AN APPRAISAL OF THE PROCEDURES FOR THE REGULATION OF MERGER TRANSACTIONS UNDER THE INVESTMENTS AND SECURITIES ACT (ISA) 2007

BY

Francis Uzoma OKAFOR
LLM/LAW/06126/2006-2007

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BEING AN LLM THESIS SUBMITTED TO THE POSTGRADUATE SCHOOL AHMADU BELLO UNIVERSITY ZARIA, IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF MASTER OF LAWS DEGREE – LL.M

Department of Commercial Law,
Ahmadu Bello University,
Zaria.

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DECLARATION

I declare that the work in the thesis entitled "An appraisal of the procedures for that regulation of merger transactions under the Investments and Securities Act (ISA) 2007" has been performed by me. The information derived from the literature has been duly acknowledged in the text and footnotes. No part of this thesis was previously presented for another degree or diploma at any University.

_____ _____

Francis Uzoma Okafor Date
LLM/LAW/06126/2006-2007

CERTIFICATION

This Thesis entitled 'An Appraisal of the procedures for the regulation of merger transactions under the Investments and Securities Act (ISA) 2007' by Okafor Francis Uzoma meets the regulations governing the award of degree of Master of Laws of the Ahmadu Bello University, Zaria, and is approved for its contribution to knowledge and literary presentation.

_____	_____
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_____	_____
Prof. I.J.G Irokalibe HOD Commercial Law	Date
_____	_____
Professor A. A. Joshua Dean, Postgraduate School	Date

DEDICATION

This Thesis is dedicated to my lovely wife Mrs. Chinomnso (Akum –Ayola) Okafor for all her love and support prior to and during my post graduate program.

ACKNOWLEDGEMENTS

My profound gratitude goes to Dr. A.A. Akume and Dr. A.R Agom, my supervisors for their patience and advices, Dr. A. Madaki for providing a leeway for us to follow. To Mrs. Deborah Laah for all she has done for me during this program. To Salihu Mohammed (My Aboki) for all his encouragements and troubles.

LIST OF CASES **PAGES**

LIST OF STATUTES **PAGES**

ABSTRACT

Merger transactions came into the front burner in Nigerian economy during the banking consolidation of 2005. The Insurance Industry was thereafter consolidated. The existing procedure for the approval of merger was reviewed and revised. These interests in merger culminated in the documentation of the procedures for the approval of merger as provided in the Investments and Securities Act, 2007.

This thesis reviewed the provisions of merger in the law. The problem it set out to review is the adequacy or otherwise of the procedures contained in the Investments and Securities Act 2007 relied upon in order to obtain approval for merger transactions.

The methodology used is the combination of doctrinal and teleological methodology. Doctrinal in the sense that the researcher made use of primary sources such as the Investments and Securities Act No. 29 of 2007, the Companies and Allied matters Act Cap C24 2004,SEC Rules and Regulations, Judicial authorities and secondary sources such as volumes of books, on merger transactions and scheme documents of approved merger transactions, writ of summons; Court ordered meetings, proxy forms and gazette copies of concluded merger transactions.

The researcher also utilized teleological methodology from the author's experiences in more than eight years working at the Securities and Exchange Commission.

The research find that there is a need to amend some Sections of the I.S.A 2007 relating to the procedure to approve merger, To update and upgrade of Information, Communication and Technology (ICT) of the Securities and Exchange Commission, It is also our finding that there is need for Linkage and Co-ordination among Regulators: SEC, CBN, CAC, NAICOM, NSE, We find that the cost of transaction in merger in Nigeria is high also the researcher find that Staff of SEC need adequate

Capacity building in the merger transactions, It was our finding that there is a need to establish Anti Trust or Anti Competition Commission.

TABLE OF CONTENTS

CHAPTER ONE

GENERAL INTRODUCTION

1.1 General Introduction

The Investments and Securities Act No. 29 of 2007 created the Securities and Exchange Commission as the apex Regulatory authority charged with the regulation of the capital market[1] in Nigeria. The Act like its repealed predecessor, Investments and Securities Act No. 45 of 1999 was previously provided as part XVII of the Companies and Allied Matters Act (CAMA) 1990[1]. This part XVII was transferred for ease of implementation and administration to the current Investments and Securities Act of 2007.

Section 13 of the Investment and Securities Act No. 29 of 2007 empowers the Securities and Exchange Commission to regulate mergers, acquisitions, takeovers and all forms of business combinations by providing under the functions and powers of the Commission that the Commission shall be the apex regulatory organization for the Nigerian Capital Market. It shall in this regard carry out the functions and exercise all the powers prescribed in the Act, and in particular, shall review, approve and regulate mergers, acquisitions, takeovers and all forms of business combinations and affected transactions of all companies as defined in the Act[2].

Part XII of the Investments and Securities Act No. 29 of 2007[3] provides the details of the procedures to be followed in the regulation of mergers transaction in Nigeria.

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[1] Part xvii of Companies & Allied Matter Act 1990
[2] S. 13 of Investments & Securities Act 2007
[3] Part Xii Ibid, See also Sections 180-111 of United Kingdom Insolvency Act 1986 0n Scheme of Arrangement and Reconstruction, See also UK Enterprise Act 2002 ,

Section 313(1) of the Investments and Securities Act No. 29 of 2007 empowers the Commission to make rules and regulations to better regulate the Capital market. It provides that the Commission may from time to time make rules and regulations for the purpose of giving effect to the provisions of the Act and may in particular and without prejudice to the generality of the foregoing provisions, make rules and regulations[4].

Section 313 (1)e further provided that the Commission may from time to time make rules and Regulations for the purpose of giving effect to the provisions of this Act and may in particular and without prejudice to the generality of the foregoing provisions, make Rules and Regulations; Prescribing the procedure and criteria for approval of mergers, takeovers, acquisitions and business combinations under this Act.

Consequently the Securities and Exchange Commission made elaborate rules and regulation guiding the conduct or operation of the capital market including rules and regulation for the consummation of merger transactions in Nigeria.

Mergers, Acquisition or business combination between or among companies shall be subject to section 118 of the Act.

Section 118 of the Act provides that "Notwithstanding anything to the contrary contained in any other enactment, every merger and acquisitions or business combination between or among companies Shall be subject to the prior review and approval of the Commission".

[4] S. 313 (1) Securities and Investments Act,2007.

Sections 118-130 of the Investments and Securities Act No. 29 of 2007 provides for mergers while Part G of the Rules and Regulations of the Commission provides for the procedures to be followed in filing, processing and approval of merger transactions.

Mergers, as consolidation concept in the business circle in Nigeria were of little or no serious consequence until the pronouncement of Professor Chukwuma Soludo on July 4, 2004. Professor Soludo the then Governor of Central Bank of Nigeria mandated the Banks in Nigeria to shore up their shareholder fund to 25 billion Naira either through the option of Mergers, Acquisitions or Takeovers on or before December 31, 2005. This pronouncement was a turning point in the business circle in Nigeria through mergers and Acquisitions. Prior to this period, the Securities and Exchange Commission had a limited number of approved merger transactions in the country.

This revolutionized the concept of merger in Nigeria and generated great interest in business circles. Stakeholders such as Issuing houses, Consultants, Solicitors, the Securities and Exchange Commission, Stock Exchange, banks and Insurance companies and other interested groups organized various seminars and workshops on mergers, Acquisition and Takeovers in order to appreciate the concepts and its packaging. It also brought to focus the issues, challenges and failure in merger transactions with consequences of litigation as a fall out from merger transactions.
The Securities and Exchange Commission in the wake of this interest in merger transactions reviewed the procedures for the approval of merger transactions.

The interest generated by this area of law, its impact, rigors and challenges from the existing procedures call for an appraisal.

The current procedure as presented by the Rules, Regulations and the law guiding merger transaction need to be x-rayed to find out its adequacy or otherwise. The concerns and complaints from the operators, investors, legal practitioners and other stakeholders in respect of the procedures for the approval of mergers and getting audience and solutions to merger transaction should also be discussed.

This project will attempt to attend to these issues revisiting the existing procedures, bringing out lacuna if any and making suggestions on the ways of alleviating the problems being encountered by company lawyers, solicitors to merger transactions and other stakeholders in processing merger transactions.

1.2 Statement of Problem

The result of consolidation of Banks and Insurance Industries in Nigeria is a res ipso liquitor. This is evident in the strength of the surviving 25 banks out of 89 previously existing bank. Each of these banks after the consolidation exercise has at least N25 billion as their shareholders funds. This is also the same record in the Insurance Industry whose shareholders funds were also raised through Mergers, Acquisitions and Takeovers. The import of this is that the era of bank failures has become history in Nigeria. This is also true of Insurance Industry. It is expected that other Corporations in other industries will consider the option of merger in view of the successes recorded in the Banking and Insurance industries.

The problem this research work is out to resolve is the problems inherent in the procedures in the Investments and Securities Act No. 29 of 2007 as it relates to the obtaining approvals for mergers.

In Nigeria, The Securities and Exchange Commission in addition to development of the capital market regulate Mergers, Takeovers and Acquisitions. Section 121 of the Act provides for the consideration of mergers and sub section 1 states that

Where 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 offset the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would 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) ….

This research work will consider the criteria for the determination of mergers as stated above in order to establish whether the Commission relies on these criteria to achieve the overall objectives of the regulation of mergers which is to substantially prevent or lessen competition.

The documentation and cost of obtaining approval of merger under the Investments and Securities Act 2007 will be x-rayed in order to bring out their effectiveness in the process of merger.

1.3 Aims and Objectives

The aims and objectives of this research work is to:

(1) Provide understanding of the procedure for the approval of merger transactions to the investing public.

(2) Examine the procedure of merger transaction as provided by the Investments and Securities Act No. 29 of 2007 and the Rules and Regulations made there under in order to highlight the difficulties inherent in the procedure if any.

(3) Analyze the functions of different parties in the packaging of merger transactions.

1.4 Justifications

Merger, Acquisition and takeover have taken the front burner in our economic life in Nigeria and beyond, it has been observed that Merger transactions commence by searching for compatible business fellow. This is followed by due diligence conducted with great energy, finances and commitment on the part of the contracting parties to the transaction. The appointment of Issuing houses, Auditor, Reporting Accountants, and Solicitor to the scheme of merger, Registrars and all other professional parties necessary to package and consummate the merger results `in great financial expense. It has also been observed that in between the review and approval of the Merger and indeed during integration processes, some merger transactions are abandoned or fail. In such cases, all the expenses are lost. The justification for this research work is to

expose the volume of documentations, time and cost in terms of finances, human and material resources being expended in the procedure to obtain approval for merger transactions in Nigeria, The research work will show the difficulties that the criteria which the law allow the Commission to consider under section 121 of the ISA can be appropriately applied in order to determine whether a merger shall substantially prevent or lessen competition

This work is justified by the problems raised. The work is relevant to stakeholders like captains of Industries, operators, capital market Regulators, legal practitioners, students, Accountants, judges and the general public.

1.5 Scope of the Research

This research work will be restricted to the procedures of application and approval within the regulatory powers of the Securities and Exchange Commission as it is empowered by the Investments and Securities Act No. 29 of 2007.

The Research work will also review the provisions of SEC rules and regulations made pursuant to S. 313 of the ISA and the Rules and Regulations made by SEC relating to merger transactions as provided in part G of the Rules and Regulations made pursuant to the ISA.

1.6 Research Methodology

The methodology the researcher in this project intends to use is the combination of doctrinal and teleological methodology. Doctrinal in the sense that the researcher will wade through primary sources such as the Investments and Securities Act No. 29 of 2007 and the Companies and Allied matters Act cap C24 2004 and secondary sources such as volumes of books, decided cases on merger transactions, and SEC

Rules and Regulation. The Researcher will also go through scheme documents of approved merger transactions, writ of summons; Court ordered meetings, proxy forms and gazette copies of concluded merger transactions. These will also be analyzed and conclusions would be drawn while suggestions and recommendation will follow the analysis.

The researcher will also resort to the use of teleological research methodology from his experiences in more than eight years practical experience in working with the Securities and Exchange Commission and particularly with the Securities and Investment Services Department which is in charge of the review of all the applications and the scheme documents required as a procedure for approval for merger transaction. His direct contact with the Operators, Solicitors, Issuing Houses and other stakeholders will bring out the desired result in this research work.

1.7 Literature Review

Mergers is defined as "Any amalgamation of the undertakings or interest of two or more companies or the undertakings or part of the undertakings of one or more companies or part of the undertakings of one or more companies and one or more bodies corporate[5]"

A merger is also defined as a combination of two companies into one large company. Such actions are commonly voluntary and involve stock swap or cash payment to the target

Mergers and acquisitions essentially involve some reorganization within the structure of a company. These mechanisms were enunciated in attempts by companies to meet the exigencies of their financial situations or better still to plan effectively for the future conduct of their businesses.

An ultimatum of July 6, 2004 delivered to the special meeting of Bankers' Committee in Abuja by the Governor of Central Bank of Nigeria on a new regulatory horizon requiring all banks in Nigeria to ensure compliance before December 2005 in upgrading their minimum share capital to N25 billion make consolidations inevitable. [6]

In Tolleys Company Acquisitions Handbook on mergers, only limited or no resources leave the combined group and the voting rights and equity interest in the combined group are allocated to the former shareholders of combining entities in such a way as to reflect the agreed values of the respective entities. Conceptually therefore, a

[5] Section 590 Companies and Allied Matters Act Cap. C20 2004See also Rule 227(1) Rules and Regulations made Pursuant to the ISA, see also Section 119 of the ISA NO. 29,2007

[6] Soludo C.C Governor Central bank of Nigeria, in a paper presented to Banker Committee, July 6,2004 titled Consolidating the Nigerian banking Industry to meet the development challenges of the 21st century.

merger is a pooling of existing interests rather than the transfer of interests from one group of shareholders to another.[7]

Robert H. Miles in his book "Leading Corporate Transformation" a blue print for Business Renewal states that "The merger of two different businesses with different cultures to form a new enterprise is a special case of corporate transformation with its own set of challenges"

A majority of merger failed because the resultant companies could not achieve improved efficiency and ultimate higher productivity[8]

There is also a compelling need for constant communication with employees of organizations unfettered communication forestalls rumors and the spreading of erroneous impressions as reality. In effect, effective communication clears the road for employee co-operation in the merger or acquisition deal. Pre and post merger communication is therefore essential.[9]

Nwabueze Ben, stated that for a successful completion of a merger or acquisition, Merger/Acquisition candidates require a wide array of financial services through pre-merger and post –merger processes such services include financial advisory services, valuation of merger/acquisition candidates, identification services and evaluation of synergies involved, facilitation of integration processes post merger management, and listing and registration of new shares of newly formed hybrid companies among so many others, this most often than not entails the use of varied enterprise,

[7] Tolly's Company Acquisition handbook Lexis Nexis, UK 7th Edition 2004 Page 7

[8] Miles R.H: Leading corporate transformation, a blue print for business Renewal Jossey – bass publishers San Francisco 1999 page 179 at 178

[9] Atedo Peterside: Drivers of Mergers and Acquisition: The Road Map of Mergers and Acquisitions. Financial Standards November 29, 2004, page 4:

awkwardness of shipping files between much construction and needless divulging of corporate information to too many consultants.[10]

1.8 ORGANIZATIONAL LAYOUT

Chapter one

The chapter one of this thesis contains the introduction of the work, the aims and objectives of the project are provided in this chapter as well as the scope of the research work. This chapter also contains the statement of problem and the justifications. The significance and the literature review as well as the research methodologies for the thesis sum up the chapter one of this project.

Chapter Two

Chapter two of the thesis is made up of definitions of mergers and other key concepts. The chapter explains concepts and technical terms in the process of merger transactions. These include among others, due diligence, company or corporate profile, scheme document, court ordered meeting, srutineer report and proxies. This chapter defined and explained other concepts such as originating summons and court sanction of scheme document. It provides the reader of the meaning as well as how they relate and their usage in merger transactions.

[10] Nwabueze B.O: Ibid, at page 11

Chapter three

This chapter identifies parties to merger transaction and their function and roles in the process for the approval of merger transaction. The chapter identified the principal company or what is regarded as company A, It explained the role or function of the initiating company in terms of the initiating the process of the merger. The chapter also discusses company B and other companies involved in the merger. Company B in the context depicts the other company involved in the merger and any other if the companies are more than two. Company secretary is also discussed in this chapter. His role in conducting of due diligence and attendance of meeting in the early period of merger transaction is also highlighted. The financial adviser, Auditor, Stockbrokers, Reporting Accountant and solicitors to the merger are discussed bring out the role and functions as parties to the transaction. This chapter also x-rayed the role of Registrars, integration consultants, the Securities and Exchange Commission (SEC), the Nigerian Stock Exchange (NSE), Central Securities Clearing System (CSCS) and Federal High Court (FHC). Their roles in merger transaction are discussed in this chapter.

Chapter four

Chapter four of this thesis duels on the procedure for the approval of merger transaction. It reviews the Regulatory requirements for obtaining approval for merger transactions. It treated pr-merger notice and what it means. It considered the requirements for pre-merger notice. The chapter also analyzed formal approval as well as the documents required before a formal approval could be granted by the Securities and Exchange Commission. The Clearance of scheme document by the SEC was also discussed. The chapter treated Court ordered meeting and how the meeting could be authorized and held including parties expected at the meeting as

well as the procedures for the meeting. The chapters also explain what happen after the court ordered meeting as the SEC based on the outcome of the meeting clear the merger for court sanction .This Chapter of the thesis also reviewed court ordered meeting and its relevance in the process of merger transaction. It explained the court sanction s the gavel that unites the merged entity in merger transaction.

The chapter is concluded with final approval given by the Securities and Exchange Commission for the merger to be complete. The chapter explain the procedures the merged entity and the Issuing House have to follow to receive final approval for the merger.

Chapter five

Chapter five provides for post approval requirements. It list out the requirements and what the merged entity will do to remain compliant with the regulatory requirements. The chapter provides post merger documentations and the Gazette of the merger. It provides for post merger inspections and what is required of the merged entity, the Registrar, the Company Secretary and other close out audit to be conducted on the merged entity. This chapter also highlights how post merger issues are resolved by the Securities and Exchange Commission. Explaining the methods employed by the SEC to resolve any post merger issue that may arise as a result of the merger. This chapter concludes with litigations that often are consequences of merger transactions. It mentioned few cases that had litigation as a fall out of merger transaction and gave the facts and the decisions reached by the court on such cases.

Chapter six

Chapter six of the thesis deals with the findings, recommendations and conclusions. It provides what the researcher observed in the course of the work, it recommendations

as a way forward or things or areas of improvement and /or actions which the researcher believe that if taken will improve the procedure to obtain approval for merger transaction under the Investments and Securities Act 2007. The chapter ended with the conclusion of the thesis.

This is followed by the bibliography which is the list of references use in this thesis. These include books, scheme documents, gazettes newspapers and other reference materials.

CHAPTER TWO

DEFINITION OF CONCEPTS AND KEY TERMS - MERGERS, ACQUISITIONS, TAKEOVERS.

2.1 General Introduction

In this chapter, certain definitions which are used contemporaneously with mergers will be defined. The definitions from other scholars and writers on these subjects will be considered with the definitions ascribed to it by the Investments and Securities Act 2007.

2.2 Merger

The Black 's law Dictionary[1] define merger as the absorption of one company (especially a corporation) that ceases to exist into another that retains its own name and identity and acquires the assets and liabilities of the former. Corporate merger must conform to statutory formalities and usually must be approved by a majority of the outstanding shares.

Merger also refers to the absorption of one firm by another. The acquiring firm retains its name and its identity, and it acquires all the assets and liabilities of the acquired firm. After a merger, the acquired firm ceases to exist as a separate business entity[2].

The Investments and Securities Act, 2007 defined merger to mean any amalgamation of the undertakings or any part of the undertakings or interest of two or more companies or the undertakings or part of the undertakings of one or more bodies corporate. [3]

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[1] Black laws Dictionary, seventh edition, Edited by Bryan A. at page 1002
[2] Ross S.A , Westerfield R.N, Jaffe J, Corporate Finance, International Edition, Fourth Edition, The McGraw- Hill companies Inc. 1996.
[3] See Section 119(1) of the Investments and Securities Act No 29,2007

2.3 Acquisitions

Acquisition is defined as the gaining of possession or control over something, the acquisition of the target company's asset.[4] Acquisition is also defined as a situation where one company takes over controlling interest in another

Company[5] The Investments and Securities Act No 29 of 2007 did not define Acquisitions.

2.4 Takeovers

Black law dictionary defined Takeover as the acquisition of ownership or control of a corporation[6] . A takeover is typically accomplished by a purchase of shares or assets, a tender offer or a merger. A takeover was further defined as a change in the controlling interest of a corporation.[7] A takeover may a friendly acquisition or an unfriendly bid that the target company may fight with share repellant technique.

The ISA No. 29 of 2007 define a takeover as meaning the acquisition by one company of sufficient shares in another company to give the acquiring company control over the other.[8]

From the definitions above, it appears that Mergers, Acquisitions and Takeovers are similar, they however can be distinguished.

2.5 Due Diligence

[4] Black law Dictionary op.cit at pg.24
[5] John Downes and Jodan Elliots Goodman, Dictionary of Finance and Investment terms, Eight Edition, pg 8.
[6] Black law Dictionary op.cit at pg 1466
[7] Dictionary of Investment and finance Supra at ,pg.730.
[8] Section 117 ISA op.cit

Due diligence is a term used for a number of concepts involving either the performance of an investigation of a business or a person or the performance of an act with a certain standard of care. It can be a legal obligation but the term will be more commonly apply to voluntary investigations. A common example of due diligence in various industries is the process through which a potential acquirer evaluates a target company or its assets.[9]

In business transactions, the due diligence process varies for different types of companies. The relevant areas of concern may include the financials, legal, labour, IT, environment, and market situation of the company. Other areas include intellectual property, real and personal property Insurance and liability coverage, debt instrument review, employment benefits and labour matters, immigration and international transactions.[10]

Operational due diligence is the process by which a potential purchaser reviews the operational aspects of a target company during mergers and Acquisitions. Operational due diligence review the main operations of the target and attempts to confirm (or not) that the business plan that has been provided is achievable with the existing operational facilities plus the capital expenditure that is outlined in the business.

Additionally, the operational due diligence review and consider whether there is the potential for additional value to be wrought out of the target company by improving its operational functions and also whether there are serious operational risks about which the potential buyer should be concerned (thereby allowing the buyer to

[9] Hoskinsons, Hitt & Irelane competing for Advantage 2004, at pg.251
[10] Gary M. L Due Dilligence in Business Transactions (Law Journal Press 1994).

consider aborting the deal or renegotiating the price) Due diligence review is often performed by a party though a professional service firm.

Other aspects of due diligence include financial due diligence –where the target company's financial status are reviewed.

Commercial diligence – Where a target company's commercial status, the market position of its products and /or services are reviewed.

IT Due diligence – where a target company's IT environment is reviewed.

Entities in merger discussion usually conduct due diligence exercise on the suitors or merging partners to enable them access their viability before consenting to merger transactions.

2.6 Company or Corporate profile

A Company or Corporate profile gives a short description that give important details about a company. It includes the name of the company, its registered office, and the Incorporation history of the company, the directors of the company and its shareholding structure. It also contains the management staff, their portfolio and business development interest. It also contains their academic qualifications, the institutions and their years of graduation including experiences in other field of Endeavour before joining the company. The profile provides the details of the ownership structure both Nigerians and foreigners. The vision and the mission statement of the company is part of the content of a profile of a company. Also contained in the corporate profile is the business interest of the company. The services it renders area of business interest and investment philosophy of the company. This is

one of the documents required to be submitted by a company that is engaging in merger transaction as a disclosure requirement.

2.7 Scheme document

A scheme document is a disclosure document which provides details for the benefit of shareholders of merging entities in order to make informed decision in respect of the merger transaction. The scheme document is usually prepared by the Issuing Houses/financial advisers of the merging companies. It contains verifiable information provided by the directors of the companies for the investment analysis of the shareholders, creditors, Regulators and the Court in sanctioning the merger. A scheme document contains the following information;

Definition part, this provide the definitions and meaning to concepts, legal citations, technical words and abbreviations in the scheme document.

Expected timetable of principal events, this tabulate and present the timetable of the proposed time frame for the events and conclusion of the transaction. This however is subject to the Regulatory clearances and court sanctioning of the scheme of merger.[11]

Letters from the chairmen of the merging entities; the various chairmen of the merging entities provide information to the shareholders and finally encouraged to vote in favour of the merger.

[11] Scheme of merger of First city monument Bank Plc with Co-operative Development Bank Plc 2005 in Suit No. FHC/L/1136/2005, see also the Scheme of Merger between Tower Aluminum Nigeria Plc & COOK "N" LITE Nigeria Ltd in Suit No. FHC/L/CS/1186/07, Flour Mills of Nigeria Plc and Golden Fertilizer Co. Ltd in Suit No. FHC/L/CS/535/05, Guardian Express Bank Plc, Citizen International Bank plc, ACB International Bank Plc, Omega Bank Plc, Trans International Bank Plc and Fountain Trust Bank Plc in Suit No. FHC/L/CS/1356/2005

Explanatory statement to the shareholders of each of the merging entities; this section of the scheme document provides for what a shareholder and /or stakeholder and other interested party would want to know about he scheme of merger. It introduces what the merger is all about, its prospects and synergies and projections at conclusion. It provides the proposals, the elements of the scheme, the financial effects of the scheme, information regarding each of the merging entities, it also provide further information if there are and recommendation

Appendices, the scheme document as one holistic document contain appendices regarding the following information for all the merging entities. These includes Corporate Information, information on the Incorporation and share capital history of the merging entities, their share holding structure, the directors' beneficial interest in the companies, the indebtedness of the companies, the subsidiaries of the companies, the extracts of the Memorandum and Articles of the companies are also provided in the scheme document. This is in addition to providing the resolution of the companies resolving to merge with each of the companies in the transaction.

The scheme document also contains financial information of the merging entities. This includes letter from the reporting Accountant, the Accountants' report, Memorandum and profit forecast, letter from the financial advisers to the companies on the profit forecast and other documents available for inspection.

The scheme document also contain under the appendices the proforma statement of the shareholding of the companies, their unaudited proforma balance sheet , Notes on the proforma balance sheet, proforma profit and loss accounts, notes on the forecast.[12]

[12] Scheme of Merger between Capital Bank Plc & Marina International Bank Limited and Access Bank Plc … 2005 Bank plc dated August 9, 2005.

Other contents of the scheme document are responsibility statement from the directors to the fact that all information provided in the scheme document are true and reliable., claims and litigation involving the companies, material contracts, consents from the directors and parties to the transaction and any other general information.

The Issuing Houses also provide the basis of valuation and the exchange ratio. This provides the background to the basis of valuation and the exchange ratio, the basis of Assumption, valuation methodologies and the exchange ratio.

Attached to the scheme of merger are the notice of court ordered meeting for each of the merging entities and the proxy forms for person who may elect that a proxy represent him in the meeting.[13]

2.8 Court Ordered Meeting

In merger transactions, it is a requirement that the merging parties be mandated by a pronouncement of the Court to convene a separate emergency general meeting of each of the merging entities where a special resolution will be put to the shareholders attending the meeting to vote for or against the merger transaction. It is expected that ¾ of members present and voting for such proposal will give the merger proposition the required backing and support needed to move to the next stage of the merger transaction. Usually such meetings are published in two nationally read Newspaper to give the meeting adequate publicity apart from notices of meeting sent to the individual shareholders. The Court will give leave for this meeting to hold when the

[13] Scheme of merger between first Bank of Nigeria Plc, MBC International Bank Plc & FBN (Merchant Bankers) Limited dated 9 November, 2005.

applicants had presented a letter of clearance of the scheme document from the Securities & Exchange Commission.

2.9 Scrutineers' Report

In every Court ordered meeting for a merger transaction the shareholders present at the meeting are expected to vote on the proposed merger sub - head and other proposals concerning the merger. The votes at the meeting are expected to be counted, analysed and announced. This is usually done by accredited accounting firm. This firm is under obligation to submit their report concerning the result of the voting to the Securities and Exchange Commission. The report so submitted will be the basis of confirmation of whether the shareholder approved the merger or not. This report is known as scrutineers report in merger transaction. It is important to state here that such accounting firm must be registered with the Commission.

2.10 Proxies

A proxy is an agent legally authorized to act on behalf of another party. Shareholders not attending a company's annual meeting may choose to vote their shares by proxy by allowing someone else to cast votes on their behalf. It is usually a formal power of attorney document that may be signed by a shareholder to authorize another shareholder, a representative of the shareholder or the company's management, to vote on behalf of the shareholder at the annual meeting. Proxy documents are meant to provide shareholders with the information necessary to make informed votes on issues important to the company's performance. They are known to offer shareholders

and prospective investors tremendous insight into a company's governance as well as a glance at the way that company's management operates.[14] The executed proxy form is expected to reach the secretary of the company at least twenty four hours before the meeting for purposes of accreditation for voting during the meeting.

2.11 Originating Summons

Court process include writ of summons, originating summons, originating process, notices, petitions, pleadings, orders, motions, summons, warrants, and all documents or written communication of which service is required[15]

Originating process means any court process by which a suit is initiated[16]

Service of originating process shall be made by a sheriff, deputy sheriff, Bailiff, special marshal or other officer of the court. The chief judge may also appoint and register any law chamber, courier company or any other person to serve court processes and such person shall be called process server.[17] In merger transactions, originating summons is used to initiate suit either for a court ordered meeting[18] or for a court sanctioning of the merger transaction.

2:12 Court Sanction of the Scheme of Arrangement

The Court usually is the sealing point/place for a merger transaction. Parties to a merger transaction after the court ordered meeting and clearance from the Securities and Exchange Commission approach the court to sanction the merger. At the

[14] Proxy: West's Encyclopedia of American Law
[15] Order 1 (3), Application and Interpretation, High Court of Lagos State (Civil Procedure) Rules 2004.
[16] Ibid.
[17] Ibid, order 7, Service of Original Process
[18] Suit No: FHC/L/CS/394/09: Originating summons for Notice of Court ordered meeting for waterside Rubber Estate Limited in RE: Rubber Estates Nigeria Limited, Araromi Rubber Estate ltd waterside Rubber estate ltd, Osse River Rubber Estate ltd Utagba – Uno Rubber Estate ltd.

pronouncement of the court that the merger has been sanctioned,[19] the parties thereupon become a merged entity.

[19] Suit No: FHC/L/CS/178/2010 in matter of application of sanction of merger in the matter of Rubber Estates Nigeria Limited and 4 ors .See also Suit FHC/L/CS/1044/09 West African HouseHold Utilities Manufacturing company Ltd & Battery Manufacturing Company Nig. Ltd, Suit No.FHC/L/CS/5463/08 MTN Nigeria Communication Ltd & VGC Communication Ltd

CHAPTER THREE

THE ROLES OF PROFESSIONAL PARTIES AND OTHER STAKEHOLDERS IN A MERGER TRANSACTION.

3.1 General Introduction

In every merger transaction, there are several parties or participants that are involved in different roles that will eventually culminate into the successful and smooth cementing of the two or more entities into one called the resultant company. In this chapter, parties to a merger transaction and will be identified, explained and defined while their various roles and function will be discussed.

3.2 Initiating company (Company A)

Like a suitor in a marriage relationship, an initiating company (company A) that intends to merger with another company usually conceives the idea having put in a lot of consideration in terms of the benefits, synergy, .economies of scale, product integration, expansion and strength in the industry before a decision to merge is taken. This could be discussed and agreed upon by the board[1] through a resolution. The board members may mandate a board committee to identify a potential suitor or a merger partner for onward discussion and a possible signing of Memorandum of Understanding. Company A on identifying the merging partner approach it with the prospect of a merger between them.

3.3 Company B and other companies

On the identification and approach of a suitable merging partner (company B) and /or more companies in addition to company B, discussions as to the possibility of the companies merging to become one is explored. Each of the companies on separate

[1] Board Resolution of GT Bank Plc in Merger consummated with Asset and Resources Management Limited

basis considers the advantages that are accruable to the shareholders, directors and other stakeholders of the companies. When each of the entities has decided to go ahead with the merger, they separately commence and conduct due diligence on the other companies. Due diligence is the process of evaluating a prospective business decision by getting information about the financial, legal and other material (important) state of the other party.[2] Due diligence is used most often when buying a business, as the buyer spends time going through the financial situation of the business, legal obligations, customer records, and other documents. The prospective buyer wants to validate his/her opinion of the business to see if it is truly a good decision.[3]

3.4 Company Secretaries:

A Company Secretary is an officer of the company.[4] A Company Secretary is a senior position in a private or public company, normally in the form of a managerial position or above. The Company Secretary ensures that an organization complies with relevant legislation and regulation, and keeps the board members informed of their legal responsibilities. Company Secretaries are the company named representative on legal documents, and it is their responsibility to ensure that the company and its directors operate within the law. It is also their responsibility to register and communicate with shareholders, to ensure that dividends are paid and to maintain company records. Such as lists of directors and shareholders, and annual accounts.

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[2] Due Diligence: Jean Murray, about.com US Business Law/Taxes
[3] Ibid
[4] Luke Thomas & Lorraine young Institute of Chartered Secretary & Administration Study Text, Corporate Secretary Ship, 5th Edition at P.4

The Company secretaries in all sector have high level of responsibilities including governance structures and mechanisms, corporate conduct within an organization's regulatory environment board, shareholder and trustee meetings, compliance with legal, regulatory and listing requirements, the training and induction of non-executives and trustees, contact with regulatory and external bodies, reports and circulars to insurance administration and organization, the negotiation of contracts, risk management, property administration and organization and the interpretation of financial accounts.

Company Secretaries are the primary source of advice on the conduct of business and this can span every thing from legal advice on conflict of interest, through accounting advice on financial reports to the development of strategy and corporate planning.
This inclusive roles and function of a Company Secretary makes him the arrow head and point man in Merger transaction. He is involved from the muting of the idea, the scouting for suitors, due diligence, negotiation, provision of documents and filings with courts and regulatory agencies. The Company Secretary is virtually the anchor person in merger transactions.

3.5 Issuing House/Financial Advisers

Issuing House/ Financial adviser is a professional who renders investment advice and financial planning services to individuals and businesses. Ideally the financial adviser helps the client maintain the desired balance of investment income, capital gain, and acceptable level of risk by using proper asset allocation. Financial advisers use stock, bonds, mutual funds, real estate investment trusts (REITS), Options, futures, notes and insurance products to meet the needs of their clients. Many financial advisers

receive a commission for the various financial products that they broker, although fee based planning is becoming increasingly popular in the financial service industry.

In merger transactions in Nigeria, Rule 183 of the Rules and Regulations made pursuant to the Investments and Securities Act No 29 of 2007 provided that Registered Issuing Houses shall have the function of financial /investment advisory services among other function.[5]

3.6 Auditors

An auditor[6] is a professional who gives opinion or disclaimer in the principal report of an organization. He may be an internal auditor or independent external auditor. This is usually done as a result of an internal or external audit or evaluation performed on a legal entity. The auditor's report is provided for a user (such as an individual, a group of persons a company, a government or even the general public, among others) as an assurance service in order for the user to make decisions based on the results of the audit.

An auditor's report is considered an essential tool when reporting financial information to users; particularly in business. Since many third party users prefer, or even require financial information to be certified by an independent external auditor. Companies rely on auditors' reports to certify their information in order to attract investors, obtain loans, and improve public appearance. Some have even stated that financial information without an auditor's report is "essentially worthless" for investment purposes.

[5] SEC Rule & Regulations pursuant to Investments & Securities Act

[6] Rule 39 Ibid, auditors are capital market consultants required to be registered by the SEC before they can participate in the capital market.

3.7 Stockbrokers:

A stockbroker is a regulated professional broker who buys and sells shares and other securities through market makers or agency only firms on behalf of investors. Stockbrokers also sometimes or exclusively trade on their own behalf, as a principal speculating that a share or other financial instrument will increase or decrease in price. In merger transactions, the shares are transferred wholly to the resultant company while the other merging entities are dissolved without winding up. The stockbrokers have a duty as a party to the merger transaction to list the shares of the merged entities on the floor of the exchange. Rule 28 (1)[7] of the Rules and Regulations of the Securities & exchange Commission provides a list of capital market operators subject to be registered by the Commission. Stockbrokers is listed as one of such operators. This is aimed to regulate the operations of stockbrokers who operate in the capital market. Rule 28(2) of the Rules of the Commission provides that it is only corporate bodies that are qualified to file application to be registered as stockbrokers.[8]

3.8 Reporting Accountants

Reporting accountants are listed as a party in a merger transaction.[9] They are expected to be a corporate body registered with the Commission[10] with valid registration status. It is their duty to give an opinion on the audited account of the merging entities. The report of reporting accountants provide comfort for the auditors report.

3.9 Solicitors to a Merger

[7] Rule 28 (1) Rules and the Regulations of the Securities & Exchange Commission
[8] Rule 28 (2), Ibid.
[9] Rule 39 (1) ii Ibid
[10] Rule 39 A Ibid

Solicitors[11] to a merger transaction has the initial role of conducting legal due diligence for the parties in the merger transaction. He is the pivotal adviser in the packaging of the transaction. He drafts the financial services agreements, the originating summons, proxy forms and initiate court processes for court ordered meetings and the sanctions of the merger.[12]

The solicitors to a merger are instrumental to the packaging of the scheme of merger. He attends the various meeting involving the parties during the process of the pre merger, post merger and gazette stage of the merger. Solicitor to the merger is also involved in the court ordered meeting which is mandatory before a merger is sanction. The role of the solicitor to a merger is very significant in a merger transaction. The solicitor to a merger should also be registered and have a valid registration status with the Commission.

3.10 Registrars

Registrars are usually party to a merger transaction. The Role of a Registrar is traditionally that of keeping records of members of a company. Registrars enter the name of new shareholders and update the records of movement of shares and their owners. Registrars also act as transfer agent who issue and cancel certificate to reflect changes in ownership.

Part VI of the Investments and Securities Act deals with Registration and Regulations of capital Market operators.[13] Registrars are therefore under obligations to register

[11] Rule 39 (1) Ibid
[12] Scheme of Merger of First Bank Plc MBC International Bank plc & FBN (Merchant Bankers) ltd dated 9 November, 2005 at Pgs 144-149.
[13] Part VI of the Investments & Securities Act No. 29. 2007. See also Rule 34 of the Rules and Regulations made pursuant to the investments and securities Acts.

with the Commission before they can operate in the capital market and their registration status must be current to operate in the capital market. In merger transactions, Registrars record the resultant shares of the merging entities and maintain their records for transactional purposes as mentioned above.

3.11 Integration Consultants

At the successful completion of a merger transaction, two or more companies become one. The companies often have different working ethics, brand, colour, information technology platforms and culture. These often create problems for a newly merged entity. With tact and careful management of these, mostly with professional integration consultants, the merged entities seamlessly become a one fully integrated company. The investments and Securities Act No. 29, 2007 provides for capital market consultants to include professionals whose opinions and activities directly impact on capital market transactions.[14]

Merged entities have failed as a result of unsuccessful management of the integration of the merged entities. Integration consultants are therefore very important in merger transactions.

3.12 Securities and Exchange Commission (SEC)

The Securities and Exchange Commission is the apex regulatory authority charged with the regulation and development of the capital market. Section 1 of the Investments and Securities Act No 29, 2007[15] established the Securities and Exchange

[14] Capital Market Consultant, Rule 39 of the Rules & Regulations made pursuant to the ISA
15 Section 1 of the Investments & Securities Act No. 29, 2007

Commission. Part ii of the act provides for the functions and powers of the Commission.[16] Section 13 provides that

"The commission shall be the apex regulatory organization for the Nigerian capital market and shall carry out the function and exercise all the powers prescribed in this Act and in particular, Section 13(p) provide that the Commission shall review, approve and regulate mergers, acquisitions, takeovers, and all forms of business combinations and affected transactions of all companies as defined in the Act".[17]

Also section 118(1) of the Investments and Securities Act provides that "Notwithstanding anything to the contrary contained in other enactment, every merger, acquisition, or business combination between or among companies shall be subject to the prior review and approval of the Commission."[18]

The combination of these statutory provisions makes it imperative for the Securities & Exchange Commission to as a matter of statutory obligation be a party, though Regulatory, in every merger transaction in Nigeria.

3.13 Nigerian Stock Exchange (NSE)

The Nigerian Stock Exchange is a private company limited by guarantee which provides a trading floor for all the quoted companies to trade on equities and bonds. It provides secondary market for primary issues. The capital market can not thrive without the existence of a viable transparent and fair stock Exchange that is properly regulated. Shares emanating from merger transaction involving companies quoted on

16 Section 13, Ibid

17 Section 13 (p) Ibid

18 Section 118 of Investments & Securities Act No. 29, 2007

the stock exchange must be listed on the floor of the exchange. This will make it possible for these shares to be traded on the floor of the exchange.

Rule 22[19] of the Rules and regulation of the Securities & Exchange Commission provides for the Registration of securities exchanges. It is therefore mandatory that the Securities & Exchange Commission regulates and supervise the activities of the stock exchanges.

3.14 Central Securities Clearing System (CSCS)

The Central Securities Clearing System[20] (CSCS) is an important stakeholder in merger transactions. It is the clearing house for settlement of transaction that involves the shares that result from merger transactions. The Central Securities Clearing System keep record in electronic format of shareholders of companies who opened accounts with them and have dematerialized their share certificates for ease of the settlement of transactions concluded on the floor of the stock exchange. Companies involved in merger transaction have shareholders whose certificates have been dematerialized at the Central Securities Clearing System and whose shares resulting from the merger transaction will go through one process or the other that will involve the Central Securities Clearing System before it is finally disposed of by the shareholder. Central Securities Clearing System is therefore an interested party in merger transactions.

3.15 Federal High Courts (FHC)

[19] Rule 22 of the Rules and Regulations made pursuant to the ISA
[20] Rule 25 Ibid requires that securities clearing and settlement company might be Regulated by the securities & Exchange commission.

Section 249 of the Constitution of the Federal Republic of Nigeria 1999[21] established the Federal High Court. Section 251[22] of the Constitution provides for jurisdiction of the Federal High Court. It provides that *"Notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other Court in civil courses" and matters –*

Subsection (f) *"any Federal enactment relating to copyright, patent, designs, trademarks, and passing- off, industrial designs and merchandise marks, business names, commercial and industrial monopolies, combines and trust, standards of goods and commodities and industrial standards'.*

Section 122(6)[23] of the Investments and Securities Act No. 29, 2007 provides

"If the merger is approved by the Commission, the parties shall apply to the court for the merger to be sanctioned and when so sanctioned, the same shall become binding on the companies and the court may by the order sanctioning the merger or by any subsequent order make provision for any of the following.

(a) The transfer of the transfer of the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;

(b) The allotment or appropriation by the transferee company of any share, debenture, policies or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by the company to or for any person;

[21] Section 249 of the constitution of the Federal Republic of Nigeria 1999
[22] Section 251 (1) Ibid
[23] Section 122(6) of the Investments & Securities Act No. 29, 2007

(c) The continuation by or against the transferee of any legal proceedings pending by or against any transferoo company;

(d) The dissolution, without winding up, of any transferoo company;

(c) The provision to be made for any person who in such manner as the court may direct, dissent from the compromise or arrangement; and

(d) Such incidental, consequential and supplemental matters as are necessary to ensure that the reconstruction or merger shall be fully and effectively carried out.[24]

The combination of the provisions of the Constitution of the Federal Republic of Nigeria 2009 and that of the Investments and securities Act No.29, 2009 vests in the Federal High Court the role it is to play in Merger transaction ; that of the sanctioning of the merger after the listed variables have been given due consideration by the court. The Federal High court therefore is a stakeholder in merger transactions.

[24] Section 122 (6)a of the investment and securities Act. No 29 of 2007.

CHAPTER FOUR

AN APPRAISAL OF THE PROCEDURES FOR THE APPROVAL OF MERGER TRANSACTION

4.1 General Introduction

In Nigeria, the Securities and Exchange Commission (SEC) is the Regulator charged with the responsibility of approving merger transactions[1]. The SEC has made Rules and Regulations[2] pursuant to the Investments and Securities Act (ISA) to bring into effect the actualization of its mandate to regulate mergers.

In this chapter, the procedures to obtain approval of mergers will be appraised with a view to identifying the stages of the procedures and to analyze their relevance or otherwise.

The broad provisions laid by the Rules and Regulations include the application for a merger, pre merger notice, obtaining approval- in- principle from the SEC, filing of scheme document, obtaining clearance of the scheme document from the SEC to proceed for separate court ordered meetings of the merging parties, submitting the documents back to the Commission for formal approval. The formal approval from the SEC would enable the parties approach the court for court its sanction and parties would thereafter submit post approval documentations to the Commission for filing.

4.2 Regulation and procedures for Merger under the ISA, 2007

[1] Section (13)p Investments and Securities Act No.29 2007.
[2] Part G of the Rules and Regulations made pursuant to the Investments and Securities Act 2007

The Investments and Securities Act No. 29 of 2007 provides that the Commission shall carry out the function and exercise the powers prescribed in this Act. One of the functions includes the power to:

Review, approve and regulate mergers, acquisitions, takeovers and all forms of business combinations and affected transactions of all companies as defined in this Act[3].

The Combination of Section 118 – 130 of the ISA No. 29 of 2007 and Rules 231 – 234 of the Rules and Regulations made pursuant to the ISA provide the procedures to obtain approval for a merger transaction.

Section 118(1) provide for the extent of application of this part. It states 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".

By this statutory and mandatory requirement of the law, all merging entities whether private or public must apply to the SEC for its prior review and approval.

4.3 Stages of the Procedures for the approval of a merger under the Investments and Securities Act:

4.3.1 Filing of Application for pre- Merger Notice

Prior to the filing of application to the SEC for a merger, Companies intending to merger should have identified their merging partners. The parties usually conduct necessary due diligence. This entails the scrutiny of the disclosed information between the merging parties relating to legal, operational and financials. If the parties satisfy themselves that they can proceed with the merger, they would as a matter of practice sign a memorandum of understanding and subsequently appoint a SEC

[3] Section13(p) ibid

registered Issuing House/Financial Adviser to file the application with the SEC for its prior review and approval[4]. The merging parties are also required to appoint other professional parties who are also registered market operators to the transaction. They include amongst others, Solicitors, Auditors, Stockbrokers, Registrars, and Reporting Accountants.[5] etc. The pre –merger notice is accompanied with a letter of intent signed by the merging parties, Information Memoranda of the merging companies, Certificates of Incorporation, Memoranda and Articles of Association of the merging companies certified by the Corporate Affairs Commission, the latest financial statements[6] of the companies among others.

On application, the SEC is required to determine whether the merger is a small, intermediate or large merger by applying the threshold and categories of merger.[7]

Section 120(1) 0f the ISA provide for the thresholds and categories of merger. It provides that:

"The Commission shall from time to time prescribe:

(a) lower and upper threshold of combined annual turnover or assets, or a lower and an upper threshold of combinations of turnover and assets in Nigeria, in

[4] See section 118, of the ISA no. 29, 2007, See also Rule 231(1) Ibid

[5] Rule 28 and 39 Ibid, see also the scheme of Merger of First Bank Plc and MBC International Bank Plc and FBN (Merchant Bankers) Limited dated 9, November 2005 in Suit No. FHC/L/CS/1176/2005, Scheme of Merger between Capital Express Securities Company Ltd & Regency Life Assurance and Pension Ltd in Suit No. FHC/L/CS/990/06 , Scheme of Merger between Linkage Plc & Central Insurance Co. Ltd in Suit No. FHC/L/CS/105/2007, Scheme of Merger between First Inland Bank Plc, NUB Inter'l Bank plc, IMB Inter 'l plc in Suit No. FHC/L/C/89/2006 Scheme document of Intercity Bank plc, First Interstae bank plc, Tropical Commercial Bank plc, Pacific Bank Plc, Centrepoint Bank Plc & Societe Bancaire Nigeria Ltd in Suit No. FHC/L/CS/1198/2008

[6] Rule 232 of the Rules and Regulations made pursuant to the ISA No 29,2007

[7] . Section 120 of Investments and Securities Act, 2007.

general or in relation to specific industries, for purposes of determining categories of mergers.

Subsection 2 of the section provides for:

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

(b) "an intermediate merger" means a merger or proposed merger with a value;

Between the lower and upper thresholds established in terms of section 1(a); and

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

On application for a merger transaction, the Commission has a duty to consider the threshold in order to ascertain whether the merger being contemplated is a small merger which is not expected to come to the Commission or an intermediate or large merger.

The ISA prescribes that the lower threshold shall be N500, 000,000 while the upper threshold shall be N5, 000,000,000.[8]

The Commission has a task of initial determination whether or not the merger is likely to substantially prevent or lessen competition, by asserting the factor in section 2 of 121 of the ISA.

If it appears that the merger is likely to substantially prevent or lessen competition, the Commission is to determine

Whether the merger is likely to result in any technological efficiency or other pro-competitive gain which will be greater than, and off-set , the effects of any prevention

[8] Section 120(4) Ibid

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

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

Determine whether all the shareholders are fairly, equitably and similarly treated and given sufficient information regarding the merger.[9]

Subsection (2) of this section

> *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 company, in the market after 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 of import competition in the market;

(b) The ease of entry into the market, including tariff and regulatory barriers;

(c) The level and trend 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

[9] Section 121(1) Ibid, See Uk Enterprise Act 2002, See also competition Act 1998 of United Kingdom and Competition Act No. 89 of 1998 of South Afica.

(h) Whether the merger will result in the removal of an effective competitor[10].

Subsection 121(3) further provided for other issues to be considered by the Commission in order to allow a merger transaction to be consummated. It provides that

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

(a) A particular industrial sector or region;

(b) Employment

(c) The ability of small businesses to become competitive; and

(d) The ability of national industries to compete in international markets

The question as to the ability of the Commission to fully consider the criteria listed above before a determination to allow a merger transaction to proceed in a matter for further consideration. This will form part of the issues of criticism in the next chapter.

The Commission after making the initial determination may grant an approval in principle to the merger and direct the merging company to make an application to the court to order separate meetings of the shareholders of the merging in order to get their concurrence to the proposed merger.

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

[10] Section 121 (2) Ibid

meetings agrees to the scheme, the scheme shall be referred to the Commission for approval[11]

4.3.2 Pre- Merger Notice

Pre- merger notice is the stage in the procedure for approval of merger transaction where the parties have identified their brides for the merger, commenced negotiations as well as due diligence on the proposed merging partners. Due diligence involve legal, financial and operational due diligence, The parties often sign memoradum of understanding (MOU) as a matter of practice. This MOU provide the extent of their relationship including availing the other parties the access to their information in term of disclosure requirements that will enable them reach a decision in the merger they are about to enter into.

The parties also at this stage may have appointed the Issuing Houses/ financial adviser that will package the merger transaction on their behalf. Other professional parties may also have been appointed at this stage of the transaction.

The pre- merger stage notice is the stage where the merging parties formally file application to the Securities and Exchange Commission through an Issuing House/financial adviser registered by the Commission and whose registration is valid and is current in the sense that the Issuing House /financial adviser with all the sponsored individuals representing them meet the registration requirement of the Commission. This is for purpose of regulation of operators in the capital market. This is also the postion for all the parties that will be represented in the transaction.

[11] See section 121 (3&4) Ibid

At the submission of the application for the merger transaction, the Commission have a duty to review the initial filings or documents submitted to enable it to determine the status of the merger, These will include whether the merger is a small, intermediate or large merger. It is important to state that small mergers are not required to notify the Commission.[9]

The Commission is also expected to determine whether the merger will cause monopoly or restain competition in accordance with the provisions of section 121 of the ISA[10]

The Commission shall determine the requirements above by reviewing the requisite submitted documents.

4.3.3 Documentary Requirements for Pre- Merger Notice

The following documents are required to accompany the application for a merger transaction:

(1) Board resolution of all the merging companies approving the merger.

(2) Certified true copies of Certificate of Incorporation of all the merging companies

(3) Certified true copies of memorandum and Articles of association

9 Section 122 (1) a of the Investments and Securities Act No. 29, 2007

10 Section 121 Ibid

of all the merging companies recently obtained from the Corporate Affairs Commission.

(4) Corporate Affairs Commission form C.O.7 (particulars of Directors)

(5) Profile of all the merging companies providing details of the companies.

(6) Five year annual report of the companies or three years annual financial report if the company is not in operation for up to five years

(7) A Copy of memoradum of understanding signed by the merging companies.

4.4 Rationale for the documentaryRequirements for pre merger Notice

4.4.1 Board Resolutions of the merging Companies:

The purpose for board resolution is to confirm that it is the consent of the board members to enter into such a far reaching decision that might affect the structure,composition and character of the companies involved in the transaction. The board of director is the body that has the responsibility to manage and direct the affairs of the companies on behalf of the owners of the companies – the shareholders at the Annual General Meeting (AGM), elect the members of the board of Directors to direct the company on their behalf.

The board of directors are expected to conduct their meetings in accordance with the constitution of the company or its memoradum and Articles of Association and in accordance with the prvisions of the Companies and Allied Matters Act.

4.4.2 Certified true copies of the Certificates of Incorporation of the merging companies

The requirement for the Cerified true copies of the Certificate of Incorporation of companies involved in merger transaction is premised on the fact that every

Incorporated company must have a certificate of incorporation evidencing its status as a corporate entity capable of suing and being sued. The Commission insists that the companies involved in merger transaction must be a Corporate entity.

4.4.3 Certified True Copies of the Memoranda and Articles of Association of the Merging Companies:

The merging companies are required to submit copies of their memoranda and Articles of Association. The Commission reviews the document in order to ascertains that the provisions of the Memoranda and article of association allows the companies to enter into such merger and combination transactions with other companies and to confirmed that there are no restritive clauses embeded in the Memoranda and Articles of Association that will make the transaction illegal.

4.4.4 Cetified True Copies of Form C.0.7 of Corporate Affairs Commission (Particulars of Directors).

The form C.0.7 or particulars of directors the merging companies obtained from the Corporate Affairs Commission is required to enable the Commission to know the actual directors who sit on the board and who took the decision to merge the company with other companies involved in the merger transaction. The decisions of directors has a consequence on the company and as such the responsibility to be a director has an obligation as well as a liability if the decision is ill conceived.

4.4.5 Profile of all the merging companies

The merging companies submit in addition to the list of documents listed above, a profile of the company. This provides details of the company in terms of who the company is, what they do,their mission and vision statements, the Incorporation and operational history, the ratings, recognitions and awards, operational performance, belief and culture. Branch network and business operations. The Corporate profile of

a company also contain the products and services of the company, Directors and key management staff.

The content of the profile avail the Commission of the materials required in addition to the financial reports of the company which will be analysed together to make the initial determination as to whether the transaction will restrict competition or cause monopoly.

4.4.6 Five year annual report of the companies or three years annual financial report if the company is not in operation for up to five years

It is also the requirement of the Commission that the companies should submit their five year annual financial report for the review of the Commission. This helps the Commission to determine the health of the companies as well as to determine the valuation ratio of the companies involved in merger transaction. The Commission also use the information obtained from the analysis of the financial report for the initial determination as to whether the merger will constitute a monopoly and /or restrained to competition.

4.4.7 A **Copy of memoradum of understanding signed by the Merging Companies.**

Companies involved in merger transaction usually sign initial memoranda of understanding detailing what they ntend to do in the merger agreements when it is finally drafted. The Commission expects the companies to submit their memorandum of understanding which give them leverage to continue their relationship during the process of negotiation, due diligence and other transactional relationship. It affords the Commission the opportunity to know the initial thinking before the final agreement that will be approved by the Commission and sanctioned by the court.

4.5 Documentary Requirements for approval in principle

Section 121(4) of the Investments and Securities Act No. 29,2007 Provides that "after making the initial determination, the Commission may grant approval in principle to the merger and direct the merging companies to make an application to the court to order seperate meetings of shareholders of the merging companies in order to get their concurrence to the proposed merger"[11]

Before the approval in principle can be granted ,the Commission shall require that a scheme document be submited to the Commission for review and approval.[12]

Rule 232[13] of the Rules and Regulation of the commission provide for the requirements for pre-merger notice; the following shall be submitted to the commission:

(i) A letter of intent signed by the merging (companies accompanied by board resolutions of the merging companies supporting the merger.

(ii) a detailed draft write up of the Proposed transaction including all the background studies relating to the merger, acquisition or combination and justification for it which shall include:

(a) Detailed information about product lines or operations of the companies.

(b) A list of the major competitors in that product market and the market posit on or market share of each company.

(c) The structure and organizations of the companies.

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[11] Section 121(4) Ibid
[12] Rule 231(2) of the Rules and Regulations made pursuant to the investments and securities Act
[13] Rule 232.Ibid

(d) Revenue information about the operations 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 statement of the companies.

(iv) Certificate of incorporation of the merging companies.

4.6 Requirement For Formal Approval

Upon Receipt of a favourable response to a pre-merger notification from the commission, a formal application for approval of a proposed merger or any other form of business combination shall be filed with the commission accompanied by the following.[14]

(a) Two had copies and a diskette (soft copy) of the scheme of arrangement containing among others the following:

(i) Separate letter from the chairman of the merging companies addressed to their respective shareholders:

(ii) explanatory statement to the shareholders by the joint financial advisers and address the following:-

(a) The proposal

(b) Conditions precedent

[14] Rule 233 Ibid

(c) Reasons for the proposal;

(d) The synergies/benefits;

(e) Plan for employees;

(f) Capital gain tax;

(g) Approved status;

(h) Meetings and voting a rights;

(i) Instructions on proxies;

(j) Settlements and certificate;

(k) Information regarding each of the merging companies;

(l) Recommendation;

(m) Further Information as may be required by the Commission or any other document that will be a material disclosure in addition to the listed documents could also be submitted by the merging parties.

Section 13(t) vest in the Commission the Power to call for, or furnish to any person such information as may be considered necessary by it for the efficient discharge of its functions[16]

At the submission of these documents, the Commission review all the documents, looking out for discrepancies if any, contained in the documents. The purpose of the review is to confirm that the standard of disclosure required by the Commission is met. The commission usually communicate deficiencies observed to the Issuing

[16] Functions and powers of the Commission.

House /financial advisers who after liasing with the merging companies foward response to the deficiencies to the Commission. The Commission make sure that the scheme document is both gramatically correct and that the disclosure requirement is met because the scheme will be exposed to the public and the shareholders will rely upon the the contents of the scheme documents to make their investment decisions with respect to the merger.

On the comprehensive review and clearance of the documents submited by the merging companies through their financial adviser/Issuing House, the Commission may then grant its approval in principle. This is in accordance with the provision of section 121(4) of the Investments and Securities Act No.29, 2007.

4.7 **Court Ordered Meeting**

Court order meetings is a statutory requirement in the processing of merger before final approval is given. The Commission requires that notices of meeting are given. This is in accordance with the provision of section 211 (2) of the Companies and Allied matters Act[17] which provides that:

> *The directors shall, at least 21 days before the day on which the statutory meeting is held, forward to every member of the company statutory report'.*

Before the Commission directs the parties to make application to the court for the court ordered meetings the Commission should have also reviewed and cleared the draft Notices of the court ordered meetings prepared by the solicitors to the merging

[17] Section 211 (2) of the Companies & Allied Matters Act Cap. C20, 2004

parties in order to confirm that the the requisite proposed resolution are contained in the notices that will be proposed for approval by the shareholders.

A sample of a notice of a court ordered meeting for the merger of FCMB and CDB is hereby attached in the appendix to this thesis as appendix A.

The shareholders at a given date as ordered by the court hold the meeting where the proposals are presnted and vote d upon.

If a majority representing not less gthan three quarters in value of the shares of numbers being present and voting either in person or by proxy at each of the seperate meetings agree to the scheme, the scheme shall be refered to the Commission for approval[18]

It is important to state here that at the court ordered meeting, the companies usually appoint a scrutineers registered by the Commission to monitor and register the shareholders who attend and vote at the meeting. The scrutineers also record the proxies and also record their pattern of voting. The Scrutineers report back to the Commission the manner and procedures of the meeting. The representatives of the Commission also seat as observers at the meeting. The representatives of the Commission will also file the report of the meeting to the Commission.

The twin but seperate reports of the of the representative of the Commission and the scrutineers will be the basis for the approval to be given by the Comission in addition to the review of the executed scheme documents by the directors and representatives of the companies attesting to the fact that they consent to the resolutions passed at the meeting as well as the contents of the scheme document. It is also required that

[18] Section 121(5) of the Investments and Securities Act No. 29, 2007

representatives of the Nigerian Stock Exchange where the resultant shares from the merger will be listed should attend the court ordered meeting as observers.

Also required to attend are representatives of Corporate Affairs Commission who will witness the result of the voting as the legacy companies would be liquidated without winding up.

4.8 SEC Clearance for Court Ordered Meeting

At the completion of the court ordered meetings of the shareholders of the merging banks, if three quarer of the majority present and voting, including proxies voted in favour of the merger transaction, this is collated and reported back to the Commission by the scrutineers to the meeting. The representatives of the Commission also submit their report of the conduct of the meeting as well as the voting partern to the Commission. Also to be submitted to the Commission is copies of the scheme document clearly executed by each of the directors of the companies as well as all the parties to the scheme document whose name appear as a party. It is important to state here that a power of Attorney duly stamped at the stamp duties office and notorised by a notory public stating the name and the specimen signature of the attorney is the only acceptable document for a person who is not a director to sign on behalf of the director.

If the Commission satisfies itself that the meeting was properly conducted and the parties have executed the necessary documents, the Commission will clear the documents and give approval for the court to sanction the merger.

4.9 Court Sanction of the merger:

It is a procedural requirement as well as a statutory demand that merger transactions approved by the Commission will be referred to the court for sanction. It is the sanction by the court that binds the parties to the merger and combines the separate entities into the resultant company. It also allow for the liquidation of the other companies without winding up.

Section 122(6) of the Investments and securities Act 2007 provides that:

" If the merger is approved by the Commission, the parties shall apply to the court for the merger to be sanctioned and when so sanctioned, the same shall become binding on the companies and the court may by order sanctioning the merger or by the subsequent order make provision for any or all of the following matters: [19]

A. The transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferoo company;

B. The allotment or appropriation by the transferee company of any shares, debentures, policies or other like interests in that company under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;

C. The continuation by or against the transferee company of any legal proceedings pending by or against any transferor company

D. The dissolution without winding up, of the transferor company;

E. The provision to be made for any person who in such manner as the court may direct, dissent from the compromise or arrangement; and

[19] Section 122(6) the requirement for the approval of merger by SEC and application to court for the sanction of the merger.

F. Such incidental, consequential and supplemental matters as are necessary to ensure that the reconstruction or merger shall be fully or effectively carried out.[20]

The above listed conditions from provided in section 122(6) a-f are the conditions the court considers before it can sanction a merger. The merging company must provide these provisions in the scheme of merger which must be vetted and approved by the Commission before the court will be called upon to sanction the merger.

Furthermore, Sub section 7 of section 122 provides that an order under paragraph (d) of this section shall not be made unless:

(a) The whole of the undertaking and the property, assets and liabilities of the transferor company are being transferred into the transferee company; and

(b) The court is satisfied that adequate provision by way of compensation or otherwise has been made with respect to the employees of the transferee company to be dissolved.[21]

The whole import of the provisions of section 122(6 & 7) of the ISA as stated above is that the court will satisfy itself that the requirements provided in the two section are present and adequately provided in the scheme document before it can put its seal to sanction the merger.

It is very important to confirm these because at the sanction by the court of the scheme document, the merger and the provisions of the scheme document becomes binding on the parties and become enforceable on the parties.

4.10 Final approvals by SEC

[20] Section 122(6) a-f provides for the Condition for the Court to Sanction a Merger
[21] See Sub Section 7 a & b of Section 122 of the ISA, No. 27, 2009

The Securities and Exchange Commission remains the final authority to perform an action in the procedure for the approval of merger transactions in Nigeria.

Section 122(9) of the Investments and Securities Act 2007 provides that

"Where an order is made under this section, every company in relation to which the order is made shall cause an office copy to be delivered to the Commission for registration within seven days after the making of the order and a notice of the order shall be published in the Gazette and in at least one national newspaper and if in default is liable to a fine of not less than N20, 000.[22]

This section has an element of sanction if the parties default in the submission of the order of the court sanctioning the merger as well as the failure to publish the merger in one national newspaper. The Commission however has a statutory mandate to publish the merger in a Gazette.

Once the merger is published in a Gazzette,[23] it bring to an end the merger transaction pending post merger issues which will be discussed in the next chapter.

[22] Section 122(9) Ibid requires that the Court order be Submitted of the Commission.
[23] Federal Republic of Nigeria, official Gazette, No. 68 Vol. 94, Lagos June 2007. Suit No: FHC/L/CS/178/2010, matters of Rubber Estate Nigeria Limited & Ors.

CHAPTER FIVE

POST APPROVAL REQUIREMENTS

5.1 General Introduction

The procedures for the approval of a merger extend to requirements expected from the resultant company and the Issuing House /financial adviser to fulfill in terms of documentations and compliance with the post approval requirements. This chapter will consider the requirements post approval.

Rule 234 provides that:

After the approval have been given by the Commission and the court order sanctioning the scheme, several documents shall be submitted to the Commission by the applicant[1]

The Investment and Securities Act of 2007 buttressed this provision in section 124(1) providing for Merger Inspections. It provided that:

"The Commission may investigate or appoint an inspector to investigate any merger and may designate one or more persons to assist the inspector"[2]

Section 124(2) provides that the Commission may require any party to a merger to provide additional information in respect of the merger.[3]

This is in accordance with the provisions of the Section 13(t) on the functions and powers of the Commission to "call for, or furnish to any person such information as may be considered necessary by it for the efficient discharge of its function.[4]

The combination of these provisions of the Investments and Securities Act and the Rules and Regulations made pursuant to the Act empower the Commission to conduct

[1] Rule 234 of the Rules and Regulation made pursuant to the ISA
[2] Section 124(1) of ISA Providing for Merger investigation of the merger by the SEC
[3] Section 124 (2) Ibid
[4] Section 13(t) of the ISA No. 29 of 2007, functions and powers of the Commission

post merger inspections, obtain and file relevant documents and gazette the merger transaction.

5.2 Requirements for post Approval of Merger transaction

The following requirements must be filed with the Commission after the final approval given by the Commission and the court sanctioning of the scheme; they include;

(a) Obtain and file the court order sanctioning the scheme;

(b) File 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 three (3) months of the court's order;

(f) File summary reports of the scheme in respect of the following –

(g) Arrangement relating to employee of the acquired company;

(h) Settlement of shareholders;

(i) Utilization of monies injected into the company, if any.

5.3 Post Merger documentations/Gazette of the Merger

The merged entities through the financial adviser submits the above listed documents to the Commission who reviews the documents to confirm the authenticity of the documents for filing and then send deficiency of the documents to the company, if any. The Company is expected to file the complete documents.

Section 122(9) provide for the Gazette of the merger; it provides that "where an order is made under this section, every company in relation to which the order is made shall cause an office copy thereof to be delivered to the Commission for registration within seven days after the making of the order and a notice of the order shall be published in the Gazette and in at least one national newspaper and if in default is liable to a fine of not less than N20, 000.00"[5]

The provision for a gazette is compulsory as shown in the section above failing which a penalty or fine is attached.

5.4 Post Merger Inspections

The letter communicating the final approval of a merger transaction usually contain a clause informing the resultant company that the Commission would conduct a post merger inspection to confirm that the depositions in the scheme document have been complied with.

Section 13(p) of the ISA provides that

"The Commission shall be the apex regulatory organization for the capital market and shall carry the functions and exercise all powers prescribed in this Act and in particular, shall:

" review, approve and regulate mergers, acquisitions, takeovers and all forms of business combinations and affected transactions as defined in this Act" [6]

[5] Section 122(9) of the ISA No. 29, 2007

[6] Section 13(p,n,r) of the Investments and Securities Act, 2007 provides for functions and powers of the commission as it relates to inspection of regulated entities including merged entities, see also Rule 9 (1,2,3,4,&5) of the Rule and Regulations made pursuant to the ISA. See also section 124 (1&2) of the ISA 2007.

Sub –section 13(n) provides that "Protect the integrity of the securities market against all forms of abuses including insider dealing",

While sub section 13(r) provide that the Commission shall "Call for information from and inspect, conduct, requires and audit securities exchanges, capital market operators, collective investment schemes and all other regulated entities".

Rule 9 of the Rules and Regulations of the Commission provides for the powers of the Commission to demand and examine records required to be maintained.

Rule 9(1) provide that the Commission may pursuant to the provisions of the Act, at any time it deems fit, examine the records and affairs of or call for the information from any entity covered by the Act.

Rules 9 (sub rules 2, 3, 4, 5) all provide for inspection of entities and their directors as well their books, accounts, records and other documents.

Section 124 of the ISA provides that *"The Commission may investigate or appoint an inspector to investigate any merger, and may designate one or more persons to assist the inspector"*

While section 124(2) provides that *"the Commission may require any party to a merger to provide additional information in respect of the merger".*

The Commission, acting on the provisions of the Investments and Securities Act and the Rules and Regulations made pursuant to the ISA, conducts post merger inspections of merger entities three months after the approvals.

The post inspection conducted by the Commission takes the forms of off-site and on-site inspections. Questionnaires are sent to the company, their Registrars and the company Secretaries to provide answers to the questionnaires.

Attached are samples of the questionnaires sent to the companies, Registrars and the company secretaries before the on-site visits as appendices B.C and D

The report of the post merger inspection is used as a check list to confirm that the companies have complied with the depositions in the scheme document, if however lacuna exists in the implementations, the Commission have option to sanction the comply to enforce compliance on their part.

5.5 Resolution of post Merger Issues by SEC

Mergers, Acquisitions, Takeovers and business combinations all over the world are highly technical areas that involve companies as merging entities and other professionals involved in packaging the transaction and making sure that the merger deals are consummated. The Scheme document acts as a contractual document in addition to negotiated terms of payment between the merging parties and the professional. The Securities and Exchange Commission review and approve the transactions while the shares are ultimately listed on the floor of the Nigerian stock Exchange. The various parties and individuals involved are juristic persons capable of suing and being sued. At the final approval of the merger transaction, any aggrieved party has a right to complain to the Securities & Exchange Commission, the Apex regulator to seek redress or solution to his/her problems. The Commission investigates the complaints to find merit of such complaints. The Commission by its regulatory tool of Registration of operator's investigation, surveillance, Enforcement and Rule making compel operates to be subject to its regulations. The Commission at times

schedule meetings of the contending parties in an attempt to settle issues arising from merger transactions. It also communicates decisions to the parties through letter to them and may sanction any offending party where necessary. This could be in the mode of restitution of shares, share adjustments, blacklisting of an issuer or operator, suspension of the party from capital market activities and publication of the names and activities of the operators in the national dailies.

The Commission also settles matters arising from merger transactions through the Administrative proceeding Committee[7]

Parties contending issues in merger transaction that could not be settled at the investigation level are referred to the Administrative proceeding Committee of the Commission where the parties are allowed to represent themselves or be represented by legal practitioners to present their cases. Representatives of professional bodies like the Association of Issuing Houses Stockbrokers, Registrars, and Trustees sit on the panel to hear the case. This Committee is devoid of legal oddities and technicalities. Their decisions can be appealed to the Investments & Securities Tribunal.

5.6 Litigations in Merger transactions

Part XVI of the Investments and Securities Act 2007 provided for the establishment, Jurisdiction, Authority and the procedure of the Investments and Securities tribunal[8]

[7] Section 310 of the Investments and Securities Act 2007 Providing for Committees of the Commission upon which the commission establish the Administrative proceeding Committee – a Quasi Judicial Committee that hear cases of parties in contention or what breach the laws, Rules and Regulations, codes of conducts of the capital market

[8] Part xvi of the ISA providing for the Establishment, Jurisdiction, Authority and Procedure of the Investments and Securities Tribunal.

Section 274 provides that "There is established a body to be known as the Investments and Securities Tribunal (In this Act referred to as "the Tribunal") to exercise the jurisdiction, powers and Authority conferred on it by or under the Act."[9]

Section 284 (1) of the 2007 Act provides "The tribunal shall, to the exclusion of any other court of law or body in Nigeria, exercise jurisdiction to hear and determine any question of law or dispute involving:

(a) Decision or determination of the Commission in the operation and application of this Act, and in particular, relating to any dispute:

i. between capital market operators;

ii. between capital market operators and their clients;

iii. between an investor and a securities Exchanges or capital trade point or clearing and settlement agency

iv. between capital market operators and self regulatory organization;

(b) the Commission and self regulatory organization

(c) a capital market operator and the Commission

(d) an investor and the Commission

(e) an Issuer of securities and the Commission

(f) disputes arising from the administration, management of and operation of collective investments scheme

(2) The tribunal shall also exercise jurisdiction in any other matter as may be prescribed by an Act of the National assembly.

(3) In the exercise of its jurisdiction the tribunal shall have the power to interpret any law, rules or regulation as may be applicable.[10]

[9] Section 274 Ibid

Transactions in mergers involve the parties who as provided by section 284 of the ISA are subject to the jurisdiction of the tribunal. Legal issues which can not be settled by the administrative proceeding committee and/or investigative procedures of the Commission often end up in the tribunal. Beta Consortium Limited Vs. Securities & Exchange Commission[11]

In this case Beta Consortium limited bid and succeeded as the Core investor in a privatization transaction handled by Bureau for public Enterprises (BPE). The BPE handed over the company Ikoyi hotels to Beta Consortium. The SEC directed Beta Consortium to regularize the transaction with it. Beta Consortium filed an application at the Investments and Securities Tribunal challenging the directives of The SEC. The Tribunal upheld the prayers of the Applicant.

The Court held that the transaction was consummated pursuant to an authority given by a Federal Government agency as provided in section 99 (3 & 4) of the Investments and Securities Act No. 45 of 1999 which is an exempt transaction. It follows that the respondent can not regularize the transaction which the law exempts from its powers.[12]

It is important to state her that the Investments and Securities Act No. 45 of 1999 has been repealed by the Investments and Securities Act No. 29 of 2007.

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[10] Section 284 Ibid
[11] Case No. IST/QA. 01. 2004
[12] Igwe J.U.K.: Investments, Nigerian Capital Market and Corporate Governance with Comparative Illustrations, Laws, Practices and Ethics, Vol. 1 Overview of Capital Market Laws and Judicial Interpretations.

The provision of the 1999 Act in section 99(4) have been amended in section 118(4) and has now empowered the Commission to approve mergers consummated pursuant to any authority given by any Government agency.[13]

In Unity Bank plc Vs. Centre point plc.[14] In this merger transaction Centre point was one of the nine banks that merged to form the new Unity Bank Plc from the Banking consolidation of 2005. Centre point is alleged among other things, Misrepresentation, undervaluation of their assets, cherry picking of their assets by Unity Bank plc and other discriminatory practices against centre point. The y are praying the court to review and /or revise the merger transaction.

It is important to state that the Federal High Court has concurrent jurisdiction to entertain matter in with the Investments and Securities Tribunal.

Section 251 of the Constitution of the Federal Republic of Nigeria 1999[15] for the jurisdiction of the Federal High Court

Subsection 251 (1) provides that:

Notwithstanding any thing to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly the Federal High court shall have and exercise jurisdiction to the exclusion of any other court in civil course and matters: -

(f) "any federal enactment relating to copyright, patent, designs, trademarks and passing –off, industrial design and merchandise marks, business names, commercial

[13] See Section 99 (4) of ISA No. 45 of 1999 (Repealed) and Section 118 (4) of ISA No. 29 of 2007
[14] FHC/L/CS/1198/2005 – Litigation from the Merger Transaction Between Unity Bank Plc and Centre Point Bank Plc.
[15] Section 251 of the Constitution of the Federal Republic of Nigeria 1999

and industrial monopolies, combines and trusts, standards of goods and commodities and industrial standards”

The litigations that arose out of merger transaction can either be filed with the Federal High Court as depicted in Unity Bank and Centre Point case or Investments and Securities Tribunal as represented in Beta Consortium case.

CHAPTER SIX

SUMMARY, FINDINGS, RECOMMENDATIONS AND CONCLUSION

6.1 SUMMARY

The procedures for the approval of merger transaction in Nigeria are vested in the Securities and Exchange Commission, the Apex regulator of the Capital market. The Investments and Securities Act(ISA) and the Rules and Regulations made pursuant to the ISA provides for detailed procedures for the application, parties to merger transactions, the documents to be filed with Commission before the final approval is obtained. The Commission has the statutory duty to review and approve merger transactions. As a requirement for this approval, the merging parties apply to the court after the approval –in- principle had been granted by the Commission and thereafter hold a court ordered meeting where the shareholders of the merging parties vote in favour of the merger. The merging companies are further required to approach the court to sanction the merger once the Commission clear the scheme document for the merger. Upon the sanction of the merger by the court, the companies in the merger group are dissolved without winding up while the resultant company absorbs the other entities, integrate them and consolidate their various businesses. The merged entities obtain the final approval of the Commission and remain merged.

The whole processes of the merger are thereafter put into a gazette.

6.2 Observations/Findings

In the course of the research work for this thesis, it was observed that section 121 of the Investments and Securities Act 2007 requires the Commission to determine whether a merger will substantially prevent or lessen competition before it approves a merger. The section empowers the Commission to consider the possible antitrust

implications of the proposed merger in section 121(1). The Act immediately takes the power granted the Commission to review the antitrust implications of the proposed merger in section 121 (2 & 3). The Law listed the factors which the Commission would consider if it appears that the merger would prevent or lessen competition. In such circumstance, the Commission is expected to consider whether the merger would result in technological efficiency or other pro -competitive gains, The SEC could also approve the merger based on substantial public interest ground. The Commission is further required to determine whether the shareholders are fairly, equitably and similarly treated and given sufficient information regarding the merger. These criteria defeat the essence of regulation of antitrust since a merger despite the fact that it could lessen competition or restrain trade could be approved once any of the above criteria is advanced by the applicant.

It is therefore the finding of this research work that the Investment and Securities Act No. 29 of 2007 as it relates to the procedure for the approval of merger is ambiguous and difficult to implement and as such should be amended for clarity.

1. The research work also observed/found that the philosophy behind the laying down of procedure for the approval of merger is hinged on the benefits derivable from merging companies into one. These include enhance revenue synergies, strong financial capacity, expanded product portfolio, improved operating efficiencies and international expansion among others. Conscious of these advantages the law found it necessary to put in place a procedure to achieve this objective in a sequential and orderly manner within the law. This procedure is laudable. It however falls short of international best practice

which requires a possible establishment of competition laws and competition Commission to specialize in this area of regulation. This is lacking in Nigeria.

2. There is a legal requirement that the merging companies should approach the Court two times. The first approach is made before court ordered meeting in order to get the concurrence of the shareholders for the merger as provided in section 121(4) of the ISA. The second approach to court is provided in section 122(6) of the Act for the sanction of the merger after the final approval from the Commission has been obtained. This procedure is unnecessary. It could be collapsed into one in order to save time in a commercial venture such as merger.

3. The whole process of merger transaction, spanning the negotiation, due diligence, application, processing and approval of the merger transaction takes a very long time. The documents required for the processing of merger transaction expected to be submitted by the financial adviser to the Commission, and the feed back mechanism in terms of identified deficiencies is very cumbersome and time consuming. The volume of documentation that passes from one point to another is very large. Also the requirement for certified true copy of Certificate of Incorporation of the merging firm is also a problem in view of the time it takes to obtain the Certified True copy of a Certificate of Incorporation from the Corporate Affairs Commission. The need to confirm the status of these corporate documents is to ensure the going concern status of the merging companies and whether the companies conform to corporate governance requirements of complete and appropriate statutory

fillings with the Corporate Affairs Commission. It is hereby observed that this results in delay in the processing of merger transaction and an aggregate negative impact on the economy of the country.

4. In addition to these it is further observed that the fees payable to professional parties, the Nigerian Stock Exchange, the Securities and Exchange Commission and the Court is quite high. This increases the cost of transaction in the processing of merger and as such is a disincentive to companies intending to merge.

6.3 Recommendations

From the observations/findings above, the following recommendations are suggested

6.3.1 Amendment of some Sections of the I.S.A

Some sections of the Investments and Securities Act 2007 as relates to mergers should be amended. Specifically, section 121 of the ISA should be amended in such a way that SEC would be empowered to determine whether a merger would prevent or lessen competition forthwith and factors for such determination should be spelt out clearly without ambiguities. The ambiguities that stem from the position of the law that empower the SEC to determine whether a merger would prevent or lessen competition and withdrawal of the power in section 121(2 &3) through the requirement to determine whether the merger would not be allowed based on technological improvement, public policies and whether the shareholders are fairly treated will be excised taking into cognizance the dearth of data base in the country and the possibility of a monopoly that may result if all mergers applications are allowed relying on the listed escape route to approve the proposed mergers.

It is recommended that the provisions of sections 121(4) and 122(6) that necessitate approaching the court on two separate occasions, one for an order of the court to hold separate meeting of the shareholders of the merging companies to vote on the merger proposal and that of approaching the court for sanction of the merger should be collapsed into one. This will reduce the cost and time spent in the processing of merger as well as make easier the process of approval for a merger transaction.

6.3.2 Updating and upgrading of Information Communication Technology (ICT)

It is recommended that the information and communication Technology (ICT) of the regulator, (the Securities and Exchange Commission) be updated and upgraded. This will be applied to operators and stakeholders who process transactions with the regulator especially Issuing Houses/financial advisers, Solicitors and Registrars and other parties to merger transaction. This will enable online real time filing and processing of documents for merger transactions. The deficiencies would be sent and received online. This will eliminate delays in sending such documents through mails or courier or sending staff of the organization to pick such documents in person. Bulky documentation will also reduce if this recommendation is implemented.

6.3.3 Need for Linkage and Co-ordination among Regulators: SEC, CBN, CAC, NAICOM, NSE.

It is also recommended that the regulators, the Securities and Exchange Commission, the Central Bank of Nigeria, the Corporate Affairs Commission, the National Insurance Commission and the Nigerian stock Exchange should have an understanding among themselves either separately or collectively. This will allow for ease or direct verification of claims by operators and companies in merger transaction

contained in applications submitted to the Securities and Exchange Commission. The effect of this is the elimination of delays occasioned by going through the process of procurement of documents for confirmation from other regulators. Such documents as the Certificate of Incorporation, Memoranda and Articles of Association of merging companies, statement of share capital and Return of allotment of shares and particulars of directors (Forms CAC 2 and 7), and no objection letter from the regulator of merging companies to merge.

6.3.4 High cost of transactional fees:

On the observed high cost of transactional fees, it is recommended that the regulators, SEC and NSE should reduce the fees they collect on merger transaction. The other professional parties should also scale down the fees they collect for merger transaction in percentage terms. All other ancillary cost such as fees to obtain corporate documents from the Corporate Affairs Commission and that of courier should be eliminated. This will reduce the cost of merger transactions and result in more merger transactions in the country where desirable.

6.3.5 Capacity Building for SEC Staff.

It is the recommendation of this research work that staff of the SEC involved in merger processing should be adequately trained to cope with the intricacies of merger transaction. Merger is generally a highly technical area. This is apt when consideration is given to the fact that the SEC is a regulator whose focal point is on the regulation of securities over that of merger. If a well tailored capacity building program is not designed to train the staff of SEC who are involved in merger

processing, a gap will be created which will affect the knowledge base of the regulator with a negative impact in the economy.

6.3.6 Need to establish Anti Trust or Anti Competition Commission

It is a further recommendation that an antitrust or anti competition law be enacted in Nigeria which would establish a competition commission. This Commission would administer antitrust issues which the research believes merger would be one of the areas to be covered by the competition Commission. The Commission when established will operate like other Competition Commissions in other parts of the world where it exists. The said Commission will be responsible for the regulation of antitrust issues. This will reduce the burden of dual regulatory role from the SEC, that of regulator of securities and the regulator of antitrust.

6.4 Conclusion

Merger is a business strategy used to expand businesses, increase revenue synergies; improve operational efficiencies and to reposition the company in the marketing of its products. Apart from the overriding benefits inherent in merger, Corporate Merger may promote monopolistic practices by reducing cost and taxes. Such activities may go against public welfare. Hence mergers are regulated and supervised by the Government. In this research work we have identified the procedures laid down in the Investments and Securities Act 2007 for the approval of mergers in Nigeria.

Observations/findings have been listed in areas that require improvement in the laws and the procedures for the approval of merger under the ISA. Recommendations have been made. It is the belief of this researcher that if these recommendations are implemented, the country will witness more merger transaction since the laws and

procedures to obtain the approvals for merger will be friendly to both the regulator and the Regulated.

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GAZETTE

1. Federal Republic of Nigeria, Official Gazette No. 68 Volume 98, Lagos, June 2007.

UNPUBLISHED WORKS AND SCHEME DOCUMENTS

1. Soludo C.C, Consolidating the Nigerian Banking Industry a paper presented to Bankers Committee by the Governor of the Central Bank of Nigeria, July 6, 2004 (unpublished).

2. Scheme of Merger between Capital Bank Plc, Marina Bank Plc and Access Bank Plc 2005.

3. Scheme of Merger between First Bank Plc, MBC International Bank Plc and FBN(Merchant Bankers) Limited 2005.

4. Scheme of Merger between Capital Express Securities Company Ltd & Regency Life Assurance and Pension Ltd, 2006.

5. Scheme of Merger between Linkage Assurance Plc & Central Insurance Co. Ltd, 2006.

6. Scheme of Merger between Flour Mills Plc and Golden Fertilizer Co. Ltd, 2006.

7. Scheme of Arrangement involving Intercity Bank plc, First Interstate Bank Plc, Tropical Commercial Bank Plc, Pacific Bank Ltd, Centrepoint Bank Plc, Societe Bancaire Nigeria Ltd, 2005.

8. Scheme of Merger involving Unity Bank Plc, Bank of the North Ltd, NNB International Bank Plc and New African Bank Plc.

9. Scheme document of West African HouseHold Utilities Manufacturing company Ltd & Battery Manufacturing Company Nig. Ltd,

10. Scheme document between Custodian & Allied Insurance & Fire Equity General Insurance Company Ltd, 2006.

11. Scheme document between Tower Aluminum Nigerian Plc & COOK "N" LITE Nigeria Plc, 2007.

12. Scheme document between MTN Nigeria Communication Ltd & VGC Communication Ltd, 2008.

13. *Scheme document between First Inland Bank Plc, NUB International Bank Plc,* and IMB International Bank Plc, 2006.

14. *Scheme document involving Guardian Express Bank Plc, Citizen Bank International plc, ACB International Bank Plc, Omega Bank Plc, Trans International Bank Plc and Fountain Trust Bank Plc, 2005*

APPENDICES

Appendix A

NOTICE OF COURT- ORDERED MEETINGS[18]

IN THE FEDERAL HIGH COURT OF NIGERIA

SUIT NO. FHC/L/XX/XX/2005

HOLDEN AT LAGOS

IN THE MATTER OF THE INVESTMENTS AND SECURITIES ACT NO.45 OF 1999

AND

IN THE MATTER OF AN APPLICATION UNDER SECTION 100 THEREOF

IN RE:

1. FIRST CITY MONUMENT BANK PLC (RC 46713)
   -1ST APPLICANT

2. CO-OPERATIVE DEVELOPMENT BANK PLC (RC 30795)
   - 2ND APPLICANT

MEETING OF THE HOLDERS OF THE FULLY PAID ORDINARY SHARES OF FIRST CITY MONUMENT BANK PLC

NOTICE IS HEREBY GIVEN that by an order by the Federal High Court (hereinafter called "the court") dated xxx day of xxx, 2005 made in the above matter, the court has directed that a meeting ("Meeting") of the holders of the fully paid ordinary shares of First City Monument Bank Plc (hereinafter called "FCMB") be convened for the purpose of considering and if thought fit, approving, with or without

[18] FCMB & CDB MERGER – SCHEME DOCUMENT- A merger consummated in 2005 in the wake of banking consolidation in Nigeria. See also Scheme of Merger involving Unity Bank Plc, Bank of the North Ltd, NNB Inter'l Bank Plc and New African Bank Plc, 2005, Scheme of merger between Custodian and Allied Insurance plc & Fire Equity & General Insurance Company Ltd , 2006, Scheme of merger between Tower Aluminum Nigeria Plc & Cook "N" LITE Nigeria plc 2007, Scheme of Merger between Flour Mills of Nigeria Plc & Golden Fertilizer Coy Ltd , 2006, Scheme of merger involving Intercity Bank Plc First Interstate Bank Plc, Tropical Commercial Bank Plc, Pacific Bank Plc, Centre point Bank Plc, Societe Bancaire Nigeria Ltd , 2006. Scheme of merger involving Guardian Express Bank plc, Citizen Bank Inter'l Bank PLc, Omega Bank Plc, Trans Inter'l Bank Plc, Fountain Trust Plc 2005.

modification, a scheme of Merger ("the Scheme") proposed to be effected between FCMB and Co-operative Development bank Plc ("CDB").

The Explanatory Statement, providing the details of the Scheme as well as a copy of the said Scheme, are incorporated on pages xxx to xx and pages xxx to xxx, respectively of the document of which this Notice forms part.

The Meeting will be held on [date] at [time] at which place and time all the aforesaid shareholders are requested to attend. The under mentioned sub-joined resolution will be proposed and if thought fit, passed as a special resolution at the Meeting

"That

1. This meeting approves the Scheme between FCMB and CDB dated xxx day of xxx 2005, a print of which has been submitted to the meeting and for the purposes of identification subscribed by the Chairman, and the Directors be and are hereby authorised to consent to any modification of the scheme that the Securities and Exchange Commission, the Central Bank of Nigeria and the Court shall think fit to impose and approve;
2. In exchange for the transfer of all the assets liabilities and undertakings, including real properties and intellectual property rights of CDB to FCMB and in accordance with the Exchange Ratio set out in the Scheme, an appropriate number of ordinary shares in FCMB's unissued share capital be issued and allotted as fully paid to holders of the ordinary shares of CDB provided that any holder of ordinary shares who does not consent to the scheme may elect to receive cash in the proportion of their shareholding as provided in the scheme;
3. The Solicitors for FCMB be directed to seek an order or orders to the following effect from the court:

(iii) that all assets; liabilities and undertakings including real properties and intellectual property rights of CDB be transferred to and vested in FCMB without any further act or deed;

(iv) Such incidental, consequential and supplemental Orders as are necessary to ensure that the Scheme is fully and effectively implemented.

4. The Directors of FCMB be and are hereby authorised to take such actions and do all things as may be necessary to put the Scheme into effect."

By the said Order, the Court has appointed Dr. Jonathan A.D. Long or failing him Mr. Ladipupo O. Balogun, or failing them both, any other director so appointed in their stead, to act as Chairman of the said meeting and has directed the Chairman to report the results thereof to the Court, Voting at the Meeting shall be by poll.

The said Scheme will be subject to the subsequent approval of the Securities and Securities Commission, the Central Bank of Nigeria and to the sanction of the Court.

Shareholders may vote in person or they may appoint another person, whether a shareholder or not, to act as proxy and to attend and vote in their stead.

A form of proxy is enclosed herewith, it is requested that forms appointing proxies be lodged at the office of the Registrars as shown on the form of proxy, not later than 24hours before the time appointed for the Meeting. Please not that the lodging of a form of proxy does not prevent you from attending the Meeting and voting in person should you wish. However, in such instances, your proxy will not be entitled to attend or vote.

Dated this xxx day of xxx, 2005.

Olawoyin & Olawoyin
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(Joint Solicitors to FCMB)