African Private Equity and Venture Capital Association

AVCA L&R

LEGAL & REGULATORY BULLETIN

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AVCA LEGAL & REGULATORY BULLETIN

LETTER FROM THE CHAIR

Compliments of the season from the **AVCA Legal & Regulatory (L&R) Committee** on the Winter Issue of the bulletin coming at the end of an eventful year for African private equity.

We thank you for your continuing interest and for your feedback on the inaugural bulletin launched in April 2017. The contributions to this second issue of the bi-annual AVCA Legal & Regulatory Bulletin reflect a heightened focus on regulation and compliance across jurisdictions flagged by AVCA's inaugural special research report: *Volatility and Uncertainty: How Private Equity in Africa Navigates Through Turbulent Times*. This Bulletin includes a report of findings from a comparative study of pan-African and global investment trends as they relate specifically to auction sales, vendor due diligence, and warranty and indemnity insurance; an assessment of the impact of regulatory changes in merger controls in Kenya; an overview of Nigeria's new Federal Competition and Consumer Protection Bill; and a note from Casablanca Finance City, host of the African Development Bank's **Africa50 Infrastructure Fund** based in the location of the 15th Annual AVCA Conference: **Morocco**.

AVCA welcomed the Compliance and Best Practice Committee earlier this year, which makes its inaugural contribution with an update on the key issues for fund managers and advisory firms of Africa-focused funds arising from the Markets in Financial Instruments Directive (MiFID) II. The Bulletin also examines the implications of the Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation.

We deeply appreciate each contributor's input and support on the publication of this Bulletin, and we invite comments, suggestions, and from AVCA's membership, contributions to future editions, which may be sent to avca@avca-africa.org.

We wish you the very best of this season and a prosperous new year.

Kind regards,

Folake Elias-Adebowale & Rafik Mzah
Co-Chairs
AVCA Legal & Regulatory Committee

ABOUT AVCA

The African Private Equity and Venture Capital Association is the pan-African industry body which promotes and enables private investment in Africa.

AVCA plays a significant role as a champion and effective change agent for the industry, educating, equipping and connecting members and stakeholders with independent industry research, best practice training programmes, and exceptional networking opportunities.

With a global and growing member base, AVCA members span private equity and venture capital firms, institutional investors, foundations and endowments, pension funds, international development finance institutions, professional service firms, academia, and other associations.

This diverse membership is united by a common purpose: *to be part of the Africa growth story*.

AVCA L&R Committee

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2017 AFRICAN PE DEALS HOTLIST

ANJARWALLA & KHANNA advised **AfricInvest** on the acquisition of a 14.3% stake in Britam Holdings Plc., a financial services group in East Africa.
Find out more: www.africalegalnetwork.com

DEBEVOISE & PLIMPTON provided legal advise to **Helios Investment Partners** in the sale of its minority stake in Interswitch to TA Associates.
Find out more: www.debevoise.com

DLA PIPER Africa partner firm, Olajide Oyewole LLP, advised **Àrgentil Capital Partners** on the acquisition of a 49% stake in Chocolate City Lounge, Nigeria.
Find out more: www.dlapiper.com

G. ELIAS & CO. served as legal adviser in the divestment of **Investec Asset Management's** stake in Ashwah Holdings, parent company of Daraju Industries.
Find out more: www.gelias.com

LATHAM & WATKINS advised **Helios Investment Partners** in connection with its acquisition of a 51% stake in *Axxela* (formerly Oando Gas and Power).
Find out more: www.lw.com

TNP advised **Verod Capital Management** on the acquisition of a significant minority stake in *Greensprings Educational Services*, a Nigerian-based education provider.
Find out more: www.tnp.com.ng

UDO UDOMA & BELO-OSAGIE advised **The Abraaj Group** on its acquisition of a minority stake in *Indorama Fertilizers*.
Find out more: www.uubo.org

View latest AVCA Member News here.

MERGER CONTROL DEVELOPMENTS IN KENYA

Aditi Khimasia & Dominic Rebelo
ANJARWALLA & KHANNA

L&R

Kenya's current competition regime has been in force since the enactment of a new Competition Act in 2010, pursuant to which the Competition Authority of Kenya (*the Authority or CAK*) was formed. The Authority has continued to grow and increase their capacity, and in the past few years has been taking an increasingly sophisticated approach to the enforcement and analysis of mergers. This article examines some of the material recent developments in the approach to merger control being taken by the Authority.

1. Enforcement

The Authority is increasingly cracking down on mergers implemented without its approval, investigating non-notification on its own accord, and has imposed financial penalties in certain cases. In addition, where mergers have been conditionally approved by the Authority, the Authority is following up on compliance with the conditions with parties to a merger being required to submit information and reports after completion of the merger.

2. Amendments to the Competition Act

In 2016, the Competition (Amendment) Act was enacted, whose effect among other things was to increase the Authority's enforcement powers. In respect of merger control, the relevant amendments include:

a) CAK's power to set merger thresholds

The Authority now has the power (in consultation with the Cabinet Secretary of the National Treasury) to set thresholds for mergers which may be excluded from full notification. This is a welcome move as it will reduce the burdens on small mergers whose effect on competition would be *de minimis*.

While thresholds are yet to be set, the Authority has through its communications committed to a faster clearance time for smaller mergers and mergers involving private equity funds.

b) Financial and criminal penalties

The amendments also give the Authority the ability to fine undertakings up to 10% of their gross annual turnover for the preceding year where such undertakings have either: (i) provided materially incorrect or misleading information; or (ii) failed to adhere to conditions imposed on a merger approval.

It was widely anticipated that failure to notify a merger would be decriminalised. Unfortunately, this penalty was not amended.

c) Appeal to the Competition Tribunal

An aggrieved party may now appeal to the Competition Tribunal on receipt of the written decision of the CAK and need not wait for the Gazettement of the decision which may be delayed.

3. Operationalisation of the Competition Tribunal

The Competition Tribunal was operationalised in July 2017 and has already started receiving appeals of the Authority's decisions.

Conclusion

The Authority is taking an increasingly vigilant approach in relation to mergers. Where mergers have been notified, the Authority is following up closely on compliance with conditions. Where mergers have not been notified, the Authority is increasingly investigating these scenarios. In addition, through the amendments to the Competition Act, the Authority has increased powers to obtain information and to fine parties.

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MiFID II – WHAT DOES IT MEAN FOR YOU?

Eve Ellis & Sarah Shackleton
AVCA COMPLIANCE AND BEST PRACTICE COMMITTEE

L&R

Markets in Financial Instruments Directive (MiFID) II is the sequel to the Markets in Financial Instruments Directive (I) which was introduced in 2007. This legislation, due to come in force in January 2018, provides an EU framework for the regulation of investment firms and trading facilities. MiFID II creates additional obligations and the extent of these vary depending on the scope of your business.

What impact will it have on me?

The impact of **MiFID II** will depend on the type of business you undertake and the structure of your fund. For many Africa focused funds, their structure is a UK adviser with an offshore fund. In this scenario, you will likely be a MiFID investment advisory firm and the key areas of **MiFID II** which will be relevant to you are:

- **Client classification:** Local government pension schemes will no longer be automatically treated as professional clients and will need to be opted up to professional status;
- **Client disclosures:** Additional disclosures will need to be made to your clients, the offshore GP or manager. This may require amendments or side letters to your existing advisory agreements;
- **Product governance:** New rules have been established in relation to product governance. In an advisory context these should have less impact. However, they will likely require more disclosures to your clients;
- **Telephone taping:** There is an exemption to these rules which applies to private equity (PE) fund managers. However, an adviser cannot take advantage of this exemption. As such, you will need to analyse how these rules impact your structure. From a practical perspective, in a PE context, it is hoped that these will have less of an impact;
- **Inducements:** There are new rules on inducements, particularly in relation to third party research. However, for most PE firms structured in a typical onshore adviser/offshore GP way, this should have less impact;
- **Knowledge and competence:** Whilst not imposing strict examination requirements, **MiFID II** imposes new competency requirements which will likely require external training and assessment;
- **Remuneration:** Firms will need to ensure they have a remuneration policy in place. This will not be as prescriptive as those required for fund managers but will require changes to your policies.

There are other changes which will need to be made, for example in relation to whistleblowing, data security, and senior management, although these are more of a procedural nature rather than substantive changes to the legislation.

If your business is structured as an onshore manager, even though you are not a MiFID firm, the Financial Conduct Authority (FCA) in the UK has gold-plated some of the provisions; therefore, you will still need to consider how **MiFID II** impacts you. Broadly, the key areas are client classification, product governance (which will impact a manager more than an adviser), and possibly telephone taping - although only in relation to listed securities.

What should I be doing now?

MiFID II comes into force on 3 January 2018, and will require updates to your policies and procedures and possibly agreements. As the legislation has not been designed with PE in mind, some of the provisions are difficult to apply in practice, so it is important to ensure you take an appropriate approach suitable to this asset class rather than using non-tailored policies. Those managers or advisers in the process of fundraising or due to start fundraising in the near future should ensure their fund documents and investment management/advisory agreements have captured the increased disclosure required. Client categorisation procedures should be updated and policies around telephone recording should be developed for any relevant business.

On behalf of the AVCA Compliance and Best Practice Committee.

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THE LESSER SPOTTED AFRICAN AUCTION SALE: AFRICAN M&A AUCTIONS IN A GLOBAL CONTEXT

Rob Cant & Louise Skipper
Freshfields Bruckhaus Deringer

In stark contrast to the African market (with the notable exception of South Africa), auctions have for some time been the preferred method for private (and some public) M&A processes in Europe, the US, and parts of Asia. Across Africa (ex. South Africa), bilateral M&A processes dominate the landscape.

Bucking the trend, there have been several hotly contested, high profile African auctions in recent years, including the acquisition of Fan Milk by The Abraaj Group (Abraaj) and Danone in 2013, the acquisitions of a minority stake in Chi by Coca Cola and in Promasidor by Ajinomoto in 2016 and, earlier this year, of Java House by Abraaj. What these transactions have in common is that they have all been in the food and beverage (F&B) sector.

This is unsurprising given the rapid expansion of the consumer markets in Africa and the growth trajectory of the African population. It is also further evidence of the pursuit by the largest multi-national companies of ready-made distribution platforms across the continent. The scarcity of such platforms with a pan-regional footprint, combined with the demand for them, makes for perfect fuel for the fire of a hotly contested auction.

Outside the F&B sector, there have been a few notable exceptions to the prevailing trend. Examples such as the acquisition of Emerging Markets Payments by Network International in 2016 and a majority stake in Tsebo by Wendel earlier this year, and, arguably, the continent's recent privatisations such as those run by the Asset Management Corporation of Nigeria (AMCON), fall into this category. While there may be no real sector commonality among these assets, their growth story is inextricably linked to the consumer story in Africa.

Given the influence of European and US market practices on M&A in Africa, it is always informative to look to those markets for guidance on how practice on the continent may evolve over time, particularly as assets mature and become increasingly international and attractive to large strategic investors and aggressive financial sponsors who are used to competing in auctions across the globe. In this article, we present a snapshot of some of the key trends and provide insight into the strategies sellers and buyers can use to best position themselves in, or in anticipation of, an auction.

Auction Framework

While there is a well-trodden path to follow when structuring an auction process, various drivers – from a private equity exit, a corporate core disposal, or an extreme remedy to an anti-trust issue – will impact the optimum structure in each transaction. Freshfields Bruckhaus Deringer (Freshfields) conducted a detailed analysis of over 50 global private M&A auctions on which it advised recently (Auction Analysis), and the results show that two-stage auctions are now the most common framework (comprising 67% of the auctions analysed).

Given the frequent involvement of financial investors in many of these auctions, the results are to be expected, as financial investors prefer to defer costs to the final (or second) stage of an auction (i.e. until they have reasonable certainty of a viable sale). Our analysis also suggests that the quality of bids will influence the number of bidders invited to the final stage; however, there is a trend to involving fewer higher quality bidders with two bidders invited to the final phase in 36% of the auctions analysed, three invited in 16% and four invited in 20% of the cases but with few (11%) asking for, and receiving, cost cover for proceeding.

Regardless of the particular framework put in place, a well-advised bidder will work with this framework and demonstrate its seriousness from the get-go. Engaging with the seller (and, subject to access, with management) early will go a long way to achieving this, as well as helping to understand if the seller has objectives beyond value (i.e. earn-out, a right of first refusal in an on-sale, management considerations).

This may result in obtaining an advantage by, for example, gaining early or more detailed access to due diligence materials and/or key advisers assisting a buyer in fast-tracking the due diligence process and progressing the transaction documents ahead of its competitors. The Auction Analysis showed that where a pre-emptive approach was made in an auction process, an accelerated timetable was granted in 38% of the cases and exclusivity was granted in 25% of the cases (albeit that making a pre-emptive approach was still reasonably uncommon and was made in only 22% of the auctions analysed). As the popularity of the auction process increases in Africa (and the interest in auctioned assets becomes more competitive), these 'softer' strategies can go a long way to helping bidders get ahead of the pack.

THE LESSER SPOTTED AFRICAN AUCTION SALE: AFRICAN M&A AUCTIONS IN A GLOBAL CONTEXT

Rob Cant & Louise Skipper
Freshfields Bruckhaus Deringer

Vendor Due Diligence

While many sellers on the continent are understandably cost conscious, the failure to invest in the preparation of vendor due diligence (VDD) reports can often be a false economy. In the context of auction sales, VDD has many potential benefits – including pre-empting buyer concerns before a full due diligence process begins – if it is (i) targeted to the 'universe of buyers' of a particular asset and (ii) executed thoroughly and properly.

VDD reports prepared in a rushed manner could achieve the opposite, potentially causing irreparable harm to a transaction. Therefore, the circumstances of each transaction will dictate whether preparing a suite of vendor reports is desirable in that situation.

The Freshfields Auction Analysis showed that most auctions in the survey included financial and commercial vendor reports and that vendor legal reports (in some form) are now more common, although they remain rare in US-led and Asia-led processes. The most common vendor legal report remains the full legal report and the red flag report (used in 33% of the auction analysed) with the legal '*factbook*' and data room roadmap, less popular (used in 20% of the auctions analysed).

These results are contrary to the results of the Freshfields African M&A Survey 2016 (African M&A Survey) which showed that vendor due diligence in African processes remains uncommon, with limited exceptions in more developed African jurisdictions. However, we expect this sentiment to evolve as inbound investment and the number of interested buyers grows together with desire to streamline or fast track sale processes.

Warranties – To give or not to give?

It will come as no surprise that the age-old argument over warranty protection continues to be largely jurisdiction agnostic when there is an institutional seller involved. The rationale for and against providing operational warranty protection is well known with little or no protection being a common institutional position from private equity sellers (although practice varies across the continent, as it does globally - including in South Africa where private equity sponsors have more commonly agreed to some form of operational warranty package on a disposal).

While expected, many buyers (e.g. US buyers) will struggle to accept a sale without warranty protection, particularly in jurisdictions that are perceived to be more 'high risk', such as some African regions. The results of our Auction Analysis demonstrate some recognition of this with 44% of private equity sellers agreeing to operational warranties with recourse to the seller.

Where operational warranties were agreed to without seller recourse, the Auction Analysis saw recourse to management agreed in 57% of cases, recourse to the target company in 14% of cases and recourse to a warranty and indemnity insurance policy in 14% of the cases. In only 15% of the cases were no operational warranties agreed at all.

With this in mind, we have seen a significant move in Europe, particularly in the UK, towards utilising warranty and indemnity insurance (W&I Insurance) to enable financial sponsor sellers to achieve the 'clean exit' that they institutionally desire and to provide buyers with meaningful operational warranties on the target business. It seems likely that the use of W&I Insurance in Africa will follow suit both to (i) help enhance bidder prospects in African auctions (as a tool to mitigate certain of the risks for financial investors investing in new or unfamiliar jurisdictions on the continent) and (ii) assist financial investor sellers present a compelling package to the market on exit, particularly in light of the higher financial caps on liability that are expected across the continent (which, according to the African M&A Study, are currently between 50-100% of the purchase price in African jurisdictions as compared to 20-30% in the UK and Europe and 10-20% in the US in respect of operational warranties).

The number and size of insured transactions on the continent has increased over recent years. This is reflected in the transactions on which Freshfields has advised in Africa and in what specialist brokers have seen.

Whilst we understand from Risk Capital Advisers (RCA) that insurers will look at transactions on a deal-by-deal basis, they are also confident that there would be insurer appetite for transactions in a large majority of African countries (excluding sanctioned countries), provided that the target company has a record of good corporate governance, there is a reputable seller, and that the sale and purchase agreement is governed by English law (or, in Francophone countries, French law).

Beyond the question of availability of W&I insurance in Africa-focused transactions, the real impediment can be the expense of utilising the product. At present, premiums are understandably less in South Africa compared to the rest of the continent (we understand from RCA typically 1.3% - 1.7% of insurance capital utilised for South African transactions compared to 1.7% - 2% for East African and multi-jurisdictional transaction). As the W&I Insurance market matures outside of South Africa, it may be that the distance between the cost of the product will narrow.

CASABLANCA FINANCE CITY
القطب المالي للدار البيضاء

CASABLANCA FINANCE CITY

YOUR BUSINESS CATALYST IN AFRICA

Casablanca Finance City (CFC) is an African financial and business located at the crossroads between Africa, America, Asia, and Europe.

Recognised as the leading financial centre in Africa[1], and partner of the largest financial centres, CFC has built a strong and thriving community of members across four major categories: financial companies, regional headquarters of multinational companies, service providers, and holding companies.

CFC offers its members an attractive value proposition and a premium "doing business" support that fosters the deployment of their activities in Africa.

Driven by the ambition to cater to its community, CFC is committed to promoting its members expertise across the continent, while enabling fruitful business and partnership synergies through its networking platform. CFC seeks to provide further impetus for a shared long-term vision to deepen south-south partnership by fostering financial integration, promoting gradual financial inclusion and conducting structural reforms to enhance regional financial markets.

Morocco, via Casablanca Finance City, is well positioned to play a key role as a hub, thanks to four key assets: its political stability, a world-class infrastructure, a dense connectivity and a robust regulation.

CFC has put in place a comprehensive ecosystem around four categories of firms wishing to do business in the region:

- Financial institutions
- Multinationals regional headquarters
- Professional service firms
- Holding companies

THE AFRICA50 FUND: A CFC SUCCESS STORY

The **African Development Bank (AfDB)** launched the Africa50 Infrastructure Fund in 2013 as a platform to mobilise resources and support the development of key infrastructure projects in Africa. The fund is designed as a new financial vehicle to accelerate and finance transformational, national and regional infrastructure delivery across the continent. **Africa50** seeks to shorten the time-lapse between project idea and financial close, from a current average of 7 years down to 3 years at most.

The fund is structured as a development-oriented yet commercially operated entity. **Africa50** has *three* main competitive advantages:

- *A sovereign shareholder base which allows it to act as a bridge between governments and private sector by improving the public-private relationship, mitigating political and regulatory risks, and catalysing project development.*
- *The fund functions as a one-stop shop throughout the life-cycle as it has an integrated approach with the ability to deploy capital in both project development and project finance*
- *Finally, **Africa50** is small and agile organisation with a private sector mindset.*

Following a consultative and competitive process among 12 African countries, the AfDB announced in 2015 that CFC has been selected to host the **Africa50** fund. The choice of CFC to host the fund reinforces Casablanca's role as a business catalyst and a leading financial platform to operate across Africa.

The **Africa50** fund closed its first round of fund raising by mobilising US$830mn. More than 20 African countries have been involved in this campaign, including two African central banks. The fund capital base is expected to reach US$10bn on the long run with a perspective to reach US$100bn on the international financial markets and a single "A" rating.

Find out more about CFC here.

1 GFCI index, September 2017

NEW EU REGULATION: DO YOU NEED A "KID" FOR YOUR FUND?

Nathalie Duguay, Henrietta de Salis & Solomon Wifa
WILLKIE, FARR & GALLAGHER

The European Parliament and the Council of the European Union recently introduced the Packaged Retail and Insurance-based Investment Products Regulation[1] (PRIIPs Regulation) aimed at providing a new, pre-contractual disclosure document (a key information document or KID) for retail investors when they are considering buying certain kinds of investment products that are referred to in the PRIIPs Regulation as packaged retail insurance-based investment products (PRIIPs). The PRIIPs regime comes into effect from 1 January 2018. From that date, firms marketing their fund to retail investors in the European Economic Area (EEA) may need to provide such investors with a KID before such fund is made available to them.

What is a PRIIP?

A PRIIP is defined as an investment where, regardless of its legal form, the amount repayable to the retail investor is subject to fluctuations because of exposure to reference values or to the performance of one or more assets that are not directly purchased by the retail investor; or an insurance-based investment product which offers a maturity or surrender value that is wholly or partially exposed, directly or indirectly, to market fluctuations. The definition includes instruments issued by special purpose vehicles that meet the definition of PRIIPs. The above definition will apply to a wide variety of investment products including alternative investment funds. Firms will also need to consider whether the definition would apply to co-investment vehicles, friends and family vehicles, and other similar vehicles (if any) in their fund structure.

Does the PRIIPs Regulation apply to non-EU Managers or funds?

The PRIIPs Regulation will apply where an investment is made available to "retail clients"[2] in the EEA. It is irrelevant where the investment is manufactured or where the manager or sponsor of such investment is based. As a general guide, "retail clients" will typically include high net worth individuals, smaller undertakings, municipalities, and local authorities who do not or cannot "opt up" to "professional client" status in accordance with the procedure set out in the revised Markets in Financial Instruments Directive (MiFID II), set to take effect from 3 January 2018.

Key requirement of the PRIIPs Regulation

The PRIIPs Regulation requires any person selling or advising on a PRIIP, whether a distributor or the product manufacturer in the case of direct sales, to provide a KID to retail clients in good time before those investors are bound by any contract or offer relating to that PRIIP. In other words, the investor must be given sufficient time to weigh up their investment options. The information should also be published on the website of the product manufacturer, or if applicable, the distributor.

The KID must contain certain prescribed information and comply with the strict requirements as to form and content set out in the PRIIP regulatory technical standards. This information will include: the name of the PRIIP, the identity and contact details of the PRIIP manufacturer, information about the PRIIP manufacturer's regulator, and the nature and features of the PRIIP (including detailed requirements as to the presentation and the content of each of the elements of information, the methodology underpinning the presentation of risk and reward, and the methodology for the calculation of costs). The PRIIP manufacturer must review the information in the KID regularly and ensure that any revised document is promptly made available to the retail client.

A PRIIP manufacturer shall not incur civil liability solely on the basis of the KID, including any translation thereof, unless it is misleading, inaccurate or inconsistent with the relevant parts of legally binding pre- contractual and contractual documents or with the requirements laid down in the PRIIPs Regulation. A retail investor who demonstrates loss resulting from reliance on a KID where that KID is shown to be misleading, inaccurate, or inconsistent with the investor documentation of the PRIIPs Regulation, may claim damages from the PRIIP manufacturer for that loss in accordance with national law.

> The *Regulation* requires any person selling or advising on a **PRIIP** to provide a **KID** to retail clients in good time before those investors are bound by any contract or offer relating to that **PRIIP**.

1 EU Regulation 1286/2014.
2 A "retail client" is defined in point (10) of Article 4(1) of the EU directive on markets in financial instruments Directive 2014/65/EU (MiFID II).

What should you do now?

Firms that intend to market their fund in the EEA after 1 January 2018 should:

- *Review that target investor list to determine whether any of their prospective investors in the EEA are "retail clients" and if so determine if such investors can be "opted up" to "professional client status". Please remember that "retail clients" could include small companies and local authorities and is not limited to individuals.*
- *Take appropriate steps to restrict and/or control access to and distribution of fund marketing materials and agreement to potential investors in the EEA who may be "retail clients".*
- *Seek advice and assistance on the preparation of your KID. The form and substance of this document is prescribed by the PRIIPs Regulation. It will be important that any KID prepared for your fund complies with the requirements of the PRIIPs Regulation including local language requirements.*

This document is provided for information purposes only and does not constitute legal advice. Professional legal advice should be obtained before taking or refraining from any action as a result of the contents of this document. Solomon Wifa, Henrietta de Salis and Nathalie Duguay are partners in the Asset Management Group of Willkie, Farr & Gallagher – www.willkie.com

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IMMINENT CHANGES TO THE MERGER CONTROL REGIME IN NIGERIA

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> The Federal Competition and Consumer Protection Bill requires merger control approval for asset acquisitions and to transactions where the acquisition is formally of shares in a foreign company with a Nigerian subsidiary.

In the past decade, several bills on competition law have been considered before the Nigerian federal legislature. In the first half of 2017, that legislature passed the Federal Competition and Consumer Protection Bill 2016 (Bill). The Bill is currently awaiting presidential assent to become law.

The Bill introduced the following changes to merger control laws: a new regulator; widened regulatory regime (on assets acquisition and foreign divestment); removal of penalty for breach; and right to break up a company.

First, the Bill establishes a new dedicated competition law regulator (Regulator). It repeals the statute currently giving power to the securities regulator to regulate the competition law aspects of mergers.

Second and third, the Bill requires merger control approval for asset acquisitions and to transactions where the acquisition is formally of shares in a foreign company with a Nigerian subsidiary (rather than formally of shares in the Nigerian subsidiary). The current law is somewhat unclear on whether asset acquisitions need regulatory approval at all, and is relatively clear that merger control approval is not needed for acquisitions of shares in a foreign company with a Nigerian subsidiary.

Fourth, the current punishable offence of undertaking a merger without merger control approval has been removed in the Bill. The only competition-related punishment created under the Bill is a fine, not exceeding 10% of the offending company's turnover in the preceding year, for the failure of the acquirer or target to notify its employees or any registered trade union of the acquisition.

Fifth, under the current law, there is regulatory sanction of breaking up an offending the company. The Regulator has no such power under the Bill.

The fourth and fifth points above are surprising and may need to be revisited and reversed. The previous three are not unwelcome.

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