



# Understanding *Price Fixing* and *Concerted Action* Among Competitors

Under the Federal Competition and Consumer Protection Act

**AELEX**

LEGAL PRACTITIONERS & ARBITRATORS

# Introduction

In recent years, competition law has become increasingly important in regulating market behaviour and ensuring fair competition among businesses. One of the critical areas that competition laws address is concerted action among competitors, including price-fixing which can harm consumers, stifle innovation, and distort market dynamics.

Price fixing and concerted action among competitors are critical issues that have significant implications for market competition and consumer welfare. In Nigeria, these practices are governed by the Federal Competition and Consumer Protection Act, 2018 (FCCPA), which aims to promote fair competition, protect consumers, and foster economic growth. This article explores the concept of price fixing and concerted action, and their implications under the FCCPA, shedding light on the legal framework and enforcement mechanisms in place.

## Overview of Price Fixing and Concerted Action

Concerted action refers to collaborative efforts or agreements among competitors to coordinate their behaviour in a manner that restrains competition. Unlike unilateral actions driven by individual market players, concerted action involves coordination or communication among competitors, often leading to anti-competitive outcomes. Some common forms of concerted action include:

- **Price Fixing:** an agreement among competitors to set prices at a certain level, eliminating competitive pricing and consumer choice.
- **Market Division:** an agreement among competitors to divide markets or territories, allocating customers or geographic areas among themselves to avoid competition.
- **Output Limitation:** agreements to restrict production, supply, or output levels, artificially controlling market supply and prices.
- **Bid-Rigging:** collusive practices in competitive bidding processes, manipulating bids to ensure predetermined outcomes and thwart genuine competition.

## Understanding Price Fixing

As previously stated, price fixing refers to an agreement or concerted action among competitors to set prices, terms, or conditions of sale, thereby eliminating competition and artificially inflating prices. It can take various forms, such as:

- **Horizontal,** where competitors at the same level of the supply chain, such as rival companies, collaborate to set prices, terms, or conditions of sale.
- **Vertical,** involving different levels of the supply chain, such as manufacturers and retailers, setting resale prices or imposing price restrictions on downstream partners.
- **Resale Price Maintenance** whereby suppliers dictate the prices at which their products must be resold by retailers or distributors.
- **Collusive Tendering and Bid-Rigging,** where competitors coordinate bids or agree not to compete genuinely, resulting in distorted bidding outcomes and potential harm to procurement processes.
- **Information Sharing** which entails the exchange of sensitive pricing information, leading to a coordinated approach in setting prices or aligning pricing strategies.
- **Hub-and-Spoke Price Fixing** which involves a central entity (the hub) facilitating agreements or exchanges of information among multiple competitors (the spokes), leading to coordinated pricing strategies that mimic price-fixing behaviour.

## Implications of Price Fixing

Price fixing and any other form of concerted action among competitors has profound negative consequences for markets, consumers, and the overall economic welfare. Some of these consequences include:

- **Reduced Competition and Consumer Harm:** Colluding competitors eliminate the benefits of competitive pricing, leading to higher prices, reduced innovation, limited choices and diminished quality of goods or services, depriving consumers of the benefits of competitive pricing and innovation.
- **Market Distortion:** Price fixing distorts market signals, hampers efficient allocation of resources, and stifles market entry for new competitors, hindering economic growth and development.
- **Legal and Reputational Risks:** Companies engaged in price fixing face severe legal consequences, including hefty fines, damages claims, and reputational damage that can tarnish their brand image.

Under the FCCPA, specifically Sections 89 and 90, price fixing, bid-rigging, and other anti-competitive agreements are expressly prohibited. The Act defines price fixing as agreements or concerted practices aimed at fixing, controlling, or maintaining prices, or determining the conditions of sale. Similarly, concerted action includes agreements between competitors to divide markets, allocate customers or territories, or restrict production or supply.

The FCCPA empowers the Federal Competition and Consumer Protection Commission (FCCPC) to investigate and penalise companies engaged in price fixing or concerted action. Penalties for such violations include fines, nullification of agreements, and potential

imprisonment for individuals involved. The Act also provides leniency programs for whistleblowers who report anti-competitive practices, encouraging cooperation with enforcement authorities.

Aside from the FCCPA, competition laws in various jurisdictions, including the Sherman Antitrust Act in the United States and Article 101 of the Treaty on the Functioning of the European Union (TFEU), expressly prohibit price fixing and impose stringent penalties on violators.

## Distinguishing Non-Price-Fixing Price Changes

While competition law prohibits price-fixing practices, legitimate price changes that do not constitute price fixing are permissible. They encompass a range of practices such as:

- **Independent Price Adjustments:** When companies independently and unilaterally adjust their prices in response to market conditions, cost fluctuations, demand-supply dynamics, or competitive pressures without engaging in coordinated behaviour with competitors.
- **Competitive Pricing Strategies:** Price adjustments made by companies in response to genuine competition, market forces, or changes in consumer preferences, provided there is no collusion or agreement with competitors to fix prices or reduce competition.
- **Promotional Pricing:** Temporary price reductions, discounts, or promotional offers aimed at attracting customers, clearing excess inventory, or boosting sales, as long as such pricing strategies do not involve anti-competitive agreements with competitors.
- **Dynamic Pricing:** Utilizing dynamic pricing algorithms or strategies to adjust prices based on real-time market data, demand elasticity, or personalized pricing models, provided there is no collusion with competitors to fix prices.
- **Market Responses to External Factors:** Price adjustments in response to external factors such as changes in taxes, tariffs, raw material costs, exchange rates, or regulatory requirements, as long as these changes are made independently and not as part of a concerted anti-competitive effort.

## Recent Pricing Changes in the Aviation Industry

The expansion of operations by Air Peace, a prominent Nigerian airline, marked by its launch of a direct flight route from Lagos to Gatwick, London, has stirred up a wave of competition within the aviation sector. This heightened competition has resulted in decreased prices and increased options for consumers. Nonetheless, concerns have arisen regarding potential antitrust activities among existing players on the Lagos-London route. Allegations of price-fixing or concerted action among existing players to frustrate Air Peace's operations have raised red flags under competition law.

When evaluating what constitutes price-fixing activity, it is imperative to differentiate between legitimate competitive behaviour, such as market-driven price competition, and anti-competitive practices aimed at unfairly stifling competition. For instance, while it is acceptable for competitors to independently adjust prices in response to Air Peace's market entry as a commercial strategy, concerted actions aimed at collectively undermining Air Peace's market presence would likely violate competition law.

The consequences of violating competition law under the FCCPA are significant. In enforcing competition law, the FCCPC employs various tools, including market inquiries, investigations, and collaboration with stakeholders to promote compliance and deter anti-competitive behaviour. The Act also encourages whistleblowing and provides incentives for reporting anti-competitive conduct, enhancing transparency and accountability in the market.

If the FCCPC finds evidence of price-fixing or collusion among airlines to thwart Air Peace's entry or expansion, it has the power to impose significant fines and corrective measures to restore competition and protect consumers' interests.

Companies found guilty of anti-competitive practices face fines of up to 10% of the preceding year's turnover, divestiture of assets, and injunctions. Individuals involved in anti-competitive conduct may also be subject to some penalties.

## Compliance and Risk Mitigation

Businesses operating in Nigeria must be aware of the legal provisions regarding price fixing and concerted action under the FCCPA. It is essential to have robust compliance programmes in place to ensure that employees and executives understand and adhere to competition law requirements.

This includes implementing internal controls, conducting regular trainings on competition law, and conducting internal audits to detect and prevent anti-competitive practices.

Risk mitigation strategies may include seeking legal advice when entering into agreements with competitors or suppliers, conducting due diligence on business partners to assess compliance with competition law, and adopting transparent pricing and procurement practices that promote competition and consumer choice.

## Conclusion

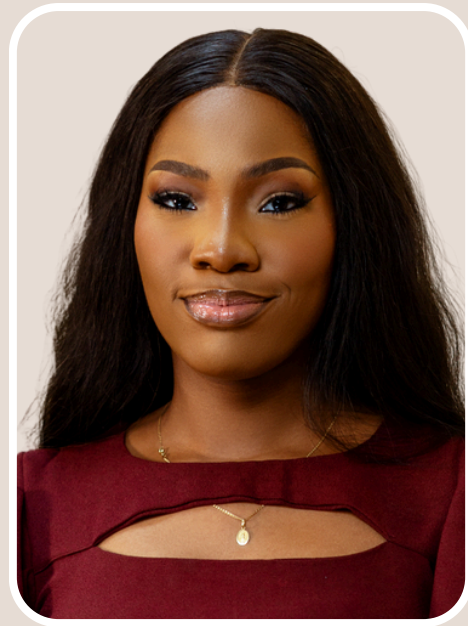
In conclusion, understanding the various forms of concerted action is necessary for businesses to ensure compliance with competition law and avoid engaging in anti-competitive behaviour. While competition authorities scrutinize price-fixing practices to preserve competition and protect consumer interests, legitimate price changes driven by market forces, independent decision-making, and competitive dynamics are essential for healthy market competition and economic efficiency. Businesses should adopt transparent pricing practices, comply with competition laws, and seek legal advice when navigating pricing strategies to maintain a fair and competitive market environment.

*Authors*



**Tiwalola  
Osazuwa**

Partner



**Onyinyechi  
Chima**

Senior Associate

# AELEX

LEGAL PRACTITIONERS & ARBITRATORS

## LAGOS, NIGERIA

4th Floor, Marble House  
1, Kingsway Road, Falomo  
Ikoyi, Lagos

**Telephone:** (+ 234 1) 2793367; 2793368,  
4736296, 4617321-3;

**Facsimile:** (+ 234 1) 2692072; 4617092

**E-mail:** lagos@aelex.com

## ABUJA, NIGERIA

4th Floor, Adamawa Plaza 1st Avenue, Off  
Shehu Shagari Way Central Business Area,  
FCT Abuja, Nigeria.

**Telephone:** (+234 9) 8704187, 6723568,  
07098808416

**Facsimile:** (+234 9) 5230276

**E-mail:** abuja@aelex.com

## PORT HARCOURT, NIGERIA

2nd Floor, Right Wing UPDC Building 26,  
Aba Road P.O. Box 12636, Port Harcourt  
Rivers State, Nigeria.

**Telephone:** (+234 84) 464514, 464515,  
574628, 574636

**Facsimile:** (+234 84) 464516, 574628

**E-mail:** portharcourt@aelex.com

## ACCRA, GHANA

Suite C, Casa Maria, 28 Angola Road, Kuku  
Hill, Osu GP Address 080-3525 Accra,  
Ghana

**Telephone:** (+233-302) 224828, 224845

**Facsimile:** (+233-302) 224824

**E-mail:** accra@aelex.com