Nigeria Competition Law Considerations in Negotiating Restrictive Agreements

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A. Background:

1. On Monday, January 29, 2024, the Competition Commission of the Common Market for Eastern and Southern Africa (**COMESA**) announced[1] its imposition of a USD$300,000 fine on the Confederation of African Football (**CAF**) and BEIN Media Group LLC (**beIN**) for engaging in anti-competitive/restrictive business practice. This is arguably the first of such sanctions to be imposed by the CCC, which, according to it, was imposed because CAF, which has the exclusive right to organize all regional football competitions in Africa, had granted the exclusive right to broadcast and market all such competitions to Lagardère Sports S.A.S (**LSS**). LSS had proceeded to grant same rights to beIN under a Memorandum of Understanding (**MoU**) concluded, lately, in 2016. CCC found that the lack of an open tender process for the award of the broadcast rights for CAF competitions to beIN, coupled with the length of the MoU's tenure resulted in significant prevention, restriction, or distortion of competition within COMESA. The commercialization of media rights of football competitions organized by CAF was also found to be in violation of Article 16 of the COMESA Competition Regulation. For context, the Article prohibits and declares void, agreements between businesses, decisions by association of businesses, and concerted practices that may affect trade between Member States and have the object or effect of preventing, restricting, or distorting competition within COMESA.

2. It is against the backdrop of this development in Eastern and Southern Africa that we discuss how Nigeria, the biggest market in the corollary Economic Community of West African States (**ECOWAS**), currently regulates restrictive agreements within the context of its fast-developing competition law regime.

[1]The Press Release of the COMESA Competition Commission (**CCC**) is available at: https://comesacompetition.org/updates/press-release/restrictive-bussiness-practicescomesa-competition-commission-fines-the-confederation-of-african-football-caf-and-bein-media-group-llc-bein-for-breach-of-the-comesa-competition-regulations/

B. A Brief on Restrictive Agreements in Nigeria and the ECOWAS Common Market:

What are Restrictive Agreements or Restrictive Trade Practices?

3. Generally, agreements, decisions, or trade practices among businesses or an association of businesses which have the *purpose* of *preventing, restricting, distorting, or eliminating competition* in a market or which may *likely have such effect* are termed restrictive of competition and prohibited[2].

4. Such restrictive agreements, decisions, or trade practices include formal or informal agreements. To this end, businesses may be liable whether such restrictive agreements or decisions are reached by its directors, officers, employees, or agents; in so far as there is a meeting of minds either explicitly or tacitly. it is immaterial that such an agreement is legally unenforceable. Hence, regardless of the market, level in the supply chain, product (whether goods or service), or nature of the agreement, businesses may be liable for stifling competition either through restrictive agreements expressly entered or because of common trade practices[3] which may have similar effect. Consequently, beyond contractual negotiations, agreements and strategies, businesses have the legal obligation to ask: *"are these terms, conducts, decisions, or trade practices restrictive?"*

5. The agreements are typically either vertical or horizontal. Vertical agreements are between independent businesses operating at different levels of the supply chain in an industry/market. Examples include agreements between a manufacturer and distributor or between a distributor and a retailer. Horizontal agreements are between independent businesses at the same level of

[2] Please see Section 59(1) of the Federal Competition and Consumer Protection Act 2018; and Article 5(1) and (2) of the ECOWAS Supplementary Act A/SA.1/12/08.
[3] Please see Regulation 19 of Nigeria's Restrictive Agreement and Trade Practices Regulations, 2022 (RATP Regulations).

the supply chain in a market – essentially, competitors or likely competitors. Examples include agreements between 2(*two*) or more competing manufacturers, distributors, retailers, etc.

6. Agreements, decisions, or trade practices are principally assessed to be restrictive by considering the ***purpose*** or ***effect*** of such agreement, decision, or trade practice[4]. An agreement, decision, or trade practice will be adjudged restrictive where, by its nature and without more, it has the potential to restrict competition. Examples of this include price fixing, resale price maintenance, withholding goods or services, market/customer sharing, output/production manipulation, and collusive tendering. On the other hand, an agreement or decision will be adjudged to have the *likely effect* of restrictiveness where, it:

    6.1. firstly, has or is likely to have an appreciable adverse impact on price, output, quality, variety, or innovation;

    6.2. secondly, appreciably reduces competition between the parties to the agreement or decision or between one or more of them and third parties by reducing the parties' decision-making independence; and

    6.3. thirdly, would within a reasonable probability allow the parties to the agreement profitably raise prices, reduce output, product quality, variety, or innovation.

7. The *nature and content* of an agreement, conduct, or trade practice constitutes a concern of great significance in determining restrictiveness. *Nature and content* relate to the factors determining possible competition concerns which may arise from the terms of an agreement. These concerns include the scope and objective of the cooperation sought by the agreement; the competitive relationship between the parties to the agreement; and the extent to which they seek to combine their activities.

8. Other relevant factors in determining restrictiveness or general anti-competitive conduct include the market share of the parties; are they close competitors – speaking of which considerations such as: "is either party an important competition force in such a market? or, are their competitors unlikely to increase supply if price increases?", all become relevant.

9. As earlier stated, a competition restrictive agreement or trade practice is prohibited and will be rendered void, at least to the extent of the prohibited clauses which may or will be severed from the contract.

Exceptions: Exempted Agreements

10. In Nigeria, the Federal Competition and Consumer Protection Commission (the **Commission**) may authorize, permit, or exempt certain restrictive agreements, decisions or trade practices by taking into consideration whether the agreement, decision, or practices:

[4] Please see generally **Regulations 3 to 6 at Part II of the RATP Regulations**.

10.1. contributes to the improvement of production or distribution of goods or services or the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefits;

10.2. are indispensable to the attainment or improvement of production or distribution of goods or services or the promotion of technical or economic progress; and

10.3. affords the concerned business(es) the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.

11. Similarly and despite the generally restrictive nature of the conducts, practices, or agreements of trade associations and professional bodies, they are exempted from the general prohibition imposed on restrictive agreements. This is understandably so as the actions of these bodies are typically limited to professional standards and welfare issues.

12. Other exempted classes of conducts, practices, and agreements which may be allowed by the Commission include:

12.1. partnership agreements between individuals (*not being corporates*) concerning the terms of the partnership, the conduct of business or competition between the partners;

12.2. contracts of service between individuals (*not being corporates*) which contains non-compete clauses during the term of such contract or a period of 2 (*two*) years after termination; and

12.3. share/asset purchase agreements or such other agreements concerning the sale of a business or shares in a body corporate which seeks to protect the goodwill or intellectual property as purchased by the acquirer.

13. Even so, the Commission reserves the power to grant further exemptions and may so do under a Block Exemption Notice subject to the provisions of the Federal Competition and Consumer Protection Commission Act (**FCCPC Act** or, the **Act**).

14. Conclusively, parties to a contractual agreement or decision are obligated to assess that the terms of their agreements are not restrictive, and where uncertain, should apply to the Commission for assessment of the Agreement or decision, for the purpose of receiving the Commission's guidance or authorization[5].

C. The Forms of Restrictive Agreements + Restrictive Trade Practices:

15. Price – Fixing: Common with horizontal agreements is price fixing. This covers all agreements, trade practices, and conducts which directly or indirectly seek to by agreement, threat, promise or any other means attempt to influence an upward increase of prices or discourage the reduction of prices. It also includes incidents of refusal to supply goods or services or to otherwise discriminate against any business because of its pricing policy. Within the ECOWAS Common

[5] Please see **Section 60 of the Act**, and **Regulation 10 of the RATP Regulation.**

Market, this extends to conduct which directly or indirectly fixes terms of sale, or any other trading condition such as discounts, rebates, commissions, etc. In addition to the prohibition of agreements of this nature, price–fixing constitutes a crime attracting jail term[6]. Nonetheless, price fixing is not prohibited where the businesses involved are interconnected or enjoy some principal and agent relationship[7]. Similarly, an advertisement of a recommended resale price in non-obligatory language would not pass as restrictive[8].

16. Market Sharing: These are agreements which seek to divide markets by allocating customers, suppliers, territories, or specific types of goods or services or sources of supply among businesses that are parties to such agreements.

17. Output Control: These are agreements, trade practices, and conducts which seek to limit or control the production or distribution of goods or services, markets, technical development, or investment in a particular market. It also includes agreements, practices, or conducts which limit, prevent, or unduly reduce the facilities for transporting, producing, manufacturing, storing, or dealing in or supplying any goods or services in a bid to unreasonably enhance the prices of goods and services. It is noteworthy that agreements, conducts and trade practices of this nature may also constitute a criminal offence known as *conspiracy* and punishable by jail terms. However, the regulatory activities of trade or professional bodies relating to the standards of competence and integrity of such service are exempted under this head and would not qualify as restrictive. Similarly, the collection and dissemination of *information* relating to the service would not qualify as a restrictive agreement or trade practice. Arguably, information in this regard may include information as to pricing.

18. Bid Rigging: Otherwise known as *collusive tendering*. This entails all such agreements, conducts, or trade practices which see businesses agree to refrain from submitting bids in response to a call or as bidders/tenderers agree to submit bids arrived at by an agreement between themselves. This situation typically arises when businesses agree to submit identical bids in response to a call, intending to prevent competition on pricing among the said entities. However, agreements of this nature among affiliated businesses would not amount to bid rigging. Bid rigging constitutes a crime, attracting jail term to offenders.

19. Tying: These are all such agreements, conducts, and trade practices which make the conclusion of an agreement for the purchase or sale of any goods or services subject to the other party accepting such supplementary obligations which by their nature or according to commercial usage have no connection with the subject of the agreement.

20. Resale Price Maintenance: Agreements seeking to maintain, establish, or enforce minimum resale prices for goods or services are another prohibited class of restrictive agreements. This covers all such agreements, conducts, and trade practices which notify dealers or publish prices stated or calculated to be understood as *minimum* resale prices for specific goods or services. It also includes agreements to withhold the supply of such goods or services to a dealer because such dealer has sold or is likely to resell such goods or services below the minimum resale price.

[6] Please see **Section 107(4) of the Act.**
[7] Please see **Section 107(2) of the Act.**
[8] Please see **Section 107(3) of the Act.**

It is noteworthy that while agreements, conduct, and trade practices aimed at establishing/fixing minimum resale prices are prohibited, agreements, conducts, or trade practices notifying dealers or publishing *recommended* resale prices are permitted. The distinction here lies in the fact that while minimum resale prices are mandatory, recommended resale prices are prescriptive/non-obligatory.

21. Exclusionary Clauses: Exclusionary clauses are agreements that require businesses to refuse to sell or purchase any goods or services offered by certain businesses, with the intention of harming those businesses. Agreements of this nature typically arise in markets controlled by cartels, such that these agreements serve as an enforcement tool in the hands of the cartel. Exclusionary clauses may also be seen in price-fixing arrangements.

22. Concerted Refusal to Supply: This sort of agreement among businesses constitutes another price – fixing, and resale price maintenance tool. It entails an agreement between businesses to withhold the supply of goods or services from dealers (whether or not parties to such agreement) seeking to resell or have resold such goods or services in breach of conditions as to the price at which those goods or services may be sold. Concerted refusal to supply also includes agreements to refuse supply of goods or services to the above class or dealers who resell except on conditions that are less favourbale than those applicable to other dealers. Similarly, agreements to enforce or recover penalties from this class of dealers are prohibited.

D. Sanctioning Restrictive Agreements + Enforcing Anti-Restrictive Practices:

23. The Act imposes criminal sanctions and administrative penalties against persons, businesses, and their directors who enter into prohibited restrictive agreements or carry on the prohibited conducts and trade practices. Body corporates found guilty and convicted on account of either of the restrictive agreements, conducts, and trade practices highlighted in the preceding paragraphs above are liable to a fine not exceeding 10% (*ten percent*) of their turnover in the preceding business year – Administrative Sanctions Process. On the other hand, natural persons and directors of body corporates are liable to imprisonment for a term not exceeding 5 (*five*) years, or a fine not exceeding ₦5,000,000 (*Five Million Naira*), or both – Criminal Sanction Process[9].

[9] Please see **Section 69 of the Act.**

Price Fixing, Conspiracy, and Bid-rigging[10] on their own constitute separate offences for which businesses, their directors (in the case of body corporates), and natural persons may be liable – Criminal Sanction Process. It, therefore, lies with the Commission to, on the premise of available evidence, decide whether to apply the Criminal Sanction Process or the Administrative Sanction Process[11].

24. In exercising its enforcement powers, the Commission is empowered to on its own, or upon receiving a complaint from any aggrieved person who has suffered any loss as a result of a restrictive agreement, conduct, or trade practice, commence an investigation into such agreement, conduct, or trade practice. In so doing, the Commission may during its investigation make such interim orders mandating the cessation of the restrictive agreement pending the outcome of its investigation. At the end of its investigation, the Commission may determine that an agreement, conduct, or trade practice is restrictive under either of the prohibited classes, in which case, it will issue an order directing the parties to cease their anti-competitive practice, i.e. the implementation of such restrictive agreement, conduct or trade practice.

E. Conclusion:

25. While businesses continue to enjoy the freedom to contract in the pursuit of commercial objectives, it is crucial to negotiate commercial terms within the permissible limits, keeping competition concerns at the forefront. In so doing, the question for businesses operating within the Nigerian and larger ECOWAS regional market should always remain: is the contemplated agreement, decision, or trade practice restrictive? does it stifle, restrict, distort, or eliminate competition? This is particularly necessary given the prevalence of collective and collaborative actions of businesses at all levels of the supply chain. More importantly, participation in the decisions and agreements of business associations must be viewed with greater scrutiny as there appears to be a thin line between permissible collaboration and cartel-like collaboration. To achieve this, a bespoke competition impact assessment requirement alongside a comprehensive competition enhancement policy should be maintained by businesses and entrenched into all formal and informal commercial engagements/agreements including market entry strategies, partnerships, and collaborations. Additionally, in cases of uncertainty, seeking guidance from the Commission may help prevent any regulatory interference with contractual arrangements. It will not be gainsaid for in–house counsel to focus on and develop expertise in competition compliance as a vital component of their broader risk management strategy.

At AO2LAW, we maintain a foremost Competition Law Practice in addition to hosting Nigeria's Centre for Competition Law. Situated within our Commercial and Criminal Law Practice Group (CCLP), our Practice brings to bear our expertise in core competition law advisory, management (especially with the regulator – FCCPC), and representation in litigations and administrative hearings.

For further information on the foregoing (none of which is a legal advice) or related matters, please generally contact us at cclp@ao2law.com, or send a direct email to the key contacts

[10] Please see **Section 107, 108, and 109 of the Act.**
[11] Please see **Regulation 19 of the RATP Regulation.**