximum payable, as stated by the Learned author. It is also true that the Act appears a mere surplusage, as the Learned author stated, as paragraph a-h of section 1 of the Act is covered by the Food and Drugs Act while the provision relating to weights and measures are well covered by the Weight and Measures Act.

fine not exceeding ₦500,000 or imprisonment for a term not less than 5 years or more than 15 years or to both[80] such fine and imprisonment.

The second offence[81] created under the Act is the prohibition of sale of drugs in certain premises or places not licenced for such purposes. This prohibition is targeted against the very popular itinerant hawkers of drugs in public buses or on the roadside. Section 2 of the Act prohibits such sales, hawking, display for sale or aiding or abetting a person to hawk, sell or display for sale of any drug in any place not duly licenced or registered by the appropriate authority, including any market, kiosk, motor park, roadside stall or in any bus, ferry or any other means of transportation. This offence is punishable by a less stringent custodial sentence of not less than two years or a ₦500,000 fine or both fine and imprisonment.[82]

3.7 Offences under the Weights and Measures Act

The Act has a long list of offences created under it to ensure compliance, with penalties that include a fine or imprisonment or both fine and imprisonment imposed against a convicted offender.[83] It is therefore confounding that the list of offences created under it that another Act, namely the Trade Malpractices (Miscellaneous Offences) Act will duplicates in its section 1 (b)- (h),[84] with almost similar offences, although with a higher fine payable by the guilty offender but without any provision for jail sentences under it.

3.8 Offences under Standard Organization of Nigeria Act

The 2015 Act has done a substantial review of both the fines payable and prison terms to be served for committing an offence under the Act. This upward review has sharpened the tools available to the organisation in performing its function, which is principally the standardisation of manufacturing and production processes and control and introduction of assurances through certification and its conformity assessment schemes. In addition, the new Act created some other offences and imposes tougher sentences and penalties on parties charged and convicted under the provisions. The first among the several offences created under the Act is the offences in relations to standardization[85] with relevance to sales, display for sale or advertisement[86] by any person other than the permitted manufacturer of any material or

[80] This custodian sentence under this Act represents the most severe and speaks to the federal government policy of fighting the menace of faked and counterfeit drugs, adulterated and unwholesome food, a situation, that was and still is, quite prevalent, despite activities of NAFDAC, SON and other government agencies. This situation has unfortunately led to countless loss of lives and permanent disability of many hapless consumers.
[81] s.2 Counterfeit and Fake Drugs and Unwholesome Processes Food (Miscellaneous Provisions) Act Cap C.34 LFN 2004.
[82] see F. Monye on page 73.
[83] s. 49 Weight and Measure Act cap W.3 LFN 2004.
[84] Trade Malpractices (Miscellaneous offences) Act cap T.12 LFN 2004.
[85] s.26 SON Act 2015.
[86] Underlined for emphasis.

document which portrayed an industrial standard or a resemblance of a standard created under a certification mark resembling or purported to be a certification issued under the act is guilty of an offence, and on conviction for an imprisonment of not less than two years or a fine of ₦1,000,000 or both term of imprisonment and fine.

Section 31 empowers the Director General of SON, under appropriate circumstances, to order the stop and search of a vehicle believed to contain any article or products covered by SON's mandate or the contravention of the Act. Under this section, SON also has the power of inspection of premises, seizure and detention of goods. Section 32 made it a criminal offence to obstruct, fail to furnish information, evade or attempt to evade, neglect or omit to pay any levy, charge or fee payable under the Act or deal with a substandard product. Upon conviction, a fine of ₦1,000,000 or a term of imprisonment of not exceeding 2 years, or both fine and imprisonment, in addition to paying double the amount of fees, levy or charge evaded leading to the charges. For a Body corporate, the fine is ₦5,000,000, with liabilities imposed on all Directors.

4. CIVIL ENFORCEMENT REGIME

The civil enforcement heading covers applying the well-rehashed principles of Contract and Tort that impact and often impede the consumer (outside the regulatory enforcement regime) to challenge, ventilate and defend consumer rights against the manufacturers, importers, or sellers in a civil court. In addition to the common law principle of contract are the relevant provisions of the Sale of Goods Act, which also delimits and defines the rights of a buyer by codifying several of these principles of common law.

It was clear, under this regime, that liability of the manufacturer may either be contract- or tort-based. Contract-based liability is founded on the main ingredients of contract in common law - offer and acceptance,[87] intention to enter into a legal relationship, and privity of contract, and consideration- all of which will ordinarily exclude a third party, including the ultimate consumer, who may not have entered into any direct contract or if there was no enforceable contract (sales promotional gifts items) and therefore no basis for the seller to have breached any contract either based on express terms or implied terms. It is equally clear under this scenario that the remedies available to the consumer under the contract could well be governed by the statute, particularly the Sale of Goods Act.

[87] Carlill v Carbolic Smoke Ball Co. (1893) QB 256.

For a claim based on Tort, the implications are even more dire, as the common law principle of Negligence as expounded in *Donoghue v Stevenson,*[88] requires the proof of fault, and although the tort of deceit or misrepresentation may be available, the burden of proof requirement on the part of the consumer makes them as ineffective as the negligence principles. Three reasons were identified[89] as to why the private law route without further intervention was not quite helpful to the consumer, namely that the liability regime does not help the consumer, as the consumer remedies available under contract are rigid with the concept of the privity of contract, while in tort, liability is mainly established by fault as the basis for negligence. Secondly, the law of contract is founded on the erroneous assumption of equality of bargaining powers and thirdly, the inadequacy of the remedies available to the consumer.

4.1 Civil Enforcement of Consumer Rights under FCCPA

Lastly, but very important, are the provisions of the Federal Competition and Consumer Protection Act[90] that have brought important changes to the old order under Contract and Tort, which inhibits the abilities of the consumer to enforce his rights. FCCPA is therefore an important piece of legislation, and while the impact of the provisions of this Act on the common law principles of caveat emptor, privity of contract, liability or exemptions limitation clauses, and the tort of negligence and fault principle are not yet felt, the provisions of FCCPA will, in years to come, lead to an explosion of successful claims by consumers of their rights under the Act, either as a standalone basis of claim or in addition to claims under contract and tort. Predictably, the path will now be easier to tread, without the enormous burden of proof challenges that have hitherto been the Achilles' heel of the consumer in notable litigation.

As opposed to the principles of common law in both contract and tort earlier identified[91] and less than favourable provisions of the Sale of Goods Act and laws, the FCCPA has introduced several reforms that have corrected the positions before the Act. Highlights of these reforms include the fact that the consumer, rather than looking for damages alone in the event of defective goods, now has a right under section 133(2)[92] of the FCCPA to access the remedy of repair, replacement, or refund. Section 136 (3) of the FCCPA has also sounded the death knell for the common law doctrine of privity of contract, and section 136 (5) and section 137 of the Act have both dealt a fatal blow to the exclusion or restriction of liability under the Sale of Goods Act and under common law.

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[88]Donoghue v Stevenson (1932) A.C 560.
[89] Yagba T.A.T 'Consumer Remedies' *Modus International Law & Business Quarterly*. (1999) vol.4, No.2 pp 15-21.
[90] FCCPA 2018.
[91]Yagba (n 17) 90
[92] S. 133 (2) FCCPA 2018.

The common law principle of caveat emptor and liability for breach of implied obligation by law as to title and fitness for purpose has been watered down and modified by the FCCPA, sections 138 and 139. Section 140[93] also effectively dealt with exclusion or restriction of liability for misrepresentation made before the contract was made. On the very important question of Burden or Onus of proving fault as a condition for a consumer's successful claim.

Section 145,[94]clearly states that where it is alleged that goods or services are defective, the onus of proof shall lie on the undertaking or company that supplied the goods or services. The provisions of section 145 clearly shift the onus of proof and dispense with the common law doctrine of fault, making the manufacturer's position akin to strict liability, unless it can discharge the burden when it comes to defective goods. Section 131[95] provides for the rights of the consumer to safe, good quality goods and section 132[96] statutorily imposes on any consumer contract an implied warranty of quality, with the consumer's right to return goods without penalty and the undertaking shall either repair or replace, failing which a refund must be made to the consumer.

5. CONCLUSION

This paper has focused on the critical examination of regulatory regimes for enforcement of consumer rights in food and drugs through labelling and advertisements. It treated these two headings as informational tools within the regulatory framework for consumer protection. Thereafter, it considered the legal and regulatory regimes for the enforcement of those rights under the broad headings of the regulatory/administrative regime, the criminal regime, and the civil/ private law regime. Under the administrative and criminal headings, it finds that several laws and regulations are duplicative, while some, in terms of the custodial sentences, fines, and penalties, imposed needs and upward review to bring them into current realities as well as to make the consequences fit the crime. The paper crucially identifies several provisions of the FCCPA which are likely to give the consumer some respite when he elects to pursue and enforce his claims through the civil/private law regime by a claim in contract or tort, a pursuit which had hitherto been hindered by several identified common law principles of tort and contract.

[93] s. 140 FCCPA 2018.
[94] s. 145 FCCPA 2018.
[95] s. 131 FCCPA 2018.
[96] s. 132 FCCPA 2018.