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Thought Leadership:

Does Every Assignment of Participating Interest Constitute a Merger in an Upstream M&A Transaction under the FCCPA?

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THE QUESTION EVERY UPSTREAM DEAL TEAM IS ASKING

Nigeria's upstream petroleum sector is in the middle of one of its biggest ownership transitions in decades. As international oil companies (IOCs) continue to divest mature onshore and shallow-water assets, indigenous producers have emerged as the principal acquirers. While these transactions have traditionally centred on obtaining Ministerial Consent under the Petroleum Industry Act 2021 (PIA) and satisfying the Nigerian Upstream Petroleum Regulatory Commission (NUPRC) that the incoming assignee has the technical and financial capacity to operate the asset, the regulatory landscape has become more complex. Today, deal teams must increasingly consider whether the transaction also falls within Nigeria's merger control regime under the Federal Competition and Consumer Protection Act 2018 (FCCPA). This is particularly important because Regulation 4 of the Nigerian Upstream Petroleum (Assignment of Interests) Regulations, 2024 requires the NUPRC, before approving an assignment of a participating interest, to satisfy itself that the transaction complies with the FCCPA. Competition law is therefore no longer a parallel consideration—it has become part of the upstream approval process.

This has given rise to an important practical question: does every assignment of a participating interest amount to a merger requiring Federal Competition and Consumer Protection Commission (FCCPC) approval? For many, the instinctive answer is yes. If a party acquires a larger participating interest—or even the remaining interest in a petroleum asset—it is easy to assume that it has also acquired control. Yet that assumption overlooks a fundamental principle of merger control. The FCCPA is concerned not simply with changes in ownership, but with changes in control.

That distinction is particularly important in upstream petroleum transactions, where operations are typically governed by Joint Operating Agreements (JOAs) rather than conventional corporate structures. A participating interest may increase without materially changing who makes the strategic decisions of the joint venture, while a minority participant may acquire governance rights that significantly influence those decisions. The real question, therefore, is not how much of the participating interest has changed hands, but whether the transaction changes who controls the strategic direction of the undertaking. In other words, the answer depends less on ownership than on control.

1. The Common Mistake: Ownership Is Not Control

The instinctive way to assess whether an upstream acquisition amounts to a merger is to look at the percentage of the participating interest being acquired. The logic appears straightforward: the larger the interest acquired, the greater the control. By that reasoning, an acquisition of 100% of a participating interest should almost always constitute a merger, while the acquisition of a minority interest should rarely do so.

The FCCPA, however, is built on a different premise. Merger control is concerned not simply with changes in ownership, but with changes in **control**. That is because section 92 of the FCCPA defines a merger not by reference to the transfer of ownership alone, but by the direct or indirect acquisition or establishment of control over the whole or part of the business of another undertaking. Equally important, section 93 prohibits the implementation of a notifiable merger unless it has first been approved by the FCCPC. The practical implication is that getting the control analysis wrong may have significant regulatory consequences. The critical question is not how much of the asset has changed hands, but whether the transaction changes who can determine the strategic commercial policy of the undertaking. In other words, competition law is concerned less with economic ownership than with decision-making power.

A simple example illustrates the point. In **Transaction A**, Company A already owns a 60% participating interest in an Oil Mining Lease and acquires the remaining 40% from its co-venturer. In **Transaction B**, an investor acquires only a 35% participating interest but negotiates extensive governance rights, including the ability to approve annual budgets, development plans, financing arrangements, operatorship and major capital expenditure. Which transaction is more likely to constitute a merger? The instinctive answer is Transaction A because ownership increases to 100%. Yet the answer is not that obvious. If Company A already exercised sole strategic control before acquiring the remaining 40%, the transaction may simply consolidate an existing position without changing who controls the undertaking. By contrast, the investor in Transaction B may, through its veto rights, acquire the practical ability to shape—or prevent—the undertaking's most significant commercial decisions. The lesson is simple: **ownership may tell us who shares in the economic benefits of an asset, but control tells us who determines its commercial future. It is the latter that merger control seeks to regulate.**

2. Why the Joint Operating Agreement Changes Everything

If ownership is not the best indicator of control, where should transaction parties be looking? In most upstream petroleum transactions, transaction parties naturally focus on the assignment agreement because it records the participating interest being transferred. However, the assignment agreement only tells us **what** is changing hands. It does not tell us **how** the joint venture is governed after completion. That answer is found in the JOA.

A participating interest represents a party's economic stake in a petroleum licence or lease—its share of production, revenues, reserves, costs and liabilities. The JOA, on the other hand, determines how the business is actually run. It allocates decision-making authority among the participants by setting out who approves annual budgets and work programmes, how operators are appointed or removed, which decisions require majority approval, which are reserved for unanimous consent, and whether any participant has veto rights over strategic matters such as financing, field development, capital expenditure or the disposal of assets.

These governance provisions are often more important than the participating interest itself. A participant may hold a majority economic interest but remain unable to approve a development plan or annual budget without the consent of another participant. Conversely, a participant with a relatively small economic interest may negotiate veto rights over the very decisions that determine the commercial direction of the undertaking. In practical terms, that participant may exercise greater influence over the joint venture than another participant holding a significantly larger ownership interest.

This is also consistent with the FCCPC Merger Review Regulations,[1] which recognise that control may be acquired not only through shares, but also through the acquisition of assets or other arrangements that enable an undertaking to establish direct or indirect control over the whole or part of another undertaking's business. For upstream transactions, that means the analysis cannot stop at the participating interest itself; it must extend to the governance rights embedded in the Joint Operating Agreement. It must also consider whether the transaction changes the governance of the joint venture. Does it alter the voting thresholds? Does it remove an existing veto right? Does it give one participant the ability to approve decisions that previously required the consent of another? These are the questions that determine whether there has been a genuine shift in control.

The practical lesson is straightforward: in upstream petroleum transactions, the participating interest tells you what a party owns, but the JOA tells you what that party can do. For regulators, investors and transaction teams seeking to determine whether an acquisition constitutes a merger, the JOA—not the participating interest—is often the best evidence of where control truly lies.

3. What Does the FCCPA Really Mean by "Control"?

The starting point is that the FCCPA does not prohibit acquisitions, nor does it require every acquisition of a participating interest to be notified to the FCCPC. Rather, the merger control regime is concerned with transactions that result in the **acquisition of control**. Section 92 of the FCCPA defines a merger as the direct or indirect acquisition or establishment of control over the whole or part of the business of another undertaking, while section 93 provides that a notifiable merger must not be implemented without the prior approval of the FCCPC. The focus, therefore, is not simply on whether ownership has changed, but whether the transaction changes who can influence the commercial direction of the business.

The FCCPC Merger Review Regulations reinforce this principle by recognising that control may be acquired in different ways. Regulation 3 makes it clear that an undertaking may become involved in a merger where it acquires another undertaking, establishes direct or indirect control over the whole or part of another undertaking through the acquisition of shares or assets, participates in an amalgamation or other combination, or enters into a joint venture. The common thread running through these scenarios is not the transfer of ownership itself, but the acquisition of **control**. In other words, the law looks beyond the legal form of a transaction to its commercial substance. An acquisition that leaves decision-making unchanged may not amount to a change in control, while another involving a smaller ownership interest may do so if it fundamentally alters the governance of the business.

Understanding this distinction requires appreciating that control exists on a spectrum. At one end is **positive control**—the ability to make or direct strategic decisions, whether by approving budgets, determining work programmes, appointing management or driving the commercial strategy of the undertaking. At the other is **negative control**—the ability to prevent those decisions from being taken. This is commonly achieved through veto rights over matters such as capital expenditure, financing, field development plans, operatorship or amendments to the Joint Operating Agreement. Although a

[1] Regulation 3

party exercising negative control may not be able to initiate decisions, its ability to block them can be equally influential.

This is why merger control is ultimately concerned with **decisive influence**. The question is not whether a party owns more of the asset after completion, but whether it has acquired the practical ability to determine—or materially influence—the strategic commercial policy of the undertaking. In the context of upstream petroleum joint ventures, that influence is rarely determined by ownership percentages alone. It is shaped by the governance rights embedded in the Joint Operating Agreement. Once viewed through that lens, the merger analysis becomes considerably clearer: the issue is not whether ownership has changed, but whether **control has shifted**.

3. The Five-Question Control Test

If ownership is not the answer, how should transaction parties determine whether an acquisition of a participating interest amounts to a merger? Neither the FCCPA nor the FCCPC Merger Review Regulations provides a roadmap for answering that question in the context of upstream petroleum joint ventures. As a result, parties are often left to make assumptions based on ownership percentages alone. In practice, however, a more structured approach is needed. We suggest that transaction parties ask five simple questions before concluding that a participating interest acquisition constitutes a merger.

i. Who controlled the strategic decisions before completion?

The starting point is to understand the governance structure before the transaction. Who approved annual budgets, work programmes, financing arrangements, field development plans and other strategic decisions? Did one participant already exercise sole control, or were key decisions shared among the participants? Without understanding the pre-transaction position, it is impossible to determine whether the transaction changes anything.

ii. Who will control those decisions after completion?

The next question is whether completion changes that governance structure. Does the acquirer gain the ability to approve decisions that previously required another participant's consent? Does it move from joint decision-making to sole decision-making? Or do the existing governance arrangements remain largely unchanged?

iii. Has anyone gained—or lost—veto rights?

Control is not exercised only by making decisions. It may also be exercised by preventing them. A transaction that gives an investor the ability to block budgets, financing, operatorship, development plans or other reserved matters may significantly alter the governance of the undertaking, even where the investor remains a minority participant. Equally, removing an existing veto right may consolidate decision-making authority in another participant. In either case, the governance dynamics of the joint venture have changed.

iv. **Has anyone acquired new decisive influence?**

This is the central question. The issue is not whether ownership has increased, but whether the transaction gives a participant a materially greater ability to influence the strategic commercial policy of the undertaking than it had before completion. That influence may arise through voting rights, reserved matters, operatorship, contractual protections or other governance arrangements. What matters is whether the transaction changes the practical ability to determine—or prevent—the undertaking's most significant commercial decisions.

v. **Has governance changed?**

Ultimately, every merger analysis in an upstream joint venture should end with one question: **has the transaction changed the governance of the undertaking?** If the answer is **yes**, there is a strong basis for considering whether the transaction results in the acquisition of control and therefore requires merger notification. If the answer is **no**, then an increase in ownership, standing alone, should not automatically trigger the conclusion that a merger has occurred.

The Five-Question Control Test is not intended to replace the statutory analysis under the FCCPA. Rather, it provides a practical framework for applying section 92 and Regulation 3 to the realities of upstream petroleum transactions. By focusing on how governance changes before and after completion, the framework seeks to identify whether the transaction has resulted in the acquisition of the kind of control contemplated by the FCCPA.

4. What This Means for Deal Teams

As upstream transactions become increasingly sophisticated, merger analysis should begin long before regulatory filings are prepared. This is no longer simply a matter of competition law. Under the Nigerian Upstream Petroleum (Assignment of Interests) Regulations, 2024, the NUPRC must satisfy itself that an assignment complies with the FCCPA before granting its approval. Accordingly, merger control should be considered at the transaction structuring stage rather than as a post-signing regulatory exercise. Before assuming that FCCPC approval is required—or that it is not—deal teams should look beyond the percentage of the participating interest being acquired and examine the governance framework of the joint venture. That means reviewing the Joint Operating Agreement, understanding the reserved matters, voting thresholds, veto rights and operatorship provisions, and comparing how strategic decisions are made before and after completion.

For sponsors, investors, lenders and upstream operators, the practical lesson is straightforward: ownership percentages should be the starting point—not the conclusion. An early assessment of how a transaction affects control can help avoid regulatory uncertainty, minimise execution risk, allocate regulatory risk appropriately and ensure that the transaction is structured correctly from the outset. As competition law becomes an increasingly important part of upstream M&A in Nigeria, understanding where control truly lies may prove just as important as understanding who owns the asset.

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