

A review of the Excise Duty (Non-Alcoholic, Carbonated and Sweetened Beverages) Regulations, 2022



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Background

The Finance Act 2021 ("Finance Act") amended the Customs, Excise Tariffs, etc (Consolidated) Act, 2004 ("CETA") by introducing a new section 21(3) to CETA. This new subsection imposed an excise duty of N10 per litre on non-alcoholic, carbonated and sweetened beverages.

According to the Federal Government, the introduction of the excise duty is to discourage excessive consumption of sugar in beverages which contributes to a number of health conditions including diabetes and obesity. This excise duty, otherwise known as the "Sugar tax" was also introduced to generate revenues for health-related and other critical expenditures.

Even though the effective date of commencement of the Finance Act is January 2022, the implementation of this excise duty did not commence until 1 June 2022. On 12 September 2022, the Minister of Finance, Budget and National Planning, in exercise of the powers conferred by virtue of section 120 of the Customs and Excise Management Act 2004 ("CEMA"), signed a Regulation titled Excise Duty (Non-Alcoholic, Carbonated and Sweetened Beverages) Regulations, 2022 ("Regulations") for the effective administration of the excise duty.

This publication seeks to analyse the Regulations and its attendant implications.

Key Provisions of the Regulations

A. Objective and Commencement

The objective of the Regulations is to provide for the implementation of the excise duty on non-alcoholic, carbonated and sweetened beverages. The commencement date specified for this Regulation is 12th September 2022.

B. What amounts to a Chargeable Event?

The Regulations explained what amounts to a chargeable event. These include:

- manufacturing;
- Packaging;
- canning;
- bottling; or
- contracting another to do any of the above;
- importation of non-alcoholic beverages is a chargeable event when the beverage is first received at the Customs Control Area in Nigeria. It is not a chargeable event if the beverage is imported into a Free Zone Area.

C. Meaning of Non-Alcoholic, Carbonated and Sweetened Beverages

Non-alcoholic beverages have been defined in the Regulations to include:

- a beverage whose alcoholic strength by volume does not exceed 0.5%,
- Fruit or vegetable juice (whether or not they contain sugar or other sweetener),
- aerated water (which contains sugar or other sweetening or flavoured matter),
- energy drinks,
- malt,
- non-alcoholic beverages that are in powdered or solid form such as capsules or tablets,
- any beverage with added caloric sweetener for human consumption prepared with water or combined with crushed ice or processed to create crushed ice or combined with carbon dioxide or prepared by a process that combines all the earlier mentioned processes.

Carbonated beverage has been defined to include any beverage that contains dissolved carbon dioxide in carbonated water.

Sweetened beverage means beverages containing free sugar or caloric sweeteners such as sugar, sucrose, fructose, glucose, lactose, honey and other forms of monosaccharides and disaccharides.

The Regulations vests the Minister with the power to include other beverages not expressly mentioned as chargeable to the excise duty upon recommendation by the Comptroller-General or if there is reason to believe that a manufacturer altered its dilution ratio to avoid paying the excise duty on its beverage.

D. Exclusions

The following non-alcoholic beverages are not subject to the excise duty:

- i. Beverage for medical use such as oral nutritional therapy and any other beverage that meets the statutory definition of a medical food.
- ii. Infant or baby formula for infants not more than 12-month-old.
- iii. Water for human consumption excluding flavoured and carbonated water.
- iv. Natural milk or milk products that have the natural milk secreted by an animal forming at least 75% of the ingredients.
- v. Drinks prepared by mixing liquids and served in open containers such as cocktails.
- vi. A manufacturer of 5000 or less litres of non-alcoholic beverages in a calendar year shall not be required to pay excise duty on the beverages.

E. Person whose duty is to pay the excise duty

The manufacturer has the obligation to pay the excise duty. If the non-alcoholic beverage is manufactured by an agent whose principal is in Nigeria, the obligation to pay the excise duty rests on the Principal. However, if the Principal defaults or the Agent cannot show proof that the Principal has paid the duty, the Agent becomes liable to pay the duty before the goods are released into Nigeria.

A non-resident manufacturer or importer must register with the Nigeria Customs Service and appoint a fiscal representative in Nigeria for the purposes of excise duty.

F. Excise Duty filings

For non-alcoholic beverages manufactured or packaged in Nigeria, the excise duty is due monthly in arrears and payable on the 21st day of the month following the taxable period. If the date falls on a weekend or public holiday, it is payable on the working day immediately following the expiration of the weekend or public holiday.

For non-alcoholic beverages imported into Nigeria, the excise duty is due on the date the beverages are released from the Customs Control.

Manufacturers and importers are obligated to register with the Nigeria Customs Service no later than 30 June 2022. They are also to submit returns on the manufacture of non-alcoholic beverages monthly in prescribed forms given by the Comptroller General. The submission of returns is also the 21st day of the month following the taxable period.

The Regulations make defaulters and those who fail to pay the excise duty liable to sanctions as prescribed by section 160 of CEMA.

G. Prevention of oversupply of non-alcoholic beverages

Manufacturers and importers of non-alcoholic beverages are to submit a report of the inventory of dutiable goods held by them as at 31 May 2022 to

In a bid to prevent the oversupply of non-alcoholic beverages, the manufacturers and importers are mandated to:

- i. calculate the average daily value and volume of supply within the 12 -month period immediately preceding the introduction of the excise duty; and
- ii. not supply a value or volume that is greater than 30 times the total value or volume calculated in (i) in the 30-day period immediately preceding the commencement date of the Regulations.

Insights

I. The Regulations provide clarity on the implementation of section 21(3) of CETA. It has put an end to the debate around the meaning of non-alcoholic, carbonated and sweetened beverages. The Regulations make it clear that the Beverage does not have to meet the 3 conditions of non-alcoholic, carbonated and sweetened for the excise duty to apply. As such, it is sufficient where the drink is only non-alcoholic and sweetened (with sugar or other sweeteners). This also emphasises that revenue generation was more important for the government than the health-related objectives in introducing the tax. It also clarified the issue of what amounts to a chargeable event. The Regulation has clarified that the excise duty is applicable to manufacturers as well as packagers/canners and importers of non-alcoholic beverages.

II. Clarity has also been provided regarding the timing of filing returns and the non-requirement to post annual bonds, since they have not been contemplated under the existing regulation for alcoholic drinks and tobacco.

III. The inclusion of provisions to prevent the oversupply of non-alcoholic beverages is consistent with the Government's objective of ensuring that manufacturers of non-alcoholic beverages do not evade payment of the excise by oversupplying pre-commencement stock. However, the limit on what amounts to an oversupply is quite high, thus, the efficacy of achieving its objective is debatable.

IV. The exclusion of manufacturers of 5000 or less litres of non-alcoholic beverages also aligns with the government intention to support Small and Medium Scale Enterprises (SMEs).

V. The Regulations provide that "beverages intended to be mixed with alcoholic drinks, or sold in powdered, solid or concentrated form for consumption after dilution" are also subject to the excise duty. The Finance Act which introduced the excise duty speaks to imposing excise duty on the basis of litres, suggesting that the product should be in liquid form or at least a determinable dilution ratio. It may pose a challenge bringing these into the same bucket, since some beverages have no set dilution ratio and there is no process for the determination of a dilution ratio for purposes of charging the excise duty. It may be helpful to provide some guidance around determination of dilution ratio where not expressly provided or where government interference may be triggered in the determination of a dilution ratio.

VI. Another area of concern is the content of Regulation 2(2). The Minister relied on section 13 of CETA to impose a 10 naira per litre on non-alcoholic beverages manufactured or imported in Nigeria. Under the current Section 13 of CETA, the Minister of Finance does not have such power to impose an excise duty. It is the President of the Federal Republic of Nigeria who has the power to impose excise duty under the referenced section.

Also, the 10 naira per litre is already imposed by statute i.e. section 17 of the Finance Act which amended CETA by adding subsection 3 under section 21. It is therefore unnecessary to repeat the imposition of the excise duty.

VII. The Regulation has also taken a very narrow definition of milk to include only infant milk or animal related milk. Other healthy and more inclusive milk substitutes that are not medical food like almond and soya were not contemplated.

VIII. There are some dating errors in the Regulations which may impact the

implementation of the Regulations unless further clarification is provided. For example, Regulation 7 referenced the commencement date of the Regulations being 12th September 2022 but imposed a mandatory obligation on manufacturers and importers of the beverages to register with the Nigeria Customs Service no later than 30 June 2022. This is a factual impossibility. The same error was repeated in Regulation 8 regarding when manufacturers or importers are to provide a report of the inventory of dutiable goods held by them.

IX. We hope the above areas of concern can be addressed in subsequent amendments to the Regulations.

Key Takeaways

The publication of this Regulation, albeit 4 months after the commencement of the implementation of the excise duty in June 2022, is a step in the right direction bringing administrative clarity to all stakeholders. In furtherance of its intent towards sensitization of healthier alternatives and reduced sugar consumption, transition from the current flat rate to a graded excise regime based on sugar content and use of healthier sugar replacements should be considered by the Government.

Institution of educational campaigns and a framework for support of diabetic and obese citizens will provide a holistic approach towards the achievement of the goals of the Federal Government in this regard.

Furthermore, the absence of a special fund for payment of the excise means that the revenue collected will be paid into the Federation Account and shared among the tiers of government. With this, there is no guarantee that the revenue will be allocated or expended specially for health purposes.

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