



Digital lending and Abuse of Borrower's Rights: Multifarious and Chaotic Regulation

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INTRODUCTION

Nigeria's FinTech industry has grown phenomenally over the last decade. Financial products formerly thought to be the preserve of the few, are now accessible by many with relative ease. Personal loans, asset finance, and more have become attainable with a few well considered digital clicks. These financial products boast attractive features like short disbursement timelines, minimal paper-based bureaucracy and, for the most part, little or no physical collateral requirements. As a result, the access to capital gap for small and medium-sized enterprises, and low to middle income earners, is shrinking. But with digital lending has come alarming levels of unmitigated consumer rights abuse by FinTech operators. The exorbitant interest rates, fees, and unethical debt recovery methods for example, have increasingly captured regulatory attention.

The Federal Competition and Consumer Protection Commission ("FCCPC") has issued the *Limited Interim Regulatory/Registration Framework and Guidelines for Digital Lending, 2022* (the "*Guidelines*"), governing operators of digital lending schemes. The Guidelines will operate pending the development of a more comprehensive framework. They offer a fundamentally pragmatic approach to digital lending regulation. Notably, approval/registration requirements are now to be satisfied before commencing the business of digital lending in Nigeria. Players seeking to lend money, must also obtain one of several licenses: a money lender's licence issued by a State; a banking license issued by the Central Bank of Nigeria ("CBN"); or a finance company license issued by the CBN, allowing finance companies to provide consumer and asset loans, among others. Bearing in mind its animating philosophy, this paper examines the Guidelines' likelihood to affect a positive impact on digital lending services in Nigeria.

REGISTRATION WITH THE FCCPC

Registration with the FCCPC requires digital lenders to comply with mandatory Know Your Customer (KYC) type disclosures by filling a Form DGL 001. These include providing information regarding the identity and nationality of the promoters and directors, source of funds, affiliations with other companies whether national or international, disclosures relating to operational matters like proposed interest rate regime, and loan balance calculation methodologies. Digital lenders must also provide certified proof of incorporation, evidence of membership in any trade or professional associations, operational service level agreements (excluding administrative type service level agreements), proof of tax payments and/or tax waivers as applicable, information regarding licenses which authorise business operations and a list of all apps in operation or intended for operation.

Additionally, digital lending businesses must file a Form 002, declaring ongoing and future compliance with applicable legislations; the Federal Competition and Consumer Protection Act, 2018 (FCCPA), the Nigeria Data Protection Regulation 2019 (NDPR), and Nigeria's anti-money laundering regime. They must also commit to protection of third-party privacy and personal data rights, including lending and recovery practices that are consistent with fair lending principles and make a declaration that the capital to be invested in the business has no origin or flow that is in violation of any law or proceeds of any illegal activity.

The import of this increased regulatory scrutiny is to ensure that digital lending platforms are not used to finance illegal or criminal acts. It would also enhance protection of borrowers against oppressive lending practices. Furthermore, it would help to ensure that the data privacy rights of borrowers or other persons that access the digital lending platforms are protected according to international best practices and standard.

FCCPC'S REGULATORY POWERS VS CBN'S

The Guidelines may have set the FCCPC and the CBN on course for a jurisdictional tug of war. The FCCPA empowers and positions the FCCPC at the vanguard of Nigeria's consumer protection landscape. However, as it pertains to banking activities and the regulation of other financial institutions, the Banks and Other Financial Institutions Act (BOFIA) 2020 similarly gives the Central Bank of Nigeria (CBN) the primary responsibility to supervise and regulate. When given the most permissible encompassing interpretation, financial institutions would include money lenders – be they digital operators or otherwise.

This potential overlap scenario was in contemplation by the BOFIA 2020's draftsman. In its section 65(1)(a), the BOFIA 2020 provides that the FCCPA shall not apply to any function, act, financial product, or other financial services issue or undertaking and transaction howsoever described, by a bank or other financial institution licensed by the Central Bank of Nigeria (CBN). On its face, this seems to divest the FCCPC of any authority to regulate digital lenders licensed by the CBN. By extension of that reasoning, the FCCPC would have the mandate to regulate non-CBN licensed digital lenders; like the unlicensed digital money lenders and digital money lenders that have obtained their licenses from a state.

It must be emphasized that the primary mandate of the FCCPC is to protect the interests of consumers irrespective of whatever industry such consumers operate. No law can impede or take away the primary mandate of the FCCPC in this regard, therefore irrespective of section 65(1) (a) of BOFIA stated above which prohibits the provisions of the FCCPA from applying to finance products or other financial services, the FCCPC has the right to make laws to protect the interests of consumers of these financial products or services.

Considering the above, this implies that the issuance of the Guidelines by the FCCPC was not done with the intention to encroach on the powers of the CBN but with the aim of complementing CBN's regulatory powers especially as they relate to protecting the rights of the consumers of financial services from the unwholesome and unethical practices of the operators of digital lending platforms. Hence, the presumption is that the underlying ethos behind the issuance of the Guidelines by the FCCPC is to provide the FCCPC with the necessary regulatory backing to address the arbitrary lending practices of digital lending platforms, which has been necessitated by the large number of complaints received from consumers that has accessed services on these digital lending platforms.

Although the business of lending is within the regulatory ambit of the CBN, the nature of some areas of the operations of banks and other financial institutions may necessitate additional regulatory oversight from other regulators. For instance, the Nigerian Communications Commission (NCC) introduced the use of USSD short-codes which facilitates access to banking/financial services including lending products as a complementary Value-Added Service enabling financial inclusion. The introduction of this codes nonetheless does not imply that the NCC regulates money lending businesses in Nigeria. Instead, the NCC only regulates the licensing of the USSD short-codes to the telecommunication companies or the value-added service providers. The same goes for the National Information Technology Development Agency (NITDA) which regulates the processing of personal data by banks and other financial institutions.

However, irrespective of the foregoing, it is quite obvious that there is lack of uniformity and collaboration between all the regulators involved. A lack or absence of coordination between these regulators portends chaos for a borrower or consumer whose rights have been abused by the service

providers or digital lenders. In fact, this complexity applies to all sectors; where though a service provider is licensed by one regulatory authority, it however rides on the back of some other underlying service providers (with whom the ultimate consumers do not have any direct contact) who are regulated by some other regulatory entity/entities. Considering the above, it is recommended that the FCCPC and other entities involved in providing financial services embrace a collaborative regulatory approach with the CBN toward regulating digital lending platforms and financial services as a whole to enhance uniformity, coordination and harmony, for the overriding goal of protecting the ultimate interests and rights of the consumers.

EFFECT OF THE GUIDELINES

The Guidelines do not explicitly define digital lending or delineate the scope of its application. Hence, it is not entirely clear whether existing digital lending license holders are exempt from registration with the FCCPC under the Guidelines. Therefore, (in the absence of an express provision) one may be compelled to imply that all lenders operating through digital platforms are required to register with the FCCPC.

The Guidelines make an important omission. They do not include provisions which would give it teeth and thus ensure compliance and effectiveness. As it currently sits, no penalty or sanction would apply to digital lenders who fail to register with the FCCPC. This may create a situation where the Guidelines are honoured more in breach.

CONCLUSION

The Guidelines on their face will help to solve the obvious lacuna in regulation of digital lenders and platforms that are not directly licensed by the CBN or who operate without any form of regulatory supervision. Certainly, the Guidelines would assist to protect and safeguard the consumers who use the services of digital lenders from arbitrary and unethical practices. In this regard, the Guidelines have an important strategic mandate to further deepen financial inclusion and unlock access to capital in the middle to low-income segments of the Nigerian population, who are the real catalysts for Nigeria's untapped economic potential.

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