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# LEGAL FRAMEWORK FOR MERGERS AND ACQUISITIONS IN NIGERIA

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## INTRODUCTION

There are various forms of corporate integrations such as mergers, acquisitions takeovers, absorption; consolidations etc. The lines of demarcation among these terms are rather narrow and are thus used Interchangeably
Briefly defined:

i) A merger scheme of arrangement involves the fusion of 2 or more companies into one company usually on equal terms.

ii) Acquisition is the purchase of all or substantial interest in a company by another company such that the acquired becomes a subsidiary of the acquirer.
Conceptually, mergers and acquisitions are used synonymously. Both schemes involve mutual consent of the board of directors and eventually, the shareholders.

iii) Take-over, usually, involves the unilateral offer by a company. (the bidder or offeror) to the shareholders of another company (the target, victim or offeree) to purchase their shares so as to gain control of a target company. Usually, the bidder deals with the share holders by offering them an attractive premium over the company's quoted market price. Mergers and Acquisitions have been long recognized as one of the options for addressing business problems and enhancing efficiency and profitability. Mergers and Acquisitions and indeed other forms of business combinations have become very relevant in the nation's contemporary economic environment which has been characterized by business failures, distress and slow corporate growth. Not all mergers and acquisitions have been induced by the conditions stated above as many healthy institutions, driven by various factors have embarked on these activities on recent years.

However, whatever reasons there are for corporate mergers and acquisitions, growth (in profit, production, product range etc) is usually a principal factor.

This paper will examine the concept mergers and acquisition, reasons for mergers and acquisition; and the legal framework for mergers and acquisition in Nigeria.

## CONCEPT

Mergers and Acquisitions which are forms of business combinations involve the coming together or fusion of two or more enterprises into a single entity. The evolving entity could assume an entirely new name or retain the identity of one of the merging companies

(The latter being the usual trend). i.e.

COMPANY A + COMPANY B = COMPANY C, OR
COMPANY X + COMPANY V + COMPANY Z = COMPANY X.

In generic terms, while mergers and acquisitions are often used synonymously, such other terms as takeovers, amalgamations and consolidations are also used to express other variants of business combinations.

## TYPES OF MERGER/ACQUSITIONS

There are three(3) types of mergers and Acquisitions, namely:

1. Horizontal Merger/Acquisition involves the combination or fusion of enterprises in the same line of business (Competitors). A merger of 2 or more banks, breweries or stockbroker firms is horizontal.
   An example is the merger of Total Nig. Plc. with Elf to form Total-finaelf Such mergers or acquisitions have the propensity to create monopolies if uncontrolled.

2. Vertical Merger/Acquisition: The merging companies have a customer/ supplier relationship. In otherwords, it involves the combination or fusion of 2 or more companies which are engaged in complementary business activities. The basic objectives in this type of arrangement is to ensure a steady supply of inputs or outlet for products or services.

3. Conglomerate Merger involves the coming together or fusion of 2 business concerns in completely unrelated lines of operation such as the combination of a pharmaceutical company with an insurance firm. Companies engaged in this form of business combination are often motivated by the desire to diversify risks with the ultimate goal of maximizing returns.

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## REASONS FOR MERGER/ACQUISITION

Mergers and Acquisitions are linked to risk and returns. These will include:

***Risk Diversification:*** As a hedge against possible failure or to maximise returns. This is a common reason for conglomerate mergers e.g whereby a manufacturing company diversifies into an unrelated line of business such as taking an equity interest in a bank. The cost and risk involved in developing and maintaining a new product line may be avoided or reduced through the acquisition of a going concern.

***Economies of Scale:*** This is the strong reason for and indeed expectation from business combinations as the amalgamation of the entities concerned bring about expanded productive capacity in the surviving/evolving entity. If output rises at a pace faster than total cost of production, it should lead to a drop in long run average cost of production. This obviously implies increased efficiency, which could result in profitability and growth.

***Stock Exchange Quotation:*** Business combinations could be motivated by the desire for stock exchange listing. In this case, a private company unable to meet the listing requirement of the stock exchange but desirous of public quotation may integrate with a publicly quoted company m order to realize its goal.

***Leverage:*** Merger/Acquisition could be used as a means of improving debt/ equity ratio.

**Technical Drive**: A company desirous of enhancing its operations but constrained by its inability to easily access the needed technology may merge with another which has the technical advantage over it.

***Management Expertise:*** A company may opt for merger or acquisition where the requisite personnel with high level technical or managerial skills to achieve its corporate objective of quality and increased production is found to be lacking or in short supply.

***Desire for Growth:*** Merger arrangement may be entered into by a company with a view to harnessing the facilities of the other company to achieve the desired growth.

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***Increased Market Share:*** A company may be compelled to merge with another that has similar products in order to enlarge its market share after the merger.

The above are the usual justification or reasons for corporate marriages. Thus, total synergistic gain is the sum of the change in the wealth of shareholders of the target and the acquiring firms. In other words, the market value of the combined firm is greater than the sum of the pre-merger values of the two individual firms.

PVC > PVA + PVB I.e.

1+1 = 3 or 4 effect.

In adopting any business combination strategy, its potential for value creation must be considered - Does the synergy effect worth the cost? Closely related to this is the issue of the effects of the business integration on the wealth of shareholders.

The issue of public interest must be considered. "Is the proposed merger against public interest or detrimental to the economy"

If a merger, acquisition or takeover, is for example, detrimental to public interest on the premise that it is likely to either cause a substantial restraint on competition or tend to create a monopoly in any line of business enterprise; the Securities and Exchange Commission (SEC), can under S-99(3)(a)and(b) of the Investment and Securities Act 1999, disapprove or prevent the proposal.

The trend in the history of corporate marriages in Nigeria show that most business combinations, have been at the convenience of foreign shareholders. Subsequently, most Nigerian incorporated companies that have merged, either have same foreign parent companies or the acquiring companies already is/are pre-merger shareholder(s) in the acquired companies.

The fact that Mergers and Acquisitions in Nigeria are consummated at the convenience of foreign partners explains why takeover bid had not been recorded in Nigerian Capital Market. This is owing to the fact that the block-holdings of between 40% and 60% of most quoted companies are in the hands of foreign shareholders. The repeal of the Nigeria Enterprises Promotion Decree (NEPD) i989 and the on-going privatisation by Government are likely to improve the "Market float" of the Nigerian Capital with more individual shareholders as against the "block holdings" by few shareholders.

The expected increase in the number of individual shareholders may lead to incidents of take-over bids in the Nigerian Corporate Environment.

Although other reasons have been slated, most Mergers & Acquisitions recorded in Nigeria are Regulatory Driven.

During the indigenization era (1970s), the incorporation of subsidiaries with the same parent companies as different legal entities was common practice e.g. the Leventis group broke into different legal entities in order to have the prescribed maximum percentage in the scheduled enterprises. In the same

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vein, the 1995 repeal of the NEPD 1989 ushered in a new era in Mergers and Acquisition in phenomena in Nigeria.

With the repeal of the 1989 NEPD, the Nigerian Capital Market witnessed the merger of some companies with some foreign parent companies e.g. PZ Industries Plc (PZ) and Thermocool Engineering Company Plc (TEC) merged. Both foreign partnersheld at pre-merger period 40% and 60% interest in PZ industries and TEC2.

## WHY MERGERS AND ACQUISITIONS ARE REGULATED

Economic theorists argue that regulation becomes necessary because independent agents in an economy in their drive for economic wealth do produce social consequences termed "externalities" These externalities, the theorists argue, create detrimental effect which is passed on to the larger society.

While pollution is perhaps the most commonly cited externality, horizontal merger and acquisitions which may be beneficial to the integrating companies could produce socially undesirable consequences if such integrations restrain competition or lead to monopolies. It is therefore, for public interest that mergers and acquisitions are regulated.

Anti-trust provisions deal with putting legislation in place to control the growth of 'Market-Power" exercised by monopolists and their restrictive practices. Monopolists have a tendency to hamper competition, promote predatory practices to detrimental levels, effect price discrimination etc.

Non-horizontal mergers and acquisitions do not restrain competition and are thus not target for legal intervention on anti-trust grounds. The fusion of factual and potential competitors usually warrants this type of intervention.

## REGULATORY FRAMEWORK

The first attempt in regulating corporate marriages in post independent Nigeria was under S.S.197-200 of the Company Act 1968 under Arrangements and Re-constructions". These stipulated procedure for business integration. S.199 dealt with Reconstruction and Amalgamation of companies while S.200 dealt with Acquisition of shares of dissenting shareholders. The provisions in the 1968 legislation were mere stipulations — there were neither anti-trust provisions nor any agency charged with the responsibility of regulating and approving business combinations.

In 1979, the Securities and Exchange Act was promulgated. S.7(1) mandated all companies with alie interest engaging in business integration to seek SEC valuation of their shares and determination of the exchange ratio as well as approval for the transfer of shares from integration scheme.

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This enactment also did not have anti-trust provision.

The promulgation of the SEC Decree No.29 of 1988 marked the first conscious effort to put into the Nigerian statute book a more explicit provision on anti-trust. S.6 of the decree also vested the SEC with powers of reviewing, approving and regulating mergers, acquisitions and all forms of business combinations.4

## COMPANIES AND ALLIED MATTERS ACT (CAMA) 1990

The CAMA 1990 in its part XVII contained provisions regulating business integrations. The SEC was vested with powers to administer the said part. The provisions of Part XVII of the CAMA 1990 has been transferred to the Investment and Securities Act 1999, thereby repealing the provisions of Part XVIII of the CAMA 1990.

## BANKS AND OTHER FINANCIAL INSTITUTIONS (BOFI) ACT 1991.

This Act is administered by the Central Bank of Nigeria (CBN]. The regulation of Mergers and Acquisitions among or involving banks is covered under S.7.

S.7 provides thus:

"Except with prior consent of the governor, no bank shall enter into an agreement or arrangement;

(a) Which results in a change in the control of the bank

(b) For the sale, disposal or transfer howsoever, of the whole or any part of the business of the bank.

(c) For the amalgamation of merger of the bank with any other person.

(d) For the reconstruction of the bank.

(e) To employ a management agent to transfer its business to any such agent.

## INSURANCE ACT 1997

This Act - empowers the National Insurance Commission(NAICOM) to regulate mergers, acquisitions combinations in the insurance industry. 5.30(1) of the Act provides that no insurer shall

(a) amalgamate with, transfer to or acquire from any other insurer any insurer any insurance business or part thereof, without the approval of the commission; or

(b) Without the sanction of the court —

(i) amalgamate with any other insurer carrying on insurance business, or workmen's compensation insurance business.

(ii) Transfer or acquire from any other insurer, any such insurance business or part thereof.

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S.30(4) of the Insurance Act states as follows, "Before an application is made to the commission for approval or to the court to sanction any transaction under this section, notice of intention to make the application together with a statement of the nature of the amalgamation, transfer or acquisition shall at least 3 months before the application is made be published in the gazette and be served on the commission (NAICOM).

S.30(8) provides that for the purposes of S.30(7), where not less than 1/5th of the total number insured by any of the concerned insurers dissent to the amalgamation, transfer or acquisition, this will be considered as sufficient objection by the court or Commission.

The Commission (NAICOM) has powers subject to the approval of the Minister to direct the merger of failing insurance companies[5].

S 100 Furthermore, S.95 provides that the provision of this decree are without prejudice to the application of the CAMA 1990 to insurers under this Decree which are companies registered under the Decree, so however, that where any of the provisions of the CAMA is inconsistent with any provisions of this Decree shall prevail, to the extent of that inconsistency".

**THE INVESTMENT AND SECURITIES ACT 1999.**

Sequel to the review of the Nigerian Capital market, the Federal Government, in May 1999, promulgated the Investment and Securities Act (ISA) 1999.

By S. 8(0) of the ISA, the Securities and Exchange Commission (SEC) was empowered to review, approve and regulate mergers, acquisitions and all forms of business combinations.

The ISA provides that notwithstanding any contrary provision in any other enactment, prior review and approval of all mergers, acquisition and business combination by SEC is mandatory[6].

The anti-trust provision is contained in S.99 (3). The subsection states that:

(a) Such acquisition whether directly or indirectly, of the whole or any part of the equity or other capital or of the whole or any part of the asset of another company, is not likely to cause a substantial restraint of competition or tend to create a monopoly in any line of business enterprise; or

(b) the use of such share by voting or granting of proxies or otherwise shall not cause a substantial restraint of competition or tend to create a monopoly in any line of business enterprise.

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**EXEMPTIONS**

The ISA made provision for exemption to the rule requiring SEC's review and approval of business arrangements and combination. These include:

(i) where shares are obtained solely for investment purposes[7]

(ii) transactions which have been duly approved by any Federal Government Agency, who has been duly empowered to do so. The effect of this being that certain government institutions, having monopolistic powers to perform specific functions have been removed from the purview of SEC. These would include NEPA PLC. and NITEL PLC Merger of statutory companies and those mainly guided by political decisions are not within the ambit of SEC.

**DISSENTING SHAREHOLDERS**

In Mergers and Acquisition as distinct from take over, the shares of the dissenting shareholders can be acquired subject to the following conditions, that:

(a) the transfer is approved within 4 (four) months by holders of not less than nine-tenth (9/10) in value of the shares whose transfer is involved.

(b) 2 (two) months notice is given to the dissenting shareholders after the expiration of the statutory four (4) months.

The transferee companies are entitled to acquire shares of dissenting shareholders with one (1) month unless the dissenter applies and the court directs otherwise[10],

The ISA further provides that on application, the court may order that separate meetings of the companies be convened in such manner do the court may direct, if the scheme is approved by majority of shareholders (as stipulated), it must be referred to the commission for approval. Following which the Federal High Court sanctions the scheme making it binding on the companies[11].

The court in sanctioning the scheme or by subsequent order may make provisions for the liabilities of any transferor company, appropriation and allotment of shares/debentures; and issues relating to the dissolution without winding up of any transferor company[12].

Dissolution of the transferor company would be granted subjected to these conditions:

(i) that the whole assets and liabilities of the transferor company are being transferred into the transferee company; and

(ii) the court is satisfied that adequate provision by way of compensation or otherwise have been made with respect to employees of the company to be dissolved. The court order do made must be delivered

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to SEC within 7 (seven) days of making the order. Furthermore, a notice of the order shall be published in the Gazette and at least one National Newspaper. Failure to deliver the court order and or failure to publish it as required attracts a fine of not less than N20,000 (twenty thousand naira)[13].

## CONCLUSION

Mergers and Acquisitions are becoming common features of Nigeria's Corporate Landscape. Increased awareness and development within the economy have made such strategies very relevant in contemporary Nigeria. The number of successful Mergers and Acquisitions has shown a spiraling increase in the last few years. In the coming years, there are strong indications of an increased number of Mergers and Acquisitions cutting across all sectors of the economy.

The ISA is in preparation of the increase, which is expected to result following the enactment for promoting foreign investment.

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## FOOTNOTES

1. S.590 Companies and Allied Matters Act (CAMA) 1990 which defines Merger, makes no distinction between Merger and Acquisition.
2. See Securities law Update Vol. IV No.12 Dec 1996.
3. S.8(2) (a) & (b) SEC Act 1988
4. See also 8.8(1) SECAct 1988
5. S.47 Insurance Act 1997
6. S.99(2) ISA 1999
7. S.99(3) ISA 1999
8. S.99(4) ISA 1999
9. S.101(1) ISA 1999
10. S. 101(2) ISA 1999
11. S.100(3) ISA 1999
12. S. 100(3)(B)&(D) ISA 1999
13. S.100(6) ISA 1999

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