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# Regulation of Mergers in Nigeria

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## I. Introduction

In Nigeria, mergers by private or public companies are principally regulated under the Investments and Securities Act 2007 (the "ISA") and the Rules and Regulations made pursuant to the ISA (the "SEC Rules"). The listing rules of the Nigerian Stock Exchange (the "Listing Rules") also contain regulations that impact on merger transactions by public listed entities. The provisions governing schemes of arrangement are contained in the Companies and Allied Matters Act, Chapter C20, Laws of the Federation of Nigeria 2004 ("CAMA").

Pursuant to the ISA, the key regulator of mergers in Nigeria is the Securities and Exchange Commission (the "SEC"). The SEC is also responsible for reviewing mergers to ascertain whether a proposed transaction would give rise to competition concerns.

In addition, there are other sector-specific laws that regulate merger transactions - the prior approval of the relevant sector regulator is required for a change of control.

a. the Banks and other Financial Institutions Act, Cap B3, Laws of the Federation of Nigeria 2004, which regulates the financial sector requires the approval of the Central Bank of Nigeria ("CBN");
b. the Nigerian Communications Act 2003, which regulates the telecommunications industry requires the approval of the Nigerian Communications Commission ("NCC");
c. the Insurance Act 2003, which regulates the insurance industry requires the approval of the National Insurance Commission ("NAICOM");
d. the National Broadcasting Commission Act, Chapter N11, which regulates the broadcasting sector requires the approval of the National Broadcasting Commission; and
e. the Electric Power Sector Reform Act 2005 which regulates the electricity requires the approval of the Nigerian Electricity Regulatory Commission.

These laws and guidelines are binding on the companies in that industry in addition to the SEC Rules.

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## II. The merger control regime

A "merger" is defined in section 119 of the ISA as "any amalgamation of the undertakings or any part of the undertakings or interest of two or more companies or the undertakings or part of the undertakings of one or more companies and one or more bodies corporate". The SEC Rules also define mergers in similar terms and makes a distinction between "horizontal mergers" i.e. mergers involving direct competitors and "vertical mergers" which involve mergers between firms in non-competitive relationships.

Section 118 (1) of the ISA provides that all mergers in Nigeria shall be subject to the prior review and approval of the SEC. This applies irrespective of whether the merging entities are public or private companies. Section 119 of the ISA provides further that a merger may be achieved in any manner, including through either a purchase or lease of the shares, interest or assets of the other company in question; or an amalgamation or other combination with the other company in question.

Notably, the ISA and SEC Rule provide certain exemptions to the requirement to obtain SEC approval. It is only with respect to transactions involving holding companies acquiring shares solely "for the purpose of investment" and not using same by voting or otherwise to cause or attempt to cause substantial restraint of competition or where the acquisition of such shares by a holding company will not tend to create monopoly in any line of business enterprise – that is a holding company that intends to acquire the shares of its subsidiary for investment purposes only -; as well as in the case of "small mergers", that the merging entities are not required to notify the SEC of that merger but are required, only, to inform the SEC at the conclusion of the merger.

There are three categories of mergers for purposes of approval, and SEC Rule 232 (B) provides that the threshold for each category of merger shall be determined by reference to a combination of assets or turnover or a combination of both turnover and assets in Nigeria of the merging entities. The lower threshold for "small mergers" is below =N=250,000,000 (approximately US$ 1.6 million), the threshold for "intermediate mergers" is between =N=250,000,000 to =N=5,000,000,000, while the threshold for "large mergers" is above =N=5,000,000,000 (approximately US$32 million).

## Small Mergers:

Section 122 (1) of the ISA provides that a party to a small merger is not required to notify the SEC of the merger unless it is specifically required by the SEC to do so, and may implement the merger without SEC approval . The parties may however, voluntarily notify the SEC of the merger. SEC Rule 230 further specifies that in a small merger, the merging entities are not required to notify the SEC of that merger but shall only inform the SEC at the conclusion of the merger.

The SEC may, within 6 months after the small merger has been implemented, require the parties to notify the SEC of the merger in the prescribed manner and form if, in the opinion of the SEC, the small merger may substantially prevent or lessen competition; or cannot be justified on public interest grounds. A party to a small merger required to notify the SEC of the merger is not to take any further steps to implement the merger until the merger has been approved or conditionally approved.

Within 20 working days after all parties to a small merger have fulfilled all their notification requirements in the prescribed manner and form, the SEC- may either extend the period within which it has to consider the proposed merger by a single period not exceeding 40 working days and, in that case, must issue an extension certificate to any party who notified it of the merger; or after having considered the merger, may notify the parties of its approval of the merger; approval of the merger subject to any conditions; the prohibition of the implementation of the merger, if it has not been implemented; or if already implemented, a declaration that that merger is prohibited. If, upon the expiration of the 20 working day period or the extension, the SEC has not notified the parties of its decision, the merger shall be deemed as having been approved, subject to section 127 of the ISA. Section 127 (1) of the ISA provides that the SEC reserves the right to revoke its own decision to approve or conditionally approve a merger of any size on any of the following grounds 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.

If the merger is approved by the SEC, the parties can apply to the court (Nigeria's Federal High Court) for the merger to be sanctioned after which, the merger will become binding on the companies in question. The court may by the order sanctioning the merger or subsequent order make provision for any or all of the following matters:

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

An order for the dissolution, without winding up, of any transferor company will only be made where the whole of the undertaking and the property, assets and liabilities of the transferor company are being transferred into the transferee company; and the court is satisfied that adequate compensation has been made with respect to the employees of the company to be dissolved. Where an order provides for the transfer of property or liabilities, that property or liabilities shall be transferred to and become the property or liabilities of the transferee company and in the case of any property, if the order so provides, be freed from any charge which by virtue of the compromise or arrangement ceases to have effect.

Every company in relation to which a merger order is made is required to deliver a copy of the order to the SEC for registration within 7 days after the making of the order. Thereafter, a notice of the order must be published in the *Gazette* and in at least one national newspaper. The SEC is also required to publish a notice of the decision in the *Gazette*; and to issue written reasons for the decision if it prohibits or conditionally approves the merger; or is requested to do so by a party to the merger.

## Intermediate and Large Mergers

Section 123 of the ISA provides that in the case of an intermediate or a large merger, the primary acquiring company and the primary target company are required to each provide a copy of the notice of that merger in the prescribed manner and form to any registered trade union that represents a substantial number of their respective employees; or to the employees concerned or to representatives of the employees concerned, if there are no such registered trade unions.

With respect to intermediate mergers, section 125 (1) of the ISA provides that within 20 working days after all parties to an intermediate merger have fulfilled all their notification requirements in the prescribed manner and form the SEC, after having considered the merger may issue a certificate in the prescribed form approving the merger, approving the merger subject to any conditions; or prohibiting the implementation of the merger. The SEC may extend the period within which it has to consider the proposed merger by a period of no more than 40 working days. If, upon the expiration of the 20 working days period or of the extension, the SEC has not issued a certificate, the merger shall be deemed to have been approved. The SEC is required to thereafter, publish a notice of the decision; and if it prohibits or conditionally approves the merger, or is requested to do so by a party to the merger, to issue written reasons for the decision.

Section 126 of the ISA requires the SEC, after receiving notice of a large merger, to refer the notice to the court; and within 40 working days after all parties to a large merger have fulfilled all the prescribed notification requirements, to forward to the court a statement indicating, whether implementation of the merger is (i) approved;(ii) approved subject to any conditions; or (iii) prohibited.

SEC Rule 229 provides that the SEC shall only approve a merger where it is satisfied that the merger is not likely to cause substantial restraint of competition or tend to create monopoly in any line of business enterprise; and the use of such shares by voting or granting proxies or otherwise shall not cause substantial "restraint of competition "or" tend to create monopoly in any line of business enterprise or that although the contemplated merger is likely to restrain competition, one of the parties to the merger has proved that it is failing.

In considering a merger, the SEC is required, in accordance with section 121 (1) of the ISA to

a. initially determine whether the merger is likely to substantially prevent or lessen competition; and

b. where it appears that the merger is likely to substantially prevent or lessen competition, then the SEC shall also have to determine -

i. whether 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 be justified on substantial public interest grounds.

When determining whether a merger is likely to substantially prevent or lessen competition, the SEC will 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:

i. the actual and potential level of import competition in the market;
ii. the ease of entry into the market, including tariff and regulatory barriers;
iii. the level and trends of concentration, and history of collusion, in the market;
iv. the degree of countervailing power in the market;
v. the dynamic characteristics of the market, including growth, innovation, and product differentiation;
vi. the nature and extent of vertical integration in the market;
vii. 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
viii. whether the merger will result in the removal of an effective competitor.

In determining whether a merger can be justified on substantial public interest grounds the SEC is required to consider the effect that the merger will have on a particular industrial sector or region; employment; the ability of small businesses to become competitive; and the ability of national industries to compete in international markets.

After its initial determination, the SEC may 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 obtain their concurrence to the proposed merger. If a majority representing not less than three quarters in value (i.e. 75%) of the shares of members being present and voting either in person or by proxy at each of the separate meetings agree to the scheme, the scheme shall be referred to the SEC for approval.

## Professional Parties required

Merger applications must be filed by separate financial advisers that are registered with the SEC as an Issuing House) or by the solicitor for each of the merging companies. In the case of small mergers, a single financial adviser may be used.

## Procedure for obtaining SEC approval to mergers:

The procedure for obtaining the approval of the SEC with respect to a merger is set out in SEC Rule 231 as follows:

a. file a merger notice (that is a pre-merger notice) for evaluation with the SEC;

b. once the SEC has given its "approval-in- principle", file an application in the Federal High Court seeking an order to convene a court ordered meeting;

c. following the passing of the resolution by the respective shareholders at the court ordered meeting, file an application with the SEC for formal approval of the merger; and

d. comply with post approval requirements.

In practice, the procedure for carrying out a merger is as follows:

a. consideration and approval in principle of the proposed merger by the boards of the merging companies;
b. issuance of pre-merger notice to SEC;
c. application to the court to sanction the proposed merger and order of the court for separate general meetings of the merging companies;
d. Obtain a "direction" and "clearance" for the merger from the Federal Inland Revenue Service;
e. referral to SEC for approval where the merger scheme is approved by at least three-quarters of the members (either in person or by proxy) of the merging companies at their separate meetings; each merging company will be required to pass a resolution approving the terms of the merger;
f. upon approval of the merger scheme by the SEC and members of the merging companies, either company may then apply to the Court to sanction the scheme;

g. upon approval by the court: publish the court order sanctioning the scheme in at least one national newspaper, file a copy of the court order with the SEC within 7 days of obtaining the order, and file a copy of the Court order with the Corporate Affairs Commission (the Nigeria companies registry).

The overall approval process (i.e. from submission to the SEC of an application for merger approval, to the sanction of such merger by the Federal High Court) can take anywhere from three to six months.

Section 127 (1) of the ISA provides that the SEC reserves the right to revoke its own decision to approve or conditionally approve a merger of any size on any of the following grounds 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

**Penalties:**

Although the ISA and SEC Rules do not provide specific penalties on non-notification of a relevant merger, section 303 of the ISA gives the SEC the power to impose a general penalty of not less than =N=100,000 (approximately US$ 645.00) and a further sum of =N=5,000 (approximately US$ 32.00) per day that the violation continues.

If the SEC considers that a transaction raises competition concerns, it can block the transaction or allow it to proceed but subject to conditions. The ISA specifically gives the SEC the power to, in addition to other sanctions, break up a company into smaller entities (and to forward its decision to the Federal High Court for sanctioning - having first written to the company, reviewed the company's response and if necessary affording senior officers of company opportunities to defend their position) so that its operations will not cause a substantial restraint of competition. Thus, for example, the SEC may allow a transaction to proceed on condition that the parties divest part of their businesses. There is no guidance on whether the SEC could impose other conditions (such as price regulation), although it appears that the SEC has broad discretion with regard to what conditions it imposes.

### Other strategic considerations

The merger rules do not apply to merger transactions that take place outside Nigeria, even where the merging companies have affiliates or subsidiaries in Nigeria. In addition, the concept of a "hostile" takeover transaction is not recognized under the ISA and the SEC Rules, and no particular rules exist to aid a party in a hostile takeover.

## III. Conclusion

The laws regulating mergers in Nigeria are extensive and such transactions must be undertaken in compliance with the laws to avoid any sanctions, which can be far reaching – such as imposition of administrative fines on the entities and the unwinding of the transaction.