Federal Competition and Consumer Protection Act 2019 - Impact on Private Equity Deal Making in Nigeria

Introduction

After about 17 years of attempting to introduce competition legislation, Nigeria finally passed the Federal Competition and Consumer Protection Act 2019 ("FCCPA" or the "Act") in the first quarter of 2019. The Act contains comprehensive provisions in relation to competition and has made significant modifications to the merger control regime. Before 2019, in addition to sector regulations, which provided for prior approval of mergers and acquisitions, the regulator responsible for merger control was the Securities and Exchange Commission ("SEC") by virtue of the Investment and Securities Act, 2007 ("ISA"). The SEC at that time acted as regulator for both securities and competition in mergers and acquisition transactions. Indeed, to most stakeholders, the SEC was more of a regulator for the former than the latter. It is against this background that the passing of the FCCPA has introduced a new regime.

The FCCPA will significantly impact private equity in Nigeria. Private Equity continues to be a significant source of deal flow as well as foreign direct investment into Nigeria. Between 2013 and 2018, it is estimated that the value of reported private equity deals was at least USD 7.8 billion, many of which were majority-type deals.

The New Sheriff

The Act establishes the Federal Competition and Consumer Protection Commission ("FCCPC" or "the Commission") with the ultimate responsibility for merger control and indeed, all matters relating to competition in Nigeria. The provisions in the ISA dealing with mergers and acquisitions were repealed. Approval of the FCCPC is now mandatory for all mergers (as defined in the Act). Notification in relation to small mergers is generally excluded, although such notification could be made to the Commission at any time at the discretion of the parties. Mandatory notification of a small merger can however arise if the Commission is of the opinion, within six months of the implementation of the merger, that the deal could substantially prevent or lessen competition.

Notifiable Mergers

The Act introduces some not so obvious changes to the nature of transactions that would constitute a merger. A transaction is notifiable if it falls within the definition of mergers under the FCCPA and, in addition, is above the threshold set by the Commission. A merger is considered to have occurred under the Act where 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. Whilst the elements of "control" in determining whether a merger has occurred remain the same as they were under the ISA, a merger can now be deemed to have occurred either by acquisition or establishment of control. Under the previous regime, the only "bright line" of control appeared to be 51% or more of acquisition of shares – thus, in spite of being only one of the elements of control, acquisition of majority shares appeared to be the determining factor of a notifiable merger within the applicable threshold.

With the definition of mergers explicitly expanded to include establishment of control, all the other elements of control now constitute a "bright line". Many private equity transactions in Nigeria are developmental growth capital in which case, the private equity fund ordinarily acquires significant minority interests. Given the explicit provisions relating to the establishment of control for purposes of determining a notifiable merger, typical provisions in minority share acquisitions, for example those that mandate appointing half or more of the board of directors or requiring consent or veto for strategic decisions in such transactions, may constitute a basis for notification. The FCCPC is yet to issue any new rules, regulations or guidance (the rules under the SEC rules and regulations by virtue of a Joint Advisory by FCCPC and SEC are still applicable and limited to only acquisition of shares) but may follow the jurisprudence in South Africa, given the similarities in merger control provisions.

Foreign to Foreign Transactions

The most significant impact of the new merger control regime on the Nigerian private equity industry, is perhaps the jurisdiction of the FCCPC over undertakings and commercial activities having an effect in Nigeria. Consequently, acquisition of shares or assets outside Nigeria which results in a change in control of part, or the whole of a Nigerian business is caught by the FCCPA. It was becoming common place for a holding company of an investee company to be set up in Mauritius or other tax-friendly location into which the investment by the private equity fund is made. This arrangement provided several benefits including alignment of the investor and promoters as well as facilitation of exits by the private equity investors. Historically, under this arrangement, an investment into and exit out of the foreign holding company would not be affected by the local laws of the investee company. This would however no longer be the case, as the approval of the FCCPC would be required if the investment or exit falls within a notifiable merger.

Extended Regulatory Approval Process

Depending on the industry in which the investment is to be made and whether the entity is a private or public company, regulatory approval for a PE transaction which is notifiable will involve between one and three approval processes.

If the notifiable merger is in an unregulated private company, it is only the approval of the FCCPC that is required. The FCCPA provides for specified timelines for the review of a merger application – 60 business days, extendable where the Commission requires more time for consideration, up to a maximum of 120 business days.

A private equity investment into a public company will require the approval of both the FCCPC and SEC, whilst a transaction involving a regulated public company will now require the approval of the FCCPC and the Sector Regulator.

Mergers involving public companies in a regulated industry will now require the approval of the FCCPC, SEC and the Sector Regulator.

Interim arrangements were put in place by the FCCPC in March 2019 to the effect that, until further notice, all merger and acquisition notifications will be reviewed under the existing SEC Rules and Regulations on Mergers and Acquisitions by both FCCPC and SEC. The Joint Advisory/Guidance while acknowledging the powers of SEC to determine the fairness of transactions involving public companies, indicated that decisions will be communicated by the FCCPC.

The Act confers concurrent jurisdiction on the FCCPC and Sector Regulators, in relation to competition. Both the FCCPC and the Sector Regulator is enjoined to enter into agreements to harmonise and co-ordinate their concurrent jurisdiction. As at the date of this article, there are no harmonisation/co-ordination agreements in place, but the regulators are statutorily required to have them in place by February 2020.

Increased Disclosure

Typically, public notifications of private equity deals (except for transactions involving public companies) are made only after the transaction has been concluded and all conditions precedent satisfied and even then, are based on the communications policy of the respective private equity firms. This practice held true under the previous regime, as parties to an acquisition were only required to publish the fact of the acquisition after the transaction had been concluded. The FCCPC is required to publish not only the notice of its decisions (in this case in two national newspapers) but must also publish the notification of the application, five days after receipt.

Furthermore, although the prevailing SEC Rules and Regulations are still applicable by virtue of the Joint Advisory/Guidance, in a recent foreign–to-foreign transaction approval, the FCCPC required information in relation to turnover, contact details of top five customers and largest aggregate purchases in value for each identified product or service.

Consolidation Play

Stakeholders in the Nigerian private equity industry have acknowledged that the bulk of the potential transactions fall within the range of USD25-50 million. Bigger private equity firms with larger ticket sizes have begun to consider a consolidation play as an approach to reaching the preferred transaction size. They previously only had to contend with the Sector Regulator, several of which had no competition provisions. With the FCCPA, it is to be expected that such transactions will involve more scrutiny and a private equity firm is now obliged to show that such transactions do not substantially prevent or lessen competition or result in any technological efficiency or pro-competitive gain with every additional bolt-on acquisition.

Due Diligence

Additional aspects of review are now required to be included in conducting due diligence on prospective investee companies. The FCCPA prohibits agreements and arrangements that have an actual or likely effect of preventing, restricting or distorting competition, except those authorised by the Commission. As this is the first time Nigeria has had a comprehensive competition law - telecommunications, aviation, power and broadcasting sectors have some competition provisions (with telecommunications being the most active industry in terms of competition) – all agreements, arrangements and practices must now be considered in line with the FCCPA, particularly provisions on restrictive agreements. The provisions of the FCCPA are prescriptive in nature with attendant criminal liability on both the company and directors. Contravention of the FCCPA provisions in respect of restrictive agreements renders the non-compliant agreements/arrangements not only void but also unlawful. Furthermore, on conviction the offending company is liable to a fine of 10% of the previous year's turnover, whilst directors are each liable to a fine of circa USD 15,000 and/or a term of five years imprisonment.

Introduction of Gun-Jumping Provisions

The FCCPA provides clear and specific provisions as to the impact of non-compliance with the mandatory nature of the merger control provisions. This was not the case under the previous regime. Any action taken further to a merger without FCCPC approval is rendered void and parties involved in such actions are liable to a fine of 10% of the previous year's turnover. It is not unusual for a prospective investee company to undergo restructuring or re-organisation in order to facilitate the receipt of the private equity investments.

With the explicit provision of the Act, two approaches are available to undertaking private equity transactions involving pre-deal restructuring (i) inclusion of the restructuring as part of the transaction as is usually the case; and (ii) disjoin the restructuring activity from the private equity transaction. The downside of the first option is that the restructuring would only be undertaken upon receipt of FCCPC approval, however, the parties would have certainty. In the second option, the restructuring will be undertaken prior to executing the transactional documents. Whilst the private equity firm will get comfort that the restructuring is effected to its satisfaction, there would be the risk of the absence of definitive agreements to bind the prospective investee company and its promoters.

Conclusion

The Commission is presently trying to put rules, regulations and guidelines in place to give effect to the provisions of the Act. At a recent event titled "The Changing Landscape – Federal Competition and Consumer Protection Act" organised by Jackson, Etti & Edu, the Director-General of the FCCPC indicated that the Commission will be taking a "prioritisation approach" towards the provision of the subsidiary legislations, which would mirror national economic priorities.

Stakeholders in the Nigerian private equity industry should take advantage of the nascent regime to contribute to the shaping of the rules, in order to further facilitate private equity deal-making in the country without taking out the essence of the provisions of the FCCPC.

Given the fact that most private equity investments are financial in nature with limited or no overlaps or relationship within the private equity firm's portfolio, a fast track procedure (maximum of two-three weeks) for merger approval should be put in place by the FCCPC. This approach should also be applicable to holding company restructuring. It is also hoped that the FCCPC would take a pragmatic approach to market definition, vertical relationships, as well as spill-over effects of private equity consortia in considering notifications involving private equity firms.

THE AUTHOR

Fola Olusanya
Partner, Head of
Corporate Commercial,
Jackson Etti and Edu