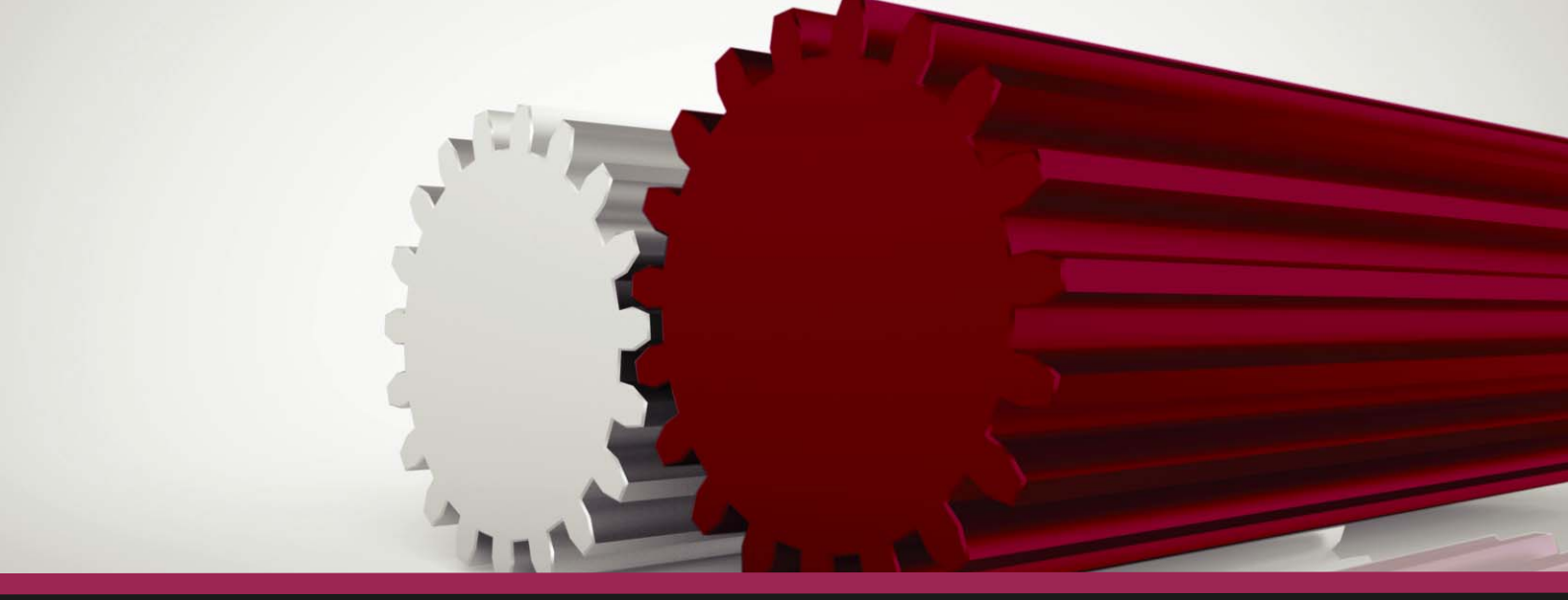

ICLG

The International Comparative Legal Guide to:

Merger Control 2014

10th Edition

A practical cross-border insight into merger control

Published by Global Legal Group, with contributions from:

Accura Advokatpartnerselskab
Advokatfirmaet Wiersholm AS
AlixPartners
Allende & Brea
Anastasios Antoniou LLC
Antitrust Advisory LLC
Ashurst LLP
Balčiūnas & Grajauskas
Beiten Burkhardt
Bergstein Abogados
Boga & Associates
Camilleri Preziosi
Chapman Tripp
Crowell & Moring
Drew & Napier LLC
ELIG, Attorneys-at-Law
Gide Loyrette Nouel
Houthoff Buruma
J. Sagar Associates
Kastell Advokatbyrå AB
Katten Muchin Rosenman LLP
King & Wood Mallesons
King & Wood Mallesons SJ Berwin
Koep & Partners
Lee and Li, Attorneys-at-Law
Linklaters LLP
Matheson
Morais Leitão, Galvão Teles, Soares da Silva & Associados
Moravčević Vojnović i Partneri in cooperation with Schoenherr
Nagashima Ohno & Tsunematsu
Olivares & Cía, S.C.
Oliveira Felix Advogados
Peltonen LMR Attorneys Ltd.
PUNUKA Attorneys & Solicitors
Schellenberg Wittmer Ltd
Schoenherr
SCPA DOGUE-ABBE YAO & Associés
Shearman & Sterling LLP
Skadden, Arps, Slate, Meagher & Flom LLP
TRINITI
Vasil Kisil & Partners
Webber Wentzel

GLG
Global Legal Group

The International Comparative Legal Guide to: Merger Control 2014

GLG
Global Legal Group

Contributing Editors
Nigel Parr and Catherine Hammon, Ashurst LLP

Account Managers
Beth Bassett, Maksim Dolgusev, Robert Hopgood, Dror Levy, Maria Lopez, Mahmoud Nedjai, Florjan Osmani, Oliver Smith, Rory Smith

Sales Support Manager
Toni Wyatt

Sub Editors
Nicholas Catlin
Barbara Fitzsimons

Editors
Beatriz Arroyo
Gemma Bridge

Senior Editor
Suzie Kidd

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd.
November 2013

ISBN 978-1-908070-79-1
ISSN 1745-347X

Strategic Partners

AEJE ECLA

MIX Paper from responsible sources FSC® C011748

General Chapters:

Country Question and Answer Chapters:

Continued Overleaf

GLG
Global Legal Group

Country Question and Answer Chapters:

EDITORIAL

Welcome to the tenth 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:

Five general chapters. These 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 in 52 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.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Chapter 38

Nigeria

Anthony Idigbe

Chinwe Chiwete

PUNUKA Attorneys & Solicitors

1 Relevant Authorities and Legislation

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

Under the present regulatory regime, the main authority in respect of merger regulation in Nigeria is the Securities and Exchange Commission (SEC) established pursuant to the Investments and Securities Act 2007 (ISA). SEC is primarily vested with the powers to regulate investments and securities business in Nigeria, registration and regulation of capital market operators, venture capital funds, collective investments schemes, review/approval and regulation of mergers and acquisitions.

There is still a pending Federal Competition and Consumer Protection Bill which will change the way mergers are regulated in Nigeria once passed into law. The Bill proposes to set up an agency (Federal Competition and Consumer Protection Commission (FCC)) with the powers to regulate competition in Nigeria. It also 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.

1.2 What is the merger legislation?

The main merger legislation is the Investments and Securities Act 2007 (ISA) and the SEC Rules, the current one being the SEC Consolidated Rules of June 2013 made supplementary to the ISA.

1.3 Is there any other relevant legislation for foreign mergers?

There is no legislation in respect of foreign mergers other than the legislation discussed above. Under the ISA, when determining whether or not a merger is likely to substantially prevent or lessen competition, the SEC shall assess the strength of the competition in the relevant market and the probability that after the merger the company will behave competitively or co-operatively, taking into account any factor that is relevant to the competition in the market including the actual and potential level of import of the competition in the market. Also, in terms of definition of 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 the SEC. On the other hand, where a foreign merger would have significant impact on the Nigerian market or where it will result in a change of control of the Nigerian subsidiary, it may be necessary to notify the 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 FCC Bill provisions are clearer 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.

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, SEC Rules on Regulations of Mergers, Takeovers and Acquisition requires a non-objection letter from the company's Regulator as part of the documents to be submitted at the pre-merger notice level. The legislations below are therefore noteworthy:

Banking Industry – 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 Central Bank of Nigeria (CBN). The said Manual was required to give effect to the provisions of CBN Guidelines and Incentives on Consolidation in the Nigerian Banking Industry issued on August 5, 2004. The CBN Manual of 2004 provides 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 mergers to the 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 the 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

The Nigerian Insurance Commission has the regulatory oversight of insurance business in Nigeria and as such its consent or no objection is also required in the case of any proposed merger involving an insurance company. NAICOM requires an advert directed at policy holders before its approval of any merger or business combination.

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.

Petroleum Act [1969] now 2004 & Petroleum Industry Bill (PIB)

The regulations made under the Petroleum Act require the consent of the Minister to change the 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 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.

Pursuant to sections 120, 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, the SEC. In terms of the ISA, a party to a small merger is not required to notify the SEC of the merger unless the SEC requires it to do so. However, the SEC Rules 2013, which came into effect in June, clearly provide that although a small merger is not notifiable, the merging parties are required to inform the SEC at the conclusion of the merger.

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 ISA 2007 to N250,000,000 (two hundred and fifty million Naira). The implication of Rules 427 of the 2013 SEC Rules is that several small companies would be removed from the regulatory purview of the SEC, except where the SEC requires such notification. It also shows that the 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 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"?

See question 2.1 above. A contemplated 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 minority) of another company can amount to a merger. Whether such a merger is notifiable would then depend on threshold provisions under the Rules. 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) defines "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?

ISA did not specifically 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 provides that that the Rules shall apply to private and public companies, partnership, every merger, acquisition or combination between and among companies, involving acquisition of shares or assets of another company.

Consequently, a joint venture is envisaged under the provisions of the Act and the Rules since it is likely be a corporate body, firm, association or partnership. Whether or not it is subject to merger control will depend on two concepts: change of control; and 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 to acquisition by the joint venture, or two firms acquired joint control over an existing firm which neither of them previously controlled, the possibility of notifiable transaction may have been created if the value of the assets or shares transferred or acquired fall within the notifiable thresholds.

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

See question 2.1 above. SEC Rules 2013 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 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?

The provisions of the ISA, as well as SEC Rules and Regulations on mergers, would apply irrespective of the absence of a substantive overlap in the activities of the parties. Once it is a merger as defined under the Act and it falls within the notificiable thresholds, then the stipulated procedures in terms of notification and obtaining approval must be followed.

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 did not specifically provide that foreign-to-foreign transactions must be notified to the 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 applies to transactions within and outside Nigeria is still pending before the National Assembly. This has created the need for merger provisions in the ISA and under the control of the SEC. The SEC, now acting as the temporary competition authority, has the mandate to consider the effect of foreign sales on the national market prior 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 the SEC has not set specific rules on the notification of offshore transactions, it is wise for organisations involved in such transactions to send perhaps a simple letter to the 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 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 the any line of business enterprise. This exeception is also reaffirmed in Rule 424(1) of the 2013 SEC Rules. By virtue of section 121 of the ISA, a merger likely to substantially prevent or lesson 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 regards to sharing merger jurisdiction with other laws, there is no such provision in the ISA to that effect, rather 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 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?

The fact that every merger which meets the threshold is 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. 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 regulation of transactions broken up in 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 person acting in concert with him) carry 30 percent or more of the voting rights of a company; or

(b) together with persons acting in concert with him holds not less than 30% but not 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 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 the SEC. However, notification of small mergers in terms of the Act is voluntary by the parties. This is, however, without prejudice to 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. Further to the above, SEC Rules of 2013 require parties to small merger to inform it at the conclusion of the merger. For small mergers, informing the SEC will be after the conclusion of the merger. For intermediate and large mergers, notification to the SEC shall be at the initial stage via 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 application is then made to the SEC for formal approval of the merger. As regards the deadline for notification, section 123(1) of the ISA merely provides that a party to an intermediate or a large merger shall notify the 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 the SEC. From 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 level. Consequently, one can say that notification should be made to the 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 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 the 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 the 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 run the risk that their mergers would be invalidated or dissolved since SEC reserves the break-up power under section 128 of the ISA and Rule 432. There are no specific formal sanctions for failure to notify the 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, Schedule II of SEC Rules list the penalties payable for late filing under the Rules. In terms of that schedule, late filing for corporates is N2,000 (two thousand Naira only) for the first two weeks and N1,000 (one thousand Naira) for every subsequent day of default. The Rules provide 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.

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

It is possible to carve out local completion of mergers to avoid delay of global completion. Nigerian law allows for 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?

Presently, SEC Rules divide the merger notification/approval process into three stages:

(a) The Merger Notification Stage, which involves primarily a premerger notice. The Rules stipulate documents to be submitted to the 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 actually convened and held pursuant to an appropriate court order.

(b) 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 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 the SEC is obtained, parties will refer back to the court to sanction the merger.

(c) 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 SEC Rules.

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 ISA 2007 the 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 the SEC retains the residual power to revoke the deemed approval. In the case of a large merger, the 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 lapsed. 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 the SEC. During the banking consolidation exercise of 2005, for instance, many mergers were concluded within a very short period to enable parties meet up with 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, merger notification must be first filed and upon receipt of favourable response (which may be referred to as approval in principle), a formal application for approval of a merger is expected to be filed and obtained from the SEC before an application is made to the court to sanction the merger. The position is the same with the pending 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 the turnover. Also, the 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. Rule 425 of the SEC Rules 2013 provides that companies proposing a merger, acquisition or other forms of external restructuring shall, amongst others, file with the SEC a merger notification for evaluation. The said merger notification under Rule 426 shall be filed by submitting to the SEC a report which contains the information listed under Rule 426. Upon receipt of a favourable response to the merger notification from the SEC, a formal application for approval will be filed with the SEC, accompanied by the documents listed under Rule 428. Consequently, the merger notification 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 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, the SEC and CBN worked out an expedited procedure to enable the banks meet the 31 December 2005 consolidation deadline for new capital requirement for banks. Also, recently the SEC has been working with other exchanges such as the London Stock Exchange to ensure effective cross listing of shares of Nigerian companies. The result has been 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 organisations which intend to merge 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. SEC Merger Rules create 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?

The SEC is also the body empowered under ISA to regulate all offers for securities by public companies and entities and to register securities of the public companies. Consequently, the Rules are carefully drafted to ensure that there is no significant impact on merger control clearance since it is the same body regulating both public offers and mergers. 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 ISA the overriding law. However, as noted in question 3.9 above, improvements in the regulation of public offer of shares tend to impact positively on merger control.

3.12 Will the notification be published?

Notifications to the SEC are not usually published but under section

126 of ISA, the 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 SEC Rules 2013.

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, 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 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 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 the SEC make this determination, SEC Rules 2013 provides a series of documentation to be provided by notifying party including documents relating to market share, competition, product line, substitutes, etc.

4.2 To what extent are efficiency considerations taken into account?

Under section 121(b) of ISA, if it appears to the SEC that the merger is likely to substantially prevent or lessen competition, the 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 the SEC may approve a merger if it considers that the merger would result in greater efficiency in the market and that 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?

Apart from the competition issue, other considerations are 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.

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 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 to have 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.

4.5 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.

4.6 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 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 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 the 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 court sanction and complying with post approval requirements, such as filing of the Court Order with the SEC and Corporate Affairs Commission, 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.

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 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 the 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, 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 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 the SEC ought to be addressed before the merger can be approved. However, the SEC reserves the right to approve a merger, approve it subject to any conditions or prohibit it. That said, no case of divestment remedy has being published under the current regime. One can only infer the possibility from the power of the 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 the 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 were negotiated at the pre-merger notice stage, the 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 subject to condition, parties can complete the merger subject to the power of the SEC under ISA to revoke its decision to approve or conditional approve a merger.

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, the 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.

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, 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. Also, the ISA established an 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 the SEC in the operation and application of the Act and in particular listed disputes that must be submitted to the exclusive jurisdiction of the IST. In terms of section 289, a person aggrieved by any decision of the Commission under the ISA may institute an action in the IST or appeal against such decision within the stipulated period. 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 the SEC to the IST shall be filed within 30 days from the date on which a copy of the order which is being appealed against is made or deemed to have been made by the SEC, provided that the IST may entertain an appeal after the expiry of 30 days if it is satisfied that there was sufficient cause for the delay. The IST is required to dispose of any matter finally within 3 months from the date of commencement of the hearing of the substantive action. Appeal from the 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 provide that a merger clearance or authorisation granted by the FCC expires: (a) twelve 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, twelve months after the date on which the determination is confirmed. It follows that an appeal should be filed within 12 months from 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?

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 should liaise with equivalent agencies in other countries when 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. Where a global merger will result in the Nigerian subsidiaries undergoing consequential merger in Nigeria, the SEC may request the necessary information on the global merger from the subsidiaries.

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

The main proposal is for the Nigerian government to speed up action to pass the Federal Competition and Consumer Protection Bill into law. It is expected that prior to passing of the Bill, a clause will be inserted to repeal Part XII in ISA that gives merger control powers to the SEC. This will ensure that once the Competition Act comes into effect, the SEC would be divested of its merger control powers which would then vest exclusively in the FCC in line with global trends.

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

These answers are up to date as of 27 August 2013.

Anthony Idigbe

PUNUKA Attorneys & Solicitors
Plot 45, Oyibo Adjarho Street
Lekki Peninsula
Lagos
Nigeria

Tel: +234 1 270 4789
Fax: +234 1 270 4790
Email: a.idigbe@punuka.com
URL: www.punuka.com

Anthony Idigbe is the Managing Partner of PUNUKA Attorneys & Solicitors and author of the book *Legal Aspect of Capital Market Operations in Nigeria* published by Distinct Universal Limited. He has over 30 years' practice experience in Advocacy, Arbitration, Dispute Resolution, Privatisation, Capital Markets, Mergers & Acquisitions, Aviation Law and Telecommunications. Elevated to the rank of Senior Advocate of Nigeria (equivalent to Queens Counsel) in 2000, he is the lawyer of first choice in Nigeria for complex commercial litigation. He is also widely consulted by government agencies in Nigeria such as the government privatisation agency (Bureau of Public Enterprises) and the Securities and Exchange Commission (SEC), as well as leading banks and businesses because of the inimitable insight he brings to commercial transactions, given his background as a commercial litigator. He is the founder of the Capital Market Solicitors Association (CMSA) of Nigeria and was Chairman of the Association for many years. Anthony has an LLM from Robert Gordon University, Aberdeen Scotland, another LLM from the University of Lagos, an MBA from the Enugu State University of Science and Technology and several diplomas. He is a Fellow of the International Bar Association IBA, member of the Nigeria Bar Association NBA, fellow of the Chartered Institute of Arbitrators ClArb, UK and member of the International Insolvency Institute III.

Chinwe Chiwete

PUNUKA Attorneys & Solicitors
Plot 45, Oyibo Adjarho Street
Lekki Peninsula
Lagos
Nigeria

Tel: +234 1 270 4789
Fax: +234 1 270 4790
Email: c.chiwete@punuka.com
URL: www.punuka.com

Chinwe is a partner in the law firm of PUNUKA Attorneys & Solicitors with about 10 years' legal practice experience. She heads the firm's Banking, Capital Market & Project Finance Group. She is currently the Social/Welfare Secretary of the Capital Market Solicitors Association (CMSA) EXCO. She is experienced in commercial and corporate law transactions and has rendered her expertise in various mergers and acquisitions, IPOs including cross-border listings, Rights Issue, Corporate Restructuring. Chinwe works as a local partner with the World Bank in its annual *Doing Business publication* with contributions on *Protecting Investors and Getting Credits-Legal Rights Nigeria.* Chinwe has participated in the review of various capital market related Rules and Regulations. She also participated in the review of the proposed Nigerian Competition Law. Chinwe holds a Masters Degree in Insolvency law from University of Pretoria South Africa a certificate in Financial Management from University of South Africa (Unisa).

Punuka Attorneys & Solicitors is a full service business law practice providing quality legal services in a variety of areas but in a specialised manner. Our expertise covers the spectrum of Commercial & Civil Litigation, Insolvency and Business Restructuring, Arbitration & ADR, Corporate and Commercial Law, Banking, Capital Market and Project Finance, Energy & Natural Resources Law, PPPs, Intellectual Property Law, amongst others.

The firm is a member of the Business Recovery and Insolvency Practitioners Association of Nigeria and also a member of Lawyers Associated Worldwide (LAW), an association of independent law firms located in over 180 commercial centers throughout the world. Punuka is affiliated to a network of international firms and experts in related fields of law whose services will be readily available where necessary for accomplishment of assigned tasks. In particular, members of the firm belong to various international organisations.

Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Commodities and Trade Law
- Competition Litigation
- Corporate Governance
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Dominance
- Employment & Labour Law
- Enforcement of Competition Law
- Environment & Climate Change Law
- Insurance & Reinsurance
- International Arbitration
- Lending and Secured Finance
- Litigation & Dispute Resolution
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- PFI / PPP Projects
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media and Internet
- Trade Marks

GLG
Global Legal Group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk