HIGHLIGHTS OF THE MERGER CONTROL PROCESS IN NIGERIA

In this series of questions and answers, we provide an overview of the competition-related aspect of the merger control process in Nigeria.

1. What is the main legislation governing mergers and the relevant merger control authority?

The Federal Competition and Consumer Protection Act 2018 (FCCPA) enacted in 2019 governs merger review and approval in Nigeria. The FCCPA is enforced by the Federal Competition and Consumer Protection Commission (FCCPC) which is established under section 3 (1) of the FCCPA. In terms of merger control, section 93(1) of the FCCPA provides that a merger shall not be implemented unless it has first been notified to and approved by the FCCPC.

In 2020, the Banks and Other Financial Institutions Act 2020 (BOFIA) was enacted. Section 65 (1) of BOFIA stripped the FCCPC of its competition powers with regard to the financial services sector by providing that the provisions of the FCCPA shall not apply to 'any function, act, financial product, or financial services issued or undertaking, and transaction howsoever described by a bank or other financial institutions licensed' by the Central Bank of Nigeria (CBN), the financial services regulator. Section 65 (3) of BOFIA further ascribed the competition regulation powers of the FCCPC to the CBN, thus subjecting mergers occurring in the financial services sector to the regulatory scrutiny of the CBN.

In the communications sector, Section 90 of the Nigerian Communications Act 2003 (NCA), authorises the Nigerian Communications Commission (NCC), the communications sector regulator to determine, pronounce upon, administer, monitor and enforce compliance of all persons with competition laws and regulations, whether of a general or specific nature, as it relates to the Nigerian communications market. Pursuant to this authority, the NCC issued through administrative rule-making the Competition Practices Regulation 2007 (CPR), which provides in Regulation 26 that the NCC may review all mergers, acquisitions and takeovers occurring in the communications sector. This merger review power of the NCC is exercised concurrently with the FCCPC.

2. What is the jurisdictional threshold for merger notification?

Under the FCCPA, a merger becomes notifiable to the FCCPC if it meets the criteria specified to constitute a relevant merger situation. According to Paragraph 2.3 of the Merger Review Guidelines (MRG) issued by the FCCPC, a relevant merger situation is created where the following cumulative criteria are met:

i. two or more undertakings must come under common control, or there must be arrangements in progress or in contemplation

which, if carried into effect, will lead to the undertakings to be under common control to be distinct; and

ii. either the value of Nigerian turnover of the undertaking which is being acquired in the preceding year exceeds the prescribed threshold or the combined value of the Nigerian element of the merging undertakings in the preceding year exceeds the prescribed threshold (known as 'the turnover test') as stipulated in the Threshold Regulations.

If the FCCPC believes that the first criteria have not been met, it will not consider the second criteria as a relevant merger situation is not created. Regarding mergers occurring in the financial services sector, this would most likely be the standard that will be applied by the CBN when assessing whether a relevant merger situation has been created.

In the communications sector, the types of qualifying merger transactions that are notifiable to NCC are: the acquisition of more than 10% of the shares of a communications licensee; a transaction that results in a change of control of a communications licensee; and a direct or indirect transfer or acquisition of an individual communications license.

3. What is the procedure for notifying a merger?

The procedure for notifying a merger to the FCCPC is as follows:

i. The **pre-notification consultation phase** where the merger parties contact the FCCPC at least two weeks before formal notification. The purpose of this consultation is to determine the scope of the merger notification process; and

ii. The **formal merger notification** follows next and may be done by way of the standard or simplified procedure, using the relevant form and attaching the requisite documents. The simplified procedure may be adopted where upon a self-assessment, merger parties are of the view that the proposed merger is less than likely to prevent or lessen competition and no further evidence will be likely to revise this finding.

In the financial services market, the CBN is yet to issue specific rules regarding how a merger may be notified, but we assume that the CBN would adopt the same (or a similar) merger notification process as the FCCPC.

In the communications sector, Part IV of the CPR prescribes the manner in which a qualifying merger transaction may be notified to NCC. In this regard, the merger parties shall submit a written notification and request for approval of the merger at least sixty (60) days, before the date of completion. The notification to the NCC must as a minimum be accompanied by the following information: the identification of all persons involved in the transaction, including buyers, sellers, their shareholders and affiliated companies, and any persons, having a greater than 10% ownership interest in all such persons; a description of the nature of the proposed transaction, including a detailed analysis of the resulting scheme of arrangement and summary of its commercial terms; financial information on the persons involved in the proposed transaction, including their annual revenues from all communications markets, identified by specific markets, the value of assets allocated to communications businesses and copies of any recent annual or quarterly financial report; a description of the communications markets in which the persons involved in the proposed transaction operate; and a description of the effects of the transaction, on the control of network facilities or related infrastructure, including any interconnection or access arrangements with other licensees.

4. What are the applicable fees?

The applicable fees for merger notification to the FCCPC are:

i. Application fees- ₦50,000 per merger party
ii. Expedited Fee- ₦10,000,000
iii. Merger Notification fees: The applicable fees shall be whichever is higher of: -
    a. the percentages of the consideration sum payable as specified in the table below; or
    b. the percentage of the last annual turnover as specified in the fee table below

Threshold	Fees (consideration of transaction	Fees (last combined annual turnover
First ₦500 million (Five Hundred Million Naira)	0.45%	0.45%
Next ₦500 million (Five Hundred Million Naira)	0.45%	0.45%
Any sum thereafter	0.35%	0.35%

The applicable fee for notifying a qualifying merger to the NCC is ₦100, 000:00 (One Hundred Thousand Naira).

5. What is the substantive test applied by the merger control authority in merger reviews?

Section 94(1) of the FCCPA requires the FCCPC to undertake two levels of review. At the first level, the FCCPC will determine whether the merger is likely to substantially prevent or lessen competition (SPLC) in a relevant market in Nigeria. Where the outcome of the FCCPC's review is negative, the merger will be approved. However, where the FCCPC determines that an SPLC situation does exist, it will undertake a second-level review that involves an in-depth substantive assessment of the merger. At this level, the FCCPC will also examine whether factors such as efficiency and public interest considerations can offset or reverse the SPLC situation.

The CBN would assess mergers on the basis of whether or not the merger is likely to substantially prevent or lessen competition (SPLC) in a relevant market in the financial services sector. The NCC will assess a merger on the basis of whether the merger is capable of a substantial lessening of competition or would result in a dominant position in a relevant communications market in Nigeria.

6. What are the applicable theories of competitive harm?

In reviewing mergers, the FCCPC is concerned about the following anti-competitive harms that can arise from the merger:

i. Unilateral effects in horizontal mergers where the merger involves two competing firms and removes the rivalry between them, allowing the merged firm profitably to raise prices;
ii. Coordinated effects in both horizontal and non-horizontal mergers where the merger enables or increases the ability for several firms within the market (including the merged firm) jointly to increase price because it creates or strengthens the conditions under which they can coordinate; and
iii. Vertical or conglomerate effects which may arise principally in non-horizontal mergers where the merger creates or strengthens the ability of the merged firm to use its market power in at least one of the markets, thus reducing rivalry.

The approach of the FCCPC to the assessment of these

harms is set out in the MRG.

It is conceivable that the CBN and NCC recognises these same theories of anti-competitive harm.

7. What type of transaction is eligible for negative clearance?

The FCCPC will grant an application for a negative clearance in any of the following circumstances where the proposed merger:

a) is exempt under the requirements of sections 92(3)(a) of the FCCPA; or
b) does not present any circumstances that may warrant an exercise of material influence under section 92(2)(f) of the FCCPA; or
c) does not constitute a relevant merger situation and is thus not notifiable under the FCCPA

Both the CBN and NCC do not specify the circumstances in which a proposed merger is eligible for negative clearance, but it is conceivable that the same standard applied by the FCCPC would also be applied by the CBN and NCC.

8. What are the available merger defences?

Where the FCCPC has determined a merger to be capable of an SPLC, the following factors may be taken into consideration as a trade-off evaluated against the perceived anti-competitive effects of the merger. These factors are:

i. Efficiencies generated from the merger that permits the better utilisation of existing assets, enabling the combined firm to achieve lower costs than either firm could have achieved alone. According to the FCCPC, the party relying on efficiencies must prove that the efficiencies are: likely to occur; merger specific; and greater than and offset the anti-competitive effects of the proposed merger

ii. Public interest gains which must be substantial and specific to the merger. In addition, public interest considerations must be assessed under any of the following grounds: particular industrial sector or region for instance stable supply of electricity; employment; the ability of national industries to compete in international markets; and the ability of small and medium scale enterprises (SMEs) to become competitive.

iii. Failing firm which can be invoked to justify the approval of an otherwise anti-competitive merger, where one of the merging firms is in financial difficulties or at the risk of bankruptcy. According to the FCCPC, for the defence of a failing firm to be successfully invoked the following conditions must be cumulatively met: the firm must be unable to meet its financial obligations in the near future; there must be no viable prospect of reorganising the business through the process of receivership or otherwise; the assets of the failing firm would exit the relevant market in the absence of a merger transaction; and there is no credible less anti-competitive alternative outcome than the merger in question.

The analytical framework adopted by the FCCPC for the assessments of these defences is set out in the MRG.

9. What are the remedies that may be applied?

The FCCPC in approving a merger may apply remedies to address the adverse effects of such mergers. These remedies are:

i. Structural remedies which typically involve the disposal of a business or assets from the merger parties to create a new source of competition (if sold to a new entrant) or to

strengthen an existing source of competition (if sold to an existing competitor);

ii. Behavioral remedies, non-structural remedies, or 'conduct' remedies, which are ongoing measures designed to modify, regulate or constrain the future conduct of merging parties; and/or

iii. Hybrid remedies which is a combination of both structural and behavioral remedies. It will be applied by the FCCPC when, for example, a merger involves multiple markets or products and competition is best preserved by structural relief in some relevant markets and by non-structural relief in others.

It is conceivable that the CBN and NCC would apply similar remedies.

10. What is the process for the judicial review of the decision of the merger control authority

Decisions of the FCCPC and the CBN (regarding merger reviews) are subject to judicial review in the first instance at the Federal Competition and Consumer Protection Tribunal (FCCPT) established under the FCCPA. All appeals or requests for a review of the decision of NCC regarding merger reviews, or the exercise of its competition regulation power shall in the first instance be heard and determined by the FCCPC before such appeals can proceed to the FCCPT.

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