THE FCCPC RELEASES GUIDELINES ON SIMPLIFIED PROCESS FOR FOREIGN-TO-FOREIGN Mergers WITH NIGERIAN COMPONENT

INTRODUCTION

In January 2019, the president of the Federal Republic of Nigeria signed the Federal Competition and Consumer Protection Act (the FCCPA) into law, which introduced a new regime and authority for the regulation of competition and M & A transactions in the country. The FCCPA applies to all undertakings and all commercial activities within or having effect within Nigeria. Under section 93(1) of the FCCPA, the Federal Competition and Consumer Protection Commission (FCCPC) is now authorized to, with or without conditions, prohibit or approve acquisitions of which notice it has received.¹

Further, pursuant to section 93(1) of the FCCPA, the prior approval of the FCCPC is required for mergers, subject to the notification threshold to be determined from time to time as provided in the Act. Whilst the FCCPC is yet to make regulations prescribing notification thresholds, the Commission and the Securities and Exchange Commission (SEC) issued a joint advisory and guidance on acquisitions and other business combinations on 3 May 2019 (Joint Advisory Note), to deal with the operational issues surrounding the implementation of the provisions of the FCCPA. In the main, the Joint Advisory Note indicates that the provisions of the SEC Rules (including those on acquisition) will continue to apply to acquisitions pending when the FCCPC Governing Board is fully constituted and Rules written as prescribed by the FCCPA.

The FCCPA applies to foreign to foreign M & A transactions having an effect within Nigeria. Further to the FCCPC’s exercise of its powers of regulation of merger transactions having effect within Nigeria, the FCCPC recently published the Guidelines on Simplified Process for Foreign-to-Foreign Mergers with Nigerian Component (the FTF Guidelines).

KEY PROVISIONS OF THE GUIDELINES

Notifiable Thresholds

The Guidelines prescribe the following thresholds, which, once met, would trigger the requirement for a notification of a foreign to foreign (FTF) merger transaction:

• merger of entities with a combined turnover of NGN1,000,000,000 and above; or

• merger where target undertaking has turnover of up to NGN500,000,000; and between NGN1,000,000,000.

With respect to the first threshold, the Guidelines do not specify the entities to be considered in arriving at the “combined turnover”. With regards to the second threshold, we believe that a reference to “target undertaking”, is a reference to “target undertaking” as defined in the FCCPA.²

---

1. Although the FCCPA does not define “acquisitions”, the definition of “mergers” in section 92(1)(a) of the FCCPA contemplates acquisitions as a form of merger.

2. Section 167 defines a “target undertaking” as an undertaking, which as a result of a merger, the whole or part of whose business would be directly or indirectly controlled by an acquiring undertaking; or would directly or indirectly transfer control of the whole or part of, its business to an acquiring undertaking.
It remains to be seen, what the FCCPC will demand in practice, whether the combined turnover in the Guidelines references the combined turnover of the acquiring entity and the target undertaking or of the foreign entities directly involved in the merger. We should be quick to point out that the thresholds prescribed will apply only where the foreign to foreign transaction having an effect in Nigeria results in a merger as defined in Section 92 of the FCCPA.

Contents of the Notification to the FCCPC

The Guidelines set out certain information to be provided by the parties seeking merger clearance with respect to a qualifying foreign to foreign merger transaction, some of which we have highlighted below:

1. Description of the merger, including a confidential summary of the information provided and the items that qualify the merger for the ‘simplified’ procedure under the Guidelines (including the extra territorial nature of the merger).

2. Information about the parties and the nature of the parties’ business including the names of the undertakings, the contact details of authorized external representatives of the applying undertaking, a copy of the Power of Attorney authorising such representative to act and the contact address for service of documents.

3. Details of the merger, ownership and control of the undertakings before and after the merger including the nature of the merger, the mode of implementation of the merger, the economic rationale of the merger as it affects the Nigerian market and the value of the transaction.

4. Information on the turnover in Nigeria for each of the undertakings concerned in the last financial year including financial information used for calculating turnover (details of the undertaking’s audited financial statements, for the end of the immediately preceding financial year to the notification).

5. Documents showing market studies and internal documents detailing products and/or services which are regarded as interchangeable or substitutable by the consumer; the relevant geographic market wherein the products and/or service has a market share, etc.

6. Information about local market activities of each of the parties to the merger, the nature of the undertaking’s business, the main subsidiaries active and/or brands, product names and/or trademarks used within Nigeria. This information will also include an estimate of the market share in terms of sales value (in Naira) and volume (units) and competitors.

7. Business secrets, which may be provided under separate cover with each page clearly marked ‘Business Secrets’ and the submission must include acceptable reasons why the relevant information should not be divulged or published. In this regard, we would expect that only “Business Secrets” directly affecting the merger would be required.

The above, is in direct contrast to what is required under the SEC Rules which is currently in use for domestic-to-foreign, foreign-to-domestic and domestic-to-domestic transactions further to the Joint Advisory Note.

3. The draft ISA Bill 2017 had suggested that ‘party to a merger’ refers to an acquiring firm or a target firm and this definition is not contained in the FCCPA.
The full bouquet of information required to be contained in an information memorandum under the SEC Rules is far more extensive than what is listed above as notifying parties were required, to amongst others, provide information relating to the number of fully paid up ordinary shares in the share capital of the target company; the total number and percentage of shares; the price per share; the purchase consideration; comparison of purchase consideration with historical market price; manner of acceptance; treatment of dissenting shareholders; source of funding the acquisition; director’s beneficial interest; statement of existing investment in a related line of business.

**Declaration by Notifying Party(ies)**

The Guidelines require that a notification must contain a declaration by or on behalf of all the notifying parties, of the completeness and accuracy of the information contained in the IM (the Declaration). It is noteworthy that the Declaration may be made by a notifying party, on behalf of all the parties to the transaction.

**A Simplified Procedure**

The Guidelines purport to simplify the procedure for obtaining the approval of the FCCPC with respect to FTF transactions, having a Nigerian component. However, the procedure set out in the Guidelines for notification in the case of an FTF transaction having effect in Nigeria, is largely the same as the usual procedure for applying for approval save with respect to the bouquet of supporting documentation the notifying party(ies) will be required to submit along with their application.

Whilst the Guidelines do not prescribe the format in which the information required to be submitted to the FCCPC is to be presented (in form of an Information Memorandum as currently required under the SEC Rules or another format), other supporting documents which the notifying parties are required to submit to the FCCPC include:

- the submission of the final or most recent version of the transaction documentation between the parties to the merger or acquisition of a controlling interest;
- an executive summary of the merger;
- a Power of Attorney, attesting that each nominated representative of the notifying party is authorised to act for that party; and
- audited financial statements, for the end of the immediately preceding financial year to the notification; or an indication of the internet address or online location, if any, at which the most recent financial information including annual reports and accounts of the parties to the merger are available, to the extent that they pertain to Nigeria.

The above supporting documentation is vastly simplified in comparison to the documentation required under the SEC Rules 2013 (as amended), currently being applied by the FCCPC as indicated in the Joint Advisory Note.

**Expedited Procedure for Foreign-to-Foreign Transactions**

The Guidelines provide a panacea for parties to FTF transaction where time is of the essence and there is a concern with regards to filings with foreign competition authorities. This accelerated route is open to parties for an expedited procedure fee of NGN5,000,000 (in addition to the prescribed fees) and guarantees feedback from the FCCPC on its decision within 15 (fifteen) business days of the submission of the application. This is in contradistinction to the provisions of the FCCPA which give the FCCPC 20 (twenty) business days (can be extended by a single period not exceeding 40 (forty) business days) to conclude its review of a small merger (which is voluntarily notified to it) and 60 (sixty) business days (which can be
extended by the FCCPC to 120 (one hundred and twenty) business days) for reviewing a large merger.

**Application Fees**

The FTF Guidelines prescribe fixed fees for the processing of application for approval. In relation to transactions involving entities with a combined turnover of NGN1,000,000,000 and above, a fee of NGN3,000,000 or 0.1% of the combined turnover, whichever is higher is prescribed. Where the target undertaking has a turnover between NGN500,000,000 and NGN1,000,000,000, the prescribed application fee is NGN2,000,000. We believe the fixed nature of the application fees under the FTF Guidelines. This is a welcome difference as under the SEC Rules, the processing fees payable is based on the value of the company or asset being acquired and same was payable on a graduated scale as follows:

- first NGN500,000,000 (circa US$1,389,000) at 0.3%;
- next NGN500,000,000 at 0.225%; and
- any sum thereafter at 0.15%.

**Confidential Information**

Considering the mandatory requirement on the FCCPC under sections 95(8) and 97(3) of the FCCPA, to publish a notice of its decision on an application, there have been fears within M & A circles, as to how notifying parties may preserve the confidential nature of certain information in connection with a notifiable transaction. With full appreciation of this, the FCCPC has, in its FTF Guideline, provided under Part 8, that "where interests may be subject to harm by reason of disclosure or publication of the information requested, then such information may be provided under separate cover with each page clearly marked ‘Business Secrets’“. The FCCPC also requires that in such instances, the application must include acceptable reasons why the relevant information should not be divulged or published. Although the Guidelines do not define what reasons qualify as acceptable, we believe that so long as reasonable grounds are put forward, the Commission would consider same acceptable.

**CONCLUSION**

Whilst not providing a complete response to the challenges which have come with the advent of the FCCPA and repeal of certain sections of the ISA, the Guidelines are a welcome development, as the provisions answer some of the questions which have been agitating the minds of stakeholders contemplating the M & A transactions. It is also indicative of the FCCPC’s commitment to improving transaction efficiency whilst regulating competition in Nigeria.

---

4. See sections 95(6) and 97(1) of the FCCPA respectively.
For further information, please contact:

**Anu Balogun**  
Partner  
+234-1-2702551 Ext 2609  
abalogun@olaniwunajayi.net

**Comfort Agboola**  
Senior Associate  
+234-1-2702551  Ext 2612  
cagboola@olaniwunajayi.net

**Victoria Anuri**  
Associate  
+234-1-2702551 Ext 2643  
vanuri@olaniwunajayi.net