Procedural Issues in Mergers and Acquisitions of Companies: A Comparison between Nigeria and India

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Abstract
Mergers and Acquisitions (M&A's) are, nowadays, frequent events in the lifecycles of companies, on the basis that M&As are one of the most successful means of enabling companies and economic entities achieve profits, whether through entry to new markets, taking advantage of economies of scale or reducing the costs associated with producing a greater number of products or services. India is now one of the leading nations in the world in terms of mergers and acquisitions while, Nigeria has also enjoyed an unprecedented high volume of mergers and acquisitions since 1999. In both jurisdictions, the laws have laid down procedures for mergers and acquisitions. In India, sanction of the High Court is an essential prerequisite for the effectiveness of mergers; whereas In Nigeria judicial involvement in sanctioning mergers has been significantly reduced. This paper examines the procedural issues involved in mergers in these two populous developing countries of the Commonwealth with a view to learning a lesson from the situation of each other and recommending reforms to the laws of both countries. This article begins with a highlight of the regulatory framework and meaning of merger and acquisition in Nigeria and India; gives an overview of the types of merger and examines the procedural issues in mergers in both Nigeria and India. The paper makes a comparative analysis between the two jurisdictions. The paper acknowledges the comprehensiveness of the laws in both jurisdictions however call for plugging some of the identified gaps in the law.

1.0 INTRODUCTION

The process of mergers and acquisitions has gained substantial importance in today's corporate world. This process is extensively used for restructuring business organizations. The trends in Indian M&A, recorded a rapid increase between 2003 and 2007,the merger and acquisition business deals amounted to $40 billion during the initial 2 months in the year 2007.The total estimated value of mergers and acquisitions in India for 2007 was greater than $100 billion. It is twice the amount of mergers and acquisitions in 2006.[1]Though the total deals value for mergers and acquisitions dropped in the subsequent years when compared to 2007; [2]India continues to be one of the leading nations in the world in terms of mergers and acquisitions.

On the other hand, Nigeria, Africa's most populous nation and arguably the continent's largest producer of crude oil, has enjoyed an unprecedented high volume of mergers and acquisitions (M&A's) since its return to democracy in 1999.However, the most striking activities in mergers and acquisitions in Nigeria were undoubtedly the 2005 mergers that took place in the banking sector. These mergers were driven by the Central Bank of Nigeria's 2004 directive to all Nigerian banks to increase their shareholders fund to a minimum of NGN25 Billion (twenty-five billion Naira)[3], from the previous minimum shareholders fund of NGN2 Billion (two billion Naira). The deadline for this increase was December 31, 2005. Few Nigerian banks had this new minimum capital base, as a result, several mergers and acquisitions emerged, with only 25 out of 89 banks surviving the conditions and operating after 2005.

Different legislations have been passed to regulate mergers and acquisition in both Nigeria and India. The laws in both jurisdictions have laid down procedures for mergers, acquisition or combinations. Parties to merger transactions must comply with the procedures as the cost of non-compliance could be too steep and detrimental. Though in India a myriad of laws, rules, regulations, govern every merger, mergers are primarily regulated under the Companies Act and also under the SEBI Act. With the enactment of the Competition Act in 2002, mergers also come within the ambit of this legislation. It aims at preventing appreciable adverse effect on competition

In Nigeria, the Investment and Securities Act of 2007 and the Companies and Allied Matters Act of 1990 (as amended) are the primary legislations that provide for mergers and acquisitions.This paper makes a comparative analysis of the procedural issues involved in mergers or amalgamation in the two jurisdictions with a view to learning a lesson from the situation of each other.

2.1 Regulatory Framework of Mergers and Acquisitions in Nigeria and India

In India the following are the legislations primarily governing M&A:

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[1]Singh P, "Mergers and Acquisitions: Some Issues & Trends" (2012) 1-1 International Journal of Innovations in Engineering and Technology 1
[2]See Assocham India,"Mergers & Acquisitions Newsletter" Volume 1 (April – June 2012) http//www.assocham.org viewed 10/08/13
[3] Approximately US$208 million; the exchange at the time was NGN120:US$1

(a) Companies Act, 1956 ("Companies Act"):
(b) SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ("Takeover Code"):
(c) The Competition Act, 2002 (the "Competition Act"). Other legislations include Income Tax Act, [1]and Stamp Act.[2] While the primary regulators governing M&A activity in India are the Securities and Exchange Board of India ("SEBI"), the Reserve Bank of India ("RBI") the Foreign Investment Promotion Board ("FIPB") and the Competition Commission of India ("CCI").

In Nigeria the legislations that have impact, directly or indirectly on mergers and acquisitions are:

(a) The Investments and Securities Act (ISA) 2007 and the Rules and Regulations of the Securities and Exchange Commission (SEC) made pursuant to the ISA. The Investments and Securities Act 2007 establishes the Securities and Exchange Commission ("the Commission or SEC").[3]One of the functions of the Commission is to review, approve and regulate mergers, acquisitions and all forms of business combinations. Other legislations include
(b) The Companies and Allied Matters Act (CAMA) 1990 (as amended).
(c) The Companies Income Tax Act 2004.

In addition, there are other sector-specific laws that regulate mergers and acquisition. The Banks and other Financial Institutions Act (BOFIA)[4] regulates the banking industry; the Nigerian Telecommunications Act[5] regulates the telecommunications industry; the Insurance Act[6]regulates the insurance industry; the Electric Power Sector Reform Act[7]regulates the electric power sector. The pension Act regulates the pension industry. Separate agencies of government also regulate each specific merger transaction. for example, the SEC, the CBN regulates, mergers or takeover where a bank is involved, the Pension Commission handles pension fund, the National insurance Commission handles the insurance industry, but to mention a few. It is submitted that the presence of too many regulators on the scene does not augur well for an effective administration of merger regulation. Nigeria is bedevilled with so many agencies performing the same or similar functions. Too many regulators allows for leakages and waste. There might be a need to streamline the functions in such a way that everything relating to merger in the securities industry will be the prerogative of the SEC. A related problem, to the problem of too many regulators is the twin problem of too many laws. The laws are scattered over so many statutes and a combination of several statutes may be required to be able to get the information needed to consider a particular transaction. A streamlining of the functions must eventually lead to a situation whereby all relevant provisions on merger transaction can be found in one single enactment.

3.1 The Meaning of Merger under the Nigeria and India Legislations

In Nigeria, a merger is defined under the Investment & Securities Act[8] as the amalgamation of the undertakings or any part of the undertakings or interest of two or more companies or the undertakings or any part of the undertakings or interest of one or more companies and one or more bodies corporate.[9]

It entails the transfer of properties and liabilities of one or more companies to another. The transfer is however, limited to those rights that can be transferred, and excludes personal contracts such as employment contracts, which has to be specifically provided for. *Aluko* asserts that merger in Nigeria means thus:

"… One or more companies may merge with an existing company (through absorption) or they may merge to form a new company (through consolidation). Nonetheless, a fundamental characteristic of merger (either through absorption or consolidation) is that the acquiring company (existing or new) takes over the ownership of other companies and combines their operations with its own operations."[10]

Nigerian legislators are also keen in solving the problem of dissenting shareholders who are not willing to merge by providing that they can exit the transferor company and recover the value of their shares through payment in cash by the transferee company.[11]

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[1]Income Tax Act, 1961
[2]the Indian Stamp Act, 1899,
[3] See Section 1 Investment & Securities Act 2007
[4]Act No 25 of 1991(as amended).Section 7(1)(c) provides that except with the prior consent of the Governor of the Central Bank of Nigeria no bank shall enter to an agreement or arrangement for the amalgamation or merger of the Bank with any other person.
[5]The Nigerian Telecommunications Act 2003
[6]The Insurance Act 2003
[7]The Electric Power Sector Reform Act 2005
[8]Investment and Securities Act, No. 29, (ISA) 2007
[9] Section 119 (1) Ibid
[10]Aluko, B, "Corporate Business Valuation for Mergers and Acquisitions" Vol.1 (2005) *International Journal of Strategic Property Management p. 3*
[11] Section 130 of ISA 2007

Unlike Nigerian legislation, Indian legislation does not define merger, Laws in India use the term amalgamation for merger.The terms 'merger' and/or 'amalgamation' have not been defined under the Companies Act 1956 anywhere and are generally used interchangeably. Although not defined in the Companies Act, a bill titled 'Companies Bill, 2009' which could succeed the Companies Act 1959 currently placed before the Parliament of India, defines 'merger' as has been defined under the English Companies Act, 2006[1] distinguishing between a merger by absorption, where one or more existing companies merge into an existing company and a merger by formation of a new company which involves merging of two or more companies to form a new company. It submitted that India should hasten to pass the bill into law because the definition under the UK Act is preferable.[2]

Both in Nigeria and India, a merger may be achieved in any manner, including through-
(*a*) Purchase or lease of the shares, interest or assets of the other company in question; or
(*b*) Amalgamation or other combination with the other company in question.[3]
In fact the most common means of acquiring companies in India is through the purchase of shares. The acquiring company may either purchase existing shares from current shareholders or subscribe to freshly issued shares in the target to acquire a controlling stake. The share purchase structure is the most flexible and straightforward means of effecting a change in control under Indian law. The share purchase structure may be used with both private and public company acquisitions.[4]

3.2 Acquisition under the Nigeria and India Laws

The terms "merger" and "acquisition" are often used interchangeably to mean the same thing, and in a more common sense used in the twin form of mergers and acquisitions. Acquisition describes the act of gaining effective control over the assets or management and ownership (of shares in the capital) of another company without any combination of companies. Whereas in the case of acquisitions, the companies remain separate legal entities; but with some change in control of companies, the acquisition is seen as a takeover of the target. In this regard, the term "acquisition" can be interchanged with "takeover".[5]

The term 'acquisition' has also been described to mean a transaction in which a large corporation purchases a small corporation.[6] It could be the purchase of an asset such as a plant, a division or even an entire company.[7] This may be by the purchase or lease of the shares, interest or assets of the other company in question or the amalgamation or other combination with the other company in question[8]. A company may also be acquired by purchasing either the entire issued capital of a company or its business and assets.[9] An "acquisition" occurs when one company acquires sufficient shares in another company so as to give it control of that other company.
Chaudhary,Tripathi and *Sanyal* describe acquisition as:

'Acquisition results when one company purchases the controlling interest in the share capital of another existing company in any of the following ways:

a) Controlling interest in the other company. By entering into an agreement with a person or persons holding

b) By subscribing new shares being issued by the other company.

c) By purchasing shares of the other company at a stock exchange, and

d) By making an offer to buy the shares of other company, to the existing shareholders of that company'[10]

In acquisition the company whose majority shares have been acquired does not merge into the acquiring company as to lose its identity, rather by having its shares acquired by another company, it becomes a subsidiary of that company, whilst retaining its former corporate personality. The effect being that the target company loses

[1] Corporate and M&A Law Committee: "India Negotiated M&A Guide" http/www.ibanet.org/document/Default.aspx?Documentuid=7793863/pdf viewed 22/07/13
[2] For definition of merger in UK see sections 904/1/a and 904/1/b of the UK Companies Act 2006.
[3] Section 119(2) ISA 2007 and sections 391, 494 and 507 of the Companies Act 1956. See also Paaranjabe,N.V *Textbook on Company Law,* 10th Edition (India, Central Law Agency, 1995) at p. 389
[4] Corporate and M&A Law Committee, n 14
[5] Fabian A., "Mergers and Acquisitions: Identifying the Opportunities and Avoiding the Pitfalls". A paper presented to the Corporate Counsel Forum, at the Nigeria Bar Association 2011 Annual Conference, Port Harcourt on August 24, 2011. p5
[6] Fox, B & Fox, E, *Corporate Acquisitions and Mergers*, Vol. 1(New York, Matthew Bender & Co, 2004) p. 1 - 5
[7] Sherman, A & Hart M, *Mergers & Acquisitions from A to Z*, 2nd ed (AMACOM, 2006,) P. 11. Sherman & Hart illustrate this aspect of an acquisition with the Procter & Gamble 2005 major acquisition of The Gillette Company Inc., in order to extend its reach in the consumer product industry.
[8] Section 119 (2) a & b of the Investment and Securities Act, 2007
[9] Boardman, N & de Carle, R, *Legal Aspects of Acquisitions*, Company Acquisitions Handbook, (Tottel Publishing Ltd, 2007) P. 235
[10] Bhuvnender C, Sourabh T and Prithvi S, "Regulatory Framework in Mergers and Acquisitions: Latest Trends and Updates" (2011) 1(3) International Journal of Research in IT, Management and Engineering 282.

its independence and now has to be subjected to the control of the acquiring company. The acquisition process is very complex and various studies shows that only 50% acquisitions are successful.[1] Economic reasons and rival bidders are the most important reasons for acquisitions.[2] From a legal perspective, takeovers adopt one of three different types: friendly takeovers, bail-out takeovers and hostile takeovers.

A friendly takeover means the takeover of one company by changes occurring in its management and control through negotiations between the existing promoters and prospective investors; this is done in a friendly manner. Thus, this type is also referred to as a negotiated takeover. This kind of takeover is carried out in further consideration of the common objectives of both parties.[3]

A hostile takeover is a takeover where one company unilaterally pursues the acquisition of the shares of another company without the knowledge of the second company. The main reason that causes companies to resort to this kind of takeover is to increase their market share.[4] Finally, the bail-out takeover option refers to the takeover of a financially tired company by a financially wealthy company.[5]

Both mergers and acquisitions have separate procedures under our laws, this paper however, discusses only the procedural issues in mergers.

4.0 Types of mergers

In both Nigeria and India, mergers and acquisitions may be broadly classified as horizontal, vertical or conglomerate: In the following paragraphs, these categories of merger will be described, showing the economic rationales behind the types

4.1 Horizontal Mergers

A horizontal merger is a business merger in which two firms are involved in the production of the same kinds of goods and services (for example, merging one shoe manufacturer with another shoe manufacturer).[6]A horizontal acquisition also takes place between two companies in the same line of business, such as one tool and dye company purchasing another.[7] In other words, horizontal acquisition simply means a strategy to increase market share by taking over a similar company. Mergers and acquisitions of this kind often take place as part of a strategy to achieve a larger share of the available consumer market by merging the strengths of each firm into one central entity. Sometimes, a merger of this kind will also take place as a way of minimising the number of competitive companies within a given industry, which subsequently decreases the number of companies operating in a particular area.[8]

Importantly, the motives for this type of merger mainly surround economies of scale or the development of the market position. Also, a horizontal merger could lead to the production of higher quality goods and services, thus allowing consumers to receive a greater amount of satisfaction from their purchases. At the same time, a horizontal merger could create a situation where consumers have fewer options when it comes to selecting goods and services, thus forcing consumers to settle for less than what they really wanted.[9]

4.2 Vertical Mergers

A vertical merger or acquisition occurs where two or more companies involved in the same industry but involved in different levels of production decide to combine their business in order to enjoy the economies of large scale production. Both parties determine that joining forces will strengthen the current positions of the two businesses and also lays the foundation for expanding into other areas as well. For example, a company that produces bearings for factory machinery may choose to merge with a company that manufactures gears for the same type of machinery. Together, they may subsequently decide to continue to provide products to their existing

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[1] *Ashok B, "Mergers and Acquisitions in India" http://www.slideshare.net/ashokbuddys/19421359-mergerandacquisitioninindia viewed 22/07/2013*

[2] Al-Hemyari A,'Merger and Acquisition Laws in UK, UAE and Qatar: Transferring Rights and Obligations'. A PhD thesis submitted to the School of Law University of Brunel 23

[3] For more reading see Antony S, "Takeovers : the 'public interest test" (2011) 2Business & Transport Section, House of Common Library, 18

[4] Al-Hemyari, n 26, p.45

[5] Ibid.

[6] For more see Jeffrey C, "The Impact of Vertical and Conglomerate Mergers on Competition" (2004) Department of Economics, University of Calgary, Calgary, Alberta, Canada

[7] For more see Patrick R.P, and Robert M.F, *The Cable and Satellite Television Industries* (Needham Heights: Allyn& Bacon 1998) 192

[8] Al-Hemyari, n26, p45

[9] For the effects of horizontal merger see Matthew W, "The Price Effects of Horizontal Mergers" (2008) 4 (2) Oxford Journals Economics & Law Journal of Competition Law &Economics 433, 447;Werden G and Luke M.F, 'Unilateral Competitive Effects of Horizontal Mergers In Handbook of Antitrust Economics', ed. (Paolo Buccirossi. MIT Press 2005)

clientele.[1] Post-merger, the result is vertical integration and a single firm now performing both stages of production.

These types of M&As can reduce the reliance of one company upon another. Also, it reduces the costs of the two firms by eliminating redundant processes. This can also mean a merger between two companies involved in an identical business but at different levels. As an example, an upstream oil company may merge with a downstream oil company to streamline operations, or an automobile company may purchase a tyre manufacturer or a glass company.[2]Similarly, a meat processing company could merge with a food distributor.[3] Mergers in such situations permit firms to gain greater control of the manufacturing or selling process within one single industry.[4]

4.3Conglomerate Mergers

Conglomerate mergers occur between two or more companies involved in totally unconnected business activities or in totally different industries. For example, a conglomerate merger could witness the unison of an athletic shoe company merging with a soft drinks company. This category of merger is further subdivided into two main types: mixed and pure. Mixed conglomerate mergers involve companies that are looking for product extensions or market extensions, whilst pure conglomerate mergers, on the other hand, involve firms with nothing in common. Moreover, there are various other subdivisions of conglomerate mergers, such as financial conglomerates, concentric companies and managerial conglomerates.[5]

There are numerous reasons for conglomerate mergers. Amongst the more general reasons are Companies look to add to their overall synergies and productivity by undergoing conglomerate mergers.[6]Also, there are many different benefits associated with conglomerate mergers.One of the major benefits is that conglomerate mergers assist companies in diversification. As a result of conglomerate mergers, the merging companies can also reduce the level of exposure to risks through the sharing of assets and the reducing of business risk.[7]

5.0The Procedure for Mergers in Nigeria

5.1 Preliminary Considerations

The formalities of a merger usually include the following steps:

a) The company may execute a Memorandum of Understanding (MOU) as an indication of their commitment to the process. The MOU spells out the understanding of the parties and "sets the stage for honest and confident negotiation and anticipates the future steps to be taken by the parties".[8] This document is not subject to regulation by the Securities and Exchange Commission. The management of the acquiring and target companies will reach a preliminary agreement.

b) The Board of directors of both companies would then adopt a merger agreement. Both companies must notify their respective shareholders of the terms of the proposed merger and the shareholders must approve the transaction by majority vote.[9]

(c)Once a company has decided to be a party to the merger, it has to hold a meeting to formally approve the merger.[10]

(d) Notification and voting materials usually are provided to shareholders of public companies as part of proxy statements required by statutory instrument. The proxy statements will include the terms of the merger, the consideration that will be offered to the target's shareholders and information about the two companies. These considerations may include stocks and shares or other securities in the acquiring company, debentures, or cash.[11]

(e) If the merger is approved by the required number of shares, the shareholders of the merging company will exchange their stocks for the pre-negotiated consideration. All shareholders must be entitled to receive equal consideration of each of their shares. However a choice of the form of consideration is sometimes permitted.[12]

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[1]For more see Anna L, Pamela H C, and Rayburn G.L, "Development of Prediction Models for Horizontal and Vertical Merger" (1996) 9 (1) Journal Of Financial And Strategic Decisions, 11,23

[2]Doug O'Brien, "Developments in Horizontal Consolidation and Vertical Integration" (2005) The National Centre for Agricultural Law Research and Information, University of Arkansas School of Law 2,

[3]ibid, 115

[4]Al-Hemyari, n26, p.45

[5]For more see Hewitt G, "Portfolio Effects in Conglomerate Mergers, an analytical note for the OECD" (2001) Computation Law and Policy 1, 296

[6]For more details see Furse M, *The Law of Merger Control in the EC and the UK* (Oregon 2007) 223, 224.

[7]Al-Hemyari, n26, p.47

[8]Orojo O, *Company Law & Practice in Nigeria*, 5th ed (London: LexisNexis Butterworth 2008) 344

[9] B Fox & E Fox, n 20, pp. 2-3

[10]Section 121 (5) if a majority representing not less than three-quarter in value of the shares of members being present and voting in person or proxy agree to the scheme, the scheme shall be referred to the commission for approval.

[11] B Fox & E Fox, n 20, pp.2-3

[12]Ibid

5.2 Merger Considerations under the Statutory Provisions

In Nigeria, Merger provisions are contained in part XII of the Investment & Securities Act (ISA) 2007.The Act has categorized mergers into 3 sub-classes determined in accordance with criteria based on market share threshold, annual turnover, assets or combination of a number of factors to be issued by the Commission from time to time(essentially a size of transaction criterion). The categories are small, intermediate and larger mergers. The criteria of what is a small or intermediate or large merger is to be determined and published by SEC. since the coming into force of the ISA in June 2007 no such criteria has been released. However, the ISA 2007 provides that pending the time SEC prescribes the substantive thresholds for the various categories of mergers, the lower threshold shall be N500 Million Naira (approx. USD 3.1 Million) while the upper threshold shall be N5 Billion Naira (USD 31 Million). The implication of the above is that every merger in which the size of the transaction is less than N500 million (USD 3.1 Million) is a small merger and not ordinarily subject to notification and approval by SEC. Where the size of the transaction is between N500 million (USD 3.1 Million) to N5 Billion (USD 31 Million), it is an intermediate merger and subject to SEC notification and approval, and where it is above N5 Billion (USD 31 Million), it is a large merger and also subject to SEC's notification, approval and references to Court.[1]

In view of the threshold provision, which stipulates the lower and the upper threshold, the issue is no longer whether it is a public or private company but whether the transaction falls within the stipulated threshold requiring approval.

The merger procedures in Nigeria would be discussed under the following categories of merger as stipulated by the *Investment and Securities Act* 2007.

5.2.1 Small Mergers

Under the Act, a small merger is defined as a merger or proposed merger with a value at or below the lower thresholds established by the Act. For small mergers, the parties are not required by the Act to notify the Commission unless it is so specifically required but notification can be done voluntarily at any time. However, the Commission may require a company to notify it within 6 months after a small merger has commenced implementation, if the Commission considers that such merger may substantially prevent or lessen competition or cannot be justified on grounds of public interest.[2]Once a notification is made to the Commission in the prescribed form and manner as stated by the Act, the party shall not take any further steps until the merger notification has been processed and approved by the Commission. The Commission is entitled to 20 working days for consideration of the proposed merger and may extend such period to not more than 40 working days for the consideration of the merger approval in which case, the Act requires the Commission to issue a certificate of extension to any party who notified it of the merger.

Upon consideration of the terms of the proposed merger by the Commission in line with the provisions of section 121 of the Act, the Commission shall notify the parties of its approval or give a conditional approval or in some cases state a prohibition on implementation of the merger. Where the merger has already been implemented, the Commission shall further make a declaration that the merger be prohibited forthwith.[3]

5.2.2Intermediate and Large Mergers

The Act has defined intermediate mergers to mean proposed mergers which are between the lower and upper thresholds established in terms of the Act. A party to an intermediate or a large merger must notify the Commission of that merger in the prescribed manner and form.[4] Besides notice to the Commission, notice will also be provided by the two companies to any registered trade union that represents a substantial number of its employees or the employees concerned or representatives of the employees concerned, if there is no trade union.[5]

The Commission has the right under section 124 to investigate or appoint an inspector to investigate the merger and may also require parties to provide further information.

The parties to an intermediate or large merger may not implement that merger until it has been approved, with or without conditions, by the Commission.

Notification of the merger proposal by the parties is condition precedent to any approval by the Commission. Once this condition has been fulfilled, the Commission is expected to within 20 days after having considered the merger terms in line with section 121 of the Act, issue a certificate in the prescribed form approving the merger

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[1]Dimgba N, "The Regulation of Competition through Merger Control: the Case under the *Investment and Securities Act 2007*"being a paper presented at the Nigeria Bar Association Section on Business Law Conference held in April 16, 2009. See also section 120 of ISA 2007

[2] Section 122 (1),(2) &(3)) ISA 2007

[3] Section 122(5) ISA 2007

[4] Section 122(5) ISA 2007

[5]Section 123 ISA 2007

subject to such conditions as the Commission may deem fit to make or may prohibit same as stated in the case of a small merger above. Where the approval is not issued within the stipulated period of 20 working days, the Act still allows the Commission to extend such period for additional 40 days and in this case, a certificate of extension should be issued by the Commission to the party who has notified the Commission of the proposed merger.

The Act also contemplates an implied approval. This arises where no approval notification is issued within the total period of 60 days, the merger in this case shall be deemed to have been approved subject however to section 127 of the Act which entitles the Commission to revoke same if the decision to approve was based on incorrect information for which a party to the merger is responsible or approval was obtained by fraud or either of the merger party has breached an obligation attached to the decision.[1] The Commission shall upon granting a merger proposal cause the notice of approval to be published in a gazette and issue a written reason for the decision.

From the above, it has been argued that the real intention of the lawmaker was to eliminate court sanction for small and intermediate mergers. The Commission is adequately equipped to deal with those types of mergers, and that the time had come for the courts not to be overburdened with small and intermediate mergers.[2] However, for large mergers, the Commission is required to refer the notice to court and to indicate its approval or otherwise.

This clearly means that the court sanctions small mergers where notification is sent to the Commission and large mergers where reference has been made to the court by the Commission. There is no need for a separate application by the parties to court for sanction as the reference by the Commission under section 126 (a) is enough.[3] However, where the merger is approved by the Commission and a reference sent to the court (Federal High Court) for the merger to be sanctioned and when so sanctioned, the same shall be binding on the companies. In sanctioning the approval particularly for small mergers, the court may make any or all of the following provisions[4]-

a) The transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;

b) 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 or for any person;

c) The continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

d) The dissolution without winding up of any transferor company;

e) The provision to be made for any persons who in such manner as the court may direct, dissent from the compromise or arrangement:

f) Such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or merger shall be fully and effectively carried out.

6.1 Issues of effect on Competition in Merger Situation in Nigeria

In Nigeria before approval can be granted to the categories of mergers discussed above. The Securities and Exchange Commission has to consider the desirability or otherwise of a merger from the point of view of the public interest or greater good to the society or economy.[5] This responsibility is exercised with clearly defined criteria and factors to be taken into consideration in arriving at a decision whether or not the merger is against public interest. Whenever required to consider a merger, the SEC is required to initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in section 121, subsection (2) of the ISA.[6] If it appears that the merger is likely to substantially prevent or lessen competition, then the SEC will determine[7]–

(*i*) whether or not the merger is likely to result in any technological efficiency or other pro-competitive gain which will be greater than, and off-set, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented, and

(*ii*) Whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3);

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[1] Section 125 and 127 ISA 2007
[2] Idigbe A, "Merger & Takeover Procedure under the Investment & Securities Act 2007: A Practitioner's perspective" *Guardian Newspaper, March 10, 2009*
[3] Ibid
[4] Section 122 (6)(a)-(f) ISA 2007
[5] Section 121 of Investment and Securities Act, 2007
[6] Section 121 (1) (a), ibid
[7] Section 121 (1) (b), ibid

(*iii*) Whether all shareholders are fairly, equitably and similarly treated and given sufficient information regarding the merger.
(2) When determining whether or not a merger is likely to substantially prevent or lessen competition, the Commission shall assess the strength of competition in the relevant market, and the probability that the company, in the market after the merger, will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including —
(*a*) The actual and potential level of import competition in the market;
(*b*) The ease of entry into the market, including tariff and regulatory barriers;
(*c*) The level and trends of concentration, and history of collusion, in the market;
(*d*) The degree of countervailing power in the market;
(*e*) The dynamic characteristics of the market, including growth, innovation, and product differentiation;
(*f*) The nature and extent of vertical integration in the market;
(*g*) Whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and
(*h*) Whether the merger will result in the removal of an effective competitor.
(3) When determining whether a merger can or cannot be justified on public interest grounds, the Commission shall consider the effect that 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.

Once the initial determination is made, the SEC may then grant an approval in principle to the merger and direct the merging companies to make an application to the court to order separate meetings of shareholders of the merging companies in order to get their concurrence to the proposed merger.[1]

The ISA has also granted powers to SEC to break up a company. Under section 128, where the Commission determines that the business practice of a company substantially prevents or lessens competition, it may order the break-up of the company into separate entities, in such a way that its operations do not cause a substantial restraint of competition in its line of business or in the market. These provisions grant the Commission powers which are traditionally held by an Anti-Competition Commission. In the absence of such a commission in Nigeria, there is value in this power being held by an entity such as SEC, however, it would have been expected that the Act would have included more substantive provisions regarding the use of this power by the Commission, so as to avoid any appearance of abuse.[2]

7.1 Procedures for merger in India

Though in India a myriad of laws, rules, regulations, govern every merger, mergers are primarily regulated under the Companies Act. With the enactment of the Competition Act in 2002, mergers also come within the ambit of this legislation. Merger procedures under the Companies Act 1956 are as follows:

1. Memorandum of Association (M/A): The Memorandum of Association must provide the power to amalgamate in its objects clause.[3] Any provision in the memorandum or articles of the company or any agreement between the company and any other person or any resolution of the company or the Board of Directors, prohibiting mergers of a company shall be void.[4]

2) Scheme of amalgamation
The scheme of amalgamation should be prepared by the companies, which have arrived at a consensus to merge.

(3) Intimation to stock exchanges:
The stock exchanges where merging and merged companies are listed should be informed about the merger proposal. From time to time, copies of all notices, resolutions, and orders should be mailed to the concerned stock exchanges.

(4) Approval of the draft merger proposal by the respective Boards of Directors (BOD):
The draft merger proposal should be approved by the respective BOD's. The board of each company should pass a resolution authorizing its directors/executives to pursue the matter further.

(5) Application to High Courts:
Once the drafts of merger proposal is approved by the respective BOD, each company should make an application to the High court of the state where its registered office is situated so that it can convene the meetings of shareholders and creditors for passing the merger proposal.

[1] Section 121 (4) ibid
[2] Adefulu A, "Mergers and Acquisitions under the Investment and Securities Act 2007" http//www.odujinrinadefulu.com viewed 12/07/13 p. 3
[3] HarikrishnaLohia v. Hoolingooree tea C. (1970) 40 Comp cas 458
[4] See section 376 Companies Act 1956. See also Paranjabe, n 16, p 345

(6) Dispatch of notice to shareholders and creditors:
In order to convene the meetings of shareholders and creditors, a notice and an explanatory statement of the meeting, as approved by the High court, should be dispatched by each company to its shareholders and creditors so that they get 21 days advance intimation. The notice of the meetings should also be published in two newspapers.
(7) Holding of meetings of shareholders and creditors:
A meeting of shareholders should be held by each company for passing the scheme of mergers at least 75% of shareholders who vote either in person or by proxy must approve the scheme of merger. Same applies to creditors also.
(8) Petition to High Court for confirmation and passing of orders:
Once the mergers scheme is passed by the shareholders and creditors, the companies involved in the merger should present a petition to the High Court for confirming the scheme of merger. A notice about the same has to be published in 2 newspapers.
(9) Filing the order with the registrar:
Certified true copies of the High Court order must be filed with the registrar of companies within the time limit specified by the court.
(10) Transfer of assets and liabilities:
After the final orders have been passed by the High Court, all the assets and liabilities of the merged company will have to be transferred to the merging company.
(11) Issue of shares and debentures:
The merging company, after fulfilling the provisions of the law, should issue shares and debentures of the merging company. The new shares and debentures so issued will then be listed on the stock exchange.

6.2 Issue of Adverse Effect on Competition in India

In India, the Competition Act, 2002[1] was enacted to ensure free and fair competition in the market by prohibiting anti-competitive agreements, abuse of dominant position and importantly combinations likely to have appreciable adverse effects on competition within the relevant market in India.[2]The Competition Act creates the Competition Commission of India (the "CCI"). The CCI is charged with regulating business combination transactions in the interest of maintaining competition and prohibiting monopolistic practices. Among other things, the Competition Act requires acquirers of a certain size of transaction to provide timely notice to the CCI and meet the other requirements set forth under the Competition Act.

Sections 5 and 6 of the Competition Act prohibit a combination which causes or is likely to cause an "appreciable adverse effect on competition" (*AAE*) in the relevant market in India and treats such combinations as void. Parties to merger transactions in India are oblige to notify the CCI for the purpose of determining whether the merger would have adverse effect on competition; if the transactions cross the thresholds (based on assets and turnover) specified in the Competition Act. The jurisdictional thresholds prescribed by section 5 of the Competition Act for the Parties and the Group are: the Parties have combined worldwide assets of USD 750 million including combined assets in India of INR 750 crores (approx. USD 143.45 million) or combined worldwide turnover of USD 2250 million including combined turnover in India of INR 2250 crores (approx. USD 430.34 million); or(b) the Group has worldwide assets of USD 3000 million including assets in India of INR 750 crores (approx. USD 143.45 million) or worldwide turnover of USD 9000 million including turnover in India of INR 2250 crores (approx. USD 430.34 million).[3]

If any proposed Combination exceeds the threshold of assets and/or turnover specified in Section 5 of the Act (as aforesaid), the person / enterprise need to intimate the same to the CCI within 30 days of:
(a) The final approval of the proposed merger or amalgamation by the Board of Directors of the enterprises concerned; or
(b) Execution of any agreement or other document for acquisition or acquiring of control.
On receipt of a notification, the CCI is required to form a prima facie opinion on whether a combination causes or is likely to cause an AAE on competition within the relevant market in India within a period of 30 calendar days. A Combination cannot come into effect until a period of 210 days has passed from the day on which the notice was given to CCI or CCI has passed an order under Section 31 of the Act, whichever is earlier.[4]

[1]The Competition Act, 2002 Act No. 12 of 2003
[2]Chaudhuri M and J Sagar Associates, "Mergers & Acquisitions under the Indian Competition Law – A Critical Legal View" http://www.jftc.go.jp/eacpf/01/india_mergers0706.pdf#page=2&zoom=auto,0,651 viewed 22/07/13
[3]Government of India has enhanced the monetary limit of "assets" and "turnover" under section 5 of the Act and the mentioned threshold is after considering such enhancement. For more see Deloitte, n 67
[4] Deloitte, "An Overview of Competition Act 2002" available at http://www.deloitte.com/assets/Dcom-India/Local%20Assets/Documents/Tax%20documents/Competition%20Act,%202002.pdf viewed 22/07/13

If the CCI forms a prima facie opinion that a combination causes or likely to cause an Appreciable Adverse Effect on Competition (AAE), a detailed investigation will follow and the standstill obligation shall continue until a final decision is reached by the CCI or a review period of 210 calendar days has passed.
The parties do not have the power or option to shorten the time limits. However, the parties may expedite the process by co-operating with the CCI and providing the requisite information promptly.[1]If the CCI asks for additional information, it "stops the clock" until the additional information is provided. Therefore, in some cases, the review period may exceed beyond the stipulated time limits.

8.1 COMPARISON BETWEEN NIGERIA AND INDIA

In India, the Companies Act, 1956 is the primary statute that regulates mergers and acquisitions, as noted in the procedure discussed above. Sanction of the High Court is an essential prerequisite for the effectiveness of mergers in India. However, judicial involvement in sanctioning merger proceedings has been significantly reduced in Nigeria under the ISA 2007. The ISA 2007 provides that only in large mergers are the courts allowed to be involved provided the Securities and Exchange Commission (SEC) has sent a notice to the court notifying it that it had examined and approved the mergers. The reduced judicial involvement under the Nigerian Act is a welcome development. These involvements historically have resulted in significant delay, with approval taking from a couple of months to a couple of years. The judicial process can also result in uncertainty. For these reasons, many foreign acquirers in India have avoided acquisition structures that depend on court approval, and only when no other structures are feasible would the parties consider using an arrangement structure.[2]

Also Indian laws do not make categorisation of merger as obtain in Nigeria; there is blanket procedure for mergers irrespective of the size. Another important difference between India and Nigeria; is that Competition Act is not enacted in Nigeria nor does Competition Commission exist. SEC is the primary regulator that considers and approves all matters of mergers and acquisitions. SEC is charged with the functions of anti-trust regulations and monopolies control. However, the SEC has not yet made any regulation controlling monopolies.[3]

Unlike the provision in Nigeria, where a merger could be approved despite the fact that the merger can prevent or lessen competition, if the factors outlined in section 121(1) above exist. In India, the Competition Act did not make such provision. The Act provides that If CCI is of the opinion that the combination has / is likely to cause Appreciable Adverse Effect on competition (AAE) but such AAE can be eliminated by suitable modification to such combination, CCI may propose appropriate modification to the parties. If Parties accept the modification proposed by CCI, it shall carry out the modifications to such combinations in accordance with directions issued by CCI. If parties fail to accept the modification, the combination is deemed to have AAE and shall be dealt with as per the Competition Act.[4]

Although there are differences in the procedure there are also similarities between some of the texts of the regulations of the India companies Act, and the Nigerian ISA. In both Nigeria and India, it is required that the draft merger proposal should be approved by the respective Board of Directors. The board of each company should pass a resolution authorizing its directors/executives to pursue the matter further. The Board of directors of both companies would then adopt a merger agreement. Both companies must notify their respective shareholders of the terms of the proposed merger and the shareholders must approve the transaction by majority vote. A company that decides to be a party to a merger must hold a meeting to formally approve the merger.

9.1 CONCLUSION

Under the India's Competition Act 2002, the provisions relating to anti-competitive agreements and abuse of dominant position are for the protection of consumer interest and enhancing competition in the market place. Similarly, the provisions relating to Combinations are to ensure that a Combination does not create an appreciable adverse effect on competition. Nigeria does not have the Competition Act. It is submitted that Nigeria should follow the path of India and enact the Competition Act and establish the Competition Commission, for the SEC is vested with numerous other functions under the Act which make it difficult to effectively regulate anti- trust competition.

Under the Companies Act 1956 sanction of the high court is the key feature of the Act in merger transactions. India should reduce this judicial involvement of courts in merger process; this would ensure speedy consummation of mergers. India should also classify mergers according to threshold as found under the ISA 2007 and provide separate procedures for each threshold; this would simplify and expedite merger transactions.

[1] Ibid
[2] J. Sagar Associates and O'Malveny,' Mergers and Acquisitions Transactions in India' http/www.omm.com/files/uploadmerger & acquisitions transactions in india.pdf visited 22/07/13
[3] Orojo, n 41, p 347
[4] Deloitte, n 65