

Merger Control

The international regulation of mergers and joint ventures in 64 jurisdictions worldwide

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

Presently, there is no distinct and multi-sector competition law in Nigeria. The recently enacted Investments and Securities Act 2007 (ISA), however, contains expansive competition provisions in respect of mergers and acquisitions. Also, there are relevant competition provisions within sector-specific legislation that regulate sectors such as communications and electricity. There are also current proposals for the enactment of a comprehensive legal framework for a multi-sector competition law. The Competition Bill before the National Assembly of the Federation (NASS) is one of several laws expected to be enacted in the new legislative dispensation in Nigeria. It is highly probable that the final Act will retain much of the form and substance of the Bill as it is. It should be noted, though, that every reference to the Bill in the present chapter is strictly an indication of how the law is expected to be modelled when it is enacted. It is not intended to be construed as a final and exhaustive view on the issues dealt with, except as indicated. The final authority to determine and enact the Bill into law and what form the law takes remains with the NASS.

This chapter is based on two legal regimes. ISA is new and subsisting while the proposed Act is only contemplative. However, the proposed Act is more competition-focused and relatively comprehensive.

Under the ISA, every merger, acquisition or business combination between or among companies shall be subject to the prior review and approval of the Securities and Exchange Commission (SEC). On the other hand, the proposed Act will establish the Federal Competition Commission (FCC), which will be responsible for Competition Law enforcement. In respect of the communications and electricity sectors, there are dual notification requirements with the existing regulators – the National Communications Commission (NCC) for communications, and Nigerian Electricity Regulatory Commission (NERC) for electricity.

2 What kinds of mergers are caught?

All mergers, acquisitions or business combinations between or among companies are subject to the prior review and approval of SEC. The scope of coverage of the law is fairly extensive as it applies to both corporations (private and public) and partnerships. Also, transactions consummated pursuant to sector-specific regulations are also subject to the apparent overriding operation of the ISA.

Under the proposed Competition Act, all forms of arrangements that have the effect of a merger or acquisition, whether horizontal or vertical, are caught. The controlling question is whether one or more entities cease or will cease to be ‘distinct enterprises’ under the arrangement.

3 Are joint ventures caught?

The provisions of Part XII of ISA extend to all business combinations which necessarily subsumes joint ventures. Apparently, there is no legal requirement for application to only incorporated entities as the term ‘company’ loosely refers to a body corporate under the Companies and Allied Matters Act, and includes a firm or association of Individuals. It is therefore conceivable that incorporated joint ventures, strategic alliances, joint venture partnerships and other types of joint ventures will be subject to the ISA regime.

The proposed Competition Act is less apparent. It provides that all agreements or arrangements between enterprises that have or are likely to have the effect of preventing, restricting or distorting competition in a market are prohibited. While there are no express provisions that include or exclude joint ventures under the proposed Competition Bill, the assumption is that joint ventures will be caught once the controlling factor – that is, ceasing to exist as a ‘distinct enterprise’ – occurs. This is the case where mutual businesses are brought under common ownership or common control whether or not the business to which either of collaborators formerly belonged continues to be carried on under the same or different ownership or control. In that instance a merger notification becomes applicable.

4 Is there a definition of ‘control’ and are minority and other interests less than control caught?

Under the ISA, control is determined by certain factors. These factors are: beneficial ownership of one-half of the issued shared capital of the company; indirect or direct majority voting ability; ability to appoint or veto the appointment of a majority of the directors of the company; a parent company of a subsidiary; in the case of a trustee corporation, ability to control the voting and appointment of a majority of the trustees or to appoint or change the majority of the beneficiaries of the trust; and ability to materially influence the policies of the company in any of the ways mentioned above. In determining ‘material influence’, there is no requirement that such person or persons have a controlling interest in the enterprise.

5 What are the jurisdictional thresholds?

Evidently, the regulatory regime provides for an intermittent threshold valuation. SEC is required to periodically determine a lower and upper threshold of combined annual turnover or assets; or a lower and an upper threshold of combinations of turnover and assets in Nigeria, in general or in relation to specific industries, for purposes of determining categories of merger. In addition, SEC stipulates the method and procedure for the calculation of annual turnover or assets to be applied regarding the prescribed thresholds.

At this time, pending when SEC would by subsidiary legislation prescribe any new or subsequent thresholds, the applicable lower threshold stands at 500 million naira (approximately

US\$4.27 million), while the upper threshold is benchmarked at 5 billion naira (approximately US\$42.7 million).

- 6** Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Notification is mandatory for intermediate and large mergers. Generally, small mergers have no notification obligations. A small merger may be implemented without prior SEC approval unless there is an express requirement to notify SEC. The requirement for notification in a small merger is voluntary unless SEC considers the merger is potentially anti-competitive under the factors identified in question 2. It is important to point out that SEC may invalidate a small merger that has already been finalised if it determines the merger is anti-competitive.

- 7** Do foreign-to-foreign mergers have to be notified and is there a local effects test?

Under ISA, there are no explicit provisions regarding foreign-to-foreign mergers. However under the proposed Competition Act, foreign-to-foreign mergers are affected to the extent that the companies undertake economic activity in Nigeria. The question here is whether such mergers substantially affect the Nigerian market. 'Market' is a reference to a 'relevant market', as determined on an examination of demand substitutability. While the proposed Act is quiet on the territorial incidence of the assets, it is assumed that the jurisdictional thresholds refer to the assets being taken over in Nigeria, or the market share in Nigeria, or a part thereof. The proposed Act clearly stipulates that its provisions include companies registered in and outside Nigeria and persons or companies doing business in Nigeria. It appears that presence in Nigeria is not necessarily an indication of control, but rather a minimum-contact test of doing business in Nigeria. However, there seems to be no stipulation in respect of a 'local effects' test.

Notification and clearance timetable

- 8** What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The timeline for notification regarding small and intermediate mergers are similar. SEC has 20 working days to conclude its determination after parties have fulfilled all notification requirements. This is however subject to one possible extension of 40 working days.

For large mergers, upon receipt of notice of a large merger, SEC shall refer the notice to the Federal High Court. In addition, SEC shall within 40 working days after parties have fulfilled notification requirements, transmit a statement to the court in the affirmative or negative of one of three things: whether the implementation has been approved; partially approved subject to conditions; or prohibited outright.

There are currently no sanctions for non-filing. It is one of the areas expected to be addressed by subsidiary legislation.

- 9** Who is responsible for filing and are filing fees required?

A party to an intermediate or a large merger is required to notify SEC of that merger in a prescribed form. In the case of an intermediate or a large merger, the primary acquiring company and the primary target company shall each provide a copy of the notice to the following persons: the registered trade union that represents a majority of the employees of that company; and the employees concerned where there are no trade unions. Under the proposed Act, the Minister (Minister for Trade and Commerce) may refer a merger to FCC. In addition, one of the merging entities may make the referral. For clearances and authorisations, the obligation is on the enterprise or

persons engaging in the takeover or acquisition. The proposed Act seems to encourage the proactive filing of parties by allowing the reference to be framed in a narrow manner to address only potential contentious issues which invariably would narrowly focus the scope of investigation, more than would be obtained in a ministerial referral. At this time there are no prescribed fees for filing. The usual practice is that when the proposed Act becomes law and the FCC is established, it would be empowered to make regulations, including setting fees for its services as it may consider appropriate.

- 10** What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

See question 8.

Generally, a party to a merger would not take any further steps to implement the merger until an approval or conditional approval is given by SEC. It is also important to note that the conclusion of a transaction other than in accordance with ISA is considered a violation. There are, however, provisions that suggest that the failure of SEC to respond within its statutory deadline operates as a waiver and the transaction may not later be subject to control queries after such waiver.

- 11** What are the possible sanctions involved in closing before clearance and are they applied in practice?

Generally, ISA provides for the imposition of administrative sanctions by SEC for the contravention of the requirements of notification, clearance and any other ancillary matters.

- 12** What solutions (such as a local 'hold-separate' arrangement) might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There are no specific provisions either in ISA or in the proposed Act regarding this. Also, since the law is not yet in effect, there have been no test cases on this issue. It remains to be seen how SEC or the proposed FCC will approach this market balancing issue.

- 13** Are there any special merger control rules applicable to public takeover bids?

Neither the ISA nor the proposed Act distinguishes between the nature of the companies in terms of their public or private ownership. Public takeovers are essentially subject to the same rules and jurisdictional thresholds as any other takeovers. This is, however, without prejudice to other sector regulators who may exercise some level of control over such takeovers, such as NCC and NERC.

- 14** What is the level of detail required in the preparation of a filing?

It is expected that the nature, form and content of the notification or relevant filings (or both) will be the subject of regulations created under the rulemaking authority of SEC. Presumably, relevant information that is basic in nature, such as names, domicile, identity of representatives, list of shareholders, market share analysis (for all relevant jurisdictions) and asset valuation (annual reports, and financial statements), would be relevant pieces of information. The proposed Act, however, specifically mandates the parties to produce relevant documents on a continual basis to the FCC while the referral, clearance or authorisation is pending.

There are also provisions to seek protective orders of confidential data that the FCC may require.

- 15** What is the timetable for clearance and can it be speeded up?

See question 8.

Under the proposed Act, when a merger is referred, the FCC is statutorily mandated to make a decision within six months of the referral. There is an additional statutory extension that the minister may grant only for cause by three months. In all, the FCC must make its determination within the nine months or waive any investigation, evaluation or decision regarding the transaction.

With respect to a notification seeking clearance, the FCC must make its decision within 21 days of registration of the notification or any such other exception as the FCC and the notifying party shall agree to prior to the expiration of the statutory 21 days.

For authorisations, the FCC must make a determination within 60 days or any additional period of time as the FCC and the notifying party shall agree to.

16 What are the typical steps and different phases of the investigation?

Under ISA, SEC may investigate or appoint an inspector to investigate any merger, and may designate some other persons to assist the inspector. As part of the process, SEC may requisition for additional information regarding the merger. Parties to a merger or other interested persons may voluntarily file any document, affidavit, statement, or other relevant information in respect of the merger. There are three steps to SEC's ultimate determination: the first or initial level analysis; second level alternate analysis; and post-initial determination level. After making the initial determination, SEC may grant an approval in principle to the merger. The merging companies are further directed to seek judicial approval by requesting the Federal High Court to order separate meetings of shareholders for the merging companies in order to secure their agreement to the proposed merger.

Under the proposed Act, the typical steps and different phases of the investigation would be the subject of rulemaking by the FCC when it is established. However the proposed Act already contemplates potential steps or phases in the investigation. There would be an initial review which could lead to a request for additional information or data from the FCC. Further, the FCC is authorised to consult with any persons it deems relevant in making its decision. This consultation includes receiving opinions from such persons. In addition, the FCC may refer the transaction to a conference (public hearing) by scheduling it for a certain date and time, publishing the information and inviting all relevant interested parties. The publication will also include information about the issues to be discussed at the conference. The Conference may take place at the instigation of the FCC or an interested party. There is also an appeal process where the decision of the FCC, once final and exhaustive, may be appealed to the Federal High Court.

Substantive assessment

17 What is the substantive test for clearance?

Whenever required to consider a merger, SEC initially determines whether or not the merger is likely to substantially prevent or lessen competition by evaluating some relevant factors. Some of these include the strength of competition in the relevant market, and the probability that the emerging company after the merger, will behave competitively in that market. Other factors are: 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 or trend 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.

18 Is there a special substantive test for joint ventures?

There are no separate provisions for joint ventures. See question 3.

19 What are the 'theories of harm' that the authorities will investigate?

There are no specified guidelines on the probable theories of harm that SEC would apply. It is conceivable that the substantive test shall primarily focus on the impact of lessened competition on the market and consumers (though consumers are not named specifically under ISA).

20 To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

Under ISA, where it appears to SEC that the merger is likely to substantially prevent or lessen competition. In this situation SEC will determine: whether or not the merger is likely to result in any technological efficiency or other pro-competitive advantage which will be greater than, and offset, 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; and if the merger is justifiable on the grounds of substantial public interest (an example of this exists in the power sector now where the government is looking to declare a state of emergency. Any arrangements that will at least in the interim improve generation and supply substantially will qualify as a public or national interest exception).

SEC's regulatory determination regarding the public interest takes into account the following relevant considerations: the particular industrial sector or region; employment; the ability of small businesses to become competitive; and the ability of national industries to compete in international markets.

21 To what extent does the authority take into account economic efficiencies in the review process?

See question 20. It appears that pro-technological efficiency is a significant consideration in SEC's analysis. By and large, the enhancement of economic efficiencies with pro-competitive features are relevant factors in SEC's determination.

Remedies and ancillary restraints

22 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The minister of trade and commerce has a range of powers regarding the provisions of the proposed Act and the activities of the FCC. These powers include merger referral upon reasonable belief that an arrangement is likely to result in a violation of the law. In addition, the minister receives reports and recommendations from the FCC and takes further actions thereon. In referrals that are narrowly framed by parties, the minister has the authority to make certain interim orders prohibiting certain conduct or preserving the status and any other orders consistent with ensuring that the subject of that investigation is maintained while the referral is pending. In addition, the minister may, upon receipt of the FCC's report on a reference, make extensive reviews which may otherwise impact on a transaction. The minister has other powers within the proposed Act that, upon publication in the gazette, he or she may exercise in order to remedy any adverse effects arising from the provisions of the proposed Act.

23 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

If SEC determines that the business practice of a company is anti-competitive, it has the requisite powers in the public interest to order a break-up of the company into separate entities. This splitting up

shall be effected in a manner that ensures that the operations of the companies are not anti-competitive. The break-up order is however subject to the overriding conditions of prior notice to the affected company and adequate opportunity for the affected company to make representations to SEC within a specific timeline. A break-up order only becomes valid upon referral and approval by the Federal High Court.

Under the proposed Act, in issuing a clearance or an authorisation, the FCC may accept an undertaking by relevant parties to divest themselves of specified enterprises. The Minister of Commerce also has powers to order a divestment in certain circumstances given by or on behalf of the applicant to dispose of assets or shares specified in an enterprise. In addition, merging or notifying parties may unilaterally give an undertaking to divest in order to remedy an otherwise inappropriate holding that is considered anti-competitive.

24 What are the basic conditions and timing issues applicable to a divestment or other remedy?

There are currently no timing conditions set regarding how SEC will handle divestments or at what point parties would be required to fulfill their undertaking to divest. This will be subject to regulations and guidelines to be issued by SEC. However, the proposed Act provides that a request for divestment to the court may be made at any time within two years from the date that a violation complained of occurred.

25 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There are no explicit provisions on foreign-to-foreign mergers under ISA or the proposed Act. However, where such foreign-to-foreign mergers substantially affect the local market, it is conceivable that statutory remedies such as divestments; special undertakings, for instance, not to open new markets or interfere with an existing one; and market relinquishments identified in ISA and the proposed Act, will be applicable.

26 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

There are no explicit provisions regarding ancillary restrictions under ISA. The proposed Act requires that the FCC makes detailed and reasoned decisions and includes the basis for its findings in the decisions. As such, it is unclear if any arrangement that is not expressly reviewed by the FCC will be covered by the decision.

Involvement of other parties or authorities

27 Are customers and competitors involved in the review process and what rights do complainants have?

Under ISA, besides the merging parties, employee representation is considered vital to the process. ISA is however silent on the role of competitors and consumers. Under the proposed Act, FCC will be required to publish requests for clearance and to receive opinions, objections, observations and comments from interested persons, whether competitors or consumers. This process allows a third party to formally participate in the merger process. In addition, the FCC is empowered to consult and receive opinions, including data from any person – including consumers and competitors – in its investigations. The Conference (public hearing) is a forum for all parties claiming to have an interest in the outcome of the transaction to express their views. There are specific requirements mandating the proposed FCC to communicate with interested parties who have filed a notice of such interest with the FCC.

Finally, the proposed Act gives the original right of private action to persons who claim to be injured by the merger. This right of action does not depend upon exhausting any remedies that the FCC can provide.

28 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The ISA is silent on publicity, though it is expected that practice would develop an appropriate method of making regulatory determination and processes public. Under the proposed Act, FCC will be required to publish notices, where required, of any conference regarding a merger referral. In addition there are other circumstances in which it will be expected to publish notices as a public service announcement in order that persons who have an interest in the outcome of the referral are afforded the opportunity to make a contribution. In addition, the minister is also required to publish certain aspects of the process in the National Gazette.

The proposed Act, in contemplation of the nature of information that the FCC may receive, provides for protective orders to safeguard confidential information or material that is otherwise precluded from exposure – particularly to competitors – such as trade secrets or work products.

29 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Nigeria is a signatory to the Cotonou Agreement between African, Caribbean and Pacific group states (ACP), and some articles of this multilateral treaty make provision for cooperation between states on competition policy. Since the establishment of the FCC remains pending, it is yet to be seen with which other international and local agencies it may have cooperative arrangements with.

30 Are there also rules on foreign investment, special sectors or other relevant approvals?

Neither ISA nor the proposed Act make provision regarding foreign investment. However, there are specific provisions about ‘regulated industries’. Enterprises within such industries are presumed to be regulated, including industries where a tariff system exists. Such enterprises may be granted certain exemptions from the provisions of the proposed Act. In addition, there are waivers available under the proposed Act, related to protection of the public interest.

There are other sector regulators that have competition provisions in their laws, including the requirement for notification when interests in a licensee within that industry changes or transfers.

Judicial review

31 What are the opportunities for appeal or judicial review?

Under ISA, disputes against SEC are initiated at the Investments and Securities Tribunal, a specialist court for securities related matters. Appeals lie to the Court of Appeal and subsequently to the Supreme Court.

Under the proposed Act, first there is the complaint mechanism before the FCC. This is an administrative hearing procedure where the FCC acts in a quasi-judicial capacity in addition to its investigative and review functions. The decisions of the FCC will be subject to review by the Federal High Court by a wide range of parties including parties to a proposed merger or interested parties such as consumers or competitors.

The Court has a variety of powers that it can exercise under the proposed Act. It may vary the decision of the FCC, confirm it, revoke it or substitute it, or refer it for further proceedings.

Update and trends

It was the general expectation that the previous National Assembly would pass the Competition Bill into law. Owing mainly to the preceding year being an election year, the political focus of the previous National Assembly was apparently re-prioritised. The legislative process regarding the passage of the Competition Bill into law is still at an advanced stage before the present National Assembly, and it is anticipated that what will become law is substantially the same as the principles discussed in the present chapter. It is also useful to point out that the inauguration of a new National Assembly does not by any means connote a back-peddalling of the legislative process. This process is preserved by the extant House Rules of NASS on inherited bills. As the legislative process remains in continuum by virtue of the Rules, so has the current leadership of the National Assembly, in tandem with the Rules, also affirmed and demonstrated a commitment to ensuring the passage of the Competition Bill into law.

The merger control provisions under ISA are obviously fairly extensive. This being relatively new legislation, it has not been subjected to judicial construction. From a regulatory interface and jurisdictional conflict standpoint, there are potentially arguable questions that would have to be resolved by judicial construction. Of

significant note is the fact that the ISA establishes SEC as a capital market-focused regulator. The merger control provisions appear to extend SEC's specialised powers to not only capital market operators but potentially to professional partnerships (such as legal and accounting practices) intending business combinations. An additional perceived shortcoming of ISA is the lack of consumer and competitor participatory focus. It remains to be seen how this will play out as a practical matter. We can expect challenges regarding the scope of SEC's regulatory authority over organizations that are not in the Nigerian capital market and a narrower definition of SEC's authority.

Additionally, several regulatory agencies already conduct some limited form of regulating competition including combinations and arrangements. In the absence of clear provisions in the ISA, it will be interesting to see how the interaction between SEC and these agencies such as the Nigerian Communications Commission or Nigerian Electricity Regulatory Commission evolve. As it is, neither SEC nor the agencies are broad enough in their mandates to oversee the entire market as they are all specialised in some sense. The proposed Competition Act may be the only broad mechanism that can possibly address all the industries and market forces that are operating or may come into operation.

32 What is the usual time frame for appeal or judicial review?

Generally, all final decisions of a court must be appealed within three months of the decision. For interlocutory decisions, the deadline is 14 days.

Enforcement practice and future developments**33** What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

As the law is new, there is a scant history of enforcement at this time.

34 What are the current enforcement concerns of the authorities?

See question 33.

35 Are there current proposals to change the legislation?

ISA is less than a year and is still being examined whether it is suitable from a functional standpoint as a competition-focused legislation for mergers. The current proposals in the Competition Bill appear to be more exhaustive and also take into account, relevant third-party (consumers' and competitors') considerations in its purview.

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