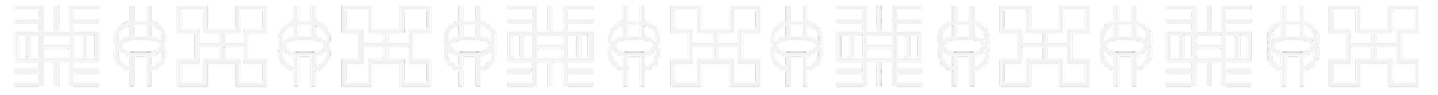




# RESTRICTIVE AGREEMENTS

COMPETITION LAW FUNDAMENTALS





- **Definitions & Types of Restrictive Agreements**
- **The Economics of Restrictive Agreements**
- **Nigerian Law: Part VIII FCCPA ss 59-69; ss107-109; Restrictive Agreement and Trade Practices Regulations (RATPR)2022**

# Definitions



- Restrictive Agreements are not defined in the FCCPA; but s 167(1) defines both **“Agreement”**:
  - “ includes a contract, arrangement, understanding, written or oral, and a concerted practice”; AND
  - Restrictive Practice**:
    - “practices in restraint of trade or which otherwise hinder competition”.
- THEREFORE, a working definition of **RESTRICTIVE AGREEMENTS** is **ARRANGEMENTS AND PRACTICES THAT RESTRAIN TRADE OR HINDER COMPETITION.**



## Types of Restrictive Agreements

- Horizontal Restraints vs. Vertical Restraints

- Collusive Effects vs. Exclusionary Effects

- Intraband Restraints vs. Interband Restraints

# Types of Restrictive Agreements

## Horizontal Restraints

- Cartels
- Information Sharing Agreements
- Research & Development Agreements
- Joint Venture Agreements

## Vertical Restraints

- Distribution Agreements
- Resale Price Maintenance (RPM)
- Exclusive Selling/Buying
- Franchising
- Tying
- Technology Licensing

# The Economics of Restrictive Agreements

- Cournot Oligopoly
- Cournot Complements
- Spengler
- The Chicago School

# **Nigerian Law: Part VIII FCCPA ss59-69; ss107-109; RATPR 2022**

- Framework
  - General Prohibitions
  - Specific Prohibitions
  - Exceptions/Defences
  - Authorizations/Exemptions
  - Right of Action/Remedy
  - Administrative Sanctions
  - Criminal Sanctions
  - Standard of Proof/Burden of Proof
  - Evidence

# General Prohibitions

- Section 59(1):
  - “Agreement”
  - “Undertakings or associations of undertakings”
  - “Purpose of actual or likely effect”
  - “Preventing, restricting or distorting competition”
  - “Unlawful”
  - “Subject to s 61” (properly s60)
  - “Void and of no legal effect”



# General Prohibitions

- Section 59(2): Examples of prohibited agreements and practices –
  - Price fixing
  - Output fixing
  - Dividing markets
  - Collusive tendering
  - Unnecessary tying

# General Prohibitions

- Assessment under section 59(1):
  - Purpose-based Restriction of Competition
  - Reg.3(4) of RATPR 2022 lists purpose-based agreements to include price fixing, customer allocation, output limitation and collusive tendering
- Basis for Assessment
  - Content of agreement and its objective aims
  - Legal and economic context of agreement
  - Actual conduct of the parties in the market

# General Prohibitions

- Assessment under section 59(1):
  - Effects-based Restriction of Competition
  - Reg. 6 of RATPR 2022 provides conditions for an effects-based restriction of competition to exist –
    - Must have, or be likely to have an appreciable adverse impact on at least one parameter of of competition
    - Appreciably reduces competition by reducing decision-making independence
    - Ability to profitably affect a parameter of competition within the relevant market
      - Basis for Assessment
        - Nature and content of agreement
        - Degree of market power
        - Extent to which agreement contributes to creation, maintenance or strengthening of market power or allows the parties to exploit such power
        - Relevant market structure

# General Prohibitions

- Assessment under section 59(1):
  - Effects-based Restriction on Competition
    - Importance of the Counterfactual
    - Other Relevant Factors For Competitive Assessment
      - Market Shares of the Parties
      - Closeness of competition between the Parties
      - Possibility of Switching Suppliers
      - Is a Party a Maverick?
      - Nameplate capacity of the market
  - Market Definition –FCCPC Market Definition Notice
    - Market Share Thresholds/Safe Harbours

## Specific Prohibitions

- Section 61: Agreements containing exclusionary provisions – Requesting refusals to deal
- Section 62: Agreements to penalize independent pricing by withholding supplies or applying discriminatory terms
- Section 63: Minimum RPM

## Exception / Defence

- Section 60:
  - Improvement of production or distribution; or the promotion of technical or economic progress
  - Indispensability to attainment of objectives
  - No possibility of eliminating competition in a substantial part of the market,
    - provided the agreement has been authorized by the FCCPC
  - Factors are cumulative and not in the alternative
  - Substantive and procedural issues in assessing exception/defence are contained in Regs. 10-18 of RATPR 2022

## Exception/Defence

- Section 64(3):
  - Grants; and assignments of patent licences containing provisions regulating price at which output by licensee may be sold.
- Section 68(1):
  - Activities of employees for the reasonable protection of employees
  - Collective bargaining
  - Activities for enforcement of standards by professional associations
  - Non-compete and other conduct of partnership provisions between natural persons
  - Non-compete provisions not exceeding 2 years post-termination in a contract of service
  - Provisions to protect goodwill in share and business sales transactions
  - Acts done to give effect to permitted exceptions in section 68(1)

# Authorizations/Exemptions

- Section 60:
  - Vests power to authorize agreements and avoid application of section 59(1).
- Unlike merger approval under section 93(1), section 60 does not mandate undertakings to seek FCCPC authorization for restrictive agreements – cf. original EU provisions and practice.
- Authorizations may be ex ante or ex post – voluntarily seeking authorization can mitigate risk of breach of section 59(1) and an agreement being found to be void.
- Individual vs. Block Exemptions – Reg. 10, RATPR 2022



## Right of Action/Remedy

- No direct right of action for private complainant – is there a right of action/remedy in a follow-on action - cf. US practice
- Private complaint may be brought only by a person who has suffered damage or loss from a restrictive agreement
- FCCPC has a right to enforcement on behalf of the public. Not hamstrung by having to show actual damage or loss
- FCCPC may issue cease and desist orders, impose penalties, secure convictions and fines, etc

# Administrative Sanctions



- Section 18(1)(h):
- FCCPC(Administrative Penalties) Regulations 2020, Sched. 1

- Administrative Sanctions are through essentially an internal process subject to review by or appeal to the Tribunal; and thereafter, appeal to the Court of Appeal
- Financial Penalties as calculated under the FCCPC (Administrative Penalties) Regulations 2020

# Criminal Sanctions



- Section 69:
- Section 107:
- Section 108:
- Section 109:

- Offences may be prosecuted directly by FCCPC in the Federal High Court or indirectly by fiat to an external prosecutor
- Dependent on FCCPC assessment of actus reus and mens rea
- Punishment consists of fines and imprisonment
- Typically for “hardcore” offences

# Standard of Proof/Burden of Proof



## Administrative Process

- Standard of Proof is “balance of probabilities”
- Burden of Proof generally lies on FCCPC, but in instances of “purpose”, a presumption of anti-competitiveness may be said to operate

## Criminal Process

- Standard of Proof is as usual, “beyond reasonable doubt”
- Burden of Proof lies on FCCPC

# Evidence



- Leniency Programme – FCCPC Leniency Rules 2022
  - Immunity from penalty from first applicant
  - Reductions for second and third applicants
  - Dependent on full cooperation and quality of information provided
  - Very useful in “hardcore” where activities are surreptitious and detection is difficult



## Questions/Discussions

Thank You



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