LEGAL FRAMEWORK FOR MERGERS AND ACQUISITIONS

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The recent Central Bank directive that banks should raise their capital base to Twenty Five Billion naira before December 2005 leaves no one in doubt that many of the existing banks can only survive through mergers and acquisitions. The purpose of this paper is to examine the legal framework for mergers and acquisitions. This framework was contained mainly in the Companies and Allied Matters Act 1990 (CAMA)[1], the Securities and Exchange Commission Act 1988[2] (now repealed) and The Securities and Exchange Commission Guidelines on Mergers, Acquisitions and Combinations. Apparently the objective of transferring the relevant laws to the Investment and Securities Act 1999 (ISA) was to have them in one legislation, but this has not been fully achieved. Mergers may still be effected under the CAMA.

1. Definition of Terms

1.1. Arrangement

An arrangement is simply a scheme under which rights of a company's shareholders or creditors (or any class of them) is altered. It is defined in section 537 of the Companies and Allied Matters Act (CAMA) as

> "any change in the rights or liabilities of members, debenture holders or creditors of a company or any class of them or in the regulation of a company, other than a change effected under any other provision of this Decree or by the unanimous agreement of all parties affected thereby".

Quite often an arrangement forms part of a reconstruction or merger.

1.2. Reconstruction

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

[1] Cap. 59 LFN 1990.
[2] Cap. 406 LFN 1990.

substantially the same persons hold interests in the new company as in the old company. Since the old company no longer has any business of its own, it is put into liquidation

1.3 **Merger**

A merger (or an amalgamation) occurs when two or more companies transfer their businesses and assets to a new company (or to one of themselves) and in consideration, their members receive shares in the transferee company. Section 590 of the CAMA (repealed) defined "Merger" as "any amalgamation of the undertakings or any part of the undertakings or interests of two or more companies or the undertakings or part of the undertakings of one or more companies and one or more bodies corporate."

1.4 **Amalgamation**

The word 'amalgamation' is sometimes used interchangeably with the word "merger". Not surprisingly, section 650 of the CAMA (the definition section) sets out the word "amalgamation" and states that it has the meaning assigned to it under section 590. However that section does not define "amalgamation" but defines "merger" as "any amalgamation of the undertakings …" of two or more companies, etc.

Like merger, an amalgamation is the fusion of the businesses of two or more companies under the ownership of one company while retaining the rights and interests of members of the fusing companies.

1.5 **Acquisition**

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

A merger may be achieved by an acquisition. But in the ordinary case, the shareholders of the acquired company are paid off (resulting in disinvestments) and the acquirer becomes owner of all or a substantial part of the assets of the acquired company. An essential difference between a merger and an acquisition is that in a merger, there is no disinvestment of the shareholders of the amalgamating companies[3] while the reverse is the case in an acquisition.

1.6 **Take – Over/ Take – Over Bid**

Weinberg and Blank define a take-over as

> "an offer to acquire shares of a company, whose shares are not closely held, addressed to the general body of shareholders, with a view to

[3] Except, of course, where there are dissenting shareholders who are paid off.

obtaining at least sufficient shares to give the offeror voting control of the company".[4]

They explain further that it is "a technique for effecting either a take-over or a merger; in the case of a take-over, the bid is frequently against the wishes of the management of the offeree company; in the case of a merger, the bid is generally by consent of the management of both companies.[5]

The definition of a "take-over bid" in Section 590 of the CAMA is circuitous and unsatisfactory. It defines a "bid" as an invitation or an offer; a "take-over" as "the acquisition by one company of sufficient shares in another company to give the acquiring company control over that other company." It then defines a "take-over" as "a bid made for the purpose of a take-over as provided in section 103 of this Act." Section 103(1) merely provides that any bid which constitutes a take-over bid shall be referred to as a bid under the take-over bid.

The overall effect of these definitions is to create the impression that take-over bids are restricted to acquisitions only whereas in fact they can be used for mergers as well. If a take-over bid is designed to achieve a merger, it will always take the form of an offer of shares in the offeror company in exchange for shares in the offeree company, i.e., share-for-share exchange offer. If the bid is designed for a take-over only, then the offer may take the form of a share-for-share exchange, purchase of shares for cash or a combination of the two.[6]

2. Forms of Mergers and Take-Overs

Weinberg and Blank classify mergers and take-overs into three broad heads – horizontal, vertical and conglomerate.

2.1 Horizontal

If the two companies involved in a take-over or merger produce the same kind of goods or render identical services then the take-over or merger is horizontal. Likewise, if their goods and services compete directly. If one brewery company merges with another brewery company, a horizontal merger results.

2.2 Vertical

Here, one of the two companies "is an actual or potential supplier of goods or services to the other", e.g. where a brewery company takes over or merges with a company engaged in the manufacture of empty bottles.

2.3 Conglomerate

[4] Weinberg and Blank on Takeovers and Mergers, London, Sweet and Maxwell (1979) p.4
[5] Ibid.
[6] Ibid.

The companies involved here are engaged in completely different kinds of business. They are not related horizontally or vertically. These are cases of "pure conglomerate." In some cases, there may be some remote relationship in the activities of the companies. In Nigeria, some examples of conglomerate include the merger between Lever Brothers Nigeria Ltd. and Cheseborough Products Industries Ltd.

A major reason for conglomerate take-overs, or mergers is diversification of activities into other spheres of business to improve earning stability, shift from a regressing business, utilize surplus resources etc.[7]

3. **Reasons for Take-Overs and Mergers**

There are many reasons for take-overs and mergers. But the commonest reason is that the take-over or merger will result in substantial trade advantage or greater profits than the combined profits of the two companies working separately. There is here what is referred to as an element of synergy.[8]

"Synergy" according to Weinberg and Blank is

> "the favourable affect on the overall earnings caused by combining two firms in circumstances which will give rise to savings in costs or increases in revenue – or more simply the 2+2 =5 effect."[9]

More generally, motivation for take-overs and mergers may arise from the fact that cost of production would be less in a large combine with enlarged operation capacity and reduction of duplications (the economies of scale). Mergers and acquisitions may enable a company acquire a competitor which poses substantial threat to it, or a company which supplies it raw materials or provides it market outlet with the aim of assuring, improving these services, or ensuring that these companies are not taken over by a competitor. Again, the motivation may be diversification of enterprises with a view to ensuring stability of earnings; it may be to acquire the much needed technology or expert managerial skills of another company.

Large combines have more obvious financial advantages than small companies. There is an enlarged capital base and loan, debt capacity, accelerated growth and increased earnings.

4. **Procedures for Mergers and Acquisitions**

There are four major procedures in the CAMA and the ISA for accomplishing mergers and acquisitions. These are:

a. By agreement under section 538 CAMA.
b. By a scheme of arrangement or compromise under section 539 CAMA.

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[7] See Weinberg and Blank, pp.6 and 7.
[8] Weinberg and Blank, p. 24
[9] Ibid

c. By a scheme of arrangement under section 100 ISA
d. By a take-over bid under sections 103 ISA et seq.

We shall now examine the operation of these provisions.

4.1 Agreement Under Section 538

A company's undertaking and assets may be transferred to another company under the provision of section 538. The section provides as follows:

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

The section 538 procedure may be used for an acquisition, a reconstruction or a merger. But in either case, a members' voluntary winding up must be involved. The procedure may be used for a merger in two ways. The assets of two merging companies may be transferred to a new company in exchange for shares in the new company and the merging companies put into voluntary liquidation. A second method is for one company, A, to transfer its assets to another company B in exchange for shares in company B, with company A going into liquidation. In each case, the former members of the transferor company become members of the transferee company.

If the consideration for the assets of the liquidated company is cash or property other than shares in the transferee company, the result is an acquisition or a take-over.

Any sale or distribution made in pursuance of a resolution under section 538 is binding on the company and all its members and each member is deemed to have agreed with the transferee company to accept the fully paid shares, debentures, cash or other consideration to which he is entitled under the distribution.[10] Any member who fails to signify his dissent as provided in the section is deemed to have accepted the resolution.[11]

4.2 Protection of Dissentients

The section affords due protection to dissenting shareholders and creditors. Creditors who fear that they may not be paid in full may petition the court for an order for a creditors' voluntary winding up. If the order is made within one year of the resolution for voluntary winding up and sale of the

[10] S.538 (2)
[11] S. 538 (3)

company's undertaking, the resolution shall not be valid unless sanctioned by the court. The same applies if at the instance of a shareholder or a creditor an order is made under sections 310 to 312 of the CAMA which deal with relief on the grounds of unfairly prejudicial and oppressive conduct.[12] The court can make a wide range of orders under section 312. These include an order for winding up, and order varying or setting aside a transaction or contract to which the company is a party, and an order for the purchase of the shares of any member by other members or by the company. Section 538 does not authorize any variation or abrogation of the rights of a creditor of the company.[13]
If within 30 days of the passing of the special resolution a member expresses his dissent by writing addressed to the liquidator and left at the company's registered or head office, the liquidator shall either refrain from giving effect to the resolution or shall purchase the dissenting member's shares at a price determined by agreement in the case of a private company in which aliens do not participate, and by the SEC in the case of a public company or a private company in which aliens participate.[14]

In the case of a private company in which no aliens participate, the price payable by the liquidator is determined by estimating what the dissenting member would have received if the whole of the company's undertaking had been sold as a going concern for cash to a willing buyer and the proceeds, less the cost of winding up, had been divided among the members in accordance with their rights.[15] In such a case, the purchase money must be paid by the company before it is dissolved and it should be raised by the liquidator in such manner as may be determined by a special resolution, or if the resolution does not so direct, in such manner as the liquidator may think fit as part of the expenses of the winding up.[16]

A dissenting shareholder receives further protection in the case of sale of a company's undertaking which does not fall directly under section 538. By section 538 (6), if a company otherwise than under section 538, sells or resolves to sell the whole or part of its undertaking or assets to another company in consideration or part consideration of shares, debentures, policies or similar interests in that company to be distributed in specie among the first company, whether in liquidation or by way of dividend, any member of that company may by written notice left at the company's registered or head office within 30 days of the resolution, require the company either to refrain from carrying the resolution into effect or to purchase his shares at a price determined in accordance with section 538

[12] S. 538 (2) (a).
[13] S. 538 (5).
[14] See S. 538 (2) (b) and 538 (4) CAMA. With the repeal of the Nigerian Enterprises Promotion Act, 1989 by the Nigerian Enterprises Promotion (Repeal) Act, 1995, the distinction is no longer of much practical value.
[15] S. 538 (4) (a)
[16] S. 538 (4) (b)

(4). Although not expressly stated in section 538, before the procedure can be used to effect a merger or take-over SEC approval must be obtained in the light of section 99 ISA.

5.1 Schemes of Arrangement or Compromise under Section 539

A merger can be effected under section 539 which provides as follows:

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

The CAMA does not define "compromise" but in **Sneath .V. Valley Gold Ltd.**,[17] it is described as an agreement which terminates a dispute between parties as to the rights of one or more of them or which modifies the undoubted rights of one or more of them or which modifies the undoubted rights of a party which he has difficulty in enforcing. An arrangement (defined above) covers a wider range of agreements, which do not involve any disputes.

There is some doubt as to whether a merger can be effected under section 539. The language of the section suggests that it is intended for internal reorganization of a company only. Reference is merely to a relationship between a company and its members and creditors. In section 538, for example, relationship between two companies is involved. This view seems supported by the Law Reform Commission's Report which describes this provision as one for "internal reorganization of a company."[18] Notwithstanding this, section 539 may be used to effect a merger provided the companies involved apply separately to the court to order their separate meetings.[19]

5.2 Creditors, Members and Classes of These

In respect of schemes under section 539, the words "creditor" and "member" have been given wide meaning by the courts. "Creditor" includes any person who has or may have a pecuniary claim against the company, whether liquidated or unliquidated and whether contingent or not.[20] And

[17] [1893] 1 Ch. 447, 494; Mercantile Investment and General Trust Co. V. International Co. of Mexico [1893] 1 Ch. 484 at 489, 491.
[18] Working Papers on the Reform of Nigerian Company Law, vol. 1 p.310
[19] In respect of a substantially similar provision, S. 206 UK Companies Act 1948, Hornby states that it may and often does, form part of a reconstruction or amalgamation; see J.A. Hornby, An Introduction to Company Law 5th ed. 1975, p.190.
[20] Re Midland Coal Coke and Iron Co. Craig's Claim [1895] 1 Ch. 267, at 271. See Sovereign life Assurance Co. V. Dodd [1892] 2 Q.B. 573

"member" has been held to include persons who had allotment letters but whose names had not been put on the register of members.[21]

It is not always easy to determine when persons can rightly be taken to belong to the same class. However, Bowen L.J. gave a general guide in **Sovereign Life Assurance Co. V. Dodd.**[22] He said:

> "It seems plain that we must give such a meaning to the term "class" as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."

In the case itself, it was held that holders of life insurance policies which had matured formed a different class from holders of policies which had not matured. And it has been held that holders of fully paid shares, partly paid shares, and further partly paid shares the outstanding balance of which had been paid in advance of calls, formed three distinct classes.[23]

5.2.2. **Procedure**

A scheme of arrangement for the merger or acquisition is prepared by the company, a member, creditor or liquidator (in the case of a company in liquidation). An application is then made to the court in a summary way to order a meeting of the members or creditors or of the relevant class. The application is supported by an affidavit verifying the facts on which the scheme is based, and disclosing a likelihood that a majority representing three-quarters in value will be obtained and that the scheme is fair and equitable to all concerned.[24]

If the court makes the order, a meeting is called as directed. To the notice of meeting must be attached a statement explaining the effect of the compromise or arrangement and stating any material interests of the company's directors and the effect thereon of the compromise or arrangement in so far as it is different from the effect on the like interests of other persons.[25] If the notice of meeting is by advertisement a similar statement must be attached to it or some notification of the place and manner in which those entitled to attend the meeting may obtain copies of it,[26] and on application it should be given to them free of charge.[27]

[21] Dey .V. Rubber and Mercantile Corpn. Ltd [1923] 2 Ch.528.
[22] Supra, at p.583
[23] Re United Prudent Assurance Co. Ltd. [1910] 2 Ch. 477. See Re Hellenic and General Trust Ltd. [1975] 3 All E.R. 382.
[24] See Yinka Folawiyo & Sons Ltd. v T.A. Hammond projects Ltd. (1977) FRCR 143.
[25] S. 540 (1) (a)
[26] S. 540 (1) (b)
[27] S. 540 (3)

If the scheme affects the rights of debenture holders of the company the statement should give the same explanation concerning the trustees of any deed for securing the issue of the debenture as for the company's directors.[28]

Every director of the company and every trustee for debenture-holders of the company must notify the company of such matters relating to him as may be necessary for the purposes of the particulars required for inclusion in the notice of meeting.[29]

At the court ordered meeting the scheme must be approved by a majority representing not less than three-quarters in value of the shares of members or class of members or of the interest of creditors or class of creditors present and voting either in person or by proxy. It is not too obvious what interpretation should be placed on the expression.

> " a majority representing not less than three-fourths in value of the shares…"

One view is that it refers to shareholders, or a shareholder, who hold/s the specified value of shares. Another view is that it refers to a numerical majority who must also, together, hold not less than three-fourths in value of the shares. The latter view has much to commend it. It ensures a majority both in number and share value, a dual safeguard and a safeguard against abuse at class meetings. The equivalent provision in the 1968 Companies Act, i.e. section 197(2) contained the expression "If a majority <u>in number</u> representing three-fourths in value… etc. It would appear that the removal of the words "in number" from section 539(2) was not deliberate.[30]
After approval by the meeting, the scheme is referred by the court to SEC which will determine its fairness and report thereon.[31]

Reference of the scheme to SEC is a welcome innovation which did not exist under the old Act. SEC is surely better placed than the court to inquire into the fairness of a scheme- a task which the court undertook under the old Act. It does appear from the language of section 539(2) that reference of a scheme to SEC is discretionary. However, if a scheme will result in a merger or take-over it must be referred to SEC in view of section 99(2) of the ISA which makes it the regulatory body for mergers and acquisitions.

[28] S. 540 (2)
[29] S. 540 (5)
[30] Section 425 of the UK Companies Act 1985 which is similar to S. 539(2) also makes reference to "a majority in number representing…" etc.
[31] S. 539(2)

If the court is satisfied as to the fairness of the scheme it will sanction it and it will become binding on all concerned. It would appear from this that the court may not sanction a scheme if it is not satisfied as to its fairness.

The court has wide powers to approve a scheme under section 539 but it will not approve a scheme which would not have been valid if it had been approved by all the creditors or members e.g. if the scheme involves a reduction of capital which would have been undertaken under the relevant statutory provisions.[32]

In deciding whether to approve a scheme the court will consider whether it has been approved by the requisite majority, at a duly convened meeting, whether those who attended a class meeting were fairly representative of the class and had acted bona fide, and whether the scheme was such as an intelligent and honest man would reasonably approve.[33]

The order sanctioning a scheme does not take effect until the company has delivered a certified true copy of it to the Commission for registration. A copy of the order must be annexed to every copy of the company's memorandum issued after the order is made.[34] This requirement is cumbersome and perhaps an easier way should be found to notify the change.[35]

As a provision under which mergers may be effected section 539 is deficient in not making provision for compulsory acquisition of shares of dissentients, and in not providing for the power of the court to make facilitatory orders. Such provisions were contained in the equivalent section 197 of the 1968 Act. Their exclusion apparently indicates legislative intention not to make the section available for mergers. On this, Ogowewo has stated that:

> "If by this the draftsman intended section 539 to be unavailable for a scheme of arrangement resulting in a take-over or merger, then once again it is apparent that the draftsman failed. Just as the absence of the facilitating powers in a reconstruction by voluntary winding up does not enjoin any transfer of assets, but merely makes it more expensive and cumbersome, so will it be in this case". [35a]

6.1. **Scheme of Arrangement under Section 100 ISA**

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[32] See Re Cooper, Cooper and Johnson Ltd. (1902) WN 199

[33] cf. Re Alabama New Orleans, Texas & Pacific Junction Railway Co. (1891) 1 Ch. 213. See Re Dorman Long & Co. (1934) Ch. 635, 657

[34] S. 539(4)

[35] See Gower, Principles of Modern Company Law, 5th ed., p. 696

35a. Ogowewo, T. I., "A Critique of the statutory procedures for Effective Corporate Structural Change in Nigeria" Lawyers' Bi-Annual, Vol. 1, No 2, p. 125.

Mergers may be effected under section 100 which is the main provision for this purpose. Although of low intensity, some mergers have occurred in Nigeria in recent times.

Normally, the directors of the merging companies would have had consultations and reached agreement on the terms of the merger. Then the scheme would be prepared, usually by the transferee company and a pre-merger notice will be filed with SEC as prescribed by the SEC Guidelines.[36] To the pre-merger notice should be attached the following documents:

(a) letters of intent signed by the merging companies;
(b) a detailed description of the proposed transaction including all the background studies relating to the merger and the justifications for it;
(c) a detailed information about the product line of the companies;
(d) a list of the major competitors in that product market and the market position or market share of each company (including the merging companies)
(e) the structure and organization of the merging companies;
(f) revenue information about the operations of the merging companies;
(g) the latest financial statements of the companies;
(h) An analysis of the effect of the acquisition on the relevant market including the post-acquisition market position of the acquiring or surviving company.

If the SEC approves the Notice, it will then grant permission for the filling of a formal application.

6.2. Approval of The Scheme by Shareholders

This is deal with by section 100 of the ISA. The section provides that where under a scheme for a compromise, arrangement or reconstruction between two or more companies or the merger of any two or more companies, the whole or any part of the undertaking or property of any company concerned in the scheme (the transferor company) is to be transferred to another company (the transferee company) the court may on the application in a summary way of any of the affected companies, order separate meetings of the companies to be summoned in such manner as it may direct. The requirement for separate meetings of the companies is an endorsement of the decision in Re Lipton[37].

At each separate meeting, the directors should explain the implications of the scheme to members, its advantages and disadvantages, if any. Although there is no specific provision in the section for

[36] Paragraphs 6 and 7,

[37] Suit No. FHC/L/M21/85 of June 5, 1985 (unrep.) For criticism of the case see Ogowewo, suprs, at p. 122. In support see Asomugha, Company Law in Nigeria Under the Companies and Allied Matters Act (1994) p. 405. See Adekoye, in Essays on Company Law (E. O. Akanki, ed.) at p. 238.

disclosure of interests, the fiduciary duties of directors will oblige them to make full disclosure of their interests to members and to act in the best interests of the company.[38]

If the scheme is approved by a majority representing not less than three-quarter in value of the shares of members present and voting either in person or by proxy at each meeting it will then be referred to SEC for approval.[39] By paragraph 8 of the SEC Guidelines the application must be accompanied by the following documents:

(a) An agreement to merge which must contain the terms and conditions of the merger, mode of carrying it out and other necessary and material details.
(b) A resolution adopted by the board of directors of each company involved in the merger
(c) A comprehensive joint write-up by the issuing houses engaged in the merger package indicating business lines and stating reasons for the merger.
(d) Five years audited accounts of the merging companies
(e) A draft scheme of arrangement
(f) Valuation fees
(g) Evidence if increase in capital of the acquiring company to accommodate any anticipated increase in paid-up capital following the share exchange.
(h) Draft prospectus or draft particulars.

6.3. **Consideration by SEC**

By Section 99(3) of the ISA, the SEC "shall approve" the application "if and only if" it finds that the merger will not cause substantial restraint of competition or create monopoly. Whereas section 539 (2) requires SEC to consider the fairness of a scheme, section 99(3) is silent on this. The issue then is whether SEC is precluded from disapproving a scheme under section 100 on the ground of unfairness.

In Costain (West Africa) Ltd. and Foundation Engineering (Nig) Ltd. v Securities and Exchange Commission,[40] Odunowo, J. held that SEC's disapproval can only be based on likelihood of substantial restraint of competition or creation of monopoly. A broader view of SEC's power under the provision is advocated. Since SEC is better placed than the court to assess the fairness of a scheme and that power is not even conferred on the court by the section, an interpretation which enables SEC to make an overall assessment of the scheme is preferred. And an amendment to achieve this is suggested.

[38] Cf. Getting v kilner (1972) 1 W. L. R. 337.
[39] S. 101 (2)
[40] (1992) 1 Securities Law Report 18.

6.4. **Sanction by the Court**

If SEC approves the scheme, then an application is made to the court by one or more of the companies. The court shall sanction the scheme which than becomes binding on the companies.[41] The use of "shall" creates the impression that the court must sanction the scheme once SEC approves it. It is submitted that the court has discretion in the matter. It may refuse to approve the scheme if it is satisfied that there is substantial irregularity, illegality or unfairness in the process – e.g., if resolutions had not been approved by the specified majority.[42]

6.5. **Facilitating Orders**

The court may by the order sanctioning the scheme or by a subsequent order make the following facilitating provisions for

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

Property is defined in section 100(7) to include property rights and powers of every description. "Liabilities" include "duties of every description notwithstanding that, such rights, powers and duties are of a personal character which could not generally be assigned or performed vicariously". By this definition it is submitted that the House of Lords decision in Nokes v Doncaster Amalgamated Collieries[43] that transfer of property and liabilities does not include transfer of contracts of personal service, no longer applies in Nigeria. Consequently contracts of employment pass as liabilities to the transferee. This effectuates the Nigerian Law Reform Commission's proposal on the matter.[44]

(b) The allotting or appropriation by the transferee company of any shares, debentures, policies or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person.

One welcome affect of Section 100 (3) (a) and (b) is to eliminate the expense of formal transfers and conveyances.[45]

(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 any transferor company.

(e) The provision to be made for any persons who within such time and in such manner as the court may direct, dissent from the compromise or arrangement.

[41] S. 100(3)
[42] cf. Re Dorman Long & Co (1934) Ch. 635, 655
[43] (1940) A. C. 1014. The decision was criticized by Gower, Principles of Modern Company Law, 3rd ed., pp. 200-201 4th ed., p. 122. In England the Transfer of Undertakings (Protection of Employment) Regulations 1981 (S. 1, 1981 Not. 1794) now allows the transfer of employment relationships as part of transfer of property and liabilities.
[44] See working papers, Vol. 1, p. 316
[45] See Gower, 5th ed., 697.

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

Before the court makes the order for dissolution it must be satisfied that adequate provisions by way of compensation or otherwise have been made with respect to employees of the company to be dissolved.

By Section 100(6) both the transferor and transferee companies must, within seven days of making the order sanctioning the scheme deliver an office copy of the order to the SEC for registration. There must be attached to the order:

(a) a resolution of the merging companies agreeing to the terms;
(b) clearance letter from the Federal Board of Inland Revenue in respect of any tax liability, and
(c) notification to SEC of the completion of the merger.[46]

A notice of the order shall be published in the Federal Gazette and in at least one national newspaper.[47]

6.6. **<u>Power to Acquire Dissentient's Shares</u>**

Section 101 provides for the acquisition of the shares of dissenting shareholders. If a scheme or contract (not being a takeover bid) involving the transfer of shares or any class of shares in company X has, within <u>four months</u> of company Y's offer, been approved by the holders of not less than nine-tenths in value of the shares involved (other than shares already held at the date of the offer by, or by a nominee for company Y or its subsidiary), company Y may at any time within the next <u>two months</u> give notice to any dissenting shareholder that it desires to acquire his shares. Then, unless the Court thinks fit to order otherwise, on an application made by the dissenting shareholder within <u>one month</u> of the notice, company Y is entitled and bound to acquire his shares on the same terms as it acquired the shares of the approving shareholders.

If, at the date of the offer, shares in company X of the same class as are involved in the transfer, are already held by or by a nominees of company Y or its subsidiary to a value greater than one-tenth of the aggregate value of the shares involved, the power of compulsory acquisition applies only if.

(a) Company Y offers the same terms to all holders of the shares (other than those already held as aforesaid) involved, or where those shares include shares of different classes, of each class of them; and

[46] S. E. C. Guidelines, p. 15.
[47] S. 100(6)

(b) The approving shareholders, besides holding not less than nine-tenths in value of the shares (other than those already held as aforesaid) are not less than three-fourths in number[48] of the holders of those shares.

The requirement that notice to dissenting shareholders should be given within two months after the expiration of four months tends to suggest that the offeror company must wait for the expiration of four months before notifying dissenters of its intention to buy them out even if it had received the requisite approvals within that period. This may cause unnecessary delay in completing the merger. It is hoped that the Court will adopt the interpretation in Re Western Manufacturing (Reading) Ltd.[49] that the expression "within four months of the making of the offer" did not describe a fixed period during which the offer must remain open but a maximum period during which the contemplated event might occur.[50]

It is not clear whether the date of the "making of the offer" refers to the date on which the offer is dispatched or the date on which it is received by the offeree, as required by the ordinary law of contract. The latter is preferred.

Another area of doubt relates to the interpretation of "nine-tenths in value of the shares whose transfer is involved", if indeed there are different classes of shares in the offeree company. One view is that this refers to nine-tenths of the aggregate value of the different classes of shares. Another view is that it refers to nine-tenths of each class of shares. This latter view is preferred.

The former will work injustice since the different classes may have different interests and it may result in compulsory acquisition of even more than fifty percent in value of the shares of a class of dissenting shareholders. The Jenkins Committee (UK) had recommended in respect of a similar provision (Companies Act 1948, s. 209) that it should be amended

> " to make it clear that an offer expressed as a single offer for shares of more than one class should be treated as comprising as many offers as there are classes of shares involved".[51]

By Section 101(5) the transferor company is required to pay any sums received by it into a separate bank account and to hold these and any other consideration in trust for the dissenting shareholders.

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[48] The additional requirement of a quantitative majority is rightly described by Weinberg as "subjecting compulsory acquisition to more arduous conditions" since the shares held by the transferor are already excluded, at p. 353.

[49] (1956) CH 436

[50] At p. 435

[51] Report of the Company Law Committee, Cmnd. 1749, para. 294(1) (ii).

6.7. **Dissenting Shareholder's Right to Compel Acquisition of his Shares**

Alongside the power of compulsory acquisition is the reciprocal power of a dissenting shareholder to compel acquisition of his shares. By section 102, within one month of the transferee company acquiring nine-tenths in value of the relevant shares, it must notify this fact to the holders of the remaining shares. Any of such shareholders may within three months of the notice require the transferee company to acquire his shares also. In that event the transferee company becomes entitled and bound to acquire the shares on the same terms as for the approving shareholders or on such other terms as may be agreed or as the Court hearing the application of the shareholder or the transferee company thinks fit to order.

There is no doubt that the section 100 procedure is a major procedure for mergers and acquisitions, more lucid and comprehensive than the equivalent section 199 of the 1968 Act. However, it does not, unlike section 539, contain disclosure provisions but does contain facilitating powers which section 539 lacks. Because of these defects, it appears, both sections are used complementarily in effecting a single scheme of merger.

7.1. **Take-Over Bid**

The meaning of a take-over bid has been examined above. Take-over bids are an important method of acquiring control of a company. No procedure for making take-over bids was contained in the 1968. Companies Act although there was provision for acquiring the shares of dissentients if a take-over should occur. Now the ISA has made elaborate provisions for take-overs. The provisions draw mainly from the Companies Act 1985 (UK), the Ghana Draft Companies Code Bill and the Caribbean Company Law Report. In the view of the Nigerian Law Reform Commission the new provisions.

> "should be aimed at protecting the public interest by regulating or controlling the monopolistic tendencies of a take-over, especially as there is yet no law on this in the country, and also at protecting shareholders of the offeror company, against any sharp practice by their directors and the offeree company against unfair expropriation in any form or guise".[52]

7.2. **Definition of Take-over Bid**

This has been discussed above.

7.3 **Persons Who May Make a Take-Over Bid**

By section 103(3) if two or more persons acting separately… by themselves or through agents, each dispatch at approximately the same time a bid to shareholders of the same company, they are, unless

[52] Working papers on the Reform of Nigerian Company Law, Vol. 1

the contrary be proved, deemed to have dispatched a bid in concert if those persons belong to any of the following groups

(a) a holding company and its subsidiary or subsidiaries;

(b) two or more subsidiaries of the same holding company;

(c) a company and any associate company;

(d) a group of a kind referred to in (a) or (b) above together with one or more than one company which is an associate of any company in the group;

(e) a subsidiary and one or more than one associate of its holding company;

(f) the pension fund of two or more companies in any group referred to in paragraphs (a) to (e) above; or

(g) any combination of –

  (i) Officers of one, or more than one company in any group of the kind referred to in paragraphs (a) to (c);

  (ii) Members of the family or families of any such officer or officers; or

  (iii) Any such officer or officers and any such member or members. The family of an officer includes the husband or wife (including the reputed husband or wife), a child or the parents of the officer.

The purpose of the concept of acting in concert is to ensure that the bidder does not conceal the true extent of his interest or his identity in respect of other concurrent bids ascribable to him.

By section 104(1), a take-over bid is deemed to be made by a person who by himself or his agent dispatches a bid, or by two or more persons jointly or in concert who dispatch a bid to shareholders at approximately the same time in order to acquire

(a) shares of any class in the offeree company which either alone or if combined with the same class of shares in the offeree company already owned or controlled by the bidder directly or indirectly, would exceed one-third in number of the issued shares of that class;

(b) sufficient shares in the offeree company to make it the bidder's subsidiary;

(c) sufficient shares in the offeree company to enable the bidder to exercise or control not less than one-third of the voting power at general meetings.

A take-over bid is also deemed to have been made by a company which dispatches a bid concurrently to its shareholders to repurchase its own shares.[53] A take-over bid cannot be made in any case in which the bid is dispatched.

(a) to fewer than 20 shareholders or any number fixed by the regulations, in order to purchase shares by way of separate agreements;

[53] S.104 (2)

(b) to purchase shares in a company which has fewer than 20 members or such number as may be fixed by the regulations, two or more joint shareholders being counted as one person;

(c) in circumstances or for a purpose prescribed in the regulations.[54]

A take-over bid cannot be made in respect of the shares of a private company.[55] And a corporation must not make a take-over bid without an approving resolution of the directors.[56]

7.4 Steps in a Take-over Bid

Before embarking on any statutory steps in a take-over bid the directors of the offeror company would have taken all necessary steps to obtain and analyse through experts, all necessary information about the target company. It must also have reached agreement with, and won the support of the directors of the target company. If they withhold their support the bid is likely to fail because of possible defensive actions by the directors.

The first step in the bid is for the offeror company to obtain the authorization of the SEC to proceed with the bid. No take-over bid can be made without SEC's written and clear authority.[57] The application must contain specified documents.[58] In considering the application the SEC will have regard to the likely effect which the bid, if successful, will have on the economy of Nigeria and on any governmental policy relating to manpower and development. If the SEC is satisfied that none of these interests will be jeopardized, it will grant its authority.[59] The authority will last for three months but may be extended on application.[60]

Before making the bid, the offeror must lodge a copy of it with the SEC for registration. The bid must contain the information and have attached to it the documents specified in section 107. If the bid meets the approval of SEC it will register it, and if not, it will refuse registration and in either case, notify the offeror. Where registration is refused, the offeror may within 30 days require the SEC to refer the refusal to the court and the SEC must do so. The court may uphold SEC's refusal or reject it and order registration of the bid.[61]

[54] S.104(3)
[55] S.104 (4)
[56] S.108
[57] S. 105(1) and (7)
[58] S.105 (2)
[59] S. 105 (6)
[60] S. 105(8)
[61] S. 106 (4)

By section 600, the bid, and any amendment to it, must be dispatched concurrently to the directors and shareholders of the target company and to the SEC. This is useful to prevent any negative acts by directors who are opposed to the bid as well as insider abuse.

7.5 Directors' Circular

The directors having received the bid are required to consider it and then send their comments by way of directors' circular to each shareholder and to SEC at least 7 days before the date on which the take-over bid terminates or before the 60th day after the date of the bid,[62] whichever is earlier.[63] If the directors do not send the circular within 10 days of the date of the take – over bid, they must immediately inform the shareholders and the SEC that a directors' circular will be sent to them, and they may recommend that no shares be tendered pursuant to the bid until the circular is sent.[64]

A director who considers that the bid is not advantageous to the shareholders of the offeree company or who disagrees with any statement in the circular is entitled to indicate his opinion or disagreement in the circular and give his reasons.[65]

Beyond providing that the directors circular should include the compensation payable to the directors for loss of office, the ISA does not specify other information to be included. This is regrettable. The circular should, like a prospectus, contain specified information necessary to enable a shareholder reach an informed judgment on the offer. In the UK, the City Code on Take-Over makes adequate provision for this. And Rule 3 of the Code requires that the board of the offeree company must obtain competent independent advice on the offer and make available to the shareholders the substance of the advice.

The circular shall not contain the report or opinion of an expert unless he has consented in writing to such inclusion.[66]

7.6 **Contents of an Offer Document**

The contents of a take-over document are set out in section 107 which is subsections (1) and (2) distinguishes between information required in respect of a bid being an invitation, and a bid being an offer. The contents of the two are similar except that an offer bid should state how and by what date the offeror's obligations are to be satisfied. The document must contain, inter alia, the identity

[62] A take-over bid is deemed to be dated on the date on which it is dispatched, and if dispatched on more than one date, on the latest date. A bid dispatched by post is deemed dated on the date of posting.
[63] S. 111 (1)
[64] S. 111 (2)
[65] S. 111 (4)
[66] S. 112(1)

of the offeror, the maximum number and particulars of the shares to be acquired, the proposed terms of the acquisition etc.

7.7 Bid for all the Shares

By section 113, if the bid is for all the shares of a class, then shares deposited pursuant to the bid, if not taken up by the offeror may be withdrawn by a shareholder in the offeree company at any time after 60 days of the bid. And the offeror must not take up shares deposited under the bid until 10 days after the bid. The offeror may if he wishes state in the bid that he intends to exercise the right of compulsory acquisition of the shares of dissentients.

7.8 Bid for less than all the Shares

If a bid is for part only of any class of the shares in the offeree company, the offeror shall not take up shares deposited pursuant to the bid until 21 days after the date of the bid and the period within which shares may be deposited pursuant to the bid, or any extension thereof, shall not exceed 35 days from the date of the bid. If more shares are deposited than the offeror is bound or willing to take up, the shares taken shall be taken rateably, disregarding fractions, according to the number of shares deposited by each shareholder.[67] If a bid for all the shares of any class is converted to a bid for part only of the shares, it is deemed to be a bid to which section 114 (1) applies.[68]

7.9 Other Provisions Applicable to Every Bid

Section 115 sets out some other provisions applicable to every bid. These include:

a). Shares deposited under the bid may be withdrawn anytime within 10 days after the date of the bid;

b). If the terms stipulated by the offeror have been complied with, he must take up and pay for deposited shares within 14 days after the last day within which shares may be deposited pursuant to the bid.

c). the period of time for depositing shares shall be less than 21 days after the date of the take-over bid.

d). If the terms of the bid are amended by increasing the consideration for the shares the increment will extend to shares taken up before the amendment.

e). If the offeror intends to purchase shares in the market during the offer period, it must state this in the bid.

f). If the offeror purchases shares to which the bid relates otherwise than pursuant to the bid during the offer period for an amount more than that offered in the bid, this is

[67] S. 114(1)
[68] S. 114 (2)

deemed an amendment of the bid and he must pay the increased amount to the offerees. Shares acquired otherwise than under the bid shall be counted to determine whether the minimum acceptance has been attained. But they shall not be counted among the shares taken up rateably under section 114 (1) (c).

7.10 **Acquisition of Share of Dissentients**

The shares of dissenting shareholders may be acquired by the offeror following the procedure set out in sections 117 and 118.

If an offer has been accepted by not less than 90 percent in number of shares to which the offer relates, the offeror may within one month of the 90 percent acceptance give notice to a dis senting offeree of its intention to acquire his shares.[69] The notice, a copy of which should be sent to SEC, should state.

a). that the requisite percentage of acceptance has been obtained;
b). that the offeror is bound to take up and pay for or has taken up and pay for or has taken up and paid for, shares of the accepting offerees;
c). the election which the dissenting offeree is required to make and the particulars and effect thereof;
d). informing the dissenting offeree as to the effect of section 117 (4) and the requirement of section 117 (5), giving particulars in each case.[70]

A dissenting offeree to whom notice is given may within 20 days of the notice, elect either to transfer his shares to the offeror on the terms of the offer or to demand payment of a fair value for his shares.[71] If he elects to transfer, his shares, the offeror is bound to acquire his share on the terms of the offer.[72] If he makes no election, he is deemed to have elected to transfer his shares.[73]

A dissenting offeree must, within 20 days of receiving a notice, send to the offeree company his share certificates of the class of shares to which the offer relates.[74] And the offeror must within 20 days of sending a notice to a dissenting offeree, pay or transfer to the offeree company the amount of money or other consideration which it would have to pay if the dissenting offeree had elected to transfer his shares.[75]

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[69] S. 117 (2)
[70] S. 117 (2) (a – d)
[71] S. 117 (3)
[72] S. 117 (6)
[73] S. 117 (4)
[74] S. 117 (5)
[75] S. 117 (6).

If a dissenting offeree elects to demand a fair value for his shares, then the offeror may, within 20 days after paying the consideration for the shares to the offeree company under section 117 (6), apply to the court to fix the fair value of the shares of the dissenting offeree.[76] The dissenting offeree may make the application within a further period of 20 days if the offeror fails to make it.[77] If an application is made by a dissenting offeree, all dissenting offerees who made a similar election must be joined as parties and are bound by the decision of the court. The offeror shall notify each affected dissenting offeree of the date and place of the application and of his right to appear and be heard in person or by counsel.[78] The court shall fix the fair value of the shares and may appoint one or more valuers to assist it in the valuation.[79]

The final order of the court shall be made against the offeror in favour of each affected dissenting offeree for the amount of his shares as fixed by the court.[80] And the court may make any order it thinks fit including any of those set out in section 118 (9).

8.0 **Brief Overview**

8.1 **Section 538 Procedure**

This provides a cheap and expeditious method for take-overs and mergers.

8.2 **Section 539**

a. This lacks provision for courts to make facilitatory orders, e.g. vesting of property. It will therefore be more expensive to use.
b. No provision for compulsory acquisition of shares of dissentients but dissent is very unlikely in the present circumstances of bank shareholders.
c. There is the issue of whether meetings of the two companies should be summoned where this provision is used for a merger.
d. The purpose of this section as conceived by the Nigerian Law Reform Commission is dubious. It has resulted in dualisation (S. 539 CAMA, S. 100 ISA) of the procedures for effecting schemes of arrangement none of which is complete in itself.
e. Meaning of majority representing not less than three-fourth in value".

8.3 **Section 100 ISA Procedures**

a. There are no disclosure provisions, i.e. that necessary information be given to shareholders to enable them make proper decision as in S. 540 CAMA.
b. The provision applies only where "the whole or any part of the undertaking or the property of any company concerned in the scheme is to be transferred to

[76] S. 118 (2)
[77] S. 118 (3)
[78] S. 118 95)
[79] S. 118 (6 and (7)
[80] S. 118 (8)

another”. If therefore the arrangement involves only transfer of shares, the section seems not to apply.

c. It has been suggested that the court ordered meeting under section. 100 ISA should be dispensed with as unnecessary and wasteful. The companies involved should hold their separate meetings, obtain the required three-fourth majority, go to SEC and then go to the courts.

d. Under this provision should SEC consider the fairness of a scheme (as in s. 539 CAMA) or is it limited to considering the anti-trust effect – s. 99 (3) (a) ISA. The later position was taken by Odunowo, J in **Costain (WA) Ltd. And Fountain Engineering (Nig) Ltd. V. Securities and Exchange Commission.**

e. Must the court sanction the scheme after SEC’s approval? S. 100 says, “the court shall sanction the Scheme”. It is believed that the court has discretion in the matter.

f. Under section.100, waiting period for acquisition of dissentients’ shares, 4 months and 2 months are too long, and may cause unnecessary delays in bank mergers together with some other required approvals.

g. What happens to employees of acquired banks? One view is that contracts of employment are contracts of personal service, not transferable. But it is argued that transfer of employees’ contracts can be effected under section. 100 by virtue of the definition of liabilities in section. 100 (7). This is the intention of the Nigerian Law Reform Commission.

8.4 Section 103 ISA Procedures

The particulars to be inserted in Directors’ Circular are not stated, except payment to directors for loss of office. Other important information should have been prescribed.

9.0. Role of Some Institutions in Mergers and Acquisitions

9.1. The SEC

The SEC is a regulatory agency, which maintains surveillance over the securities market. It is particularly charged with the duty of “reviewing, approving and regulating mergers, acquisitions and all forms of business combinations”.[81] The S.E.C must ensure that any proposed merger or acquisition does not breach the anti-trust regulations. Thus Section 99 (2)[82] provides that “The Commission shall approve any application made under this section if and only if the Commission finds that-

[81] See s.8(0) ISA
[82] ISA

(a) such acquisition, whether directly or indirectly, of the whole or any part of the equity or other share capital or of the whole or any part of the assets of another company is not likely to cause substantial restraint of competition or tend to create monopoly in any line of business enterprise, or

(b) the use of such shares by voting or granting proxies or otherwise shall not cause substantial restraint of competition or tends to create monopoly in any line of business enterprise".

The alternative grounds mentioned above are grounds, which must be met before SEC's approval may be granted. They are not the only grounds upon which an approval may be refused as Odunowo J. appears to suggest in Costain (West Africa) Ltd and Foundation Engineering (Nig.) Ltd v. Securities and Exchange Commission.[83] In other words, the role of the SEC in reviewing and approving mergers and acquisitions is not limited to preventing anti-trust practices but extends to determining fairness of the proposed merger or acquisition.

In order to facilitate the performance of its role the SEC has, pursuant to section 542(1) (d) CAMA and section 262(1) (e) ISA formulated a set of guidelines on mergers, acquisitions and combinations. The guidelines provide that in order to legally consummate a merger the following three steps should be followed:

i. filing a pre-merger notification
ii. filing a formal application for approval of the proposed merger;
iii. complying with post-approval requirements.

The role of the SEC may be summarized as follows:

1. To determine the fairness of a scheme of arrangement where the scheme is referred to it by the court for that purpose[84]
2. To determine the price payable to a dissenting shareholder in a merger involving a public company or a private company having alien participation[85]
3. To approve a scheme of arrangement effected under section 100.

In granting such approval, the Commission must ensure that the proposed merger will not cause substantial restraint of competition or create monopolies.[86]

4. To grant an authority to proceed with a take-over bid[87]

[83] (1992) 1 Securities Law Report p. 18
[84] See 539(2) CACA
[85] See 538(4) CACA
[86] See 99(3) ISA

In deciding whether or not to grant the authority, the commission shall consider the impact of the proposed take-over bid on the economy of Nigeria and any policy of the government on manpower and development.[88] It follows that the Commission may not grant an authority where a take-over bid, if successful, will result in massive retrenchment.

9.2 The Court [89]

The court plays a major role in effecting mergers and acquisitions. Generally, it ensures that the companies concerned have complied with their articles and memoranda of association and the relevant provisions of the guiding legislation. Its role is more pronounced in mergers and acquisitions effected under sections 539 and 100 procedures. Under section 538 procedure, if within one year from the date of the passing of a special resolution for the winding up of a company for the purpose of transferring its undertakings to another 'company, an order is made under section 310 to 312 for relief on grounds of unfairly prejudicial and oppressive conduct or for the winding up of the company under a creditors voluntary winding up, the arrangement shall not be valid unless sanctioned by the court. This appears to be the only role of the court under section 538 procedure.

In a take-over bid, the court comes in only to determine the right of a dissenting offeree. A dissenting offeree, who elects to demand payment of a fair value for his shares, may apply to the court to fix a fair value for them if the offeror does not make the application to the court within the prescribed period.[90]

Under sections 539 and 100 procedures the role of the court includes:

1. to order meetings of the companies concerned upon an application(s) made to it for that purpose[91]
2. to refer the scheme to the SEC to investigate the fairness of the scheme.[92]
3. to ensure that the resolutions were passed by the requisite majority at a duly convened meeting.[93]
4. to sanction the scheme.[94]
5. to make facilitating orders such as an order for the transfer of the undertaking and property, assets and rights of the transferor company to the transferee company, an order for the dissolution, without winding up, of the transferor company[95]

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[87] See 105 ISA
[88] See 105 (6)
[89] This refers to the Federal High Court, see s. 99(1) ISA
[90] The refers to the Federal High Court, see s. 99(1)ISA

[91] s.118(2) and (3)
[92] s.s.539(1) CACA and 100(1) ISA
[93] s. 539(2) CACA
[94] See Maugham J. in Re Dorman Long & Co. (1934) Ch.635 at 655-7

6. to order that the terms of the offer be varied.[96]

7. to order that the shares of a dissenting offeree be not acquired compulsorily.[97] This is in exercise of its discretion to "order otherwise".[98] This power is rarely exercised by the court except where the applicant adduces strong grounds for objecting e.g. where he shows that the scheme is "obviously unfair, patently unfair, and unfair to the meanest intelligence.[99]

8. to fix the fair value of the shares of a dissenting offeree in a take-over bid.[100]

9.3. **The Central Bank**

The Central Bank of Nigeria has a general oversight on banks. Mergers, acquisitions, reconstructions in the banking sector cannot be effected without the consent of the CBN,[101] Realising the difficulties which some banks may face in achieving the 25 billion naira capital base, the Bank has issued Guidelines and incentives on consolidation in the banking sector. According to the Guidelines the only lawful methods of consolidation allowed are "Mergers and outright acquisition/takeover. A mere group arrangement is not acceptable for the purpose of meeting the 25 billion naira (para 3). Consequently mergers and acquisitions should be accomplished in any of the ways discussed above. Banks which have subsidiaries cannot resort to other arrangements to meet the new capital base.

A number of incentives are provided for banks which consolidate of meet the new capital base timeously. These include authorization to deal in foreign exchange, permission to take public sector deposits and prospects of managing part of Nigeria's external reserves. There will also be tax incentives, reduction in transaction costs, provision of experts to give technical assistance to banks, securing speedy approvals for steps involved in mergers and acquisitions, and the CBN governor's distinguished industry leadership award which is based on specified criteria – speed of completion of the consolidation, successful acquisition of marginal and unsound banks and the number of banks involved in each consolidated group (para. 4).

The CBN will also negotiate the possible write-down of its exposure to the distressed banks that will be acquired as a means of improving their balance sheets as well as the treatment of the distressed banks bad assets. The interests of the owners of the distressed banks in the new arrangement will also be addressed in the negotiation (para 5)

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[95] s. 100 (3)
[96] s. 102 (4)
[97] s. 101(2)
[98] 1 bid
[99] Re Sussex Brick Co. Ltd. (1961) Ch.289, per Vaisey J. See also Maugham J. in Re Hoare & Co. (1934)150 L. T. 374
[100] 118 (6)
[101] S. 7 BOFIA

Paragraph 7.10 of the Guidelines provide that the consideration in respect of all mergers should be by exchange of shares and not monetary payments except where it is necessary to buy off dissenting minority shareholders and provided that such payment does not impair the financial condition of the surviving bank.

The Guidelines also contain provisions on governance of the new organization. Its structure should reflect defined lines of responsibility and hierarchy. Any arrangements to accommodate co-chairman or co-chief executive officer are not allowed. And the number of non-executive directors in the new organization should be more than the number of executive directors subject to a maximum board membership of 20 directors (para.8).

On the social safety side the Guidelines state that the CBN and the NDIC will ensure that banks protect the interests of depositors. Staff who are laid off consequent upon consolidation will be compensated by the new organization in line with industry standards but not below the terms of their sustaining employment. And the CBN will assist disengaged staff to access the SMIEIS fund and set up their own enterprises (para.9).

Banks are urged to be honest in their negotiations and present the actual value of their assets to the other party. Amnesty is granted in respect of any previous misreporting detected in the course of consolidation but not for any false or misleading information to the other party or to the regulatory authorities found after the consolidation (para.10). The scope of this amnesty seems questionable. It may be valid or effective as concerns the CBN but not in relation to third parties.

10. General

Although the legal provisions on mergers and acquisitions need reform in some aspects, they surely will serve the present needs of banks for mergers and acquisitions.

One agrees with the Governor of the Central Bank that the new banking reform will guarantee solid, sound and reliable banking system on which investors would depend and depositors could put their money and go to sleep with their two eyes closed,[102] in addition, of course, to the immense beneficial effect it would have on the economy.

By the Guidelines, the CBN has held out a helping hand to banks which may be unable to meet the new capital base as well as save depositors from the consequences of bank failures. The Nigerian

[102] The Guardian, Thursday July 15, 2004 p.21

Stock Exchange has also offered to assist quoted banks meet the new capital base.[103] There is great hope that all will turn out well for the banks and for the economy.

PROFESSOR C. O. OKONKWO SAN

[103] Ibid, p.1