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The International Comparative Legal Guide to:

Merger Control 2011

A practical cross-border insight into merger control

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

Under the present regime, the main authority in respect of merger regulation in Nigeria is the Securities and Exchange Commission (SEC).

The principal legislation regulating mergers and acquisitions is the Investment and Securities Act 2007 (ISA). The SEC is primarily vested with the powers to regulate investments and securities businesses in Nigeria, registration and regulation of capital market operators, venture capital funds, collective investments schemes, review/approval and regulation of mergers & acquisitions. The provisions of the ISA are supplemented by Rules issued from time to time by the SEC.

The SEC procedure for mergers in Nigeria can be divided into three main stages:

(a) The Pre-Merger Stage which involves primarily a pre-merger notice to the members of the companies involved as well as to the SEC, an application to the Federal High Court (FHC) for an order of the court to convene separate meetings of members of the merging companies. Thereafter, meetings of shareholders of the merging entities are actually convened and held pursuant to an appropriate court order.

(b) Formal Application to Court and to the SEC. This involves the passing of a special resolution by the holders of not less than ¾ of the shares of the company, voting in person or by proxy, approving the merger, a formal application for approval of the merger is made to the SEC and upon approval, an application is made to the court for an order sanctioning the scheme.

(c) Post-Approval Notifications. This basically involves making necessary filings with the regulatory authorities e.g. filing of the court order sanctioning the scheme of arrangement with the SEC as well as publication of the Order in the Official Gazette and in at least one national newspaper.

Mergers and acquisitions involving organisations in regulated industries are also subject to the provisions of various sector legislations. For example, mergers involving banks are subject to the Banks and other Financial Institutions Act 1991 (as amended), the Central Bank of Nigeria Act 1991 (as amended) and the Central Bank of Nigeria Procedures Manual for processing Applications for Bank Mergers/Take-over 2004 (as updated). Furthermore, mergers involving insurance companies are subject to provisions of the Insurance Act. Similarly, mergers involving telecommunications companies are subject to the Nigerian Communications Commission (NCC) Act. In addition, the Corporate Affairs Commission (CAC) is involved as the overall regulatory body for all companies in Nigeria. Thus, changes in shareholding occasioned by the merger or changes in directorship of the resulting or surviving entity would have to be registered or filed with the CAC.

Law Reform:

Following the enactment of the ISA in June 2007 to replace the ISA 1999, presently mergers in Nigeria fall into three categorisations for notification purposes, these without prejudice to the discussion above on merger procedure in general are: small; intermediate; and large mergers. This categorisation is determined in accordance with criteria based on market share thresholds, annual turnover, assets or combination of a number of factors, to be issued forth by the SEC through regulations from time to time (essentially a size-of-transaction criterion). Small mergers need not be notified, intermediate and large mergers must be notified and approved by the SEC. This categorisation of mergers into three in ISA 2007 has its roots in the South African merger control method and first found its way into Nigeria in a revised version of the Federal Competition and Consumer Protection Bill, a law that is proposed to be passed in Nigeria on the regulation of competition. If this law is passed, it would introduce competition law enforcement into Nigeria. Institutionally, if not substantively, it would change the way mergers are regulated in Nigeria. The law proposes to set up an agency (Federal Competition and Consumer Protection Commission (FCC)) with the powers to regulate competition in Nigeria. It proposes two institutions for the regulation of mergers in Nigeria: the FCC; and a Competition Tribunal, effectively taking merger control away from the jurisdiction of the SEC. In the proposed law, there is still a categorisation of mergers for notification and institutional jurisdictional purposes: small; intermediate; and large. This categorisation is to be determined in accordance with criteria based on market share thresholds, annual turnover, assets or combination of a number of factors, to be issued forth by the FCC through regulations from time to time (essentially a size-of-transaction criterion). Small mergers need not be notified, intermediate mergers must be notified and approved by the Commission while large mergers must be notified to the Commission but approved by the Tribunal before they could be implemented. Upon notification of a merger, the Commission or the Tribunal must first determine if the merger would substantially lessen or prevent competition in the relevant market, and thereafter consider if there are any technological or efficiency contributions to the economy which the merger would produce, that would offset the negative effects on competition. A merger can also be justified on substantial public interest grounds, such as by reference to the effect on employment, a particular industrial sector or region, or the ability of national industries to compete in international markets.

1.2 What is the merger legislation?

Under the present regulatory regime, the main merger legislation is the Investments and Securities Act 2007 (ISA) and the SEC Rules (issued from time to time) which are supplementary to the ISA. It should be noted that the ISA 2007 came into force on 1 June 2007, replacing the Investments and Securities Act No 45 1999 which was the legislation regulating mergers at the time the 2008 Edition of The International Comparative Legal Guide to: Merger Control was published. As earlier discussed, mergers in particular industries are subject to the legislation regulating such industries e.g. the banking industry - Banks and Other Financial Institutions Act 1991 (as amended), the Central Bank Procedures Manual for Applications for Bank Mergers/Take-overs, and in respect of the telecommunications industry, the National Communications Act.

The Federal Competition and Consumer Protection Bill, when passed into law, would be the predominant legislation on merger control generally, subject to the application of the referred sector legislations.

1.3 Is there any other relevant legislation for foreign mergers?

There is no other legislation in respect of foreign mergers other than the legislations discussed above. However, the Federal Competition and Consumer Protection Bill contains provisions extending its application to conducts (including acquisitions of assets or shares of businesses outside Nigeria) by a person resident or who carries on business in Nigeria, to the extent that such substantially affects a market in Nigeria.

1.4 Is there any other relevant legislation for mergers in particular sectors?

Banking Industry – Banks and Other Financial Institutions Act 1991 (as amended); the Central Bank of Nigeria Act 1991 (as amended); and the Central Bank of Nigeria Procedures Manual for Applications for Bank Mergers/Take-overs 2004 (as updated). The above legislations regulate mergers and acquisitions in the Nigerian Banking Industry, and require banks to obtain a number of Approvals/Consents from the Central Bank of Nigeria in respect of proposed mergers. These are in three stages:

(a) Pre-merger- this represents the Central Bank of Nigeria's preliminary consent to the banks wishing to merge stating that it has no objection to the merger.

(b) Approval-in-Principle- this represents the Central Bank of Nigeria's conditional approval of the proposed merger.

(c) Final Approval- this is given after the merger has been approved by the SEC.

Insurance Industry – *The National Insurance Commission Act.*

The Nigerian Insurance Commission has the regulatory oversight of insurance business in Nigeria and as such its consent is also required in the case of any proposed merger involving an insurance company.

Telecommunications – *The Nigerian Communications Act No 19 2003.*

The Nigerian Communications Commission has regulatory oversight over the telecommunications industry in Nigeria. The Commission is charged with the function of promoting fair competition in the communications industry and protection of communications services and providers from the misuse of market power or anti-competitive and unfair practices. As such necessary approval must be obtained and necessary notifications must be given to the Commission regarding proposed mergers involving companies in the communications industry.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, how is the concept of "control" defined?

Under the ISA 2007 a transaction is a merger and therefore caught if it is an amalgamation of the undertakings or any part of the undertakings or interest of two or more companies or the undertakings or part of the undertakings of one or more companies and one or more bodies corporate. The above may be achieved in any manner including (i) purchase or lease of the shares, interest or assets of the other company in question, or (ii) amalgamation or other combination with the other company in question. Also, "control" is achieved if a person or entity: (a) beneficially owns more than one half of the issued share capital of the firm; (b) is entitled to cast a majority of the votes that may be cast at a general meeting of the firm or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person; (c) is able to appoint or to veto the appointment of a majority of the directors of the firm; (d) is a holding company, and the firm is a subsidiary of that company as contemplated under the Companies and Allied Matters Act; (e) in the case of a close corporation, owns the majority of members' interest or controls directly or has the right to control the majority of members' votes in the close corporation; or (f) has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in the preceding paragraphs.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Practically, it is difficult to conceive of a situation where the acquisition of a minority shareholding could constitute a merger. However, technically it cannot be stated that this is impossible. Since by definition "control" for purposes of our merger regulation could occur where a person is able to appoint or to veto the appointment of a majority of the directors of a given company, technically therefore a "merger" could occur where minority shareholding acquisition transaction is structured in such a way as to accord the minority shareholding acquirer the power to appoint or to veto the appointment of a majority of the directors of the company in question. Though this is rare, it does not seem impossible.

2.3 Are joint ventures subject to merger control?

This would depend on whether a 'joint venture' can be said to constitute a 'merger'. The Black's Law dictionary (Special Deluxe 5th edition) defines a "joint venture" to mean "***a legal entity in the nature of a partnership engaged in the joint prosecution of a particular transaction for mutual profit…a onetime grouping of two or more persons in a business undertaking. Unlike a partnership, a joint venture does not entail a continuing relationship among parties***". The ISA does not expressly provide for the inclusion of a joint venture under merger regulation, but if a joint venture transaction is structured to fall into any of the manners above by which according to the ISA a merger could be achieved, then the joint venture would be caught, otherwise by itself a joint

venture being usually a one-off cooperation transaction would not be normally subject to merger control.

2.4 What are the jurisdictional thresholds for application of merger control?

Under the ISA, an application must be made to the SEC for a formal approval of any intermediate or large merger in Nigeria. The criteria is to be determined and published by the SEC. Since the coming into force of the ISA 2007 no such criteria has been released. However, the ISA provides that pending the time the SEC prescribes the substantive thresholds for the various categories of mergers, the lower threshold shall be =N=500,000,000 (Five Hundred Million Naira) while the upper threshold shall be =N=5,000,000,000 (Five Billion Naira). Therefore every merger in which the worth of asset or market turnover exceeds =N=500,000,000 (Five Hundred Million Naira or around USD4 Billion (Four Billion United States Dollars) shall be subject to notification to the SEC for approval by virtue of the SEC's oversight function as the regulatory authority for mergers, acquisitions and capital market work.

Note: The SEC is proposing to reduce the minimum threshold from =N=500,000,000 (Five Hundred Million Naira or around USD4 Million (Four Million US Dollars) to =N=250,000,000 (Two Hundred and Fifty Million Naira) or USD2 Million (Two Million US Dollars). The SEC explains the rationale for this proposal in the following words: "A review of the records of filing by applicants for mergers over the years i.e. 2000 – 2008 (excluding mergers in the banking and the insurance industry which were government induced) revealed that only a few companies had an annual turnover or assets that exceeded =N=30,000,000.00 (Thirty Million Naira or USD200,000). The rationale therefore of reducing the threshold would be to bring more companies within the regulatory purview of the Commission". We must make it clear that this proposal is still at discussion stage and has not yet been adopted nor is it certain that it will be.

Note: Under the latest revisions in the Federal Competition and Consumer Protection Bill (subject to National Assembly acceptance) any merger which falls within the criteria of intermediate or large mergers must be notified to and approved by the FCC or the Tribunal, as the case may be. The criteria are not defined in the Bill but are to be released from time to time by the FCC.

2.5 Does merger control apply in the absence of a substantive overlap?

At the moment every merger must be approved by the SEC, so the question of the existence or otherwise of a substantive overlap does not arise. Under the Federal Competition and Consumer Protection Bill the position on substantive overlap does not change since every intermediate or large merger must be notified to and approved by the FCC or the Tribunal, as the case may be.

2.6 In what circumstances is it likely that transactions between parties outside Nigeria ("foreign to foreign" transactions) would be caught by your merger control legislation?

The present legal regime does not apply to organisations outside Nigeria, although it may be necessary to obtain certain approvals involving cross-border share acquisitions. However the Federal Competition and Consumer Protection Bill would apply to transactions within and outside Nigeria (e.g. acquisition of assets or shares of a business) by any person resident or carrying on business in Nigeria to the extent that such transaction substantially affects a market in Nigeria.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

To the best of our knowledge, under the present legal regime there are none. However, the Federal Competition and Consumer Protection Bill provides that to the extent that a given industry or sector is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction over matters of competition law (and presumably in respect of mergers), the bill is presumed to have established concurrent jurisdiction between the FCC and that sector regulator over competition law. However, it mandates the FCC and the relevant sector regulator to enter into an agreement on how they would exercise their concurrent jurisdiction in order to avoid conflicts. Therefore, it is conceivable that occasionally, in keeping with the terms of any agreements so entered, the FCC may cede the control of a given merger to any sector regulator to be assessed in accordance with the provisions of the relevant sectoral law, thus putting the operation of the jurisdictional threshold under the competition bill in abeyance.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

In our law, the fact that every merger which meets up the threshold gets notified to the SEC simplifies the process and makes it unnecessary to begin to examine whether a particular stage in a transaction now constitutes a merger or not quite. Moreover, once control is attained in the manner discussed under question 2.1 above, then a transaction has occurred which activates the merger control mechanism. This would also be the situation under the Federal Competition and Consumer Protection Bill which contains similar provisions to the ISA 2007.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Intermediate and large mergers compulsorily must be notified. However, notification of small mergers is voluntary by the parties. There is power given to the SEC to require parties to a small merger to notify the merger for review where it is felt that the merger, though 'small' nevertheless substantially lessens competition. This same provision is preserved in the Federal Competition and Consumer Protection Bill. In the case of the Bill however, the power to require parties to a small merger to notify the merger must be exercised by the FCC within six months of the implementation of the merger or the power is lost.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

To our knowledge, there are none, both in the present regime and in the proposed FCC Bill's provisions. Even with the latest revisions

to the Competition Bill, mergers which raise concerns must still be cleared, either by the FCC or under the terms of any agreements with a relevant sector regulator, by the sector regulator.

Note: There is a provision in the ISA 2007 section 118 (3) (on mergers) which provides as follows: "Nothing in this section shall apply to holding companies acquiring shares solely for the purpose of investment and not using same by voting or otherwise to cause or attempt to cause a substantial restraint of competition or tend to create a monopoly in any line of business practice". This provision has not been tested nor any guidance yet provided by the SEC. On a literal basis it could mean that if parties take a view that the purpose by which they make an acquisition is for portfolio investment and not to exercise political authority, that they do not need to notify the transaction, even where the threshold for notification are met. We doubt whether the SEC would agree to this interpretation which would have the effect of limiting their powers or their sphere as the SEC (like all public authorities in Nigeria) do tend to guard their jurisdiction or perception of that, jealously. Therefore, the safer interpretation is that the SEC would most likely insist that where the thresholds are met, notification should be made, and it is for the SEC itself to take into account the purpose for which an acquisition is made (such as for investment and not for voting purposes) in reaching a decision to authorise the transaction or not.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

As discussed above, under the present regulatory regime, the requirement of obtaining the SEC's approval in respect of a proposed merger is mandatory where the merger is intermediate or large. The same is the case under the Federal Competition and Consumer Protection Bill where mergers meeting the threshold have to be notified to the FCC. Parties that fail to notify run the risk that their mergers would be invalidated and thus be dissolved. There is also another risk that the SEC might prevent the new acquirer assuming it is an indirect merger, from assuming effective control of the entity acquired such as Board directorship. Under the old draft of the Federal Competition Bill, there are no financial penalties however for failure to notify, only that the merger would not be valid. However, the present revisions (subject to National Assembly acceptance) provides for an administrative fine of up to 10% of the turnover of the parties to a merger who failed to notify it for approval before implementing it.

There are no specific formal sanctions from failure to notify. However, apart from its power to invalidate the merger, the SEC has a general power to impose administrative fines on parties for breach of the securities law and rules and regulations of the capital market. It is in that context that it could impose those administrative monetary sanctions on parties who breached the notification requirements.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

As a matter of necessity even if a global merger is contemplated by parent companies of Nigeria subsidiaries, Nigerian law makes it mandatory for the local subsidiaries to undergo a merger process under Nigerian law. However, there is no provision against carving out their Nigerian subsidiaries from the transaction to enable the merger to go ahead globally, if compliance with Nigerian requirements would be onerous and delay the global merger.

3.5 At what stage in the transaction timetable can the notification be filed?

Presently as earlier discussed, the SEC Rules divide the merger notification/approval process into three stages and require notification and thus approval at each of those stages. These are discussed in question 1.1 above. The proposed Federal Competition and Consumer Protection Bill requires the parties to notify once they conclude the merger agreement.

Please note also that mergers in particular industries are also subject to the legislation regulating such industries e.g. the banking industry. The Central Bank of Nigeria Procedures Manual for Applications for Bank Mergers/Take-overs makes provisions for three stages in the merger process and expressly specifies the stage at which all necessary notification, approvals must be obtained. These are discussed in question 1.4 above.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

Under the latest revisions in the Bill (subject to National Assembly acceptance), SEC has 20 days, extendable by a single period not exceeding 40 business days, for the consideration and decision on a small merger notified to it upon demand, and 20 days, extendable by a single period not exceeding 40 business days, for the consideration and decision on an intermediate merger. Mergers which are not approved or prohibited within these statutory periods are deemed to be approved, though SEC retains the residual right to revoke the deemed approval. In the case of a large merger, SEC has 40 business days within which it must forward to the Federal High Court a statement on its decision on the merger, whether or not implementation of the merger is approved or prohibited.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

The ISA and SEC Rules make it mandatory to obtain certain approvals before moving on to the next stage in the merger process. For example a formal application of a merger is expected to be filed with the SEC which must be approved before an application is made to the court to sanction the merger.

The position is the same with the latest revision of the Federal Competition and Consumer Protection Bill. The risk of completion before clearance is obtained or waiting periods exhausted is that the merger runs the risk of being invalidated and the parties exposed to huge financial penalties of up to 10% of turnover.

3.8 Where notification is required, is there a prescribed format?

There is no particular format presently, but parties are expected to provide necessary information regarding the proposed merger. There are no formats yet in respect of the Federal Competition and Consumer Protection Bill since the law has not yet come into effect. It is expected however that subsidiary legislation would be made when the law comes on stream prescribing the format that notifications to the FCC should take.

3.9 Is there a short form or accelerated procedure for any types of mergers?

There are no short forms or accelerated procedures under the ISA or under regulations in respect of particular industries e.g. banking and insurance sectors. The same is the situation under the Federal Competition and Consumer Protection Bill.

3.10 Who is responsible for making the notification and are there any filing fees?

The organisations with intent of merging are responsible for making necessary notification and filings. However it is common place for such organisations to instruct professional advisers such as financial/transaction advisers or legal advisers to make such notification or filings on their behalf. Under the proposed Federal Competition Commission Bill, the merging parties would also have to make the reference with the assistance of their professional advisers. It is also expected that filing fees would be introduced when the law comes into force. Presently, filing fees are payable for notifications to the SEC.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed? Are non-competition issues taken into account?

Mergers are assessed against the test of 'substantial lessening or prevention of competition' and 'on substantial public interest grounds'. The latter would allow considerations such as the effect of the merger on employment, particular industrial sector, the ability of national industries to compete in international markets. In determining whether a merger is likely to substantially prevent or lessen competition, the SEC shall assess the strength of competition in the relevant market, and the probability that the company, in the market after the merger, will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including: the actual and potential level of import competition in the market; the ease of entry into the market, including tariff and regulatory barriers; the level and trends of concentration, and history of collusion, in the market; the degree of countervailing power in the market; the dynamic characteristics of the market, including growth, innovation, and product differentiation; the nature and extent of vertical integration in the market; whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and whether the merger will result in the removal of an effective competitor. As stated above, the additional test of "substantial public interest grounds" quite independent of the test of "substantial lessening or prevention of competition" allows consideration of non-competition issues such as effect on employment and promotion of national champions.

4.2 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Under the ISA 2007, it is a requirement in the case of an intermediate or large merger for the parties to provide a copy of the merger notice to any registered trade union that represents a substantial number of its employees; or the employees concerned or representatives of the employees concerned, if there are no such registered trade unions.

The Federal Competition and Consumer Protection Bill provides that when a notification is made to the Commission, the Commission is to convene a special conference inviting all interested parties to attend and make contributions. Also generally, the Bill provides that any person who alleges that he has suffered, or is likely to suffer, an injury as a result of a violation or likely violation of any provision of this Act may bring an action in the Federal High Court. These are mechanisms for ensuring third parties and complainants of protection and input in the merger scrutiny process. The Bill also provides for the relevant Trade Unions to be notified and they have the right to participate in the merger consideration process to make representations.

4.3 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

Under the existing legal regime, the SEC may seek for clarification and request more information in respect of mergers filed for its approval. However, the Federal Competition and Consumer Protection Bill gives the Commission wide information gathering and investigatory powers and these apply across the various fields that the Bill gives the FCC jurisdiction including merger control.

4.4 During the regulatory process, what provision is there for the protection of commercially sensitive information?

For the purpose of seeking necessary approvals from the regulatory authority (SEC), and in the case of mergers in particular industry sectors e.g. banking, (the CBN), all necessary information is required to be provided to the regulatory authorities and as such necessary information should not be withheld. The regulatory authorities are aware of the commercial sensitivities of the information which is submitted to them in the course of seeking approvals for mergers. Nigerian law makes provision for protection of commercially sensitive information. For example the ISA seeks to protect abuse of information obtained in official capacity and prohibits communication of such information to any other person or the dealing in securities relevant thereto. The Federal Competition and Consumer Protection Bill has no provisions on legal privilege and commercially sensitive information. However, the Commission has the powers to prohibit parties from disclosing any information furnished to the Commission by a party to any proceeding. It is expected that either during legislative deliberations provisions for protection of commercially sensitive information and legal privilege would be introduced in the Bill or when the new law comes on stream, subsidiary legislation would be made addressing specifically the issue of commercially sensitive information and legal privilege.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

Under the existing regulatory regime, the regulatory process ends by the grant of an approval of the merger by the SEC, an application to court for an order sanctioning the scheme, and the filing of the Court Order with the SEC, as well as publication of same in the Official gazette and in at least one national newspaper.

Under the Federal Competition and Consumer Protection Bill the process ends with the approval with or without conditions or the prohibition by the FCC or the Tribunal, as the case may be of the merger. In general, the revision provides that a party aggrieved

with the FCC's decision can file an application for review before the Tribunal, and where the grievance relates to a Tribunal decision, to the Court of Appeal on points of law.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

Yes, this is possible both under the present regime and under the proposed law. Parties can always readjust their merger agreement to take care of concerns raised by the authorities, or raised by other parties otherwise affected by the merger. In fact, the presence of elaborate merger conference provisions in the Federal Competition and Consumer Protection Bill is intended to ensure that competition problems identified can be remedied by mutual consultations and agreements.

5.3 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

As soon as the competition problems identified have been brought to the attention of the parties, the negotiation of remedies can commence at the earliest possible time during meetings with the regulators. At the least, the concerns raised regarding the impact on competition have to be met before approval can be given for the merger. There are no specific, clearly defined procedural steps for the negotiation of remedies.

5.4 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

No standard approach is applied under the current regime to any divestment remedies. However, the ISA provides that the SEC may order the break-up of a company into separate entities in such a way that its operations do not cause a substantial restraint of competition in its line of business or in the market. Before the break-up order becomes effective, the affected company shall have been notified by the Commission and given a specified time within which to make representations to the SEC. It should be noted that to the best of our knowledge in practice there has not been any occasion when the SEC has had to order any structural or divestment remedies. The Federal Competition and Consumer Protection Bill has provisions for divestment remedies. However, being a proposed law, no standards of approach have been developed as the law has not yet come into operation.

5.5 Can the parties complete the merger before the remedies have been complied with?

As discussed in question 5.4, no divestment remedies have been imposed under the current legal regime. What would happen under the Federal Competition and Consumer Protection Bill is unclear as the law is yet to be enacted.

5.6 How are any negotiated remedies enforced?

The authorities can withdraw approvals given if the conditions for the approval are not fulfilled. However, this has never happened in practice. Under the proposed competition law, as parties aggrieved by a merger decision can apply to the court for review, presumably affected parties who were participants in the conference procedures which culminated in the merger can apply to the court for redress where merging parties violate the conditions of a merger, including negotiated ones. The FCC can also take action against parties who violate or disregard the terms under which the merger was approved.

5.7 Will a clearance decision cover ancillary restrictions?

This is not provided for expressly in the law. However, it is conceivable that any decision approving a merger would cover restrictions to competition which are incidental to the lawful implementation of the merger.

5.8 Can a decision on merger clearance be appealed?

Yes, in the event of dissatisfaction by an applicant for a merger approval from the SEC, such an applicant can apply to the court for judicial review. As already noted, the Federal Competition and Consumer Protection Bill provides expressly that a party aggrieved by an FCC decision can apply for review of that decision to the Tribunal and where the decision is that of the Tribunal, then on points of law to the Court of Appeal.

5.9 Is there a time limit for enforcement of merger control legislation?

Subject to the deadlines discussed in question 3.6 above for reaching decisions on notified merger transactions, the law does not provide a time limit for regulatory authorities to enforce merger control issues.

6 Miscellaneous

6.1 To what extent does the merger authority in Nigeria liaise with those in other jurisdictions?

There is no express provision for liaison in our laws but we believe that like other government agencies in our country, the SEC and proposed FCC would be able to liaise with equivalent agencies in other countries where such would be necessary for the proper performance of their functions. There is no law or administrative directive, to our knowledge, that prohibits such liaison and cooperation.

6.2 Please identify the date as at which your answers are up to date.

16th October, 2010.

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