

THE CHANGING LANDSCAPE:

FEDERAL COMPETITION AND CONSUMER
PROTECTION ACT



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AN APPRAISAL OF RESTRICTIVE AGREEMENTS UNDER THE FEDERAL COMPETITION AND CONSUMER PROTECTION ACT

Introduction

The enactment of Nigeria's first comprehensive competition legislation has introduced some interesting considerations into the manner and structure in which businesses can be undertaken in Nigeria. It is a given fact that a business will negotiate and agree to market practices which ensures that it keeps its fair share of the market and where possible, increase its stakes if allowed.

Typically, the principle of freedom of contract affords contracting parties the liberty to negotiate the terms or conditions under which they carry out their business transactions. However, competition laws are often introduced to ensure that businesses do not adopt over-reaching restrictive agreements or trade practices in a manner that prevents fair competition or confer unfair advantage on a business at the expense of other players in the market. This paper examines the provisions of the Federal Competition and Consumer

Protection Act, 2019 ("FCCPA") on restrictive agreements and provides practical recommendations for businesses in the light of these provisions.

What are Restrictive Agreements?

Restrictive Agreements are agreed trade practices or business arrangements which prevents fair competition within a market either by controlling prices, conferring unfair advantage or by influencing the availability of goods in a market.

Examples of restrictive market practices include price fixing, market allocation, limitation of production/distribution of goods and services, collusive tendering and tied selling.

Restrictive Agreements under the FCCPA

A core objective of the FCCPA is to *"prohibit restrictive or unfair business practices which prevent, restrict or distort competition in*

Nigeria". In line with this purpose, the Act prohibits all agreements which contains or promote restrictive trade practices in Nigeria. Such agreements are unlawful, void and of no legal effect, except where they fall within permissible exceptions, or are approved or authorised by the Federal Competition and Consumer Protection Commission ("the Commission") on justifications recognised under the Act.

The impact of these provisions is that businesses can no longer restrict competition or carry on acts which can confer undue advantage on them in the market. For instance, the pricing of goods and services will be driven by market forces and suppliers will no longer be able to protect their market share or determine the price of their goods in the hands of retailers or secondary dealers through uncompetitive means.

The FCCPA also prohibits any agreement restricting a business from buying or selling goods and services with the intention of harming the business of a third party. With respect to suppliers, the FCCPA prohibits all agreements to withhold supply of goods and services from resellers; or recover penalties from these resellers simply because the resellers have resold at a price different from the suppliers' price. The suppliers are also prohibited from offering less favourable terms to resellers who have breached any condition relating to the suppliers' price.

Furthermore, the FCCPA prohibits businesses from fixing a minimum retail price on goods and services in Nigeria. Any clause in an agreement that attempts to fix

a minimum retail price on goods and services will be void. However, a supplier is permitted to lawfully fix and publish a recommended resale price for its goods and services.

Authorisation of Restrictive Agreements by the Commission

Despite the sweeping provisions of the Act on the illegality of restrictive agreements, the Commission is empowered to authorise or approve a restrictive agreement where it is satisfied that the agreement satisfies certain criteria:

Firstly, the undertaking must demonstrate that the agreement either contributes to the improvement of production or distribution process of goods and services or promotes technical/economic progress whilst allowing the consumers to enjoy the resulting benefits.

Secondly, it must be demonstrated that the restrictions imposed by the agreement are indispensable to either the achievement of improved goods and services or the promotion of technical or economic progress with the consumers being the major beneficiaries of the agreement. Thus, the delineation of franchise areas for distribution companies in the power sector may be regarded as permissible market division which will lead to the provision of improved electricity for the populace.

Finally, representations must be made to show that the agreement has no possibility of eliminating competition in respect of a substantial parts of the goods or services concerned.

Exceptions

The following restrictive agreements /arrangements are not prohibited under the FCCPA:

- i. Trade union activities;
- ii. Collective Bargaining Agreements on behalf of employees for the determination; of minimum wage amongst others;
- iii. Restrictions based on ethics and standards of a professional body;
- iv. Partnership Agreements;
- v. Restraint of trade clauses in contracts of employment;
- vi. Non-compete clauses in Share Sale and Purchase Agreements;
- vii. Restricted professional services as may be published by the relevant professional body.

The Commission is also empowered to grant further exemptions from time to time.

Complaints and Remedy for Restrictive Agreements

Any person or business who suffers a loss as a result of a restrictive agreement or practice can make a complaint to the Commission. The Act empowers the Commission to, either on its own or upon receipt of a complaint, serve a Cease and Desist order against a defaulting party. The Commission is also empowered to make interim orders suspending the contract pending conclusion of investigation.

Where a party is unsatisfied with the decision of the Commission on such complaint, such a party can apply to the Tribunal established under the Act for a review.

Offences and Penalties for Breach

Any individual who enters into an unlawful restrictive agreement or disobeys the cease and desist order of the Commission shall be guilty of an offence punishable with a sentence of imprisonment for a term of 5 years or a fine not exceeding N5,000,000.00 (Five Million Naira) or both.

A corporate body found guilty of unlawful restrictive agreement or disobeying the Commission's order shall be liable to a fine up to 10% of its turnover for the preceding business year. All directors of the company may also be prosecuted and on conviction shall be liable as individual defaulters.

Practical Recommendations for Companies

Companies are advised to undertake a review of all existing agreements and commercial arrangements including joint venture agreements and distribution agreements to ensure compliance with the provisions of the FCCPA. Where companies are in breach of the law, appropriate counsel should be sought to determine whether there is a justification for seeking authorisation from the Commission and the procedure to make representations on this basis to the Commission.

In addition to the above, it is recommended that the companies put in place compliance training programmes for their employees and directors on issues relating to restrictive agreements and practices.

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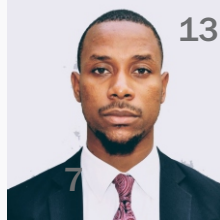


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