STANDARD OF DEALS FOR MERGER NOTIFICATIONS UNDER THE FEDERAL COMPETITION AND CONSUMER PROTECTION ACT 2018 (QUESTIONS & ANSWERS)

Should notification threshold though not be tied to the size of market in the country, rather than say amount X is too low or too high?

Notification threshold needs to be respective and reasonable, especially in respect of a notifiable global transaction. In this case, it may be very difficult to consider individual markets within countries and may be impractical to consider the actual market's specific thresholds in each case. The important factor to consider is the size of the economy and the target market or target threshold within the economy. This is to avoid very small transactions getting notified, as the review process can become expensive, and time consuming for the regulators. This may also shift their focus from the bigger issues.
An increase in the Nigerian merger review threshold would be better and helpful in this regard.

Additionally, the regulator must exercise discretion on this subject, thus the notification threshold should be related to what is reasonable and the size of the market. Although in many cases, determining the size of the market can be challenging.

Maybe there should be a distinction between foreign-to-foreign mergers that have a great impact in Nigeria where the threshold is raised a great deal more. Though these mergers in terms of dollars may not be a lot but when converted to naira, could be a fair amount and therefore cross the threshold.

Do you have any insight as to when the merger filing fees would be amended such that they would have a cap or maximum amount if so, do you have an idea as to what the cap may be?

Currently, the merger notification fees in Nigeria are charged ad valorem while other jurisdictions have capped fees. The underlining basis for the applicable notification fees is subject to how much work the Federal Competition and Consumer Protection Commission (FCCPC) must undertake in the merger review process.

Sometime in 2022, the FCCPC announced that there were plans to introduce capped fees, however, no further directive has been shared in this regard. We note that there would be capped fees in the nearest future, but it would be difficult to say when, although we suspect that this might be higher than what is obtainable in other jurisdictions.

With respect to the exemption to merger notification, where it is predetermined by the merging parties via their advisers that the transaction satisfies the exemption criteria for internal restructuring despite meeting the fiscal threshold, will a formal merger notification still be required to be made to the FCCPC?

After the enactment of the Federal Competition and Consumer Protection Act 2018 (FCCPA), the Banks and Other Financial Institutions Act 2020 (BOFIA) restricted the power of the FCCPC to review mergers between parties operating in the financial services sector. This means that such merging parties are exempted from notifying the FCCPC. Consequently, only the Central Bank of Nigeria (CBN) which is the chief regulator of the sector, has the power to assess mergers happening in the financial services sectors.

In the case of other mergers where the parties have

determined that an exemption applies in their case but would prefer to err on the side of caution, they may file a negative clearance application. This is an issue which merging parties must consider carefully and discuss with their counsel.

In the case of an internal restructuring happening with a major player in the economy and where there is a likelihood for it to make the news, many times for the sake of abundant caution it might be advisable to seek negative clearance.

Comparing the fees charged in South Africa, do you think the fees charged by the FCCPC are reasonable?

South Africa has a capped fee, that is, there is a particular fee for intermediate mergers and a larger fee for large mergers. They are proportionate to what the regulator must do in assessing a particular transaction. The fees are designed to recoup the necessary actions taken by the regulator in conducting its assessment and with time Nigeria would get there.

The challenge with an uncapped fee is that an acquirer entering a relatively small transaction and because the acquirer has quite a considerable turnover or asset value, may be required to pay very high filing fees. In other jurisdictions where the fees were uncapped, an acquirer in an international transaction pay more in filing fees than what the target generates in local revenue and such fees should be commensurate with the assessment.

Why is there a lot of emphasis on public policy objectives in South Africa rather than say in Nigeria or the European Union?

In South Africa, the emphasis on public policy is linked to South Africa's history. The South Africa Competition Act was introduced in 1998, shortly after the transition from a dictatorship government to democracy. This is the reason the legislation is more focused on the rights of workers to participate in the merger notification process which has made this quite unique to South Africa. There has not been sufficient transformation in South Africa, as the South African Competition Act is being used as a tool for transformation.

It is also interesting to note that some jurisdictions are increasingly looking towards the public interest approach of inculcating other factors in merger assessments such as Europe, there is an outlook towards environmental issues as part of the merger notification process.

Although Nigeria has considerable unemployment, it would be interesting to see if the FCCPC is also going to use the competition regime as a tool to preserve and create further employment.

Is there a process to check with the FCCPC whether a merger needs their approval?

There is a process to check with the FCCPC whether a merger requires their approval, and this process could be through a pre-notification engagement which the merging parties may choose to have with the FCCPC within two (2) weeks before formal notification.

The scope of this consultation is to examine certain issues such as whether the merger meets the jurisdictional threshold for notification, and if it does in what manner should that notification be made. These are all procedural questions where one must consider whether to notify by either a Form 1 (Merger Review), Form 2 (Simplified Procedure) or where it doesn't meet the jurisdictional threshold, by a Form 4 (Negative clearance).

In addition, it is also important to note that this pre-notification can be done on a "no-name"/anonymous" basis, for confidentiality purposes.

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