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**FEDERAL COMPETITION AND CONSUMER
PROTECTION ACT, 2018 (A29 ACT NO. 10F 2019)**
ABUSE OF DOMINANCE REGULATIONS, 2022



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S. I. No. 00 of 2022

**FEDERAL COMPETITION AND CONSUMER
PROTECTION ACT, 2018 (A29 ACT NO. 10F 2019)**

ABUSE OF DOMINANCE REGULATIONS, 2022

[00th Day of, 2022]

Commence-
ment.

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. These Regulations are made to provide a regulatory framework for the implementation of Part IX of the Act relating to abuse of dominance and all matters related thereto.

Scope of the
Regulations.

2. These Regulations shall—

Objectives
of the
Regulations.

(a) provide the substantive and procedural requirements for the implementation of Part IX of the Act ;

(b) provide guidance on the regulatory review process for assessing whether an undertaking is dominant and has abused its dominant position or whether two or more undertakings are collectively dominant and have abused their dominant position ;

(c) clarify the process for an exception based on pro-competitive gains and efficiencies.

PART II—ASSESSMENT OF DOMINANCE

3.—(1) The assessment of whether an undertaking is in a dominant position in the relevant market is a first step in the application of Part IX of the Act and while holding a dominant position is not by itself prohibited, the position confers a special responsibility on the undertaking concerned not to engage in anti-competitive conduct in violation of the Act.

General
Approach to
Assessment
under
Part IX.

(2) The second step, which only becomes relevant when an undertaking is found to be dominant within the meaning of Section 70(1) and (2) of the Act, is to determine whether the undertaking is abusing a dominant position within any market or markets in Nigeria for goods or services.

(3) The third step, which only becomes relevant when an undertaking is found to have abused its dominant position within the meaning of Section 72(2) of the Act is to determine whether there are any technological efficiency and other pro-competitive benefits produced by that activity (if any) and to assess whether those technological efficiencies and pro-competitive effects outweigh the anti-competitive effects on competition.

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Concept of
Dominance
under
Section
70(1) and (2)
of the Act.

4.—(1) Under Section 70 of the Act, the Commission shall deem an undertaking to be in a dominant position, where the undertaking has market power and exhibits any of the following features—

(a) can act without taking account of the reaction of its customers, consumers, or competitors ; or

(b) enjoys a position of economic strength in a relevant market enabling it to prevent effective competition being maintained.

(2) For the purposes of applying Section 70 (1) and (2) of the Act and Regulation 3(1), the Commission shall assess the features therein in relation to the undertaking's ability to increase price unilaterally in the relevant market above the competitive level.

(3) The term “price” under Regulation 4(2) encompasses the parameters that can be influenced in any way to the advantage of the dominant undertaking and to the detriment of consumers including—

(i) prices ;

(ii) output ;

(iii) innovation ;

(iv) the variety or quality of goods or services ;

(v) in the case of undertakings in the digital economy, data ; or

(vi) other relevant parameters.

(4) A dominant position may be held by—

(a) a single undertaking otherwise referred to as single dominance ; or

(b) two or more undertakings otherwise referred to as collective dominance.

(5) With respect to collective dominance under the Act, the following shall apply—

(a) a collective dominant position consists in two or more undertakings being able together, in particular because of factors giving rise to a connection between or among them, to adopt a common policy on the relevant market and act to a considerable extent independently of their competitors, their consumers, and ultimately consumers.

(b) a finding that two or more undertakings hold a collective dominant position must, in principle, proceed upon an economic assessment of the position on the relevant market of the undertakings concerned, prior to any examination of the question whether those undertakings have abused their position on the market.

(c) there are three elements to be considered when determining an abuse of collective dominance—

(i) first, the undertakings in question must be considered to be part of a collective entity *vis-à-vis* their competitors;

(ii) secondly, where such a collective entity as provided under Regulation 4(5)(c)(i) is established, the next question is whether the collective entity holds a dominant position as provided under Regulation 6(3); and

(iii) thirdly, the finding of such dominant position is in itself not an abuse, rather, it must be further examined whether the collective entity has abused its dominant position under Section 72 of the Act.

(d) in order to establish the existence of a collective entity as required by Regulation 4(5)(c)(i), the Commission shall examine the economic links or factors which give rise to a connection between or among the undertakings concerned and shall, in particular, consider the following conditions—

(i) first, each member of the collective entity must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy;

(ii) secondly, the situation of tacit co-ordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy of the market;

(iii) thirdly, the foreseeable reaction of current and future competitors, as well as of consumers must not jeopardise the results expected from the common policy.

(6) The dominant position must be held within a relevant market in Nigeria.

5.—(1) In determining whether an undertaking is in a dominant position under Section 70 of the Act, the Commission shall first delineate the relevant market defined in terms of Section 71 of the Act and the Commission's Notice on Market Definition.

(2) Upon delineating the relevant market, the Commission shall consider the competitive factors provided under Section 72(3) of the Act to assess the competitive structure of the relevant market as encapsulated below—

(a) assess the constraints imposed by the existing supplies from, and the position on the market of, actual competitors involving an analysis of the market position of the undertaking and its competitors including its market shares, financial power, access to supplies or markets and/ or link with other competitors;

(b) assess the constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors involving an analysis of expansion and entry, and legal and factual barriers to entry;

(c) assess the constraints imposed by the bargaining strength of the undertaking's customers involving an analysis of countervailing buyer power.

Determination
of
Dominance
under
Section 70
and 72 (3)
of the Act.

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(3) The Commission may consider that effective competitive constraints are insufficient even if some actual or potential competition remains.

(4) In the case of multi-sided markets and networks, the Commission will particularly consider the following in the determination of dominance—

- (a) direct and indirect network effects,
- (b) the parallel use of services from different providers and the switching costs for users,
- (c) the undertaking's economies of scale arising in connection with network effects,
- (d) the undertaking's access to data relevant for competition,
- (e) innovation-driven competitive pressure.

(5) In general, a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative and the Commission shall examine the facts underlying each specific circumstance and the characteristics of the relevant market in which the undertaking operates before it concludes that the undertaking is dominant in the market.

Market
Shares under
Section
70(3) of the
Act and
Market
Position.

6.—(1) An undertaking's market share is an important factor in ascertaining the market position of that undertaking but does not, on its own, determine whether an undertaking is dominant without regard to other factors in Regulation 5.

(2) For the purposes of Section 70(3) of the Act, the Commission generally deems—

- (a) low market shares below the thresholds specified in Regulation 6(3) as less likely to be indicative of dominance ;
- (b) higher market shares above the thresholds specified in Regulation 6(3), sustained over a period of time, as more likely a preliminary indication of the existence of a dominant position.

(3) The Commission publishes the following market share thresholds on its treatment of dominance under Section 70(3) of the Act—

- (a) it may presume that an undertaking is singly dominant if its market share is 40 per cent (40%) or above in the relevant market ;
- (b) in the case of three or fewer undertakings, it may presume collective dominance where they have a combined market share of fifty percent (50%) or above of the relevant market ;
- (c) in the case of five or fewer undertakings, it may presume collective dominance where they have a combined market share of two-thirds or above of the relevant market ;

(d) dominance may be established below the levels of presumption specified in Regulation 6(3) (a)-(c) in the relevant market if it considers other relevant factors provide strong evidence of dominance, such as a high level of concentration.

(e) the presumptions set out in this Regulation 6(3) only apply where there is no significant competition between undertakings; and these undertakings do not face external competition.

(4) Where an undertaking is presumed to be dominant under Regulation 6(3), it shall have the responsibility to rebut the presumption of dominance.

(5) The Commission shall interpret market shares in the light of the relevant market conditions, and in particular the dynamics of the market and the extent to which products are differentiated.

(6) Where the determination of dominance relates to undertakings within the digital economy, the Commission shall in addition to the factors set out in Regulation 5(2) and Regulation 6(3) consider the undertaking's access to data relevant for competition.

7.—(1) The Commission shall consider that a dominant undertaking may be deterred from increasing prices if expansion from actual competitors or entry from potential competitors is likely, timely and sufficient.

Expansion
and Entry as
Competitive
Constraints

(2) The Commission shall consider expansion or entry likely if it is sufficiently profitable for the competitor or entrant, taking into account factors such as—

(a) the barriers to expansion or entry ;

(b) the likely response of the allegedly dominant undertaking and other competitors ; and

(c) the risks and costs of failure.

(3) The Commission shall consider expansion or entry timely where it is sufficiently swift to deter or defeat the exercise of any market strength, typically within no more than one to two years.

(4) The Commission shall consider expansion or entry to be sufficient—

(a) where it is of such a magnitude as to be able to deter any attempt to increase prices by the dominant undertaking in the relevant market ;

(b) where it is of large scale and not simply a small-scale entry, for example into a market niche.

(5) Barriers to expansion or entry can take various forms, including legal or factual.

(6) Legal barriers include barriers such as tariffs, quotas, or regulatory barriers.

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(7) Factual barriers include structural, strategic, technological, or other types of entry barriers that may take the form of advantages specifically enjoyed by the dominant undertaking, such as—

- (i) economies of scale and scope,
- (ii) privileged access to essential inputs or natural resources,
- (iii) important technologies or an established distribution and sales network,
- (iv) costs and other impediments, for instance resulting from network effects, faced by customers in switching to a new supplier,

(8) The dominant undertaking's own conduct may also create barriers to entry, for example—

- (i) where it has made significant investments which entrants or competitors would find difficult to match, or
- (ii) where it has concluded long term contracts with its customers that have appreciable foreclosing effects.

(9) The Commission may deem persistently high market shares held over a long period of time to be indicative of the existence of barriers to entry and expansion.

Countervailing
Buying
Power.

8.—(1) The Commission recognises that an undertaking with a high market share may not be able to act to an appreciable extent independently of customers with sufficient bargaining strength referred to as 'countervailing buying power'.

(2) Countervailing buying power may result from the customers' size or their commercial significance for the dominant undertaking, and their ability to switch quickly to competing suppliers, to promote new entry or vertically integrate, and to credibly threaten to do so.

(3) If countervailing power is of a sufficient magnitude, it may deter or defeat an attempt by the undertaking to profitably increase prices.

(4) Countervailing buying power may not, however, be considered a sufficiently effective constraint if it only ensures that a particular or limited segment of customers are shielded from the market power of the dominant undertaking.

Abuse of
Dominance
under
Section
72(2) of the
Act.

9.—(1) The assessment under Section 72 of the Act, which prohibits abuse of a dominant position, is only relevant once dominance has been established.

(2) Where the Commission has established dominance, it shall consider the existence of any of the abusive practices identified under Section 72(2) of the Act.

(3) The Commission—

(a) shall assess whether any conduct by a dominant undertaking constitutes an abuse of a dominant position based on objective factors ;

(b) may consider evidence of subjective intent on the part of the dominant undertaking to restrict competition as a relevant, albeit not necessary, factor.

10.—(1) The Commission considers excessive pricing under Section 72(2)(a) of the Act as where dominant undertakings take undue advantage of consumers by using their market position to charge excessive prices either in itself or when compared to competing products.

Excessive Pricing under Section 72(2)(a) of the Act.

(2) The Commission shall first assess whether—

(a) the market is characterised by high barriers to entry ;

(b) consumers have no credible alternatives to the products or services of the dominant undertaking ; and

(c) firms compete in a mature environment, where investment and innovation play little or no role.

(d) the price increase is due to external factors.

(3) If at least one of the market conditions specified in Regulation 10(2) is not present, the Commission considers that it is unlikely that very high prices would constitute abusive excessive pricing because high prices can be regulated by new entrants or innovation.

(4) If the market conditions specified in Regulation 10(2) are present, the Commission will assess—

(a) whether the price charged significantly exceeds the costs actually incurred in producing the good or service (that is, the price-cost difference) ;

(b) the price that would have been expected to be charged by an efficient undertaking in a competitive market ;

(c) the price charged is excessive either in itself or when compared to competing products in the geographical market or in comparable geographic markets.

(5) A price shall only be excessive if the difference with the cost/price benchmarks within the relevant market and competing products is substantial.

(6) The increase in price will be regarded as “substantial” if it bears no reasonable correlation to the economic value of the product being considered.

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Refusal to Supply or Deal or Provide Access to Essential Facility under Section 72(2)(b) and (d).

11.—(1) A dominant undertaking's unilateral refusal to supply essential goods or services or to provide access to essential facilities may lead to an infringement of Section 72 of the Act in certain circumstances specified in Regulation 11(2).

(2) The Commission will generally consider that a refusal to supply is abusive if the following cumulative conditions are satisfied—

(a) where a refusal relates to a product, a service or an essential facility that is objectively necessary for the undertaking to compete effectively on a downstream market such that the input is indispensable since there are no alternative solutions which enable equally efficient competitors to counter (at least in the long-term) the negative effects of the refusal ;

(b) where a refusal is likely to lead to the elimination of effective competition or the prevention of its emergence in the downstream market (the higher the market share and the less capacity-constrained the dominant undertaking is, the more likely effective competition will be eliminated) ;

(c) where a refusal is likely to lead to consumer harm (this will particularly be the case if the refusal is likely to prevent innovation or limit technical development, for instance by preventing the emergence of a new product that is not a mere duplicate of the dominant undertaking's product) ;

(d) where the requirement to deal will not significantly deter the dominant undertaking's incentives to invest and the refusal to deal is not otherwise objectively justified.

(3) For the purpose of Regulation 11(2)(a), a facility is likely to be essential where—

(i) access is indispensable in order to compete on the relevant market ; and

(ii) where duplication is very difficult owing to physical, geographic or legal constraints.

(4)(a) A refusal to deal may take several forms, from an outright refusal to more subtle forms such as margin squeeze.

(b) Margin squeeze describes a situation where the dominant undertaking charges a price for the product in the upstream market which, compared to the price it charges in the downstream market, does not allow an equally efficient competitor to trade profitably in the downstream market on a lasting basis (for instance, the downstream operation of the dominant firm would not be profitable if the dominant firm internally charged itself the same price that it charges its downstream competitor).

(5) In the case of the digital economy, the Commission will, in addition to the cumulative conditions outlined in Regulation 11(2), consider an unjustified refusal to supply another undertaking with, or grant it access to essential data,

networks, or infrastructure facilities which are not easily accessible, for an appropriate consideration, as an abuse of dominance.

12.—(1) Tying refers to situations where customers that purchase one product (tying product) are required also to purchase another product (tied product) from the dominant undertaking and, in addition—

(a) tying conduct can result from an express contractual stipulation or a unilateral refusal to supply the tying product until the tied product is also purchased ;

(b) tying can also take place on a technical basis occurring—

(i) if the tied product is integrated into the tying product so that it is impossible to purchase only one of them ; or

(iii) if the tying product is so designed that it only works properly with the tied product.

(2) Bundling refers to the way products are offered and priced by the dominant undertaking as a single package, while pure bundling refers to the situation when products are only sold jointly in fixed proportions.

(3) Multi-product rebate or mixed bundling refers to a situation where the products are also made available separately, but the sum of the prices of the individual elements of the bundle when sold separately is higher than the bundled price.

(4) The Commission shall deem that the conduct or practices in Regulation 12(1)-(3) constitute a violation of Section 72(d)(iii) of the Act only if the three cumulative conditions are met—

(a) first, the undertaking is dominant in the primary product market which is the product on which other products are bundled or tied ;

(b) second, the products are distinct products from the consumer's point of view with the Commission assessing whether in the absence of such conduct, a substantial number of customers would have bought the products from the dominant undertaking without the tied product, which may notably be evidenced by the presence on the market of producers specialized only in the manufacture and sale of one of the two products ; and

(c) third, the conduct or practices are likely to lead to foreclosure of competitors on the tied or bundling market (this is more likely to occur where the dominant undertaking's strategy is a lasting one).

(5) Where the Commission deems that one of the conditions in Regulation 12(4) above are not met, the Commission may allow the undertaking(s) to demonstrate objective pro-competitive justification for the tying/bundling of products.

Tying,
Bundling and
Multi-
product
Rebates
Conducts
under
Section
72(d)(iii) of
the Act.

(6) The Commission may consider a multi-product rebate as anti-competitive on the tied or the bundling market if it is so large that equally efficient competitors offering only some of the components cannot compete against the discounted bundle.

Predatory Pricing under Section 72(2)(d)(iv) of the Act.

13.—(1) Predatory pricing involves an undertaking deliberately setting the price of a product(s) below an appropriate measure of its own cost to incur short-term losses on the sale of product(s) in the market(s) for a period of time sufficient to eliminate, discipline, or deter entry or expansion of a competitor, in the expectation that the dominant undertaking will thereafter recoup its losses by charging higher prices than would have prevailed in the absence of the impugned conduct.

(2) Predatory pricing may be implicit (through discounts or rebates, for example), or explicit.

(3) In order to assess whether a dominant undertaking is engaged in predatory pricing, the Commission shall examine whether the dominant undertaking incurs losses that it would have avoided when compared to economically rational and practical alternatives that may realistically be expected to be more profitable, but for the elimination of competitors.

(4) The Commission considers a dominant undertaking to be engaging in predatory conduct—

(a) if it sets a price below the average avoidable cost as a short-term strategy subject to market conditions.

(b) it is, not necessary to demonstrate that recoupment took place or that initial losses were actually recouped before a finding of predation is made.

(5) The Commission will also take into account other factors, such as—

(a) direct evidence of a strategy aimed at excluding competitors ;

(b) the likelihood for equally efficient competitors to have entered the market in the absence of the conduct in question or the period during which lower prices are sustained.

(6) The Commission considers that targeted prices below costs that exclude certain competitors are more likely to be predatory and these principles shall apply—

(a) it is not necessary to show that competitors actually exited the market as a result of predation though it is vital to demonstrate consumer harm arising from the predatory conduct of the dominant undertaking ;

(b) if a dominant undertaking maintains a low price over a significant period of time, this price could be a sustainable low price rather than a predatory price and it is unlikely that this conduct constitutes predatory pricing ; and

(c) it would be important, though, to assess if an equally efficient competitor would survive in the particular market scenario.

(7) The Commission considers that average avoidable cost is the most appropriate cost standard to use when determining if a dominant firm's prices are below cost, and applies the following—

(a) avoidable cost refers to all costs that could have been avoided by a firm if the firm had not produced the identified amount of product(s) in question.

(b) whether a cost is avoidable depends in part on the duration of the alleged predation as, in general, more costs become avoidable over time.

(8) Where the undertaking's pricing of the product(s) does not cover its own average avoidable costs, the Commission will consider the pricing to be predatory in the absence of evidence that the overriding purpose of the conduct was in furtherance of a credible efficiency or pro-competitive rationale, for example—

(i) it may be reasonable for a firm to sell excess, obsolete or perishable products at below-cost prices ;

(ii) undertakings may use below-cost promotional pricing to induce customers to try a new product.

14.—(1) Exclusive purchasing refers to the obligation for a customer to purchase exclusively or to a large extent only from the dominant undertaking in a specific market.

Exclusive
Purchasing
under
Section
72(2)(d)(i)
of the Act.

(2) The Commission considers that an obligation to purchase at least 50% of the customer's requirement amounts to exclusivity.

(3) An exclusive purchasing obligation may constitute an abuse of dominant position if it forecloses competitors by hindering them from selling to customers.

(4) In its assessment, the Commission shall take into account—

(a) the competitive constraints exercised by both actual and potential competitors ;

(b) the stability of market shares ;

(c) the likelihood of new entry ;

(d) the portion of the market affected by such conduct and the duration of the exclusive purchasing obligation.

(5) The Commission applies the following considerations—

(a) that exclusivity obligations of longer duration are more likely to have a foreclosure effect on the market than obligations of short duration.

(b) generally, the duration of two or more years is considered long, although the length of duration will be determined on a case-by-case basis.

(c) in either long or short durations, the dominant undertaking must be an unavoidable trading partner for most customers.

(d) in some cases, purchasing obligations of short duration may lead to anti-competitive foreclosure if the dominant undertaking is an unavoidable trading partner of all or most customers.

(6) An exclusive purchasing obligation does not constitute a violation of the Act if only a small portion of the relevant market is affected so that there remains sufficient demand on the market to allow equally efficient competitors or potential competitors to compete viably on almost equal terms for each individual customer's entire demand.

(7) The same principles specified in this Regulation 14 shall apply with regard to exclusive supply obligations whereby the dominant undertaking would oblige a supplier exclusively or to a large extent to supply only to the dominant undertaking on a specific market.

PART III—PRO-COMPETITIVE ASSESSMENTS

Pro-Competitive Assessment for Individual Cases.

15.—(1) Where in an individual case, an abuse of dominance within the meaning of Section 72(2) of the Act has been, Section 72(3) of the Act may be invoked as a defence given that the assessment of abuse of dominance under Section 72(2) of the Act is only one side of the analysis.

(2) The other side of the Commission's analysis, which is reflected in Section 72(3) of the Act, shall be the assessment of the pro-competitive effects of the specific conduct.

(3) The burden of proof under Section 72(3) 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 conduct in question gives rise to pro-competitive effects or not.

(4) For the purpose of the Commission's analysis, "pro-competitive effects" or "efficiencies" or "efficiency gains" has the meaning contemplated under Section 72(3) of the Act.

Conditions for Pro-Competitive Effects.

16.—(1) The Commission shall examine arguments presented by a dominant undertaking that the pro-competitive effects of the conduct outweigh its anti-competitive effects and is objectively justified on unquestionable commercial grounds.

(2) The application of the exception rule of Section 72(3) of the Act is subject to four cumulative conditions—

(a) the efficiencies have been, or are likely to be, realised as a result of the conduct which may, for example, include technical improvements in the quality of goods, or a reduction in the cost of production or distribution ;

(b) the conduct is indispensable to the realisation of the efficiencies in Regulation 16(2)(a) and there must be no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies ;

(c) the likely efficiencies brought about by the conduct concerned outweigh any likely negative effects on competition and consumer welfare in the affected markets ;

(d) the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.

(3) When the four conditions specified in Section 72(3) are fulfilled, the conduct 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 lessening of competition.

(4) The four conditions under Section 72(3) of the Act are exhaustive with the exception becoming applicable without being made dependent or contingent on any other condition.

(5) Where the conditions under Section 72(3) of the Act are satisfied, the undertaking will not be considered as abusing its dominant position.

(6) Where the conditions under Section 72(3) of the Act are not satisfied, the undertaking will be considered as abusing its dominant position and the conduct shall be prohibited under Section 72(1) of the Act.

17.—(1) The assessment under Section 72(3) of the Act of the benefits flowing from an abuse of dominance is in principle made within the confines of each relevant market where the abuse is taking place—

General principles.

(a) the condition that consumers must receive a fair share of the benefits implying in general that—

(i) the advantages or cost benefits must be passed on to consumers ; and

(ii) the efficiencies generated by the specific anti-competitive conduct within a relevant market must be sufficient to outweigh the anti-competitive effects produced by the conduct within that same relevant market.

(b) negative effects on consumers in one geographic market or product market cannot be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market, for example in tying and bundling ;

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(c) where however two markets are related, efficiencies achieved on separate markets can be considered, if the group of consumers affected by the anti-competitive conduct and benefiting from the efficiency gains are substantially the same ;

(d) cost savings that arise from the mere exercise of strength by the parties cannot be considered.

The
Efficiency
Condition.

18.—(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 ;

(b) the direct link between the conduct and the efficiencies to ascertain that there is a sufficient causal link between the specific conduct and the claimed efficiencies ;

(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.

Condition
regarding
indispensa-
bility of the
abusive
conduct in
Section
72(3)(b).

19.—(1) The indispensability condition under Section 72(3)(b) of the Act implies a two-fold test—

(a) first, the abusive conduct must be reasonably necessary in order to achieve the efficiencies ; and

(b) secondly, the anti-competitive effects that flow from the abusive conduct must also be reasonably necessary for the attainment of the efficiencies.

(2) The first test specified in Regulation 19(1)(a) requires that the efficiencies be specific to the conduct 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 undertaking alleged to have abused its dominant position ; and

(c) undertakings invoking the benefit of Section 72(3) of the Act are not required to consider hypothetical or theoretical alternatives.

(3) The second test specified in Regulation 19(1)(b) considers whether more efficiencies are produced with the abusive conduct than in the absence of the abusive conduct and whether in the absence of the abusive conduct, the efficiencies would not have materialised.

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

(5) In certain cases, a lessening of competition may be indispensable only for a certain period of time, in which case the exception of Section 72(3) of the Act only applies during that period.

(6) In making the assessment, 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.

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

20.—(1) For the purpose of Section 72(3) of the Act,—

(a) ‘*consumer*’ encompasses all direct or indirect users of the products covered by the conduct, including producers that use the products as an input, wholesalers, retailers and final consumers ;

(b) consumers are the customers of the undertaking(s) alleged to have abused their dominant position 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 anti-competitive conduct found under Section 72 (2) of the Act and as such—

(a) the net effect of the conduct must at least be neutral from the point of view of those consumers directly or likely affected by the conduct ; and

(b) if such consumers are worse off following the conduct, the consumer fair share condition under Section 72(3)(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 72(3)(a) of the Act and it suffices that sufficient benefits are passed on to compensate for the negative effects of the abusive conduct.

(4) If the conduct relates to excessive prices, consumers must be fully compensated through increased quality or other benefits, otherwise, the consumer fair share condition under Section 72(3)(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.

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

(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 72(3) of the Act ;

(b) but the greater the time lag, the greater must be the efficiencies to compensate for the loss to consumers during the period preceding the pass-on.

Possibility
of
Eliminating
Competition.

21.—(1) The condition of Section 72(3)(c) 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 ends and short-term efficiency gains are outweighed by longer-term losses stemming inter alia from expenditure incurred by the incumbent to maintain its position, 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 concerned undertaking(s) 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.

PART IV—ADMINISTRATIVE AND INVESTIGATION PROCESSES

22.—(1) Where the Commission considers that an undertaking has abused its dominant position and is prohibited under Section 72(1) of the Act, the Commission shall institute an administrative process under section 73 of the Act and shall adhere to the Commission’s Rules for Hearing and Investigations.

Administrative
process and
Investigation.

(2) If in doubt about whether any contemplated conduct or practice may constitute a violation of these Regulations or the Act, an undertaking may seek authorisation, clearance or an advisory opinion from the Commission under the Commission’s Rules on Authorisations, Clearances and Opinions.

(3) Any person may present a complaint to the Commission in Form 1 relating to an abuse of a dominant position.

PART VI—APPEALS

23.—(1) 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.

Appeals.

PART VII—REWARD OF COOPERATION APPLICATION

24. Notwithstanding anything in this Regulation, an undertaking or group of undertakings who have been found to abuse their dominant position not permitted under the Act, may apply for reduced sanctions under the Reward of Cooperation Rules of the Commission.

Reward of
Cooperation.

PART VIII—MISCELLANEOUS PROVISIONS

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

Power of the
Commission
to Issue
Guidelines.

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Interpretation. **26.** 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 Abuse of Dominance Regulations, 2022 ;

Citation. **27.** These Regulations may be cited as the Abuse of Dominance Regulations, 2022.

MADE at Abuja this day of, 2022.

MR BABATUNDE IRUKERA
Executive Vice Chairman

SCHEDULE

[FORM 1]

COMPLAINTS FORM

(Paragraph 22 of the Regulation)

[date]

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

Dear Sir/Madam,

COMPLAINTS AGAINST CERTAIN ABUSE
OF DOMINANT POSITION

I/We write to notify you of the existence of (state details of the abuse of dominant position including the alleged erring undertaking. Where relevant, state the period within which the abuse of dominance has been going on to your knowledge).

(state in details how the anti-competitive conduct negatively affects you, market competition and why you think it infringes *Part IX* 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.

Sincerely,

[Name of Complainant]