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The International Comparative Legal Guide to:

Merger Control 2016

12th Edition

A practical cross-border insight into merger control issues

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EDITORIAL

Welcome to the twelfth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Three general chapters. These chapters are designed to provide readers with a comprehensive overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control laws and regulations in 50 jurisdictions.

All chapters are written by leading merger control lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Nigel Parr and Catherine Hammon of Ashurst LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 Relevant Authorities and Legislation

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

The apex regulatory institution in relation to merger control is the Securities and Exchange Commission ("SEC"). SEC was established by section 1 of the Investment and Securities Act 2007 ("ISA") CAP I24 LFN 2004. SEC performs an all-pervasive role in merger control in Nigeria. It receives pre-merger notifications, formal applications and gives approvals before any merger can be completed. It also ensures that all post-merger requirements are met.

The Corporate Affairs Commission ("CAC"), established by the Companies and Allied Matters Act 1990 ("CAMA") CAP C20 LFN 2004, also has a part to play with respect to corporations that intend to merge. It is its responsibility to receive corporate filings and to certify corporate resolutions and de-registration of any dissolved companies that may occur in the merger process.

The Nigerian Stock Exchange is worth mentioning as quoted companies need to meet the listing rules on merger transactions. Listed companies are required to submit to the Exchange drafts of all circulars issued by the company to its shareholders; they are also required to disclose any conflict of interest issues between directors of merging companies. In addition, a listed company may have to be delisted as a result of a merger.

The Federal High Court ("FHC") also acts as a relevant authority in merger control. Section 251 of the 1999 Constitution of the Federal Republic of Nigeria gives this court the power to handle matters with respect to companies' operation, management and regulation. This court makes orders for shareholders' meetings to consider the merger scheme. The FHC also sanctions the merger scheme.

There is a pending Federal Competition and Consumer Protection Bill. The Bill makes provision for the creation of the Federal Competition Commission ("FCC"). This commission will act as a competition regulator empowered to prevent and punish anti-competitive practices, regulate mergers, takeovers and acquisitions, and protect regulated industries in every sector and location in Nigeria. It also proposes the creation of a competition tribunal to deal with any disputes and concerns which may arise.

We note that, given the recent dissolution of the Nigerian National Assembly, and the subsequent inauguration of a new one on the ninth day of June, 2015, there is, technically, no pending Federal Competition and Consumer Protection Bill before the said new Assembly. In accordance with the Nigerian constitutional law, a bill not passed, or passed but unsigned, elapses at the end of the lifespan of the Assembly. However, we have deliberately retained the characterisation in order to highlight what we believe will be the new frontier of M&A regulation in Nigeria, but also in anticipation of the Bill's re-introduction by the new Assembly.

1.2 What is the merger legislation?

The key merger legislation is the Investment and Securities Act 2007 ("ISA") CAP I24, LFN, 2004 and the rules made pursuant to it, the "SEC Rules and Regulations 2013 (as amended by SEC Rules and Regulation 2015)".

1.3 Is there any other relevant legislation for foreign mergers?

There is no other legislation in respect of foreign mergers than the Investment and Securities Act stated in question 1.2 above.

The Act subjects every merger (which means both local and foreign) to prior review and approval by SEC. The Act provides for three kinds of mergers (small, intermediate and large); the kind of merger the foreign company contemplates having will decide whether notification to SEC is voluntary or mandatory.

Rule 427 of the 2013 SEC Rules (as amended) provides for the threshold for these mergers. It puts the lower threshold for a small merger below N1,000,000,000 (one billion Naira) and an intermediate merger is between N1,000,000,000 (one billion Naira) and N5,000,000,000 (five billion Naira), while a large merger is above N5,000,000,000 (five billion Naira). The determination of these thresholds is calculated by either combined assets or turnover or a combination of both assets and turnover in Nigeria.

SEC's main interest is in determining whether or not a merger is likely to substantially prevent or lessen competition. To resolve this, SEC shall assess the strength of the competition in the relevant market and determine whether the success of the merger will be competitive or co-operative, taking into account any factor that is relevant to competition in the market including the actual and potential level of imports in the market.

Also, in terms of the definition of a merger under the ISA, change of control is a relevant factor and a person is said to control a company if that person beneficially owns more than one half of the issued capital of the company, or is a holding company and the company is a subsidiary of that company, etc. Consequently, foreign mergers with no impact whatsoever in the Nigerian market may require no notification to SEC. On the other hand, where a foreign merger would have significant impact on the Nigerian market or where it will result in change of control of the Nigerian subsidiary, it may

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be necessary to notify SEC. It should be noted also that where a foreign merger will result in the merger of two or more of their Nigerian subsidiaries, compliance with the ISA in terms of merger notification and approval will apply to the local consequential transaction.

The time frame for obtaining clearance is not stipulated by the rules, however foreign companies intending to go through a merger process that will affect the market in Nigeria should use their discretion in giving themselves ample time to apply for clearance from the Nigerian regulators before implementing the merger in Nigeria, as required by law. Failure to do this may cause SEC to break up the merger or levy heavy fines for acts contrary to those stated in the law.

However, the FCC Bill has clearer provisions with respect to foreign mergers. In terms of scope, the Bill is made to apply to all economic activities within or having effect within Nigeria. The Bill also contains provisions extending its application to conduct (including acquisitions of assets or shares of businesses outside Nigeria) by a person who is resident or who carries on business in Nigeria, to the extent that such conduct substantially affects a market in Nigeria which to a large extent covers foreign mergers.

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

The ISA is the major legislation on mergers, acquisitions and takeovers in Nigeria. However, mergers, acquisitions and takeovers involving organisations in regulated industries are also subject to the provisions of the various sector legislations. Most often, those legislations would require the organisations to obtain approval/or no objection from the relevant authority in any proposed merger or acquisition. Indeed, the SEC Rules and Regulations 2013 PART I dealing with Mergers, Takeovers and Acquisitions require a non-objection letter from the company's regulator as part of the documents to be submitted at the pre-merger notice level. The legislation below is therefore noteworthy:

Banking Industry – The Central Bank of Nigeria ("CBN") regulates bank mergers pursuant to its powers under: the Banks and Other Financial Institutions Act 1991 (as amended); the Central Bank of Nigeria Act 1991 (as amended); and the Procedures Manual for Applications for Bank Mergers/Take-overs 2004 (as updated) published by the CBN. The Manual gave effect to the provisions of the CBN Guidelines and Incentives on Consolidation in the Nigerian Banking Industry, issued on 5 August 2004. The CBN Manual of 2004 provides for stages of approval from the CBN as follows:

(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. The preliminary consent will form a basis for the merging banks to forward an application for merger to SEC.

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

(c) Final Approval – this is given after the merger or takeover has been approved by SEC. Upon obtaining final approval, the successor bank in the case of a merger will be issued a new banking licence.

Electricity Sector – Electric Power Sector Reform Act 2005

In line with its regulatory function of promoting competition and preventing abuse of market power in the electricity sector, the Nigerian Electricity Regulatory Commission ("NERC"), pursuant to section 82(5) of the Act, has the power to make a decision on whether or not to approve a merger or acquisition in the Nigerian power sector.

Insurance Industry – The National Insurance Commission Act 1997, CAP N53 LFN 2004

The Nigerian Insurance Commission has regulatory oversight of insurance business in Nigeria and, as such, its consent or non-objection is also required in the case of any proposed merger involving an insurance company. The National Insurance Commission ("NAICOM") requires a public advert directed at policyholders before its approval of any merger or business combination.

Telecommunications – The Nigerian Communications Act No 19 2003 CAP N97 LFN 2004

The Nigerian Communications Commission ("NCC") has regulatory oversight over the telecommunications industry in Nigeria and has made a regulation in this regard: "The Competition Practices Regulations 2007". These regulations provide a framework for the promotion of fair competition in the communications sector, and creates standards and procedures which will assist the NCC in determining anti-competitive conduct by licensed entities. As such, necessary approval must be obtained and necessary notifications must be given to the NCC regarding proposed mergers involving such licensed companies in the communications industry. The NCC gives a maximum of sixty (60) days for such notification and responds within a thirty (30) day time frame. It may approve, approve with conditions, deny or initiate an inquiry or any other public proceeding regarding the merger or proposed transaction. The regulation gives the NCC the right to review procedures for the acquisition of more than 10% of the shares of a licensed company, and transactions that may result in a change of control or direct/indirect transfer of acquisitions in a licensed company in the communications industry. Where there is a breach of any of these rules, the NCC has the power to levy heavy sanctions or any other penalties in its Enforcement Process Regulation 2005.

Oil and Gas – Petroleum Act [1969] now 2004 CAP P10 LFN 2014 & Petroleum Industry Bill ("PIB")

The regulations made under the Petroleum Act require the consent of the Minister to a change of control of the holder of an oil licence or asset. The PIB, which is a proposed unified legal framework for the petroleum sector in Nigeria, provides that where a licensee, lessee or production sharing or service contractor is taken over by another company or merges with or is acquired by another company, either by acquisition or exchange of shares including a change of control of a parent company outside Nigeria, it shall be deemed to be treated as an assignment within Nigeria and shall be subject to the terms and conditions of the proposed Act and any regulations made under it. The Act provides that such an assignment shall require the consent of the Minister of Petroleum Resources and further provides the conditions for the granting of the Minister's consent to such assignments.

2 Transactions Caught by Merger Control Legislation

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

The ISA 2007 defines a merger as 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.

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Under sections 120 and 123-126 of the ISA and the SEC Rules, intermediate and large mergers are caught transactions (that is, transactions that fall within thresholds for notification) and as such, are subject to notification to, and regulation by, SEC. In terms of the ISA 2007, a party to a small merger is not required to notify SEC of the merger unless SEC requires it to do so. However, the SEC Rules 2013 (as amended) clearly provide that although a small merger is not notifiable, the merging parties are required to inform SEC at the conclusion of the merger, presumably for statistical purposes only.

Also under the 2013 SEC Rules, an intermediate merger is between N1,000,000,000 (one billion Naira) and N5,000,000,000 (five billion Naira) of either combined assets or turnover or a combination of both assets and turnover in Nigeria, while a large merger is above N5,000,000,000 (five billion Naira). The significant point is that the 2013 SEC Rules have increased the lower threshold to below N1,000,000,000 (one billion Naira) as against the Merger Rules 2010 which reduced the lower threshold from N500,000,000 (five hundred million Naira) as provided under section 120 of the ISA 2007, to N250,000,000 (two hundred and fifty million Naira). The implication of Rule 427 of the 2013 SEC Rules (as amended) is that several small companies would be removed from the regulatory purview of SEC, except where SEC requires such notification. It also shows that SEC is beginning to focus more on significant transactions that are likely to have an impact on the market.

The concept of "*control*" is defined under section 119(3) of the ISA and covers where 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 a majority of members' interest or controls directly, or has the right to control, a 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"?

Yes, the acquisition of a minority shareholding may amount to a merger due to the fact that, under the ISA 2007, a merger can be achieved through purchase or lease of the shares, interest or assets of the other company in question, or by amalgamation or other combination with the other company in question. It follows then that the acquisition of the entire shareholding or any part thereof (even if it is just the minority shareholding) in another company can amount to a merger. The threshold requirements under the SEC Rules discussed in question 2.1 above will determine whether such a merger is notifiable. Where the value of the transaction falls within intermediate or large mergers as defined under the Act and the Rules, it is a notifiable transaction.

Further, section 119(3) defined "*control*", for the purposes of merger regulation, to include where a person is able to appoint or to veto the appointment of a majority of the directors of a given company. It can then be inferred that technically, even though it is a rare situation, a "*merger*" could occur where a minority shareholding acquisition 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.

2.3 Are joint ventures subject to merger control?

The ISA 2007 did not expressly mention joint ventures in its definitions, but section 117 defined "company" to mean any body corporate, and includes firms or associations of individuals. Rule 422 of the 2013 SEC Rules (as amended) provides that that the Rules shall apply to private and public companies, partnerships, and every merger, acquisition or combination between and among companies, involving the acquisition of shares or assets of another company.

Consequently, a joint venture is envisaged under the provisions of the Act and the Rules, since such a joint venture is likely to be a corporate body, firm, association or partnership. Whether or not a joint venture is subject to merger control will depend on two concepts: change of control; and a thresholds requirement. Since joint venture transactions may play out in different scenarios, it is the nature of the joint venture that would determine whether it falls within the change of control concept. For instance, where two or more firms form a new entity for a specific purpose with none of the parties acquiring control over the business of the other, it may not constitute a merger. On the other hand, where two competitors transfer a division of their businesses to the venture, which translates into acquisition by the joint venture, or two firms acquire joint control over an existing firm which neither of them previously controlled, the possibility of a notifiable transaction may have been created if the value of the assets or shares transferred or acquired falls within the notifiable thresholds.

Apart from issues of strict merger control, a joint venture can raise other issues of competition law in the sense that such agreement could be construed as anti-competitive and unenforceable depending on market share and dominant position resulting in favour of the joint venture.

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

See question 2.1 above. The SEC Rules 2013 (as amended) provide that the lower threshold shall be below N1,000,000,000 (one billion Naira). An intermediate threshold is between N1,000,000,000 (one billion Naira) and N5,000,000,000 (five billion Naira) of either combined assets or turnover or a combination of both assets and turnover in Nigeria, while the upper threshold is above N5,000,000,000 (five billion Naira).

Under the ISA 2007, any merger which falls within the criteria of intermediate or large mergers must be notified to and approved by SEC. SEC has power to adjust its criteria from time to time and it has done this, as discussed earlier above. Under the FCC Bill, 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?

Yes, merger control will still apply even where there is no increase in market share or competition concerns. The main area of concern to merging parties according to law are the jurisdictional thresholds, although the issue of market share and competition are of great importance to the regulators. The ISA mandates that once a merger is within the notifiable thresholds, then the stipulated procedures in terms of notification and obtaining approval must be followed. Also

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the other aspect of merger control regulation is consideration of fairness of the transaction amongst the shareholders of the merging parties. This issue is considered even if no competition issues arise from the merger.

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 ISA 2007 did not specifically provide that foreign-to-foreign transactions must be notified to SEC. However, section 117 intentionally extended the scope of Part XII beyond companies incorporated pursuant to the Companies and Allied Matters Act CAP C20 LFN 2004, thus sections 117 and 118 can be said to apply to firms, associations of individuals and, by extension, companies or other bodies/entities outside Nigeria whose activities are likely to or may have some effect on the Nigerian market, more so in view of section 121 of the ISA. In determining the thresholds, the assets or turnover, or a combination of both assets and turnover, in Nigeria are the key relevant factors. As noted earlier, the Nigerian Federal Competition and Consumer Protection Bill, which would clearly apply to transactions within and outside of Nigeria, is still pending before the National Assembly. It was the absence of a national competition commission that created the need for extension of the merger provisions in the ISA 2007 to competition issues under the regulatory control of SEC. SEC, now acting as the temporary competition authority, has the mandate to consider the effect of foreign sales on the national market prior to or post merger. This will imply that, so far as an acquisition transaction could create an impact in Nigeria's market environment (immediately or potentially) or the foreign companies have turnovers within notifiable thresholds in Nigeria, the transaction may fall within SEC's jurisdiction. Although SEC has not set specific rules on the notification of offshore transactions, it is wise for organisations involved with such transactions having impact on the Nigerian market, to perhaps send a simple letter to SEC informing it of the offshore transaction, as a precautionary measure.

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

Section 118(3) of the ISA excludes certain transactions involving holding companies acquiring shares solely for the purpose of investment and not using such shares 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 enterprise. This exception is also reaffirmed in Rule 424 (1) of the 2013 SEC Rules (as amended). This rule also excludes any acquisition in a private or unquoted company with assets or turnover below N500,000,000 (five hundred million Naira). By virtue of section 121 of the ISA, a merger likely to substantially prevent or lessen competition may be approved if it is likely to result in any technological efficiency or other pro-competitive gain which will be greater than its effect of lessening competition, or when the merger can be justified on substantial public interest grounds.

With regard to sharing merger jurisdiction with other laws, there is specific provision in the ISA 2007 dealing with such matter, but SEC requires regulated companies to submit the approval of their regulators alongside merger notification. The Federal Competition and Consumer Protection Bill, however, provides that, to the extent that a given industry or sector is subject to another regulatory authority that 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 the other 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 into, 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?

The fact that every merger which meets the threshold is notified to 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. Moreover, once control is attained in the manner discussed in question 2.1 above, then a transaction has occurred which activates the merger control mechanism. This would also be the situation under the FCC Bill.

However, as regards takeovers, the ISA has created two scenarios for the regulation of transactions broken up into stages or a series of transactions under section 131(1), as follows:

(a) where a person acquires shares, whether by a series of transactions over a period of time or not, which (taken together with shares held or acquired by a person acting in concert with him) carry 30% or more of the voting rights of a company; or

(b) where a person, together with persons acting in concert with him, holds no less than 30% but no more than 50% of the voting rights, and such person or any person acting in concert with him acquires additional shares which increase his percentage of the voting rights, such person shall make a take-over offer to the holder of any class of equity share capital in which such a person or any person acting in concert with him holds shares.

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?

It is compulsory for intermediate and large mergers to be notified to SEC. However, notification of small mergers in terms of the Act is voluntary by the parties subject to the power given to SEC to require parties to a small merger to notify it of the merger for review where it is felt that the merger, although "small", nevertheless substantially lessens competition. Further to the above, the 2013 SEC Rules (as amended) require the parties to a small merger to inform it at the conclusion of the merger. For small mergers, informing SEC is mandatory after the conclusion of the merger. It is presumed that this is for statistical purposes only.

For intermediate and large mergers, notification to SEC shall be at the initial stage via the filing of a merger notification with all necessary documents, followed by an application to the Federal High Court to convene a court-ordered meeting. Following the resolutions of shareholders at the court-ordered meeting, a formal

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application is then made to SEC for formal approval of the merger. As regards the deadline for notification, section 123 (1) of the ISA 2007 merely provides that a party to an intermediate or large merger shall notify SEC of the merger in the prescribed manner and form. Section 123 (3) provides that the parties to an intermediate or large merger shall not implement the merger until it has been approved, with or without conditions, by SEC. From the SEC Rules, a letter of intent signed by the merging companies, as well as resolutions of the merging companies supporting the merger, are part of the documents to be filed before SEC at the merger notification stage. Consequently, one can say that notification should be made to SEC as soon as parties have signified intention to proceed with the merger which can be evidenced by the resolutions of parties.

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

See question 2.7 above. Section 118 (3) of the ISA 2007 excludes transactions involving holding companies acquiring shares solely for the purpose of investment and not using such shares 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 enterprise. This provision has not been tested nor any guidance yet provided by SEC. On a literal basis, it could mean that if parties take a view that the purpose for which they have made an acquisition is portfolio investment and not to exercise political and economic authority or control over the entity, then they do not need to notify the transaction, even where the thresholds for notification are met. SEC has, however, maintained in several fora that it is not for parties to make that determination. Consequently, once the thresholds are met, notification should be made, and it is for SEC itself to take into account the purpose for which an acquisition was made (such as for investment and not for voting purposes) in reaching a decision whether or not to authorise the transaction.

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 SEC's approval in respect of a proposed merger is mandatory where the merger is intermediate or large. Parties that fail to notify SEC run the risk of their merger being invalidated or dissolved, since SEC reserves rights to break up such mergers under section 128 of the ISA and Rule 432 of the SEC Rules and Regulations. There are no specific formal sanctions for failure to notify SEC. However, apart from its power to invalidate or break up 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 breach the notification requirements. Also, by virtue of the amended SEC Rules, 2015, Schedule II of the SEC Rules contains new penalties in respect of mergers, acquisitions, external restructuring and other form of business combinations. For instance, "merger among companies with combined assets or turnover between N1,000,000,000.00 and N5,000,000,000.00 shall be liable to a penalty of not less than N1,500,000.00 and N5,000.00 for every day of continuing default or nullification of the said transaction from the date of consummation of the transaction". On the other hand, "a merger among companies with combined assets or turnover of N5,000,000,000.00 and above shall be liable to a penalty of not less than N2,000,000.00 and N5,000.00 for every day of continuing default or nullification of the said transaction from the date of consummation of the transaction". Furthermore, "an acquisition in private/unlisted public companies with combined assets or turnover of N500,000,000.00 and above shall be liable to a penalty of not less than N1,000,000.00 and N5,000.00 for every day of continuing default or nullification of the said transaction from the date of consummation of the transaction". Finally, "any entity which contravenes the provisions of Rule 440 shall be liable to a penalty of not less than N500,000.00 and N5,000.00 for every day of continuing default or nullification of the said transaction from the date of consummation of the transaction". See the Sundry Amendments to the SEC Rules and Regulation, April, 2015.

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

It is possible to carve out the local completion of mergers to avoid a delay to global completion. Nigerian law allows for the consequential merger of local affiliates after global completion. A case in point is the global Total and Elf merger, which resulted in the consequential merger between Total Nigeria Plc and Elf Oil Nigeria Limited in 2011. The Chevron Texaco merger in Nigeria was also consequential to global completion. This process separates the local merger from the global one and does not affect the completion of the global merger.

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

Under the SEC old Rules, the merger notification/approval process was divided into three stages:

(a) The Merger Notification Stage, which involves primarily a premerger notice. The Rules stipulate documents to be submitted to SEC at this stage in order to obtain SEC approval in principle. Once an approval in principle is obtained, an application can be made to the Federal High Court ("FHC") for an order of court to convene separate meetings of members of the merging companies. Thereafter, meetings of shareholders of the merging entities are convened and held pursuant to an appropriate court order.

(b) The Formal Approval Stage. This will require formal application for approval and it is done after the court-ordered meeting has been held and shareholders have voted, approving accordingly. The accompanying documents will include, amongst others, draft financial statements, a certified copy of the court order directing the holding of the shareholders' meeting, etc. After formal approval from SEC is obtained, parties will refer back to the court to sanction the merger.

(c) The Post-Approval Stage. Here, parties are required to file a copy of the court order sanctioning the scheme, as well as a copy of the newspaper publication of the court order, statement of the actual cost of the scheme, as well as other necessary documents listed under the SEC Rules.

However, in order to fast-track the process and make it more beneficial for shareholders, the new SEC Rules, 2015, have shortened the process to two stages by amending Rule 425 of SEC Rule 2013. Under this Rule, applicants are required to file a merger notification, in addition to a draft scheme to SEC, as part of the first stage. Upon the Commission's approval-in-principle, the applicants would then proceed to file for a court-ordered meeting at a FHC. What this new arrangement means, therefore, is that the old approach whereby an applicant must first obtain a letter of "no-objection" from the Commission, before proceeding with any of the processes, is no longer the rule.

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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 ISA 2007, 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 reserves the residual power 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 the implementation of the merger is approved or prohibited. In practice, however, it is not advisable to deem an intermediate or larger merger as being approved on the basis that time has elapsed. Parties to such merger must therefore obtain SEC approval before implementing the same. Indeed, SEC approval is one of the documents the court requires before sanctioning the merger.

Abridging the time frame for the merger process is possible but is entirely at the discretion of SEC. During the banking consolidation exercise in 2005, for instance, many mergers were concluded within a very short period to enable parties to meet the CBN deadline.

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 of the merger process. For example, under the new Rules, merger notification, together with a draft scheme document must first be filed and, upon receipt of a favourable response (which may be referred to as approval in principle), a formal application for a court-ordered meeting is made to the court.

The risk of completion before clearance is obtained or the risk of the waiting period being exhausted, is that the merger runs the risk of being invalidated and the parties exposed to huge financial penalties. Also, SEC's power to revoke or break up a merger in terms of the ISA can be invoked. See also question 3.3 above.

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

Essentially, parties are expected to provide the stipulated information or documents regarding the proposed merger as contained in the SEC Rules. The amended Rule 425 of the SEC Rules 2013 provides that companies proposing a merger (note that the new Rule has amended Rule 425 to exclude "… acquisition or other forms of external restructuring") shall, amongst others, file with SEC a merger notification together with a draft scheme for evaluation and must ensure that they issue notice of a court-ordered meeting to members and publish the same in two national dailies and that a copy is filed with the Commission. The said merger notification as well as the draft scheme under Rule 426 shall be filed by submitting to SEC reports which contain the information listed under Rule 426. Upon receipt of a favourable response to the merger notification from SEC, a formal application for approval will be filed with SEC, accompanied by the documents listed under Rule 428. Consequently, the merger notification and the draft scheme will be by way of a report stating all the information required under Rule 426, while the formal approval is via an application for approval with supporting documents.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

There are no short forms or accelerated procedures under the ISA 2007 or under regulations in respect of particular industries. The same is the situation under the Federal Competition and Consumer Protection Bill. However, in practice, effective liaison (by professional advisers of the merging parties) with the appropriate SEC officers in charge of the approval may speed up the approval process. During the 2005 banks consolidation exercise, for instance, SEC and the CBN worked out an expedited procedure to enable the banks to meet the 31 December 2005 consolidation deadline for a new capital requirement for banks.

Also, recently SEC has been working with other exchanges such as the London Stock Exchange to ensure effective cross-listing of shares in Nigerian companies. The result has been an overhaul of approval processes which is likely to positively affect merger control regulation.

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

The merging parties are responsible for making the necessary notification and filings. However, it is commonplace 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.

Rule 426 (g) of the SEC Rules creates a merger notification fee of N50,000 (fifty thousand Naira) per merging company for intermediate and large mergers.

3.11 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

SEC is also the body empowered under the ISA 2007 to regulate all offers of securities to the public by public companies and entities and to register such securities. Also, the Nigerian Stock Exchange ("NSE") Rules which govern offers of securities by listed businesses in Chapter 5 (5) provide that all documents of offer by a listed company shall comply with the relevant provisions of the Investments and Securities Act and any other relevant law, thus making the ISA the overriding law. However, as noted in question 3.9 above, improvements in the regulation of public offers of shares tend to impact positively on merger control. Thus where a merger or acquisition is to be consummated by a listed company, then several provisions applicable to listed companies may become applicable to the transaction. These relate mostly to primary and secondary market disclosures. However, since SEC regulates publicly listed companies and mergers, the impact of additional disclosure requirements are minimised.

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3.12 Will the notification be published?

Notifications to SEC are not usually published but under section 126 of the ISA 2007, SEC may refer the notice of a large merger to the court along with a statement that implementation of the merger is approved, approved conditionally or prohibited. Also, the court order sanctioning the merger must be published in at least one national newspaper. See Rule 430 of the SEC Rules 2013 (as amended).

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?

Mergers are assessed against the test of 'substantial lessening or prevention of competition' and 'on substantial public interest grounds'. Even where it appears that the merger is likely to substantially prevent or lessen competition, it may still be considered if it is likely to result in any technological efficiency or other pro-competitive gain which will be greater than its effect of lessening competition, or when the merger can be justified on substantial public interest grounds. To determine whether or not the merger is likely to substantially prevent or lessen competition, 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 cooperatively, 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 any 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. When determining, on the other hand, whether a merger can or cannot be justified on substantial public interest grounds, SEC shall consider the effect of the merger on employment, particular industrial sectors, and the ability of national industries to compete in international markets.

To enable SEC to make this determination, Rule 426 of the SEC Rules 2013 (as amended) prescribes a series of documents to be provided by the notifying party, such as letters of intent, board resolutions supporting the merger, a memorandum detailing the proposed transaction, a list of the major competitors in that product market and the market position or market share of each company, the structure and organisation of the companies, revenue information about the operations of the companies, and an analysis of the effect of the transaction on the relevant market including the post-transaction market position of the merging parties.

SEC may also require additional information to be disclosed in the memorandum which may include information concerning the geographical area of Nigeria in which the merging entities intend to do business, and identification of any products or services that parties believe are considered by buyers to be a substitute. For each identified product or service, the merging parties are expected to provide contact details of the top five producers or providers in each identified geographical area with the largest estimated turnover in value, and their estimated share of the total turnover during the last financial year. SEC may at its discretion request any other information that will assist it in doing a thorough job in preventing competition.

4.2 To what extent are efficiency considerations taken into account?

Under section 121 (b) of the ISA 2007, if it appears to SEC that the merger is likely to substantially prevent or lessen competition, SEC would, in assessing the merger, "determine whether or not the merger is likely to result in any technological efficiency or other pro-competitive gain which will be greater than the effects of any prevention or lessening of competition that may result or is likely to result from the merger and would not likely be obtained if the merger is prevented". Thus SEC may approve a merger if it considers that the merger would result in greater efficiency in the market, and the benefits of the resulting efficiency far outweigh the impact of lessening competition. See question 4.1 above.

4.3 Are non-competition issues taken into account in assessing the merger?

Yes, non-competition issues such as whether the merger can or cannot be justified on substantial public interest grounds and whether all shareholders are fairly, equitably and similarly treated and given sufficient information regarding the merger, are taken into consideration. Fairness issues are increasingly playing a greater role in merger litigation as compared to competition issues. In *Victor Odili v Oceanic Bank Plc* (unreported Suit No. FHC/L/CS/1361/2005) the Federal High Court declared the merger terms between International Trust Bank Limited ITB and Oceanic Bank Plc to be unfair to minority shareholders of ITB. The parties eventually settled the matter amicably whilst it was on appeal. We are currently involved in a good number of cases concerning the issue of fairness of certain mergers, one of which is the case of *BGL Plc v. Finbank & Ors* (Suit No: FHC/CS/L/1367/2011) in which a FHC, among other prayers, is invited to determine whether, by virtue of certain provisions of CAMA, a proposed scheme of merger arrangement is not oppressive, or unfairly prejudicial to or unfairly discriminatory against the Plaintiff and therefore illegal, null and void.

4.4 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 to the employees concerned or representatives of the employees concerned, if there are no such registered trade unions. This notification requirement creates the possibility of a third party opposing the merger either before the court or by a formal complaint to the SEC.

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 or she has suffered, or is likely to suffer, an injury as a result of a violation or likely violation of any provision of the Bill, may bring an action in the Federal High Court. These are mechanisms for ensuring that third party complainants enjoy protection and have 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

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to make representations. Unfortunately, so many years down the line, this Bill has still not seen the light of the day and the law remains as in the ISA 2007.

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

Under the existing legal regime, SEC may seek clarification and request more information in respect of mergers filed for its approval.

Also, the Federal Competition and Consumer Protection Bill gave the Commission wide information-gathering and investigatory powers, and these apply across the various fields over which the Bill gave the FCC jurisdiction, including merger control.

4.6 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 2007 seeks to protect abuse of information obtained in an 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 the 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, after the grant of an approval of the merger by SEC, an application to court for an order sanctioning the scheme is made, resulting in the court sanctioning the merger. The regulatory process will end after obtaining the court sanction and complying with post-approval requirements, such as the filing of the court order with SEC and the Corporate Affairs Commission, as well as the publication of the same in the official gazette and in at least one national newspaper. One sticky issue is usually close-out tax. During the merger process, parties usually obtain from the various tax authorities a letter of no objection. The tax authorities usually reserve their right to assess close-out tax after the merger. It is important to pursue final tax assessment after a merger as this can become an issue for the merged company, and complications as regards the allocation of tax liability amongst the merging parties may arise where a delay is brought about due to the process for post-merger adjustment under the merger agreement or scheme having expired or been dismantled.

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.

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 are intended to ensure that any competition problems which are identified can be remedied by mutual consultations and agreements.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

See question 3.4 above to the effect that even where there is a global merger by parent companies of Nigerian subsidiaries, the Nigerian subsidiaries must undergo a consequential merger process under Nigerian law. This separates the transactions and also eliminates the possibility of SEC imposing remedies on the foreign companies. Consequently, we are not aware of any remedies imposed upon any foreign-to-foreign mergers by regulators in Nigeria.

5.4 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, negotiation of remedies can commence at the earliest possible time during meetings with the regulators. At the very 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 or clearly defined procedural steps for the negotiation of remedies.

5.5 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?

As discussed in question 5.4, any concern raised by SEC ought to be addressed before the merger can be approved. However, SEC reserves the right to approve a merger, approve it subject to any conditions, or to prohibit it outright. That said, no case of divestment remedy has been published under the current regime. One can only infer the possibility, from the power of SEC to approve a merger subject to conditions, as such right creates the possibility of a divestment remedy. So far, no standard approach has been developed by SEC on the terms and conditions to be applied to the divestment where applicable.

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

Where the remedies have been negotiated at the pre-merger notice stage, SEC is likely to insist that parties comply with such remedies which will then be reflected in the scheme document for formal approval. On the other hand, where formal approval has been given

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subject to a condition, parties can complete the merger subject to the power of SEC, under the ISA 2007, to revoke its decision to approve or conditionally approve a merger if the conditions are subsequently not met.

5.7 How are any negotiated remedies enforced?

SEC as a regulator has so many ways of enforcing negotiated remedies where applicable. It could withhold its formal approval where, for instance, the remedies were negotiated at the pre-merger notice level. Alternatively, SEC could resort to its power to revoke its decision to approve, or conditionally approve, or to break up the merger as contained under the Act, in addition to the right to impose an administrative fine as noted earlier. Also, SEC can use its power to refuse the processing of new requests, such as for the authorisation of new offers of securities to the public, until there is compliance with an outstanding remedy.

5.8 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 ensure competition is maintained which are incidental to the lawful implementation of the merger.

5.9 Can a decision on merger clearance be appealed?

Yes, an applicant who is dissatisfied with the response from SEC regarding its application for a merger approval can apply to the FHC for judicial review.

Keep in mind also that a shareholder opposed to a scheme of merger has the right to sue in vindication of his rights. He can either apply for a subsequent order for the beneficent provisions under section 122(6)(e) of ISA 2007, or come by way of petition for relief under section 311(2) of CAMA (that is, a derivative action). It is important to note that the current jurisprudence on the "timing" of such application is that it can only be made after the court has made an order sanctioning the merger scheme. Without the existence of such an order, the application of a dissentient will be deemed to be speculative, anticipatory and pre-emptive. See *Ojora v. Agip (Nig) Plc & Anor* (2014) 6 NWLR (Pt. 1387) 150 at 161.

The ISA 2007 also established the Investments and Securities Tribunal ("IST") and empowered it under section 284 to hear and determine any question of law or dispute involving a decision or determination of SEC in the operation and application of the Act and, in particular, listed disputes that must be submitted to the exclusive jurisdiction of IST. Under section 289, a person aggrieved by any decision of SEC may institute an action at IST or appeal against such decision to IST within the stipulated period.

Given the exclusivity of IST's jurisdiction over SEC-related matters, coupled with the fact that that, pursuant to section 295(1), an appeal against its decision can only be made to the Court of Appeal, there is an ongoing jurisprudential debate as to whether: (a) section 284 is not unconstitutional for appearing to offend section 251 of the Constitution, which, among other things, confers exclusive jurisdiction on the FHC over matters arising from the operation of CAMA; and (b) the IST is subject to the supervisory jurisdiction of the FHC, pursuant to section 6 of the Constitution. On the authority of the Court of Appeal's decision in *Okeke v. SEC et al. (2013) 2 CLRN 41-67*, it would seem that the FHC still retains its judicial review power over decisions of the IST.

The Federal Competition and Consumer Protection Bill provides expressly that a party aggrieved by an FCC decision can apply for a 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.

5.10 What is the time limit for any appeal?

An appeal against the decision of SEC to IST shall be filed within 30 (thirty) days of the date on which a copy of the order which is being appealed against is made or deemed to have been made by SEC, provided that IST may entertain an appeal after the expiry of 30 (thirty) days if it is satisfied that there was sufficient cause for the delay. IST is required to dispose of any matter before it within 3 (three) months of the date of commencement of the hearing of the substantive action. An appeal from IST, which can only be on points of law, goes to the Court of Appeal established pursuant to the Constitution of the Federal Republic of Nigeria.

The Federal Competition and Consumer Protection Bill provides that a merger clearance or authorisation granted by the FCC expires: (a) 12 months after the date on which it was given or granted; or (b) in the event that an application or appeal is made against the determination of the Commission giving the clearance or granting the authorisation, and the determination of the Commission is confirmed by the court, 12 months after the date on which the determination is confirmed. It follows that an appeal should be filed within 12 months of the date of the clearance or authorisation.

5.11 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?

Theoretically there are no express provisions in our laws or administrative directives for such liaison with other jurisdictions; however, there is also none prohibiting the same. In practice, there is a need for such liaison, as SEC and the proposed FCC will need to liaise with equivalent agencies in other countries for the proper performance of their functions. For instance, where a global merger will result in the Nigerian subsidiaries undergoing a consequential merger in Nigeria, SEC may request the necessary information on the global merger. Where SEC has established a Memorandum of Understanding ("MOU") with other regulators under the auspices of the International Organization of Securities Commissions ("IOSCO"), it may be possible for interagency cooperation to result in information-sharing, as happened in the review process for the ISA 1999 which led to the ISA 2007.

6.2 Are there any proposals for reform of the merger control regime in Nigeria?

The Federal Competition and Consumer Protection Bill is pending reform of the merger control regime. This is due to the fact that

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presently SEC is overburdened with the pressures of being both a securities and a competition regulator, causing undue pressure and unintended inefficiency. To ensure effective and efficient regulation of competition in the different industries, there is a need for these roles to be separated and handled by independent agencies, which is what the FCC Bill intends to put in place. It is expected that, prior to the passing of the Bill, a clause will be inserted to repeal Part XII in the ISA which gives merger control powers to SEC. This will ensure that once the FCC Act comes into effect, SEC would be divested of its merger control powers save for fairness issues which would then vest exclusively in the FCC, and it will set a direction for merger activities in line with global trends. However, it is expected that SEC would retain its role of regulating fairness issues in mergers even when a competition commission is in place.

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

These answers are up to date as of 20 August 2015.

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- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
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