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AN APPRAISAL OF THE EXTANT LEGAL FRAMEWORK FOR MERGERS & ACQUISITIONS IN NIGERIA

ARTICLE SERIES

The principal legislation regulating mergers and acquisitions in Nigeria are the Investment and Securities Act 2007 ("ISA"), the Federal Competition and Consumer Protection Act 2018 ("Competition Act"), the Rules of the Securities and Exchange Commission 2013 made pursuant to the ISA ("SEC Rules"), the Companies and Allied Matters Act, Chapter C20, Laws of the Federation of Nigeria 2004 ("CAMA") and the Rule Book of the Nigerian Stock Exchange (applicable to listed public companies).

The Companies Income Tax Act 2007 As Amended also specifies that no merger, take over, transfer or restructuring of the trade or business carried on by a company shall take place without having obtained the Federal Inland Revenue Service's direction and clearance with respect to any capital gains tax that may be due and payable. Furthermore, where there is no relevant provision in any of the statutes, common law may apply to the transaction.

THE REGULATORS

Prior to the passage of the Competition Act, the apex regulator responsible for the regulation of mergers and acquisitions in Nigeria was the Securities and Exchange Commission ("SEC"). However, with the establishment of the Federal Competition and Consumer Protection Commission ("FCCPC") and the repeal of sections 118-128 (excluding section 121(1)(d)) of the ISA, the power to approve mergers was taken from the SEC and vested with the FCCPC.

Consequently, the passage of the Competition Act also resulted in the introduction of a new regulatory framework for merger transactions in Nigeria.

However, the retention of Section 121(1)(d) of the ISA means that SEC ought to be given sufficient information regarding the merger and it ought to continue determining whether all shareholders are fairly, equitably and similarly treated. Moreover, by a notice to the general public, SEC has indicated that as the primary regulator of the capital market, its regulatory purview extends to mergers involving public companies as well as transactions involving a change of shareholding of capital market operators and that, where any merger involves a public company, the public company has a duty to obtain the 'No Objection' of the SEC. SEC will also continue to enforce compliance with the takeover provisions and monitor acquisition of shares of public companies.

As the Commissioners for the FCCPC are yet to be appointed, and in order to make provision during the transition period, the FCCPC and SEC issued the 'Joint Advisory and Guidance on Mergers, Acquisitions and Other Business Combinations' ("Guidance") on 3rd May, 2019. The Guidance provides that during the transition period, commencing from 3rd May, 2019, all notifications or filings should be filed at the FCCPC or the Interim Joint Merger Review Desk of the FCCPC/SEC. FCCPC and SEC will jointly review the notifications and the FCCPC will convey the decision.

This process will also apply to notifications previously received by the SEC that are yet to be decided. The Guidance will remain in force until otherwise discontinued by further advisory or guidance.

SECTOR SPECIFIC LAWS

There are also sector-specific laws applicable to target companies operating in certain industries. Some of them include the following:

The Banks and Other Financial Institutions Act 1991 (as amended), The Central Bank of Nigeria Act 1991 (as amended) and the CBN Procedures Manual for Applications for Bank Mergers/Take-overs, 2004 (as updated) for mergers and acquisitions activity in the banking and financial services sector.

The Nigerian Communications Act 2003 regulates the telecommunications, media and technology sector.

The Electric Power Sector Reform Act 2005 regulates the power sector.

The Insurance Act 2003 regulates the insurance sector.

The Petroleum Act, Chapter P10, Laws of the Federation of Nigeria, 2004 and Nigerian Oil and Gas Industry Content Development Act regulates the oil and gas sector.

These laws require that the prior approval of the sector regulator be obtained where there is a merger/acquisition of a specified percentage in a company operating in the sector

In this respect, it is important to note that the approval of the FCCPC, in addition to the relevant sector regulator, would need to be obtained prior to implementation of the proposed merger or acquisition.

Moreover, the FCCPC's decisions on competition and consumer protection matters take precedence over the relevant sector regulator and it is empowered to hear and determine appeals or requests to review the exercise of power of any sector regulator.

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Contact us at:

4th Floor, Marble House,
1 Kingsway Road, Falomo Ikoyi,
Lagos, Nigeria

Telephone: (+234-1) 4617321-3, 2793367-8, 7406533,

E-mail: lagos@aelex.com

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