
An Overview of Mergers and Acquisitions under Nigerian Law

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ABSTRACT

This essay seeks to explore the legal framework governing the operation or activities of mergers and acquisitions in Nigeria. It is a unique field in the Nigeria legal system, and this is connected to the limited expertise in this area. The sectors affected by mergers and acquisitions include: Banking, Aviation, Power, Oil and Gas, Insurance, and Manufacturing. The significance of this research is to provide local and foreign investors with the whither know-how of sector-specific regulatory requirements. Furthermore, the essay seeks to provide mergers and acquisition as a survival business option; and as a useful vehicle for the economic development of Nigeria.

1.0 INTRODUCTION

The current global economic recession and inflationary situations have made noticeable the challenges posed by the rapidly changing information technology and dynamics of the business environment. In order to overcome these inevitable challenges, corporate integration strategies have been evolved to enable companies in different sectors increase their resource base, diversify their portfolio, reduce their risks, expand their market share through the elimination of vicious competition and ultimately, enhance their earning abilities. Since the 1990s, the use of certain words has gained currency in our lexicon. Prominent among them are “mergers” and “acquisition”. Thus, mergers and

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acquisitions have become a business imperative due largely to the desire by corporate entities to benefit from synergies associated with the economies of scale, acquisition and use of technology, enhanced access to financial resources and new markets, availability of large pool of skilled personnel, etc.

Mergers and Acquisitions are two distinct concepts. Mergers and Acquisitions (M&A) occur when two or more organizations join together all or part of their operations. In an expansive definition, a merger can refer to any takeover of one company by another, when the businesses of each company are brought together as one. Succinctly, the concept of Mergers is a situation where, for many strategic and economic reasons, two or more companies or, indeed, organizations come together to form a larger company.¹

On the other hand, Acquisition entails a buy-over of one company by usually a bigger company. In most cases, the company bought over loses its identity, whereas under a merger it may be agreed that the larger formed company may retain their individual names to form the final name of the merged company. This is the case with the merger of Platinum Bank Limited and Habib Nig. Bank Limited which produced Bank PHB Plc.

It is important to note that acquisition of companies can either be full or partial. In a full acquisition, the acquirer buys all the stock capital of the purchased company. In a partial acquisition, the acquirer obtains a controlling interest, normally over 50% of the equity stocks, but less than 100%.²

¹ E. Okwor, "Mergers & Acquisition: The Environmental and Practical Considerations" in E.O. Chiejina, *Issues in Mergers & Acquisition for the Insurance Industry* (2005), Ch. 1, p. 6

² B. Coyle, *Mergers and Acquisitions* by Brian Coyle, (Glenlake Publishing Company Ltd: Chicago, 2000) p.5

2.0 BACKGROUND STUDY OF MERGERS AND ACQUISITION IN NIGERIA

It cannot be gainsaid that the primary objective of mergers and acquisition is to fortify the corporate structures in a particular area of business activity. This is with a view of enhancing the overall economic/social benefits derivable by the companies' stakeholders and the society at large.³ Hence, their relevance in any country cannot be divorced from the level of business activities in such country. In 2014 a significant level of mergers and acquisition was recorded in various sectors of the Nigerian economy. In 2014 alone, "Nigeria recorded 24 mergers and acquisition".⁴ This was driven largely by the continuing divestments by banks from non-core financial services. Following the repeal of the universal banking regime in 2010 by the Central Bank of Nigeria (CBN), commercial banks were directed to divest from their non-banking activities or adopt a holding company structure in the event that they chose to retain their non-banking activities. As a result of the CBN directive, the majority of commercial banks chose to divest from their non-banking activities which created significant M&A opportunities in 2013 and 2014⁵. An increasing proportion of M&A activity now involves cross-border deals. Most especially, this involves Anglo Saxon countries where mergers and acquisition have a longer history.⁶

2.1 Distinction between Mergers and Acquisition

The differences between mergers and acquisitions relate mainly to:

³ Supra note 2 at p. 32-33

⁴ 'Nigeria records 24 mergers and acquisitions' *The Nation Nigeria* 10 June 2015

⁵ R. Oladosu & A. Alex-Adedipe "Nigerian Mergers and Acquisitions in 2014 and the Outlook for 2015" available at <http://www.aluko-oyebode.com/resources/nigerian-mergers-acquisitions-in-2014-and-the-outlook-for-2015/> (accessed 22 February 2017)

⁶ Supra note 3 at p. 6 See also para. (4)

- The relative size of the individual companies in the business combination
- Ownership of the combined business
- Management control of the combined business⁷
- Notably, a merger exists when neither company is portrayed as the acquirer or the acquired
- In mergers, both companies participate in establishing the management structure of the combined business
- Likewise, in mergers, both companies are sufficiently similar in size that one does not dominate the other when combined.

2.2 Mergers and Acquisition in Practice

The main reason for the growing number of cross-border takeovers, mergers and joint ventures is the desire to compete, or survive, in new world markets. That is, companies and organizations are constantly looking for green fields to explore and recreate their products. While some companies are running out of general acceptability in the economic market, some others with either the financial strength or broad-spectrum are taking over the market. Particularly, larger consumer and industrial markets are developing in several parts of the world. In America and Asia Pacific region, the landmark \$19 billion acquisition of Whatsapp by Mark Zuckerberg's Facebook and the 2013 acquisition of Nokia by Microsoft are a few of global operations of M&A.

In the Nigerian context, mergers and acquisition has been a reoccurring feature of the banking, power and aviation industries respectively. An example of such acquisition was demonstrated in 2005 by United Bank for Africa in its acquisition of Standard Trust Bank (STB), though this is mostly referred to as a merger. It was referred to as a merger due to the latitude afforded some STB directors to be subsequently elected as UBA directors and hold seats on the post-merger UBA. That is, while it looks like a

⁷*Ibid* at p.2

merger on paper, it is in fact an acquisition. One of the major M & A transactions in 2014 was the acquisition of a majority equity stake in Mansard Insurance Plc by French multinational investment banking company, the AXA Group, for US\$246 million. Helios Investment Partners also acquired an equity stake in ARM Pension Managers, a leading pension fund administrator in Nigeria. Different reasons have been given for mergers and acquisition, but more importantly is what is hoped to be achieved by such mergers and acquisitions. Undoubtedly, M&A will bring about economic prospects, restructuring for efficiency, rationalization and taking of the advantages of economies of scale. It will lead to growth, by the generation of more capital for technology, strengthening of marketing opportunities, better management team, and thus broadened responsibilities, promotions and improved efficiency.⁸

Generally, there are three basic theories for wanting to acquire other companies, and they are:

- Pursuing a growth strategy
- Defensive reasons
- Financial opportunities

Many companies due to their vision and mission statement are interested in gaining more public acknowledgement. Hence, they use acquisitions to pursue a strategy for growth. For some, it is all about the turnover, market share and profits. In other instances, acquisition takes place because of the managerial benefits of such acquisitions. That is, need for the restructuring of the company to eliminate over staffing or over capacity. Likewise, the financial prospects and benefits sometimes can encourage mergers and acquisition. This is one important factor or theory responsible for most of the mergers and acquisitions in Nigeria. A case in point is the acquisition that took place in the banking sector in 2014. While Skye Bank acquired Mainstreet Bank (formerly Afribank),

⁸ Supra note 2 at p. 7

Keystone acquired Bank PHB. This was necessary in order to meet up with the threshold set by the Central Bank of Nigeria (CBN).

However, some companies takeover other companies for investment management reasons, these types of companies are called “corporate raiders”. Corporate raiders are interested in the potential benefits of takeovers. They look for undervalued companies to buy cheaply, and unlock the value quickly, perhaps by breaking up the acquired company into smaller divisions that can be resold at a profit.⁹

Other factors responsible for mergers and acquisition are:

- Trade barriers have been removed in some areas, notably the European Union (EU), making access to foreign markets easier.
- Many product markets have become international, *i.e.* In 2014, the manufacturing sector witnessed considerable M & A activity as Raysun Nigeria Limited, a wholly owned subsidiary of Heineken International BV, acquired a 57% equity stake in Champion Breweries Plc, while Lafarge Africa, acquired all the shares of AshakaCem Plc through a mandatory tender offer.¹⁰ Improvements in worldwide communications have made it easier for management to control businesses in other countries while still maintaining efficiency in their operations. In spite of all these factors responsible for mergers and acquisition, it is worthy to state that M&A is aimed at a growth objective. This objective often influences the choices of M&A. Generally there are four ways mergers and acquisition could be done. But the Nigeria legal system mainly adopts the following three ways:
 - Horizontal Mergers and Acquisition
 - Vertical Mergers and Acquisition

⁹ Supra note 3 at p. 8

¹⁰ Supra note 6

- Conglomerate Mergers and Acquisition

2.2.1 Horizontal Mergers and Acquisition

This is a merger between two or more businesses that are on the same market level because they manufacture similar products in the same geographic region. It is a merger of direct competitors also termed horizontal integration.¹¹ Likewise, when a company grows through horizontal diversification, it expands into markets for products that it has not made before, but which are similar to its existing product range for instance a merger between Coca-Cola and Pepsi. Example of such M&A in Nigeria in the 1980s include the mergers of Lever Brothers Nig Ltd and Lipton Nigeria Ltd. Recently, in October 2011, Nigerian Breweries acquired majority equity interests in Sona Systems Associates Business Management Limited, and Life Breweries Limited from Heineken N.V.

However, Banks that were acquired as a result of horizontal acquisition are Afribank Plc, which was acquired by Mainstreet Bank Ltd; Equatorial Trust Bank was acquired by Sterling Bank Plc; First Inland Bank was acquired by First City Monument Bank; Intercontinental Bank Plc was acquired by Access Bank Plc. Hence, according to the Central Bank of Nigeria (CBN), “Banks operating in the country are now sound, from a capital perspective following the exercise.”¹²

2.2.2 Vertical Mergers and Acquisition

It is a merger between businesses occupying different levels of operation for the same product, such as between a manufacturer and a retailer; a merger of buyer and seller.¹³ For instance a manufacturer of computers might seek to purchase a producer of microchips or the acquisition of a retail gas station by the oil

¹¹ *Black's Law Dictionary* (8th edition, 2004)

¹² ‘Nigeria: New Shape of the Country’s Banking Sector’ *This Day Newspaper* 12 October 2011

¹³ *Ibid*

refining companies. It could also be a baking industry acquiring a flour mill industry. Reason for vertical mergers and acquisition is usually due to the wish to secure a steady source of supply for key materials or services.

2.2.3 Conglomerate Mergers and Acquisition

Conglomerate merger is a merger between unrelated businesses that are neither competitive nor customers or suppliers of each other. It is simply a merger that is neither vertical nor horizontal. A pure conglomerate merger is one in which there are no economic relationships between the acquiring and the acquired firm.¹⁴ Conglomerates are group of companies that operate in widely diverse industries.

3.0 REGULATORY FRAMEWORK

In whichever direction any company decides to go, either as a private or public company, it must be in substantial compliance with the law. All M&A or combinations between or among companies (both private and public) are subject to the prior review and approval of both Securities and Exchange Commission (SEC) and The Nigerian Stock Exchange (NSE). Before a merger becomes effective, it has to be approved by the shareholders of the companies involved in the merger and the Federal High Court. An application is made to the Federal High Court which then orders that a separate meeting of the shareholders of the merging companies be convened. At such meeting, the merger must be sanctioned by a majority representing not less than 75% in value of the shares of members present and voting either in person or by proxy.¹⁵

The next step is for the company to pass a resolution for voluntary winding up of the company. The provision for winding up of the company is provided for in s. 538 (1) of *Companies and*

¹⁴ *Ibid*

¹⁵ J. Olakanmi, *Companies and Allied Matters Act 2004* pg 53

*Allied Matters Act 1990*¹⁶. Subsequently, the company will authorize the liquidator to sell the whole or part of its business to another body corporate on terms that the consideration is to be distributed among members of the transferor company. The consideration may be cash, debentures, policies or other interest in the transferee company. The merger is then referred to the Securities and Exchange Commission (SEC) for approval. If approved, an application is made to the court by one or more of the companies and the court shall sanction the merger or acquisition, and when so sanctioned, the same shall become binding on the companies.¹⁷

The nature of mergers and acquisition necessarily makes it evident that mergers and acquisitions are a feature of modern business activities in any society. This welcome development in business activities was duly recognized by the Companies Act of 1968, which made certain provisions for what is therein described as “Arrangements and Reconstructions” in section 197 to 200.

The post 1968 period witnessed the genesis of the indigenization era with its attendant effect on the growth and complexity of business activities carried on by companies in Nigeria. Consequently, by the time the Companies and Allied Matters Decree, now known as *Companies and Allied Matters Act (CAMA)*, was promulgated in 1990, the need for a closer look at the statutory provisions regulating the subject of mergers, take-over and acquisition had become imperative. In response to this need, sections 590 - 613 of CAMA, which constitute Chapter 4 of Part XVII of the Act, contain copious provisions on the subject of mergers and acquisition of companies.¹⁸

¹⁶ *Companies and Allied Matters Act (CAMA)*, 1990 Cap. C20, Laws of the Federation of Nigeria, 2004, s. 538 (1)

¹⁷ E. Okwor, “Mergers & Acquisition: The Environmental and Practical Considerations” in E.O. Chiejina, *Issues in Mergers & Acquisition for the Insurance Industry*(2005), Ch. 1, p. 6

¹⁸ *Supra* note 2 at p. 34

4.0 CHALLENGES

Importantly, although mergers and acquisition ensure the expansion of a company's operation, it is not without its negative consequences. Despite the regulatory frameworks in place to ensure a smooth take-over or merger of companies, often times this frameworks and theoretical approach fail to achieve its goals. Usually, the conflict in cultural and social realities may lead to difficulty in achieving set-goals. Furthermore, the conflict of interests and mistrust by promoters do serve as an obstacle to the success of mergers and acquisition. It has also been noticed that lack of adequate knowledge or experience, coupled with the paucity of experts in the field, often lead to failures of mergers and acquisition. So also, a merger that is not well managed more often leads to collective catastrophe and synergy suicide. We have seen instances where acquiring companies got choked like a python, while swallowing a prey. At times, it takes time for the meal to digest, thereby leading to negative metabolism in form of corporate frustration and boardroom aggression.¹⁹

5.0 CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Indeed, it is observed that mergers and acquisition, especially in the banking industry are aimed at achieving economies of scale and scope. They have over time resulted in more efficient banking systems, just as the growth in this sector also means a growth in the Gross Domestic Product (GDP) of any country. In spite of the challenging investment climate for the different sectors, it is hoped that some positive results will arise from the decline in International Oil prices, as the Federal Government seem determined to diversify the economy to grow the economy. Also, though the problems associated with M&A are not to be underestimated, the advantage of M&A to a country is the catch.

¹⁹ Supra note 15 pg 53

5.2 Recommendations

Finally, introduction of unnecessary rigid new system may not be appropriate for the new business. Where there are differences in culture, technology and marketing needs, managers in the acquired companies should be allowed the necessary freedom to manage the competitive and functional strategy and respond to market pressures.²⁰ There should be a re-orientation of board members or promoters of companies on the need to change their cultural thinking away from fear and mistrust when mergers and acquisition arises. They should have a positive and not a negative view point on major managerial issues.

Also, recognized experts in the field of mergers and acquisition should be well consulted for the smooth and successful implementation of the takeovers. In doing this, legal opinion of proposed mergers and acquisition should be sought and obtained from legal experts in the field. This will provide the companies with a forward thinking mentality that will help foresee the probable challenges and how to resolve them. This is the case with the regulatory frameworks that govern the implementation of mergers and acquisition.

²⁰ “Business Merger and Acquisition- Growth, Survival Strategy in Economy” available at <http://www.gistarsea.com/business-mergers-acquisition-growth-survival-strategy-economy/> (accessed on 21 February 2017)