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**Merger control in Nigeria. (Some) questions answers, concerns raised.**
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When the Nigerian legislator introduced a merger control regime in early 2019 substantial questions concerning its application and scope remained. Subsequently the Federal Competition and Consumer Protection Commission (FCCPC)–the Nigerian competition authority–took steps to further clarify the provisions of merger control regime. Still, to date material questions remain unanswered. The resulting ambiguity continues to pose significant issues for businesses with engagements in the country or transactions involving such businesses. This contribution seeks to highlight key issues that need to be considered by parties involved in relevant transactions and outlines first practical experiences we gained through our work with the FCCPC on merger control matters since the regime was introduced.

The Nigerian merger control regime was established in January 2019 when the Federal Competition and Consumer Protection Act (Competition Act) entered into force. Prior to the adoption of the Competition Act, merger control matters were not regulated in the country. Only a securities-based regulation of mergers and acquisitions existed under the Investment and Securities Act. According to announcements made in May 2019 by the FCCPC and the Securities and Exchange Commission the regime under the Investment and Securities Act would continue to apply for a transitional period until the new regime had been fully implemented through regulations and guidelines. While some guidelines have been issued in 2019 and more drafts of a merger control regulations and more comprehensive guidelines were published in March 2020, the transitional application of the Investment and Securities Act was to date not officially ended. We expect the new merger control regime to fully replace the regime under the Investment and Securities Act once the draft regulations and guidelines published in 2020 enter into force.

*Implementation of the merger control regime*

The FCCPC issued a number of instruments to facilitate the implementation of the Competition Act and the merger control regime provide for therein. In particular, in September 2019 the FCCPC adopted thresholds. Later that year the FCCPC issued guidelines on the extra territorial application of the merger control regime as well as an expedited and simplified procedure (Guidelines (2019)). In March 2020, the FCCPC published draft Merger Review Regulations (Regulations) and revised draft Merger Review Guidelines (Guidelines (2020)). While these guidelines and regulations provided welcome clarification on some issue, they raised questions about key aspects of the Nigerian merger control regime, such as its extra-territorial reach, filing fees and what constitutes control under the Nigerian merger control regime.

*Procedure*

The notification and review process was further clarified in the Regulations, which provide for pre-notification consultations, clarification on the substantive assessment as well as remedies. Pre-notification consultations–that may be held in person or digitally–shall serve to clarify matters regarding thresholds, calculation of relevant turnover and form requirements. Considering the remaining ambiguities concerning application of thresholds (see below) such pre-notification consultations are particularly relevant in foreign-to-foreign transactions.

In respect to the substantive merger assessment, the Regulations address fundamental issues such as the definition of the relevant market as well as some concepts that are less frequently considered in emerging merger control regimes. Unlike other regimes in the region the Regulations for example address countervailing buyer power–thus consider to which extend customers will be in a position to counter the increase in market power created by the transaction–and the failing firm argument–thus, the treatment of transactions involving entities that are losing market share.

Finally, the Regulations provides for the possibility of structural and behavioural remedies that would allow a problematic transaction to go forward. However, the Regulations do not go into detail on what these remedies may be. Accordingly, pending more detailed guidance, whether a remedy would be acceptable to the FCCPC will be determined on a case-by-case basis. Dedicated engagement of the FCCPC will be required.

*Thresholds*

In September 2019, the FCCPC adopted notification thresholds for the new merger control regime. Thresholds are based on turnover and differ depending on which parties to the transaction have turnover in Nigeria.

- Target leg – notification is required where the target has an annual turnover in Nigeria of at least NGN 500 million–approximately USD 1.3 million.

- Combined leg – notification is also required where the parties to the transaction have a combined annual turnover in Nigeria of NGN 1 billion–approximately USD 2.6 million–or more.

When assessing the turnover relevant for the thresholds the FCCPC will consider turnover accrued domestically in Nigeria as well as turnover accrued through exports to Nigera.

*Extra-territorial scope*

The thresholds are alternative. Furthermore, the threshold under the combined leg could be met by one party alone. This raises concerns regarding the scope of application of the Nigerian merger control regime to foreign-to-foreign transactions.

Under the combined leg threshold, no domestic turnover of the target is required. Consequently, transactions concerning a target with no engagement in Nigeria could be caught. For instance, a merger between two entities without subsidiaries in Nigeria could trigger notification obligations, if one of the parties has exports to Nigeria exceeding NGN 1 billion per annum. Moreover, the acquisition of a target outside of Nigeria could be caught if the target has significant exports to Nigeria or the acquirer has a relevant turnover in Nigeria could require clearance by the FCCPC. These concerns are particularly relevant due to the comparatively low thresholds.

There are good arguments that it could not have been the intention behind the Nigerian merger control regime to make the FCCPC a regulatory authority for all transactions including parties with some connection to Nigeria. Still, the guidelines issued thus far, have not set aside concerns that the FCCPC would take the position that it had wide authority to review foreign-to-foreign transactions.

Some clarification on the extra territorial application of the Nigerian merger control regime was provided by the Guidelines (2019). These clarify that the regime applies not only to Nigerian businesses but also to foreign companies whose goods or services are sold in Nigeria. While the Guidelines (2019) make reference to a domestic component foreign-to-foreign transaction must have to require notification, they do not specify what this domestic component is. In particular, the Guidelines (2019) do not clarify whether the domestic component would be fulfilled by meeting the thresholds alone. The Guidelines (2019) could be read as requiring notification of transactions between foreign parties only where they concern a Nigeria target, or the parties have subsidiaries in Nigeria. However, it is not entirely clear whether only these transactions would fall within the purview of the FCCPC.

Finally, the reference to foreign companies whose goods or services are sold in Nigeria raises some concerns. The Guidelines (2019) explicitly do not refer to direct sales only but appear to include indirect sales–i.e. through distributors. The FCCPC has to date not clarified whether such indirect sales would be included and–if so–what type of indirect sales would be included. Thus, it is not clear whether only sales made through distributors or other intermediaries directly engaged by the principle would be caught or any sale of goods or services of a party–including sales made entirely without the involvement of the party such as resales of customers or unauthorized third party distributors–would be considered.

To date the FCCPC has taken a case-by-case approach when assessing whether a specific foreign-to-foreign transaction would require notification. Considering that these decisions have not been entirely homogenous no established practice can be derived from existing practice. Pre-notification consultations, therefore, remain indispensable for foreign-to-foreign transactions that raise concerns that they meet the notification thresholds.

*Control*

The Guidelines (2020) raise a further concern in respect to the definition of 'control' for merger review purpose. While it is a welcome specification that a change of control test will be employed–thus, notification shall only be required where the proposed transaction results in a change of control–the definition of 'control' provided in the Guidelines (2020) is comparatively extensive. The list of matters that would constitute control provided by the Guidelines (2020) includes–aside from matters commonly understood to constitute control–in particular, the ability to block any resolution and any pre-emption rights in relation to the transfer of shares or assets. Thus, while the control test somewhat restricts the application of the Nigerian merger control regime, minority rights and non-controlling interests may be considered a change of control under the Nigerian merger control regime and thereby trigger notification.

To date the Guidelines (2020) and Regulations are still in draft form. Thus, no reliable experience with their application exists. However, it appears that the FCCPC is leaning to apply a broad interpretation of what would constitute 'control'.

*Filing fees*

With NGN 2 million–approximately USD 5,200 the filing fees for transactions that require notification under the target leg threshold (only) are comparatively low. The filing fees for combined leg notifications, however, raise concerns. Where the combined leg thresholds are met the filing fee is NGN 3 million–approximately USD 7,800–or 0.1 percent of the combined annual turnover of the parties involved, whichever is higher. No cap attaches to the valorem fee under the combined leg. Thus, in larger transactions filing fees could quickly become excessive. Further clarification would be appreciated.

Furthermore, the above filing gees were provided by the Guidelines (2019), which deal with the application of the Nigerian merger control regime to foreign parties. It is, thus, not clear how these fees would apply to domestic transactions.

*Expedited procedure*

The Guidelines (2019) also provide for an expedited procedure. Under this procedure the parties could opt to pay an additional fee of NGN 5 million–approximately USD 13,000–for the FCCPC to expedite its review and issue a decision within 15 business days as of filing being deemed complete. Notably, there is no mention of the envisaged timetable for the review of non-expedited procedures. Moreover, since the expedited procedure was discussed in the Guidelines (2019), it is not clear whether only foreign-to-foreign transactions qualify for the expedited procedure or whether it is also open to domestic transactions.

Since 2019 Nigeria has a designated merger regime. Over the past 18 months the FCCPC has taken steps to regulate and clarify the details of the Nigerian merger control regime and its application. Nontheless, material questions still remain unanswered. While the Guidelines (2020) as well as the Regulations have thus far not been finalized, the drafts available lack the necessary precision to resolve remaining issues. Consequently, as of now many issues will be decided on a case-by-case basis and pre-notification consultations remain essential. Further regulatory specifications and guidelines will have to be monitored.

Please note that the views and assessments provided herein are accurate as of 31 July 2020. Since the Nigerian merger control regime is still rather recent and new specification and guidance are continuously forthcoming statements made in this contribution may have to be amended over time.

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