**FEDERAL COMPETITION AND CONSUMER PROTECTION COMMISSION**

# EXPLANATORY GUIDELINES

# TO THE

# AUTHORISATION, EXEMPTION AND GUIDANCE REGULATIONS (NON-MERGER MATTERS), 2026

*Issued pursuant to the Federal Competition and Consumer Protection Act, 2018*

2026

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# EXPLANATORY GUIDELINES TO THE AUTHORISATION, EXEMPTION AND GUIDANCE REGULATIONS (NON-MERGER MATTERS), 2026

## PREAMBLE

### Purpose of these Guidelines

1. These Explanatory Guidelines ("the Guidelines") are issued by the Federal Competition and Consumer Protection Commission ("the Commission") to assist undertakings, legal practitioners, economists, and other stakeholders in understanding and applying the Authorisation, Exemption and Guidance Regulations (Non-Merger Matters), 2026 ("the Regulations").

2. The Guidelines set out the Commission's interpretive approach, analytical frameworks, evidentiary expectations, and decision-making methodology for each Part of the Regulations. They expand on the procedural and substantive framework under the Regulations, expounding the principal analytical techniques, evidentiary standards, and the assessment methodology of the Commission with respect to exemptions, authorisations, and guidance on non-merger matters.

3. With these Guidelines, the Commission seeks to identify the bases upon which it would grant or refuse exemptions, whilst avoiding needless intervention with agreements that are either competitively beneficial or neutral. Most exemption analysis is necessarily predictive, requiring an assessment of what will likely happen if an agreement is permitted as compared to what will likely happen if it is not. Given this inherent need for prediction, these Guidelines reflect the legislative intent that competition enforcement should be evidence-based and analytically rigorous.

### Legal Status

4. These Guidelines are issued for the purpose of providing transparency as to the Commission's general approach and analytical framework. They do not create, modify, or extinguish any legal right or obligation and shall not be construed as binding rules of law. The Commission shall retain full discretion to depart from these Guidelines where the circumstances of a particular case so require.

5. Any analytical frameworks, evidentiary approaches, illustrative examples, or templates set out in these Guidelines are provided for guidance only. They are not exhaustive, and compliance with such frameworks shall not of itself be determinative of whether the requirements of sections 60 or 72(3) of the Act are satisfied. The Commission may accept alternative forms of evidence and analysis, having regard to the facts and circumstances of each case.

6. Nothing in these Guidelines shall be construed as establishing a system of prior approval or pre-clearance of conduct under section 72 of the Act. The assessment of conduct shall remain subject to the statutory framework and shall be determined by the Commission on a case-by-case basis.

7. The submission of an application for authorisation does not preclude the Commission from exercising its investigative or enforcement powers under the Act pending determination.

**Relationship with the Act and the Regulations**

8. The Act remains the primary legal authority. The Regulations are binding subsidiary legislation made under the Act. These Guidelines are non-binding interpretive guidance. In the event of any inconsistency, the Act prevails over the Regulations, and the Regulations prevail over these Guidelines.

9. These Guidelines should be read in conjunction with: the Federal Competition and Consumer Protection Act, 2018; the Restrictive Agreements and Trade Practices Regulations, 2022 ("RATPR 2022"); the Abuse of Dominance Regulations, 2022 ("ADR 2022"); the Authorisation, Exemption and Guidance Regulations (Non-Merger Matters), 2026; the Notice on Market Definition, 2022; and the Federal Competition and Consumer Protection Leniency Rules, 2022.

**Regulatory Architecture: Dual-Pathway Framework** with Ancillary Confirmatory Mechanism

10. The Regulations establish three principal mechanisms:

    (a) **Exemption of restrictive agreements** under section 60 (Part II), providing a binding determination that an agreement is not unlawful under section 59;

    (b) **Treatment of conduct by dominant undertakings** (Part III), distinguishing between agreement-based conduct routed through section 60 (Division 1) and unilateral conduct addressed through non-binding guidance (Division 2); and

    (c) **Administrative confirmation** under section 73(2) (Part III, Division 3), providing a non-binding confirmation regarding the affiliated-entity carve-out.

**Structure of these Guidelines**

11. These Guidelines are structured in three Parts:

    (a) **Part I** addresses the Scope and Objectives of the Regulations, including their territorial application and relationship with the Act;

(b) **Part II** addresses the substantive framework for the Authorisation and Exemption of Restrictive Agreements under section 60, including the four conditions for exemption, the procedural requirements for applications, and the administrative framework for block exemptions and statutory exceptions; and

(c) **Part III** addresses the framework for conduct by dominant undertakings, including the dual characterisation principle distinguishing agreement-based conduct (amenable to section 60 exemption) from purely unilateral conduct (addressed through non-binding guidance).

**Status of Analytical Frameworks and Templates**

12. These Guidelines include analytical frameworks, worked examples, and templates designed to illustrate the Commission's approach. These materials are provided to assist applicants in structuring their submissions and to demonstrate the quality of evidence and analysis the Commission expects. However, applicants are not required to adopt any specific template or analytical approach, provided that the submission adequately addresses the statutory criteria and provides sufficient evidence to enable the Commission to conduct a rigorous assessment.

**No Pre-Clearance System**

13. The Commission emphasises that the Regulations do not establish a pre-clearance or advance authorisation system under section 72 of the Act. Applications for guidance under Regulation 18 (contemplated agreements) or requests for guidance under Division 2 (unilateral conduct) do not confer legal protection or immunity from enforcement. Such guidance is non-binding and may be withdrawn or revised at any time.

**Preservation of Enforcement Powers**

14. The submission of an application for exemption or guidance, or the lodging of any notification, does not suspend, limit, or otherwise affect the Commission's exercise of its investigative or enforcement powers. The Commission may simultaneously investigate an agreement or conduct that is the subject of an application or guidance request and may use evidence from the application in its investigation, subject to confidentiality protections.

**Disclaimer Notice for Illustrative Case Studies**

15. The illustrative examples and case studies set out in these Guidelines are fictional. They do not represent actual decisions or transactions and should not be relied upon as precedent. Conditional language reflects the non-binding nature of the analysis.

# PART I — SCOPE AND OBJECTIVES

*[Regulations 1–2]*

## 1.1 Scope of the Guidelines (Regulation 1)

### 1.1.1 Applicability and Subject Matter

1. These Guidelines apply to all non-merger matters falling within the scope of the Regulations, including: the exemption of restrictive agreements under section 60 of the Act; the treatment of conduct by dominant undertakings under Part III of the Regulations; and the administrative confirmation procedure under section 73(2) of the Act. The Regulations do not apply to merger-related matters governed by Part XII of the Act, which are addressed through separate merger control procedures and guidelines.

### 1.1.2 The Dual-Pathway Architecture Explained

2. The Regulations establish a fundamental distinction that permeates the entire regulatory framework: the distinction between agreement-based conduct and unilateral conduct, each of which is addressed through different regulatory mechanisms.

#### 1.1.2.1 Agreement-Based Conduct

3. Where potentially anti-competitive conduct is given effect through an agreement, decision, or concerted practice within the meaning of section 59 of the Act (whether horizontal or vertical in character), that conduct is routed through the exemption regime of section 60. This means that parties to an agreement that restricts or distorts competition may apply for an individual exemption or may rely on an applicable Block Exemption Notice, provided that the statutory conditions are satisfied. Where an exemption is granted, the agreement remains lawful notwithstanding the restriction on competition. This pathway applies to all agreement-based conduct regardless of whether it is perpetrated by dominant or non-dominant undertakings.

4. The assessment of agreement-based conduct proceeds along two analytical tracks:

   - First, the Commission identifies the nature and magnitude of the restriction on competition, including any potential for exclusionary or exploitative harm.
   - Second, the Commission assesses whether the restrictive agreement generates efficiency gains and consumer benefits sufficient to satisfy the section 60 test.

5. Notably, where the agreement is concluded by a dominant undertaking, this does not trigger a separate assessment under section 72. Rather, the section 60 framework remains the operative

exemption mechanism. However, the Commission may in its final decision (as envisaged in Regulation 14) take into account the dominance of a party and the magnitude of any competition restriction when determining whether to attach conditions to the exemption or to assess whether the conditions for exemption are satisfied.

#### 1.1.2.2 Unilateral Conduct

6. Where potentially anti-competitive conduct does not involve an agreement, decision, or concerted practice—that is, where it is genuinely unilateral in character—it is addressed through the guidance framework in Part III, Division 2 of the Regulations. This pathway covers conduct such as exclusive dealing (where not contractually agreed), excessive pricing, refusal to supply or grant access to essential facilities, predatory pricing, margin squeeze, and similar unilateral abuses of dominance. For such conduct, the Regulations do not establish a binding exemption regime comparable to section 60. Rather, they establish a non-binding guidance framework under which a dominant undertaking may seek clarification as to whether the Commission considers the conduct likely to infringe section 72, and if so, whether the conduct may be justified under section 72(3) (the efficiency defence).

7. This distinction is fundamental to the regulatory architecture and is reflected throughout these Guidelines. It ensures that the exemption regime (which provides binding legal protection) applies only to conduct that is genuinely contractual or concerted in character, while unilateral conduct is subject to an enforcement framework that provides transparency but not binding pre-approval.

### 1.1.3 Merger Exclusion

8. These Guidelines do not apply to merger-related exemptions governed by Part XII of the Act. Merger control in Nigeria is subject to separate substantive merger appraisal standards and procedural requirements, including the public interest test set out in section 94 of the Act. The exemptions and guidance procedures established under these Regulations are expressly limited to non-merger matters.

## 1.2 Objectives and Applicability (Regulation 2)

### 1.2.1 Primary Objectives of the Regulations

9. The objectives of the Regulations, as set out in Regulation 2(1), inform the substantive and procedural provisions throughout these Guidelines. Each objective is explained below.

(a) *Legal certainty* (Regulation 2(1)(a)). The Regulations establish clear substantive and procedural requirements for the assessment of applications. Undertakings can identify in advance what information the Commission will require, how that information will be assessed, what analytical framework the Commission will apply, and when they can expect a decision. Legal certainty reduces regulatory risk and enables undertakings to make informed commercial decisions about proposed conduct — including whether to seek an exemption, request guidance, or rely on a statutory exception — before committing resources or creating potential liability.

(b) *Transparent and predictable processes* (Regulation 2(1)(b)). The Regulations specify the requirements for lodging applications (including prescribed forms, supporting documentation, and information requirements), the procedure for completeness verification (five business days), the process for requesting additional information, consultation with third parties and interested stakeholders, the issuance of preliminary assessments where the Commission is minded to refuse or to impose conditions different from those sought, the procedures for oral hearings, and the timeframes for final decision-making (thirty to ninety business days of substantive review, depending on complexity, with suspension during periods in which additional information is awaited). These procedures are designed to afford procedural fairness to applicants while ensuring that the Commission conducts a rigorous assessment.

(c) *Compliance obligations* (Regulation 2(1)(c)). The Regulations specify the ongoing obligations of undertakings that benefit from exemptions, including compliance with conditions imposed by the Commission, periodic reporting (at intervals of not less than twelve months), record-keeping (for a minimum of five years), and notification of material changes within thirty days. These obligations ensure that exemptions remain justified throughout their duration and that the Commission can monitor market developments and the realisation of claimed efficiencies.

(d) *Clarification of the relationship among exemption, guidance, statutory exceptions, administrative confirmation, and enforcement* (Regulation 2(1)(d)). The Regulations establish a coherent regulatory architecture in which five distinct mechanisms — each with its own legal character — operate in relation to one another. Section 60 exemption provides binding protection for restrictive agreements. Non-binding guidance under Division 2 informs commercial risk assessment for unilateral conduct without conferring legal protection. The statutory exceptions under section 68 remove specified categories of arrangement from the Act's prohibitions entirely. Administrative confirmation under section 73(2) provides a non-binding determination that the affiliated-entity carve-out applies. And enforcement under Parts VIII and IX remains available to the Commission regardless of whether an undertaking has sought any of the preceding mechanisms. These Guidelines explain the interrelationship among these mechanisms,

including: the dual characterisation principle (routing agreement-based dominant-firm conduct through section 60 while preserving section 72 enforcement); the administrative coherence principle (ensuring consistency between section 60 and section 72(3) findings); the safe harbour for information submitted in voluntary engagement; and the non-aggravating character of a failure to engage.

(e) *Consistency and coherence* (Regulation 2(1)(e)). The Regulations and these Guidelines promote a consistent analytical approach across all categories of application, ensuring that comparable agreements and conduct are assessed against the same substantive standards. Coherence is maintained across the three Divisions of Part III through the common provisions in Division 4, and across the Regulations as a whole through the definitions, cross-references, and the analytical frameworks set out in these Guidelines and the Annexures.

### 1.2.2 Geographic and Extraterritorial Scope

10. The Regulations apply throughout the Federal Republic of Nigeria and extend to conduct or agreements entered into outside Nigeria where they have, or are likely to have, direct and reasonably foreseeable effects within Nigeria's market. This is consistent with section 2(1) and (2) of the Act. An agreement or conduct is treated as having direct and reasonably foreseeable effects on the Nigerian market if it is objectively foreseeable at the time the agreement is concluded (or the conduct is undertaken) that it would have an appreciable effect on competition in Nigeria. This may arise where:
    - The parties intend to supply goods or services in Nigeria.
    - The agreement or conduct is designed to influence pricing or supply decisions affecting the Nigerian market.
    - The conduct creates barriers to market entry for Nigerian competitors or limits the ability of Nigerian consumers to access goods or services.
11. The Commission's exercise of jurisdiction over foreign conduct is subject to principles of international comity and respect for the sovereignty of other states. However, as a general matter, the Commission will assert jurisdiction over conduct that has foreseeable effects on the Nigerian market, consistent with international practice in competition law enforcement.

### 1.2.3 These Guidelines' Role in Meeting Stated Objectives

12. These Guidelines explain the Commission's approach to each of the objectives stated above. In particular:

- On legal certainty: the Guidelines set out the substantive legal standards, explain the tests that the Commission will apply, and provide detailed checklists to assist applicants in understanding what information to gather and how to present it.
- On procedural requirements: the Guidelines elaborate on the procedural steps set out in the Regulations and explain the Commission's expectations regarding information provision, consultation, and hearing procedures.
- On decision-making timeframes: the Guidelines explain how the Commission calculates timeframes, when the clock is suspended (e.g., when additional information is requested), and the likely timeline from lodging to final decision.
- On transparency and predictability: the Guidelines set out analytical frameworks, evidentiary approaches, and illustrative examples that exemplify the Commission's reasoning.

## 1.3 Interpretation and Definitions

### 1.3.1 General principles of interpretation

13. Any word or expression to which a meaning has been assigned in the Act bears the same meaning in these Guidelines, unless the context otherwise requires. Where these Guidelines use a term defined in the Regulations, that definition applies.

### 1.3.2 Hierarchy of instruments

14. The interpretation and application of these Guidelines shall be informed by the following hierarchy of legislative and regulatory instruments—

**(a)** **Primary legislation:** the **Federal Competition and Consumer Protection Act, 2018**, being the principal legal authority establishing substantive rights, duties, prohibitions, and administrative powers. In the event of any inconsistency between the Act and a subsidiary instrument, the Act prevails.

**(b)** **Binding subsidiary legislation:** regulations and rules made under the Act with binding force, including—

(i) the **Restrictive Agreements and Trade Practices Regulations, 2022** ("RATPR 2022"), governing the assessment of restrictive agreements under sections 59 to 61 of the Act, including restrictions by object and by effect, exemptions, and evidentiary standards for efficiency claims;

(ii) the **Abuse of Dominance Regulations, 2022** ("ADR 2022"), establishing the framework for assessing dominance under section 70, identifying abuse under section 72, and allocating the burden of proof for the section 72(3) efficiency defence;

(iii) the **Authorisation, Exemption and Guidance Regulations (Non-Merger Matters), 2026**, being the Regulations to which these Guidelines relate;

(iv) the **Merger Review Regulations, 2020**, governing the procedural and substantive requirements for merger notifications and merger assessment under Part XII of the Act; and

(v) the **Federal Competition and Consumer Protection Leniency Rules, 2022**, governing leniency applications in cartel enforcement proceedings under the Act.

**(c)** **Notices:** interpretive instruments issued by the Commission with binding or quasi-binding effect within their scope, including—

(i) the **Notice on Market Definition, 2022**, providing the framework for defining relevant product and geographic markets, including the SSNIP test and supply-side substitution analysis; and

(ii) any **Block Exemption Notice** issued under the Regulations.

**(d)** **Non-binding guidance:** these Explanatory Guidelines, the **Merger Review Guidelines, 2020**, and any other interpretive guidance issued by the Commission, which explain the Commission's general approach and analytical framework but do not create enforceable legal obligations.

### 1.3.3 Rules of Construction

15. In interpreting these Guidelines—

**(a)** the Act prevails over all subsidiary instruments;

**(b)** binding regulations and rules prevail over notices, and notices prevail over non-binding guidance;

**(c)** where inconsistency arises between subsidiary instruments of equal status, the more recent instrument prevails;

**(d)** these Guidelines shall be read as complementary to the Regulations, and as clarifying the substantive and evidentiary framework applicable to exemption and guidance assessments; and

**(e)** the Commission may have regard to relevant international best practices in competition law, while applying these Guidelines in a manner responsive to Nigeria's legal and economic context.

### 1.3.4 Definitions of Key Terms

16. For the purpose of these Guidelines, unless the context otherwise requires:

| Term | Definition |
|---|---|
| **Act** | The Federal Competition and Consumer Protection Act, 2018. |
| **Agreement** | Any arrangement, whether in writing or not, that is binding or non-binding in law, including decisions and concerted practices, that restricts or distorts competition. |
| **Block Exemption** | An exemption granted under Section 60 of the Act for specific categories of agreements that meet predefined efficiency and competition criteria, as set out in a Block Exemption Notice. |
| **Commission** | The Federal Competition and Consumer Protection Commission (FCCPC). |
| **Consumer** | A consumer as defined in Section 167 of the Act; for the purposes of the exemption test, the ultimate consumer who benefits from the efficiencies arising from the agreement. |
| **Dominant Position** | The ability of an undertaking to behave independently of competitive pressures, assessed with regard to market share, financial power, access to inputs, customer relationships, barriers to entry, and countervailing power of customers, as elaborated in the Abuse of Dominance Regulations, 2022. |
| **Dynamic Efficiency** | Innovation-driven improvements, including increased investment in research and development, accelerated product development, and technological advancement. |
| **Individual Exemption** | An exemption granted on a case-by-case basis under Section 60 of the Act where an agreement does not qualify for a block exemption but demonstrates that it satisfies the statutory conditions for exemption. |
| **Market** | The relevant market in Nigeria, encompassing all goods or services that are substitutable or otherwise competitive with the relevant goods or services, as defined through demand-side and supply-side substitution analysis. |

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| **Market Definition** | The process of delineating relevant product and geographic markets for the purpose of assessing market power and competitive effects, in accordance with the Notice on Market Definition, 2022. |
| **Market Power** | The ability of an undertaking to act independently of competitive pressures, assessed based on the criteria set out in the Abuse of Dominance Regulations, 2022. |
| **Material Change** | Any change that is reasonably likely to affect the Commission's assessment of whether the conditions for exemption continue to be satisfied, including: (i) a change in the market share of any party exceeding five (5) percentage points; (ii) a change in the parties to the agreement; (iii) a material amendment to the terms of the agreement; (iv) a significant change in market conditions; or (v) entry or exit of a significant competitor. |
| **Potential Competition** | The likelihood of market entry by new competitors, assessed with regard to entry barriers, sunk costs, regulatory requirements, and the profitability of market entry. |
| **Pro-Competitive Effects** or **Efficiencies** | Any technological, economic, or other competitive advantage resulting from an agreement that may be taken into account in assessing whether the conditions for exemption under Section 60 of the Act are satisfied, including productive efficiency, allocative efficiency, and dynamic efficiency. |
| **Pro-Competitive Justification** | A legal and economic defence available to dominant undertakings to justify otherwise anti-competitive conduct under section 72(3) of the Act, subject to strict evidentiary requirements. |
| **Relevant Market** | The defined scope of competition for a product or service, assessed using supply-side and demand-side substitution analysis, as per the Notice on Market Definition, 2022, and consisting of both a product dimension and a geographic dimension. |
| **Restrictive Agreement** | An agreement that restricts or distorts competition within the meaning of Section 59 of the Act, including the types of agreements assessed under the Restrictive Agreements and Trade Practices Regulations, 2022. |
| **Undertaking** | Any natural or legal person engaged in economic activity in Nigeria or affecting the Nigerian market, |

| | |
|---|---|
| | regardless of its legal status or the way in which it is financed. |
| **Vertical Agreement** | An agreement between undertakings operating at different levels of the supply chain, which may be subject to block exemption or individual assessment under the Regulations on Exemptions and Authorisations, 2026. |

### 1.3.5 Textual Anomalies in the Act

17. The Commission notes the following textual matters that affect the interpretation of the Act and these Guidelines:

    (a) **Reference to section 61 in section 59.** Section 59(1) of the Act provides that agreements which restrict or distort competition are unlawful and void, "subject to section 61". However, section 61 does not establish an exemption regime; it establishes a distinct prohibition on exclusionary conduct involving provisions in agreements that limit supply or acquisition. The operative exemption provision is contained in section 60 of the Act. Accordingly, references in these Guidelines to the exemption of agreements under Part VIII are to section 60. The reference to section 61 in section 59(1) is treated as a drafting error and does not affect the application of section 60.

    (b) **Numbering of section 72(3).** Section 72 of the Act contains two subsections numbered (3):

        (i) The first subsection (3) sets out factors relevant to the assessment of dominance, including market share, financial power, access to inputs, and barriers to entry.

        (ii) The second subsection (3) provides that an undertaking shall not be treated as abusing a dominant position where specified conditions relating to efficiencies, indispensability, and the preservation of competition are satisfied.

18. The second of these provisions constitutes the efficiency-based defence to an allegation of abuse of dominance. This interpretation is reinforced by section 72(4), which refers to subsection "(3)(c)" in a manner consistent only with the second subsection (3). Accordingly, unless otherwise indicated, references in these Guidelines to "section 72(3)" are to the second subsection (3), being the provision establishing the efficiency defence.

## PART II — AUTHORISATION AND EXEMPTION OF RESTRICTIVE AGREEMENTS

*[Regulations 3–23]*

### Division 1 — Individual Exemption

### 2.1 Eligibility for Individual Exemption (Regulation 3)

#### 2.1.1 General Eligibility

1. Any party to an agreement that restricts or is likely to restrict competition within the meaning of section 59 of the Act may apply for an individual exemption under section 60. The agreement need not have been implemented at the time of application; indeed, the Commission encourages prospective applications before implementation, as this allows the Commission to provide guidance before the undertakings have committed resources and created potential liability.

#### 2.1.2 The Section 60 Statutory Test: Three Conditions, Four Questions

2. Section 60 of the Act prescribes three statutory conditions that must be satisfied cumulatively for an agreement to qualify for exemption. The Commission, for analytical clarity and consistency with international practice and the framework in RATPR 2022, analyses these three statutory conditions as four substantive questions:

3. **First Statutory Condition: Efficiency Gains.** Analysed as **Question 1: Does the agreement contribute to improving production or distribution, or to promoting technical or economic progress?**

4. The agreement must contribute to improving production or distribution (whether through cost reductions, improved logistics, better inventory management, or similar productive enhancements) or to promoting technical or economic progress (whether through innovation, technological advancement, process optimisation, or similar dynamic improvements).

5. **Second Statutory Condition: Consumer Benefit.** Analysed as **Question 2: Do consumers receive a fair share of the resulting benefit?**

6. This condition requires a balancing test: the net effect of the agreement on consumers (taking into account both benefits and harms) must be neutral or positive. The consumer must benefit from the efficiencies generated; it is insufficient that the parties to the agreement benefit while consumers bear the costs of the restriction.

7. **Third Statutory Condition: Indispensability.** Analysed as **Questions 3 and 4**, which together comprise the indispensability assessment:

8. **Question 3: Is the agreement as a whole reasonably necessary to achieve the efficiency gains?** The restrictive elements of the agreement must be necessary to achieve the claimed

efficiencies. Could the same benefits be achieved without any restrictive agreement at all, through unilateral conduct, arm's-length commercial relationships, or less restrictive contractual arrangements?

9. **Question 4: Are the specific restrictions within the agreement necessary?** Does each restriction go beyond what is required to achieve the stated efficiencies? Or are there elements that impose restrictions that could be removed without diminishing the efficiency gains?

10. **Fourth Statutory Condition: No Elimination of Competition.** This is distinct from questions 1–4 and requires that the agreement must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services concerned. This condition serves as an outer limit: even where efficiencies are substantial, consumer benefits are clear, and restrictions are indispensable, the agreement will not qualify for exemption if it would enable the parties to eliminate competition in a substantial part of the market.

11. The Commission stresses that these three statutory conditions are cumulative: all three must be satisfied. Failure to meet any one of them is fatal to the application. In particular, the fourth condition (no elimination of competition) is an absolute bar that is not subject to a balancing test against efficiency gains. As explained further below, where the agreement would enable the parties to eliminate competition, exemption cannot be granted regardless of the magnitude of efficiency gains.

### 2.1.3 Reconciliation of Statutory Conditions with Analytical Questions

12. The Commission notes that section 60(a) of the Act contains both the efficiency gains requirement and the consumer benefit requirement within a single statutory provision. For analytical clarity, and consistent with the approach taken in Regulation 12(2) of RATPR 2022 and international practice, the Commission treats the efficiency gains and consumer benefit components as distinct questions. This allows for more granular analysis: an agreement might generate efficiency gains (satisfying the first question) but fail to pass those benefits on to consumers (failing the second question). Conversely, an agreement might result in consumer benefits through reallocation of existing production rather than through genuine efficiency gains. By treating these as separate questions, the Commission ensures that both components of the statutory test are rigorously assessed.

### 2.1.4 Environmental Sustainability and Climate-Change Mitigation *(Regulation 3(3))*

#### 2.1.4.1 General principle

13. The Commission may, in assessing whether an agreement contributes to the improvement of production or distribution or to the promotion of technical or economic progress under Question 1, have regard to the agreement's contribution to environmental sustainability or climate-change mitigation. This reflects the statutory objective of promoting the sustainable development of the Nigerian economy, as set out in section 1(e) of the Act, and aligns with the broader policy framework established by the National Climate Change Act, 2021, the Energy Transition Plan, and Nigeria's commitments under the Paris Agreement.

14. However, environmental benefits are assessed within the framework of section 60, not as a freestanding justification independent of the four conditions set out above. Sustainability is a relevant input to the exemption analysis, not a substitute for it. Environmental benefits must be substantiated by objective and verifiable evidence. The Commission will not accept speculative or hypothetical claims regarding environmental or climate benefits.

#### 2.1.4.2 Comparative context and the Commission's approach

15. The relationship between competition law and environmental sustainability is the subject of active international debate. Three principal approaches have emerged in other jurisdictions, each of which is instructive for the Commission's own position:

(a) *The European Union approach (2023 Horizontal Guidelines, Chapter 9)*. The European Commission's revised Horizontal Guidelines, adopted on 1 July 2023, include a dedicated chapter on sustainability agreements. The EU takes an orthodox approach to the consumer benefit condition: benefits to consumers must generally accrue in the same market as the product or service to which the agreement relates, or in markets with a substantial overlap with the affected consumers. The EU does not permit benefits to society at large to substitute for benefits to affected consumers. However, the EU provides a "soft safe harbour" for sustainability standardisation agreements — agreements that set sustainability standards for an industry are unlikely to restrict competition where six cumulative conditions are met, including that the agreement does not cause a significant price increase or the parties' combined market share does not exceed 20%.

(b) *The United Kingdom approach (CMA Green Agreements Guidance, October 2023)*. The UK Competition and Markets Authority departs from the EU position for a specific sub-category of sustainability agreements: climate change agreements. For such agreements, the CMA considers it appropriate to assess the fair share condition by reference to the totality of the climate change benefits to all UK consumers, not merely to consumers in the relevant market. The rationale is that climate change is an exceptional threat whose effects are diffuse, cross-market, and intertemporal — no individual market's consumers can be isolated as the sole beneficiaries. This out-of-market approach applies only to climate change agreements; other environmental

sustainability agreements (e.g. biodiversity, water quality) remain subject to the standard in-market test, although the CMA has indicated that it will keep this distinction under review.

(c) *The Netherlands approach (ACM Policy Rule, October 2023)*. The Netherlands Authority for Consumers and Markets applies a broadly EU-aligned framework but retains additional flexibility for "environmental-damage agreements" — agreements aimed at preventing or reducing specific environmental harm, such as $CO_2$ emission reductions. The ACM has applied this approach in practice, providing clearance for a cooperation agreement on $CO_2$ storage and for an agreement to remove plastic handles from multipacks of beverages.

#### 2.1.4.3 The Commission's position on the consumer benefit question

16. The Commission considers that the correct approach under the Act is as follows:

(a) *General rule — in-market benefits*. The starting position is that consumer benefits must accrue to consumers in the relevant market — that is, the same consumers who bear the cost of any competitive restriction imposed by the agreement. This is consistent with the consumer welfare standard under the Act and with the Commission's general approach to the fair share condition (see section 2.3.2 below).

(b) *Climate-change mitigation agreements — broader assessment*. Where an agreement is specifically directed at climate-change mitigation — that is, at reducing greenhouse gas emissions or facilitating the transition to a low-carbon economy — the Commission considers it appropriate to assess the consumer benefit condition by reference to the benefits to Nigerian consumers as a whole, not limited to consumers in the relevant market. This is justified by three factors:

i. the statutory framework: section 1(e) of the Act identifies the promotion of sustainable development as a statutory objective, and the National Climate Change Act, 2021, establishes a national framework for achieving Nigeria's climate commitments, reflecting a legislative determination that climate action benefits all Nigerians;

ii. the nature of climate change as a systemic and diffuse harm: the effects of greenhouse gas emissions are not confined to any product market or geographic region but affect all Nigerian consumers through their impact on agricultural productivity, public health, energy security, and economic resilience; and

iii. the impracticability of an in-market-only approach: requiring applicants to demonstrate that consumers in a narrowly defined product market (e.g. "cement consumers in the South-West region") receive a fair share of climate benefits (e.g. reduced $CO_2$ emissions from a joint production agreement) would impose an evidential burden that is disproportionate to the analytical question and would effectively preclude the exemption of any climate-focused agreement, notwithstanding that section 1(e) of the Act and Regulation 3(3) of the Regulations expressly contemplate the relevance of such considerations.

(c) *Other environmental sustainability agreements — standard in-market test with qualitative recognition*. For environmental sustainability agreements that do not involve climate-change mitigation (e.g. agreements to reduce water pollution, conserve biodiversity, or eliminate specific pollutants), the Commission applies the standard in-market approach: consumer benefits must accrue to consumers in the relevant market. However, the Commission recognises that environmental improvements may constitute indirect consumer benefits — for example, improved air quality may reduce health costs for consumers in the affected area, and sustainable sourcing may improve product quality or safety. Where such indirect benefits are claimed, the Commission will require evidence of the causal chain linking the environmental improvement to a consumer benefit.

#### 2.1.4.4 Categories of environmental agreement unlikely to restrict competition

17. The Commission recognises that many sustainability initiatives involve cooperation between competitors that does not affect the parameters of competition (price, quality, quantity, choice, or innovation) and therefore does not engage section 59 of the Act. The following categories of agreement are ordinarily unlikely to restrict competition and do not require an application for exemption:

(a) *Internal conduct agreements*: Agreements between competitors to adopt environmental practices in their own operations — for example, to eliminate single-use plastics from business premises, to adopt energy-efficient building standards, to reduce water consumption in manufacturing, or to limit the volume of printed documents. These agreements concern the parties' internal operations, not their market conduct.

(b) *Sustainability information databases*: Agreements to establish or maintain databases containing general information about the environmental performance of suppliers, production processes, or raw materials — provided the agreement does not require or prohibit the parties from purchasing from or selling to specific suppliers or distributors. Such databases facilitate informed procurement decisions without restricting competitive choice.

(c) *Industry awareness campaigns*: Agreements to conduct joint awareness campaigns on environmental sustainability — for example, campaigns to inform consumers about the carbon footprint of their consumption, or campaigns to promote recycling — provided the campaigns do not amount to joint advertising of specific products or joint pricing.

(d) *Compliance with binding environmental standards*: Agreements that do no more than ensure compliance with legally binding environmental standards — whether under Nigerian law, international treaties, or sector-specific regulations — do not restrict competition beyond what is already mandated by law. However, agreements that go beyond legal requirements (e.g. agreeing to exceed emission standards) must be assessed under section 59.

18. Where an agreement falls within one of these categories, no application for exemption is required. The Commission may provide informal confirmation on request.

#### 2.1.4.5 Substantive requirements where section 60 assessment is engaged

19. Where an environmental sustainability agreement does engage section 59 — because it affects price, quality, quantity, choice, or innovation — the Commission will assess it under the full section 60 framework. In doing so, the Commission will apply the following principles:

(a) Environmental improvements must constitute a genuine form of technical or economic progress, or in some cases allocative efficiency through improved resource allocation. They cannot be invoked as a justification for arrangements whose primary purpose or effect is to restrict competition between the parties.

(b) The magnitude of environmental benefits must be quantifiable, to the extent reasonably practicable. The Commission recognises that some environmental benefits — particularly those relating to biodiversity, ecosystem services, and long-term climate impacts — are inherently difficult to monetise. In such cases, the Commission will accept qualitative evidence supported by scientific assessment, provided the evidence is objective, independently verifiable, and demonstrates a credible causal link between the agreement and the environmental outcome.

(c) Where environmental benefits are claimed, the Commission will require evidence regarding the timeline for realisation and the magnitude of benefits relative to any competitive restrictions imposed. Environmental benefits that are speculative, delayed indefinitely, or dependent on contingencies outside the parties' control will not ordinarily be accepted.

(d) Environmental benefits cannot offset a failure to satisfy any of the other conditions. If the agreement eliminates competition in a substantial part of the market, environmental benefits do not cure this defect. If the agreement is not indispensable to achieving the environmental objective, the exemption will be refused — even if the environmental benefits are substantial. The Commission will assess whether the same environmental outcomes could be achieved through less restrictive means, including voluntary industry standards, unilateral commitments, or regulatory measures.

(e) The Commission will scrutinise claims that purport to characterise competitive restrictions as "environmentally necessary." An agreement to fix prices for "green" products, to divide markets between "sustainable" producers, or to restrict output in the name of resource conservation will be assessed with the same rigour as any other potentially anti-competitive agreement. The environmental character of the stated objective does not reduce the evidential burden.

#### 2.1.4.6 Sustainability standardisation agreements

20. The Commission notes the emerging international practice of providing a soft safe harbour for sustainability standardisation agreements — agreements between competitors that set voluntary sustainability standards for an industry or supply chain (e.g. minimum environmental performance criteria for products, sustainable sourcing requirements, or carbon-labelling standards). The Commission considers that such agreements may be appropriate candidates for block exemption, subject to safeguards including: transparency and openness of the standard-setting process; non-discriminatory access to the standard; proportionality of the requirements; and the preservation of competition on other parameters (price, quality, innovation). The Commission may address this category in a future Block Exemption Notice.

#### 2.1.4.7 Illustrative applications

21. *Example 1 (likely to satisfy section 60)*: Three competing cooking gas distributors in Lagos agree to jointly invest in a fleet of electric delivery vehicles, replacing their diesel fleets. The agreement involves shared logistics infrastructure and a temporary non-compete clause in respect of delivery routes. The environmental benefit (reduced urban air pollution, lower $CO_2$ emissions) is quantifiable and directly linked to the agreement. The restriction (shared logistics, temporary route allocation) is indispensable because no single distributor could justify the capital investment alone. Competition on price and product quality is preserved. The Commission would assess this favourably under section 60, treating the climate and air quality benefits as relevant under both Question 1 (technical and economic progress — cleaner technology) and Question 2 (consumer benefit — improved air quality for Lagos residents, including consumers of the parties' products).

22. *Example 2 (unlikely to satisfy section 60)*: Five competing cement manufacturers agree to cap production output at current levels, claiming that reduced output will lower aggregate $CO_2$ emissions from the industry. The environmental benefit (lower emissions) is real, but the mechanism — output restriction — is a hardcore restriction under section 59(2). The agreement is in substance a production cartel with an environmental label. The output reduction would increase cement prices, harming consumers. Less restrictive alternatives exist (investment in cleaner technology, emissions trading, energy efficiency standards). The Commission would refuse exemption.

23. *Example 3 (does not engage section 59)*: A trade association of textile manufacturers agrees to publish an industry-wide guide to sustainable sourcing of cotton, including information on the environmental performance of major cotton suppliers. No purchase obligation or supplier exclusion is imposed. The agreement does not affect price, quantity, quality, choice, or innovation. It does not engage section 59 and does not require an application for exemption.

### 2.1.5 Hardcore Restrictions (Regulation 3(4))

24. Agreements containing restrictions of the kind described in section 59(2) of the Act—including price-fixing, market division, output limitation, bid-rigging, and collusive tendering—are ordinarily unlikely to satisfy the conditions for exemption. The reason is structural: these restrictions are designed, by their nature, to harm competition directly, and they are not typically indispensable to any genuine efficiency gain. A cartel that fixes prices, for example, does generate cost savings (through elimination of the expenses associated with competitive rivalry), but these are not genuine efficiency gains; they are benefits arising from reduced competition rather than from improved production or distribution.

25. However, the Commission shall not refuse an application solely on the ground that the agreement contains such a restriction, and each application will be assessed on its merits (Regulation 3(4)). This means that an undertaking may seek to demonstrate that even a price-fixing agreement generates genuine efficiencies (e.g., the price-fixing enables the parties to implement a joint investment programme that would be infeasible without the certainty of the fixed price) that satisfy all four questions. The Commission will consider such evidence but will require a particularly cogent justification.

26. The Commission notes that in practice, it is extremely difficult for hardcore restrictions to satisfy the conditions for exemption, particularly the indispensability condition (Question 3/4), because less restrictive alternatives almost always exist. For example, a price-fixing agreement designed to enable joint investment might be replaced by a joint venture with a market-competitive pricing mechanism, or by licensing arrangements that allow each party to price independently. In assessing any application involving hardcore restrictions, the Commission will be particularly sceptical of claims that the restriction is indispensable.

### 2.1.6 Specific Categories of Agreement (Regulation 3(5)–(6))

27. Applications may be made in respect of any agreement falling within section 59, including:

- Agreements between suppliers of similar goods (section 62)
- Agreements imposing minimum resale prices (section 63)
- Agreements relating to patented articles (section 64)
- Agreements involving the withholding of supplies (sections 65–66)

28. The Commission will have regard to the particular statutory context of the relevant provision when assessing such applications. For example:

- **Section 62 agreements.** Where competitors agree on prices or terms for the supply of similar goods, the burden on the applicant is substantial, as section 62 is designed to address precisely such conduct. The applicant must demonstrate not only that genuine efficiencies arise, but that these efficiencies cannot be achieved through non-cartel arrangements.
- **Section 63 agreements (minimum resale prices).** Vertical agreements imposing minimum resale prices have generally been treated as subject to scrutiny, though they may qualify for exemption where they enable significant investment by resellers or address free-riding problems. The Commission will require clear evidence of these efficiency gains.
- **Section 64 agreements (patented articles).** Agreements relating to the licensing or supply of patented articles may benefit from less intense scrutiny, as the patent provides a justification for some restrictions on supply and pricing. However, licensing restrictions that go beyond the scope of the patent (e.g., territorial restrictions, field-of-use restrictions) may require specific justification.
- **Sections 65–66 agreements (withholding of supplies).** Agreements that involve withholding supplies (whether voluntarily or through collective refusal to supply) are treated seriously by the Commission, as they can foreclose markets and harm consumers. The applicant must demonstrate compelling efficiency justifications.

## 2.2 Burden and Standard of Proof (Regulation 4)

### 2.2.1 Burden on the Applicant

29. The burden of demonstrating that an agreement satisfies the conditions for exemption rests entirely on the applicant (Regulation 4(1)). The Commission does not bear any burden of establishing that the conditions are met; rather, the applicant must affirmatively demonstrate that all four questions are answered in the affirmative. This allocation of burden reflects the principle that the applicant is in the best position to possess information about the agreement and its effects, and that the burden should not rest on the competition authority to construct a justification for conduct that may harm competition.

30. The applicant's burden is substantial. It is insufficient to make general assertions or to rely on speculative reasoning. The applicant must provide concrete, verifiable evidence that demonstrates each element of the test.

### 2.2.2 Standard of Proof

31. The standard of proof is the balance of probabilities (Regulation 4(2)). This means that the applicant should demonstrate that, on the evidence presented, it is more likely than not that each

of the four questions is answered in the affirmative. This is a civil rather than criminal standard of proof, reflecting the administrative nature of the exemption process.

32. However, the balance of probabilities standard does not mean that the applicant may rely on speculation or hypothesis. Rather, the evidence must be sufficiently concrete and compelling to make it more likely than not that the statutory conditions are satisfied. The Commission will assess the credibility and weight of evidence and may disregard speculative, self-serving, or unsubstantiated assertions.

### 2.2.3 Evidentiary Expectations

33. The Commission expects applicants to provide evidence that meets the following standards:

34. **Objective evidence of the nature and magnitude of claimed efficiencies.** The applicant must not make mere assertions or speculative projections. Instead, evidence should be based on concrete data, financial modelling, cost analyses, or comparable transactions in the market. For example, a claim that an agreement reduces production costs should be supported by detailed financial models showing the cost reduction, with citations to verifiable sources (such as historical cost data, industry benchmarks, or expert economic analysis).

35. **Evidence of a direct causal link between the agreement and the claimed efficiencies.** The applicant must demonstrate that the efficiencies arise from the agreement itself, not from external market factors or from conduct that would occur even without the agreement. This requires a counterfactual analysis: what would the competitive landscape look like in the absence of the agreement? How would the parties' conduct differ? This analysis must be persuasive and grounded in realistic market dynamics.

36. **A detailed assessment of the likelihood and timing of the realisation of efficiencies.** The applicant must explain not only that efficiencies will arise, but when they will materialise, in what magnitude, and with what confidence. Efficiencies that are speculative or expected only in the distant future (absent concrete evidence of the basis for those expectations) will not ordinarily be accepted.

37. **An explanation of how the claimed efficiencies offset any identified restriction of competition.** This requires a net benefit analysis: the applicant must quantify both the consumer benefits from the efficiencies and any anti-competitive harms from the agreement, and demonstrate that the benefits outweigh the harms. This analysis must address the four questions comprehensively.

### 2.2.4 Weight and Credibility of Evidence

38. The Commission will give more weight to evidence that is:

- Independently verifiable (e.g., third-party reports, industry data, expert economic analysis)
- Supported by financial modelling or economic analysis (e.g., cost-benefit analyses, econometric studies)
- Corroborated by market data (e.g., historical pricing, transaction data, competitor information)
- Consistent with the applicant's internal documents (e.g., business plans, strategy documents, internal memoranda)

39. Conversely, the Commission will give little weight to:

- Self-serving assertions without supporting evidence
- Speculative projections that are not grounded in realistic economic analysis or comparable market experience
- Efficiency claims attributable to a reduction in competitive rivalry rather than to genuine productive, allocative, or dynamic efficiency
- Hypothetical scenarios that are not supported by evidence of likelihood or feasibility

## 2.3 Substantive Assessment Framework: The Three Conditions Analysed as Four Substantive Questions

### 2.3.1 Condition 1 — Efficiency Gains (section 60(a), first limb)

#### 2.3.1.1 Economic basis

40. The efficiency condition reflects the economic principle that some agreements, whilst restricting rivalry between the parties, may nonetheless generate welfare gains that exceed the welfare losses from the restriction. The Commission's task is to determine whether the agreement produces genuine gains in economic efficiency — that is, improvements in the productive, allocative, or dynamic performance of the market — as opposed to merely transferring surplus from consumers to producers or from competitors to the parties.

#### 2.3.1.2 Three Categories of Efficiency

The Commission distinguishes rigorously between three categories of efficiency:

**(a) Productive efficiency — reducing costs and enhancing resource use**

Productive efficiency occurs when goods and services are produced at the lowest possible cost through optimisation of inputs, economies of scale, process innovation, and specialisation. It is the most commonly claimed and most readily quantifiable category of efficiency.

**Key analytical questions:**

(i) Does the agreement reduce production or operational costs? If so, by what magnitude and through what mechanism (economies of scale, elimination of duplication, technology transfer, shared infrastructure)?

(ii) Does the agreement lead to improvements in product quality, variety, innovation, or environmental performance that contribute to overall productive efficiency?

(iii) Are there economies of scale or scope that could not be achieved by the parties independently?

(iv) Does the agreement eliminate redundant costs or increase specialisation?

(v) Are the cost reductions demonstrably related to the restrictive features, or could the same costs savings be achieved through less restrictive means?

**Evidentiary requirements:**

(i) Financial models demonstrating cost reductions from joint ventures, integration, or technological improvements;

(ii) Cost-benefit analysis comparing pre- and post-agreement costs, with clear identification of baseline assumptions;

(iii) Process optimisation reports identifying specific operational improvements;

(iv) Independent third-party verification of claimed cost savings (e.g., audit reports, engineering studies);

(v) Sensitivity analysis showing how results change if key assumptions (labour costs, inflation, throughput) vary.

**Illustrative example (acceptable):** A joint production agreement between two competing pharmaceutical firms consolidates their manufacturing operations into a single modern plant, eliminating duplicate kiln operations, reducing transport costs, and improving yield through modern technology. The applicant provides: pre- and post-agreement cost statements audited by an independent firm; a detailed timeline showing when efficiencies are expected to materialise; engineering reports confirming the technical basis for cost reductions; and sensitivity analysis showing that costs savings are robust across reasonable scenarios.

**Illustrative example (unacceptable):** A price-fixing agreement that results in cost savings through reduced marketing expenditure because the parties no longer compete for customers.

The "efficiency" arises solely from the elimination of competitive rivalry, not from genuine productive improvement.

**(b) Allocative efficiency — enhancing consumer welfare**

Allocative efficiency occurs when resources are distributed to their most valued uses, ensuring that prices reflect consumer demand and production costs. Gains in allocative efficiency typically manifest as lower consumer prices, improved product availability, or reduced market distortions.

**Key analytical questions:**

(i) Does the agreement lead to lower consumer prices? If so, through what mechanism (lower input costs, improved distribution, reduced transaction costs)?

(ii) Does it improve product availability or reduce supply shortages in underserved markets?

(iii) Are there price or cost reductions that are demonstrably passed through to consumers, or are they retained as increased profits?

(iv) Does the agreement reduce transaction costs or search costs for consumers?

(v) Are there improvements in the alignment of supply and demand?

**Evidentiary requirements:**

(i) Pricing studies comparing pre- and post-agreement prices to consumers;

(ii) Consumer surveys measuring improved product access or affordability;

(iii) Economic models demonstrating better allocation of resources across markets;

(iv) Distribution network analysis showing improved reach or efficiency;

(v) Evidence of pass-through rates from wholesale to retail levels.

**Illustrative example (acceptable):** A distribution agreement between two logistics firms improves market access for rural consumers, reducing transport costs and consumer prices by 10%. The applicant provides: geographic distribution data showing the extension of the distribution network to previously underserved areas; transport cost analysis demonstrating reduced per-unit delivery costs; consumer access surveys confirming improved availability; and retail price data showing the pass-through of cost savings to consumers.

**Illustrative example (unacceptable):** A market-sharing agreement between competitors that raises consumer prices but claims that the "efficiency" is the elimination of "wasteful" competition or duplication in marketing. The elimination of competitive rivalry is not a cognisable efficiency under these Guidelines.

**(c) Dynamic efficiency — innovation and long-term competitiveness**

Dynamic efficiency refers to innovation-driven improvements, including technological advancement, increased research and development (R&D) investment, and accelerated product development. Dynamic efficiencies are often the most valuable for long-term consumer welfare but are also the most difficult to quantify and verify.

**Key analytical questions:**

(i) Does the agreement increase R&D spending? By what magnitude and in what areas?

(ii) Does it lead to faster product innovation or technological diffusion?

(iii) Are there new products, patents, or licensing arrangements that benefit competition and consumers?

(iv) What is the counterfactual — would the innovation occur absent the agreement, albeit more slowly or at higher cost?

(v) Are the parties genuinely pooling complementary research capabilities, or is the agreement merely a vehicle for coordinating market activities whilst claiming innovation benefits?

**Evidentiary requirements:**

(i) R&D expenditure reports demonstrating increased innovation investment compared to a realistic counterfactual;

(ii) Patent filings confirming new technology development, with priority dates;

(iii) Time-to-market data showing faster innovation cycles compared to pre-agreement or independent benchmarks;

(iv) Expert reports on the likelihood and timing of innovation outcomes;

(v) Development timelines and milestone targets substantiated by project plans;

(vi) Quantified assessment of the value of accelerated innovation (discounted net present value of earlier market entry).

**Illustrative example (acceptable):** A collaborative R&D agreement between biotech firms accelerates vaccine development through shared investment in clinical trials and pooling of complementary research capabilities. The applicant provides: R&D expenditure data showing increased spending compared to budgets for independent development; detailed development timelines with measurable milestones; patent applications confirming new therapeutic targets; independent scientific assessment of the innovation pathway; and probability-weighted valuation of the time acceleration benefit.

Illustrative example (unacceptable): A dominant firm acquiring smaller competitors and suppressing their innovation programmes, claiming that "consolidation promotes R&D efficiency." The Commission will not accept efficiency claims that are in substance strategies for eliminating competitive threats or suppressing innovation that would otherwise constrain the dominant firm.

#### 2.3.1.3 Cross-cutting Principles for All Efficiency Categories

41. The Commission requires that efficiency claims satisfy four cross-cutting criteria, applicable to all three categories:

    (a) **Market-specificity**: Efficiency gains must be demonstrated within the same relevant market where the restrictive effects arise. Cross-market justifications are not permitted. If a pharmaceutical company claims that higher domestic prices enable cheaper exports, this is not an acceptable justification, unless the consumers affected by the restriction (domestic purchasers) and those benefiting from the efficiencies (export purchasers) are substantially the same group or the domestic restriction is an unavoidable consequence of achieving genuine export efficiencies.

    (b) **Timeliness**: Efficiency benefits must materialise within a reasonable period, typically three to five years. The Commission will not accept efficiencies that are speculative, delayed indefinitely, or expected only in the long term without concrete evidence of realisation and a credible implementation timeline.

    (c) **Objectivity and verifiability**: Efficiency claims must be supported by economic analysis, financial models, and operational data. Claims that are hypothetical, vague, or based solely on internal projections without independent validation will not be accepted.

    (d) **Direct causal link**: The efficiency gains must arise directly from the agreement and not from external market factors, pre-existing advantages, or actions that the parties could take independently.

#### 2.3.1.4 Prohibited Justifications — Cost Savings from Market Power

42. The Commission will disregard cost savings arising solely from a reduction in competition. Examples include:

    (a) Reduced output leading to lower production costs (limiting supply to raise prices);

    (b) Elimination of sales and marketing expenses due to lack of competition;

    (c) Artificial reduction in consumer choice leading to higher profits;

(d) Price-fixing arrangements that reduce operational redundancies;

(e) Suppression of a competitor's innovation to avoid the costs of competing on innovation.

43. These are not genuine efficiencies; they are the exercise of market power.

#### 2.3.1.5 Quantification and Measurement

44. Wherever possible, efficiency claims should be quantified. The Commission expects applicants to provide:

(a) Baseline data showing pre-agreement costs, prices, output, and quality;

(b) Projected post-agreement data showing anticipated changes, with clear assumptions identified;

(c) A net present value calculation of efficiency gains over the proposed duration, using a discount rate appropriate to the market and risk profile;

(d) Sensitivity analysis showing how results change under different assumptions (conservative, base case, optimistic scenarios);

(e) An identification of the risks to realisation and the probability weighting attached to each efficiency claim;

(f) Comparison to applicable industry benchmarks or historical data from comparable transactions.

45. Where quantification is not possible (e.g. for some dynamic efficiencies), the applicant should provide the most rigorous qualitative evidence available, including expert reports, industry benchmarks, and comparative case studies from comparable markets or jurisdictions.

#### 2.3.1.6 Quantification of Efficiency Gains: Worked Examples

*(This section elaborates on Regulation 4(3) of the Regulations)*

**2.3.1.**6.1 Why Quantification Matters

46. The Commission expects applicants to quantify claimed efficiency gains wherever possible. Quantification serves three purposes: it enables the Commission to assess the magnitude of the efficiencies against the magnitude of the competitive harm; it enables the Commission to assess whether the efficiencies are passed on to consumers; and it disciplines the analytical process, requiring the applicant to move from assertion to evidence.

47. The Commission recognises that not all efficiencies can be precisely quantified. Dynamic efficiencies (innovation, R&D) are inherently more uncertain than productive efficiencies (cost reductions). However, even where precise quantification is not possible, the applicant should provide the most rigorous analysis available, including scenario modelling, sensitivity analysis, and probability-weighted estimates.

48. This section illustrates the Commission's expected approach through worked examples.

#### 2.3.1.6.2 Worked Example 1: Net Present Value Calculation for a Joint Production Agreement

49. **Scenario**: Two cement producers — AlphaCem (35% market share) and BetaCem (15% market share) — propose a joint production agreement to consolidate their operations into a single modern plant. They claim productive efficiency gains of ₦3.5 billion annually from Year 2, requiring an upfront investment of ₦8 billion in Year 0. The agreement involves an exclusivity clause in the jointly operated region.

50. **Step 1: Identify and quantify gross efficiency gains**

51. The applicant provides the following annual efficiency breakdown:

| Efficiency Source | Annual Saving (₦ million) | Category |
|---|---|---|
| Elimination of duplicate kiln operations | 1,200 | Productive |
| Shared raw material procurement (bulk discounts) | 600 | Productive |
| Consolidated logistics and transport fleet | 800 | Productive / Allocative |
| Reduced energy cost from modern kiln technology | 500 | Productive |
| Reduced wastage and improved yield | 400 | Productive |
| **Total gross annual efficiency** | **3,500** | |

52. **Step 2: Deduct implementation costs**

53. Not all gains are net. The Commission deducts costs necessary to achieve the efficiencies:

| Cost Item | Amount (₦ million) | Timing |
|---|---|---|
| New plant construction | 6,000 | Year 0 |
| Decommissioning of old plants | 1,200 | Year 0–1 |
| Staff retraining and redeployment | 500 | Year 0–1 |
| IT systems integration | 300 | Year 0 |
| **Total implementation cost** | **8,000** | |

54. **Step 3: Determine the agreement-specificity of efficiencies**

55. The Commission asks: which of these efficiencies could be achieved without the restrictive agreement?

| Efficiency Source | Agreement-specific? | Reasoning |
|---|---|---|
| Duplicate kiln elimination | Yes | Requires coordinated decommissioning |
| Bulk procurement | Partly | Each firm could negotiate independently, but joint volume yields larger discount |
| Consolidated logistics | Yes | Requires shared fleet, which requires exclusivity to guarantee volume |
| Energy cost from new kiln | Yes | New plant justifiable only at combined volume |
| Reduced wastage | Yes | Higher-throughput plant requires combined volume |

56. The Commission accepts ₦2.9 billion as agreement-specific (deducting 50% of the bulk procurement savings, which are partly achievable independently). Net agreement-specific annual efficiency: ₦2.9 billion.

57. **Step 4: Calculate Net Present Value**

58. The Commission applies a discount rate of 12% (reflecting the cost of capital in the Nigerian industrial sector and the risk of realisation). The assessment period is the proposed five-year exemption duration plus two additional years to capture lagged effects.

| Year | Gross Efficiency (₦m) | Implementation Cost (₦m) | Net Cash Flow (₦m) | Discount Factor (12%) | Present Value (₦m) |
|---|---|---|---|---|---|
| 0 | 0 | 6,300 | -6,300 | 1.000 | -6,300 |
| 1 | 1,000 | 1,700 | -700 | 0.893 | -625 |
| 2 | 2,900 | 0 | 2,900 | 0.797 | 2,311 |
| 3 | 2,900 | 0 | 2,900 | 0.712 | 2,065 |
| 4 | 2,900 | 0 | 2,900 | 0.636 | 1,844 |
| 5 | 2,900 | 0 | 2,900 | 0.567 | 1,644 |
| 6 | 2,900 | 0 | 2,900 | 0.507 | 1,470 |
| 7 | 2,900 | 0 | 2,900 | 0.452 | 1,311 |
| **Total** | | | | | **3,720** |

59. **NPV of agreement-specific efficiencies: ₦3.72** billion (positive — the efficiencies exceed the implementation costs on a risk-adjusted basis).

60. **Step 5: Assess pass-through to consumers**

61. The Commission estimates the pass-through rate. In the Nigerian cement market, with four significant competitors and moderate barriers to entry, the Commission estimates a pass-through rate of 55–65%, based on:

(a) Price elasticity of demand for cement: approximately -0.4 (inelastic — construction demand is relatively insensitive to price);

(b) Competitive intensity: four-firm concentration ratio (CR4) of approximately 80% — moderately concentrated;

(c) Historical evidence: in previous cement market interventions, cost reductions were passed on at approximately 60% within 18 months.

62. At a 60% pass-through rate, the annual consumer benefit is approximately ₦1.74 billion (60% × ₦2.9 billion), equivalent to a reduction in retail cement prices of approximately ₦580 per tonne on an industry volume of approximately 3 million tonnes.

63. **Step 6: Compare against competitive harm**

64. The Commission assesses the competitive harm from the exclusivity clause. The agreement forecloses approximately 20% of the regional market (BetaCem's pre-agreement share) from competition. Using a simple deadweight loss estimation:

(a) Post-agreement market share: 50% (combined);

(b) Estimated price increase absent efficiencies: 3–5% (based on the reduction in competitive constraints);

(c) Estimated annual consumer harm from reduced competition: **₦800 million – ₦1.2 billion**.

65. Net assessment: Annual consumer benefit from efficiencies (**₦1.74 billion**) exceeds estimated annual consumer harm (**₦800 million – ₦1.2 billion**). The net effect is positive. However, the Commission notes the significant margin of error and would attach conditions to manage the risk.

**Sensitivity Analysis**

66. The Commission expects applicants to present a sensitivity analysis showing how the results change under different assumptions. This is essential because efficiency projections are inherently uncertain.

67. **Sensitivity on key variables**:

| Variable | Base Case | Optimistic | Pessimistic |
|---|---|---|---|
| Annual gross efficiency | ₦3,500,000 | ₦4,200,000 (+20%) | ₦2,800,000 (-20%) |

| | | | |
|---|---|---|---|
| Implementation cost | ₦8,000,000 | ₦7,000,000(-12.5%) | ₦10,000,000 (+25%) |
| Pass-through rate | 60% | 70% | 45% |
| Discount rate | 12% | 10% | 15% |

| Scenario | NPV (₦m) | Annual Consumer Benefit (₦m) | Net Assessment |
|---|---|---|---|
| Base case | 3,720 | 1,740 | Positive |
| Optimistic | 6,850 | 2,058 | Clearly positive |
| Pessimistic | 580 | 882 | Marginal — borderline |
| Worst case (pessimistic + high discount) | -1,200 | 756 | Negative |

68. The sensitivity analysis shows that the efficiency case is robust under base and optimistic assumptions but becomes marginal or negative under pessimistic scenarios. The Commission would take this into account in setting conditions — for example, requiring a mid-term review at Year 3 to verify whether efficiencies are materialising as projected.

**2.3.1.6.3 Worked Example 2: Dynamic Efficiency: Dynamic Efficiency — R&D Investment Valuation**

69. **Scenario**: Two pharmaceutical companies propose a joint R&D agreement for a new malaria treatment. They claim that pooling resources will accelerate development from 8 years to 5 years and reduce total R&D cost from ₦12 billion (individual) to ₦8 billion (joint).

70. Dynamic efficiencies are inherently uncertain. The Commission applies a probability-adjusted approach:

| Parameter | Value | Source |
|---|---|---|
| Expected R&D cost (joint) | ₦8 billion | Applicant's project plan |

| | | |
|---|---|---|
| Expected R&D cost (individual) | ₦12 billion | Applicant's counterfactual estimate |
| Cost saving | ₦4 billion | Difference |
| Probability of successful development | 35% | Industry benchmark for Phase II compounds |
| Expected revenue if successful | ₦25 billion (over 10 years) | Market analysis |
| Time acceleration | 3 years earlier | Applicant's clinical trial schedule |

71. The probability-adjusted value of the R&D efficiency is:

(a) Cost saving (certain): ₦4 billion × probability of proceeding (100%) = ₦4 billion

(b) Revenue acceleration (conditional on success): 3 years × annual revenue of ₦2.5 billion × probability of success (35%) = ₦2.625 billion

Probability-weighted total: approximately ₦6.625 billion.

72. The consumer benefit from time acceleration is substantial — three years earlier access to a new malaria treatment. This is a non-pecuniary consumer benefit that the Commission weighs heavily, particularly given the public health significance in the Nigerian context. The Commission would not require precise monetary valuation of the health benefit but would require credible clinical trial timelines and independent scientific assessment of the feasibility of acceleration.

### 2.3.2 Condition 2: Fair Share for Consumers (Section 60(a), Second Limb)

73. The net effect of the agreement on consumers must be neutral or positive. Any anti-competitive harm—including higher prices, reduced choice, or limited market access—must be fully offset by quantifiable consumer benefits. This is not a balancing test that allows the parties to trade off consumer welfare against producer welfare; rather, it requires that consumers themselves receive a fair share of the efficiencies.

#### 2.3.2.1 Consumer Definition and Reconciliation with Section 167

74. For the purposes of this assessment, the Commission applies the definition of "consumer" under section 167 of the Act. Section 167 defines a consumer as any natural person who is acting for purposes which are outside his or her trade, business, or profession. This means that the relevant consumers are the ultimate end-users of goods or services, not business intermediaries or resellers.

75. In some cases, the end-consumer and the immediate contractual counterparty to the agreement are different. For example, an exclusive distribution agreement is between a manufacturer and a distributor, but the ultimate consumers are the retailers' customers. In assessing whether consumers receive a fair share of benefits, the Commission will trace the benefits through the supply chain: do the benefits eventually reach the end-consumers, or are they captured by intermediaries?

76. In some cases, business intermediaries (such as retailers or distributors) may be relevant to the analysis because they are "consumers" in the sense that they purchase goods from the manufacturer. The role of business intermediaries is economically relevant to the analysis, but the ultimate test is whether final consumers benefit.

#### 2.3.2.2 The Net Effect Test

77. The Commission will assess the net effect of the agreement on consumers by:

**(a)** **Identifying consumer benefits:** What benefits do consumers receive from the agreement? These may include:

- Lower prices
- Improved product quality
- Increased product variety
- Improved availability or accessibility
- Enhanced innovation or technological advancement
- Improved environmental characteristics

**(b)** **Quantifying consumer benefits:** Where possible, the Commission will quantify the benefits in monetary terms or in other measurable units (e.g., units of quality improvement, hours of reduced delivery time).

**(c)** **Identifying consumer harms:** What harms do consumers suffer from the restriction on competition? These may include:

- Higher prices

- Reduced choice
- Reduced access to market or foreclosed entry
- Reduced innovation incentives
- Reduced product quality or variety

**(d)** **Quantifying consumer harms:** The Commission will quantify harms in monetary or measurable terms where possible.

**(e)** **Balancing:** The Commission will balance the quantified benefits against the quantified harms. The benefits must exceed the harms for the condition to be satisfied.

#### 2.3.2.3 Market-Wide Analysis and Temporal Considerations

78. *Market-Wide Benefit Requirement*— The consumer benefits must accrue to the consumers in the affected market. It is insufficient that the parties' preferred customers receive benefits if other consumers are harmed. The Commission will assess whether the agreement produces net benefits across the entire customer base.

79. Example: An exclusive distribution agreement might improve distribution and reduce prices for consumers in urban areas (where the distributor's network is strong) while reducing access and raising prices for consumers in rural areas (where the distributor does not operate). In this case, the overall net effect on all consumers in the market must be assessed, not merely the effect on urban consumers.

80. *Temporal Considerations*— The consumer benefit must be sustained over a reasonable period. The Commission will not accept arguments that consumers benefit in the short term but suffer in the long term (e.g., because the restriction of competition reduces incentives for innovation in future periods). Rather, the assessment must consider the full duration of the exemption and the sustainability of consumer benefits throughout that period.

#### 2.3.2.4 Practical Checklist for Assessing Fair Share for Consumers

81. To assist applicants in demonstrating a fair share for consumers, the Commission provides the following checklist:

| Question | Guidance |
|---|---|
| **Price Effects** | Have you demonstrated that prices to consumers will not increase, or if they increase, that the increase is offset by other benefits (quality, variety, innovation)? |

| | |
|---|---|
| **Quality Improvements** | Can you quantify improvements in product quality or consumer experience? |
| **Availability and Access** | Will consumers have better access to products or services? Can you demonstrate the nature and magnitude of access improvements? |
| **Consumer Choice** | Will consumers have access to a wider variety of products or suppliers? Or will choice be reduced? |
| **Innovation Benefits** | Will the agreement result in new products or improved products that benefit consumers? Can you project the timeline and magnitude of innovation benefits? |
| **Offsetting Harms** | For each anti-competitive harm (e.g., reduced choice), can you identify an offsetting benefit (e.g., lower prices or innovation)? |
| **Duration** | Will benefits persist throughout the duration of the exemption? Or will consumers experience long-term harm after initial benefits dissipate? |
| **Scope** | Will all consumers in the affected market benefit? Or only a subset? If only a subset, does the overall net effect still favour consumers? |

### 2.3.3 Condition 3: Indispensability (Section 60(b))

82. The restrictive elements of the agreement must be necessary to achieve the claimed efficiencies. The Commission applies a two-fold test:

#### 2.3.3.1 Two-Fold Test for Indispensability

83. **First Test: Is the agreement as a whole reasonably necessary?**

84. This test asks: Could the same efficiency benefits be achieved without any restrictive agreement at all? For example:

- Could the parties achieve the same cost reductions through arm's-length licensing arrangements or service contracts rather than through a restrictive joint venture?

- Could the parties achieve the same innovation benefits through information-sharing arrangements that do not restrict competition?
- Could the parties achieve the same market access improvements through non-exclusive distribution agreements?

85. If the answer to any of these questions is "yes," the agreement as a whole is not indispensable, and exemption should be denied.

86. **Second Test: Are the specific restrictions within the agreement necessary?**

87. Even if some form of agreement is necessary, does each restrictive element go beyond what is required? For example:

- If an exclusive supply agreement is necessary to incentivise a distributor's investment, does the agreement need to be exclusive for a ten-year period, or would five years be sufficient for the distributor to recoup its investment?
- If a joint venture is necessary to pool R&D resources, must the joint venture include a clause that prevents each party from independently conducting R&D in the field?
- If price coordination is claimed to be necessary to reduce transaction costs, could the same benefit be achieved through published pricing schedules without ongoing coordination?

88. The Commission will require applicants to justify the duration, scope, and specific content of each restrictive element.

#### 2.3.3.2 Decisive Factors in Indispensability Analysis

89. The Commission will evaluate indispensability based on several considerations:

- **Existence of practical alternatives:** Are there less restrictive business models or contractual structures that would achieve similar efficiency gains? The applicant must identify and address practical and commercially viable alternatives.
- **Comparative effectiveness:** How much less effective would a less restrictive alternative be compared to the proposed agreement? If the difference is marginal, the more restrictive approach is not indispensable.
- **Sunk investments and risk allocation:** Does the agreement require one party to make significant sunk investments that would not be made absent the restriction? If so, the restriction may be indispensable to allocate risk fairly between the parties.
- **Contractual certainty:** Does the restriction provide contractual certainty that is necessary to induce one party to perform its obligations or make investments? For example, an exclusive

supply agreement may provide the distributor with certainty regarding its supply source, which may be indispensable for the distributor to commit to market development activities.

- **Competitive intensity and market conditions:** In a highly competitive market, restrictions on competition may be less indispensable because market forces will constrain the parties' behaviour. In a less competitive market with high barriers to entry, restrictions may be more necessary to achieve efficiency gains.

90. Illustrative Example: A group of small manufacturers agreeing to jointly purchase raw materials to secure bulk discounts might be justified if this leads to lower costs for consumers. However, if each firm could independently negotiate lower prices through separate but competitive procurement agreements with different suppliers, or if they could join a non-exclusive purchasing cooperative, the restriction would not pass the indispensability test. The focus is on whether the specific restrictive feature (exclusivity, in this example) is necessary.

#### 2.3.3.3 Specific Indispensability Criteria

91. The first test under the indispensability inquiry requires that efficiencies be unique to the agreement, meaning:

i. **No other practicable and less restrictive alternatives exist.** The Commission will consider whether there are genuine alternatives that would produce comparable efficiency gains. The applicant is not required to demonstrate that every conceivable alternative has been explored, but must address practical and commercially viable alternatives that are known to the applicant or that are evidenced in comparable markets or transactions.

ii. **The restriction is the minimum necessary to achieve the efficiency.** The applicant must justify the specific scope and duration of the restriction, demonstrating that smaller or shorter restrictions would not achieve the desired efficiency gain.

iii. **The restriction is proportionate to the efficiency gain.** A ten-year exclusive supply agreement designed to achieve efficiency gains that are expected to materialise within three years would not be proportionate, and the excess duration would not be indispensable.

#### 2.3.3.4 Commission's Approach to Indispensability

92. The Commission will not second-guess business decisions unless it is clear that reasonable, less restrictive options exist. If the applicant fails to justify why an alternative approach is significantly less effective, authorisation will be denied.

93. However, the Commission is not confined to the options explicitly considered by the applicant. If the Commission identifies an obviously less restrictive alternative (e.g., a well-established

business practice in comparable markets), the applicant may need to explain why that alternative is not feasible in its case.

94. Illustrative Example of a Failing Justification: An airline applies for exemption for an exclusive long-term fuel supply agreement, claiming that it is necessary to assure stable fuel prices and supply. However:

- Other fuel suppliers offer similar price guarantees through medium-term contracts.
- The airline could use long-term supply contracts (without exclusivity) that would provide price certainty while allowing the airline to diversify suppliers.
- There is no credible evidence that exclusivity is necessary for the fuel supplier to make investments justifying the restriction.

95. In this case, the Commission would likely find that exclusivity is not indispensable, because less restrictive alternatives (non-exclusive long-term contracts with multiple suppliers) would achieve the same efficiency gains.

#### 2.3.3.5 Hardcore Restrictions and Indispensability

96. Restrictions that fundamentally distort competition—such as price-fixing, bid-rigging, or market allocation—are presumed not to be indispensable. The Commission will rarely accept arguments that such restrictions are necessary for efficiencies because, in almost all cases, less restrictive alternatives exist.

97. For example, if competitors argue that agreeing on prices is necessary to achieve economies in joint purchasing, the Commission would likely find that the parties could achieve the same purchasing economies through a non-exclusive purchasing cooperative or joint purchasing agent (with competitive pricing maintained through each firm's independent supply decisions).

#### 2.3.3.6 Market Context and Economic Risk

98. The Commission will assess indispensability in context, considering:

- **Market characteristics and competitive dynamics:** Whether competition is intense or limited, whether entry barriers are high or low.
- **Party characteristics:** Including the size, resources, and competitive position of the parties.
- **Incentives facing the parties:** Whether the parties have incentives to comply with less restrictive alternatives or whether the restriction is necessary to overcome free-rider problems or coordination challenges.

99. Example: A joint venture between two telecom operators to share rural network infrastructure might be indispensable if:

- The investment risks are too high for individual firms to bear alone.
- The returns are too low to justify individual investment but sufficient to justify shared investment.
- No less restrictive alternative (e.g., access regulation, wholesale network access) would achieve the same efficiency gains.

#### 2.3.3.7 Time-Limited Indispensability

100. Some restrictions may only be necessary for a fixed period to allow the parties to recoup their investment or to achieve the efficiency gains. The Commission will limit authorisation duration based on:

- The expected payback period for investment
- The expected period for realisation of efficiencies
- Technological developments that might reduce the necessity of the restriction over time

101. Example: A software firm that collaborates on a new encryption standard may require a temporary non-compete clause to ensure adequate R&D investment. However, once the initial investment is recovered (typically within three to five years), the restriction must be removed or substantially relaxed.

#### 2.3.3.8 Summary of Indispensability Assessment

| Assessment Criterion | Key Considerations |
|---|---|
| **Necessity of Agreement** | Is the entire agreement required to generate efficiencies? |
| **Necessity of Each Restriction** | Does each element contribute to the claimed efficiency gain? |
| **Proportionality** | Is the scope and duration proportionate to the efficiency gain? |
| **Less Restrictive Alternatives** | Do practically viable less restrictive alternatives exist? |
| **Duration Limitation** | Should the restriction be time-limited to the period necessary to realise efficiencies? |

| | |
|---|---|
| **Competitive Context** | Does the market context (e.g., entry barriers, competitor strength) affect the necessity of the restriction? |

### 2.3.4 Condition 4: No Elimination of Competition (Section 60(c))

102. The agreement must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services concerned. This is the outer limit of the exemption regime: even if an agreement generates enormous efficiency gains that fully benefit consumers and involves only indispensable restrictions, it cannot be exempted if it would enable the parties to eliminate competition.

#### 2.3.4.1 Meaning of "Eliminating Competition"

103. Elimination of competition occurs when the agreement so reduces competitive constraints that the parties can maintain prices, quality, product innovation, or market access at levels that deviate substantially from competitive levels, without regard to the preferences or competitive reactions of consumers or remaining competitors.

104. The relevant question is not whether competition is eliminated de facto (i.e., whether competitors actually exist), but whether the agreement affords the *possibility* of eliminating competition (i.e., whether it creates a situation in which the parties have the power to eliminate competition if they choose to do so).

#### 2.3.4.2 Assessment Framework: Market Concentration, Entry Barriers, and Competitive Strength

105. The Commission will assess whether competition would be eliminated by examining:

106. *Market Concentration*— How much market share do the parties collectively hold after implementation of the agreement? What is the combined market share of remaining competitors? The Commission will calculate the Herfindahl-Hirschman Index (HHI) before and after the agreement:

- If pre-agreement HHI is below 1500 and post-agreement HHI is below 1500, the market is competitive and the agreement is unlikely to eliminate competition.
- If pre-agreement HHI is 1500–2500, the market is moderately concentrated, and the post-agreement HHI is a significant factor in assessing whether competition is eliminated.
- If post-agreement HHI exceeds 2500, the market is highly concentrated, and elimination of competition is a serious concern.

107. However, HHI is only one factor; it does not mechanically determine the outcome.

108. *Barriers to Entry and Expansion*— Could new competitors or existing competitors outside the agreement realistically enter or expand to constrain the parties' behaviour? The Commission will assess:

- **Regulatory barriers:** Are there licenses, permits, or regulatory approvals required to enter the market? How costly and time-consuming are these?
- **Cost barriers:** What is the minimum efficient scale for a competitor? What are sunk costs required for entry? How long is the payback period?
- **Technological barriers:** Is access to key technologies restricted by patents, proprietary know-how, or intellectual property protection?
- **Buyer power:** Do customers (especially large customers) have the ability and incentive to limit price increases or to switch to competitors or self-supply?
- **Supplier power:** Is access to key inputs controlled by a limited set of suppliers, or is it competitive?

109. *Competitive Strength of Remaining Competitors*— The strength and number of remaining competitors matter:

- If one or two large competitors remain, and they have similar market power to the parties, competition may be maintained through multi-firm competition.
- If remaining competitors are fragmented, numerous, and lacking market power, they may not provide meaningful competitive constraints.
- The Commission will assess whether remaining competitors have the ability to expand or to achieve scale economies that would constrain the parties' behaviour.

110. *Durability of the Restriction*— Is the reduction in competition likely to be durable, or will competitive pressures (e.g., from entry, technological change, or customer switching) constrain the parties? Time-limited restrictions that are subject to re-evaluation may be less concerning than permanent restrictions.

#### 2.3.4.3 Illustrative Assessment

111. Consider a joint venture in the manufacture of a commodity product in Nigeria:

- The two parties collectively hold 55% of the market after the venture.
- The remaining 45% is held by three competitors, each with approximately 15% market share.

- Entry barriers are moderate: a new entrant would need to invest in production facilities (high sunk costs) but could source technology and raw materials from competitive suppliers.
- Existing customers have some buyer power (they can source from the three remaining competitors).

112. In this case, the Commission would likely find that competition is not eliminated because:

- Market concentration (55% post-venture) is high but not overwhelming.
- Multiple remaining competitors constrain behaviour.
- Entry barriers, while material, are not insurmountable.
- Buyer power provides some discipline.

113. Now consider a different scenario:

- The two parties collectively hold 80% of the market after the venture.
- Barriers to entry are very high: technology is protected by patents held by the parties, and raw material access is controlled by the parties' vertically integrated suppliers.
- The remaining 20% is held by one competitor, which has significantly lower scale and is financially weaker than the parties.
- Customers have no buyer power and cannot self-supply.

114. In this case, the Commission would likely find that competition is eliminated or nearly eliminated because the parties would have the ability to increase prices or restrict supply without meaningful constraint.

#### 2.3.4.4 Non-Balancing Nature of the Condition

115. Critically, this condition is not subject to a balancing test. Even if efficiencies are enormous and consumer benefits are substantial, the agreement cannot be exempted if it eliminates competition in a substantial part of the market.

116. This reflects a fundamental policy decision: the Commission will not permit efficiency gains to justify the creation of quasi-monopolistic conditions, because such conditions create risks of long-term harm (e.g., through reduced incentives for innovation, entrenchment of market power, or coordination that becomes easier as competition weakens) that may outweigh short-term efficiency gains.

117. However, the Commission recognises that in some cases, the creation of a dominant position is the inevitable result of efficiency-generating cooperation (e.g., a joint venture between two competitors in a market with only three competitors may increase their combined market share

substantially). In such cases, the Commission may condition the exemption on safeguards (e.g., access obligations, pricing transparency, or sunset clauses) designed to prevent abuse of the dominant position.

## 2.4 Market Definition in the Exemption Assessment

### 2.4.1 Role of market definition

118. Market definition is a preliminary and essential step. It is not an end in itself but an aid to competitive assessment. It provides a framework for identifying the competitive constraints on the parties and for computing market shares and concentration measures.

119. An incorrect market definition may lead to erroneous conclusions. A market defined too narrowly may overstate concentration; a market defined too broadly may mask the existence of market power.

### 2.4.2 The SSNIP test (Hypothetical Monopolist Test)

120. The Commission's primary tool for market definition is the SSNIP test (Small but Significant Non-transitory Increase in Price), also known as the Hypothetical Monopolist Test. It asks: would a hypothetical monopolist of a candidate set of products find it profitable to impose a small but significant (typically 5–10%) non-transitory increase in price?

(a) If the price increase is profitable (because insufficient customers switch to alternatives), the candidate set of products constitutes a relevant market.

(b) If the price increase is not profitable (because sufficient customers switch), the market definition is too narrow and should be expanded to include the next-best substitute.

121. The process is iterative. The Commission begins with the narrowest candidate market and progressively expands it until the hypothetical monopolist test is satisfied.

### 2.4.3 Demand-side and supply-side substitutability

122. The Commission assesses substitutability from both the demand side (would consumers switch?) and the supply side (could producers quickly switch production?):

(a) **Demand-side**: Consumer switching behaviour in response to price changes. Relevant factors include price sensitivity, brand loyalty, switching costs, functional interchangeability, and consumer surveys.

(b) **Supply-side**: The ability of producers to switch production to the relevant product quickly and without significant investment. Supply-side substitution is relevant where it provides an immediate competitive constraint (within one year).

### 2.4.4 Geographic market definition

123. The geographic market defines the area of effective competition. The Commission assesses: the extent of competition across regions; logistical and regulatory barriers; transportation costs; and consumers' ability to source alternatives from outside the candidate area.

### 2.4.5 Evidence

124. The Commission may rely on: pricing data and pricing patterns; consumer surveys and switching data; transport cost analysis; industry reports; and internal business documents showing how the parties themselves define their competitive environment.

### 2.4.6 Market Definition in the Exemption Assessment: A Worked SSNIP Example

*(This section elaborates on section 2.4 of the Guidelines)*

**2.**4.6.1 Why Market Definition Matters for Exemptions

125. Market definition in an exemption case serves a different purpose from market definition in a merger case. In a merger, the question is whether the transaction will substantially prevent or lessen competition. In an exemption case, the question is whether the agreement restricts competition *and*, if so, whether it satisfies the four substantive questions under section 60. Market definition is critical to both questions because it determines the competitive arena within which the effects of the agreement are assessed.

126. An incorrect market definition can distort the exemption assessment in either direction. If the market is defined too narrowly, the agreement may appear to foreclose a large proportion of the market (overstating harm) and the efficiency gains may appear disproportionate to a small market (understating consumer benefit). If the market is defined too broadly, the agreement may appear insignificant (understating harm) and the parties' combined shares may appear low (understating the risk of competition elimination).

127. The Commission applies the SSNIP test (Hypothetical Monopolist Test) as the primary tool for market definition. The methodology is the same as that applied in the Notice on Market Definition, 2022, and the Merger Review Guidelines, 2020, adapted for the exemption context.

#### 2.4.6.2 The SSNIP Test — Methodology

128. The SSNIP test is applied through the following steps:

129. **Step 1: Define the candidate market**

130. Identify the narrowest candidate market — typically, a specific product (or product category) in a defined geographic area. Example: "packaged flour for household consumption in the South-West region of Nigeria."

131. **Step 2: Assess demand-side substitutability**

132. Would consumers switch to alternative products if the price of the candidate product increased by 5–10% on a non-transitory basis (i.e., an increase that is expected to persist)? Relevant evidence includes:

(a) Price elasticity of demand (what is the demand response to a 1% price increase?);

(b) Consumer switching behaviour (do consumers actively switch brands or product types in response to price?);

(c) Brand loyalty and switching costs (do consumers perceive significant differences between brands or face costs in switching?);

(d) Functional interchangeability (do consumers regard the candidate product and alternatives as interchangeable?).

133. If switching would be sufficient to make the price increase unprofitable (i.e., revenue gains from higher prices would be offset by losses from customers switching away), the market definition is too narrow.

134. **Step 3: Assess supply-side substitutability**

135. Could suppliers of substitute products quickly and without significant investment switch production to the candidate product in response to a 5–10% price increase? Relevant evidence includes:

(a) Production technology (are alternative production lines easily convertible?);

(b) Sunk costs (what is the cost of exiting one product line and entering another?);

(c) Time-to-market (how quickly could a supplier re-orient production?);

(d) Economies of scale and scope (are there benefits to producing multiple products jointly?).

136. If supply-side substitution would be rapid and costless, the market definition should expand to include the substitute products.

137. **Step 4: Expand the market progressively**

138. If the SSNIP test is not satisfied for the candidate market (i.e., sufficient switching would occur), expand the market definition to include the next-best substitute(s) and repeat the analysis. Continue iteratively until the SSNIP test is satisfied (i.e., a hypothetical monopolist would find a 5–10% price increase profitable).

139. **Step 5: Define geographic extent**

140. Determine whether the market is local, regional, national, or international by assessing whether consumers can source from geographically distant suppliers and whether suppliers can cost-effectively deliver across distances.

#### 2.4.6.4 Worked Example: GrainCo and MillerCo Flour Milling Agreement

141. *The following example is illustrative. The figures, entities, and market conditions are hypothetical and are used solely to demonstrate the Commission's analytical methodology. They do not represent actual market data or the Commission's assessment of any real market.* **Scenario**: GrainCo and MillerCo, two flour milling companies operating in the South-West region of Nigeria, propose a joint milling agreement. They will consolidate operations into a single modern mill, reducing costs and improving quality. The Commission must first determine the relevant product and geographic market. The South-West region, particularly Lagos, is home to the majority of Nigeria's wheat milling capacity, because mills are located at or near the ports through which imported wheat grain enters the country. This geographic concentration of milling capacity is a structural feature of the industry.

142. **The candidate market**: "Packaged wheat flour for household consumption in the South-West region."

143. **Analysis of demand-side substitutability**: Is packaged wheat flour substitutable with alternative flours (cassava flour, rice flour) from a consumer perspective?

(a) **Price sensitivity**: Wheat flour and alternative flours are not perfect substitutes. A 5–10% increase in wheat flour prices would not cause all consumers to switch to alternatives; wheat flour is preferred for many baking applications. However, some price-sensitive consumers (particularly those purchasing for lower-grade uses) might switch.

(b) **Brand loyalty**: Consumers of premium wheat flour exhibit moderate brand loyalty (they prefer familiar brands) but are willing to switch in response to price increases of 5–10%.

(c) **Functional interchangeability**: For some uses (bread-making), wheat flour and alternative flours are not functionally equivalent. For other uses (porridge, batters), they are partially substitutable.

144. **Conclusion on demand substitution**: Not all consumers would switch; wheat flour is differentiated from alternative flours. The candidate market ("wheat flour") may be appropriate, but the Commission should test whether alternative flours exert sufficient competitive pressure. If a 5–10% price increase for wheat flour would lead to switching rates exceeding 5–10% (the critical threshold varies by demand elasticity), the market is too narrow.

145. **Analysis of supply-side substitutability**: Could alternative flour producers (cassava flour mills, rice flour mills) quickly switch to wheat flour production in response to a 5–10% price increase for wheat flour?

(a) **Production technology**: Wheat flour milling is more capital-intensive and technologically advanced than cassava or rice milling. Conversion would require significant new investment (new mill equipment, trained personnel).

(b) **Sunk costs**: A cassava mill cannot be easily converted to wheat milling. The equipment is specialised, and exit from cassava milling would involve significant losses.

(c) **Time-to-market**: Converting from cassava to wheat milling would take 12–24 months, during which the price increase would have eroded the profit incentive.

146. **Conclusion on supply substitution**: Supply-side substitution is not timely (exceeds 12 months) or economically feasible. Alternative flour mills would not constitute an immediate competitive constraint.

**Testing the SSNIP hypothesis: an illustrative example**

147. If a hypothetical monopolist of all domestic wheat flour in the South-West region imposed a 5% price increase, would it be profitable? The Commission estimates:

(a) Current quantity demanded (illustrative): 500,000 tonnes per annum in the South-West region;

(b) Average wholesale price (illustrative): ₦450,000 per tonne;

(c) Price elasticity of demand (illustrative): approximately −0.5 (relatively inelastic — wheat flour is a staple ingredient in bread, pastries, and noodles, with limited short-term substitution);

(d) Cross-elasticity with cassava flour (illustrative): approximately 0.2 (weak substitution — cassava flour is functionally different and not interchangeable for most baking applications);

(e) A 5% price increase (to ₦472,500 per tonne) would reduce quantity demanded by approximately 2.5% (elasticity of −0.5 × 5%), from 500,000 to 487,500 tonnes;

(f) Revenue comparison:

- Before: 500,000 tonnes × ₦450,000 = ₦225 billion;
- After: 487,500 tonnes × ₦472,500 = ₦230.3 billion;
- Revenue gain: ₦5.3 billion (approximately 2.4%);

(g) The price increase is profitable. Because demand is inelastic (elasticity of −0.5), total revenue increases by ₦5.3 billion. Total production costs simultaneously decrease, because 12,500 fewer tonnes are produced. At illustrative variable costs of approximately ₦350,000–₦380,000 per tonne, the cost saving on foregone production is approximately ₦4.4–₦4.8 billion, reinforcing the profitability of the price increase. In an inelastic market, a hypothetical monopolist will always find a small price increase profitable — this is precisely the condition that identifies a relevant market.

(h) **Conclusion on SSNIP**: The hypothetical monopolist would find a 5% price increase profitable. The candidate market ("packaged wheat flour for household consumption in the South-West region") satisfies the SSNIP test and constitutes the relevant market. Cassava flour and imported wheat flour provide insufficient competitive constraint to defeat a 5% price increase.

148. Although alternative flours do not satisfy the SSNIP test as part of the same market, the Commission will nonetheless consider them as competitive constraints in the competitive assessment (assessing foreclosure, barriers to entry). A 5–10% price increase in wheat flour might still induce some switching to alternatives, disciplining the parties' conduct.

149. **Geographic market definition**: Is the market regional (South-West only) or broader (national)? This question has a distinctive character in wheat flour markets because milling capacity is concentrated at the ports in the South-West. The South-West is therefore both the primary production region and a major consumption region. The geographic market question is accordingly whether mills in the South-West serve the national market (making the market national) or whether transport and distribution costs fragment the market into regions. The Commission would assess:

(a) *Transport costs from the South-West to other regions*: Wheat flour is a high-volume, relatively low-margin product. Transporting flour from port-adjacent mills in the South-West to consuming regions in the North-Central, North-East, or North-West would involve significant road freight costs — illustratively ₦50,000–₦80,000 per tonne over distances of 700–1,200 kilometres — representing 11–18% of the wholesale price. These costs act as a

natural barrier to price arbitrage, enabling a hypothetical monopolist in the South-West to raise prices without losing substantial volume to lower-priced flour from distant regions (because there are no distant mills — the mills are in the South-West).

(b) *Distribution networks*: Mills in the South-West have distribution infrastructure optimised for the South-West and adjoining regions. Serving distant northern consuming markets would require investment in additional warehousing, cold storage, and transport logistics.

(c) *Regional pricing differences*: If wholesale flour prices in distant consuming regions (e.g. the North-Central) are significantly higher than in the South-West — reflecting transport costs from port-adjacent mills — this pricing differential is evidence of geographic market segmentation.

(d) *Competition from inland mills*: To the extent that inland milling capacity exists (whether port-independent or using grain transported by road or rail), this would constitute a competitive constraint on South-West mills in those inland regions, potentially fragmenting the national market further.

150 **Conclusion on geographic market:** In this illustrative scenario, the market is regional (South-West), not national. The concentration of milling capacity at the ports means that the South-West is a distinct supply region. Downstream consumers in distant regions face significantly higher delivered prices reflecting transport costs, and mills in the South-West face no immediate competitive constraint from rival mills located elsewhere.

151 **Final market definition**: "Packaged wheat flour for household consumption in the South-West region of Nigeria."

#### 2.4.6.5 The Cellophane Fallacy — A Caution

152. Where one or more of the parties to the agreement is already dominant, the Commission must take care to avoid the "cellophane fallacy." This arises when the SSNIP test is applied at the prevailing market price, which may already be above the competitive level because of existing market power.

153. If a dominant firm has already raised prices to the monopoly level, a further 5% increase may cause significant switching — but this does not mean the market is competitive. It means the firm has already exploited its market power.

154. The Commission addresses this by considering the appropriate base price for the SSNIP test. Where there is reason to believe that prevailing prices are above competitive levels, the Commission may use a competitive benchmark price (cost-plus, or prices in comparable competitive markets) rather than the actual prevailing price. Applicants should identify whether any party to the agreement holds a dominant position in the candidate market and, if so, should address the cellophane fallacy in their market definition analysis.

## 2.5 Application Requirements (Regulation 5)

### 2.5.1 Prescribed Form and Supporting Documentation

155. An application for individual exemption must be submitted in the form prescribed in Schedule 1 of the Regulations. The Commission expects applications to be comprehensive, well-structured, and supported by relevant evidence. The prescribed form requires:

(a) Identification of the applicant(s) and other parties to the agreement;

(b) A description of the agreement and the markets affected;

(c) Market share data and competitive landscape analysis;

(d) Efficiency justifications addressing all four substantive questions;

(e) Supporting documentation (economic studies, financial models, cost analyses, market data).

### 2.5.2 Ordinarily Helpful Additional Information

156. In addition to the formal requirements set out in Regulation 5(1), the Commission considers that the following information would ordinarily assist in the assessment of an application:

(a) **Clear identification of the restrictive elements**: The applicant should explicitly identify which provisions of the agreement restrict competition. This assists the Commission in focusing its analysis and in determining whether the restriction is by object (inherently anti-competitive) or by effect (requiring analysis of actual or likely effects).

(b) **Market share data with sources identified**: Market share data should be provided for all parties to the agreement and for competing firms, with clear identification of the source and methodology (e.g., revenue data from financial statements, industry reports, market research). The Commission will assess the reliability of the data and may request additional information. Data should cover at least three years to show trends.

(c) **Analysis of competitive constraints**: The applicant should describe existing competitors (their sizes, market shares, capabilities), potential entrants (and barriers to entry), and buyer power. This assists the Commission in assessing whether the agreement eliminates competition.

(d) **Financial modelling or economic analysis supporting efficiency claims**: This is critical. Vague statements that efficiencies will arise are insufficient. Applicants should provide detailed financial models showing the nature, magnitude, and timing of efficiencies, with transparent assumptions and sensitivity analysis.

(e) **Counterfactual analysis**: Applicants should explicitly compare market conditions with and without the agreement. What would the competitive landscape look like absent the agreement? How would consumer prices, product choice, and innovation differ? This analysis should be grounded in realistic assumptions and evidence.

(f) **Less restrictive alternatives analysis**: For each restrictive element, applicants should consider whether less restrictive alternatives exist and explain why they are insufficient. This demonstrates engagement with the indispensability requirement.

#### 2.5.3 Flexibility in Format and Presentation

157. Applicants are not required to adopt any specific format beyond that prescribed in Schedule 1 and may present relevant information in any manner that adequately addresses the statutory criteria. The Commission recognises that different applications may benefit from different structures, and it does not prescribe a rigid template. However, the application must be clear, well-organised, and must address all four substantive questions with sufficient evidence and analysis.

### 2.6 Completeness, Information Requests, and Third-Party Consultation (Regulations 6–8)

#### 2.6.1 Preliminary Completeness Check (Regulation 6)

158. The Commission will conduct a preliminary completeness check within five business days of receipt of the application. An application is deemed lodged on the date the Commission confirms completeness (Regulation 6(4)). Applicants should note that the decision-making timeline under Regulation 36 runs from the commencement of substantive review, not from the date of initial lodging.

159. The completeness check verifies that:

(a) All required forms and documentation have been provided;

(b) The application fee has been paid;

(c) The basic information necessary to identify the parties, the agreement, and the markets affected has been provided.

160. The completeness check does not assess the substantive quality or adequacy of the information provided. An application may be deemed "complete" for procedural purposes even though the Commission later determines that additional substantive information is needed.

### 2.6.2 Information Requests (Regulation 7)

161. The Commission may request additional information at any time after lodging (Regulation 7). The Commission will specify a timeframe for response, ordinarily fifteen business days. Failure to respond within the specified period may result in the application being determined on the basis of available information or declared lapsed.

162. Information requests may relate to:

(a) Clarification of factual matters;

(b) Provision of additional economic analysis or modelling;

(c) Documentation of claimed efficiency gains;

(d) Analysis of less restrictive alternatives;

(e) Market studies or third-party data;

(f) Updates to market share information.

163. The applicant should prioritise information requests and allocate resources to responding thoroughly and promptly.

### 2.6.3 Third-Party Consultation (Regulation 8)

164. The Commission may seek input from third parties or conduct public consultation. Where it does so, the applicant will receive a non-confidential summary of any adverse submissions and will be afforded not less than fifteen business days to respond.

165. Third-party submissions might include:

(a) Statements from competitors regarding competitive effects;

(b) Submissions from customers regarding likely price or quality effects;

(c) Submissions from consumer groups or industry associations;

(d) Statements from business partners or supply chain participants.

166. The applicant should be prepared to address critiques from third parties and to clarify disputed factual matters or economic analyses.

## 2.7 Preliminary Assessment, Hearing Rights, and Final Decision (Regulations 9–10)

### 2.7.1 Preliminary Assessment (Regulation 9)

167. Where the Commission proposes to refuse an application or to grant an exemption subject to conditions that differ materially from those sought by the applicant, it will issue a preliminary assessment setting out:

(a) Its provisional findings on each of the four substantive questions;

(b) The reasons for the proposed outcome;

(c) The information relied upon;

(d) Any proposed conditions or modifications.

168. The preliminary assessment is not final; it gives the applicant an opportunity to respond before the Commission reaches its final decision.

### 2.7.2 Hearing Rights (Regulation 9(2)–(3))

169. The applicant will have twenty business days to submit written representations and, if requested, to make oral representations. The Commission will consider all representations before making its final decision.

170. Oral hearings are not automatic; they occur if requested by the applicant or if the Commission determines that oral argument would be helpful. Oral hearings typically last two to three hours and allow the applicant to clarify matters, to respond to the Commission's concerns, and to present additional evidence or arguments.

### 2.7.3 Final Decision (Regulation 10)

171. The final decision will include written reasons and will specify:

(a) Whether the exemption is granted or refused;

(b) If granted, the scope of the exemption (which provisions are covered), its duration, and any conditions or obligations;

(c) The basis for the decision, with reference to the four substantive statutory questions;

(d) Any procedural matters (e.g., the date on which the exemption becomes effective, the timeline for compliance with conditions, appeal procedures).

## 2.8 Legal Effects of Exemption, Refusal, and Revocation (Regulation 11)

### 2.8.1 Binding Legal Effect of Exemption

172. An agreement in respect of which an exemption has been granted is, for the duration and to the extent of the exemption, not treated as unlawful or void by reason of section 59(1) (Regulation 11(1)). This is the binding legal effect of an exemption.

173. The exemption is specific to the agreement as described in the application. If the agreement is materially modified after the exemption is granted, the exemption may no longer apply. The applicant has a duty to notify the Commission of material changes.

### 2.8.2 Effect of Refusal

174. Refusal of an exemption does not preclude enforcement action under section 67 or criminal proceedings under section 69 (Regulation 11(2)). A refused applicant may be subject to investigation or enforcement action based on the same agreement, and the applicant has no protection against such action.

175. However, the applicant may reapply for exemption if circumstances change (e.g., if the agreement is modified to address the Commission's concerns, if new evidence of efficiencies becomes available, or if market conditions change materially).

### 2.8.3 Effect of Revocation

176. Where an exemption is revoked, the agreement becomes subject to section 59(1) from the date of revocation (Regulation 11(3)). Conduct undertaken during the period of the exemption is protected by the exemption; only future conduct is exposed to enforcement action.

### 2.8.4 Severability of Restrictive Provisions (Regulation 11(6))

177. Section 59(1) of the Act provides that an agreement prohibited under section 59(2) is null and void. Regulation 11(5) addresses the practical application of this provision by providing that nullity applies only to the severable restrictive provisions, and the Commission may identify those provisions in its decision.

178. This means that if an agreement contains both restrictive and non-restrictive provisions, and the restrictive provisions cannot be severed from the non-restrictive provisions, the entire agreement is void. However, if the restrictive provisions can be severed (e.g., through deletion or modification), the remaining provisions remain valid.

179. The Commission will identify in its decision which provisions are severable and which are not.

## 2.9 Conditions, Duration, and Renewal (Regulation 12)

### 2.9.1 Conditions and Safeguards

180. The Commission may attach conditions to an exemption where it considers this appropriate and proportionate (Regulation 12(1)). Conditions may include:

(a) **Market access safeguards**: Requirements that the parties maintain access by competitors (e.g., in a joint venture, a requirement that the venture provide access to its facilities on reasonable terms);

(b) **Price monitoring obligations**: Requirements that the parties provide periodic reports on pricing (useful when competition is reduced but the Commission believes consumer benefits will result from efficiency gains);

(c) **Reporting obligations**: Regular reporting on compliance with the exemption, on realisation of efficiencies, or on changes in market conditions;

(d) **Access or interoperability conditions**: Obligations to grant access to essential inputs or to maintain interoperability with competitors (relevant in technology-intensive industries);

(e) **Sunset provisions**: Automatic expiration of the exemption unless renewed, or phased relaxation of conditions over time;

(f) **Divestiture or structural conditions**: Structural separation of the parties' non-joint activities to prevent spillover effects;

(g) **Audit conditions**: Submission to independent audit to verify realisation of claimed efficiencies.

### 2.9.2 Duration of Exemptions

181. Exemptions are granted for a specified period, having regard to the nature of the agreement and prevailing market conditions (Regulation 12(2)). The Commission will ordinarily grant exemptions for a period of three to five years, subject to renewal.

182. Shorter durations may be appropriate where:

(a) Market conditions are volatile or uncertain;

(b) The parties' market power is significant and the agreement reduces competition substantially;

(c) Technological change may affect the basis for the agreement;

(d) There is uncertainty regarding the realisation of claimed efficiencies.

183. Longer durations may be appropriate where:

(a) The agreement involves long-term investments that take time to recoup;

(b) The parties require contractual certainty over an extended period;

(c) Market conditions are stable and competitive constraints are strong;

(d) Efficiency claims are strongly supported by evidence.

### 2.9.3 Renewal Applications (Regulation 12(4))

184. Applications for renewal should be made not less than ninety days before expiry and should be accompanied by updated information demonstrating that the conditions for exemption continue to be met. Renewal applications are typically assessed more quickly than initial applications, as much of the analysis from the original exemption remains relevant.

## 2.10 Revocation and Variation (Regulation 13)

### 2.10.1 Grounds for Revocation

185. The Commission may revoke or vary an exemption on four grounds:

(a) **Material change of circumstances**: If circumstances have changed materially (e.g., entry of a new competitor, significant change in market share, technological developments), the basis for the exemption may no longer be valid. Material change includes changes exceeding the notification thresholds specified in the exemption decision.

(b) **Anti-competitive effects outweighing benefits**: If experience under the exemption reveals that anti-competitive effects are greater than anticipated, or that consumer benefits are less than projected, the Commission may revoke the exemption.

(c) **Failure to comply with conditions**: If the applicant materially breaches conditions attached to the exemption (e.g., fails to provide required reporting, violates access conditions, or exceeds price limits), the Commission may revoke the exemption.

(d) **Exemption obtained on the basis of incomplete, false, or misleading information**: If the Commission determines that the exemption was obtained through misrepresentation or omission of material facts, it may revoke the exemption retroactively.

### 2.10.2 Procedure before Revocation

186. Before revoking or varying an exemption, the Commission will provide notice and an opportunity for representations (Regulation 13(2)). The applicant will have an opportunity to:

(a) Cure any breach of conditions;

(b) Provide updated information addressing changed circumstances;

(c) Offer modifications to the agreement to address anti-competitive effects;

(d) Contest the factual or legal basis for the proposed revocation.

### 2.10.3 Enhanced Sanctions for Deceptive Conduct

187. Where an exemption is found to have been obtained by deception, the Commission may impose sanctions including referral for criminal prosecution under section 69 (Regulation 13(4)). This provides strong incentives for applicants to be forthright and accurate in their applications.

## 2.11 Interim Measures (Regulation 14)

### 2.11.1 Standard for Interim Measures

188. The Commission may impose interim measures where it has reasonable grounds to believe that the continued implementation of an agreement is causing, or is likely to cause, serious and irreparable harm to competition or consumers (Regulation 14(1)).

189. The threshold for interim measures is high: the Commission must demonstrate that:

(a) There is a reasonable basis to believe that the agreement restricts competition seriously;

(b) Irreparable harm is occurring or is likely to occur (harm that cannot be remedied through subsequent enforcement action or damages);

(c) Interim measures are necessary to prevent such harm;

(d) The harm from implementing interim measures does not outweigh the harm from the continued agreement.

### 2.11.2 Duration and Procedure

190. Interim measures are time-limited (ordinarily ninety days without review), subject to representations (Regulation 14(2)), and appealable to the Tribunal (Regulation 14(4)).

191. Before imposing interim measures, the Commission should ordinarily provide notice and an opportunity for the applicant to be heard, unless notice would defeat the purpose of the interim measures (e.g., if notice would allow the applicant to destroy evidence or to accelerate harmful conduct).

## Division 2 — Block Exemption

## 2.12 Block Exemption Notices (Regulation 15)

### 2.12.1 Function and Presumptive Effect

192. The Commission may issue Block Exemption Notices declaring that the prohibition under section 59(1) does not apply to specified categories of agreements that, in the Commission's opinion, satisfy the conditions for exemption under section 60 (Regulation 15(1)). Block exemptions operate on a presumptive basis: agreements falling within their scope are presumed to satisfy section 60 and do not require individual application.

193. The presumption is rebuttable: if the Commission has grounds to believe that a particular agreement falls within a block exemption but does not actually satisfy the conditions for exemption (e.g., because it produces serious anti-competitive effects unexpected at the time the block exemption was issued), the Commission may withdraw the benefit of the block exemption in respect of that agreement.

### 2.12.2 Content of Block Exemption Notices

194. Block Exemption Notices will specify:

(a) **The category of agreements covered**: A clear definition of the types of agreements to which the exemption applies (e.g., "vertical distribution agreements with a market share cap of 30%").

(b) **The conditions and obligations applicable**: Conditions that must be satisfied for the exemption to apply (e.g., "the agreement must not contain territorial restrictions preventing customers from purchasing from other distributors").

(c) **Any restrictions excluded from the benefit of the block exemption**: "Hardcore" restrictions (e.g., price-fixing, market division) that are excluded from the presumption and require individual exemption.

(d) **The period of validity**: The duration of the block exemption and the timeline for renewal or review.

### 2.12.3 Anticipated Categories of Block Exemptions

195. The Commission anticipates issuing Block Exemption Notices for categories of agreements that are generally pro-competitive, including:

(a) **Research and development agreements**: Joint R&D agreements among non-competitors or where market shares are below specified thresholds;

(b) **Specialisation agreements**: Agreements in which parties agree to specialise in different products or stages of production;

(c) **Technology transfer and licensing agreements**: Agreements for licensing of patents, know-how, or trademarks;

(d) **Certain vertical distribution agreements**: Exclusive or selective distribution agreements meeting specified criteria;

(e) **Purchasing cooperatives**: Agreements among competitors to jointly purchase inputs, subject to market share caps and absence of hardcore restrictions.

196. The detailed analytical framework for each category of agreement, including applicable market share thresholds, hardcore restrictions, and efficiency criteria, is set out in Annexure 1 to these Guidelines (Substantive Assessment Framework — Agreement Types and Cooperation Analysis). The relevant Block Exemption Notice, when issued, will specify the binding conditions for automatic exemption within each category.

## 2.13 Notification of Reliance on Block Exemption (Regulation 16)

### 2.13.1 Voluntary Nature of Notification

197. Notification of reliance on a Block Exemption is voluntary (Regulation 16(1)). Failure to notify does not affect the availability of the exemption, provided the agreement falls within the scope of the relevant Notice (Regulation 16(5)).

198. An undertaking may choose to rely on a block exemption without notifying the Commission. If the Commission later investigates the agreement, the undertaking may defend against any alleged infringement by demonstrating that the agreement satisfies the conditions for exemption under the relevant Block Exemption Notice.

### 2.13.2 Benefits of Voluntary Notification

199. The Commission nonetheless encourages notification, as it assists the Commission in monitoring market developments and in identifying agreements that may warrant individual review. Notification also provides certainty: once the Commission receives and accepts a notification, it typically confirms that the agreement qualifies for the block exemption (though this confirmation is not binding and may be withdrawn if circumstances change).

### 2.13.3 No Binding Determination

200. A notification does not constitute a binding determination by the Commission that the agreement falls within the Block Exemption Notice (Regulation 16(4)). Parties relying on a block exemption should conduct a rigorous self-assessment of compliance with the applicable conditions.

## 2.14 Review and Withdrawal of Block Exemption (Regulation 17)

### 2.14.1 Grounds for Withdrawal

201. The Commission may withdraw the benefit of a Block Exemption in respect of a particular agreement where:

    (a) The agreement does not, on the facts, satisfy section 60;

    (b) It produces anti-competitive effects outweighing benefits;

    (c) It was self-assessed on the basis of false or materially incomplete information.

### 2.14.2 Effect of Withdrawal

202. Withdrawal does not of itself constitute a finding that the agreement has infringed section 59 (Regulation 17(3)(c)). The affected party may apply for an individual exemption (Regulation 17(3)(b)).

## Division 3 — Guidance, Enforcement Interface, and Statutory Exceptions

## 2.15 Notification for Guidance on Contemplated Agreements (Regulation 18)

### 2.15.1 Formal Guidance Mechanism

203. Regulation 18 establishes a formal guidance mechanism for contemplated agreements that have not yet been implemented. A party who considers that a proposed agreement may restrict

competition under section 59 may apply for guidance as to whether the agreement is likely to infringe Part VIII.

### 2.15.2 Distinction from Pre-Consultation

204. This mechanism is distinct from the informal pre-consultation service available under Regulation 40 (Part VI). Notification for guidance under Regulation 18 is a formal written application to which the Commission is required to respond within forty business days, and the Commission's guidance carries qualified protective effects described in Regulation 18(6).

205. Pre-consultation is informal, voluntary, and intended to assist applicants in refining their applications before formal lodging. Guidance under Regulation 18 is formal and carries quasi-binding protective effects.

### 2.15.3 Non-Binding Nature of Guidance

206. The Commission's guidance under this Regulation is not a binding determination (Regulation 18(5)). However, where the Commission provides guidance that an agreement is unlikely to infringe Part VIII, it will not take further steps in respect of the agreement unless:

(a) There has been a material change of circumstance;

(b) The information provided was materially incomplete or misleading;

(c) A party applies for an exemption;

(d) A third-party complaint is received.

### 2.15.4 Temporal and Scope Limitations

207. This guidance mechanism applies only to contemplated agreements. It does not extend to agreements already in operation (Regulation 18(7)). If an agreement is already operating, the parties should apply for an exemption under section 60 (if the agreement restricts competition).

## 2.16 Relationship between Exemption and Enforcement (Regulation 19)

### 2.16.1 Preservation of Enforcement Powers

208. An application for exemption or a block exemption notification does not prevent or suspend the Commission's powers of investigation or enforcement under Part VIII, including under section

67 (Regulation 19(1)). The Commission retains full authority to investigate conduct even whilst an exemption application is pending.

### 2.16.2 No Protection for Pre-Application Conduct

209. The grant of an exemption does not affect liability in respect of conduct that took place before the exemption was granted (Regulation 19(3)). The exemption provides protection prospectively, from the date the application is lodged or the exemption is granted, as specified in the Commission's decision.

### 2.16.3 Concurrent Proceedings

210. Where an investigation is running concurrently with an exemption application, the Commission may consider both processes together (Regulation 19(2)). The applicant may provide evidence in the exemption application that addresses the subject-matter of the investigation, and the Commission may consider such evidence in assessing both the exemption application and the underlying conduct.

## 2.17 Leniency (Regulation 20)

### 2.17.1 Relationship between Leniency and Exemption

211. The Regulations do not affect the operation of the Federal Competition and Consumer Protection Leniency Rules, 2022 (Regulation 20(1)). A party who has applied for or been granted leniency may also apply for an individual exemption, but leniency does not satisfy the conditions for exemption (Regulation 20(2)).

212. Leniency provides protection (immunity from fines or reduced fines) in respect to investigation and enforcement of cartel conduct. Exemption provides a substantive determination that conduct satisfying the section 60 test is lawful. These are distinct regimes.

### 2.17.2 Confidentiality of Leniency Information

213. Information provided in connection with a leniency application is protected by the confidentiality provisions of the Leniency Rules and will not, without consent, be used in an exemption determination (Regulation 20(3)).

214. This means that if a party provides information to secure leniency, that information will not be used against it in an exemption application (or vice versa, unless the party consents).

## 2.18 Exclusionary Provisions under Section 61 (Regulation 21)

### 2.18.1 Section 61 Prohibition

215. Section 61 of the Act establishes a distinct prohibition on exclusionary conduct — specifically, provisions in agreements that have the purpose of preventing or limiting supply to, or acquisition from, particular persons or classes of persons.

216. Section 61 is closely related to but distinct from section 59. Whilst section 59 addresses agreements that restrict competition generally, section 61 specifically targets provisions designed to exclude particular market participants.

### 2.18.2 Relationship to Exemption Regime

217. Regulation 21 clarifies that section 61 does not establish a separate exemption regime and does not displace the availability of exemption under section 60 (Regulation 21(2)–(3)). Where an agreement involves exclusionary conduct, the Commission will have particular regard to the serious nature of the conduct and the cogency of the justification advanced (Regulation 21(4)).

218. In other words, agreements involving exclusionary provisions (such as clauses preventing competitors from accessing key supplies or distribution channels) may be exempted under section 60, but only if the applicant provides particularly strong and convincing evidence that the exclusion is indispensable and that consumer benefits are substantial.

### 2.18.3 Heightened Burden for Exclusionary Provisions

219. The Commission considers that exclusionary provisions will ordinarily require strong efficiency justifications to satisfy the conditions for exemption, given their inherently harmful character. Examples include:

    (a) **Exclusive supply agreements**: Provisions that prevent a distributor from sourcing from competitors. Such provisions may be justified where they enable the distributor to make substantial investments in market development that would not be made absent exclusivity (e.g., infrastructure investment or exclusive territories).

    (b) **Non-compete clauses**: Provisions that prevent one party from competing in a field. Such provisions are rarely justified, except where necessary to protect genuinely confidential information or investments in a specific market.

220. In each case, the applicant must demonstrate that the exclusion is indispensable and that less restrictive alternatives would not achieve the same efficiency gains.

## 2.19 Statutory Exceptions under Section 68 of the Act

*(This section elaborates on Regulation 22 of the Regulations)*

### 2.19.1 Nature and Function of Section 68

221. Section 68(1) of the Act provides that "nothing in this Act prohibits" certain specified categories of arrangement. This is a fundamentally different mechanism from exemption under section 60. An exemption under section 60 is an administrative determination that a restrictive agreement, notwithstanding its anti-competitive character, satisfies conditions justifying its continuance. A statutory exception under section 68 means that the Act's prohibitions simply do not apply to the arrangement in the first instance. The practical consequence is significant. An arrangement falling within section 68 does not require an exemption, does not need to satisfy the four conditions under section 60, and does not need to be the subject of an application to the Commission. It is outside the scope of the Act's prohibitions, to the extent provided by section 68.

222. However, section 68 must be construed strictly (Regulation 22(5)). It is a derogation from the general prohibitions and should not be extended beyond the categories and circumstances expressly provided. The burden of establishing that section 68 applies rests on the party asserting the exception (Regulation 22(3)).

### 2.19.2 Categories of Exception under Section 68

223. Section 68(1) of the Act identifies the following categories:

(a) **Employee combinations and activities (section 68(1)(a))**

224. Combinations or activities of employees for the reasonable protection of employees are excepted. This reflects the fundamental principle that employees' collective action to protect their interests — including trade union activity, workplace safety campaigns, and coordinated responses to employer conduct — is not to be assessed under competition law. The exception is limited by the qualifier "reasonable": activities that go beyond the reasonable protection of employees and extend to conduct whose purpose or effect is to restrict product market competition (for example, a union-organised boycott directed at a competitor of the employer) may fall outside the exception.

**(b) Collective bargaining arrangements (section 68(1)(b))**

225. Arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing minimum terms and conditions of employment are excepted. This is the statutory foundation for collective bargaining in the Nigerian labour relations framework: agreements between employers (or employers' associations) and employees (or trade unions) that set

minimum wages, working hours, leave entitlements, and other employment conditions are outside the scope of the Act's prohibitions.

226. The exception is confined to its stated purpose — fixing *minimum terms and conditions of employment*. It does not extend to arrangements between competing employers that use the language of collective bargaining to fix product prices, allocate markets, or restrict output. The Commission will examine the substance of the arrangement, not merely its form or label. An agreement between competing firms not to solicit each other's employees (a "no-poach" arrangement), where the purpose is to suppress labour costs and reduce competition for talent rather than to establish minimum employment conditions, would require scrutiny under section 59 notwithstanding its superficial connection to employment matters.

227. *Illustrative example*: A collective agreement between the Producers Association of Nigeria and the National Union of Chemical, Rubber and Non-Metallic Products Workers setting minimum wages and shift allowances for the chemical manufacturing sector falls within section 68(1)(b). However, if the same manufacturers' association separately agrees that its members will not hire employees who have worked for a competitor within the preceding twelve months, the Commission would assess whether this is genuinely an employment condition or an anti-competitive no-poach agreement.

**(c) Professional association standards (section 68(1)(c))**

228. Activities of professional associations designed to develop or enforce standards of professional qualifications are excepted. Professional bodies — such as the Nigerian Bar Association, the Institute of Chartered Accountants of Nigeria, or the Council for the Regulation of Engineering in Nigeria — may establish qualification standards, ethical codes, and entry requirements without engaging the Act's prohibitions, provided these activities are genuinely directed at maintaining professional standards.

229. However, this exception does not extend to professional association activities that restrict competition beyond what is necessary for professional standards. Recommended fee scales, restrictions on advertising, territorial allocation of practices, or limitations on the number of practitioners admitted are not activities "designed to develop or enforce standards of professional qualifications" and are subject to the Act's prohibitions.

230. The Commission notes that section 68(2)–(3) empowers it to issue guidelines for the application of the Act to professional services and to publish a list of professional bodies to which this provision applies. The Commission may exercise these powers to clarify the boundary between

legitimate professional standard-setting and anti-competitive restrictions on the supply of professional services.

**(d) Partnership agreements (section 68(1)(d))**

231. A contract or arrangement among partners, none of whom is a body corporate, is excepted insofar as it contains provisions relating to: the terms of the partnership; the conduct of the partnership business; or competition between the partnership and a party to the contract while that party is, or after that party ceases to be, a partner. This recognises that partnership arrangements — governing how partners share profits, allocate responsibilities, and manage post-departure competition — are ancillary to the partnership relationship and should not be assessed as if they were agreements between independent competitors.

232. Two limitations apply. First, the exception is confined to partnerships where *none of the partners is a body corporate*. A partnership or joint venture arrangement involving corporate entities does not benefit from this exception and must be assessed under section 59. Second, the exception applies only insofar as the provision relates to the partnership terms, business conduct, or partner non-compete — provisions that go beyond these purposes (for example, a provision allocating product markets between the partners in areas unrelated to the partnership business) are not excepted.

(e) **Restrictive covenants in employment and service contracts (section 68(1)(e))**

233. A contract of service or a contract for the provision of services is excepted insofar as it contains provisions by which a person, not being a body corporate, agrees to accept restrictions on the work in which that person may engage during or after the termination of the contract. However, the Act imposes an express time limit: the restrictive period shall not be more than two years.

234. This exception recognises that non-compete clauses and restrictive covenants in employment and service contracts serve legitimate purposes — protecting confidential information, trade secrets, and client relationships — provided they are reasonable in duration. The two-year limit reflects the statutory judgment as to what constitutes a reasonable restriction. A restrictive covenant exceeding two years does not benefit from section 68(1)(e) and may be assessed under section 59.

235. The exception applies only to natural persons, not to bodies corporate. A non-compete obligation imposed on a corporate entity (for example, a company agreeing not to compete with a joint venture partner) must be assessed under section 59 and may require exemption under section 60.

**(f) Sale of business — goodwill protection (section 68(1)(f))**

236. A contract for the sale of a business or shares in the capital of a body corporate carrying on a business is excepted insofar as it contains a provision that is solely for the protection of the purchaser in respect of the goodwill of the body corporate. This recognises that non-compete and non-solicitation clauses in sale-of-business agreements are ancillary to the transaction and serve the legitimate purpose of protecting the value of the goodwill acquired.

237. The exception is narrowly drawn: the provision must be *solely* for the protection of the purchaser *in respect of goodwill*. Provisions that go beyond goodwill protection — for example, a permanent non-compete covering markets unrelated to the acquired business, or a restriction on the seller's activities in industries where the acquired business does not operate — are not excepted and must be assessed under section 59.

238. *Illustrative example*: A vendor sells a chain of pharmacies to an acquirer and agrees not to operate a competing pharmacy within a 50-kilometre radius for three years. This provision is solely for the protection of the purchaser's goodwill and falls within section 68(1)(f). However, if the same vendor agreement includes a provision prohibiting the vendor from engaging in any healthcare-related business — including hospital management, medical equipment supply, and health insurance — for ten years, the broader restriction exceeds what is necessary for goodwill protection and does not benefit from section 68(1)(f).

**(g) Acts giving effect to excepted provisions (section 68(1)(g))**

239. Any act done to give effect to a provision of a contract or arrangement referred to in paragraphs (a) to (f) is excepted. This ensures that the practical implementation of an excepted arrangement is not itself treated as a violation of the Act.

### 2.19.3 The Professional Services Power (Section 68(2)–(5))

240. Section 68(2) empowers the Commission to issue guidelines for the application of certain provisions of the Act to the supply of services or conduct of business by members of professional associations. Section 68(3) requires the Commission to publish, from time to time, a list of professional bodies to whom this subsection applies. Section 68(4) provides that any privilege or exemption granted under section 68(1) shall be consistent with the provisions of the Act. Section 68(5) empowers the Commission to develop and publish procedural rules for group inquiries.

241. These provisions establish a framework for sector-specific engagement with professional services. The Commission may exercise these powers to address concerns about anti-competitive

practices in professional services markets — including recommended fee scales, advertising restrictions, and barriers to entry — whilst respecting the legitimate role of professional associations in maintaining qualification standards. The Commission intends to publish a list of professional bodies under section 68(3) and to issue sector-specific guidance as appropriate.

### 2.19.4 Analytical Framework for Section 68 Assessment

242. The Commission applies the following framework when a party asserts that section 68 applies:

**Step 1: Identify the specific provision relied upon.** The party must specify which paragraph of section 68(1) is said to apply and must not rely on section 68 in general terms.

**Step 2: Establish the factual basis.** The party must demonstrate, with supporting evidence, that the arrangement falls squarely within the categories and circumstances specified in the relevant paragraph. The evidence should include: the text of the agreement; and the factual basis establishing the employment, professional standards, partnership, restrictive covenant, or goodwill protection character of the arrangement.

**Step 3: Assess the extent of the exception.** Section 68(1) provides exceptions in specific terms — "insofar as" (for paragraphs (d), (e), and (f)) and "for the purpose of" (for paragraph (b)). These qualifiers are critical. Where an arrangement contains both excepted and non-excepted provisions, only the excepted provisions benefit from section 68. The remaining provisions are subject to section 59 and may require exemption under section 60.

**Step 4: Apply the strict construction principle.** The Commission construes section 68 strictly. Where there is doubt as to whether an arrangement falls within the exception, the doubt is resolved against the exception and in favour of the application of the competition rules. A party should not assume that section 68 applies merely because the arrangement has some connection to the subject matter of the relevant paragraph; it must fall squarely within it.

### 2.19.5 Interaction between Section 68 and Section 60

243. Section 68 and section 60 operate independently. An arrangement that falls within section 68 does not need an exemption under section 60 (Regulation 22(2)). However, if there is uncertainty about whether section 68 applies, a party may prudently apply for an exemption under section 60 as an alternative. The Commission may also, on its own initiative, consider whether section 68 applies to an arrangement that is the subject of an exemption application (Regulation 22(6)).

244. Where the Commission determines that section 68 applies, the exemption application becomes moot to the extent of the exception. However, if section 68 applies only partially — for example, where a sale-of-business agreement contains both a goodwill-protection clause (excepted) and a broader market-allocation provision (not excepted) — the Commission may still assess and grant an exemption for the non-excepted provisions.

### 2.19.6 Seeking Guidance on Section 68

245. Where a party is uncertain whether section 68 applies, it may seek guidance from the Commission (Regulation 22(7)). The Commission will provide guidance on a case-by-case basis, having regard to the text and purpose of section 68 and the specific facts of the arrangement.

246. The Commission notes that a determination under Regulation 22 that section 68 applies is published (Regulation 23(1)(d)), subject to confidentiality. This promotes transparency and assists other undertakings in assessing whether their arrangements may benefit from the same exception.

## 2.20 Publication and Transparency (Regulation 23)

247. The Commission will publish summaries of exemptions, Block Exemption Notices, guidance, and section 68 determinations, subject to confidentiality (Regulation 23).

## PART III — CONDUCT BY DOMINANT UNDERTAKINGS

*[Regulations 24–35]*

### 3.1 Overview

1. Part III establishes a structured framework for the treatment of conduct by dominant undertakings. The framework rests on a fundamental distinction between agreement-based conduct and unilateral conduct:

   (a) Agreement-based conduct — conduct given effect through an agreement, decision, or concerted practice within the meaning of section 59 — is routed through the section 60 exemption mechanism under Division 1. This provides a binding exemption of the agreement dimension and generates analytical findings that the Commission will take into account in any subsequent section 72 assessment.

   (b) Unilateral conduct — conduct that does not involve an agreement within the meaning of section 59 — is addressed through the non-binding guidance framework under Division 2. The Commission does not grant exemptions, authorisations, or pre-clearance for unilateral conduct.

2. This architecture reflects a statutory constraint. The Act expressly confers upon the Commission the power to exempt agreements under section 60, but does not confer a freestanding administrative authorisation or pre-clearance power for conduct under Part IX. The Regulations accordingly apply the section 60 mechanism to agreement-based conduct and deploy only non-binding guidance for purely unilateral conduct.

   2.1 The Act itself contemplates that conduct under Part IX may be contractual in character. Section 167(2) of the Act provides that a reference to "engaging in conduct" shall be read as including "the entering into, or the giving effect to a provision of, a contract or arrangement." This statutory definition applies throughout the Act, including to the prohibitions in Part IX. When section 72 prohibits a dominant undertaking from engaging in exclusionary conduct, that prohibition encompasses — by express statutory definition — conduct that is implemented through contracts or arrangements.

   2.2 The dual classification framework in these Regulations and Guidelines accordingly reflects the structure of the Act: where dominant-firm conduct is given effect through an agreement, the conduct falls simultaneously within Part VIII (as an agreement restricting competition) and Part IX (as conduct by a dominant undertaking), and the section 60 exemption mechanism is available in respect of the agreement dimension.

3. The single most important analytical question confronting a dominant undertaking that wishes to engage with the Commission under Part III is therefore: does the conduct involve or arise from an agreement, decision, or concerted practice within the meaning of section 59? The answer determines the entire regulatory pathway, and the difference is not merely procedural but

substantive. A section 60 exemption provides genuine legal protection; a guidance opinion under Division 2 provides none.

## 3.2 The Classification Framework: Agreements versus Unilateral Conduct

### 3.2.1 What Constitutes an "Agreement" for the Purposes of Section 59

4. Section 59(1) of the Act prohibits "an agreement between undertakings, a decision by an association of undertakings or a concerted practice by undertakings" which has as its object or effect the prevention, restriction, or distortion of competition. The term "agreement" is not defined in the Act but, consistently with international competition law usage and the definition in Regulation 43 of the Regulations, extends to "any formal or informal arrangement, whether written, oral, or implied, between undertakings."

5. The essential element is a meeting of minds — a concurrence of wills between two or more undertakings as to their conduct on the market. This may be evidenced by:

    a. a written contract or formal agreement;

    b. an oral understanding, whether express or implied;

    c. a course of dealing from which a mutual understanding can be inferred;

    d. an exchange of assurances, commitments, or undertakings, even if not legally enforceable; or

    any other arrangement evidencing a consensus between undertakings as to their future market behaviour.

6. The concept of "concerted practice" is broader than "agreement." It captures coordination that falls short of a formal agreement but involves direct or indirect contact between undertakings that has the object or effect of influencing the market conduct of an actual or potential competitor, or of disclosing to such a competitor the course of conduct that one undertaking has decided to adopt or is contemplating adopting on the market.

7. The concept of "decision by an association of undertakings" captures collective action by trade associations, professional bodies, and industry groups that binds or influences the competitive conduct of their members.

### 3.2.2 Vertical Agreements

8. Agreements between undertakings at different levels of the supply chain — manufacturer and distributor, supplier and retailer, licensor and licensee — are within scope. The fact that an agreement is "vertical" does not remove it from section 59. Vertical agreements are, however, often amenable to exemption because they may produce efficiencies (distribution improvements, investment incentives, quality assurance) that horizontal agreements typically do not.

9. This is particularly significant for the classification analysis. Most exclusive dealing arrangements, tying arrangements, and exclusive supply arrangements are vertical agreements. They involve a dominant firm on one side and one or more counterparties on the other. The bilateral character of these arrangements — the fact that they are implemented through contractual or quasi-contractual commitments between two parties — is what makes them amenable to section 60 routing.

### 3.2.3 What Constitutes Unilateral Conduct

10. Unilateral conduct, for the purposes of Part III, is conduct by a dominant undertaking that is not given effect through an agreement, decision, or concerted practice within the meaning of section 59. The dominant firm acts alone, without requiring the participation, cooperation, or contractual commitment of a counterparty.

11. The Commission considers the following indicia of unilateral conduct:

    (a) the conduct is determined and implemented solely by the dominant firm, without negotiation or agreement with counterparties;

    (b) counterparties are price-takers or conduct-takers — they may choose whether to transact with the dominant firm, but they have no role in setting the terms of the conduct;

    (c) the competitive harm arises from the dominant firm's market position and pricing or output decisions, not from a bilateral commitment; and

    (d) there is no obligation on any counterparty to refrain from dealing with competitors, to purchase minimum quantities, or to accept bundled products — the alleged restriction arises from the structure of the dominant firm's offering, not from a contractual constraint.

### 3.2.4 The Grey Zone: Conduct with Both Bilateral and Unilateral Dimensions

12. Certain categories of conduct do not fall neatly into one classification. They may involve elements of both agreement and unilateral action — what the Commission refers to as "hybrid" or "mixed" cases. In such cases, the Commission will assess the conduct by reference to its substance and economic effect, and may apply both Division 1 and Division 2 as appropriate (Regulation 31(1)–(2)). This approach flows from the statutory architecture: section 167(2) of the Act defines "engaging in conduct" to include "the entering into, or the giving effect to a provision of, a contract or arrangement," confirming that the same conduct may simultaneously constitute an agreement under section 59 and conduct under section 72. Where hybrid conduct forms part of a broader integrated cooperation agreement, the Commission applies the centre-of-gravity principle set out in Annexure 1 to determine the primary analytical framework.

#### 3.2.4.1 Tying and Bundling

13. Tying and bundling may arise in both contractual and technical forms.

(a) *Contractual tying*: Where a customer is required under the terms of an agreement to purchase a secondary product as a condition of obtaining a primary product, the conduct is agreement-based and is assessed under Division 1. The tying obligation is a contractual term; the customer accepts it as part of the bargain.

(b) *Technical tying*: Where products are integrated by design such that the customer cannot obtain one without the other, the conduct is unilateral and is assessed under Division 2. There is no contractual obligation — the tying occurs through product design.

(c) *Mixed tying*: Where both contractual and technical elements are present — for example, a software platform that requires contractual purchase of support services (contractual tying — Division 1) and also integrates a security component by code so that it cannot be removed (technical tying — Division 2) — the Commission will assess each element separately, ensuring consistency between the assessments under Division 1 and Division 2 (Regulation 31(1)–(2)). Findings on efficiencies and consumer benefit under the section 60 assessment of the contractual element will inform — though not automatically determine — the section 72(3) assessment of the technical element, in accordance with the administrative coherence principle in Regulation 25.

**3.2.4.2 Loyalty Rebates and Conditional Discounts**

14. The classification of loyalty rebates requires close attention to the statutory definition of exclusive dealing and to the distinction between conduct that is implemented through a bilateral arrangement and conduct that is implemented unilaterally.

14.1 *Statutory anchors.* The Act provides two textual anchors for the classification of loyalty rebates:

(a) Section 167(1) defines "exclusive dealing" to include not only arrangements that *require* a customer to deal exclusively with the undertaking (sub-paragraph (a)(i)), but also arrangements that *induce* a customer to meet such condition by offering more favourable terms or conditions (sub-paragraph (a)(ii)).

(b) Section 72(2)(d)(i) prohibits "requiring or inducing a supplier or customer not to deal with a competitor."

14.2 *Significance of "inducing."* The word "inducing" in both provisions establishes that exclusive dealing is not confined to arrangements involving a binding contractual commitment. A loyalty rebate that offers a substantial discount conditional on the customer purchasing exclusively or predominantly from the dominant firm is, by statutory definition, an inducement to exclusive dealing — regardless of whether the customer is bound by a formal obligation. The inducement, if accepted, creates a bilateral arrangement: the dominant firm offers favourable terms; the customer accepts them by purchasing exclusively or predominantly. Both parties' conduct is shaped by the arrangement.

14.3 *Classification.* The Commission accordingly classifies loyalty rebates as follows:

(a) Where a rebate or discount is structured such that it requires or induces a customer to purchase exclusively or predominantly from the undertaking, and is implemented through or gives rise to an agreement, arrangement, or concerted practice within the meaning of section 59, the conduct constitutes exclusive dealing within the meaning of section 167 and is assessed under Division 1. This applies whether the inducement operates through a binding contractual commitment (sub-paragraph (a)(i) of the definition) or through the offer of more favourable terms conditional on exclusivity (sub-paragraph (a)(ii)).

(b) Where a rebate or discount is established unilaterally as part of a pricing policy, without any condition of exclusivity or near-exclusivity — that is, where the price schedule is genuinely unconditional and volume-based, and the customer faces no requirement, inducement, or practical compulsion to purchase exclusively — the conduct is unilateral and is assessed under Division 2.

(c) In determining whether conduct falls within paragraph (a) or (b), the Commission will have regard to whether the pricing structure, in substance, requires or induces exclusivity, including through economic incentives that make deviation from exclusive or near-exclusive purchasing commercially impracticable. The Commission will examine not only the formal terms of the rebate but also its practical operation: does the rebate penalise the customer for purchasing from competitors? Does the discount structure create a cost of switching that forecloses rivals from the contestable portion of the customer's demand? Is the rebate conditional on the customer meeting a threshold that, in practice, can only be met by purchasing exclusively or near-exclusively from the dominant firm?

14.4 *The critical distinction.* The critical distinction is: does the pricing structure require or induce exclusivity? If yes — whether through contractual obligation or economic inducement — the conduct constitutes exclusive dealing, and Division 1 applies. If no — the pricing is genuinely unconditional and volume-based, without any requirement or inducement directed at exclusivity — the conduct is unilateral, and Division 2 applies.

14.5 *Classification under Division 2 does not connote absence of competitive harm.* A volume discount or retroactive rebate that does not require or induce exclusivity may nonetheless foreclose equally efficient competitors if the pricing structure drives the effective price on the contestable portion of demand below cost. Such conduct remains subject to assessment under section 72 as unilateral exclusionary pricing, and may constitute an abuse of a dominant position. The difference between Division 1 and Division 2 is one of regulatory pathway, not of competitive concern: Division 1 provides access to binding exemption under section 60; Division 2 provides access only to non-binding guidance under section 72. An undertaking whose loyalty rebate is classified as unilateral has less protection, not more, because it cannot obtain a binding exemption.

14.6 *Evidentiary expectations.* The Commission expects applicants to provide quantitative evidence in support of their classification, including analysis of the contestable share of demand, the magnitude of the rebate relative to switching costs, and the proportion of the customer's requirements covered by the rebate condition. The Commission will not accept purely qualitative assertions as to the presence or absence of an exclusivity element where quantification is reasonably practicable.

#### 3.2.4.3 Refusal to Supply Implemented through Termination of Contracts

15. Where a dominant undertaking refuses to supply a competitor by terminating or declining to renew an existing contract—

(a) the refusal to supply constitutes unilateral conduct and is assessed under Division 2; and

(b) the terms of any existing agreement, including exclusivity provisions or dealing restrictions, may be assessed under Division 1, to the extent that those terms restrict competition within the meaning of section 59.

15.1 The Commission will assess the contractual terms under the section 60 framework (if they are restrictive) and the refusal itself under the section 72(3) efficiency defence framework (if it constitutes an abuse of dominance).

15.2 Efficiencies or consumer benefits demonstrated in the section 60 assessment of the contractual terms are directly relevant to whether the refusal can be justified under section 72(3).

#### 3.2.4.4 Coherence in Hybrid Assessment

16. Where conduct is genuinely hybrid, the Commission will apply the same foreclosure and efficiency analysis regardless of which Division the particular element is routed to. Findings on efficiencies, indispensability, consumer benefit, and the preservation of competition under section 60 will inform — though not automatically determine — any parallel assessment under section 72(3), in accordance with the administrative coherence principle in Regulation 25. Where the Commission considers it appropriate, it may issue a single reasoned determination explaining the classification of the conduct, the interrelationship between the section 60 findings and the section 72(3) assessment, and the basis for any divergence between the two.

### 3.2.5 Decision Framework for Classification

17. The Commission recommends that undertakings apply the following sequential test:

- *Step 1: Identify the specific conduct.* What precisely is the dominant firm doing, or proposing to do? Describe the conduct in operational terms, without legal characterisation.
- *Step 2: Ask — does the conduct require the participation of a counterparty?* If the conduct can be implemented unilaterally, it is unilateral — proceed to Division 2. If the conduct

requires, is given effect through, or arises from a contractual or quasi-contractual arrangement with another party, proceed to Step 3.

- *Step 3: Identify the agreement.* What is the agreement, decision, or concerted practice? Who are the parties? What are its terms? Does it restrict competition within the meaning of section 59? If there is a clearly identifiable agreement that restricts competition, the agreement dimension is amenable to section 60 routing under Division 1. If the agreement is merely an ordinary commercial transaction and does not itself restrict competition, the conduct is better characterised as unilateral — proceed to Division 2.
- *Step 4: Ask — does the conduct have both bilateral and unilateral dimensions?* If yes, apply Division 1 to the agreement dimension and Division 2 to the unilateral dimension. Ensure coherence between the two assessments.
- *Step 5: If uncertain, seek direction.* The Commission encourages undertakings to use the pre-consultation service under Regulation 40. The Commission may reclassify conduct under Regulation 31(5).

### 3.2.6 Classification Table

| Conduct | Agreement-Based? | Unilateral? | Pathway |
|---|---|---|---|
| **Exclusive dealing contract with distributor** | Yes — contractual commitment | No | Division 1 |
| **Exclusive supply obligation in contract** | Yes — contractual commitment | No | Division 1 |
| **Contractual tying** | Yes — contractual condition | No | Division 1 |
| **Technical tying** | No | Yes — product design | Division 2 |
| **Excessive pricing** | No | Yes — unilateral pricing | Division 2 |
| **Predatory pricing** | No | Yes — unilateral pricing | Division 2 |
| **Refusal to supply / essential facility** | No | Yes — unilateral refusal | Division 2 |
| **Loyalty rebate with exclusivity commitment** | Yes — contractual obligation | No | Division 1 |
| **Volume discount (no commitment)** | No | Yes — unilateral price structure | Division 2 |
| **Contractual tying + technical tying (mixed)** | Partly | Partly | Division 1 + Division 2 |
| **Loyalty rebate inducing exclusivity (no binding commitment but favourable terms conditional on exclusivity)** | Yes — statutory exclusive dealing under s.167(a)(ii) | No | Division 1 |

## DIVISION 1 — AGREEMENT-BASED CONDUCT BY DOMINANT UNDERTAKINGS

### 3.3 Application of Section 60 to Dominant-Firm Conduct (Regulation 24)

#### 3.3.1 The Regulatory Approach

18. Regulation 24 establishes the mechanism by which conduct that falls within both Part VIII (restrictive agreements) and Part IX (abuse of dominant position) of the Act is routed through the section 60 exemption framework. This permits the Commission to apply the mature, detailed analytical framework developed under section 60 to agreement-based dominant-firm conduct, providing greater coherence, transparency, and analytical rigour than ad hoc assessment under section 72 alone.

#### 3.3.2 Categories Amenable to Section 60 Routing

19. The Commission considers the following categories of conduct to be ordinarily amenable to assessment under Part II and Part III, Division 1:

    (a) Exclusive dealing arrangements within the meaning of section 72(2)(d)(i) and ADR 2022 Regulation 14, including exclusive purchasing obligations, exclusive supply obligations, selective distribution arrangements involving contractual restrictions on customer resale, and duration and territorial limitations structured through contractual terms.

    (b) Contractual tying or bundling arrangements within the meaning of section 72(2)(d)(iii) and ADR 2022 Regulation 12, insofar as they are implemented through contractual terms, including contractual bundling, contractual tie-in sales, and non-optional product or service bundles imposed through contract.

    (c) Arrangements for the supply of scarce goods within the meaning of section 72(2)(d)(ii), insofar as they are structured through contractual exclusivity obligations, including exclusive supply arrangements for inputs in short supply, allocation arrangements between affiliated or interconnected undertakings, and arrangements limiting customer access to scarce capacity or inventory.

20. The following categories of dominant-firm conduct are unilateral in character and are not amenable to section 60 routing:

    (a) Excessive pricing (section 72(2)(a));

    (b) Refusal to provide access to an essential facility (section 72(2)(b));

    (c) Predatory pricing (section 72(2)(d)(iv));

    (d) Buying up scarce supply (section 72(2)(d)(v)).

    For these categories, Division 2 applies exclusively.

#### 3.3.3 Exclusive Dealing as the Paradigmatic Category

21. The most significant category amenable to section 60 routing is exclusive dealing (section 72(2)(d)(i)). Exclusive dealing necessarily involves an arrangement between the dominant firm and a supplier or customer; it is fundamentally bilateral. The statutory definition in section 167 of the Act confirms this bilateral character by capturing both arrangements that require a customer or supplier to deal exclusively (sub-paragraphs (a)(i) and (b)) and arrangements that induce a customer to do so by offering more favourable terms (sub-paragraph (a)(ii)). Both mechanisms presuppose a counterparty who is required or induced. The Abuse of Dominance Regulations 2022 confirm this bilateral character: Regulation 14(1) defines exclusive purchasing as "the obligation for a customer to purchase exclusively or to a large extent only from the dominant undertaking." The routing of exclusive dealing arrangements through the section 60 exemption framework reflects the structure of the Act and the nature of such arrangements. This approach is supported by the following considerations—

**(a)** **Statutory definition of "conduct."** Section 167(2) of the Act provides that a reference to "engaging in conduct" includes "the entering into, or the giving effect to a provision of, a contract or arrangement." The Act therefore expressly contemplates that conduct within Part IX — including the exclusionary acts identified in section 72(2) — may be implemented through contractual arrangements. This establishes, at the definitional level, that the dual classification of exclusive dealing as both agreement-based (Part VIII) and conduct-based (Part IX) is a feature of the statutory scheme, not an analytical construction.

**(b)** **Bilateral character of the arrangement**: Exclusive dealing arrangements ordinarily arise through consensual commitments between a dominant undertaking and one or more trading partners. Such arrangements typically take the form of obligations imposed on customers or suppliers to deal exclusively or predominantly with the undertaking. As a result, they will generally constitute agreements within the meaning of section 59 of the Act, and are therefore capable of assessment under the section 60 exemption mechanism.

**(c)** **Dual statutory characterisation**: Exclusive dealing is capable of constituting both a restrictive agreement under section 59 and an exclusionary practice under section 72(2)(d)(i) of the Act. It may therefore fall within both Part VIII and Part IX. The section 60 framework provides a structured basis for assessing whether the agreement generates efficiencies that justify the restriction. Such assessment does not displace the application of section 72, but may inform the Commission's consideration of the conduct under section 72(3).

**(d)** **Alignment of analytical frameworks**: The analytical factors relevant to exclusive dealing under Regulation 14 of the Abuse of Dominance Regulations, 2022—including scope, duration, extent of foreclosure, the position of the undertaking as a trading partner, competitive constraints, and efficiency justifications—substantially overlap with the conditions set out in section 60 of the Act. The use of the section 60 framework for

agreement-based exclusive dealing therefore promotes analytical consistency and avoids duplication of assessment.

### 3.3.4 Application Requirements

22. An application under Regulation 24 must comply with the requirements of Part II (Schedule 1) and must, in addition, include:

    (a) a statement as to whether the applicant is, or the Commission has indicated that the applicant may be, dominant in the relevant market;

    (b) evidence supporting the claim to dominance, including market share data (covering at least three years), market structure analysis (number and size of competitors, barriers to entry and expansion, buyer power), and conduct history;

    (c) explicit identification of the relevant section 72(2) category or categories implicated by the conduct;

    (d) a structured assessment of potential anti-competitive effects, having regard to the applicable provisions of the ADR 2022; and

    (e) an efficiency justification, addressing each of the four cumulative conditions in section 60 of the Act.

### 3.3.5 Assessment Methodology: Exclusive Dealing

23. When assessing an application for exemption of an exclusive dealing arrangement under Part II, the Commission will have particular regard to:

    (a) *Scope*: The proportion of the dominant firm's output or the customer's requirements covered by the exclusivity obligation. Full exclusivity imposes a stronger restriction than arrangements limited to specified product categories or time periods.

    (b) *Duration*: Indefinite exclusivity or lengthy fixed-term arrangements (typically exceeding five years) raise greater concerns than time-limited arrangements, as they reduce competitors' opportunities to compete for the customer's business and create switching costs.

    (c) *Territorial extent*: Global or multi-regional restrictions impose stronger foreclosure effects than restrictions limited to a single territory or customer location.

    (d) *Unavoidable trading partner status*: Where the dominant undertaking is an unavoidable trading partner — because the customer or supplier has limited realistic alternatives and must deal with the dominant firm as a matter of commercial necessity — the foreclosure risk of exclusive dealing is heightened. Where viable alternatives exist, the foreclosure risk is correspondingly reduced.

(e) *Market foreclosure*: What percentage of downstream demand or upstream supply is locked in through exclusivity? Foreclosure exceeding 50% raises substantial concerns; foreclosure below 30% may be tolerable if other conditions are satisfied. The Commission will also assess duration and reversibility, and cumulative foreclosure where multiple dominant firms impose exclusive dealing on the same set of customers or suppliers.

(f) *Competitive constraints*: The presence of actual competitors with comparable product quality, distribution networks, and market presence; the ease with which new entrants or fringe competitors can challenge the dominant firm; and the negotiating strength of customers subject to the exclusivity obligation.

### 3.3.6 Efficiency Justifications

24. The applicant must establish that the exclusive dealing arrangement produces efficiency gains satisfying the four cumulative conditions in section 60:

(a) *Technical advancements or cost reductions*, including supply chain optimisation, quality assurance, free-rider prevention, and investment protection.

(b) *Indispensability*: The applicant must demonstrate that these efficiencies cannot be achieved through less restrictive means, such as non-exclusive supply with performance-based incentives, volume-based rebates, quality certification regimes, or contractual warranties.

(c) *Consumer benefit*: The efficiency gains must be passed to consumers through lower prices, improved product quality, or expanded distribution. The Commission will scrutinise claims that efficiency gains benefit only the dominant firm.

(d) *No elimination of competition*: Competitors must retain meaningful opportunities to compete for market share, even if partially foreclosed by the exclusive arrangement.

### 3.3.7 Legal Effect of Exemption (Regulation 25)

25. A section 60 exemption granted in respect of an agreement involving conduct by a dominant undertaking is binding only in respect of the agreement dimension. The exemption constitutes the Commission's determination that the agreement satisfies the conditions in section 60, and the agreement shall not, to the extent and for the duration of the exemption, constitute a contravention of section 59.

### 3.3.8 Relevance to Section 72 Assessment

26. The Commission's section 60 findings are highly relevant to any subsequent assessment under section 72(3). The conditions for exemption under section 60 are substantively identical to the conditions for the efficiency defence under section 72(3). Where the Commission has made

detailed findings on efficiency gains, consumer benefit, indispensability, and non-elimination of competition in assessing the section 60 application, it shall have due regard to those findings in any subsequent section 72 assessment (Regulation 25(3)).

### 3.3.9 Administrative Coherence Principle

27. The Commission considers that, as a matter of administrative coherence, it would ordinarily be inconsistent to conclude that an arrangement satisfies the section 60 conditions but simultaneously fails the materially identical section 72(3) conditions, absent a material change in circumstances (Regulation 25(4)). This principle rests on rationality (administrative decision-making requires internal coherence) and legitimate expectation (an undertaking granted an exemption may reasonably expect consistent analytical standards).

28. However, the Commission recognises that the two assessments may diverge where:

    (a) market circumstances have changed materially since the exemption was granted;

    (b) the undertaking has modified the conduct in ways not contemplated by the exemption application;

    (c) new evidence emerges that was not available at the time of the section 60 assessment; or

    (d) market conditions have evolved over time, reducing the force of efficiency justifications or increasing foreclosure effects.

29. Where the Commission proposes to diverge, it must provide written reasons explaining the factual or legal basis for the divergence (Regulation 25(4)).

30. Upon revocation, variation, or expiry of a section 60 exemption, the conduct may be assessed afresh under section 72(3) on the basis of the facts and circumstances then prevailing (Regulation 25(5)). The previous section 60 findings do not bind the Commission's section 72 assessment in this context, as the exemption is no longer in effect and market conditions may have changed.

## DIVISION 2 — NON-BINDING GUIDANCE ON UNILATERAL CONDUCT

### 3.4 Scope and Legal Effect

#### 3.4.1 Regulation 26

31. Division 2 addresses categories of dominant-firm conduct that are unilateral in character — that is, conduct not given effect through an agreement within the meaning of section 59. A dominant undertaking may request non-binding guidance from the Commission as to whether proposed conduct is, in the Commission's preliminary view, likely to satisfy the conditions in section 72(3).

32. The guidance framework exists to inform commercial risk assessment, not to confer legal protection or immunity from enforcement.

### 3.4.2 Legal Effect

33. A guidance opinion issued under this Division has the following character:

    (a) **Not a decision or determination:** It is not a decision within the meaning of the Administrative Law Act, nor a determination of the Commission's enforcement position. It does not bind the Commission, the Tribunal, or any court.

    (b) **Not binding on the Commission:** The Commission may withdraw, revise, or disregard guidance at any time without notice or explanation. Subsequent investigations or enforcement actions are not precluded by the issuance of guidance.

    (c) **Non-precedential:** Guidance opinions are not precedents and do not constrain the Commission's future decision-making, even if inconsistent with prior guidance on similar facts.

    (d) **Not admissible as defence:** A guidance opinion is not admissible as a defence, justification, or proof of compliance in any subsequent proceeding before the Commission, the Tribunal, or any court (Regulation 28(2)).

34. Undertakings should **not** rely on a guidance opinion as conferring any:

    (a) Legal right or immunity;

    (b) Legitimate expectation of non-enforcement;

    (c) Safe harbour or reduced enforcement risk;

    (d) Clearance or approval for the proposed conduct.

35. The guidance framework is transparent and explicitly non-binding. An undertaking that submits to guidance does so at its own commercial risk.

### 3.4.3 Circumstances of Declination:

36. The Commission may decline to consider a request for guidance where:

    (a) The conduct is already under investigation by the Commission (Regulation 26(6)(a));

    (b) The request concerns **implemented conduct** that raises **serious concerns** about market foreclosure or harm to consumers (Regulation 26(6)(b));

    (c) The request is incomplete or fails to provide sufficient information for meaningful guidance (Regulation 26(6)(c));

(d) The matter is more appropriately dealt with through formal enforcement action, particularly where patterns of conduct or repeat violations suggest that guidance would be ineffective (Regulation 26(6)(d)).

### 3.4.4 Request and Response Procedure

#### 3.4.4.1 Form and Content of Request

37. A request for non-binding guidance should be submitted in the form prescribed in Schedule 5 and should include:

(a) A clear description of the proposed conduct, including:

– The specific actions or practices proposed;

– The undertakings involved (the requesting undertaking and, where relevant, its customers, suppliers, or competitors);

– The relevant markets affected;

– The duration and scope of the proposed conduct;

(b) Market position information, including:

– The requesting undertaking's market share and competitive position;

– Market structure analysis (competitors, barriers to entry, buyer power);

– Evidence of dominance or substantial market power;

(c) Identification of the relevant section 72 provisions (section 72(2)(a), (b), (c), or (d));

(d) Identification of any pro-competitive justifications relied upon, with supporting economic or market evidence.

**3.4.4.2** No Admission of Dominance

38. **Critical:** The submission of a request for guidance does not constitute an admission that the undertaking is dominant, that its conduct is or may be abusive, or that any factual or legal matter asserted in the request is true (Regulation 27(3)).

39. This provision is essential to encourage voluntary engagement with the Commission. An undertaking may submit guidance requests to explore the treatment of proposed conduct without fear that the submission will be used against it in a subsequent investigation, provided that the Commission does not obtain independent corroboration of the matters stated (Regulation 33(2)).

**3.4.4.3** Response Timeline

40. Where the Commission accepts a request for guidance, it will use reasonable endeavours to respond within ninety business days (Regulation 28(1)). This is an aspirational timeline; the Commission may require longer periods in complex cases or where market inquiries are necessary.

**3.4.4.4** What Guidance IS

41. Guidance on unilateral conduct is:

    (a) The Commission's preliminary, non-binding view of whether specific proposed conduct appears likely to raise concerns under section 72;

    (b) An indication of whether efficiency justifications may be relevant to the assessment;

    (c) An articulation of the Commission's preliminary evidence standards and analytical approach;

    (d) Assistance to the undertaking in assessing commercial risk associated with the proposed conduct.

42. Guidance may identify gaps in the undertaking's evidence or suggest that certain efficiency claims require greater support.

**3.4.4.5** What Guidance IS NOT

43. Guidance on unilateral conduct is **not**:

    (a) A decision, clearance, approval, or authorisation;

    (b) An exemption, safe harbour, or immunity from enforcement;

    (c) A legitimate expectation;

    (d) A defence or evidence of compliance;

    (e) A commitment to non-enforcement;

    (f) Precedent or binding guidance for similar cases;

    (g) An acknowledgment that the undertaking is dominant, absent an explicit statement to that effect.

### 3.4.5 The Four-Tier Analytical Framework for Assessing Unilateral Conduct

44. Where a dominant undertaking requests non-binding guidance under Division 2 in respect of unilateral conduct, the Commission applies a structured, four-tier analytical framework. The framework is designed to ensure rigour, consistency, and transparency in the Commission's preliminary assessment, while recognising that guidance issued under Division 2 is non-binding and does not constitute a determination under the Act.

45. The four tiers reflect the logical sequence of the competitive assessment: first, characterise the market and the conduct; second, assess the claimed efficiencies; third, weigh the pro-competitive gains against the anti-competitive harm; and fourth, determine whether competition is preserved.

46. The Commission emphasises that each tier involves a substantive analytical inquiry. Merely asserting that the conduct produces efficiencies, or providing conclusory statements, will not satisfy the evidentiary requirements. The Commission expects rigorous, data-driven analysis at each stage.

**3.4.5**.1 Tier 1 — Market Structure and Conduct Assessment

47. **Objective:** Determine the competitive context in which the conduct operates and whether the undertaking holds a dominant position.

#### 3.4.5.1.1 Market Definition

48. The Commission defines the relevant product and geographic markets using the methodologies set out in the Notice on Market Definition, 2022. The SSNIP test is the primary tool, supplemented by evidence of demand-side and supply-side substitutability, consumer switching behaviour, and geographic competitive constraints.

49. The applicant should provide a proposed market definition supported by evidence. The Commission may adopt a different market definition if the evidence warrants it.

#### 3.4.5.1.2 Dominance Assessment

50. Under section 70 of the Act, an undertaking is presumed dominant if it holds a market share of 40% or above. An undertaking may also be found dominant at a lower market share where it exercises substantial market power, assessed by reference to: barriers to entry and expansion; the competitive strength of existing rivals; buyer power; and the durability and stability of the undertaking's market position.

51. The ADR 2022, Regulation 3, provides a detailed framework for assessing dominance. The Commission expects the applicant to address each of the factors identified in that Regulation and to provide supporting market data.

#### 3.4.5.1.3 Characterisation of the Conduct

52. The Commission will characterise the conduct by reference to the specific provisions of section 72(2) and the corresponding provisions of the ADR 2022:

    (a) *Excessive pricing* (section 72(2)(a), ADR 2022 Regulation 5): Prices that bear no reasonable relation to the economic value of the goods or services. The Commission applies a two-stage test: first, is the price-cost margin excessive? Second, is the price unfair in itself or when compared to competing products?

    (b) *Essential facility refusal* (section 72(2)(b), ADR 2022 Regulation 6): Refusal to provide access to infrastructure or inputs that are indispensable for competition in a downstream market. The Commission applies four conditions: the facility is essential; refusal eliminates effective competition; access is technically and economically feasible; and there is no objective justification for the refusal.

    (c) *Predatory pricing* (section 72(2)(d)(iv), ADR 2022 Regulation 9): Pricing below cost with the purpose of eliminating a competitor. The Commission distinguishes between pricing below average variable cost (presumptively predatory) and pricing between average variable cost and average total cost (predatory only if part of an exclusionary strategy).

    (d) *Buying up scarce supply* (section 72(2)(d)(v), ADR 2022 Regulation 10): Purchasing intermediate goods in excess of requirements to deny them to competitors.

### **3.4.5.2** Tier 2 — Efficiency Gains and Pro-Competitive Justifications

53. **Objective:** Assess whether the claimed efficiencies are real, necessary, and substantial.

#### 3.4.5.2.1 The Statutory Defence

54. Under section 72(3) of the Act, conduct that would otherwise constitute an abuse may be justified where it satisfies four cumulative conditions. These conditions are substantively identical to those under section 60:

    (a) *Efficiency gains*: The conduct results in improvements in production, distribution, or technical or economic progress;

    (b) *Consumer benefit*: Consumers receive a fair share of the resulting benefit;

(c) *Indispensability*: The conduct does not impose restrictions that are not indispensable; and

(d) *No elimination of competition*: The conduct does not eliminate competition in a substantial part of the market.

#### 3.4.5.2.2 Evidentiary Requirements — Heightened Standard for Dominant Firms

55. The Commission applies the same analytical framework to section 72(3) as to section 60, but notes that the evidentiary requirements are in practice more demanding for dominant-firm conduct. This is because: dominant firms face fewer competitive constraints and therefore have less incentive to pass on efficiency gains; the scope for anti-competitive harm is greater; and the risk of strategic justification — claiming efficiencies as a pretext for exclusionary conduct — is higher.

56. The Commission accordingly expects dominant firms to provide:

(a) *Verifiable empirical evidence*: Economic modelling of price and output effects; cost-benefit analyses using historical data; independent expert reports. Self-generated internal projections, standing alone, are insufficient.

(b) *Market benchmarking studies*: Comparison of markets where similar conduct occurs and markets where it does not, to isolate the effects of the conduct.

(c) *Internal business documents*: Strategy documents, board papers, feasibility studies, and management reports showing the genuine commercial rationale for the conduct. The Commission will examine whether the contemporaneous business documents are consistent with the efficiency claims advanced in the application.

(d) *Counterfactual analysis*: A rigorous comparison of market conditions with and without the conduct. What would happen to prices, output, quality, innovation, and market structure if the conduct did not occur?

#### 3.4.5.2.3 Efficiencies That the Commission Will Not Accept

57. The Commission will not accept efficiency claims that are:

(a) speculative, hypothetical, or unsupported by objective data;

(b) attributable to a reduction in competitive rivalry rather than genuine improvement in productive, allocative, or dynamic efficiency;

(c) derived solely from the exercise of market power — for example, cost savings from reduced output, eliminated marketing, or suppressed innovation;

(d) incapable of being independently verified; or

(e) inconsistent with the undertaking's own contemporaneous business documents.

**3.4.**5.3 Tier 3 — Balancing Anti-Competitive Effects Against Pro-Competitive Gains

58. **Objective:** Determine whether the net effect of the conduct is positive or negative for consumer welfare.

**3.4.5.3.1 The Net Consumer Impact Test**

59. The Commission assesses the overall impact on consumers. The relevant question is: are consumers better off, worse off, or no worse off as a result of the conduct? This requires a quantitative comparison of the magnitude of the efficiency gains against the magnitude of the competitive harm.

60. The Commission will consider:

(a) *Pricing effects*: Does the conduct lead to lower, higher, or unchanged prices for consumers? The applicant should provide price elasticity data and pricing projections.

(b) *Quality and innovation effects*: Does the conduct improve or degrade product quality, service standards, or the pace of innovation?

(c) *Output effects*: Does the conduct increase or decrease the total output available to consumers?

(d) *Choice effects*: Does the conduct expand or restrict the range of products or suppliers available to consumers?

**3.4.5.3.2 Time-Lag Analysis**

61. The Commission will assess the timing of both the anti-competitive effects and the claimed efficiencies. If the anti-competitive harm is immediate but the efficiencies are delayed, the net assessment may be negative even if the ultimate magnitude of the efficiencies exceeds the harm.

62. The Commission will discount future efficiency gains using a rate that reflects the uncertainty of realisation. Efficiency gains that are expected to materialise within two years carry greater weight than those projected over five or ten years.

**3.4.5.3.3 Counterfactual Analysis**

63. The Commission's assessment is conducted against the counterfactual: what would the market look like absent the conduct? The applicant should identify the relevant counterfactual and explain why it is realistic.

64. Where there are competing counterfactuals, the Commission will consider the robustness of the evidence supporting each scenario and may apply a probabilistic assessment, attaching probability weightings to alternative scenarios rather than selecting a single counterfactual.

**3.4.5**.4 Tier 4 — Competitive Impact and Final Determination

65. **Objective:** Determine whether effective competition is preserved.

#### 3.4.5.4.1 Competitive Sustainability Test

66. Even where the efficiency gains exceed the anti-competitive harm, the Commission will not issue a positive guidance opinion if the conduct eliminates effective competition in the relevant market. The preservation of competition is the ultimate safeguard.

67. The Commission examines:

    (a) *Can rivals realistically compete?* Are existing competitors able to maintain their market position, or does the conduct foreclose them from the market?

    (b) *Is new entry feasible?* Can new competitors enter the market within a reasonable period (typically two years) to replace the competition lost?

    (c) *Is buyer power sufficient?* Can downstream customers discipline the dominant firm's conduct?

    (d) *What is the long-term consumer impact?* Even if consumers benefit in the short term, will they be worse off in the long term if competition is eliminated?

#### 3.4.5.4.2 Historic Market Entry Analysis

68. The Commission will examine historical evidence of market entry. If past attempts to enter the market have consistently failed, this is strong evidence that entry barriers are high and that the conduct, if it further raises barriers, may eliminate competition.

#### 3.4.5.4.3 Consumer Welfare Simulations

69. In complex cases, the Commission may commission or require the applicant to commission economic modelling simulating the long-term effects of the conduct on consumer welfare. Such

modelling should project the effects over a five- to ten-year period and should account for dynamic effects including innovation incentives and market structure evolution.

**3.4**.5.5 Illustrative Application of the Four-Tier Framework

70. *Scenario*: NaijaPower Ltd, which holds 65% of the market for electricity generation in a specific grid zone, proposes to set a pricing structure under which industrial customers receive a 30% discount for committing to ten-year supply contracts (without exclusivity clauses). Smaller generators argue that the pricing structure will foreclose them by locking in the largest customers.

71. **Tier 1:** The Commission defines the relevant market (grid-zone-specific electricity generation). NaijaPower's 65% share exceeds the 40% dominance threshold. The conduct is a unilateral pricing strategy — no exclusivity obligation, so Division 2 applies.

72. **Tier 2:** NaijaPower claims productive efficiency (long-term contracts enable investment in new generating capacity) and allocative efficiency (lower prices for industrial customers). Evidence: investment plans for two new plants; projected cost reductions from capacity optimisation; independent engineering report confirming feasibility.

73. **Tier 3:** Balancing — industrial customers benefit from lower prices. However, if smaller generators lose their largest customers, they may exit the market, reducing competitive pressure in the medium term. Counterfactual: absent the ten-year contracts, NaijaPower would invest in new capacity anyway (because the grid zone has growing demand), so the efficiency gain is only partly attributable to the pricing structure.

74. **Tier 4:** With 65% market share and only two rival generators (holding 20% and 15%), locking in large customers for ten years could foreclose the rivals. Entry barriers are very high (capital-intensive infrastructure, regulatory approvals). Conclusion: the Commission would express concern that competition may not be preserved, even though some efficiency gains exist. Guidance would likely indicate that a shorter contract duration (three to five years) or removal of the volume discount structure would reduce competitive concerns.

## DIVISION 3 — ADMINISTRATIVE CONFIRMATION UNDER SECTION 73(2)

### 3.5 Affiliation, Interconnection and the Section 73(2) Carve-Out

#### 3.5.1 The Threshold Question

75. Before the ejusdem generis framework in Regulation 29(3)–(6) becomes relevant, the applicant must establish a prior threshold: that the undertakings party to the arrangement are "affiliated or interconnected" within the meaning of section 73(2) of the Act.

75. Before the ejusdem generis framework in Regulation 29(3)–(6) becomes relevant, the applicant must establish a prior threshold: that the undertakings party to the arrangement are "affiliated or interconnected" within the meaning of section 73(2) of the Act.

76. The term "affiliated" is defined by section 167(4) of the Act: two undertakings are to be treated as affiliated if (a) one is a subsidiary of the other within the meaning of CAMA; (b) both are subsidiaries of the same undertaking; or (c) both are affiliated with undertakings that are themselves affiliated under paragraphs (a) or (b). That statutory definition governs the interpretation of "affiliated" for the purposes of section 73(2) and cannot be expanded by these Guidelines.

77. The term "interconnected" is not defined in the Act. The Commission's approach to that term is guided by: (i) its ordinary meaning; (ii) the economic rationale of section 73(2); (iii) cognate provisions in CAMA 2020; and (iv) international competition law practice. It is in relation to interconnection — rather than affiliation — that the Commission has interpretive latitude and that concepts drawn from the single economic entity doctrine have their most substantial evidentiary role.

78. The economic rationale of section 73(2) is that arrangements between entities within a single corporate family — which, by virtue of their common ownership or control, do not have genuinely independent commercial interests — should not be treated in the same way as arrangements between independent competitors. The carve-out recognises that intra-group arrangements organising the terms of dealing within a corporate family are functionally different from agreements between unrelated undertakings.

79. Section 73(2) refers to "exclusive dealing arrangements" as the first limb of the carve-out. That expression has a defined meaning under the Act: section 167 defines "exclusive dealing" as a practice whereby an undertaking, as a condition of supplying goods or services, requires a customer to deal only or primarily in goods or services supplied by that undertaking, or induces a customer to meet such condition by offering more favourable terms; or as a condition of purchasing, requires a supplier to refrain from supplying competitors. That definition governs the interpretation of the first limb of section 73(2). The second limb — "market restrictions" — is construed by Regulation 29(3)–(6) through the ejusdem generis framework discussed below.

### 3.5.2 The Differentiated Architecture of Intra-Group Carve-Outs

80. Section 73(2) is one of several provisions in the Act that address intra-group arrangements. The Act adopts a deliberately graduated approach:

(a) *Section 73(2) (abuse of dominance, Part IX)*: the broadest carve-out, covering both affiliated and interconnected undertakings.

(b) *Section 107(2) (resale price maintenance, Part XIV)*: narrower, covering "interconnected undertakings" only — not affiliated undertakings.

(c) *Section 109(2) (bid-rigging, Part XIV)*: narrower still, covering "affiliates" only — not interconnected undertakings.

(d) *Section 108 (conspiracy, Part XIV)*: no intra-group carve-out at all.

81. This calibrated architecture confirms that the legislature did not adopt a blanket principle of intra-group immunity, but tailored the scope of protection to the nature and severity of the prohibited conduct. The analysis in this section is confined to the section 73(2) carve-out, but undertakings should note that the availability and scope of intra-group protection varies materially across the Act's different prohibitions.

### 3.5.3 Relationship with the Single Economic Entity Doctrine

82. The economic rationale of section 73(2) reflects the principle, recognised in international competition law as the single economic entity doctrine, that arrangements between entities within a single corporate family do not raise the same competitive concerns as arrangements between independent undertakings. Under that doctrine, a parent company and its subsidiaries may — where they operate under common control and do not enjoy genuine commercial independence — be treated as forming a single economic unit for the purposes of the prohibition on restrictive agreements.

83. That principle is relevant to the Commission's analysis under section 73(2) in two respects. First, it illuminates the policy rationale of the statutory carve-out. Secondly, concepts drawn from the doctrine may serve as interpretive indicators when the Commission assesses whether undertakings are "interconnected" — particularly by reference to common ownership, decisive or material influence, operational integration, and the absence of genuinely independent commercial conduct. As regards affiliation, the statutory definition in section 167(4) governs, and the doctrine's evidentiary role is correspondingly limited.

84. However, the relevance of the doctrine must be carefully confined:

(a) *It does not replace the statutory test.* The application of section 73(2) is governed by the statutory concepts of affiliation (as defined in section 167(4)) and interconnection (as elaborated in these Guidelines), not by a comparative-law doctrine. A finding that undertakings form a single economic unit in a comparative or economic sense does not, of itself, establish that section 73(2) applies.

(b) *It does not negate the existence of an agreement.* This is a fundamental structural distinction. Under the FCCPA, affiliated or interconnected undertakings remain capable of entering into agreements within the meaning of section 59. Section 73(2) does not deny the existence of such arrangements; it provides a limited carve-out from the application of section 73 in respect of specified categories of arrangement. The agreement remains real, and the legal question is one of regulatory treatment, not conceptual inexistence.

(c) *It does not expand the carve-out.* Arrangements falling outside the genus identified in Regulation 29(3) and (4), or falling within the negative boundary drawn by Regulation 29(5) and (6), do not come within the carve-out merely because the parties are economically integrated.

85. The Commission's approach may accordingly be stated as follows: in determining whether undertakings are affiliated or interconnected, the Commission applies the statutory definition of affiliation in section 167(4) and, for interconnection, may have regard to the degree of common ownership, control, and economic integration, informed by interpretive indicators drawn from the single economic entity doctrine. The availability of the carve-out is determined solely by the statutory criteria: first, the requisite relationship of affiliation or interconnection; and secondly, the character of the arrangement as assessed under the ejusdem generis framework. Both elements must be satisfied.

86. The approach adopted by section 73(2) is structurally distinct from approaches that rely upon the fiction that entities under common control are incapable of agreement. The FCCPA recognises that affiliated entities may coordinate through legally cognisable arrangements, but confines the carve-out to arrangements that organise the terms of intra-group dealing, preserving regulatory oversight over arrangements directed at third-party foreclosure.

### 3.5.4 Dual Classification: Section 73(2) and Section 72(2)(d)(i)

87. A question of dual classification may arise because section 72(2)(d)(i) identifies as an exclusionary act the requiring or inducing of a supplier or customer not to deal with a competitor. Conduct of that character between affiliated or interconnected undertakings may therefore, depending on the facts, be capable of being characterised both as an exclusive dealing arrangement for the purposes of section 73(2) and as conduct falling within section 72(2)(d)(i).

88. The Commission’s view is that section 73(2) operates by disapplying section 73 in relation to the categories of arrangement there specified. It does not follow, however, that every arrangement involving affiliated or interconnected undertakings is thereby insulated from scrutiny under Part IX. In particular, where the arrangement is, in substance, directed at the foreclosure or restriction of third parties rather than the organisation of intra-group dealing, it may fall outside the scope of section 73(2) altogether, consistently with Regulation 29. Undertakings should not therefore assume that the section 73(2) carve-out confers complete immunity in respect of exclusive dealing arrangements merely because they arise within an affiliated or interconnected structure.

### 3.5.5 Affiliation

89. Affiliation is determined by the statutory definition in section 167(4), read with section 381 of CAMA 2020 (which defines when a company is a subsidiary). The following relationships constitute affiliation:

(a) *Direct majority ownership*: Where one undertaking holds more than 50% of the issued share capital of another (CAMA 2020, section 381(1)(b)).

(b) *Control of board composition*: Where one undertaking is a member of another and controls the composition of its board of directors (CAMA 2020, section 381(1)(a)). This may encompass cases where effective control is exercised without majority shareholding — for example, through a shareholders' agreement or constitutional provisions conferring the power to appoint or remove a majority of directors. The Commission considers that this limb of the CAMA definition provides a statutory basis for recognising affiliation through control of board composition, even where the controlling entity holds a minority of the shares.

(c) *Indirect ownership (chain of subsidiaries)*: Where undertaking A is a subsidiary of B, and B is a subsidiary of C, then A and C are affiliated through B. The chain may extend through multiple tiers.

(d) *Common parentage (sister companies)*: Where two undertakings are both subsidiaries of the same parent — whether directly or through intermediate holding companies — they are affiliated (section 167(4)(b)).

(e) *Transitive affiliation*: Where A is affiliated with B, and C is affiliated with B, then A and C are affiliated with each other (section 167(4)(c)).

90. Relationships that do not satisfy the parent-subsidiary test under CAMA — including minority shareholdings without board control, interlocking directorates, commercial agreements creating economic dependence, or de facto influence short of control of board composition — do not constitute affiliation. Such relationships may, however, constitute interconnection.

### 3.5.6 Interconnection

91. Interconnection is not defined in the Act. It captures structural relationships that fall short of the parent-subsidiary relationship but involve sufficient linkage, common interest, or economic integration to bring the entities within the scope of section 73(2). The Commission recognises the following categories:

(a) *Cross-shareholding*: Where two undertakings hold shares in each other, they may be interconnected. A cross-shareholding of 25% or more, or a cross-shareholding conferring board representation, information rights, or veto powers over strategic decisions, will ordinarily establish interconnection. A passive minority shareholding below 25% without governance rights will not ordinarily do so.

(b) *Interlocking directorates*: Where the same individual or individuals serve on the boards of two or more undertakings, those undertakings may be interconnected, provided the interlocking directorate creates a channel for the exchange of commercially sensitive information and an alignment of strategic decision-making. Interlocking directorates alone may not establish interconnection where the directors do not participate in decisions relating to the arrangement under review and effective information barriers are in place.

(c) *Common economic interest*: Undertakings may be interconnected where they share a common economic interest that aligns their competitive conduct — for example, through joint ventures, profit-sharing arrangements, technology-sharing agreements, or long-term supply contracts creating mutual dependence. The question is whether the entities' economic interests are so closely aligned that they do not, in practice, make independent commercial decisions in respect of the subject matter of the arrangement.

(d) *Financial dependence*: Where one undertaking is financially dependent on another — for example, deriving more than 80% of its revenue from a single customer, or having guaranteed the debts of another — the two may be interconnected.

92. The Commission notes that the functional definition of interconnection developed for section 73(2) may serve as a reference point for the interpretation of "interconnected" as used in section 107(2) of the Act, although the Commission reserves the right to adopt a different interpretation if the context requires.

93. The Commission notes that section 167(4) of the Act refers to "the Companies and Allied Matters Act, Cap. C20, Laws of the Federation of Nigeria, 2004." That legislation has been repealed and replaced by the Companies and Allied Matters Act, 2020. The definition of "subsidiary" for the purposes of section 167(4) is now governed by section 381 of CAMA 2020.

### 3.5.7 Burden of Proof

94. The burden of establishing affiliation or interconnection rests on the party requesting an administrative confirmation under Regulation 30. The request must include evidence of the corporate or structural relationship (Regulation 30(2)(b)–(c)), which may include corporate structure charts, shareholding certificates, CAMA filings, shareholders' or management agreements, evidence of interlocking directorates, evidence of cross-shareholdings with details of governance rights, and any other evidence demonstrating the relationship.

### 3.5.8 Entities That Are Not Affiliated or Interconnected

95. The following relationships do not, without more, establish affiliation or interconnection:

(a) Ordinary commercial relationships at arm's length.

(b) Passive minority shareholdings below 25% without governance rights.

(c) Franchise relationships, unless the franchisor holds a controlling equity stake or exercises control equivalent to that of a parent company.

(d) Joint venture partners with respect to their activities outside the joint venture (though the joint venture entity itself may be affiliated with its parents).

96. Where a party incorrectly asserts that section 73(2) applies, the Commission will decline to issue a confirmation and will direct the party to consider whether the arrangement may require exemption under section 60.

### 3.5.9 Illustrative Applications

**Example 1: Parent-Subsidiary Exclusive Distribution**

- NigerOil Plc (parent) directs its wholly-owned subsidiary, NigerPetrol Ltd (downstream distributor), to supply only through designated retail stations. This is an exclusive dealing arrangement between affiliated undertakings. Section 73(2) applies because the undertakings are affiliated (parent-subsidiary), the arrangement is an exclusive dealing arrangement, and the restriction organises intra-group distribution. The Commission would ordinarily issue a confirmation.

**Example 2: Cross-Shareholding with Governance Rights**

- PharmaCo Ltd holds 35% of MediSupply Ltd and appoints two of seven directors. MediSupply holds 15% of PharmaCo without governance rights. The two companies enter into an exclusive supply arrangement. The Commission would consider them interconnected (by virtue of PharmaCo's cross-shareholding and board representation) and would assess whether the arrangement constitutes an exclusive dealing arrangement or a market restriction within the meaning of section 73(2).

**Example 3: Non-Affiliated Entities Incorrectly Claiming the Carve-Out**

- DistributorA and ManufacturerB enter into an exclusive distribution agreement. Manufacturer B holds 10% of DistributorA's shares with no governance rights. The parties claim section 73(2) applies. The Commission would decline to confirm: the 10% passive shareholding does not establish interconnection. The parties should apply for exemption under section 60.

### 3.5.10 The Ejusdem Generis Framework

97. Regulation 29 codifies the ejusdem generis interpretation of “market restrictions” in section 73(2) across the following structure:

(f) **Sub-regulation (3)** defines the *genus* through three abstract limbs: restrictions governing the terms of intra-group dealing; restrictions on the freedom of affiliates to deal with third

parties; and vertical restraints within a corporate group governing access to markets, supply channels, or distribution networks.

(g) **Sub-regulation (4)** provides four *illustrative categories* that fall within the genus: territorial restrictions; customer allocation; non-compete obligations; and intra-group sourcing obligations.

(h) **Sub-regulation (5)** states the *general exclusion principle*: an arrangement is not a market restriction merely because it restricts competition, unless it is of the same general character as the restrictions described in sub-regulations (3) and (4) — namely, a restriction that organises the terms of intra-group dealing rather than one whose principal object or effect is directed at third parties.

(i) **Sub-regulation (6)** establishes the *substance-over-form principle*: the Commission shall have regard to the substance and economic effect of the arrangement, and not merely to its form or characterisation by the parties.

(j) **Sub-regulation (7)** draws the *negative boundary*: four categories of arrangement that do not, without more, constitute market restrictions — transfer pricing, information-sharing, third-party-directed restrictions, and cross-market leveraging of dominance.

(k) **Sub-regulation (8)** provides that in assessing whether an arrangement is directed at third parties within the meaning of sub-regulation (7)(c), the Commission may have regard to the extent of foreclosure in the relevant market, and a significant level of foreclosure may give rise to a rebuttable inference that the arrangement is not of the character contemplated by section 73(2).

98. The Commission applies this framework sequentially:

- *First*: Is the arrangement of the genus described in sub-regulation (3)? Does it govern the terms of intra-group dealing, restrict an affiliate's freedom to deal with third parties, or impose vertical restraints governing market access within the group?
- *Second*: Does it fall within or resemble the illustrative categories in sub-regulation (4)?
- *Third*: Does sub-regulation (6) require the Commission to look beyond the arrangement's label to its substance?
- *Fourth*: Does it fall within any of the exclusions in sub-regulation (7)?
- *Fifth*: If potentially within sub-regulation (7)(c), does sub-regulation (8) apply — is there significant foreclosure giving rise to a rebuttable inference?

### 3.5.11 Worked Examples for Each Illustrative Category

#### 3.5.11.1 Territorial Restrictions (Regulation 29(4)(a))

99. *Scenario*: NaijaFoods Group comprises three subsidiaries: NorthernMills Ltd (flour milling, North), WesternMills Ltd (flour milling, West), and SouthernMills Ltd (flour milling, South). The parent company directs each subsidiary to sell only within its designated region.

100. *Analysis*:

- *Genus test (Regulation 29(3))*: The restriction governs the terms on which affiliated undertakings distribute goods as between themselves ((3)(a)), restricts the freedom of each subsidiary to deal with customers in other regions ((3)(b)), and has the character of a vertical restraint governing access to geographic markets ((3)(c)). All three limbs are satisfied.
- *Illustrative category (Regulation 29(4)(a))*: The arrangement is a territorial restriction confining each affiliated undertaking to a specified geographic area for the supply of goods. Squarely within (4)(a).
- *Negative boundary (Regulation 29(7))*: The restriction does not fall within any of the excluded categories. It is not a pricing arrangement ((7)(a)), not information-sharing ((7)(b)), not directed principally at third-party foreclosure ((7)(c)), and not an extension of dominance into a new market ((7)(d)). It organises intra-group distribution.
- *Conclusion*: The arrangement constitutes a market restriction within section 73(2). The Commission would ordinarily confirm.

#### 3.5.11.2 Customer Allocation (Regulation 29(4)(b))

101. *Scenario*: BuildCorp Holdings has two construction subsidiaries: ResidentialBuild Ltd and CommercialBuild Ltd. The parent directs ResidentialBuild to serve only residential customers and CommercialBuild to serve only commercial/industrial customers.

102. *Analysis*:

- *Genus test*: The arrangement restricts the freedom of each subsidiary to deal with specific classes of customers ((3)(b)) and governs access to customer segments within the group ((3)(c)).
- *Illustrative category*: Customer allocation restricting each affiliated undertaking to dealing with specified classes of customers. Squarely within (4)(b).
- *Negative boundary*: Not excluded — the arrangement organises intra-group market access, not third-party foreclosure.
- *Conclusion*: Market restriction within section 73(2). Confirmation appropriate.

#### 3.5.11.3 Non-Compete Obligations (Regulation 29(4)(c))

103. *Scenario*: TechHoldings Ltd acquires a 70% stake in AppDev Ltd, a software company. As part of the acquisition agreement, TechHoldings requires AppDev not to develop or market any software product that competes with TechHoldings' existing enterprise software suite.

104. *Analysis*:

- *Genus test*: The obligation restricts the freedom of an affiliated undertaking (AppDev) to compete with another member of the group (TechHoldings) in a specified product market

((3)(b)). It has the character of a vertical restraint organising the scope of each entity's activities within the group ((3)(c)).

- *Illustrative category*: Non-compete obligation restricting an affiliated undertaking from competing with another group member. Squarely within (4)(c).
- *Negative boundary*: Not excluded. The restriction organises intra-group product scope, not third-party foreclosure.
- *Conclusion*: Market restriction within section 73(2). Confirmation appropriate, subject to the Commission satisfying itself that the 70% shareholding establishes affiliation (which it does — majority ownership per section 167(4)(a) of the Act).
- *Qualification*: The Commission notes that the non-compete is limited to products competing with TechHoldings' existing suite. If the obligation extended to *all* software products, including those that do not compete with any TechHoldings product, the Commission would apply the substance-over-form principle in Regulation 29(6) and scrutinise whether the restriction exceeds what is necessary to organise intra-group dealing and begins to constitute a restriction principally aimed at foreclosing AppDev from competing with third parties — in which case Regulation 29(7)(c) may apply.

#### 3.5.11.4 Intra-Group Sourcing Obligations (Regulation 29(4)(d))

105. *Scenario*: PetroChem Group has a refining subsidiary (RefineryCo) and a petrochemicals subsidiary (ChemCo). The parent directs ChemCo to source all its feedstock exclusively from RefineryCo, rather than from third-party suppliers.

106. *Analysis*:

- *Genus test*: The obligation relates to the terms on which affiliated undertakings supply goods as between themselves ((3)(a)), restricts ChemCo's freedom to deal with third-party suppliers ((3)(b)), and has the character of a vertical restraint governing access to supply channels within the group ((3)(c)).
- *Illustrative category*: Supply obligation requiring an affiliated undertaking to source goods exclusively from within the corporate group. Squarely within (4)(d).
- *Negative boundary*: Not excluded.
- *Conclusion*: Market restriction within section 73(2). Confirmation appropriate.
- *Qualification*: The Commission notes that a confirmation under sub-regulation (9) applies only for the purposes of section 73 of the Act. If the sourcing obligation has the effect of foreclosing third-party feedstock suppliers from a substantial part of the relevant market, the Commission may separately assess whether the arrangement engages section 59 (restrictive agreement) or section 72 (abuse of dominance). The section 73(2) carve-out does not immunise the arrangement against those provisions.

### 3.5.12 The Negative Boundary: Substance Over Form (Regulation 29(6)–(7))

### 3.5.12.1 The Interpretive Principle

107. Regulation 29(6) establishes the interpretive key to the negative boundary: the Commission shall have regard to the substance and economic effect of the arrangement, and not merely to its form or characterisation by the parties. This principle applies to every assessment under sub-regulation (7). An arrangement labelled as a pricing mechanism, an information-sharing system, or an internal coordination tool is not thereby excluded from the definition of "market restriction." The Commission will examine what the arrangement does, not what it is called.

108. The practical significance is this: the negative boundary in sub-regulation (7) identifies four categories of arrangement that are excluded from the definition of "market restriction." But the exclusion applies only where the arrangement genuinely is what it purports to be. Where the arrangement is, in substance, a mechanism for allocating markets, coordinating competitive conduct, foreclosing third parties, or leveraging dominance across markets, the Commission will look through the label and assess the arrangement by reference to its true character.

### 3.5.12.2 Classification Framework

**109. The Commission applies the following analytical taxonomy:**

(l) *Substantively restrictive arrangements (disguised restrictions).* An arrangement presented as pricing, information-sharing, or intra-group dealing but which, in substance, operates as a mechanism for allocating markets, coordinating competitive conduct, or foreclosing third parties requires assessment on two levels. First, the Commission will determine the arrangement's true character: is it in substance a market restriction under sub-regulation (3)–(4), in which case the undertaking may seek a confirmation on that basis; or is it in substance an arrangement directed at third-party foreclosure under sub-regulation (7)(c), or an arrangement leveraging dominance under sub-regulation (7)(d), in which case section 73(2) does not apply at all? Second, regardless of whether section 73(2) applies, the Commission will assess whether the arrangement independently constitutes a restrictive agreement under section 59 or an abuse of a dominant position under section 72. The section 73(2) carve-out disapplies section 73 only; it does not immunise conduct against the underlying prohibitions in Parts VIII and IX of the Act (Regulation 29(9)).

(m) *Borderline arrangements.* An arrangement that exhibits features both of a genuine internal coordination mechanism and of a restriction affecting competitive conditions shall be assessed by reference to its substance and economic effect, taken as a whole. The Commission will determine whether the arrangement is properly characterised as organising the terms of intra-group dealing (and therefore potentially a market restriction qualifying for the carve-out); as a genuinely excluded category under sub-regulation (7)(a) or (b) (and therefore not a market restriction at all); or as an arrangement whose principal effect is third-party foreclosure or cross-market leveraging (and therefore excluded from the carve-out by sub-regulation (7)(c) or (d)). Relevant considerations include whether the

arrangement correlates with observable patterns of market segmentation, customer allocation, or price coordination; whether there is a cost-based or operational justification for the arrangement's structure; and whether the subsidiaries in practice make independent commercial decisions in respect of their dealings with third parties.

(n) *Legitimate intra-group arrangements.* An arrangement that, in substance, organises the internal allocation of functions, risks, or resources within an affiliated or interconnected group, and whose principal object is intra-group coordination rather than the restriction of third-party competitive opportunities, shall be treated as a legitimate intra-group arrangement. In respect of such arrangements:

(i) pricing and information-sharing arrangements that genuinely fall within sub-regulation (7)(a) or (b) are not market restrictions — section 73(2) is not engaged, and no confirmation under Division 3 is required or available; and

(ii) intra-group sourcing, distribution, territorial, or non-compete arrangements that fall within sub-regulation (3)–(4) are market restrictions and may benefit from the section 73(2) carve-out, subject to the statutory conditions of affiliation or interconnection and the ejusdem generis framework being satisfied.

110. The boundary between these categories is determined by economic substance, not by formal structure or labelling. The Commission will apply the substance-over-form principle in Regulation 29(6) consistently, and arrangements designed to circumvent the negative boundary by adopting the formal characteristics of an excluded category will be assessed by reference to their true character.

### 3.5.13 Worked Examples for Each Exclusion

#### 3.5.13.1 Transfer Pricing and Internal Accounting (Regulation 29(7)(a))

I. *Abusive structuring*: PharmaCo Holdings has two wholly-owned subsidiaries: PharmaCo Manufacturing (active pharmaceutical ingredients) and PharmaCo Nigeria (finished pharmaceuticals). PharmaCo Holdings directs PharmaCo Manufacturing to charge PharmaCo Nigeria a transfer price of cost plus 45% — substantially above the arm's length rate of cost plus 10–15%. The effect is that PharmaCo Nigeria's cost base is artificially elevated, making it uneconomic for it to serve price-sensitive customer segments (government hospitals, rural pharmacies). Those segments are instead served by PharmaCo Distribution, a third subsidiary sourcing directly from PharmaCo Manufacturing at cost plus 10%. The Commission applies the substance-over-form principle in Regulation 29(6). The substantive effect is to allocate customers between subsidiaries through the mechanism of pricing. This is a customer allocation restriction under sub-regulation (4)(b), not a transfer pricing arrangement within sub-regulation (7)(a). The arrangement may constitute a market restriction — and the undertaking may seek a confirmation on that basis — but the Commission will also assess whether the arrangement

independently constitutes an abuse of dominance under section 72(2)(d)(i) (inducing customers not to deal with a competitor through the mechanism of pricing) or a restrictive agreement under section 59. The section 73(2) carve-out, if applicable, does not displace those provisions (Regulation 29(9)).

II. *Borderline*: The same PharmaCo group sets transfer prices that vary by region — cost plus 10% for the South-West, cost plus 25% for the North. The higher transfer price for the North does not make PharmaCo Nigeria's northern operations unviable, but it reduces margins sufficiently that PharmaCo Nigeria concentrates its sales effort in the South-West, leaving the northern market predominantly to PharmaCo Distribution. The Commission would examine whether the pricing structure operates functionally as a territorial allocation. The relevant question is not whether each subsidiary *can* serve all regions, but whether the pricing structure *in practice* confines each to a designated territory. Where pricing differentials correlate with territorial segmentation and the Commission identifies no cost-based justification (such as higher logistics costs in the North), it may conclude that the arrangement is in substance a territorial restriction under sub-regulation (4)(a) rather than a pricing arrangement within sub-regulation (7)(a). The Commission would request the applicant to explain the commercial rationale for the regional pricing differential.

III. *Legitimate intra-group arrangement*: The same PharmaCo group sets a uniform transfer price of cost plus 10%, applied across all regions and product lines. PharmaCo Nigeria remains free to sell to any customer in any region at any price. The transfer price determines only the internal allocation of margin between the two affiliates and does not constrain the terms on which any party deals with third parties. This is a transfer pricing arrangement within sub-regulation (7)(a): it is not a market restriction and section 73(2) is not engaged.

IV. *Principle*: The Commission applies a substance-over-form test. Where a transfer pricing arrangement has the effect of segmenting customers, confining subsidiaries to particular territories, or channelling commercial opportunities to particular group entities, it will be assessed by reference to its substantive effect. The Commission will examine the correlation between pricing differentials and actual competitive outcomes and will require cost-based justification for any differential that corresponds to a pattern of market allocation.

#### 3.5.13.2 Internal Information-Sharing (Regulation 29(7)(b))

I. *Abusive structuring*: AgroGroup Holdings has three subsidiaries — CropCo, LivestockCo, and FertiliserCo — each operating in adjacent agricultural markets with some customer overlap. AgroGroup establishes a centralised reporting system through which the subsidiaries share weekly sales reports, customer lists, real-time pricing data, and bid pipeline information. The system includes an automated alert that notifies each subsidiary when another subsidiary is pursuing the same customer or preparing a bid in an overlapping product category. The subsidiaries have adopted a practice — enforced through periodic group management reviews

— of deferring to the subsidiary that has the "primary relationship" with the customer, ensuring that no two subsidiaries compete for the same customer. The Commission applies Regulation 29(6). The automated alert and deferral practice function as a customer allocation mechanism: the subsidiaries coordinate to avoid competition for the same customers, and the information-sharing system is the vehicle for that coordination. This is, in substance, a customer allocation arrangement under sub-regulation (4)(b) and a non-compete arrangement under sub-regulation (4)(c), not an information-sharing arrangement within sub-regulation (7)(b). Additionally, the coordination may independently constitute a concerted practice under section 59 — and section 73(2) does not displace section 59.

II. *Borderline*: The same AgroGroup subsidiaries share monthly sales reports and customer lists through a centralised system. No automated alerts or deferral practices are in place, and there is no formal directive to avoid competing for the same customers. However, the shared information includes forward-looking pricing intentions — each subsidiary reports its planned pricing for the next quarter — and the subsidiaries operate in overlapping product markets where price is the primary competitive parameter. The Commission would examine whether the exchange of forward-looking pricing data creates conditions for tacit coordination, even without an express directive. The relevant questions are: do the subsidiaries adjust their pricing after receiving each other's planned prices? Is there a pattern of price parallelism that post-dates the introduction of the reporting system? Are the subsidiaries genuinely making independent pricing decisions, or has the information exchange reduced the uncertainty that competitive pricing ordinarily involves?

III. *Legitimate intra-group arrangement*: The same AgroGroup subsidiaries share monthly production data, inventory levels, and consolidated financial performance reports through a centralised system for group-level planning, budgeting, and regulatory compliance. No customer-specific information, pricing data, or bid pipeline information is shared. The subsidiaries remain free to set their own prices, pursue any customer, and compete in their respective markets. This is an information-sharing arrangement within sub-regulation (7)(b): it is not a market restriction and section 73(2) is not engaged.

IV. *Principle*: The Commission distinguishes between information-sharing that serves legitimate group coordination (budgeting, compliance, resource planning, financial consolidation) and information-sharing that functions as a coordination mechanism for the allocation of customers, territories, or competitive opportunities. The critical questions are: does the information shared include commercially sensitive data relevant to competitive decision-making? Does the system impose or facilitate constraints on the subsidiaries' independent dealings with third parties? Does the observed competitive behaviour suggest coordination rather than independence?

#### 3.5.13.3 Arrangements Directed at Third-Party Foreclosure (Regulation 29(7)(c))

I. *Abusive structuring*: ConglomerateCo Holdings has two subsidiaries: WholesaleCo (a dominant wholesale distributor of building materials) and RetailCo (a retail chain). ConglomerateCo directs WholesaleCo to supply exclusively to RetailCo and simultaneously to refuse to supply IndependentRetailer Ltd, a competitor of RetailCo that has historically purchased wholesale goods from WholesaleCo. IndependentRetailer has no alternative wholesale supplier of comparable scale. There are two elements. First, the exclusive dealing arrangement between WholesaleCo and RetailCo — an intra-group sourcing obligation under sub-regulation (4)(d) that may constitute a market restriction. Second, the refusal to supply IndependentRetailer — an arrangement directed principally at the foreclosure of a third party. The second element falls within sub-regulation (7)(c) and does not constitute a market restriction. The Commission will further assess whether the two elements are severable or whether the intra-group exclusivity is the mechanism for the third-party foreclosure — in which case the entire arrangement falls within sub-regulation (7)(c). Additionally, where WholesaleCo holds a dominant position, the refusal to supply may independently constitute an abuse under section 72(2)(b) or (d)(i). The section 73(2) carve-out does not preclude that assessment (Regulation 29(9)).

II. *Borderline*: The same ConglomerateCo group directs WholesaleCo to prioritise supply to RetailCo — fulfilling RetailCo's orders first and allocating remaining capacity to independent retailers on a non-exclusive basis. No formal refusal to supply is issued. However, in periods of constrained supply (which occur seasonally), IndependentRetailer receives significantly reduced allocations, sometimes insufficient to sustain its operations. The Commission would apply sub-regulation (8) and assess the extent of foreclosure. Where the prioritisation arrangement systematically disadvantages independent retailers and reduces their competitive viability — particularly where WholesaleCo holds a dominant position — a significant level of foreclosure may give rise to a rebuttable inference that the arrangement's principal effect is directed at third parties within the meaning of sub-regulation (7)(c), notwithstanding its intra-group form.

III. *Legitimate intra-group arrangement*: The same ConglomerateCo group directs WholesaleCo to supply RetailCo exclusively, and RetailCo to source exclusively from WholesaleCo. No restriction is imposed on WholesaleCo's dealings with independent retailers — WholesaleCo remains free to supply any third party, and does so in practice. The arrangement organises only the intra-group supply relationship. This is an intra-group sourcing obligation under sub-regulation (4)(d). Its principal object is the organisation of supply within the corporate family, not the foreclosure of third parties. Sub-regulation (7)(c) does not apply, and the arrangement may constitute a market restriction within section 73(2).

IV. *Principle*: The Commission draws a clear distinction between arrangements that organise the terms of intra-group dealing and arrangements whose principal object or effect is to foreclose third parties. The test is not whether the arrangement has *any* effect on third parties (most intra-group arrangements will have some incidental effect) but whether the restriction of third-party competitive opportunities is the *principal* object or a *substantial* effect of the arrangement.

Incidental competitive effects do not disqualify an arrangement from the section 73(2) carve-out; deliberate or substantial foreclosure does.

#### 3.5.13.4 Cross-Market Leveraging of Dominance (Regulation 29(7)(d))

I. *Abusive structuring*: CementCo (dominant, 55% of the cement market) and ConcreteCo (its subsidiary, 15% of the concrete market) operate within BuildGroup. CementCo directs ConcreteCo to offer concrete only in bundles with CementCo cement — customers purchasing concrete must accept CementCo cement as part of the package. Independent cement producers cannot access ConcreteCo's customer base. The arrangement is structured as an intra-group supply directive (ConcreteCo must source cement from CementCo — a sourcing obligation under sub-regulation (4)(d)). However, the principal object is not the organisation of intra-group supply but the extension of CementCo's dominant position in cement into the concrete market, where the group does not hold a dominant position. The arrangement falls within sub-regulation (7)(d) and does not constitute a market restriction. Section 73(2) does not apply. Additionally, the bundling may independently constitute an abuse under section 72(2)(d)(iii) (tying).

II. *Borderline*: The same BuildGroup directs ConcreteCo to source cement exclusively from CementCo and to offer customers a discounted price if they purchase both concrete and cement from the group. No obligation to purchase cement is imposed — customers may purchase concrete alone, though at a higher price. The Commission would examine whether the discount structure operates as a de facto tying arrangement. The relevant questions are: is the price differential so large that customers face no real commercial choice? What proportion of ConcreteCo's customers purchase the bundled product? Are independent cement producers losing market share in the concrete customer segment since the discount was introduced? If the discount functions as conditional supply — in substance requiring customers to accept cement as a condition of obtaining competitive concrete pricing — the arrangement may fall within sub-regulation (7)(d) notwithstanding the absence of a formal bundling obligation.

III. *Legitimate intra-group arrangement*: The same BuildGroup directs ConcreteCo to source its cement requirements from CementCo rather than from external suppliers — a straightforward intra-group sourcing obligation. ConcreteCo sells concrete to customers without any bundling condition or price differentiation based on cement sourcing. Customers are free to purchase cement separately from any supplier. The arrangement organises intra-group supply in the ordinary course and does not condition the terms on which ConcreteCo deals with its own customers. This is a sourcing obligation under sub-regulation (4)(d) that may qualify for the section 73(2) carve-out.

IV. *Principle*: The Commission distinguishes between legitimate vertical integration — where an affiliated group organises its internal supply chain by directing subsidiaries to source from within the group — and the leveraging of dominance, where the group uses the market power of one subsidiary to advantage another in a market where the group does not hold a dominant

position. The critical question is whether the arrangement conditions the terms on which downstream customers are served (bundling, tying, conditional pricing) or merely organises which group entity supplies which internal requirement.

### 3.5.14 The Limits of the Section 73(2) Carve-Out (Regulation 29(9))

127. Regulation 29(9) provides that a confirmation issued under Division 3 applies only for the purposes of section 73 of the Act. It does not constitute a determination that the arrangement is lawful under any other provision. It does not affect the Commission's powers under Part VIII or Part IX of the Act, including its power to assess the arrangement under sections 59 or 72.

128. The practical significance of this provision is substantial. An undertaking that obtains a confirmation under Division 3 — establishing that its intra-group arrangement is a "market restriction" within section 73(2) and that section 73 does not apply — has obtained protection against section 73 only. The arrangement may still:

    (o) constitute a restrictive agreement under section 59, requiring exemption under section 60;

    (p) constitute an abuse of a dominant position under section 72, subject to the efficiency defence under section 72(3);

    (q) engage the Commission's investigatory and enforcement powers under Parts VIII and IX generally.

129. Undertakings should not treat a section 73(2) confirmation as a comprehensive clearance. Where an intra-group arrangement raises potential concerns under section 59 or section 72, the undertaking should consider whether to apply for an exemption under section 60 (if the arrangement is agreement-based) or to seek guidance under Division 2 (if the conduct is unilateral), in addition to seeking a confirmation under Division 3.

### 3.5.15 Foreclosure Assessment (Regulation 29(8))

130. In assessing whether an arrangement is directed at third parties within the meaning of sub-regulation (7)(c), the Commission may have regard to the extent of foreclosure in the relevant market. A significant level of foreclosure may give rise to a rebuttable inference that the arrangement is not of the character contemplated by section 73(2).

131. The Commission does not apply a fixed numerical threshold. Whether foreclosure is "significant" depends on the competitive conditions in the relevant market, including: the number and size of remaining competitors; the availability of alternative sources of supply or distribution; barriers to entry and expansion; and the duration and reversibility of the foreclosure.

132. However, the Commission considers that where an intra-group arrangement forecloses third parties from access to more than 40% of a downstream or upstream market, there is ordinarily a strong inference that the principal effect of the arrangement is directed at third parties. The

undertaking may rebut the inference by demonstrating that the foreclosure is an incidental consequence of the group's legitimate internal structure and that the arrangement's principal object is the organisation of intra-group dealing.

133. Where the inference is not rebutted, the arrangement falls within sub-regulation (7)(c) and does not constitute a market restriction. Section 73(2) does not apply, and section 73 applies in full.

### 3.5.16 Decision Framework for Applicants

134. The applicant should apply the following test when assessing whether an arrangement constitutes a market restriction and may benefit from the section 73(2) carve-out:

(a) **Question 1 — Affiliation or interconnection**: Are the parties affiliated (within section 167(4)) or interconnected (within the meaning given by these Guidelines)? If no → section 73(2) does not apply. Consider whether exemption under section 60 is available.

(b) **Question 2 — Ejusdem generis**: Is the arrangement of the same genus as exclusive dealing? Does it organise the terms of intra-group dealing, restrict an affiliate's freedom to deal with third parties, or impose vertical restraints governing market access within the group (Regulation 29(3))? If no → not a market restriction.

(c) **Question 3 — Illustrative categories**: Does the arrangement fall within or closely resemble one of the four illustrative categories in Regulation 29(4) (territorial restriction, customer allocation, non-compete, intra-group sourcing)? If yes → likely a market restriction. If no → unlikely to be a market restriction, but the Commission may consider whether it is nonetheless of the same genus.

(d) **Question 4 — Substance over form**: Does the arrangement's substance match its label? Apply Regulation 29(6). If the arrangement is labelled as pricing, information-sharing, or internal coordination but operates in substance as market allocation, coordination, or foreclosure, assess it by reference to its true character.

(e) **Question 5 — Negative boundary**: Does the arrangement fall within any of the four exclusions in Regulation 29(7)?

(i) Is it a transfer pricing or internal accounting arrangement that does not constrain the terms on which any party deals with third parties? (7)(a) — not a market restriction.

(ii) Is it information-sharing confined to internal reporting, compliance, or operational management, without facilitating coordination of commercial conduct? (7)(b) — not a market restriction.

(iii) Is its principal object or effect directed at the foreclosure or restriction of third parties, rather than at organising intra-group dealing? (7)(c) — not a market restriction. Consider Regulation 29(8): is there significant foreclosure?

(iv) Does it have as its principal object or effect the extension or leveraging of a dominant position into a market in which the group does not hold a dominant position? (7)(d) — not a market restriction.

(f) **Question 6** — Independent liability: Even if the arrangement qualifies for the section 73(2) carve-out, does it independently engage section 59 (restrictive agreement) or section 72 (abuse of dominance)? The carve-out disapplies section 73 only (Regulation 29(9)).

135. If the arrangement satisfies Questions 1–3, is not caught by Questions 4–5, and the undertaking has addressed Question 6, the applicant may request a confirmation under Regulation 30.

### 3.5.11 Worked Examples for Each Illustrative Category

#### 3.5.11.1 Territorial Restrictions (Regulation 29(3)(a))

99. *Scenario*: NaijaFoods Group comprises three subsidiaries: NorthernMills Ltd (flour milling, North), WesternMills Ltd (flour milling, West), and SouthernMills Ltd (flour milling, South). The parent company directs each subsidiary to sell only within its designated region.

100. *Analysis*:

- *Genus test (Regulation 29(2))*: The restriction governs the terms on which affiliated undertakings distribute goods as between themselves ((2)(a)), restricts the freedom of each subsidiary to deal with customers in other regions ((2)(b)), and has the character of a vertical restraint governing access to geographic markets ((2)(c)). All three limbs are satisfied.
- *Illustrative category (Regulation 29(3)(a))*: The arrangement is a territorial restriction confining each affiliated undertaking to a specified geographic area for the supply of goods. This squarely falls within (3)(a).
- *Exclusion test (Regulation 29(4)–(5))*: The restriction does not fall within any of the excluded categories. It is not a pricing arrangement, information-sharing arrangement, or arrangement principally aimed at restricting third-party competition. It organises intra-group distribution.
- *Conclusion*: The arrangement constitutes a market restriction within section 73(2). The Commission would ordinarily confirm.

#### 3.5.11.2 Customer Allocation (Regulation 29(3)(b))

101. *Scenario*: BuildCorp Holdings has two construction subsidiaries: ResidentialBuild Ltd and CommercialBuild Ltd. The parent directs ResidentialBuild to serve only residential customers and CommercialBuild to serve only commercial/industrial customers.

102. *Analysis*:

- *Genus test*: The arrangement restricts the freedom of each subsidiary to deal with specific classes of customers ((2)(b)) and governs access to customer segments within the group ((2)(c)).
- *Illustrative category*: This is a customer allocation arrangement restricting each affiliated undertaking to dealing with specified classes of customers. Squarely within (3)(b).
- *Exclusion test*: Not excluded — the arrangement organises intra-group market access, not third-party foreclosure.
- *Conclusion*: Market restriction within section 73(2). Confirmation appropriate.

#### 3.5.11.3 Non-Compete Obligations (Regulation 29(3)(c))

103. *Scenario*: TechHoldings Ltd acquires a 70% stake in AppDev Ltd, a software company. As part of the acquisition agreement, TechHoldings requires AppDev not to develop or market any software product that competes with TechHoldings' existing enterprise software suite.

104. *Analysis*:

- *Genus test*: The obligation restricts the freedom of an affiliated undertaking (AppDev) to compete with another member of the group (TechHoldings) in a specified product market ((2)(b)). It has the character of a vertical restraint organising the scope of each entity's activities within the group ((2)(c)).
- *Illustrative category*: This is a non-compete obligation restricting an affiliated undertaking from competing with another group member. Squarely within (3)(c).
- *Exclusion test*: Not excluded. The restriction organises intra-group product scope, not third-party foreclosure.
- *Conclusion*: Market restriction within section 73(2). Confirmation appropriate, subject to the Commission satisfying itself that the 70% shareholding establishes affiliation (which it does — majority ownership per section 3.5.1.2.4 above).
- *Qualification*: The Commission notes that the non-compete is limited to products competing with TechHoldings' existing suite. If the obligation extended to *all* software products, including those that do not compete with any TechHoldings product, the Commission would scrutinise whether the restriction exceeds what is necessary to organise intra-group dealing and begins to constitute a restriction principally aimed at foreclosing AppDev from competing with third parties.

#### 3.5.11.4 Intra-Group Sourcing Obligations (Regulation 29(4)(d))

105. *Scenario*: PetroChem Group has a refining subsidiary (RefineryCo) and a petrochemicals subsidiary (ChemCo). The parent directs ChemCo to source all its feedstock exclusively from RefineryCo, rather than from third-party suppliers.

106. *Analysis*:

- *Genus test*: The obligation relates to the terms on which affiliated undertakings supply goods as between themselves ((2)(a)), restricts ChemCo's freedom to deal with third-party suppliers ((2)(b)), and has the character of a vertical restraint governing access to supply channels within the group ((2)(c)).
- *Illustrative category*: This is a supply obligation requiring an affiliated undertaking to source goods exclusively from within the corporate group. Squarely within (3)(d).
- *Exclusion test*: Not excluded.
- *Conclusion*: Market restriction within section 73(2). Confirmation appropriate.

## DIVISION 4 — COMMON PROVISIONS

### 3.6 Overview

115. This Division sets out provisions that apply across all three Divisions of Part III. Divisions 1, 2, and 3 each establish distinct pathways for engagement with the Commission — binding exemption of agreement-based conduct, non-binding guidance on unilateral conduct, and administrative confirmation under section 73(2) respectively. The provisions in this Division address matters that are common to all three pathways: the framework for choosing between them; the safeguards that protect undertakings engaging voluntarily with the Commission; the Commission's retained enforcement powers; and the publication of decisions for transparency and development of competition law.

116. These common provisions serve a single overarching purpose: to ensure that the Part III framework operates as a coherent whole rather than as three disconnected mechanisms. The pathway-choosing framework (section 3.5) ensures that conduct is routed to the correct Division. The safe harbour provision (section 3.9) ensures that voluntary engagement does not create enforcement risk, regardless of which Division the undertaking engages with. The preservation of enforcement powers (section 3.10) confirms that the Commission's investigatory and enforcement discretion is not fettered by any pathway. The publication framework (section 3.11) ensures that the Commission's analytical approach is transparent across all three Divisions, enabling undertakings to assess their position before engaging.

**3.6**.1 Choosing the Appropriate Pathway

117. Conduct by a dominant undertaking may, depending on the facts and analytical classification, be capable of assessment under:

(a) **Division 1** (agreement-based pathway) — where the conduct is given effect through an agreement;

(b) **Division 2** (unilateral conduct pathway) — where the conduct involves no agreement;

(c) **Both** (dual pathway) — where the conduct has both bilateral and unilateral dimensions (Regulation 31(1)).

118. An undertaking's assessment of the appropriate pathway is not determinative; the Commission retains full discretion to reclassify conduct and direct the undertaking to the appropriate pathway.

### 3.6.2 Five-Step Framework

119. Undertakings should apply the following framework to determine the appropriate pathway for engagement with the Commission:

**Step 1: Identify Whether Conduct Involves an Agreement**

120. Determine whether the conduct involves an agreement, decision, or concerted practice within the meaning of section 59 of the Act.

- **If YES:** proceed to Step 2.
- **If NO:** proceed to Step 4.

**Step 2: Apply Division 1 (Agreement-Based Pathway)**

121. Where the conduct is agreement-based and falls within the dual characterisation categories (exclusive dealing, contractual tying, arrangements for scarce goods), the primary pathway is an application for exemption under Part II, supplemented by Regulation 24.

122. The application should:

(a) Comply with all requirements of Schedule 1 (Part II application requirements);

(b) Include the additional information specified in Regulation 24(3):

– Explicit statement of dominance or potential dominance;

– Evidence of market position;

– Identification of the relevant section 72(2) category;

– Assessment of anti-competitive effects having regard to the ADR 2022;

(c) Include a structured efficiency justification addressing all four conditions in section 60 and the substantive framework in these Guidelines.

**Step 3: Expect Integrated Assessment**

123. Where an exemption is granted under Part II in a dual-characterisation case, the Commission's findings on efficiency, indispensability, consumer benefit, and non-elimination of competition will be taken into account in any subsequent section 72 assessment in accordance with Regulation 25.

124 The undertaking should treat the section 60 exemption as creating a strong analytical foundation for the conduct dimension, though not an absolute protection against section 72 enforcement.

**Step 4: Where Conduct Is Unilateral**

125. Where the conduct is unilateral and does not fall within the dual characterisation categories (e.g., excessive pricing, predatory pricing, essential facility refusal, buying up scarce supply), the undertaking may request non-binding guidance under Division 2.

126. A guidance opinion does not confer legal protection or immunity; it is purely informational. The undertaking remains at risk of enforcement action if the guidance is unfavourable or if the conduct is implemented in ways that differ from the guidance request.

**Step 5: Where Conduct Has Multiple Dimensions**

127. Where the conduct has both bilateral and unilateral dimensions (e.g., tying implemented through both contractual and technical means), the undertaking should:

(a) Apply under Division 1 for the agreement-based dimension (obtaining exemption of the contractual aspect under Part II);

(b) Request guidance under Division 2 for the unilateral dimension (the technical tying);

(c) Expect the Commission to ensure **coherence** between the two assessments, ensuring that the combined effect of exempting the bilateral dimension and assessing the unilateral dimension produces a consistent overall conclusion.

128. Where an undertaking is uncertain about the appropriate classification, it may seek direction through the pre-consultation process under Part VI (Regulation 31(4)). The Commission may reclassify conduct and direct the undertaking to the appropriate Division (Regulation 31(5)).

## 3.7 Safe Harbour, Enforcement Powers, and Publication

### 3.7.1 Safe Harbour for Submitted Information (Regulation 33)

129. Where the Commission subsequently commences an investigation under Part IX in respect of conduct that was the subject of a request or application under Part III, the Commission shall **not rely upon information submitted solely in connection with that request or application as the basis for initiating the investigation** (Regulation 33(1)).

130. This provision eliminates the risk that an undertaking's own submission will trigger enforcement action. An undertaking can disclose its proposed conduct to the Commission in a guidance request or exemption application without fear that this disclosure will be weaponised against it.

131. **Limits:** The safe harbour does not prevent the Commission from relying on information that is independently obtained, corroborated by independent evidence, or publicly available (Regulation 33(2)).

### 3.7.2 Preservation of Enforcement Powers (Regulation 34)

132. The Commission retains full power to investigate and take enforcement action under Part IX, whether or not a request for guidance has been submitted, an application for exemption has been made, or a confirmation has been issued (Regulation 34(1)).

133. The failure of an undertaking to seek guidance, to apply for exemption, or to request a confirmation shall not, of itself, be treated as an aggravating factor in any enforcement proceeding (Regulation 34(2)).

### 3.7.3 Publication Framework (Regulation 35)

134. The Commission may publish, in non-confidential form, summaries of guidance opinions, exemption decisions, and confirmations for purposes of transparency and development of competition law and policy (Regulation 35(1)).

135. Publication serves multiple objectives including transparency, guidance development, accountability, and refinement of law. The Commission will protect confidential information and commercially sensitive data in published materials.

136. **Important:** Publication does not cause any response, summary, or confirmation to become binding precedent or to constrain the Commission's future decision-making (Regulation 35(3)).

## 3.8 Dual Classification of Conduct

### 3.8.1 Multiple Pathways

137. Conduct by a dominant undertaking may, depending on the facts and analytical classification, be capable of assessment under:

(a) **Division 1** (agreement-based pathway) — where the conduct is given effect through an agreement;

(b) **Division 2** (unilateral conduct pathway) — where the conduct involves no agreement;

(c) **Both** (dual pathway) — where the conduct has both bilateral and unilateral dimensions (Regulation 31(1)).

138. An undertaking's assessment of the appropriate pathway is not determinative; the Commission retains full discretion to reclassify conduct and direct the undertaking to the appropriate pathway.

### 3.8.2 Choosing the Appropriate Pathway: Five-Step Framework

139. Undertakings should apply the following framework to determine the appropriate pathway for engagement with the Commission:

**Step 1: Identify Whether Conduct Involves an Agreement**

140. Determine whether the conduct involves an agreement, decision, or concerted practice within the meaning of section 59 of the Act. Section 59 prohibits "agreements between undertakings, decisions by associations of undertakings, or concerted practices" that have as their object or effect the restriction of competition.

- **If YES:** proceed to Step 2.
- **If NO:** proceed to Step 4.

**Step 2: Apply Division 1 (Agreement-Based Pathway)**

141. Where the conduct is agreement-based and falls within the dual characterisation categories (exclusive dealing, contractual tying, arrangements for scarce goods), the primary pathway is an application for exemption under Part II, supplemented by Regulation 24.

142. The application should:

(a) Comply with all requirements of Schedule 1 (Part II application requirements);

(b) Include the additional information specified in Regulation 24(3):

– Explicit statement of dominance or potential dominance;

– Evidence of market position;

– Identification of the relevant section 72(2) category;

– Assessment of anti-competitive effects having regard to the ADR 2022;

(c) Include a structured efficiency justification addressing all four conditions in section 60 and the substantive framework in Part 7 of these Guidelines.

**Step 3: Expect Integrated Assessment**

143. Where an exemption is granted under Part II in a dual-characterisation case, the Commission's findings on efficiency, indispensability, consumer benefit, and non-elimination of competition will be taken into account in any subsequent section 72 assessment in accordance with Regulation 25.

144. The undertaking should treat the section 60 exemption as creating a strong analytical foundation for the conduct dimension, though not an absolute protection against section 72 enforcement.

**Step 4: Where Conduct Is Unilateral**

145. Where the conduct is unilateral and does not fall within the dual characterisation categories (e.g., excessive pricing, predatory pricing, essential facility refusal, buying up scarce supply), the undertaking may request non-binding guidance under Division 2.

146. A guidance opinion does not confer legal protection or immunity; it is purely informational. The undertaking remains at risk of enforcement action if the guidance is unfavourable or if the conduct is implemented in ways that differ from the guidance request.

**Step 5: Where Conduct Has Multiple Dimensions**

147. Where the conduct has both bilateral and unilateral dimensions (e.g., tying implemented through both contractual and technical means), the undertaking should:

    (a) Apply under Division 1 for the agreement-based dimension (obtaining exemption of the contractual aspect under Part II);

    (b) Request guidance under Division 2 for the unilateral dimension (the technical tying);

    (c) Expect the Commission to ensure coherence between the two assessments, ensuring that the combined effect of exempting the bilateral dimension and assessing the unilateral dimension produces a consistent overall conclusion.

### 3.8.3 Pre-Consultation and Classification Guidance

148. Where an undertaking is uncertain about the appropriate classification, it may seek direction through the pre-consultation process under Part VI (Regulation 31(4)). The Commission may reclassify conduct and direct the undertaking to the appropriate Division (Regulation 31(5)).

149. This is particularly valuable where:

    (a) The boundary between agreement-based and unilateral conduct is unclear;

    (b) The conduct involves multiple related practices that may fall under different headings;

(c) The applicant wishes to avoid committing to a particular interpretation of the conduct in the absence of preliminary guidance.

## 3.9 Relevance of Prior Engagement to Remedial Measures

### 3.9.1 Discretionary Consideration in Enforcement

150. Where an undertaking has engaged with the Commission under Part III before receiving a directive under section 73(1)(b) to cease conduct determined to be abusive, the Commission may have regard to the nature and extent of that engagement in determining whether to accept measures proposed by the undertaking under section 75 of the Act (Regulation 32(2)).

151. This provision creates a non-binding incentive for voluntary engagement. It does not create a right, legitimate expectation, or guarantee of leniency.

### 3.9.2 Illustrative Scenarios

(a) **Accepted engagement:** An undertaking submitted a detailed application for exemption, engaged constructively with the Commission's information requests, and provided comprehensive efficiency evidence. If enforcement action is later initiated, the Commission may view the undertaking's prior engagement favourably when assessing proposed remedial measures.

(b) **Rejected engagement:** An undertaking submitted a perfunctory guidance request, failed to respond to information requests, and provided inadequate evidence. The Commission would not view this as a basis for accepting remedial measures.

(c) **No engagement:** An undertaking did not engage with Part III and enforcement action is initiated. The Commission will not treat the failure to engage as an aggravating factor (Regulation 34(2)), but neither will it use prior engagement as a mitigating factor.

## 3.10 Safe Harbour for Information Submitted

### 3.10.1 Critical Incentive Mechanism

152. The safe harbour provision is a critical incentive for voluntary engagement with the Commission. Where the Commission subsequently commences an investigation under Part IX in respect of conduct that was the subject of a request or application under Part III, the Commission shall not rely upon information submitted solely in connection with that request or application as the basis for initiating the investigation (Regulation 33(1)).

153. This provision eliminates the risk that an undertaking's own submission will trigger enforcement action. An undertaking can disclose its proposed conduct to the Commission in a guidance request or exemption application without fear that this disclosure will be weaponised against it.

### 3.10.2 Limits of Safe Harbour

154. The safe harbour is **not absolute**. It does not prevent the Commission from relying on information that is:

(a) **Independently obtained** — information obtained through the Commission's own investigatory powers, sector inquiries, complaints from third parties, or other sources;

(b) **Corroborated** — information submitted in the guidance request that is corroborated by independent evidence;

(c) **Publicly available** — information that becomes publicly known or is disclosed in public documents or filings.

155. The safe harbour applies only to information submitted solely in connection with the Part III request or application. Where the same information is obtained through independent channels or becomes part of the Commission's investigatory evidence through other means, the Commission may rely upon it (Regulation 33(2)).

### 3.10.3 Application to Initiation Only

156. The safe harbour applies specifically to initiation of investigations. It does not prevent:

(a) The Commission from using information submitted in Part III requests as evidence in investigations initiated on other grounds;

(b) The Commission from issuing information requests to the undertaking requesting documents or data beyond those submitted in the Part III request;

(c) Third parties (whistleblowers, competitors) from relying on publicly available information about the proposed conduct.

## 3.11 Preservation of Enforcement Powers

**3.11**.1 Full Enforcement Discretion

157. The Commission retains full power to investigate and take enforcement action under Part IX, whether or not a request for guidance has been submitted, an application for exemption has been made, or a confirmation has been issued (Regulation 34(1)).

158. The existence of a guidance request, exemption application, or confirmation does not:

(a) Preclude investigation of the undertaking's conduct;

(b) Create an estoppel or legitimate expectation against enforcement;

(c) Constitute an admission that investigation is unwarranted;

(d) Trigger any special procedure, higher evidentiary threshold, or exemption from enforcement.

### 3.11.2 Non-Aggravating Factor Provision

159. **Critically:** The failure of an undertaking to seek guidance, to apply for exemption, or to request a confirmation shall not, of itself, be treated as an aggravating factor in any enforcement proceeding (Regulation 34(2)).

160. This provision is essential to the voluntary nature of the Part III framework. An undertaking that chooses not to engage with the Commission will not be penalised for this choice. The provision ensures that dominant undertakings are not discouraged from engaging with the Part III framework by fear that failure to do so will worsen their position in enforcement proceedings.

161. However, the provision does not prevent the Commission from treating other matters as aggravating factors, such as:

(a) Concealment of conduct or deliberate obstruction of investigations;

(b) Dishonest or misleading statements in prior Part III engagement;

(c) Failure to comply with information requests or Commission directives;

(d) Repeat or continuation of conduct despite prior warnings.

## 3.12 Publication and Transparency

**3.12**.1 General Publication Framework

162. The Commission **may** publish, in non-confidential form, the following materials for purposes of transparency and development of competition law and policy (Regulation 35(1)):

(a) **Guidance responses:** Summaries of guidance opinions issued under Division 2, setting out the conduct assessed and the Commission's preliminary view;

(b) **Exemption summaries:** Summaries of decisions granting exemptions under Part II in dual-characterisation cases, setting out the parties, the conduct, the markets, and the efficiency justifications;

(c) **Confirmations:** Summaries of administrative confirmations issued under Division 3, setting out the arrangement assessed and the conclusion as to section 73(2) application.

163. Publication serves multiple objectives:

(a) **Transparency:** Undertakings and the public can understand the Commission's analytical approach and decision patterns;

(b) **Precedential guidance:** While published decisions do not create binding precedent, they provide guidance to undertakings on likely Commission treatment of similar conduct;

(c) **Accountability:** Publication subjects the Commission's decision-making to scrutiny and invites feedback from stakeholders;

(d) **Development of law:** Repeated publication of guidance and decisions enables the Commission to refine and develop competition law over time, creating a coherent body of practice.

### 3.12.2 Confidentiality and Commercial Sensitivity

164. The Commission will protect confidential information in published summaries, including:

(a) Trade secrets and technical information;

(b) Commercially sensitive financial data (prices, costs, profit margins);

(c) Identifying information of customers or suppliers;

(d) Strategic or business planning information.

165. The Commission will anonymise parties' identities where appropriate and will redact commercially sensitive passages, provided that the resulting summary retains sufficient detail to serve the publication purposes.

### 3.12.3 Non-Precedential Nature of Publication

166. **Important:** Publication does not cause any response, summary, or confirmation to become binding precedent or to constrain the Commission's future decision-making (Regulation 35(3)).

167. The Commission retains full discretion to:

(a) Reach different conclusions in factually similar cases;

(b) Modify its approach to guidance or exemption assessment;

(c) Revise or withdraw previously published guidance;

(d) Apply different analytical standards in different market contexts.

168. Publication is informational and assists in understanding the Commission's practice, but does not fetter the Commission's discretion in future cases.

## PART IV — DECISION TIMELINES AND COMPLIANCE OBLIGATIONS

*[Regulations 36–38]*

### 4.1 Decision Timelines (Regulation 36)

#### 4.1.1 Standard and Extended Timelines

1. The Commission aims to issue its decision on an application for exemption within thirty (30) business days of the commencement of the substantive review (Regulation 36(1)). In complex cases involving multiple undertakings, novel legal issues, or extensive economic analysis, this period may be extended to ninety (90) business days (Regulation 36(2)).

2. The applicant will be informed in writing of any extension and the reasons for it, including identification of the factors making the case complex.

#### 4.1.2 Clock Suspension

3. The decision-making clock is suspended during any period in which the Commission has requested additional information from the applicant and is awaiting the applicant's response (Regulation 36(3)). The clock does not re-commence until the requested information is received.

4. **Critical:** The clock does **not** run from the date of initial lodging to the commencement of the substantive review. The Commission may require an initial assessment period (up to 14 days) during which it:

   - Conducts preliminary completeness review of the application;
   - Undertakes initial market inquiries;
   - Identifies gaps in the evidence;
   - Determines whether the substantive review should commence or further information is required.

#### 4.1.3 Deemed Withdrawal

5. Where the applicant fails to provide requested information within forty (40) business days, the Commission may treat the application as withdrawn (Regulation 36(4)). The applicant may request reinstatement if the information is subsequently provided, subject to Commission discretion.

### 4.1.4 Proactive Communication

6. The Commission recognises that timely decision-making is essential for business planning. It will use reasonable endeavours to adhere to stated timelines and will communicate proactively with applicants about:

    - The progress of their applications;
    - Anticipated timing for substantive review commencement;
    - Information requests and expected response timelines;
    - Anticipated decision date;
    - Any factors likely to extend the timeline.

## 4.2 Compliance and Ongoing Obligations (Regulation 37)

### 4.2.1 Ongoing Compliance Framework

7. Undertakings granted an individual exemption are subject to ongoing compliance obligations (Regulation 37(1)), including:

    (a) **Compliance with all conditions imposed:** The exemption decision may impose conditions designed to mitigate anti-competitive effects or ensure that efficiencies are realised. Compliance with all such conditions is mandatory.

    (b) **Periodic reporting:** At intervals of not less than twelve months, the undertaking must submit a report using the template in Schedule 3, updating the Commission on:

    – Market conditions and competitive dynamics;

    – The undertaking's market share and competitive position;

    – Measures taken to ensure compliance with exemption conditions;

    – Efficiency outcomes (cost reductions, consumer benefits, innovation gains);

    – Any material changes in the conduct or market circumstances.

    (c) **Record-keeping:** The undertaking must maintain records for a minimum of **five years**, including:

    – Documentation of the conduct and relevant agreements;

    – Financial records supporting efficiency claims;

    – Market data and competitive analysis;

    – Compliance certifications and audit reports.

(d) **Notification of material changes:** The undertaking must notify the Commission of any material change within thirty (30) days of the change occurring.

### 4.2.2 Definition of Material Change

8. A "material change" is defined as any change reasonably likely to affect the Commission's assessment of whether the conditions for exemption continue to be satisfied (Regulation 37(2)). Specific examples include:

(a) **Market share changes:** Changes in market share exceeding five percentage points (e.g., from 45% to 50%, or from 50% to 45%);

(b) **Changes in the parties:** Acquisition, merger, or termination of one of the parties to the agreement;

(c) **Material amendments to the agreement:** Significant changes to the duration, scope, territorial extent, or core terms of the agreement;

(d) **Competitive changes:** Entry or exit of major competitors; consolidation in the market; changes in barriers to entry;

(e) **Economic changes:** Significant changes in cost structures, input prices, or technology that affect the efficiency justifications;

(f) **Conduct changes:** Expansion or contraction of the conduct beyond the scope contemplated by the exemption.

### 4.2.3 Compliance Audits and Additional Reporting

9. The Commission may conduct compliance audits and may require additional reports where it considers necessary (Regulation 37(3)). Audits may be conducted on a periodic basis (e.g., annually or biannually) or in response to specific concerns.

### 4.2.4 Compliance Culture

10. The Commission expects exemption holders to treat compliance as an ongoing obligation, not a one-time exercise. Internal compliance systems should be established to:

- Monitor adherence to exemption conditions;
- Detect and report material changes;
- Maintain required records;

- Ensure timely reporting and communication with the Commission;
- Identify emerging risks or issues that may affect exemption status.

### 4.3 Consequences of Non-Compliance (Regulation 38)

**4**.3.1 Enforcement Consequences

11. Failure to comply with the terms of an exemption may result in (Regulation 38(1)):

    (a) **Revocation of the exemption:** The Commission may revoke the exemption, retroactively or prospectively, where material non-compliance is found. Revocation terminates the exemption's protection, rendering the conduct subject to enforcement action;

    (b) **Imposition of administrative penalties:** The Commission may impose administrative penalties under the Act and the Administrative Penalties Regulations, proportionate to the nature and seriousness of the non-compliance;

    (c) **Other remedial action:** The Commission may issue remedial orders requiring the undertaking to:

        – Cease or modify the conduct;

        – Accept additional conditions;

        – Divest assets or reorganise operations;

        – Implement compliance measures or undergo audits.

**4.3.2** Opportunity to Remedy

12. The Commission will ordinarily give the exemption holder an opportunity to remedy non-compliance before proceeding to revocation, except where:

    (a) The non-compliance is serious or deliberate (e.g., intentional breach of a material condition, or concealment of a material change);

    (b) The non-compliance is likely to cause immediate harm to competition or consumers (e.g., expansion of the conduct significantly beyond the exemption scope);

    (c) The undertaking has repeatedly failed to remedy prior breaches.

13. In these circumstances, the Commission may proceed directly to revocation without an opportunity to remedy.

## PART V — APPLICATION FEES AND CLASSIFICATION

*[Regulation 39]*

### 5.1.1 Application Fees

### 5.1.2 Fee Basis and Calculation

1. Filing fees are payable upon submission of an application and are calculated in accordance with **Schedule 2** of the Regulations, based on the applicant's turnover (Regulation 39(1)–(2)).
2. The fee schedule establishes sliding-scale fees, with larger undertakings paying higher absolute fees but lower percentage fees (as a proportion of turnover). The rationale is cost-sharing: larger undertakings benefit more from regulatory certainty and are able to bear proportionally higher costs.

### 5.2 Turnover Calculation

3. Turnover is calculated based on the most recent audited financial statements (Regulation 39(3)). Where audited financials are unavailable, the Commission may accept:
    (a) **Certified management accounts:** Reviewed and certified by an external accountant;
    (b) **Tax filings:** Official tax returns filed with the Revenue Authority;
    (c) **Estimated turnover:** In the case of micro or new undertakings without audited financials or tax filings, the undertaking may provide a reasonable estimate certified by the applicant's management, subject to Commission verification.

### 5.3 Accommodation for Micro and Small Enterprises

4. The Commission recognises that filing fees should not be disproportionate for micro and small enterprises (Regulation 39(5)). The Commission may:
    (a) Provide fee waivers or reductions for undertakings meeting micro-enterprise criteria (e.g., fewer than 10 employees, turnover below ₦50 million);
    (b) Issue further guidelines or thresholds capping fees for small enterprises;

## PART VI — PRE-NOTIFICATION CONSULTATION

*[Regulation 40]*

### 6.1 Voluntary Pre-Consultation Service

1 The Commission provides a voluntary pre-notification consultation service to assist parties in preparing formal applications for guidance, exemption, or authorisation of restrictive agreements. The Commission encourages parties to engage in pre-consultation at least fourteen days before submitting a formal application (Regulation 40(2)).

2 Pre-consultation is distinct from formal notification for guidance under Regulation 18. Pre-consultation is informal, exploratory, and non-binding. It does not trigger a formal response obligation or set a clock for the Commission's decision-making. By contrast, notification under Regulation 18 is a formal written application to which the Commission must respond within forty business days (Regulation 40(6)). Pre-consultation serves as an important pathway for applicants to clarify requirements, scope issues, and potential evidentiary gaps before commencing formal procedures.

3 The purposes of pre-consultation include:

- Determining whether an exemption application is appropriate and likely to succeed;
- Clarifying the specific information requirements for the agreement in question;
- Identifying potential waivers of non-essential documentation to reduce compliance burden;
- Highlighting issues likely to arise during the formal assessment;
- Discussing the applicant's preliminary efficiency claims and market analysis;
- Assisting parties in understanding the Commission's analytical framework and evidentiary standards.

4 Pre-consultation may be conducted in person, by telephone or video conference, or through digital platforms as determined by the Commission.

5 Any guidance provided during a pre-consultation is non-binding and does not preclude the Commission from requesting additional information or raising new concerns during the formal review. The Commission reserves the right to modify its preliminary views upon receipt of complete information or following stakeholder input.

6 The Commission considers pre-consultation particularly valuable in the following circumstances:

(a) **Novel or Complex Agreements** — Applications involving agreements with features not previously assessed by the Commission, or those requiring integration of multiple analytical frameworks (e.g., combined R&D and production agreements). Pre-

consultation assists applicants in understanding how the centre of gravity principle will apply and which evidentiary standards the Commission will employ.

(b) **Applications by Dominant Undertakings** — Applications by dominant firms under Part III, Division 1 (conduct-based assessments), where the interaction between Section 60 (restrictive agreements) and Section 72 (abuse of dominance) may require careful structuring. Pre-consultation clarifies the dual-characterisation framework and the distinct evidentiary burdens for agreement-based versus conduct-based challenges.

(c) **Requests for Administrative Confirmation** — Applications under Part III, Division 3, involving the ejusdem generis classification of market restrictions. Pre-consultation allows applicants to discuss how their provisions fit within the interpretative framework and whether they constitute "market restrictions" or merely restrictions on affiliated dealing.

(d) **High-Risk or Contentious Matters** — Applications involving hardcore restrictions, market foreclosure concerns, or agreements that may trigger enforcement scrutiny. Early dialogue with the Commission reduces the risk of rejection and allows for modification of terms.

(e) **SME or Novel Business Model Applications** — Applications by smaller undertakings or those involving innovative business structures (digital platforms, data-sharing arrangements, etc.) where the applicant may lack familiarity with competition law requirements.

## PART VII — REVIEWS, APPEALS, AND MISCELLANEOUS PROVISIONS

*[Regulations 41–44]*

### 7.1 Appeals to the Competition and Consumer Protection Tribunal

1. Any person aggrieved by a decision of the Commission under the Authorisation and Exemption Regulations (Non-Merger Matters), 2026, or the Restrictive Agreements and Trade Practices Regulations (RATPR) 2022 may appeal to the Competition and Consumer Protection Tribunal within thirty days of service of the decision (Regulation 41(1)). The thirty-day period runs from the date the Commission serves the decision on the applicant, and time computation follows ordinary civil procedure rules.

2. The Tribunal has jurisdiction to review the merits of the Commission's decision, including the factual findings, economic analysis, and legal characterisation. On such review, the Tribunal may confirm, vary, or set aside the Commission's decision (Regulation 41(3)). The Tribunal may also remit the matter to the Commission for reconsideration in light of the Tribunal's legal guidance.

3. The filing of an appeal does not automatically suspend the Commission's decision unless the Tribunal grants a stay of execution. An applicant seeking a stay must demonstrate that: (a) there is a serious issue to be tried; (b) the applicant will suffer irreparable harm if the stay is not granted; and (c) the balance of convenience favours granting the stay (Regulation 41(4)).

4. Decisions that may be appealed include:

   (a) Refusal of an application for exemption or authorisation;

   (b) Conditions attached to an exemption or authorisation;

   (c) Revocation or variation of an exemption during its term;

   (d) Withdrawal of a Block Exemption or protective measure;

   (e) Interim measures orders;

   (f) Confidentiality determinations under Regulation 42.

5. Non-binding guidance issued under Part III, Division 2, is not a "decision" for the purposes of Regulation 41, as it creates no binding legal obligation. Similarly, administrative confirmations issued under Part III, Division 3, constitute statements of the Commission's interpretation rather than enforceable decisions. Accordingly, such guidance and confirmations may not be appealed, although they may be considered in enforcement proceedings should circumstances change materially.

### 7.2 Confidentiality

6. Information submitted to the Commission will be treated as confidential where the applicant demonstrates that disclosure would cause serious irreparable harm to its business interests or relates to sensitive commercial strategies, trade secrets, or confidential financial data (Regulation 42(1)). The applicant bears the burden of justifying each confidentiality claim with reference to the specific nature of the information and the harm that would result from disclosure.

7. All applications must be accompanied by both a confidential and a non-confidential version of all submissions (Regulation 42(6)). Applicants should clearly mark confidential material by using a "CONFIDENTIAL" header and provide adequate reasons for each confidentiality claim. Generic assertions that all business information is confidential will not be accepted; applicants must identify specific paragraphs or documents and explain why disclosure would cause demonstrable harm.

8. The Commission will determine confidentiality claims within fifteen business days of application submission (Regulation 42(2)). Where the Commission proposes to disclose information designated as confidential, the applicant will receive not less than ten business days' notice and an opportunity to make written representations explaining why disclosure would be prejudicial (Regulation 42(4)).

9. An applicant aggrieved by a confidentiality determination may apply to the Tribunal for review. The Tribunal may uphold the Commission's determination, order disclosure with redactions, or restrict disclosure to a limited class of persons (e.g., Tribunal counsel only) (Regulation 42(5)).

10. The Commission will balance legitimate confidentiality claims against the public interest in transparency. Information relating to market concentration, efficiency claims, or competitive effects may be partially disclosed in redacted form even where the applicant claims confidentiality.

### 7.3 Definitions (Regulation 43)

11. The definitions in Regulation 43 of the Regulations apply throughout these Guidelines. Key definitions include "agreement," "block exemption," "contemplated agreement," "efficiency gains," "exclusion order provision," "market restriction," "material change," and "statutory exception." These definitions are integral to the Commission's analytical framework and must be applied consistently.

12. The definition of "market restriction" in Regulation 43 incorporates the ejusdem generis interpretation established in Regulation 29(2) to (5). Market restrictions are restrictions of the same general character as exclusive dealing arrangements — that is, restrictions organising the terms of dealing within an affiliated or interconnected group, rather than restrictions whose principal object

is to foreclose or restrict competition with third parties. This principle ensures that ancillary restrictions incidental to legitimate cooperation are not caught by the prohibition in Section 59 of the FCCPA.

13. "Efficiency gains" is defined to include productive efficiency (cost reductions, economies of scale), allocative efficiency (better resource allocation, consumer access), and dynamic efficiency (innovation, R&D investment, technological advancement). The definition requires gains to be real, substantial, and quantifiable, not speculative or incidental to the agreement.

### 7.4 Citation and Commencement (Regulation 44)

14. These Guidelines supplement and provide detailed interpretation of the Authorisation, Exemption and Guidance Regulations (Non-Merger Matters), 2026, and the Restrictive Agreements and Trade Practices Regulations (RATPR) 2022. The Guidelines shall come into effect on the date of their publication on the Commission's official website.

15. The Commission may revise these Guidelines periodically to reflect developments in competition law, market conditions, economic understanding, and jurisprudential interpretation. Updates will be published on the Commission's website, and stakeholders are encouraged to refer to the most recent version. The Commission will provide reasonable notice of material changes to ensure applicants have adequate time to adjust compliance practices.

# PART VIII — CONCLUSION

## 8.1 Summary of Key Principles

1. These Guidelines provide a comprehensive framework for understanding the Commission's approach to authorisation and exemption of restrictive agreements and conduct by dominant undertakings under the Federal Competition and Consumer Protection Act (FCCPA) and related regulations. The four cumulative conditions under Section 60 of the FCCPA remain the cornerstone of assessment for restrictive agreements, whilst the conditions in Section 72(3) provide the substantive framework for assessing conduct by dominant undertakings. These frameworks are supported by the dual-pathway architecture in the Authorisation, Exemption and Guidance Regulations, 2026, and by the detailed evidentiary requirements and analytical frameworks set out in these Guidelines.

## 8.2 Core Principles

2. The core principles underpinning these Guidelines include:

(a) **Individual Exemptions for Restrictive Agreements:** Providing a structured process for undertakings whose agreements do not automatically qualify for Block Exemption but may still be eligible for individual exemption if they generate substantial and verifiable efficiency gains. These exemptions ensure that legitimate business arrangements that foster innovation, cost savings, and consumer benefits are not unduly restricted by competition law.

(b) **Eligibility Criteria for Block Exemptions:** Defining pre-approved conditions under which categories of agreements can be automatically exempted, including market share thresholds, competition effects tests, and efficiency considerations. This framework provides regulatory certainty, allowing businesses to engage in pro-competitive cooperation without formal notification, whilst safeguarding competition and consumer welfare.

(c) **Treatment of Conduct by Dominant Undertakings:** Setting out the Commission's analytical approach to assessing conduct by dominant undertakings, including the dual-characterisation framework for agreement-based conduct and the non-binding guidance framework for unilateral conduct. The framework imposes rigorous efficiency justifications, proportionality tests, and continuous monitoring to ensure that dominance is not exploited to foreclose competitors or restrict market access.

(d) **Evidentiary and Analytical Standards:** Establishing a high evidentiary burden for undertakings seeking exemptions or authorisations. This includes:

- Quantitative economic studies demonstrating verifiable efficiency gains with specific figures, not percentage claims alone;
- Comparative market analyses proving that no less restrictive alternatives exist;
- Impact assessments confirming that the conduct does not result in substantial consumer harm;
- Counterfactual analysis isolating the agreement's effects from other market dynamics.

(e) **Procedural Oversight by the Commission:** Defining a transparent process for the application, review, renewal, and revocation of exemptions and authorisations. The Commission retains discretionary authority to reassess market conditions and modify or withdraw exemptions where necessary, particularly if circumstances change materially.

### 8.3 Balancing Innovation, Market Stability, and Competition

3. These Guidelines reflect a forward-looking regulatory approach that supports legitimate business cooperation whilst maintaining market stability and ensuring fair competition. The Commission's regulatory priorities are:

(a) **Encouraging Market Innovation and Economic Growth:**

By facilitating research and development (R&D), specialisation, and technology transfer agreements, whilst ensuring that competition is preserved. The framework is designed to enable Nigerian businesses to compete effectively in both local and global markets, fostering technological advancements that enhance product quality, reduce costs, and improve consumer welfare.

(b) **Preventing Market Foreclosure and Abuse of Dominance:**

By imposing strict requirements for assessment under Section 72(3) of the FCCPA, ensuring that dominant firms do not misuse their market power to exclude competitors or distort market access. The Commission will not tolerate practices that entrench dominance at the expense of competition or innovation.

(c) **Ensuring Tangible Consumer Welfare Gains:**

By requiring that any efficiency claims made by undertakings are demonstrably passed on to consumers in the form of lower prices, improved quality, enhanced accessibility, or innovation. The Commission will closely scrutinise any claims of consumer benefits to ensure they are not speculative, overstated, or captured by undertakings rather than consumers.

(d) **Regulating with Flexibility and Responsiveness:**

By allowing conditional authorisations where necessary, ensuring that dominant firms implement proportionate, non-exclusionary efficiency measures. The Commission will consider the specific market context and economic realities of undertakings when assessing proportionality.

## 8.4 Ongoing Monitoring and Compliance Obligations

4. To ensure that exempted and authorised conduct continues to meet competition law principles, the Commission retains broad oversight over all Block Exemptions and Individual Exemptions. The Commission reserves the right to:

(a) **Conduct Periodic Market Assessments:**

Reviewing whether authorised conduct remains pro-competitive over time, ensuring that market conditions have not changed in ways that undermine efficiency justifications. If market evolution suggests that an agreement's competitive effects have altered materially, the Commission may reassess and revoke authorisation.

(b) **Impose Monitoring and Reporting Obligations:**

Requiring undertakings benefiting from exemptions or authorisations to submit periodic compliance reports, economic impact studies, and competition assessments. This ensures ongoing transparency and regulatory accountability, preventing undertakings from operating in ways inconsistent with authorisation conditions.

(c) **Modify, Renew, or Revoke Authorisations:**

If new evidence emerges showing that previously authorised conduct has become anti-competitive, or if efficiency justifications are no longer substantiated, the Commission retains the power to withdraw authorisation or impose new conditions. Revocation procedures will follow transparent processes with opportunity for the undertaking to respond.

(d) **Forward-Looking Enforcement Priorities:**

The Commission will continue to refine and update enforcement priorities based on emerging competition trends, technological developments, and international best practices. The approach is proactive rather than reactive, ensuring that the regulatory framework remains adaptable to dynamic market changes.

## 8.5 Final Considerations: Enforcement, Compliance, and Regulatory Certainty

5. The Commission remains committed to facilitating compliance whilst safeguarding competition and consumer welfare. These Guidelines will be updated periodically to reflect developments in competition law, market realities, and jurisprudential interpretations.

6. To achieve these objectives, undertakings benefiting from exemptions or authorisations must rigorously self-assess compliance, as failure to adhere to the regulatory framework may result in:

   (a) **Revocation of Exemptions or Authorisations:** If the conduct ceases to meet the efficiency or competition criteria, the Commission will act swiftly to withdraw exemptions.

   (b) **Legal and Enforcement Consequences:** Firms engaging in unauthorised anti-competitive practices may face financial penalties under Section 69 of the FCCPA, injunctive relief, and structural remedies to restore market competition.

7. The Commission encourages businesses and legal professionals to engage in proactive compliance efforts, seeking early consultations where necessary. Market participants should use these Guidelines to self-assess agreements and conduct, ensuring compliance with Nigerian competition law.

8. These Guidelines serve as an evolving regulatory tool, ensuring that competition policy remains relevant, robust, and responsive to market realities. The Commission's ultimate goal is to create a level playing field where businesses can compete fairly, innovate freely, and contribute to Nigeria's economic growth, whilst consumers benefit from better choices, fair prices, and higher-quality products and services.

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# ANNEXURE 1

# SUBSTANTIVE ASSESSMENT FRAMEWORK — AGREEMENT TYPES AND COOPERATION ANALYSIS

## A. Centre of Gravity Principle for Integrated Cooperation Agreements

### I. Introduction

Certain horizontal agreements involve multiple stages of cooperation, such as research and development (R&D), joint production, or commercialisation. These integrated cooperation agreements require careful assessment to determine which analytical framework applies. Given that integrated cooperation may incorporate different types of agreements (e.g., R&D followed by joint production followed by joint distribution), it is essential to determine the primary function or "centre of gravity" of the cooperation. This centre of gravity helps the Commission decide which analytical framework should apply when assessing whether an agreement is a restriction by object or by effect and whether it qualifies for authorisation.

### II. Identifying the "Centre of Gravity" in Integrated Cooperation Agreements

When an agreement covers multiple interlinked stages of cooperation, the dominant or most critical aspect, its centre of gravity will determine the primary lens through which the Commission assesses the agreement. This principle prevents applicants from strategically characterising agreements to avoid scrutiny or claim exemptions inappropriately.

The centre of gravity is assessed based on:

(a) **The starting point of the cooperation** — Whether the cooperation originated from an R&D initiative, a production agreement, or a specialisation arrangement;

(b) **The degree of integration of different functions** — Whether one function is contingent upon another (e.g., if commercialisation only occurs because of joint production, production is the centre of gravity);

(c) **The financial and strategic weight of each component** — Which aspect commands the largest investment or carries the greatest strategic importance for the parties?

(d) **The temporal sequence** — Whether stages follow logically and sequentially or are independent activities grouped into a single agreement.

### III. General Principles for Determining the Centre of Gravity

**Principle 1: Agreements Combining Joint R&D and Joint Production**

(a) **Rule:** If joint production is entirely dependent on the success of joint R&D, the agreement's centre of gravity is joint R&D.

(b) **Rationale:** The R&D component is decisive because production would not occur unless the R&D produces viable, commercially marketable results.

(c) **Assessment Approach:** The framework for R&D agreements will prevail when determining the agreement's competitive effects and whether it meets the conditions for authorisation.

**Illustrative Example 1:** Two pharmaceutical companies collaborate to develop a new drug. They agree that if the R&D succeeds, they will also engage in joint production of the drug. In this case, the joint production is conditional on the R&D, making R&D the centre of gravity. Assessment focuses on R&D conditions (market share thresholds, 10 percent for competitors), IP provisions, and duration (seven years post-marketing).

**Principle 2: Agreements Combining Specialisation and Joint Commercialisation**

(a) **Rule:** If joint commercialisation results directly from the specialisation agreement (i.e., parties specialise in different products and jointly distribute them), then specialisation is the centre of gravity.

(b) **Rationale:** This means that the Commission will assess the agreement primarily as a specialisation agreement, and any commercialisation elements will be considered ancillary to specialisation.

**Principle 3: Agreements Combining Joint Production and Joint Commercialisation**

(a) **Rule:** If joint commercialisation exists only because of joint production (i.e., the parties agreed to jointly market their output), then production is the centre of gravity.

(b) **Rationale:** In this scenario, the Commission will apply the assessment framework for production agreements rather than commercialisation frameworks.

## B. Research and Development (R&D) Agreements

### I. Definition and Scope

Research and Development (R&D) agreements encompass a broad spectrum of scientific, technological, and experimental initiatives aimed at fostering innovation. The definition covers:

(a) **Theoretical Analysis:** Advancing scientific principles through mathematical modelling, hypothesis testing, computational simulations, and theoretical proofs.

(b) **Systematic Experimentation:** Conducting controlled trials, laboratory testing, prototyping, and field studies to develop new or improved products, processes, or services.

(c) **Pilot Production:** Assessing manufacturing feasibility, production scalability, and product performance before full-scale production.

(d) **Technical Testing:** Evaluating viability, safety, regulatory compliance, and market suitability of developed technologies.

(e) **Securing Intellectual Property (IP) Rights:** Patenting innovations, registering trademarks, protecting copyrights, and safeguarding proprietary research outcomes.

## II. Block Exemption Criteria

An R&D Agreement may qualify for Block Exemption if it meets cumulative conditions:

**(a) Market Share Thresholds:**

- 10 percent for competitors (undertakings whose products are considered by users as interchangeable or substitutable);
- 15 percent for non-competitors (undertakings whose products do not compete directly in the relevant market).

**Justification:** Ensures no excessive concentration of market power from R&D cooperation.

(b) **Market Scope:** The agreement must operate in markets for R&D-derived products or markets for substitute technologies. Generic or speculative R&D without clear market application faces scrutiny.

(c) **Efficiency Gains:** The agreement must result in faster innovation cycles, lower R&D costs, improved consumer welfare, or technological advancements. Applicants should quantify these gains.

(d) **Exploitation of R&D Results:** The agreement must allow for:

- Production or distribution of R&D outputs without undue restrictions;
- Licensing of intellectual property rights on reasonable terms (preferably FRAND — Fair, Reasonable, and Non-Discriminatory);
- Technology commercialisation and know-how dissemination.

## III. Intellectual Property Provisions

IP provisions within an R&D Agreement may qualify for exemption provided that:

(a) They are essential for the execution of the agreement (e.g., joint ownership of patents, exclusive licensing periods during development);

(b) The agreement's primary objective remains R&D, rather than restricting IP access to competitors for anti-competitive purposes.

### IV. Duration of Block Exemption

The Block Exemption applies for the duration of the R&D project. It extends for seven (7) years after the product or technology is first marketed, provided that market share thresholds remain within permitted limits. This ensures that companies recover R&D investments and maintain innovation incentives whilst preventing long-term market foreclosure.

## C. Specialisation Agreements

### I. Definition and Overview

A Specialisation Agreement is an arrangement where two or more undertakings agree to focus production on specific goods or services to enhance efficiency, reduce costs, optimise resource allocation, and improve consumer welfare. These agreements enable businesses to achieve economies of scale, technological specialisation, and operational efficiencies.

### II. Categories of Specialisation Agreements

The Notice of Block Exemption 2026 recognises three principal categories:

**(a) Unilateral Specialisation Agreements:**

One or more undertakings cease or scale down production of certain products and procure them from another undertaking that specialises in producing those goods.

**(b) Reciprocal Specialisation Agreements:**

Two or more undertakings agree to specialise in different products within the same market, with an arrangement to supply each other with the products they no longer manufacture.

**(c) Joint Production Agreements:**

Two or more undertakings agree to collaboratively manufacture products, either through a joint venture or shared production facilities.

### III. Conditions for Block Exemption

To qualify for Block Exemption, a Specialisation Agreement should meet cumulative conditions:

**(a) Market Share Thresholds**

- 10 percent if the participating firms are actual or potential competitors;
- 15 percent if the firms are non-competitors.

**Justification:** Prevents any single firm or agreement from gaining excessive market power, which could distort competition.

**(b) Exclusivity Provisions Must Be Necessary for Efficiency Gains**

- Exclusive supply or purchase obligations must be indispensable for achieving cost savings or product improvements;
- These obligations must not extend beyond what is necessary for achieving the agreement's benefits.

**(c) Agreement Must Not Eliminate Effective Competition**

The agreement should not lead to market foreclosure or create a dominant position that prevents smaller competitors from entering or competing effectively.

**(d) Efficiency Gains Must Benefit Consumers**

The agreement must lead to lower prices, higher quality, or enhanced innovation that reaches consumers.

**(e) Intellectual Property (IP) Provisions Must Be Ancillary**

IP restrictions must be proportional and not designed to foreclose competitors from accessing technology.

**(f) Hardcore Restrictions Are Prohibited**

The agreement must not include:

- Price-fixing or coordinated output limitations;
- Territorial market allocation or customer allocation;
- Restrictions on independent research or sales outside the agreement.

## D. Purchasing Agreements

### I. Definition and Overview

A Purchasing Agreement refers to an arrangement where two or more undertakings combine their purchasing activities to achieve cost efficiencies, secure better terms from suppliers, and improve distribution effectiveness. These agreements can provide substantial benefits by reducing procurement costs, increasing bargaining power, improving supply reliability, and fostering competitive supply chains.

### II. Types of Purchasing Agreements:

(a) **Joint Purchasing Arrangements:** Undertakings jointly negotiate and procure goods or services from suppliers.

(b) **Purchasing Cooperatives:** A formal or informal association of buyers collectively procuring inputs, raw materials, or services under uniform terms.

## III. Conditions for Block Exemption

To qualify for Block Exemption, a Purchasing Agreement should satisfy cumulative conditions:

(a) **Market Share Thresholds:**

The combined market share of the participating buyers must not exceed 15% in both:

- The purchasing market (where buyers collectively procure goods or services);
- The selling market (where purchased goods or services are resold or incorporated into products sold to consumers).

(b) **Efficiency Gains Requirement:**

The Purchasing Agreement must generate tangible efficiency benefits, such as:

- Cost savings through bulk procurement and better contract terms;
- Improved product quality from supplier standardisation;
- Enhanced distribution efficiency by reducing logistics costs;
- More reliable supply chains and reduced supply uncertainty.

(c) **Exclusive Purchasing Obligations:**

Exclusive purchasing obligations must be justified as essential to achieving efficiency gains. The agreement must not impose restrictions that prevent members from seeking alternative suppliers where necessary.

(d) **Prohibited Anti-Competitive Conduct:**

A Purchasing Agreement shall not qualify for Block Exemption if it includes:

- **Price-Fixing:** Coordinated resale pricing, which eliminates independent pricing competition downstream;
- **Market Allocation:** Division of suppliers, customers, or territories to limit competition;
- **Output Restrictions:** Artificially reducing supply to increase prices.

(e) **Transparency and Non-Discrimination:**

The purchasing process must be transparent, ensuring fair competition among suppliers. The agreement must not favour certain suppliers in a way that forecloses competition.

### IV. Duration and Oversight

The Block Exemption applies for the duration of the agreement, provided that:

- The market share remains within the 15% threshold in both purchasing and selling markets;
- No anti-competitive restrictions emerge.

## E. Commercialisation Agreements

### I. Definition and Overview

A Commercialisation Agreement is a cooperative arrangement between undertakings relating to the selling, marketing, distribution, or promotion of products. These agreements may enhance efficiencies in distribution and market access, particularly for SMEs seeking to expand reach and consumer accessibility.

### II. Types of Commercialisation Agreements:

(a) **Joint Selling Agreements:** Participants jointly determine pricing and commercial terms for products.

(b) **Marketing and Distribution Agreements:** Participants coordinate advertising, promotion, and distribution logistics to maximise sales efficiency.

(c) **Reciprocal Distribution Agreements:** Two or more undertakings agree to distribute each other's products in separate geographic markets.

### III. Conditions for Exemption

A Commercialisation Agreement may qualify for Block Exemption if it satisfies cumulative conditions:

(a) **Market Share Thresholds:** The combined market share of participating undertakings must not exceed 15% in any relevant market.

(b) **Prohibited Anti-Competitive Conduct:** A Commercialisation Agreement shall not qualify for Block Exemption if it contains:

(c) **Price-Fixing Between Competitors:** If parties agree to fix or standardise prices, the agreement is per se illegal;

(d) **Market or Customer Allocation:** If the agreement divides customers, regions, or market segments, it eliminates competition;

(e) **Exclusive Dealing Restrictions:** Any exclusivity obligations must be necessary for efficiency gains and must not foreclose competitors.

(f) **Consumer Benefit and Efficiency Gains:** The agreement must enhance consumer choice by improving product availability and distribution efficiency. The distribution model should provide tangible benefits such as:

- Faster delivery times
- Better stock management and product availability;
- Cost reductions reflected in lower consumer prices;
- Improved service quality.

## F. Supply Chain and Distribution Agreements

### I. Definition and Overview

A Supply Chain and Distribution Agreement refers to contractual arrangements between manufacturers, suppliers, wholesalers, and retailers aimed at improving supply chain efficiency, reducing transaction costs, and enhancing product availability.

### II. Types of Supply Chain and Distribution Agreements:

(a) **Exclusive Distribution Agreements:** A supplier grants a distributor exclusive rights to sell products within a specified territory or market segment.

(b) **Selective Distribution Agreements:** A supplier limits sales to approved distributors or retailers meeting specific quality or service criteria.

(c) **Franchise Agreements:** A franchisor licenses intellectual property, brand identity, and operational methods to franchisees under detailed operational guidelines.

(d) **Exclusive Supply Agreements:** A buyer agrees to source certain inputs exclusively from a designated supplier.

### III. Conditions for Block Exemption

A Supply Chain and Distribution Agreement may qualify for Block Exemption if it meets cumulative conditions:

(a) **Market Share Thresholds:** The supplier's market share must not exceed 30% in the relevant market.

(b) **Prohibited Restrictions Under Block Exemption:** A Supply Chain and Distribution Agreement shall not qualify for Block Exemption if it includes:

(i) **Fixed or Minimum Resale Prices (Resale Price Maintenance — RPM):** Suppliers cannot dictate fixed or minimum resale prices to retailers or distributors.

**Permitted Alternative:** A supplier may recommend resale prices or set a maximum resale price to prevent excessive pricing that harms brand reputation.

(ii) **Unjustified Territorial or Customer Restrictions:** A supplier cannot prohibit distributors from selling to certain customers or territories, except where:

- Selective distribution systems require compliance with objective quality criteria;
- Exclusive territories promote investment in brand development or infrastructure.

(c) **Efficiency Gains and Consumer Benefits:** The agreement must promote efficiencies that directly benefit consumers, such as:

- Lower consumer prices due to cost savings in supply chains;
- Improved availability of products across wider geographical areas;
- Faster delivery and distribution efficiencies through streamlined logistics;
- Better customer service and after-sales support.

## G. Intellectual Property Licensing and Technology Transfer Agreements

### I. Definition and Overview

**Definition of IP Licensing:** An Intellectual Property (IP) Licensing Agreement is an arrangement where an undertaking grants another entity rights to use its patents, trademarks, copyrights, or trade secrets under defined terms. Such agreements allow firms to commercialise innovations, expand market reach, and facilitate industry-wide technological advancements.

**Definition of Technology Transfer:** A Technology Transfer Agreement refers to an arrangement where a party transfers knowledge, techniques, or proprietary technology to another party for the purpose of innovation, production enhancement, or process improvement.

## II. Types of IP Licensing and Technology Transfer Agreements:

(a) **Patent Licensing Agreements:** A licensor grants rights to use its patented technology under defined conditions.

(b) **Trademark Licensing Agreements:** A licensor authorises a licensee to use a brand name, logo, or trademark in specified territories.

(c) **Know-How and Trade Secret Transfer Agreements:** A licensor transfers specialised knowledge, processes, or proprietary methods essential for production.

## III. Conditions for Block Exemption

An IP Licensing or Technology Transfer Agreement may qualify for Block Exemption if it meets cumulative conditions:

(a) **Prohibited Restrictions Under Block Exemption:** An agreement shall not qualify for Block Exemption if it includes:

- **Price-Fixing for Products Derived from Licensed Technology:** Licensors cannot dictate resale prices for products incorporating licensed technology.
- **Market Entry Restrictions on New Competitors:** Licensing agreements must not be structured to prevent new firms from entering the market.
- **Territorial Exclusivity Beyond Innovation Incentives:** Restrictions on where licensees can sell products must be objectively necessary for innovation, investment recovery, or brand protection.

(b) **Market Share Thresholds for Exemption:** The licensor's market share must not exceed 30% in the relevant market.

## ANNEXURE 2

## SECTORAL ILLUSTRATIONS

***(This section provides sector-specific guidance on how the analytical frameworks apply in key sectors of the Nigerian economy)***

### 1. Purpose

The analytical frameworks set out in these Guidelines — the four conditions test, the dual characterisation principle, the four-tier unilateral conduct framework, and the ejusdem generis framework — are of general application. However, their practical application varies across sectors, reflecting differences in market structure, regulatory environment, competitive dynamics, and the nature of efficiency gains. This section illustrates how the frameworks apply in four key sectors.

### 2. Telecommunications

#### 2.1 Market characteristics

The Nigerian telecommunications sector is characterised by: high fixed costs and economies of scale (network infrastructure); regulatory oversight by the Nigerian Communications Commission (NCC); spectrum as a scarce and regulated input; significant switching costs for consumers (number portability is available but usage is limited); network effects (the value of a network increases with the number of users); and rapid technological change (4G to 5G transition, fibre rollout).

#### 2.2 Types of agreement likely to arise

(a) **Network-sharing agreements:** Two or more operators share passive infrastructure (towers, masts) or active infrastructure (radio access networks). These may restrict competition but can produce significant productive efficiencies (lower deployment costs, faster rural coverage). The Commission will assess: the scope of sharing (passive-only is less restrictive than active); whether the sharing extends to geographic areas where the operators compete; whether the agreement reduces the operators' incentives to invest independently; and whether the sharing facilitates information exchange or coordination on competitive parameters.

(b) **Spectrum pooling or sharing:** Operators pool spectrum resources to provide higher-capacity services. This raises particular competition concerns because spectrum is a scarce, non-replicable input. The Commission will assess whether the pooling forecloses competitors from spectrum access and whether the efficiency gains (better network performance) are passed on to consumers.

(c) **Exclusive content agreements:** A mobile operator enters into an exclusive agreement with a content provider (streaming service, financial platform). This is a vertical agreement

and, if the operator is dominant, engages the dual characterisation principle. The Commission will assess foreclosure of competing operators from the content and whether the exclusivity is indispensable for the investment in content development.

### 2.3 Sector-specific analytical considerations

(a) **Dynamic efficiency is particularly important:** The telecommunications sector is characterised by rapid innovation. Agreements that accelerate 5G deployment, fibre rollout, or rural connectivity may produce dynamic efficiencies that outweigh short-term competitive harm. The Commission will give significant weight to dynamic efficiency claims in telecommunications, provided they are supported by credible investment plans and deployment timelines.

(b) **Regulatory interaction:** Where the NCC has mandated or approved an arrangement (e.g. infrastructure sharing mandated by regulation), section 68(a) may apply. However, the mere fact that the NCC has approved an arrangement does not of itself bring it within section 68 — the arrangement must be *required by* the NCC regulation, not merely *permitted by* it. The Commission will coordinate with the NCC where appropriate.

(c) **Pass-on assessment:** The retail telecommunications market in Nigeria is relatively competitive (four major operators, numerous MVNOs). This suggests that cost savings from network sharing or spectrum pooling are more likely to be passed on to consumers than in less competitive sectors. The Commission will assess historical pass-through rates in the sector.

## 3. Pharmaceuticals

### 3.1 Market characteristics

The Nigerian pharmaceutical sector is characterised by: significant regulatory barriers (NAFDAC registration, WHO prequalification); patent protection and data exclusivity; long product development cycles (8-15 years for new chemical entities); high R&D costs with uncertain outcomes; importation dependence (Nigeria imports approximately 70% of pharmaceutical products); and a complex distribution chain (manufacturer → importer → wholesaler → sub-wholesaler → pharmacy/hospital).

### 3.2 Types of agreement likely to arise

(a) Joint R&D agreements: Two pharmaceutical companies pool resources for drug development. These are commonly pro-competitive and may be candidates for block exemption. The Commission will assess: the parties' combined market position in the

relevant therapeutic area; whether the R&D covers a product market where the parties currently compete; the probability-weighted value of the R&D investment; and whether access to the results is restricted in a way that forecloses competitors.

(b) Exclusive distribution agreements: A manufacturer appoints a single distributor for a therapeutic area. In the Nigerian context, where distribution channels are fragmented and quality assurance is a significant concern (counterfeit medicines), exclusive distribution may produce genuine efficiencies (cold-chain integrity, traceability, pharmacovigilance). The Commission will assess whether the exclusivity is genuinely necessary for quality assurance or whether selective distribution (multiple quality-assured distributors) would achieve the same objective.

(c) Patent licensing arrangements: A patent holder licenses the right to manufacture to a local producer, subject to restrictions (field of use, territory, quantity). The Commission will assess these under section 64 of the Act (restrictive conditions relating to patented articles) and will apply the section 60 framework with particular attention to the innovation incentives created by patent protection.

### 3.3 Sector-specific analytical considerations

**Indispensability:** In pharmaceuticals, the indispensability test is often satisfied because the R&D investment is genuinely non-recoverable without the exclusive or restrictive arrangement. The Commission recognises that pharmaceutical R&D requires certainty of return, and a degree of exclusivity may be indispensable to incentivise innovation.

**Consumer benefit:** The Commission defines "consumer" broadly in the pharmaceutical context. Patients, hospitals, pharmacies, and the National Health Insurance Authority may all be relevant. The Commission will assess whether new treatments reach Nigerian patients at accessible prices and within reasonable timescales. An R&D agreement that produces a new treatment but prices it beyond the reach of Nigerian patients does not satisfy the fair share condition.

**Market definition:** Pharmaceutical markets are typically defined by therapeutic class (ATC classification) rather than by broader product categories. The Commission will assess substitutability between products within the same therapeutic class, having regard to clinical efficacy, side-effect profiles, and prescribing practices.

## 4. Agriculture

### 4.1 Market characteristics

The Nigerian agricultural sector is characterised by: fragmented production (millions of smallholder farmers); limited processing capacity; poor post-harvest infrastructure (storage, cold chain, transport); seasonal supply variability; government intervention (marketing boards, price stabilisation, import restrictions); and significant informal-sector activity.

### 4.2 Types of agreement likely to arise

**Purchasing cooperatives:** Groups of buyers (processors, exporters) agree to purchase jointly from farmers, negotiating collective prices and terms. These may restrict competition among buyers but can produce significant efficiencies: guaranteed offtake for farmers (reducing waste and uncertainty); collective investment in storage and processing infrastructure; and quality standardisation. The Commission anticipates issuing a Block Exemption Notice for purchasing cooperatives subject to market share thresholds.

**Exclusive offtake agreements between processors and farmer cooperatives:** A processor agrees to purchase exclusively from a specified cooperative, and the cooperative agrees not to sell to competing processors. This is a vertical exclusive dealing arrangement. Where the processor is dominant in the relevant processing market, the dual characterisation principle applies. The Commission will assess: whether the exclusivity provides the cooperative with a guaranteed market (benefiting farmers); whether competing processors are foreclosed from raw material access; and whether the exclusivity is time-limited and geographically bounded.

(a) **Supply chain coordination agreements:** Multiple actors along the supply chain (input suppliers, farmers, aggregators, processors, distributors) coordinate their activities through formal arrangements. These may involve vertical restraints (exclusive supply, resale price maintenance, territorial restrictions) but may also produce significant allocative efficiencies by reducing waste, improving quality, and connecting fragmented producers to formal markets.

### 4.3 Sector-specific analytical considerations

(a) **Statutory and regulatory interface:** Agricultural markets in Nigeria are subject to extensive statutory and regulatory intervention, including commodity marketing arrangements, cooperative societies legislation, and export promotion schemes. The interaction between these regulatory frameworks and the Act requires careful analysis:

*i.* *Statutory marketing boards exercising statutory functions.* Where a statutory body (such as a commodity board established by legislation) exercises powers conferred upon it by its enabling statute — including the power to fix prices, allocate quotas,

or designate approved buyers — the threshold question is whether the body's conduct constitutes "an agreement between undertakings" within the meaning of section 59 at all. A statutory body acting in the exercise of regulatory or public administrative functions is not ordinarily an "undertaking" engaged in economic activity for the purposes of Part VIII. However, where a statutory body engages in commercial activity in competition with private undertakings — for example, by trading in commodities on its own account — it may be subject to the Act to the extent of that commercial activity.

ii. *Farmer cooperatives structured as non-corporate partnerships.* Where a farmer cooperative or producer group is structured as a partnership in which none of the partners is a body corporate, arrangements among the partners relating to the terms of the partnership, the conduct of the partnership business, or competition between the partnership and a departing partner may fall within section 68(1)(d) of the Act. This may be relevant to smallholder cooperatives that pool production, coordinate marketing, or agree on minimum quality standards. The exception does not apply where any partner is a body corporate, and does not extend to provisions that go beyond partnership terms — for example, an agreement among cooperative members to fix prices for sales to third parties must be assessed under section 59.

iii. *Collective bargaining for agricultural workers.* Arrangements for collective bargaining on behalf of employers and employees in the agricultural sector for the purpose of fixing minimum terms and conditions of employment fall within section 68(1)(b). This covers, for example, collective agreements between agricultural estates and farmworkers' unions setting minimum wages, seasonal employment terms, and working conditions.

iv. *Other agricultural arrangements.* Purchasing cooperatives, exclusive offtake agreements, supply chain coordination agreements, and other agricultural arrangements that do not fall within any of the categories above are subject to the ordinary competition law framework under sections 59 and 60 of the Act. The Commission recognises that such arrangements may produce substantial efficiencies — guaranteed offtake reducing waste, collective investment in storage and processing infrastructure, quality standardisation facilitating access to export markets — and will assess efficiency claims with due regard to the particular characteristics of agricultural markets, including seasonal supply variability, perishability, and the fragmented structure of smallholder production.

(b) **Pass-on assessment:** In agricultural markets, pass-on analysis is complicated by the dual role of farmers — they are both producers (upstream) and, in many contexts, consumers (downstream, purchasing inputs). The Commission will assess pass-on at both levels: are efficiency gains passed on to final consumers (retail food prices)? And do farmers benefit from guaranteed offtake, reduced price volatility, or improved access to inputs?

(c) **Market definition:** Agricultural markets often have distinct regional dimensions due to transport infrastructure and perishability. The Commission will define geographic markets having regard to: road conditions and transport costs; seasonal variation in supply; and the reach of informal versus formal distribution networks.

(d) **Environmental efficiency:** Agreements that reduce food waste, improve post-harvest storage, or promote climate-resilient farming practices may produce environmental efficiencies that the Commission will take into account under Regulation 3(3), provided they are objectively substantiated.

## 5. FMCG (Fast-Moving Consumer Goods)

### 5.1 Market characteristics

The Nigerian FMCG sector is characterised by: high brand concentration (a small number of multinational and domestic producers hold significant shares in most FMCG categories); extensive distribution networks (from modern trade to traditional trade, open markets, and kiosk distribution); significant marketing and advertising expenditure; brand loyalty and switching costs; and intense competition on price, promotion, and product availability.

### 5.2 Types of agreement likely to arise

(a) **Exclusive distribution agreements:** A manufacturer appoints a single distributor for a territory or customer segment. In the FMCG sector, exclusivity can produce efficiencies (investment in distribution infrastructure, cold-chain maintenance, merchandising support) but can also foreclose competing distributors from access to a significant product line.

(b) **Category management agreements:** A leading manufacturer agrees with a retailer to manage the entire product category (including competitors' products) within the retailer's store, in exchange for preferred shelf positioning. The Commission will assess whether the arrangement gives the manufacturer the ability to disadvantage competitors' products and whether it restricts the retailer's freedom to make independent purchasing decisions.

(c) **Joint purchasing agreements:** Competing retailers or wholesalers agree to purchase jointly from manufacturers to obtain volume discounts. These may produce allocative efficiencies (lower input costs, leading to lower retail prices) but may also facilitate information exchange and coordination on retail pricing. The Commission will assess: the combined purchasing share of the parties; whether the agreement includes safeguards against information exchange on downstream pricing; and whether the cost savings are passed on to final consumers.

**5.3** Sector-specific analytical considerations

(a) **Market definition:** FMCG markets are typically defined by product category (e.g. "packaged flour," "carbonated soft drinks," "bar soap"), not by broader groupings (e.g. "food products" or "personal care"). The Commission will assess substitutability within categories using consumer switching data, pricing data, and the SSNIP test.

(b) **Pass-on assessment:** The FMCG sector's competitive distribution landscape (multiple channels, intense price competition at the retail level) generally facilitates pass-on. However, where a manufacturer holds a dominant position in a product category, the pass-on rate may be lower because retailers have fewer alternatives and less bargaining power. The Commission will assess pass-on by reference to the actual competitive conditions at each level of the supply chain.

(c) **Indispensability:** In FMCG distribution, the Commission applies a heightened indispensability standard. This is because the FMCG sector typically offers multiple commercially viable distribution models (exclusive, selective, open). An applicant claiming that exclusivity is indispensable must demonstrate why selective distribution or performance-based incentive contracts would not achieve comparable efficiencies.

(d) **Foreclosure assessment:** The Commission applies portfolio foreclosure analysis: if a dominant manufacturer implements exclusive distribution across multiple product categories, the cumulative foreclosure effect on distributors may be greater than the effect of exclusivity in any single category. The Commission will assess the cumulative impact of the manufacturer's distribution strategy across all product categories.

## ANNEXURE 3

## PRACTICAL CHECKLIST FOR APPLICANTS

- □ Have you quantified efficiency gains in monetary terms (₦ millions) or percentages with absolute baselines?
- □ Have you demonstrated that efficiency gains are "real" (verifiable through independent sources) rather than theoretical?
- □ Have you provided historical cost data showing cost reductions in similar operations or pilot programs?
- □ Have you distinguished between productive, allocative, and dynamic efficiency?
- □ Have you addressed how efficiencies will be measured and monitored post-authorisation?
- □ Have you identified less restrictive alternatives and explained why they are insufficient?
- □ Have you demonstrated that the specific restrictions (not merely the agreement) are necessary?
- □ Have you provided evidence that restricting conditions are proportionate (not excessive)?
- □ Have you specified the period for which restrictions are necessary (e.g., 3 years for investment payback)?
- □ Have you quantified consumer price reductions or quality improvements?
- □ Have you identified the consumer segments benefiting and assessed whether benefits are market-wide?
- □ Have you explained how cost efficiencies at the business level translate to final consumer benefits?
- □ Have you provided timelines for when consumers will experience benefits?
- □ Have you assessed whether the agreement eliminates competition (merger-like concerns)?
- □ Have you evaluated entry barriers and whether the agreement exacerbates them?
- □ Have you analysed market concentration (HHI — Herfindahl-Hirschman Index) before and after the agreement?
- □ Have you provided counterfactual analysis comparing market conditions with and without the agreement?
- □ Have you submitted both confidential and non-confidential versions?
- □ Have you explained each confidentiality claim with specific reference?

- □ Have you provided all supporting documentation (market studies, financial models, consumer surveys)?
- □ Have you included an Efficiency Justification Report covering all sections?
- □ Have you verified that all four cumulative conditions under Section 60 FCCPA are met?
- □ Have you reviewed the Commission's latest guidance on restrictive agreements?
- □ Have you obtained expert legal or economic opinion to support your submission?
- □ Have you prepared for potential follow-up questions from the Commission?

## ANNEXURE 4

## ILLUSTRATIVE CASE STUDIES

### Case Study 1

### Approved Exemption — Cement Industry

### Background

MegaCem Ltd., a dominant cement producer in Nigeria with approximately 45% of the national cement market, entered into a joint production and distribution agreement with two regional manufacturers — NigerCem Plc (15% market share) and BuildRight Ltd (10% market share). The agreement involved:

(a) **Production rationalisation:** The parties consolidated output into two modern, high-efficiency plants, decommissioning four older kilns.

(b) **Joint distribution network:** The parties established a single centralised logistics network, replacing three independent transport fleets.

(c) **Exclusivity clause:** Each party agreed not to distribute competing cement brands in the jointly operated markets for the duration of the agreement.

The combined post-agreement market share of the parties was approximately 70%.

### Market Definition and Competitive Assessment

The Commission defined the relevant product market as *ordinary Portland cement* (OPC), excluding speciality cements. The geographic market was defined as *national*.

**Pre-agreement market structure:**

| Producer | Market Share | HHI Contribution |
|---|---|---|
| MegaCem | 45% | 2,025 |
| NigerCem | 15% | 225 |
| BuildRight | 10% | 100 |
| Others (fragmented) | 30% | ~180 (est.) |
| **Total HHI** | | **~2,530** |

**Post-agreement structure:**

| Entity | Market Share | HHI Contribution |
|---|---|---|
| JV (MegaCem + NigerCem + BuildRight) | 70% | 4,900 |
| Others (fragmented) | 30% | ~180 |

| | | |
|---|---|---|
| **Total HHI** | | **~5,080** |
| **Delta (change in HHI)** | | **~2,550** |

The post-agreement HHI of approximately 5,080 and the delta of approximately 2,550 indicate a highly concentrated market with a very significant increase in concentration. This would ordinarily raise serious competition concerns. The exemption was granted only because the efficiency gains were exceptional and demonstrably passed on to consumers.

**Efficiency Analysis**

**(a) Productive efficiency**

The applicant provided engineering reports showing that the two modern plants had thermal efficiency ratings of 85%, compared to 55--65% for the decommissioned kilns. Financial models showed ₦12 billion annual cost savings (verified by independent audit), with unit costs falling from ₦28,500 per tonne to ₦24,200 per tonne — a 15% reduction.

The Commission was satisfied that these were genuine productive efficiencies — not cost savings from reduced competition, but from the elimination of technologically obsolete capacity and the exploitation of economies of scale.

**(b) Allocative efficiency**

The applicant provided logistics analysis showing that the consolidated fleet reduced average delivery distance by 35% and delivery cost by 30%. Market studies demonstrated a 20% reduction in price volatility in regions served by the joint distribution network, with mean delivery time falling from 14 days to 6 days.

The Commission applied a pass-through analysis. Given competitive conditions in regional markets (where the JV faced residual competition from imports and from fringe producers), the Commission estimated a pass-through rate of approximately 60--70%. At a 15% unit cost reduction and 65% pass-through rate, the expected consumer price reduction was approximately 10%, or ₦2,800 per tonne.

**(c) Dynamic efficiency**

The applicant provided a binding ₦5 billion R&D investment commitment, engineering feasibility study for new cement formulations using locally sourced pozzolanic materials, and environmental impact assessment projecting a 30% reduction in $CO_2$ emissions from the modern plants.

**(d) Indispensability**

The Commission assessed whether the efficiencies could be achieved without the exclusivity clause. It found that: the production rationalisation required coordinated decommissioning of four plants, which no single party could achieve independently; the joint distribution network required shared investment of ₦8 billion in logistics infrastructure, which was commercially viable only with guaranteed volume from all three parties; and the exclusivity clause was necessary to ensure that each party channelled its full volume through the joint network, thereby achieving the economies of scale on which the cost savings depended.

**(e) No elimination of competition**

Despite the 70% combined share, the Commission found that: imports (approximately 8% of the market) provided a competitive constraint, particularly in coastal regions; fringe domestic producers (22% combined) were capacity-constrained but could expand with investment; and the five-year duration of the agreement, combined with the sunset review provision, limited the risk of permanent market foreclosure.

**Decision**

Exemption granted for five years, subject to conditions: independent price monitoring by a Commission-appointed auditor; annual compliance reporting; obligation to supply fringe distributors on fair and non-discriminatory terms; and mandatory sunset review at Year 3 to assess whether competitive conditions had changed.

**Case Study 2**

**Rejected Exemption — FMCG**

1.Background

FastGro Distributors Ltd (FastGro), a wholesale distributor with approximately 25% of the FMCG wholesale market in Lagos, applied for exemption of an exclusive supply agreement with FreshPak Ltd, a producer of packaged foods with approximately 35% of the packaged foods retail market.

Under the agreement: FreshPak would supply only through FastGro as its exclusive wholesale distributor; competing distributors would be barred from purchasing FreshPak products directly; retailers could source FreshPak products only from FastGro; and FastGro would invest in a new logistics network to improve rural availability.

**1. Economic Analysis**

(a) **Productive efficiency — rejected**

FastGro claimed that exclusivity would "optimise logistics and supply chain costs." However:

- No financial model or cost-benefit analysis was provided. The applicant submitted general assertions about "streamlined operations" without quantification.
- The Commission's own analysis found that any claimed cost savings (approximately ₦800 million per year) were attributable to warehouse management improvements that could be achieved without exclusivity.

**Conclusion:** The efficiencies were not proven to be caused by the restriction and could have been achieved through non-restrictive means.

(b) **Allocative efficiency — rejected**

FastGro argued that exclusivity would lead to "better inventory management and stable retail prices." However:

- The Commission's economic analysis showed that restricting FreshPak's distribution to a single wholesaler would *reduce* inter-brand and intra-brand competition at the wholesale level, leading to higher wholesale margins.
- Using a simple mark-up model: if wholesale margins increased from 12% to 18% (due to the elimination of competing distributors), and the retail pass-through rate was approximately 80%, consumer prices for FreshPak products would increase by approximately 4.8%.

**Conclusion:** The claimed consumer benefit was not substantiated. Consumers were net losers.

**(c) Dynamic efficiency — rejected**

FastGro claimed that exclusivity would incentivise investment in rural distribution infrastructure. However:

- No binding investment commitment was provided. FastGro submitted a "business plan outline" but no Board resolution, no capital allocation, no construction timetable, and no performance milestones.
- The Commission found that FreshPak could partner with multiple distributors to achieve rural market penetration, using volume-based incentive contracts rather than exclusivity.

**Conclusion:** Investment incentives were not dependent on the restriction, and FreshPak could achieve rural market penetration through alternative, less restrictive arrangements.

(d) **Indispensability — rejected**

The Commission identified several less restrictive alternatives:

- *Non-exclusive distribution with volume incentives*: FastGro could receive preferential pricing or rebates based on volume targets, incentivising investment without foreclosing competitors.
- *Selective distribution*: FreshPak could select a limited number of quality-assured distributors (including FastGro) without granting exclusivity to any single one.
- *Performance-based exclusivity*: If exclusivity were genuinely necessary, it could be limited to specific geographic areas (e.g. rural regions where FastGro proposed to invest) rather than applied nationally.

**Conclusion:** The restriction was not indispensable and failed the necessity test under Section 60(b) FCCPA.

(e) **No elimination of competition — serious concern**

- The exclusive arrangement would foreclose approximately 35% of the packaged foods wholesale market (FreshPak's share of retail sales, channelled exclusively through FastGro).
- Competing wholesalers would lose access to a major product line, reducing their viability and potentially forcing exit.
- Retailers dependent on FreshPak products would have no choice but to purchase from FastGro, increasing FastGro's buyer power and potentially leading to foreclosure in adjacent product categories.

**Conclusion:** The agreement would substantially foreclose competition in the wholesale market and could contribute to the elimination of effective competition.

**Decision: Application rejected.**

**FastGro directed to modify its distribution strategy.**

**FreshPak advised to consider non-exclusive or selective distribution models.**

**Comparison Table**

| Criterion | Approved (MegaCem) | Rejected (FastGro) |
|---|---|---|
| **Nature of efficiency** | Cost savings from economies of scale in production and logistics | Claimed operational savings from warehouse management |
| **Causal link** | Efficiencies directly resulted from the collaboration agreement | No connection between exclusivity and claimed savings |
| **Quantification** | Detailed financial models, ₦12bn annual savings, independent audit | Generic statements without concrete data or modelling |
| **Timeframe** | Expected within 18 months, with monitoring mechanisms | Projected only after 5 years, with no interim benefits |
| **Consumer benefit** | Lower prices (10% reduction), improved rural availability | Higher consumer prices expected (4.8% increase) |
| **Competition impact** | Market remains contestable (imports, fringe producers) | Near-monopoly in wholesale; foreclosure of competitors |
| **Indispensability** | No viable less restrictive alternative at comparable scale | Multiple less restrictive alternatives identified |
| **Transparency** | Full disclosure, independent verification | Crucial market data withheld; no independent validation |
| **Final Decision** | **Authorisation Granted** — satisfies all four conditions with conditions | **Authorisation Rejected** — insufficient evidence and excessive restrictions |

## ANNEXURE 5
## EFFICIENCY JUSTIFICATION REPORT TEMPLATE

**Submitted to the Federal Competition and Consumer Protection Commission**
**Date of Submission:** [DD/MM/YYYY]
**Applicant(s):** [Company Name(s)]
**Reference No:** [FCCPC Assigned Number]

### SECTION 1: EXECUTIVE SUMMARY

1. Brief description of the agreement or conduct requiring authorisation, including:
   (a) Parties involved and their market positions;
   (b) Nature of restrictions (e.g., exclusivity, production coordination, joint distribution);
   (c) Duration and geographic scope.

2. Overview of claimed efficiencies:
   (a) Productive efficiency (cost reductions, economies of scale);
   (b) Allocative efficiency (market access, price stability);
   (c) Dynamic efficiency (innovation, R&D investment).

3. Summary of key evidence supporting efficiency claims:
   (a) Quantified efficiency gains (monetary values, not percentages alone);
   (b) Market share data and competitive impact assessment;
   (c) Consumer benefit projections.

4. Expected consumer benefits and competitive impact:
   (a) Projected price reductions or quality improvements;
   (b) Enhanced product availability;
   (c) Impact on market competition and entry barriers.

### SECTION 2: DESCRIPTION OF THE AGREEMENT

#### 1. Parties Involved

(a) Name, location, and market position of participating undertakings:

- Size (turnover, employee count);
- Market share in relevant markets;
- Competitive relationship (are parties competitors?).

(b) Nature of the business activities involved:
- Products/services provided;
- Distribution channels;
- Geographic markets served.

## 2. Market Context

(a) Relevant market(s) affected by the agreement:
- Product market definition (using SSNIP test methodology);
- Geographic market scope (local, national, international);
- Market size and growth trends.

(b) Market share analysis of parties involved:
- Individual market shares;
- Combined market share post-agreement;
- Comparison to block exemption thresholds (10%, 15%, 30%).

(c) Competitive landscape and market dynamics:
- Number and size of competitors;
- Entry barriers (regulatory, financial, technological);
- Historical price and output trends.

## 3. Terms and Scope of the Agreement

(a) Nature of restrictions:
- Exclusive dealing, territorial restrictions, pricing coordination, production limitations;
- Duration and renewal terms;
- Exit provisions and termination conditions.

(b) Duration and geographic scope of the agreement:
- Term length (3 years, 5 years, indefinite);
- Renewal mechanisms;
- Geographic application (Nigeria, West Africa, global).

(c) Justification for restriction(s) and expected efficiencies:
- Why each restriction is necessary;

- How restrictions enable efficiency gains;
- Counterfactual scenarios (market structure without restrictions).

## SECTION 3: EFFICIENCY CLAIMS AND JUSTIFICATION

### 1. Type of Efficiencies Claimed

(a) Applicants should specify which categories of efficiency are claimed:

- **Productive Efficiency:** Reduction in production costs, economies of scale, operational efficiencies, logistics improvements;
- **Allocative Efficiency:** Better resource allocation, improved consumer access, price stability, supply chain coordination;
- **Dynamic Efficiency:** Innovation, R&D investments, product improvements, technological advancement.

### 2. Direct Link Between Agreement and Efficiencies

(a) Explanation of how the agreement causes the claimed efficiencies:

- Mechanism by which cooperation generates benefits;
- Economies of scale or specialisation gains;
- Cost reductions through integration.

(b) Evidence demonstrating why these efficiencies would not occur without the agreement:

- Cost projections for independent operation;
- Barriers to unilateral action (capital requirements, infrastructure investment);
- Market structure analysis showing cooperation is necessary.

(c) Consideration of less restrictive alternatives and justification for indispensability:

- Identification of potential less restrictive arrangements;
- Explanation of why alternatives are insufficient;
- Proportionality analysis (restrictions are not excessive relative to benefits).

### 3. Quantification and Measurement of Efficiencies

| Efficiency Type | Key Metrics | Supporting Evidence | Expected Realisation Timeframe |
|---|---|---|---|
| **Productive Efficiency** | % cost reduction in production, economies of scale, unit cost decrease | Cost-benefit analysis, financial modelling, operational reports, | [X months/years] |

| | | | |
|---|---|---|---|
| | | benchmark comparisons | |
| **Allocative Efficiency** | Lower consumer prices, improved product availability, supply consistency | Pricing studies, consumer surveys, supply chain analysis, market data | [X months/years] |
| **Dynamic Efficiency** | R&D investment, new product introduction, patents filed, time-to-market reduction | R&D expenditure records, patent filings, technology roadmaps, innovation metrics | [X months/years] |

## SECTION 4: CONSUMER IMPACT ANALYSIS

1. **Fair Share for Consumers**

(a) Expected benefits for consumers in terms of:
- Price reductions (quantified in monetary terms, not percentages alone);
- Quality improvements (measurable attributes);
- Availability enhancements (geographic coverage, product variety).

(b) Demonstration that efficiencies outweigh any potential anti-competitive effects:
- Competitive harm assessment (price increases, reduced choice, foreclosure risks);
- Net consumer welfare calculation (benefits minus harms);
- Comparison of market structure with and without the agreement.

(c) Comparative analysis of market conditions with and without the agreement:
- Counterfactual scenario: independent operation;
- Pricing, output, innovation in counterfactual vs. proposed agreement;
- Consumer welfare metrics for each scenario.

**2. Potential Negative Effects and Mitigation Measures**

(a) Identification of any potential harm to consumers:
- Price increases or supply reductions;
- Reduced competition or market foreclosure;
- Innovation dampening;
- Reduced consumer choice.

(b) Steps taken to mitigate or offset negative effects:
- Pricing transparency commitments;
- Innovation guarantees or R&D investment commitments;

- Non-discrimination commitments (ensuring fair access for competitors);
- Sunset clauses limiting duration of restrictions.

## SECTION 5: COMPETITIVE IMPACT ASSESSMENT

### 1. Market Structure and Competition Analysis

(a) Market concentration:
- Herfindahl-Hirschman Index (HHI) before and after the agreement;
- Market share distribution among competitors;
- Changes in competitive dynamics.

(b) Entry barriers and market shares:
- Regulatory barriers (licensing, permits);
- Financial barriers (capital requirements);
- Technological barriers (R&D cycles, patent protection);
- Structural barriers (switching costs, network effects).

(c) Impact of agreement on competitors and potential new entrants:
- Does the agreement foreclose competitor market access?
- Are there exclusive arrangements preventing entry?
- Are there discriminatory pricing or supply terms?

### 2. No Elimination of Competition

(a) Demonstration that the agreement does not eliminate competition in a substantial part of the market:
- Identification of surviving competitors;
- Viability of competitive alternatives;
- Absence of market-sharing or collusive arrangements.

(b) Evidence of sufficient remaining competition:
- Number and size of remaining competitors;
- Countervailing buyer power (retailers' ability to negotiate);
- Threat of entry (are barriers surmountable?);

- Potential for new competitive strategies by rivals.

## SECTION 6: COMPLIANCE WITH REGULATORY REQUIREMENTS

### 1. Consistency with Section 60 FCCPA

Confirmation that all four cumulative conditions are met:

(a) **Condition 1:** Agreement improves production or distribution or promotes technical or economic progress? [YES/NO]

(b) **Condition 2:** Consumers receive a fair share of benefits? [YES/NO]

(c) **Condition 3:** Restrictions are indispensable to achieving efficiencies? [YES/NO]

(d) **Condition 4:** Agreement does not eliminate competition? [YES/NO]

### 2. Consistency with Section 72(3) FCCPA (for Dominant Firm Conduct)

If applicable, confirmation that conduct satisfies the four cumulative conditions for pro-competitive justification:

(a) **Efficiency Gains:** Real, substantial, and quantifiable? [Specify gains with evidence.]

(b) **Indispensability:** Is the conduct necessary to achieve those efficiencies? [Explain and address less restrictive alternatives.]

(c) **Efficiency vs. Anti-Competitive Effects:** Do efficiency gains outweigh anti-competitive effects? [Quantify both sides.]

(d) **No Elimination of Competition:** Does the conduct eliminate competition in the relevant market? [Provide market structure analysis.]

### 3. Additional Regulatory Considerations

(a) Compliance with sector-specific regulations (if applicable):
- Healthcare, pharmaceuticals, telecommunications, banking regulations;
- Data protection, environmental, labour law implications.

(b) Any prior regulatory approvals obtained for similar agreements:
- Previous FCCPC decisions on comparable arrangements;
- International competition authority guidance (EU, UK, US) on analogous agreements;
- Relevant case law and jurisprudence.

## SECTION 7: CONCLUSION AND REQUEST FOR AUTHORISATION

1. Summary of key points and justification for authorisation:
   (a) Recap of efficiency gains, consumer benefits, and competitive impact;
   (b) Explanation of why all Section 60 conditions are met;
   (c) Distinction from agreements that would be prohibited.

2. Affirmation that the agreement meets all legal and evidentiary requirements:
   (a) Confirmation that all documentation is complete;
   (b) Statement that applicant is prepared for further Commission inquiries.

3. Formal request for authorisation under Section 60 FCCPA and/or Section 72(3):
   (a) Duration of requested authorisation (e.g., 5 years);
   (b) Any proposed conditions or monitoring obligations;
   (c) Contact details for further communication.

**Signed by:**
[Name of Applicant Representative]
[Designation]
[Company Name]
[Contact Information: Tel, Email, Address]

### ANNEXURES (SUPPORTING DOCUMENTATION)

(d) Market analysis reports (defining relevant markets, SSNIP test results);
(e) Financial impact assessments (cost-benefit analyses, projections);
(f) Consumer surveys and pricing data (evidence of consumer benefits);
(g) R&D expenditure records (innovation and technology development);
(h) Patent filings and innovation reports (evidence of dynamic efficiency);
(i) Independent expert reports (economist assessments, technical evaluations);
(j) Board minutes and internal documents (contemporaneous evidence of agreement purposes);
(k) Comparative market studies (benchmarking against comparable agreements in other jurisdictions);
(l) Any other relevant supporting documents.