FEDERAL COMPETITION AND CONSUMER PROTECTION ACT 2019; A DEATH KNELL ON THE REGULATORY ROLE OF THE SEC AS REGARDS MERGERS AND ACQUISITIONS IN NIGERIA.

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Abstract

This ground breaking business legislation came into being on the 5th of February 2019. Before the birth of this legislation, the Securities and Exchange Commission was saddled with the provision of apex regulation as regards mergers in Nigeria, with emphasis on antitrust. One of the highpoints of this legislation is the annihilation of sections 118 to 128 of the Investments and Securities Act. The ISA provided the SEC the needed regulatory gravitas to regulate the Capital Market for which Merger review and approval happened to be one of the contents. As shrewd as this piece of legislation may seem, it is the contention of this work that regulatory remit of the SEC did not suffer a total obliteration. It is also in this wise that this work further contents that the Federal Competition and Consumer Protection Commission not being a corporate finance institution, will be ill tooled to solely embark on the review of merger documents of public companies without the regulatory input and imprimatur of the SEC.

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Introduction

Merger is a form of business restructuring and reconstruction. This arrangement may entail the coming together of two or more going concerns, figuratively speaking into a single going concern or entity. The first recorded case of merger in Nigeria took place in 1912 by the acquisition of Anglo African Bank established in 1899 by the then British Bank of West Africa. These entities morphed into what is known as First bank of Nigeria.

Since the consummation of this first merger, the country has witnessed so many merger transactions involving entities which in some cases are in direct competition in their lines of business, firms in non competitive relationship as well as Companies in different industries.[1]

Before the incursion of this legislation, the Securities and Exchange Commission was clothed with the responsibility of determining from time to time, a lower and upper threshold of the combined annual turnover of assets or a lower and upper threshold of the combination of turnover and assets in Nigeria, in general or in relation to specific industries, for the purposes of determining categories of mergers and

[1] Donald Attah: An overview of Mergers and Acquisitions in Nigeria, 2021.pg2

a method for the calculation of annual turnover or assets to be applied in relation to each of the prescribed threshold.[2]

Under the old regulatory regime of the SEC, there were three categorizations of merger, the small, the intermediate and the large mergers.[3] This new legislation has in its wake, whittled down the number to two, the small and the large mergers. These two categories have identifiable watermarks. Because of the sheer volume of the literature and the extensive works that have been done under mergers in the past, we will restrict this endeavor to the brief review of the scope and application of the Act, review of merger documents by the FCCPC, the role of the SEC, if any, in merger review and approval and lastly, suggestions/ conclusion.

Objectives and the Application of the Act

The Act is made up of 168 sections and two schedules.[4] The Act has as its forte, the development and promotion of fair, efficient and competitive markets in Nigerian economy.[5] The Act also seeks to promote and protect the interest and welfare of consumers by the provision of untrammeled choices.

[2] These are known as categorization of mergers.

[3] See section 120(1) of the ISA 2007.

[4] The long title of the FCCPA 2018 goes as follows, An Act to repeal the Consumer Protection Act Cap C25 LFN 2004 and to establish the Federal Competition and Consumer Protection Act and the Competition Tribunal.

[5] The essence of .the Act is to facilitate access by citizens to safe products and secure the protection of rights for all consumers in Nigeria.

In very broad terms, the application and binding effect of the Act is upon a body corporate or agency of the government of the Federation or a body corporate or agency of a subdivision of the Federation, if the body corporate or agency engages in commercial activities. It also applies to a body corporate in which a government of the Federation or government of a State or a body corporate or agency of government of the Federation or any State or local Government has a controlling interest where such a body corporate engages in economic activities. The application also extends to commercial activities aimed at making profit and geared towards the satisfaction of demands by the transacting public.

The conduct outside Nigeria by a citizen of Nigeria or a person ordinarily resident in Nigeria is within the regulatory sphere of the Act. A body corporate incorporated in Nigeria or carrying on business within Nigeria is also of interest to the Act. The most important application of the Act in relation to the forte of this work is as it relates to the acquisition of shares or other assets outside Nigeria resulting in the change of control of a business, part of a business or any asset of a business in Nigeria.[6]

The common denominators in all these are commercial activities and or economic activities. The very essence of the Act is to ensure efficiency, fairness, competitive markets by all the players. This will undoubtedly, secure value in the entire chain of consumerism.

[6] See generally, section 2 of the FCCPA 2018.

Merger Approval by the FCCPC

The FCCPC was established for the purposes of the promotion and maintenance of competitive markets in Nigerian economy. One of its numerous functions is the review of mergers applications as well as authorizing with or without conditions, and prohibit or approve mergers of which notice has been received.

The Commission determines when a merger transaction shall be notified to it before the implementation of the merger. In determining this, the Commission walks back to the previous year preceding the application for Merger. If the combined annual turnover of the acquiring undertaking and the target undertaking in, into or from Nigeria equals or exceeds one billion naira or the annual turnover of the target undertaking in, into or from Nigeria equals or exceeds five hundred million Naira. In the above cases, there must be notification before implementation.[7] The first arm of the yardstick depicts large merger, while the second arm represents small merger.

The calculation of the annual turnover will reckon with all monies received or otherwise receivable either in cash or on accrual basis including monies received not necessarily in exchange for goods or services, or as sales, but including injections which maybe equity or deferred or convertible equity for the purpose of the business or similar payments or returns, or the use by others of the undertaking's assets yielding interest, royalties, rent or dividend shall be considered

[7] See section 1 Notice of Threshold For Merger Notification Pursuant to section 93(4) of the FCCPA.

to be included in the turnover. It is observed that the FCCPC not being a corporate finance institution may be in a regulatory bind in the execution of the above. A strategic collaboration with a corporate finance institution like the SEC will in our opinion achieve a better result.

The commission shall consider an undertaking to be involved in a merger if it is being acquired directly or indirectly by another undertaking, or is directly or indirectly acquiring another undertaking; or establishes direct or indirect control over the whole or part of the business of another undertaking by way of acquisition of either shares or assets; or is involved in an amalgamation or other combination with another undertaking or is the product of that amalgamation or combination between the undertakings; or is entering into a joint venture with another undertaking or is the product of an understanding to create a joint venture between two or more undertakings.[8]

The commission will not infer a merger transaction where affiliated undertakings engage in an internal scheme of reorganization or restructuring which involves the transfer or change of business, interest, assets, shares or operations among the affiliated undertakings, without a change of control, such a transaction shall not be deemed a merger for the purpose of notification and approval by the commission. Where however there's a change of control of any of the undertakings within a group undergoing a restructuring or reorganization, the

[8] See Regulation 3 FCCPA 2018, Merger Review Regulation 2020.

commission shall deem such transaction as notifiable merger under the Act.[9]

Joint ventures can only be subject to merger control by the Commission if they meet the requirements prescribed by the Act.[10] As has been highlighted above, there are two types of mergers, small merger and the large merger. Each is measured by definable threshold emplaced by the Regulation.

Small mergers are not notifiable except where the Commission considers that the reconstruction will substantially prevent or lessen competition or where the contracting parties volunteer the notification.[11] The essence is not to offend the antitrust legislation and Regulation. Once it is ascertained that the merger will substantially

[9] Regulation 4 FCCPA 2018, Merger Review Regulation 2020, it therefore follows that Arrangement and Compromise under section 710-717 of the Companies and Allied Matters Act 2020 does not fall within the precincts of merger as contemplated by the FCCPA 2018.

[10] See section 92(2) FCCPA provides thus; undertaking has control over the business of another of another if it beneficially owns more than one half of the issued share capital or assets of the undertaking or is entitled to cast majority vote at a general meeting or has ability to appoint or veto the appointment of majority of the directors or where the company is a holding company and the other one is a subsidiary. The bottom line is, if it can generally exercise control, a merger would be imputed.

[11] See Regulation 11 Merger Regulation 2020. Large mergers are notifiable. The essence is not offend the antitrust legislation and. Regulation. Once it is ascertained that the merger will substantially restrain or prevent effective competition, the Commission will deny approval.

restrain or prevent effective competition, the commission will deny approval[12]

The Role of the SEC in Merger Approval

Before the passage of the Federal Competition and Consumer Protection Act, the Investments and Securities Act of 2007 was unassailability the go to legislation in merger consummation in Nigeria. The Investments and Securities Act provides thus; notwithstanding anything to the contrary contained in any other enactment, every merger, acquisition on or business combination between or among companies shall be subject to prior review and approval of the Commission.[13] [14]

Section 164 of the FCCPA curiously added to the atmosphere of confusion which pervaded the Investment clime then by subjugating other enactments including the ISA, regulations or subsidiary laws relating to or connected with the subject matter of the Act to modifications necessary to bring to fruition, the intendment of the Act. This confusion would have been averted if section 164 was more elegantly worded. Roused by this, the SEC and the CBN seized the initiative to roll out new Regulation and legislation that will make them to be actively involved in merger review and approval in relevant

[12] See Regulation 12 Merger Regulation 2020.

[13] See section 13(p) and 118 of the ISA 2007.The sweeping nature of the powers given to the FCCPC by the Act led to an initial regulatory confusion. Olaniwun Ajayi submitted that the FCCPC by the Act was empowered to receive merger documents, review and approve proposed mergers.

[14] Olaniwun Ajayi: Federal Competition and Consumer Protection Act 2018. A new Regulatory landscape for Mergers in Nigeria. Newsletter. Pg 2.

regulated sectors. The SEC promulgated the 2021 Regulations on Mergers, acquisitions and restructuring. The Regulations empowers the SEC to review and regulate mergers, acquisition and combinations between or among companies. For the Regulations to be operative, the acquisition must be that of shares, assets, business, or subsidiary of a Public company. *Abisola Akinyemi* surmised and rightly in our view that the implication of the new Regulation by the SEC is that there's now an extra layer of regulatory requirements in executing merger transactions in Nigeria.[15] It should be noted that operators in other sectors of the economy desiring a merger are also subject to notification and approval requirements by the various regulators in that sector.[16]

In practice, merger applications involving regulated going concerns are first referred to the primary regulators by the FCCPC for review and approval before the FCCPC can issue the final approval. Notably, mergers and acquisitions involving Public companies require the approval and no objection letter from the SEC.

It therefore follows that the regulatory role of the SEC is activated once the merging entities are public companies. The approval of the SEC shall be obtained prior to undertaking a proposal, scheme, transaction,

[15] Abisola Akinyemi: Overview of Recent Changes to Regulatory Framework for mergers and acquisition in Nigeria Part 2 SITEADMIN March 24 2022).

[16] In 2020, the BOFIA was reenacted; section 65(3) ousted in practical terms the jurisdiction of the FCCPC over banks and other Financial Institutions regulated by the CBN. Furthermore, that section provides that references to FCCPC in the FCCPA shall be deemed to be references to CBN.

arrangement, or activity or issue of securities or offer for subscription or purchase of securities in relation to the conversion of a public company or reconstruction of its shares. It is also required even when the company is embarking on a carve -out, spin-off, split- off or other forms of restructuring of the operations of a public company. It's equally required in acquisition or disposal of the assets, business, subsidiaries, shares or other significant property of a public company which results in a material and significant change in its business direction. The SEC can only give its approval if it is satisfied that all the shareholders have been fairly, equitably and similarly treated. They must be availed with relevant and significant information regarding the merger transaction. [17]Also Regulation 4 provides for exemption in deserving cases. In cases of acquisition by a public company of the business or assets which does not involve the issuance of shares of the public company as the consideration for the acquisition shall be treated as an exempted case. There must however be a disclosure to the shareholders at the next general meeting.

Interestingly, there are no notification thresholds in the capital market. Every transaction which will have the effect of changing the control and or beneficial ownership of a public company or a material change in the business direction or policy of a public company shall be subject to such notification, approval and/ or disclosure regimes as prescribed by the Rules. What this means in practical terms is that the provisions of the Notice of Threshold For Merger Notification Pursuant To Section 93(4) will not be reckoned with by the SEC in its overall

[17] See Regulation 3 Amended SEC Regulation 2021.

consideration in the assumption of jurisdiction over mergers involving Public companies. Its driving interest rests on two factors, change of control of the public company or a material change in its business direction. Once any of these occurs or coincides, the SEC will assume jurisdiction to review and approve the merger transaction.

General Requirements for Merger and Acquisition under the Amended SEC Merger Regulation 2021

Every public company involved in a merger transaction or other forms of business combination is mandated to file a merger notification with the commission. The following documents shall accompany the notice.

(a) Extract of the board Resolution of the public company authorizing the merger transaction.
(b) Extract of the Resolution of the company in a general meeting authorizing the transaction.
(c) Draft copy of the scheme document specifying the information prescribed in the appropriate schedule, if applicable.
(d) Copy of valuation report relied on by the Board of directors.
(e) Letter of consent given by the parties to the scheme.
(f) Copy of the certificate of incorporation of the public company.
(g) Certified True copies of the particulars of directors and allotment of shares.
(h) Summary of the pending claims and litigations of the company to be acquired.
(i) Copy of the letter conveying the approval by the Federal Competition and Consumer Protection Commission, where applicable.

(j) Evidence of reconciliation of the issued shares of the company with the

Company's Registrars, Central Securities Depository and the SEC where the shares of the company are listed.

Court - Ordered Meeting

Where at the court ordered meeting for the consideration of the scheme of merger and the proposed merger, majority representing not less than three quarters in value of the shares of members being present and voting either in person or by proxy at each separate meetings sanctions the merger, a formal approval for the proposed merger will be filed at the SEC. Where the SEC grants a formal approval, the contracting parties shall proceed to obtain the order of court sanctioning the scheme.[18]

Suggestion and Conclusion

It is inconceivable that the regulatory functions of the SEC would have been obliterated by the FCCPA. SEC is a corporate finance institution while the FCCPC is not. With the cacophonous regulatory sounds coming from fringe regulators in Mergers and Acquisition, the need for a one stop coordinating center has become very imperative and has

[18] They will be required to file the following documents, a copy of the court order sanctioning the scheme within seven days of the making of the order. A copy of the newspaper publication of the court order sanctioning the scheme will be sent to the SEC. They will also file an application for the registration of the securities to be issued as consideration for the scheme where applicable. They will also file summary reports of the scheme within three months of the court sanction.

assumed the urgency of now. The positives for this are quite glaring and obvious. The one stop center if established will lead to a better coordination and synchronization of duties of all the regulators. It will also drive down the costs of achieving merger documentation and finalization.[19] This initiative will also reduce the regulatory overlap and the likely attendant red tapism in the conduct of the business of merger. *Abisola Akinyemi* also opined that greater collaboration by the respective regulators will facilitate effective resource sharing and also impact positively on the cost component of the consummation of merger in Nigeria. Also in dispute management and resolution in merger transactions Part VII, it is suggested with utmost humility that disputes arising from the consummation of merger of a Public company be subjected to the jurisdiction of the Investments and Securities Tribunal. The Tribunal is better equipped to handle such disputes. It is worthy of note that ISA 2007 requires members of the Tribunal to be persons knowledgeable in the capital market activities and members of Competition and Consumers Tribunal are not so required.

There's no doubt that the role of SEC in mergers and acquisitions involving Public companies which appeared to be in hiatus in 2019 owing to the initial confusion that assailed the new Act has been restored and reinforced through regulatory pragmatism.

[19] The Nigerian Investment Promotion Commission Act 1995 has a similar provision which established the OSIC. Since its establishment, there has been noticeable improvement in regulation, compliance and coordination of various sectoral regulators in Nigeria.