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Restrictive Agreements Under the Federal Competition and Consumer Protection Act: Part 2

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INTRODUCTION

A restrictive agreement or contractual restraint is only prohibited under Section 59(1) of the Federal Competition and Consumer Protection Act ("**the Act**") if the agreement or contract has the purpose or effect of being in restriction competition. "Restriction of competition" shall be used as shorthand for preventing, restricting and distorting competition[1]. Pursuant to Regulation 4(1) of the Restrictive Agreement and Trade Practices Regulations 2022 ("**Regulations"**), an inquiry if an agreement is an infraction of Section 59(1) of the Act is a 2 step process:

- assessing whether the agreement has the purpose of restricting competition ("**Purpose Based Restriction**") or produces the effect of restricting competition ("**Effect Based Restriction**"). The use of the word "include" in Section 59(2) of the Act means that the list of agreements and practices listed in Section 59(2) of the Act are not exhaustive of anticompetitive agreements but merely serves as an indicative list of agreements and practices that are subject Purpose Based Restriction or Effect Based Restriction;
- if the agreement is found to be offending Section 59(1) of the Act because it is caught under a Purpose Based Restriction or Effect Based Restriction, the Federal Competition and Consumer Protection Commission ("**Commission**") will assess whether the agreement will produce some pro-competitive benefits such as efficiencies and if the pro-competitive benefits exceed and outweigh the anti-competitive effect[2].

The subject of this Part 2 of our Competition Law Series on Restrictive Agreements and Trade Practices are agreements that are subject to the Purpose Based Restriction.

Section A: Purpose Based Restriction

1. Is the Purpose Based Restriction analysis and Effect Based Restriction Analysis Cumulative?

No. Where an agreement is found to be prohibited under a Purpose Based Restriction analysis, the need to assess the actual or potential effect of the agreement under the Effect Based Restriction does not arise. Only where it is uncertain that the purpose of the agreement is to restrict competition will the Commission consider it necessary to investigate whether the agreement might have the effect of restricting competition. Agreements and arrangements subject to Purpose Based Restrictions or Effect Based Restrictions can be diagrammatically represented in Diagram 1 below:

Purpose Based Restriction		Effect Based Restriction
Horizontal Agreements • Price Fixing • Market/Customer Allocation • Output Limitation • Collusive Tendering Vertical Agreements • Fixed and Minimum Resale Price	**OR**	• Tying Agreements • Exclusivity Agreements • Joint Ventures

[1] Reg. 3(2) Restrictive Agreement and Trade Practices Regulations, 2022 (Regulations)
[2] Reg. 4 of the Regulations

2. What is the Nature of Agreements Subject to a Purpose Based Restriction?

Agreements subject to a Purpose Based restriction are those that by their very nature have the potential of restricting competition[3]. Agreements caught under the Purpose Based Restriction are agreement and practices which because of their potential pernicious effect are bereft redeeming virtues. Thus, agreements caught under the Purpose Based Restriction are presumed to be anti-competitive and do not require elaborate investigation as to the exact competitive harm the agreements will have in the relevant market. As leading authors, Richard Whish and David Bailey describes it, just as the law prohibits driving under the influence of alcohol does not require an accident similarly, an agreement subject to a Purpose Based Restriction does not need proof of the economic effect of such agreement. Therefore, agreements prohibited on a Purpose Based Restriction Basis are proscribed on the fact that the agreement or concerted practice in fact occurred and not the effect of the agreement or concerted practice on the market.

3. Why will the Commission neglect an Effect Based Restriction Analysis upon a Positive finding of Purpose Based Restriction

The reason for dispensing with an Effect Based Restriction analysis following an affirmative finding of a Purpose Based Restriction include the following:

- identifying agreements as subject to a Purpose Based Restriction conserves the limited time and resources of the Commission, since the agreements are by their purpose intended to restrict competition and do not need an Effect Based Restriction analysis;
- Categorization of an agreement as Purpose Based Restriction creates legal certainty that allows undertakings to calibrate and adopt their market conduct in compliance with the Act

4. Can an Agreement or Practice subject to Purpose Based Restriction be Redeemed under Section 60 of the Act?

Regulation 3(5) of the Regulations stipulate that agreements and practices subject to a Purpose Based Restriction is unlikely to be justified under Section 60.

5. Categories of Agreement Caught under Purpose Based Restriction

As stated earlier, Purpose Based Restrictions accommodates agreements and practices that are obviously designed to restrict competition and are by their very nature inimical to the proper functioning of effective competition in the market. Section 59(2) of the Act and Regulation 3(4) of the Regulations provides an inexhaustive list of agreements subject to the Purpose Based Restriction. Since Section 59(2) of the Act and Regulation 3(4) of the Regulations use the term "includes" the Commission and the Competition and Consumer Protection Tribunal may extend the scope of agreements caught under the Purpose Based Restriction provided that such agreements are examined against the background of their content, the economic context and the actual conduct and behaviour of the parties to the agreement[4].

Agreements prohibited under Regulation 3(4) of the Regulations can be analysed from the horizontal agreement perspective and the vertical agreement perspective.

[3] Regulation 3(3) of the Restrictive Agreements and Trade Practices Regulations 2022 (Regulations)
[4] Reg. 5(1) of the Regulations

I. Horizontal Agreements

The indicative list of agreements subject to a Purpose Based Restriction from a horizontal perspective are as follows:

A. Price Fixing

Sections 59(2)(a) and Regulation 3(4)(a) of the Regulations prohibit any direct or indirect fixing of the purchase or selling price of a product.

1. What is Price Fixing?

Price fixing occurs when competitors directly or indirectly agree to increase, decrease or maintain prices of a product independently of the laws of demand and supply. Firms that participate in price fixing benefit because they are able to reap higher margins in the absence of cheaper products in the market while consumers pay a higher price determined by the erring firms[5].

2. Why is Price Fixing Categorized under Purpose Based Restriction?

The primary importance of price competition amongst competing undertakings is to keep prices down to the lowest possible level, therefore, price fixing amongst two or more undertakings erodes the freedom of the undertakings in the market to compete. Each seller has the freedom to change their prices while taking cognizance of the foreseeable or present response of their competitors, thus, it is contrary to the law for the undertakings to distort competition by engaging in collusive practices to fix prices. Price fixing is thus described as one of the most pernicious anti-competitive agreements or practices and when there is an agreement not to compete in terms of price, no elaborate industry analysis is required to demonstrate the anti-competitive character of such an agreement. Similarly, the Nigerian Communication Commission Competitive Practices Regulations 2007 ("NCC Regulations") in Regulation 12(2) thereof provides that rate fixing agreements are prohibited per se without the need for the assessment of their practical effect.

Box 1

The LIBOR Scandal was a highly publicized scheme in which bankers at several major financial institutions colluded with each other to manipulate the London Interbank Offered Rate (LIBOR). The Scandal sowed distrust in the financial industry and led to a wave of fines, lawsuits, and regulatory actions. Although the scandal came to light in 2012, there is evidence suggesting that the collusion had been ongoing since as early as 2003. This resulted in fraudulent interest payments estimated at $4 billion. Many leading financial institutions were implicated in the scandal, including Deutshe Bank (DB), Barclays (BCS), Citigroup (C), JPMorgan Chase (JPM), and the Royal Bank of Scotland (RBS).

See also Munene Kamau, "Price Fixing: Determining Price Against the Laws of Supply and Demand

3. What are the Forms of Price Fixing?

Price fixing can take various forms including but not limited to where undertakings or association of undertakings:

[5] Munene Kamau, "Price Fixing: Determining Price Against the Laws of Supply and Demand "Compedia March 21

- enter into naked price fixing arrangements stipulating the prices for the relevant product;
- agree, threaten, promise or by any other means attempt to influence or conspire to influence upward or discourage the reduction of the price at which any other undertaking supplies, offers to supply or advertise any goods or service[6];
- agree to refuse supply of products or otherwise discriminate against any undertaking because of the pricing policy of that undertaking[7];
- set a minimum below which prices are not to be reduced;
- stipulate the amount or percentage by which prices are to be increased or establish a range outside which prices are not to be moved;
- agree to notify each other of the prices they intend to charge their customers or consumers;
- agree to adopt similar accounting methods;
- agree to adhere to a particular price list; or
- fix or prohibit discounts, rebates or other financial concessions to customers and consumers.

Box 2

T"The Commission's preliminary investigation discloses the meeting dates of the AON [Airline Operators of Nigeria] to have been on or about 8 February 17 and February 23, 2022. The investigation also confirms that one of the items of discussion during at least one of the items for discussion during at least one of those meeting was to set a base or minimum air fares. The Commission's understanding from intelligence so far gathered is that there was significant controversy and or an initial lack of consensus with respect to coordinated conduct resulting in setting air fares. The Commission also had credible information that while attendees at the meeting may not have arrived at a consensus, the meeting ended in a resolution that encouraged, permitted or consented to the coordinated conduct. The Commission's understanding from the deliberations at the meeting is that the attendees engaged in mutual discussion and exchange of their respective revenue management models or other commercially sensitive information. In furtherance of the discussions and or resolution at the meeting, certain campions of the coordinated conduct of imposing a base fare or Minimum Resale Price (MSRP) for their services in a coordinated and contemporaneous manner proceeded to increase their fares to a minimum of N50,000 across all sectors. Specifically, Air Peace, Azman Air and United Nigerian Airlines immediately proceeded with the increase. Arik followed. However on Friday, February 18, 2022 at 6.31 pm Aero Contractors informed its trade partners (travel agents) and its commercial executives team by email that ticket fares were reviewed effective February 18, 2022 with the least fare being N50,000 across all routes. Aero Contractors noted in this communication that all other airlines have effected same increase. Within days, Max Air also increased fares to the same minimum N50,000. Ibom Air and Dana approximately 48 hours after what appears to be the initial coordinated conduct, also increased fares although not to the purported N50,000. Green Africa Airlines Limited maintained its existing fares between N33,000 and N38,650, but progressively increased its fares rising to approximately N47,000 on its Lagos-Abuja route on Wednesday February 23, 2022.

The FCCPA prohibits conduct or any coordination between competitors including on platform of trade associations. Specifically, Section 107(1) (a) forbids competitors from fixing prices and Section 108 prohibits any conspiracy, combination, agreement or arrangement between competitors in any manner that unduly restrains or injures competition... Further, the current and prevailing Nigeria Civil Aviation Regulations (Air Transport Economic Regulations) in Regulation 18.15.2 (i) and (iii) expressly prohibit airlines from engaging in any contract, arrangement, understanding conspiracy or combination in restraint of competition which includes directly or indirectly fixing a charge, fee, rate, fare or tariff and any collusive action... Although the investigation is at the early stages, there is sufficient probable cause to proceed and also to provide interim measures to restore free and undistorted domestic aviation market.

See fccpc.gov.ng for ""Interim Statement Regarding Coordinated Increase in Air Fares by Certain Scheduled Domestic Airline Operators accessed on 28 May 2022

[6] Section 107(1)(a) of the Act
[7] Ibid

4. Does the Prohibition on Price Fixing apply to Interconnected Undertakings?

No. The prohibition on price fixing does not apply where an undertaking attempts to influence the pricing conduct of another undertaking where the 2 undertakings are interconnected undertakings. Hence, the prohibitions on price fixing will not apply to price agreements between undertakings that are affiliates[8]. For the purposes of the Act, undertakings are treated as affiliates (a) when there is a parent company and subsidiary relationship between the undertakings within the meaning of Section 381 of the Companies and Allied Matters Act No. 3 2020 (CAMA); (b) the undertakings are subsidiaries of the same parent company within the meaning of the CAMA; and (c) the undertakings are affiliated with another undertaking in accordance with (a) and (b)[9]. Furthermore, the Court of Appeal ***in Federal Board of Inland Revenue v. Halliburton (WA) Limited***[10] described an affiliate as a company that is connected with or controlled by another larger company.

The rationale for exempting affiliates and connected undertakings is premised on the "single economic unit" doctrine to the effect that 2 or more legally independent persons can be considered a single economic entity because they pursue a common and specific economic aim for a considerable period of time. Hence, where the relationship between the undertakings is so close that they economically form a single economic entity (such as group companies), agreements between them are not regarded as prohibited price fixing but an internal allocation within a single economic unit. It is also important to note that the determination of the single economic unit depends on the control or decisive influence one of the undertakings have on the other.

For more discussion on control and decisive influence, see Seye Ayinla "Mergers and Acquisition: Principles and Practice" Chapter 3.

5. Does the Prohibition on Price Fixing apply to Agent/Principal Relationship?

No. The prohibition does not apply to principal agent relationships[11].

B. Market Sharing

Agreements between undertaking that divide markets by allocating customers, suppliers, territories or specific types of products among participating undertakings are subject to the Purpose Based Restriction[12]. In a market sharing arrangements, the participating undertakings agree to apportion the relevant product market and/or geographical markets amongst themselves. The vice of market sharing arrangement is the attrition of consumer autonomy because it restricts/reduces the preference of consumer with respect to products they wish to purchase or the geographical market from which they wish to purchase the product. Thus, market sharing arrangements are contrary to the provisions of Section 1(b) of the Act which expressly identifies one the objective of the Act as the protection and promotion of the interest and welfare of consumers by providing consumers with a wider variety of quality products at competitive prices.

C. Output Limitation

Section 59(1) of the Act, prohibits the limiting or controlling of the production or distribution of any goods or services, markets, technical development or investment. Similarly, Section 108 of the Act

[8] Section 107(2) of the Act
[9] Section 167(4) of the Act
[10] (2016) 4 NWLR 53 at 91
[11] Section 107(2) of the Act
[12] Reg. 3(4)(a) of the Regulations

also provides that an undertaking shall not conspire, agree or arrange with another undertaking to unduly: (i) limit facilities for transporting, producing, manufacturing, storing or dealing in or supplying any product (ii) prevent, limit or reduce the manufacture or production of any product or to unreasonably enhance the price of any product (iii) reduce competition in the production, manufacture, purchase, barter, sale, supply, rental or transportation of any product.

1. Why is Output Limitation Subject to Purpose Based Restrictions?

A restriction on output amongst competing undertakings results in a mismatch between supply and demand which may result in price increases.

2. Are Restrictions on Output Prohibited in All Circumstances?

No. The prohibition of Sections 59(2) and 108(1) of the Act shall not apply to agreements which relate only to a service and to standards of competence and integrity which are reasonably necessary for the protection of the public in the (i) practice of a trade or profession relating to the service; or (ii) collection and dissemination of information relating to the service[13].

D. Collusive Tendering

Sections 59 and 109 of the Act prohibits collusive tendering where 2 or more undertakings as bidders in a competitive bid process, submit bids or tenders that are arrived at by agreement between or among themselves. Putting it simply, collusive tendering is the practice whereby undertakings agree amongst themselves to collaborate over their response to invitations for a competitive tender.

1. Why is Collusive Tendering Subject to the Purpose Based Restriction?

In markets where sellers interact with buyers through a competitive tendering process for the right to supply goods and services, the client negotiates with multiple suppliers as a means of using one supplier to obtain a better price form another supplier. In a bidding exercise, there are multiple suppliers competing on price and potentially other competition parameters to sell to a single buyer. Customarily (though not always), the preferred supplier will be the suppler with the lowest bid. Thus, markets where suppliers compete via competitive tender processes are generally more competitive. Consequently, collusive tendering by undertakings means that the competing bidders manipulate the conditions of what should otherwise be a competitive tender process.

2. What are the Various Forms of Collusive Tendering?

Collusive tendering customarily occurs when the undertakings collaborate in response to an invitation to tender instead of submitting competitive bids. The erring undertakings may for example agree to:

- submit the lowest possible bid at the highest possible margin;
- quote similar prices with the expectation that at the end each will receive its fair share of the orders;
- notify each other of their respective intended quotes;

[13] Section 108(2) of the Act

- rotation of orders where one undertaking whose turn it is to get a contract or order will ensure that its fee quote is lower than that of the other bidders.

3. Does the Prohibition on Collusive Tendering apply to Affiliates?

Premised on the principle of single economic entity or unit discussed above, the prohibition on collusive tendering does not apply to arrangement between affiliate companies[14]. The concept of affiliate companies and the definition of the term "affiliate" is already discussed above.

I. Vertical Agreement

From the vertical arrangement perspective, the Act and the Regulations proscribe fixed and minimum sale price maintenance arrangements.

1. What Are Minimum Resale Price Maintenance?

Generally, resale price maintenance can be described as a practice where resale price down the distribution line or discounts allowed by the customers are fixed. Resale price maintenance could take the form of either a minimum or maximum price at which products are charged to customers or end consumers. What the Act and Regulations prohibit is minimum resale price maintenance and not maximum resale price maintenance.

Minimum resale price maintenance accommodates agreements or arrangements which purports to establish minimum prices to be charged on the resale of a product. Hence, undertakings are prohibited from notifying their dealers or other contractual counterparties on terms and conditions which can be understood to mean the minimum price which may be charged on the resale of a product in Nigeria. Furthermore, undertakings are prohibited from withholding the supply of a product to a dealer that intends to purchase such products for the purpose of resale on the grounds that the dealer has:

- sold or is likely to sell the products obtained directly or indirectly from the undertaking in question at a price below the stipulated resale price;
- supplied them either directly or indirectly to a third party who had sold the products at price below the stipulated resale price.

2. What is a Resale Price?

Resale price means the price to be notified to dealers, resellers or otherwise published by or on behalf of a supplier of the product (legally or otherwise) as the price or minimum price which is to be charged on or is recommended as appropriate for a sale. Its also means the price prescribed or purporting to be prescribed pursuant to an agreement between the dealer and the supplier.

3. Why is Minimum Resale Price Maintenance Subject to a Purpose Based Restriction?

Minimum resale price maintenance have the anti-competitive effect of facilitating collusion amongst competitors by helping upstream competitors circumvent hindrances to maintaining price above competitive levels. Collusion at the upstream level can enhanced if undertakings in the upstream have fixed the minimum price for a particular product category such that if a

[14] Section 109(2) of the Act

participating undertaking should renege on the arrangement, such cheating can be easily detected by the price charged by their dealers and distributors.

4. Are Price Recommendations Prohibited?

No. The Act does not preclude an undertaking or association of undertaking or any person acting on their behalf, from notifying their dealers and resellers by publishing recommended prices as appropriate for the resale of the products supplied or to be supplied[15].

SECTION B: Analysis of Purpose Based Restriction

The Regulations stipulate that in assessing whether an agreement or decision is subject to a Purpose Based Restriction, the Commission shall examine: (i) the content of the agreement and the objective aims pursued by the agreement; (ii) the legal and economic context in which the agreement is applied or to be applied; (iii) the actual conduct of the parties on the market[16].

1. Content and Objective Aims of the Agreement

Generally in assessing whether the agreement is subject to a Purpose Based Restriction, the Commission will examine the provisions of the agreement to ascertain its objective[17].

- **Will the Commission apply a Objective or Subjective Test?**

  Generally, the Commission will consider the objective meaning and purpose of the agreement while considering the economic context of its application. Hence, it is not necessary to prove the subjective intention of the parties.

- **Must the Provisions Expressly contain Anti-Competitive Provisions?**

  No. The implementation of an agreement may reveal a Purpose-Based Restriction even where the formal agreement does not contain an express provision to that effect and in such cases the Commission may receive and analyse evidence of subjective intent of the parties to restrict competition. However, evidence of subjective intent shall not be the sole decisive factor but may be a relevant factor in determining whether an agreement is restrictive of competition[18].

2. Legal and Economic Context of the Agreement

In analysing whether an agreement is subject to a Purpose-Based Restriction, the Commission will not restrict the analysis to the express provisions of the agreement but also assess the agreement against the background of the actual economic context in which the agreement will be operationalized so as to properly assess the impact of the agreement on the parameters of competition, that is, price, quantity, quality, innovation. For more discussions on the aforementioned parameters of competition, *please see our Competition Law Series on Abuse of Dominant Position Part 1*. Hence, the Regulations expressly states that the Commission shall examine the facts underlying the agreement and the specific circumstances in which it operates before concluding that the agreement is subject to a Purpose-Based Restriction[19].The Commission will also take cognisance of other factors such as the:

[15] Section 63(4) of the Act
[16] Reg. 5(1) of the Regulations
[17] Reg.5(1)(a) of the Regulations
[18] Reg.5(3) of the Regulations
[19] Reg. 5(2) of the Regulations

- nature of the products;
- the real conditions for the functioning and structure of the market in question;
- facts peculiar to the business in respect of which the restraints apply;
- the market conditions before and after the restraints was imposed.

3. Actual Conduct and Behaviour of the Parties

While the analysis commences with assessing the content of the agreement and assessing same against the legal and economic context, it is also important to examine the behaviour of the parties because the behaviour and conduct of the parties with respect to the operationalization of the agreement may serve as evidence of the anti-competitive purpose of the agreement, even where the agreement does not have any express anti-competitive provision.

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