INTERNATIONAL BAR ASSOCIATION

ANTITRUST SECTION MERGERS WORKING GROUP

SUBMISSION TO THE FEDERAL COMPETITION AND CONSUMER PROTECTION COMMISSION REGARDING THE NIGERIAN MERGER REGIME

1. INTRODUCTION

1.1 This submission is made to the Federal Competition and Consumer Protection Commission (the **Commission**) on behalf of the Mergers Working Group (**Working Group**) of the Antitrust Section of the International Bar Association (**IBA**). The IBA Antitrust Section welcomes the opportunity to comment on the Nigerian merger control regime, and in particular the Federal Competition and Consumer Protection Act Merger Review Regulations, 2020 (the **Regulations**) and the Notice of Threshold for Merger Notification pursuant to Section 93 (4) (the **Threshold Notice**).

1.2 The IBA is the world's leading organization of international legal practitioners, bar associations and law societies. The IBA takes a keen interest in the development of international law reform and helps shape the future of the legal profession across the world, including in relation to the Nigerian competition law regime.

1.3 The IBA's 50,000-strong membership of individual lawyers from across the world, including antitrust/competition law practitioners and experts with a blend of jurisdictional backgrounds and professional experience, places it in a unique position to provide an international and comparative analysis in the development of commercial laws. The IBA has many Nigerian members including the newly appointed chair of the IBA African Regional Forum, Babatunde Ajibade. Further information on the IBA is available at http://www.ibanet.org/.

1.4 The Working Group's comments draw on the vast experience of the IBA Antitrust Section's members in merger control law and practice in jurisdictions worldwide. Further information on the Antitrust Section and its Working Group is available at: https://www.ibanet.org/LPD/Antitrust-Section/Antitrust/Default.aspx.

2. EXECUTIVE SUMMARY

2.1 The Working Group welcomes the legal certainty provided by the Regulations in relation to acquisitions of minority shareholdings and when these may result in a material influence. The majority of the factors set out in Regulation 6(5) are generally accepted considerations in other jurisdictions in assessments of control and material influence; however, the Working Group respectfully submits that it would only be in limited exceptional circumstances that the factors in Regulation 6(6) would amount to material influence in other jurisdictions, absent a material shareholding and/or specific governance rights. The Working Group therefore respectfully suggests that the exceptional nature of these factors amounting to material influence should be clarified in the Regulation.

2.2 The Working Group understands that the primary reason that jurisdictions have introduced filing fees is full or partial recovery of the cost of merger review, although full cost recovery is not always a practical or desirable policy goal, including as it could seriously impact the economic rationale for mergers.[1] The Working Group is concerned that the current fee framework could result in excessive fees which do not correlate to reasonable costs for operating a merger control regime. The Working Group therefore respectfully submits that

[1] Merger Notification Filing Fees, a report of the International Competition Network, April 2005 (https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_FilingFees.pdf).

the Commission should reconsider the calculation of the filing fee to (i) clarify that it is based on the parties' domestic turnover or the domestic component of the transaction; and (ii) introduce a cap.

2.3 The current merger notification thresholds are very low, which could result in the notification of a large number of transactions with no material effect in Nigeria. This would impose significant resource burdens on the Commission as well as unwarranted costs and burdens on businesses engaging in merger transactions. Furthermore, the thresholds do not provide for a sufficient material local nexus which is contrary to generally accepted international principles. The Working Group has considered the thresholds in other jurisdictions and respectfully proposes amendments for the Commission's consideration in this regard.

3. BEST PRACTICE PRINCIPLES

3.1 The Working Group believes that there should be a convergence towards best practices by all jurisdictions in the application of merger control laws and rules. In this regard, the Working Group respectfully submits that the Guiding Principles for Merger Notification and Review issued by the International Competition Network (**ICN**) (of which the Commission is a member) should be adhered to, in particular with respect to the promotion of legal certainty and procedural fairness.[2] Where appropriate, the ICN guiding principles are referenced in this submission.

4. COMMENTS

Minority control

4.1 The Working Group commends the Commission for providing legal certainty in relation to acquisitions of minority shareholdings, and specifically that the acquisition of shareholding or voting rights below fifteen percent (15%) will not, in general, lead to the Commission's review.

4.2 The Working Group notes that the majority of the factors set out in Regulation 6(5) are factors that are generally considered in assessments of control or material influence, for example in the United Kingdom.[3]

4.2.1 Under the European merger regulations, however, convertible loan arrangements potentially confer control only when exercised.

4.2.2 Furthermore, a pre-emption right in relation to the sale of shares or assets would not automatically result in material influence unless it results in relevant thresholds for control being met or is accompanied by governance rights which confer control.

4.3 The Working Group notes that there would be relatively limited exceptional circumstances where the factors set out in Regulation 6(6) confer material influence, absent a material shareholding and/or specific governance rights.

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[2] https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidingPrinciples.pdf. See also the ICN Recommended Practices for Merger Notification and Review Procedures accessible here: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.

[3] Competition and Markets Authority *Mergers: Guidance on the CMA's jurisdiction and procedure* accessible here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/950185/Mergers_-_Guidance_on_the_CMA_s_jurisdiction_and_procedure__2020_-_revised_-_guidance_.pdf.

4.3.1 The Working Group respectfully submits that it would be worthwhile making this clear in the text of the Regulations.

4.3.2 In addition, it is unclear how the cessation of production by one party amounts to material influence; this seems rather to be a factor that may be relevant in an assessment of pre-implementation or restricted agreements between competitors.

Filing fee

4.4 The filing fees set out in Schedule 1 to the Regulations are based on a percentage of the combined turnover of the merging parties or the transaction consideration. It appears that merger applications are also subject to an additional application fee of NGN50,000 per undertaking (approx. USD130).[4]

4.5 The Regulations do not provide for a cap on the potential filing fee. In addition, it is unclear whether the parties' domestic turnover, or global turnover, is applicable in the filing fee calculation in paragraph 1 (ii) of Schedule 1 to the Regulations and the threshold set out in the fee table in Schedule 1 to the Regulations.

4.6 The Working Group is uncertain as to the factors that were taken into account in the development of the fee framework, however, the group assumes that the Commission may be seeking to cover the costs associated with conducting merger assessments. The Working Group is concerned that the current fee framework could result in parties being liable for potentially excessive filing fees that do not correlate with the costs borne by the authority in undertaking its merger assessments, for example, if the parties generate significant turnover globally (if the thresholds set out in the filing fee table are based on global turnover), or if the relevant transaction has a high transaction value in Nigeria. For example, if an entity has global turnover of USD10 billion, the filing fee in Nigeria would be almost USD80 million even though it may only make a small amount of sales in Nigeria. Similarly, if the global transaction value is USD10 billion, the filing fee in Nigeria would be more than USD15 million, even if the Nigerian component of the transaction represents a small proportion of the total transaction value. These would be among (or above) the highest fees in the world.

4.7 To avoid potentially excessive filing fees, it is respectfully recommended that the Commission (i) clarifies that the filing fees are based on domestic turnover generated in Nigeria or the Nigerian component of a transaction's consideration; and (ii) introduces a cap on the potential filing fee, as is the case in relation to the applicable filing fees for foreign to foreign merger notifications. This approach is common in other jurisdictions in Africa (and elsewhere):

4.7.1 In South Africa, there are set filing fees for intermediate and large mergers. Although the merger notification thresholds are based on the parties' domestic turnover or asset value in South Africa, once a merger is classified as an intermediate merger or a large merger, the intermediate or large merger filing fee is applicable, as the case may be, regardless of the size of the parties.[5]

4.7.2 In Zambia, the prescribed fee for authorisation is 0.1% of turnover or assets of the economic entity in Zambia, whichever is higher. The filing fee is subject to a cap of 16,666,667 units (approx. ZMW5 million or USD234,000).[6]

4.7.3 In Kenya, the filing fees are fixed amounts based on the combined assets or turnover of the merging parties in Kenya. Where the parties' combined assets or turnover in Kenya is greater than Kshs50 billion (approx. USD456 million), the filing fee is Kshs4 million (approx. USD37,000) which is the maximum filing fee payable.[7]

4.7.4 In eSwatini, the filing fee is based on the value of the combined annual turnover or assets of the merging enterprises. While small mergers are exempt from the payment

4 All conversions in the submission reflect the exchange rate as at 8 February 2021.

5 Amendment to Rule 10(5) of the Rules for the Conduct of Proceedings in the Competition Commission, Government Gazette No. 42082, 4 December 2018.

6 The Competition and Consumer Protection (General) Regulations, 2011 read with the Competition and Consumer Protection Guidelines for Merger Regulations.

7 The Competition (General) Rules, 2019.

of notification fees, the fee payable for all other mergers is 0.1% of the combined annual turnover or assets of the merging entities, whichever is greater. The filing fees are capped at E600,000 (approx. USD40,000) for any single merger notified.[8]

4.8 We have also attached as **Annex 1** a table summarising filing fees in certain European jurisdictions.

4.9 In addition, it is respectfully submitted that the filing fee should not be so high so as to deter merger activity in Nigeria. This may mean that merging parties decide not to file in Nigeria.

4.10 The Commission may be aware that in COMESA, the filing fee initially was calculated at 0.5% of the combined annual turnover or combined asset value (whichever was higher) of the merging parties in the Common Market and was capped at a maximum fee of USD500, 000. A number of stakeholders expressed concerns about the high filing fees and their impact. As a result, the filing fee was revised to 0.1% of the merging parties' combined annual turnover or value of assets in the Common Market, whichever is higher, subject to a lower cap of USD200,000.[9]

Notification thresholds

4.11 Under the current merger notification thresholds set out in the Threshold Notice, a merger is notifiable if the parties' combined annual turnover in Nigeria is greater than or equal to N1 billion (approx. USD 2.6 million); or the annual turnover of the target undertaking in Nigeria is greater than or equal to N500 million (approx. USD1.3 million).

4.12 It is respectfully submitted that the merger notification thresholds are too low and will therefore capture a large number of transactions, which are unlikely to have any material effect in Nigeria. This may also place a significant administrative burden on the Commission and divert resources away from the assessment of mergers that are more likely to have a material effect in Nigeria as well as the Commission's investigation and enforcement of consumer protection, cartel, dominance and other competition matters.

4.13 The Working Group suggests that the Commission considers increasing the merger notification thresholds so as to ensure that only mergers that have the potential to have a significant effect in Nigeria are considered.

4.14 When determining appropriate thresholds in Nigeria, as the largest economy in Africa, it is submitted that it may not be appropriate to look at thresholds applied in much smaller economies and the focus should instead be on similarly-sized economies. For example, in South Africa, a smaller economy than Nigeria, the thresholds are (i) combined annual turnover in, into or from South Africa, or combined asset value in South Africa, of the acquiring firms and transferred firms, whichever combination is higher, of ZAR600million (approx. USD40 million); and (ii) annual turnover in, into or from South Africa, or asset value in South Africa, of the transferred firms of ZAR100million (approx. USD6.6million).

4.15 In addition, it appears that the current thresholds in Nigeria are capable of being met by only one party, and potentially only the acquiring undertaking. The Working Group suggests that a clear local nexus is established by the thresholds to ensure that only mergers that may have a significant effect in Nigeria are captured. This is in line with the ICN's recommended practices which suggest that when establishing merger notification thresholds, each jurisdiction should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory. Requiring merger notification relating to such transactions imposes unnecessary delays and transaction costs and commitment of competition agency resources without a corresponding enforcement benefit. The merger notification thresholds should therefore incorporate appropriate standards and thresholds to ensure that jurisdiction over mergers will be asserted only over transactions that have a material nexus to the reviewing jurisdiction.[10]

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8 The Competition Commission Regulations Notice, 2010.

9 Amendments to COMESA Competition Rules, 2004.

10 https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf, at II Nexus to Reviewing Jurisdiction B. Merger

4.16 A material nexus to the reviewing jurisdiction is present when a proposed transaction has a significant and direct economic connection to the jurisdiction. The most common means of providing for a material local nexus, and which the Working Group suggests should be the case in relation to Nigeria too, is by requiring significant local sales or local asset levels by at least two of the participating undertakings, one of which should be the acquired or transferred undertaking in the merger notification thresholds. Transactions in which the acquired or transferred undertaking does not generate turnover in the territory, should not be subject to a notification.[11]

4.17 The Working Group therefore suggests that the Commission considers revising the thresholds to require that both parties, and at least the target undertaking, generate a certain level of turnover in Nigeria. This is common in other jurisdictions:

4.17.1 The European merger regulations, and many individual EU member states, require that both parties have local turnover exceeding a certain level for a merger to be notifiable.[12]

4.17.2 Similarly in COMESA, at least two of the parties to a merger must meet minimum turnover or asset value thresholds, and the target must in addition meet a minimum turnover threshold sufficient to 'operate' in the Common Market, for a merger to be notifiable.[13]

4.17.3 In South Africa, in addition to a combined threshold which must be met by the parties' turnover or asset value in South Africa, the target must also generate a minimum turnover or have a minimum asset value in South Africa for the merger to be notifiable.[14]

5. The Working Group hopes that the Commission finds these comments helpful and constructive. Please do not hesitate to contact us should you wish to discuss any of aspect of this submission.

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notification thresholds should incorporate appropriate standards ensuring a material nexus to the reviewing jurisdiction comment 1, page 3.

11 See note 10 at II Nexus to Reviewing Jurisdiction C. Determination of a transaction's nexus to the reviewing jurisdiction should be based on activities within that jurisdiction as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the jurisdiction, comment 2, page 5.

12 Council Regulation (EC) No 139/2004.

13 COMESA Merger Assessment Guidelines, 31 October 2014.

14 Amendment of the Determination of Merger Thresholds as set out in General Notice 216 of 2019, Government Gazette No. 41124, 15 September 2017.

Annex 1

Jurisdiction	Merger filing fees
EU Merger Regulation	No filing fee.
Germany	The fee is imposed by the Federal Cartel Office (*Bundeskartellamt*) (***FCO***) on the notifying party at the end of the proceedings. The fee amount depends on the FCO's administrative expenses and the economic significance of the notified transaction. For a case of ''average'' importance, a fee of EUR 25,000 (approx. USD30,000)[15] has been considered reasonable by the competent courts. Usually, fees are somewhat lower (EUR 3,000 - EUR 15,000) (approx. USD3,600 - USD18,000). In exceptional cases, a fee of EUR 50,000 (approx. USD60,000) or up to EUR 100,000 (approx. USD119,000) is possible. The filing fee is determined by the Bundeskartellamt on the basis of the personnel and material expenses and the economic significance of the case. In addition to the fee, the FCO can recover costs for external consultants (e.g. economists) from the parties to the concentration.
France	No filing fee.
Spain	The CNMC Law establishes the fee as follows: • EUR5,502 (approx. USD6,600), where the combined turnover in Spain of the undertakings concerned does not exceed EUR240 million (approx. USD290 million). • EUR11,004 (approx. USD13,000), where the combined turnover in Spain of the undertakings concerned is between EUR240 million (approx. USD290 million) and EUR480 million (approx. USD570 million). • EUR22,009 (approx. USD26,000), where the combined turnover in Spain of the undertakings is between EUR480 million (approx. USD570 million) and EUR3 billion (approx. USD3.6 billion). • EUR43,944 (approx. USD52,000), where the combined turnover in Spain of the undertakings concerned exceeds EUR3 billion (approx. USD3.6 billion), plus an extra EUR11,004 (approx. USD13,000) for each EUR3 billion (approx. USD3.6billion) in excess of that turnover, up to a maximum fee of EUR9,860 (approx. USD11,800). • For notifications filed under the simplified procedure, the fee is currently EUR1,545 (approx. USD1,800).
Belgium	No filing fee.
Netherlands	Undertakings are required to pay a filling fee. For a decision in the notification phase (Phase 1) the fee is EUR 17,450 (approx. USD21,000). For an application for a licence (Phase 2) the fee is EUR 34,900 (approx. USD42,000). This is in addition to the EUR 17,450 Phase I fee. The fees must be paid even if the parties later decide to withdraw their notification.

[15] All conversions in Annex 1 reflect the exchange rate as at 18 March 2021.