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MERGERS AND ACQUISITIONS IN NIGERIA: LAWS AND PROCEDURE

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Mergers and Acquisitions

A merger is defined by the Investment and Securities Act of 2007 as any amalgamation of the undertakings or any part of the undertakings or interest of two or more companies or the undertakings or part of the undertakings of one or more companies.

"Takeover" is defined by the ISA as "the acquisition by one company of sufficient shares in another company to give the acquiring company control over that other company."

The act provides that a merger can be achieved through the purchase or lease of the shares, interest or assets of the other company in question or an amalgamation or other combination with the other company in question.

Alternatively, a merger or acquisition could be achieved using a scheme of arrangement.

Legal regime governing M&As in Nigeria

The principal law regulating mergers and acquisitions in Nigeria is the Investment and Securities Act of 2007 ("ISA"), the Securities and Exchange Rules and Regulations ("SECRR") and the Companies and Allied Matters Act ("CAMA"). The ISA and the SECRR apply to all companies notwithstanding the sectors they operate in.

In addition to the ISA, the SECRR and CAMA, there are other laws applicable to mergers and acquisitions which are sector or industry specific. For instance, the Central Bank Act and the Banks and Other Financial Institutions Act regulate mergers and acquisitions in the banking sector, the Insurance Act applies to mergers and acquisitions in the insurance sector, the Nigerian Communications Act includes provisions that regulate mergers and acquisitions in the telecommunications sector while the Electricity Power Sector Reform Act applies to mergers and acquisitions in the power sector.

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Thresholds and categories of mergers

By virtue of the section 120 of the ISA, the Securities and Exchange Commission ("SEC") has the power to prescribe a lower and an upper threshold of combined annual turnover or assets or a combination of both in Nigeria, in general or in relation to specific industries, for the purposes of determining categories of mergers.

The categories are small, intermediate and large mergers. According to section 120(4) of the ISA, pending the time the SEC prescribes the threshold, the lower threshold is ₦500,000,000.00 ($3.3 million) while the upper threshold is ₦5,000,000,000.00 ($33.3 million).

Considerations of Mergers

The SEC's approval must be obtained before any merger, acquisition or business combination between or among companies can be effected.

Among other things, this gives the SEC the opportunity to review proposed mergers in light of competition issues which are currently overseen by the SEC. No competition law presently exists in Nigeria, however one is being considered by the National Assembly.

Section 121 of ISA sets out the factors the SEC takes into consideration when deciding whether to approve a merger application or not. Initially, the SEC has to determine whether or not the merger is likely to substantially prevent or lessen competition. If it does appear that it will, the SEC would then determine whether or not the merger is likely to result in any technological efficiency gain greater than, and off-setting, the effects of any prevention or lessening of competition that may result from the merger which may not be obtained if the merger is prevented.

In making its decision, the SEC will also look at the strength of the competition in the relevant market and the probability that the company after the merger, will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market.

Additionally, the SEC would also decide whether the merger can or cannot be justified on substantial public interest grounds by considering the effect the merger will have on (a) a particular industrial sector or region (b) employment (c) the ability of small businesses to become competitive and (d) the ability of national industries to compete in international markets.

The SEC would also assess whether all the shareholders are fairly, equitably and similarly treated and given sufficient information regarding the merger.

The SEC may grant an approval in principle after making an initial determination and direct the merging companies to make an application to the court to order shareholders' meetings of the respective companies to get their concurrence to the proposed merger.

If at least three quarters in value of the shares of members being present and voting either in person or by proxy at each at the separate meetings agree to the scheme, the scheme shall be referred to SEC for approval.

Procedure for Small Mergers

Section 122 provides that a party to a small merger is not required to notify the SEC of a merger unless the SEC requires it to do so and the party implement the merger without approval unless the SEC requires that it should be notified. Such party may nevertheless voluntarily notify the SEC at the time of the merger.

However, the SEC may require parties to a small merger to notify it within six (6) months after the merger has commenced if, in the opinion of the SEC, the merger may substantially prevent or lessen competition or if it cannot be justified on public grounds. No further steps can be taken by the parties until the merger has been approved.

After considering the merger, the SEC may either approve the merger, prohibit the merger if it has not been implemented or, if already implemented, can make a declaration that the merger is prohibited.

If the merger is approved by the SEC, the parties must apply to the courts for the merger to be sanctioned. When sanctioned, the merger will become binding on the parties.

The parties must deliver a copy of the order to the SEC for registration within seven (7) days after it is made and should publish the order in the gazette and in at least one national newspaper.

Procedure for Intermediate and Large Mergers

With respect to intermediate and large mergers, under section 123 of ISA parties are required to notify the SEC of the proposed merger. The acquiring company and the target company must also provide a copy of the notice to its employees or any registered trade union that represents its employees.

Notices of proposed mergers, acquisitions or other forms of combinations, referred to as pre-merger notices in the SECRR, must be filed with the SEC for evaluation.

After the parties to a merger have fulfilled all notification requirements, within twenty (20) working days for intermediate mergers and forty (40) working days for larger mergers, the SEC may approve the merger subject to any conditions or prohibit the implementation of the merger.

The merger must not be implemented without the approval of the SEC. Where the approval was gained by incorrect information given by a party or deceit by a party, the SEC has the power to revoke its decision approving any merger.

Furthermore, where the SEC is of the opinion that the business practice of a company substantially prevents or lessens competition, section 128 empowers the SEC to order the break-up of the company into separate entities in such a way that it does not substantially restrain competition in its line of business or in the market.

Acquisitions and Takeovers

Where a person acquires shares, whether by a series of transactions over a period of time or not, carrying 30% or more of the voting rights of a company, or together with persons acting in concert with him, holds not less than 30% but not more than 50%, such person is required by section 131 of the ISA to make a takeover offer to the shareholders of the class of shares he holds.

Procedures for Takeovers

Authority to proceed with bids must first be obtained from the SEC before a party can proceed with the bid. In deciding whether to grant the authority to proceed or not, the SEC would have regard only to the likely effect of a successful takeover bid on the Nigerian economy and on any manpower and development policy of the Nigerian Government.

The bid proposal must also be circulated by the offeror to the directors' of the target company and its shareholders and must register the proposal with the SEC.

An authority to proceed with a takeover will remain in force for three (3) months and may be extended if an application to do so is submitted to the SEC before the end of the initial three month period.

Once a notification of approval in principle has been granted in response to a pre-merger notice, the parties are required to file a draft scheme of arrangement with SEC for clearance and file an application in the court seeking to convene a court ordered meeting. After the shareholders resolution has been passed at the court ordered meeting, the parties must file a formal application of approval of the merger. The parties would also have to comply with post-approval requirements.

Qualification

The contents herein are meant for general information and do not amount to legal advice. The author or Adepetun Caxton- Martins Agbor & Segun accept no legal responsibility for any loss or damage that may arise from reliance on information contained in this publication. All enquiries to be addressed to: Olujimi Bucknor at Obucknor@acas-law.com

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