THE LEGAL REGIME FOR MERGERS AND ACQUISITIONS: A COMPARISON OF THE NIGERIAN AND GERMAN FRAMEWORKS*

Abstract

The prime objective of any company within and outside the Nigeria sphere is growth in the presence of tough competition and reduction of barriers in the way new companies and businesses are floated. It is this strong desire for growth as an imperative for survival that has birthed Mergers and Acquisitions as a preferred route. Mergers and Acquisitions have found its way into the Corporate and Commercial sector of countries the world over. This paper sets out to examine legal regime and frameworks of Mergers and Acquisitions particularly as it affects the Nigerian and German Corporate and Commercial Sectors. In examining the legal regime and frameworks, this paper seeks to define Mergers and Acquisitions; State the rationale for Mergers and Acquisitions; The objective of the Investment And Securities Act(looking at the provisions of the Federal Competition and Consumer Protection Act 2019 which repealed certain provisions of ISA),the Security And Exchange Commission Rules and Regulations 2013 and the Company and Allied Matters Act as it pertains to Mergers and Acquisitions ;Types of Mergers and the principles governing them in Nigeria ,Comparing the German Framework and Legal Regime with that of Nigeria. This paper also makes recommendations for Mergers and Acquisitions in line with international best practices.

Keywords: Mergers, Acquisitions, Legal Regime, Nigeria, Germany

1. Introduction

Mergers and Acquisitions in recent times is becoming an approach adopted by businesses seeking to grow fast. In December 2018, Access Bank merged with Diamond Bank. Earlier before that in February 2018, Zinox Nigeria Company Yudala acquired Konga Nigeria's largest online mall. It is upon this background that this study is being carried out to examine the effect of Mergers and Acquisitions as a strategy for business growth through a comparative case analysis of Mergers and Acquisitions in Nigeria and Germany. One cannot poach on a subject matter such as concerns 'the legal regime for Mergers and Acquisitions: a comparison of Nigerian and German frameworks' without first having an understanding of the concepts Mergers and Acquisitions. The term Merger is used interchangeably by various authors with ' takeover', 'amalgamation', 'transfer of business' from one person or group of persons to another.[1] It is for this reason that a proper definition of the concept is inevitable. As defined by the Investment and Securities Act 2007, Section 119(1), a Merger is 'the amalgamation of the undertaking 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.'[2] The provisions of ISA in Sections 118-120,121(excluding Sections 121(i) (d)), and 122-128 having been repealed by the Federal Competition and Consumer Protection Act 2019, it is appropriate that we look at the definition of Merger from the perspective of the new Act. Section 92 of the Federal Competition and Consumer Protection Act defines Merger thus:'a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.....and this includes...:(i)the purchase or lease of shares, an interest or assets of other undertakings in question. (ii) the amalgamation or other combination with the other undertaking in question or (iii) a joint venture'[3] According to S.O.Akinwale(supra), a Merger can also connote the agreement by two or more companies to come together as one company to maintain a single fund for the new unit or separate funds for each of the original companies.[4] On the other hand, according to Tom

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[1] S.O.Akinwale " Merger and Acquisitions of Financial Institutions in Nigeria: a case study of Insurance Conpany" Archives of Business Research-Vol 16,No 11.Published Nov 25, 2018.

[2] ISA 2007 CAP. Section 119(1) and Rule 227(1) of the Security and Exchange Commission (SEC) Rules and Regulations.

[3] Section 92, FCCPA 2019

[4] S.O. Akinwale Ibid

Speechley,[5] Acquisition within the contest of business combinations (which is the purview of this paper) may be defined as a transaction where an entity acquires control over assets of another entity, either directly or indirectly. Acquisition has not been defined in the ISA 2007 or the new Federal Competition and Consumer Protection Act but it connotes a takeover, in other words, the acquisition of control over the target company. Thus, in business and commercial terms, the expression 'acquisition' is properly used interchangeably with the term 'take over' as distinct from a Merger.[6]

From the above definitions, it can be gleaned, that Mergers and Acquisitions (M & A's) are businesses coming together to form either a new company or one company or more assimilating the existing business of another or others.There happened in the Nigerian Corporate/Commercial Sector an influx of Mergers and Acquisitions in its banking sector post 1995 and 2004 based on the Central Bank of Nigeria(C.B.N) strengthening of the capital base of Nigerian Banks. In 2004, the CBN gave a directive to all banks in Nigeria that any bank that wished to operate in Nigeria after 2005 must, not later than December 2005 have a Shareholder's fund of not less than N25billion instead of N2 billion as at that time.This led to a lot of Mergers and Acquisitions. Also in 2013, there was a Merger and Acquisitions influx in the Nigerian Capital Market following new capitalisation requirements announced by the Securities and Exchange Commission and a similar influx in the Insurance sector in 2007 triggered by NAICOM'S recapitalization directive. A Merger may take the form of an amalgamation of two companies into one of them, for example, as in Re Lipton of Nigeria Ltd[7] in which Lipton of Nigeria Ltd was merged with Lever Brothers Nigeria Ltd;Re John Holt Investment Ltd and John Holt Ltd[8] where the former was merged with the latter, and in Re Chesebrough Products Industries Ltd and Lever Brother Nigeria Ltd where the former was again merged with the latter.The merger may also take the form of an amalgamation of two or more companies into another one formed for the purpose as in Re Bendel Line Co Ltd where the scheme for sanction was that Re Bendel Line Co Ltd,Bendel Intra City Bus Service Ltd and Trans Kalife Ltd be amalgamated under a new company known as Bendel Transport Service Ltd.

2. Rationale for Mergers and Acquisitions.

1) It is a way foreign investors enter into the Nigerian Corporate and Commercial Sector.For example SABMiller bought Pabod breweries, Port-Harcourt where it owns 57% and Voltric Lagos where it owns 80% respectively. Also, in 2011 SABMiller acquired the majority share in International Breweries Ilesha, manufacturers of Trophy Larger and also took control of the ownership of Hero. 2)It is a way companies try to expand their business thereby extending their tentacles.

3. Types of Mergers in Nigeria

According to Dimgba et al,[9] Mergers are broadly of three types notably horizontal, vertical and conglomerate. Horizontal Merger is a combination of businesses in the same level within the same industry to eliminate or reduce competition.[10] In recent years the vast majority of Mergers in Nigeria have all been horizontal.[11] The reason for this is not far-fetched from the fact that there is a desirable effect of reduction in competition that results from this type of Merger and greater likelihood of achieving economies of scale through elimination of facility duplication.[12] Vertical Merger occurs where two or more distinct enterprises engage in the same Industry but operating at different levels in the process of production and selling of the product combine, for example on producing raw materials and the other final products.[13] The object of this type of Merger is usually to ensure supply or an outlet for products and services but the effect may be to improve efficiency by increasing flow of production

[5] T. Speechley, *Acquisition Finance*" (2nd Edition), Tottel Publishing Ltd 2008.

[6] J.O. Orojo (2008) *Company Law And Practice in Nigeria*. (Fifth Edition).Published by Lexis Nexis Butterworths . Page 339-340

[7] Suit No FHC/L/M21/81 of 5th June 1985(unreported)

[8] Suit No FHC/L/M68/87 of 18th May 1987(unreported)

[9] N. Dimgba et al Article on *Law and Practice of Mergers and Acquisitions in Nigeria* Page 2

[10]Orojo (2008) ,(Ibid) Page 340

[11] M.A. Weinberg, M. V. Blank, A. L. Grey Stock, *Takeovers and Mergers*(14th Edition),Sweet & Maxwell(1979)

[12] The merger of Dangote Cement Plc and Benue Cement Limited in 2009 is apt example.

[13]Orojo (Ibid)

and reducing stockholding and handling costs.[14] In Conglomerate Merger, business in unrelated or indirectly related industries are combined which have no vertical or horizontal relationships.

4. The Convergence between Mergers and Acquisitions

In practical terms, there exist points of convergence between Mergers and Acquisitions such that the types of mergers can be described also as the types of Acquisitions (take overs).[15] The divergence between Mergers and Acquisitions are somewhat neutralised by law and the Regulator through tight legislative drafting made to avoid leaking and ensure no transaction type escapes regulation. Merger rules in many jurisdictions are usually expansive and far reaching to catch all forms of Acquisitions. In some jurisdictions for instance, an acquisition and sale of assets may be deemed by the courts as a ‘ de facto merger’ or a ‘mere continuation’ of the transferor company, if it bears indicia of a statutory merger.[16] Some of these indicias are: a)Use of the acquiring company’s shares as consideration resulting in Shareholders of the transferor company owning shares of the acquiring company, b) reduction of transferor company's shareholders' interest in the surviving company and c) eventual passage of control in the transferors company to the acquiring company.[17] In Nigeria, the Scope of what constitutes a Merger is even more complicated looking at the ISA 2007 and the new operational Act Federal Competition and Consumer Protection Act (FCCPA)2019 as the definition of Merger in both the ISA and the current Act appears wide enough to capture even Acquisitions. The ISA provided that the amalgamation it referred to in Section 119 can be achieved IN ANY MANNER which may even include (i) purchase or lease of the shares, interest or assets of the other company in question (clearly coming within the sphere of a traditional acquisition) or (ii) amalgamation or other combination with the other company in question.[18]

Under the new Act (FCCPA 2019) Section 92(2), the act goes further to explain when an undertaking has control over the business of another undertaking to mean where the said undertaking:- a) beneficially owns more than one half of the issued share capital or assets of the undertaking, b)Is entitled to cast a majority of the votes that may be cast at a general meeting of the undertaking or has the ability to control the voting of the majority of those votes, either directly or through a controlled entity of that undertaking, c)Is able to appoint or to veto the appointment of a majority of the directors of the undertaking, d)Is a holding company, and the undertaking is a subsidiary of that company as contemplated under the Companies and Allied Matters Act, e)In the case of an undertaking that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust, f)has the ability to materially influence the policy of the undertaking in a manner comparable to a person who in ordinary commercial practice, can exercise an element of control referred to in paragraph (a) to (f). According to Dimgba et al,[19] the question of whether a transaction is a merger or an acquisition is effectively one of markets accepted practice and the legal procedure adopted in effecting the transaction. Explaining further, they said that it is unlikely that a transaction will be classified as a merger in Nigeria if it only involves an acquisition of all the shares of a private company by another company even though it may be viewed as coming under the statutory definition of a Merger. It is for this reason that our discussion of M & A in this paper will be discussed together with focus on M & A principles, laws and Regulations while downplaying on the distinctions.

5. Nigerian Legal Regime and Frameworks for Mergers and Acquisitions

The experience of Mergers and Acquisitions in Nigeria has been progressive. The Country did not witness any successful Mergers and Acquisitions in the real sector of the Economy until the period of

[14]Dimgba et al (Ibid)Page 3
[15]Orojo (Ibid)
[16] B. F. Egan, ’Asset Acquisitions: Assuming and Avoiding Liabilities’, *Penn State Law Review* Vol 116,2012, Pg 222
[17]It should be noted that where the consideration for the acquisition of assets is cash, it is less likely to be deemed evidence of a merger than would be the case if shares were used as consideration as that would resultin shareholders of the transferor owning a percentage of the acquiring company.
[18] Section 119 of ISA 2007.
[19] Dimgba et al, (Ibid)Page4

1983 and 1996.[20]Indeed even during these periods, only very few business entities merged and as such, no real impact was felt.[21]The apex regulatory Institution in relation to Merger control used to be the Securities and Exchange Commission (SEC).SEC performed all pervasive roles in merger control in Nigeria. It received premerger notifications, formal applications and gives approval before any merger can be completed. It also ensures that all post-merger requirements are met. However, with the signing into law of the Federal Competition and Consumer Protection Act which now established the Federal Competition and Consumer Protection Commission, the Commission is to now take over the function of SEC as it pertains to Mergers. In Nigeria, Merger, Acquisitions and business combinations between or among companies were generally subject to prior review and approval by the Securities and Exchange Commission (but this will change now as Section. 93 of the Federal Competition and Consumer Protection Act (FCCPA) 2019 now provides that approval shall be done by the Federal Competition and Consumer Protection Commission) other than in specific circumstances.[22] It is a condition that applications for such approval must include evidence that the relevant sector regulator (where applicable) has no objective to the relevant transaction. For instance:- a)The Central Bank of Nigeria regulates participants in the banking financial services sector;[23] b)The Nigerian Communication Commission regulates participants and certain transactions in the telecommunications, media and technology sector; c)The National Pension Commission regulates participants in the pension Sector; d)The National Insurance Commission regulates participants in the Insurance sector; e)The National Agency for Food and Drug Administration regulates participants in the food, beverages and drugs sectors. f) The Minister of Petroleum Resources usually acting through the Department of Petroleum Resources (DPR) regulates M& A activity in the Oil and Gas sector together with the Nigerian Content Development and Monitoring Board, which regulates local content issues in all transactions; and g)The National Electricity Regulatory Commission which regulates participants in the energy sectors. It should be noted that Sector regulators such as CBN, DPR (acting for Minister for Petroleum), the NCC and NAICOM independently regulate M & A activity in their relevant sectors, subject to prescribed triggering conditions and for thresholds. M & A activity involving publicly listed companies is also subject to the regulation of the Nigerian Stock Exchange (NSE).[24] The Corporate Affairs Commission established under the Companies and Allied Matters Act 1990(CAMA) CAP C20 LFN 2004 plays a part in the merger process by receiving Corporate Filings and Certifying corporate resolutions and deregistration of any dissolved companies that may occur in the merger process.[25] Quoted Companies need to meet the listing rules of the Nigerian Stock Exchange (NSE) on Merger transactions. Listed companies are to submit to the NSE drafts of all circulars issued by the company to its shareholders; they are also required to disclose any conflict-of-interest issues between directors of merging companies. They also delist any company that needs to be delisted as a result of Merger.[26]

The Federal High Court (FHC) made orders for Shareholders' meetings to consider the merger scheme. It also sanctioned the merger scheme under ISA 2007.[27]This is however missing under the new FCCPA 2019.It appears that Mergers may no longer require the sanction of the court and can be implemented once approval of the Commission is obtained. Under ISA, the scheme of Merger becomes binding on the Shareholders upon sanction of the scheme by the court with orders including cancellation of the issued share capital of the absorbed company, transfer of the asset/liabilities of the absorbed company to the enlarged entity and the dissolution of the absorbed company without being wound up.e.t.c.

[20]Ajogwu Fabian (2011) Merger & Acquisition: Opportunities and Pitfalls, Journal of Law, Faculty of Law, University of Ibadan, Vol 1 No 1 Oct 2011,30th Anniversary Edition. Pp 1-35

[21]J. O. Udoidem & I. A. Acha, Corporate Restructuring through Mergers and Acquisitions :Experience from Nigeria,(2012) Journal of Economics and Sustainable Development. Vol 3, No 13, Please note that the first merger attempt on Nigerian shores was in 1992 between United Nigerian Insurance Company Ltd and United Life Insurance Company Ltd which was not consummated.

[22] FCCPA 2019 Section93

[23]The Banks And Other Financial Institution Act 1991, Section 7(1)(c)

[24]Folake Elias-Adebowale, et al " Corporate M & A-Chambers Global Practice Guides contributed by Udo Udoma & Belo Osagie Law Firm.

[25]Anthony Idigbe and Ogoegbunam N. Okafor, Nigeria: Merger Control 2015" .Last Updated 23 June 2017. www.mondaq.com/Nigeria

[26] Ibid

[27] Ibid

Without a court order contemplated under the new Act, there appears to be a gap in the law and a lot of questions begging to be answered. Some of which are: a) How will the absorbed company be dissolved or how will its assets/liabilities transfer to the enlarged entity? b) Would the Commission's approval suffice for these purposes? c) Would parties still approach the court for sanction of the scheme?

The FCCPA 2019

With the signing into law of the Federal Competition and Consumer Protection Act 2019, in February 2019, the Act is now to be the key legislation on Mergers. The Act makes provision for the creation of the Federal Competition and Consumer Protection Commission which will act as the Competition regulator to prevent and punish anti competition practices, regulate mergers, takeovers and Acquisitions, and protect regulated industries in every sector and location of Nigeria. It also proposes the creation of a Competition and Consumer Protection Tribunal to deal with any disputes and concerns which may arise.

The Act repealed Merger provisions in ISA 2007 and Consumer Protection Act 2003.It is worthy to note that the legislation has been modeled to a great extent on the European Union Competition Law derived primarily from Articles 101 to 106 of the Treaty on the functioning of the European Union. Under the Act, the definition of Merger has been extended to include ‘Joint Venture’. This could have far- reaching effect for proposed or current Joint Venture (JV) arrangements as the Act does not define what type of joint venture falls within the control of the Commission or how a Merger could be achieved via a JV arrangement. An example of this controversy is seen in the case of a JV arrangement as enshrined in the Oil and Gas Sector where two or more parties come together to fund oil exploration. It is not clear if a JV of the above nature is contemplated as a Merger under the FCCPA.[28] FCCPA 2019 did not repeal Section 121(i)(d) of ISA meaning that in addition to the approval by the Federal Competition and Consumer Protection Commission, SEC approval will still be obtained to determine whether all shareholders are fairly, equitably and similarly treated and given sufficient information regarding the merger. Under Part 1, Section 2(3)(d) there is a provision on the application of the Act to transactions relating to acquisition of shares or other assets outside Nigeria resulting in a change of control of a business, part of a business or any asset of a business in Nigeria. From the Act, it is envisaged that a change in the ownership of an offshore parent of a Nigerian entity that results in a change of control of the Nigerian business would typically fall within the purview of the Act. An instance is where Company XYZ (German multinational) acquires majority shareholding in Company ABC another German Company that has a wholly owned subsidiary in Nigeria and this offshore transaction results in a change of ownership/control of the Nigerian subsidiary, this transaction could be deemed a Merger under the new Act.

6. German Legal Regime and Frameworks for Mergers and Acquisitions

Mergers and Acquisition activities in Germany just like in Nigeria became relevant fairly in comparison with the Anglo-Saxon jurisdictions in the mid 1980s.It was only until then that Mergers and Acquisitions became a common business practice of market participation.[29] As a fall back of the reunion of East and West Germany, a large number of former State owned enterprises in East Germany were privatised by the government in a controlled process involving many Mergers and Acquisitions (M & A) transactions.[30] M & A activities in Germany were aided by political and economic integration of Europe and in particular Europe's enlargement towards the East given Germany's central location with Europe and economic strength as one of the biggest exporters in the world. The M & A potential of Germany was remarkably increased by parallel trends such as the restructuring of many German market participants from partnership into capital companies and the disentanglement of the cross holding of the leading private industry conglomerates due to corporate governance campaigns.[31] Right from the very beginning, Germany had a mature jurisdiction making provision for detailed public and civil law

[28]Ogochukwu Isiadinso and Emmanuel Omoji, Nigeria:The Federal Competition and Act 2019:Regulatory Implications in Nigeria.

[29] BASK SE et al, Mergers and Acquisitions in Germany in Germany Trade and Invest. www.gtai.com. Accessed 24/8/19

[30] Ibid

[31] Ibid

as well as legal certainty, legal conditions relevant for a functioning and well structured M & A .Towards the end of the 1990s Germany introduced into its market attributes applicable and already in use in Anglo- Saxon jurisdictions such as bidding processes and performance of different forms of due diligence.[32]The main source of regulation for public take overs in Germany is the Take Over Act, as amended in 2006 to implement the EU Take Over Directive as well as the German Stock Corporation Act, which provides the general framework of the Corporate legislation pertaining to German Stock Corporation. In addition, provisions of the German Securities Trading Act, including provisions on the disclosure of holdings of listed securities and certain other instruments ,are relevant in connection with any public takeover relating to German target companies(or in some respects, companies with securities that are listed at a German Stock Exchange.)[33] The volume of deals with German involvement(as bidder,seller or target) increased again by about 40 percent from US $90.3 billion in 2016 to US $126.3 billion in 2017.Most notable was the merger of Linde AG and Praxair Inc (US $45.5 billion), the combining of Siemens' mobility business with Alstom SA(US $8.7 billion) and the acquisition of Ista International GmbH by Sarvana S.A.R.L.(US $7.3 billion)[34]

7. Comparing the Nigerian and German Legal Regime and Frameworks on Mergers and Acquisition

(1) M & A transactions in Germany are not subject to approvals from trade unions and other employees' associations. Though German Labour Law foresees certain rights for company work counsels to involve and discuss the company's business matters, which involvement, has proven over the past to help build a stable and harmonious relationship between the employer and the employees.[35] However, under the Nigerian Framework, as provided under Section 96(3) of the FCCPA 2019 provides for a notification of trade union or employees of the target and acquiring undertaking.[36] (2) Germany like most jurisdictions requires notifications of transactions in cases where the parties meet certain turnover threshold. The scope of transactions covered is far reaching compared to other jurisdictions. The Federal Cartel Office (FCO) examined 1100 mergers in 2013.Phase II examination was necessary in just 18 cases. Of these 18 cases, six were cleared by FCO. It is therefore advisable to seek advice from a qualified lawyer on requirements of notification by the competent authority. According to $ 35 ARC (Act Against Restrictions of Competition), a concentration is in principle notifiable in the following circumstance:- (i)Where the aggregate global turnover of all companies concerned exceeds EUR 500 million and ii) the domestic turnover of (x) at least one company concerned is more than EUR 25 million and (y) that of another undertaking concerned in more than EUR 5 million.

However, there is an exception that no filing obligation exists when these thresholds are met when a company that is not an affiliate or subsidiary of another company had a worldwide turnover of less than EUR 10 million in the last business year and the enterprise merger with another undertaking. The rationale for this is that private owners of small companies should be able to sell their business at the end of their working life in instances where there is no heir apparent.[37] In Nigeria, under the Rule 427 of the SEC Rules and Regulation 2013,[38] the rules provided for threshold for Mergers. It puts the lower threshold for a small merger below N1,000,000,000(one billion naira) and an intermediate merger between N1,000,000,000(one billion naira) and N5,000,000,000(five billion naira) while a large merger is above N5,000,000,000(five billion naira). The determination of these thresholds is calculated by either combined assets or turnover or a combination of both assets and turn over in Nigeria. Under the FCCPA 2019, there is no provision for threshold. The Act just provides in its Section 92(4) and Section 93 that the threshold shall be stipulated by the Commission through a Regulation.[39]The Federal Competition and Consumer Protection Commission is taking steps to invite submissions on the proposal

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[32] Ibid Page 10

[33]Heinrish Knepper Online Article in *The Law Review,* "*The Merger & Acquisition Review*" Edition 12, Published in September 2018. www:https://thelawreviews.co.uk/edition/

[34] Ibid

[35] Ibid Page 7

[36] FCCPA 2019 Section 96(3)

[37] Ibid Page 49

[38] SEC Rules and Regulations 2013, Rule427

[39] FCCPA 2019, Section 92(4) and 93

of threshold from the public. (3) Under the German framework they have threshold specification dividing company types into small and large company. In Nigeria under the SEC Rules there was threshold and a division into small, intermediate and large merger. However, with the FCCPA 2019, the act does not provides the threshold but there appears to be an omission of intermediate mergers leaving only small and large mergers. This makes the Nigerian and German frameworks to be somewhat similar. (4) In Germany, a breach of the duties of managing director(s) may give rise to a claim for damages of the GmbH, shareholders, and/or third parties against the managing director(s) personally and may justify a dismissal of the managing director(s) for cause. In addition, non-compliance with certain duties may lead to further sanctions, e.g. authorize the courts or governmental authorities to impose fines in order to enforce compliance with statutory law. The GmbH may also be subject to administrative and/or criminal penalties. A conviction of a managing director for certain crimes relating to breaches of the duties of the managing director(s) (e.g. the duties relating to the insolvency of the GmbH, fraud or embezzlement) leads to a disqualification to exercise the office of a managing director.[40] In Nigeria the FCCPA 2019 introduces monetary penalties for Regulatory Infractions under its Sections. (5) German tax laws require aside tax due diligence procedure, a customized acquisition structure. Therefore, tax advice should be sought early in the process of Mergers.[41] In Nigeria it is advised that both the acquiring undertaking and the target undertaking make prenuptial tax considerations. According to Fatai Folarin,[42]it is useful to raise the following tax considerations for M &A purposes:- What is the targets level of task compliance with respect to Companies Income Tax(CIT),Tertiary Education Tax(TET),Capital Gains TAx(CGT),Information Technology Levy and payroll related taxes? What are the available tax assets (e.g. unrelieved capital allowances, unabsorbed tax losses, unutilized WHT credits etc) on the target books? What is the quantum of non- allowable tax expenses and/or deductions in the target's tax position? e.g. filling fees, stamp duties, etc? What are the prospects for applicability of the commencement and/ or cessation tax rules post- combination given their potential for double taxation? Commencement/Cessation Rules can be waived for the company under the approval of Federal Inland Revenue Services (FIRS). This enable counterparties to manage the incidence of double tax on overlapping profits and the cumbersome computation of tax profits under both rules. Getting the above tax advise assists the parties to an M &A transaction to forestall inheriting unwielding tax burdens in the surviving and / or resulting company after M& A is sealed. (6) Just like in Nigeria where we have the FCCPA 2019, Germany had for some time already had a competition law set out in the Seventh Chapter of the Act Against Restrictions of Competition. German industrial policy just like Nigeria's follows the principles of the social market economy. The government creates a policy environment that promotes innovation and investment to ensure a dynamic economic development and fair competition ('level playing field'). (7) In Germany while upon the acquisition of all shares in the target company the investor is in full control of the target company, the acquisition of only a portion of the shares in the target company results in a joint venture among the investor and the remaining shareholder(s) of the target company. In a joint venture, the investor will have to leave a certain amount of control over the target company to the remaining shareholder(s) or, depending on the circumstances, may exercise joint control together with the remaining shareholder(s). This shows that joint venture is contemplated in the German framework just like we now have under the FCCPA 2019. (8) In Germany Stock Corporations (AGs) generally are prohibited from giving financial assistance to a potential buyer of her shares. For an AG such provision of financial assistance would be void. Limited Liability Companies (GmbHs) are restricted by the rules on capital contributions and capital maintenance from giving financial assistance to a potential buyer of their shares. The respective funds would have to be reimbursed to the GmbH and the managing director(s) can be liable for damages caused by the payments. Apart from the company itself, though it is somewhat rare in Germany presently, there are situations where the giver of the undertaking may be willing to give financial assistance to the person (company) acquiring for example through mechanisms deferring the payment of the purchase price or by granting a vendor loan. The exceptions are: (a) Credit institutions or financial institutions trading their own shares. (b) AGs selling shares to their own employees or to employees of affiliated companies

[40] BASK SE et al, Ibid Page 56
[41] Ibid, Page7
[42]Fatai Folarin, Mergers & Acquisitions in Nigeria: What are the Prenuptial Tax Considerations? on Deloitte Nigeria. Accessed 24/8/19.

(c) Certain transactions in the context of group companies having concluded enterprise agreement (such as a domination and profit and loss transfer agreement) under the Stock Corporation Act (d) Shareholder loans and similar Instruments such as upstream a Security. In Nigeria, Limited Liability Companies are also restricted by Capital Maintenance Rule from giving financial assistance to potential buyers of their shares. (9)In Germany, under the provisions of the Civil Code relating to the transfer of an undertaking or dismissal of an employee on the sole reason of a transfer of an undertaking is void. This applies to dismissal by both the seller and purchaser in an asset sale. Generally, employees are protected against dismissals by the Dismissal Protection Act (Kundigungsschutzgest) (KSchG) which applies to employees with more than six months of service at companies that employ more than ten employees on a regular basis. The Dismissal Protection Act contains high hurdles for employers and the following exhaustive reasons for termination:- (a)The Conduct(verhaltensbedingt) of the employee (b)The person (personenbedingt) of the employee and (c)Operational reasons. There is also special protection against dismissal for certain groups, such as pregnant employees (maternity protection provisions were informed in 2018 and now also cover, among others, managing directors of a GmbH), employees under a disability or members of employee respective bodies. Additional dismissal protection is often contained in collective bargaining agreements (Tarifvertrage) for example for employees above a certain age with multiple years of service. In Nigeria the reasons for termination have to be for misconduct, incompetence, disobedience or negligence. The International Labour Organization Termination of Employment Convention which applies in Nigeria states that a person’s employment can be terminated based on Operational Requirements of the Organization: e.g. redundancy or mergers or transfer of undertaking. I will be correct to say in Nigeria employment cannot be terminated solely due to transfer of undertaking.

8. Conclusion and Recommendations for Reform

In conclusion, I recommend that the Federal Competition and Consumer Protection Commission provide guidelines on the type of JV arrangement contemplated in the Act as Merger quickly make its Regulations and Rules to provide for threshold in merger transactions and also clarify the issue whether a court still needs to sanction the Merger scheme.