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The Thin Line between Mergers, Acquisitions & Takeovers.

Addressing the Existence or Otherwise of a Distinction between the Major Business Restructuring Methods in Nigeria

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The past decade has seen increased M&A activity within our borders and with practitioners and businesses seeking a greater understanding of the process, its benefits, and possible shortcomings, unattended questions arise. The most popular of these questions appears to be whether or not there exists a real distinction between a Merger, a Takeover, and an Acquisition and if so, what it is. The recently announced Access-Diamond Bank combination has revived this seemingly never-ending debate with some tagging it a "Merger" while others insist it is an "Acquisition". This article will summarily discuss the existence or otherwise of a distinction between the restructuring methods as identified above and any significance in relation to practice and procedure under Nigerian law.

Mergers, Acquisitions & Takeovers – Introduction

Like most jurisdictions, the Nigerian legal framework provides for business restructuring and combination methods including the famed trio of Mergers, Acquisitions, and Takeovers (MATs). MATs involve two or more distinct companies[1] entering into an arrangement under which results in a change of control or structure in their operations. Despite marked differences in the theory behind each of these procedures, the reasons for pursuing either are essentially the same. They include:

- **Increased Shareholder Value** – Regardless of the form, the entire idea behind business combination and restructuring methods is to enhance shareholder value and ensure increased profitability. In ideal circumstances, the value of shareholding in the merged entity will exceed that of both entities while they existed independently.
- **Diversification** – this is an advantage available when the two (or more) companies involved operate in different sectors of the economy.
- **Synergy** – In this regard, the saying *"two heads are better than one"* finds its way to the business landscape. This notion presupposes that by combining undertakings, the companies involved are able to optimize their profits and reduce capital and operating costs.
- **Growth** – Invariably, merging, acquiring or taking over a company allows the purchasing company leverage on the existing reputation and customer/client base of the target company.
- **Market Share** – the primary purpose of any business is to create a clientele. A successful restructuring will quickly build the market presence of the company while reducing the competition's stronghold.

[1]Please note that under Nigerian law, the word "company" when used in relation to Mergers, Acquisitions and Takeovers as under the Investment and Securities Act 2007 ("ISA"), refers to not just corporations but includes a firm or an association of individuals. As such, partnerships and other associations may be merged, acquired or taken over. See Section 117 ISA.

Is There A Distinction?

With the objectives of these transactions being similar or more or less identical, the distinction between Mergers, Acquisitions, and Takeovers is virtually non-existent in global practice. It is often said that the different mechanisms are mere appellations hence the general reference to business restructuring methods as **'M&A transactions'**. While globally, the lines between each of these methods are either blurred or non-existent, in Nigeria, our laws create room for a marked distinction between these varying restructuring methods.

A combined reading of the provisions of the Nigerian Investment and Securities Act 2007 ("ISA") and the Securities and Exchange (Consolidated) Rules 2013 (As Amended in November 2017) ("SEC Rules") defines each of MATs as follows:

Merger – the amalgamation of two or more distinct business entities[2] ;

Acquisition – the purchase of a controlling stake (most, if not all of the holdings) in a private company[3] ;

Takeover – the purchase of a controlling stake in a public company[4] ;

The ISA and SEC Rules stipulate conditions which must be fulfilled for the consummation of each of these transactions. However, the major difference under Nigerian law is that an amalgamation only occurs in a Merger. This amalgamation is usually effected by one of the following means:

- The merging companies make way for the emergence of a fresh and distinct entity.
- One of the merging companies (or the merging companies) is subsumed into the other merging company.

Under both laws, however, acquisitions and takeovers do not result in an amalgamation of the entities involved, instead, pursuant to the provisions of the Companies and Allied Matters Act ("CAMA"), both transactions give rise to a Holding-Subsidiary relationship between the acquiring and target company[5].

Examples of popular Mergers, Acquisitions and Takeovers in Nigeria are as follows:

- ✓ Veritas Registrars Limited's Acquisition of Zenith General Insurance Limited (per a 45.4% equity stake).
- ✓ Stacap Limited's 100 percent Acquisition of Union Capital Markets Limited.
- ✓ NIPCO's Takeover of downstream operator, Mobil Oil Nigeria Plc (now 11 Plc).
- ✓ Merger of commercial banks during the consolidation era. For example, Access-Intercontinental bank merger and now, the proposed Access-Diamond Bank merger.

Contrastingly, on a global level, the difference between Mergers, Acquisitions, and Takeovers exists only in theory and in any event, is only indicative of the nature of the entities involved in the restructuring or the manner in which the deal was brokered.

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[2] Section 117, ISA
[3] Rule 421 & 433, SEC Rules
[4] Section 131, ISA
[5] Section 338, CAMA

Generally, the terms Mergers, Acquisitions and Takeovers are used as follows:

- Merger – an amalgamation of "equals" i.e. companies or similar reputation and size
- Acquisition – a purchase of a smaller company by a bigger one (whether there is an amalgamation or not);
- Takeover – a hostile "Acquisition" (as described above).

Notwithstanding the above, any distinctions between these forms of corporate restructuring will be seen in the legal framework governing each of these transactions in the jurisdictions in consideration.

The Cause for Confusion

The ISA expressly provides that, one of the methods through which a Merger can be effected is by a purchase of shares of a target company or companies. As such, this creates an even more proximate relationship between Mergers on the one hand, and Acquisitions and Takeovers on the other hand. Since Takeovers and Acquisitions are effected solely through the purchase (or acquisition) of shares, it is harder to determine the precise nature of a transaction when the Merger is effected through a purchase of shares (as is usually the case). However, the distinction under Nigerian law is the occurrence of an "amalgamation" in a Merger and the absence of same in Takeovers and Acquisitions.

Significance/Implications

Opting for either of the aforementioned business combination or restructuring options has its implications – legal and financial, a few of which are discussed summarily below in relation to the different modes.

Mergers

Pursuing a Merger is likely to be the most demanding (procedurally and financially) of all three restructuring options. The very nature of a merger implies ensures that the Board of the merging companies will engage in extensive negotiations to guarantee that the interests of the members of their respective companies are protected and catered for in the transaction. The downsides of an amalgamation of entities will also need to be considered. Senior and mid-level staff are likely to be out of employment once the transaction is consummated and the merging companies have to seek legal avenues to secure their interests.

Financially, due to the comprehensive and expansive documentation and procedure involved in effecting a Merger, a company pursuing a merger is likely to incur more expenditure in professional fees (lawyers, financial advisers, accountants, auditors etc.) than a company pursing other restructuring methods (as will be seen below). Also, in anticipating the merger, terminal benefits will have to be paid to employees whose engagement with the merging companies will be

[2] Section 117, ISA
[3] Rule 421 & 433, SEC Rules
[4] Section 131, ISA
[5] Section 338, CAMA

terminated or compromise arrangements will have to be entered. In addition, depending on the mode of effecting the merger (shares or assets), tax liability will vary.

In all, the core implication of a Merger is that two or more merging entities become a single entity, that is, the amalgamation.

Acquisitions

Acquisitions are less-complex and in reality only involve an agreement to purchase a controlling stake in the target company. However, with a change in control imminent, discussions with shareholders as to future plans for the target company must hold and this will drive the negotiation process as the acquiring company must be able to convince the board and members of the target company to buy into this process.

On a smaller scale (when compared to mergers), cost will be incurred in relation to the appointment and remuneration of professionals – issuing house, financial advisers and legal practitioners etc. In the event that the intending controller considers certain members of staff redundant, severance benefits will also have to be catered for.
In all, the core implication of an Acquisition is a change in control of the target company.

Takeovers

Essentially "acquisitions" of public companies, the major difference between the processes is the more stringent regulations. To protect the interest of shareholders, the SEC Rules mandates that an intending acquirer goes through a mandatory bid process[6] . The bid process entails hiring a plethora of professionals, all of which will attract their attendant remuneration. The takeover process also involves a slightly increased number of regulatory requirements.
All the above "additional undertakings and requirements" will result in the company incurring additional expenses. Like with acquisitions, in takeovers, employees terminations are likely (although not usual), and where that is the case, companies will cater for terminal benefits or compromise arrangements.
In all, as with Acquisitions, the major implication is the change of control over the target company involved in the Takeover.

A Comparative Analysis of Implications

The major significance of the categorization of the restructuring method is its impact on the procedure to be complied with in ensuring the consummation and conclusion of the restructuring. As mentioned earlier, the ISA and the SEC Rules set out distinct prerequisites which must be complied with for each of these restructuring methods.

A marked difference between the procedure for a Merger and a Takeover/Acquisition is the significant role played by the Court in effecting a merger[7] . The Court, in an ideal situation, plays no role in an acquisition or a takeover.
Also, in a Takeover, the purchasing company is mandated to issue a takeover bid to acquire the shares of shareholders in a public company[8]. No such process is required for effecting a Merger or an Acquisition.

[6] See Rule 445 SEC Rules
[7] Rule 425, SEC Rules
[8] Rule 445, SEC Rules

The Access-Diamond Bank Transaction – Merger or Acquisition?

Both companies have opted for the appellation "Merger" in the official publication released in relation to the transaction till date and from all indications, having regard to discussions above, it appears to be the right one. Both companies have made reference to a merger scheme and a need to obtain special approval from their respective shareholders. Most importantly, it has been expressly stated that Diamond Bank will cease to exist and will be fused into Access Bank Plc. The amalgamation of both entities (by way of the fusion) is our clincher. Merger, it is.

Practical Considerations for an M&A Transaction

Companies considering a Merger, an Acquisition or a Takeover are advised to consider the following:

- Identifying growth/expansion opportunities;
- Identifying possible candidates;
- Assessing financial position and capabilities to consummate the transaction;
- Internal cost-benefit analysis;
- Valuation of target companies;
- Due Diligence, Negotiation, and Preparation of Merger (or other relevant) Agreement and Execution
- Implementation and Post-Transaction Compliance

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