

AELEX

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The background of the lower half of the page features a photograph of a desk. On the desk, there are several stacks of coins of various denominations, some silver and some gold. In the foreground, there is a bar chart with blue bars and a red line graph overlaid on it. The lighting is soft and focused on the coins and chart.

FEDERAL COMPETITION AND CONSUMER PROTECTION COMMISSION NOTICE OF THRESHOLD FOR MERGER NOTIFICATION

The Federal Competition and Consumer Protection Commission (“Commission”) has issued a ‘Notice of Threshold for Merger Notification’ (“Notice”), with an effective date of 9th September 2019.

The Notice was issued pursuant to Section 93(4) of the Federal Competition and Consumer Protection Act 2018 (the “Competition Act”), which vests the Commission with the power to determine the threshold of annual turnover for the purpose of determining what constitutes a small and large merger; and the method for the calculation of annual turnover to be applied in relation to the threshold.

The Notice prescribes that the Commission shall be given notice of a merger before implementation if, in the financial year preceding the merger:

(a) The combined annual turnover of the acquiring undertaking and the target undertaking in, into or from Nigeria equals or exceeds N1,000,000,000 (about US\$3,267,974); or

(b) The annual turnover of the target undertaking in, into or from Nigeria equals or exceeds N500,000,000 (about US\$1,633,987).

It is presumed that a merger with an annual turnover below the threshold will constitute a “small merger” and those above the threshold would constitute a “large merger”. In accordance with Section 95(1) (a) of the Competition Act, a transaction classified as a “small merger”

does not require notification to the Commission unless, within the six-month period from implementation of the merger, the Commission is of the opinion that the merger may substantially prevent or lessen competition.

For the purpose of calculating the annual turnover, the Commission has determined that the following will be considered:

- i. all monies received or otherwise receivable either as cash or on accrual basis including:
 - a. monies received but not necessarily in exchange for goods or services, or as sales;
 - b. equity injections (deferred or convertible) for the purpose of the business, or similar payments or returns; and
 - c. interest, royalties, rent or dividend obtained from the use by others of the undertaking’s assets.

ii. No amount of the money at (i) above, including sums that may be otherwise deductible as a matter of law or any mutual agreement with respect to splits or funds sharing, shall be excluded.

iii. Financial years that do not cover a full twelve-month period shall be converted to a full twelve-month period based on the average turnover of the recorded months.

iv.

Turnover in foreign currencies shall be converted into the Naira at the prevailing official exchange rate determined by the Central Bank of Nigeria.

v.

The calculation of turnover shall have regard to generally accepted accounting principles applicable in Nigeria under the Financial Reporting Council of Nigeria Act.

vi.

Financial information used for calculating turnover of an undertaking must include the undertakings' audited financial statements for the end of the preceding financial year to the notification.

vii.

In the event that an undertaking relevant to the threshold acquires, disposes or otherwise transfers any assets/ business or part thereof after its last audited financial statement provided to determine threshold, but prior to notification, the turnover of such business; or attributed to such asset may be considered by the Commission in the merger.

The issuance of this Notice is a welcome step and is evidence of the Commission giving effect to the provisions of the Competition Act. We expect that further guidelines will soon follow, particularly on the documentary requirements for obtaining approval.

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