

Mergers and Acquisitions as an option for recapitalizing the Stockbroking Industry: The Legal Perspective

Understanding the Legal and Statutory Framework in Executing Mergers and Acquisitions

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Introduction

- Outlook of Presentation:
 - ✓ Review relevant statutes and regulations for carrying out mergers and acquisitions in Nigeria;
 - ✓ Briefly consider any additional regulatory issues that may impact on mergers and acquisitions; and
 - ✓ Provide a few practical suggestions based on my experience in relation to mergers, acquisitions as well as company reconstructions.

Relevant Statutes/Regulations

- Investments and Securities Act, 2007 (the **ISA**)
 - ✓ Part XII of the ISA – Regulation of Mergers, Takeovers and Acquisitions.
- Rules and Regulations issued by the Securities and Exchange Commission ("**SEC**")
 - ✓ In June 2013, the SEC issued its consolidated rules (the **SEC Rules**): Part I SEC Rules provide guidelines for mergers, takeovers and other business combinations.
- Companies and Allied Matters Act, Chapter C20, LFN 2004 (**CAMA**) – section 538 on scheme of arrangement: transfer of assets and winding up of transferor company.

Relevant Statutes/ Regulations Contd

- Key Provision on SEC Approval: Section 118(1) of the ISA . Note exemptions in Slide 6.

'... every merger, acquisition or business combination between or among companies shall be subject to the prior review and approval of the [SEC].'

- SEC approval is required for both private and public companies as well as partnerships.
- Key Considerations:
 - Whether the transaction is in substantial restraint of competition/tend to create a monopoly in any line of business (Section 121 ISA).

Merger

- A merger can be achieved by way of:
 - A classical merger under section 119 of the ISA:
 - Scheme of arrangement under section 538 of the CAMA, which involves the transfer of the undertakings and assets and winding up of the transferor company (See Slide 9).

Merger Contd

- Merger under the ISA: Definition

‘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.’ [Section 119 (1) of the ISA]

- Amalgamation - One legal entity will survive transaction.

Merger Contd

- Exemptions to SEC Approval:

- Holding company that intends to acquire the shares of its subsidiary for investment purposes; and

Small mergers (mergers in which the total annual turnover/assets of the merging entities is less than =N=1 Billion). Requirement to inform SEC upon completion.

NOTE: Acquisition in a private/unquoted public company with assets/turnover below =N=500 Million are not subject to SEC approval.

- Most parties wait for a no-objection from SEC to enjoy the 'exemption' offered under the ISA.

Merger Contd

- Procedure for SEC Approval (SEC Rule 425):
 - ✓ file a merger notice (that is a pre-merger notice) for evaluation with the SEC;
 - ✓ 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;
 - ✓ 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
 - ✓ comply with post approval requirements.

Merger Contd

- Timing to conclude merger (i.e. from submission to SEC to sanction of merger by the Court) – 3 to 6 months

Alternative procedure to Merger – Section 538 of CAMA

- Scheme of arrangement, which involves the transfer of the undertakings and assets and winding up of the transferor company (Section 538 CAMA).
 - ✓ SEC approval required
 - ✓ No court approval
- Key disadvantage - Double-edged sword: transferee company cannot take advantage of sweeping court orders.

Acquisition

- Acquisitions' not specifically defined in the ISA.
- SEC Rule 421, however provides:

An acquisition is 'the takeover by one company of sufficient shares in another company to give the acquiring company control over that other company.

Thresholds - None specified in ISA/SEC Rules: SEC Rule 421 generally interpreted to mean that the approval of the SEC is only required where more than 50% of the shares or equity interests or assets of a company are to be acquired.

Notice obligations to trade unions and employees

- SEC approval required. Exemptions in relation to holding companies acquiring the shares of its subsidiary for investment purposes

Acquisition Contd

- Meaning of “control” of a company. [Section 119 of the ISA]

A person controls a company if that person:

- beneficially owns more than half of the issued share capital of the company;
- is entitled to vote a majority of the votes that may be cast at a general meeting of the company or has the ability to control the voting of a majority of those votes either directly or through a controlled entity of the person;
- is able to appoint or to veto the appointment of a majority of the directors of the company;

Acquisition Contd

Meaning of “control” of a company contds:

- is a holding company, and the company is a subsidiary within the meaning of the CAMA;
- in the case of a company that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
- has the ability to materially influence the policy of the company in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in (i) to (v) above .

Acquisition Contd

- Forms of acquisition:
 - i. Acquisition by private sale/purchase – straightforward by Share Sale and Purchase Agreement. SEC approval required.
 - ii. Takeover bids . Note SEC Rule 133(4) – shares of a private company cannot be made subject of a takeover.
- Management Buyouts (SEC Rule 449)

Tax and competition issues

- Capital Gains Tax
 - Section 29(2) of CITA – FIRS clearance required for any capital gains tax.
 - Section 32A of the Capital Gains Tax: Gains from merger/scheme of arrangement under section 538 of CAMA not subject to capital gains tax.
- Competition issues – no specific Competition Law. SEC has general anti-trust oversight.

Conclusion - Practical suggestions

- Based on my years of experience, I have set out below key practical suggestions in achieving a successful merger/acquisition.
 - It is important to carry minority shareholders along, as aggrieved shareholders can file legal proceedings that may cause expensive delays.
 - Employee issues are also very sensitive. Where the merger will result in redundancies, a well thought out separation package must be presented to employees.
 - A thorough due diligence must be carried out on the transferor company. Don't forget, you will be acquiring all of that company's liabilities as well as its assets.

Conclusion - Practical suggestions contd

- Based on my years of experience, I have set out below key practical suggestions in achieving a successful merger/acquisition.
 - Take advantage of the very wide powers of the court in a merger and ask the court to make all such ancillary orders as will help to bring about the speedy completion of the merger.
 - Get things right the first time. Once the court has sanctioned a Scheme, any mistakes or omissions can only be corrected with the approval of the court.
 - Establish realistic timelines.
 - Retain experienced financial, legal, and other professional advisers



Thank you