LAW AND PRACTICE OF MERGERS AND ACQUISITION IN NIGERIA[1]

INTRODUCTION

1. The increase in competition in the commercial landscape, due in part to globalization and reduction of barriers to entry, has made growth an imperative for companies that hope to survive.. Whilst growth may be achieved organically through product and service innovation, inorganic and external methods often present an ideal avenue for companies to achieve the desired growth levels.

2. Of the several external methods to achieve growth, recent trends suggest that mergers and acquisitions (**M&A**) is the preferred route.[2] Using the U.S. as a case study, the value of mergers and acquisitions transactions in 2013 stood at $1.04 trillion, at $1.5 trillion in 2014,[3] and by March 2015, already at $746 billion. [4]

3. In essence, mergers and acquisitions have become a commercial phenomenon, being one of the more famous external corporate restructuring options utilized by companies globally. M&A has become a veritable tool increasingly utilized not only within the national landscape, but also consistently, and even more frequently, on a cross-border basis.

4. The experience in Nigeria has been a little different. The country did not witness any successful merger and acquisition transactions in the real sector of the economy until the periods of 1983 and 1996.[5] Indeed, even during these periods, very few business entities merged and as such no real impact was felt.[6]

5. That said, the prospects of mergers and acquisitions in Nigeria have improved, and legislation has evolved to provide a framework within which merger and acquisition transactions are consummated. In addition to the Companies and Allied Matters Act (**CAMA**)[7] and Investment and Securities Act, 2007 (**ISA**), other sector specific laws exist.

6. As an expose on M&A law and practice in Nigeria, this paper commences in Part I by providing an overview of mergers and acquisitions – objectives, definitions and types of business combinations.

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2 Deloitte M&A Trends Report 2015

3 Deloitte M&A Trends Report 2015

4 Deloitte M&A Trends Report 2015

5 Ajogwu, Fabian (2011), Mergers & Acquisitions: Opportunities & Pitfalls, Journal of Law, Faculty of Law, University of Ibadan, Ibadan, Vol. 1 No. 1, Oct 2011, 30th Anniversary Edn. pp. 1-35

6 John O. Udoidem & Ikechukwu A. Acha, 'Corporate Restructuring through Mergers and Acquisition: Experience from Nigeria'; (2012) Journal of Economics and Sustainable Development, Vol 3, No. 13; Please note that the first merger attempt on Nigerian shores was in 1982 between United Nigeria Insurance Company Limited and United Life Insurance Company Limited which was not consummated.

7 Cap C20, Laws of the Federation of Nigeria, 2004

Going further, in Part II, this paper explores the legal and regulatory framework of M&A in Nigeria, and discusses the key issues that have arisen under the ISA and the rules and regulations made thereunder. Sequel to this, Part III considers a few key issues and considerations that commonly arise in M&A transactions, following which, the paper concludes, emphasizing the need for regulatory clarity and the prospects in M&As in Nigeria.

Part I: An Overview of Mergers and Acquisitions

What are Mergers and Acquisitions?

7. M&A transactions may take a variety of forms, including: (i) mergers; (ii) acquisitions i.e. private treaty transactions in relation to private companies; and (iii) takeovers i.e. regulated mandatory tender offer transactions, amongst others.

Mergers

8. The term 'merger', even in business circles, is a rather flexible expression that admits a number of circumstances. Classically however, a merger may be defined as an arrangement whereby the assets of two companies[8] become vested in, or come under the control of, one company (which may or may not be one of the original two companies), which has as its shareholders all, or substantially all, the shareholders of one or both of the merging companies, who exchange their shares (either voluntarily or as a result of legal operation) for shares in the other or a third company.[9]

9. This leads to the amalgamation of the undertakings or part of the undertakings of two or more independent and autonomous entities under the identity of one of the combined entities or, in other cases, under the identity of a new corporate entity.[10]

10. Mergers are broadly of three types, notably horizontal, vertical and conglomerate.

    10.1 *Horizontal:* A merger is horizontal if it involves the combination of two or more companies offering the same products or services. In recent years, the great majority of mergers have been horizontal,[11] this is perhaps because of the desirable effect of the reduction in competition that results from this type of merger and greater likelihood of achieving economies of scale through elimination of facility duplication.[12]

    10.2 *Vertical:* This occurs where two or more distinct enterprises engaged in the same market but

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8 Although a merger may involve more than two companies

9 K.R Sampath, "Law and Procedure on Corporate Restructure leading to Mergers/Amalgamations, Takeovers, Joint Ventures LLPs and Corporate Restructure" (2010), p 1074.

10 A good example of the former is the merger of Standard Trust Bank and UBA after which Standard Trust Bank lost its identity to UBA, while the merger of nine banks to form Unity Bank serves as an illustration of the latter.

11 Weinberg M A, Blank M V, Greystoke A L, 'Takeovers and Mergers' (4th edition, Sweet & Maxwell 1979)

12 A recent example of this would be the 2009 merger of Dangote Cement PLC and Benue Cement Limited.

operating at different levels of the market, combine. Here, the object is usually to ensure a supply or an outlet for products or services, but the effect of merger may be to improve efficiency by increasing flow of production and reducing stockholding and handling costs.

10.3 *Conglomerate:* A conglomerate merger involves the coming together of two companies in different industries which have no vertical or horizontal relationship. In fact, in a pure conglomerate merger, there are no important common factors between the merged entities in terms of production, marketing, research and development or technology.

Acquisitions and Takeovers

11. An acquisition, within the context of business combinations, (with which this paper is principally concerned), may be defined as a transaction or a series of transactions where an entity acquires control over assets, either directly or indirectly.[13] However, unlike in the case of mergers, the companies that are parties to the relevant transaction may not necessarily combine their respective businesses and operations – this is ultimately a question of the transaction structure adopted – and may remain independent separate legal entities but there may be a change in the control of the subject entity.

12. Viewed broadly, an acquisition may generally be achieved through (i) share sale; (ii) and asset sale; or (iii) a business sale.[14] The first two methods may not result in an immediate business combination (at least not at the level of the acquirer and target); however the last, by its very nature, almost invariably results in an amalgamation of operations of the acquirer and the acquired entity.

13. A takeover, also known as a mandatory tender offer in some jurisdictions,[15] is a distinct mode of acquisition, for which separate rules are prescribed in Nigeria, as in many other climes. Essentially, a takeover is employed for the purpose of acquiring control of publicly traded companies often with widely held shares.

The Confluence between Mergers, Acquisitions and Takeovers

14. Given their many points of confluence, mergers, acquisitions and takeovers are, in practical terms, no more than alternative methods of achieving business combinations. While there are actual distinctions from a business operations and functionality perspective, these are sometimes in reality, fine lines that are drawn for purposes of regulation.

15. Interestingly also, the distinctions between mergers and acquisitions are usually somewhat neutralized

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13 Tom Speechley, 'Acquisition Finance' (2nd edition, Tottel Publishing Ltd), 2008.

14 Stilton, A., (2006), Sale of Shares and Businesses, Sweet & Maxwell, London pages 1 – 9.

15 Indonesia, Philippines, Italy, United States, Thailand, Turkey, etc

by law and the regulator – through tight legislative drafting which seeks to avoid leakage and ensure that no transaction type escapes regulation. In particular, the merger rules in many jurisdictions are often so expansive and far-reaching as to catch any form of acquisition which results in the assumption of control of one entity by another. For instance, in some jurisdictions, an acquisition and sale of assets may be deemed by the courts as a "*de facto merger*" or a "*mere continuation*" of the transferor company, if it bears indicia of a statutory merger.[16] These indicia include (a) the use of the acquiring company's shares as consideration resulting in shareholders of the transferor company owning shares of the acquiring company, (b) reduction of transferor company's shareholders' interest in the surviving company, and (c) eventual passage of control in the transferor company to the acquiring company.[17]

16. In Nigeria, the scope of what constitutes a merger is even less clearly defined and appears wide enough to capture many acquisition-type structures. A transaction qualifies as a merger under the ISA if it is an *"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 and one or more bodies corporate".* The ISA further provides that this may be achieved **<u>in any manner</u>** including: (i) purchase or lease of the shares, interest or assets of the other company in question (clearly coming within the sphere of a traditional acquisition), or (ii) amalgamation or other combination with the other company in question.[18]

17. Given the blurry lines between these concepts, the question of whether a transaction is a merger, and another, an acquisition, is effectively one of market-accepted practice and the legal procedure adopted in effecting the transaction. For instance, in Nigeria, it is highly unlikely that a transaction will be classified as a merger where it only involves an acquisition of all the shares of a private company by another company – even though, technically, it may be viewed as coming within the statutory definition of a merger. That said, this paper is not primarily concerned with analysing the distinctions between the various business combination methods and as such, these will generally be discussed together, with focus being placed instead on general M&A principles, driving factors, as well as law and regulation.

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[16] Egan, B.F., (2012) *'Asset Acquisitions: Assuming and Avoiding Liabilities'* , published in Penn State Law Review, vol. 116, pg. 922

[17] However, where the consideration for the acquisition of assets is cash, it is less likely to be deemed evidence of a merger than would be the case if shares were used as consideration, as that would result in shareholders of the transferor owning a percentage of the acquiring company.

[18] Section 119 of ISA

Why Mergers and Acquisitions?

18. Why do companies engage in business combinations? The driving motivations behind a business combination, from the perspective of the acquiring entity (or the larger entity driving the merger), differ, and may involve a number of co-existing factors. Viewed from a business combination perspective, (as it is perhaps best to consider these rationales together, given that there is little, if any, practical distinction in terms of driving factors behind mergers and acquisitions), some of these reasons are explored below.

19. Opportunism: It is possible that certain business combinations are mainly opportunistic with no immediate motivation of corporate strategy. A survey conducted by KPMG in 2015 amongst chief executives of large corporates illustrates opportunism as the most cited reason for undertaking a business combination.[19] This again goes to the increased competitive landscape where timely action has become of the essence especially where the target or distressed company may also be acquired by a competitor.[20] Aside from insolvency scenarios, various situations arise in which a bidder may succeed in obtaining control over the assets of a company at less than their value. The value of a company may be standing at a considerable discount to the value of its assets for several reasons some of which include (x) poor management and efficient use of the assets of the company (this is a common reason in highly industrialized businesses); (y) directors are not aware of the true value of the assets (especially real property); (z) an inefficient capital structure; and (xx) the adoption of a limited dividend distribution policy which may ultimately affect price per share.[21]

20. Synergies: Mergers and acquisitions are justified where the combination is associated with operating, financial and managerial synergies.[22] Operating synergies arise where the combination results in the increase of pricing power in a particular market or by being able to increase volumes by accessing new markets. The financial strength of a large company enables it to raise funds more easily, both by loan and by issue of shares, a factor that may be particularly important to undertake large capital projects. Larger entities would usually have access to a wider and cheaper pool of funds as it may be considered to be more credit worthy, as it owns a vast pool of assets. Managerial synergies would arise where a high-performing management team replaces a poor-performing one. Expertise and experience may be deployed through the utilization of a single management team.

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[19] KPMG; 'The boom is back: M&A reemerges as leading growth strategy' available at http://www.kpmgsurvey-ma.com/ Last accessed 23/07/15.

[20] KPMG; 'The boom is back: M&A reemerges as leading growth strategy' available at http://www.kpmgsurvey-ma.com/ Last accessed 23/07/15.

[21] Weinberg M A, Blank M V, Greystoke A L, 'Takeovers and Mergers' (4th edition, Sweet & Maxwell 1979)

[22] Financial Times Valuation of Mergers and Acquisitions; an overview

21. Increased Revenues and Market Share: This is a common result of horizontal mergers and would have the effect of reducing competition. This is often cited as a primary reason for mergers – the Scheme of Merger between UBA and Standard Trust Bank Plc revealed: "*through the merger, the combined bank will be better able to compete with institutions within Nigeria, the Sub-Saharan Africa region and internationally, thereby increasing market share, surpassing the competition and consequently increasing gross revenue.*"[23]

22. Geographical/Product Diversification: Diversification will result in multiple income streams for a combined entity and will thus reduce vulnerability to single geographical market uncertainties especially in the case of a cross-border merger and product uncertainty in the case of a conglomerate or even in a vertical merger.

23. Cross-selling: This is a benefit experienced more by vertically merged entities and conglomerates as the merging companies can sell their varying products to their respective customers. The strength of this consideration will depend on the ease of accessibility to the customers of the respective entities. Greater benefit from cross-selling results in cross border mergers and acquisition transactions where geographical limitations for the varying products and services are overcome.

24. Tax Advantages: A profitable entity may acquire a loss leading company so as to take advantage of a reduction in tax liability. Additionally, a highly geared company may be merged with another entity, in order to take advantage of the more favorable tax position of highly leveraged companies enjoy. Again, this is not often publicly cited by merging entities but it is one that is often seriously considered by entities looking to merge.

25. Management Motives: It seems clear that some mergers and acquisitions are not inspired by the prospective economic advantages but by the desire of the directors to build a financial empire, or having built a financial empire, to extend it further as a boost to the feeling of achievement, status and prestige that controlling a large enterprise and its employees would bring. Another motivating factor may be higher remuneration management would enjoy from controlling a larger entity.[24]

26. Private Equity/Investment Company Models: Also to be noted, in addition to the foregoing, is the private equity business model, in which case the acquiring entity buys up shares private companies because, quite simply, that is what it does – invest in smaller companies, make them profitable, earn a sizeable yield and an even bigger return when the acquired company is eventually sold to another investor, who may be buying for any of the foregoing reasons, or simply because, like the seller, it is

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[23] Letter from the Chairman of United Bank for Africa Plc dated May 18, 2005, in the Scheme of Merger between United Bank for Africa Plc and Standard Trust Bank Plc

[24] Weinberg M A, Blank M V, Greystoke A L, 'Takeovers and Mergers' (4th edition, Sweet & Maxwell 1979)

in the business of buying companies and selling them for profit.

27. From a target's perspective, a company may find it advantageous to be acquired where:

27.1 the company may not have developed managers capable of leading the business in the future;

27.2 new technological developments may have damaged its competitive position;

27.3 the company may need, and be unable to secure, new or additional financing;

27.4 its owners may need liquid assets, such as the marketable securities of the acquire; and

27.5 the company may want to block a takeover bid, and as such may invite a 'white knight' to invest funds which will help keep the target company afloat and able to resist the takeover by an undesirable investor.

Part II - Legal & Regulatory Framework in Nigeria

Overview

28. M&A activity in Nigeria is principally regulated by the provisions of the: (i) ISA; and (iii) the SEC Rules and Regulations, 2013 (as amended in 2015) (the **SEC Rules**). These instruments prescribe the broad framework for regulation of M&A, set out the process and requirements for specific kinds of transactions in Nigeria, and establish the Securities and Exchange Commission (**SEC**) to regulate the implementation of such transactions, in line with public policy objectives from time to time.

Overarching Role of the SEC as Regulator

29. As mentioned above, the SEC is the apex regulatory body in Nigeria for the regulation of capital markets, and more pertinently, mergers, acquisitions and all forms of business combinations amongst companies in Nigeria.[25]

30. There is an on-going debate amongst practitioners and academics alike as to the real extent of the SEC's powers under the ISA, particularly in view of recent SEC rules and regulations which has been interpreted as a desire by the SEC to arrogate to itself powers which do not appear to be within the contemplation of its enabling statute, the ISA. Notable amongst these points of debate and of particular relevance to the discussion, is whether the SEC is empowered by law to regulate mergers and acquisitions in relation to private companies. However, the jury still remains out on this debate, and as such this paper proceeds on the assumption that the SEC is empowered to do all that it purports, by subsidiary legislation and practice, to be empowered to do.

Mergers

31. Basically, the ISA groups mergers into three (3) categories,[26] namely small, intermediate and large. Notably, Section 120 ISA empowers the SEC to determine the threshold for each category from time to time. The threshold for a small merger is a merger, whose value is below N1 billion or any amount or value that SEC may prescribe from time to time. For an intermediate merger, the threshold between ₦1 billion and ₦5 billion or any amount or value SEC may prescribe from time to time, whilst the threshold for a large merger is from N5 billion or any amount or value that SEC may prescribe from time to time. The key point of difference amongst these classes of mergers is the obligation imposed on the merging entities – whether to simply notify, or obtain the prior approval

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25 Section 1(1) of the Investments and Securities Act 2007 provides for the establishment of SEC. Meanwhile, Section 13(p) of the ISA 2007 empowers SEC to review, approve and regulate mergers and acquisitions. See also Sections 13(p) and 118(1) of the Investments and Securities Act 2007. Section 118(1) of the ISA 2007 clearly stipulates that every merger, acquisition or business combination or among companies shall be subject to the prior review and approval of SEC.

26 See Section 120 ISA

of, the SEC.

Small Mergers

32. Pursuant to Section 122 of the ISA, a party to a small merger is not required to notify SEC unless SEC requires such a party to do so. Nonetheless, SEC may, within 6 months after commenced of implementation of a small merger, require that the parties to the merger notify SEC of the merger if SEC, in its opinion feels that such merger may substantially prevent or lessen competition or cannot be justified on public interest grounds.[27] Further to the foregoing, a party to a small merger required to notify SEC of a merger, is prohibited from taking any further steps to implement the merger until the merger has been approved or conditionally approved.[28]

Intermediate and Large Mergers

33. Generally, parties to an intermediate or large merger are mandated by law to notify SEC of, and obtain its formal approval to, such merger.[29] Furthermore, when contemplating an intermediate or large merger, the primary acquiring company and the primary target company are expected to provide a copy of the notice of the merger to any registered trade union that represents a substantial number of its employees or make such notice of merger available to the employees concerned or representatives of the employees concerned, if there are no such registered trade unions.

34. SEC may, within 20 working days after all parties to an intermediate merger have duly notified it, issue a certificate for any of the following purposes: approving the merger; approving the merger subject to any conditions; or prohibiting implementation of the merger.[30] SEC is statutorily mandated to publish a notice of its decision in the Gazette and issue written reasons for the decision if it prohibits or conditionally approves the merger or a party to a merger requests for same.[31]

35. SEC may however choose to extend the period within which it has to consider the proposed merger by a single period not exceeding 40 working days, and in such a circumstance, SEC must issue an

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[27] See Section 122 of the Investments and Securities Act 2007

[28] Section 122(4) of ISA 2007. Essentially, within 20 working days after all parties to a small merger has duly notified SEC of such merger, SEC may extend the period within which it has to consider the proposed merger by a single period not exceeding 40 working days and, in such a circumstance, SEC must issue an extension certificate to any party who notified it of the merger. Also, SEC is expected to notify such parties of its decision which could be any of the following: (x) approval of the merger; (y) approval of the merger subject to any conditions; (z) the prohibition of the implementation of the merger, if it has not been implemented and; (zz) if already implemented, a declaration that the merger is prohibited. However, it should be noted that if upon the expiration of the 20 working days period stated in the above paragraph, SEC has not notified the parties of its decision, the merger shall be deemed as having been approved, subject only to the power of revocation imposed on SEC.

[29] See Section 123(1) ISA 2007

[30] Section 125(1) of the ISA 2007

[31] Section 125(4) of the ISA 2007

extension certificate to any party who notified it of the merger.[32]

36. In a large merger, upon receipt of the notice of the merger, SEC is under a statutory obligation to refer the notice to the Federal High Court and within 40 working days after all parties to a large merger have duly notified SEC, forward to the Federal High Court a statement, whether or not implementation of the merger is approved; approved subject to any conditions; or prohibited.[33]

37. Where such a merger is approved by SEC, the parties to the merger are usually expected to apply to the court for the merger to be sanctioned and when such a merger is sanctioned, the same becomes binding on the companies. In addition, the Federal High Court may by the order sanctioning the merger, or by the subsequent order, make provision for any of the following matters:

37.1 the transfer of the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;

37.2 the allotment or appropriation by the transferee company of any shares, debentures, policies or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;

37.3 the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

37.4 the dissolution, without winding up, of any transferor company;

37.5 the provision to be made for any persons who in such manner as the court may direct, dissent from the compromise or arrangement; and

37.6 such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or merger shall be fully and effectively carried out.[34]

Merger Revocation

38. SEC may revoke its own decision to approve or conditionally approve a merger if the decision was based on incorrect information for which a party to the merger is responsible; the approval was obtained by deceit; or a company concerned in the merger has breached an obligation attached to the decision.[35]

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32 Section 125(2) of the ISA 2007. However, Section 125(3) ISA 2007 provides that where the 20-working day period expires or upon the expiration of the extended 40-working day period and no certificate has been issued by SEC, the merger shall deemed as having been approved.

33 Section 126 of the ISA 2007

34 Section 122(6) of the ISA 2007. In addition, the parties to the merger are expected to deliver a copy of the order made by the Federal High Court sanctioning the scheme of merger to SEC for registration within seven days after making of the order. Thereafter, such a notice of the order will be published in the Gazette and in at least one national newspaper.

35 Section 127 of the ISA 2007

Acquisitions & Takeovers

Private Company Acquisitions

39. Section 118 of the ISA provides that: *"…that every merger, acquisition or business combination or among companies shall be subject to the prior review and approval of SEC."* Beyond this, (and not considering the mandatory takeover rules set forth in Section 131, which relate to public companies and are discussed in greater detail below) the ISA makes no express provisions regarding acquisitions of shares in private companies.

40. However, the regulatory framework for the regulation of acquisitions is detailed in the SEC Rules. Rule 433 of the SEC Rules defines an acquisition as *"where a person or group of persons buys most (if not all) of a company's ownership stake in order to assume control of the target company"* and Rule 434 further provides that the SEC will regulate *"acquisitions in both private and public unquoted companies…"*

41. It thus appears sufficiently clear that, on the state of law and regulation today, the SEC is responsible for regulating private sector acquisitions. While this is so, it is certainly not the case that practitioners have completely come to terms with the notion of SEC's oversight functions over acquisitions in private companies. There are some good reasons for this lack of ease, one of which is that the transfer of shares in private companies has always been the exclusive preserve of the corporate affairs commission, and is regulated under the provisions of the CAMA. Indeed, there seems to be little reason for the involvement of the securities' regulator where there is a private treaty to acquire the shares of a private company.[36]

42. There are a number of structures by which a private company acquisition may be effected. These include a scheme of arrangement done pursuant to section 539 of CAMA, which is an arrangement between the company and its members/creditors. It is also useful to note that the sale of a private company as a going concern may be effected by way of arrangement on sale under section 538 of CAMA, pursuant to which a company is put into voluntary winding-up and its entire assets and undertaking transferred to another body corporate. These are rather flexible tools which may be used

[36] In the case of mergers, the issue appears somewhat more straightforward (though by no means settled) as neither the ISA nor the SEC Rules draws any distinction between public and private companies, but merely speaks of asset/turnover thresholds for notification or approval as the case may be. However, for acquisitions, the landscape appears much murkier – the ISA does not prescribe any regulation for private company acquisitions (as the takeover rules expressly exclude takeover bids in respect of private companies, and as such it would appear that the legislative intention was to exclude the operation of SEC's regulatory powers where the acquisition in question is for a private company. However, the SEC Rules 2013 seeks to expand the scope of SEC's powers to include regulation of private company acquisitions (see Rule 422 thereof), where the assets or annual turnover of the target exceeds 500 million naira. This, it has been argued, is ultra vires, as it is beyond the scope of the enabling legislation; however, others have argued that such power falls squarely within Section 118 of ISA and therefore is intra vires SEC.

for a myriad of purposes, but are not the focus of this paper and as such will not be elaborated upon herein.

Public Company (Mandatory) Takeovers

43. The statutory basis for mandatory takeovers may be found in Section 131 (1) of ISA which prescribes the scenarios in which a person acquiring shares in a public company would be required to make a takeover bid to all the shareholders holding shares of the same class as the shares being acquired. It provides thus:

> *Where any person:*
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> *(a) acquires shares, whether by series of transactions over a period of time or not, which (taken together with shares held or acquired by persons acting in concert with him) carry 30 per cent or more (or any lower or higher threshold as may be prescribed by the commission from time to time) of the voting rights of a company; or*
>
> *(b) together with persons acting in concert with him, holds not less than 30 per cent but not more than 50 per cent (or a lower or higher threshold as may be prescribed by the commission from time to time) of the voting rights and such person or any person acting in concert with him, acquires additional shares which increases his percentage of the voting rights, such person shall make a take-over offer to the holder of any class of equity share capital in which such person or any person acting in concert with him holds shares.*

44. The above section of the ISA is rather inelegantly drafted and as such it is difficult to decipher the intent and practical import of the provision. The **SEC Rules** do not help in providing clarity either, as it merely provides that the mandatory takeover requirement is triggered where *"a person acquires or wishes to acquire 30% or more…with the intention of taking control"*, thus introducing the element of 'control' without clarifying Section 131. This lack of clarity is underscored by the fact that, from a studied read, Section 131 is open to at least two possible interpretations, each with different implications.

45. One possible interpretation is that the mandatory takeover rules would only apply to a person already holding at least 30% of the shares in a company, who seeks to acquire additional shares in the company. Applying this hypothetically, it would appear that to the extent that an acquirer holds less than 30% of the share capital of the target, a direct acquisition of additional shares in the target, even where it results in taking the acquirer's shareholding beyond 30%, would not trigger the mandatory takeover requirement. It is however unlikely that this interpretation of Section 131 accords

with the SEC's view of the point.[37]

46. As such, the other possible (and, perhaps, more plausible interpretation, given SEC's application of the rules in a few cases) interpretation of Section 131 is that it requires the making of a takeover bid: (i) where a person (whether alone or acting in concert with other persons) acquires shares (whether at once or over a series of transactions) amounting to 30% of the voting rights in a company; or (ii) where a person (whether alone or acting in concert with other persons) holds shares amounting to at least 30% but not more than 50% of the voting rights in a company, acquires additional shares (whether at once or over a series of transactions).

47. This raises a key practical challenge for potential investors as a trigger of the mandatory takeover threshold would almost inevitably result in situations where an investor is unable to finance a mandatory takeover after acquiring additional shares. In view of this and given the lack of clarity around the takeover rules, an approach sometimes adopted by investors who seek to acquire more shares but do not have sufficient capital acquire the entire issued capital of the target, is the indirect acquisition route, which would involve acquiring shares in a shareholder of the target. This approach finds support in the fact that Section 131 does not regulate indirect acquisitions of shares (which would vest only beneficial interest in the shares) rather it looks at acquisition of shares which directly impact the shareholding structure of the target.

48. A potential risk to this approach that the acquirer and the shareholder in the target (from whom shares are acquired) could thereby be regarded as "acting in concert" for the purpose of acquiring the shares of the target and thus caught by the provision of Section 131.

49. In analyzing this, it is important to consider the concept of "acting in concert" within the context of a takeover. Unfortunately, Nigerian law does not offer much guidance as there is little by way of judicial authority or academic commentary on the point and as such we have considered the construction of the term in other jurisdictions and the common thread that seems to run through all these is that for persons to be said to be acting in concert, they must be acting pursuant to an understanding or agreement, whether formal or informal, towards the common purpose of taking control of the target company.

37 In fact, SEC has in the past mandated a party, in the Otedola's Zenon takeover, to make a takeover bid where it attempted to sidestep the mandatory takeover rules by acquiring the shares through a vehicle set up for that purpose.

PART III - KEY ISSUES IN M&A TRANSACTIONS

Due Diligence

50. Regardless of the form or business combination, it is quite fundamental to conduct due diligence, to enable the merging parties (or in the case of an acquisition, the buyer) ascertain the nature and extent of existing liabilities and other potential legal and commercial risks. There is need to conduct proper investigations before any binding transfer of final purchase contract is prepared much more executed. There is a need to ensure that there is accuracy of information supplied to the acquiring company by the company to be acquired. The reason for this is to ensure that the acquisition is not made on the faulty assumptions or inaccurate information.[38]

51. Notably, when conducting due diligence, there are certain areas to focus. Some of these are: assets and liabilities of the company to be acquired; existing and pending claims and litigations, Memorandum and Article of Association, Ownership of the Company, Shareholding/Directors of the Company, Share Capital, Taxation; Regulatory Compliance Issues, Insurance and Liability; Assets and Liabilities; Litigation; Employees and Related Information; Financial Information; amongst others.

52. At this stage, there is need to engage the services of professionals experienced in the relevant sector and transaction type in question. Some of these professionals include solicitors, financial advisers, accountants and auditors, to mention but a few.

Role of Legal Documentation

53. The SEC Rules prescribe extensive documentation requirements in respect of each of the kinds of business combination being considered and would usually require additional documentation on a case-by-case basis, depending on the transaction structure adopted. Generally, however, there are a number of documents commonly required irrespective of whether a merger, acquisition or takeover bid is to be consummated. These include:[39]

- Information Memorandum
- Transaction/Merger Implementation Agreements
- Board Resolutions of entities involved
- Court Applications
- CTC Copy of CAC 7
- CTC Copy of CAC 2
- Certificate of Incorporation of entities involved
- Shareholder Resolutions of entities involved

[38] Bhadmus on Corporate Law Practice, Second Edition, 2013, Chenglo Limited, Enugu,560-562

[39] Rule 429 SEC Rules 2013

- Letter of No Objection from Relevant Regulatory Body
- Bid Documents
- Evidence of appointment of Financial Adviser(s) and other transaction parties
- Financial Services Agreement between Acquirer and Target company
- Annual reports, Financial Statements and Audited accounts of entities involved for the preceding five years of the number of years any of the companies have been in operation if less than five years
- Payment of Applicable fees etc.

Appraisal Rights

54. In M&A transactions in many developed business climes, it is not unusual to see cases of shareholder dissent and demands to be paid fair value for their shares. For instance, in the USA, the increase in M&A value ($379 billion during the first quarter of 2014, up 24% compared with the same period last year and representing the highest first-quarter volume since 2007) has seen a commensurate increase in deal volume and more specifically, M&A disputes that have pitted shareholder activists against public companies. In addition to the typical pre-closing disclosure issues or post-closing accounting issues or breach-of-fiduciary-duty claims, there have been a sizeable number of litigation claims in which shareholders exercised appraisal rights to contest the deal prices offered in the transactions.[40]

55. In general terms, the key bone of contention in an appraisal rights action is the fair value of the shares of a company at the time of the company's proposed sale. Appraisal rights allow shareholders to object to the consideration offered in a merger or purchase transaction and in turn require corporations to pay shareholders the fair value of their stock as determined in an appraisal proceeding. In some states within the US, for instance, shareholders must deliver a timely and written appraisal demand to the corporation in order to exercise their appraisal rights.

56. To determine a price that represents fair value—as well as any premium in excess of a proposed deal price—the parties may each develop an independent expert valuation to be assessed by the court. The court, which may or may not accept either expert's analysis in full, nonetheless considers the analyses, along with the merger price, in determining the fair value of the stock at issue.[41]

57. Generally, in many jurisdictions, the factors considered in the determination of a company's fair

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40 Alix Partners (2014) "M&A Litigation: The Upswing in Appraisal Rights Actions" http://www.alixpartners.com/en/Publications/AllArticles/tabid/635/articleType/ArticleView/articleId/1184/MA-Litigation-The-Upswing-in-Appraisal-Rights-Actions.aspx#sthash.BsjIZhR2.dpuf: Last accessed on 06/07/2015.

41 Ibid.

market value may include:

57.1 Market value as determined by current and historical pricing of the company's own publicly traded stock;

57.2 Price of the stock as paid by the purchasing company in the transaction;

57.3 Price of any fully formed competing bids to the transaction;

57.4 The company's earnings prospects;

57.5 Asset value;

57.6 Dividend capacity and payments; and

57.7 Value of intellectual property such as patents, trademarks, trade secrets, and other proprietary information.

58. In Nigeria, there are no express rules guiding the court in determining fair value for a company's shares, and this would generally be a matter of the (usually, expert) evidence adduced in support of his claim by the shareholder asserting a given price as fair value. That said, the ISA provides for a clearly stipulated, though largely untested, process for appraisal rights claims by shareholders of companies in M&A transactions. These are: (x) dissenting shareholder rights in relation to merger schemes and contracts – under section 129 of the ISA; and (y) dissenting shareholder rights in relation to takeovers of public companies – under section 146 of ISA.

59. Further to the foregoing, a dissenting shareholder in a Nigerian company is allowed to exercise his or her appraisal rights within the purview of the ISA. However, such shareholder must timeously exercise this right. As stipulated in Section 129 of ISA, a dissenting shareholder is entitled to make an application within one (1) month from the date on which the notice by the transferee company that it desires to acquire such shares.

60. Nonetheless, where the consent to acquire a shareholder's shares has been given, the transferee company[42] shall be entitled and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company unless on an application made by the dissenting shareholder within one month from the date on which the notice was given.[43]

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42 Ordinarily, where a scheme or contract (not being a take-over bid under this part involving the transfer of shares or any class of shares in a company ("the transferor company") to another company, ("the transferee company") has, within four months after the making of the offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved (other than shares already held at the date of the offer by, or by a nominee for the transferee company or its subsidiary), the transferee company may at any time within two months after the expiration of the said four months give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares. See Section 129 (1) of the Investments and Securities Act 2007.

43 See Section 129(2) of the Investments and Securities Act 2007.

61. Notably, section 129(4)(a) of the ISA 2007 stipulates that where a notice has been given to a shareholder showing an intention to acquire his shares and the court has not, on an application made by the dissenting shareholder ordered to the contrary, the transferee can do the following: (x) on the expiration of one month from the date on which the notice has been given, or if an application to the court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company together with an instrument of transfer executed on behalf of the shareholder by any person appointed by the transferee company and on its behalf by the transferee company; and (y) pay or transfer to the transferor company, the amount or other consideration representing the price payable by the transferee company for the shares which that company is entitled to acquire.

62. Similarly, Section 146 of the Investments and Securities Act 2007 contains express provision of how and what should be done where the shares of dissenting shareholders are to be acquired. Section 146(2) provides that where a take-over bid in respect of outstanding shares[44], representing not less than ninety percent in number of shares subject to acquisition has been accepted, the offeror may, within one month after the date on which acceptance of the shares representing not less than that per cent is completed, give notice as prescribed to a dissenting offeree.

63. Notably, a dissenting offeree may, within twenty days of receiving a notice sent to the offeror elect:(*x*) to transfer his shares to the offeror on the terms on which the offeror acquired the shares of the offeree who accepted the take-over bid; or (*y*) to demand payment of the fair value of his shares in accordance with section 147 of the ISA.

64. Interestingly, Section 147(6) provides that upon an application to court by the dissenting offeree (shareholder), the court shall fix a fair value for the shares of all dissenting offerees who made an election. In coming to a conclusion as to what is the fair value of such shares, subsection 7 of Section 147 allows the Federal High Court the discretion to appoint one or more independent valuer to assist the court in fixing a fair value for the shares of the dissenting offeree.

Potential Competition Law Considerations

65. The first point to note in this regard is that, as of today, there is no overarching competition legislation, and as discussed elsewhere,[45] (from reasons ranging from weak political will to the power

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44 "Outstanding shares" means shares subject to acquisition in respect of which a take-over bid was made but has not been accepted. See Section 146(1)(b) Investments and Securities Act 2007

45 Dimgba, N., *'The Regulation of Competition through Merger Control: Case under the Investments and Securities Act 2007*" being paper presented at the Nigerian Bar Association (NBA), Section on Business Law (SBL) conference, April 16, 2009, at Transcorp Hilton Hotel, Abuja, Nigeria; available at www.globalcompetitionforum.org (Africa,

of entrenched business interests) competition regulation in Nigeria is mostly by way of merger control by the SEC (introduced in 2007 by the ISA).[46]

66. Accordingly, of the three classes of business combination discussed here, it is in relation to mergers that the SEC's antitrust role is most pronounced. In this regard, there are certain factors that SEC would consider in its substantive assessment of a merger before making an informed decision as to whether it should approve a merger or not. The provision of Section 121 of the ISA 2007 is quite instructive in this regard. The factors which SEC considers whenever it is notified of a merger are:

    66.1 whether such a merger is likely to substantially prevent or lessen competition;[47]

    66.2 whether the business or part of the business of a party to the merger has failed or is likely to fail; and

    66.3 whether the merger will result in the removal of an effective competitor.

67. However, where it appears to SEC that the merger is likely to substantially prevent or lessen competition, SEC is allowed to determine whether or not the merger is likely to result in any technological efficiency or other pro-competitive gain which will be greater than the effects of any prevention or lessening of competition that may result or is likely to result from the merger.

68. Furthermore, SEC would consider whether the merger can or cannot be justified on substantial public interest grounds by considering the effect the merger will have on the following: (x) a particular industrial sector or region; (y) employment; (z) the ability of small business to become competitive; and (xx) the ability of national industries to compete in international markets.

69. In addition to or independent of the outcome of the above three tests, by section 121(1)(d) SEC is also to determine whether all shareholders are fairly, equitably and similarly treated and given sufficient information regarding the merger. This last is more consistent with the role of a securities regulator, and arguably but for the absence of a competition authority in Nigeria, should be the only thing SEC should be concerned with in a merger transaction.

70. Further, it should be noted that the key competition issues considered by SEC in relation to any given merger will, to a large extent, turn on the nature of the merger in question. As previously mentioned, there are three (3) kinds of mergers: (i) horizontal; (ii) vertical; and (iii) conglomerate.

Nigeria); also published in the **Guardian Newspapers** of 21, 28 April, 2009; and also published in the **Apogee Journal of Business, Property and Constitutional Law, 2010 Vol. 2**.

46 Prior to the enactment of the ISA, the position of the law was that mergers already approved by sector regulators were exempt from SEC's regulatory purview.

47 In coming to a conclusion whether a merger is likely to, or substantially prevents or lessens competition, SEC is to assess the following factors, to wit: (x) actual and potential level of import competition in the market; (y) ease of entry into the market, including tariff and regulatory barriers; (z) level and trends of concentration, and history of collusion, in the market; (xx) degree of countervailing power in the market; (yy) dynamic characteristics of the market, including growth, innovation, and product differentiation; (zz) nature and extent of vertical integration in the market;

Each of these raises different competition law concerns, and these are discussed below.

Horizontal Mergers

71. In the case of a horizontal merger, (such as, hypothetically, between DSTV and Startime), the competition concerns are readily apparent, as an <u>immediate</u> by-product of such a merger would be: (i) the elimination of competitive forces and (ii) the emergence of an undisputable market leader – two consequences that do not commonly flow from vertical or conglomerate mergers.

Vertical Mergers

72. Where the merger is vertical, the competition issues are less obvious and as such a merger between Chi and a packaging company (say, Tetrapak) would, at first blush, seem rather benign in comparison to the three-way merger described above. However, this requires closer analysis as vertical mergers are not entirely free from competition issues, which could manifest in the form of predatory foreclosure and profit squeeze.[48]

73. To illustrate, consider the case of the example given above of a merger between Coca Cola and a major national soft drinks distributor, thus enabling Coca Cola (a powerful firm) to expand vertically from the production to the marketing level. The newly-integrated firm may be able to injure its non-integrated competitors by withholding supplies of sugar from them (having also merged with the major sugar manufacturer at the upstream level) or foreclosing distributional outlets to them (having also merged with the major distributor). Alternatively, it may be able to raise its supply price for sugar and simultaneously lower its market price for soft drinks so as to squeeze the profits of its non-integrated competitors to unremunerative levels.[49]

74. Where, as a result, the non-integrated competitors are eliminated or their influence destroyed,[50] the vertical merger will have served to promote the extension of market power from one level to another in the process. With the elimination of independent sources of supply and channels of distribution, only the more difficult, more expensive, and less likely entry at both levels simultaneously will seem to have a chance of success. The vertical merger would thus raise both immediate and psychological barriers to the entry of new competitors.

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48 T Ellis, 'A Survey of the Government Control of Mergers in the United Kingdom' (1971) Northern Ireland Legal Quarterly, 22, 251 - 299 and 459 - 497, at 465

49 For a fuller discussion of the effects of vertical integration, see the following works cited by Ellis, ibid: Singer, Antitrust Economics (1968), 206-23; Kessler & Stern, 'Competition, Contract and Vertical Integration' (1959) 69 Yale LJ 73; Adelman, 'Integration and the Antitrust Laws' (1949) Harv. L. Rev. 27

50 This is partly because non-integrated firms are not likely to pursue policies in opposition to the interests of the vertically integrated competitor on whom they depend for their supplies.

Conglomerate Mergers

75. On the surface, since there would usually be no prior competition existing between two entities in a conglomerate merger, it may be thought that this type of mergers would be considered neutral from a competition perspective. However, conglomerate mergers may have the following anticompetitive effects: (i) the introduction of a mammoth corporation into a new market may adversely affect the competitive behaviour and raise psychological barriers to entry in any of these markets; (ii) large company with diversified operations may be able to subsidize predation in one market with profits from another; (iii) if the acquiring firm (in a merger that is effectively an acquisition) is standing at the edge, poised to enter any of the acquired firm's markets, and further, if that market's behaviour is influenced by this fact, then the merger, by eliminating this influence, may have an adverse effect on that market; (iv) by increasing the number, volume and type of goods bought and sold, a conglomerate merger increases the chance that, in imperfect markets, the merged firm's buying power can be used to induce others to buy its products or services – and this may foreclose competition.[51]

The Roles of other Sector Regulators

76. In addition to the role of the SEC discussed above, there are also sector-specific regulators which are saddled with the responsibility of reviewing and approving M&A transactions within their respective sectors. This layer of approval is typically required due to: (i) the specialized and sensitive nature of some of these sectors (such as oil and gas, telecommunications, power etc.); (ii) the need to ensure that entities operating in these sectors are subjected to scrutiny to check compliance with government policies and standards and (iii) consequently, the level of detail implicated in the review is such that the SEC alone is understaffed to address. Some of these are highlighted briefly below.

77. **Oil and Gas**: A typical feature of petroleum legislation across the world is the need for prior governmental consent before any change is made to the identity of an upstream concession interest-holder. In Nigeria, this position is hinged on Schedule 1 Paragraph 14 of the Petroleum Act,[52] which states that *"without the prior consent of the Minister, the holder of an oil prospecting licence or an oil mining lease shall not assign his licence or lease, or any right, power of interest therein or thereunder"*. Interestingly, exactly what kind of change in identity or what sort of transaction will necessitate consent is not always perfectly prescribed in the law or the underlying petroleum concession, (and for a long time the market was led by assumption) often leading to difficult

[51] See generally Ellis, supra, 473 - 477
[52] Cap P10, LFN 2004

questions of interpretation, as happened in the Moni Pulo case.[53]

78. **Power**: In the post-reform Nigerian power sector, the Electric Power Sector Reform Act, 2005 (EPSRA) establishes the Nigeria Electricity Regulatory Commission (NERC) and provides that *"a licensee shall not…assign or cede his licence or transfer his undertaking , or any part thereof, by way of sale, mortgage lease, exchange or otherwise without the prior consent of the Commission…"*. In effect, this would subject many M&A transactions in the sector to the prior consent of the NERC. In determining whether to grant its consent, NERC would be required to have regard to a number of considerations, including the public interest, and the likelihood that the new entrant is likely to comply with the provisions of EPSRA and all rules, regulations and codes applicable to the relevant operations. In addition, for the purposes of monitoring competition in the sector, EPSRA stipulates that NERC must be notified where a licensee acquires a ten per cent (10%) shareholding interest (or such other percentage prescribed by NERC), in any other licensee.

79. **Telecommunications**: The Nigerian Communications Commission Act (NCC Act) establishes the Nigerian Communications Commission and prohibits licensees from undertaking non-competitive mergers or engaging in conducts which have the purpose of substantially lessening competition in any aspect of the Nigerian Communications market.[54] Additionally, the NCC Act empowers the NCC to direct licensees in dominant positions to cease conduct which have or may have the effect of substantially lessening competition in any communications market and to implement appropriate remedies.[55] In effect, the foregoing provisions entail that M&A transactions that have the potentials of eliminating competition within the telecommunications market risk being objected to by the NCC.

CONCLUSION

80. M&As present important opportunities for men of business and commerce to grow their businesses in a challenging climate, and it will continue to be an area of continuing practical importance. As the global economy continues to metamorphose and evolve, businesses would constantly seek new means of adapting to changing times while maintaining growth in profitability.

81. However, and as it has done in the past, it is crucial for legislation to continue to evolve to meet business needs, and the provisions on mandatory takeovers in particular, as well as the exact ambit of the competition law powers of the SEC, will benefit from much clarity.

82. M&As will continue to remain relevant in today's business world and legal professionals, as advisors,

53 Moni Pulo Limited v Brass Exploration Limited et al (Unreported); Suit No: FHC/L/CS/835/2011

54 Section 91(1); Section 91(2) of the NCC Act permits the NCC to publish guidelines or regulations from time to time which clarify the meaning of "substantial lessening of competition".

55 Section 92(4)

must develop a clear understanding of the domestic legal and regulatory M&A landscape, while keeping an eye on the global trends and local possibilities.

Appendix

Typical Timelines for M&A Transactions

1. M&A transactions are usually time-consuming and can take months, even years to complete; these timelines would typically vary depending on a number of factors including issues arising from due diligence, regulatory hurdles, tax and accounting issues, amongst others. Set out hereunder is a table of various tasks which are typically implicated under a merger and acquisition transaction (from a legal perspective), as well as indicative timelines for the execution of these tasks. Given that the vast majority of the merger transactions in Nigeria have taken place in the banking sector, the table below is modelled specifically against a bank merger.

2. Further below is a timetable for takeover transactions, using a manufacturing company as a hypothetical, and incorporating a fair value claim process. Given that private company share acquisitions are generally conducted by private treaty, with no express statutory timelines, no indicative timelines have been provided for acquisitions.

Merger	
Activity	**Timelines**
Preliminary processes including – - Preparing draft board/shareholder resolutions authorising the scheme; - Assessing and selecting professional advisers (including auditors, financial advisers, accountants etc.) for the merger; and - Preparing draft documentation for the scheme, including the scheme document.	2 weeks
Apply to CBN and obtain CBN's preliminary approval to the merger.	1 week
Notify FIRS of the scheme and seek confirmation of the tax implications.	1 week
The Board of Directors of each Merging Entity holds a meeting at which each board of directors passes a resolution proposing that a scheme of merger be put to the shareholders, and confirms the appointment of its professional advisers for the merger.	1 week

A notice of meeting is sent to all the shareholders of each Merging Entity	3 Weeks
At the respective meetings, the Shareholders of each Merging Entity pass a resolution authorising the Board of Directors to embark on the Scheme.	1 day
A merger notification is submitted to the SEC for its Formal Approval.[56]	1 week
A copy of the merger notification is also forwarded to the registered trade union representing a substantial number of employees, or representatives of the employees if there is no registered trade union.	1 day
The Merging Entities receive formal Approval from SEC of the merger.	6 weeks
Upon obtaining the approval of the SEC, a summary application is made to the court by each Merging Entity, praying the court for an order that a meeting of the Merging Entity or a class of its members be summoned in such a manner as the court may direct;	1 week
Receive the order from the Federal High Court to convene the meetings of the Merging Entities	1 week
Finalise Scheme Documents	1 Week
Convene court-ordered meetings of the members of each of the Merging Entities and publish notice of Court Ordered meeting in 2 national newspapers or as stipulated by the court.	3 weeks
Hold Court-Ordered Meeting, during which a shareholders resolution shall be passed by each of the Merging Entities approving the Scheme.	1 day
File returns of the court ordered meeting at CAC and obtain CAC certified resolutions.	3 days
Following the Court-Ordered Meeting, each of the Merging Entities files a formal application for the final approval of the Scheme of Merger with the SEC	1 week
Receive SEC's Final Approval of the Scheme	2 weeks
Obtain final approval from CBN for the merger and obtain a national banking license for X-Company from the CBN and surrender banking license of Y-Company.	1 week

56 The pre-merger notification is submitted alongside some other documents including: (x) an information memorandum containing detailed information about the Merging Entities, product lines, operations, major competitors, structure and organization, the business relationship amongst the Merging Entities in terms of products and services, whether the merger will entail the transfer of all or part of the assets, liabilities and undertakings or shares of the Merging Entities, the actual or potential impact of the merger on the level of competition within the relevant industry; and (y) the letter of consent.

Upon receipt of SEC approval for the merger, an application for a Court Order sanctioning the scheme is made by the Merging Entities	1 week
Receive the Court Order sanctioning the Scheme	1 week
The court makes an order sanctioning the scheme, which is published in at least 2 national newspapers.	1 day
Obtain Tax clearance certificate from FIRS.	1 day
The court order sanctioning the scheme and the newspaper publication are filed with the SEC within seven (7) days of the Court making the order. (Notification of Completion).	1 day
Make statutory filings at the Corporate Affairs Commission (**CAC**).	3 days
The court order sanctioning the scheme is published in the Gazette.[57]	1 week
ESTIMATED TIME	23 weeks[58]

TAKEOVER	
ACTIVITY	**TIMELINES**
Convene a board meeting to deliberate on the proposed takeover bid by sending out a notice of meeting to all directors of bidder.	14 days[59]
Board resolves to make a takeover bid and appoints advisers for this purpose (e.g. Financial Adviser and Legal Adviser).	1 day
An application is made to the SEC for its authority to proceed with the takeover bid, stating: (i) the name and other particulars of the person making the bid; (ii) the particulars of the proposed bid with supporting documents[60] in compliance with the provisions of the Act and these rules and regulations; (iii) any other information or documents that may be required by the SEC from time to time.	1 day

57 Within 3 months of the completion of the merger, a post-completion report is filed with the SEC. SEC may also conduct a post-merger inspection to ascertain compliance with the terms of the scheme.

58 Please note that in practice, many of these steps may be carried out simultaneously and this has been considered in arriving at the total estimated time.

59 The timeline for this would generally depend on the period specified in the Memorandum and Articles of Association. In the absence of any provision in the articles, this would be 14 days, as indicated above.

60 The application will be accompanied by: (i) a letter of application (ii) Two copies of the information memorandum (where applicable); (iii) a letter of "no objection" from relevant regulatory body (where applicable); (iv) A copy of shareholders and board resolutions of the bidder certified by its company secretary approving the takeover; (v) A copy of the certificate of incorporation of the bidder certified by the company secretary; (vi) Copies of the memorandum and article of association of the bidder certified by the CAC; (vii) copies of letters from the bidder appointing their financial adviser to the transaction.

SEC issues authority to proceed with the takeover bid, which would be valid for a period of three (3) months.	3 – 4 weeks[61]
A copy of the proposed bid is lodged with the SEC for registration, along with a number of documents.[62]	1 day
If satisfied that the bid is in compliance with the requirements of the law, the SEC shall register the takeover bid.	3 – 4 weeks
The takeover bid is dispatched concurrently to the directors and shareholders of the Target and the SEC. The takeover bid is also advertised in two (2) national daily newspapers.	1 day
The directors of the Target shall send a directors' circular to each shareholder of FMN and to the SEC at least 7 days before the date on which the take-over bid is to take effect.	1 day
The Target (and any approving shareholders) accept the takeover bid pursuant to which their shares are deposited.[63]	At least 21 days
The offer closes and acceptance forms are collated by the Financial Advisers acting on behalf of the bidder.	2 days
Funds are transferred to settle acceptances and the bidder's name is entered in the register of members of the Target.	2 days
Notices are issued by the bidder to dissenting Shareholders, the Target and the SEC of the bidder's intention to acquire their shares	1 day
Funds equal to value of the dissenting Minority Shareholders' shares (per the terms of the takeover bid) are paid by the bidder to the Target to hold in trust for the dissenting Shareholders	Within 20 days of squeeze-out notice
Dissenting Shareholders deposit their share certificates with the Target and elect to either: (i) accept the bid on the same terms as the other shareholders who accepted; or (ii) demand fair value for the shares.	

61 This is merely indicative, as the actual period required for all SEC approvals is largely dependent on: (x) the leverage of the Financial Advisers with the SEC; and (y) the ability of the Target/Bidder to provide all documentation/further information required by SEC in a timely fashion.

62 These include: (i) two (2) draft copies of the takeover bid; (ii) consent letters of directors and other parties to the transaction; (iii) CAC form containing particulars of directors of the bidder; (iv) a copy of draft Financial Services Agreement between the financial adviser and the bidder, and any other agreement(s) entered into in the course of the transaction; (v) annual report and accounts of the bidder for the preceding period of five (5)years or the number of years the company has been in existence; (vi) payment of N50,000 application fee and relevant SEC fee based on the value of shares to be taken over; (vii) a draft newspaper publication of the proposed takeover; (viii) evidence of source of funds; and (ix) any other documents the SEC may require from time to time.

63 Such shares so deposited may be withdrawn within ten (10) days of the date of the takeover bid.

Bidder notifies the Target of elections made by the dissenting Minority Shareholders.	
Bidder makes an application to court to fix fair value of shares for any dissenting Shareholder who has so elected.	1 day
The court fixes the fair value at which the shares are to be acquired.[64]	1 – 2 months[65]
The Target: (i) makes payment of sums held in trust to such dissenting Minority Shareholder(s) and issues new share certificates to the bidder in respect of the shares; and (ii) cancels the shares held by any dissenting Minority Shareholder(s) who did not deposit his share certificate following the squeeze-out notice.[66]	1 day
The bidder files with the SEC a post-offer report setting out: (i) a schedule of the Target's shareholders who accepted the offer containing the volume and value of the respective shares; and (ii) evidence of settlement of consideration.	1 day[67]
SEC undertakes a post-takeover inspection within 3 months after the registration of the takeover bid.	3 months

64 The court may appoint one or more independent valuers to assist with the determination of the fair value of the shares. Where this exceeds the price of the terms of the offer deposited by the bidder with the Target, the bidder will make such additional payment to the Target as may be required to comply with the order.

65 Please note that the timing for this would vary, as hearings would be subject to the convenience of the court.

66 The ISA requires that notices of cancellation be issued to such dissenting shareholders.

67 The SEC Rules prescribe that this must be within a period not less than 7 working days from the conclusion of the offer.