

Telecommunications - Nigeria

Regulation of mergers, acquisitions and joint ventures

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Introduction

There has recently been an increase in the number of acquisitions in the Nigerian telecommunications market, with deals including Bharti Airtel/Zain, Etisalat Nigeria/Alheri Mobile Services Limited and Helios Towers/Multi-Links Communications. These acquisitions have largely been facilitated by the deregulation of the telecommunications sector, which has led to an increase in private sector participation in the sector, including foreign direct investments from private companies, international and multilateral institutions. The acquisitions have also been influenced by the availability of funding from the Nigerian banking sector for telecommunications network development and service roll-out and expansion.

This update highlights elements of the regulatory framework governing such acquisitions.

Nigerian Communications Commission approval

All mergers, acquisitions and joint ventures involving telecommunications companies incorporated in Nigeria are regulated by the Nigerian Communications Commission (NCC). They must be undertaken in strict compliance with the Nigerian Communications Act 2003, the Competition Practices Regulations 2007 - published by the NCC pursuant to the act - and the various licences issued under the act. The general requirement is that the transfer of more than 10% of the shareholding in a licensee requires the prior approval of the NCC. Prior NCC approval must also be obtained where the proposed transaction involves the transfer of an individual telecommunications licence or an agreement or arrangement that relates to a joint venture between a licensee and a third party.

The regulations set out the details for such transactions, and in particular provide that a licensee must obtain the prior approval of the NCC in respect of:

- transactions that involve the acquisition of more than 10% of the shares of a licensee;
- any other transaction that results in a change in control of the licensee;
- any transaction that results in the direct or indirect transfer or acquisition of any individual licence previously granted by the NCC; and
- where the NCC so determines, based on the preliminary information provided by a licensee in its initial transaction notification, transactions that may result in a substantial lessening of competition in one or more communications markets, or in the licensee or any successor company having a dominant position in one or more communications markets.

The substantive test for the NCC's review of mergers, acquisitions and joint ventures is whether the transactions have the purpose or effect of substantially lessening competition in any part of the telecommunications sector. The NCC can, by virtue of the regulations, make a finding that there is a substantial lessening of competition when there is a degree of interference with competition that results in identifiable injury to competitors or consumers.

The regulations provide guidance on the application process for the NCC's prior approval of a proposed acquisition or transfer. The licensee must submit a formal letter

of application to the NCC at least 60 days prior to the completion date for the proposed transaction, together with the following documents:

- identification of all parties to the transaction, including buyers, sellers, their shareholders and affiliated companies, and any persons with an ownership interest of more than 10%;
- a detailed description of the nature of the proposed transaction, including a detailed analysis of the resulting scheme of arrangement and a summary of its commercial terms;
- financial information of the parties to the proposed transaction, including their annual revenues from all communications markets, identified by specific markets, the value of assets allocated to communications businesses and copies of any recent annual or quarterly financial reports;
- a description of the communications markets in which the parties to the proposed transaction operate; and
- a description of the effects of the transaction on the control of network facilities or related infrastructure, including any interconnection or access arrangements with other licensees.

The NCC may, upon receipt of the letter of application, either grant approval immediately or request the licensee to submit additional documents in support of its application before it is considered. However, the NCC's response is dependent on the outcome of internal checks carried out on the licensee to confirm its compliance with its licence obligations (and also to confirm that there are no outstanding obligations under any of its licences). The NCC will usually make payment of all outstanding fees due from the licensee to the NCC (eg, annual operating levies) a condition precedent to the review of the application.

The regulations require the NCC to respond to the application within 30 days of its submission.

Securities and Exchange Commission approval

The Investments and Securities Act 2007 is also relevant where a telecommunications sector acquisition (or merger or joint venture arrangement) is being considered. The relevant provision of the act is Section 118, which provides that every merger, acquisition or business combination between or among companies shall be subject to the prior review and approval of the Securities and Exchange Commission (SEC). The SEC will give its approval only if it is satisfied that:

- the acquisition is unlikely to cause a substantial restraint of competition or tend to create a monopoly in any line of business enterprise;
- the use of such shares by voting or granting proxies or otherwise shall not cause a substantial restraint of competition or tend to create a monopoly in any line of business enterprise; and
- although the contemplated merger is likely to restrain competition, one of the parties to the merger can prove the contrary.

However, Section 118(3) of the Investments and Securities Act and Rule 230 of the rules and regulations of the SEC provide an exemption from compliance with respect to "holding companies acquiring shares solely for the purpose of investment and not using same by voting or otherwise to cause or attempt to cause a substantial restraint of competition". This means that the requirement to obtain the SEC's prior approval will not apply to a holding company that intends to acquire the shares of its subsidiary for investment purposes only.

The Investments and Securities Act and SEC provisions prescribing the above exemption are relatively new and are yet to be clarified, extensively interpreted or tested. It is therefore recommended that the SEC be notified in advance of any proposed acquisition where there is an intention to rely on the exemption provided by Section 118 (3) of the act and Rule 230. This notification is not an application for approval for the transaction, but merely a request of confirmation from the SEC that the exemption is applicable and can be relied upon for the particular transaction.

The requirement to obtain the prior approval of the SEC also does not apply to small mergers - that is, mergers between companies which have a combined annual turnover or assets of less than N250 million (approximately \$1.6 million). However, the merging entities must inform the SEC upon conclusion of the merger.

Federal Inland Revenue Service clearance

Clearance from the Federal Inland Revenue Service is required under the Companies Income Tax (Amendment) Act 2007. Section 25(12) of the act provides that no merger, takeover, transfer or restructuring of 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 tax that may be due and payable under the Capital Gains Tax Act. All asset transfers are valued on an arm's-length basis and capital gains tax (10% of chargeable gains) computed in respect of any gains made on the transfer of assets.

Comment

The laws regulating mergers, acquisitions and joint ventures in the telecommunications sector are extensive and such arrangements must be undertaken in compliance with the laws to avoid any sanctions, which can be far reaching – such as suspension or revocation of a licensee's licence, imposition of administrative fines on the licensee and the unwinding of the transaction.

For further information on this topic please contact [Afoke Igwe](#) at Udo-Udoma & Belo-Osagie by telephone (+234 1 263 4831), fax (+234 1 263 4541) or email (afoke.igwe@uubo.org).

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