

## REGULATION OF FOREIGN-TO-FOREIGN MERGERS IN NIGERIA

### Introduction

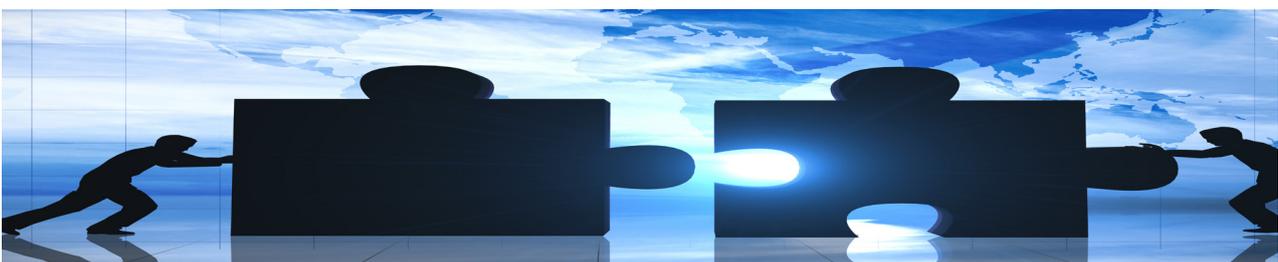
Prior to the enactment of the Federal Competition and Protection Commission Act 2018 (FCCPA), there were no laws regulating mergers between non-Nigerian entities which result in a change of control of a Nigerian business (foreign-to-foreign mergers). Thus, a person desiring to acquire a company may avoid Nigerian merger control regulations by simply acquiring the foreign parent company of the Nigerian entity.

This lacunae in Nigerian law was finally addressed by the enactment of the FCCPA. Accordingly, from 30 January, 2019, foreign-to-foreign mergers now require the approval of the Federal Competition and Protection Commission (FCCPC) (the body which replaced the Securities and Exchange Commission (SEC) as the regulatory body saddled with the responsibility for conducting competitive review of all mergers and business combinations in Nigeria), if the thresholds set out in the FCCPC's Guidelines on Simplified Process for Foreign-to-Foreign Mergers with Nigerian Component (Guidelines) are exceeded. The Guidelines extended the foreign-to-foreign merger control review under section 2(3)(d) FCCPA 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".

A foreign-to-foreign merger comes under the purview of the FCCPC where the Nigerian target undertaking has a turnover of of N500,000,000 to N1,000,000,000 or where their combined turnover in Nigeria is N1,000,000,000 and above.

### Regulation of foreign mergers

Under the FCCPA, a merger occurs 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. This may be achieved through the purchase or lease of shares, an interest or assets of an undertaking; the amalgamation or other combination with an undertaking and a joint venture.



## FCCPC Approval requirements

Parties to a foreign-to-foreign merger must submit a merger notification to the FCCPC either by themselves or through a nominated entity before the merger is implemented. The documentation requirements for application for approval of foreign-to-foreign mergers include:

- (a). Information Memorandum containing relevant information as stipulated by the Guidelines, for example information about each of the parties to the merger, the nature of the undertaking's business, the main subsidiaries active and/or brands, product names and/or trademarks used within Nigeria etc.;
- (b). Most recent version of the transaction documentation between the parties to the merger;
- (c). An executive summary of the merger;
- (d). A Power of Attorney, attesting that each nominated representative of the notifying party is authorised to act for that party; and
- (e). Recent audited financial statements, for the end of the immediately preceding financial year to the notification; or an indication of the internet address or online location, if any, at which the most recent financial information including annual reports and accounts of the parties to the merger are available, to the extent that they pertain to Nigeria.

The notification must include a declaration by or on behalf of all the notifying parties that the information provided in the notification is true, correct, and complete; true and complete copies of documents required have been submitted; all estimates are identified as such and are best estimates of the underlying facts; and all the opinions expressed are sincere.



## Consideration for approval

In approving or disapproving the merger, the FCCPC seeks to understand the economic rationale of the merger as it affects Nigerian markets. This it does by determining whether the merger would substantially lessen or prevent competition in the relevant market, whilst considering if there are any technological or efficiency contributions to the economy which the merger would produce, thereby offsetting the negative effects on competition. The merger may also be justified on substantial public interest grounds, such as by reference to the effect on employment, a particular industrial sector or region, or the ability of national industries to compete in international markets.

## What are the applicable fees?

The application fee for foreign-to-foreign merger notification in Nigeria depends on the threshold. Where the merging entities have a combined turnover in Nigeria of N1,000,000,000 and above, the application fee is N3,000,000.00 or 0.1% of combined turnover, whichever is higher.

The application fee for mergers where target undertaking has turnover in Nigeria of N500,000,000 to N1,000,000,000 is N2,000,000.00.

Where the parties want an expedited procedure under which the FCCPC is expected to conclude its review of the merger transaction and issue a decision timeously, within fifteen (15) business days, they shall pay an expedited procedure fee of N5,000,000 (Five million naira) in addition to the application fee.

## Effect of Failure to obtain FCCPC approval

The FCCPA provides that any merger which is subject to FCCPC review and which is undertaken without the requisite notification is void.<sup>1</sup> Also, the undertaking commits an offence and is liable on conviction to a fine not exceeding 10% of turnover of the undertaking in the business year preceding the date of the commission of the offence or to such other percentage as the court may determine having regard to the circumstances of the case.<sup>2</sup>

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For further information, please contact us via our contact channels.

<sup>1</sup> Section 96(4), FCCPA  
<sup>2</sup> Section 96(7), FCCPA