



FCCPC

Federal Competition and Consumer Protection Commission
Restrictive Agreements and Trade Practices Regulations
2021

ARRANGEMENT OF REGULATIONS

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FEDERAL COMPETITION AND CONSUMER PROTECTION ACT, 2018
(A29 (Act No.1 of 2019))

RESTRICTIVE AGREEMENTS AND TRADE PRACTICES REGULATIONS, 2021

[.] 2021

In exercise of the powers conferred upon it by sections 17, 18 and 163 of the Federal Competition and Consumer Protection Act, 2018 (“the Act”), and all other powers enabling it in that behalf, the **Federal Competition and Consumer Protection Commission** hereby makes the following Regulations-

PART I- SCOPE AND OBJECTIVES

1. Scope of the Regulations

These Regulations are made to provide a regulatory framework for the implementation of Part VIII and some aspects of Part XIV of the Act relating to restrictive agreements and all matters related thereto.

2. Objectives of the Regulations

These Regulations shall-

- (a) provide the substantive and procedural requirements for the implementation of Part VIII and some aspects of Part XIV of the Act;
- (b) provide guidance on the regulatory review process for agreements or decisions.
- (c) clarify the process for authorisation of exempted agreements and practices among undertakings.

PART II- PURPOSE AND EFFECTS ASSESSMENTS

3. Prohibited Agreements under Section 59(1) of the Act

3. (1) An agreement or contractual restraint is only prohibited by Section 59(1) of the Act if its purpose or effect is to prevent, restrict, or distort competition.

(2) For the purpose of Section 59(1), 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”).

(3) Purpose-based restrictions are those that by their very nature have the potential to restrict competition within the meaning of Section 59(1) of the Act and in such cases, it is unnecessary to examine the actual or potential effects of an agreement on the market once its anti-competitive purpose has been established.

(4) For the purpose of subparagraph 3 of this regulation, purpose-based restriction of competition includes-

(a) in the case of horizontal agreements, price fixing, market/ customer allocation, output limitation and collusive tendering under Sections 59(2), 107, 108 and 109 of the Act;

(b) in the case of vertical agreements, fixed and minimum resale price maintenance and restrictions providing absolute territorial protection, including restrictions on passive sales under Sections 63, 65 and 66 of the Act.

(5) Where the Commission finds that an agreement contains a purpose-based restriction of competition within the list in subparagraph 4 of this regulation, the agreement shall be illegal and is unlikely to be justified on efficiency grounds under Section 60 of the Act.

(6) Where an agreement is shown to produce an effects-based restriction of competition and falls within one of the categories specified in Regulation 3(4), the agreement shall be illegal and is unlikely to be justified or exempted under efficiency grounds under Section 60 of the Act.

(7) Further to Regulation 3(7), in all other cases, any agreement shown to produce an effects-based restriction of competition shall be illegal **unless** the contracting parties can demonstrate that it falls within a potentially applicable block exemption as provided under

this Regulations or can be explicitly justified on efficiency grounds under Section 60 of the Act.

4. Assessment under Section 59(1) of the Act

4.- (1) The assessment of agreements and decisions under Section 59(1) of the Act shall consist of two steps:

(i) the first step is to assess whether an agreement between undertakings, has a purpose-based restriction of competition or produces effects-based restriction of competition

(ii) the second step, which only becomes relevant when an agreement is found to be restrictive of competition within the meaning of Section 59(1) of the Act, is to determine the pro-competitive benefits produced by that agreement (if any) and to assess whether those pro-competitive effects outweigh the restrictive effects on competition.

(2) The balancing of restrictive and pro-competitive effects shall be conducted exclusively within the framework laid down by Section 60 of the Act.

5. Purpose-based restriction of Competition

5.- (1) The assessment of whether an agreement elicits a purpose-based restriction of competition shall be based on the following factors-

- (a) the content of the agreement and the objective aims pursued by it;
- (b) the legal and economic context in which the agreement is applied or to be applied; and
- (c) the actual conduct and behaviour of the parties on the market.

(2) The Commission shall examine the facts underlying the agreement and the specific circumstances in which it operates before it concludes that an agreement constitutes a purpose-based restriction of competition.

(3) The implementation of an agreement may reveal a purpose-based restriction of competition even where the formal agreement does not contain an express provision to that effect and the Commission may receive and analyse evidence of subjective intent of the

parties to restrict competition, although such 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.

6. Effects-based restriction of competition

6.- (1) If an agreement is not restrictive of competition by purpose it shall be examined whether it has restrictive effects on competition.

(2) The Commission shall take into account both actual and potential effects.

(3) For an agreement to constitute an effects-based restriction of competition within the meaning of Section 59(1) of the Act-

(a) it must have, or be likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation.

(b) it appreciably reduces competition between the parties to the agreement or between any one of them and third parties by reducing the parties' decision-making independence, either due to obligations contained in the agreement which regulate the market conduct of at least one of the parties or by influencing the market conduct of at least one of the parties by causing a change in its incentives.

(c) within the relevant market, it can be expected with a reasonable degree of probability that, due to the agreement, the parties would be able to profitably raise prices or reduce output, product quality, product variety or innovation.

(4) The assessment of whether an agreement elicits an effects-based restriction of competition shall be based on the following factors-

(a) the nature and content of the agreement,

(b) the extent to which the parties individually or jointly have or obtain some degree of market power; and

(c) the extent to which the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power.

(5) The assessment of agreements that elicit effects-based restrictions of competition within the meaning of Section 59(1) of the Act shall be undertaken in comparison to the actual legal and economic context in which competition would occur in the absence of the agreement with all of its alleged restrictions (that is to say, in the absence of the agreement as it stands (if already implemented) or as envisaged (if not yet implemented) at the time of assessment) (otherwise referred to as the counterfactual) and such assessment shall take into account:

(a) the loss of existing or potential competition as well as other factors such as how and to what extent the agreement impacts on both inter-brand competition and intra-brand competition;

(b) the legal context which refers to an examination of the agreement in view of the applicable legal framework;

(c) the economic context which refers to a consideration of the agreement with regard such conditions including the nature of the products, market structure, concentration, operating conditions.

(6) In order to prove actual or potential restrictive effects on competition, it is necessary to take into account competition between the parties and competition from third parties, and in particular, actual or potential competition that would have existed in the absence of the agreement.

(7) The comparison envisaged in Subregulations 5 and 6 of this Regulation shall not take into account any potential efficiency gains generated by the agreement as these will only be assessed under Section 60 of the Act.

(9) Horizontal agreements between competitors that, on the basis of objective factors, would not be able to independently carry out a project or activity covered by the

agreement, for instance, due to the limited technical capabilities of the parties, shall normally not give rise to restrictive effects on competition within the meaning of Section 59(1) of the Act unless the parties could have carried out the project or activity with less stringent restrictions.

7. Nature and content of the agreement

7.- (1) The nature and content of an agreement relates to factors which determine the kinds of possible competition concerns that may arise from an agreement and include:

- (a) the area and objective of the cooperation;
- (b) the competitive relationship between the parties; and
- (c) the extent to which they combine their activities.

(2) The nature and content of an agreement may restrict competition in a number of ways including:

- (a) being 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) requiring the parties to contribute such assets that their decision-making independence is appreciably reduced;
- (c) touching 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 coordination among the parties within or outside the field of the cooperation;
- (e) achieving 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;

(3) The potential effect of the agreements provided in Regulation 7(2) of these Regulations may be:

(a) the loss of competition between the parties to the agreement;

(b) other competitors can also benefit from the reduction of competitive pressure that results from the agreement and may therefore find it profitable to increase their prices.

(c) the reduction in the competitive constraints in Regulation 7(2)(a) & (b) may lead to price increases in the relevant market.

8. Competitive Assessment of Agreements

8.- (1) Other relevant factors for the competitive assessment of agreements under Section 59(1) of the Act are:

(a) whether the parties to the agreement have high market shares;

(b) whether the parties are close competitors;

(c) whether the customers have limited possibilities of switching suppliers;

(d) whether competitors are unlikely to increase supply if prices increase; and

(e) whether one of the parties to the agreement is an important competitive force.

(2) The starting point for the analysis of market power is the position of the parties on the markets affected by the agreement and to undertake this analysis, the Commission shall define the relevant market(s) by using the methodology of the Commission's Market Definition Notice.

(3) If the parties do not exceed the market shares threshold provided under Regulation 9, a horizontal agreement is unlikely to give rise to restrictive effects on competition within the meaning of Section 59(1) of the Act and, typically, no further analysis will be required.

(4) If one of just two parties has only an insignificant market share and if it does not possess important resources, even a high combined market share shall ordinarily not be deemed as indicating a likely restrictive effect on competition in the market.

(5) Depending on the market position of the parties and the concentration in the market, other factors such as the stability of market shares over time, entry barriers and the likelihood of market entry, and the countervailing power of buyers/suppliers also have to be considered.

9. Market Share Thresholds

9.- (1) The Commission holds the view that agreements between undertakings do not appreciably restrict competition within the meaning of Section 59 (1) of the Act:

(a) 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, where the agreement is made between undertakings which are actual or potential competitors on any of these markets (agreements between competitors); or

(b) 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, where the agreement is made between undertakings which are not actual or potential competitors on any of these markets (agreements between non-competitors).

(2) In cases where it is difficult to classify the agreement as either an agreement between competitors or an agreement between non-competitors the 10 % threshold in Regulation (9)(1)(a) shall be applicable.

(3) Where in a relevant market competition is restricted by the cumulative effect of agreements for the sale of goods or services entered into by different suppliers or distributors (cumulative foreclosure effect of parallel networks of agreements having similar effects on the market)-

(a) the market share thresholds under Regulations 9(1) and (2) are reduced to 5 %, both for agreements between competitors and for agreements between non-competitors.

(b) Individual suppliers or distributors with a market share not exceeding 5 % are in general not considered to contribute significantly to a cumulative foreclosure effect.

(c) cumulative foreclosure effect is unlikely to exist if less than 30 % of the relevant market is covered by parallel (networks of) agreements having similar effects.

(4) The Commission also holds the view that agreements are not restrictive of competition if the market shares do not exceed the thresholds of respectively 10 %, 15 % and 5 % set out in Regulations 9(1), 9(2) and 9(3) during two successive calendar years by more than 2 percentage points.

(5) The thresholds specified in Regulations 9(1), 9(2) and 9(3) do not apply to agreements containing any of the hardcore (purpose-based) restrictions provided in Sections 59(2), 107, 108 and 109 of the Act,.

PART III- AUTHORISATIONS AND EXEMPTIONS

10. Authorisation Powers under Section 60

10.- (1) Under Section 60 of the Act, the Commission may authorise agreements found to be restrictive within the meaning of Section 59 of the Act in one of these cases -

(a) individual cases or agreements where a restriction of competition within the meaning of Section 59 of the Act has been found; or

(b) to categories of agreements and concerted practices, where a restriction of competition within the meaning of Section 59 of the Act exists, by way of block exemption under Regulation 18.

(2) When an agreement is covered by a block exemption the parties to the restrictive agreement are relieved of their burden under Regulation 11 of showing that their individual

agreement satisfies each of the conditions of Section 60 of the Act and they only must prove that the restrictive agreement benefits from a block exemption.

(3) The application of Section 60 of the Act to categories of agreements by way of block exemption under Regulation 18 is based on the presumption that restrictive agreements that fall within their scope fulfil each of the conditions laid down in Section 60.

(4) The Commission shall withdraw the benefit of a block exemption when it finds that in a particular case an agreement covered by a block exemption has certain effects which are incompatible with Section 60 of the Act.

(5) Section 60 of the Act only becomes relevant when an agreement between undertakings restricts competition within the meaning of Section 59 of the Act and in the case of non-restrictive agreements there is no need to examine any benefits generated by the agreement.

11. Pro-Competitive Assessment for Individual Cases

11.- (1) Where in an individual case a restriction of competition within the meaning of Section 59(1) of the Act has been proven (as specified by Regulation 10(i)), Section 60 of the Act may be invoked as a defence given that the assessment of restrictions of competition by purpose or effect under Section 59 (1) of the Act is only one side of the analysis.

(2) The other side of the Commission's analysis, which is reflected in Section 60 of the Act, shall be the assessment of the pro-competitive effects of restrictive agreements.

(3) The burden of proof under Section 60 of the Act rests on the undertaking(s) invoking the benefit of the provision, and as such, the factual arguments and the evidence presented by the undertaking(s) must enable the Commission to arrive at the conclusion that the agreement in question is sufficiently likely to give rise to pro-competitive effects or that it is not.

12. Conditions for Pro-Competitive Effects

12.- (1) When the pro-competitive effects of an agreement outweigh its anti-competitive effects the agreement is on balance pro-competitive and shall be authorised by the Commission given that the net effect of such agreements is to promote the very essence of

the competitive process, namely to win customers by offering better products or better prices than those offered by rivals.

(2) The application of the exception rule of Section 60 of the Act is subject to four cumulative conditions-

(a) the agreement must contribute to improving the production or distribution of products or services and contribute to promoting technical or economic progress;

(b) consumers must receive a fair share of the resulting benefits;

(c) the restrictions must be indispensable to the attainment of the objectives referred to in Regulation 12(2)(a) and (b); and

(d) the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

(3) When the four conditions specified in Regulation 12(2) are fulfilled, the agreement is deemed to enhance competition within the relevant market, because it leads the undertakings concerned to offer cheaper or better products to consumers, compensating consumers for the adverse effects of the restriction of competition.

(4) The four conditions under Section 60 of the Act are exhaustive with the exception becoming applicable without being made dependent or contingent on any other condition.

(5) Where the conditions of Section 60 of the Act are not satisfied, the agreement is deemed null and void under Section 59(1) of the Act with such nullity only applying to those parts of the agreement that are incompatible with Section 59(1) of the Act, provided that such parts are severable from the agreement as a whole.

13. General principles

13. (1) The assessment under Section 60 of the Act of benefits flowing from restrictive agreements is in principle made within the confines of each relevant market to which the agreement relates, with-

(a) the condition that consumers must receive a fair share of the benefits implying in general that efficiencies generated by the restrictive agreement within a relevant market must be sufficient to outweigh the anti-competitive effects produced by the agreement within that same relevant market.

(b) negative effects on consumers in one geographic market or product market unavailable to be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market.

(c) where however two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same.

(2) When applying Section 60 of the Act in accordance with these principles it is necessary to take into account the initial sunk investments made by any of the parties and the time needed and the restraints required to commit and recoup an efficiency enhancing investment.

(3) The Commission shall consider only objective benefits in terms of the risk facing the parties and the sunk investment that must be committed to implement such benefits with no regard for the subjective point of view of the parties on efficiencies.

(4) Cost savings that arise from the mere exercise of market power by the parties cannot be taken into account, for instance, where undertakings agree to fix prices or share markets-

(a) there is reduced output and thereby production costs;

(b) reduced competition may also lead to lower sales and marketing expenditure;

(c) such cost reductions in Regulation 13(4)(a) or (b) are a direct consequence of a reduction in output and value;

- (d) the cost reductions in Regulation 13(4)(a) or (b) do not produce any pro-competitive effects on the market.
- (e) in particular, they do not lead to the creation of value through an integration of assets and activities.
- (f) they merely allow the undertakings concerned to increase their profits and are therefore irrelevant from the point of view of Section 60 of the Act.

14. The Efficiency Condition

14.- (1) All efficiency claims must be substantiated so that the following can be verified:

- (a) the *nature* of the claimed efficiencies to ascertain that they are objective as provided under Regulation 13(3);
- (b) the direct *link* between the agreement and the efficiencies to ascertain that there is a sufficient causal link between the restrictive agreement and the claimed efficiencies, often represented in terms of the efficiencies resulting from the economic activity that forms the object of the agreement;
- (c) the *likelihood* and *magnitude* of each claimed efficiency to ascertain the quantitative value of the claimed efficiencies; and
- (d) *how* and *when* each claimed efficiency would be achieved.

(2) In the case of claimed cost efficiencies, the undertakings invoking the benefit of Section 60 of the Act shall-

- (a) as accurately as reasonably possible, calculate or estimate the value of the efficiencies and describe in detail how the amount has been computed;
- (b) also describe the method(s) by which the efficiencies have been or will be achieved.

(3) In the case of claimed efficiencies in the form of new or improved products and other non-cost based efficiencies, the undertakings claiming the benefit of Section 60 of the Act shall describe and explain in detail what is the nature of the efficiencies and how and why they constitute an objective economic benefit.

(4) In cases where the agreement has yet to be fully implemented the parties must substantiate any projections as to the date from which the efficiencies will become operational so as to have a significant positive impact in the market.

15. Condition regarding indispensability of the restrictions

15.- (1) The indispensability condition under Section 60(b) of the Act implies a two-fold test-

(a) first, the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies;

(b) secondly, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies.

(2) The decisive considerations are-

(a) whether or not the restrictive agreement and individual restrictions make it possible to perform the activity in question more efficiently than would likely have been the case in the absence of the agreement or the restriction concerned;

(b) whether more efficiencies are produced with the agreement or restriction than in the absence of the agreement or restriction not whether in the absence of the restriction the agreement would not have been concluded.

(3) The first test specified in Regulation 15(1)(a) requires that the efficiencies be specific to the agreement in question in the sense that-

(a) there are no other economically practicable and less restrictive means of achieving the efficiencies;

(b) the assessment shall be underpinned by the market conditions and business realities facing the parties to the agreement.

(c) undertakings invoking the benefit of Section 60 of the Act are not required to consider hypothetical or theoretical alternatives.

(4) The Commission will not second guess the business judgment of the parties and will only intervene where it is reasonably clear that there are realistic and attainable alternatives and the parties must only explain and demonstrate why such seemingly realistic and significantly less restrictive alternatives to the agreement would be significantly less efficient.

(5) Restrictions that are identified as hardcore (purpose-based) restrictions under Section 59(2) of the Act are unlikely to be considered indispensable.

(6) The assessment of indispensability is made within the actual context in which the agreement operates and shall in particular take account of the structure of the market, the economic risks related to the agreement, and the incentives facing the parties.

(7) In certain cases, a restriction may be indispensable only for a certain period of time, in which case the exception of Section 60 of the Act only applies during that period.

(8) In making the assessment in Regulation 15(7), the Commission shall take due account of the period of time required for the parties to achieve the efficiencies justifying the application of the exception rule.

(9) In cases where the benefits cannot be achieved without considerable investment, account must, in particular, be taken of the period of time required to ensure an adequate return on such investment,

16. Condition for Fair Share for Consumers (Pass-On)

16.- (1) For the purpose of Section 60(a) of the Act,-

(a) ‘*consumer*’ encompasses 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;

(b) consumers are the customers of the parties to the agreement and subsequent purchasers.

(2) ‘*Fair share*’ denotes 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 found under Section 59 (1) of the Act and as such-

(a) in line with the overall objective of Section 59 of the Act to prevent anti-competitive agreements, the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement; and

(b) if such consumers are worse off following the agreement, the consumer fair share condition under Section 60(a) of the Act is not fulfilled.

(3) It is not required that consumers receive a share of each and every efficiency gain identified under the first condition in Section 60(a) of the Act and it suffices that sufficient benefits are passed on to compensate for the negative effects of the restrictive agreement.

(4) 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 under Section 60(a) of the Act is not fulfilled.

(5) The decisive consideration is the overall impact on consumers of the products within the relevant market and not the impact on individual members of this group of consumers.

(6) In certain cases, a certain period of time may be required before the efficiencies materialise-

- (a) the fact that a pass-on to the consumer occurs with a certain time lag should not in itself exclude the application of Section 60 of the Act;
- (b) but the greater the time lag, the greater must be the efficiencies to compensate also for the loss to consumers during the period preceding the pass-on.

17. Possibility of Eliminating Competition

17.- (1) The last condition of Section 60(a) of the Act affirms that rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation.

(2) When competition is eliminated, the competitive process is brought to an end and short-term efficiency gains are outweighed by longer-term losses stemming *inter alia* from expenditure incurred by the incumbent to maintain its position (rent seeking), misallocation of resources, reduced innovation and higher prices.

(3) The Commission shall undertake an assessment of entry barriers and the real possibility for new entry on a significant scale, and it is relevant to examine, *inter alia*, the following:

- (a) the regulatory framework with a view to determining its impact on new entry;
- (b) the cost of entry including sunk costs;
- (c) the minimum efficient scale within the industry-
 - (i) which is the rate of output where average costs are minimised; and
 - (ii) if the minimum efficient scale is large compared to the size of the market, efficient entry is likely to be more costly and risky.
- (d) the competitive strengths of potential entrants where effective entry is particularly likely-

- (i) where potential entrants, at a minimum, have access to similar or equivalent cost-efficient technologies as the incumbents or other competitive advantages that allow them to compete effectively; and
 - (ii) where potential entrants are on the same or an inferior technological trajectory compared to the incumbents and possess no other significant competitive advantage, entry is more risky and less effective.
- (e) the position of buyers and their ability to bring onto the market new sources of competition-
- (i) it is irrelevant that certain strong buyers may be able to extract more favourable conditions from the parties to the agreement than their weaker competitors;
 - (ii) the presence of strong buyers can only serve to counter a *prima facie* finding of elimination of competition if it is likely that the buyers in question will pave the way for effective new entry.
- (f) the likely response of incumbents to attempted new entry where incumbents may for example through past conduct have acquired a reputation of aggressive behaviour, having an impact on future entry.
- (g) the economic outlook for the industry may be an indicator of its longer-term attractiveness, with industries that are stagnating or in decline being less attractive candidates for entry than industries characterised by growth.
- (h) past entry on a significant scale or the absence thereof.

18. Block Exemptions

18.- (1) Pursuant to Section 60 of the Act and subject to the provisions of this Regulation, the Commission hereby authorises the categories of agreements specified by the Block Exemption Notice and declares that Section 59 (1) of the Act shall not apply to the categories of agreements specified in the Block Exemption Notice.

(2) The exemption referred to in Regulation 18(1) shall apply upon such terms as provided by the Block Exemption Notice.

PART IV –CRIMINAL AND ADMINISTRATIVE PROCESSES

19.- (1) Where the Commission considers that an agreement restricts competition and is unlawful under Section 59 of the Act, the Commission shall then determine, based on evidence in its possession or to be gathered, whether the criminal process under Sections 69, 107, 108 and 109 of the Act or the administrative process under section 67 of the Act are applicable to the agreement.

(2) In determining whether an agreement exists, the Commission shall consider whether the parties to the alleged agreement or decision reached a "meeting of minds", either explicitly or tacitly, to engage in the conduct described in section 59(2).

(3) This regulation shall apply to all forms of agreements between competitors, regardless of the degree of formality or enforceability and regardless of whether it has been implemented.

(4) The fact that any agreement or decision to fix prices, divide markets, limit production or output, or to collude with respect to tenders or bids is in writing or not or is constituted by covert rather than overt acts shall not be a defence to the application of sections 69, 107, 108 or 109 of the Act.

(5) For the purpose of these regulations, "competitors" includes directors, officers, employees, and agents of competing companies so that, for example, an agreement that is reached between an officer of an undertaking and a director of a competing undertaking is considered to be an agreement between competitors for the purpose of sections 59, 107 or 109 of the Act.

(6) In the circumstance specified in Regulation 19(5) of this regulation, the individual employees who entered into the agreement may be subject to prosecution under sections 69, 107 or 109 of the Act.

(7) Undertakings may be subject to prosecution as a result of an agreement between their respective employees if they are acting as senior officers.

(8) Where an agreement involves competing and non-competing parties, the fact that some parties are not competitors does not insulate the competing parties from prosecution under sections 69, 107 or 109 of the Act.

PART V – NOTIFICATION OF CONTEMPLATED AGREEMENTS AND CLEARANCE

20. Notification for guidance

- (1) All parties are under obligation to assess that the terms of their agreements do not infringe Part VIII of the Act.
- (2) A party to any *contemplated* agreement or decision who is of the opinion that such agreement or decision may infringe any aspect of Part VIII of the Act, may apply to the Commission for assessment of the agreement for the purpose of receiving guidance or authorisation from the Commission.
- (3) A party to an agreement or decision who applies for the agreement or decision to be assessed shall –
 - (a) file a notification in respect of restrictive agreements in Form 1;
 - (b) file a copy of the contemplated agreement or provide full details of the decision to Commission; and
 - (c) provide such relevant supporting information to the Commission.

Each application must be accompanied by evidence of payment of the prescribed fees specified under the Schedule to this Regulation.

- (4) Pursuant to an application under Regulation 20(3), the Commission may within 30 (thirty) business days of receiving such application, give the applicant guidance as to whether, in its view, the agreement or decision is likely to infringe any provisions of Part VIII of the Act or not and whether it authorises the agreement. The Commission shall state the reasons for its guidance in writing in *Form 2 [Notification of Infringement or Non-infringement]*.

- (5) If the Commission considers that the agreement or decision is likely to infringe any provision under Part VIII of the Act, the Commission may indicate in its guidance, that the agreement or decision is exempt from the prohibition.
- (6) If the Commission gives guidance that the agreement or decision is unlikely to infringe Part VIII of the Act, the Commission shall not take any further steps with respect to the agreement or decision, unless –
 - (a) it has reasonable grounds for believing that there has been a material change of circumstance since it gave its guidance;
 - (b) it has a reasonable suspicion that the information on which it based its guidance was incomplete, false or misleading in a material fact;
 - (c) one of the parties to the agreement or decision applies to it for a decision under Regulation 11 below; or
 - (d) a complaint about the agreement has been made to it by a person who is not a party to the agreement.
- (7) Paragraph 7 of this Regulation only applies to restrictive agreements that are *contemplated* and does not extend to restrictive agreements that are already in operation.

21. Application for exemption under Section 60 of the Act

- (1) Notwithstanding the provisions of the Leniency Rules, a party to an agreement or decision who is of the opinion that a prohibited agreement or decision under Paragraph 5 of this Regulation qualifies for exemption under Section 60 of the Act, may apply to the Commission to grant an exemption.
- (2) A party to an agreement or decision who applies for the agreement or decision to be assessed shall –
 - (a) file a copy of the contemplated agreement or provide full details of the decision to Commission; and
 - (b) apply to the Commission for a decision and include a request for exemption, providing submissions on the overall impact of the contemplated agreement on competition in the market as outlined in Section 60 of the Act and these Regulations.

- (3) Pursuant to an application, the Commission shall, within 30 (thirty) days of the application for a decision, give the applicant its decision in writing as in [*Form 3 -Exemption Notification or Refusal of Exemption*] stating whether the agreement satisfies the requirements of Section 60 of the Act.
- (4) Any exemption granted may have effect for such a period as the Commission considers appropriate;
- (5) This application for exemption under this Regulation 21 only applies to restrictive agreements that are *contemplated* and does not extend to restrictive agreements that are already in operation.

22. Amendment, Variance or Revocation of Exemption

- (1) If the Commission -
 - (a) has reasonable grounds to believe that there has been a material change of circumstances since it granted an exemption; or
 - (b) it has reasonable suspicion that the information on which it based its decision to grant an exemption was incomplete, false, or misleading in a material fact; or
 - (c) any condition or obligation in the Exemption Notice has been breached, the Commission may by a notice in writing in *Form 4 [Modification of Individual Exemption]* –
 - (i) revoke the exemption;
 - (ii) vary or remove any condition or obligation; or
 - (iii) impose one or more additional conditions or obligations.
- (2) Where the Commission confirms the suspicion in Regulation 22 (1)(b), it may impose the sanctions provided under Section 112 of the Act.

PART IV– INVESTIGATION PROCESS

23. Complaints and investigations

- (1) Any person who may be affected by any restrictive agreement or decision, or any

person who, though not directly affected by a restrictive agreement or decision is a citizen of Nigeria, may by an application in the form prescribed in *Form 5 [Complaints Form]* notify the Commission about the existence of such restrictive agreement or decision.

- (2) The application shall, as much as possible, include such details as are available to the applicant in respect of the following –
 - (a) parties to the agreement or decision;
 - (b) copy of the agreement or details of the agreement or decision where a written copy of the agreement is not available to the complainant or does not exist;
 - (c) a statement of the reasons for the belief or conclusion that the agreement or decision infringes Part VIII of the Act;
 - (d) any other information that may assist the Commission in conducting its investigations.
- (3) Where the Commission has reasonable grounds for suspecting that there is an agreement or trade practice, which may prevent, distort, or restrict competition within Nigeria, or which infringes any section of Part VIII of the Act, the Commission may on its own volition commence investigations against persons suspected to be parties to such agreement or trade practice.

24. Procedure for Investigations

- (1) Any person likely to be affected by the application or person(s) other than the Complainant, shall within 10 (ten) days of receiving notification of the application, respond in writing to the Commission, either challenging or supporting the application and stating its reasons.
- (2) The Commission may request information and documents from the parties to the restrictive agreement or decision, as may be required for investigations and just determination of the complaint.
- (3) The Commission shall use its best efforts to conclude its investigations in a

timely manner and publish its decision with respect to any application filed under paragraph 10 of this Regulation, within a reasonable time.

- (4) The Commission shall issue, from time to time, a notice specifying the indicative timeframes applicable to the restrictive agreements investigation process (“Notice of Indicative Timeframes for Investigation of Restrictive Agreements”).
- (5) The Commission shall conduct an investigation and a substantive review of the restriction, including gathering extensive information in the form of —
 - (a) requests for further information or clarification from the infringing undertaking(s), where necessary;
 - (b) requests for information from the parties’ competitors, suppliers, customers and/or any other third parties deemed appropriate to seek their views where necessary;
 - (c) infringing undertaking(s) internal documents or economic data;
 - (d) companies’ inspections whether announced or unannounced; and/or witness interviews during the investigation process.
- (6) If the Commission determines an application filed pursuant to Regulation 24, it must publish its decision in the form of an order under Section 67 of the Act, together with its reasons for making it, in *Form 6 [Decision Notice]*.

PART V – APPEALS

25. Appeals

A person or an undertaking aggrieved by a decision of the Commission pursuant to this Regulation, may appeal to the Competition and Consumer Protection Tribunal (“the Tribunal”) within thirty (30) business days of being notified of the Commission’s decision.

PART VI – LENIENCY APPLICATION

26. Leniency

Notwithstanding anything in this Regulation, a party to a restrictive agreement or trade practice in restraint of trade not permitted under the Act, may apply for immunity from sanctions or reduced sanctions under the Leniency Rules of the Commission.

PART VII – MISCELLANEOUS PROVISIONS

27. Power of the Commission to Issue Guidelines

The Commission may, from to time to time issue additional rules or guidance on any aspect of these Regulations.

28. Interpretation

In these Regulations terms defined in the Act shall have the same meanings as in the Act and in addition to the following:

“Act” means the Federal Competition and Consumer Protection Act, 2019;

“Commission” means the Federal Competition and Consumer Protection Commission;

“Regulations” means the Restrictive Agreement and Trade Practices Regulations, 2020;

29. Citation

These Regulations may be cited as the Restrictive Agreement Regulations, 2021.

MADE at Abuja this day of , 2021

MR. BABATUNDE IRUKERA
Executive Vice Chairman

SCHEDULE

Applicable Fees for Notification of Contemplated Agreements

As approved by the Federal Competition and Consumer Protection Commission (“the Commission”) pursuant to Section 18 (1)(h) of the Act and Regulation 20 of the Restrictive Agreement Regulations, every applicant shall pay the prescribed fees.

Where applicable:

- i. every applicant shall be subject to the payment of an application fee in the sum of N25,000 (Twenty-Five Thousand Naira) for the guidance of the Commission on the contemplated agreement.
- ii. The applicable fee for expedited guidance is N50,000 (Fifty Thousand Naira)

[Form 1]
[Notification of Infringement or Non-infringement]
(Paragraph 7 of the Regulation)

[date]

[Addressee]

Dear Sir/Madam,

Notification of Infringement (or non-infringement) of Contemplated Agreement

You are hereby notified that the Commission has examined your contemplated agreement [or trade practice or decision] (state details of the agreement) pursuant to your application for examination and has found that the said agreement [or trade practice or decision] infringes Section(s) (state particular sections) of Part VIII of the Act/does not infringe Part VIII of the Act.

*The reason(s) for the Commission's findings are as follows:
(state detailed reasons for findings)*

(in the case of an infringement)

The Commission hereby directs as follows:

(state directives by the Commission directing parties to either modify the offending aspects of the agreement or terminate the agreement)

Sincerely,

[Name]

Executive Vice Chairman

Federal Competition and Consumer Protection Commission

[Form 2]
[Exemption Notification or Refusal of Exemption]
(Paragraph 6(3) (4) and Paragraph 8 of the Regulation)

[date]

[Addressee]

Dear Sir/Madam,

Exemption Notification (or Refusal of Exemption)

You are hereby notified that the Commission has examined your agreement [or trade practice or decision] (state details of the agreement) pursuant to your application for exemption.

The Commission, however, is of the view that the agreement [or trade practice or decision] satisfies Section 60 of the Act (state in detail the aspect of Section 60 of the Act that has been satisfied)/does not satisfy section 60 of the Act (state in detail why the aspect of Section 60 of the Act that has not been satisfied).

The Commission hereby grants/refuses your request for exemption from the application of Part VIII of the Act.

(In case of granted exemption)

You are required to:

(state all obligations as may be determined by the Commission which is required from the beneficiary of the exemption)

(In case of refusal of exemption)

The Commission hereby directs as follows:

(state directives by the Commission directing parties to either modify the offending aspects of the agreement or terminate the agreement)

Sincerely,

[Name]

Executive Vice Chairman

Federal Competition and Consumer Protection Commission

[Form 3]
[Modification of Individual Exemption]
(Paragraph 9 of the Regulation)

[date]

[Addressee]

Dear Sir/Madam,

Amendment, Variation or Revocation of Exemption

You are hereby notified that, effective from [insert date], the Commission has amended/varied/revoked the Exemption Notice dated granted to you in respect of (state details of the agreement, trade practice or decision).

The decision of the Commission to amend/vary/voke the Exemption Notice is based on (state the reasons in detail)

Note:

- 1. Where the reason is on grounds that there has been a material change of circumstances since it granted an individual exemption, the Commission shall state the changes in circumstances.*
- 2. Where the reason is on grounds that the information on which it based its decision to grant an individual exemption was incomplete, false, or misleading in a material fact, the Commission shall state the details of the false or incomplete information or material facts.*
- 3. Where the reason is on grounds that any condition or obligation in the Exemption Notice has been breached, the Commission shall state the details of that condition or obligation that has been breached.*

*The Commission hereby directs as follows:
(state directives by the Commission)*

Sincerely,

[Name]

Executive Vice Chairman

Federal Competition and Consumer Protection Commission

[Form 4]
[Complaints Form]
(Paragraph 10 of the Regulation)

[date]

*The Executive Vice Chairman,
Federal Competition and Consumer Protection Commission.*

Dear Sir/Madam,

Complaints against certain restrictive agreement/trade practice/decision

I/We write to notify you of the existence of (state details of the restrictive agreement/trade practice/decision including the parties to the agreement/decision and the date. In the case of a trade practice, state the period within which the trade practice has been going on to your knowledge).

(state in details how the agreement/trade practice/decision negatively affects you, market competition and why you think it infringes Part VIII of the Act).

(State any other information, which in your opinion, may be useful to the Commission for investigations).

I/We hereby request that the Commission take necessary steps to investigate this complaint and make necessary directions or sanctions as the circumstances may require.

Please find attached a copy of the agreement/decision complained about (where available).

*Sincerely,
[Name of complainant]*

[Form 5]
[Decision Notice]
(Section 67(1) of the Act and Paragraph 12 of the Regulation)

[date]

[Addressee]

Dear Sir/Madam,

Decision Notice

You are hereby notified that the Commission has examined your agreement [or trade practice or decision] (state details of the agreement) pursuant to a complaint received by the Commission and has found that the said agreement [or trade practice or decision] infringes Section(s) (state particular sections) of Part VIII of the Act/does not infringe Part VIII of the Act.

State a summary of the following:

- *The complaint*
- *the defensive representations received from the persons likely to be affected by the decision and any other third party*
- *outcome of investigations by the Commission*

The reason(s) for the Commission's findings are as follows:

(state detailed reasons for findings including the competition concerns existent in the transaction, substantive analysis undertaken by the Commission including its initial determination on market definition, the counterfactual and theories of harm)

(in the case of an infringement)

The Commission hereby directs as follows:

(state directives by the Commission directing parties)

Sincerely,

[Name]

Executive Vice Chairman

Federal Competition and Consumer Protection Commission

[Form 6]
[Suspension Order]
(Section 67(2) of the Act and Paragraph 13 of the Regulation)

[date]

[Addressee]

Dear Sir/Madam,

Suspension Order

You are hereby notified that the Commission is currently investigating your agreement [or trade practice or decision] (state details of the agreement) pursuant to a complaint received by the Commission.

You are hereby required to suspend the implementation of the said agreement [or trade practice or decision] pending the conclusion of investigations by the Commission so that the outcome of the investigations may not be prejudiced or rendered nugatory.

Sincerely,

[Name]

Executive Vice Chairman

Federal Competition and Consumer Protection Commission