Nigeria: Deal Structuring Considerations under the Federal Competition and Consumer Protection Act 2019

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Industry analysts had predicted that factors such as macroeconomic recovery in oil production and prices and relative political stability following the April elections would result in concomitant boosts in GDP growth, business confidence, and M&A and IPO deal making (including cross-border private equity (PE) transactions) in Nigeria in 2019. Available deal data for the Nigerian PE sector in the last 18 months appears to lend credence to such predictions, with notable transactions announced including LeapFrog's investment in ARM Pensions, The Carlyle Group's investment in Wakanow.com, continuing investment following the merger of Access Bank plc and Diamond Bank plc, Vectis and AGL's investment in Leventis, AFIG's investment in NEM Insurance plc, the CDC Group plc's investment in CCAGF, and Verod's investment in DayStar Power Limited, among others.

Notwithstanding such discernible evidence of continuing investor optimism, however, PE and other investors continue to flag legal, regulatory, and compliance challenges as key impediments to consummating transactions and doing business in Nigeria. In a bid to improve the ease of doing business within its borders, Nigeria's recent regulatory reform drive has birthed several initiatives relevant to PE deal structuring in Nigeria including a currently stunted review of Nigeria's companies' legislation, the issuance of a Nigerian Code of Corporate Governance 2018, and the enactment of the Federal Competition and Consumer Protection Act on January 30 2019 (''the Act''). The Act establishes the Federal Competition and Consumer Protection Commission (the ''Commission'') and the Competition and Consumer Protection Tribunal and seeks to promote competition in the Nigerian markets at all levels by eliminating monopolies, prohibiting abuse of a dominant market position, and penalizing other restrictive trade and business practices. In addition to establishing a framework for competition and antitrust regulation, the Act repealed the Consumer Protection Council Act and also the merger control provisions of the Investments and Securities Act, which had hitherto given the Securities and Exchange Commission (the "SEC") primary authority to regulate merger controls in Nigeria. The Commission has assumed the role of the principal merger control regulator in Nigeria.

In this note, we focus narrowly on some immediate implications of the Act for mergers and acquisitions (including private equity) transactions in Nigeria.

What is a merger under the Act? Under the Act, any transaction that results in the direct or indirect acquisition of control over the whole or part of the business of another undertaking is notifiable if the thresholds are met. The Act includes within its definition of a merger, share purchases, share leases, asset purchases, asset leases, amalgamations, or combinations as potentially notifiable to the Commission. The definition of a merger has been expanded to specifically include joint ventures as notifiable transactions. The Act, however, does not specify at what point a new joint venture must be notified, which makes it arguable that the mere creation of a joint venture, without more, may not constitute a notifiable transaction.

Classification of Mergers. The Act, however, expressly provides for ''small'' mergers (threshold of NGN 1 billion[1]) and ''large'' mergers (with a threshold of NGN5 billion[2] or more). It excludes mention of a category of intermediate mergers (i.e. mergers between NGN1 billion and NGN5 billion) which had hitherto been identified and provided for under the ISA. The language of the relevant provisions appears to suggest that only large mergers are notifiable. The Commission may, however, within (six) months after a small merger is implemented, require the parties to that merger to notify it of the transaction at its discretion, and no further steps to implement the merger may be taken until the merger has been approved by the Commission. Notably, however, it appears that the Commission currently applies the existing Rules and Regulations of the SEC (which provide for intermediate mergers) in the review of pending transactions in practice. Its approval will, therefore, be required where the threshold for a ''small merger'' (i.e. NGN 1 billion) is exceeded. The Commission, however, reserves the statutory power to issue regulations prescribing (or modifying) thresholds for each type of merger.

1. USD3.2 million using the prevailing currency exchange rate as at September 21st 2019
2. USD16.3 million using the prevailing currency exchange rate as at September 21st 2019

Joint Review of Applications. On May 3 2019, the Commission and the SEC issued a joint notice on mergers, acquisitions and other business combinations pursuant to the Act which stated that all notifications or filings will be reviewed in accordance with the existing SEC regulations, guidelines, and fees. Unless otherwise determined by the Commission, the Commission and the SEC currently have joint regulatory oversight to review mergers. The Commission will, however, be responsible for granting all formal approvals and all applicable fees will be payable to it (even where fees are shared with the SEC). The joint desk is a transitional arrangement to ensure continuing and seamless commercial and market operations until the Commission appoints commissioners and passes its own regulations.

Procedure for a Large Merger. Unlike the position under the ISA, the Act does not require a court sanction for the approval of a large merger. The court sanction under the ISA, provided for the transfer of the assets, undertakings and liabilities of the transferee to the transferor; the dissolution, without winding up of the transferor; and the continuation by the transferee of any legal proceedings pending by or against the transferor. It will be interesting to see whether the regulations issued by the Commission will require parties to obtain a court sanction prior to the approval of the merger, and if it does not, whether the Commission will insist after the transition period, that merging entities obtain a court sanction as part of the conditions for approving their merger.

Timeline for the grant of an approval. The Commission has 20 business days from the day it is notified by the parties to a small merger to approve the merger. The Commission may, by notice to all the parties, extend the approval period by a single period not exceeding 40 business days. Where the Commission neither approves nor prohibits the merger within 20 business days, or within 60 business days in the case of an extension, the merger shall be deemed approved. With respect to larger mergers, the Commission has 60 business days from the day it is notified of the merger by the parties, to approve the merger. The Commission may by notice to all the parties extend the approval period to 120 business days (including the initial 60 business day period). Where the Commission neither approves nor prohibits the merger within 60 business days, or within 120 business days (in the case of an extension), the merger shall be deemed to have been approved.

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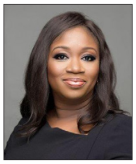
Challenge of the Commission's Decision. It is important to note that the Commission has the power to revoke its approval, and to prohibit the implementation of any merger. Any entity aggrieved with the Commission's decision in relation to a merger may file an application for review before the Competition and Consumer Protection Tribunal (Tribunal). If such an entity succeeds at the Tribunal, it is required to register the ruling at the Federal High Court, for the purpose of enforcement. In the event that the aggrieved entity loses at the Tribunal, it may appeal to the Court of Appeal and further appeal to the Supreme Court where necessary.

Regulation of offshore equity and asset transactions deemed to have effect in Nigeria. The Act expressly provides that the approval of the Commission will be required if the acquisition of shares or other assets outside Nigeria will result in the change of control, whether directly or indirectly, of a business, part of a business or any asset of a business in Nigeria. This means that where a foreign transaction (e.g. involving a holdco) will result in a change of control (whether direct or indirect) of a Nigerian entity, the approval of the Commission will be required.

Conclusion

From a deal structuring perspective, the Act introduces significant changes in the regulatory landscape for private equity and other investment transactions in (or having effect within) Nigeria. It endows the Commission with extensive powers. Several of which are yet to be properly defined or to be the subject of definitive judicial interpretation, or which will, in our view, require harmonization with or restructuring of existing sectoral regulations and processes. Notably, the Act imposes significant general penalties on companies as well as their directors that fail to comply with its provisions, including fines as high as 10% of annual turnover in the preceding business year for defaulting corporate entities and, in addition, individual fines and potential imprisonment of up to 2 years for directors of such companies.

About the Authors



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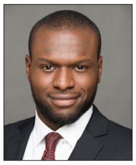

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