Mergers and acquisitions in Nigeria: current issues

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Introduction
Nigeria at the moment offers a lot of potential returns for investors. Analysts predict that Nigeria will obtain the highest average GDP growth in the world in the next 40 years. It is currently the largest economy in West Africa and the second largest in Africa. Due to its size and strategic location it is regarded as a major port of entry into other parts of Africa. Internally, the recent successful elections have led to increased interest in investment opportunities.

The Nigerian business environment is no stranger to mergers and acquisitions (M&A), especially in the financial sector. In recent years numerous successful deals, some involving Chinese companies, have been concluded.

Regulatory framework
In Nigeria, a business combination may take the form of a merger, a purchase of shares, an acquisition of assets or an arrangement, compromise or reconstruction amongst or between companies. Business combinations are generally subject to the approval of the Securities and Exchange Commission (SEC) and the principal law that regulates business combinations in Nigeria is the Investments and Securities Act 2007 (ISA 2007), along with the Rules and Regulations of the Securities and Exchange Commission (SEC Rules).

In addition, all companies are subject to the authority of the Corporate Affairs Commission (in respect of all their operations) and the Federal Inland Revenue Service (in respect of taxation). The Federal High Court orders the merging companies to hold meetings and will sanction the resulting mergers. Additional laws may apply, depending on the industry in which the merging companies operate. For example, the banking, broadcasting, electricity, insurance, oil and gas and telecommunications industries all have industry-specific legislation and applicable regulatory authorities.

Nigerian SEC rules provide for mergers defined by three thresholds, which are determined by valuing either the combined assets or turnover, or the combined assets and turnover of the merging companies. They are as follows:

- Small merger threshold, below 250 million naira (or N);
- Intermediate merger threshold, between N250 million and N5 billion; and
- Upper merger threshold, above N5 billion.

Reasons for M&A
The acquisition of a Nigerian entity is the preferred way for foreign investors to gain entry into the Nigerian business market. This is due to the fact that an acquisition provides access to existing structures, possibly with any required permits and assets in place.

For example, United Africa Company of Nigeria Plc has sold part of its food division to South Africa’s Tiger Brands, while Singaporean Olam International recently acquired a company that resulted from a merger of Crown Flour Mills Limited, Mix & Bake Flour Mills Limited and Interstate Flour Mills Industries Limited. SAB Miller Plc acquired two Nigerian companies and Airtel has had numerous foreign owners, the latest being Bharti Airtel.

Another reason is to increase market share through merging with or buying out smaller rivals. This was the case with the recent merger between Benue Cement Company Plc and Dangote Cement Plc. In addition, Heineken NV has acquired two holding companies in the Sona Group and in turn its Nigerian subsidiary, Nigerian Breweries Plc, is in discussions to acquire part of that interest.

Finally, it is a way of avoiding being pushed out of the market. This is the option that several banks (including foreign-owned banks) took following the recent capitalisation programmes in the banking and insurance industries.

Issues for foreign investors to note
It should be noted that the SEC approves a business combination only if it finds that it is unlikely to cause substantial hindrance to competition or create a monopoly...
in any line of business enterprise, an exception to the rule being if one of the parties is able to prove that it is failing and a merger is the only way to maintain continuity.

By virtue of the provisions of the Nigerian Investment Promotion Commission Act 1995, Nigeria now allows businesses to be wholly foreign-owned and guarantees foreign investors the unconditional transfer of the net proceeds of their investments through authorised dealers. This has created more opportunities for foreign investors as they no longer need to partner with Nigerians in their business operations. In spite of the freedom given by the Act, however, working with Nigeria partners is highly recommended as it indicates commitment to investing in Nigeria on a long-term basis.

There are, however, exceptions to the rule on the freedom of foreign participation. Both Nigerians and foreigners are prohibited from carrying out activities on the Negative List. This includes the production of arms and ammunition, narcotic drugs and psychotropic substances and military and para-military wears and accoutrements (see the Nigerian Investment Promotion Commission Act 1995).

The services of local specialists are required to conduct a successful business combination. This is due to their particular knowledge of and insight into the Nigerian business environment. Lawyers, accountants, tax consultants, actuaries, as well as IT analysts, will all be able to provide specialist advice. Their services are necessary for liaising with the regulatory authorities, as well as negotiating with trade unions and other stakeholders. In any case, certain actions can only be performed by professionals with accreditation from the relevant Nigerian professional body.

At any stage of a business combination, compliance with the law is essential. In respect of tax, no merger, take-over, transfer or restructuring of a business can take place without the prior direction and clearance of the Federal Inland Revenue Service with respect to capital gains tax. Capital gains tax is not chargeable in respect of any gains arising from the acquisition of the shares of a company that has either been taken over or merged so that the company loses its identity as a limited company. This is on condition that no cash payment is made in respect of the shares acquired.

In the oil and gas industry in particular, the recently passed Nigerian Oil and Gas Industry Content Development Act 2010 requires participants in the oil and gas industry who make use of consulting services to obtain a proportion of those from within Nigeria. In general, limits have been prescribed in respect of the level of foreign participation in the industry.

Trade unions can wield considerable influence and effectively stall a transaction. It is advisable to keep them informed of developments as they arise. Some collective agreements between unions and management may require the permission of those unions involved before a change in ownership can be effected.

A due diligence exercise is a necessity for any business combination. It will provide more information on the companies and allow for early mitigation of any concerns or risks uncovered. This should include verification with the appropriate authorities such as the Corporate Affairs Commission (CAC), Trade Mark Registry, Lands Registries and the courts.

It should further be noted that any Nigerian company with foreign participation should have a minimum share capital of N50 million, which is expected to be divided into shares of a fixed value. The Federal Ministry of Interior recently has also adopted a policy to the effect that companies applying for permission to have foreign participation must show evidence of investment in Nigeria of US$300,000 or its naira equivalent.

What next?
The Nigerian business environment offers promising opportunities for foreign investors. This favourable investment climate has been bolstered by the removal of restrictions on foreign participation, the recent successful elections, encouraging predictions for growth and a history of successful involvement of foreigners in the Nigerian market.