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Control Test for Mergers in Nigeria: What Constitutes Material Influence?

directly or indirectly acquire or establish direct or indirect control over the whole or part of another undertaking and in any manner, including through the:

- purchase or lease of shares, an interest, or assets of the other undertaking in question;
- amalgamation or other combination with the other undertaking in question; or
- a joint venture.

Since the definition of a merger is strongly hinged on “control”, the Act stipulates that an undertaking has control over the business of another undertaking if ⁶:

- it beneficially owns more than half of the share capital or assets of the undertaking;
- it can directly or indirectly through a controlled entity, cast or control the majority of the votes in a general meeting, or control the voting of the majority of votes cast;
- it is able to appoint or veto the appointment of majority of the directors in the undertaking;
- it is a holding company, and the undertaking is a subsidiary of that company as recognised under the Companies and Allied Matters Act;
- it is a trust; it can control majority of votes of the trustees or appoint majority of the trustees or to appoint or change majority of the beneficiaries of the trust; or
- it can *materially influence* the policy of the undertaking in *a way a person who in ordinary commercial practice can exercise control as provided in these paragraphs (a) – (f)*.

Therefore, where none of the parameters or conditions mentioned in paragraphs (a) – (f) are met, a deal would not be seen to amount to an acquiring undertaking establishing control over a target undertaking. Simply put, a transaction which does not give an acquirer the power to do any of the above in the target, will not be regarded as a merger according to the Act.

The specific part of section 92(2) which has been of concern and controversy, however, is with respect to what exactly constitutes material influence. This is further fuelled by the Commission’s attempt to define it.

Definition of Material Influence by the Commission

The Commission through the Regulations attempts to define or stipulate what will amount to material influence. Regulation 6 states that “*the ability to exercise material influence is the lowest of control that may give rise to a relevant merger situation*”. Furthermore, Regulation 4(a) provides that the Commission will consider:

“the acquisition of shareholding or voting rights above twenty five percent (25%) confers upon an acquirer a rebuttable presumption of the ability to materially influence policy”.

The rationale behind this threshold according to the Commission in the Guidelines is that “*under the relevant provisions of the Companies and Allied Matters Act, a shareholder of (sic) over twenty five percent (25%) is in the unique position of blocking special resolutions that require the approval of seventy-five (75%) of the shares.*”⁷ However, the Act is very clear as to what amounts to material influence. A combined reading of Regulation 4 (a) with section 92(2)(f) of the Act means that an acquirer who will have twenty – five percent (25%) or more shareholding in a target together with influence over any of the items listed in section 92(2)(a) – (e) of the Act, will be deemed to have control over the target. It is instructive to mention though, that a mere twenty – five percent (25%) shareholding is not enough to give an acquirer material influence over the target where the acquirer will not exercise or have the power to do any of the acts identified in sections 92(2)(a) to (e) of the Act.

Although the Act provided in section 163(2) (d) for the power of the Commission to make regulations for the assessment of mergers, the said section does not extend the Commission’s powers to make provisions for what amounts to material influence. The specific powers given to the Commission for determination is in respect of thresholds for merger notification and approval. Consequently, where a transaction passes the control test, the next step is to check whether the same is a small or large merger, in order to determine whether you need the Commission’s approval.

Conclusion

We are of the view that, whilst the Commission is saddled with the responsibility of ensuring compliance with the letter and spirit of the Act, it cannot expand the scope of its remit by regulations or interpret the Act by the same measure. The Commission needs to be circumspect and should not be too hasty to consider a transaction as a merger simply because it involves the acquisition of at least 25% of the shareholding in a target. It is instructive for the Commission to ensure the intended acquisition also confers one or more of the rights in Section 92(2)(a) to (e) of the Act on the acquirer before it can be considered a merger.

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¹ Section 30 of the Insurance Act
² Section 3 of the Act
³ Section 93 of the Act
⁴ Section 2 (3)(c) & (d)
⁵ Section 2 of the Act
⁶ Section 92(2)
⁷ Paragraph 2.25 of the Guideline⁸

Before 2019, the Securities and Exchange Commission (“SEC”), was the principal regulator monitoring and administering regulatory control over mergers in Nigeria. There were also sector specific laws which required certain regulated entities to notify and or seek the approval of their industry specific regulators, in the event of a proposed merger or acquisition. For example, under the Insurance Act 2003, insurance companies required the approval of the National Insurance Commission before any amalgamation or transfer of insurance businesses.¹ However, come 2019, the Federal Competition and Consumer Protection Commission (the “Commission”)² was established under the Federal Competition and Consumer Protection Act (the “Act”) repealing the relevant provisions of the Investment and Securities Act with respect to mergers. Consequently, the SEC ceased monitoring the control of mergers and acquisitions. The Act places within the purview of the Commission, the administration of and the oversight functions over mergers in Nigeria³. Additionally, the Act applies to “*any person in relation 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.*” This essentially means that a foreign merger will require the notification of the Commission where it will lead to a change in control of a Nigerian subsidiary or where such foreign merger is between entities who (though not registered in Nigeria), produce goods and services sold to Nigeria.⁴

Pursuant to the powers conferred upon it by the Act, as it applies to all undertakings and commercial activities within or having effect in Nigeria⁵, the Commission released the Federal Competition and Consumer Protection Act Merger Review Regulations, 2020 (“the Regulations”) and the Merger Review Guidelines 2020 (the “Guidelines”) to amongst other things, further regulate merger activities in Nigeria.

The Control Test

In defining a merger, the Act describes it as an instance where one or more undertakings

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