



Takeover of Companies as a Restructuring Option Under Nigerian Corporate Laws: Need for Harmonization

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ABSTRACT

Before the Companies and Allied Matters Act 1990 was repealed, takeover was under the realm of Investment and Securities Act 2007 but with the coming into force of Companies and Allied Matters 2020, new provisions were inserted providing for takeover. These provisions provided for 90% threshold of shares to be acquired by the transferee/acquiring company as opposed to that provided under ISA which is pegged at not less than 30% but not more than 50% shares. These discrepancies amongst others is the reason behind the need for harmonization of laws regulating corporate takeovers in Nigeria. This article recommends amongst others that in order to have a single law regulating takeover of companies in Nigeria, the sections providing for takeover in CAMA 2020 be expunged for CAMA and moved to ISA. This will bring these provisions under the realm of ISA and if need be takeover can be classified to accommodate the difference in threshold.

INTRODUCTION

Takeover is an option of corporate restructuring where a company (referred to as the acquiring company) acquires majority shares of another company (referred to as the acquired company) in order for the acquiring company to have control over the acquired company. This usually happens under corporate restructuring where a company is in trauma and need to be rescued. In order to save the traumatized company from liquidation and winding up, the acquiring company takes over the control over the affairs of the traumatized company by acquiring majority of its shares¹. This keeps the acquired company afloat, that is, it still remains a going concern.

Before the coming into force of Companies and Allied Matters Act 2020,² takeover of companies was not covered under CAMA 1990, reliance was made only on the provisions of Investment and Securities Act 2007 and the Securities and Exchange Commission Rules 2013³. Under the ISA, the threshold for takeover is acquiring not less than 30% but not more than 50%⁴ of shares of the acquired company and the takeover bid⁵ must be made against not less than 20 persons who control at least 60%⁶ of the net asset of a public quoted company.⁷

With the enactment of CAMA 2020, two new provisions⁸ were inserted directed at takeover offers “*not being a take-over bid under the ISA*”⁹. These provisions are meant to tidy up such schemes or contracts where an (transferee company, that is, the acquiring company) has achieved a 90%

¹ S. B. Gupta, “Mergers and Takeovers of Companies/Financial Restructuring”, www.youarticlelibrary.com/financial-management/financial-restructuring/mergers-and-takeovers-of-companies-financial-restructuring, accessed on 6/9/22

² Hereinafter, referred to as CAMA 2020. The 2020 Act replaces the CAMA Cap. C20 LFN, 2004. The 2020 Act was signed on 7th August, 2020 and becomes operational in January 2021. Sourced at <<https://businessday.ng/news/article/buhari-signs-amended-companies-and-allied-matters-bill-cama-2020-into-law/>>. It is the principal law for registration of business and non-business organizations in Nigeria

³ Hereinafter, referred to as ISA 2007 and SEC Rules 2013 respectively.

⁴ See section 131 (1) (a) & (b) ISA 2007

⁵ “bid” means an invitation or an offer, see section 117 ISA 2007. A takeover bid is an offer made by an acquiring company to purchase sufficient shares in another company.

⁶ See section 133(3) (a) ISA 2007. See also Rule 445(3) (a) SEC RULES 2013.

⁷ See Rule 445 (3) (a) SEC Rules 2013 and also section 133(4) to the effect that take-over bid shall not be made in any case where the shares to be acquired under a bid are shares in a private company.

⁸ Sections 712 and 713 CAMA 2020

⁹ See section 712 CAMA 2020

acceptance of its takeover in a company (the acquired company). Another feature in take over under CAMA 2020, is that the transferee company can either be a company¹⁰ whether within the meaning of the Companies and Allied Matters Act or not¹¹.

In this article, we are concerned mainly with two areas we consider confusing as regards to take over as provided for in ISA 2007 as well as CAMA 2020. These areas are that of threshold of takeover and the types of companies that can be taken over.

We are not touching on procedure for takeover or details of takeover bid as contained in the ISA 2007 and SEC Rules 2013.

Looking at the threshold of take over under ISA which is acquisition of not less than 30% but not more than 50% of shares of the acquired company in contrast with the threshold of takeover under CAMA 2020 which is not less than 90% acceptance of the transferee company's offer, there is definitely a confusion in this area.

Another area of confusion in takeover under the ISA 2007 and that under CAMA 2020 is the entity to be taken over or entity that can be acquired. Under SEC Rules, it is clearly stated that only public quoted companies¹² can be taken over, under CAMA 2020, it is not specified the type of company that the transferee/ acquiring company should target.

These two confusions among others, are the reasons behind this article's need for harmonization of Takeover Laws as it affects corporate entities in Nigeria.

MEANING OF TAKEOVER OF COMPANIES

Takeover means the acquisition by one company of sufficient shares in another company to give the acquiring company control over that other company¹³

In another definition, a takeover is a situation in which a company gets control of another company by buying enough of its share.¹⁴

Takeover is the acquisition by one company of substantial shares in another company to give the acquiring company control over the acquired company. The acquiring company takes over the control and management of the acquired company.

Takeover consists of an offer from an acquirer made generally to the shareholders of the target company to acquire their shares for a consideration which may be cash or securities of the offeror or a mixture of both¹⁵

Every takeover is initiated by a take over bid. A bid is an offer made to the existing shareholders to acquire their shares for a consideration in cash or securities. The purpose of the offer being to transfer control of the company to the offeror.¹⁶

In takeovers, a larger company initiates the takeover of a smaller company. It can be based on consent of the two companies or it may without the notice of the target company, in which case, the acquiring company gradually and secretly acquire shares of the target company until it gets to the threshold of takeover.¹⁷

In corporate financing, takeovers come in various ways, an acquiring company may acquire controlling interest in the acquired company and make the acquired company its subsidiary or acquire the entire company outrightly, merge the two companies together and form a new one.¹⁸

PARTIES TO TAKEOVER OF COMPANIES

Companies that can be taken over/acquired

For takeovers under ISA 2007, only public quoted companies can be taken over. Rule 445 (1) (a) SEC Rules 2013 provides thus:

¹⁰ A company under the meaning of the Act is an incorporated entity under Part C of CAMA 2020 which must have complied with the provisions of section 18 CAMA 2020, it can either be private or public, limited by shares, unlimited by shares or limited by guarantee see sections 21 and 22 CAMA 2020. A company under these sections is conferred with legal personality as effect of registration, see section 42 CAMA 2020.

¹¹ This means a company here must not company comply with the provisions of sections 18, 21 and 22 as stated above to enjoy the benefits as stated in section 42 CAMA 2020. It can therefore, be any entity.

¹² See Rule 445 (1)(a), SEC Rules 2013. A public quoted company is a company that has its shares quoted on the floor on Nigerian Exchange Group (formerly Nigerian Stock Exchange). The Nigerian Exchange Group (NGX Group) Plc is a leading integrated market infrastructure in Africa, championing the development of Africa's financial markets. NGX Group provides a wide range of services including listing and trading securities, licensing, market data solutions, ancillary technology, regulation, real estate, and more through its wholly-owned subsidiaries. See <https://ngxgroup.com/>, accessed on 3/9/22

¹³ Section 117 ISA 2007.

¹⁴ <https://dictionary.cambridge.org/dictionary/english/takeover>, accessed on 6/9/22

¹⁵ P.I. Davies and S. Worthington, "Gower's Principles of Modern Company Law (10thedn., London: Sweet & Maxwell, 2016) p.917

¹⁶ Osamolu, Samuel A, "Corporate Law Practice in Nigeria", 3rd Edition, (Abuja, Nigeria: Law Lords Publications, 2021), p.

¹⁷ <https://www.investopedia.com/terms/t/takeover.asp>, accessed on 6.9.22

¹⁸ *ibid*

“Where a person or group of persons acquire(s) or wishes to acquire a minimum 30% shares in a public quoted company with the intention of taking over control of that company, a take-over bid shall be made by such person or group of persons or through their agent to the shareholders of the target company”

This explains why an authority to proceed with a takeover bid must be obtained from the Securities and Exchange Commission.¹⁹

For Takeovers under CAMA, no type/classification of company is specified. The provisions²⁰, simply says “... *the transfer of shares or any class of shares in a company (in this section referred to as “the transfer of company”)*”.²¹ A company may be limited by share, limited by guarantee or unlimited. Any of these three types of company can either be public or private.²² A private company can further be formed by just one person.²³ A public company’s shares and debentures can be dealt in on the stock exchange. This is to say that all the shares and debentures of public companies are admitted to stock exchange dealings and this is when a public company is said to be quoted.²⁴

From the above we have seen that, depending on the law providing for takeover, there is discrepancy on the type of company that can be acquired/taken over. Under the ISA 2007 and SEC Rules 2013, only a public quoted company can be taken over while under CAMA 2020, any type of company can be taken over.

Companies or persons that can take over a company

We have seen that irrespective of the distinction between companies that can be acquired/taken over under the different laws under review, only a company can be acquired/taken over.

We will now look at the body that can take over a company under the ISA 2007 and SEC Rules 2013 as well as under CAMA 2020 provisions.

For takeover under the ISA 2007 and SEC Rules 2013, it is provided that:

*“Where a person or group of persons acquire(s) or wishes to acquire a minimum 30% shares in a public quoted company with the intention of taking over control of that company, a take-over bid shall be made by such person or group of persons or through their agent to the shareholders of the target company.”*²⁵

The agent of the above persons shall be a registered capital market operator.²⁶

A corporate body too can make a take over bid to acquire a public quoted company. On this, the SEC Rules 2013 provides in Rule 445 (2) thus: *“Where a take-over bid is made by a corporate body, a resolution of the directors approving the bid shall accompany the bid. The resolution shall be signed by at least one director and the company secretary”*

It is therefore clear that, for a takeover under the ISA, persons or group of persons through capital market operators can acquire substantial shares in a target company. Also, a corporate body (a company), through its director and secretary can acquire substantial shares in a target company.

For a takeover under CAMA 2020, section 712 provides that: “ Where a scheme or contract, not being a take-over bid under the Investment and Securities Act involving the transfer of shares or any class of shares in a company (in this section referred to as *“the transfer of company”*) to another company, whether a company within the meaning of this Act or not (in this section referred to as *‘the transferee company’*)”. Going by this provision, acquiring/transferee company, needs not be a company under the Act, that is, it doesn’t need to fulfil the criteria for incorporation of company and type of company under CAMA²⁷. It can just be any entity that is capable of acquiring a company’s shares.

In contrast to the above, section 713 CAMA 2020 provides that: “... *shares in a company are transferred to another company or its nominee...*”. This means that the acquiring body where shares of the target company is transferred to must be either a company or its nominee. A company nominee is usually an officer of the company either its director or secretary nominated to act on behalf of the company.

With the above provisions, we can conclude that under CAMA 2020, in section 713, a company or any entity can acquire shares of a target company while under section 713, a company or its nominee can acquire shares of a target company.

¹⁹ Rule 447(1)(a) SEC Rules 2013. SEC regulates the activities of companies whose shares/stocks are quoted on the exchange, hence, public quoted companies. The companies must first be registered as public companies before they can interface with SEC. The SEC holds the primary responsibility of enforcing the Federal Securities Laws and regulating the securities industry, the nation's stock and options exchanges and other electronic securities markets.

²⁰ Both in sections 712 and 713 CAMA 2020

²¹ Section 712 CAMA 2020

²² See section 21(1) and 22(2) of CAMA 2020

²³ See section 18 (2) CAMA 2020

²⁴ See fn. 18

²⁵ Rule 445(1) (a) SEC Rules 2013

²⁶ Rule 445 (1) (b) SEC Rules 2013

²⁷ E.g. criteria under section 18, 21 and 42 of CAMA 2020.

TAKEOVER UNDER THE COMPANIES AND ALLIED MATTERS ACT 2020

Generally, the Companies and Allied Matters Act does not regulate take-over bids,²⁸ but CAMA 2020 has two provisions, section 712 and 713 directed at takeover offers “not being a take-over bid under the Investment and Securities Act. These sections are meant to tidy up such scheme or contract where an offeror (transferee company) has achieved a 90% acceptance of its takeover in a company.”²⁹

Section 712 provides for the procedure by which an offeror can compulsorily acquire the remaining 10% shares of the dissenting shareholders thus:

“Where a scheme or contract, not being a take-over bid under the Investment and Securities Act involving the transfer of shares or any class of shares in a company (in this section referred to as “the transfer of company”) to another company, whether a company within the meaning of this Act or not (in this section referred to as ‘the transferee company’) has, within four months after the making of the offer in that behalf by the transferee company been approved by the holders of at least nine-tenth in value of the shares of the company (other than shares already held at the date of the offer by a nominee for the transferee company, or its subsidiary), the transferee company may at any time within two months after the expiration of the said four months give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares”.

Under this type of takeover, the transferee company makes the offer to take over the shares or any class of shares of “the transfer company”³⁰ and the transferee company can either be a company³¹ whether within the meaning of the Companies and Allied Matters Act or not³². Also, the holders of at least nine-tenth in value of the shares of the company to be taken over by the transferee entity must have approved the takeover, this places the threshold on at least 90%.

Also, the shares of the transferee company to be transferred to another entity³³, while computing the 90% threshold, excludes shares already held by the nominee or subsidiary of the transferee company.

Under this type of takeover, within 2 months after the expiration of the 4 months, the dissenting members³⁴ (holding the 10%) shall be notified by the transferee of its desire to acquire their shares. This is so because, unless on an application made by the dissenting shareholders (holders of 10% shares), within one month from the date on which the notice was given to them, or where the Court deems fit to order otherwise, the transferee company is entitled and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company.³⁵

The provision under this section can be looked at from the angle of a hostile takeover³⁶ where the dissenting members are not willing to transfer their stakes but the transferee company is entitled and bound to acquire their shares.

Section 713 on the other hand, provides for the procedure by which the holder of the remaining shares (10%) can ask to be bought out of the company thus:

*“... where, in pursuance of any scheme or contract, shares in a company are transferred to another company or its nominee, and those shares together with any other shares in the first mentioned company held by, or by a nominee for the transferee company or its subsidiary at the date of the transfer comprise or include nine-tenth in value of the shares in the first mentioned company or of a class of those shares”.*³⁷

*“... give notice of that fact in the prescribed manner to the holder of the remaining shares or of the remaining shares of that class, as the case may be, who have not assented to the scheme or contract any holder may, within three months from the giving of the notice to him, require the transferee company to acquire the shares in question”.*³⁸

Under this section, in computing the 90% threshold to be acquired by the transferee company, it includes shares held by the transferee company’s nominee or subsidiary.

After the acquisition of 90% shares of the acquired company, the transferee company shall, within one month from the date of the transfer (unless on a previous transfer in pursuance of the scheme or contract it has already complied with this requirement), give notice of that fact in the prescribed manner

²⁸ This is exclusively within the regulation of the Investment and Securities Act.

²⁹ Ibid. see Bhadmus, H.Y., “Bhadmus on corporate Law” (5thedn., Enugu: Cheglo Publishers 2021), p.359

³⁰ The transfer company here simply means the transferor company or the target company. This is the company whose shares will be acquired by or transferred to the transferee company.

³¹ A company under the meaning of the Act is an incorporated entity under Part C of CAMA 2020 which must have complied with the provisions of section 18 CAMA 2020, it can either be private or public, limited by shares, unlimited by shares or limited by guarantee see sections 21 and 22 CAMA 2020. A company under these sections is conferred with legal personality as effect of registration, see section 42 CAMA 2020.

³² This means a company here must not company comply with the provisions of sections 18, 21 and 22 as stated above to enjoy the benefits as stated in section 42 CAMA 2020. It can therefore, be any entity.

³³ “entity”, because the section says “a company under the Act or not”. I will prefer to refer to “the company” as an entity

³⁴ Members/shareholders not willing to go on with the takeover. That is, they are not desirous of having their shares being acquired by the transferee company.

³⁵ Section 712 (2)

³⁶ A takeover not agreed by the management of the acquired company.

³⁷ Section 713(1) CAMA 2020

³⁸ Section 713 (2) CAMA 2020

to the holder of the remaining 10% shares or of the remaining shares of that class, as the case may be, who have not assented to the scheme or contract.³⁹

Any holder of the remaining 10% may, within three months from the giving of the above notice, require the transferee company to acquire the shares in question and the transferee company will be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders were transferred to it, or on such other terms as may be agreed on as the Court hearing the application of either the transferee company or the shareholder deems fit.

This provision is seen as a friendly takeover⁴⁰ in the sense that there are no dissenting members. Rather upon notice of the transferee's company intention to acquire the outstanding shares, the holders of the 10% outstanding shares willingly requires the transferee company to acquire the shares.

TAKEOVER UNDER THE INVESTMENT AND SECURITIES ACT 2007

Take-over is defined under the Investment and Securities Act, as the acquisition by one company or individual (acquirer) of sufficient shares in another company (target company) to give the acquirer or acquiring company substantial control over that other company.⁴¹

Section 131 (1) says, as summarized in Bhadmus on Corporate Law⁴² thus:

“Where any person, directly or indirectly:

- a. Acquires shares or an interest in shares, whether by a series of transactions over a period of time or not, which (taken together with shares held or acquired by persons acting in concert with him) carry 30% or more of the voting rights of a public company; or
- b. Together with persons acting in concert⁴³ with him, holds not less than 30% but not more than 50% of the voting rights and such person or any person acting in concert with him, acquires additional shares which increase his percentage of the voting rights of a public quoted company.”

The question here is where a bid is made to holders of shares exceeding 51% of the issued paid up shares of the company, what will the restructuring option be called?

It is definitely not merger. Merger is defined in the Act as follows;⁴⁴

“A merger means any amalgamation of the undertakings 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”

So, it can be clearly seen that any acquisition on excess of 51% cannot be a merger because a merger envisages an amalgamation of the undertaking of two or more companies, while takeover is between the acquiring company and the shareholders of the acquired company as opposed to mergers. What then can this type of restructuring be called? This may be one reason behind the new innovation in CAMA 2020 as provided in sections 712 and 713 where acquisition of 90% of the shares of a company by a transferee company is seen as takeover but what happens where the transferee company is able to compulsorily acquire the remaining 10% of the dissenting shares as seen in section 712 or where the dissenting shareholders under section 713 voluntarily offer their remaining 10% shares to be taken over by the transferee company? Will this scenario still be seen as takeover or a merger? There is need to bring the provisions of the two laws together for better appreciation of the intendment of the laws.

CONCLUSION

The aim of takeover of company is basically to acquire a substantial share in a target company in order to have control over the affairs of the company, thereby making it a subsidiary of the acquiring company. This is mostly necessitated where the target company is experiencing some financial problems and the acquiring company get involved, one, to rescue the dwindling company from liquidation. The takeover rescue help keep the target company as a going concern at the same time, expanding the business control of the acquiring company. In Nigeria, before the repeal of the CAMA 1990, takeover as a form of corporate restructuring was only in the realm of ISA 2007 and SEC Rules 2013 and the procedure was structured in such a way as to achieve the above aim of rescuing to enable the target company continue its business albeit under the control of another entity. Under this law the threshold for the takeover of a company is placed at between acquisition of not less than 30% and not more than 50% shares of a public quoted company. But with the enactment of CAMA 2020, new takeover provisions were introduced, specially in section 712 and 713 of the Act, the takeover provisions placed the threshold to be acquired by the transferee company on 90% of the shares of the acquired company with the provision that the outstanding 10% shall be compulsorily acquired or voluntary offered to the transferee company by the shareholders. Where this happens, it is a complete take over of the company, in this instance, the transferee company can make the acquired company its wholly owned subsidiary or even

³⁹Ibid

⁴⁰ A takeover where the management of the acquired company agreed with.

⁴¹ Section 131 ISA 2007

⁴²Bhadmus, H.Y., opcit, fn.29, p.397

⁴³ For persons acting in concert with other persons in the same category, see section 132 (3) (a-g) ISA 2007

⁴⁴ Section 119(1) ISA 2007

merge the acquired company with its own. This, to our mind is not the essence of takeover. Looking at takeover from the perception of the provisions of section 131 ISA 2007 is more agreeable to us.

We therefore, recommend that there is the need to harmonize the provisions of section 131 ISA 2007 with those of sections 712 and 713 CAMA 2020 for a better understanding of takeover as a mode of corporate restructuring in Nigeria.

In order to achieve the above recommendation, we recommend further that the provisions of section 712 and 713 CAMA 2020 be expunged from CAMA 2020 and moved to ISA which is regulated by Securities and Exchange Commission. Takeover of corporate entities is regulated by SEC, if need be takeover can be classified based on the threshold. The classification will also give more understanding to difference in what we referred to in this article as 'parties to companies takeover transactions especially as it relates to companies that can be taken over. This way a certain classification can provide that the takeover will target only public quoted companies like is the case under ISA while another classification of takeover can provide that the takeover will target any other type of company as is presently applicable under CAMA 2020.