FEDERAL COMPETITION AND CONSUMER PROTECTION ACT, 2018: A NEW REGULATORY LANDSCAPE FOR MERGERS IN NIGERIA

Introduction

On 5th February 2019, the Federal Competition and Consumer Protection Act ('the Act') received Presidential Assent and was passed into law. Prior to the enactment of the Act, the legal framework for competition in Nigeria was inadequate[1] in comparison to the size of the economy. Apart from introducing a competition regime applicable to all sectors of the economy, the Act repeals the Consumer Protection Council Act and sections 118-128 of the Investment and Securities Act (ISA)[2]. Further, the Act establishes the Federal Competition and Consumer Protection Commission (the Commission). The Act also establishes the Competition and Consumer Protection Tribunal (the Tribunal) which is vested with judicial powers to review decisions of the Commission and decisions of any sector specific regulatory authority[3] and make rulings and orders as may be necessary.

This piece shall consider briefly the objectives of the Act, the powers of the Commission and Tribunal, and provisions impacting on M & A transactions in Nigeria.

Objectives of the Act

The objectives of the Act are to promote and maintain competitive markets in the Nigerian economy. The Act seeks to prohibit unfair business practices and the abuse of dominant position of market powers. It also seeks to protect and promote the interest and welfare of consumers by providing consumers with choices. Finally, the Act seeks to promote economic efficiency and contribute to the sustainable development of the Nigerian economy.

Scope of Application

Broadly speaking, the Act applies to all undertakings and all commercial activities within, or having effect within Nigeria and binds:

1. a body corporate or agency of the Government of the Federation, or of a subdivision of the Federation, in so far as such a body corporate or agency engages in any commercial activities;

2. a body corporate in which a Government of the Federation or of a State or body corporate or agency of Government of the Federation or any State or Local Government has controlling interest where such a body corporate engages in economic activities; and

3. all commercial activities aimed at making profit and geared towards the satisfaction of demand from the public.

Establishment of the Commission and the Tribunal

As mentioned earlier, the Act establishes the Commission which is responsible for the administration and enforcement of the provisions of the Act. The functions of the Commission are far-reaching. The Commission

1. *Before the passing of the Act, competition regulations covered only few sectors, for example, the Competition Practice Regulations, 2007 made pursuant to Section 70 and 90 of the Nigerian Communications Act, and certain provisions of the Investments and Securities Act (ISA).*

2. *Section 165(1) of the Act.*

3. *Appeals or request for review of the exercise of the power of any sector specific authority are required to be determined first by the Commission before such appeals can be determined by the Tribunal. Section 47(2) of the Act.*

is charged with the responsibility of protecting the rights of all consumers in Nigeria, investigating anti-competition practices, eliminating anti-competitive agreements and misleading, unfair, deceptive or unconscionable business practices, and ensuring that citizens have access to safe products.

It is worthy of note that the Act has stripped the Securities Exchange Commission (SEC) of its powers to regulate merger transactions in Nigeria as the Commission is now authorized to, with or without conditions, prohibit or approve mergers of which notice is received[4].

The Commission is a body corporate with perpetual succession and a common seal and may sue and be sued in its corporate name. The Commission may also acquire, hold and dispose of moveable or immovable property. The Act contains provisions aimed at ensuring that the Commission shall be independent in the exercise of its functions, powers, duties and responsibilities[5].

The Act also establishes the Tribunal, which is empowered to hear appeals from decisions of the Commission taken in the course of implementing the Act and decisions from the exercise of the powers of any sector specific regulatory authority in respect of competition and consumer protection matters, and to make rulings or orders as may be necessary[6]. More on the powers of the Tribunal will be discussed later on.

The Commission's Power to Review Mergers

Before the enactment of the Act, the SEC was vested with the powers of reviewing and approving mergers and acquisitions. The Act has repealed provisions of the ISA relating to mergers and acquisitions and introduced a new regime and authority for the regulation of mergers. The Commission is now empowered to receive submissions on and approve a proposed merger[7]. Section 164 of the Act requires that the provisions of any other enactment including the ISA, regulations or subsidiary laws relating to or connected with the subject matter of the Act should be read with such modifications as are necessary to bring them in conformity with the provisions of the Act.

It would appear that the Act makes no provision for a transitional period or for a date on which it would become effective[8]. It is expected that the SEC will relinquish the powers it had under the ISA to approve mergers once the Commission is constituted. The Commission would also be required to prescribe rules, similar to the repealed provisions of the ISA and SEC Rules, to ensure the effective implementation of the powers conferred on it by the Act, including timelines and procedure for notifying the Commission of a proposed merger and merger thresholds[9].

In scope, the Act is applicable to all businesses and all commercial activities within or having effect within Nigeria. Accordingly, the Act will impact offshore acquisitions that would fall within the thresholds to be set by the Commission. Accordingly, dealmakers who adopt offshore structures for several reasons, including tax benefits, will not be able to complete such transactions without the approval of the Commission if such transactions fall within the threshold stipulated by Commission.

Many corporate entities and private equity firms contemplating M & A transactions will thus need to structure their transactions to meet the standards set by the Act to avoid conflicts with

4. *Section 17(k) of the Act*
5. *Section 3(2)*
6. *Section 47(1)*
7. *Section 93(1)*
8. *The expectation is that the Gazetted copy of the Act will contain a commencement date.*
9. *Section 93(2) – (4)*

its provisions and adjust their transaction timelines to accommodate the requirement to obtain the Commission's approval to M & A deals. Notably also, the exemption hitherto applicable under the ISA which exempts holding companies acquiring shares solely for the purpose of investment and not using same by voting or otherwise to cause or attempt to cause a substantial restraint of competition or tend to create a monopoly[10] from seeking the approval of the SEC (an exemption taken advantage of by holding companies to effect a group restructuring without SEC approval) does not exist in the Act.

Mergers under the Act

Section 92(1) (a) of the Act provides that 'a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking'. This definition is a lot broader than the definition of mergers under the repealed provisions of the ISA[11]. Further, whilst the ISA expressly recognized two modes[12] of achieving a merger- (x) the purchase or lease of the shares, an interest or assets of the other undertaking in question, and (y) the amalgamation or other combination with the other undertaking in question, the Act brings under the umbrella, a joint venture[13].

Section 92(2) sets out the various steps for determining when an undertaking has 'control' of another undertaking, including if it: (x) beneficially owns more than half of the issued share capital or assets of the undertaking; (y) is entitled to cast a majority of votes that many be cast at a general meeting of the undertaking or has the ability to control the voting of a majority of those votes either directly or through a controlled entity of that undertaking; and (z) is able to appoint or to veto the appointment of a majority of the directors of the undertaking.

With respect to the categories of merger, the Act only recognizes two categories of mergers viz: (x) small mergers, and (y) large mergers and this be can be contrasted with the categories of mergers under the ISA which categorizes mergers into small, medium and intermediate mergers[14]. Under the Act, a 'small merger' means a merger with a value at or below the threshold to be stipulated by the Commission by regulations while a 'large merger' means a merger with a value above the threshold stipulated by the Commission by regulations[15]. Similar to the previously existing provisions under the ISA and the SEC Rules[16], a party to a small merger is not required to notify the Commission unless the Commission requires it to do so.

Prior to determining the threshold of annual turnover[17] and a method for calculating the annual turnover to be applied, the Commission shall publish in the Federal Gazette a notice, which sets out the proposed threshold and method of calculation and invite written submissions on the proposal. In considering a merger or a proposed merger, the Commission shall determine whether or not the merger is likely to substantially prevent or lessen competition by assessing

10. *Section 118(3) of the ISA. Rule 424(1)(a) of the SEC Rules.*
11. *Section 119(1) of the ISA defines a merger as "any 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 corporate bodies".*
12. *Section 119(2) of the ISA*
13. *Section 92(1)(b)*
14. *Section 119(2) of the ISA*
15. *Section 120(2) of the ISA.*
16. *Section 122(1) of the ISA and Rule 424(1)(b) of the SEC Rules.*
17. *For the purpose of determining the categories of mergers.*

- (x) the strength of the competition in the relevant market, and (y) the probability that the undertakings in the market will behave competitively or cooperatively after the merger, based on: (i) the actual and potential level of import competition in the market, (ii) the ease of entry into the market, including tariff and regulatory barriers, (iii) the level and trends of concentration, and history of collusion in the market, (iv) the degree of countervailing power in the market, (v) the dynamic characteristics of the market, including growth, innovation and product differentiation, (vi) the nature and extent of vertical integration in the market, (vii) failure/likelihood of failure of the business or part of the business of a party to the merger or proposed merger, and (viii) whether the merger or proposed merger will result in the removal of an effective competitor[18].

The Minister of trade matters is under the Act entitled to make representations on any public interest ground indicated in section 94(4) to the Commission with respect to any merger which is under consideration by the Commission and the Commission in arriving at a decision on the merger notification, shall have special regard to the representations made by the Minister on such public interest grounds[19]. It is important to note that, although the Commission shall have special regard to made representations by the Minister, the power of the Minister to intervene on public interest grounds is circumscribed by the public interest considerations listed in section 94(4)[20].

The Commission may revoke its own decision to approve or conditionally approve a small or large merger if: (x) the decision was based on incorrect information for which the party to the merger is responsible, (y) the approval was obtained by deceit, (z) the parties fail to implement the merger within twelve months after the approval was granted, or (xx) an undertaking concerned has breached an obligation attached to the decision of the Commission approving the merger[21]. Where the Commission revokes its decision approving a merger, it may further prohibit that merge[22]. The Commission is required under section 97(3)(a) of the Act, to give to the parties applying for approval of a large merger its decision and cause a notice of the decision to be published in at least two national newspapers[23].

This is unlike the practice of the SEC, which issues approval letters to the applicant, and introduces some transparency into the process of approving mergers.

Review of Decisions of the Commission on Mergers

As earlier mentioned, the Act gives the Tribunal power, *inter alia*, to hear appeals from or review any decisions of the Commission taken in the course of the implementation of the Act[24]. Accordingly, a party interested in a merger who is dissatisfied with the decision of the Commission may appeal against such decision to the Tribunal. The Act further provides that any party dissatisfied with the order, ruling, award or judgement[25] of the Tribunal may appeal to the Court of Appeal, upon giving notice in writing to the Secretary of the Tribunal and within thirty (30) days after the date of such ruling, award or judgement. The Act does not limit the right to appeal against the decision of the Court of Appeal on matters covered by the Act, it thus appears that appeals on merger approvals can further lie to the Supreme Court in this regard.

18. *Section 94(2). These provisions are similar to those contained in the repealed section 122 of the ISA.*
19. *Section 100(1)*
20. *While considering the effect a merger or proposed merger, the Commission is required to consider the effect the merger or proposed merger will have on: a particular industrial sector or region, employment, the ability of national industries to compete in international markets, and the ability of small and medium scale enterprises to become competition*
21. *Section 99(1)*
22. *Section 99(2)*
23. *Section 97(2)*
24. *Section 47(1)(a)*
25. *Section 55(1)*

The right of appeal provided in the Act with respect to mergers in Nigeria accords with the practice in the EU, USA and South Africa[28] where the decision of the competition tribunals can be appealed up to the highest court in the judicial hierarchy. In the EU, decisions of the Commission on merger transactions can be challenged or appealed against at the General Court (GC), which is a constituent court in the Court of Justice of the European Union (CJEU)[29] and appeals lie from the General Court to the CJEU. In the United States, decisions of the Antitrust Unit of the Department of Justice and the Federal Trade Commission on mergers and acquisition transactions can be appealed to the relevant District Court. A further appeal can be filed at the Court of Appeal of the relevant circuit, and subsequently to the US Supreme Court[30].

While it appears that the multiple appeal process allowed by the Act may occasion significant delay in transaction timelines, it remains to be seen how this will play out in practice.

Conclusion

Unlike the sector-specific and inadequate provisions regulating competition in Nigeria, the Act has introduced a harmonised and broad competition law which cuts across all sectors of the Nigerian economy in its application.

It is envisaged that there may be a significant time lapse once the Act becomes effective, between deal signing and completion as there will inevitably be a teething period during which the new Commission is constituted and issues its rules and regulations.

Furthermore, it remains to be seen how the Commission will make its decisions and in what way it will deviate from the established practices and policies of the SEC. Notwithstanding, it is hoped that the enforcement of its provisions would help promote fair, efficient and competitive markets in the Nigerian economy.

26. *Section 274 of the ISA.*
27. *Section 289 of the ISA.*
28. *In South Africa, all notifiable mergers are submitted to the Competition Commission for review and approval. Decisions of the Competition Commission are appealable to the Competition Tribunal and further on to the Competition Appeal Court. In appropriate instances, an appeal would lie from a decision of the Competition Appeal Court to the Supreme Court of Appeal, or Constitutional Court.*
29. *For instance, the GC annulled the Commission's 2014 decision following an in-depth review to approve US television company Liberty Global's acquisition of Ziggo, the largest Dutch cable operator. The complaint leading to the reversal of the Commission's approval was filed by Dutch rival KPN in 2015 claiming that the Commission failed to carry out a proper assessment of the transaction's impact on the market for pay- TV sports channels. In 2006, the GC's predecessor, the Court of First Instance ("CFI") reversed the Commission's clearance of a merger between BMG and Sony, following a complaint by the Independent Music Publishers and Labels Association that the Commission had conducted an inadequate competitive assessment. The judgment was celebrated as a victory for complainants, only to later be set aside by the European Court of Justice on appeal. See Bryan Cave Leighton Paisner, EU Court issues two important Merger Control Rulings, October 27, 2017.*
30. *The acquisition of AT&T Inc's $85.4 billion acquisition of Time Warner was not approved by the USDOJ. The deal however got the judicial approval of U.S. District Judge Richard Leon. The USDOJ is appealing at the U.S. Court of Appeals for the District of Columbia Circuit.*

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