

Mergers & Acquisitions

It is a New Year. I say Happy New Year 2004 you and your family!

Greater challenges and business opportunities will come in 2004. I have just concluded reading the popular book, "Straight from the Gut" by Jack Welch. I recommend this book to everyone who aspires to own a global corporation as it teaches, amongst others, the following, for financial success:

- Boundarylessness. This also entails partnering or merging and or acquiring businesses in which the Owners are guaranteed the Number 1 or Number 2 position in profitability and competitiveness.
- Engaging the best people with ideas and backing them with the required finance and working environment to achieve results.
- The world is now a global village and economic intelligence with intellectual capital are key to competitiveness and survival.

In Nigeria , the general belief is that for there to be greater economic growth, there must be an increase in direct foreign investment ("DFI"). The Nigerian government, through legislation, has tried to make this possible as a foreign company/corporation can now acquire a 100% (One Hundred Percent) interest in a Nigerian company, among other benefits.

Unfortunately, in global terms, there are no large corporations in Nigeria, with the required long, tested business cultures and values because most corporations are owned by one man, on whose demise, the corporation also comes to an end. There continues to be a resistance to mergers and acquisitions as most business people do not understand and appreciate its benefits but in its stead, prefer a one-man owned corporation.

What Is A Merger?

Section 590 of the Nigerian Companies & Allied Matters Act 1990 defines a merger of companies as "an amalgamation of the undertakings or any part of the undertakings or interest of two or more companies or the undertakings or part of the undertakings of one or more companies and one or more bodies corporate".

The Investment & Securities Act, 1999 ("the Investment Act") gives a very similar definition to

mergers. Further, the Securities & Exchange Commission Rules & Regulations (the SEC Rules), made pursuant to the Investment Act defines an acquisition under Rules 227 (i) as the take-over by one company, of sufficient shares in another company, to give the acquiring company control over that other company.

Advantages of A Mergers/Acquisitions

- Some of the benefits/advantages of a merger or acquisition for a combined company include:
 - Increased financial resources for the combined company;
 - Enhanced product capacity;
 - Expanded and enhanced product lines and brand portfolio;
 - Elimination and optimisation of overlap in operational activities;
 - Increased market share;
 - Increase in technology acquisition;
 - Enhanced work force as the best people from the combined company will remain;
 - Flexibility in its timing and implementation to avoid any uncertainty and hostility especially from the tax and other regulatory authorities. On this, see the article by Jay A. Lefton, Esq. in the IBA Lawyer Magazine for December 2003.

Legal Requirements for Mergers & Acquisitions

There are various stages, under Nigerian Law, that a merger or acquisition has to pass through. They include:

- The intending companies are required, either alone or together, to apply to a Federal High Court, who in turn orders separate meetings of the intending companies, to approve the proposed merger or acquisition (the scheme);
- The members of each company, comprising three quarters in value of the shares of each company, are required to consent by resolution to the scheme;
- The above consent is then required to be referred to the Securities and Exchange Commission (SEC) for approval;
- On SEC giving its approval, the parties or one of them is required to apply to the Federal High Court who must sanction the scheme;
- The sanction of the Federal High Court must then be forwarded to the Corporate Affairs

Commission (CAC) within seven (7) days of the Order of the Federal High Court.

- Also, a notice of the Order of the Federal High Court must be published in two government gazettes and in at least one National Newspaper.

The above stages are as provided for in Section 591 of the Companies & Allied Matters Act, 1990 (?CAMA?). This section is also very similar to Section 100 of the Investment Act. The main difference though is the penalty for default in obtaining the approvals; under the Investment Act, the fine is not less than N 20,000 (Twenty Thousand Naira) whereas under CAMA, it is only N 1,000 (One Thousand Naira). Under the SEC Rules, the penalty can be as high as N 1,000,000 (One Million Naira) with additional sums for each day of default.

The Role Of Securities & Exchange Commission

Section 99 (2) of the Investment Act and Rule 228 (i) of the SEC Rules requires every company in Nigeria, whether private or public, to submit an application for every merger and acquisition to the Securities and Exchange Commission (?SEC?).

The area of concern amongst private practitioners is whether private companies, who are not members of the capital market and who cannot make share subscription offers to members of the public, should submit their merger or acquisition applications to SEC? This is in spite of Rules 228 to 234 of the SEC Rules. This is because most private corporations in Nigeria have not developed to the stage where they have or would assume monopolistic or dominating stature in the market.

Whilst we await further clarification on this regulatory requirement, I encourage compliance as SEC in Nigeria has just published the name of a large multi national pharmaceutical company for failing to complying with the above provisions. This will surely affect and can undermine the credibility of this corporation.

Mergers & Acquisitions Exceptions To The Sec Approval Rule

Rule 230 of the SEC Rules, in its almost exact words, provides that the following merger or acquisitions transactions do not require SEC approval:

- Holding companies acquiring shares solely for the purposes of investment and not for the purpose of voting or to cause substantial restraint of competition or tend to create a

monopoly.

- Transactions undertaken by an authority given by the Federal Government Agency vested with statutory power to enter into investments.

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Januray, 2004.