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A – Z OF CORPORATE REORGANISATIONS IN NIGERIA

Olayemi Anyanechi
Managing Partner, Sefton Fross

Introduction

With businesses around the world severely impacted by the Covid-19 pandemic, many may require some form of restructuring in the near future. Even before the pandemic, several sectors in the Nigerian economy were primed for reorganisation, either to meet regulatory requirements, maximise performance or stay afloat, increase economies of scale, increase market share or diversify the company's business.

While mergers and acquisitions remain the most popular form of corporate restructuring, there are other methods of corporate reorganisations.

Corporate re-organisations

Corporate reorganisation can be defined as a change in the structure or ownership of an organisation through merger, combination, acquisition, divestment, etc, to increase its long-term profitability.

In the context of business combinations, a merger is the coming together of two or more enterprises for the mutual sharing of the risks and rewards of the combined enterprise. An acquisition on the other hand requires the taking possession of substantial number of shares by an acquirer in another company (target), while the acquirer and the target remain separate entities. A divestment is the mirror imagine of an acquisition, viewed from the lens of the target of an acquisition. Other types of corporate reorganisations which will be discussed later on in this Series revolve around these two main structures and are variants of one or the other.

The Federal Competition and Consumer Protection Act (**FCCPA**) which is the principal law regulating corporate reorganisations in Nigeria provides that 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.*"

While the term "*merger*" under the FCCPA is admittedly quite wide, it must lead to the direct or indirect acquisition or control over another undertaking for it to come under the purview of the FCCPA. Under the FCCPA, control of by undertaking over the business of another (**target**) involves (amongst others) the direct or indirect:

(a). ownership of more than 50% of the issued share capital or assets of the target;

(b). entitlement to cast or control a majority of the votes at a general meeting of the target;

(c). ability to appoint or to veto the appointment of a majority of the directors of the target;

(d). ability to materially influence the policy of the target.

Thus, an unincorporated joint venture where parties work together to do a business or manage an asset without controlling one or the other would not fall within the context of "mergers" under the FCCPA.

That having been said, in this article, the term "reorganisation" or "merger" will be used interchangeably to describe all types of corporate restructuring, business combinations, no matter how achieved, depending on the context.

Legal framework for reorganisations in Nigeria

Prior to the FCCPA, reorganisations were regulated by the Investments and Securities Act, 2007 (**ISA**) and the Securities and Exchange Rules and Regulations 2013, made pursuant to the ISA, as amended and updated from time to time (**SEC Rules**). The ISA and SEC Rules continue to be relevant to reorganisations involving public companies. The Companies and Allied Matters Act (**CAMA**), being the principal law governing the establishment and maintenance of companies in Nigeria, also impacts notably on reorganisations. The Company Proceeding Rules expands on the CAMA and provides for certain procedures for merger implementation. The Nigerian Stock Exchange (**NSE**) comes in on reorganisations involving publicly quoted companies. In addition to the above, there are sector-specific laws which govern reorganisations of regulated companies.

It is instructive to note that the FCCPA now regulates foreign-to foreign mergers with Nigerian component. A foreign-to foreign merger with Nigerian component is the acquisition by one person of shares or other assets outside Nigeria which results in the change of control of a business, part of a business or any asset of a business, in Nigeria.

No merger or acquisition should be undertaken by a company without obtaining prior direction as to the manner of assessment of its taxable income from the Federal Inland Revenue Service (**FIRS**). Accordingly, the Companies Income Tax Act, the Petroleum Profits Tax Act and the Capital Gains Tax Act may be significant considerations in merger implementation. The tax considerations will depend on the manner in which the proposed reorganisation is structured, and the amendments made to the Finance Act 2019, may significantly impact on structuring of reorganisations, going forward. Lastly, all documents executed in Nigeria or concerning a matter or thing to be done in Nigeria must be stamped pursuant to the Stamp Duties Act, and stamp duties costs must be factored into the structuring of the reorganisation.

Depending on the transaction structure, the Federal High Court may be required to give orders convening court-ordered meetings and sanction reorganisations, for completion.

Thresholds for mergers

For a merger to be subject to merger control, it must fall within the threshold for mergers. At the moment, the thresholds for mergers continues to be that prescribed under existing SEC Rules as follows:

- **Small merger** – where the combination of assets or turnovers of the merging companies is below One Billion Naira.
- **Intermediate merger** – where the combination of assets or turnovers of the merging companies is between One Billion Naira and Five Billion Naira.
- **Large reorganisations** – where the combination of assets or turnovers of the merging companies is above Five Billion Naira.

The threshold for foreign-to-foreign mergers are provided under the FCCPC Foreign-to-Foreign Guidelines and mirrors the threshold for domestic mergers.

It is noteworthy that the FCCPA categorises mergers only as either small or large. While large mergers are required to notify and obtain approval from the FCCPC, small mergers do not require such notification unless the FCCPC determines, within six months of consummation of that merger, that it will hamper competition.

Under the FCCPA, a merger may be achieved in any manner, including through the purchase or lease of the shares, an interest or assets of the other undertaking, the amalgamation or other combination with the other undertaking, or a joint venture. Accordingly, the next article in the Series will focus on types of corporate reorganisation, including arrangements and compromise, take-overs, reduction of capital and demergers.

At the end of the Series, readers should have an understanding of what reorganisations entail, gain insight about the legal framework, transaction structures, issues and how they may be addressed, and an overall broad view of the mechanics of reorganisations in Nigeria.

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