Mergers and take-overs procedures under ISA 2007-practitioners' perspective

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MERGERS and takeovers/acquisitions are very similar corporate actions because both combine two previously separate entities into one. In so doing, significant advantages are recorded, some of which are improved company performance and shareholders' value, economies of scale, diversification and so on. The cumulative effect of the above advantages is an improved economy.

Indeed, mergers and takeovers are features of modern business, which are largely responsible for growth of many firms thereby playing a key role in the economic growth of any society. It is in recognition of their impact on any economy that different jurisdictions have tried to regulate mergers and takeover procedures in their laws to suit their peculiar circumstances, and Nigeria is not left out.

Prior to now, we had the Investment and Securities Act (ISA) 1999, which regulated mergers and takeovers. Permit me to add that the ISA 1999 regime of mergers and acquisitions recorded significant success even in the face of apparent lacunae therein. At least, we all witnessed the various small and mega mergers recorded in the country under the ISA 1999 regime. The few lacunae in ISA 1999 which time will not permit me to address, prompted the need for its amendment so as to address the changing circumstances and needs of the corporate sector, the result of which is the new ISA 2007.

This paper intends primarily to outline the significant changes in ISA 2007 with respect to mergers and takeovers and to emphasise areas of interest and concern for the private legal practitioner.

The paper shall be discussed under six parts as follows: merger procedures and control under ISA 2007; applicability of threshold stipulation on private companies; the change of control concept; interface with the regulators and court's intervention, post merger litigations and the role of court and mandatory takeover under Section 131 of the Act.

Part one

Merger procedures and control under ISA 2007 requisite approvals under the Act

A merger means any amalgamation of the undertakings or any part of the undertakings or interests of two or more companies or the undertaking or part of the undertaking of one or more companies and one or more bodies' corporate.1

ISA 2007 categorised mergers into three as follows: small, intermediate and large mergers. To determine which transaction is small, intermediate or large, recourse will be had to the working lower and upper thresholds. The lower threshold is said to be N500,000,000.00 while the upper threshold is N5,000,000,000, pending the time the commission (or "SEC") prescribes the thresholds as per section 120(1)2

A small merger:

"A small merger" means a merger or proposed merger with a value at or below the lower threshold established in terms of subsection 1(a)".3

In other words, a small merger is that which is valued at N500,000,000.00 or less.

Like other jurisdictions, example, South Africa, parties to a small merger are not under an obligation to notify SEC of that merger unless the commission requires them to do so. However, the Commission may require a company to notify it within six months of implementation of the small merger if the commission is of the opinion that the merger may substantially lessen competition or cannot be justified on public interest grounds.

In that case, the parties will take no further steps with respect to implementation of the merger until the commission's decision in relation to the merger (usually within 20 days after notification or such extended time) is made known in terms of whether the merger is approved, disapproved or approved subject to conditions and prohibition of the merger if it is yet to be implemented and if already implemented, a declaration that the merger is prohibited.4

Although it is provided that a party to a small merger is not under obligation to notify the commission, it should be noted that where pursuant to section 121, the commission requests for notification, parties will be under obligation to comply with the notification request to obtain the approval of the commission, followed by an application to court to sanction the merger with several consequential orders as the parties may require.

If after the 20 days period of notification and the extended time not being more than 40 days, the commission has not notified the parties of its decision, the merger shall be deemed to have been approved subject to commission's right to revoke a merger approval under section 127.

Intermediate merger

"An intermediate merger" means a merger or proposed merger with a value between the lower and upper thresholds established in terms of subsection 1 (a)"5

In essence, an intermediate merger is higher than N500,000,000 but not up to N5,000,000,000 in value.

For an intermediate merger, notification to the commission is compulsory. 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.6

In simple terms, if Company A and B are merging, either Company A or B will notify the commission of the proposed merger, then each of the companies will also serve the notification on its registered trade union or employees concerned or their representatives.

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. 7

Just like the case of a small merger notification request, the commission shall within 20 days of fulfilment of notification requirements or such other extended time, notify the parties that the merger is approved, approved with conditions or prohibited. Unlike the small merger with notification requirement, parties to an intermediate or large merger shall not implement the merger until it is approved with or without conditions by the commission.8

It follows that where parties have gone ahead to implement an intermediate merger prior to the commission's approval, then they will be at the mercy of the commission as the commission will have to utilise its discretion to determine the appropriate consequence/effects of such an action.

A large merger:

"A large merger means a merger or proposed merger with a value at or above the upper threshold established in terms of subsection 1 (a)".9

In other words, a merger from N5,000,000,000 and above is a large merger.

Unlike the small and intermediate mergers, once the commission receives notice of a large merger, it will refer the notice to the court and within 40 days after fulfilment of notification requirements by parties forward a statement to the court as to whether or not the merger is approved, approved subject to any condition, or prohibited.

The law does not indicate if parties to a large merger should notify their respective trade unions or employees as in the case of an intermediate merger. This would appear to be an oversight on the part of the draftsmen. If parties to an intermediate merger should notify their employees, it stands to reason that parties to a large merger should also notify. It follows that although not specifically stated, prudence dictates that parties to a large merger should notify their respective registered trade union, or employees' representatives or concerned employees.

Some people have expressed concern that sections 123-126 did not provide for application to court for sanction after the commission's approval. While this concern is legitimate as sections 123-126 on the surface ought to have expressly provided for court sanction, it is noteworthy that the orders which parties may require in terms of Section 122 (6) are generic to all kinds of merger transactions.

It must be stated clearly from a very privileged position as someone involved in the evolution of the ISA that the real intention of the lawmaker was to eliminate court sanction for small and intermediate mergers. It was felt that SEC was adequately equipped to deal with those and the time has come for our courts not to be over-burdened with small and intermediate mergers. However, for large mergers, SEC is required to refer the notice to court and to indicate its approval or otherwise. This clearly means that the court sanctions large mergers. There is no need for a separate application to court for sanction as the reference is enough. The intention here is to reduce cost by avoiding the present double requirement for application to court; first for court ordered meeting and secondly for court sanction. In other words, ISA 2007 sought to streamline the process and make the merger procedure easier.

Also, ISA 2007 sought to curtail delays in the merger process on the part of the regulator SEC by imposing time limits for the commission to indicate its decision. For small and intermediate mergers, SEC has only 20 days to make a decision and 40 days for large mergers. These time limitations for SEC decision are in line with international best practice, which now requires regulators to keep to strict time and performance standards.

It is important to add that pursuant to Section 127 of the Act, the commission has the power to revoke its decision to approve or conditionally approve a merger where its decision to approve or conditionally approve was based on incorrect information by a party or the approval is obtained by deceit or the concerned company has breached the obligation attached to the decision.

What then are the determinant factors in considering a merger?

The key issues are well stipulated in Section 121 of the Act which in effect are, that the merger is to not likely to substantially lessen competition and where it does, that it is likely to result in any technological efficiency or other pro-competitive gain. Other factors are whether the merger can be justified on substantial public interest grounds and whether all shareholders are fairly, equitably and similarly treated.

Indeed, the above merger procedures are similar to the South African practice. For instance, under its Competition Act of South Africa, parties to small mergers are not obliged to notify the Competition Commission except they voluntarily wish to do so or the commission requests for notification on certain grounds similar to what we have. On the other hand, pre-merger notification is mandatory for all transactions that fall within the stipulated thresholds of intermediate and large mergers. In the event of post-merger notification with respect to intermediate and large mergers, parties can expect an administrative fine to be imposed on them by the Competition Tribunal at the Competition Commission's instance. The key difference between ISA 2007 and the South African practice is hinged on the fact that South African merger control is provided for in its Competition Act.

There is a Competition Commission and Competition Tribunal to ensure that the whole essence of its Competition Act is achieved. As at date, Nigeria is yet to have a wholesale competition law in place. It is, therefore, understandable to have the ISA regulate merger control in the absence of a competition law.

A provision, which must be particularly noted is the commission's power to order the break-up of a firm into separate entities where it forms the view that the business practice of a company will substantially prevent or lessen competition.

The break-up will be to achieve the result that the operations of the company do not cause a substantial restraint of competition. Before the break-up order, the affected company will be notified by the commission and given opportunity to make representation to the commission. Thereafter the commission shall refer the break-up order to the court for sanction.10

This power of the commission in section 128 referred to above is far-reaching indeed. The implementation of this sort of provision and power poses significant challenges even to well-established antitrust/competition bodies the world over.

Incidentally, beyond stating the commission's power to order break-up of a company that it considers its business practices to be "substantially lessening competition", the Act gives no further guide. In view of all these, the innovation of a provision such as section 128 in a predominantly securities legislation such as ISA 2007, and the conferment of such a power to a securities regulator such as SEC, is very novel and unique indeed.

The ISA 2007 sought to fill the vacuum created by absence of a comprehensive legal framework for regulation of competition in the Nigerian economy. It is expected that when the Competition Bill becomes law in Nigeria, the capabilities achieved by SEC would be transferred to the new Competition Commission. SEC's true focus should in the long term be determining the fairness of a merger transaction between the various shareholders.

In this regard, the commission requires from applicants for merger approval documents such as valuation reports, financial statements, authorising resolutions of board of directors and general meetings of the companies, among others, to enable it determine the fairness of the deal even though it no longer fixes prices for such transactions.

Generally, it is to be noted that SEC is yet to develop forms and procedure for notification. In other countries, the notification form requests a lot of information and documents both of the companies and of the market.

The time for SEC decision should ideally begin to run only after such a form has been properly filled and all necessary documents supplied and a certificate to the effect that all, necessary documents and forms have been supplied issued by SEC.

Company documents would include those mentioned earlier like resolutions, shareholding, directorship, share valuations, among others, while market information would include product and geographical market, competitors, exempting factors such as efficiency issues, expert reports to such information, among others.

Indeed, the efficiency exemption provided for in Section 121 of ISA 2007 to the effect that an otherwise anti-competitive merger can be allowed if it is shown that it was likely to result in any technological efficiency or other pro-competitive gain, is very modern.

Countries like the United States only recently underwent antitrust review and one of the recommendations was adoption of efficiency argument as ground for exemption. A good example in Nigeria is MNET/DSTV monopoly, which lasted for a couple of years in Nigeria before other players like HITV and Daarsat came on stream. Recall that prior to MNET/DSTV, the cost of obtaining satellite television service was enormous.

You had to buy your own large dish with expensive equipment and even then could not access many stations, which were coded. So when MNET started though they were in a dominant position in the satellite television market because they were more efficient and actually reduced cost for consumers whilst increases their choices, their operations could not be broken up as anti-competitive! Applicability of thresholds stipulation on private companies

In view of the threshold proviso, which stipulates the lower threshold as N500,000,000 and the upper threshold as N5,000,000,00, the issue is no longer whether you are a private company or a public company, but whether the transaction falls within the stipulated threshold requiring approval. In essence, the provisions of small merger with notification request, an intermediate or larger merger applies to public and private companies alike. The applicability of this section to private companies and partnerships if in any doubt was made clearer by section 117 and 118 (2) as follows:

"Without prejudice to the provisions of the Companies and Allied Matters Act, company as used in this Act means any body corporate and includes a firm of association of individuals";

118(2) "the provisions of this part of the Act shall apply to partnerships"

Indeed, it is intended that every merger, acquisition or business combination between or among companies be subject to prior review and approval of the commission.11

Permit me to mention that the applicability of merger sections to private companies was contemplated in ISA 1999. First, Section 99 (2) of ISA 1999 has similar provisions with 118 (2) of ISA 2007. Although, it is arguable that there was no specific provision requiring the commission to control mergers of private companies, that argument can be countered with Section 228 of the rules made pursuant to ISA 1999, which specifically stated that the provisions of the regulations with respect to mergers, acquisition and combination shall apply to public and private companies.

Consequently, private companies are also contemplated in the provisions regulating mergers and acquisitions. However, in practice as observed in the 1999 regime, private companies rarely approached the commission for approval of mergers.

Again, the commission was not hard on enforcement with respect to private companies, perhaps on the basis that most private companies' mergers/acquisitions are small value transactions. The above is also not entirely different from the concept of lower and upper thresholds which is currently provided for in the sense that most small mergers will predominantly be private companies mergers thereby dispensing with the commission's notification expect where notification is requested as stated above. But today, the environment has changed.

In concluding this part, I will like to state again that whether you are a private or public company, once your transaction falls within the thresholds requiring the commission's notification, you are under obligation to notify the commission and obtain its approval before implementing the merger. This is in line with modern practice as the underlying factor is to monitor every merger that would have significant impact in the market with respect to competition issues irrespective of who is involved in the transaction.

The change of control concept

By the provisions of section 119, mergers contemplated therein may be achieved by purchase or lease of the shares, interest or assets of the other company in question, or amalgamation or other combination with the other company in question. The underlying factor is that there must have been a change in control through purchase of shares or amalgamation of companies as stipulated above. The section, that is 119 provides inter alia:

"A person controls a company if that person:

- beneficially owns more than one 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 that person;
- is able to appoint or veto the appointment of a majority of the directors of the company;
- is a holding company, and the company is a subsidiary of that company as contemplated by the Companies and Allied Matters Act;
- 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 paragraphs (a) to (e)".

The change of control concept should be read along with the thresholds requirements under section 120 (4) in the sense that although there may be change of control by virtue of acquisition or amalgamation, the determinant factor as per notification to the commission is whether the transaction is caught by the thresholds requiring notification as a matter of obligation.

In simple terms, change of control or beneficial ownership arising from a small merger does not require notification as a matter of necessity unless the commission requests for notification. On the other hand, once the transaction falls within the intermediate or large merger, notification to the commission is triggered off.

Who is a beneficial owner?

A beneficial owner is the person who enjoys the benefits of a company's shares or property, regardless of whose name the title is in. In terms of companies, the beneficial owner is the person that enjoys the benefits of the company's shares whether there is change of holder in the company's register of members or not.

In practical terms, if for instance, Company A an American Company acquires shares in Company B, a Nigerian Company, to the extent of having one half of the issued share capital of the Nigerian Company, even though the acquirer is not in Nigeria, to the extent that Company A has become the beneficial owner of the Nigerian Company, it is a transaction that requires notification if it falls within the thresholds requiring notification.

The argument that the acquirer is not a Nigerian company will not suffice. This of course is understandable from the underlying basis for notification requirement, which is to assess that impact of the transaction in Nigerian market.

Accordingly, if a transaction satisfies both the control and threshold tests, it will be notifiable even if the parties are foreign firms and do not have subsidiaries, branches or assets in Nigeria. This means that even if, for example, an acquiring firm has no business operations in Nigeria but the target firm has sufficient turnover in Nigeria, the parties will be required to notify the transaction.

Again, the South African practice which is similar to the provisions of ISA 2007 defined the concept of "control" clearly to apply to circumstances where one or more firms, directly or indirectly, acquire or establish (direct or indirect) control over the whole or part of the business of another firm.

The notification requirements of the South African Competition Act are, therefore, triggered when there is a change in direct or indirect control over another firm. Like the ISA 2007, this may be achieved by the purchase or lease of the shares, an interest or assets of the other firm in question; or amalgamation or other combination with the other firm in question.

An interesting South African case of Caxton and CTP Publishers and Printers Limited and Naspers Limited and others, can be used to illustrate the change of control concept. In that case, the question was whether a particular scheme of arrangement by means of which the acquiring party (which post-merger would possess more than 50 per cent of the target firm directly and indirectly but would not enjoy sole control) acquired control that was notifiable.

In fact, 26 per cent of the shares in question were held through an entity, which was jointly controlled by Caxton through a shareholder's agreement. Consequently, it did not exercise direct control over its 26 per cent shareholding. The Competition Tribunal stated that the case was not about how to add up shares but rather whether the shares could be counted for the purpose of establishing control.

In deciding what species of economic interest could legitimately be considered in determining whether the section 12(2)(a) threshold had been crossed, the tribunal held that "there must be limits to the arithmetic of control ... The putative acquirer should, at the very least, on its own, control the indirect shareholding".

The tribunal held further that a mere increase in economic ownership on its own is insufficient to make a showing in terms of section 12(2)(g) and that a party alleging a change of control would also have to show a concomitant ability to materially influence the firm in the manner of a controller.

Are joint ventures subject to merger control?

In view of the above, the question is whether joint ventures are subject to merger control? A joint venture is generally defined as a business arrangement in which two or more parties undertake a specific economic activity together. There are two aspects of the transaction that need to be examined to determine whether a transaction is notifiable which are: change of control; and determination of thresholds.

We are aware that a joint venture transaction may involve as follows:

- Two or more firms jointly forming a new entity for a specific purpose. Here none of the parties would be acquiring control over the other's business and it would, therefore, not constitute a change of control;

- The creating firms transfer assets or interests to the joint venture. This may amount to a merger. If for example, two competitors transfer a division of their businesses to the venture, that transfer will constitute an acquisition by the joint venture; or a special purpose vehicle created to acquire certain divisions of the creating firms;

- Two or more firms acquiring joint control over an existing firm or business, in which none of them previously exercised control. This type may be notifiable as control of the acquired entity would change.

Where the joint venture involves a change of control, the next step is to determine whether it falls within the threshold for the purposes of notification which will be calculated on the basis of what is transferred. For instance, where a division or part of a business of a firm is acquired, it is only that specific asset that will be considered for the threshold.

In summary, change of control and threshold determine whether the transaction is notifiable irrespective of which company is involved. The only circumstance where notification is not required even in the face of a change of control or beneficial ownership is provided under Section 118(3) of the ISA 2007, which excludes the jurisdiction of the commission to review and approve mergers/acquisitions "where the acquirer is a holding company acquiring shares solely for the purpose of investment and not for using same by voting or otherwise to cause or attempt to cause a substantial restraint of competition or tend to create a monopoly in any line of business enterprise".

Part four

Regulators interface and court's intervention

Prior to now, the procedure particularly with respect to mergers of public companies is to first obtain the commission's approval in principle, then file an application to court to request for court ordered meeting to vote on the Scheme.

In the application to court, the approval in principle is exhibited and on the strength of the application, the court will order meetings of respective shareholders to consider the Scheme. After the court-ordered meeting, SEC's approval is also sought and obtained before approaching the court via a petition to sanction the merger in line with the resolutions passed at the court ordered meeting. This whole process is captured under section 100 of ISA 1999.

In a nutshell, two approvals are required from the commission/SEC to wit approval in principle and the main approval. Also, two applications are made to court, one for court-ordered meeting and the other for sanction12.

The above rigorous practice appears to have been dispensed with in the ISA 2007. This is in line with the legislative intent mentioned above which is to reduce transaction cost and create certainty both from an advisory and from a business point of view. The intent as captured in ISA 2007 is to interface with SEC once through making only one notification and seeking only one approval from the commission; this applies to all categories of mergers.

In relation to interface with the courts, with respect to small13 and intermediate mergers, the intent is to limit interface to SEC and to cut out judicial interface from every stage of the transaction. Only in relation to large mergers is judicial interface an element, and even then, this would come by way of a reference made by SEC itself to the court, and not by the transaction parties. The whole essence is to reduce cost and burden on the parties. In all the types of mergers, the hitherto practice of applying for a court-ordered meeting has been eliminated entirely.

On their own, internally parties would have to convene general (EGM) or board meetings to sanction the arrangement and pass necessary resolutions because such resolutions in any case would be part of documents which SEC would require to consider approval of the transaction.

Again, expensive advertisement of court ordered meetings may be saved by the new procedure except SEC decides to insist on advert before meeting to approve merger resolutions. In this regard from a practitioner's point of view, the uncertainty as to implementation of the new merger control procedure by SEC makes it difficult to advise clients on their notification and other obligations when they are involved in a merger process.

Recently, we had to advise a French company, which was in the process of acquiring another French company, which had controlling interest in a Nigerian company with turnover of N7 billion on their notification and other obligations under ISA 2007. It was not as easy as one would have expected because there were certain grey areas, which could have been clarified by issuance of SEC guideline on how SEC would exercise its discretion.

Another way would be for SEC to issue rules that would clarify procedures such as whether for instance there is still requirement for advertisement before approval meeting is held to pass resolution. There is also need for sensitisation and public enlightenment on procedures eliminated by new ISA so both the courts and the private practitioner is not caught unaware and do not engage in unnecessary litigation.

It should be noted that the commission's approval does not dispense with other regulators approvals/notifications, which the companies are subject to. For instance, Central Bank of Nigeria (CBN) in relation to banks, NAICOM in relation to insurance companies, NCC in relation to telecommunications or NERC in respect of power.

Part five

Post-merger litigations and the role of court

The above discussions on the lessened judicial interface envisioned under the ISA 2007 in the course of merger transactions, invites some comment on the current post-merger disputes before the courts, and what should be the appropriate judicial attitude to the invocation of courts jurisdiction in what are ideally purely commercial and economic arrangements over which a body such as SEC is more suited to handle.

The whole motivation informing the curtailment of the courts intervention in merger procedures under the ISA 2007 is the realisation of the fact that assessing the fairness of merger deals, and evaluation of companies are economic issues which a body such as SEC (as opposed to courts) has the capacity to undertake, and as such, there should be judicial deference to the opinion and judgment of SEC as an institution.

Unfortunately, this has not always been the case, for as some of the cases reviewed below show, even under the old law in the ISA 1999 where SEC had approved a merger followed by judicial sanction, some parties have gone back to court sometime down the line to ask the court to unravel the merger arrangement which SEC had carefully considered and approved, and the court sanctioned.

This brings to the fore the extent, propriety and necessity of the exercise of judicial powers in capital market, particularly merger affairs. This is against the undercurrent of jurisdictional conflicts that is perhaps not too obvious but is nevertheless real; in relation to the powers of the courts vis-☐-vis the powers of capital market institutions such as the SEC and the IST.

Clearly, the institutions cannot function effectively in the absence of certainty that their competence shall not be disturbed. Also, transaction parties and their advisers are considerably weakened in the absence of certainty that the deal shall not be disturbed or reversed by subsequent judicial order months or years after the merger had been completed and parties have irreversibly altered their positions in reliance on it.

This makes it difficult if not impossible for the private practitioner to advise his client on likely legal outcome in a merger transaction. In fact, the need for certainty becomes more urgent in view of a recent decision of the Federal High Court in Oceanic Int. Bank v. Victor Odili & ors14 of July 20, 2007, which if allowed to stand, has the potential to unravel the banking mergers concluded two years ago with the approval of SEC and CBN, and thus destroy the operations of the capital market with economy-wide effects.

The case arose from the merger between Oceanic Int. Bank and International Trust Bank (ITB), which merger the FHC (Tijani Abubakar J) had sanctioned after approval by SEC in accordance with the provisions of Section 100(3) of the ISA 1999.

The merger scheme document had provided that: "the shareholders of ITB will be issued shares of Oceanic Bank in exchange for their shares cancelled in ITB only if the post merger Oceanic is able to make sufficient recoveries on the risk assets of pre-merger ITB that will cover the negative shareholders funds of ITB being absorbed by Oceanic".

Subsequent upon the merger and its consummation, some minority shareholders of ITB then applied to the same court and judge that had sanctioned the merger earlier on for a variation of the above provision and substitution of a provision that would allow them receive one Oceanic Bank share for every ITB share that they held. This prayer the judge granted.

This decision is dangerous for many reasons and could portend serious consequences across the capital market in proportions that is difficult to foresee, especially in relation to mergers and takeovers. However, from the point of view of judicial deference to the decisions and authority of the capital market institutions (SEC and IST), the decision could be faulted on the following two specific grounds:

- The judge ignored the fact that the scheme document in question and its provisions had been examined and approved by the SEC, upon which the court had previously given its sanction for the merger.

  Since merger formulae are technical and economic concepts which institutions like the SEC are suited and equipped to handle, without saying so, the decision of the court is extremely troublesome for a private practitioner who wants to advise his clients on a merger transaction.

  For instance, the formula for valuation of shares can be complex such as net assets, shareholders fund, and net profits over a period or quality of management. Usually, a bouquet of these formula is used to arrive at ratio of exchange of shares of two companies in a merger situation. For the judge to arbitrarily impose a ratio of one to one is to deny the economic fundamentals of merger as contained in court sanctioned consensual merger document. The court rewrote the contract for the parties: and

- By revisiting and varying a scheme document which it had earlier sanctioned upon the approval of the SEC, the decision also exemplified judicial challenge to the jurisdiction of the IST. The IST exists to review decisions of the SEC in capital market matters. This includes scheme documents and formulae for merger.

This oversight function of the IST is not taken away by the fact that the under the ISA 1999, the FHC was required to sanction the merger after it has been approved by SEC (the same situation for large mergers under ISA 2007). On a proper and well considered view, the technical nature of mergers and other forms of business combination, the evaluation of which the traditional courts do not have the capacity, could only mean that the approval which the court was to give to the merger after SEC approval is merely a ministerial function (to give the merger scheme judicial imprimatur).

Any challenge on the substantive and technical aspects of a merger which have been approved by the SEC can only be reviewed by the IST and not by a regular court, which on the particular facts of the present case, was functus officio anyway.

Another case worthy of mention, though briefly as it is still in court is the case of M.A. Sulaimon v Spring Bank15 in which some shareholders of some of the legacy banks making up Spring Bank applied to the Federal High Court seeking reliefs, which would have the practical implication of reversing a merger arrangement already reviewed by SEC and sanctioned by court, and which the parties have already implemented.

The moral in the above narration is that while no one doubts the hallowed position of the courts in society and the overarching judicial power to see that things are done properly, even in transactions in the economic sphere, where decisions are taken by a specialist body such as SEC in specialised transactions such as mergers, the courts should defer to the expertise and competence of SEC and should only intervene in cases of crass and palpable misdirection or abuse of power by SEC.

This is limited judicial review role, in which the courts should not seek to substitute their own views of fairness and propriety with that of the body better equipped to make those technical assessments in the particular sphere in question.

It would seem that ISA 2007 anticipated the above problem by trying to clarify who has the power to review an approved merger. As pointed out earlier in this paper, Section 127 of the Act empowers SEC to revoke its decision to approve or conditionally approve a merger where its decision to approve or conditionally approve was based on incorrect information by a party or the approval is obtained by deceit or the concerned company has breached the obligation attached to the decision.

From this provision, it would seem that the courts would not be the appropriate forum to seek to upset an approved merger under ISA 2007. It is hoped that the courts would defer to SEC and only exercise its usual supervisory jurisdiction where they exceed their powers under the law or act in breach of the rules of natural justice.

Part six

Mandatory take-over under Section 131 of the Act

Section 131 (1) ISA 2007 provides that:

"Where any person:

- 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

- 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 increase his percentage of the voting rights, such person shall make a takeover 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.

Section 131 above (mandatory offers provisions) is one of the innovations introduced in ISA 2007. That section places an obligation on a person who either acquired up to 30 per cent or more of the voting rights of a company alone or in concert with others to make a mandatory offer to buy the shares of other shareholders in the class of shares that he has bought the 30 per cent or more shares.

In the same token, if a person alone or in concert with others already has up to 30 per cent but not more than 50 per cent of the voting rights, but subsequently acquires additional shares that would increase his voting rights, he is also obliged to make a mandatory offer to buy the shares of other shareholders of the same class of equity where he made additional investment.

The purpose of section 131 ISA 2007 is to give other shareholders an opportunity to exit a company in the event of change of control presumed to occur upon acquisition of set threshold of between 30 per cent and 50 cent of shareholding of a quoted company by any person acting alone or in concert. Provisions similar to section 131 ISA 2007 can be found in a number of jurisdictions with advanced securities laws with provisions relating to exceptions or waivers for a mandatory takeover provision.

In South Africa for instance, not all acquisitions by an investor who falls within the threshold are prohibited. The South African Code only prohibits such a person from acquiring, in any one year, securities that carry more than five per cent of the voting rights without making a similar offer to other shareholders. The implication is that under the South African Code, if an investor who falls within the prohibited threshold acquires additional shares that are less than five per cent of the voting rights of the company in a single year, he is not obliged to make a mandatory take over bid.

The Nigerian section 131 ISA 2007 on the other hand follows the London City Code in its blanket insistence that any additional acquisitions that increase the voting power of a substantial shareholder beyond the threshold must result in a general offer being made to all other shareholders.

However, it is to be noted that under the London City Code, the Takeover Panel has the right to grant dispensation from the mandatory offer obligation under Rule 9.1 in some circumstances.

Although, the Nigerian Section 131 ISA 2007 did not specifically provide for right to grant dispensation from the mandatory offer obligation, one can take a clue from other jurisdiction and indeed it will not be out of place for an investors who is confronted by challenges revolving around section 131 ISA 2007, to explore the following options.

- Seeking the commission's waiver by way of special dispensation from section 131 obligations; this to be done even before the entry into a share acquisition transaction that would trigger mandatory takeover offer obligations;

- Where threshold is already exceeded unknowingly, seek the commission's ratification of the transaction through waiver of mandatory takeover requirement upon approval of shareholders at a general meeting which approval could be proposed to SEC as condition for receiving its ratification.

Again, there is no reason why SEC cannot by issuance of guideline of rules create the exception for acquisition of less than five per cent over the threshold within one year.

Conclusion

It will be premature to conclude at this stage that we have arrived so to say with the new ISA 2007. This is because the Act is still undergoing its testing phase and some criticisms may come up in its daily implementation. Having said that, one thing is sure and that is the fact that we have an improved Act that seeks to address concerns of many investors in line with international best practices.

Again, the elimination of one phase of approval from the commission, as well as court's intervention is a plus in the sense that lots of time has been saved and of course we are all aware that time is of essence in any investment transaction.

Like every other new legislation, its proper implementation in terms of achieving its purpose is attitudinal. It will require collective efforts of all stakeholders.

In conclusion, I will not fail to emphasise that in the process of implementation, some challenges may be encountered; those challenges are expected and indeed necessary as they will assist the draftsmen in re-evaluating the Act when the need arises to better suit our circumstances.

1 Section 119 of ISA 2007

2 Section 120 (4) of ISA 2007

3 Section 120 (2) (a) of ISA 2007

4 Section 122 (3) (4), (5) (a), (6)

5 Section 120 (1) (b) ISA 2007

6 Section 123 ISA 2007

7 Section 124 (1) (2)

8 Section 123 (3)

9 Section 120 (2) (c)

10 Section 128 of the Act

11 Section 118 (1)

12 The double requirement was instituted by the Federal High Court in the Lipton V Lever Brothers merger case

13 Where notification request is made by SEC in appropriate cases

14 FHC/L/CS/1361/2005. On appeal as CA/L/171M/08.

15 FHC/L/CS/516/2008