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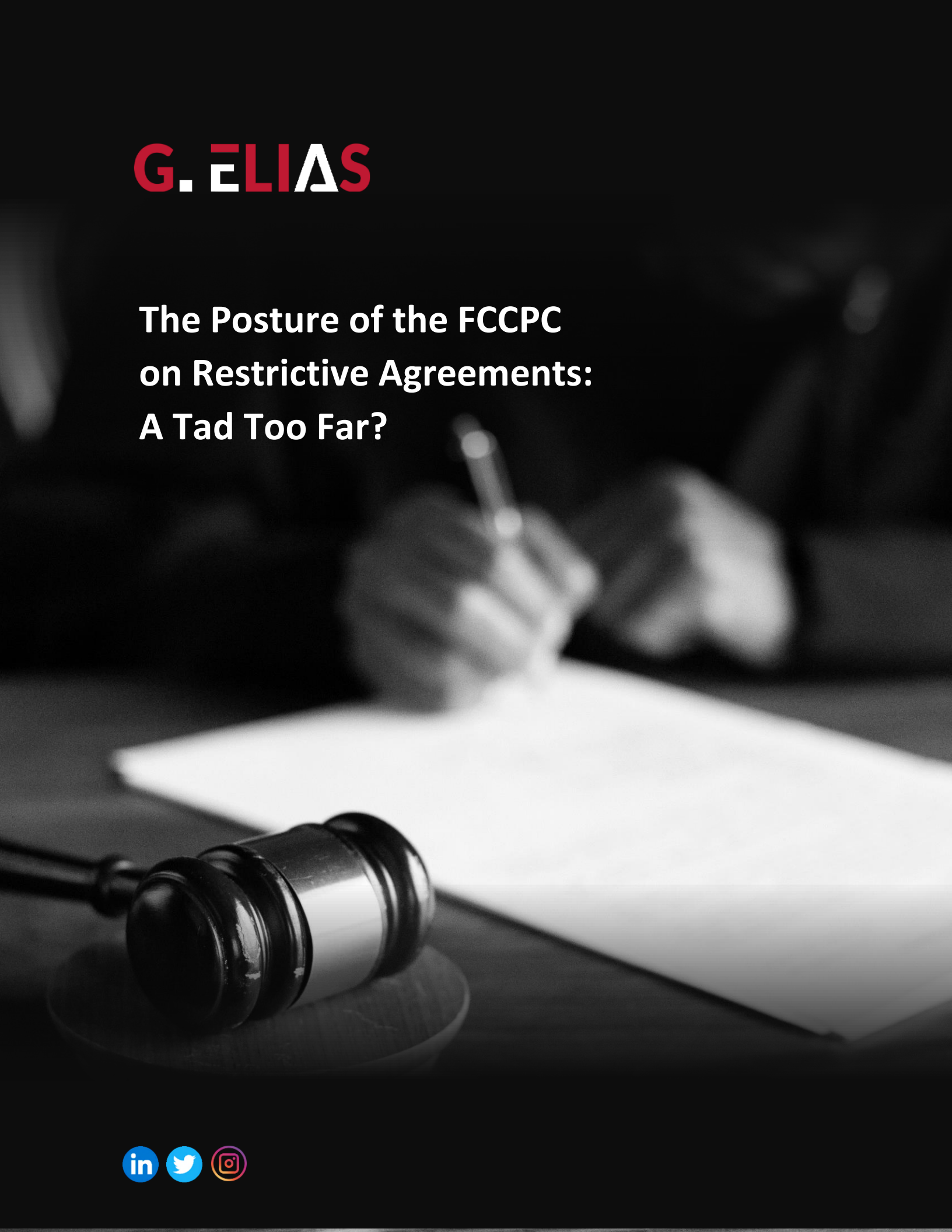
The Posture of the FCCPC on Restrictive Agreements: A Tad Too Far?



Introduction

That the Federal Competition and Consumer Protection Commission ("**FCCPC**") is the new sheriff in town as far as the regulation of competition in the Nigerian market is concerned is no longer news. Indeed, since its establishment by the Federal Competition and Consumer Protection Act, 2018 ("**FCCPA**"), the FCCPC has striven to consolidate its stranglehold on its statutory mandates by churning out a panoply of subsidiary legislations on a scale and at a volume that its predecessor, the now-defunct Consumer Protection Council, never quite managed.

One of such subsidiary legislations released by the FCCPC is the Restrictive Agreement and Trade Practices Regulations, 2022 ("**Regulations**"). By its own admission, the Regulations seek "to provide a regulatory framework for the implementation of PART VII and some aspects of PART XIV of the [FCCPA] relating to restrictive agreements."[1] The Regulations hope to achieve this vaunted overarching goal by clarifying "the process for authorization of exempted agreements and practices among undertakings"[2] and setting out "guidance on the regulatory review process for agreements or decisions."[3]

In essence, the Regulations aim to throw much-needed light on the provisions of the principal law, the FCCPA, on the evaluation of contracts for their potential for restricting competition. This article critiques the FCCPC's position on restrictive agreements, as seen through the lens of the Regulations, and ultimately concludes that though the FCCPC may be well-intentioned in looking at restrictive agreements askance, its disposition to interrogate any agreement with a potential to restrict competition, even when such potential is established to be only an effect (rather than the purpose) of such an agreement may be a tad overzealous and misguided in the broader context.

The Regulations in Essence – a Panoramic Look

The Regulations proffer detailed explanations of sections 59 and 60 of the FCCPA. The former deals with the prohibition of agreements in restraint of competition whilst the latter sheds a framework for the FCCPA's authority to give a pass mark to certain agreements which though restrict competition contribute to the improvement of production or distribution of goods or services whilst correspondingly providing consumers a fair share of the resulting benefit.[4]

[1] Regulations, paragraph 1.
[2] Regulations, paragraph 2(c).
[3] Regulations, paragraph 2(b).
[4] FCCPA, s. 60(9).

According to the Regulations, an agreement is only prohibited by section 59(1) of the FCCPA if its purpose or effect is to prevent, restrict, or distort competition.[5] The Regulations distinguish between an agreement that has as its "purpose" the restriction of competition and an agreement which is not designed to restrict competition but may have an effect on competition.[6] In deciding whether an agreement has the *purpose* or the *likelihood* of distorting competition in the relevant market, the Regulations prescribe a two-step approach, namely: (i) assessing whether the agreement under the microscope has the restriction of competition as its *main purpose* or as its *effect*; and (ii) determining the pro-competitive benefits of the agreement and whether the said pro-competitive benefits outweigh the restrictive effects on competition.[7]

In order to ascertain whether an agreement has the restriction of competition as its central purpose, the FCCPC will consider (i) its content and pursued aims, (ii) its legal and economic background, and (iii) the behaviour of its parties in the market.[8] That a written agreement does not contain a provision restricting competition does not inoculate it from the FCCPC's scrutiny, if the implementation of the said agreement reveals it is contrived to restrict competition.[9]

Where an agreement does not have the restriction of competition as its purpose, the FCCPC will examine its effect by evaluating if: (i) the agreement has or is likely to have an appreciable adverse impact on any of price, output, product quality, product variety, or innovation; (ii) the agreement stymies competition between parties or between any of them and third parties by reducing their decision-making independence either due to obligations in the agreement or influence on the market conduct of a person; or (iii) the parties would be able to profitably raise prices or reduce output, product quality, product variety, or innovation.[10]

Other relevant factors in evaluating the competition restriction potential of an agreement include considering whether: (a) the parties have high market shares; (b) the parties are close competitors; (c) the customers have limited possibilities of switching suppliers; (d) competitors are unlikely to increase supply if prices increase; and (e) one of the parties is an important competitive force.[11]

[5] Regulations, paragraph 3(1).
[6] Regulations, paragraph 3(2).
[7] Regulations, paragraph 4(1).
[8] Regulations, paragraph 5(1).
[9] Regulations, paragraph 5(3).
[10] Regulations, paragraph 6(3).
[11] Regulations, paragraph 8(1).

The Regulations empower the FCCPC to sanctify as valid an individual agreement or a block of agreements found to be restrictive of competition under section 59 of the FCCPA.[12] Section 60 of the FCCPA offers an outlet to an agreement ordinarily in restraint of competition to avoid being voided if the FCCPC is satisfied that the agreement: (i) contributes to the improvement of production or distribution of goods or services or the promotion of technical or economic progress whilst allowing consumers a fair share of the resulting benefit(s); (ii) imposes on the parties thereto only such restrictions as are indispensable to the attainment of (i) above; and (iii) does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.[13]

In determining whether an agreement exists, it is immaterial to the FCCPC that such an agreement is not in writing. Where there is a meeting of the minds and the traditional elements of a contract exist[14], the FCCPC would subject such arrangement to regulatory scrutiny in the manner stated in the FCCPA and the Regulations – and declare the said arrangement to be in restraint of competition in deserving circumstances.[15]

Out of an abundance of caution, a party to an agreement who is concerned that the agreement infringes the competition restriction provisions of the FCCPA may apply to the FCCPC to assess the said agreement and deliver a verdict on its anti-competition potential.[16] The Regulations go further to set out the steps and procedures for such an application to the FCCPC.[17] The Regulations further prescribe the mechanics of applying to the FCCPC for an exemption under section 60 of the FCCPA.[18]

The provisions of the FCCPA and the Regulations on restrictive agreements relate only to agreements which came into being from the effective date of the FCCPA – the said provisions do not operate retrospectively to apply to contracts in existence before the FCCPA was enacted.[19]

Critical Commentary

Despite the Regulations' best efforts to expatiate on and explain the FCCPA's provisions on restrictive agreements, there remains a significant level of uncertainty on whether the commercial terms of contracts could run afoul of the provisions of the FCCPA on restriction of competition. This issue is further exacerbated by the relative recentness of the said provisions, which have not particularly enjoyed judicial interpretation for clarity.

Section 59 of the FCCPA which outlaws agreements with competition restriction potential is obviously inspired by section 2 of the United Kingdom's Competition Act, 1998, which similarly nulls agreements that have as their object or effect the prevention, restriction, or distortion of competition.[20]

From a drafting perspective, it is unclear whether contractual provisions on "exclusivity" can pass muster with section 59 of the FCCPA. In other words – as contracting parties must now be helplessly wondering – are contractual provisions to the effect that one party shall exclusively supply goods or

[12] FCCPA, s. 60.
[13] *Ibid*.
[14] Namely capacity to contract, an offer, unqualified acceptance, consideration, and an intention to create legal relations. See *Uwah & Anor v. Akpabio et al.* (2014) LPELR-22311(SC).
[15] Regulations, paragraph 19(2).
[16] Regulations, paragraph 20(2).
[17] See, for example, paragraph 20(3) of the Regulations.
[18] [18] See, for example, paragraph 21 of the Regulations.
[19] As a general Nigerian law matter, a statute is not to be held to operate retrospectively unless a clear intention to that effect is present in such statute. See *Orthopaedic Hospitals Management Board v. Garba et al*. (2002) 12 NWLR (Pt. 799) 538.
[20] United Kingdom's Competition Act, 1998, s. 2.

services to another party for a given period valid under Nigerian law? The FCCPA and the Regulations demur to pointedly answer this increasingly teething question. As a result, there is a cloud hanging over parties negotiating an agreement for goods or services regarding what may be included or excluded from such agreements.

Where an agreement for supply of goods or services is for an extended period of time, such an agreement, considering the present language of the FCCPA and the Regulations, would be riddled with a possible violation of the law on restriction of competition. Take for instance, an offtake agreement in the hydrocarbons industry under which X (an oil producer) contracts with Y (buyer) to supply Y with crude on an exclusive basis over a ten-year period. This hypothetical offtake arrangement would likely be adjudged by the FCCPC as having the potential to adversely impact competition for X's crude, given that during the decade-long life of the contract, X would be contractually restricted from supplying extracted crude to Y's competitors. The risk that this offtake arrangement would be struck down for being anti-competition is ultimately the FCCPA's prerogative.

Due to the presence of this risk, Y's lenders would be skeptical of extending credit to Y to pay for the crude to be received from X under the offtake arrangement, as the said lenders may not be all too certain that the dimension of the offtake arrangement on exclusivity (which is the cornerstone of the contract) is not inconsistent with the FCCPA and the Regulations. These are the potential issues the FCCPA has unwittingly created for Nigerian corporates, traders, service providers, and their creditors.

This problem would have been resolved had the FCCPA only provided for the voidance of agreements whose "principal purpose" is the restriction of competition. A statute voiding a conduct only where an ulterior motive exists is not unusual in our jurisdiction. For instance, financial assistance[21] by a company to an acquirer is permitted under Nigerian law to the extent that such assistance is not given for the "principal purpose" of reducing or discharging any liability incurred by such acquirer in its acquisition of the shares of the company.[22]

A similar approach by the FCCPA (*i. e.*, the FCCPA outlawing a contract restricting competition where such restraint is the principal purpose of the said contract) would have been helpful and proper. The FCCPA, a tad overzealously, has however painted all agreements with competition restriction tendencies or elements with the same brush – thereby unwittingly opening a Pandora's box that only definitive judicial pronouncements on the matter or a legislative amendment can effectively shut.

Conclusion

The FCCPA sweepingly voiding agreements with elements of competition restriction, regardless of whether such elements are central or merely incidental, has created more problems than it has solved. Ironically, in trying to ensure competition is not restricted, the regulator may now be restricting commerce.

An amendment of the principal legislation, the FCCPA, is necessary to limit voidance of only those agreements engineered by market actors to stifle competition and/or amp their competitive advantages. The current overzealous posture of the statute is a step forward but a thousand backward.

[21] Defined by the Companies and Allied Matters Act, 2020 ("**CAMA**") as a gift, guarantee, any form of security or indemnity, a loan or any form of credit or any other financial assistance given by a company, the net assets of which are thereby reduced by up to 50%, or which has no net assets. See CAMA, s. 183(1)(a).

[22] Companies and Allied Matters Act, 2020, s. 183(3)(f).

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