Regulation of competition through merger control: Case under the Investment and Securities Act 2007

By Nnamdi Dimgba

Introduction

THE enactment of the Investments and Securities Act (ISA) in June 2007 was an opportunity to improve the legal rules governing the operation of the Nigerian capital market. The new Act clarified some of the ambiguities present in the pre-existing 1999 Act, in areas such as the scope of jurisdiction of the Investments and Securities Tribunal (IST), the applicability of the capital market legal rules to private companies in certain respects, and the coverage of the Investors Protection Fund (IPF) among others. Beyond the clarification of ambiguities, the new Act also came with some bold new measures such as the redefinition of the relationship between the Securities and Exchange Commission (SEC) and other sector regulators by making approvals or dispensations granted by sector regulators, particularly in the area of merger transactions to be subject to a second approval by SEC.1 Another innovation brought by the ISA 2007 into securities regulation in Nigeria, in keeping with the trend in advanced jurisdictions, was the concept of mandatory takeovers.2

None of the above is the focus of this paper.3 Rather, this paper is concerned with the enhanced competition law provisions brought in by the ISA 2007 through its merger control provisions. Prior to the Act, Section 100 of the ISA 1999 mandated SEC to approve mergers on the condition that such shall not lessen competition. Owing to the very vague and fleeting way in which that requirement was worded, with no further guidance provided on what SEC should be looking out for, there was strong opinion that as far as competition issues were concerned, these were not really considered by SEC,4 but that the later always only focused on assessing merger transactions by reference to the fairness of a merger deal on the totality of the shareholders of the merging companies, which test or requirement though not expressly mentioned in the Act, was consistent with the traditional role of a securities regulator such as SEC.

The lack of consideration or insufficient consideration of competition issues in the appraisal of mergers in Nigeria by SEC is intended to be changed by the very robust competition provisions introduced by the new Act, modelled after the system in the South African Competition Act. Additionally, following the persistent frustration arising from the failure or lack of commitment of the Nigerian government to the enactment of a competition law in Nigeria, the thinking by the panel of experts who advised on the reform of ISA was to introduce competition law into Nigeria through the less controversial route of securities regulation albeit via merger control, pending such a time that the enactment of a full competition law in Nigeria becomes more politically acceptable or overcomes the powerful forces aligned against its emergence. As the saying goes, half bread is better than none.

This paper examines the extent to which the above belief, though noble, is in fact realisable. It argues in the main that, as well intended as the introduction of competition law through the ISA's merger control provisions are, there are a number of factors which might inhibit the attainment of that goal. It argues that some of the factors are internal to the Act in itself, arising from the model that was emulated in the Act, while others have nothing to do with the model but arise necessarily from the absence of a complete competition law system in Nigeria.

For clarity, the sole focus of the paper is on the effectiveness of competition law as has been introduced by the ISA 2007's merger provisions. The paper is not concerned with the other strengths5 or weaknesses6 of the merger portions of the ISA 2007 as drafted. Those are the concerns of other available literature.7 Part II of the paper would discuss generally the relationship between mergers and competition law, highlighting the competition problems that could arise from each of the different types of mergers. Part III would present the key provisions of the ISA 2007 on merger control. Part IV attempts a critique of the effectiveness of the provisions vis-☐-vis the goal of regulating competition in Nigeria while Part V is the conclusion.

II. The Relationship Between Mergers and Competition Law

A merger occurs where two or more formerly independent entities unite. The essence of merger control is to enable competition authorities to regulate changes in market structure by deciding whether two or more companies may combine or consolidate their operations into one. Since competition authorities are hostile to anti-competitive agreements concluded between independent companies, especially horizontal ones, it is not surprising therefore that they are also suspicious of mergers since they do tend to create a more permanent and lasting change on the market than agreements.8

Depending on whether a merger is horizontal, vertical or conglomerate, it raises a number of competition issues.

a. Horizontal Mergers

Horizontal mergers occur when formerly distinct enterprises operating on the same level of the market combine. For example, a merger between soft drinks manufacturers Coca-Cola and Pepsi Cola. Because by its nature this type of merger eliminates a present, competitive force, it readily raises competition concerns. As a commentator noted, because the horizontal merger involves two firms in the same market, it produces two consequences that do not flow from vertical or conglomerate mergers: 1) after the merger the relevant market has one firm less than before; 2) the post merger-firm ordinarily has a larger market share than either of the partners had before the merger.9

b. Vertical Mergers

Vertical mergers on the other hand occur when two or more distinct enterprises operating at different levels of the market combine. For example, a merger between Coca Cola and a major sugar manufacturer (sugar being a major raw material for soft drinks) or a major national distributor of soft drinks. Though these types of mergers are more benign than horizontal mergers, they may nevertheless raise competition concerns. The principal and most common threat of a vertical merger is the potential it may create for predatory foreclosure and profit squeeze.10 To illustrate, consider the case of the example given above of a merger between Coca Cola and a major national soft drinks distributor, thus enabling Coca Cola (a powerful firm) to expand vertically from the production to the marketing level. The newly-integrated firm may be able to injure its non-integrated competitors by withholding supplies of sugar from them (having also merged with the major sugar manufacturer at the upstream level) or foreclosing distributional outlets to them (having also merged with the major distributor). Alternatively, it may be able to raise its supply price for sugar and simultaneously lower its market price for soft drinks so as to squeeze the profits of its non-integrated competitors to unremunerative levels.11 If, as a result, the non-integrated competitors are eliminated or their influence destroyed,12 the vertical merger will have served to promote the extension of market power from one level to another in the process. With the elimination of independent sources of supply and channels of distribution, only the more difficult, more expensive, and less likely entry at both levels simultaneously will seem to have a chance of success. The vertical merger would thus raise both immediate and psychological barriers to the entry of new competitors.

c. Conglomerate Mergers

Conglomerate mergers occur when enterprises operating in different markets combine. For example, a merger between Coca Cola and a major hotel chain. On the surface, since there is no previous competition existing between these two firms, it may be thought that this type of mergers would be considered neutral from a competition point of view. However, conglomerate mergers may have the following anticompetitive effects: (1) If one of the firms is especially large, then its introduction into any of the other firm's markets may adversely affect the competitive behaviour and raise psychological barriers to entry in any of these markets; (2) A diversified firm may be able to subsidise predation in one market with profits from another; (3) If the acquiring firm is standing at the edge, poised to enter any of the acquired firm's markets, and further, if that market's behaviour is influenced by this fact, then the merger, by eliminating this influence, may have an adverse effect on that market; (4) By increasing the number, volume and type of goods bought and sold, a conglomerate merger increases the chance that, in imperfect markets, the merged firm's buying power can be used to induce others to buy its products or services.13 This potential reciprocity operates in this way: "If you buy product X from me, I (my newly acquired division) will buy product Y from you". This potential reciprocity may foreclose competitors.14

From the above, it is clear that generally mergers may raise severe competition concerns. In particular, they may result in the undertakings acquiring or strengthening a position of market power and, consequently, in an increase in the market price of the products or services on the relevant market. A merger between two or more previously independent undertakings which does not lead to the creation of an individual dominant position may nonetheless lead to a substantial increase in the concentration of a particular industry. This may lead to the creation or strengthening of a collective dominant position on an oligopolistic market and may consequently facilitate collusion, explicit or tacit, between the undertakings operating on the relevant market. As a commentator put it: "These structural changes raise two potential competitive concerns. First, by eliminating the competitive constraints, which currently exists between the parties, the merger may weaken to a significant degree the strength of the overall competitive constraints acting on one or both of the two parties. As a result, the prices charged by the merged entity may increase relative to their pre-merger level. A merger which has these characteristics is said to give rise to a situation of single dominance the unilateral effect of the merger...Secondly, the merger may lead to a reduction in the effectiveness of competition if the change in market structure creates a competitive environment more favourable to sustainable tacit collusion.15

Many competition authorities, therefore, adopt a merger policy, which seeks to prevent undertakings from merging to create or strengthen a collective dominant position. As Hovenkamp states in relation to US merger law: "Since we cannot go after oligopoly directly under section 1 Sherman Act, we do the next best thing. We try to prevent...the creation of market structures that tend to facilitate...collusion-like outcomes".16

However, for all their drawbacks, mergers also generate certain advantages, which in the long run conduce to the overall good structure of the economy and therefore enhance competition and market efficiency. For instance, mergers give the owner of a business the opportunity to sell it. Without this possibility, entrepreneurs might be reluctant to start a business. And without entrepreneurs starting businesses there would not be competition in the first place. A merger may provide an escape route for a company facing an otherwise inevitable liquidation. In a case such as this, the possibility of selling the business to another may mean that productive assets are kept in production and that creditors, owners, and employees are protected from the adverse consequences of the undertaking's failure.17 As a commentator noted: "A policy of free transferability of capital assets tends to put them in the hands of those who will use them to their utmost economic advantage, thus tending to maximize society's total output of goods and services...Entry by merger may stimulate improved economic performance in an industry characterised by oligopolistic lethargy and inefficiency."18

Further, mergers provide many other efficiency opportunities. These include economies of scale in production.19 Such economies will be crucial in a market in which the cost of production of a product is high in relation to the size, or anticipated size, of the market or where there is a minimum efficient scale of production. The merger may also give rise to other operating efficiencies20 such as greater capacity for research and development, leading to more innovation. Efficiency in management is also promoted since mergers often bring new and superior management to the business.21 All these advantages would be difficult to attain through internal growth.

It is precisely because of the above beneficial effects of a merger that generally antitrust bodies the world over are reluctant in making mergers unlawful per se, unlike price-fixing, market division and other cartel agreements and abuses of dominant positions, or even coming anywhere near such a rule. In fact, most operate with the guiding principle that mergers are good things.22 The task of the competition authorities is to identify and prohibit those mergers, which have such an adverse impact on competition or society that any benefits resulting from them are outweighed or should be ignored. By and large, this involves a careful balancing act on the part of the authorities.

III Merger provisions of the ISA 2007

Categorisation of Mergers

The merger provisions of the Act are contained in Part XII. The key innovation here is the categorisation of mergers into 3 sub-classes determined in accordance with criteria based on market share thresholds, annual turnover, assets or combination of a number of factors, to be issued forth by SEC through regulations from time to time (essentially a size-of-transaction criterion). The categories are small, intermediate and large mergers. Essentially, small mergers need not be notified unless SEC orders parties to do so; intermediate and large mergers must be notified and approved by SEC. This categorisation of mergers into 3 types in ISA 2007 has its roots in the South African competition law, and first found its way into Nigeria in a revised version of the Federal Competition and Consumer Protection Bill.

In terms of jurisdictional thresholds for the application of merger control, the ISA provides that an application must be made to SEC for a formal approval of any intermediate or large merger in Nigeria.23 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 provides that pending the time SEC prescribes the substantive thresholds for the various categories of mergers, the lower threshold shall be N500,000,000 (Five Hundred Million Naira) while the upper threshold shall be N5,000,000,000 (Five Billion Naira). The implication of the above therefore is that every merger in which the size of the transaction is less than N500 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 to N5 billion, it is an intermediate merger and subject to SEC notification and approval; and where it is above N5 Billion, it is a large merger and also subject to SEC's notification and approval.24

As in 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.25

Third Party Input in the Merger Process

With respect to an intermediate merger, besides notification of the Commission, there is scope for the involvement of relevant stakeholders in the merger process. The Act imposes a requirement in the case of an intermediate mergers for the parties to provide a copy of the merger notice 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 are no such registered trade unions.26

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. Idigbe explains that this would appear to be an oversight on the part of the draftsmen. For 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.27

Reduction of Judicial Involvement

Another key feature in ISA 2007 was the drastic reduction of judicial involvement in the whole merger control process, in comparison to the situation under the ISA 1999 where there were two interfaces with the courts in a merger procedure. Thus only in the case of large mergers are the courts supposed to be involved, and only then not until the Commission had sent a notice to the court to inform the court that it (SEC) had examined and approved the mergers. The former situation of going to court to get preliminary orders before holding company meetings to consider and approve the merger transaction appears to have been done away with. As explained by Idigbe who was a member of the panel that advised on the reform of the ISA 1999:28

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 overburdened 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.

Reduction of Delays in the Merger Assessment Process

Also, ISA 2007 sought to curtail delays in the merger process by imposing time limits for the Commission to indicate its decision. For small and intermediate mergers SEC has only 20 days to make a decision29 and 40 days for large mergers.30

It is important to add that pursuant to section 127 of the Act, the Commission has the power to revoke its decision approving a merger where such approval 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.

Power to Impose Structural Remedies

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 restrain 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.31 To state the obvious, this is a far-reaching antitrust power. 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", and reference to court for sanction, the Act gives no further guide on the circumstances in which the business practices or what business practices would come to be considered as "substantially lessening competition." Hopefully, SEC would have to develop and issue guidelines on how these powers would be exercised.

Approval of Sector Regulators does not oust SEC's Merger Jurisdiction

Note must also be taken of section 118 of the Act, which unlike the 1999 Act provides that transactions consummated pursuant to authority given by any Federal Government owned agency under any statutory provisions vesting such power in the agency, shall in addition be subject to SEC's approval.

Transactions Caught

Under the ISA 2007 a transaction is a merger and therefore, caught if it is an amalgamation of the undertakings or any part of the undertakings or interest of two or more companies or the undertakings or part of the undertakings of one or more companies and one or more bodies corporate. And the above may be achieved in any manner including (i) purchase or lease of the shares, interest or assets of the other company in question, or (ii) amalgamation or other combination with the other company in question. Also, "control" is achieved if (a) a person beneficially owns more than one half of the issued share capital of the firm; or (b) is entitled to cast a majority of the votes that may be cast at a general meeting of the firm or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person; or (c) is able to appoint or to veto the appointment of a majority of the directors of the firm; or (d) is a holding company, and the firm is a subsidiary of that company as contemplated under the Companies and Allied Matters Act; or (e) in the case of a close corporation, owns the majority of members' interest or controls directly or has the right to control the majority of members' votes in the close corporation; or (f) has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in the preceding paragraphs.

Substantive Assessment of Mergers

In terms of the substantive assessments of the merger, mergers are assessed against three (3) tests, which are both sequential and alternatives, namely: (i) the test of 'substantial lessening or prevention of competition' (ii) the test of "technological efficiency or pro-competitive gain greater than the harm to competition"; and (iii) the test of justification 'on substantial public interest grounds'. The latter would allow considerations such as the effect of the merger on employment, particular industrial sector, and the ability of national industries to compete in international markets.32 In determining whether a merger is likely to substantially prevent or lessen competition, SEC 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: the actual and potential level of import competition in the market; the ease of entry into the market, including tariff and regulatory barriers; the level and trends of concentration, and history of collusion, in the market; the degree of countervailing power in the market; the dynamic characteristics of the market, including growth, innovation, and product differentiation; the nature and extent of vertical integration in the market; 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 whether the merger will result in the removal of an effective competitor.33

Independent of any of the above three tests, SEC is also mandated to also determine whether all the shareholders of the companies have been fairly, equitably and similarly treated.34

IV Effectiveness of the Merger Control Provisions in the ISA 2007 vis-□-vis the Regulation (Promotion) of Competition in Nigeria

It is accepted that the elaborate provisions in ISA 2007 are well intended, motivation being to reduce the deficit created in the Nigerian legal system by the absence of a competition law regime. Firstly, the creation of elaborate provisions on competition and the conferment of competition powers on SEC by the panel of experts who reviewed the ISA 1999 and came up with the 1SA 2007 was a reaction of the persistent failure of the Nigerian state to enact a full-fledged competition law in Nigeria. The panel had sought to use the opportunity afforded them to revise the ISA to bring in elaborate competition law provisions into the Nigerian legal system. The thinking was that when the competition bill is enacted and a proper competition body set up, SEC would hands off jurisdiction on all competition issues in deference to the new competition body.35 A second thinking is that by having SEC familiarise itself with competition law and be forced to develop capacity in this area, upon the creation of a new competition body (whenever it is established), hopefully the capacity developed within SEC in terms of manpower and expertise, would form the foundation staff of the new competition body and thus assure it of an effective early start.36 This is normal with all new Commissions such as Pencom and NERC where old staff of the BPE involved in the creation of those Commissions as part of the public sector reform mandate of the BPE provided the initial staff.

However, without prejudice to the good intentions of the panel, assessing the elaborate competition provisions in the Act critically and objectively, there are a number of factors upon which the argument could be made that the provisions would not in real terms reduce the deficit in any way of the absence of a competition law in Nigeria or have solved the problem. There are a number of possible grounds to support this assertion.

1) Competition law has traditionally been made up of various interdependent and complementary components all of which have to exist together in a system for the effectiveness or strength of each or any one of them to be felt. These are: a) Control of cartels and restrictive agreements; b) control of dominant positions and their abuse; c) regulation of prices in a natural monopoly market; and d) Merger control. Merger control is therefore only one aspect of an effective competition law system. For merger control from a competition point of view to be effective or to have any meaning at all, there must also be fully operational the other aspects of a competition law system all of which do need to be integrated with the merger control regime. Nigeria does not have any competition rules for all the other components. In the absence of any rules for the other competition law components as mentioned above, the notion of an elaborate competition law provision for mergers might be of limited effect or even be misconceived in terms of the competition expectations, no matter how well the intents are. I note the attempt to bring in dominance control through section 128 but for reasons argued below, it seems that even that is fraught with problems and limitations.

As stated in the preceding section, mergers are generally looked upon in a benign way by antitrust/competition authorities. Competition authorities can afford to do so given that they have in their legal kit the other tools for controlling competition in the form of explicit and well defined rules on other components, which they can wield harshly to correct or deal with any problems arising following a benign approval of a merger by the authorities. There cannot be an alternative to the institution of an integrated competition law system, which unfortunately we do not have.

2) As far as competition is concerned, the model adopted in the ISA does not really give any guarantee to the yardstick of competition. As already reported, following the South African model, SEC is to consider first whether the merger is likely to substantially lessen competition. If SEC were to end the analysis here, then one would have been glad that to a large extent, competition is going to be protected. But unfortunately or incidentally, the analysis does not end there. If SEC comes to the conclusion that the merger would substantially lessen competition, SEC would consider if the merger can contribute to technological efficiency or some other gain offsetting the harm to competition to be caused by the merger, and if so, shall approve the merger irrespective of the fact that it substantially lessens competition. Assuming that the otherwise anti-competitive merger is not saved by any technological efficiency that it has, SEC is thirdly mandated to consider and if thought fit approve the merger on "substantial public interest grounds" by reference to factors such as employment, regional development etc. In other words, the model is such that in the event of conflict, other policy considerations such as industrial policy and regional development have to triumph over competition policy. And it is my view that there will always be conflicts, particularly given the amorphous nature of the 3rd test; the test of public interest. In other words, the design is such that whatever competition elements that appear to have been enhanced in ISA 2007 vis-a-vis ISA 1999 run a serious risk of being cancelled out by the industrial policy elements in the merger control provisions of the Act.

3) The Act confuses or misconceives the proper role of SEC. In other words, even assuming the competition provisions in ISA 2007 are intact, and not cancelled by the industrial policy elements, does SEC really have the capacity to consider competition law issues. I am tempted to answer the question in the negative, which is to say that I doubt if such a competence exists within SEC, though I admit that this could be cured by SEC engaging the services of specialists in the field, and to gradually build the capacity in-house. However, in the period before any such capacity is engaged or developed in-house, I fear that because the Act provides a number of alternative tests, namely competition policy, industrial policy, public interest, there will always be a tendency for SEC to navigate towards the direction of more familiar, safer and populist territories of industrial policy and public interest to the detriment of competition considerations. Indeed, due to the esoteric nature of competition law and its novelty in this jurisdiction, while SEC may pay lip service to the test of the "effect of the merger on competition", the real test would be the other alternative tests, to wit, industrial policy and test of public interest.

Part of the reason why SEC might take the path predicted above could be found in the confusion of roles conferred upon it. The ISA 2007 combines the role of antitrust enforcer/competition authority and that of securities regulator in SEC in a manner that is unique and unprecedented. In all jurisdictions, SEC or similar bodies in a merger have never had to consider and determine the impact of a merger transaction on competition. They traditionally have concerned themselves with the fairness aspect of the deal while on competition issues they have to defer to a separate body with the mandate to consider the competition law aspects of a merger. Where in the middle of consideration of a merger issues of competition are raised, a body such as SEC mandatorily have to stay proceedings until the body equipped with the competition law jurisdiction finishes its assessment and approves the merger, before SEC or its equivalents continue with the determination of the fairness aspects of the deal. In the UK for example, the Takeover Panel deals with the fairness issues while the Office of Fair Trading (OFT) and Competition Commission (CC) deal with competition law issues. By the City Code on Takeovers and Mergers, once a merger is referred to the Competition Commission, the Takeover Panel automatically stays action. In South Africa, the Securities Regulation Panel (SRP) performs the role of the UK's Takeover Panel and deals with the fairness aspects of a merger while the Competition Commission and Competition Tribunal deal with the competition issues.

4) Further to the above, the Act seems to misconceive the proper role of SEC by virtue of some specific antitrust powers given to SEC outside the sphere of merger control. This is evidenced for example by the conferment of the power to break-up a company into separate entities on SEC by section 128 of the Act, which is an abuse of dominance power normally exclusively reserved for an antitrust/competition authority. I doubt if a securities regulator such as SEC is well-equipped to play the role of an antitrust enforcer or competition authority in this way. This power of the Commission in section 128 referred to above to impose what is known in competition law parlance as "structural remedies" 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, and is likely to even present greater challenges to SEC in the absence of any guide in the Act. In fact, in the history of antitrust, it is on about two occasions that such far-reaching structural remedies have been imposed. The first is in the early 20th century at the early stages of the antitrust movement when the US judiciary ordered the break-up of Rockefeller's Standard Oil into separate entities because of its super-dominant position in the US economy. The second was in the early 21st century when the US judiciary ordered the break-up of Microsoft into separate entities, also on account of its super-dominant and domineering position in the IT sector of the US economy.[37]

In view of the historic limitation to this sort of power in antitrust law, 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 on a securities regulator such as SEC is quite ambitious. In justifying the rationale behind this provision, Idigbe explains that the ISA 2007 sought to fill the vacuum created by the absence of a comprehensive legal framework for regulation of competition in the Nigerian economy, and that the expectation was that when the Competition Bill becomes law in Nigeria, the capabilities achieved by SEC would be transferred to the new Competition Commission, while SEC's true focus should now revert to the determination of the fairness of a merger transaction between the various shareholders.[38]

On the basis of the above factors, there is a real possibility, and I seriously suspect, that irrespective of the elaborate competition law provisions in the ISA 2007, SEC would probably continue doing what it has been doing before and ignore the issue of competition, especially where it conflicts or tends to contradict its traditional role. The net result therefore is that at the end of the day, on the issue of competition promotion or protection, nothing really changes, and at best, the presence of those elaborate provisions in the ISA might be largely cosmetic and create an illusion of progress and a sense of false achievement in all those who have been pushing and might otherwise push even harder for the institution of a full competition law system in Nigeria.

V. Conclusion

As made clear at the beginning, this paper is not concerned with the merits or otherwise of the new merger provisions in ISA 2007 vis-□-vis the 1999 Act, as those are rightly the focus of other available literature. The focus of the paper is on the question of the extent to which the elaborate competition provisions in the merger portions of the Act would succeed in promoting or protecting competition. As was made clear in the paper, the good intentions of the authors of the Act is recognized and is a worthy response to the government's lethargic approach to the institution of a competition law regime in Nigeria through the enactment of the competition bill. However, ample grounds exist to doubt if those elaborate provisions would by themselves change anything on the ground. SEC, as they say, has its work cut out in its new role as an antitrust enforcer. To ensure that those provisions do not remain cosmetic or exist as paper tigers, SEC must be conscious of the limiting factors identified in the paper and must work to overcome them. Hopefully, the Commission may well succeed in this new enterprise. However, whether the Commission succeeds or not, one thing that remains very clear is that the idea of a piece-meal introduction of a competition law in Nigeria is not desirable; and it seems that there are occasions when no bread is in fact better than half. When all is said and done, solution lies in the taking of urgent steps to enact a full competition law in Nigeria. I must therefore seize the moment that this conference has afforded me in renewing my calls for the passage of such a law in Nigeria.

In my paper at last year's conference,39 I did recommend for the creation of a Competition Promotion Office (CPO) within any relevant government agency e.g. the BPE or independently within the Presidency, such body to be devoted to the promotion of consciousness and grooming of expertise on competition issues in the country, even before the passage of a competition law. This body I believe would take charge of all issues related to competition in the country, and lead the charge on competition advocacy functions and sensitisation efforts in the country. In my view, the conferment of elaborate competition responsibilities on SEC by the ISA 2007 could present an opportunity, if nothing else, for SEC itself to champion the setting up of the CPO, possibly within SEC or under its patronage. Possibly, such a body would facilitate an effective exercise by SEC of the competition powers conferred on it by the Act and to adorn very well the new antitrust cloak cast upon it.

- Dr. Dimgba, a partner with Punuka Attorneys, Lagos, presented this paper at the just-concluded conference by Section on Business Law (SBL) of the NBA, at Abuja.

1 Hitherto, the practice and law was that any approvals or dispensation granted by sector regulators effectively immunised or insulated a transaction from the reach of SEC in terms of seeking SEC's approval as the approval by the sector regulator was enough.

2 See section 131 ISA 2007.

3 Those are already the subject of other literature; see e.g. Anthony Idigbe and Nnamdi Dimgba, "Appraisal of Mandatory Takeover Offers under the Investments and Securities Act 2007", Guardian Newspapers, 09 December 2009.

4 On these reservations, see Afolabi Elebiju, "The Investments and Securities Act of 1999: An Overview of Antitrust Considerations in Regulation of Mergers in Nigeria" (2001) International Company and Commercial Law Review, Vol. 12, Issue 9; see also Nnamdi Dimgba, "A Review of Merger Control under

Nigeria's Proposed Competition Law", Journal of Law and Investment, vol 1 2007.

5 For an exhaustive treatment of the strengths of the merger portions of the ISA 2007, see Tony Idigbe "Merger and Takeover Procedures under the Investment and Securities Act 2007: A Practitioner's Perspective" Guardian newspaper , 10 March 2009.

6 For an exhaustive treatment of the weaknesses of the merger portions of the ISA 2007, see Gbolahan Elias, "The ISA 2007: Two Merger Law Problems" in Celebration of a Legal Maestro, Essays in Honour of Justice Salihu Modibbo Alfa, page 119.

7 See notes 3 and 4 above.

8 Alison Jones and Brenda Sufrin, EC Competition Law. Text, Cases and Materials (2nd edn., Oxford, OUP, 2005), p. 846.

9 H. Hovenkamp, Federal Antitrust Policy: The Law of Competition and its Practice (West Publishing, 1994), 445.

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

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

12 Non-integrated firms are not likely to pursue policies in opposition to the interests of the vertically integrated competitor on whom they depend for their supplies.

13 See generally Ellis, supra, 473-477.

14 See Harlan Blake, supra, 89.

15 S Bishop and M Walker, The Economics of EC Competition Law: Concepts, Application and Measurement (Sweet & Maxwell, London, 1999), 6.08.

16 H Hovenkamp, op. cit., 445 and 447.

17 Alison Jones and Brenda Sufrin supra, p. 849.

18 D Turner, 'Conglomerate Mergers and Section 7 of the Clayton Act' (1965) 78 Harvard Law Review 1313, 1317, cited in Jones and Sufrin supra.

19 This argument will be strongest in the context of horizontal or, sometimes, vertical mergers where related operations are combined.

20 Arising, for example, from broader product lines, streamlining of the sale force, and the use of common advertising, etc.

21 Indeed, the simple threat of a take-over may encourage the incumbent management of a company to strive for efficiency (rigid control of mergers will remove or greatly reduce this perceived threat). However, over-confident entrepreneurs may overestimate their ability to manage more complex undertakings or businesses in an unfamiliar field or market.

22 See S Wilks, In the Public Interest: Competition Policy and the Monopolies and Mergers Commission (MUP, 1999), p. 205.

23 Section 118.

24 See generally section 120 of the ISA 2007.

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

26 Section 123 ISA 2007

27 See Anthony Idigbe, supra note 3.

28 Ibid.

29 Section 125.

30 Section 126.

31 Section 128 of the Act.

32 Section 121(3).

33 Section 121(2).

34 Section 121(1)(d)

35 In fact, the draft Federal Competition and Consumer Protection Bill has a section to that effect.

36 See Anthony Idigbe, supra note 3.

37 It is noteworthy that this decision was later up-turned.

38 Supra note 3.

39 See Nnamdi Dimgba, "The Need and the Challenges to the Establishment of a Competition Law Regime in Nigeria", presented at the 2008 NBA SBL conference in Abuja.