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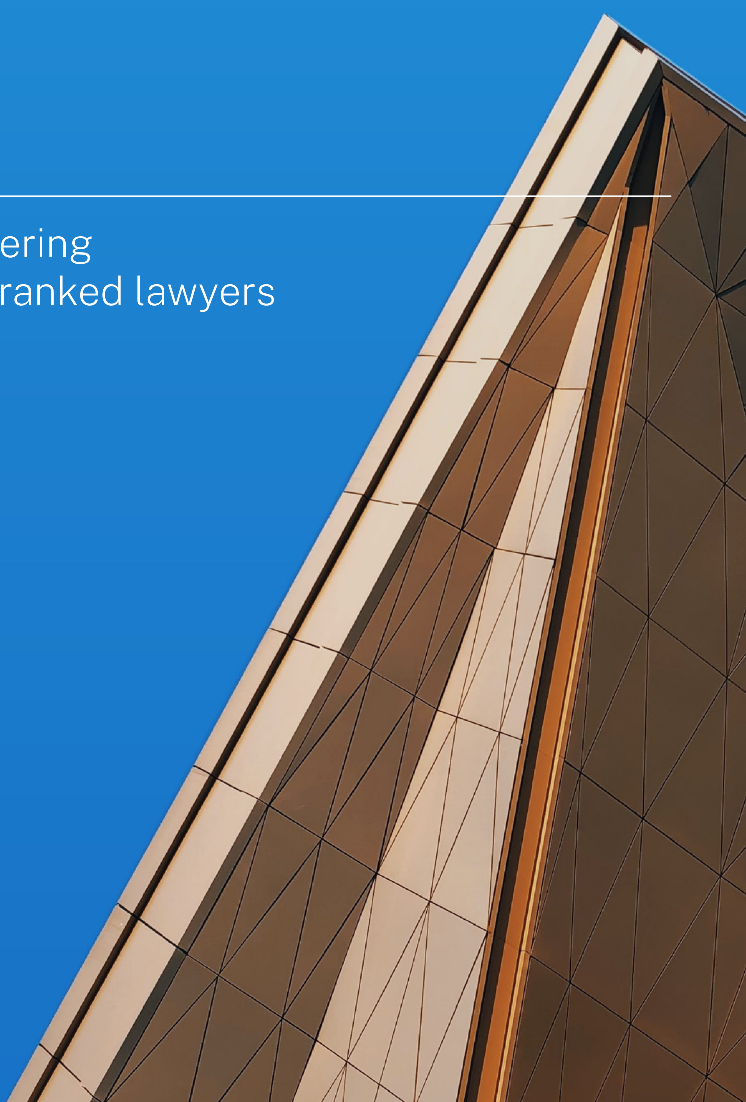

Nigeria: Law & Practice
Chiagozie Hilary-Nwokonko, Chukwuyere Ebere Izuogu and Osefan Anegbe
Streamsowers & Köhn

NIGERIA

Law and Practice

Contributed by:
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Contents

NIGERIA CONTENTS

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Streamsowers & Köhn is a full-service law firm located in Nigeria. Its team comprises six partners including a Senior Advocate of Nigeria, equivalent to a KC in the UK, an of counsel and 20+ associates. It has offices in Lagos, Abuja and Port Harcourt. Since the enactment of the Federal Competition and Consumer Protection Act 2018, its lawyers have advised a diverse range of clients from different industries in all areas of competition law. Its work includes: advising an oil and gas industry group on the anti-competitive effect or otherwise of a proposed technical standard; advising a satellite telecommunications services provider on notifying a merger to the Federal Competition and Consumer Protection Commission (FCCPC) and the Nigerian Communications Commission; and successfully filing a merger notification to the FCCPC in respect of the global acquisition of an EduTech company and its Nigerian subsidiary, a merger valued at USD450 million.

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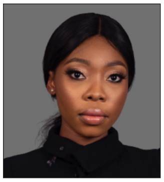

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The Federal Competition and Consumer Protection Act 2018 (FCCPA), enacted in 2019, governs merger review and approval in Nigeria.

In 2020, the Banks and Other Financial Institutions Act 2020 (BOFIA) was enacted. Section 65 (1) of BOFIA stripped the Federal Competition and Consumer Protection Commission (FCCPC) of its competition powers with regard to the financial services sector, which is under the regulatory supervision of 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 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 they relate to the Nigerian communications market. Pursuant to this authority, the NCC issued through administrative rule-making the Competition Practices Regulation 2007, 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.

1.2 Legislation Relating to Particular Sectors

The FCCPC in exercising its rule-making power under the FCCPA issued the Guidelines on Simplified Process for Foreign-to-Foreign Mergers with Nigerian Component (the Foreign-to-Foreign Merger Guidelines). The Foreign-to-Foreign Merger Guidelines, among other things, prescribe the manner in which a foreign-to-foreign merger with a Nigerian component may be notified to the FCCPC and how the applicable fees for notification may be calculated.

In terms of foreign investment, the Nigerian Investment Promotion Commission Act provides that a foreign national can own up to 100% of a business or can invest in any business except those on the negative list. Sectors that are listed in the negative list in which foreign investment is prohibited are: production of arms, ammunition, etc; production of and dealing in narcotic drugs and psychotropic substances; production of military and paramilitary wear and accoutrements, including those of the police and the customs, immigration and prison services; and such other items as the Federal Executive Council may from time to time determine.

1.3 Enforcement Authorities

The FCCPC enforces the FCCPA. When reviewing mergers in which one of the merger parties is also subject to the regulatory supervision of another regulator, the FCCPC requires a letter of no objection from that sector regulator as a requirement for the issuance of an unconditional approval for the merger.

2. Jurisdiction

2.1 Notification

Notification to the FCCPC is only required if the merger meets the jurisdictional threshold for notification. Under the FCCPA, a merger becomes notifiable to the FCCPC if it meets the criteria specified as constituting 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:

- 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 coming under a common control to be distinct; and
- 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 Notice of Threshold for Merger Notification 2019 (Threshold Regulations) issued by the FCCPC.

If the FCCPC believes that the first criterion has not been met, it will not consider the second criterion as a relevant merger situation is not created. In addition, where an undertaking in Nigeria comes under the control of a foreign undertaking, the merger may be subject to notification if the turnover test under the Threshold Regulations is met or if the acquisition of the Nigerian undertaking affects the market structure by preventing or lessening competition in Nigeria.

Regarding mergers in the financial services sector, the standard for assessing the jurisdictional threshold applied by the FCCPC 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 licence.

2.2 Failure to Notify

Failure to notify a qualifying merger transaction is an offence under section 96 (7) of the FCCPA that would expose the merger parties to a fine not exceeding 10% of their turnover in the business year preceding the date of commission of the offence or such other percentage as the court may determine having regard to the circumstances of the case.

In the communications sector, a failure to obtain the written consent of the NCC when transferring or assigning a communications licence is an offence under the Nigerian Communications (Enforcement Processes, etc) Regulations 2019. Convicted offenders are liable to a fine of NGN10 million and a further NGN500,000 per day calculated from the effective date of the transfer or assignment as determined by the NCC and payable for as long as the contravention persists. The NCC may impose a maximum lump sum fee of NGN2 million on licensees with a turnover less than NGN1 billion. Where a joint venture or change in shareholding structure in a communications licensee is implemented without first obtaining the consent of the NCC, the offending licensee(s) is/are liable to a fine of NGN5 million and a further NGN500,000 per day calculated from the effective date of the joint venture arrangement or change in shareholding structure, as determined by the NCC, and payable for as long as the contravention persists.

However, the NCC normally publishes details of its enforcement activities regarding a failure to notify a qualifying merger occurring in the communications sector. We are not aware of any case where such a penalty has been applied in practice by the FCCPC or made public.

2.3 Types of Transactions

According to paragraph 2.6 of the MRG, the following transactions are subject to a merger review:

(a) acquisitions of property within Nigeria are covered by virtue of section 92 (1) of the FCCPA, including (but not limited to):

- shares in Nigerian companies, wherever the transaction is entered into, as the shares are domestically situated;
- domestic businesses;
- local intellectual property such as trademarks, patents and copyright; and
- local plant and equipment;

(b) acquisitions of property, wherever situated, are covered by virtue of section 92(1) and section 2 (1)-(3) of the FCCPA if the acquirer:

- is incorporated in Nigeria;
- carries on business in Nigeria;
- is a Nigerian citizen; or
- is ordinarily resident in Nigeria; and

(c) if (a) and (b) above do not apply, acquisitions of a controlling interest (presumably shares in almost all cases) in a body corporate where that body corporate has a controlling interest in a corporation are covered by virtue of section 92 (1) of the FCCPA.

According to the FCCPC, an internal restructuring within a group of companies does not constitute a relevant merger situation and is thus exempt from notification because it does not lead to control by an external party.

In the communications sector, the following transactions are caught: 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 licence.

2.4 Definition of "Control"

Neither the FCCPA nor the FCCPC defines what constitutes control for merger notification purposes. However, the FCCPA in section 92 (2) provides a list of situations where an undertaking may be determined to exercise control over the business of another undertaking. These situations are where an undertaking:

(a) beneficially owns more than one-half of the issued share capital or assets of another undertaking;
(b) is 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;
(c) is able to appoint or veto the appointment of a majority of the directors of the undertaking;
(d) is a holding company, and the company is a subsidiary of that company as contemplated under the Companies and Allied Matters Act (CAMA);
(e) 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; or

(f) has the ability to materially influence the policy of the company in a manner comparable to a person who, in ordinary commercial practice, can exercise the element of control referred to in (a) to (e).

According to section 92 (3) of the FCCPA, control does not exist in either of the following circumstances:

- 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 the competitive behaviour of the undertaking and they dispose of the securities within one year of acquisition; and
- control acquired under the law relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings.

In addition, as explained in **2.1 Notification**, control is only one of the criteria used for assessing whether a merger is notifiable to the FCCPC. The other criterion is the turnover threshold. If these two criteria are met, then a merger is caught and must be notified to the FCCPC.

2.5 Jurisdictional Thresholds

See **2.1 Notification**.

2.6 Calculations of Jurisdictional Thresholds

The jurisdictional threshold necessary to trigger a merger review involves two cumulative criteria that must be met in every case. These are the control element and the turnover test. Only the turnover test involves calculations which must be done in accordance with the Threshold Regulations. Pursuant to paragraph 1.1 of the Threshold Regulations, the turnover test is met if in the financial year preceding the merger:

- the combined annual turnover of the acquiring undertaking and the target undertaking in, into or from Nigeria equals or exceeds NGN1 billion; or
- the annual turnover of the target undertaking in, into or from Nigeria equals or exceeds NGN500 million.

Where the applicable turnover is in foreign currency, the FCCPC uses the prevailing exchange rate determined by the CBN as at the end of the financial year preceding the notification or the date on which the contract creating the merger came into force, whichever is later.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

The businesses or corporate entities that have generated a turnover that is attributable to a business, or derived from Nigeria are relevant for the purpose of calculating the turnover. In addition, as we explained in **2.6 Calculations of Jurisdictional Thresholds**, turnover may be calculated on the basis of the combined annual turnover of the acquiring undertaking and the target undertaking, or on the basis of the annual turnover of only the target undertaking.

Turnover may also be calculated on a group-wide basis provided it is attributable to and/or derived from Nigeria. 'Group-wide', according to the practice of the FCCPC, refers to an undertaking in which any of the merger parties has a controlling interest. Lastly, regarding changes in the business during the reference period, there is no particular procedure prescribed by the FCCPC for this; however, it is conceivable that discussions in this regard may be had with the FCCPC as part of the pre-notification consultation.

2.8 Foreign-to-Foreign Transactions

Where there is a local component to foreign-to-foreign transactions, such transactions are subject to merger control. According to the FCCPC, a local component exists if a foreign entity has a local nexus such as having subsidiaries in Nigeria or satisfies the turnover test provided in the Threshold Regulations. Where the target undertaking has no subsidiaries, sales and/or assets in Nigeria, our view is that no turnover has been generated, and as such, notification to the FCCPC is not required.

2.9 Market Share Jurisdictional Threshold

As at the time of writing, market share jurisdictional threshold does not apply in Nigeria.

2.10 Joint Ventures

As a general rule for any joint venture to qualify for a merger review, it must meet the basic criteria of economic integration of the parties' business activities (for example, through a contribution of productive assets to a new business undertaking), the elimination of competition between the parties in the joint venture's field of activity through this contribution, and the relative permanence of the joint business activity. Where these basic criteria are met, the joint venture will be brought within the general scope of merger review if the creation of the joint venture will typically involve the transfer of voting equity or assets and by reference to the underlying combination of previously independent businesses.

In addition, a full-function joint venture must be notified to the FCCPC if the value of its assets or turnover is above the turnover test. A full-function joint venture is one which operates on a lasting basis with all the functions of an autonomous economic entity, competes with other undertakings in a relevant market, and has sufficient resources and staff to operate independently in the relevant market.

2.11 Power of Authorities to Investigate a Transaction

Section 95 (3) of the FCCPA authorises the FCCPC to require the parties to a merger that does not meet the jurisdictional threshold to notify it of the merger in the prescribed manner and form, if the FCCPC is of the opinion that the merger may substantially prevent or lessen competition. The exercise by the FCCPC of its section 95 (3) power under the FCCPA must be done within six months of the merger being implemented.

2.12 Requirement for Clearance Before Implementation

According to section 93 (1) of the FCCPA, a proposed merger shall not be implemented unless it is first notified to and approved by the FCCPC. Specifically, regulation 13 (2) of the Merger Review Regulations 2020 (MRR) requires the merging parties to ensure that before and during the notification period, they take no steps and undertake no activities that may be deemed co-ordination or integration of their businesses or their competitive conduct in any of the following respects: (a) the exchange of commercially sensitive information; (b) the nature of contractual clauses governing the relationship; and (c) the activities of the parties before and during the notification of the merger. To do otherwise would increase their risk of engaging in a gun-jumping conduct which could expose them to fines from the FCCPC.

Examples of gun jumping as stated in paragraph 3.61 of the MRG include the following:

- co-ordination between merging parties on prices or terms to be offered to customers for sales prior to closing the merger;
- allocating customers for sales to be made prior to closing; and
- if, prior to closing, merging firms coordinate their negotiations with customers for sales to be made after the merger closes (eg, negotiations of long-term contracts).

For mergers that do not meet the jurisdictional threshold for notification, which are notified to the FCCPC post-transaction, no further steps are required to be undertaken by the merger parties to integrate the respective businesses.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Under the Federal Competition and Consumer Protection Commission (Administrative Penalties) Regulations 2020, the base penalty for gun jumping is 2% of the turnover in the preceding year of the merger parties, and the final penalty is calculated on the basis of a number of factors such as the duration of the months in which the gun jumping persists, the ratio of the aggravating factors and the ratio of the mitigating factors.

The FCCPC has on several occasions stated that it will impose a penalty where parties implement a qualifying merger without its approval. While we are aware that such penalties have been imposed in the case of undertakings domiciled in Nigeria, we are not aware of any case where such a penalty has been made public or applied in the case of a foreign-to-foreign merger.

2.14 Exceptions to Suspensive Effect

As at the time of writing, there are no general exceptions to the obligation not to implement a qualifying merger without first seeking and obtaining the approval of the FCCPC and/or the NCC.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Global transactions may be implemented without seeking prior approval of the FCCPC in circumstances where there is no local component and the jurisdictional threshold is not met.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There is no specific deadline for notification. The requirement of the FCCPA is that the approval of the FCCPC must be sought and obtained before implementing a qualifying merger.

3.2 Type of Agreement Required Prior to Notification

A copy of all documents that led to the merger is required for the merger review process. These may include heads of terms, memorandums of understanding, sale and purchase agreements, business purchase agreements or similar documents. If these documents are not finalised, then the latest draft should be provided along with updates on any subsequent changes made. It is important that the notifying parties keep the FCCPC informed of any modifications.

3.3 Filing Fees

Filing fees are payable for merger notifications. The applicable fee is determined by a percentage of either the consideration sum payable for the transaction or the combined turnover in the preceding financial year of the merging companies (whichever is higher).

The applicable percentages are 0.45% of the first NGN500 million, 0.45% of the next NGN500 million and 0.35% of any sum thereafter. The relevant turnover for calculating the applicable fees for mergers involving foreign entities with a local component is the turnover based on or attributable to the business of, or in the local component in Nigeria.

There are no deadlines for payments; however, a merger notification will not be considered satisfactory if no payments are made.

3.4 Parties Responsible for Filing

The primary acquiring undertaking and the primary target undertaking are responsible for filing the merger application at the FCCPC, although it is commonplace for such organisations to instruct local counsel to make such filings and notifications on their behalf.

3.5 Information Included in a Filing

The FCCPC requires copies of specific documents prepared or received by any member(s) of the board of management, board of directors, supervisory board, shareholders' meeting, or other individuals with similar functions or to whom such functions have been delegated or entrusted, to be submitted. These include minutes of meetings where the transaction was discussed, reports, surveys, studies, presentations, and related documents that assess or analyse the merger in terms of its rationale, potential for sales growth, market shares, competitive conditions, competitors (actual and potential), expansion into other markets, and general market conditions.

Additionally, analysis, reports, studies, surveys and related documents from the last two years that assess the affected markets concerning market shares, competitors (actual and potential), competitive conditions, and potential for sales growth or expansion into other markets should also be submitted. In the case of a full merger, the most recent business plan of both merging parties should be included.

Lastly, the FCCPC requires that the information provided is comprehensive, factual, detailed and translated into English, Nigeria's official language, before submission.

3.6 Penalties/Consequences of Incomplete Notification

Although there are no penalties for failing to provide a complete notification, it is worth noting that if an application is incomplete, the merger review will be suspended until all necessary information or documentation is submitted to the FCCPC.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

The FCCPC can revoke its decision to approve or may conditionally approve a merger where the application was based on incorrect information supplied by the merging parties subject to the provisions of section 99 1 (a) of the FCCPA. In addition, the FCCPC can prohibit the merger in its entirety.

Subject to section 112 of the FCCPA, an undertaking that gives to the FCCPC or an authorised officer of the FCCPC any information that the undertaking knows to be false or misleading commits an offence and, where the undertaking is:

(a) a natural person, is liable on conviction to imprisonment for a term not exceeding two years or to payment of a fine not exceeding NGN10 million or both a fine and imprisonment;
(b) a body corporate, is liable on conviction to a fine not exceeding 10% of its turnover in the preceding business year; and
(c) a body corporate referred to in paragraph (b), each director of the body corporate is liable to be proceeded against and on conviction dealt with as specified in paragraph (a).

3.8 Review Process

Subject to the provisions of the MRG and the provisions of section 95 of the FCCPA, the merger review consists of two phases. For small mergers, the FCCPA requires the FCCPC's review to be concluded within 20 business days (extendable by a 40-day period) of satisfactory notification of the merger. The period may be extended up to a further 15 business days where the merger raises initial competition concerns and the parties propose acceptable remedies but where the need for a Phase Two review is not expected.

For large mergers, section 97 of the FCCPA limits the period of review to 60 business days, extendable by an additional 60 business days, which may be extended by up to a further 30 business days where the merger raises initial competition concerns but the need for a Phase Two review is not expected. For most cases where no material competition concerns arise, the FCCPC will seek to complete the first detailed review within 45 business days. Generally, Phase One review will conclude within the statutory timeframes. Under regulation 19 of the MRR, the FCCPC utilises the statutory extensions in two ways: first, to fulfil the remedies proposals objective where they are acceptable; and, second, to undertake the Phase Two review.

3.9 Pre-notification Discussions With Authorities

The MRG suggest that the pre-notification phase of a merger review is crucial, and the FCCPC encourages merging parties to discuss a proposed merger informally and confidentially before submitting a notification, typically at least two weeks before submission of a formal notification is contemplated. This gives both the FCCPC and the merging parties the opportunity to discuss legal issues, prepare for investigations and identify potential competition concerns early on.

Such consultations may take place in person, by telephone, by video conference or other digital means, or by any other means the FCCPC determines to be appropriate to enable the parties and the FCCPC to clarify matters which may cover jurisdictional questions, as well as substantive and procedural matters. These discussions can be scheduled on the merger notification portal and can be done on a "no-name" basis for confidentiality purposes.

3.10 Requests for Information During the Review Process

The FCCPC may, during the review process or while conducting its investigation, undertake market testing of the notified transaction and request additional information from the notifying parties to enable it to proceed or conclude with its review.

When such requests are made, they effectively suspend the review pending their resolution.

3.11 Accelerated Procedure

Form 2 (Notice of Merger Simplified Procedure) allows for a simplified procedure if the merger parties assess the proposed merger and believe that the transaction is unlikely to prevent competition.

Paragraph 21(3) of the MRR provides that the FCCPC may approve the use of a faster process for mergers if requested by the parties involved. This reduces the timeline for all relevant processes during the initial review by 40%, unless stated otherwise in the applicable notice. Notably, this timeframe is subject to any issues raised during the prescribed period. The 40% rule for reducing timeframes only applies to merger notifications that do not have a timeframe already published by the FCCPC.

For foreign-to-foreign mergers with Nigerian components, the Foreign-to-Foreign Merger Guidelines provide an expedited procedure for merger reviews, and the FCCPC will conclude its review and issue a decision within 15 business days upon payment of a fee of NGN10 million. The FCCPC generally complies with the 15 business days timeframe, except in cases of deficiencies in the notification or where any other issues have been raised.

4. Substance of the Review

4.1 Substantive Test

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 will assess a merger on the basis of whether or not the merger is likely to 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.

4.2 Markets Affected by a Transaction

As a general principle, the FCCPC would not assume that the merging parties operate in the same relevant market(s), even when there appears to be some overlap between their products and the geographic areas in which they conduct business. In addition, the FCCPC considers that the relevant market(s) being analysed for competitive effects may not necessarily correspond to the product categories or service areas established by the merging firms or their rivals for operational purposes. Thus, the conceptual framework adopted by the FCCPC within which relevant information can be organised for the purpose of assessing the competitive effect of a merger is in the first instance to identify the products or services and geographic area in which competition may be harmed. In this regard, the FCCPC defines the relevant product market in terms of the set of products that customers consider to be close substitutes, while the relevant geographic market is defined in terms of the location of suppliers. It includes those suppliers that customers consider to be feasible substitutes and it may be local, state-wide, regional, national or wider (transcending national boundaries).

Although neither the FCCPA nor the FCCPC expressly refers to the phrase 'de minimis level', in circumstances where two or more of the undertakings involved in the merger or acquisition are active in the same product or geographic market but their combined market share is less than 15%, such merger or acquisition is eligible for notification through the simplified procedure. According to the FCCPC, the simplified procedure may be applicable for mergers that do not raise significant competition concerns.

4.3 Reliance on Case Law

The FCCPC as a matter of practice allows the merger parties, in articulating their views on the overall impact of the merger on competition in the market, to rely on cases and theories from other jurisdictions as a persuasive basis for the views that they advance.

There is no preference for cases from any particular jurisdiction; what is most relevant is that the cases and theories parties rely on are applicable to the views that they advance.

4.4 Competition Concerns

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

- unilateral effects in a horizontal merger where the merger involves two competing firms and removes the rivalry between them, allowing the merged firm profitably to raise prices;
- co-ordinated effects in either a horizontal and non-horizontal merger where the merger enables or increases the ability for several firms within the market (including the merged firm) jointly to increase prices because it creates or strengthens the conditions under which they can co-ordinate; and
- vertical or conglomerate effects which may arise principally in a non-horizontal merger 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 recognise these same theories of anti-competitive harm.

4.5 Economic Efficiencies

The FCCPC considers economic efficiencies in circumstances where a merger has been determined to be capable of an SPLC situation. In such cases, economic efficiencies would be considered as a trade-off evaluated against the perceived anti-competitive effects of the merger. Such economic efficiencies must result in 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.

4.6 Non-competition Issues

Non-competition issues are taken into account by the FCCPC during the review process. Specifically, the following non-competition issues are considered in applicable circumstances when reviewing a merger:

- 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: gains relating to a particular industrial sector or region, for instance, the stable supply of electricity; employment; the ability of national industries to compete in international markets; and the ability of small and medium-sized enterprises (SMEs) to become competitive; and
- 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.

There are no specific rules for foreign direct investment in relation to merger control.

4.7 Special Consideration for Joint Ventures

The same standard that applies to the substantive assessment of mergers would also apply to the substantive review of joint ventures. As at the time of writing, there is no indication as to whether or not the FCCPC will examine possible co-ordination issues between joint venture parents when reviewing a joint venture.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

Section 98 of the FCCPA authorises the FCCPC to direct any of its officers to investigate a merger. In exercising this power, the FCCPC may also require any person or undertaking to provide any information in respect of the merger. In addition, regulation 20 (1) of the MRR authorises the FCCPC to prohibit a merger upon the conclusion of the review process.

However, the FCCPC has indicated that it is only mergers that lessen competition substantially that will be prohibited. In assessing whether a merger is likely to prevent or lessen competition substantially, the FCCPC evaluates whether the merger, either through the unilateral ability of the merged firm or in coordination with other firms, is likely to lead to higher prices. Generally speaking, the prevention or lessening of competition will be considered by the FCCPC to be 'substantial' in either of the two following circumstances:

- where the price of the relevant product(s) would likely be higher in the relevant market than it would be in the absence of the merger ('material price increase'); and
- where sufficient new entry would not occur rapidly enough to prevent a material price increase, or to counteract the effects of any such price increase.

Additionally, where the merging firms, individually or collectively, have pre-existing market power, smaller impacts on competition resulting from the merger will be considered by the FCCPC to meet the test of being substantial.

5.2 Parties' Ability to Negotiate Remedies

The FCCPC may apply or the merger parties may propose remedies. These remedies are:

- 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);
- behavioural remedies, non-structural remedies or 'conduct' remedies, which are ongoing measures designed to modify, regulate or constrain the future conduct of the post-merger firm; and/or
- hybrid remedies, which are a combination of both structural and behavioural remedies. These 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.

5.3 Legal Standard

Typically, remedies are not required to meet any specific legal standard in order to be deemed acceptable. However, the FCCPC in assessing a remedy must as a matter of practice ensure that it is tailored to the competition harm(s) identified and effective in mitigating such harm(s).

5.4 Typical Remedies

See **5.2 Parties' Ability to Negotiate Remedies**. Remedies are generally applied to address competition issues only.

5.5 Negotiating Remedies With Authorities

Merger parties may put forward remedies to the FCCPC at any time during the merger review process, including during pre-notification consultations. Alternatively, the FCCPC may give the merger parties an opportunity to propose remedies in any of the following circumstances.

If after the initial first-level review of the merger, the FCCPC determines that the merger is likely to give rise to an SPLC situation, it shall issue an issues paper to the merger parties that among other things requires the presentation of a written response addressing the competition concerns raised in the issues paper and proposing remedies as applicable to alleviate them.

After consideration of the merger parties' response to the issues paper, where the FCCPC still finds that the merger is likely to SPLC and the remedies proposed by the merger parties do not address the competition issues identified, the FCCPC shall issue a Statement of Objections and commence the second level of the merger review process. At this level, the merger parties may put forward a remedies proposal in their response to the Statement of Objections to address the competition concerns raised by the FCCPC in the issues paper. Where the FCCPC is satisfied with the presentation of the merger parties, it may approve the merger at this stage but subject to requiring the merging parties to:

- take an action to remedy, mitigate or prevent the substantial lessening or prevention of competition; or
- fulfil any other conditions as may be appropriate in the circumstance of the case.

Thereafter, the FCCPC shall publish a non-confidential version of the remedies proposal in order to provide an opportunity for interested third parties to comment on the effectiveness and sufficiency of the proposals. Not less than ten working days will be given for this consultation process. Following the consultation process, the FCCPC will determine whether the remedies proposal will be accepted and will finalise the remedies package alongside the final decision on the merger.

The power of the FCCPC to approve a merger subject to conditions also includes the power to impose any remedies whether or not agreed by the merger parties.

5.6 Conditions and Timing for Divestitures

There is no specific timeline for complying with a remedy. However, the FCCPC, in approving a particular remedies package, may prescribe the timeframes within which the remedies shall be implemented to alleviate the competition concerns identified.

Some transactions may be completed prior to implementing the remedies, especially if the remedy is one that is required to be implemented post-merger approval. In such cases, the FCCPC will as a matter of practice require, as a condition for approving the merger, that the merger parties and/or the post-merger firm undertake to implement the remedy after approval.

There is no specific penalty for failure to comply with a remedy approved by the FCCPC; however, disobedience to the FCCPC's order or directive is an offence under the Federal Competition and Consumer Protection Commission (Administrative Penalties) Regulations 2020, and the offender(s) is/are liable to a base penalty of NGN5 million, which is then used to determine the final penalty on the basis of a number of factors such as the duration of the months in which this offence persists, the ratio of the aggravating factors and the ratio of the mitigating factors.

5.7 Issuance of Decisions

Section 97 (1) (b) of the FCCPA requires the FCCPC to issue a decision in the form of a report after considering a merger stating whether to:

- approve the merger;
- approve the merger subject to condition(s); or
- prohibit the implementation of the merger.

Merger review decisions are not made publicly available.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

We are not aware of any recent case where the FCCPC has required remedies or prohibited a merger transaction. However, on 4 March 2023, the FCCPC published and invited comments with respect to the remedies package proposed by the merger parties in the proposed acquisition of a 21.61% equity stake by FMDQ Holdings PLC in Central Securities Clearing Systems PLC. The remedies proposed by the merger parties, in this case, are both behavioural and structural remedies. We are not aware of the outcome of this case nor of any decision of the FCCPC in this regard.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Both the FCCPA and the decisional practices of the FCCPC are silent on the concept of ancillary restraints. However, according to regulation 13 (2) (b) of the MRR, certain contractual clauses ancillary to the merger transaction may be deemed a co-ordination or integration of their businesses or their competitive conduct, and thus expose them to liability for gun jumping. These clauses, according to the FCCPC, demand greater scrutiny during the merger review process and include the following:

- the lack of a precedence clause delineating the effective date of the contract and the date of its execution in relation to the creation of any integration among parties;
- prior non-compete clauses;
- clauses for full or partial payment, non-reimbursable, earnest money deposit or advance payments, in consideration for the target, except in the case of:
  - (a) customary down payments for business transactions;
  - (b) deposits in escrow accounts; or
  - (c) breakup fees (payable if the transaction is not consummated);
- clauses allowing direct interference by either party in the other party's business strategies by submitting, for example, decisions over prices, customers, business/sales policy, planning, marketing strategies and other sensitive decisions (that do not constitute a mere protection against deviation from the normal course of business and, consequently, the protection of the value of the business being sold); and
- in general terms, any clause providing for activities that cannot be reversed at a later time or which implies the expenditure of a significant amount of resources by the agents involved or the authority.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Third parties are involved in the merger review process. Regulation 16 (1) of the MRR requires the FCCPC to publish a notice of a proposed merger upon satisfactory notification by the merger parties. Per regulation 16 (2) of the MRR, the publication of the notice shall include an invitation to any interested third parties to comment on the merger by providing a written submission to the FCCPC within the prescribed timelines.

In addition, regulation 16 (3) of the MRR requires the merger parties, in notifying the merger to the FCCPC, to provide evidence of service of notice of the proposed merger to any registered trade union that represents the employees in the acquiring and target undertakings respectively; or the employees or representatives of the employees of the acquiring and target undertakings, if there are no such registered trade unions.

7.2 Contacting Third Parties

The FCCPC, in conducting a second-level review of the proposed merger, may hold hearings with third parties including issuing detailed questionnaires to market participants, such as key customers or competitors, and industry experts such as relevant public authorities or regulators.

The FCCPC does not generally market-test the remedies proposed by the merger parties. However, in assessing the effectiveness of a proposed remedy, the FCCPC would consider its competitive impact, that is, whether the remedy is designed to address the identified competition harm that is likely to result from the merger, with due consideration to how the remedy changes the competitive dynamics of the market and the incentives of the post-merger firm post-remedy. In doing this, the FCCPC will set out terms in the Remedy Order that specify and anticipate potential issues that may arise during the implementation phase to help actualise the intended competitive impact (eg, restoring competition) and protect against the merging parties' ability to thwart the intended competitive impact.

7.3 Confidentiality

Public notice of a proposed merger is published by the FCCPC; however, commercial information including business secrets are treated with the utmost confidentiality by the FCCPC at the request of the merger parties. If the merger parties believe that their interests would be harmed if any of the information they are required to supply were to be published or otherwise divulged to other parties, they should submit this information separately, with each page clearly marked 'Business Secrets' under separate cover. They are also required to give reasons why this information should not be divulged or published.

In the case of business combinations or in other cases where the notification is completed by more than one of the parties, business secrets may be severally submitted under separate cover and referred to in the notification as an annex. All such annexes must be included in the submission in order for a notification to be considered complete.

7.4 Co-operation With Other Jurisdictions

The FCCPC as a matter of policy encourages the merger parties to facilitate international co-operation between the FCCPC and other competition authorities reviewing the same merger. The FCCPC during the pre-notification consultation and actual notification of the merger encourages the merger parties to disclose the jurisdictions outside Nigeria where the merger is subject to regulatory clearance under merger review rules.

Furthermore, the FCCPC encourages the undertakings concerned to submit waivers of confidentiality that would enable the FCCPC to share information with other competition authorities outside Nigeria reviewing the same merger. Each waiver is intended to facilitate joint discussion and analysis of a merger as it allows the FCCPC to share relevant information with another competition authority reviewing the same merger, including confidential business information obtained from the undertakings concerned.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Parties may appeal a merger review decision. Merger review decisions from the NCC may, in the first instance, be reviewed by the FCCPC before an appeal can be made to the Federal Competition and Consumer Protection Tribunal (FCCPT). Decisions from the FCCPC are, in the first instance, reviewed by the FCCPT before an appeal can be made to the Court of Appeal.

8.2 Typical Timeline for Appeals

There is no specific deadline set for filing an appeal as at the time of writing. We are also not aware of any appeal against a merger review decision at the FCCPC, the FCCPT or the Court of Appeal.

8.3 Ability of Third Parties to Appeal Clearance Decisions

There is no express provision regarding whether third parties are able to appeal a merger clearance decision. However, it is conceivable that parties that have an interest in a merger and/or that are able to prove locus standi in a particular case may be able to appeal a merger decision.

There is no history of a merger clearance decision granted under the FCCPA being appealed in Nigeria.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

In Nigeria, there is no foreign direct investment/ subsidies review legislation nor are there related filing requirements.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

While there have not been any recent changes to the FCCPA and other applicable rules, stakeholders have been calling on the FCCPC to cap the processing fee applicable to a notified merger.

10.2 Recent Enforcement Record

The FCCPC and NCC do not make enforcement records public.

10.3 Current Competition Concerns

The FCCPA and the merger review process are still a new development in Nigeria. The primary focus as indicated by the FCCPC is to create awareness of compliance with the FCCPA including the requirements for notifying qualifying mergers. We have also seen a significant interest in notifying foreign-to-foreign mergers at the FCCPC.

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