

EXECUTIVE SUMMARY OF THE RESTRICTIVE AND TRADE PRACTICES REGULATION, 2022



By: Jemimah Bestmann



Solola & Akpana
(Law Firm)

Introduction

The Restrictive and Trade Practices Regulation, 2022 (“The RTPR or the Regulation”) was established to provide a regulatory framework for the implementation of Part VIII and some aspects of Part XIV of the Federal Competition and Consumer Protection Act, 2018 (“the Act”), these Parts of the Act deal with restrictive agreements and all matters related thereto.

Restrictive agreements are described in Section 59 (1) of the Act, as “*agreements among undertakings or decisions of an association of undertakings that has the purpose of actual or likely effect of preventing, restricting or distorting competition in any market*”.

The RTPR is aimed at providing guidance on the regulatory review process for agreements or decisions

and clarifying the process for authorisation of exempted agreements and practices among undertakings.

Highlights of the Regulation

Assessment of Restriction of Competition

In assessing the nature of an agreement which is restrictive to competition, the Federal Competition and Consumer Protection Commission (“the Commission”) shall distinguish between those agreements that have a restriction of competition as their purpose (“purpose-based restriction of competition”), and those agreements that have a restriction of competition as their effect (“effects-based restriction of competition”).

Purpose Based Restriction of Competition

Purpose-based restrictions are those restrictions that by their very nature have the potential to restrict competition. These agreements are clearly inimical to effective competition on the market and are by their very nature in clear contravention of Section 59 (1) of the Act, therefore they need no further investigation as to its anti-competitive effect in the market. Regulation 3(4) of the Regulation provides an analysis of Agreements that fall under the Purpose Based Restriction of Competition, these agreements are; *Horizontal Agreement and Vertical Agreements*.

- (a) Horizontal Agreements: These are Agreements between competitors/entities at the same chain of distribution. The agreements that fall under the

Horizontal Agreement as set out by the Regulation are:

- (i) Price fixing
- (ii) Market/customer allocation
- (iii) Output limitation and
- (iv) Collusive tendering

(b) Vertical Agreements: These are agreements between entities at different chain of distribution. The agreements that fall under the Vertical Agreement as set out by the Regulation are:

- (i) fixed and minimum resale price maintenance
- (ii) restrictions on passive sales



Where the Commission finds that an agreement contains a purpose-based restriction of competition as enumerated above, the agreement shall be illegal and will be unlikely to be justified on efficiency grounds.¹

Effect Based Restriction of Competition

Regulation 3(6) of the Regulation provides that although an Effect Based Restriction of competition may not by its very nature be automatically inimical to competition, it may have the effect of negatively affecting prices, output, variety, innovation, and quality of goods on the market and/or appreciably reduce competition between the parties to the agreement or between any one of them and third parties.

Where the commission is satisfied that the Effect Based Restriction of competition has similar characteristics as that of the Purpose Based Restriction of competition in the sense that the nature of it is one that restricts competition, such agreement shall be illegal and is unlikely to be justified or exempted under efficiency grounds.

However, where an Effect Based Restrictions does not have similar characteristics as that of the Purpose Based Restriction, the Commission shall allow such Agreement, particularly where it is satisfied that the pro-competitive effect of such agreement outweighs the anti-competitive effect on competition and the contracting parties can demonstrate that it falls within a potentially applicable block exemption as provided under the Regulation or can be explicitly justified on efficiency grounds.

Scenario 1

- (a) Company B produces strawberry flavoured yogurt and sells in Nigeria.
- (b) Company A is the only entity in Nigeria that plants and sells strawberry's on a large scale.
- (c) Company A and Company B enter an Agreement, whereby Company B is the sole buyer of bulk strawberry from Company A whilst also assisting Company's A local small packaged sale of strawberry's in the northern part of Nigeria.

Although on the face of it, this agreement may not be restrictive, its effect on the market would be one that would render competitors helpless as they would have no recourse but to import strawberries.

Nature and content of an Agreement which may be restrictive to competition.

The nature and content of an agreement may restrict competition where it:

- (a) Is exclusive in the sense that it limits the possibility of the parties to compete against each other or third parties as independent economic operators or as parties to other, competing agreements;
- (b) Requires the parties to contribute such assets that their decision making independence is appreciably reduced;
- (c) Touches on the parties' financial interests in such a way that their decision-making independence is appreciably reduced with all financial interests in the agreement and also financial interests in other parties to the agreement being relevant for the assessment;
- (d) leading to the disclosure of strategic information thereby increasing the likelihood of co-ordination among the parties within or outside the field of the cooperation;
- (e) achieves significant commonality of costs (that is to say, the proportion of variable costs which the parties have in common), so the parties may more easily coordinate market prices and output;

Market Share Threshold

Regulation 9 of the Regulation provides that there are certain Agreements between entities that may possess elements of restriction to competition, however, the Commission holds the view that agreements between entities do not

¹ See Paragraph 2.4

appreciably restrict competition when;

- (a) In cases where the Agreement is between competitors, the agreement is not restrictive to competition if the aggregate market share held by the parties to the agreement does not exceed 10 % on any of the relevant markets affected by the agreement.
- (b) In cases where the Agreement is between non competitors, if the market share held by each of the parties to the agreement does not exceed 15 % on any of the relevant markets affected by the agreement.
- (c) In cases where it is difficult to ascertain whether or not the agreement is between competitors or non-competitors, the aggregate market share held by the parties to the agreement must not exceed 10 % on any of the relevant markets affected by the agreement.

However, in cases where there exists cumulative effect of agreements for the sale of goods or services entered into by different suppliers or distributors, the market share threshold for both competitors and non-competitors must not exceed 5% in the relevant market.

It is worthy of note that these thresholds do not apply to agreements that are clearly purpose-based.

Conditions under Section 60 of the Act

The Efficiency Condition

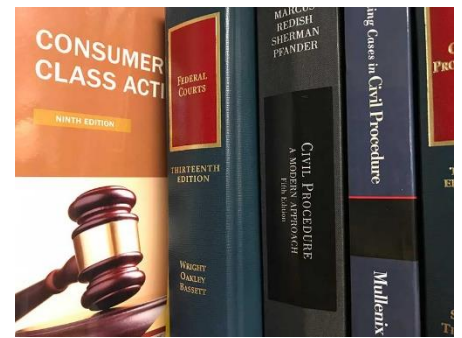
Efficiency ground is provided for under section 60 of the Act as an exception to section 59 (1) of the Act, where the Commission is satisfied that although an agreement has characteristics of anti-competition, the agreement has a positive impact on the market in the sense that it

allows a positive improvement on the market, allowing consumers a fair share of the resulting benefits; the agreement imposes on the entities concerned restrictions which are indispensable to the attainment of the objectives of improving production or distribution of goods and services or promoting technical or economic progress and the agreement does not have the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.

Scenario 2

- (a) Company X is a mega company in the milk producing business and produces instant milk for adult consumption in Nigeria
- (b) Company Y is a semi-mega milk producing company that produces instant milk for infant consumption in Nigeria
- (c) Company X and Company Y agree to form an alliance, producing a brand of milk consumable by both adults and infants and said milk is fixed at a high price.

Ordinarily, this Agreement is restrictive to competition as it not only creates an anti-competitive market but fixes the prices to be sold at the down-line level. However, if the parties make a case that this Agreement falls under the Efficiency condition and upon investigation by the commission it is satisfied that the end result of the Agreement is indeed beneficial to the consumers, the Efficiency ground shall become a defence to this Agreement.



The Indispensability Condition

Regulation 15 of the Regulation spells out the two-fold tests as implied by Section 60 of the Act.

- (a) The restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies. In order for this test to result in the positive, the efficiencies must be specific to the agreement in the sense that:
 - (i) There are no other economically practicable and less restrictive means of achieving the efficiencies;
 - (ii) The assessment shall be underpinned by the market conditions and business realities facing the parties to the Agreement; and
 - (iii) Undertakings invoking the benefit of Section 60 of the Act are not required to consider hypothetical or theoretical alternatives.
- (b) The individual restrictions of competition that flow from the agreement must be reasonably necessary for the attainment of the efficiencies.

Condition for Fair Share for Consumers

Consumers under the Act comprises all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers, and final consumers; consumers are also the customers of

the parties to the agreement and subsequent purchasers.

Relatedly, Fair share under the Act means that the pass-on of benefits must, at a minimum, compensate consumers for any actual or likely negative impact caused to them by the restriction of competition and as such the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely to be affected by the agreement; and if such consumers are worse off following the agreement, the consumer fair share condition is not fulfilled.

Furthermore, Regulation 16(4) of the Regulation provides that if a restrictive agreement is likely to lead to higher prices, consumers must be fully compensated through increased quality or other benefits, otherwise, the consumer fair share condition is not fulfilled.

Block Exemption

The Commission may authorise agreements found to be restrictive in one of these cases;

- (a) Individual cases or agreements where a restriction of competition has been found;
- (b) Agreements and concerted practices, where a restriction of competition exists by way of block exemption.

An Agreement covered by Block exemption is one where parties to the restrictive agreement are relieved of

their burden of showing that their individual agreement satisfies each of the Efficiency conditions as set out by Section 60 of the Act and they only must prove that the restrictive agreement benefits from a block exemption.

Criminality of Restrictive Agreements

Where the Commission considers that an agreement restricts competition and is unlawful the Commission shall then determine, based on evidence in its possession or to be gathered, the criminal process or the administrative process applicable to the agreement.

The material nature of the agreement I.e., whether the agreement was oral or written is inconsequential, the Commission shall carefully consider the agreement and once it is satisfied that parties to the alleged agreement or decision reached a “meeting of minds”, either explicitly or tacitly, to engage in the conduct, the act is illegal and punishable by either a fine Or imprisonment and both punishment in some cases.

Applicability of the punishment

The penalties provided for in the Act are Applicable to both natural persons and a body corporate (entity). An entity may be subject to prosecution as a result of an agreement between their respective employees if they are acting as senior officers. The senior officers of an entity include; chief executive officer, chief financial officer, chief operating officer,

controller and such other officers of the entity as may be designated as Senior Officers from time to time by the entity’s board of directors.

Notification for Guidance

All parties are under obligation to assess that the terms of their agreements are not restrictive to competition. Where a party is uncertain whether or not the agreement or decision sought to be entered is restrictive to competition, the party may apply to the Commission for assessment of the agreement for the purpose of receiving guidance or authorisation from the Commission.

Where such application is made, the Commission shall within 40 (forty)



business days of receiving such application, give the applicant guidance as to whether, in its view, the agreement or decision is restrictive to competition and whether it authorises the agreement.

Conclusion

The Regulation provides an insight on the application of the Act and affords further direction. It is our opinion that this Summary simplifies the regulation and shall act as a guide, enabling you to conduct business

transactions within the ambit of the provisions of the Act.

