IMPLICATIONS OF THE JUDGMENT IN *EMEKA NNUBIA V. MINISTER OF INDUSTRY, TRADE AND INVESTMENT & 2 OTHERS* FOR MERGER CONTROL IN THE COMMUNICATIONS SECTOR

Implications of the *Emeka Nnubia v. Minister of Industry, Trade and Investment & 2 Others* Judgment for Merger Control in the Communications Sector

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Introduction

On 7 February 2025, the Federal High Court, Lagos Division (the Court), in *Emeka Nnubia v. Minister of Industry, Trade and Investment, Federal Competition and Consumer Protection Commission & MTN*, affirmed the authority of the Federal Competition and Consumer Protection Commission (FCCPC) to enforce competition regulation within Nigeria's communications sector. This decision was made notwithstanding the provisions of Section 90 of the Nigerian Communications Act 2003 (NCA), which confers exclusive jurisdiction on the Nigerian Communications Commission (NCC) in matters of competition regulation in the sector.

In the case, the Plaintiff, a shareholder of MTN, the third Defendant, argued that only the NCC has been statutorily granted the exclusive competence to determine, administer, monitor, and enforce compliance with competition laws as they apply to the communications sector. However, the Court held that the Federal Competition and Consumer Protection Commission Act 2018 (FCCPA), being a later statute, overrides Section 90 of the NCA to the extent of any inconsistency concerning the exclusive regulation of competition and consumer protection matters in the communications sector. The Court also made it clear that the FCCPC now exercises concurrent jurisdiction with the NCC over competition regulation in the communications sector. Notably, the Court relied on section 104 of the FCCPA, which establishes the primacy of the FCCPA over any other legislation in matters concerning competition and consumer protection.

This article explores the legal implications of the Court's decision, with a focus on merger control under the FCCPA. In particular, it examines how this development affects transactions that meet the jurisdictional thresholds for merger notification, especially asset acquisitions within the communications sector and clarifies the circumstances under which such transactions must be notified to the FCCPC for competitive assessment in accordance with the provisions of the FCCPA.

Jurisdictional Threshold for Mergers Occurring in the Communications Sector

Following the Court's decision affirming the concurrent jurisdiction of the NCC and the FCCPC over competition regulation in the communications sector, it is important to note that each regulator applies distinct jurisdictional thresholds for merger notification.

Under Regulation 27 of the Competition Practice Regulations 2007 (CPR) issued by the NCC, the following transactions are notifiable to the NCC for merger review purposes:

i. Any transaction involving the acquisition of more than 10% of the shares of a communications licensee;

ii. Any transaction resulting in a change in control of the communications licensee; or

iii. Any transaction resulting in the direct or indirect transfer or acquisition of an individual licence previously granted by the NCC pursuant to the NCA.

In contrast, the FCCPC applies a different threshold under Paragraphs 2.1–2.2 of its Merger Review Guidelines 2020 (MRGs). A merger is notifiable to the FCCPC where a "relevant merger situation" is created or will be created. Pursuant to Paragraph 2.3 of the MRGs, a relevant merger situation arises where the following cumulative conditions are met:

i. Two or more undertakings come under common control, or arrangements are in progress or contemplation that, if implemented, will result in such undertakings being brought under common control and made distinct; and

ii. Either the Nigerian turnover of the undertaking being acquired in the preceding financial year exceeds the prescribed threshold, or the combined Nigerian turnover of the merging undertakings exceeds the prescribed threshold (commonly referred to as the "turnover test").

Although the NCA and, by extension, the NCC do not expressly classify asset acquisitions as notifiable transactions, the FCCPA adopts a broader framework that may bring certain asset acquisitions within the scope of merger notification requirements. Specifically, Section 92(1)(b)(i) of the FCCPA recognises that a merger may be implemented through the acquisition of assets of the target undertaking. In line with this, the FCCPC has clarified that an asset acquisition in which the purchaser acquires all or part of the seller's business assets may be viewed as a qualifying transaction for merger review purposes.[1] The primary consideration by the FCCPC in such circumstances, whether an asset acquisition constitutes a relevant merger situation, is whether the acquired assets have sufficient economic significance to merit a merger review coverage.[2]

Thus, for an asset acquisition to be considered a merger, it must 'constitute the whole or a part of an entity to which a turnover threshold can be attributed'.[3] In other words, under the FCCPC's decisional practice, assets alone are unlikely to constitute a notifiable merger unless it is possible to attribute identifiable turnover directly to the asset being acquired. The Federal High Court in *Theodak Nigeria Limited v. Federal Inland Revenue Service Board*[4] defined turnover as 'the aggregate income that a business receives from its normal business activities for a given period, usually from the sale of goods and services to consumers.'

Merger Notification Implications of *Emeka Nnubia v. Minister of Industry, Trade and Investment & Ors.* on Asset Acquisitions in the Communications Sector

Nigeria's communications sector comprises a wide array of operators, ranging from mobile network operators (MNOs) and internet service providers (ISPs) to submarine cable operators, satellite

[1] MRGs para. 2.42.
[2] ibid para. 2.42.
[3] ibid.
[4] Suit No: FHC/ABJ/CS/17/2017 (Unreported).

communication providers, wholesale access network providers, mobile virtual network operators (MVNOs) and data centre operators. These entities own or control various categories of infrastructure and assets that serve as the backbone of connectivity and digital services. Many of these assets, by their nature, are capable of independently generating revenue and may therefore fall within the scope of merger review by the FCCPC, particularly where they constitute a whole or a part of a business to which turnover can be attributed.

For instance, some of these revenue-generating assets in the communications sector include:

i. **Radio Access Network (RAN) Infrastructure**
This includes base transceiver stations (BTS), antennas, towers/masts, and remote radio units that enable wireless communication. RAN infrastructure is deployed by MNOs, MVNOs via wholesale agreements and wholesale access network providers. Revenue is derived from end-user subscriptions, roaming charges, and wholesale access fees paid by MVNOs and other third-party service providers.

ii. **Spectrum Licenses**
Spectrum licences confer the legal right to use specific segments of the radio frequency spectrum, a finite and scarce national resource. These licences are held by MNOs, satellite communication providers, and ISPs. Spectrum facilitates the delivery of voice, SMS, mobile data, and broadband services. In Nigeria, spectrum rights may be leased, transferred, or shared, providing additional streams of income.

iii. **Fibre Optic Cable Infrastructure**
This asset includes both terrestrial and submarine fibre optic cables used for high-speed data transmission. It is operated by ISPs, wholesale network access providers, submarine cable operators, and other licensed entities. Revenue is generated through capacity leasing (e.g., dark fibre and lit fibre services), backhaul provisioning, and long-term infrastructure sharing agreements with ISPs, data centres and enterprise clients.

iv. **Submarine Cable Landing Stations**
These facilities serve as critical infrastructure for the landing and interconnection of undersea cable systems. Operated by submarine cable companies, they generate income by charging access fees to ISPs, MNOs, and other telecommunications carriers for bandwidth landing and interconnection rights. Ownership stakes or Indefeasible Rights of Use (IRUs) in international cable systems can also serve as valuable revenue-generating assets.

v. **Satellite Ground Stations and Orbital Slots**
Satellite ground stations are terrestrial facilities used to control and communicate with satellites. Orbital slots, allocated positions in Earth's orbit, are essential for satellite operations. These assets are primarily used by satellite communication providers to deliver broadband, broadcast, and data services, particularly in remote or underserved areas. Revenue is earned through bandwidth leasing, managed services, and wholesale agreements.

vi. **Data Centres**

Data centres house computing infrastructure such as servers, storage systems, and network equipment. Used by ISPs, cloud service providers, and dedicated data centre operators, they support a wide range of digital services. Revenue streams include colocation services, Infrastructure as a Service (IaaS), and managed hosting solutions for enterprises, government agencies, and digital platforms.

vii. **Points of Presence (PoPs) and Internet Exchange Points (IXPs)**

PoPs and IXPs are critical network facilities where internet traffic is exchanged between different networks. Operated by ISPs and MNOs, these nodes support interconnection, traffic routing, and peering. Monetisation occurs through bandwidth sales, interconnection charges, and peering arrangements that enhance network efficiency and reduce latency.

Undoubtedly, the FCCPC shares concurrent jurisdiction with the NCC in the enforcement of competition law within the communications sector. This concurrent jurisdiction now extends to the FCCPC's merger review authority, which encompasses qualifying transactions, including acquisitions of assets that meet the statutory thresholds under the FCCPA and the MRGs. Where the jurisdictional thresholds under the FCCPA are met, the acquisition of any of the revenue-generating assets outlined above by a third-party acquirer would, in principle, constitute a qualifying merger and must be notified to the FCCPC, unless there is credible and legitimate evidence establishing that the asset in question does not generate turnover. This exception may apply where the asset has not been in active use or operation for an extended period and would require material further development to become operational. In such circumstances, it may be arguable that no turnover can be properly attributed to the asset, thereby negating the requirement for notification.

Persuasive guidance on the assessment of asset acquisitions as mergers can be found in *Société Coopérative de Production SeaFrance SA (Respondent) v. Competition and Markets Authority and another (Appellants)*,[5] where the UK Supreme Court (UKSC) clarified the applicable two-step test. According to the UKSC, for an asset acquisition to constitute a merger giving rise to a "relevant merger situation", the following criteria must be satisfied:[6]

i. The acquirer must obtain something more than what could be obtained by simply purchasing the factors of production from the market (the "extra"); and

ii. The "extra" must be attributable to the fact that the assets were previously used in combination in the activities of the target enterprise.

The UKSC further held that "the longer the interval between a target enterprise's cessation of trading and the acquisition of control of its assets, the less likely it is that either criterion will be satisfied". Applied in the Nigerian context, the FCCPC is likely to treat the acquisition of a fully functional data centre, operational submarine cable landing station, or active spectrum licence as notifiable mergers where the jurisdictional thresholds are met.

This position also applies where the transferred assets enable the continuation of a particular business

[5] [2015] UKSC 75.

[6] ibid para 39.

activity.[7] If, following the acquisition, the asset cannot support the continuation of the target business without substantial additional development or investment, it becomes arguable that the asset lacks attributable turnover and, consequently, does not give rise to a notifiable merger. Conversely, the acquisition of dormant or non-operational infrastructure, for example, unused fibre networks or decommissioned towers, may not, in and of itself, trigger notification obligations, unless the asset retains demonstrable commercial utility.

Conclusion

Given the concurrent jurisdiction of the FCCPC and NCC, merging parties may be subject to parallel notification requirements. This calls for careful transaction planning to ensure compliance with both regulators. Failure to notify the FCCPC, even where NCC approval has been secured, may expose the transaction to enforcement risk under the FCCPA, including penalties for implementing a merger without prior approval, known as gun-jumping. To mitigate regulatory uncertainty, parties are encouraged to engage proactively with the FCCPC where doubt exists regarding the notifiability of a transaction, particularly asset acquisitions involving infrastructure central to telecommunications service delivery. In practice, the FCCPC is open to pre-notification consultations that can provide clarity on jurisdictional issues and the likely classification of a transaction.

The Federal High Court's decision in *Emeka Nnubia v. Minister of Industry, Trade and Investment & Ors.* signals a definitive affirmation of the FCCPC's role in merger control within the communications sector. By affirming the supremacy of the FCCPA over the NCA in matters of competition enforcement to the extent of any inconsistency, the Court has reinforced the mandate of the FCCPC to review mergers, including asset acquisitions that meet the prescribed statutory thresholds.

Although the divergence in notification thresholds between the NCC and FCCPC highlights the need for careful regulatory assessment in structuring mergers or acquisitions within the communications sector, particularly where both regimes may apply concurrently. As a result, stakeholders in the communications sector must now factor FCCPC's approval into their transaction timelines, even where the NCC has traditionally been viewed as the primary regulator. Importantly, any acquisition of revenue-generating assets such as spectrum, fibre networks, data centres, and submarine cable infrastructure, provided it meets the turnover test, will likely be subject to notification to the FCCPC. Accordingly, parties contemplating the acquisition of dormant or non-operational infrastructure should carefully assess the asset's commercial status and functionality. A fact-specific inquiry into whether the asset is capable of supporting ongoing or imminent business operations will be critical in determining the applicability of merger notification obligations under the FCCPA.

It is also important to note that even where an asset acquisition does not qualify for notification as a merger due to the absence of attributable turnover, it may still fall within the scope of Section 92(1)(b)(i) of the FCCPA, which defines a merger to include the acquisition of an *interest*. Under Nigerian law, courts generally interpret "interest" in property (or an asset) to mean a legally recognisable right, claim, or title that a person holds in or over the property.[8] In contexts not

[7] MRGs para. 2. 4.

[8] Kensal Farms Ltd & Anor v. Nigercat Construction Co (2013) LPELR-20162(CA) P 23 Paras E – F.

involving land, this typically refers to movable or intangible assets such as shares, intellectual property rights, funds in bank accounts, insurance entitlements, vehicles, and other forms of personal or proprietary interests.[9] Accordingly, an asset acquisition, regardless of whether the asset generates turnover, may still constitute the acquisition of an interest for the purposes of merger control. If the applicable jurisdictional thresholds are met, such a transaction may be deemed a notifiable merger and should be submitted to the FCCPC for review.

For competition lawyers and industry participants, this development calls for a more nuanced appreciation of merger thresholds and regulatory coordination. It also reinforces the need for a structured and evidence-based approach to analysing whether an asset acquisition constitutes a notifiable merger under the FCCPA.

Disclaimer

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[9] Bryan A Garner, Black's Law Dictionary (8th edn, OUP 2004) p 2374.