



FCCPC

Federal Competition & Consumer Protection Commission

Business Guidance Relating to COVID-19 On Business Co-operation/Collaboration and Certain Consumer Rights Under the Federal Competition and Consumer Protection Act (FCCPA)

Sections 17 (b), 163 (1), (2) (a) and (e) FCCPA 2018.

April, 2020



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PART 1. Introduction and Regulatory Context

- 1.1 Nigeria, and the world at large, is experiencing a severe public health emergency. The COVID-19 pandemic presents an unprecedented challenge for businesses and consumers as well as the global and local economy.
- 1.2 The economy, across several value chains and channels, has been disrupted. With a lockdown in effect, locally and globally, there has been a sharp rise in demand for certain essential products and services, notably those related to health (medicines, medical equipment and devices, etc.) and food items, just as there has been an abrupt decline in the demand for many other products and services that keep the economy vibrant such as tourism and transportation. The impact of the shock on the whole economy is as yet unquantifiable as there is still uncertainty on both the duration and intensity of the shock. Much of what will shape the duration of this crisis is outside the purview of businesses and left to public entities who are driven primarily by public health considerations.
- 1.3 But businesses have played and will continue to play a key role in overcoming the crisis. Over the course of the COVID-19 outbreak, Nigerian businesses have assisted in national, state and local based efforts to tackle its effects. Many have gone to great lengths to keep essential products and services in supply, just as their employers have braved the odds to keep production and supply of these products and services going. The FCCPC recognises that given these exceptional circumstances, businesses might seek cooperation with competitors to ensure that supply chains remain unbroken and scarce products and services continue to flow into the stream of commerce. Addressing the shortage of essential products and services will mitigate the severest effects of the crisis and be of ultimate benefit to consumers and Nigerian citizens.
- 1.4 While some businesses have acted responsibly, a handful have chosen to use this as an opportunity to subvert competition or prey on vulnerable Nigerians. The FCCPC restates that it is of utmost importance that products and services remain available at competitive prices, especially those that are essential to urgent public health and subsistence needs in the current situation, like medical supplies, equipment and food. The Commission will not hesitate to seek to hold accountable those who violate the law. The Commission will also prosecute any criminal violations of the Act, which typically involve agreements or conspiracies between individuals or businesses to fix prices or wages, rig bids, or allocate markets. More broadly, the FCCPC is addressing actions by

individuals and businesses to take advantage of COVID-19 through other fraudulent and illegal schemes. Anyone with information or concerns about this sort of conduct, or other COVID-19-related complaints, should contact the FCCPC- <https://covid19.fccpc.gov.ng> or 07086159973 (WhatsApp only).

- 1.5 The main attention of the Federal Competition and Consumer Protection Commission (FCCPC) at this time and in the near future will be to continue to promote and maintain competitive markets as well as to protect consumers from the adverse consequences of the COVID-19 pandemic to the greatest extent possible. In this extraordinary situation, the FCCPC is providing a framework to legally assure businesses that need to coordinate or combine efforts to ensure the supply and distribution of scarce products and services that attend to the health, safety and subsistence needs of consumers. Such cooperation, coordination or joint efforts, provided they are limited in scope and duration necessary to address concerns arising from the current crisis and does not go further or last longer than necessary, will not receive legal sanction from the FCCPC.
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- 1.6 Specifically, therefore, the FCCPC issues this Notice to provide clarity for businesses and consumers in relation to the following:
- a. Authorisations for cooperation among businesses during the COVID-19 pandemic; and
 - b. Certain consumer rights under Part XV of the Federal Competition and Consumer Protection Act during the COVID-19 pandemic

PART 2 Cooperation Among Businesses

2.1 Under the Act, businesses cannot enter into agreements that prevent, restrict or distort competition. Coordination and cooperation among companies to fix prices, allocate markets, limit production or engage in collusive tendering are unlawful.

2.2 The Commission issues this Notice to exempt a category of agreements or practices between companies or undertakings from the application of Section 59 of the Act in response to the COVID-19 pandemic ("Crisis"), solely for the purpose of:

- (a) promoting concerted conduct to prevent an escalation of the Crisis and to alleviate, contain and minimise the effects of the national disaster;
- (b) enabling companies and undertakings to cooperate on effecting the supply and distribution of essential products and services to minimise the negative impact of the Crisis on consumers;

(c) cooperation in the health and relief sectors which might be limited to entrusting a trade association, an independent advisor, independent service provider, or a public body, to undertake one of the following:

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- (i) coordinate joint transport for input materials;
 - (ii) contribute to identifying those essential medicines for which, in view of forecasted production, there are risks of shortages;
 - (iii) aggregate production and capacity information, without exchanging individual company information;
 - (iv) work on a model to predict demand on a national level, and identifying supply gaps;
 - (v) share aggregate supply gap information, and request participating companies or undertakings, on an individual basis and without sharing that information with competitors, to indicate whether they can fill the supply gap to meet demand (either through existing stocks or increase of production).

- (d) Putting in place measures to adapt production, stock management and, potentially, distribution in the health industry that are-
 - (i) designed and objectively necessary to actually increase output in the most efficient way to address or avoid a shortage of supply of essential products or services, such as those that are used to treat COVID-19 patients;
 - (ii) temporary in nature (i.e. to be applied only as long there is a risk of shortage or in any event during the COVID-19 outbreak);
 - (iii) not exceeding what is strictly necessary to achieve the objective of addressing or avoiding the shortage of supply;
 - (iv) encouraged and/or coordinated by a public authority (or carried out within a framework set up by the latter).
- (e) Entering joint purchasing arrangements among healthcare providers, and other critical service and goods providers such as those designed to increase the efficiency of procurement and reduce transaction costs;
- (f) Collaborations that involve agreements to engage in joint research and development ("R&D") that might involve sharing of information on technical know-how, without sharing company-specific data about prices, wages, outputs, or costs.

2.3 Pursuant to section 60 of the Act, the Commission hereby exempts and authorises the categories of agreements or practices in paragraph 2.2 from the application of section 59 of the Act if undertaken at the request of, and in coordination with, the Commission for the sole purpose of responding to the Crisis and which exclude communication and agreements in respect of prices.

Request for Authorisation

- 2.4 The request for authorisation may be submitted by email to exemptionapplications@fccpc.gov.ng.
- 2.5 Companies requesting authorisation are required to provide, at the time of the request, the following information on the proposed collaboration:
- (a) The companies involved and the parameters of the collaboration including its proposed scope and duration;
 - (b) A detailed description of how the collaboration is intended to achieve a clearly identified COVID-19 related objective in the public interest and how it contributes to the benefit or wellbeing of consumers;
 - (c) A description of the nature and rationale of the proposal (the product(s) or service(s) the proposal will cover, and the temporal and geographic scope of the arrangement), any proposed contractual or other arrangements among the parties (including copies of any documents documenting the contract or arrangement), the names of the major expected customers, and any available information regarding the competitive significance of other providers of the product(s) or service(s) to be offered.
 - (d) An explanation of why the collaboration is necessary to meet the COVID-19 objective;
 - (e) A description of any measure being undertaken at the behest of a public body;
 - (f) A description of any authorisation sought on whether the collaboration contemplated will actually further Nigeria's response to COVID-19;
 - (g) A statement that the collaboration will last no longer than is necessary to deal with the COVID-19 issues; and
 - (h) the name and contact information of a person whom the Commission can contact for additional information.

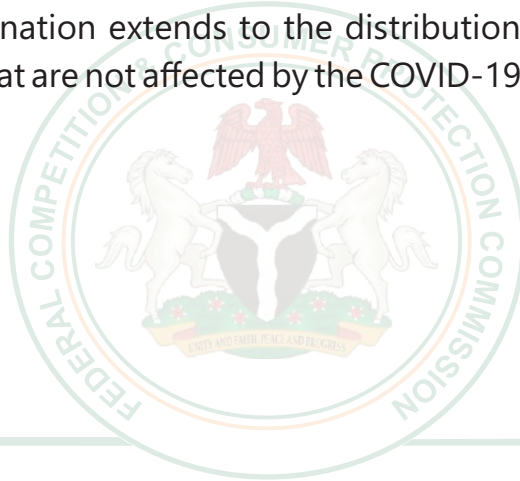
2.6 The following operational considerations will apply:

- (a) The Commission may seek input on the proposed collaboration from other parts of government at all levels, stakeholders, and market contacts;
- (b) The Commission may require conditions to ensure the impact on competition is limited only to the extent necessary to meet the critical needs in this emergency period;
- (c) Any authorization will be for a limited period of time that will be clearly stated. Such period may be extended upon further request and justification.
- (d) It would be within the Commission's purview to make the authorisation public to support transparency; and
- (e) At the conclusion of the time period (if not extended by the Commission), each of the parties would be expected to provide written confirmation to the Commission that the collaboration has been terminated.

2.7 The Commission will continue to monitor incidence of certain conduct by unscrupulous businesses who might seek to exploit the crisis as a 'cover' for non-essential collusion. This could include, for example:

- (a) Companies or undertakings exchanging with their competitors commercially sensitive information on future pricing or business strategies, where this is not necessary to meet the needs of the current situation;
- (b) retailers excluding smaller rivals from any efforts to cooperate or collaborate in order to achieve security of supply, or denying rivals access to supplies or services;
- © a business abusing its dominant position in a market (which might be a dominant position conferred by the particular circumstances of this crisis) to raise prices significantly above normal competitive levels;

- (d) collusion between companies or undertakings that seeks to mitigate the commercial consequences of a fall in demand by artificially keeping prices high to the detriment of consumers; or
- (e) coordination between businesses that is wider in scope than what is actually needed to address the critical issue in question (for example, if the coordination extends to the distribution or provision of goods or services that are not affected by the COVID-19 pandemic).



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PART 3 Certain Consumer Rights

- 3.1 It is of the utmost importance to ensure that the prices of products or services considered essential to protect the health of consumers in the current situation (for example, face masks and sanitizers) are not artificially inflated by unscrupulous businesses seeking to take advantage of the current situation by colluding to keep prices high, if they have a dominant position in a market, by unilaterally exploiting that position.
- 3.2 Manufacturers can also take steps themselves to help combat 'price gouging' or excessive pricing. Manufacturers setting maximum prices at which retailers may sell their products is not unlawful. Manufacturers may therefore directly address price gouging by setting maximum prices for the retail of their products.
- 3.3 Consumers' rights to return and full refund under section 122 of the Act shall subsist despite the lack of movement occasioned by the lockdown so long as the consumer shall ensure that the goods are not used and remain in pristine condition.
- 3.4 Recognising the restriction to movement occasioned by the Crisis, consumers' rights to warranty under section 132(2) of the Act shall not be extinguished by effluxion of time if the Consumer is unable to physically return the defective product but notifies the undertaking by email or other means of the defect.