LéLaw
THOUGHT LEADERSHIP INSIGHTS

APRIL 2019

EMPLOYEES' RIGHTS IN A MERGER: THE UNHEARD GRASS AT THE ELEPHANT'S STOMP?

THOUGHT LEADERSHIP BY

OLUWAPELUMI ODETOYINBO

o.odetoyinbo@lelawlegal.com

> "OFTEN, M&A TENDS TO FOCUS ON THE SYNERGY BENEFITS FROM CAPITAL AND MATERIAL RESOURCES AT THE EXPENSE OF THE HUMAN RESOURCES"

The old African saying *"when two elephants fight, it is the grass that suffers"* can sometimes be a metaphor for the plight of employees in a merger and acquisition (M&A) process. Often, M&A tends to focus on the synergy benefits from capital and material resources at the expense of the human resources (employees in particular). Globally, M&A are essential for corporate growth and it is, one of the strongest corporate restructuring tools. Do employees have rights in a merger? Are these rights really enforceable or is it truly the case of the unheard grass at the elephants' stomp?

In Nigeria, mergers, even though had been happening opportunistically, came into the public consciousness[1] when a directive was given by the Central Bank of Nigeria (CBN) upping authorised and fully paid share capital of all Nigeria banks to N25 billion from N2 billion. Expectedly, this 1150% increase, which was to be achieved within a somewhat tight deadline of eighteen months before the end of 2004 elicited a reverberating uproar, but the die was cast.[1] Out of the eighty-nine (89) banks at the time, only twenty-five (25) 'survived', mostly through 'consolidation' or mergers. [2]

1 Charles Chukwuma Soludo, ***'Consolidating the Nigerian Banking Industry to Meet The Development Challenges Of The 21st Century'***, 06.07.04, available at: http://w1219.cbn.gov.ng/OUT/SPEECHES/2004/GOVADD-6JUL.PDF, (accessed 18.02.19).

2 Olakunle Orojo, ***'Company Law and Practice in Nigeria'***, *(5th ed., 2008), p. 341.*

This article examines the concepts of mergers, the regulatory landscape, employee's rights (as a likely element to be downplayed in a successful merger), and proposes ways of ensuring that employee rights/protection are treated as front burner issues alongside other considerations, such as economies of scale, scope and diversification.

Conceptual Definitions

Section 92 Federal Competition and Consumer Protection Act 2018 (FCCPA) *posits* 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."[3]

The recently concluded merger between Access Bank and Diamond Bank, culminated in an enlarged Access Bank the biggest retail Bank in Africa by customer base with 29 million customers, 592 branches in 12 countries and 27,000 staff.[4]

According to ***Rule 433, Securities and Exchange Commission Rules and Regulations (SECRR) 2013:*** "an *acquisition means where a person or group of persons buys most (if not all) of a company's ownership stake in order to assume control of the target company."*

On its part, ***Section 131 ISA*** defines a 'Takeover' as: *"where any person- (a) acquires 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 per cent... of the voting rights of a company; or (b) together with persons acting in concert with him, holds not less than 30% but not more than 50 per cent..."*

Takeovers are employed for the purpose of acquiring control of publicly traded companies and this could be done in a friendly or hostile way.

Mergers – A Necessary Reality?

Virtually all businesses desire growth, and this implies adaptation to the ever-changing, competitive business environments. Thus they must either look inward (solo ventures) or outward (business alliance) for elements that can aid growth. Again, technological innovations, regulatory and policy directions among others fuel change in

> 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

3 **Section 119 Investment Securities Act, Cap.I24 Laws of the Federation of Nigeria (LFN) 2004 (ISA)** defined merger as: "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." **Section 119** was amongst the ***ISA*** provisions repealed by the ***FCCPA***.

4 Access Bank **'Access Bank – Diamond Bank Merger: Creating Nigeria and Africa's Largest Retail Bank'** available at: https://www.accessbankplc.com/AccessBankGroup/media/Investors/Results-2019/Access-Bank-Diamond-Bank-Investor-Presentation.pdf, (accessed 28.04.19).

business environment. Strategies employed in responding to external changes in the business environment include joint ventures, strategic alliances, minority investments, franchises, licenses and M&A. Popular reasons for mergers include: *A desire to diversify and reduce risk*[5] *economies of scale, growth, elimination of competition,*[6] *stock exchange quotation, technological acquisition, talent acquisition, insolvency and government policy.*

Regulatory Landscape for Merger Supervision in Nigeria

Given its 'drastic' nature and potential for 'downstream' impact, mergers have to be regulated, for example, to prevent creation of monopolies and ensure they are in furtherance of competitive market interests.

Prior to enactment of the ***FCCPA***, and apart from the SEC, the Corporate Affairs Commission (which receives corporate filings of merging entities), and the Federal High Court (which orders for meetings and sanctions the mergers), regulators, which oversee merger procedures, were generally sector specific. If banks are merging, the Central Bank of Nigeria (CBN) will be the main regulator pursuant to the ***CBN Act*** and the ***Bank and Other Financial Institution Act (BOFIA)***, respectively. [7]

Hitherto, in addition to sectoral merger regulation, SEC had overall merger regulatory oversight over all Nigerian companies, pursuant to enabling powers in that regard.[8] However, the recently passed **FCCPA** stripped **SEC** of its merger regulatory powers, putting same under the auspices of the Federal Competition and Consumer Protection Commission (FCCPC).[9] By ***Section 93 FCCPA***, *"... a proposed merger shall not be implemented unless it has first being notified to and approved by the Commission."* FCCPC has also been empowered to weigh the merits and demerits of a merger as against its impact on restricting competition: where a restriction on competition is justifiable under the reasons listed in ***Section 94 FCCPA***, the merger will be approved.[10]

Employee Rights in a Merger: Matters Arising

How actionable are employee rights in Nigerian mergers? For example, the 'right' to be informed of the prospective M&A transaction at the earliest possible time,[11] inclusion of HRs in

5 A company may decide to venture into other areas of business, in order to lessen its risk in line with the saying, *"don't put all your eggs in a basket."* The merger of A.G Leventis Nigeria PLC with Leventis Technical PLC and Leventis Motors PLC in 1994 was reportedly the first successful merger in Nigeria. See *Adeke Aondongu* Abel, ***'An Appraisal of the Legal Framework for Mergers and Acquisitions in Nigeria'***, *International Journal of Accounting, Vol 7, Issue 5 p. 3,:* https://www.academia.edu/35629167/AN_APPRAISAL_OF_THE _LEGAL_ FRAMEWORK_FOR_MERGERS_AND_ACQUISITIONS_IN _NIGERIA. The companies expanded their business from importing and selling textile goods to include the sales and service of motor vehicles. See also ***'A.G. Leventis (Nigeria) Plc at a Glance'***, available at: www.agleventis.com/About/ag-leventis-in-general/, (accessed 15.03.19).

6 This is customary among companies in the same industry. They synergise to eliminate competition in the industry. This is exactly what ***Section 94(1)(a) FCCPA*** seeks to abolish by regulating mergers and preventing monopoly. An example of this is the Glaxo Wellcome PLC and SmithKline Beecham which became GlaxoSmithKline after the merger and is now amongst the top ten (10) pharmaceutical companies in the world. See ***'Top 10 Pharmaceutical Companies in The World'***, *Pharmaceutical Tech:* https://www.pharmaceutical-tech.com/articles/top-10-pharmaceutical-companies-in-the-world, (accessed 12.03.19).

7 *Caps. C4,* and *B3, LFN 2004* respectively. *Section 7 BOFIA* empowers the CBN to sanction any merger within the banking sector and requires the prior consent of the CBN Governor to any sectoral merger.

8 Mergers were formerly defined by *Section 119 ISA* as *"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.'*

9 The **FCCPA** repealed ***Sections 118 - 128 ISA*** dealing with mergers. However, the **FCCPA** repeal of **ISA** excluded ***section 121 (1)(d) ISA*** which still allows SEC to determine whether all shareholders are fairly, equitably and similarly treated and given sufficient information regarding the merger. See Aderemi Ojekunle, **'Everything You Need to Know About the Federal Competition and Consumer Protection Act'**, Business Insider by Pulse, *02.07.2019*, : https://www.pulse.ng/bi/politics/everything-syou-need-to-know-about-the-federal-competition-and-consumer-protection-act/wlk0211, (accessed 18.03.19).

10 ***Section 94(1)(a) FCCPA*** provides that**:** *"when considering a merger or proposed merger, the Commission shall a) determine whether or not the merger is likely to substantially prevent or lesson competition..."*

11 This may be hampered due to regulatory requirements, which require secrecy for a specific period.

the merger teams and 'retention' of staff?

Nigeria, following common law tradition, largely assesses the employment relationship on a personal basis. Therefore, employees' contracts and other rights typically expire once the employer changes.[12] Whilst the surviving entity generally steps into the shoes of the merged entity, by taking over its assets and liabilities; however, in the case of staff this is usually subject to the need of the surviving entity for such employees. Apparently there are no Nigerian legal provisions that mandates the surviving entity to assume the merged entity's erstwhile employer obligations.

Thus, service of employees cannot be transferred except by mutual or 'tripartite' agreement. In most cases, there has to be a termination before rehiring vide a new contract with the surviving entity. If the new contract specifies entitlements that are less favourable than the former one, the employee may opt out; or the reduced compensation may also engender dissatisfaction amongst the affected employees, potentially resulting industrial disharmony or disputes.

Also, in most cases, when a merger transaction team is to be constituted, consideration is given to investment bankers, lawyers, accountants and public relations professionals, but it is rare to find their Human Resource (HR) counterparts on the team.[13] Could this be an indication that the HR aspect of mergers is not viewed as critical to the success of merger? People are arguably the most valuable resource of any organisation and the underplay of this important aspect could spell failure for M&A.

Anecdotal evidence suggests that reasons for this underplay could either be due to the merging firms not really understanding the import of managing employee issues or they simply cannot be bothered. After all, where the labour market is saturated, they can hire and fire almost at will.

Challenges Posed to Employees in a Merger

It is a known fact that mergers often entails 'rightsizing' the work force. Thus, by their very nature, M&As may pose certain challenges to employees, thereby constituting additional load to their regular workday pressure:

Anxiety

M&A is synonymous with change, and in many cases it is a 'destabilising' event. This may affect many employees psychologically, which in turn reduces their productivity and could generate various 'survival' behaviours. M&A activity often leads to duplication of certain manpower, hence the excess manpower or "surplus staff" at times needs to be terminated. While lay–offs cannot always be avoided in M&A, reducing uncertainty among employees through open, honest and consistent communication is advisable.

In most cases, only directors and top management staff are informed at the onset. The exclusivity of this information is premised on business confidentiality in order to prevent insider abuse, stock fluctuations or other market changes triggered by the leak of such sensitive information. This, however must be balanced by need to emasculate

12 In the oil and gas industry, the ***Department of Petroleum Resources (DPR)'s Guidelines on the Release of Staff in the Oil and Gas Industry, 2015 (DPR Guidelines)*** provides for the consent of the Minister of Petroleum before disengagement of staff. Such provisions will apply in M&A situations.

13 Dixon & Nelson, ***'SHRM Case Study: Culture Management and Merger Acquisitions'***, *Society for Human Resource (online), March 2005, p. 1*: http://www.shrm.org, (accessed 23.03.19).

rumour mills and the grapevine work overtime, otherwise there could be more anxiety. The uncertainty created may even sabotage the M&A process by giving wrong signals to clients.

Change in Organizational Culture/Acculturation

M&A also involves combining two distinctive organisational cultures or imposing one over the other. M&A may result in a new way of doing business and this may negatively affect the morale of employees. The exposure to a new culture during M&A could lead to 'culture shock'. The uncertainty of whether one will fit in can lead good employees to seek employment with competitors, or other employees could become demotivated. It is suggested that providing employees with the vision and mission for the new organization as early as feasible as well as facilitating intercultural learning may be antidotes to the challenge posed by differences in the culture of merging organisations.

Executive/Managerial Roles

M&A transitions typically take a long time and may not always be clear-cut. This means there may be some periods of organization drift and uncertainty about who has what or does what in the new entity. The processes involve disrupting the existing cultural, structural, and job arrangements for new ones. More often than not, one firm and its executive team take the lead in managing the new entity.[14] This may either hamper the M&A process or lead to lower work motivation and less productivity.

Are Employees Protected in Mergers in Nigeria?

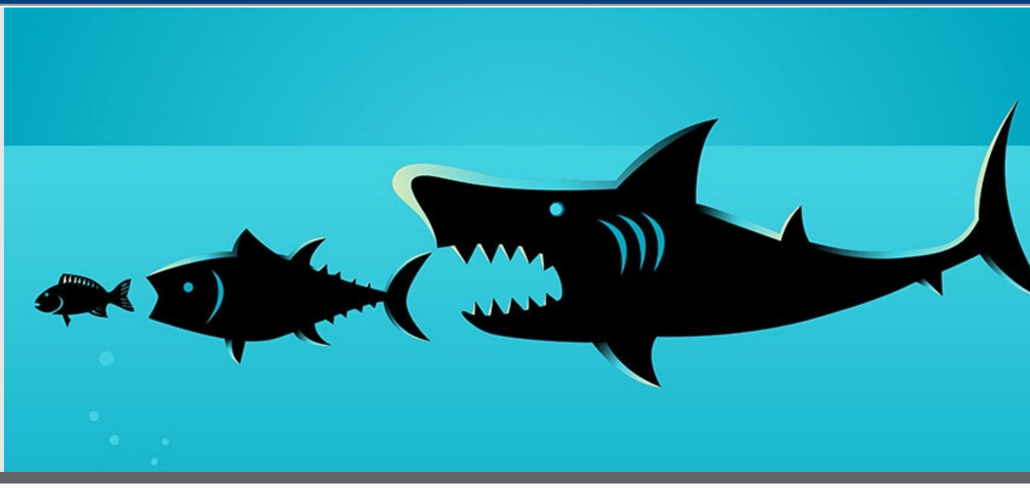
The ***Labour Act (LA)***[15] generally serves as a guide to employment relations in Nigeria. However, the ***LA's*** definition of a "worker" excludes persons exercising administrative, executive, technical or professional functions as public officers or otherwise, the ***LA*** only applies to low level or clerical workers. A few of the rights of employees as stated in the ***LA*** are a written contract within three months of employment,[16] entitlement to sick leave with pay[17] and annual leave[18] as well as compensation for workers who have been injured or died during the course of their employment as stated in the ***Employee Compensation Act (ECA)***.[19] Other employees excluded by the ***LA*** are strictly guided by their individual contracts setting out the terms and conditions of their employment.

In Nigeria, it appears no special protection is afforded employees in a merger. The ***LA*** only caters for situations where employees are laid off as a result of redundancy. Redundancy is often an incidence in merger situations as a result of necessary rationalisations. ***Section 20(1) (b) LA*** requires that for imminent layoffs, the applicable rule should be *"last in, first out subject to all factors of relative merit, including skill, ability and reliability."*

This may in practice however not be always adhered to, which was the dominant issue in ***Agoma v. Guinness (Nig) Plc.***[20] The ***LA*** however provides for the compensation of laid off workers.[21]

Rights of employees in M&A presumably include right to

15 ***Cap. L1, LFN 2004.***
16 ***Section 7 LA***
17 ***Section 16 LA***
18 ***Section 18 LA***
19 ***Cap. E74, L.F.N 2010***
20 ***[1995] 2 NWLR (Pt. 380), 672 SC. In that case,*** the Appellant sued the Respondent after her retrenchment stating that the "last in, first out" rule was not followed, even though she was in the respondent's employment for five years with no query. The Supreme Court (SC) dismissed her appeal and held that the rule had been complied with.
21 ***Section 20(1)(c) LA*** the employer shall use his best endeavours to negotiate redundancy payments to any discharged workers who are not protected by regulations made.



information and fair representation in the M&A process and even to retention as provided for in some countries. An M&A scenario could provide the opportunity for employers to terminate non-performing employees or renegotiation of employment contracts in the best interest of the emerging entity. However, it is noteworthy that employees too are entitled to resign at will, they only need to comply with provisions of their subsisting employment contracts.[22]

Nonetheless, improper management of employee rights could lead to litigations and in severe situations, failure of the merger.[23] There are barely any court actions of employees kicking against mergers in Nigeria. This could be an indication that unions have accepted mergers as fait accompli, implying that employees are indeed grass at the elephants' stomp!

However it is telling that there seems to be no data of any such regarding private sector mergers in Nigeria. Furthermore, the usual strategy is to especially at the initial stage push a positive narrative of the rationale and benefits of proposed mergers, with downsizing as a subsequent event, by which time it could have been too late for the unions[24] to exert their influence. Finally, it is apt to state that in some trade sectors, trade unionism has become more or less non-existent through for example, employers use of staff outsourcing arrangements.

What happens in a merger situation where the employee is also a shareholder? Generally the position of an employee and that of a shareholder are not co-terminous, and the resolution of the latter status may be a function of the provisions of the relevant shareholders agreement (SHA)[25], or employee share ownership/incentive plan rules.[26]

Situations where the employee has a subsisting share option called Employee Share Option Plan (ESOPs). ESOPs allow employees to purchase shares of the company depending on the fulfilment of certain preconditions. Most companies use ESOPs to attract talent and retain them, this is usually incorporated into contracts of big companies like ICT start-ups. This right will be incident on the employee's continued stay in the company. Where such employee is retained, the ESOP may be transferred to his new employment contract. The company may also exercise a buy back where it is included in the ESOP.

Comparison with other Jurisdictions

In the United Kingdom (UK), the ***Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)*** protects employees in merger situations. ***Article 4 TUPE*** states that a business transfer must not result in a dismissal subject to the exception of economic, technical or organizational reasons.[27]

22 This is because an employment relationship is predicated on *"a willing master and a willing servant"* basis: ***Chukwumah v. Shell Petroleum [1993] 4 NWLR (Pt.289), 512 (SC).*** There is therefore a sense of equivalence: either party can terminate, in pursuit of their best interests. For example, employees can leave for better compensation or career prospects. Why then should employers not be entitled to act in their own enlightened self-interest by for example terminating unwanted employees?

23 In 2014, the Amalgamated Union of Public Corporations, Civil Service Technical and Recreational Service Employees (AUPCTRE) threatened to embark on a strike if the Federal Government failed to reverse its decision to merge some aviation industry agencies, on the ground that the proposed merger was not in the best interest of employees. Grace Obike, ***'Union threatens strike over aviation agencies' merger'***, (The Nation Online) 17.04.14: https://thenationonlineng.net/union-threatens-strike-aviation-agencies-merger-2/, (accessed 16.04.19).

24 The fate of the defunct National Electric Power Authority (NEPA, which became Power Holding Company of Nigeria)'s workers during power sector privatization could be an indication of the lack of importance attached to workers rights in Nigeria as many of them were yet to have received their severance benefits many years after the privatization occurred. See Victor Ahiuma-Young, ***'Electricity Workers Mocks Power Sector Privatisation',*** *The Vanguard, 07.12.17:* https://www.vanguardngr.com/2017/12/electricity-workers-mocks-power-sector-privatization /, (accessed 29.04.19).

25 For example, the SHA may have call or put option provisions which could be utilised by parties (including the employee) to acquire/ dispose the employee's stake.

26 The rationale for making employees shareholders is to create alignment and engender long-term loyalty and commitment to their employer-company. Or sometimes, such arises from founder-employees of the M&A target. Where an employee is laid off his status as a shareholder does not cease (unless he acquired his shares pursuant to an incentive plan that mandates sale back to the company for addition to the employee share pool). Where such exception does not apply, only his position as an employee is affected unless he decides to sell his shares.

27 ***Article 4 TUPE*** provides that: *"Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee."* See also, Wyn Derbyshire, ***'TUPE: Law & Practice: A Guide to the TUPE Regulations 2014)*** *4th Revised ed.*

Article 6 TUPE[28] requires that the parties involved in the transfer (merger in this case), give reasons for the transfer and explain the legal, economic and social implications on the employees.[29]

There is also a similar provision for employees in the United States (US) through the ***Worker Adjustment and Retraining Notification Act 1988 (WARN)***. This applies to companies with a large base of employees (50 or 33% of the workforce) and requires that employers give notice at least 60 days prior to the layoff. Different States have their own modifications of the **WARN;** for example, Minnesota requires that in giving notice, the names, addresses and occupants of the employees who have been laid off be given to the Commissioner of Economic Security.[30]

In reality, retaining employees in Nigeria in an M&A scenario is not a matter of compulsion as some other countries, because there is generally no statutory obligation to retain all the staff of the target entity.

Conclusion

It is respectfully submitted that Nigerian legal jurisprudence has to eschew the personal nature theory of employment contracts. Our laws should provide for consultation rights of employees in a merger and ensure the automatic transfer of employment rights and liabilities upon the change in ownership of an undertaking, business or part of a business, from an old to a new employer.

Regarding communication, the culture of secrecy should be done away with, subject to realities of business and regulatory exigencies. Frequent and regular communication should be provided during and after the M&A event. Subject to specific regulatory requirements, especially regarding commercial sensitivity, firms should inform all employees of merger plans at the same time as, or better still, in advance of press releases.

Also, the surviving entity could explore employee-friendly restructuring options. For example, *vide* redeployments to other positions where applicable, rather than outright layoff.
It is also important that HR professionals be included in the merger team, towards achieving optimal HR aspects of a merger. HR staff or consultants should conduct cultural audits to provide recommendations for overcoming cultural differences of the merging entities. HR strategists should also facilitate the development of a new organizational structure and establish clear, well-defined reporting relationships as soon as possible.

Applying the analogy of the economic historian Joseph Schumpeter, M&A can be a form of *"creative destruction"*. The bid to create wealth and stronger firms through M&As must be properly managed to minimize downsides, including HR aspects, in order to get the most out of the *"creative destruction."*

Given that M&As may not be the most 'friendly' event for employees, steps that can be taken to ameliorate the stress and ensure there is 'balanced' consideration of all factors, including of employee rights and interests. Providing employees with a long-term stable career is a win-win situation for employers and their employees. Nigerian law can provide a 'nudge' to employers in that regard.

LeLaw Disclaimer

28 *"(1) This regulation applies where after a relevant transfer the transferred organised grouping of resources or employees maintains an identity distinct from the remainder of the transferee's undertaking. (2) Where before such a transfer an independent trade union is recognised to any extent by the transferor in respect of employees of any description who in consequence of the transfer become employees of the transferee, then, after the transfer (a) the trade union shall be deemed to have been recognised by the transferee to the same extent in respect of employees of that description so employed; and (b) any agreement for recognition may be varied or rescinded accordingly".*

29 ***GMB v MAN Truck & Bus UK Ltd [2000] 6 WLUK 650.***

30 See ***Section*** 116L.976, 2018 Minnesota State Laws, available at: https://www.revisor.mn.gov/statutes/cite/116L.976, (accessed 25.04.2019).