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LEGAL FRAMEWORK AND CONSEQUENCES FOR MERGERS AND ACQUISITIONS IN NIGERIAN BANKING INDUSTRY

A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE AWARD OF MASTER OF LAWS (LL.M) DEGREE, UNIVERSITY OF NIGERIA, ENUGU CAMPUS

BY

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PG/LL.M/05/45065

SUPERVISOR
PROF. MRS. F.N. MONYE

AUGUST, 2015

Title Page

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AUGUST 2015

Certification

This is to certify that ANIUGBO, ANGELINA ULOMA, a postgraduate student of the Faculty of Law, University of Nigeria, Enugu Campus in the Department of Commercial and Property Law, with Registration No. PG/LL.M/05/45065 has satisfactorily completed the requirement for course and original research work for the award of a Master of Laws (LL.M) degree in Commercial and Property Law.

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Dedication

This dissertation was successfully completed, not only by the efforts that everybody including my erudite supervisor, Prof. Mrs. F.N. Monye had put into it, but most importantly by the divine inspiration and guidance of the Almighty God.

I, therefore, dedicate it to the Almighty God who is the Alpha and Omega.

ANIUGBO, ANGELINA ULOMA
PG/LL.M/05/45065

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A.C.	Appeal Cases
A.G.	Attorney – General
All. E.R.	All England Reports
All. NLR	All Nigeria Law Reports
A.L.R.	African Law Reports
BOFIA	Banks and Other Financial Institutions Act
C.A.	Court of Appeal
CAMA	Company and Allied Matters Act
Ch.	Chancery
Ch. App.	Chancery Appeal Cases
C.J.	Chief Judge, Chief Justice
E.R.	English Reports
F.H.C	Federal High Court
FWLR	Federation Weekly Law Reports
ISA	Investments and Securities Act
J.C.A.	Justice of Court of Appeal
J.S.C	Justice, Supreme Court
K.B.	King's Bench
L.F.N	Laws of the Federation of Nigeria
L.J.	Law Journal
L.R.	Law Reports
N.C.L.R.	Nigerian Commercial Law Reports
N.N.L.R.	Northern Nigeria Law Reports
N.S.C.C.	Nigerian Supreme Court Cases
N.L.R.	Nigerian Law Report
N.M.L.R	Nigerian Monthly Law Report
N.W.L.R.	Nigerian Weekly Law Report

Q.B.	Queen's Bench
S.C.	Supreme Court
S.C.N	Supreme Court of Nigeria
S.C.N.L.R.	Supreme Court of Nigeria Law Report
SEC	Securities and Exchange Commission
U.I.L.R	University of Ife Law Reports
U.K.	United Kingdom
W.L.R	Weekly Law Reports
W.R.N	Weekly Reports of Nigeria
W.A.C.A.	West Africa Court of Appeal

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Abstract

Mergers and acquisitions have gained so much currency and acceptance worldwide that many countries have embraced them in the promotion of their economy, especially in the banking industry. Nigeria however, is not left out among countries that are involved in mergers and acquisitions. Mergers and acquisitions in the banking industry have highly protected both the depositors and bank workers in the event of a bank going into liquidation the depositors would not lose entirely. Bank workers no longer exercise undue exploitation over customers/depositors. In spite of numerous existing laws regulating banking activities, it was only in 2004-2005 that the then Governor of the Central Bank of Nigeria (CBN), Professor Chukwuma C. Soludo came up with the bold step of mergers and acquisitions that shook the financial institutions. Between 2004 and 2007 there were a flurry of mergers and acquisitions in the banking and insurance sectors of the economy. It is in the light of the heightened interest in corporate mergers and acquisitions in Nigeria, coupled with the recent enactment of the Investments and Securities Act (ISA) No. 29 of 2007 which repealed the Investments and Securities Act (ISA) No. 45 of 1999 (Cap 124, LFN 2004) that this dissertation seeks to examine legal framework for mergers and acquisitions in Nigeria's banking industry. The study examined the legal framework for mergers and acquisitions in Nigeria banking industry, evaluating the effects of mergers and acquisitions on human and material resources, asset and liabilities sharing and shareholders. In addition, the impact of mergers and acquisitions in the banks and other companies in other to know whether the banking system competes and transforms from middle player to mega players since the introduction of mergers and acquisitions. Also, the roles of the financial institutions regulators to proactively stem banking failures and contributes to solving the problems in Nigeria banking sector was examined. The study strongly recommends that banks be categorized into small, medium and big, each with different authorized share capital base and minimum paid-up capital and the regulating laws harmonized. The study concludes by commending the efforts of the Central Bank of Nigeria (CBN) in the mergers and acquisitions strategic initiative and notes that with this, institutions that are involved in mergers and acquisitions can effectively perform their duties without fear or favour.

CHAPTER ONE: GENERAL INTRODUCTION

1.1. Background of the Study

The study examines the Legal Framework for Mergers and Acquisitions in Nigerian Banking Industry and how Mergers and Acquisition affect the performance of the Banking Industry in Nigeria. It also seeks to ascertain the improvements which ISA 2007 has made on the old law contained in part XI, ISA 1999 (now repealed).

Mergers and Acquisitions are the latest solution to save the lives of banks, companies, and other industries that are collapsing in recent years. The year 2005 witnessed the reduction of 89 banks to 25 as a result of the re-capitalization policy of the Central Bank of Nigeria (CBN) from N2 billion to N25 billion in Nigeria. Also, many companies, banks, and business ventures have collapsed leaving those who invested in such ventures suffering. In the 1980s when the Co-operative and Commerce Bank (Nigeria) Ltd booming with golden advertisement on televisions and radios suddenly collapsed, many customers lost their deposits in that bank. Suddenly, Savannah Bank followed and other banks such as the All States Trust Bank, City Express Bank, ACB, International Bank, and Hallmark Bank. In the light of this, the failed Bank Tribunal was set up and some workers of such banks were tried and jailed, but this did not solve the problem of business collapse and banks liquidation.

The Central Bank of Nigeria (CBN) sort for solutions to alleviate the sufferings of the customers, shareholders, debenture holders and creditors, etc. thus the idea to re-organise the banks. In achieving this, the banks in the country resorted to mergers, acquisitions, take-overs, compromise, and amalgamation in their restructuring.[1] The Federal Government of Nigeria was advised to undertake a consolidation programme that will result in mergers and acquisitions among banks in the country, strengthen them and put

[1] The Daily Independent Newspaper Volume 3 No 870, Tuesday Jan 3 2006.

an end to the frequent collapse of banks in Nigeria. It is better to have few banks and other companies with reliable safety standards than numerous banks whose safety standards cannot be guaranteed. With recapitalization and consolidation in banks and insurance industries, it gradually extended to other sectors of the economy like the airline industry operators. The relevant laws were transferred to the Investment and Securities Act (ISA) 2007 No. 29 to have them in one body of legislation. Mergers and acquisitions, will involve preliminary steps, verification of corporate structure, verification of titles to assets, Banking/Financial taxation matters, Intellectual property, rights permits, and authorization, miscellaneous and deliverables. Also the ways of petitioning to the court for mergers and acquisitions by both 1st and 2nd petitioners became obvious and will be considered in this study.

1.2. Statement of the Problem

The incidence of mergers involving banks and companies has been on a gradual increase in recent times. The reasons for this include global economic recession, gross mismanagement of some banks and other companies; many harsh and stringent government policies, such as the regulatory fiat of the Central Bank of Nigeria and the National Insurance Commission forcing banks and insurance companies respectively to meet new minimum share capital requirements, the force of globalisation and the breaking of barrier to trade and movement of international capital.

In a bid to overcome the spate of the banks and financial institutions collapsing, which is as a result of mismanagement, global recession, harsh and stringent government policies like the CBN regulation policies, mergers and acquisitions have become the recent remedy for the banking and other financial institutions. Good as the proponent of mergers and acquisitions maintain, the effects on human and material resources on the mergering and acquiring banks have become manifest in the sharing of assets and

liabilities of the mergering and acquiring banks, on the shareholders, share revaluation, organisational problems and employee problems.

1.3. Research Questions

This study will address the following research questions:

1. Can the effects of mergers and acquisitions with regards to human and material resources, assets and liabilities sharing and shareholders justify its use for the banking sector in Nigeria?
2. Can the impacts of strategic mergers and acquisitions transform ailing banks from middle players to mega banks in Nigeria?
3. Are the roles of the financial institutions regulators proactive to banking failures and contributes to solving the problems in the sector?

1.4. Objectives of the Study

The main objective of this study is to examine the legal framework for mergers and acquisitions in Nigeria banking industry. Specifically, the study will evaluate the effects of mergers and acquisitions with regards to human and material resources, asset and liabilities sharing and shareholders as to justify its use for the banking sectors in Nigeria. It will ascertain the impact of mergers and acquisitions in the banks and other companies in other to know whether the banking system competes and transforms from middle player to mega players since the introduction of mergers and acquisitions in Nigeria banking industry, and finally, examine the roles of the financial institutions regulators to proactively stem banking failures and contributes to solving the problems in the sector.

1.5. Methodology

The study adopts the descriptive, analytical and comparative study designs. The presentation of the comparison of Nigeria Banks with International Banks, and the discussion of mergers and acquisitions in other jurisdictions such as Ghana, China, Israel and India. These countries were selected randomly for comparison. The study relied

essentially on primary and secondary source materials. Primary source materials are interviews and case law; while secondary source materials relied on include journal articles, textbooks, magazines, newspapers, conference papers and relevant internet materials.

1.6. Scope of Study

This research is rooted in a study of legal framework for mergers and acquisitions in Nigerian banking industry. The work examines concept of banks and other companies in Nigeria and also some foreign banks and other companies that were used as comparison in other jurisdictions. Among the banks and other companies visited was include the Central Bank of Nigeria (CBN), United Bank for African, First Bank Plc, Diamond Bank, National Insurance Company, Bendel Line Company Limited, Total Nigeria Plc, Investments and Securities Tribunal Nigeria, MTN Company Limited.

It is however limited to banks and other companies who witnessed merger and acquisitions and both the managers, workers, shareholders, debenture holders were interviewed. Some contributions were made by others who suffered during the liquidation of some banks and other companies.

1.7. Literature Review

Mergers and acquisitions are among the business combinations in Nigeria that set out to solve the problems of banks and companies collapse. Although there are other business combinations such as take-overs,[2] compromise,[3] amalgamation,[4] arrangement,[5] reconstruction[6] and consolidation.[7] Mergers and acquisitions is however preferred to

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[2] The acquisition of ownership or control of a corporation and is typically accompanied by a purchase of shares, a tender offer, or a merger.
[3] An agreement for the settlement of claim in which party surrenders something in concession to the other.
[4] The act of combining or uniting two small companies to form a new corporation.
[55] Where a debtor and a creditor arrange for settlement.
[6] The act of rebuilding, recreating or reorganisation of a corporation.
[7] To combine or unite two or more corporations into one new corporation.

other methods of saving an ailing banks or companies because it appear to be the fastest method of solving the problems of banks and other companies collapse in Nigeria.[8] The Central Bank of Nigeria started looking for solutions to alleviate the sufferings of customers, shareholders, debenture holders, creditors, etc. The then Central Bank Governor, Professor Chukwuma Charles Soludo came up with the idea of re-organisation of Banks. In achieving this, the banks in the country used all the methods of Mergers, Acquisitions, Take-Overs, Compromise and Amalgamation.

In no particular order, an understanding of these various could be stated thus: Arrangement is simply a scheme under which rights of a company's shareholders or creditors (or any class of them) is altered. It is defined in Section 537 of Company and Allied Matters Act 2004 (CAMA) as:

> Any change in the rights or liabilities of members, debenture holders or creditors of a company or any class of them or in the regulation of a company, other than a change effected under any other provision of this Act or by the unarming agreement of all parties affected thereby.[9]

An arrangement often forms part of a reconstruction or merger. Reconstruction unlike "arrangement," is not defined in the CAMA 2004 or ISA 2007. Reconstruction of a company occurs when a company transfers its business and assets to a new company formed for that purpose in consideration of the issue of the shares of the new company to the members of the old company. If the debentures of the old company have not been paid off, then shares or debentures of the new company are issued to debenture holders of the old company to satisfy their claims. The result is that substantially the same business is carried on by the new company as the old, and substantially the same persons hold

[8] The Daily Independent Newspapers Volume 3, No 870, Tuesday Jan 3, 2006, *supra*.

[9] Section 537 CAMA 2004

interest in the new company as did in the old company. Since the old company no longer has any business of its own, it is into liquidation.[10]

Take-over means the acquisition by one company of sufficient shares in another company to give the acquiring company control over that one company.[11] While Take-over bid means a bid made for the purpose of a take-over as provided in Section 132 of this Act.[12]

Compromise,[13] on the other hand is described as an agreement terminating between parties as to the rights of one or more of them or modifying the undoubted rights of a party which has difficulty in enforcing.[14]

The term "compromise" differs in meaning from the term "arrangement", whereas the former involves an element of give and take, the latter does not. An agreement which enables the majority of the creditors to accept less than is due to them may be a compromise on the part of the creditors as a whole, but the shareholders do not give up anything, no compromise as such is involved, but only an arrangement resulted.[15]

Consolidation is defined in Black's Law dictionary,[16] as the unification of two or more corporations (companies) or other organisations by dissolving the existing ones and creating a single new corporation (company) or organisation.

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[10] Okonkwo, Legal Framework for Mergers and Acquisitions September 17-19, 2004 Abuja Nigeria.
[11] Section 117 ISA 2007
[12] Section 117 ISA 2007
[13] Okonkwo, *Op. Cit.*
[14] Pennington's Company Law, 5th edn., (London: Butterworth and Publishers Ltd, 1985), p. 583
[15] *Yinka Folawiyo Sons Limited v. T.A. Hammond Projects* Limited (1977) FRCR, p. 143.
[16] Bryan A. Garner, Black's Law Dictionary, 9th edn., (US: St. Paul, Minn, West Publishing Co., 2009).

Offeror means a person or two or more persons jointly or in concert who make a take-over bid.[17] While an Offeree company means a company whose shares is the subject of a take-over bid.[18]

A merger (or an amalgamation) occurs when two or more companies transfer their businesses and assets to a new company (or to one of the original companies) and in consideration, their members receive shares in the transferee company. It means any amalgamation of the undertaking or any part of the undertakings or interests of two or more companies or the undertakings or part of the undertakings of one or more companies and one or more bodies corporate.[19]

An acquisition occurs when one company acquires sufficient shares in another company so as to give it control of that other company. This may be by a take-over bid or by purchasing shares in the market. Usually the acquired company is a smaller company and becomes a subsidiary of the acquiring company.[20]

Mergers and Acquisitions succeeds more than other business combinations in solving the problems of bank failures in Nigeria because the weak banks merged with the strong banks and some strong banks acquired some weak banks whole and entire. In the process of that, some banks started growing again. Mergers and Acquisitions in the banking sector restored confidence in the customers and bank workers, and shareholders started subscribing to shares in the banks.

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[17] Section 117 ISA 2007.
[18] Section 117 ISA 2007
[19] Section 119 (1) ISA 2007
[20] Okonkwo *Op. cit*.

Many banks and other companies which were practically supposed to disappear from doing business are now enjoying the fruit of business combination. Okonkwo[21] is of the opinion that Mergers and Acquisitions appear to be the main stay in the restoration of banks failure in Nigeria. This is his view in conjunction with West African Institute for Financial and Economic Management (WAIFEM) together with Central Bank of Nigeria emphasized this in a seminar at Abuja Nigeria, entitled Legal Framework for Mergers and Acquisitions. This legal framework was contained mainly in the Companies and Allied Matters Act 1990 (CAMA) now repealed and called CAMA 2004. The Securities and Exchange Commission Act 1988 now repealed and called SEC Act 1999 and the Securities and Exchange Commission Guidelines of Mergers and Acquisitions and other combinations. The importance of Mergers and Acquisitions in the Banking Industry in Nigeria cannot be overstressed.

Other industries and companies are now clamouring for such business combinations. There is a move to have such in Airlines Industries in the country. The Federal Government of Nigeria has been advised to undertake a consolidation programme that will result in mergers and acquisitions among airlines in the country to strengthen them and put an end to the frequent air mishaps and also restore confidence in their customers. It is better to have few companies with reliable safety standards than numerous whose safety standards cannot be guaranteed.

Ogunleye,[22] noted the resolve of the Central Bank of Nigeria to strategically place the nation's banking system in regional and international context and promote soundness, stability and enhanced efficiency of the system. This led to the proposed increase of minimum capital base for all universal banks to N25 billion in July 2004. No doubt, the

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[21] C. O. Okonkwo, Legal Framework of Mergers and Acquisitions, Sept. 17-19, 2004. Spara Regulatory challenges in a Consolidated Nigeria Banking.

[22] G. A. Ogunleye Feb. 24, 2006 at Lagos, Nigeria.

development had in turn prompted[23] a regulatory induced restructuring in the form of consolidation through Mergers and Acquisitions. Consolidation of banking institutions aims, amongst others at strengthening the banking sector to be more meaningful and to protect depositors, play development roles in the nation's economy, and become a competent and active player in the African regional and global financial system. It is also envisaged that the reform would over time, guarantee higher returns to the shareholders and other stakeholders of the bank industry. As observed by Bossone, Honohan and Long observed that small banking systems under-perform. They suffer from a concentration of risks. The smaller the banking system, the more vulnerable it is to external shocks. Small banking systems provide fewer services at higher unit costs, largely because they cannot exploit economics of scale, and partly because of lack of effective competition. Regulation and supervision of small banking system have also been observed to be disproportionately costly.[24]

Ofili, states some types and reasons why it should be necessary that companies should merge and acquire one another. Horizontal mergers and vertical acquisitions are advocated. Mergers and Acquisitions conglomerate. All those are to bring the banks and other companies to the limelight in the economy of Nigeria, so that people's lives will not collapse if the Banks or other companies collapse. Many reasons were advanced why there must be mergers and acquisitions in the companies in Nigeria. Such reasons are synergy, economies of scale, risk diversification, desire for growth, technological drive, management expertise's, increased market share, assets at a discount, financial advantages, steady supply of raw materials and control of sales outlet, stock exchange quotation, regulatory, fiat of an Apex Regulator and Personal interests. When all those things succeed in mergers and acquisitions system there will be rapid growth in the

[23] P.N. Ofili, An Appraisal of the Law Regulating Mergers and Acquisitions of Companies in Nigeria (Enugu Unpublished LL. M. Dissertation, 2009).
[24] Bossone, Honohan and Long (ed), "Globalisation and National Financial System" (Washington DC: World Bank Publicationa and Oxford University Press, 2003), p.45.

economy of Nigeria and foreign investors can comfortably invest in our companies which banks are among.

Williamson is of the opinion that mergers and acquisitions of banking sector can make Nigerians compete favourably with their counterparts in other jurisdictions such as the United Kingdom, United States of America, Canada, etc. [25] It seems to be true, because of the outcome of the consolidation exercise, which made the twenty-five banks emerge from 75 banks, out of a total of 89 banks that existed as at June 2004. The successful banks account for about 93.5% of the deposit liabilities of the banking system. In the process of complying with the minimum capital requirement, N406.4 billion was raised by banks from the capital market out of which N360 billion was verified and accepted by the Central Bank of Nigeria and also the process led to the inflow of FDI of US$652 million and 162,000 pounds sterling. Apart from the shrinkage of banks to 25 and heavy capital mobilization, there are other benefits such as:

- The liquidity engendered by the inflow of funds into the banks induced interest rate to fall drastically while an unprecedented 40% increase has been recorded in lending to the real sector.
- Already, more banks now have access to credit lines from foreign banks (one recently received $250 million from two foreign banks – this is unprecedented).
- Ownership of the banks has been diluted. This will in no small way tame the monster of insider and corporate governance abuse.
- With virtually all the banks now publicly quoted, there is wider regulatory oversight with SEC and NSE joining the team. Regulatory resurges would now be focused on fewer and more stable banks.

[25] S. D. Williamson, "The functions and impact of the Corporate Affairs Commission in the operation of companies in Nigeria vis-à-vis similar bodies in other Jurisdictions," Enugu, February 21, 2007.

- Depositors confidence is bound to be greater and interest rate on deposit lower due to "safety in bigness" perception by depositors.
- The banks will of course enjoy economies of scale and consequently pass on the benefit in the form of reduced bank charges to their customers.
- The capital market deepened and consciousness about it increased significantly among the population. The market has become more liquid and the total capitalization markedly increased.

Nwosu agrees that there is need for Corporate Mergers and Acquisitions in Nigeria economy to help in the rapid growth of banks and other companies.[26] As is to be expected, there are bound to be integration challenges in the new banks. In this regard, the Central Bank of Nigeria (CBN) is poised to address such concerns. Some of the measures intended to address the corporate governance and integration issues in the consolidation banks are:

> A new Draft Code of Corporate Governance for banks has been issued to the industry in the spirit of transparency and constructive consultation. There will be need for a stakeholder's forum to deliberate on the new code of conduct in order to save the lives of banks.

The Central Bank of Nigeria (CBN) will closely monitor the banks to ensure that the provisions of the merger schemes documents are complied with. The Central Bank of Nigeria (CBN) maintains a black book of discredited practitioners in the system. The black book is being automated for easy identification of persons on the list. Meanwhile the list of debtors of banks is being screened to ensure that no non-performing debtor is left on the Boards of 25 Banks.

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[26] E. O. Nwosu, Corporate Mergers and Acquisitions in Nigeria Economy: A Legal Perspective, (UNEC: Unpublished LL.M. dissertation, 1997).

There is zero tolerance regarding infractions, misreporting and non-transparency. This is one of the 3 points in the reform programme which the Central Bank of Nigeria (CBN) intends to strictly apply now that the first phase of the programme has been concluded.

The supervisory process is also being reformed. The prudential supervision arm of the Central Bank of Nigeria (CBN) is migrating to a risk based approach to supervision. The framework for this has been released and the implementation process is to be launched. The capacity of supervisors is being enhanced through training, especially in risk management. The supervision software deployed in the Central Bank of Nigeria has been significantly upgraded and is now being operationalised.

A post consolidation due diligence exercise is slated to be carried out on all the banks as time goes on to ensure the successful mergers and acquisitions. This exercise would involve a re-verification of each bank's capital to prevent or eliminate any incidence of "bubble capital". In the event that a bubble that had existed bursts, a contingency plan, which includes getting stronger banks to acquire any shaky bank, is in place and the Central Banks of Nigeria stands ready to play its role as lender of last resort.

1.7.1. Forms of Mergers and Acquisitions

Most mergers and acquisitions in Nigeria are regulatory driven. However, before the flurry of mergers and acquisitions witnessed in the banking and insurance sectors of the economy between 2005 and 2007 the major actors in the field were foreign-owned multinational companies which became Nigerian companies under the various Indigenisation Acts.[27] Very few wholly-owned Nigerian companies were involved in mergers and acquisitions as Nigerian business entrepreneurs usually shy away from

[27] Nigerian Enterprises Promotion Act, 1972 formerly Decree No 4 of 1972 which was repealed by the Nigerian Enterprises Promotion Act 1977. This Act formerly Decree No 3 of 1977, was repealed by the Nigerian Enterprises Promotion Act, 1989 Cap. 303, LFN 1990 formerly Decree No 54 of 1989.

business integration on account of our cultural background. Most of the Nigerian companies that merged either had the same foreign parent companies or the acquiring companies already were pre-merger shareholders in acquired companies.

The fact that most mergers and acquisitions in Nigeria were consummated at the convenience of foreign parent companies explains why takeover bids have not been recorded in the history of the Nigerian Corporate World. This is owing to the fact that a greater percentage of the block-holdings of most quoted companies are in the hands of foreign shareholders. The repeal of the Nigerian Enterprises Promotion Act, 1989 and the on-going privatization by government are likely to improve the 'market float' of the Nigerian Capital Market with more individual shareholders as against the block holdings by few shareholders. The expected increase in the number of shareholders may lead to the incidence of takeover bids in the Nigerian Corporate existence in no distant future. However, Weinberg and Blank classify mergers and acquisitions into three broad heads, namely: horizontal, vertical and conglomerate.[28]

1.7.2. Horizontal Merger and Acquisition

If the two banks involved in merger or acquisition produce the same kind of goods or render identical services, then the merger or acquisition is horizontal. The examples of such banks are United Bank for Africa and Standard Trust Bank. Both Banks render identical services or almost the same service and when both merged. United Bank for Africa found it very easy to acquire Standard Trust Bank. Likewise if their goods and services compete directly, if one brewery company merges with another brewery company a horizontal merger results. The example of such companies is the Ama Brewery Plc and Guinness Plc.

[28] Weinberg and Blank pp. 6 and 7.

When a merger or an acquisition involves the combination or fusion of companies in the same line of business or whose products or service compete directly with each other, it is said to be a horizontal merger or acquisition. This implies that the merger of two or more oil marketing companies or textile companies is horizontal in nature.[29] Such mergers or acquisitions have the propensity to create monopolies, prevent or lessen competition if uncontrolled. As a result, they are usually of special interest to regulators.[30] On the other hand, this type of merger or acquisition gives the greatest scope for economies scale, the synergy advantage and also the avoidance of duplication of effort in service or facilities.

1.7.3. Vertical Merger and Acquisition

Here one of the two banks or other companies "is actual or potential supply of goods or services to the other". The examples are where a bank takes over or merges with SCOA Nigeria Limited or where Ama brewery merger or takeover or acquires John Holt Investment Limited. In a vertical merger or acquisition the companies involved are engaged in complementary business activities such that the output of one becomes the input in another. For instance the acquisition of a steel mill by an automobile manufacturer or of a bakery by a flour mill company would be regarded as vertical acquisitions. Vertical integration is often motivated by the desire to ensure a steady source of raw materials or to control the marketing outlet to products and services which are vital to the survival of the company. This type of integration may sometimes create monopolies or restrain companies.

In simple terms, horizontal merger involves a merger of direct competitors, manufactures of similar products in the same geo graphic region, while vertical merger involves the

[29] Examples are: The Merger in 2001 of Total Nigeria Plc and ELF Oil Nigeria Limited with a new name called Totalfina ELF Nigeria Plc and united Nigeria Textile Plc and Nichemtex industry Limited in the same year.

[30] Section 121 ISA which contains antitrust provisions

merger between businesses occupying different levels of operation for the same product. This may involve manufacturer and retailer or buyer and seller.

1.7.4. Conglomerate Merger and Acquisition

In this situation the banks or other companies involved here are engaged in completely different kinds of business. They are not related horizontally or vertically. There are cases of "pure conglomerate." In some cases, here may be some remote relationship in the activities of the banks or other companies. In Nigeria some examples of conglomerate include the merger between Lever Brothers Nigeria Limited and Cheseborough Products Industries Limited. A major reasons for conglomerate acquisitions or mergers is diversification of activities into other spheres of business to improve earnings stability, shift regressing business utilize surplus resources.

Also the companies involved in this type of business combination or "Diversifying Mergers and Acquisitions" are engaged in completely unrelated lines of business activities, such as the acquisition of a pharmaceutical company by an insurance company or the merger of an oil exploration company with a hospitality company.

Now Mergers and Acquisitions are increasingly being stronger in the Banking Industry. In Nigeria, the 14 Banks that totally disappeared from carrying on banking business could not have been so; such Banks were: African Express Bank, all States Trust Bank, Assurance Bank of Nigeria, City Express Bank, Eagle Bank, Fortune International Bank, Gulf Bank, Hallmark Bank, Lead Bank, Liberty Bank, Metropolitan Bank, Societe Generale Bank, Trade Bank and Triumph Bank. Also another body is interested in banking issue such body is the Nigeria Deposit Insurance Corporation (NDIC). The Nigeria Deposit Insurance Corporation (NDIC) has also been directed to obtain court approval to commence the process of liquidation of the affected banks. But Mergers and Acquisitions are now playing a very important role to make sure that no bank is to go into

liquidation again. The Union Bank Plc., International Bank, etc. wanted to go into liquidation but the process of Mergers and Acquisitions brought them alive and they are now carrying on the banking business effectively.

1.8. Organisation of the Study

This work is divided into six chapters. The first chapter is a general introduction which sets out the problems to be addressed, the questions to be answered, the objective of the study, the methodology that will be adopted, the scope of the study and the literature review. Chapter two examines legal framework for mergers and acquisitions. The forms of mergers and acquisitions, the various laws regulating mergers and acquisitions and the schemes of mergers and acquisitions reviewed. Chapter three examines the Procedures for Mergers and Acquisitions in Nigeria. It takes into cognisance the schemes of arrangement under section 538 CAMA and schemes of arrangement and compromise under section 539 CAMA, scheme of merger under section122 and 123 ISA, takeover bid under section 132 ISA and takeover offer under section 131 ISA and others. Chapter four will analyse the Rationale and Effects of Mergers and Acquisitions in Nigeria. The chapter will analysis of the effects of mergers and acquisitions with regards to human and material resources, asset and liabilities sharing and shareholders to ascertain if it justifies the use in the banking sectors in Nigeria. In addition, why banks merge will be examined. Chapter five will identify the roles of financial regulators in transforming banks from middle players to mega banks in Nigeria. The final chapter presents the findings, recommendations and conclusion.

CHAPTER TWO: LEGAL FRAMEWORK FOR MERGERS AND ACQUISITIONS IN NIGERIA

This chapter will examine the legal framework for mergers and acquisitions in Nigeria. The chapter will review the forms of mergers and acquisitions, before examining the five major procedures in the CAMA and the ISA for accomplishing mergers and acquisitions which include: Scheme of arrangement under section 538 CAMA, scheme of arrangement or compromise under section 539 CAMA, scheme of merger under sections 122 and 123 ISA, takeover bid under section 132 ISA and takeover offer under section 131 ISA. Also, the chapter will consider implementation of small merger procedure before Security and Exchange Commission, revocation of the merger approval and procedures for merger and acquisition in other jurisdiction.

There are extensive provisions in Company and Allied Matters Act 1990 which were repealed and now are contained in the Investment and Securities Act 2007[1] (hereinafter referred to as ISA). In effect Investment and Securities Act 2007 is now the main Act on the regulation of mergers and acquisitions.

Prior to the enactment of the repealed ISA 1999, mergers and acquisitions were entirely regulated by CAMA and the Securities and Exchange Commission Act[2] (hereinafter referred to as SEC Act) before the repeal of ISA 1999; there were four major ways of effecting mergers and acquisitions in Nigeria. Two remained in CAMA 1990 and part XVI, while the remaining two previously under XVII, CAMA came under ISA 1999 part XVII, CAMA was repealed by and reproduced in ISA 1999 as part XI without substantial changes. But both CAMA 1990 and ISA 1999 were repealed. There are now three ways of effecting mergers and acquisitions of other companies and banks in Nigeria. These are under ISA 2007. Other relevant provisions on mergers and acquisitions, with particular

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[1] No 29 of 2007, Section 314 (1) repealed the Investment and Securities Act Non 45 1999.
[2] Cap. 406 LFN 1990, repealed by ISA 1999.

reference to banks and other financial institutions and insurance companies are found in the Banks and Other Financial Institutions Act 1991[3] (BOFIA) and the Insurance Act, 2003[4] respectively. Of particular importance are the Securities and Exchange Commission's Rules and Regulations on Mergers, Takeovers and Acquisitions 2000 (as amended)[5] made pursuant to ISA 1999 (repealed).[6]

2.1. The Companies and Allied Matters Act Cap C. 20 (LFN) 2004

In spite of the transfer of the relevant sections of CAMA to the ISA, the law still has a considerable impact on mergers, acquisitions and forms of business combinations, arising from the fact that the Corporate Affairs Commission regulates incorporation of Companies Section 29 of the Act provides for incorporation of names of Companies. In the merger transactions the role of the Corporate Affairs Commission comes in once the parties to the transactions have concluded their negotiations in principle and have adopted a corporation name whether of one of the merging companies or a new name. The name of the new merger company must as a matter of law be registered at the Corporate Affairs Commission. Section 237 of CAMA provides for the registration of copies of every resolution or agreement with the Corporate Affairs Commission. This means that merged concerns have regulatory obligations to the Corporate Affairs Commission.

Sections 538 and 539 of CAMA 2004 are very important under the mergers and acquisitions of the companies. Section 538 provides for the arrangement on sale of company during members' voluntary winding up. Such must occur by special resolution and the majority must agree that the liquidators be authorized to sell the whole or part of its undertaking or assets to another body corporate. Also section 539 of CAMA 2004 provides for powers to compromise with the creditors and members, which court must

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[3] Cap B', LFN 2004.
[4] Cap 117 LFN 2004
[5] Rules
[6] S. 262 (1) (C) This is the equivalent of Section 313 (1) (e) ISA 2007.

sanction before merger could take place. From the above, it can be seen that Corporate Affairs Commission is a principle player in Mergers and Acquisitions in accordance with the statutory provision in the Companies and Allied Matters Act 2004.

2.2. The Investments and Securities Act (ISA) 2007 No 29

The Investments and Securities Act (ISA) is the principal legislation regulating Mergers, Acquisitions and Other forms of business combinations in Nigeria. Mergers, Acquisitions and Take-overs are in part XII of the Investment and Securities Act (ISA) 2007 No 29. The part XII of ISA houses the meaning of certain words[7].

The extent of application of this part XII of ISA 2007 No 29.

(1) Notwithstanding anything to the contrary contained in any other enactment, every merger, acquisition or business combination between or among companies shall be subject to the prior review and approval of the Commission[8].

(2) The provisions of this part of Act shall apply to partnerships[9].

(3) Nothing in this section shall apply to holding companies acquiring shares solely for the purpose of investment and not 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[10].

(4) Any transaction 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 the Commission's approval[11].

The thresholds and categories of mergers are:

1) The Commission shall from time to time prescribe:[12]

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[7] Section 117 ibid
[8] Section 118 (1) ibid
[9] Section 118 (2) ibid
[10] Section 118 (3) ibid
[11] Section 118 (4) ibid

(a) a lower and an upper threshold of combined annual turnover or assets, or a lower and an upper threshold of combinations of turnover and assets in Nigeria, in general or in relation to specific industries, for purposes of determining categories of mergers.

(b) a method for the calculation of annual turnover or assets to be applied in relation to each of the prescribed thresholds.

2) For the purpose of this part of this Act merger is categorized into three, namely, small merger, intermediate merger and larger mergers.

Section 120 (a) a small merger means a merger or proposed merger with a value at or below the lower thresholds established in terms of subsection 1 (a).

Section 120 (2)(b) 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), and

Section 120 (2)(c) a larger merger means a merger or proposed merger with a value at or above the upper threshold established in terms of subsection 1(a).

Section 120 (4) says that pending the time commission prescribes the thresholds referred to in subsection (1) of this section the lower threshold shall be N500,000,000. While the upper threshold shall be N5,000,000,000.

The specific provisions for regulating mergers and acquisitions and other forms of business combinations are spelt out in sections 117 – 151 of ISA 2007. The essence of regulation is to ensure that any merger, acquisition or other forms of business

[12] Section 120 (1) (a) (b) ISA 2007

combination is not likely to cause substantial restraint to competition or tend to create monopoly.

Restraint of competition and monopolistic tendencies are usually very serious matters in advanced economies. This is why in the US, for example, the anti-trust guidelines are very well developed. A Variety of laws impact on Mergers and Acquisitions in the US, they basically prohibit mergers that will tend to create monopolies and restrain competition through the activities of the Department of Justice (DOJ) as well as, strengthen the powers of the Federal Trade Commission (FTC). The basic elements for regulating Mergers and Acquisitions are also present in the ISA

Provision is made for the reconstruction and mergers of banks. A majority is required at such a meeting before approval of the Commission is sought.

Section 121 (1) whenever required to consider a merger, the Commission shall:

a) initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2) of this Section; and
b) if it appears that the merger is likely to substantially prevent or lessen competition then determine:
    i) whether or not the merger is likely to result in any technological efficiency or other pro-competitive gain which will be greater than, and off-set, the effects of any prevention or lessening of competition that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented, and
    ii) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3);

c) otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3):
d) determine whether all shareholders are fairly, equitably and similarly treated and given sufficient information regarding the merger.

Section 121 (2) when determining whether or not a merger is likely to substantially prevent or lessen competition, the Commission shall assess the strength of competition in the relevant market, and the probability that the banks and other companies, in the market after the merger, will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including:

a) the actual and potential level or import competition in the market;
b) the ease of entry into the market, including, tariff and regulatory barriers;
c) the level and trends of concentration, and history of collusion, in the market;
d) the degree of countervailing power in the market;
e) the dynamic characteristics of the market, including growth, innovation, and product differentiation;
f) the nature and extent of vertical integration in the market;
g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and
h) whether the merger will result in the removal of effective competitor.

3) When determining whether a merger can or cannot be justified on public interest grounds, the Commission shall consider what effect the merger will have on the following:

a) a particular industrial sector or region;
b) employment;
c) the ability of small business to become competitive; and
d) the ability of national industries to compete in international markets.

4) After making the initial determination, the Commission may grant an approval in principle to the Mergers and direct the merging banks to make an application to the court to order separate meetings of shareholders of the merging banks in order to get their concurrence to the proposed merger.

5) If a majority representing not less than three quarters in value of the shares of members being present and voting either in person or by proxy at each of the separate meetings agree to the scheme, the scheme shall be referred to the Commission for approval.

2.3. The Banks and Other Financial Institutions Act (BOFIA)

In Banks and Other Financial Institutions Act (BOFIA),[13] the rules and regulations on reconstruction, reorganisation, mergers, and disposal etc. of banks are provided for in section 7 of the Act. In essence, the Act has considerable impact on mergers, acquisitions and other forms of business combination as they relate to banks. The provisions in section 5(1) state that:

> Except with the prior consent of the Governor, no bank shall enter into an agreement or arrangement:
>
> a) which results in a change in the control of the bank.
> b) for the sale, disposal, or transfer howsoever of the whole or any part of the business of the bank.
> c) for the amalgamation or merger of the bank with any other person.
> d) for the reconstruction of the bank
> e) to employ a management or to transfer its business to any such agent.

The implication of these is that the Securities and Exchange Commission (SEC) requires a no-objection letter before processing mergers, acquisitions, and business combinations

[13] BOFIA No 25

for approval. To that extent, therefore, the Central Bank of Nigeria (CBN) has a very significant role in the regulation of mergers and acquisitions and other combinations as they affected banks.

The combined effect of Section 7(1) BOFIA and Section 118 (1) ISA 2007 is that any two or more banks wishing to merger must first obtain the prior consent of the Central Bank of Nigeria (CBN) and the overriding formal approval of the Commission before consummating their marriage. This is the case because, by virtue of section 118 (1) ISA 2007, every merger, acquisition or business combination between or among companies shall be subject to the prior review and approval of SEC as the apex regulator of the securities market, notwithstanding anything to the contrary contained in any other enactment.

One commentator, has expressed the opinion that section 7 (1) BOFIA will not apply to a takeover bid for a bank since the target bank will not be the one entering into “agreement or arrangement”. He argued that in a takeover bid, it is the target banks’ shareholders who enter into such an agreement and that to this agreement; the target bank is a stranger. This view is correct more so as a takeover bid involves the unilateral offer by the bidder to the shareholders of the target bank to purchase their shares so as to gain control of the target bank.

2.4. The Securities and Exchange Commission Act (SEC) 1999 No 45

The Rules and Regulations of the Securities and Exchange Commission (SEC) essentially prescribe the disclosure requirements and the procedure for Mergers and Acquisitions in the furtherance of the objectives of the ISA in regulating Mergers and Acquisitions. They are made to the Investments and Securities Act as provided by Section 262 (1) which states that:

> The Commission may, from time to time make rules and regulations for the purpose of giving effect to the provision of this Act and may in particular without prejudice to the generality of the foregoing provisions make regulations.

Mergers and acquisitions and other business combinations are covered under the Securities and Exchange Commission[14].

The essential features of the rules and regulations include scope of regulations, approval by the Commission, procedures for obtaining approval, pre-merger notice, formal application and post approval requirements.

i) *Scope of Regulators*

The provisions of the Rules and Regulations apply to public and private companies and every merger, acquisition or combination between or among companies involving acquisitions of shares or assets of another bank.

ii) *Approval by the Commission*

a) Every merger and acquisition or combination is subject to prior review and approval of the Commission.

b) Approvals are given by the Commission if such combination is not likely to cause restraint of competition or create monopoly.

iii) *Procedures/requirements for obtaining Approval*

a) File a pre-merger notice with the Commission: This should include letter of intent signed by the merging banks accompanied by relevant board resolutions, justification for the mergers or acquisitions product lines, competitors, structure of the banks/revenue information analysis of effect of transaction on market, memorandum and articles of association of the banks as well as the proposed amendments. Latest financial statements and certificate of incorporation of the merging banks are also required.

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[14] Rules 227-238 of Securities and Exchange Commission.

b) File a formal application for approval on receipt of a favourable response to the pre-merger notice. The formal application shall be filed including an agreement terms and conditions, mode of the transaction, proposed amendments or changes to the certificate of incorporation or articles of association of the surviving bank, statement of certificate of incorporation, mode of converting shares and other material information.

iv) *Post-Approval Requirements*

a) Court order sanctioning the scheme or arrangement to be filed with the Commission within 5 days of such order.

b) Notification of the completion of the exercise. On completion of the merger process, the Commission carries out post-mergers inspection three months after the formal approval. The following documents/issues are examined:

1. The Board Minutes Book
2. Original Copy of Certificate of Incorporation of the New Banks (where applicable).
3. Changes to be reflected in the Memorandum and Articles of Association (where applicable)
4. Plans for employees of the bank
5. Settlement of the shareholders of the bank
6. Settlement of creditors of the bank
7. Use of proceeds (where applicable)
8. Any other document or issue that may be necessary for acquisition

i. Pre-acquisition fee

ii. Certified certificate of incorporation of the two or more banks involved by the Corporate Affairs Commission (CAC).

iii. Memorandum and Articles of Association of the banks involved

iv. Resolution of the board of directors of the two or more banks agreeing to the acquisition signed by the directors and Bank Secretary.

v. Audited report and Accounts of the Banks involved for the preceding five (5) years for banks or three (3) years for some banks.

vi. Profile of the banks involved.

vii. Payment of SEC fees

viii. Details of the acquisition, which should include the price and quantum of shares involved.

2.5. The Insurance Act Cap 117 (LFN) 2004

The Insurance Act also provides in part V for amalgamation and transfers. Section 30 of the Act provides for the procedure for amalgamation while section 31 provides for the documents to be deposited with the National Insurance Commission after the amalgamation or transfer. Section 30 (1) provides that subject to its provisions no insurer shall:

a) Amalgamate with, transfer to or acquire from any other insurer any insurance business or part thereof, without the approval of the Commission or

b) Without the sanction of the court (1) amalgamation with another insurer caring on life insurance business or workman's compensation insurance business or (ii) transfer to or acquire from any other insurer, any such insurer, any such insurance business or part thereof.

The procedure for Mergers and Acquisitions under section 30, Insurance Act, the first statutory hurdle under section 30 procedure is the requirement for the concerned insured to publish in the gazette at least three months before making a notice of their intention to make the application together with a statement of the nature of the merger or acquisition, should also be served on NAICOM[15].

[15] Section 30 (4) of Insurance Act

Prior to the publication and service of the notice, the boards of directors of the insurers concerned would have consulted and agreed to execute the merger or acquisition. By section 30 (5) each of the insurers concerned shall during the three months referred to in subsection (4) keep open at its principal and branch offices, certified copies of the following documents for inspection by its members and policy – holders, namely;

a) The draft scheme of the proposed merger and acquisition;
b) The balance sheet of its insurance business;
c) Actuarial reports in respect of its life insurance bonuses;
d) The report of an independent actuary on the proposed merger or acquisition shall be made available for inspection by both the shareholder and policy-holders free of any charge for a period of twenty-one days after the publication of the notice in the gazette[16].

NAICOM may, prior to the granting of the formal approval under section (3)(1) (a) require the submission of such and such statements, documents and other information that will enable it reach a decision on the application[17]. Where under section 30(1)(b) a class of insurance business referred to in that section is intended to be merged with any other insurance business or an insurer or the class of insurance shall apply to the court to sanction the proposed scheme of merger or acquisition[18].

NAICOM or the court is satisfied that no sufficient objection has been established by those entitled to be heard, it may in its discretion approve or sanction the scheme as the case may be[19]. This means that NAICOM or the court may withhold its approval or sanction if it is satisfied that sufficient objection to the scheme has been so established. In deciding whether or not to approve or sanction the scheme, it shall be sufficient objection

[16] Section 30 (6) ibid
[17] Section 30 (2) ibid
[18] Section 30 (3) ibid
[19] Section 30 (7) ibid

if it appears to NAICOM or the court that policy-holders representing not less than one-fifth of the total number insured by any of the insurers carrying on the insurance business concerned, dissent from the proposed merger or acquisition[20].

Having completed the merger or acquisition following NAICOM's approval of court sanction, section 31, Insurance Act requires the insurer carrying the merged business or the insurer who has acquired the business, as the case may be, to file in duplicate, with NAICOM the following documents:

a) Certified copies of the statement of assets and liabilities of the insurers concerned in the merger or acquisition, together with a statement of the nature and terms of the merger or acquisition.
b) A certified copy of the scheme of merger or acquisition.
c) A certified copy of the actuarial or other reports relating to the scheme of merger or acquisition.
d) A declaration signed by each of the insurers concerned:
i) That every payment made or to be made to any person in respect of the merger or acquisition is therein fully set out; and
j) That no other payments except those set out have been made or are to be made either in money, policies securities or other valuable consideration by or with the knowledge of any of the parties to the merger or acquisition.

2.5.1. Mergers and Acquisitions in the Insurance Industry

The Insurance industry in Nigeria comprised 118 insurance companies and was dominated by small and medium-sized underwriting companies that were grossly undercapitalized and lacked the ability of taking advantage of economies of scale which big companies enjoyed. The situation at the time was that about 20 biggest insurance companies controlled about 90% of the premium income. The industry also lacked the

[20] Section 30 (8) Ibid

technical expertise required to tap the enormous potentials that abound in the country in the oil and energy business. Besides, there was need for the industry operators to become more competitive and so launch out into the international insurance market following the recent trend in globalization[21].

In anticipation that quite a good number of the existing insurance companies may not mobilize enough funds to beat the deadline, the Commissioner for Insurance advocated and encouraged insurance companies to consider the option of mergers and acquisitions to enable them to raise the required capital. It was expected that at the end of the consolidation exercise, which was voluntary, there will emerge fewer but bigger and stronger insurance companies. Under the second dispensation, NAICOM had in September, 2005 pronounced a fresh minimum capitalization of N2 billion for life insurance, N3 billion for general insurance business and N10 billion for reinsurance business with a deadline of February 28, 2007 for full compliance[22].

In the process of consolidation, NAICOM issued a directive abrogating the previous practice of composite insurance business under which insurers combined general and life insurance business. Insurers can now engage only in one line of insurance business – general, life or reinsurance. By the deadline, the recapitalization and consolidation exercise resulted in the emergence of 71 insurance companies, made up of 43 general insurance companies, 26 life insurance companies and 2 reinsurance companies[23].

Some of the insurance groups that embraced mergers and acquisitions include the following:

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[21] Insurers canvass merger option for small company. The Guardian October 24, 2005 p. 56
[22] Loc, Cit.
[23] Loc. Cit.

Table 1: Some insurance groups that embraced mergers and acquisitions in Nigeria

	Group	Members
1	Consolidated Hallmark Insurance Plc	Hallmark Assurance Plc Consolidated Risks Insurers Plc Nigeria General Insurance Co. Ltd (Mergers)
2	Stace Assurance Plc	Staco Assurance Plc Summit Insurance Co. Ltd (Merger)
3	Standard Alliance Insurance Plc	Standard Alliance Plc Perpetual Assurance Co. Ltd (Acquisition)
4	NEM Insurance Plc	NEM Insurance Plc Vigilant Insurance Co. Ltd (Merger) The two later acquired Numbered Insurance Co. Ltd their merger.[24]

Among the insurers that sealed the hurdle, Cornerstone Insurance, Alliance Insurance, Guinea Insurance, law Union and Rock Insurance, Niger Insurance, Royal Exchange Assurance Nigeria and Prestige Insurance were re-certified by NAICOM to continue as general insurance, underwriters. Those that were certified life underwriters include: Allinco Life Insurance, Niger Life Insurance and UNIC Life Insurance. Two reinsurance companies that scaled the hurdle were Continental Reinsurance Plc and Nigeria Reinsurance Plc. One of the landmarks of the insurance reform was the substitution of the

[24] Consolidated Insurance Companies make debut, Daily Champion March 20, 2007, Volume 19, No 57 P24.

private companies dominance with public companies dominance, just as occurred in the banking sector following the sectors reform.

There appears now to be an atmosphere of uncertainty and retrogression over the recently concluded recapitalization exercise in the insurance industry. In legal battle stalls fresh insurers' recapitalise financial standard, November 5, 2007 volume 9 No 14. P. 4 by Friday Atufe. The Federal High Court had recently suspended the entire recapitalization exercise pending the determination of the suit brought against the Federal Government by NICON Insurance Plc and Alliance and General Insurance Plc. The two companies had contended that section 9 (2) of the Insurance Act 2003[25] which empowers NAICOM to increase the capital base of insurance companies was not amended by the National Assembly be NAICOM members on the recapitalization exercise[26].

Fifteen insurance companies have joined NAICOM in praying the court to vacate its order of injunction. Meanwhile, fears have been expressed by analysis that the whole exercise of recapitalization may be quested if Senate agrees with the position of NICON Insurance Plc[27]. It is noteworthy that section 10 (10) of the Insurance Act Cap. 117, LFN 2004, passed by the National Assembly much later in 2007, stipulates much lower minimum paid-up share capital requirements for insurers than those pronounced by NAICOM in 2005 which are now sub judice. The various amounts are N20 million for composite insurance business and N150 million in the case of reinsurance business.

However, by section 10 (4) of the Act[28], the Minister may from time to time, on the recommendation of NAICOM but subject to the approval of the President by an order

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[25] Now, Section 10 (14) Cap. 117. LFN 2004.
[26] Friday Atufe, "Legal battle stalls fresh insurers' recapitalize financial standard, November 5, 2007 Volume 9 No 14. P. 4.
[27] Modestu Anaesoronye, Financial Standard, November 5, 2007 Volume 9 No 14, P. 24.
[28] Cap. 117, LFN 2004.

published in the Gazette, vary the amount of the minimum paid-up share capital. It is important to mention that the recapitalization and consolidation programme in the insurance industry had been concluded prior to the LFN 2004 receiving the required force of Law in 2007.

2.6. The Companies Tax Act Cap 60 1990

The Companies Income Tax Act[29] states in Section 25 (12) that no merger, take-over, transfer or restructuring of the trade or business carried on by a company shall take place without having obtained the Boards directions under section 9 of this section and clearance with respect to any tax that may be due. The Board is empowered in section 9 to use its discretion to waive certain provisions of the Companies Income Tax Act. The Federal Inland Revenue Service, therefore, also regulates mergers, acquisitions and business combination for tax purposes.

In conclusion, it is observed here that this chapter has clearly mapped out the various laws that are followed for mergers and acquisitions in the financial sector, with emphasis on the banking sector and how they can be used to influenced and revived the declining fortunes of the banks.

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[29] Cap. 60 1990.

CHAPTER THREE: PROCEDURES FOR MERGERS AND ACQUISITIONS IN NIGERIA

This chapter will set out the various procedures for mergers and acquisitions that can be used in the banking sector, as well as draw comparison with some randomly selected countries which will include Israel, Ghana, Sweden and India respectively. Implementation and revocation issues will be part of the chapter.

3.1. Scheme of arrangement under section 538 CAMA

A bank or other companies undertaking and assets may be transferred to another company under the provisions of section 538 CAMA. The section provides as follows:

> With a view to effecting any arrangement, a company may by special resolution resolve that the bank or other companies be put into member's voluntary winding up and that the liquidator be authorized to sell the whole or part of its undertaking or assets to another body corporate whether a company within the meaning of this Act or not (in this section called "the transferee company") in consideration or part consideration of fully paid shares, debentures, policies, cash or other like interests in the transferee company and to distribute the same in species among the members of the company in accordance with their rights in the liquidation.

This type of arrangement requires the special resolution of members for the company to go into voluntary liquidation and then authorizing the liquidator to transfer the whole or part of the company's business or assets to another company in consideration of shares or like interests in that company for distribution among members of the liquidating.

Whatever the intention of the draftsman of CAMA may be, some commentators have recognised that the import of section 538 (1) is that in addition to serving as an effective method for reconstructing a single company they could also be used to effect a merger or

acquisition of a company[1]. This apart, under the English practice, a scheme of arrangement under section 110 of the Insolvency Act 1986, the provisions of which are substantially similar to section 538 CAMA, affords relatively simple method of reconstructing a single company or of effecting a merger of its undertaking into that of another company[2]. The former case will involve an internal arrangement whereby a new company will be incorporated and the business of the liquidating company transferred by the liquidation to the new company in return for its shares which will be distributed to members of the liquidating company. The method can also be employed in achieving the merger of two or more existing banks whereby the said banks go into voluntary liquidation and authorize their respective liquidators to transfer the business of their respective banks to a newly formed bank in consideration of that bank's shares to be distributed among the shareholders of the liquidating bank. The result is that the shareholders of the liquidating banks become shareholders of the new bank.

The term "arrangement" is defined in section 537 CAMA as any change in the rights of liabilities of members, debenture holders or creditors of a company or any class of them or in the regulation of a company. The definition covers the scheme of arrangement envisaged by section 538 CAMA but does not cover any type of arrangement under any other provision of CAMA other than in part XVI dealing specifically with Arrangement and compromise. This limitation in the definition of the word "Arrangement" is in opposition with the way in which the courts have widely constructed it[3] as covering all manner of legal transactions, once there was some element of quid pro quo and the required approvals were obtained. Hence the court in *Re N.F.U. Development Trust*

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[1] Nwosu, op. cit. p. 32. Cited in Okonkwo, op. cit. p. 5; Tunde I. Ogowewo, The Market for Cooperate Control and Investments and Securities Act 1999 (London: The British of International and Comparative Law. 2002) p. 20.

[2] Gowers Principles of Modern Company Law the edition (London: Sweet and Maxwell, 1997) p. 761; see section 110 and 111 English Insolvency Act 1986 which section 538 CAMA is substantially similar to.

[3] *Re National Bank Ltd* (1966) I.W.L.R. 819 at p. 829; *Re Calgary and Edmonton Land Co.* (1975) I.W.L.R. 355 at 363; *Re Savay Hotel Ltd* (1981) Ch. 351 at 359 D-F.

Limited[4], failed to sanction a scheme which obliged all the members to relinquish their financial rights without any quid pro quo. Also, in *Re Savay Hotel Ltd*[5], an attempt to obtain court sanction for a scheme which received neither the board's nor the general meeting's approval failed. The advantage of the section 538 procedure is that it requires neither an application to court to summon a meeting of members nor does it demand court sanction. However, the court's sanction shall be required if, within one year from the date of the special resolution for the member's voluntary winding up, a court order is made under sections 310 to 312 CAMA dealing with relief on the grounds of unfairly prejudicial and oppressive conduct or for the winding up of the company under a creditors' voluntary winding up. The latter situation may occur where the creditors harbour the fear that they may not be paid in full. In that event, by section 538 (2) (a), the scheme of arrangement for the sale and distribution shall not be valid unless sanctioned by the court.

In the absence of such a court action, any sale or distribution made pursuant to the said special resolution shall be binding on the company and all its members and each member shall be deemed to have agreed with the transferee company to accept the fully paid shares or other like interests to which he is entitled[6]. It should be noted that section 538 (5) disallows any variation or abrogation of the rights of any creditor of the company.

One noticeable shortcoming of section 538 procedure is the absence of any provision for information disclosure to members in the manner provided for under section 540 CAMA

[4] (1972) I.W.L.R. 1548 but see *Yinka Folowiyo & some limited v. T.A. Hammod Projects Limited* where the term, "arrangement" was constructed.
[5] *Supra*
[6] Section 538 (2) CAMA

Unlike section 539, section 538 makes no provision on issue of the determination of the fairness of the arrangement by the Securities and Exchange Commission, neither does it provide for a prior review and approval of the scheme by the said Commission.

This notwithstanding since section 538 can be employed to effect a merger or acquisition, section 118(1), ISA together with the SEC's Rules on Mergers, Takeovers, Acquisitions, and Combinations will of necessity apply to the transaction.

Section 13(P) ISA empowers SEC "to review, approve and regulate mergers, acquisitions, takeovers and all forms of business combinations and affected transactions of all companies as defined in Act."

Section 118 (1) ISA specifically provides that "Notwithstanding anything to the contrary contained in any other enactment, every merger, acquisition or business combination between or among companies shall be subject to the prior review and approval of the Commission."

3.1.1. Protection of Dissenting Members

Section 538 (2)(b) CAMA affords members the opportunity to signify their dissent from the members' special resolution failing which they shall be deemed to have accepted the resolution.[7] The section provides that any member of the company who dissents from the members' special resolution may within 30 days of its being passed, serve a written notice on the liquidator to be left at the company's registered or head office and the liquidator shall either refrain from carrying the resolution into effect or shall purchase the dissenting members share[8], at a price to be determined in accordance with section 538 (4)

[7] Section 538 (3) ibid
[8] Where the liquidator does not elect to purchase such shares, it does appear that he can be compelled by the disserting member so to do by an action brought under S. 311 (2)(a) and an order made under S.312(2)(c) for the purpose of the shares of any members by other members of the company.

that is to say, either by agreement in the case of a private company in which aliens do not participate or by Securities and Exchange Commission in the case of a public company or a private company in which aliens participate[9].

Section 111, English Insolvency Act 1986, on the other hand provides that the price shall be determined either by agreement or by arbitration. The arbitral option was criticized by Gower as not being very satisfactory since in England the process involves the use of antiquated provisions of the Companies Clauses Consolidation Act of 1845, such that what the member will receive will be based on a hypothetical assumption that the liquidation had proceeded without any transfer of the company's undertaking.[10]

Under section 538 (4) (a) CAMA, such price, in the case of private company in which no aliens participate, shall be determined by estimating what the dissentient member would have received had the whole of the undertaking of the company been sold as a going concern for cash to a willing buyer and the proceeds, less the cost of winding up, been divided among the members in accordance with their rights[11]. In our humble opinion, we subscribe to the view that the share valuation be determined, not by SEC, but by agreement between the dissentient member and the liquidation. But, if this fails, the process of arbitration in accordance with Nigeria Law should be followed.[12]

3.2. Scheme of Arrangement or Compromise under Section 539 CAMA

Merger or acquisition can be effected by a scheme of arrangement or compromise under section 539 CAMA Section 539 (1) provides as follows:

> Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its

[9] The price determination role of S.E.C is now illusory as regards private companies in which aliens participate following the repeal of the Nigerian Enterprises Promotion Act 1989 and removal of restrictions on aliens participation in Nigerian companies.
[10] Gower op. cit. p. 762
[11] Enterprise Promotion Act, 1989 by the Nigeria Enterprise Promotion Act 1995 (Repealed)
[12] See Tunde I. Ogowewo, op. cit. p. 21

> members or any class of them, the court may, on the application in a summary way of the company or any of its creditors or members, or in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company, or class of members, as the case may be, to be summoned in such a manner as the court directs.

This section seems to suggest an intention on the part of the draftsman of CAMA to restrict section 539 procedure to the internal reorganization of a company only, a view which seemed to have gained the support of the Nigerian Law Reform Commission.[13] This view is erroneous because the section can be employed to effect a merger or acquisition involving transfer of undertaking or shares.[14] It should be noted that, prior to CAMA schemes of arrangement and mergers were effected under section 197 of the repealed Companies Act, 1968. Section 539 (1) CAMA is a replica of section 197(1) of that Act. Some of the schemes of arrangement/merger effected under the repealed Act involved the following company. A.G. Leventis & Co. and Leventis Stores. Nigeria Limited (1983); Lever Brothers Nigeria Limited and Lipton Nigeria Limited (1984), John Holt Limited and Bauchi Bottling Co. Limited (1985); John Holt Limited and John Holt Investment Limited (1987), and Lever Brothers Nigeria Limited and Chesbrough Products Industries Limited (1988) SEC which started its regulatory functions in 1982, supervised thirteen mergers between 1982 and 1988 out of which only two were unsuccessful.[15]

Under the English practice, even though most mergers and other structural changes are achieved through the more usual takeover bid, section 425 of the English Companies Act 1985 which replaced the former section 206 of the 1948 English Companies Act which

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[13] The Law Reform Commission's Report (1988) p. 310. The fact that the section makes reference to the relationship between one company alone and its creditors or members may be accountable for this view.
[14] E. O. Nwosu, Corporate Mergers and Acquisitions in the Nigerian Economy. A Legal Perspective cited in C. O. Okonkwo, op. cit. p. 8.
[15] J. Olakunle Orojo, Company Law and Practice in Nigeria, 3rd education. (Lagos: Mbeyi & Associates (Nig) Ltd, (1992) p. 428.

has substantially similar provisions as section 539 CAMA can sometimes be employed to effect a scheme of merger or a takeover in addition to compromises with creditors and other wide-ranging structural changes.[16] The term "compromise" which is not defined in CAMA has been construed judicially as an agreement which terminates a dispute between parties as to the rights of one or more of them or which modifies the undoubted rights of a party which he has difficulty in enforcing.[17] In *Re N. F. U. Development Trust Limited*[18] the term "arrangement"[19] was construed as a word of very wide import and also as involving an element of "give and take" just as a compromise does. But it has been expressed that both terms are not synonymous and that whereas "compromise" involves an element of "give and take", an "arrangement" does not.[20]

3.2.1. The Procedure

A scheme of Arrangement to effect a merger or acquisition under section 539 CAMA will usually require the corporate action of the companies involved, that is to say, the mutual consent of the boards of directors and subsequently, resolutions of shareholders of both companies involved. The first major step is the formulation of the proposed scheme which will contain an Explanatory Statement setting out the details of the terms and effects of the scheme including the effective date of the merger or acquisition, the consideration for the merger or acquisition, that is to say, cash-for-share or share-for-share exchange and the proposed plan for directors and employees of the companies involved. This is followed by an application to court in a summary way[21] made separately by each companies involved or its member, praying the court to order their separate meetings in such a manner as they may direct.[22] The application to which the proposed scheme is attached is supported by an Affidavit setting out the facts on which it

[16] Tunde Ogowewo. Op. cit. p. 22; Gower, op. cit. p. 763
[17] *Smeath v. Valley Gold Ltd* (1893) 1 Chg. 447
[18] *Supra*
[19] See page 6 where the term was defined
[20] *Yinka Folawiyo & Sons limited v T. A Hammond Projects Limited*.
[21] The application is made ex-parte to the Federal High Court
[22] Section 539 (1) CAMA

is based. The application is required to show sufficient cause why the court should order that the meeting be convened and must also show that there is a likelihood of securing at the meeting a majority representing three equitable to all concerned.[23] If the court grants the order, which it will generally do, a meeting is summoned accordingly.

3.2.2. Court Ordered Meeting

Section 540 (1) (a) CAMA requires the notice summoning the meeting to be accompanied by a statement explaining the effect of the arrangement or compromise and in particular stating any material interests of the directors of the company (whether in their capacity as directors or otherwise) and the effect thereon of the arrangement or compromise in so far as it is different from the effect on the like interest of other persons.[24] If the notice is by advertisement, the advertisement must include the foregoing statement, or a notification of where and how those entitled to attend the meeting may obtain copies of the said statement,[25] and on application, they must be furnished free of charge.[26]

Where the scheme affects the rights of debenture – holders of the company, the statement must give the same explanation concerning the trustees of any deed for securing the issue of the debenture as in the case of the company directors.[27]

At the court-ordered meeting the Draft Scheme of Arrangement or Merger will require the approval of a majority representing not less than three-quarters in value of the shares of members or the relevant class present and voting in person or by proxy.[28]

Section 539 (2) provides:

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[23] *Yinka Folawiyo & Sons Limited V. T. A. Hammond Projects Limited, Supra*.
[24] Section 540(1)(a) ibid
[25] Section 540(1)(b) ibid
[26] Section 540 (3) ibid
[27] Section 540(2) ibid
[28] Section 539(2) ibid

> If a majority representing not less than three-quarters in value of the shares of members or class of members, or of the interest of creditors or class of creditors as the case may be, being present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement, the compromise or arrangement may be referred by the court to the Securities and Exchange Commission which shall appoint one or more inspectors to investigate the fairness of the said compromise or arrangement and to make a written report thereon to court within a time specified by the court.

A problem that arises is the meaning to be given to the expression “majority” under the sub-section. The expression may refer either to one or more shareholders who hold not less than the requisite three-quarters in value of the shares or a numerical majority of shareholders who together must hold not less than the requisite three-quarters in value of the shares. It is notable that the equivalent section 197 (2) of the repealed 1968 Companies Act used the expression “majority in number” just as the equivalent section 425 of the 1985 English Companies Act does. The omission of the words “in number” from section 539(2) may have been inadvertent. In view of the saying that “there is strength in number,” a numerical majority of members representing a majority in value of shares will assure double protection against abuse by an insignificant minority of members who are able to master the requisite majority in value of the shares. We therefore advocate an arrangement of section 539 (2) CAMA with expression “majority in number” are introduced into the sub-section.

3.2.3. Powers and Functions of the Court

When the Draft Scheme has been approved by the meeting, either in its original form or with amendments, an application is made to the court for an order stating the scheme agreed upon. The court may, at this stage refer the Scheme to the Securities and Exchange Commission and, if it does so, the Commission must appoint one or more

Inspectors to examine its fairness and issue a written report to the Court thereafter.[29] The word "may" in the subsection suggests a discretion on the part of the court. It is only proper that such a reference be made as the Securities and Exchange Commission is better equipped than the Court to play that role. However, it is worthy of note that if section 539 is employed to effect a merger or acquisition the court will be bereft of any option as the Scheme must be referred to the Securities and Exchange Commission, a body charged with regulatory oversight of mergers and acquisitions, notwithstanding the absence of any specific provision in CAMA to this effect. Section 118 (1) ISA[30], specifically provides that subject to the prior review and approval of the Securities and Exchange Commission notwithstanding anything to the contrary contained in any other enactment.[31]

If the court is satisfied as to the fairness of the Scheme it shall sanction it and the same shall become binding on all members concerned.[32] Section 539(3) provides:

> If the court is satisfied as to the fairness of the compromise or arrangement, it shall sanction the same and the compromise or arrangement shall be binding on all the creditors or the class of creditors or on the members or class of member as the case may be, and also the company or in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

This section suggests that the court has the discretion to withhold its sanction if it is not satisfied as to the fairness of the Scheme. If dissatisfied as to the fairness of the Scheme, the court may, instead of refusing its sanction, require that certain modifications be made as a condition of its sanction.[33]

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[29] Section 539(2). This is an improvement on the repealed 1986 Companies Act which contained no similar provision.

[30] This is a re-enactment of Section 8 of the repealed Securities and Exchange Commission Act 1988 see also ISA Section 13(P) which gives SEC the regulating mandate to review mergers and acquisitions.

[31] SEC Rule 229(1) is a duplication of Section 118(1) ISA a primary legislation.

[32] Section 539(3) CAMA

[33] *Re Anglo-Continental Supply Co.* (1922) 2 CL 723

In deciding whether or not to sanction the Scheme, the court's function is twofold:

> The first is to see that the resolutions have been passed by the statutory majority at a meeting duly convened and held, the second is to decide in its discretion whether the arrangement is fair… what I have to see is whether the proposal is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.[34]

There may well be a third requirement, and that is, whether those that attended a class meeting were fairly representative of the class.[35]

By Section 539(4) CAMA, the court order sanctioning the Scheme shall not take effect until a certified true copy of it has been delivered to the Corporate Affairs Commission for registration, further, a copy of the order must be annexed to every copy of the Company's Memorandum issued after the order has been made.

The employment of section 539 procedure as a means of effecting a merger or acquisition has many observable disadvantages. This section lacks provision for facilitating powers of the court by way of simple vesting order for the automatic transfer of the undertaking property and liabilities of the transferor company to the transferee company and for the allotment or appropriation of the shares of securities of the transferee company.[36] In view of this, the procedure involves a great deal of labour and expense in the document process and execution of formal transfers and conveyances.

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[34] Maugham J. in *Re Dorman Long & Co*. (1934) Ch 635

[35] *Re Anglo-Continental Supply Co. Supra.*

[36] The equivalent section 197 of the repealed 1968 Companies Act contained provisions for facilitating powers of the court, likewise, section 100 (3) ISA 1999 (repealed) and section 122(6) S.A. 2007. In the case of small merger only.

Again, unlike section 538 procedure, there is absence of appraisal rights for dissenting shareholders under section 539 which should stipulate what options, if any are available to dissentients regarding their shares. This is one of the matters which come within the facilitating regarding their shares. This is one of the matters which come within the facilitating powers of the court under section 122 ISA procedure on small mergers.[37]

Another deficiency of section 539 is the absence of provision for compulsory acquisition of shares of dissenting shareholders unlike sections 122 and 123 ISA procedure for all categories of mergers, under which the transferee company is empowered to acquire shares of dissenting shareholders.[38] Despite the deficiencies attributed to section 539 procedure one of its advantageous features lies in its provision for information disclosure to members.[39]

Since the deficiencies of section 539 CAMA procedures far outweigh its attributes as an appropriate method for effecting mergers and acquisitions there is an obvious need to incorporate into the section the relevant provisions that it lacks in order to enhance its value.

3.3.Scheme of Merger under Sections 122 and 123 ISA

This procedure appears to be the main one for effecting a scheme of merger and it is contained in sections 122 and 123 part XII of ISA 2007. This procedure replaces the former procedure under section 100 of the repealed ISA 1999 which deals with Compromise, Arrangement Reconstruction and Mergers of Companies.[40]

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[37] Section 122(6)(c) ibid, the equivalent of section 100(3)(c) Ibid (repealed) see detailed procedure in this chapter.
[38] Section 129 ISA 2007.
[39] Section 540 CAMA This will enable members decide whether or not to approve the scheme.
[40] Section 100 ISA 1999 (repealed) was a re-enactment of the repealed section 591 CAMA

The procedure under sections 122 and 123 ISA can be employed to effect a merger involving, not only a transfer of undertakings but also a purchase or lease of shares. It can be contrasted with the former position under the repealed ISA, 1999 which restricted section 100 procedure to transfer of undertakings only of the transferor company without extending the interest to be acquired to its share capital (that is, its voting securities) This option is vital where the motivation for a takeover or acquisition is mainly to acquire voting control. The company which seeks control will be more interested in acquiring voting securities, rather than assets of the transferor company.

Section 119(1) ISA 2007 explained the full meaning of merger which was discussed earlier in this work. A merger can be achieved under section 119(1) through the purchase or lease of the shares, interest or assets of the other party to the merger,[41] or the amalgamation or other combination with the other company concerned.[42] Section 119(2) has achieved a lot by resolving the misconception of the Nigeria Law Reform Commission under section 539 CAMA in issues of "internal" re-organization involving a single company, whereas the procedure under section 539 CAMA may be designed to achieve any form of merger or takeover but by scheme of arrangement or a takeover bid involving transfer of undertaking or shares.[43]

Section 119(3) ISA comes up with six different situations in which a person may be said to be in control of a company. By this subsection, a person controls a company if that person:

a) beneficially owns more than one half of issued share capital of the company.

[41] Section 119(2) (a) ibid
[42] Section 119(2)(b) ibid
[43] Nwosu, op.cit. p. 20, cited in Okonkwo op. cit p. 8, Tunde Ogowewo op. cit p. 22.

b) is entitled to 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
c) is able to appoint or to veto the appointment of a majority of the directors of the company.
d) is a holding company, and the company is a subsidiary of that company as contemplated by the Companies and Allied Matters Act.
e) 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 trustee or to appoint or change the majority o the beneficiaries of the trust;
f) 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).

3.3.1. Thresholds and Categories of Mergers

Section 120 ISA empowers SEC popularly known as Commission to, from time to time, prescribe a lower and an upper threshold of combined annual turnover or assets, or a lower and an upper threshold of combinations of turnover and assets in Nigeria, in general or in relation to specific industries.[44] The power extends to the establishment by SEC of the method for the calculation of the annual turnover or assets which shall apply to each threshold,[45] pending the determinations of the said thresholds by SEC, the lower and upper thresholds are put at the rate of N500,000,000 and N5,000,000,000 respectively.[46]

[44] Section 120(1)(a) ibid
[45] Section 120(1)(b) ibid
[46] Section 120(4) ibid

Mergers are now classified, according to their relative values, into three, namely small merger, intermediate merger and large merger.[47] This fundamental change introduced by the new Act is quite commendable as different requirements for notification and implementation of mergers now apply, depending on the category in question.[48]

A small merger is a merger or proposed merger with a value at or below the lower threshold which presently is N500,000,000.[49] An "intermediate merger" is one with a value between the lower and upper thresholds, presently N500,000,000 and N5,000,000,000 respectively.[50] While a "large merger" has a value at or above the upper threshold presently, N5,000,000,000.[51]

The procedure for effecting a merger under sections 122 and 123 ISA 2007, involves a number of stages which are considered below:

3.3.2. Pre-Merger Notification

A pre-merger notification under Rule 23(1) of S.E.C's Rules and Regulation, Takeovers, Mergers and Acquisitions is required in principle for an approval to be given to the SEC. Prior to the giving of the notice, which is a formal expression of intention to arrange a merger, the directors of the companies involved would have held consultations and agreed to execute the merger.

Pre-merger notice must be accompanied by a report which shall contain the following:

i) letter of intent signed by the merging companies together with the board resolutions of the merging companies in support of the merger;

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[47] Section 120(2) ibid
[48] Sec sections 122 and 123 ibid. The requirement appear to be less stringent for parties to small merger except in the exceptional circumstance when SEC demands notification from the parties
[49] Section 120(2)(a) ibid
[50] Section 120(2)(b) ibid
[51] Section 120(2)(c) ibid

ii) detailed write-up of the proposed transaction including the background studies relating to the merger or acquisition or combination and justification for it. The write-up shall disclose the following details:

a. information about product lines or operations of the companies;
b. a list of the major competitors in that product market and the market position or market share of each company;
c. the structure and organization of the companies;
d. revenue information about the operation of the companies;
e. an analysis of the effect of the transaction on the relevant market, including the post-transaction market position of the acquiring or surviving company;
f. Memorandum and Articles of Association of the merging Companies Certified by the Corporate Affairs Commission;

iii) the latest financial statements of the companies;

iv) certificate of incorporation of the merging companies.

3.3.3. Notification of Small Merger

A party to a small merger is not required to notify SEC of the merger unless otherwise required by SEC and may implement the merger without its approval. Such a party may, however, voluntarily notify SEC, of merger at anytime,[52] SEC on the other hand, may, within six months after commencement of the implementation of a small merger, require the parties to the merger to notify it of the merger in the prescribed manner and form, if in its opinion, having regard to the provisions of section 121,[53] the merger may substantially prevent or lesson competition, or cannot be justified on public interest

[52] Section 122(2) ibid Notification requirement is an innovation that was absent in the repealed ISA 1999.
[53] The section among other things, contains antitrust provisions

grounds.[54] The parties shall, there-upon, take no further steps to implement the merger until the merger is approved either outright or conditionally by SEC[55]

It seems that there is a conflict between section 122(1) ISA and section 118(1) ISA 2007. The provisions of section 122(1) barring S.E.Cs, requirement for notification under subsection (3) appears to exempt small mergers from the regulatory oversight of S.EC contrary to section 118(1).[56] Section 118(1) empowers SEC to review and approve, "ever merger, acquisition or business combination between or among companies." We are of the opinion that the apparent conflict between the two sections should be resolved by legislative amendment. The conflict apart, the dispensation from SEC's notification requirement and approval under section 122(1) has the advantage of facilitating and shortening the period within which a small merger can be fully implemented unlike in the case of intermediate and large mergers, the parties of which comply with elaborate notification requirement prior to SEC's approval.

3.3.4. Notification of Intermediate and Large Mergers

Section 123(1) ISA made it mandatory that an obligation must be on a party to an intermediate and large merger to notify SEC of that merger in the prescribed manner and form. It is necessary that both the primary acquiring and the primary target companies must each provide a copy of the notice to registered trade union exists, to the employees concerned or their representative[57].

It is in the interest of the employees that the innovation of the new Act is introduced in order to help and safeguard the employees also. The notice helps to put them on guard early enough about the proposed merger. The employees of the transferor company will,

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[54] Section 122(3) ibid
[55] Section 122(4) ibid
[56] Rule 231 of SEC's Rules and Regulations also imposes an obligation on companies wishing to merge to file a pre-merger notice with S.EC.
[57] Section 123(2) Ibid

as a matter of urgency, want to know early enough the intention of the transferee regarding the continuation or cessation of their employment after merger.

3.3.5. Initial Consideration by SEC

The guiding principle at this stage is the issue of competition. Whenever required to consider a merger section 121(1)(a) ISA imposes an obligation on SEC to initially determine whether or not the merger is likely to substantially prevent or lessen competition.[58] Section 121(2) sets out the various factors which SEC must assess in determining whether or not a merger is likely to substantially prevent or lessen competition.

These are the strengths of competition in the relevant market and probability that the company after the merger, will behave competitively or co-operatively in the said market, taking into account any factor that is relevant to competition in that market including:

a) the actual and potential level of important competition therein;
b) the ease of entry into the market, including tariff and regulatory barriers;
c) the level and trends of concentration, and history of collusion;
d) the degree of countervailing power therein;
e) the dynamic characteristics of the market, including growth innovation and product differentiation;
f) the nature and extent of vertical integration;
g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and
h) whether the merger will result in the removal of an effective competition.

After making the initial determination, SEC may issue a letter of approval in principal to the parties. This letter allows the parties to the merger to move to the next stage of the transaction, which is the formulation of the Draft Scheme Document with the assistance

[58] This is an antitrust prevision, the equivalent of which was contained in section 99(3) ISA 1999 (repealed)

of professional advisers. The Scheme Documents, containing the agreed and negotiated terms of the merger, is filed with SEC and if it meets SEC's, requirement will be cleared to enable the companies hold the statutory-ordered meeting.[59]

3.3.6. Court-Ordered Meeting

It is mandatory for court to order for meeting in the process of merger which must be for all the shareholders of all the merging companies. Section 121(4) ISA 2007 provides:

> After making the initial determination, the Commission may grant an approval in principle to the merger and direct the merging companies to make an application to the court to order separate meeting of shareholders of the merging companies in order to get their concurrence to the proposed merger.

The provision resolves the issues as to whether or not the companies involved need to hold separate meetings to approve the scheme. The requirement for separate meetings has however, been criticized on the grounds that the decision in the *Re Lipton's case* was erroneous and ought not to have in the first place been codified by the draftsmen of CAMA and then later moved into the repealed ISA[60] One disadvantageous feature of the procedure under sections 122 and 123 ISA 2007 is the absence of information disclosure. No disclosure requirement is imposed by the sections as does the procedure under section 539 CAMA 2004.

It is in our opinion that such disclosure requirement is necessary and will enable the shareholders form a fair judgment of the merits or demerits of the proposed scheme of merger. In effect the directors of each company are obliged to disclose their interest to members as well as act in the best interest of the company in accordance with the deemed of the fiduciary.[61]

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[59] Rule 231(2) SEC rules and regulation op. cit. p. 264.
[60] Section 100 ISA 1999 repealed.
[61] *Gething v. Kilner* (1972) I.W.L..R. 337

The application to court is made ex-parte by all of the companies affected to the Federal High Court praying it to order separate meetings of the companies or banks concerned for the purpose of approving the draft scheme, with or without modification.

Section 121(5) provides:

> If a majority representing not less than three quarters in value of the shares of members being present and voting either in person or by proxy at each of the separate meetings agree to the scheme, the scheme shall be referred to the Commission for approval.[62]

Depending on the outcome of the meeting of the shareholders which the Court ordered for both companies and banks on a separate manner, the applicants shall file with SEC a formal application for approval of the merger.

Consideration of Mergers by SEC Rule 233(1) of SEC's Rules and Regulations requires the application for SEC's formal approval of the Scheme of merger to be accompanied by the following:

- i) two hard copies and a diskette copy of the scheme containing among other things, the following:
  - a. separate letters from the chairman of the merging companies/banks addressed to their respective shareholders:
  - b. explanatory statement to the shareholders by the shareholders by the joint financial advisers:
- ii) evidence of increase in share capital of the acquiring company to accommodate any anticipated increase in paid-up capital following the share exchange:
- iii) prescribed fees:
- iv) draft prospectus (if necessary) or draft particulars in the case of listing on the second-tier securities market:

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[62] This section is replica of Section 100(2) ISA 1999 repealed.

v) two copies of the draft financial services agreement:

vi) copies of draft proxy forms for each of the merging companies:

vii) a certified copy of the court-order directing the holding of the shareholders’ meeting:

viii) a statement that the certificate of incorporation of one of the merging companies shall be the certificate of the surviving or resultant companies (where applicable):

ix) proposed amendment to the original Memorandum and Articles of Association of the resultant company (where applicable):

In considering the formal application for formal approval of the proposed merger SEC is expected to guard against mergers which are likely to substantially prevent or lessen competition. Section 121 ISA which in part contains antitrust provisions enjoins SEC, prior to granting an approval to consider whether or not the merger is likely to substantially prevent or lessen competition by assessing the enumerated factors earlier considered.[63]

Section 121(1)(b) provides:

> If it appears that the merger is likely to substantially prevent or lesson competition then the commission shall determine:
>
> i) whether or not the merger is likely to result in any technological efficiency or other pro-competitive gain which will be greater than, and off-set, the effects of any prevention or lessening of competition that may result or likely to result from the merger, and would not likely be obtained if the merger is prevented, and:

[63] Sections 121 (1)(a), 121(2) and 121(4) Ibid

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

The antitrust provisions under the new Act appear to be more flexible than under the repealed ISA 1999. Even when there appears to be a likelihood that the merger will substantially prevent or lessen competition, SEC is allowed to further consider whether or not any technological efficiency and pro-competitive gain likely to be obtained by allowing the merger will be greater than and off-set any advantages or gains that are likely to be obtained by preventing the merger. It is our view that the effect of section 121(1) (b) though not expressly stated, is to give SEC, discretion to approve a proposed merger despite the likelihood that the merger will substantially prevent or lessen competition. This can be contrasted with the position under section 99(3) of the repealed 1999 Act which specifically empowered SEC, to approve the merger if and only if it found that the merger will not likely cause a substantial restraint of competition or tend to create a monopoly in any line of business enterprise,[64] or that the use of voting shares shall not cause substantial restrain of competition or tend to create a monopoly in any line of business enterprise.[65] If the proposed merger failed to meet either of the tests, then SEC must disapprove of it and there is no room for any further consideration by SEC.

The provisions of section 8(2) of the repealed SEC Act 1988 which was a replica of section 99(3) was considered by the Federal High Court in *Costain (West Africa) Ltd and Foundation Engineering Co. Ltd v. Securities and Exchange Commission*[66]. Where Odunowo J. held that a denial of approval could only be based on one of two alternative grounds stated under subsections 2(a) or (b) of section 8, namely, that the transaction was

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[64] Subsection (3)(a) Ibid
[65] Subsection (3)(a) Ibid
[66] (1992) 1 Securities Law Report, 18 at p. 31

likely to result in a monopoly or substantial restraint of trade or that the use of the voting power shall cause substantial restraint of competition or tend to create a monopoly.

Under the new dispensation, the consideration upon which SEC may approve or disapprove merger is no longer based on issue of competition but is now much more extensive. By section 121 (1)(c) ISA 2007, SEC is required to determine whether or not the merger can be justified on substantially public interest grounds by considering the effect that the merger will have on:

a) a particular industrial sector or region;
b) employment;
c) the ability of small business to become competitive; and
d) the ability of national industries to compete in international markets.[67]

Section 121(1)(d) also confers power on SEC to determine whether all shareholders are fairly, equitably and similarly treated and given enough information on the merger. This is an improvement on Section 100(2) of repealed ISA; 1999 which was silent on the issue of determination of fairness of the scheme and conferred the power neither on SEC, nor on the court. Entrusting the role on SEC is quite commendable because SEC appears to be better equipped than the court to determine the fairness of the scheme, in line with the provisions governing the procedure under section 539(2) CAMA 2004.

Section 124(1) allows SEC the discretion to investigate or appoint an inspector. SEC, may in the course of investigation call for additional information from any party to the merger.[68] However, any person may voluntarily file any document, affidavit, statement or other relevant information concerning the mergers.[69]

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[67] Section 121(3) ibid
[68] Section 124(2) ibid
[69] Section 124(3) ibid

The provisions of ISA on mergers and acquisitions are all embracing and extends to partnerships,[70] as well as transactions duly consummated pursuant to the authority given by any Federal Government-owned agency under any statutory provision vesting such power in the agency.[71] This brings under the purview of SEC institutions created and given monopolistic power by Government to perform specific functions such Federal Agencies include Power Holding Company of Nigeria Plc and Nigerian Communication Plc.[72] It is doubtful whether the monopolistic tendencies of these institutions will come to an end until fully privatized under the current Federal Governments privatization programme. The Act, however, grants an exemption. Section 118(3) ISA provides that section 118 shall not apply to holding companies acquiring shares solely for the purpose of investment as opposed to using voting shares to cause or attempt to cause a substantial restraint of competition or to create a monopoly in any line of business enterprise.

3.4.Takeover Bid under section 132 ISA

Takeover bid is one of the techniques for effecting a takeover or merger of companies. All about the procedure for takeover bid is contained in sections 131-151, part XII ISA 2007. The takeover bid was effected under sections 103 -122 of part XI ISA 1999 (repealed) but the Companies Act 1968 contained no procedure for effecting takeover bids which was one of the deficiencies in that 1968 Companies Act. Before the introduction of the City Code on Takeovers and Mergers, the acquisition of controlling shares in a company was a matter of contrast in the nature of private deal between the bidder[73], and the target[74] shareholders or stock market purchases[75]. This freedom led to problems of coercion and unequal treatment of target shareholders since the English

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[70] Section 118(2) ibid

[71] Section 118(4) ibid. Such transactions were exempted by section 99(3) ISA 1999 (repealed).

[72] Professor Bob Osaze, "Basics of mergers, acquisitions, takeover and consolidation".

[73] A bider is a person who makes an offer or an invitation and the term in this work used interchangeably with the term "offeror" which ISA uses.

[74] The term is used interchangeable with the term "offeree" which ISA uses.

[75] Weinberg et al, op. cit. p. 115 para 901

Company Law introduced only the mechanism for compulsory acquisition of shares following a takeover bid[76].

The City Code on Takeovers and Mergers, the edition of which was published in 1996, was introduced in England in 1976 as an effective takeover bid regulation, principally for investor protection. The Code ensures that target shareholders are treated fairly and equally and that the decision to accept a bid is made by the target shareholders and not by its management. The Code is not concerned with the merits of bid. The English Companies Act, 1985, together with the Financial Services Act 1986 perform an accessory role in the regulation of takeover in England.

There has not, as yet been any reported case of a takeover bid in the Nigerian Corporate World, in spite of the space of mergers and acquisitions witnessed in the banking sectors in the recent past. The reason for this may not be unconnected with the "buy and hold", attitude of the majority of Nigerian shareholders as well as the block holding nature of shares persons deemed to make a takeovers Bid.

Section 133(1) ISA provides as follows:

> Subject to this section, a takeover bid shall be deemed to be made by a person who either himself or through his agent despatches a bid; or by two or more persons jointly or in concert who either themselves or through their agent dispatch a bid to shareholder at approximately the same time in order to acquire

a) shares of any class in an offeree company which
    i) either alone or

[76] Tunde ogowewo op. cit. p. 40.

ii) if combined with shares of that class in the offeree company already, on the date of the takeover bid, beneficially owned or controlled directly or indirectly by that person or any of them or any company belonging to the same group as that person or, as the case may be, those persons or any of them, or any company belonging to the same group as that person or as the case may be, those persons or any of them[77], would exceed 30 percent (or any lower or higher threshold as determined by the Commission from time to time) of all issued shares include in that class; or

b) sufficient shares in the offeree company to make that company a subsidiary of that person or, as the case may be, of any of those persons; or

c) sufficient shares in the offeree company to enable that person or as the case may be, those persons or any of them to exercise or to control the exercise of not less than 30 percent (or any lower or higher threshold as determined by the Commission from time to time) of the voting power at any general meeting of the offeree company.

A takeover bid is also deemed to be made by a company which dispatches a bid concurrently to its shareholders to repurchase its own shares[78].

Section 133(1)(a)(ii) aggregates the shares sought to be acquired under the bid with those already owned or controlled by the bidder and joint bidders or concert bidders for the

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[77] The italicized its origin. But this seems to be a typographical error moved from the repealed Act which duplicates the immediately preceding clause. The section should be amended by expending the repealed clause.

[78] Section 133(2) ibid

purpose of determining whether the threshold of 30 per cent of the issued shares of the target company has been exceeded.

The notion of "concert bidders" or "person acting in concert" is aimed at ensuring that a bidder does not conceal the true extent of his interest or his identity with regard to another concurrent bid that may be traceable to him.

The English City Code on Takeovers and Mergers defines "persons acting in concert" as comprising:

> Person who, pursuant to an agreement or understanding (whether formal or informal) actively co-operate, through the acquisition by any of them of shares in a company, to obtain or consolidate control of that company.[79]

Investment Securities Act (ISA), does not set out any general definition of the phrase, "person acting in concert" like the English City Code.

Section 132(3) ISA identifies seven very wide categories of persons who may be presumed to be acting in concert with each other, unless the contrary be proved. By section 132(3) I.S.A, if two or more persons acting separately or acting separately through an agent or agents each dispatch a bid at approximately the same to shareholders of the same company, they shall, unless the contrary be proved, be deemed to have dispatched the bid in concert, if those persons belong to any one of the following group:

a) a holding company and its subsidiary or subsidiaries;
b) two or more subsidiaries of the same holding company;
c) a company and any associate company;
d) a group of a kind referred to in (a) or (b) above, together with one or more than one company which is an associate of any company in the group;

[79] City Code, op. cit. p. 60.

e) a subsidiary and one or more than one associate of its holding company;
f) the pension fund of two or more companies or any group referred to in (a) to (c) above; or
g) any combination of;
    i) officers of one or more than one company in any group of the kind referred to in (a) to (c)[80]
    ii) any such officer or officers and any such member or members. The family of an officer includes the husband or wife, as well as the reputed husband or wife, a child or the parents of the officer.

The test as to whether or not persons are acting in concert is a question of fact based on the establishment of satisfactory evidence[81]. Again, any presumption that associated companies have dispatched a bid in concert may be a difficult one to apply since ISA offers no definition of "associate companies". CAMA also offers no definition of the term, neither did the repealed ISA.

Section 137(1), ISA permits a corporate to make a takeover bid, but subject to an approving resolution of the directors. Every director in default commits an offence and is liable on conviction to a fine of not less than N100,000 or to imprisonment for a term not exceeding twelve months or to both such fine and imprisonment[82].

The ISA prohibits the making of a takeover bid in any case where the bid is dispatched:

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[80] Note that this may well be a typographical error moved from the repealed ISA as the repealed equivalent section 594(3) (g) CAMA restricted this to (c).
[81] Weinberg et al, op. cit. para. 921, p. 125
[82] Section 137(2) ISA 2007. The penalty is much more stringent than the mere fine of N1,600 stipulated by the repealed equitant section 599(2) CAMA and may be sufficient deterrent against the violation of the provision.

a) to fewer than twenty shareholders where the purchase is to be by way of separate arrangement[83]. The provision to section 133(3)(a), however, does allow a takeover bid to be made to fewer than twenty shareholders who hold in the aggregate a total of 51 per cent of the issued and paid-up shares of the company. The provision which was absent in the corresponding Section 104(3)(a) of the old Act, is a welcome development for recognizing a minority in number of shareholding.

   Rule 235(3)(a) of S.E.C's. Rules and Regulations appears to be in conflict with section 133(3)(a) ISA by forbidding the making of a takeover bid to fewer than twenty shareholders representing 60 per cent of the members of the target company. I propose an amendment of the rule by SEC

b) to purchase shares in a company that has fewer than twenty shareholders[84].

c) in circumstances or for a purpose prescribed by regulation[85], and

d) in respect of shares in a private company[86].

3.4.1. Stages in a Takeover Bid

The making of a takeover bid involves the following stages:

1. Bid Authority

First and foremost, the bidder must clear the first statutory hurdle which is the mandatory requirements that the bidder or his agent[87] must obtain from SEC an authority to proceed with the takeover bid[88]. Such an application shall state the name and other particulars of the bidder and the particulars of the proposed bid together with supporting documents as may be required by SEC[89] By section 134(5) ISA, SEC is under an obligation to keep

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[83] Section 133(3)(a) ibid.
[84] Section 133(3)(b) ibid.
[85] Section 133(3)(c) ibid. see also Rule 235 S.E.C's Rules and Regulations op. cit. p. 271.
[86] Section 133(4) ibid.
[87] Rule 235(1)(b) SEC Rules and Regulations, op. cit. p. 271. Such an agent must be a registered capital market operator.
[88] Section 134(1) and 7 ibid.
[89] Section 134(2) ibid.

confidential matters relating to an application for an authority to proceed with a takeover bid. The same subsection at the same time appears to allow SEC to ignore this confidential requirement in the case of necessity for the purpose of consulting any person or persons to enable it reach a decision on the application[90].

SEC can only grant an authority to proceed with the proposed bid if it is satisfied that none of these matters will be adversely affected[91]. The authority if granted[92], will remain in force for three months but may be extended by SEC on application made to it before the expiration of the initial three months[93]. Rules 237(2), SEC's Rules and Regulations[94], is specified that the application for renewal must be made within 14 days prior to the expiration of the authority to proceed within the period and that such renewal shall be for a period of not more than 3 months.

It is unlawful to make a takeover bid without an authority to proceed or where the authority is no long in force[95]. Section 151(1) ISA 2007 prescribes a fine of not less than N100,000 or an imprisonment for a term not exceeding twelve months or to both such fine and imprisonment.

3.4.2. Bid Registration

By section 135(1) ISA 2007, a takeover bid shall not be made unless a copy of the proposed bid has been registered[96]. The proposed bid must be lodged with SEC by the prospective bidder and shall register same if it is satisfied that the proposed bid has

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[90] Section 134(2) ibid.
[91] *Loc. cit.*
[92] Section 134(7) ibid. The authority must be in writing, dated and give sufficient particulars of the proposed takeover bid to enable it to be identified.
[93] Section 134(8) ibid.
[94] *Op. cit*. p. 274.
[95] Section 151 (1)(a) ibid.
[96] Section 135(6) ISA forbids SEC from registering the proposed bid unless an authority has been granted under section 134 and still remains in force.

complied with all the requirements in "section 133(1) and (2)"[97]. The bidder will be notified by the registration. It is obvious that section 133(1) and (2) has no relevance at all to section 135(2) (a) as the former is concerned with a person making a takeover bid, discussed earlier. This error was moved from the corresponding section 106(2)(a) of the repealed Act without amendment. The correction should have been section 136(1) and (2). It is this section that specifies the requirements which the proposed bid must comply with. The correction of the observed error shall be by legislative amendment of section 125(2)(a) ISA 2007.

By section 136 I.S.A, in the case of an invitation[98], the bid shall be incorporated in a document which shall disclose among other things:

i) the identity and particulars of the bidder[99]
ii) the maximum number and other particulars of the target company's shares proposed to be acquired[100]
iii) the terms on which the shares are to be acquired[101]
iv) the number and other particulars of the target company's shares to which the bidder, and other companies in the same group are entitled[102]
v) the intention if any of the bidder, if he intends to invoke the right under section 143[103], to acquire the shares of dissenting shareholders[104]
vi) the intention if any, of the bidder to make market purchase of the target company's shares during the bid period[105].

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[97] Section 135(2)(a) ibid.
[98] Section 136(1) ibid.
[99] Section 136(1) (a) ibid.
[100] Section 136(1)(b) ibid.
[101] Section 136(1)(c) ibid.
[102] Section 136(1)(d) ibid.
[103] This is yet another error, moved from the repealed Act needs to be corrected by the amendment of section 142(c). The correct sections should have been section 146 which specifically deals with the compulsory acquisition of shares of dissenting shareholders, section 143 deals with bid for less than all shares.
[104] Section 136(1)(e) and section 142(c) ibid.

Except for minor differences the mandatory requirements in the case of an offer as similar to those of an invitation[106] exists. Whereas the maximum number of the target company's shares to be acquired is required in the case of an invitation, the world "maximum" is omitted in the case of an offer[107]. Again, the requirement that the bid document should set out how and by what date, the obligations of the bidder to be satisfied is peculiar to an offer and does not extend to an invitation[108]. It is difficult to ascertain why this requirement should not equally apply to an invitation, more so as section 117 ISA 2007 defines a bid to mean both an invitation and an offer.

SEC will refuse to register it if the proposed bid fails to meet the disclosure requirements and shall accordingly notify the bidder, giving reasons for its refusal[109].

Where bid registration is refused, the bidder may within thirty days of the service on him of the notice of refusal appeal against the fact of SEC's refusal to register a copy of the bid to the Tribunal[110]. The Tribunal may uphold SEC's refusal or reject it and order registration of the bid[111].

3.4.3. Dispatch of Bid Document to interested Parties

Section 138, ISA 2007 provides that the bid, and any amendment to it, must be dispatched by the bidder concurrently to each director and each shareholder of the target company as well as to SEC The essence of this, is to minimize inside abuse.

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[105] Section 136(1)(e) and section 144(e) ibid.
[106] Section 136(2) ibid. These will enable the largest shareholders form a judgment on the merit of the proposed bid.
[107] Section 136(1)(b) and section 136(2)(b) ibid.
[108] Section 136(2)(d) ibid.
[109] Section 135(2)(b) ibid.
[110] Section 135(3) ibid.
[111] Section 135(4) ibid.

In Section 132(2) ISA a takeover bid is deemed to be dated as from the date on which it is dispatched, and if dispatched on more than one date as from the latest date. A bid dispatched by post shall be deemed dated as from the date of posting. The relevance of the date of a takeover bid is such that the bid period and withdrawal period are calculated on the basis of this date which is the bid's commencement date.

Rule 235(4) SEC's Rules and Regulations provides that a takeover bid shall, for the purpose of information, be advertised in at least two national daily newspapers[112].

3.4.4. Directors' Circular

When relieving the takeover bid, the directors of the target company are required to consider it and thereafter send a directors' circular to each shareholder and to SEC "at least seven days before the date on which the takeover bid, whichever is earlier is to take effect"[113].

There appears to be a serious omission in the subsection. Left as it is, the provision makes no sense. The omission initially occurred in moving the provisions of the repealed section 602 (1), CAMA into section 111(1) of the repealed ISA, 1999. The latter was subsequently re-enacted as section 140(1) of ISA, 2007 without amendment.

The circular is required to be sent to each shareholder and to the SEC at least seven days before the date on which the takeover bid terminates or before the 60th day after the date of the takeover bid[114], whichever is the earlier.

If the directors fail to send the required circular within ten days of the date of the takeover bid, they are duty bound to notify the shareholders and SEC that the circular

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[112] Op. cit. p. 271.
[113] Section 140(1) ibid. Emphasis mine.
[114] Emphasis mine.

shall be sent to them, and they may recommend that no shares be tendered pursuant to the takeover bid until the circular is sent[115].

The director shall approve a circular containing the recommendations of the majority[116]. Any director who takes the view that the takeover bid is disadvantageous to the shareholders or who disagrees with any statement in the circular is entitled to express such a view or disagreement in the circular and give his reasons[117].

The main purpose of the directors' circular is to convey an opinion as to the merits or demerits of the takeover bid and the reasons behind such opinion. Hence, the circular should contain adequate information to enable the target shareholders form a balanced view on the right step to take with regard to the takeover bid. But, rather unfortunately, neither ISA nor CAMA makes provision specifying the information which should be disclosed in the directors' circular other than as provided in section 140(6) ISA and section 273(1), CAMA

By section 141(1) ISA, the directors' circular shall not include the report, opinion or statement of any professional expert, each as a legal practitioner, auditor, accountant, engineer etc. unless he has consented in writing to such inclusion. By this section the directors of the target company are not under a duty to obtain an expert advice regarding the takeover bid.

3.4.5. Bid for All the Shares

In a bid for all the shares of a class, the bid period or the period of time within which shares shall be deposited by the target shareholders shall be at least twenty-one days from

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[115] Section 140(2) ibid.
[116] Section 140(5) ibid.
[117] Section 140(4) ibid.

the date of the takeover bid[118]. The section appears to have now amended the error in the bid period of less than twenty-one days provided for in the corresponding section 115(c) of the repealed ISA 1999.

Section 144(a) ISA allows the target shareholders to withdraw deposited shares within ten days from the date of the takeover bid. But, if they fail to exercise their right of withdrawal within the given period, and the bidder fails to take up the deposited shares throughout the bid period, the target shareholders will have no right to withdraw their shares until sixty days from the date of the takeover bid[119]. This places the target shareholders at a great disadvantage as they will then be unable immediately to withdraw from a failed bid. They must have to allow the sixty days run out before doing so.

The bidder shall not take up the deposited shares until ten days after the date of the takeover bid[120]. If the terms stipulated by the bidder have been complied with, he must take up and pay for the deposited shares within fourteen days after the last day within which shares may be deposited pursuant to the bid[121], that is, not later than thirty four days from the date of the takeover bid. This is to ensure that the target shareholders are paid within a reasonable time.

If the terms of the bid are amended during the course of the bid, thereby resulting in an increased consideration for the shares, the increment shall extend to shares take up both before and after the amendment[122]. This applies also where the increased consideration relates to payment made by the bidder for the target company's shares on the stock

[118] Section 144(c) ibid. Section 144 applies to bids for all and for less than all the shares.
[119] Section 142(a) ibid.
[120] Section 144(c) ibid. section 144 applies to bids for all and for less than all the shares.
[121] Section 142(a) ibid.
[122] Section 144(d) ibid.

market during the bid period[123]. Shares acquired otherwise than under the takeover bid shall be counted in determining whether the minimum acceptance has been attained[124].

3.4.6. Bid for Less than all the Shares

In a bid for part only of any class of shares, the period of time which shares shall be deposited by the target share shall be deposited by the target shareholders (that is, the bid period), or any extension thereof, shall not exceed a maximum of thirty-five days from the date of takeover bid[125]. It will be up to twenty-one days from the date of takeover bid before the bidder can take up deposited shares[126]. It differs from section 142(b) which stipulates a shorter period of ten days from the date of the takeover bid in the case of a bid for all the shares. If more shares are deposited than the bidder is bound or willing to take up and pay for, the shares taken up shall be taken up rateably, disregarding fractions, according to the number of shares deposited by each target shareholder[127]. This is aimed at ensuring that all the target shareholders are given equal treatment. Shares acquired otherwise than by takeover bid shall not be counted among the shares taken up rateably under section 143(1)(c), ISA.[128] If a bid for all the shares of any class is converted by amendment or otherwise to a partial bid, it is deemed to be a bid which section 143(1) applies[129].

3.4.7. Buy-Out Rights of the Bidder

This procedure enables a bidder who has successfully acquired ninety per cent of the shares under the bid to eliminate the remaining shares for which no acceptances were received[130].

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[123] Section 144(f) (i) & (ii) ibid.
[124] Section 143(1)(b) ibid.
[125] Section 143(1)(b) ibid.
[126] Section 143(1) (a) ibid.
[127] Section 143(1)(c) ibid.
[128] Section 144(f)(iv) ibid.
[129] Section 143(2) ibid.
[130] Section 146(1)(b) ibid.

Section 146(2) ISA provides that where a takeover bidder has obtained acceptances for not less than ninety per cent in number of the shares to which the takeover bid relates the takeover bidder may, within one month of obtaining the ninety per cent acceptances, notify each of the dissenting shareholders, among other things, that he desires to acquire his shares and that he is entitled to elect within twenty days of the receipt of the notice[131], either to transfer his shares to the bidder on the terms on which the bidder acquired the shares of the accepting shareholders; or to demand payment of a fair value for his shares[132], as determined by court[133]. If he elects to transfer his shares, the bidder is deemed to have elected to transfer his shares[134]. If he makes no election, he is deemed to have elected to transfer his shares[135]. The dissenting shareholders must within twenty days of receiving the above notice from the bidder send his share certificate to the target company[136]. The bidder must within twenty days of sending notice to the dissenting shareholder, pay or transfer to the target company the amount of money or other consideration which the bidder would have to pay if the dissenting shareholder elected to transfer his shares[137]. Any amount or consideration so received shall be deemed to be held in trust for the dissenting shareholder[138]. The said amount shall be paid into a bank account and the consideration placed in the custody of a bank[139].

By section 147(2), ISA, if a dissenting shareholder elects to demand payment of fair value of his shares, the bidder may within twenty days after paying or transferring to the target company the money or other consideration under "subsection (6) of this section[140],

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[131] Section 146(8) ibid, requires that a copy of the notice be sent to SEC
[132] Section 146(3)(a) & (b) ibid.
[133] Section 147(6) ibid.
[134] Section 146(6) ibid.
[135] Section 146(4) ibid.
[136] Section 146(5) ibid.
[137] Section 146(6) ibid.
[138] Section 146(6)(a) ibid.
[139] Section 146(6)(a) ibid.
[140] The intended section is section 146(6).l The error move from section 117(6) of the repealed ISA which is confirmed by the repealed equivalent section 609(2) CAMA meets to be amended.

apply to the court to fix the fair value of the shares of the dissenting shareholder. If the bidder fails to make the application within the given period, the dissenting shareholder may apply to the court within a further period of twenty days[141].

Where an application has been made to the court, all the dissenting shareholders who made a similar election must be joined as parties and are bound by the decision of the court[142]. The court shall fix the fair value of the shares and in doing so may appoint one or more valuers to assist it.[143] The target company shall pay to the dissenting shareholder who has sent his share certificate the money or other consideration to which he is entitled to on an application being made by him for that purpose[144].

If any dissenting shareholder fails to send his share certificate, the target company has the duty to notify him that his shares have been cancelled, that a payment or transfer has been made, and that he shall be given the money or other consideration to which he is entitled when he complies with "subsection (6)"[145] of section 146[146].

Any person, other than the target company who is holding money or property in trust by virtue of an order of court[147], shall likewise give to the dissenting shareholder the money or other consideration to which he is entitled on application being made by him for that purpose[148].

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[141] Section 147(3) ibid.
[142] Section 147(5) ibid.
[143] Section 147(6) and (7) ibid.
[144] Section 148(2)(a) ibid.
[145] The subsection is totally irrelevant in this context more relevant is subsection 5 which requires the dissenting shareholder to send his share certificate to the target company. This is yet another error moved from the repealed ISA 1999 without amendment.
[146] Section 148(2)(b)(iii) ibid.
[147] Section 147(9)(b) ibid.
[148] Section 148(3) ibid.

3.4.8. Sell-Out Right of Minority Shareholder

The minority shareholder's**[149]** right to compel the takeover bidder to acquire his shares arises only when the takeover bidder's aggregate shareholding following a takeover bid reaches ninety per cent in number of the issued shares in the class of shares to which the takeover bid relates[150]. In that event, the takeover bidder must within two months of reaching the ninety per cent mark give notice of that fact to the holders of the remaining shares included in that class[151]. Each such holder may, within two months thereafter, given notice to the bidder to acquire his shares included in that class[152]. The takeover bidder shall then be entitled and bound to acquire those shares either, on the terms on which the shares of the accepting shareholders[153], were acquired under the takeover bid or on such other terms as may be agreed or as the court, on the application of either party, deems fit to order[154].

3.5.Takeover Offer under Section 131 ISA

The procedure for a takeover offer is contained in section 131 ISA**[155]** such an offer is also referred to as a mandatory offer or mandatory bid as opposed to a voluntary bid under section 132 ISA Under the procedure, an obligation to make a general offer or bid arises as soon as a shareholder or persons acting in concert with him has acquired sufficient shares in a particular company to enable him control that company or has made further acquisitions in that company to enable him consolidate control. All the shareholders of the particular class of equity share capital in the offeree company must be given an equal opportunity to quit the company be selling their shares to the new

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[149] The minority shareholder is a non-acceptor of the takeover bid who be locked in if he otherwise fails to exercise his sell-out right.
[150] Section 150(1) ibid. The aggregate shares are made up of those acquired by the bidder under the takeover bid and those held by him before the takeover bid in the target company.
[151] Section 150(2) ibid. Note that the provision is not backed by any sanction in the event of default.
[152] Section 150(3) ibid.
[153] Section 150(5) ibid. no account shall be taken of the terms on which the shares of any dissenting shareholder were acquired under the takeover bid.
[154] Section 150(1) ibid.
[155] This is quite a fundamental change introduced by the new ISA 2007.

controller on the same terms as have been obtained by those who have sold to him[156]. This opportunity is made available on compulsory basis and is not dependent on the wish of the new controller to make a general offer for the shares of the offeree company[157].

The opportunity is important because those shareholders may not want to remain as shareholders of the offeree company, under the new controller.

Section 131(1) ISA provides:

> Where a person:
>
> (a) acquires shares, whether by a 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
>
> (b) 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 increases 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(2) imposes an obligation on an offeror to treat similarly all shareholders of the same class of an offeree company. This requirement will not permit a person who

[156] Gower, op. cit. 792.
[157] Loc. Cit.

acquires effective control of a company to pay a premium for that control without conferring the benefit of that premium element on all the shareholders equally[158].

Section 131(3) forbids an offeror, the company or any of the representatives and advisers of the offeror or offeree, either during an offer or whom one is in contemplation from making available information to some shareholders which is not extended to all shareholders.

As the offer may not be made conditional upon any higher level of acceptance, the offeror, even if he so wishes, cannot exercise the right of compulsory acquisition of shares of dissenting shareholder[159]. Similarly, shareholders of the offeree company whose shares have not been purchased have no right to compel the offeror to acquire those shares[160]. Furthermore in the same jurisdiction a mandatory bid must be a cash bid or some other consideration as long as it is accompanied by a cash alternative and at the highest price paid by an offeror or a member of his concert party[161].

The ISA is silent on these important matters which are recommended should be incorporated, by legislative amendment, as part of the special features of section 131 procedure. It is also recommended that as soon as an obligation to make a mandatory bid arises, in addition to the special features relating to mandatory bids, all relevant provisions governing voluntary takeover bid under section 132 including disclosure of information, should apply in the normal way. This can be achieved by legislative amendment of section 131 ISA procedure. Again SEC's Rules and Regulations on Mergers, Takeovers and Acquisitions which are silent on mandatory bids but provide

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[158] ibid
[159] Weinberg et al. op. cit. p. 150 para 968.
[160] ibid. p. 65. para 534.
[161] ibid. p. 150. para 968, Gower, op. cit, p. 791.

only for voluntary takeover bids need a total overhaul in order to accommodate the charges engendered by ISA 2007.

3.6.Summary of Procedure for Merger

Banks proposing a merger, acquisition, amalgamation or combination shall:

i. file with the Securities and Exchange Commission (SEC) a pre-merger notice;
ii. file with the SEC a formal application for approval of the proposed merger;
iii. hold the Court Ordered Meetings;
iv. comply with post-approval requirements.[162]

3.6.1. Pre-Merger Notice

The pre-merger notice shall contain such information as:

a) letter of intent to merge, signed by the merging companies;
b) detailed write-up of the proposed transaction including all the background studies relating to the merger, acquisition, amalgamation or combination and justification of the merger;
c) detailed information about the product lines or operations of the banks;
d) a list of the major competitors in that product market and the market share of each of the banks in the proposed merger;
e) the structure and organization of each of the banks;
f) revenue information about the operations of the banks;
g) an analysis of the effect of the merger on the relevant market including the post merger market position of the surviving banks;
h) the Memorandum and Articles of Association of the merging banks certified by the Corporate Affairs Commission;
i) the proposed amendments to the Memorandum and Articles of Association of the Surviving company; and

[162] Eleh, Zephy Nwoye, "Mergers, Acquisitions and Take-over" EL, DEM ARK (Publishers) Nigeria 2005, pp. 23-28.

j) the latest financial reports of the merging banks.

When SEC reviews the Pre-Merger Notice and finds that proposed merger satisfies all statutory provisions for merger, it will grant provisional approval or approval-in-principle for the merger.

3.6.2. Formal Application for Merger

Upon receipt of a favourable response to a pre-merger notice from SEC, the merging banks will send formal application to the SEC for approval of the proposed merger.

The formal application shall contain such details such as:

a) An agreement by the consenting banks to merge i.e. fuse into one bank such agreement must specify:
   i. Terms and conditions for the merger
   ii. Mode of carrying out the transaction
   iii. Any amendments or changes to be made in the Certificate of Incorporation, Memorandum and Articles of Associate of the surviving or resultant bank.
   iv. A statement that the Certificate of Incorporate of one of the constituent banks shall be the Certificate of Incorporation of the surviving or resultant bank where applicable.
   v. The mode converting the shares of each constituent bank into shares or other Securities of the surviving or resultant bank. If there are no exchange of shares or securities; the cash, property, rights or securities of any other bank to be given in lieu of the shares.
   vi. The signatures of the Chairman of the Board of Directors or the Chief Executive of the banks attested to by Secretary of each of the constituent banks.

b. A comprehensive joint write-up of the issuing housing in respect of the proposed merger.
c. Five years audited Accounts (or number of years in existence if not up to five years) of all the banks/enterprises involved in the merger. In the case of sale for cash only the accounts of the banks being taken over would be required.
d. Draft schemes of arrangement (if any).
e. Evidence of increase of capital of the surviving or acquiring bank to accommodate any anticipated increase in the paid-up capital following the share exchange.
f. Draft prospectus (if applicable), or draft particulars in the case of listing on the Second-Tier Securities.
g. Evidence of shareholders' approval of the merger by each of the merging banks at their separate meetings.

The Court shall give order that each of the constituent banks in the proposed merger should hold a meeting of its shareholders to deliberate on the merger. At the Court ordered meeting the shareholders are given opportunity to vote for against the merger based on the information provided on the scheme documents. At this stage, the merging banks must have held their respective Court ordered meeting and the statutory majority of the shareholders vote must have supported the merger. Also, the directors and all parties to the scheme must have signed the relevant documents in relation to the merger. These documents should be stamped at the Corporate Affairs Commission (where necessary) before forwarding to the SEC for approval of the merger.

2.6.3. SEC Approval

The Securities and Exchange Commission will review the formal application for the merger and if it is satisfied that:

a) Such merger or acquisition, whether directly or indirectly, of the whole or any part of the equity or other share capital or of the whole or any part of the assets of another bank, is not likely to cause substantial restraint of competition or tend to create monopoly in any line of business enterprise.
b) The use of such shares by voting or granting proxy or otherwise shall not cause substantial restraint of competition or tends to create monopoly in any line of business enterprise, will formally approve the merger.

3.7. Implementation of Small Merger Procedure before S.E.C

When all the parties to the merger have complied with all notification requirements SEC[163] may within 20 working days therefore, extend by one single period of not more than 40 working days, the period in which it has to consider the proposed merger and in that event, must issue an extension certificate to the party who notified it of the merger[164]. Again, SEC shall, without extending the initial 20 working days, but after having considered the merger terms of section 121[165], notify the parties in the prescribed form of either its outright approval or approval of the merger subject to conditions, the prohibition of the implementation of the merger is prohibited[166]. If upon the expiration of the 20 working days period or any extended period for considering the merger SEC fails to notify the parties of its decision, the merger shall be deemed as having been approved but subject to SEC's power of revocation of approval under section 127[167]. The deadline is to ensure that approval of the merger is not unduly prolonged. The provision is an improvement which was absent in the repealed ISA By section 122(12) SEC is duty bound to publish a notice of its decision in the Gazette and to issue written reasons for the decision if it prohibits or conditionally approves the merger or if requested to do so by a party to the merger.

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[163] The provisions on merger procedure before SEC are innovations that were sent in the repealed ISA
[164] Section 122(5)(a) ibid
[165] See earlier pages where it was discussed.
[166] Section 122(5)(b) ibid
[167] Section 122(11) ibid

3.7.1. Court's Powers in Sanctioning and Facilitating a Small Merger

When SEC approves a small merger an application is made to the Federal High Court to sanction the scheme. Section 122(6) ISA 2007 provides: If the scheme is approved by the Commission, the parties shall apply to court for the merger to be sanctioned and when so sanctioned, the same shall become binding on the companies.

The application for court sanction shall be made by parties to the merger. The language of the subsection appears flexible enough to allow the court exercise its discretion either to sanction the merger or withhold its sanction so that following the principle in *Re Dorman Long & Co*[168], the court may in the exercise of its discretion withhold its sanction if satisfied that the process involved substantial irregularities or unfairness where for instance the resolution approving the scheme was not passed by statutory majority of shareholders or the meeting was not duly convened.

Our submission is that, the court sanction for a small merger will unduly prolong the time for implementing the merger and may not be necessary once SEC's approval has been obtained to implement the merger.

The court in sanctioning the scheme or by subsequent order may make facilitating provisions for all or any of the following matters[169].

a) The transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company.[170] Section 122(10)(a) defines "property" as including property rights and powers of every description while under section 122(10)(b) "Liabilities" include rights, powers and duties of every description notwithstanding that such

[168] (1934) Ch. 635 at 657
[169] Section 122 (6) ibid
[170] Section 122(6) (a) ibid, this saves a great deal of labour and expense in executing formal transfers.

rights, powers and duties are of a personal character which could not generally be assigned or performed vicariously.

b) The allotment or apparition by the transferee company of any shares, debentures, policies or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person[171]. The words “compromise” and “arrangement” moved from section 100 (3)(b) 1999 repealed ISA seem to be inappropriate here as section 122 deals only with scheme of small merger. We advocate an amendment of the paragraph to replace both words with “merger”.

c) The continuation by or against the transferee company of any legal proceedings pending by or against any transferor company[172].

d) The dissolution without winding up, of any transferor company[173]. The court shall not make this order unless the whole of the undertaking and the property, assets and liabilities of the transferor company are being transferred into the transferee company[174], and the court is satisfied that adequate provision by way of compensation has been made with respect to the employees of the company to be dissolved[175].

e) The provision to be made for any persons who in such manner as the court may direct, dissent from the compromise or arrangement[176].

f) Such incidental, consequential and supplemental matters as are necessary to ensure that the reconstruction or merger shall be fully and effectively carried out[177].

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[171] Section 122(6)(b) ibid
[172] Section 122(6)(c) ibid
[173] Section 122(6)(d) ibid. this also saves effort and expense of winding up formalities.
[174] Section 122(7)(a) ibid
[175] Section 122(7)(b) ibid
[176] Section 122(6)(e) ibid
[177] Section 122(6)(f) ibid. the word “reconstruction’s which is inappropriate in the subsection was moved in error from section 100(3) 1999 repealed ISA

Within seven days after the making of the order, an office copy of the court order sanctioning the scheme of merger must be delivered to the Securities and Exchange Commission for registration while a notice of the order shall be published in the Gazette and in at least one newspaper[178].

If any of the companies concerned failed to deliver the court order for registration or publication as required, it attracts a penalty of not less than N20,000.00[179]. But if it is in CAMA both officers and companies in default would be liable, but to a mere fine of N100.00[180], which we submit was less than adequate.

3.7.2. Implementation of Intermediate and Large Mergers

Intermediate Merger Procedure Before S.E.C. Section 125(1) ISA 2007 provides:

> Within 20 working days after the parties to an intermediate merger have fulfilled all their notification requirements in the prescribed manner and form, the Commission, after having considered the merger in terms of section 121[181], of the Act, may issue a certificate in the prescribed form approving the merger, subject to any conditions; or prohibiting implementation of the merger[182].

SEC is allowed to extend the 20 working days in which it has to consider the proposed merger by one single period of not more than 40 working days and in that event, must issue an extension certificate to the party who notified it of the merger[183]. If SEC fails to issue a certificate referred to in section 125(1) above, upon the expiration of the 20 working days period or any extended period for considering the merger, the merger shall

[178] Section 122(9) ibid
[179] ibid
[180] Section 591(6) CAMA 1990 repealed.
[181] This has been examined in the provisions page
[182] The repealed ISA contained no equivalent provision
[183] Section 125(2) ibid

be deemed as having been approved subject to SEC's power of revocation under section 127[184].

Section 125(4) imposes an obligation on SEC to publish a notice of its decision in the Gazette and to issue written reasons for its decision if it prohibits or conditionally approves the merger, or if requested by a party to the merger to do so. Issue written reasons for the decision if:

i) it prohibits or conditionally approves merger, or
ii) requested to do so by a party to the merger.

3.7.3. Large Merger Procedure before SEC

After receiving notice of large merger, SEC shall:

a) refer the notice to the court and
b) within 40 working days after all parties to a large merger have fulfilled all the prescribed notification requirements, forward to the court a statement, whether or not implementation of the merger is;
    i) approval
    ii) approved subject to any conditions; or
    iii) prohibited[185]

There are some obvious shortcomings in section 126 of ISA 2007. It is silent on the issue of SEC's consideration of the merger in terms of section 121 of the Act. It may be oversight on the part of the draftsmen of ISA.

It will be necessary if such can be amended to fill the gap which is absent in the same manner as for intermediate merger procedure before SEC The section is also silent on the

[184] Section 125(3) ibid. This is aimed at ensuring that approval in not unduly delayed. The repealed ISA was silent on the issue of deadline.
[185] Section 1226iIbid

nature of the role which the court is expected to play on receipt of the notice of the merger from SEC.

This should not be left in any doubt and should be clearly spelt out. Since the merger requires no court sanction, such a notice appears to be needless. The same is true about the mandatory statement which, SEC is required to forward to the court with regard to the approval, approval with conditions or prohibition of the implementation of the merger within 40 working days after the parties have complied with the notification requirements. The section is again silent on the consequence of any default on the part of SEC in either taking a decision about the merger or in forwarding, the required statement to the court within the set deadline. We recommend that, just as in the cases of small and intermediate mergers, the mergers be deemed as having been approved, subject to SEC's power of revocation under section 127.

The requirements for publication of notice of SEC's decision in the Gazette and the issuance by SEC of written reasons for that decision are noticeably absent from the section. We propose that the requirements be incorporated in the section by legislative amendment.

In all, the procedure for the implementation of intermediate and large mergers has as its major shortcoming, the absence of provisions for facilitating power of the court by way of simple vesting order, for the automatic transfer of the undertakings, property and liabilities of the transferor company to the transferee company and for the allotment or appropriation of shares and securities of the transferee company. In the absence of such facilitating provisions it will be more cumbersome and expensive for the parties to execute formal conveyance and transfers. We recommend an amendment of the Act to empower the parties to the merger to apply to court for facilitating order. In such a manner as for small mergers, but without necessity for court sanction of the scheme of

merger. The procedure's disadvantageous feature lies on lack of information disclosure as does section 539 CAMA 2004 procedure. Even though section 121(1)(d) requires SEC to determine whether all shareholders are given sufficient information regarding the merger, the Act fails to specify the nature of the information required.

3.8. Revocation of the Merger Approval

Section 127(1) ISA[186] empowers SEC to revoke its own decision to approve or conditionally approve all categories of merger if:

a) the decision was based on incorrect information for which a party to the merger is responsible;
b) the approval was obtained by deceit; or
c) a party to the merger has breached an obligation attached to the decision.

Once a merger approval has been revoked, SEC may prohibit the merger notwithstanding the lapse of anytime limit prescribed in part XII of the Act[187].

3.8.1. Post-Approval Requirement

Having obtained SEC's final approval and the court order sanctioning the scheme, Rule 234[188], demand that the application complies with the following requirements:

a) obtain the court order sanctioning the scheme;
b) file copy of the court order sanctioning the scheme within seven (7) days of the court making the order;
c) file a copy of the newspaper publication of the court order;
d) file a statement of the actual cost of the scheme;
e) file a notification of the completion or otherwise of the exercise within 3 months of the court order;
f) file summary reports of the scheme in respect of the following

[186] Part xi of the repealed ISA contained no similar provision.
[187] Section 127 ibid.
[188] SEC's Rules and Regulations.

1) arrangement relating to employees of the acquired company;
2) settlement of shareholders;
3) utilization of monies injected into the company; if any.

3.8.2. SEC's power to order Break-Up of company

Section 128(1) ISA provides:

> Where the Commission determines that the business practice of a company substantially prevents or lessens competition, the Commission may, in the public interest, order the break-up of the company into separate entities in such a way that its operations do not cause a substantial restraint of competition in its line of business or in the market.

This antitrust provision is yet another improvement in the law that was absent in the repealed ISA The break-up order shall not take effect until the company concerned should have been notified by SEC and given a specified time within which to make representation to SEC[189], there after SEC shall refer the order for court sanction[190].

3.8.3. Power to Acquire Dissenters' Shareholder

Section 129(1) ISA makes provisions for the compulsory acquisition of the shares of dissenting shareholders. The provisions are based on the principle of majority rule, which as a result of the recommendations of the Greene Committee in England extended to enable an outsider who had acquired a larger percentage of shares in a company to acquire the remaining shares[191]. The Committee saw the need to prevent the "oppression of the majority by the minority" which would occur if a small minority can block a takeover or a merger as the case may be. Even in the absence of opposition and little apathy, compulsory acquisition is necessary as 100% approval is seldom possible on account of untraceable shareholders[192]. Untraceable shareholders include those who have

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[189] Section 128(2) ibid
[190] Section 128(3) ibid
[191] Greene Committee Report, para. 84 cited in Weinberg et, op. cit. p. 33, para. 1402
[192] Loc. Cit.

changed their contact addresses without due notifications to the company and deceased shareholders whose executors or administrators are yet unknown.

Section 129 ISA is the exact equivalent of section 101 of the repealed ISA 1999, the successor of section 592 in the repealed part XVII of CAMA which predecessor was section 200 of the Companies Act, 1968[193]. The compulsory acquisition provision applies to a scheme other than a takeover bid. This is strange considering that the corresponding section 429 of the English Companies Act 1985 is primarily directed at takeover bids[194].

One writer had strongly argued that the compulsory acquisition provision outlined in section 101 of the repealed ISA 1999, in respect of a scheme under section 100(1) of the same Act were relevant only to a takeover bid and therefore irrelevant to a scheme of arrangement or merger[195]. He considered that since a compulsory acquisition provision already existed in respect of takeover bids in part XI of the repealed ISA, there should not have been one for a scheme under its section 100.

It is an accepted view that a scheme of merger followed by compulsory acquisition under section 129 ISA 2007 after the requisition majority of shareholders and SEC have given their respective approvals is bound to unduly prolong the period within which the merger will be fully implemented. It is our further view that facilitating provisions if entrenched in the procedures for all categories of merger, will ensure the full and effective implementation of the scheme of merger, except where, in making the facilitating orders. The court makes it a condition that provision made for dissenting shareholders. The

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[193] Section 200 C.A., 1968 was based on section 209(1) of English Companies Act, 1948 which was designed to deal with takeover bids. But note in contrast that section 129 ISA just like its predecessor is directed to a scheme which must not be a takeover bid.

[194] See footnote 120 above. This section is the successor of section 209(1) the English Companies Act 1948.

[195] Tunde Ogowewo, op. cit. p. 23.

procedure for compulsory acquisition of share under section 129(1) has its limitation, just as some of its basic features are fraught with problems of interpretation.

The transferee company need not be a company as defined in section 315 ISA, that is to say, a company formed and registered under CAMA or earlier companies Act[196]. Neither does it have to be company as defined in section 117 of part XII dealing specifically with mergers, takeovers and acquisitions, that is to say, a body corporate which includes a firm or association of individuals. It is uncertain what body or bodies are envisaged as coming within the classification. It has been suggested that the word company used in relation to the transferee is sufficiently wide to include a partnership[197]. It had been held by the Privy Council that a section similar to section 129(1) ISA did not apply to an individual[198]. Section 129(1) ISA is expressed in such a way that the transferee company cannot initiate action on the compulsory acquisition until four months after the making of the offer. It specifically requires that the company "may at any time two months after the expiration of the said four months" notify the dissenting shareholders that it desires to acquire their shares. This may cause undue delay in completing the transaction, especially if the required percentage acceptances have been received or the offer has closed much earlier.

It was held in *Re Western Manufacturing (reading) Limited*[199], that making of the offer as not describing a fixed period during which the offer must remain open but a maximum period during which the contemplated event might occur[200].

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[196] Section 650 CAMA 1990 repealed.
[197] Palmer, pp. 846 and 847 cited in Weinberg et al op. cit. p. 346, para 1428; By section 118 (2) ISA, the provisions of part XII of the Act apply to partnership.
[198] *Blue metal Industries Ltd v. Dillery* (1970) A.C. 827, PC
[199] (1956) Ch. 436.
[200] ibid. at p. 435

The Jenkins Committee in England had recommended in respect of a similar provision (section 209 English Companies Act 1948) that the offeror company may commence the compulsory acquisition as soon as the required percentage of acceptances has been received, provided this is within four months after the date of the making of the offer[201]. The subsection does not indicate whether the date of the "making of the offer" is the date of the dispatch of the offer document shareholder's or the date of its receipt by them.

Another area that may seem difficult to interpret is the requirement that the scheme must be approved by holders of not less than nine-tenths in value[202], of the shares whose transfer is involved. Where there is only one class of share in the transferor company no problem of interpretation arises. But where there exist different classes of shares, the "nine-tenths in value of the shares whose transfer is involved" could refer to nine-tenths in aggregate value of the different classes of shares put together but on the other hand it could refer to nine-tenths in value of each separate class of share involved.

Since the different classes of shares may have different rights attached to them, it would only be just to relate the requisite percentage approval to each separate class rather than to an aggregate approval of the different classes. This will be in line with the recommendation of the Jenkins Committee to the effect that a single offer for shares of more than one class should be treated as comprising as many offers as there are classes of shares involved[203]. In calculating the requisite nine-tenths approval, the subsection takes no account of shares already held by the transferee company or its subsidiary. This would seem to imply that shares held by the holding company of the transferee company or its associate company are not excluded and may therefore be counted in calculating the nine-tenths requisite approval.

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[201] Jenkins Committee report, para 294(i)(iv), cited in Weinberg et al; op. cit. pp. 337 and 338 para 1408.

[202] We presume the term "value" to mean the nominal value opposed to the market value of the relevant shares.

[203] Jenkin's Committee *supra.*

We suggest that the subsection be amended to exclude shares already held by any holding or associate company of the transferee company. To effect compulsory acquisition, the transferee company has two months after the expiration of four months from the date of the making of offer to give notice to the dissenting shareholders that it desires to acquire the shares. The expression "dissenting shareholders" is defined by section 129(6) ISA to include not only a shareholder who has not assented to the scheme but also any shareholder who has failed or refused to transfer his share to the transferee company in accordance with the scheme.

By section 129(2), unless the court, on application made by a dissenting shareholder within one month after the giving of the notice under section 129(1) order to the contrary, the transferee company is entitled and bound to acquire those shares on the same.

Upon the expiration of the one month's notice given under section 129(1) or, if an application to the court is made by a dissenting shareholder, upon the court disposing of the application, the transferee company must:

a) transmit to the transferor company a copy of the notice together with an instrument of transfer in favour of the transferee company, executed on behalf of the dissenting shareholder by any person appointed by it to do so[204], and
b) pay or transfer to the transferor company the amount or other consideration payable by the transferee company for the shares to which it is entitled to acquire compulsorily. The transferor company must thereupon register the transferee company as the holder of the shares formerly held by the dissenting shareholders[205].

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[204] Section 129(4) (a) ibid
[205] Section 129(4)(b) ibid

By section 129(5), the transferor company is required to hold on trust for the dissenting shareholder's any sum of other consideration received by it. Cash is to be paid by it into a separate bank account.

One problem with this subsection is that where there are untraceable shareholders the transferor company upon whom cash or other consideration is given will inevitably hold them in perpetuity except where it is wound up after the merger or acquisition and a substitute trustee is appointed. The vesting of the consideration in a bank is recommended as a better option.

3.8.4. Dissenter's Right to Compel the Acquisition of his shares

Similar to the power of compulsory acquisition conferred by section 129 ISA on a successful transferee company, a dissenting shareholder has a corresponding power under section 130 ISA[206], to compel the acquisition of his shares by the said company. The main aim of section 130 is to enable a dissenting shareholder who fears being locked in as a small minority in a company of which the transferee holds nine-tenths in value of shares to withdraw from the company.

Section 130(1) ISA 2007 provides as follows:

> This section shall apply where, in pursuance of any such scheme of merger, shares in a company are transferred to another company or its nominee, and those shares together with any other shares in the first mentioned company held by or by a nominee for the transferee company or its subsidiary at the date of the transfer comprise or include nine-tenths in value of the shares in the first mentioned company or of any class of these shares.

[206] Section 130 ISA 2007 transported from section 102 ISA 1999 (repealed) corresponds to section 209(2) of the English Companies Act 1948, which successor is section 430 (A) and (B) of the English Company Act, 1985

The subsection applies where in pursuances of a scheme of merger shares in the transferor company are transferred to the transferee company with the effect that at least nine-tenths in value of the shares or class of shares of the transferor company are then held by or for the transferee company and its subsidiary.

By section 130(2) ISA the transferee company shall, within one month of the date of the transfer which raised its shareholding to the requisite nine-tenths in value, give notice of that fact to each of the holders of the remaining shares of the class in question who have not assented to the scheme.

In the subsection, the expression, "the date of the transfer" would appear to mean the date of registration of the transferee company on the register of members of the transferor company.

Any of such shareholders may within three months of the transferee's notice require the transferor company to acquire his shares.[207] The shareholder's right arises only upon the transferee company giving the notice which is required to be give within one month from the date of the transfer[208]. The use of the word "shall" in subsection 2 clearly makes the giving of the notice mandatory. Once it is given, the section comes into operation. The reverse will be the case where the transferee company fails to give the requisite notice, though not in all cases it is suggested section 130 ISA should be amended to include an appropriate sanction for violation.

3.9.The Procedures for Mergers and Acquisition in other Jurisdictions

The changing economic, technological social and political environment and new forms of completion, fuelled by advances in Information Technology and Communication as well

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[207] Section 130(3) ibid

[208] Section 130(2) ibid

as Globalisation, have combined to create new opportunities and threats for business forms. With globalisation, a company no longer competes with only other companies within the same country, but also with companies in other countries around the world. In order to survive, firms must adjust to forces of competition from all directions. Firms adopt various growth strategies to counter competitive challenges and/or take advantage of opportunities emanating from the changing environment.

Corporate growth is generally viewed as essential for the wellbeing of a firm. Size and scale are obviously becoming critical as firms compete in today's market. In recent years Chinese economy has been growing so rapidly that even the US has entered into a bilateral trade relationship with China. China, therefore, becomes a good representative of a growing economy in the Asian continent. As for India, although it is a third world country, its economy is also growing fast. In the area of Agricultural development in particular Israel is a force to reckon with.

Of course, the choice of Ghana being an ECOWAS country under-going a rapid economic growth commands attention. The choice of these countries, therefore, gives this work a balanced presentation and affords opportunities for a healthy comparison.

While the Nigerian Company Law contains Mergers and Acquisitions of Companies, the Company Law of the People's Republic of China contains Mergers and Divisions of Companies. Also Nigerian Company Law talks about sections while Company Law of the People's Republic of China talks about articles. If a company is to undergo merger and division, its shareholder's committee shall adopt a resolution[209]. The merger or division of a joint stock limited company is subject to approval by the department authorized by the state council or the people's government at the provincial level.[210]

[209] Article 182 of Company Law of the People's Republic of China
[210] Article 183 of Company Law of the People's Republic of China

Companies may be merged in two forms that is merger by consolidation[211]. One company absorbing another company is merged by absorption, and the company being absorbed shall be dissolved. Merger of two or more companies through establishment of a new company is a consolidation, and the companies being consolidated shall be dissolved.

The process of mergers and acquisitions in this jurisdiction is that the companies shall execute a merger agreement and prepare their respective balance sheets and schedules of assets. The Companies shall notify their creditors within 10 days of adoption of merger resolutions, and shall publish a notice at least three times in a newspaper within 30 days. Creditors are entitled to Claim full payment of the debts of the company, or require the provision of appropriate assurances within 30 days of receipt of the notice, or within 90 days of publication of the first notice if such creditors did not receive the notice. Companies may not be merged unless debts are fully paid or appropriate assurances provided. Once the companies are merged, the creditors' rights and debtors' liabilities of the merged companies shall be assumed by the surviving company or the newly formed company after merger.

Where a company is to undergo division, its assets shall be divided accordingly.[212] In dividing the company, a balance sheet and a schedule of assets shall be prepared. The company shall notify its creditors within 10 days of adoption of a division resolution, and shall publish a notice at least 3 times in a newspaper within 30 days. Creditors are entitled to claim full payment of company's debts or require the provision of appropriate assurances within 30 days of receipt of the notice or within 90 days of publication of the first notice if such creditors did not receive the notice, the company may not be divided unless debts are fully paid or appropriate assurances within 30 days of receipt of the notice or within 90 days of publication of the first notice if such creditors did not receive

[211] Article 184 of Company Law of the People's Republic of China
[212] Article 185 of Company Law of the People's Republic of China

the notice. The company may not be divided unless debts are fully paid or appropriate assurances are provided. The liabilities of the company prior to its division shall be assumed by the companies resulting from the division according to the agreement reached among them.

Where a company or bank needs to reduce its registered capital, a balance sheet and a schedule of assets must be prepared.[213] The company shall notify its creditors within 10 days of adoption of a resolution to reduce its registered capital, and shall publish a notice at least 3 times in a newspaper within 30 days. Creditors are entitled to claim full payment of the company's debts or require the provision of appropriate assurances within 30 days of receipt of the notice, or within 90 days of publication of the first notice if such creditors did not receive the notice. After capital reduction, the company registered capital may not fall below the statutory minimum level. When a limited liability company is to increase its registered capital, after subscription for the newly increased capital, the shareholders shall make capital contribution in accordance with the provisions hereof concerning capital contribution for the establishment of a limited company.[214]

When a joint stock company is to issue new shares for the purpose of increasing its registered capital, the shareholder's subscription for the new shares shall be carried out in accordance with the provisions hereof concerning payment of share proceeds for the establishment of a joint stock company.

3.9.1. Mergers and Acquisitions in Israel

The acquisition of publicly – traded Israeli[215] companies is governed primarily by the Companies Law, 5759 – 1999 (the "companies Law") and the Securities Law, 5728-1968 (the "Securities Law"). In particular: sections 314 to 327 of the Companies Law deal with

[213] Article 186 of Company Law of the People's Republic of China
[214] Article 187 of Company Law of the People's Republic of China
[215] www.lclg.co.uk, 13 August , 2012: Yigal Drnon & Co.

acquisitions by way of merger. These sections are augmented by the Companies Regulation (merger) 5760 – 2000.

Acquisitions by way of tender offer are governed by sections 336 to 340 of the Companies Law, and by the Securities Regulations (Tender offer), 5760 – 2000. Acquisitions by way of a court approved merger or similar arrangements are governed by sections 350 and 351 of the Companies Law, as well as by the Companies Regulations.

Application of Settlement or Arrangement 5762-2000, the Securities Regulations (Periodical and Immediate Reports) 5730-1970, govern the reporting obligations of companies listed on the Tel AVIV Stock Exchange ("TASE") that are party to a merger. In the event that securities, and not cash, are used as consideration for an acquisition, the provisions of section 15 of the Securities Law dealing with the requirements for a prospectus are also implicated. Israeli companies listed in the United States would also in general be subject to applicable U.S. Law, including U.S Securities Exchange Act of 1934 and to rules and regulations promulgated there under. Additional regulatory schemes also play a role in regulating acquisitions.

The procedures for mergers and acquisitions in Israel are three primary procedures to gain 100% of the shares of the public company:

1) **Reverse Triangular Merger:**

The reverse triangular merger is the most common way for an acquirer to gain full ownership of an Israeli public company and to take it private. The acquirer typically establishes a wholly-owned subsidiary in Israeli ("Merger Co"). Merger Co merges with and into the Israeli target company, with the Israeli target surviving the merger and becoming a wholly owned subsidiary of the acquirer. The consideration payable to the shareholders of the Israeli target company may be cash or the acquirer. The consideration

payable to the shareholders of the Israeli target company may be cash or the acquirer's stock, or a combination of the two.

2) **Tender offer:**

The acquirer makes an offer to purchase some or all of the shares of the target company, usually using cash or, less frequently, its own stock. The offer may be conditioned upon successful acquisition of all the shares of the target company. If the requisite majority of target shareholders approve, then the acquirer can acquire 100% of the shares of the target. The requisite majority is very high: holders of 95% of the issued and outstanding shares of the target (not 95% of the shares of responding shareholders) must respond positively to the offer. The positively responding holders must also comprise a majority of the shares held by the acquirer and reaches 100% of the shares. Target shareholders have a six-month window, following consummation of the transaction, to apply to the court to challenge the fairness of the transaction. The acquirer may, however, stipulate in its tender offer that this appraisal remedy will not be available to shareholders that accept the offer, and such stipulation is valid.

3) **Court-Approved Merger:**

Sections 350 and 351 of the Companies Law appear, on their face, to deal with arrangements between companies and their creditors and shareholders. However, these statutes can and have been used to effect mergers between two companies. The procedure requires two applications to the court: one to authorize the convening of a special meeting of the shareholders and creditors of the target company, and a second to approve the arrangement reached by the creditors and shareholder. In the current regulatory climate, this procedure, although cumbersome and requiring court approval, enables the parties to surmount certain difficulties posed by Israeli securities law, and are often the preferred method to where the target has outstanding listed options or debentures.

3.9.2. Mergers and Acquisitions in Ghana

Firms adopt various growth strategies to counter competitive challenges and or take advantage of opportunities emanating from the changing environment. Corporate growth is generally viewed as essential for the well-being of a firm. Size and scale are obviously becoming critical as firms compete in today's market.[216] For many companies, especially in brewery industry in Ghana, [217] corporate growth has been a major survival strategy. Among other reasons, growth is needed by a firm to enable it compete for the best managerial talent by offering rapid promotions and broadened responsibilities. Without a continued inflow of competent executives, firms are likely to decline in efficiency and value.

Firms can achieve growth through internal or external expansion. Internal growth involves investing internally to extend existing operations to provide new capacity, new product or to serve new markets. It occurs within the same corporate entity and under the same management. Normally, this form of growth is relatively gradual and predictable as the business identifies the natural growth available to it, in areas it has an established position. External growth on the other hand, involves the acquisition of or merger with other firm(s). in the global economy, some firms operate tightly integrated partnership; while others have become their own global enterprises through mergers and acquisitions.[218]

Mergers and acquisitions thus represent one set of the many adjustment and expansion responses. This form of corporate growth produces relatively rapid expansion for various reasons. It is more visible, attracts a lot of attention and is more stimulating to investors,

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[216] Hoyle, Schaefer and Doupnik, *Advanced Accounting*, 6th ed (Boston: McGraw-Hill Irwin, 2001).
[217] SEI DU, Stephen Sanye Balogbee, 2009
[218] Mcshane and Von G.linow, *Organisational Behaviour,* 3rd ed, (Boston: McGraw-Hill Irwin, 2005)

analysts and other interested parties, than internal growth. The media give considerable coverage to big merger and acquisition deals.

Mergers and acquisitions are forms of business combinations which involve events or transactions in which two or more businesses pool their resources to form a single entity:[219] the business community is clearly moving rapidly towards business combination as a strategy for growth and competitiveness. They posit that a merger is fundamentally a business combination involving two or more formerly independent and roughly equal firms on roughly equal terms under the joint ownership of the previous separate owners. Osuji and Odita[220] consider a merger as any transaction that forms one economic unit from two or more previous ones. However, James Von Home[221] considers a merger as a combination of two corporations in which only one survives.

An acquisition on the other hand, occurs when one entity purchases another entity, with ownership of the combined entity remaining with owners of the purchasers. In this study, however, the definition by Brealey, Myers and Marcus is adopted for both mergers and acquisitions and these two terms are used interchangeably throughout the work. They define a merger as the complete absorption of one company by another, where the acquiring firm retains its identity and the acquired firm ceases to exist. According to them the terminology of mergers and acquisitions are used loosely to refer to any kind of corporate combination or takeover.[222] This is the basis of the decision to use these terms interchangeably in this work.

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[219] Hoyle, Schaefer and Doupnik, *Advanced Accounting* 6th ed (Boston: McGraw-Hill Irwin, 2001).
[220] C. C. Osuji and A. Odita, "Impact of Capital Structure on the Financial Performance of Nigerian Firms, *Arabian Journal of Business and Management Review,* Vol.1, No. 12, 2012, p. 43-61 at 48.
[221] James c. Von Home, *Financial Management and Policy* (Michigan: Prentice Hill, 1998) at 460.
[222] Brealey and myers, *Principles of Corporate Finance* 6th Int'l ed, (Boston: McGraw-Hill Irwin, 2000)

The procedures of mergers may be initiated by either of the parties to the merger or by a third party, such as an investment banking firm, which recognizes in the merger some direct or indirect advantage to itself. Negotiations may be conducted between the top managements of the companies concerned, as was the case in the Ghana Breweries Limited merger, or directly with owners of the target. Sometimes, management of the target firms is deliberately by-passed, where it is expected to be antagonistic to the merger proposal[223]. Where the target is a listed company, the acquiring company may choose to make a public offer to buy all or a good percentage of the target's stock usually at a price that is above the prevailing market price. The higher offer price is meant to induce the shareholders to sell their shares. Where an outright merger is not achieved the aim may be to gradually establish a parent subsidiary relationship and then proceed to achieve ultimate merger. The legal procedures that one firm can use to acquire another firm are either acquisition of the target firm's stock or its assets.

However, these often spark unhealthy takeover battles and tactics between the potential target, as happened between Mesa Petroleum and Cities Service[224] or between potential acquirers, as happened in RJR Nabisco's acquisition[225]. In such situations, the target is mostly over valued and the acquire losses value after the merger.

Acquiring Target Firm's Stock is the most frequently used procedure for bringing ownership and management together is for one company to acquire ownership of all or substantial proportion of the voting stock of the other. In this initial stage, therefore, the target company is likely to retain its identity and[226] the two companies are in a parent-

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[223] Ibid

[224] *Hunt, v. boyer* [1950] 15 LTO5 281

[225] Johnsan and Ruback, "The market for corporate control the Scientific Evidence" *Journal of Finance* vol 11, 5- 50, 1983.

[226] Burrough and Helyar, *Barbarians at the Gate* (New York: HarperCollins Publishers, 1990).

subsidiary relationship. This relationship may last for a brief period or sometimes for years before actual merger takes place.[227]

Where the acquiring company gains less than 100 per cent ownership in the initial transaction, it may find it necessary or desirable to increase its ownership level before initiating merger proceedings. Even where the acquirer/parent has majority shares necessary to vote approval of the merger, it may wish to reduce further the minority interest, which will have to be reimbursed in cash at an arbitrated price[228]. Payment for the voting stock of the target may be made in cash or with shares of the acquirers or other securities or a combination of these. Acquisition of stock by cash may be obtained in a private negotiation between the acquiring company and a single owner or a small group of owners. In case of a publicly owned company, the stock may be purchased gradually on the open market through a public offer. This offer may be made with or target company[229]. Payment by cash will require payment of tax on any capital gains realized as a result of the merger.

Under acquisition by shares the acquiring company offers its own stock in exchange at a ratio, usually expected to be attractive to the target's shareholders. This way together with the acquired firm becomes shareholders of the surviving company, together with the acquirer's shareholders. Apart from the possible advantages of the exchange itself there may be considerable attraction in becoming part of a larger and more diversified company.[230] In addition, tax payment on any capital gains is postponed when acquisition is by shares. Postponement of tax payment may be a positive attraction in the long term, but the prospect of being a member of a larger and more diversified firm may not be

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[227] Brealey an myers at al, 2000 and Johsen and Ruback, et al 1983
[228] Loc. Cit
[229] Loc Cit
[230] Loc. Cit

positive in the long run. This is because of difficulties in managing larger and diversified firms and the fallacy that risk is reduced in diversified firms, as discussed above.

Buying of the Target firm's Assets is the alternative to acquisition of the stock of a going concern is to purchase its assets. This might appear to be a more direct and therefore a more satisfactory procedure for the acquiring company, since the ultimate purpose in acquiring stock is to have the use of these assets. Instead of the shareholders receiving the payment directly, the acquired company receives it and ultimately disburses it to the stockholders as a liquidating dividend when they dissolve the company. The acquiring company is thus relieved of the formal merger proceedings and the costs and problems of minority interests.[231]

In practice the purchase-of-stock route often proves to be a quicker and more effective procedure, as evidenced by its use in majority of cases. Where there is an established market price for the stock, the key problem of valuation is greatly simplified. Often, the purchase of stock is a way of by-passing antagonistic management, and it may be done with a minimum publicity, through the impersonal medium of the stock market[232].

When a company is acquired through the purchase of its stocks, the acquiring company indirectly takes on responsibility for its liabilities, as well as its assets, since it assumes ownership. However, with a direct purchase of its assets, there is no necessity for the acquiring company to assume the liabilities, although this is often part of the deal, especially where the acquired company is in a weakened financial condition. Otherwise,

[231] NIckolasos Travos (1987) "Corporate takeover bids, methods of payment and bidding firms stock return" J & F. 42 pp. 943-963.
[232] Loc Cit.

the target company concerned is simply converting earning assets into cash; it retains responsibility for discharging its own obligations.[233]

3.9.3. Mergers and Acquisitions in Sweden

Attractive business opportunities, high transparency and uncomplicated legal and regulatory procedures under-pin Sweden's attractiveness to companies seeking business opportunities. [234] This fact sheet aims to provide a brief overview of the market as well as information on the process for mergers and acquisitions. Business opportunities small and medium sized enterprises in Sweden host a rich diversity of advanced technology that presents unique opportunities for international companies seeking to enter the Swedish market, expand their footprint or develop new know-how.

Firm framework for mergers and acquisitions in many countries, the process of acquiring a company is often seen as complex and time-consuming. This is not the case in Sweden, where a culture of openness and transparency avoids bureaucracy and red tape and facilitates business dynamism. Legal agreements are relatively simple by international standards. Information on a target company's shares, articles of association, real property or floating charges is easily available in publicly available registers.

The process for mergers and acquisitions in Sweden acquiring a limited liability company (aktiebdag) involves a multi-step process that starts with strategic evaluation, preliminary analysis and feasibility study and ends with due diligence and completion of the deal. A typical process might take 8-10 months from initial strategic evaluation of multiple acquisition targets to final completion or around months from first approach. The various steps are described below.

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[233] Hong, H. Mandelker, G. Kaplan, R. S. (1978) "Pooling V. Purchase: The Effects of accounting for mergers on stock prices". Accounting review 53, pp. 31-47.

[234] www.invest Sweden. Se 13th August 2012 & www.skatteverketise, 13th August, 2012.

1. *Analysis of company and buyer*

Initial evaluation involves detailed analysis of the Target Company or companies. Potential synergies, restructuring needs and intrinsic risks and potential problems are assessed at this stage. Capital and equity structures are also received, along with any excluded assets and loss capital forwards in the target company. At this point the client and advisor sign an engagement letter outlining the scope and terms of the assignment.

2. *Analysis of pricing mechanism and deal structures*

The primary considerations here are whether the acquisitions will be financed by debt or equity or a combination of the two and identification of the pricing mechanism and terms and conditions of purchase and sale.

3. *Analysis of share data*

Swedish Limited liabilities companies fall within one or two categories depending on how their shares and dividends are organized. "VPC companies (avstamningsbolag) are those whose register of shareholders is held by a central securities depository in this case Euro clear. These companies are generally, but not always, listed on a stock exchange and do not issue share certificates; the board of directors is responsible for keeping, maintaining and making available shareholders' register. In all cases, the buyer needs access to share data, including information on minority shareholders.

4. *Management presentation*

Management presentations involve the owner and management team, together with the investment banker, inviting the buyer or group of buyers to hear a management presentation highlighting key information. Presentations also allow an opportunity to ask questions to the management.

5. *Letter of intent*

The parties may enter into a confidentiality agreement and/or letter of intent to protect sensitive information and to acknowledge that the acquisition is being seriously considered. A letter of intent will specify the final best price.

Overviews of process and related tasks, eternal experts have reviewed this fact sheet. However, the contents should not he viewed as legal or financial advice but only as an overview of current conditions in Sweden. These may change and thereby render descriptions of laws and other frame-works inaccurate. In all individual cases we request that advice always be sought with relevant organisations on specific issues. A buyer is willing to pay for the business and explain details of the transaction structure, including the amount of debt and equity needed to secure the transaction. At this point the buyer's advisors will negotiate with the seller to determine whether the buyer is granted exclusivity, meaning sole entitlement to proceed with the intended acquisitions.

6. *Due diligence*

Due diligence involves the buyers professional advisors, including lawyers, accountants and consultants, completing an exclusive evaluation of the target company- a process that includes a review of all financial records plus anything else deemed material to the sale. A review of public registers is standard practice. The seller's data is summarized in a due diligence report containing the advisers conclusions on legal and financial risks relating to the transaction and other matters of interest to the buyer. The due diligence report further constitutes the basis for the pricing of the target company.

7. *Official approval*

Application, filings and applications for official approvals such as from the Swedish competition Authority (Konkurrensverket), the Swedish financial supervising Authority (finansinspeketionem) and Bolagsverket are drawn up.

8. *Signing*

A signing memorandum outlines the documents signed or provided at signing, such as powers of attorney, minutes of board of directors' meetings, share transfer agreements. Issues relating to timing, power to sign and disclosure schedules are resolved.

9. *Official approval*

Application, filings and applications for official approvals such as from Konkurrensverket, finansinspektionem and Bolagvsverket are filled in, signed and submitted.

10. *Closing*

The closing involves finalization for the purchase/sale contract and the filing of registration documents with Bolagsverket. Preparations are also made for the finalization of pension arrangements, collateral, bank accounts, insurance and settlement of intra-group issues and internal debts, A closing memorandum outlines closing actions to be taken in accordance with the share transfer agreement, such as transfer of the shares and confirmation of receipt of the purchase price. The actual closing is the day when funds are transferred to pay the purchase price and refinance the target company, and all executed documents are delivered. Shares are transferred and an escrow agreement signed. Any post-closing actions cover the finalization of and any adjustment to, the purchase price and fulfilment of any escrow agreement.

3.9.4. Mergers and Acquisitions in India

India is one of the fastest growing economies in the World. With the recent acquisitions of Land Rover and Jaguar Brands by India's Tata Group from Ford Motor Company, the message is clear – India[235] sees herself as a global player in the race for economic power and supremacy. While Indian companies are scouring the horizons globally for strategic

[235] Bhatnager, N. Mergers and Acquisitions Aprd [2007]

acquisitions, India also offers exciting deals in its domestic corporate sector. In the past decade, Michigan's automotive giants and other Michigan companies have steadily cultivated business and supply-chain relationships with Indian companies, India's dynamic business and regulatory environment, intellectual property rights protection and enforcement and 300 million-plus middle class population with rapidly increasing purchasing powers makes investing or acquiring a business in India a strategic business decision for Michigan corporations.

India had more than 40 years of protected economy alone with numerous dysfunctional and unproductive state-owned corporations. However, since the 1990s there have been landmark developments in India's corporate sector.

First, the corporate sector was freed from the red-tape of the earlier "license raj", second, there were attempts to privatize the state –owned industries. Third, the rules concerning foreign direct investment in several industries were released, and cross-border cash-flow was eased. All of these factors propelled India's mergers and acquisitions activity into a frenzy.

In the past three years, India's mergers and acquisitions activity has truly been phenomenal. Though, the volume of mergers and acquisitions activity is small when compared to the global volume of mergers and acquisitions. Indian companies' appetite for global assets is growing, which has been demonstrated by a spate of audacious overseas acquisitions made by Indian companies and conglomerates such as the Tata Group, Ranbaxy, Videocon, Satyam, Mahindra and Mahindra.

Some key definitions under Indian Law include:
"Acquisition" is the purchase of a company or a part of it so that the acquired company is completely absorbed by the acquiring company and thereby no longer exists.

"Amalgamation" means two or more companies are fused into one by merger or by taking over by another so that a third company is absorbed into one or blended with another, with the amalgamating company losing its identity.

"Merger" is essentially a fusion of two companies, also is a combination of two or more distinct entities into one. But the term "merger" is not defined under the Companies Act, 1956, the Income Tax Act, 1961 or any other Indian Law.

Types of Mergers in India include:

Horizontal Mergers

Also referred to as a 'horizontal integration', this kind of merger takes place between entities engaged in competing businesses which are at the same stage of the industrial process. A horizontal merger takes a company a step closer towards monopoly by eliminating a competitor and establishing a stronger presence in the market. The other benefits of this form of merger are the advantages of economies of scale and economies of scope.

Vertical Mergers

Vertical mergers refer to the combination of two entities of different stages of the industrial or production process. For example, the merger of a company engaged in the construction business with a company engaged in production of brick or steel would lead to vertical integration. Companies stand to gain on account of lower transaction costs and synchronization of demand and supply. Moreover, vertical integration helps a company move towards greater independence and self-sufficiency. The downside of a vertical merger involves investments in technology in order to compete effectively.

Congeneric Mergers

These are mergers between entities engaged in the same general industry and somewhat interrelated, but having no common customer – supplier relationship. A company uses this type of merger in order to use the resulting ability to use the same sales and distribution channels to reach the customer of both businesses.

Conglomerate Mergers

A conglomerate merger is a merger between two entities in unrelated industries. The principal reasons for a conglomerate merger is utilization of financial resources, enlargement of debt capacity, and increase in the value of outstanding shares by increased leverage and earning per share and by lowering the average cost of capital. A merger with a diverse business also helps the company to foray into varied business without having to incur large start-up costs normally associated with a new business.

Cash Mergers

In a typical merger, the merged entity combines the assets of the two companies and grants the shareholders of each original company shares in the new company based on the relative valuations of the two original companies. However, in the case of a 'cash merger', also known as a 'cash-out merger', the shareholders of one entity receives cash in place of shares in the merged entity. This is common practice in cases where the shareholders of one of the merging entities do not want to be a part of the merged entity.

Triangular Mergers

A triangular merger is often resorted to for regulatory and tax reasons. As the name suggests, it is a tripartite arrangement in which the target merges with a subsidiary of the acquirer.[236]

Legal framework and procedure for mergers and acquisitions in India include:

Sections 391 and 394 of India's Company Act 1956 deal with the right of companies to enter into a compromise or arrangement either between itself and its creditor or any class of them. The term "arrangement" is a term of wide importance and contemplates not merely reorganization of share capital but also a modification of the rights of the shareholder. It includes reorganization of shares capital by the consolidation of different

[236] Corporate Mergers Amalgamations and Takeovers, J. C. Verma, 4th edn, 2002, p. 58. Financial Management and Policy-Text and Cases; V. K. Bhalla, 5th revised edn; p. 1016.

classes of shares or division of shares into shares of different classes or by both methods. Essentially, these provisions cover restructuring, merger, demerge, and hiving off a unit by a company. Some of the nuances of section 391 should be noted.

The section has to be read with the Companies (Court) Rules, 1959, which forms a complete procedural code for implementing mergers. Section 391 is a complete code by itself. Once a scheme of compromise and arrangement falls squarely within the four corners of the section, it can be sanctioned, even if it involves doing acts for which the procedure is specified in other sections of the Act. To illustrate, once a scheme satisfying the requirement of section 391 is sanctioned there is no need to comply with other provisions of the Act, such as section 293 for sale, lease, etc of the company's property. The scope of this section is very wide. It also applies to a company that is in the winding up proceedings. An arrangement under this section can, therefore, also take the merging company out of winding up proceeding. An amalgamation or merger cannot be used to bypass other statute. Schemes of compromise and arrangement can only transfer such rights, power, duties, and property as are capable of being lawfully transferred by a party to the scheme, if no sections of the companies Act exited. If any part of the scheme includes anything to which the parties cannot bind themselves, then that part of the scheme will be treated as a nullity. Subsection 6 of section 391 enables a court to stay suits and proceedings against the company pending in the same court or elsewhere till such time as the proceeding for the sanction of the court, under section 391, is disposed. High courts in India are split over whether this sub-section allows courts to order a stay of any criminal proceedings against the company.

The usual steps involved:

1) *Inspection of the objects clause*:

The memorandum of association of both companies – the transfer company and the transferee company – should contain an enabling provision for the amalgamation to take

place. If such clauses do not exist, necessary alteration of the object clause of the memorandum of association must be put through at the outset.

2) *Approval of the scheme by the board of directors*:

The board of directors of the transferor and the transferee companies have to approve the scheme of amalgamation, has to be prepared by the financial advisors, and a merchant banker generally provides a fairness opinion certificate on the valuation report.

3) *Notification of the stock exchange*:

Since the decision of the board on a proposed merger of the company is price-sensitive information, in cases of public companies, both the companies are, among other things, required under clause 36 of the listing agreements with the stock exchange to communicate the price-sensitive information to the stock exchanges. This is done immediately after the board meeting deciding on the merger and/or according to approval of the merge scheme.

4) *Application to the court*:

The next step is to make an application, under section 391(1) to the high court having jurisdiction over the company. Both the transferor and the transferee companies have to seek for the court's sanction.[237] The high court generally is the high court of the state in which an incorporated company has its registered office. The application should seek the court's permission for convening a meeting of creditors and/or members and is generally made through a judge's summons in form 33 (supported by an affidavit in form 34 of rule 67 of the companies (Court) Rules, 1959 ("The Court Rules"). A copy of the proposed scheme of amalgamation needs to be annexed to the affidavit. Documents accompanying the summons should be a true copy of the company's updated memorandum and articles

[237] Sections 391 to 394 India's Companies Act.

of association. However depending on the high court, it would be prudent to also submit a certified copy of the company's latest audited balance sheet and certified copy of the board resolution that authorizes making the application to the court.

5) Forwarding a copy of the application made to the court to the concerned Regional Director of the department of company affairs.

6) *Obtaining the high court's directions for convening a shareholders' meeting*:
The hearing on the summons is usually attended by the representatives of the merging companies as well as their respective advocates (attorneys). Following this hearing, the high court gives directions under rule 69 of the Court Rules determining among other things, (a) the class or classes of creditors and/or of members whose meeting or meetings have to be held for considering the proposed merger (b) fixing the date, time, and place of the meeting, (c) appointing the chairman who will preside over the meeting, (d) fixing the quorum and the procedure to be followed at the meeting(s) including voting by proxy (e) the notice of the meeting and the advertisement and (f) the time within which the chairman of the meeting is to report to the court the result of the meeting. In case a request has been made in the application for dispensing with holding of the creditors' meeting, the courts may, after considering the grounds for dispensation, direct that separate requirements of the creditors' meeting be dispensed with.

7) *Dispatching notice of shareholders and creditors:*
In order to convene the meeting of the shareholders and creditors, a notice of the mergers/acquisitions and an explanatory statement of the meeting, as approved by the court, should be dispatched by the transferor and transferee companies under section 393 of the Act to their respective shareholders and creditors together with the scheme of amalgamation at least twenty one days period to the date of the meeting. The notice is to be drawn up in form 36 of the Court Rules and a proxy form in form 37 to the Court

Rules also needs to be sent. The documents are required to be mailed under certificate of posting.

8) *Advertising the notice of the meeting*:

Rule 74 of the Court Rules stipulates that the notice of the meeting should be advertised in a format specified in form 38. The advertisement is to be issued by both the companies in English language daily together with a translation thereof published in the regional language of the place where the registered office of the company is situated. Under rule 76 of the Court Rules the chairman appointed for the meeting shall file with the court not less than seven days prior to the date of the meeting, an affidavit confirming that the notice has been dispatched to the shareholders and creditors and that the same has been published in newspapers as required.

9) *Holding the shareholders' and creditors' meeting*:

The shareholders/creditors' meeting should be held on the appointed date. The amalgamation scheme should be approved by the members/creditors by a majority in number present in person or by proxy. This majority must represent at least three-forth in value of the shareholder/creditors present and voting. The requisite majority must be computed on the basis of a poll. Mere presence is not enough. Any member who, though present at the meeting, does not vote for or against, but remains neutral is not to be taken into consideration. Further, only those creditors whose names are shown on the company's books of account are entitled to vote.

10). *Submitting the Chairman's report on the conduct of the meeting to the court:*

Pursuant to rule 78 of the court rules, the Chairman of the shareholders/ creditors meeting is required to submit to the court within the time fixed, within seven days after the date of the conclusion of the meeting, a report in form 39 of the court Rules that, among other

things, sets out the number of persons who attended and voted values and the percentage of members who voted in favour or against the scheme.

11) *Filing of the resolution with the Registrar of companies*:

Within thirty days from the date of closing the resolution, a copy of the passed by the shareholders/creditors approving the scheme of amalgamation is required to be filed with the Registrar of companies in form 23 appended to the companies (central government's) general Rules and forms, 1956.

12) *Submitting of the petition to the court for sanction of the scheme*:

Under rule 79 of the court Rules within seven days from the date on which the Chairman submits his or her report on the result of the meeting to the court, the transferor and the transferee companies are required to make a petition to the high court for confirmation of the scheme of amalgamation. The petition has to be drawn up in form 40 of the court Rules. Rule 80 of the court Rules states that, based on the petition, the court will fix the date of hearing of the petition and direct that the notice of the hearing must be advertised in the same newspapers in which the notice of the meeting has been announced or in such other newspapers as the court may direct. This advertisement must be issued not less than ten days before the date fixed for the hearing. The notice affirms that should any member or creditor of the transferor company raise written objections to the proposed amalgamation no objection may be raised to the member or creditor being heard on its objections by the court.

13) *Issuing a notice to Regional Directors, Company law Board, Registrar of companies and the official liquidator:*

On receipt of the petition, the court issues a notice of the petition to the concerned Regional Director of the company board having jurisdiction over the transferor and the

transferee companies, the respective Registrar of companies and also to the official liquidator of the company that is to be dissolved upon the merger.

14) *Conducting hearings and issuing an order confirming the scheme:* Proceedings begin with the court hearing the objections, if any, on the amalgamation scheme filed, in concerned Regional Director of the company law board, the concerned Registrar of the companies and/or the court by any member, creditor, or any other person wishing to oppose the petition.

Thereafter, the court may pass an order sanctioning the amalgamation scheme in form 41 of the companies (court) Rules. The court may also issue an order in form 42 directing that all properties, rights and powers of the transferor company, to be specified in the schedule attached to the order, be transferred without any further act or deed to the transferee company, and all liabilities and duties of the transferor company be similarly transferred to the transferee without any further act or deed.

15) *Transferring the assets and liabilities to the transferee company*:
Passing of the order is pursuant to the scheme of amalgamation, which provides that from the appointed date and upon the scheme becoming effective, all assets and liabilities including intellectual property rights, licenses, etc in regulation to the transferor company, or to which the transferor company is a part, are transferred and are in full force and effect on, against, or in favour of the transferor company and may be enforced as fully and effectively as if, instead of the transferor company, the transferee company has been a part or beneficiary thereto without any further act or deed by the transferee company.

16) *Filing the court's order with the Registrar of companies by both companies:*

Under section 394 (3) of the Act and Rules 81 of the court Rules, the transferor and the transferee companies are required to file the court's order sanctioning the scheme of amalgamation with the Registrar of companies under their respective jurisdictions. The filing is made in form 21 appended to the companies (central governments) General Rules and Forms, 1956. Under section 394 (3), the time limit given for the filing is thirty days. The amalgamation takes effect from the date on which the court's order is filed with the Registrar of companies. Therefore, in the interest of synchronization with the effective date of the merger, it is advisable for both the transferor and the transferee companies to file the order with their concerned Registrar of companies on the same date.

17) *Issuing the shares to the shareholders of the transferor company:* Pursuant to the sanctions scheme of amalgamation, the shareholders of the transferor company are issued shares in the transferee ratio approved under the scheme. This is made by way of an allotment, following which the return of allotment in form 2 must be submitted to the Registrar of companies by the transferee company within thirty days from the allotment date in accordance with section 75 of the Act 1956. Necessary entries in the register/index of members must also be made in companies with sections 150 and 151 of the companies Act 1956.

18) *Listing the new shares*: After making the allotment, the transferee company, if applicable, must apply to the stock-exchange where its securities are listed for listing the new shares allotted to the shareholders of the transferor company.

19) *Attaching the court's order to the memorandum of association*:
Section 319 (4) of the Act stipulates that a certified copy of the court's order sanctioning the scheme of amalgamation must be annexed to every copy of the memorandum of association issued by the transferee company, failing which penal clauses become applicable.

20) *Preserving the books and papers of the transferor company*:

Under section 396A of Companies Act, 1956 the books and papers of the amalgamated company are to be preserved and not to be disposed of without prior permission of the central government. Although in a number of other countries an additional approval under applicable anti-trust laws may be required at this stage, this is still not necessary under the Indian law. Nevertheless, the stage has been set for a change with the introduction of the competition Act, 2002. Once this Act becomes fully operational, acquisitions and mergers will require the approval of the competition commission of India if the combined assets of the acquirers and the acquired enterprise in India cross the various thresholds envisioned under that law[238].

3.10. Some Cases on Mergers and Acquisitions

In the case of *O. Afolabi & Ors. v. Western Steel Works Limited & Ors.*[239] on the acquisition of one Company by another. This is the rule governing the acquisition of shares in Companies and Takeover of one company by another. There must be a legal burden of proof that the acquiring banks properly acquired the other banks.

To prove to the satisfaction of the Court that a Company had been bought by another, the person who asserts must place before the Court documents from the Corporate Affairs Commission to justify the assertion. Such documents are, (i) Instrument of transfer, (ii) Documents to show acquisition of shares of the acquired company/bank, (iii) Filling of the relevant papers.

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[238] Tata and Ford Reach Peal Land Rovers, March 27, 2008 at B3. Kumar, N, Corporate strategy in Emerging Scenario-Merger and Acquisitions April 2007. Bhatnagar *supra*.

[239] (2012) LPEL – 9340 (SC)

On the problems in sharing the assets and liabilities in mergers and acquisition, problems arise in a situation when banks usual acquire one another or other companies but court always settle such problem amicably and share the assets and liabilities accordingly.[240]

When the two banks are in Court for the issues of mergers and acquisitions and they fail to bring any issue concerning mergers and acquisitions the Court cannot *Suo Motu* to make a case for either or both of the banks and proceed to give judgment on the case so formulated contrary to the case of the parties/banks and other companies before the Court. So the issue of waiver or addition does not come in the mergers and acquisitions.[241]

In conclusion, the law for mergers and acquisitions are robust and clear for the implementation of the programme and this has laid the foundation for a strong financial sector and good investment climate in Nigeria.

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[240] See the cases of *Anyaegbuman v. Osaka* (2000) 3 SC1; *NNPC v Lutin Investment Ltd* (2006) 2 NWLR pt. 965, pg 506; *ACB Plc v Emostrade Ltd* (2002) 8 NWLR, pt. 770, pg 501; and the case of *Nigerian Bank for commerce and Industry v. Integrated Gas (Nigeria) Limited Mother* (2005) 4 NWLR (pt. 916).
[241] See also *Diamond Bank Limited v. Partnership Investment Co. Limited* (2009) 18 NWLR (Pt. 1172) 67. S.C.

CHAPTER FOUR: RATIONALE AND EFFECTS OF MERGERS AND ACQUISITIONS IN NIGERIA

This chapter will examine the rationale and effects of mergers and acquisitions in Nigeria. While mergers and acquisitions may be voluntary in some situations, many are based on directives of supervisory agencies. Although, there are many reasons[1] for mergers and acquisitions, the banking industry mostly accepts that the bank's customers and workers can now have confidence in Nigeria banking industry with mergers and acquisitions.

4.1. The Rationale for Mergers and Acquisitions

4.1.1. Technological Drive

A bank desirous of enhancing its operations but constrained by its inability to easily access the needed technology may be driven into merging with or acquiring another which has the technological advantage over it.

4.1.2. Management Expertise

A smaller bank may opt for merger or an acquisition where the requisite personal with high level technical or managerial skills to achieve its corporate objective of quality and increased production is found to be lacking or in short supply.

4.1.3. Increased Market Share

A bank may be compelled to merge with or acquire another that has similar products in order to enlarge to its market share after the merger or acquisition and also avert the threat of competition from the bank.

4.1.4. Financial Advantages

Bigger banks enjoyed more obvious financial advantages than smaller banks. There is an enlarged capital base and greater access to financial resources for development and enhanced earning capacity.

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[1] C. Ogbechie, "Corporate Governance: A challenge for Banks in Nigeria" at http://www.businessdayonline.com.accessed on 31/2/2006.

4.1.5. Synergy

One of the reasons for a take-over or merger is the substantial trade advantage or the synergy that will result in the combined earnings of the two banks or companies, now under a single control, being greater than the sum of two banks or other companies operating separately synergy means:

> The favourable effect of the overall earnings caused by combing the two firms in circumstances which will give rise to savings in costs or increases in revenue or more simple the 2 x 2 = 5 effect.[2]

Synergy means the extra energy, powers, success etc that are achieved by two or more people or banks working together, instead of on their own.[3]

It is usually said that "two good heads are better than one." Had the Co-operative and Commerce Bank (Nigeria) Limited (CCB) pulled its resources together with All States Trust Bank, merger and acquisition could have resulted from both and they consolidate their grounds so that many people that died out of frustration when the two banks collapsed could not have been dead today.

4.1.6. Economies of Scales

This is usually a very strong reason for takeovers and mergers in view of the resultant enlarged productive capacity and reduction of wasteful duplication of effects in a large combine. Increased output in production should lead to a drop in cost of production. This obviously will imply efficiency which could result in profitability and growth.

4.1.7. Risk Diversification

Banks often embark on diversification of their operations either as a hedge against possible failure or to maximize returns. This is particularly common with conglomerate mergers or acquisitions whereby an oil exploration company, for

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[2] Weinberg et al op. cit. p. 24, para. 303

[3] Oxford Advanced Learner's Dictionary of Current 7th Ed.

instance, diversified into an unrelated line of business such as taking an equity interest in a bank. Similarly the cost and risks involved in developing and maintaining a new product line may be avoided or reduced through the acquisition of a going concern.

If a bank acquires one company that is producing oil, the bank will be funding the oil company to produce oil, while the oil company will make effort to see that their products must be sold in the market to make money for the bank. Both of them are not dealing on the same thing but they decided to merge and acquire each other.

4.2. Other Reasons for Mergers and Acquisitions

4.2.1. Assets at a discount

In this situation a bank may acquire the assets or shares of an under-valued bank with potentials with the view of selling the assets and reinvesting the products in another form of business.

Steady supply of raw materials and control of sales outlet. A bank may opt to merges with or acquire another bank in order to have a firm control over the source of raw materials or market outlets thereby ensuring that the bank does not fall prey to its competitors. Examples of raw materials which banks can use are, the date of cash, the cheques, Automated Tellers Machines Cards (ATM) etc.

4.2.2. Stock exchange quotation

In the stock exchange quotation business combinations could be motivated by the desire for a stock exchange listing. A private Microfinance Bank unable to meet the listing requirements of the Stock Exchange but desirous of public quotation may integrate with a public quoted company in order to realize its goal.

4.2.3. Regulatory fiat of an apex regular

A bank that comes under the supervision of an apex regulatory body may opt to merge with another with the sole aim of satisfying a statutory requirement for example, smaller banks that could not raise the funds needed to meet the increased minimum share capital requirement of the Central Bank of Nigeria (CBN) were forced to merge in order to continue in business.

4.2.4. Personal Interests

Mergers and acquisitions could be motivated by the desire of one or more members of the Board of Directors of a company to build up a financial empire, boast their ego or make financial gains.

4.2.5. Desire for growth

A merge or takeover arrangement may be entered into by a bank with a view to helping to facilitate the growth of that bank and make the other bank to achieve accelerated growth and increased earnings. Two banks that merge would make speedy progress in the banking industry. The desired growth would steadily increase and such growth would restore confidence in the customers. For instance, when there is growth in the bank after merger and acquisition, banking fraud would be reduced drastically. The manager of First Monument Bank Plc is now in the net of the Economic and Financial Crimes Commission (EFCC) and shamefully appeared in the Federal High Court, Abuja on 20th July 2012 being Friday for the case of bank fraud. Had it been that the bank above merged with another bank it would have acted as a check-mate to the Manager and such could have saved the ugly situation. The knowledge which the expert acquired from the failed bank speeds up the consolidation of the banking industry. In general terms, consolidation of banking firms involves either a combination of existing growth among the leading banks exit from the industry of weak banks. In recent years we have witnessed a lot of growth in the banking industry through mergers, takeovers, acquisition, etc.

4.2.6. The Stabilization of Banking Industry in Nigeria

There were enormous many problems in the banking industry in Nigeria over a decade and people became afraid of transacting business in the banking industry. But when there was consolidation of financial institutions, where the weaker ones were absorbed into the stronger ones in the name of mergers and acquisitions, customers discovered that there is now stabilization in the financial institutions especially in the banking industry. There ensued a strong policy in the banking system in the name of mergers and acquisitions.

In the main, the policy aims at developing a more, resilient, competitive and dynamic banking system that supports and contributes positively to the growth of the economy with a core of strong and forward-looking banking institutions that are technological-driven and ready to face the challenges of liberalization and globalization. The reform essentially entails the build-up of capital size, and business scale of the banking institutions, at the end of which smaller number of, but much stronger, institutions will emerge and bring the desired result to the economy of Nigeria. After the massive retrenchment in the financial institutions in the early 1980s and 1990s, many people died and many were afraid of job insecurity but with the coming up of mergers and acquisitions people can now go in and sleep with their two eyes closed because there is relative stability in the banking industry in Nigeria. The resolve of the CBN to strategically place the nation’s banking system in regional and international context and promote soundness, stability and enhanced efficiency of the system led to the proposed increase of minimum capital base for all universal banks of N25 billion in July, 2004; no doubt the development had in turn prompted a regulatory-induced restructuring in the form of consolidation through mergers and acquisitions (M & A). Consolidation of banking institutions aims among others at strengthening the banking sector by protecting depositors and developing the nation’s economy. The sector also becomes a competent and active player in the African regional and global financial system. It is also envisaged that the reform would over time, guarantee higher returns to the shareholders and other stakeholders in the banking industry.

4.2.7. Instilling Confidence in Banking Customers

It is gratifying to note that the banking industry has played the above roles effectively well over the years and that has gone a long way in engendering depositors' confidence in the nation's banking system. One of the functions of capital is to serve as a symbol of confidence in banking institutions. Therefore, the strong capital base prescribed under the consolidation programme is consistent with the mandate of promoting public confidence in the banking system. The increase in the minimum capitalization requirement for banks will, to a large extent, engender public confidence in the banking system as it will enhance bank's capacities to absorb operating losses and minimize recourse to depositors funds for acquiring 'brick and mortar' or 'marble façade'. Many customers of banking industry today transact their banking business realizing that their money and other valuable things in the banks are safe. Capital is now raised, using depositors' funds and there are indications that depositors' funds have been utilized to grant loans for share acquisition in the pursuit of the consolidation initiative. Mergers and Acquisitions have, therefore, helped in no small measure in restoring investors' confidence in the banking industry.

4.2.8. Comparison of Nigeria Banks with International Banks

Over the last decade, the international banking industry, particularly in emerging market economies, has undergone substantial structural changes; particularly noticeable is the tendency toward consolidation which has the effect of reducing the number of banks and other deposit-taking financial institutions with a simultaneous increase in size and concentration of the remaining entities in the sector. Among other factors, these changes have been initiated and sustained by technological innovation, deregulation of financial services industry at the national level, and opening up of countries to international competition. In Nigeria, the most notable contemporary banking policy issue that recently received a great deal of attention is consolidation and the implications for the economy and the banking system and other agents like NDIC. A review of development in the Nigeria banking and financial system indicates that the banking sector has undergone remarkable changes over the years, in

terms of the number of institutions as well as the scale of operations driven largely by the deregulation of the financial sector in line with the global trend.

The foregoing notwithstanding, the market share, based on the industry's total assets distribution shows that the sector was (and still is) highly concentrated with the top ten banks accounting for more than 50% of the total assets. Many of the 89 banks are small in size and unable to effectively compete with the bigger ones. Many of the small banks are closely held and are plagued by low capital base, weak corporate governance as manifested in meddlesome interference in management function, and poor risk management. The banking industry remains largely oligopolistic. Besides, the nation's banking sector when compared with foreign banking sectors in Nigeria could be rightly described as fragile, poorly developed and extremely small as illustrate by the then CBN Governor in his July 6, 2004 address to the Bankers' Committee.

Bossone, Honohan and Long,[4] observed that small banking systems under-perform. They suffer from a concentration of risks. The smaller the banking system, the more vulnerable it is to external shocks. A small banking system provides fewer services at higher costs, largely because they cannot exist as economies of scale and partly because of lack of effective competition. The regulation and supervision of small banking systems have also revealed a disproportionately costly financial base.

Foreigners are no longer afraid of transacting business involving money with Nigerians, following this new strength. For example, the Chinese and Malaysian governments are among trading partners with Nigeria.

Mergers and acquisitions have exposed Nigeria bankers to new banking ideas making it possible for these bankers to compete favourably with their foreign counterparts.

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[4] Bossone, Honohan and Long (ed), *Globalisation and National Financial System* (Washington DC: World Bank Publication and Oxford University Press, 2003).

4.2.9. More Jobs for Job Seekers in Nigeria

After the introduction of mergers and acquisitions in Nigeria many banks became stable and bank liquidation has become a thing of the past. The failed bank tribunal brought the erring bank workers to book in the process of it, some were jailed while some were dismissed. A lot of ideas and innovations came into the banking industry which created a lot of job opportunities for many job seekers. Many people who read accountancy both in Universities and Polytechnics have been employed in the banks. Also computer operators have been employed to reduce the hardships of bank workers thereby increasing employment of job seekers in Nigeria. Many job seekers got employed in the other financial institutions in Nigeria, because mergers and acquisitions were introduced in other sectors such as airlines and insurance companies. Consolidation in banks in Nigeria helped job seekers to get employment and reduce the number of jobless people in the country. Where the stronger banks or other companies acquire the weaker ones, the workers would also be absorbed into the stronger banks and none of them would lose their jobs. For instance, two of my friends in the then All States Trust Bank are now with the First City Monument Bank.

There are now many experienced workers in the banks and nobody wants to lose his or her job. Also there are lots of incentives to help bank workers rather than they indulging in the depositors/customers' money. Really mergers and acquisitions have tremendously helped job seekers.

Although without prejudice to 5.4 (more jobs for job seekers in Nigeria) mergers and acquisitions have the socioeconomic impact of loss of jobs by some staff of the failed banks. When mergers and acquisitions are fully effected there is massive retrenchment of workers and such retrenchment leads to unemployment. Of course the Central Bank of Nigeria (CBN) could not fulfil its promise of helping those who lost their jobs to access funds from the Small and Medium Industries Equity Investment Scheme (SMIEIS) in order to set up their own business.

4.2.10. Increase in our Income Per Capital

The new minimum capital requirement of N25 billion by the CBN which prompted the on-going consolidation exercise, initially triggered off panic in the inter-bank market following the new policy. The big players in the inter-bank market withdrew their funds in the market with the attendant liquidity problem for the marginal banks. But with the minimum capitalization of N25 billion, banks were continually flooding the capital market to raise additional capital funds either to meet up with minimum requirement or to position themselves for mergers and acquisitions. To date, all the banks that were in the capital market to source funds have been reporting over-subscription.

After consolidation many bank customers were compensated unlike before when bankers went into liquidation and customers lost their capital in the banks. With mergers and acquisitions banks will continue witnessing increase in income per capital.

4.2.11. Increase in Investment of Shares

With mergers and acquisitions many more customers brought shares into the merged banks. There is an appreciable increase in investment in shares. Many people are now aware that shares can sustain somebody; even after retirement one can still enjoy benefits from ones shares in the banks. Many banks now pay customers' dividends directly into the banks because such banks, like the First Bank Plc asked the shareholders to indicate the account numbers to enable them to pay their dividends directly into their banks to avoid embezzlement in transit.

Depositors/customers invest more on shares after the process of mergers and acquisitions. Those depositors/customers who benefit in increment of shares in banks now become unpaid advertisers about the banks shares. Investments in shares are popular now unlike before.

Banking industry consolidation is not a new phenomenon in Nigeria. Banking in its modern form, started in 1892 when African Banking Corporation commenced formal banking business in Nigeria. The bank was later acquired by the Bank for British West Africa, today known as First Bank of Nigeria Plc[5].

Few acquisitions of banks that occurred between the period 1995 and 2003 were:

1995 – 75% equity City Trust Merchant Bank Limited was acquired by Union Bank of Nigeria Plc.

1996 – 70% equity in Morcidian Equity Bank of Nigeria Limited was acquired by Nigeria International Merchant Bank Limited.

1996 – 100% equity in Magnum Trust Bank Limited was acquired by Guaranty Trust Bank Limited.

1997-100% equity in Nigeria – Arab Bank Plc was acquired by the National Insurance Corporation of Nigeria.

1998- 48.9% equity Stanbic Merchant Bank Limited was acquired by SBIC Africa Holdings Limited.

2003 – 51% equity in Continental Trust Bank Limited was acquired by Standard Trust Bank Plc.

The acquired banks continued to operate as independent entities or subsidiaries with their new owners having controlling shares[6]. Prior to 2005, mergers and acquisitions in the banking sector or industry of the Nigerian economy were at very low level. The spate heightened only in 2005, the immediate trigger being the CBN's regulatory fiat pronounced by the then Governor of the CBN, Professor Chukwuma Charles Soludo on July 6, 2004. The pronouncement on the banking sector reform was a proactive response to the weakening of the banking system. The 13 point reform agenda which was adopted as part of the broader National Economic Empowerment and

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[5] Odufu I, I. Mala, "Challenges of Banking Sector Reforms and Bank Consolidation in Nigeria" Bullion (Publication of CBN), April-June 2005, Volume 29 No 2 P. 25.

[6] Y. A. Bellow, "Banking System Consolidation in Nigeria and Some Regional Experiences: Challenges and Prospects", Bullion, April – June 2005, Volume No 2 P. 49 – 50.

Development Strategy (NEEDs) programme was intended to stem the perceived or impending sector crisis and subsequent bank failures. NEEDs is a long-term Federal Government programme aimed at wealth creation. To achieve the vision of NEEEDs, bank consolidation was pursued in order to foster private sector participation, with an opportunity for banks to finance large scale investment which will trigger real sectors growth and development[7].

Two very important components of the reform agenda were the requirements for a minimum capitalization of N25 billion of banks, up from the previous N2 billion, and consolidation of their operations through mergers and acquisitions, with full compliance before December 31, 2005[8]. The regulatory fiat triggered the several mergers and acquisitions that have effectively reduced the number of banks from the previous 89, most of which were private companies to 25 as at the beginning of 2006[9], 22 of which are currently quoted on the Nigeria Stock Exchange.

This consolidation of banks was expected to address the problem of distressed and insolvent institutions without an initial resort to liquidation with all its adverse consequences for depositors. Again, the case for the merger and acquisitions option was made especially in the light of global and emerging market trends which reflected increasing cases of mergers and acquisitions in the banking industry. The inability of the Nigeria banks to voluntarily embrace consolidation in line with the global trend necessitated the adoption of appropriate legal and regulatory frameworks as well as comprehensive incentive package to facilitate mergers and acquisitions in the banking sectors[10]. Thus, the mergers and acquisitions witnessed entailed the use of “carrot and stick” approach to ensure compliance unlike the traditional mergers and acquisitions

[7] Nnanna, “Beyond Bank Consolidation: The Impact on Society”, Bullion, April-June, 2005 Volume, 29 No 2 pp. 68-70.
[8] Uchendu, “Banking Sector Reforms and Bank Consolidation. The Malaysian Experience”, Bullion April – June 2005, Volume 29 No 2, p. 14.
[9] Christy, Ogbechi, “Corporate Governance: A Challenge for Banks in Nigeria at http://www.businessday.online.com accessed on 31/8/2006.
[10] Mike I. Obadan, “Mergers, Acquisitions and New Capital Base: Matters Arising”, The Guardian August 24, 2004. P. 27

which in general are voluntary, except in the case of hostile takeover bids which suppress competition.

The CBN's incentive package included, loan write-off and amnesty for deserving banks in respect of past misrepresentation of their unhealthy state. The aim was to encourage these banks to be transparent in their merger arrangement. The banks being providers of similar products and services, were involved in horizontal mergers and acquisitions[11], although the methods used differed from one bank to another, for example, First Bank combined its business with that of its investment banking subsidiary, FBN (Merchant Bankers) Limited along with that of another bank, MBC International Bank. Following the merger, the separate corporate existence of the other two banks ceased, with the primary bank, First Bank, continuing as the surviving bank. In consideration for the transfer of all the assets, liabilities and undertakings of the two other banks to First Bank, all the holders of their shares which were cancelled received, in the case of FBN (MB)'s ordinary shares of N100 each held by them, and in the case of MBC International Bank, one ordinary share of 50 kobo each in FBN in exchange for every twenty-five MBC's ordinary share of 50 kobo each held by them. Also, Union Bank, along with two other banks, Broad Bank and Universal Trust Bank were to merge, but later Union Bank Plc was revived while others were merged. Prior to the recapitalization and consolidation programme only First Bank and Union Bank could boast of shareholders funds in excess of N25 billion[12]. Quite a good number of banks that were relatively equal in size and power joined to form entirely new bigger banks that took over the assets and liabilities of the original banks. In this category, the new banks that emerged were; Skye Bank, Unity Bank, Spring Bank, and Sterling bank.

Those groups whose combined capital was insufficient to meet combined capital requirement augmented from other sources such as private placement, right issues and

[11] The transactions were effected through schemes of mergers under Section I.S.A. 1999 (repealed).
[12] Gabriel Omoh, "The Changing Phase of Consolidation in Nigeria. Winners and Losers," Vanguard February 14, 2004. P. 5

public offers. However, four separate banks, namely, Zenith Bank, Econbank, GTbank and Standard Chartered Bank were able "to do it alone" because they succeeded in raising sufficient funds.

Table 2: 25 banking groups that emerged from the re-capitalisation and consolidation programme in Nigeria[13]

S/N	Group	Members	Capital Base Nbn
1	First Bank	First Bank, FGN (Merchant Banks) MBC International Bank	78.28
2	Intercontinental Bank	Intercontinental Bank, Equity Bank, Global Bank, Universal Trust Bank	58
3	Union Bank	Union Bank, Union Merchant Bank, Broad Bank, Universal Trust Bank	58
4	United Bank of Africa	United Bank of Africa, Standard Trust Bank, Continental Trust Bank	41
5	Fidelity Bank	Fidelity Bank, Merchant Bank, FSB International Bank	38.7
6	Skye Bank	Prudent Bank, ELB International Bank, Cooperative Bank, Broad Bank, Reliance Bank	37
7	GT Bank	Guaranty Trust Bank alone	34.9
8	IBTC Charted Bank	Investment Banking Trust Company, Charted Bank, Regent Bank	35
9	Unity Bank	Intercity Bank, First, First Interstate Bank, Tropical Commercial Bank, Pacific Bank, NNB International Bank, Society Bancaire, Bank of the North, New Africa Bank, Central Point Bank.	27
10	Wema Bank	Wema Bank, National Bank, Lead Bank	31
11	Access Bank	Access Bank, Marina International Bank, Capital Bank, Midas Bank	28

[13] Sources: Okey Nwankwo, Consolidation: 25 Banks embrace finishing line", Daily Champion, December 30, 2005. Volume p. 27, Friday Atufe, Investors Renew Interest in IBTC Chartered Bank Post Merger" Financial Standard October 15, 2007, Volume 8 No 247, p. 26.

12	Mainstream Bank	Afribank, All (Merchant Bankers)	28.3
13	Stanbic Bank	Stanbic Bank	N/A
14	Citi Bank	Citibank, Nigeria International Bank	25
15	Spring Bank	Citizens Bank, Guardian Express Bank, ACB International Bank, Omegabank, Trans/International Bank, Fortain Trust Bank	27.5
16	Diamond Bank	Diamond Bank, Lion Bank, African International Bank	33.24
17	Ecobank	Ecobank alone	25
18	Equatorial Trust Bank	Equatorial Trust Bank, Devocom Bank	27
19	First City Monument Bank	Cooperative Trust Bank, First City Monument Bank, Nigeria American Merchant Bank	29.6
20	Zenith Bank	Zenith Bank alone	38.7
21	First Inland Bank	First Atlantic Bank, Inland Bank, International Merchant Bank NUB	31
22	Oceanic Bank	Oceanic Bank, International Trust Bank	31.1
23	Standard Chartered Bank	Standard Chartered Bank (alone)	25
24	Sterling Bank	Magnum Trust Bank, NAL Bank Nigeria Merchant Bank, Indo-Nigeria Bank, Trust Bank of Africa.	24.4
25	Platinum Habib	Platinum Bank, Habib Bank	27.8

Table 3: Rating of Banks[14]

Category	**Number**				
	2002	**2003**	**2004**	**2005**	**2006**
Sound	13	11	10	5	10
Satisfactory	54	53	51	47	12
Marginal	13	14	16	16	3
Unsound	10	9	10	18	Nil
Total	90	87	87	86	25

[14] Source: Gabriel Omo, "Post-banks' Consolidation 10 Sound, 12. Satisfactory, 3 Marinal" Vanguard December, 9, 2007, p. 5.

One of the legal challenges faced by the CBN was that of having to conclude litigations arising from some of the failed banks contesting the right of the CBN to liquidate them. The 11 banks that failed and were closed for failure to meet the CBN deadline include: Triumph Bank, Gulf Bank, Metropolitan Bank, Liberty Bank, Afex Bank Fortune Bank, City Express Bank, Hall Mark Bank, Eagle Bank, Societe-Generale Bank, and Trust Bank. It is our view that CBN made a critical error when in the course of consolidation, it decided not to allow the Alliance Bank group in consolidation a 90-day extension sought by them to enable them conclude their mergers plan. The Alliance Bank was a group of about 7 weak banks that could not strike a merger or acquisition deal with any of the strong bank groups. All the merged banks were thus liquidated[15].

Banking sector consolidation had its negative aspects. There were job losses arising from the consolidation exercise and liquidation of the failed banks. As at April 2006, close to 10,000 direct jobs were lost in spite of the CBN's repeated assurance that no job would be lost as the bank would be made to absorb all the staff involved[16]. No doubt this has worsened the problem of unemployment which Government has been battling with. Again, the CBN proved incapable of keeping to its promise of helping those who lost their jobs to access funds from the Small and Medium Industries Equity Investment Scheme (S.M.I.E.I.S) in order to set up their own business. In many instances ex-Managing Directors were appointed to the lower position of Executive Director after consolidation. This raised the critical issue of the ability of the latter to operate effectively under a boss after being bosses themselves in their previous banks. This may affect team work. The employees whose services were not retained following the merger received handsome redundancy payments.

Another challenge is in the area of competition. If appropriate safe guards are not provided by the CBN, the consolidation of banks into 25 mega banks may gradually

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[15] Lawson Omokhodion, "Fallacies of the banking consolidation", Punch August 3, 2007, p. 13.
[16] Nik Ogbulie, "Questions over CBN's Quarter Report", Daily Champion April 24, 2006 p. 16

reduce and thus cause harm to bank customers. It was the expectation that the now bigger and consolidated banks will begin to lend at highly reduced rates but as at June 2007, eighteen months after conclusion of the consolidation, interest rates had remained high at between 18% -22% per annum.

As was the case in U.S.A in the 1980's and 1990's, the consolidation of banks in Nigeria into 25 mega banks may lead to reduced lending to new and small firms[17]. Only time will judge the course of events in this area. However, the situation can be redressed by strengthening community banks, allowing for medium category banks and the liberation of entry by allowing 5-10 years for new entrants to comply with the N25 billion minimum paid-up capital requirements.

Again, it is antithetical to growth and development for every bank to be big. It is a major failing of the consolidation exercise that all Nigeria banks have to be big, of equal size and of similar complexities. It is our view that there ought to have been a categorisation of banks into small, medium and large, with different authorised capital base and minimum paid-up capital. On the financial implications of bank consolidation there were unfulfilled promises on the part of the CBN to ensure the reduction of the exorbitant statutory fees charged by the Corporate Affairs Commission (CAC), Nigeria Securities and Exchange Commission (SEC), Nigeria Stock Exchange (NSE) and to appeal for tax breaks the FIRS.

It is also worthy of note that in most cases, the shares of the weaker member banks in the various bank groups were in the course of consolidation exchanged or acquired at much lesser value than their original value, thus resulting in financial losses to the shareholders, their shares must have been based on the actual values placed on them.

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[17] Udoma Udo Udoma, "banking: Post-consolidation challenges, a paper presented at CBN conference on consolidation of Nigeria's Banking Industry, (Abuja CBN November,2004)

4.2.12. Mergers and Acquisitions by Compulsion

The fact that the mergers and acquisitions in the banking sector were not at all voluntary put strange bed fellow together in their desperation to meet the minimum capital requirement and the merged acquisition option. Even when some banks were not willing to merge or be acquired, they were compelled to do so in order to survive in the new dispensation. In this compulsory policy of mergers and acquisitions there were many financial loses incurred by shareholders of the weaker banks whose shares were either exchanged or acquired at much lesser value than their original value, and huge monetary cost of statutory fees charged by CAC, SEC, NSE and FIRS. Besides, the Central Bank of Nigeria (CBN) could not conclude any litigation arising from some of the failed banks.

4.3. Why do banks merge?

Eleh,[18] opined regarding Mergers, Acquisitions and Takeovers that any business arrangement that does not bring about some commercial benefits may never be considered worthwhile by the entrepreneurs and captains of industries. Merger arrangement could then occur in any industries following situations where:

1) There is cost reduction in operation and administration as a result of possible elimination of duplication of functions and activities.
2) Some acceptable level of monopoly and hence competitive advantages may be achieved through merger.
3) The capital base of the new bank will be enhanced hence it would have enough financial muscle to shrug-off business shocks and adversities.
4) A lot of savings could be made in the area of competition and product advertising.
5) Merger may bring the whole process of raw material production, product development, production and marketing under one management for better coordination.

[18] Eleh, Zephy Nwoye, "Mergers, Acquisitions and Take-over" EL, DEM ARK (Publishers) Nigeria 2005, pp. 23-28.

6) On the national level, merger could be for the purpose of enhancement of corporate development of the economy via emergence of stronger banks and Industries resulting from the fusion of the banks' assets.
7) Merger could be embarked upon just for purpose of corporate growth and survival.

Notwithstanding the above stated attributes of merger, it sometimes encounters some difficulties in its execution. Such difficulties may include:

i. Misconception and ignorance about the purpose and benefits derivable from the merger leading to stiff resistance by the directors, labour unions, employees and shareholders of the target banks. This may lead to controversies and litigation to abort the merger.
ii. Fear of loss of jobs due to elimination of duplicated tasks. This may lead to blackmailing and rumour peddling to stop the proposed merger.
iii. Dissatisfaction with and hence refusal to accept the share exchange ratio by either of the parties to the merger. This often leads to unnecessary litigations that could abort the merger.

In conclusion, the rational for mergers and acquisitions are enormous as to justify their use in the banking sector. Also, it has been seen to transform ailing banks from middle players to mega players with N25 billion share capital. This have in no small way strengthened the banking industry and repositioned Nigerian economy for better efficiency.

CHAPTER FIVE: ROLE OF SOME INSTITUTIONS IN MERGERS AND ACQUISITIONS

This chapter will examine the role of some institutions in mergers and acquisitions in Nigeria. This will cover the Securities and Exchange Commission, the Registration of Securities Exchange and Capital Trade Point and other self-regulatory organisations, the courts and the Central Bank of Nigeria. Also, the effects of consolidation exercise on the banking industry will be assessed.

5.1. The Securities and Exchange Commission (SEC)

The SEC is a regulatory agency, which maintains surveillance over the securities market. It is particularly charged with the duty of reviewing, approving, regulating mergers, acquisitions and all forms of business combinations[1]. The SEC must ensure that any proposed merger or acquisition does not breach the antitrust regulations.

5.2. The Registration of Securities Exchange and Capital Trade Point

No Securities Exchange or capital trade point defined in Section 315 of this Act shall commence operation unless it is registered with the Commission in accordance with the provisions of this Act and the rules and regulations made under it[2]. An application for registration as a Securities exchange or capital trade shall be made to the Commission in the prescribed form and in the manner specified by the Commission[3].

5.3. Role of Securities exchange, capital trade point and other self-regulatory organization

Subject to the powers of the Commission under this Act, a securities exchange, capital point, merger or any other self-regulatory organization shall, as point of its primary responsibility, call for information from, inspect and conduct inquires and audit of its

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[1] Section 8 ISA. (1999 repealed)
[2] Section 28(1) ibid
[3] Section 28(2) ibid

members[4]. A securities exchange, capital trade point, merger or self-regulatory organization, shall at the end of every quarter file a detailed report on its surveillance and enforcement activities with the Commission[5]. Nothing in this section shall preclude the Commission from carrying out inspections or conducting enquiries or audit of any member of a securities exchange, capital trade point, merger or other self-regulatory organization[6].

The guidelines provide that in order to legally consummate a merger; the following three steps should be adopted:

i. Filing a pre-merger notification
ii. Filing a formal application for approval of the proposed merger.
iii. Complying with post-approval requirements.

In deciding whether or not to grant the authority, the Commission shall consider the impact of the proposed acquisition on the economy of Nigeria and any policy of the government on manpower development. It follows that the Commission may not grant any authority where acquisition if successful, will result in massive retrenchment[7].

5.4. The Court

The Court[8] plays a major role in effecting mergers and acquisitions. Generally, it ensures that the banks concerned have complied with their articles and memoranda of association and the relevant provisions of the guiding legislation. Its role is more pronounced in mergers and acquisitions effected under sections 117 -151 of ISA 2007.

Its role in mergers and acquisitions in the case of companies, the procedure is within one year from the date of the passing of a special resolution for the winding up of a company

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[4] Section 32(1) ibid
[5] Section 32(2) ibid
[6] Section 32(3) ibid
[7] Okonkwo, Op. Cit. p. 10.
[8] This refers to the Federal High Court

for the purpose of transferring its undertaking to another company an order is made for relief on grounds of unfairly prejudicial and oppressive conduct or for the winding up of the company under a creditor's voluntary winding up, the arrangement shall not be valid under sanction by the court[9]. In a takeover bid, the court comes in only to determine the right of a dissenting offeree. A dissenting offeree, who elects to demand payment of a fair value for his shares, may apply to the court to fix a fair value for them if the offeror, does not make the application to the court within the prescribed period[10].

5.4.1. The role of court in effecting mergers and acquisitions

1. The court sanction must be obtained
2. The names of both 1st and 2nd applicants must be made known to the court
3. There must be joint petitions to the Court
4. The background and particulars of the 1st petitioner stating all the requirements to the knowledge of court
5. Also the background and particulars of the 2nd petitioner stating all the requirements to the knowledge of court
6. The objectives of the scheme, for example, the principal objective of the scheme is to effect the merger of the 1st petitioner with the 2nd petitioner
7. Court will order meetings of the 1st and 2nd petitioners and results thereof
8. There will be application to the Securities and Exchange Commission (SEC)
9. The joint petition of both 1st and 2nd petition will be presented by the Solicitors on both sides filing to court
10. Both will contain affidavit
11. They also will present affidavit confirming the approval of mergers of 1st and 2nd petitioners by the Securities and Exchange Commission (SEC). [11]

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[9] Sections 486 – 489 CAMA 2004
[10] Section 135 (3) ISA 2007
[11] Okonkwo (*supra)*

When Court is satisfied with all the processes as mentioned it will now sanction mergers to such banks and the 1st petitioner will acquire the 2nd petitioner in all ramifications and such will be binding, both assets and liabilities will be handled accordingly.

5.5. The Central Bank of Nigeria (CBN)

The Central Bank of Nigeria has a general oversight control on banks. Mergers, acquisitions, reconstructions in the banking industry cannot be effected without the consent of the CBN[12].

Realizing the difficulties which some banks may face in achieving the N25 billion naira capital base, the Bank issued Guidelines and incentives on consolidation in the banking industry. According to the Guidelines the only lawful method of consolidation allowed are mergers and outright acquisition/takeover. A mere group arrangement is not acceptable for the purpose of meeting the N25 billion naira consolidation[13]. Consequently, mergers and acquisitions should be accomplished in any of the ways discussed above. Banks which have subsidiaries cannot resort to other arrangements to meet the new capital base.

A number of incentives are provided to banks which consolidate to meet the new capital base timeously. These include authorization to deal in foreign exchange, permission to take public sector deposits and prospects of managing part of Nigeria's external reserves. There will also be tax incentives, reduction in transaction costs, provisions of experts to give technical assistance to banks, securing speedy approvals for steps involved in mergers and acquisitions and the CBN Governor's distinguished industry leadership which is based on specified criteria, speed of completion of the consolidation, successful

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[12] Section 7 BOFIA

[13] Paragraph 3

acquisition of marginal and unsound banks and the number of banks involved in each consolidated group[14] of the Guidelines.

The CBN will also negotiate the possible write-down of its exposure to the distressed banks that will be acquired as a means of improving their balance sheet as well as the treatment of the distressed banks assets. The interests of the owners of the distressed banks in the new arrangement will also be addressed in the negotiation[15] of the Guidelines.

Paragraph 7.10 of the Guidelines provides that the consideration in respect of all mergers should be by exchange of shares and not monetary payments except where it is necessary to buy off dissenting minority shareholders and provided that such payment does not impair the financial condition of the surviving bank. The Guidelines also contain provisions on governance of the new organization. Its structure should reflect defined lines of responsibility and hierarchy. Any arrangement to accommodate co-chairman or co-chief executive directors in the new organization should be more than the number of executive directors subject to a maximum board membership of 20 directors.[16] On the social safety side, the Guidelines state that the CBN and the NDIC will ensure that banks protect the interests of depositors. Staff who are laid off consequent upon consolidation will be compensated by the new organization in line with the industry's standards but not below the terms of their sustaining employment.

The CBN will assist disengaged staff to access the SMIEIS fund and set up their own enterprises[17].

[14] Paragraph 4 of Guidelines
[15] Paragraph 5 ibid.
[16] Paragraph 8 ibid
[17] Paragraph 9 ibid

Banks are urged to be honest in their negotiations and present the actual value of their assets to the other party. Amnesty is granted in respect of any previous misreporting detected in the case of consolidation but not for any false or misleading information to the other party or to the regulatory authorities found after the consolidation[18]. The scope of this amnesty seems questionable. It may be valid or effective as it concerns the CBN but not in relation to third parties. Although the legal provisions on mergers and acquisitions need reform in some aspects, one agrees with the Governor of the Central Bank that the new banking reform will guarantee solid, sound and reliable banking system on which investors would depend and depositors could put their money and go to sleep with their two eyes closed[19], in addition of course, to the immense beneficial effect it would have on the economy.

By the Guidelines, the CBN has held out a helping hand to banks which may be unable to meet the new capital base as well as save depositors from the consequences of bank failure. The Nigeria Stock Exchange has also offered to assist quoted banks meet the new capital base. There is great hope that it will turn out well for the banks and for the economy.

5.6. The Effect of Consolidation Exercise on the Banking Industry

As a result of the consolidation of the various banks in the banking industry, the banks started to be strengthened; there is no liquidation. It has allayed the fears of liquidation in the banking industry in Nigeria. The consolidated banks are now in a better position to discharge their corporate and social responsibilities. The corporate responsibilities are:

a) advancing loans to the customers
b) helping in financing certain social programmes, such as agricultural development
c) sponsoring of scholarship

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[18] Paragraph 10 ibid
[19] The Guardian, Thursday July 15, 2004 p. 21

d) setting up social institutions, such as recreational centres
e) construction of schools and partnering with other institutions to better the lives of community where they are located.

Some of the banks are now financially buoyant enough to finance social activities such as football teams, health projects, helping in equipping armed forces including the police and civil defence corps in the protection of lives and properties of the citizenry.

The Central Bank of Nigeria (CBN) responds to mergers and acquisitions in many ways such as:

a) Mergers and acquisitions portray Central Bank of Nigeria (CBN) in a better light as being in control of the banking sector of Nigeria's economy.
b) Central Bank of Nigeria now enjoys some measure of peace unlike before when it was always on a rescue mission to salvage an ailing bank in one way or the other.

In conclusion therefore, it can be stated that financial institutions regulators, particularly the CBN have been proactive to stopping banking failures and contributes to solving the problems of the sector.

CHAPTER SIX: FINDINGS, RECOMMENDATIONS AND CONCLUSION

6.1. Findings

This work fills the gaps by investigating the effects of mergers and acquisitions on the efficiency of financial intermediation on the Nigerian banking industry. It found that the incidence of mergers and acquisitions which was on a gradual increase heightened in recent times, with the flurry of mergers and acquisitions witnessed in the banking sectors of the Nigerian economy between 2004 and 2007. Findings shows that until today mergers and acquisitions are in progress in the banking system because the five troubled banks, namely Union Bank of Nigeria Plc, Intercontinental Bank Plc, Oceanic Bank Plc, Afri Bank and Fin Bank could have ordinarily disappeared from functioning and customers suffer as usual but CBN made it possible to see such banks through until now: The CBN Governor, Mallam Sanusi Lamido Sanusi issued order that the banks must complete their process of mergers and acquisitions by June 2010. Between 2011 and 2012 Access Bank Plc, had already acquired the Intercontinental Bank Plc with the inscription of Access Bank Plc, written boldly in all the former Intercontinental Bank Plc buildings all over the country. In the process of writing this dissertation the study shows as a universal idea that, “mergers”, “acquisitions”, “amalgamation” and “consolidation”, are expressions which are often used interchangeably. Also Nigerians have three types of mergers which they depend on in the process of merging and acquiring banks while in India, they have six types of mergers, and India appears to be the fastest in merging and acquiring banks and other companies.

The CBN, the apex regulator of the banking sector of the economy, derives its power to regulate mergers and acquisitions in the banking sector from section 7, BOFIA. The CBN’s role in mergers and acquisitions is very narrow, being restricted to the Banking sector, while SEC’s jurisdiction encompasses that to include every merger or business

combination in all sectors of the economy.[1] The view expressed by Tunde Ogowewo,[2] that section 7 (1) BOFIA is inapplicable to a takeover bid in the case of a bank. This is so because a takeover bid involves the unilateral offer by the bidder to the shareholders of the target bank to purchase their shares so as to gain control of the bank.[3] But by section 7 (1) BOFIA, it is the target bank itself, not its shareholders that is expected to enter into "an agreement or arrangement".

The spate of mergers and acquisitions in the banking sector of the Nigerian economy which was hitherto at a very low level heightened only in 2005, the immediate trigger being the regulatory fiat of the CBN aimed at addressing the problem of distress and insolvency in the banks and thus making Nigerian banks more competitive in order to participate actively in the global financial market. Being providers of similar products and services, the banks engaged in horizontal mergers and acquisitions through the scheme under section 118 ISA. The fact that the mergers and acquisitions in the banking sector were not at all voluntary put strange bed fellows together in their desperation to meet the minimum capital requirement and the merged acquisition option.

This study also shows the socio-economic impact of bank mergers and acquisitions, such as more job seekers which have worsened the problem of unemployment, financial losses incurred by shareholders of the weaker banks whose shares were either exchanged or acquired at much lesser value than their original value, and huge monetary cost of statutory fees charged by CAC, SEC, NSE and FIRS. A major challenge is how to foster competition in the banking sector, with the fewer mega banks that emerged at the end of

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[1] Section 118 (1) I.S.A. 2007
[2] Tunde Ogowewo, 2001, p. 22
[3] Section 133 ibid

the exercise.[4] Certainly, fewer banks cannot be efficiently managed within the limited competitive field.

In examining the reasons for mergers and acquisitions in chapter three of this study shows that those reasons gingered the banks and the other companies to embrace mergers and acquisitions, in the insurance sector.

Finally, this study has shown the experience of bank sector consolidation in other jurisdictions, such as China, Israel, Ghana, Sweden and India. In the process it shows that mergers and acquisitions are widely accepted especially in their banking sector and other companies. While some were regulatory – driven (aimed at addressing weakness in the banking sector), others were voluntary and mainly due to market considerations, such as profit potential risk reduction, market positioning benefit and increased growth rate. Out of the five other jurisdictions considered India is one of the fastest growing economies in the World due to mergers and acquisitions.

6.2. Recommendations

The findings of the study have some useful recommendations which, if adopted and implemented will facilitate the consummation of corporate mergers and acquisitions in Nigeria, especially in the banking industry.

1. To ensure that the twenty-five banks that emerged from the banking sector consolidation do not slip back to their erstwhile habits and go into liquidation like other banks that could not meet up with the N25 billion minimum capital requirement, the existence of medium category banks and the removal of restrictions, new entrants should be allowed five to ten years to comply with such order above from the Central Bank of Nigeria (CBN.

[4] The number of banks was effectively reduced from 89 to 25, see Table 1.

2. Indeed, the study strongly recommends that banks be categorized into small, medium and big, each with different authorized share capital base and minimum paid-up capital. All Nigerian banks do not have to be big, of equal size and of similar complexion. This will be in direct opposition to growth and development.
3. The study suggests that provisions of ISA and SEC's rules and regulations should be harmonized. In particular part G, dealing with mergers, takeovers and acquisitions should be totally over hauled in order to accommodate the changes introduced by the new ISA of 2007. Companies and Allied Matters Act, 2004 no longer contains mergers and acquisitions but had the definition of "amalgamation" in the repealed act of 1990, since section 117 of ISA 2004 contains other definitions including "Company" and even "Court".
4. That there should be a definition of "amalgamation' in the same section.[5] ISA is now the major procedures for affecting mergers and acquisitions,[6] while SEC modifies all the mergers and acquisitions as it concerns banks and other companies.
5. That court should play major roles in issues concerning mergers and acquisitions in the banking industry and other companies.

   In line with the practice in England,[7] there should be fuller disclose of adequate and up-to-date information in the directors' circular,[8] of the type normally provided in a prospectus.
6. That Nigerians should add extra three types of mergers like the Indians namely: "Congeneric mergers", "Cash mergers and Triangular mergers".
7. That foreign banks should be given the opportunity to participate in the bid for the acquisitions of any of the ailing banks.

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[5] Section 117 ibid
[6] Sections 117 to 151 ibid
[7] City Code, General Principle 5
[8] Section 140 (6) ibid

Investors should feature proximately in the court cases involving the troubled banks. Foreign banks can merge with Nigerian banks and foreign banks can acquire Nigerian banks entirely.

6.3. Conclusion

This study has established that business combination is a world-wide practice in the business sector which instils confidence in the customers and owners of the business. The study also shows that mergers and acquisitions are well acceptable all over the world to boost the economy of many countries especially in the banks and other companies. The study demonstrates that so many banks and other companies which practically were supposed to disappear from doing business are now enjoying the fruit of business combinations which is mergers and acquisitions. The study really shows that when the business is no longer functional or giving the owners that satisfaction they want, such business can be arranged for sale or re-organized/reconstructed or merged or acquired in a way that such business will start booming again. The business that is shaking can make arrangement with another strong business institution to be taken over to sustain the workers. Also examined in this work were that today's mergers and acquisitions are the main stay of Nigeria's economy especially in the banking sector, and other companies. A bank which suffers from reduce success to capital (whether Naira or foreign exchange) that has inefficient or ailing management, or a non-competitive product destitution network may find itself the larger of an acquisitions. This study also shows that the sharing of assets and liabilities of the mergering and acquiring banks was equitably done. In addition, the banking groups that emerged from the recapitalization and consolidation programme have become stronger and are strategically transformed and are still being transformed from middle players to mega banks.

Nowadays, the good thing that happened in the business institutions is business combination in which mergers and acquisitions are involved. On the whole it is

important to commend the efforts of the Central Bank of Nigeria (CBN) in the mergers and acquisitions strategic initiative. This work would finally conclude on the note that institutions that are involved in mergers and acquisitions can only be effectively performing their duties without fear or favour.

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