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THE FEDERAL COMPETITION AND CONSUMER PROTECTION COMMISSION ("FCCPC") GUIDELINES ON FOREIGN TO FOREIGN MERGERS: A NOTE TO FOREIGN TRANSACTION ADVISORS

On 13 November 2019, the FCCPC published its Guidelines on Simplified Process for Foreign to Foreign Mergers with Nigerian component (the "**Guidelines**"). The Guidelines were issued further to the extension of the reach of the FCCPC to M&A transactions involving a change of control of businesses, parts of businesses or any assets of businesses, in Nigeria.[1] The Guidelines essentially cater to the procedural matters pertaining to prior notification, requisite information, documentation of notification and applicable fees.

The Guidelines stipulate thresholds that will trigger the requirement for prior notification and approval. Accordingly, where the combined turnover of the merging entities is or exceeds ₦1,000,000,000 (One Billion Naira), the higher of either a fee of ₦3,000,000 (Three Million Naira) or 0.1% of the combined turnover is payable.[2] If the turnover of the target undertaking is between ₦500,000,000 (Five Hundred Million Naira) and ₦1,000,000,000 (One Billion Naira), the fee payable is ₦2,000,000 (Two Million Naira). It appears that the thresholds and fees payable depend on the local entities impacted, such that the former threshold and fee relate to where a single Nigerian entity is impacted by the offshore transaction and the latter threshold and fee relate to where the offshore merger transaction impacts two Nigerian entities. In our opinion, the turnover thresholds set out in the Guidelines are high enough to meet a materiality standard. The existence of the Nigerian component to the M&A transaction also complies with the local nexus test recommended by the International Competition Network ("**ICN**").[3]

Notably, although the Guidelines do not provide for any exemptions based on the insignificance of the "local nexus" and "effect" on the Nigerian market, there is a clear indication that once the M&A transaction results in a change of control in a Nigerian entity, only a notification obligation arises. This approach makes for clarity so that once the foreign M&A transaction will result in a change of control locally, the FCCPC must be notified. Also, because the jurisdiction of the FCCPC extends to all M&A transactions with effect in Nigeria,

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[1] See section 2(3)(d) of the Federal Competition and Consumer Protection Commission Act, 2018 ("**FCCPA**"). It is worth noting that the FCCPA does not distinguish between a direct or an indirect control of the Nigerian entity. The position of the regulator suggests that the FCCPA covers both direct and indirect control.

[2] We are of the opinion that the turnover contemplated here is the local turnover of the Nigerian entities involved in the merger.

[3] The ICN is a virtual, informal and multinational network of competition authorities which facilitates cooperation among competition authorities globally. The local nexus test recommends that a competition authority exercises supervision over only mergers that have an appropriate connection to its jurisdiction. That way, the competition authority does not expend scarce resources reviewing transactions that are unlikely to result in material changes in its local jurisdiction, while respecting the sovereignty of nations with greater interest in the outcome of the transaction.

in addition to notification, proposed M&A transactions meeting the thresholds set by the FCCPA must also be approved by the FCCPC.[4] It is important to emphasize that the notification and approval requirement applies to private and public companies alike.

The Guidelines do not provide an indicative timeline within which an approval is required to be granted. It however recognizes that for the purpose of efficiency, an expedited application may be made. The expedited process prescribes that following the submission of the requisite documents, the FCCPC will review them and make a decision within 15 (fifteen) business days. This expedited application procedure attracts a fee of ₦5,000,000 (Five Million Naira).

The Guidelines do not outline consequences for implementation of a foreign-to-foreign merger without a notification and approval of the FCCPC as now clearly required. However, the FCCPA itself considers the implementation of a merger without complying with the FCCPA notification and approval requirement to be an offence. Accordingly, in addition to the transaction being considered void, the FCCPA imposes a penalty upon conviction by a court of not more than 10% (ten percent) of the turnover of the target undertaking and the impacted merging entities (as may be applicable) in the business year preceding the date of the commission of the offence or such other percentage which the court may consider appropriate in the circumstance of each case.[5]

In light of the above, it is important that foreign transaction advisers working on M&A deals with a Nigerian component take into consideration the need to engage with the FCCPC as early as possible and get requisite advice on relevant issues concerning the same. Timely and competent legal advice will ensure that they do not contravene Nigerian law and are able to implement their transactions in a hitch-free manner.

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[4] See section 93(1) FCCPA.

[5] See generally, section 96(4)-(7) FCCPA. In the context of foreign to foreign M&A transactions, it is not clear from the FCCPA whether it is the target undertaking or the local entity (or entities) impacted by the M&A transaction that is penalized upon conviction.