THE CHANGING LANDSCAPE:

FEDERAL COMPETITION AND CONSUMER PROTECTION ACT

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FEDERAL COMPETITION AND CONSUMER PROTECTION ACT 2019: **INSIGHTS ON THE NEW MERGER CONTROL REGIME**

INTRODUCTION

Merger and Acquisition (M&A) activities in Nigeria have developed significantly in terms of volume and sophistication of the transactions undertaken. The dynamics of the M&A landscape have made the development of an enabling legal and regulatory environment an essential factor for the protection of stakeholders' interests and creation of a competitive atmosphere for business and innovation to thrive. Therefore, legal and regulatory framework for the review and evaluation of M&A activities have over the years evolved in response to the dynamics of the landscape. The enactment of the Federal Competition and Consumer Protection Act ("FCCPA" or the "Act") is the most recent effort to bring Nigeria's competition and merger control regime in line with global best practices.

Prior to the enactment of the FCCPA, three (3) principal legislations were at different periods responsible for prescribing the requirements for the review and evaluation of M&A activities in Nigeria. These legislations were the Companies and Allied Matters Act Cap C20 Laws of the Federation of Nigeria 2004 ("CAMA"), Investment and Securities Act No. 45 of 1999 ("ISA 1999") and the Investment and Securities Act No. 7 of 2007 ("ISA 2007"). There were other sector-specific legislations/regulations such as the competition regulations made pursuant to the Civil Aviation Act No. 6 of 2006 and the Nigerian Communications Act No. 19 of 2003 providing merger control requirements with respect to M&A activities in the aviation and telecommunications sectors. These legislations and relevant regulatory agencies created thereunder provided oversight for M&A activities in Nigeria and different sectors. The ISA 2007 empowered the Securities and Exchange Commission ("SEC") as both a securities and competition regulator for merger control purposes as well as the overall supervising authority for mergers, acquisitions and business combination.

Under CAMA and ISA 1999, the focus of review and evaluation of M&A activities was

to ensure the protection of interest of and fairness of the transaction to the stakeholders such as the minority and dissenting shareholders and employees of the respective entities. ISA 2007 introduced limited merger control regime in relation to the evaluation of M&A activities including the power to determine whether the merger is likely to substantially prevent or lessen competition, assessment of the strength of competition in the relevant market, and probability that the company will behave competitively. SEC also had the power to break up a company whose business practice substantially prevents or lessens competition. The FCCPA however, provides a comprehensive legal and regulatory framework for competition matters which includes merger control requirements in respect of M&A activities.

THE NEW MERGER CONTROL REGIME UNDER THE FCCPA

Sections 92 – 103 of the FCCPA provides for a new merger control regime. The FCCPA empowers the Federal Competition and Consumer Protection Commission ("FCCPC" or "Commission") as the overall supervising authority for M&A activities in Nigeria and repealed Sections 118 – 128 of the ISA 2007 relating to merger control requirements. SEC is therefore restricted to regulation of securities matters having been stripped of its powers to review competition matters for merger control purposes. The new merger control regime under the FCCPA is discussed hereunder.

Scope of M&A Activities Captured Under the FCCPA

Section 92 (1) (a) of the FCCPA, provides that "a merger occurs when one or more undertakings directly and indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking". Section 92 (1) (a) in addition provides that the merger may be achieved in any manner including through (a) purchase or lease of shares, interest or assets of the other undertaking; (b) amalgamation or combination with the other undertaking; and (c) joint venture. This implies two umbrella methods to attaining control over the business of another undertaking. That is (a) to "acquire" shares, interest or assets of the other undertaking; or (b) to "establish" control without necessarily acquiring any interests in the target entity.

Section 92 (2) sheds more light on what constitutes "control". In Sections 92 (2) (a) and (d), control is attained through acquisition of interest in another undertaking. That is, by (a) "beneficially holding more than one half of the issued share capital or assets of the undertaking"; and (b) being "a holding company and the undertaking is a subsidiary of the [holding] company". While under Sections 92 (2) (b), (c), (e) and (f), control is established without acquiring an interest in the other undertaking. That is, by (a) being "entitled to cast majority of the votes at the general meeting of the undertaking or ability to control majority of the votes"; (b) being "able to appoint or veto the appointment of majority of directors"; and (c) being "able to control the majority of the votes of the trustees, to appoint majority of the trustees or to appoint or change majority of the beneficiaries" in cases where the undertaking is a trust.

This implies that the FCCPC may determine that an undertaking is being controlled by another undertaking without necessarily

acquiring an interest in that undertaking especially where it is determined that an undertaking can control the board or majority votes of the other undertaking. This view makes the definition of merger under the Act very broad.

Acquisitions of shares or assets outside Nigeria but resulting in the change of control of a business, part of a business or any assets of a business in Nigeria are also covered by the FCCPA[3] . This means that M&A transactions relating to parent companies of Nigerian subsidiaries occurring outside Nigeria will be subject to the approval of the FCCPC. Transactions of this nature were not covered under the ISA 2007 except that some sector-specific legislations like the Insurance Act and guidelines made pursuant thereto covering indirect acquisitions. Also not covered under the ISA 2007 was a definition of merger that captured joint ventures as an M&A transaction requiring regulatory approval.

Under the FCCPA, mergers are categorised in small and large mergers. A small merger is a merger with a value at or below the threshold stipulated by FCCPC by its regulations. A large merger is one with value above the threshold stipulated by the Commission[4] . Under the ISA 2007, mergers are categorised into small, intermediate and large mergers. The Act empowers the FCCPC to make regulations to determine a threshold of annual turnover for the purposes of determining a small or large merger and the method of calculation of annual turnover to be applied.

[3]Section 2 (3) (d) of the FCCPA | [4]Section 92 (4) of FCCPA
[5]Section 95 (1) | [6]Section 95 (3) | [7]Section 95 (2)

Notification and Approval Requirements

Section 93 (1) of the Act provides that a proposed merger shall not be implemented unless it has first been notified to and approved by the Commission. Small mergers may be implemented without the approval of the FCCPC[5] except within six (6) months after the merger is implemented, the FCCPC is of the opinion that the merger may substantially prevent or lessen competition[6] . In any case, a party to a small merger may voluntarily notify the FCCPC at any time[7].

If the Commission comes to the determination that a small merger is required to be notified to the FCCPC, such notification has to be published within five (5) business days after receipt by the Commission. The parties to the merger cannot take further steps to implement the merger until the merger has been approved with or without conditions by the FCCPC. Within twenty (20) business days after notification of a small merger, the FCCPC may extend the period to consider the

parties' application to not more than 40 business days and it shall:

(a) issue an extension notice to the parties; or
(b) consider the merger and issue a report (i) approving the merger; (ii) approving the merger subject to conditions; (iii) prohibiting the implementation of the merger, if it has not been implemented; or (iv) declaring the merger to be prohibited[8].

If however, at the expiry of twenty (20) business days, the Commission has not issued an extension notice or report regarding its consideration of the merger, the merger would be deemed to have been approved[9].

The parties to a large merger are required to notify the FCCPC. Also, the parties have to publish the merger notification within five days after receipt by the Commission[10]. A copy of such notice is required to be provided to any registered trade union that represent the employees; or the employees or their representatives if there are no such registered trade unions[11]. Parties to a large merger are prohibited from implementing the merger unless approved by the Commission with or without conditions[12]. Any action taken by the parties to implement the merger without the approval of the Commission is void and the Commission has the power to render void any action so taken[13]. Any undertaking that implements a merger without the approval of the FCCPC commits an offence and would be liable on conviction to a fine not exceeding 10% of the turnover of the undertaking in the business year preceding the date of the offence or such other percentage as may be determined having regard to the circumstance of the case.

Within sixty (60) business days after notification of a large merger, the FCCPC:

(a) may extend the period to consider the parties' application to 120 business days and issue an extension notice to the parties; or
(b) consider the merger and issue a report (i) approving the merger; (ii) approving the merger subject to conditions; (iii) prohibiting the implementation of the merger[14].

Where, at the expiry of 60 business days, the Commission has not issued an extension notice or report regarding its consideration of the merger, the merger would be regarded as approved subject to the Commission's power to revoke its own decision to approve a merger[15].

Upon approval of a merger, the FCCPC would (a) give the parties its decision and cause a notice of the decision to be published in two national dailies; and (b) issue written notice for its decision where it prohibits or conditionally approves a merger or it has been requested to do so by a party to the merger.

In the process of reviewing the merger, the Commission has powers to direct its officers to investigate the merger and may require any person or undertaking to provide information in respect of the merger. Any person aggrieved by the decision of the Commission may file an application for review before the Competition and Consumer Protection Tribunal.

[8]Section 95 (6) | [9]Section 95 (7) | [10]Section 96 (1) | [11]Section 96 (3) | [12]Section 96 (4) | [13]Section 96 (5), (6) | [14]Section 97 (1)
[15]Section 97 (2), Section 99

It is pertinent to note that unlike the CAMA, ISA 1999 and ISA 2007, the FCCPA does not require parties to business combination to convene court-ordered meetings or an order of the court sanctioning a scheme of merger or business combination. Based on the draft amended CAMA Bill, it is intended that this requirement will be restored to CAMA and the extant law for convening court-order meetings and obtaining the court sanction for a merger will be CAMA [16].

Determining whether a Merger Substantially Lessens or Prevents Competition

The criteria for determining whether a merger substantially lessens or prevents competition is substantially the same as under the ISA 2007. In determining whether a merger substantially lessens or prevents competition, the Act requires the FCCPC to assess the strength of competition in the relevant market and the probability of the undertaking to behave competitively and co-operatively after the merger. In the assessment, the following key factors are to be taken into account:

a) the actual and potential level of import competition in the market;
b) the ease of entry into the market, including tariff and regulatory barriers;
c) the level and trends of concentration, and history of collusion in the market;
d) the degree of contravening power in the market;
e) the dynamic characteristics of the market including growth, innovation and product differentiation;
f) the nature and extent of vertical integration in the market;
g) whether the business or part of a business of a party to the merger or

[16]Section 712 of the CAMA (Amendment) Bill

proposed merger has failed or is likely to fail; and

h) whether the merger or proposed merger will result in the removal of an effective competitor.

Based on the above assessment, where the proposed merger is likely to substantially prevent or lessen competition, the Act requires the Commission to determine:

a) whether the proposed merger is likely to result in any technological efficiency or other pro-competitive advantage which will be greater than the effects of prevention or lessening of competition while allowing consumers a fair share of t the resulting advantage;
b) whether the proposed merger can or cannot be justified on substantial public interest grounds.

While determining whether the merger or proposed merger can be justified on public interest grounds, the Commission would consider the effects of the merger on:

a.) particular industrial sector or region;
b.) employment;
c.) ability of national industries to compete in international markets; and
d.) ability of small and medium scale enterprises to become competitive.

Also, in determining whether the merger or proposed merger can be justified on public interest grounds, the Minister of Industry, Trade and Investment would be entitled to make any representation on any public interest ground with respect to the merger being considered[17].

CONCLUSION

The FCCPA is an excellent development for Nigeria's M&A and competition jurisprudence. It signifies the Federal Government's determination to create an enabling environment for innovation, creativity and vibrant business environment which is the hallmark of competitive markets. Having enacted the FCCPA, it is important that the Commission provides the relevant guidelines and regulations that will be necessary to give effect to the objectives of the Act. The expectation is that the guidelines and regulations to be made by the FCCPA will address market developments and address any gaps not envisaged by the FCCPC or not covered by the Act.

[17] See generally Section 94 and Section 100

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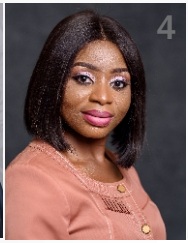

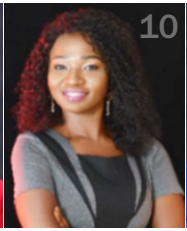

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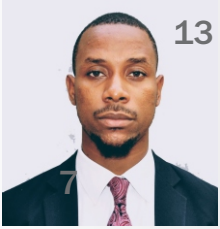

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