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**FCCPC Guidelines on Digital Lending –  
A Usurpation of the Powers of the CBN?**



## Introduction

In August 2022, the Federal Competition and Consumer Protection Commission (the “**FCCPC**” or “**Commission**”) released the ‘Limited Interim Regulatory/Registration Framework and Guidelines for Digital Lending, 2022’ (the “**Guidelines**”). This article examines the legality of the Guidelines including, (a) whether the Central Bank of Nigeria (the “**CBN**”) as opposed to the FCCPC should regulate the business of digital lending in Nigeria, and (b) the extent to which the Guidelines impact on the moneylender laws of the various States in Nigeria.

Amongst others, the article concludes that while the Guidelines tend towards regulatory overreach, it recommends that a prudent digital lender should out of an abundance of caution, comply with both the Guidelines and the requirements of the CBN.



## Purpose of the Guidelines

The Guidelines, according to the FCCPC, is the FCCPC’s approach to (i) regulating the digital lending space, and (ii) prescribing approval/registration requirements for the business of digital lending in Nigeria.

The necessity for a framework to regulate digital lending in Nigeria cannot be overemphasized. It is in fact a welcomed development given the distasteful approach by which some digital lenders conduct their business. An example that comes to mind is the unethical debt recovery methods employed by some digital lenders, which include the harassment of debtors’ contacts with no knowledge of the loans with spam phone calls and/or messages. There have also been complaints of exorbitant and unreasonable interest rates and tenors, all of which violate consumer privacy and fair lending rules and practices.

The FCCPC reported in March 2022, that pursuant to an Order of the Federal High Court procured by, and granted to the FCCPC, an inter-agency Joint Regulatory and Enforcement Task Force (“**JRETF**”) made up of the FCCPC, the National Information Technology Development Agency, and the Independent Corrupt Practices Commission, executed a search and seizure order on certain digital lenders.<sup>1</sup> The FCCPC in August 2022 also reported that it ordered Google Play Store to take down certain applications discovered to be created and operating in circumvention of existing investigative interventions, whose objective was the protection of citizens’ rights.<sup>2</sup> Thus, in furtherance of the

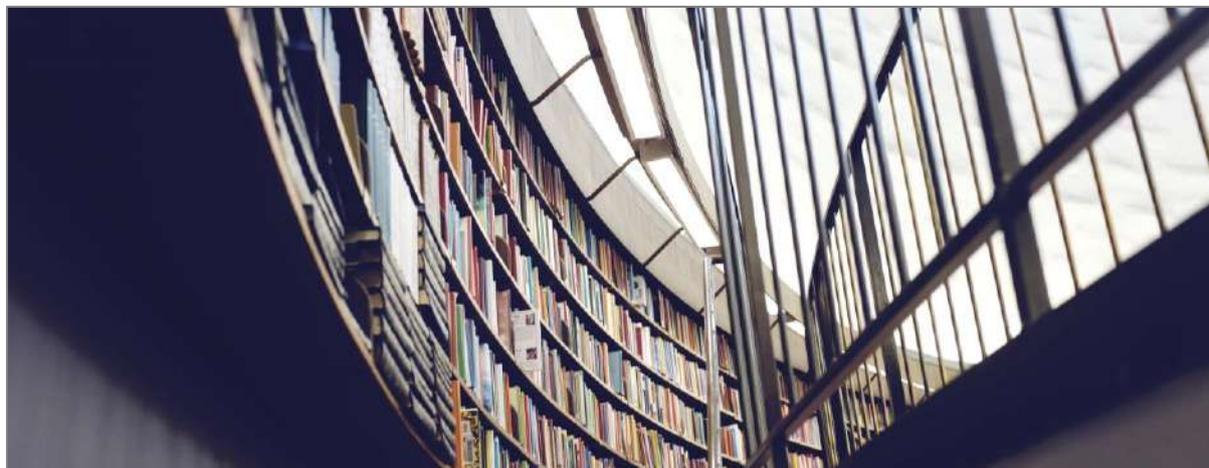
<sup>1</sup>(2022, March 14). *FCCPC, ICPC, EFCC, NITDA, NHRC AND CBN to Jointly Investigate Rights Violations in Money Lending Industry: Initial Enforcement Operations by Joint Task Force (FCCPC, NITDA AND ICPC)*. FCCPC. Retrieved December 15, 2022, from <https://fccpc.gov.ng/fccpc-icpc-efcc-nitda-nhrc-and-cbn-to-jointly-investigate-rights-violations-in-money-lending-industry-initial-enforcement-operations-by-joint-task-force-fccpc-nitda-and-icpc/>

<sup>2</sup>(2022, August 26). *Further Update: Further and Continuing Investigation of Rights Violations in Money Lending Industry; and Release of Interim Regulatory Framework*. FCCPC. Retrieved December 15, 2022, from <https://fccpc.gov.ng/further->

desire to promote fair, transparent, and mutually beneficial alternative lending opportunities, the JRETF developed and mutually adopted the Guidelines.<sup>3</sup>

### Provisions of the Guidelines

The Guidelines contain a form called the ‘FCCPC Interim Digital Lending Guidelines Form 001’ (“**Form 001**”). In addition to the provision of general corporate details of the digital lender, Form 001 also requires every digital lender to provide information on its source(s) of funding, interest rate regime, loan balance calculation methodologies, and a list of its computer software applications.



Form 001 is to be submitted along with (a) certified copy of certificate of incorporation, (b) brief description of the business, (c) organogram, (d) name and address of a correspondence agent, (e) evidence of membership in any trade or professional associations, (f) any service level agreements, (g) evidence of feedback and complaint resolution mechanism, (h) evidence of tax payments/tax waivers, (i) applicable fees, and (j) FCCPC Interim Digital Lending Guidelines Form 002 (Declaration for Digital Lending Businesses in Nigeria).

### Powers of the FCCPC vis a vis Powers of the CBN

The Guidelines is made pursuant to sections 17, 18, and 163 of the Federal Competition and Consumer Protection Act, 2018 (the “**Act**” or “**FCCPA**”). To be clear:

FCCPA, section 17 provides for the functions of the Commission, which generally is to regulate competition in Nigeria and to protect consumers’ interest.

FCCPA, section 18 provides for the powers of the Commission, which essentially authorizes the Commission to carry out its functions.

FCCPA, section 163 gives the Commission powers to make regulations and issue guidelines and notices for the effective implementation and operation of the FCCPA.

On the other hand, the CBN is responsible for the issuance of licenses to entities intent on carrying on business in the banking and finance sectors of Nigeria. The Banks and Other Financial Institutions Act, 2020 (“**BOFIA**”) authorizes the CBN to do so.<sup>4</sup>

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[update-further-and-continuing-investigation-of-rights-violations-in-money-lending-industry-and-release-of-interim-regulatory-framework/](#)

<sup>3</sup> *Ibid.* While the publication by the FCCPC states that the Guidelines was mutually adopted by the JRETF, there is no provision in the Guidelines to that effect.

<sup>4</sup> BOFIA, ss. 2 & 57.

To be sure, BOFIA does not define either ‘digital lending’ or ‘digital lending business’ *per se*. However, BOFIA defines ‘banking business’, ‘business of other financial institutions’, and ‘other financial institutions’ to cover such businesses as are also “conducted digitally, virtually or electronically.”<sup>5</sup>

Specifically, ‘other financial institutions’ includes a ‘finance company’.<sup>6</sup> ‘Finance company’ means a company providing financial services to individual consumers or enterprises such as consumer loans, micro, small and medium enterprises (MSMEs), fund management, asset finance, project finance, and so forth.<sup>7</sup> The Guidelines also do not define ‘digital lending’ or provide for its scope. Thus, it is fair and reasonable to deduce that the business of digital lending as envisaged under the Guidelines will be an ‘other financial institution’ carrying on digital finance business.

### Should the CBN or the FCCPC regulate digital lending?

The CBN, without doubt, has the primary responsibility for the licensing and regulation of entities doing business in the banking and finance sectors of the Nigerian economy. Granted that it is imperative that the digital lending space be regulated, the Commission does not have the power to regulate the business of digital lending. Whilst the Commission may in certain circumstances, be authorized to regulate competition and protection of consumer interest in the digital lending space,<sup>8</sup> it is the author’s view that the Commission acted *ultra vires* in issuing the Guidelines.

The power of the Commission to regulate competition does not extend to regulating competition (including mergers and acquisitions) in the banking and finance sectors as that function falls squarely within the regulatory purview of the CBN. The FCCPC can only regulate matters on competition involving an entity to the extent that such entity is not a CBN licensee. To be sure, BOFIA, section 65(1) provides that “[t]he provisions of the [FCCPA] shall not apply to (a) any function, act, financial product, or financial services issued or undertaking, and transaction howsoever described by a bank or other financial institutions licensed by the [CBN]; and (b) the [CBN], [its governor, deputy governors], or other executive officer or staff of the [CBN].”<sup>9</sup>

It is arguable that the scope of the Guidelines is limited to competition and the protection of consumer interest in the digital lending space. However, the language of the Guidelines which expressly states that it is “the Commission’s approach to regulating the digital lending space and makes provisions for the requirements for approval/registration to carry out the business of digital lending in Nigeria” suggests otherwise. Further, the FCCPC has limited powers in relation to entities and activities licensed by the CBN<sup>10</sup> and the CBN currently has in place, a robust consumer protection framework. That is, the CBN Consumer Protection Framework, 2016 and the CBN Consumer Protection Regulations, 2019.

### Other Issues

- (a) Implementation and Enforcement – The Guidelines make no provision for its implementation and enforcement. This begs the question as to whether the Guidelines is merely a recommendation with no mandatory obligation on digital lenders. This does not appear to be the case as the FCCPC has by an order, required digital lenders to comply

<sup>5</sup> BOFIA, ss. 2(1), 57(1)(2), 131.

<sup>6</sup> BOFIA, s. 131.

<sup>7</sup> CBN Revised Guidelines for Finance Companies in Nigeria, 2014.

<sup>8</sup> An example is a merger between a CBN licensee and a non-CBN licensee. The approval of the FCCPC should be sought as an additional measure, especially where the resulting entity will be a non-CBN licensee.

<sup>9</sup> See also BOFIA, ss. 53, 61, 65. For a fuller analysis on this point, see (2021). Mergers and Acquisitions in the Banking Sector: An Examination of Separation of Powers Amongst Regulators. *The Gravitas Review of Business & Property Law*, 12(2). Retrieved December 11, 2022, from <https://gravitasreview.com.ng/shop/mergers-and-acquisitions-in-the-banking-sector-an-examination-of-separation-of-powers-amongst-regulators/>

<sup>10</sup> *Ibid.*

with the Guidelines within a stipulated time to avoid interruptions to their business activities.<sup>11</sup>

- (b) Lacking details and context – The Guidelines lack necessary details, thus inhibiting clarity and making it susceptible to ambiguity. For example, ‘digital lending’ which is the crux of the Guidelines is not defined. This leaves much to the imagination and the possibility of multiple interpretations as to the scope and applicability of the Guidelines.

### Food for thought - Moneylenders licensed by States in Nigeria

It is not altogether clear if the FCCPC’s issuance of the Guidelines suggests an intention on the part of the FCCPC to also regulate the business of moneylenders, an activity that is currently outside the regulatory ambit of the CBN. For example, in Lagos State,<sup>12</sup> a moneylender (who is not a cooperative society, body corporate empowered by a special enactment to lend money, bank, insurance company, or pawnbroker) is required annually to take out a license for its business.<sup>13</sup>

The Lagos State Law defines a ‘moneylender’ to include *“every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business, whether or not he also possesses or owns property or money derived from sources other than the lending of money and whether or not he carries on the business as a principal or as an agent”*.<sup>14</sup> This also includes any person who lends money at interest or who lends a sum of money in consideration of a larger sum being repaid.<sup>15</sup>

Prior to 1990, moneylending was regulated concurrently by the Federal and State Governments of Nigeria through the Moneylenders Act, 1939 (the **“Moneylenders Act”**) and the Moneylenders Laws of the various States of the Federation respectively, all of which originated from the English Moneylenders Act, 1927.<sup>16</sup> It has been reported that the Moneylenders Act, 1939 was repealed,<sup>17</sup> leaving the regulation of moneylending to the Moneylenders Laws of the various States in Nigeria.<sup>18</sup>

It is arguable that the FCCPC’s role to protect consumers can be extended to moneylenders. However, the FCCPC cannot regulate the actual business of moneylending as that currently falls within the rights

<sup>11</sup> By an order and notice of the Commission on August 17, 2022, existing digital lenders were required to comply with the Guidelines not later than ninety (90) days. The deadline expired on November 14, 2022, and has been extended by the FCCPC to January 31, 2023. See (2022, December 6). *EXTENSION OF TIME FOR THE REGISTRATION OF DIGITAL MONEY LENDERS (DMLS) UNDER THE INTER-AGENCY JOINT TASK FORCE’S LIMITED INTERIM REGULATORY/REGISTRATION FRAMEWORK AND GUIDELINES FOR DIGITAL LENDING 2022*. FCCPC. Retrieved December 15, 2022, from <https://fccpc.gov.ng/extension-of-time-for-the-registration-of-digital-money-lenders-dmls-under-the-inter-agency-joint-task-forces-limited-interim-regulatory-registration-framework-and-guidelines-for-digital-lending-2/>

<sup>12</sup>The Moneylenders Law of Lagos State, 1939 (the **“Lagos State Law”**) has been omitted from the latest edition of the Laws of Lagos State (2015). The index indicates that it is ‘spent and omitted’, which is noticeably different from the laws that were categorized as ‘repealed’. Also, mere omission of a legislation from an edition of laws does not amount to a repeal of the said legislation. See *Ibidapo v. Lufthansa Airlines* (1997) LPELR-1397 (SC). Moreover, as at the date of this article, moneylenders’ licenses are still being processed by Lagos State in accordance with the Lagos State Law.

<sup>13</sup>The Lagos State Law, ss. 2, 4. Also, while it is not expressly provided for in the Lagos State Law, it is the understanding that Lagos State is more inclined to grant moneylending licenses to corporate applicants when compared to individual applicants.

<sup>14</sup> The Lagos State Law, s. 2.

<sup>15</sup> The Lagos State Law, s. 4.

<sup>16</sup> Eja, E. E., & Basse, E. E. (2011). Money Lending Law and Regulation of Consumer Credit in Nigeria. *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 2, 190. Retrieved December 11, 2022, from <https://www.ajol.info/index.php/naujili/article/view/82404/72558>

<sup>17</sup> Sagay, I. E. (2000). *Nigerian Law of Contract* (2nd ed., p. 380). Spectrum Books Limited. During the course of writing this article, there was no readily available information on the law that repealed the Moneylenders Act. The Moneylenders Act is still contained in the Laws of the Federal Capital Territory, 2006 (M-1, Chapter 525, Volume 3). In any case, as earlier stated in Footnote 11, the omission of a legislation from an edition of laws does not amount to a repeal of the said legislation.

<sup>18</sup> See Footnote 16.

of States in the Federation.<sup>19</sup> In the light of BOFIA and its predecessor,<sup>20</sup> the CBN should ideally primarily be responsible for the regulation of all financial institutions in Nigeria, including those engaged in the business of moneylending. This seems to have been the intention of BOFIA, as it provides that “[a]ny person or institution which, before the commencement of [BOFIA], was carrying on any business of other financial institution shall apply in writing to the [CBN] for a license within three months of the date of commencement of this Act.”<sup>21</sup>

However, the State laws on moneylending have not been repealed by BOFIA or any other federal enactment. For the time being, they still co-exist with BOFIA until a future law reform/harmonization of laws clearly addresses the apparent regulatory conflict and ambiguity in the moneylending space.

### Conclusion

While the power of the FCCPC to issue the Guidelines or regulate digital lending in general is mostly non-existent, out of an abundance of caution, a prudent digital lender should in addition to obtaining a license from the CBN, also comply with the Guidelines.

The Guidelines is stated to be an interim set of regulations. This pre-supposes that a fuller and finalized guideline on the subject will be issued in the future. As such, it is assumed that the current gaps and lacunae which have been discussed in this article will be eliminated in the finalized guidelines.



Furthermore, the Guidelines was developed and mutually adopted by the JRETF. However, it is unclear whether the CBN was part of the JRETF.<sup>22</sup> Going forward, it is recommended that regulations/guidelines released by regulators must be clearly defined and within their respective regulatory orbit to avoid contradictions and encroachment on the statutory powers of other regulators.

Amendment of the FCCPA to specifically carve-out CBN licensees from the FCCPC’s reach will be helpful. In addition, the CBN actively investigating consumer protection issues and enforcing its regulations on the same in the banking and finance sectors, especially as it relates to digital lenders may signal to the FCCPC that its attempt to regulate the same sectors constitutes a regulatory overreach and a usurpation of the powers of the CBN.

<sup>19</sup> 1999 Constitution of the Federal Republic of Nigeria (as amended), Schedule 2, Part I, Item 32 & Schedule 2, Part II, Items 17(d), 18 & 19.

<sup>20</sup> The Banks and Other Financial Institutions Act, 1991.

<sup>21</sup> BOFIA, s. 57(3).

<sup>22</sup> See Footnotes 1, 2 and 3.

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