



**A REVIEW OF THE IMPACT OF THE FEDERAL
COMPETITION AND CONSUMER PROTECTION
ACT 2019 ON MERGER CONTROL IN NIGERIA**

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Introduction

On 5th February 2019, President Muhammadu Buhari signed into law, the Federal Competition and Consumer Protection Bill. The establishment of a comprehensive competition legislation in Nigeria has been long overdue, especially given that an initial draft competition law was first proposed in 2002. Historically, a broad competition law has been absent in Nigeria, but regulatory oversight of matters pertaining to competition and anti-trust issues in relevant markets was provided for in the law creating the Securities and Exchange Commission (“SEC”), the Nigerian capital markets operator, and other sector-specific regulators.

The Commission

The newly established Federal Competition and Consumer Protection Act 2019 (the “FCCP Act”) introduced the Federal Competition and Consumer Protection Commission (the “Commission”) and the Competition and Consumer Protection Tribunal (the “Tribunal”) for the purpose of the promoting competition in all Nigerian markets through the elimination of anti-competitive practices such as monopolies, agreements that distort competition, price fixing, abuse of dominant market position amongst others. The FCCP Act also safeguards consumers through the enforcement of consumer rights and goods. To this end, the FCCP Act repeals the Consumer Protection Council Act, Cap. C25, Laws of the Federation of Nigeria, 2004; and the Commission shall be empowered to retain control of the erstwhile Consumer Protection Council.

Essentially, the Commission is empowered to regulate and identify anti-competitive practices, enforce consumer rights and approve all mergers, acquisition and takeover transactions having an effect in Nigeria and falling within the prescribed threshold of the Commission.

The Tribunal

The FCCP Act creates a Tribunal which is empowered to deal with issues and disputes that may arise therefrom. In accordance with the provision of the FCCP Act, the Tribunal is conferred with original jurisdiction in respect of the matters specifically reserved for it, given that the FCCP Act stipulates that an order, ruling, award or judgement of the Tribunal shall be enforced and registered with the Federal High Court.¹ Furthermore, appeals from the decisions of the Tribunal lie directly to the Court of Appeal. It is our view that this constitutes an inherent conflict in light of the fact that section 251(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) stipulates that matters pertaining to commercial and industrial monopolies, standard of goods², and decision of the Federal Government and any of its agencies³ shall be under the exclusive jurisdiction of the Federal High Court.

Overview of the FCCP Act

This review seeks to provide an overview and highlight the significant changes introduced by the FCCP Act on the merger landscape in Nigeria and analyse the implications of these changes on transactions in Nigeria. For this purpose, it is important to note that section 165 of the FCCP Act has effectively repealed the merger provisions of sections 118-128 of the Investment and Securities Act, Cap. 124, Laws of the Federation of Nigeria, 2004 (the “ISA”) which empowered the SEC to block or cancel a merger it considered to be anti-competitive. However, it is important

¹ Section 54 Federal Competition and Consumer Protection Act, 2019

² S.251(1)(f)

³ S.251(1)(r)

to note that section 121(1)(d) of the ISA has not been repealed.⁴ In essence, Section 121(1)(d) of the ISA provides that in considering mergers, the SEC shall: “(d) *determine whether all shareholders are fairly, equitably and similarly treated and given sufficient information regarding the merger*”. This means that a company would still be required to obtain approval from the SEC to determine whether all shareholders are fairly, equitably and similarly treated and given sufficient information regarding the merger.

Furthermore, the scope and application of the FCCP Act is quite broad particularly with regards to the meaning of the word “undertaking” which is widely used in the legislation. Under the interpretation provisions of the FCCP Act, an “undertaking” is defined as “*any person involved in the production of, or the trade in, goods, or the provision of services*”. This suggest that an undertaking includes retailers, manufacturers and e-commerce sites.

In light of the foregoing, the following sections in this review shall examine the relevant provisions of the FCCP Act touching on mergers in Nigeria.

Definition of merger

The FCCP Act adopts a broad based approach in defining what constitutes a merger as can be gleaned from section 92(1) of the FCCP Act which states 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*”. Furthermore, a merger can be achieved in any of the following manners:

- i. *the purchase or lease of the shares, an interest or assets of the other undertaking in question,*
- ii. *the amalgamation or other combination with the other undertaking in question, or*
- iii. *a joint venture (the FCCP Act is silent on the type of joint venture contemplated.)*

Section 92(2) of the FCCP Act further stipulates that: “*an undertaking has **control** over the business of another undertaking if it:*

- a. *beneficially owns more than one half of the issued share capital or assets of the undertaking;*
- b. *is entitled to cast a majority of the votes that may 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;*
- c. *is able to appoint or to veto the appointment of a majority of the directors of the undertaking;*
- d. *is a holding company, and the undertaking is a subsidiary of that company as contemplated under the Companies and Allied Matters Act;*
- e. *in the case of an undertaking that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;*
- f. *has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).*

It appears that the occurrence of any of the above-mentioned transactions which result in “control” could be characterized as a merger; and that such control may be either direct or indirect. Interestingly, this broad definition of mergers adequately captures private equity and venture capital transactions which are usually in the form of share or asset purchase. In addition,

⁴ [SEC Circular dated 08/02/2018 titled ‘Notice on the Passage of the Federal Competition and Consumer Protection Act’ accessed August 8, 2019](https://sec.gov.ng/notice-on-the-passage-of-the-federal-competition-and-consumer-protection-act/) - <https://sec.gov.ng/notice-on-the-passage-of-the-federal-competition-and-consumer-protection-act/>

an instance of control can be exercised by a private equity firm that acquires shares that enable it to cast majority of votes at the general meeting of a portfolio company.

Notably, the FCCP Act differentiates mergers into two distinct categories namely small or large mergers, unlike the ISA which included three categories comprising small, intermediate and large mergers. It is anticipated that the Commission will publish guidelines regarding the prescribed threshold for both small and large mergers in due course. The FCCP Act states that a small merger constitutes a merger with a value at or below the prescribed threshold, whereas a large merger constitutes a merger with a value above the prescribed threshold. In terms of notifications for the categories of mergers, the prior notification and approval of the Commission is not required for a small merger, although the Commission may within six months after the implementation of a small merger, require notification of the small merger and determine whether such small merger substantially prevents or lessens competition.⁵ On the other hand, parties to a large merger must notify the Commission of the merger. It is also necessary to note that the FCCP Act seems to have dispensed with the need to obtain a sanction by the Federal High Court as was previously required and contemplated under the ISA merger provisions.

It is important to note that, whilst the SEC and ISA determined threshold based on assets and/or turnover, the FCCP Act is based solely on turnover.

Extra-territorial implications

Section 2 of the FCCP Act clearly specifies that the Act shall apply to all undertakings and commercial activities within or having effect in Nigeria. This signifies that the FCCP Act would apply to activities involving persons or entities that are resident or conducting business outside Nigeria, provided that such activities have an effect in Nigeria. A foreign company that carries on business activities in Nigeria but conducts a merger transaction outside Nigeria with implications for the Nigerian entity such as change of control, would effectively be subject to the provisions of the FCCP Act.

The inclusion of indirect control as contemplated in the FCCP Act means that offshore transactions which result in the change of ownership or control of a Nigerian subsidiary of a foreign company would be subject to the provisions of the FCCP Act. The Commission would however need to satisfy the public by publishing guidelines about when approvals should be sought for indirect mergers occurring outside Nigeria and whether approvals for foreign competition or antitrust authorities would be acceptable to the Commission for its evaluation.

Anti-competitive or Pro-competitive? Striking the right balance

The FCCP Act takes into consideration the fact that although a merger may produce anti-competitive outcomes, it may in turn result in some pro-competitive advantages. For example, if a proposed merger is considered by the Commission to have the adverse effect of lessening or substantially preventing competition, the Commission shall evaluate if there are any advantages that are likely to come about in the event that the merger is approved such as technological efficiency that cannot be attained without the merger.⁶ A merger may also be justified if it is in the interest of the public to approve the merger. This suggests that the Commission would consider if substantial benefits can be passed on to consumers as a result of a merger transaction.

⁵ Section 95 Federal Competition and Consumer Protection Act, 2019

⁶ Section 94(1) Federal Competition and Consumer Protection Act, 2019

In addition, where a merger is approved but later found to be anti-competitive such as a monopoly, then the Tribunal may order a divestiture.

Inter-agency cooperation

The Commission shares concurrent jurisdiction with other sector-specific government agencies with respect to competition and consumer protection matters under the FCCP Act. Section 105(2) of the FCCP Act stipulates:

“In so far as this Act applies to an industry or sector of an industry that is subject to the jurisdiction of another government agency by the provisions of any other law, in matters or conducts which affect competition and consumer protection, this Act shall be construed as establishing a concurrent jurisdiction between the Commission and the relevant government agency, with the Commission having precedence over and above the relevant government agency”.

The above provision denotes that the Commission shall override decisions of other government agencies with regards to competition and consumer protection. Nonetheless, it is necessary for the Commission to recognize and acknowledge the complexities of any given sector or industry and the valuable insights that a sector-specific government agency may have about the relevant sector it is mandated to regulate. For the purpose of merger approvals, there may be situations whereby parties to a merger transaction may need to seek approvals from both the Commission and the relevant sector-specific regulatory agency. To ensure that the Commission performs its functions effectively, it should seek to address any conflicts by increasing cooperation with other government agencies.

Conclusion

To reiterate, Nigeria joins several countries in establishing a comprehensive competition legislation and we await to see how the legislation and the Commission will affect the markets in a practical way. The FCCP Act has expanded the landscape of mergers in Nigeria, and we expect to see the Commission publish guidelines that would further clarify the ways in which mergers may be approved and facilitated in Nigeria. In order to function effectively, the Commission would need to work closely and collaborate with other sector-specific government agencies so as to reduce bureaucracy or repetitive compliance which may be an impediment to ensuring that Nigeria is an attractive environment to conduct business.



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