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STANDARD OF DEALS FOR MERGER NOTIFICATIONS UNDER THE FEDERAL COMPETITION AND CONSUMER PROTECTION ACT 2018

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CHAPTER 1

STANDARD OF DEALS FOR MERGER NOTIFICATIONS UNDER THE FEDERAL COMPETITION AND CONSUMER PROTECTION ACT 2018

PRESENTED BY:

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THE STATUTORY DEFINITION OF MERGERS

Section 92 (1) (a) of the FCCPA provides that a merger occurs where one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business or of another undertaking

A merger according to **section 92 (1) (b) of the FCCPA** may happen in any of the following ways:

- the purchase or lease of shares, an interest, or assets of the other undertaking;
- the amalgamation or other combination with other undertakings; or
- A joint venture

WHAT IS CONTROL UNDER SECTION 92 (2) FCCPA)?

In the case of an undertaking that is a trust, has the ability to control the majority of votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust

Entitled to cast the majority of votes that may be cast at a general meeting of the company or has the ability to control the voting of the majority of those votes

Is a holding company, and the company is a subsidiary of the of that company as contemplated under CAMA

Is able to appoint or veto the appointment of a majority of the directors of the undertaking

Beneficially owns more than one-half of the issued share capital or assets of the undertaking

Has the ability to materially influence the policy of the company

EXEMPTION TO CONTROL (SECTION 92 (3) FCCPA) 92 (3) FCCPA)

Credit institutions or other financial institutions or insurance companies acquiring securities of an undertaking in the ordinary course of business on a transitory basis or where the company is raising capital provided, they do not exercise voting rights to determine competitive behaviour of the undertaking and they dispose of the securities within one year of acquisition

Control acquired under the law relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings, cessation of payments, compositions or analogous proceedings

JURISDICTIONAL THRESHOLD FOR MERGER REVIEW (PARA 2.3 MRGS)

Two or more undertakings must come under control

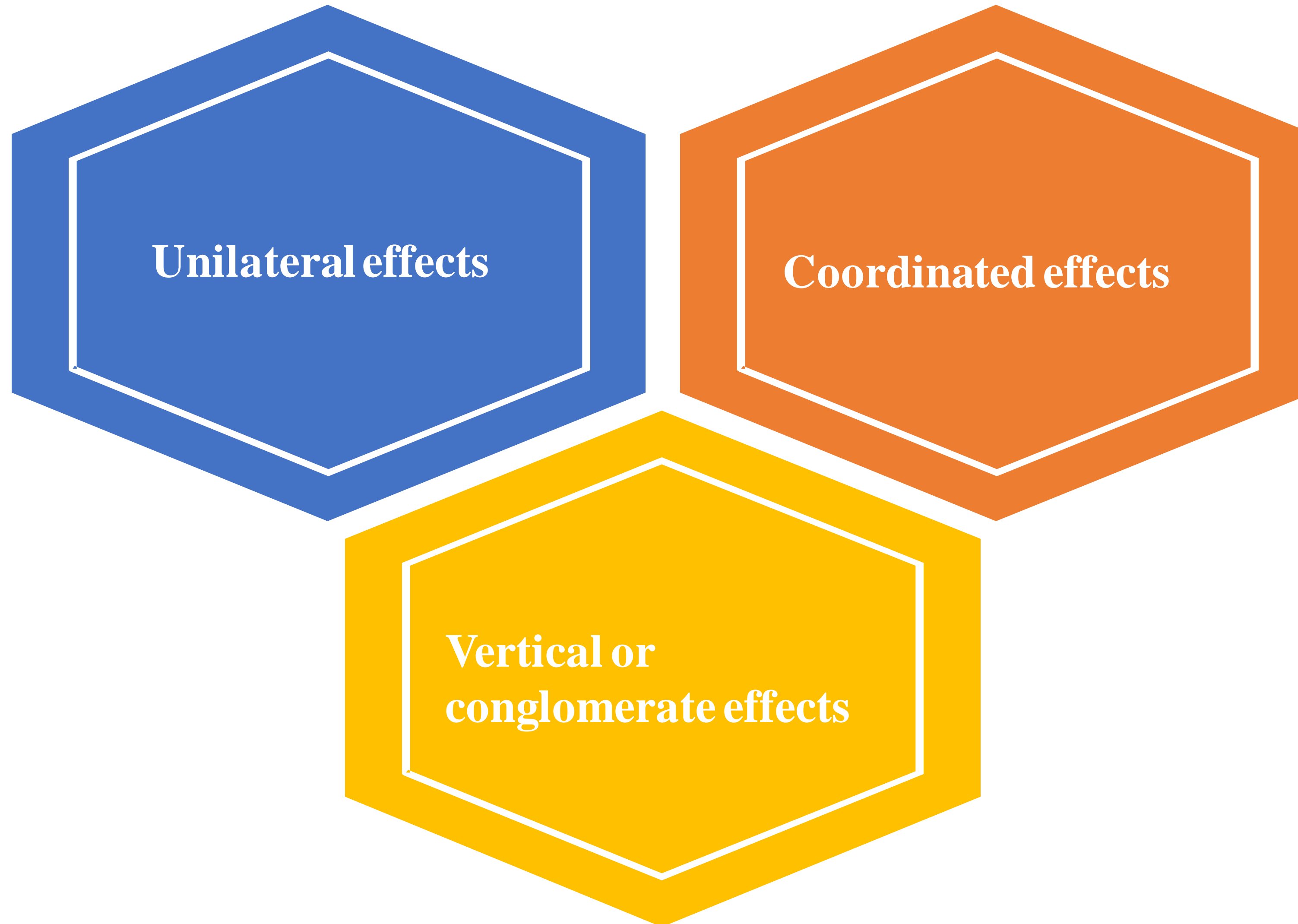
If yes, then proceed to…

If in the financial year preceding the merger (para. 1.1 of Notice of Threshold for Merger Notification)

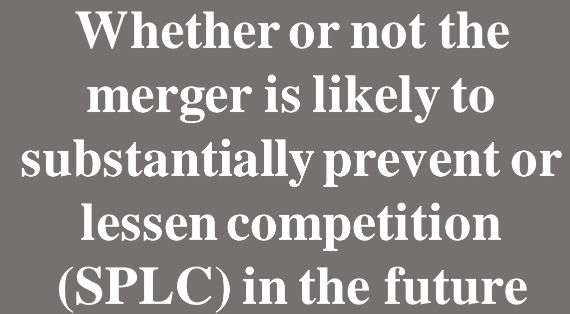
Combined turnover of the acquiring undertaking and target undertakings attributable to Nigeria equals or exceeds 1 billion naira or

Turnover of the target undertaking attributable to Nigeria equals or exceeds 500 million naira

THEORIES OF COMPETITIVE HARMS (PARA. 7.5 MRGS)



SUBSTANTIVE TEST FOR MERGER REVIEW (SECTION 94 (1) (A) FCCPA)



Elements of the SPLC test

STRUCTURAL ANALYSIS OF THE MARKET (PARA. 5 MRGS)

Market definition

Product market: Are goods or services regarded as interchangeable or substitutable - small but significant and non-transitory increase in price (SSNIP). Defined based on demand-side substitutability) and supply-side substitutability

Geographic market: Based on the location of suppliers of the defined products. Can also be defined based on supply-side substitutability where suppliers are able to produce substitute products for sale in the relevant geographic market without incurring a significant cost of production.

STRUCTURAL ANALYSIS OF THE MARKET (PARA. 5 MRGS)

Calculating market concentration: Through market shares, concentration rations and Herfindahl-Hirschman Index (HHI).

Market shares will be calculated according to sales, volume and capacity from a variety of sources such as the merger parties, competitors, customers, trade associations and market research reports from third parties.

HHI measures: (a) the extent of market concentration before and after the transaction is completed; and (b) the change in market structure and concentration because of the transaction. It is calculated by summing the squares of the market share of firms in the market. For instance, in a market consisting of four firms with market shares of 30%, 30%, 20%, and 20% respectively, the HHI is 900 + 900 + 400 + 400 = 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$).

A change or increase in the HHI following a merger is referred to as delta.

STRUCTURAL ANALYSIS OF THE MARKET (PARA. 5 MRGS)

In a correctly defined market, the FCCPC will consider that;

A post-merger HHI below 1,000 is unlikely to cause concern;

A market with a post-merger HHI greater than 1,000 may be regarded as concentrated and highly concentrated if greater than 2,000:

In a concentrated market, a delta of less than 250 is unlikely to cause concern while in a highly concentrated market, a delta of less than 150 is unlikely to cause concern.

STRENGTH OF COMPETITION TEST/OTHER FACTORS TAKEN INTO CONSIDERATION BY THE FCCPC

Ease of entry or expansion (Regulation 28 MRRs): Barriers to entry could be legal regulatory, structural, strategic, technological etc. In assessing barriers to entry or expansion, the FCCPC considers whether entry is:

i. Timely – FCCPC considers entry as timely if it occurs within 1 to 2 years

ii. Likely – FCCPC will consider firms that appear to have an entry advantage such as firms in adjacent geographic markets, firms in upstream or downstream markets, firms that produce products with technology that is similar to that used in producing the relevant product: FCCPC will also consider the history of exit and entry into that market.

iii. Sufficient: Most be of a scale and scope to provide an effective competitive constraint in the market.

Countervailing buyer power (Regulation 29 MRRs): Buyer's monopoly (monopsony). This they can do by self-supplying through vertical integration, refusing to buy products from the post-merger firm, imposing their own cost on the post-merger firm

Failing firm defence (Regulation 30 MRRs): The FCCPC must be satisfied that the following elements are present:

i. the firm must be unable to meet its financial obligations in the near future;

ii. there must be no viable prospect of reorganising the business through the process of receivership or otherwise;

iii. the assets of the failing firm would exit the relevant market in the absence of a merger transaction; and

iv. there is no credible less anti-competitive alternative outcome than the merger in question.

TRADE-OFF EXCEPTIONS (SECTION 94 (1) (B), (3) & (4)

Efficiency test (Regulation 36 MRRs): The FCCPC takes into consideration the following types of efficiencies: allocative; technical (productive); and dynamic. To rely on this, the merger parties must prove that the efficiencies are:

i. Likely to occur
ii. Merger specific
iii. Are greater than and offset the anti-competitive effects – verifiable through evidence provided by the merger parties

Public interest (Regulation 37 MRRs): Public interest in all instances must be substantial in nature and specific to the merger. The public interest must relate to one or more of the following grounds:

i. Industry sector or industry, for instance, the energy/power sector – stable provision of electricity
ii. Employment;
iii. Ability of national industries to compete in international markets
iv. The ability of SMEs to become competitive

MERGER REMEDIES (PARAS 38 – 39 MRRS 9)

If a merger raises SPLC concerns, parties are allowed to propose remedies that address or reduce these concerns. Remedies should be effective the FCCPC considers the following:

i. Tailored to the harm

ii. Effective: competitive impact; duration; practicality; and risk.

The following are the forms of remedies that may be proposed by the parties:

i. Structural remedies: which 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). Good for unilateral effects cases

ii. Behavioural remedies, non-structural remedies, or 'conduct' remedies: which are ongoing measures that are designed to modify, regulate or constrain the future conduct of merging parties. In contrast to structural remedies, behavioral remedies do not restructure firms or asset ownership, they permit integration subject to specific operating rules. Good for vertical effects cases. Obligations may include non-discrimination; firewall provisions; prohibition of certain commercial practices; transparency provisions;

iii. Hybrid: Mixture of both structural and behavioural: Effective the 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.

OTHER MATTERS!!!!!

Gun jumping (Section 95 (5), Section 96 (4) FCCPA and Regulation 13 MRRs): Merger parties are not to take any steps to implement the merger without the approval of the FCCPC.

Typical examples are:

i. coordination between merging parties on prices or terms to be offered to customers for sales prior to closing the merger;

ii. allocating customers for sales to be made prior to closing;

iii. If, prior to closing, merging firms coordinate their negotiations with customers for sales to be made after the merger closes (e.g., negotiations of long-term contracts).

The penalty for gun jumping is a base amount of 2% of the annual turnover of the parties taking into consideration factors such as the number of months of the violation, ratio of mitigating factors, etc (Schedules 1 and 2 of APRs)

CHAPTER 2

STANDARD OF DEALS FOR MERGER NOTIFICATIONS UNDER THE SOUTH AFRICAN COMPETITION ACT 1998

PRESENTED BY:
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THRESHOLDS FOR MERGER NOTIFICATION

Getting the merger notification thresholds 'focused'

- South African merger notification thresholds adjusted periodically to try ensure that only transactions that are material to South Africa are subject to notification and review by the competition authorities.
- Rationale? Competition regulator should be freed up to focus resources on substantial matters, rather than small transactions.
- Are South African thresholds appropriate? Still relatively low compared to some jurisdictions but arguably suitable for the size of the economy and objectives of the Competition Act.
- Like many other jurisdictions, no impact on competition is necessary for a transaction to be notifiable, i.e., no overlaps required.

From an international best practice perspective, there should be a deliberate effort to ensure that:

- Thresholds are clear and understandable, based on objectively quantifiable criteria, and on financial information that is readily accessible to the merging parties.
- Jurisdiction is only asserted over transactions with a material local nexus and/or propensity to result in an appreciable effect on competition.
- Jurisdiction is based on local activities with reference, at least, to the activities of the target.

THEORIES OF COMPETITION HARM

Testing the effects of a merger on competition

- Like Nigeria, in South Africa the substantive test for assessing a merger is whether or not it is likely to substantially prevent or lessen competition (**SPLC**). Important that any SPLC is identified as merger-specific.

- The competition authorities must assess the **strength of competition** in the relevant market and the probability that, post-merger, the firms in the market will behave **competitively or cooperatively by assessing any factors relevant to competition** including:
  - level and trends of concentration in the market (market shares should be a point of departure, not the "be all and end all");
  - whether the merger will result in the removal of an effective competitor;
  - whether the business of a party to the merger has failed or is likely to fail;
  - degree of countervailing power in the market.

- These factors are identical to those in the Nigerian Competition Act. However, following the 2019 amendments to the South African Competition Act, an **additional 3** factors were included:
  - the extent of **ownership** by a party to the merger **in another firm or other firms in related markets**;
  - the extent to which a party to the merger is **related to another firm or other firms** in related markets, including through common members or directors;
  - any **other mergers** engaged in by a party to the merger **in the last 3 or more years**.

- If it appears that the merger is likely to substantially prevent or lessen competition, competition authorities must then assess:
  (i) whether or not the **merger is likely to result in benefits/gains** ("outweighing factors); and
  (ii) whether the merger can or cannot be justified on **substantial public interest** grounds.

"OUTWEIGHING" EFFECTS

Outweighing technological, efficiency or pro-competitive gains and public interest benefit

- If it appears that the merger is likely to substantially prevent or lessen competition, then the Competition Commission or the Competition Tribunal must determine whether:
  - there are any technological, efficiency or other pro-competitive gains that will be greater than and offset the effects of any prevention or lessening of competition, that would not be obtained if the merger is prevented; and
  - Whether the merger can or cannot be justified on substantial public interest grounds by assessing certain listed factors.

Possible submissions by merging parties include:

Efficiency gains, e.g., increased productivity and cost-savings which can be passed on to consumers. Cannot be value to shareholders alone.

- Improved competitiveness, e.g., enabling merging parties to compete with larger more established firms, especially technology-driven transactions, or transactions that allow a local company to compete internationally (so-called "national champion" argument).
- Technology transfer and/or increased innovation, e.g. Product/service development benefiting consumers and driving economic growth.
- Public interest benefits, e.g., creating (or preserving) employment.
- Should be supported by evidence, rather than mere "claims".

PUBLIC INTEREST CONSIDERATIONS

Testing the effects of a merger on the public interest

- Before the 2019 amendments to the Competition Act, as a "secondary enquiry" to the competitive assessment, the Competition Commission or the Competition Tribunal was required to assess the effect of a merger on the following public interest factors:
- (i) a particular industrial sector or region;
- (ii) employment;
- (iii) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons (**HDPs**), to become competitive; and
- (iv) the ability of national industries to compete in international markets.

Following the 2019 amendments to the Competition Act:

- the effect of a merger on the public interest was elevated to a separate and self-standing assessment in merger review;
- Item (iii) above was amended to refer to the ability of SMEs, or firms controlled or owned by HDPs to effectively enter into, participate in or expand within a market;
- In line with South Africa's transformation imperatives, a new public interest factor was introduced, namely, the effect that a merger will have on the promotion of a greater spread of ownership, in particular to increase the levels of ownership by HDPs and workers in firms in the market.
- It will be interesting to observe whether the Nigerian FCCPC will use the public interest considerations similarly (e.g. employment).

MERGER REMEDIES

- In South Africa, prohibition of a merger is a remedy of last resort.
- It may be necessary and possible to address competition harm by way of remedies:
  - Structural remedies (typically a form of divestiture); or
  - behavioural remedies (usually not a regulator's preference because monitoring is required).
- Remedies must be intended to address "merger-specific" issues, rather than another issue that is not merger-related. Has South Africa gone too far?
- Remedies should be **proportional, measurable and effective**.
- Entails a **dialogue** between the competition authorities and merging parties, facilitated by external counsel.

Addressing public interest concerns:

- In South Africa, Minister of Trade, Industry and Competition and trade unions play a unique role and have automatic rights to intervene in mergers on the basis of public interest.
- Common to include a 2 or a 3 year moratorium on merger-specific retrenchments as a condition to approval.

Other conditions may include:

- establishing employee share ownership programmes and/or the introduction of HDP shareholders
- bursaries for underprivileged students;
- financial commitments to maintaining and/or developing supply chains.

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