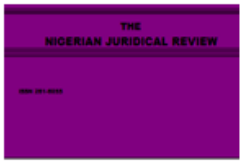

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REGULATION OF MERGER OF ASSOCIATIONS IN NIGERIA

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Abstract

A notable provision in the Companies and Allied Matters Act (CAMA) 2020 is the merger of associations. Section 849 provides that 'Two or more associations with similar aims and objects may merge under terms and conditions as the Commission may prescribe by regulation.' This novel provision sets the wheels in motion for the merger of associations under the Nigerian law. Curiously, the procedure for merger of associations pursuant to section 849 appears not to cut the mustard, as it is particularly silent on certain key issues such as the content of the scheme of merger, treatment of liabilities, and rights of dissenting members; these issues being features of mergers of companies. The paper examines the procedure for merger of associations under the CAMA 2020, comparing same with the procedures for similar mergers in the UK and South Africa respectively. The paper, among other things, recommends that the procedure for merger of associations in Nigeria be modified to address the essential elements which it omitted so as to promote due diligence and best practices, ensure fairness of the scheme of merger, and hold trustees liable for their actions.

Keywords: Merger of associations, CAMA 2020, Nigeria, **scheme of merger**

1. Introduction

Nigeria has a population of over 200 million people, and is ranked the most populated country in Africa.[1] Out of this figure, over 130 million are multidimensionally poor due mainly to a lack of access to health, education, good living standards, employment and security,[2] occasioned largely by misgovernance and bad leadership. In response to this dysfunction,

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[1]Dennis Kamprad '9 Best Charities Impacting Nigeria'<https://impactful.ninja/best-charities-for-nigeria/> accessed 1 March 2023.

[2] See Sami Tunji , 'Nigeria's poverty exceeds World Bank projection, five states lead' <https://punchng.com/nigerias-poverty-exceeds-world-bank-projection-five-states-lead/> accessed 1 March 2023.

organizations with charitable purposes are stepping in to fill the gap by providing essential services and social protection for the citizens.'[3] In carrying out their activities, these organizations/charities depend largely on contributions from their members as well as on voluntary donations from individuals, companies, development agencies and governments, both local and foreign. With the growing economic recession and mounting public expenditures, available resources for funding the objects of charities are getting lean. It is, therefore, imperative that the available resources are used in the best possible way, and options for sustainability of charities explored. Merger of associations presents as a veritable way of sustaining and strengthening charities. For instance, mergers will enable charities with similar objects to enjoy the benefit of economies of scale, save administrative costs by eliminating duplicity, and use of integrated system,[4] etc. Generally, mergers are driven by the synergy effect.[5] The synergy motive is informed by the resource-based theory of the firm, where complementary resource profiles of two merging entities, such as physical resources, intangible resources, financial and human resources are integrated in ways that make the emerging entity stronger, bigger and more productive.[6] In the simplest terms, synergy effect is reflected in the total output of the combined efforts being greater than the total of individual efforts added together. Thus, synergy can equally motivate charities to merge.

The option of mergers was unavailable to charities operated as incorporated trustees in Nigeria until 2020, when CAMA for the first time introduced mergers of associations under Part F. Unfortunately, both CAMA and its regulations left unanswered a number of questions bordering on the procedure for effecting such mergers. For instance, the procedure is silent on the treatment of liabilities during mergers. The issues of tax obligations and rights of dissenting members and creditors are also unsettled. Without these issues clearly addressed, merger options may remain unattractive to associations in their quest to synergize efforts for optimal operations and maximum impact in Nigeria.

2. Classification and Legal Status of Associations

Pursuant to Regulation 27 of the Companies Regulations 2021, associations regulated under the CAMA are classified as religious, educational, literary, scientific, social, developmental, cultural, sporting or charitable. Thus,

[3] Dennis Kamprad, (n 2).

[4] See 'Should non-profits merge?' https://businessday.ng/opinion/article/should-non-profits-merge/ accessed 2 March 2023.

[5] Edith Ogonnaya Nwosu, 'Gridlock and Goodluck in Quasi-Corporate Marriages in Nigeria' (University of Nigeria Senate Ceremonial Committee, 2021) 15.

[6] See generally Michael A Hitt, 'Creating Value Through Mergers and Acquisitions: Challenges and Opportunities' (2012) 7 <https://epublications.marquette.edu/cgi/viewcontent.cgi?article=1123&context=mgmt_fac> accessed 8 February 2023.

classification of associations in Nigeria is based primarily on the interests and objects they promote.[7] Accordingly, religious associations are made up of members who share similar religious inclinations. Similarly, educational, scientific, social and cultural associations comprise those with similar interests. Section 823 of CAMA 2020 provides thus:

> Where two or more trustees are appointed by any community of persons bound together by custom, religion, kinship or nationality or by anybody or association of persons established for any religious, educational, literary, scientific, social, development, cultural, sporting or charitable purpose, they may, if so authorised by the community, body or association (in this Act referred to as "the association") apply to the Commission in the manner provided for registration under this Act as a corporate body.[8]

Similarly, section 26 of CAMA 2020 provides that:

> Where a company is to be formed for the promotion of commerce, art, science, religion, sports, culture, education, research, charity or other similar objects, and the income and property of the company are to be applied solely towards the promotion of its objects and no portion thereof is to be paid or transferred directly or indirectly to the members of the company distributed among the members but shall be transferred to some other company limited by guarantee having objects similar to the objects of the company or applied to some charitable object and such other company or association shall be determined by the members prior to dissolution of the company.

Generally, associations in Nigeria can be formed either under Part B of CAMA or Part F of CAMA, depending on the objects or interests sought to be promoted. When associations are formed under Part B of CAMA, they can be referred to as companies with legal personality separate from the members. The company so formed can carry on business transactions but the profits are not shared among the members. This is primarily why they are referred to as not-for-profit companies or organisations. The notion here is not that they do not make profits, but that the profits arising from their activities are channelled to the objects which they promote.[9] Where the association is registered under Part F, only the trustees of the association, and not the association itself, acquire legal personality.

Accordingly, to operate any association in Nigeria, there are at least two options available to the members. One is to register the association as a company limited by guarantee, in which case the members are required to guarantee some funds for the purpose of discharging liabilities in the event of winding up of the

[7] See s 824 particularly, which provides that the Commission shall determine the classification of associations to be registered in accordance with the aims and objects of the association.
[8] See s 823 (1) CAMA.
[9] See s 26 CAMA.

company.[10] Apart from this feature and status as not-for-profit, associations registered and operated under this form are generally subject to the same regulations as companies limited by shares, including regulations on winding up and mergers. The stringent registration requirements and strict regulation of associations registered under this category therefore altogether make this route less attractive.

Where the members of an association or community do not intend to carry on business at all as their object, but desire to promote a charitable purpose as their object, they can nominate two or more of their members to be registered as incorporated trustees. Under this category, the members do not have to guarantee any sum, and the association does not enjoy separate corporate personality like companies limited by guarantee. Only the trustees of the association enjoy legal personality.[11]

It is worth mentioning that in some cases, what determines which of Part B or F an association is registered is not the resolution of the members but the interest sought to be promoted. Religious organisations and community-based associations compulsorily come under Part F. Some other interests like scientific, educational, social, and cultural or charity can come under either. It will, however, be noted that with respect to education, members who intend to promote educational activities by running schools must register as companies limited by shares, and this is primarily to bring them under the tax net.[12]

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[10] See generally s 26 CAMA.

[11] According to s 830 CAMA, From the date of registration, the trustees shall become a body corporate by the name described in the certificate, and shall have—
(a) perpetual succession;
(b) a common seal if they so wish;
(c) power to sue and be sued in its corporate name as such trustees; and
(d) subject to s 836 of this Part, power to hold and acquire, and transfer, assign or dispose of any property, or interests therein belonging to, or held for the benefit of such association, in such manner and subject to such restrictions and provisions as the trustees might without incorporation, hold or acquire, transfer, assign or otherwise dispose of the same for the purposes of such community, body or association of persons.
(2) The certificate of incorporation shall vest in the body corporate all property and interests of whatever nature or tenure belonging to or held by any person in trust for such community, body or association of persons.
(3) A certificate of incorporation when granted shall be prima facie evidence that all the preliminary requisitions herein contained and required in respect of such incorporation have been complied with, and the date of incorporation mentioned in such certificate shall be deemed to be the date on which incorporation has taken place.

[12] *Best Children International Schools Ltd v FIRS* ([(2018) CA/A/393/2016], where the Federal Inland Revenue Service (FIRS) argued that an educational institution which is registered as a company limited by shares is liable to pay tax and thus assessed the defendant in that case on income tax, notwithstanding that the nature of its business comprised wholly academic activities. Agreeing with the FIRS, the Court of Appeal

The concern here is limited to associations regulated under Part F of CAMA, reason, as stated above; being that merger of Part B associations is treated similarly as companies limited by shares.

3. Legal Framework and Regulation of Associations in Nigeria

Associations in Nigeria are regulated by various statutes, the foundation of which is the Constitution of the Federal Republic of Nigeria 1999 (1999 Constitution) as amended. Pursuant to section 40 of the 1999 Constitution, every person is entitled to assemble freely and associate with other persons, and in particular may form or belong to any association for the protection of his interests. This freedom of association is the bedrock of other laws regulating associations.

Companies and Allied Matters Act is another principal law that regulates associations in Nigeria. By section 823 CAMA, members whose interests cut across religion, education, literature, science, society, development, culture, sport or charity may apply to the Corporate Affairs Commission (CAC) to be registered. Until registered, it appears that such associations are free to carry out their activities provided that such activities are lawful and within the bounds of the law. The unregistered associations, however, will not enjoy corporate trappings such as the ability to sue and be sued in their corporate names, own property and operate corporate accounts. In effect, the unregistered association is not recognized as persons in law. Individual members of the associations may, however, sue to enforce their rights when violated. Once the association applies to the Corporate Affairs Commission (CAC) to be registered, and is registered according to the requirements of the law, it comes under the regulatory oversight of the Commission, and must ensure legal and regulatory compliance. The association is mandated to apply its income and property solely towards the promotion of the objects of the body as set forth in its constitution, and no portion from it shall be paid or transferred directly or indirectly, by way of dividend, bonus, or otherwise by way of profit to any of the members of the association.[13] A person who knowingly contravenes this

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held that what qualified a company to tax exemption under the relevant provision of the law is the corporate form of the corporation and not its business object(s). This decision is now obsolete with the enactment of the Finance Act 2021, s 7 of which amended s 23 (1) (c) of CITA by deleting educational activities from the list of companies whose profits are tax exempts.

[13] See s 838(1) CAMA. By s 838(2), however, of reasonable and proper remuneration to an officer or servant of the body in return for any service actually rendered to the body or association: Provided that— (a) with the exception of ex-officio members of the governing council, no member of a council or governing body shall be appointed to any salaried office of the body or any office of the body paid by fees ; and (b) no remuneration or other benefit in money or money's worth shall be given by the body to any member of such council or governing body, except repayment of out-of-pocket

provision is liable to refund such income or property so misapplied to the association.[14] Where the trustees of the association take part in the violation of this provision, they may be suspended and interim management appointed by the Commission.[15]

Another aspect of regulatory compliance which is often neglected, and which attracts penal sanction is the filing of annual returns. By virtue of section 848, incorporated trustees are expected to file annual returns between June 30 and December 31 each year. Where there is default in filing annual returns, the association is liable to pay fine as may be prescribed by the Commission.[16] Similarly, section 845(1) mandates trustees of an association to submit to the Commission a bi-annual statement of affairs of the association, as the Commission shall specify in its regulations. If the trustees fail to comply with subsection (1), each trustee shall be liable to a penalty for every day during which the default continues in such amount as the Commission shall specify in its regulations.[17]

Operation of associations in Nigeria may also implicate taxation obligation. Generally, associations registered under Part F are not subject to income tax. By section 23(1)(c) of the Companies Income Tax Act as amended, the profits of any company[18] engaged in ecclesiastical, or charitable[19] activities of a public character in so far as such profits are not derived from a trade or business carried on by such company, are tax exempt. The implication is that the income of those associations is not subject to tax. However, where the association engages in any business or trade outside of its object, the profits derived therefrom will be subject to tax.[20] This proviso was tested in the case of *Rev. Shodipe & Ors v Federal Board of Inland Revenue*[21], where the Court held that where a charitable institution carries on a profit-making business, profits made from such business are taxable.

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expenses, reasonable rent for premises demised or let to the body or reasonable fee for services rendered.

[14] See s 838(3) CAMA.

[15] See s 839 CAMA. This provision has however been a subject of scathing criticism. For instance, Abdullahi who argued that the aspect of vesting power on the Registrar-General of the Commission to suspend trustees of incorporated trustees and appoint interim managers is one of such troubling area of the law which is subject to abuse. AY Abdullahi 'The Legal Framework for Regulating Not-For-Profit Organizations in Nigeria' 2021 8(2) *NAUJCPL* 84.

[16] Annual Returns for Incorporated Trustees is N5,000 each year and penalty for failing to pay Annual Returns within the specified period is N5,000.

[17] See s 845(2) CAMA.

[18] Emphasis supplied.

[19] As amended by s 7 of the Finance Act 2021.

[20] For example, where a religious body runs a school or operates a printing press, the profit generated from the school or printing press will be subject to tax.

[21] [1974] FRCR 35.

4. Procedure for Effecting Merger of Associations in Nigeria

The procedure for merger of associations is captured under Reg. 35 of the Companies Regulations 2021, made pursuant to section 849 of CAMA.[22] By virtue of that regulation, the mandatory requirements for effecting a merger of associations are:

(i) The merging associations must have similar aims and objectives

The first condition for a merger of associations is that the merging entities must have similar aims and objectives. This suggests that an association with religious objects cannot merge with one that has sporting objects. Similarly, one with scientific objects cannot merge with one that has cultural objects. Their aims and objectives must be similar for a merger to be initiated. This provision is important because where two or more associations with dissimilar objects merge; it would amount to unlawful transfer since the entities are bound by law to transfer their property in the event of winding up or dissolution to associations having similar objects.[23]

(ii) 75% of the members of each of the associations must approve of the merger

This requirement presupposes that there should be a meeting of the members of each of the associations where the requisite majority's approval is obtained, or in the alternative a written consent of three-fourths of the members is secured. Since the law is silent on the issue of meetings contrary to the procedure for mergers of companies, it is suggested that the meetings of the merging associations should be held simultaneously on the same day so as to avoid a situation where the outcome of the meeting of one has an overriding influence on the other.

Since the resolution is not by unanimous consent of all the members, the issue of the fate of dissenting members is necessarily implicated. Some members who do not approve of the merger proposal, and who have a stake in the association should have a right of redress in one way or the other. They should normally be able to approach the Court to seek either a cancellation of the resolution approving the merger or have the scheme of merger reviewed. Voluntary associations usually make for free entry and free exit. Thus, a member cannot be forced or pressured into a relationship with others under a merger activity nor will an unwilling member hold the association to ransom by frustrating the merger. It is for this reason that merger provisions for companies normally

[22] The s provides that two or more associations with similar aims and objects may merge under terms and conditions as the Commission may prescribe by regulation.

[23] See s 850 of CAMA. However, it should be noted that where it is impracticable to find an association with similar objects to transfer all its assets, what remains of its assets can be transferred to a body with some charitable object. See s 850(5) CAMA.

provide for rights of dissenting members.[24] Whereas it is necessary to provide for rights of dissentients, one is not advocating a pecuniary relief because the interests of members of an association are not measured in units of money as obtained in companies limited by shares. Therefore, a member is not lawfully entitled to a refund of the aggregate of his/her contributions in the event of exiting the association.

Despite the omission by CAMA to specifically provide for the rights of dissenting members in a merger of associations, it is trite to opine that where the merger is between associations with dissimilar objectives, a dissenting member can seek an injunction to prohibit the merger transaction as being unlawful. Also, where there is default in complying with regulations governing meetings such as notice, quorum and right to vote, a dissenting member may seek legal redress. Where a member who was entitled to notice of a meeting in which the merger was approved, was not given notice and so could not attend the meeting to vote, the failure to give notice of meeting may be a ground for seeking redress.

(iii) Publication of application for merger to be made in two national daily newspapers for 28 days

The application for merger must be published in the daily newspapers circulating within the area where the associations are situate, and one of the newspapers must be a national newspaper.[25] It will be noted that what is to be published is application for the merger. This suggests that once the merger is approved by the members as required under the law, an application will be made by the merging entities to the CAC. The publication is to last for 28 days. This is to notify the general public and stakeholders, and may evoke legitimate reactions bordering on matters of public interest.

(iv) Display of notice of the proposed merger conspicuously at the headquarters and branches of each of the associations for at least 28 days:

The display of notices must be made at both the headquarters and branches (if any) of each of the associations, and may be made either before or after the publication of the application in the dailies.[26] The purpose of this requirement may be to bring into the web of protection persons other than members who are interested in the merger. Such persons as creditors and litigants constitute interested parties who may need this additional notice.

[24] See s 713 of CAMA 2020, which requires a dissenting member's shares to be purchased by the company 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.

[25] See Regulation 35.

[26] See Reg 35(5).

In any case, Reg. 35(5) requires that the contents of the publication and notices must contain a call for objection to the application for merger. The objection if any is to be forwarded to the Registrar-General of the CAC not later than 28 days after the last publication or notice, whichever is later. It seems that dissenting members of each of the associations may take advantage of this protective measure to object to the application since the requirement does not restrict the persons who are to make the objections.

(v) Scheme of merger to be sanctioned by the Federal High Court

The last stage is the sanctioning of the scheme of merger by the Federal High Court. It should be noted that it is the scheme that is taken to the Court for sanctioning, and not the application itself.[27] Thus, where the Court is not satisfied with the scheme of merger, it may refuse to sanction it, and the merger may not be implemented. However, CAMA does not provide for the things the Court should consider before sanctioning the scheme. It is hoped that the law does not intend for the Court to act as a rubber stamp by making an order sanctioning the scheme once it is presented. The Court naturally would consider regularity of the procedure and compliance with statutory provisions. Also, it is not clear who should make the application to the court - one of the merging associations or the surviving association?

5. Treatment of Liabilities under Merger of Associations

It is obvious from the procedure for effecting merger of associations highlighted above, that CAMA omitted the treatment of liabilities of the trustees to third parties. Debra Morris emphasizes that "[m]ergers involve the risk of potential trustee liability. Charities considering merger, therefore, need to know what the potential liabilities are and which charity will be responsible for particular liabilities".[28] Accordingly, under the repealed section 122 of the Investment and Securities Act 2007, which regulated mergers and acquisitions in Nigeria until 2019,[29] the court while sanctioning the merger was required to make some facilitating orders which must include an order for the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company.[30] Consistent with the tenor of this provision, it was held in *Paul Mbu v Stanbic IBTC Bank Plc* that as part of the

[27] See Reg 35(6).

[28] Debra Morris, 'Legal Issues in Charity Mergers' <https://www.liverpool.ac.uk/media/livacuk/law/2-research/clpu/report01.pdf> accessed 22 February 2023.

[29] It is important to note that ISA didn't contemplate mergers of associations.

[30] Curiously, this provision was omitted in the Federal Competition and Consumer Protection Act 2019, which is the principal legislation regulating mergers of business associations in Nigeria. However, it is retained in s 711(3) CAMA 2020 which governs scheme of arrangements, compromise or 'merger of companies' under a part designated for internal reorganisation.

incidences of merger, the resulting company acquires both the assets and liabilities of those merging companies, whose past dealings remain intact. In *Ecobank v FRN*,[31] the court, however, provided a limit to this rule by holding that the principle does not extend to (vicarious) criminal liability. According to the court, even though a company may under certain circumstances be liable for crime committed by its agents or officers but a company resulting from a merger deal cannot in law be vicariously liable for the crimes committed by its predecessor company even despite the acquisition.

The implication of the foregoing is that in the absence of any express provision requiring the transfer of liabilities as part of the scheme of merger in association mergers, the option left is for the parties to provide for such transfer in the scheme of merger to be sanctioned by the court. It is proposed in this paper that such a provision in the scheme of merger should be a *sine qua non* for obtaining the court's sanction.[32] This is imperative for the following two reasons:

i. In the absence of such provisions, only civil liabilities can be transferred to the trustees of the emerging association in view of the decision in *Ecobank.*[33] Thus, criminal liabilities where applicable will abate or be left untreated. This may invariably occasion social injustice against which most charities are promoted to fight.

ii. Under the incorporated trustees regime in Nigeria, only the trustees acquire legal personality, and not the entire association, as mentioned earlier. Where there is no clear provision on transfer of liabilities and the trustees of the target charity all retire after the merger is sanctioned, they will be deemed discharged of all liabilities upon the dissolution of any of the target charity. Where this happens, it will be legally impossible to discharge any civil or criminal liabilities of the trustees who at this point would have lost their corporate personality. Even where it is intended that there should be a shell association[34] after the merger, the shell association will be absolved of any such liability, reason being that, as stated afore, the legal personality of incorporated trustees only attaches to the trustees and not to the members or to the association as a whole.

Making transfer of liabilities a mandatory requirement for obtaining court's sanction under the scheme of merger will enable a third party to stop the merger where his/her interest is not adequately captured, or is threatened, and will minimize situations where trustees' motivation for a merger talk will be solely

[31] (2021) LPELR-52836(CA).
[32] Thus, it is pertinent that the statutory provisions be amended to provide for transfer of liabilities.
[33] Ibid.
[34] A shell charity becomes desirable where there is need to collect future legacies named for the original charity. See Debra Morris, (n 29)14.

to escape liabilities. This way, discussions on who bears the liabilities will form part of the merger negotiations and should be clearly resolved before the parties conclude the merger transaction.

6. Regulation of Merger of Associations in the UK and South Africa

6.1 Merger of Charities in the UK

Under the UK regime, merger of charities is regulated by the Charities Act 2011[35] (the UK Act). The Act defines charity as an institution established for charitable purposes only, and which falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities.[36] An institution is said to have a charitable purpose if it falls within any of the descriptions assigned under section 3 of the Charities Act, that is, if it is formed for the purpose of the prevention or relief of poverty; the advancement of education; the advancement of religion; the advancement of health or the saving of lives; the advancement of citizenship or community development; the advancement of the arts, culture, heritage or science; the advancement of amateur sport; the advancement of human rights; conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity; the advancement of environmental protection or improvement, the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage or the advancement of animal welfare.[37] This description of charitable purpose under the UK Charities Act is specific and broad unlike section 823 CAMA which merely mentions 'charitable purpose' as being one of the objects[38] which an association seeking registration as an incorporated trustee may undertake.

Merger of charities is regulated by Part 16 of the UK Act. Pursuant to section 305 of the Act, 'relevant charity merger' means:

> (a) a merger of two or more charities in connection with which one of them ("the transferee") has transferred to it all the property of the other or others, each of which (a "transferor") ceases to exist, or is to cease to exist, on or after the transfer of its property to the transferee, or
>
> (b) a merger of two or more charities ("transferors") in connection with which both or all of them cease to exist, or are to cease to exist, on or after the transfer of all of their property to a new charity ("the transferee").[39]

In effect, a merger is said to occur where there is a transfer of property from one association to another (or others) in which case the transferor ceases to exist

[35] As amended by the Charities Act 2022.
[36] See s 1 of the Charities Act 2011.
[37] See s 3(1) of the Charities Act 2011.
[38] The objects are similar to the ones within the description of 'charitable purpose' in the UK Charities Act, but they are not as exhaustive as the latter.
[39] See s 305(1) of the Charities Act 2011.

once the transfer is effected, or where two or more associations transfer their property to a new association, and they cease to exist once the transfer is effected. The transfer of property is effected by way of vesting declaration.[40] The vesting declaration operates on the specified date to vest the legal title to all of the transferor's property in the transferee, without the need for any further document transferring it.[41] However, vesting declaration is invalid if it applies to any land held by the transferor as security for money subject to the trusts of the transferor (other than land held on trust for securing debentures or debenture stock; any land held by the transferor under a lease or agreement which contains any covenant (however described) against assignment of the transferor's interest without the consent of some other person, unless that consent has been obtained before the specified date, or any shares, stock, annuity or other property which is only transferable in books kept by a company or other body or in a manner directed by or under any enactment.[42]

Even though the UK Act does not expressly limit merger negotiation to associations having the same objects, as provided under the Nigerian law, it would appear that where there is a transfer of property from an association to another with dissimilar object, a breach of the law would be implicated under the UK regime.[43] Any such transfer must then be made from one association to another with the same or broadly similar objectives. According to Debra Morris,

> If one charity has broader objects than the other, it is only possible to transfer from the charity with broader objects to the charity with narrower objects (as opposed to vice versa). This is because in Charity Law there is a duty on charity trustees only to apply the assets of the charity for the purposes for which the charity was created, as set down in the objects clause in the governing documents of the charity. Therefore, to transfer the assets of a charity into another charity with wider objects would be a misapplication of funds and a breach of trust by the trustees of the transferor charity.[44]

Limiting merger of associations to entities having similar objects would in addition to fulfilling the demands of the law, serve to respect the intents and will of donors. This is because, sometimes, donors may restrict the use of their gifts to certain charitable cause. Such restrictions, if not honoured particularly after the death of the donor, may lead to a breach of trust and may implicate legal battles. In *Newcomb Case*,[45] the will of Josephine Newcomb established Sophie Newcomb College in honour of her daughter, and to elevate women's

[40] See s 306(4) of the Charities Act 2011.
[41] S 310(2) of the Charities Act 2011.
[42] S 310 (3) of the Charities Act 2011.
[43] See Debra Morris (n 29), 25.
[44] Ibid.
[45] See Doug White, 'Good Giving from the Grave, <http://www.philanthropyroundtable.org/topic/donor_intent/good_giving_from_the_grave> accessed 13 February, 2023.

education. Following Hurricane Katrina, the college found itself in financial crisis and the board of directors voted to create a new co-educational entity, Newcomb-Tulane College. The family of the deceased donor argued that the intended action violated donor intent.[46] Though the issue was eventually resolved in favour of the university by the Louisiana Supreme Court, it "nevertheless likely caused significant legal, reputational, and time costs".[47] Donor restrictions over all may then constitute one of the factors which may prevent merger of associations from happening.[48]

Section 307 requires the UK Charity Commission to be notified of any relevant charity merger at any time after the transfer of property involved in the merger has taken place, or, if more than one transfer of property is so involved, the last of those transfers has taken place. It is noteworthy that the notification pursuant to this section is required to be made only after the transfer of property has been made, implying that the approval of the Charity Commission may not usually be required for merger of charities in the UK, similar to what is obtainable in Nigeria. That notwithstanding, the notification is to be given by the charity trustees of the transferee and must specify the transfer of property involved in the merger and the date or dates on which it took place and include a statement that appropriate arrangements have been made with respect to the discharge of any liabilities of the transferor charity or charities.[49]. The notification must also include such matters as the fact that a vesting declaration has been made, the date when the declaration was made, and the date on which the vesting of title under the declaration took place.[50]This provision suggests that parties contemplating merger of associations in the UK must first agree on the discharge of liabilities of the transferor associations. For instance, "which charity will be liable to pay employees' salaries and what is the cost? What is the rent on the property that the merged charity will be using and is there any liability for arrears?"[51] To identify the potential liabilities, Morris opines that:

> [I]t is necessary to carry out what is known in the context of commercial mergers as a 'due diligence exercise'. It will be seen that the commercial process of due diligence provides a helpful starting point for merging charities but, in practice, charities have to adopt a far more flexible process.[52]

[46] See Doug White, ibid. See also The Endowment & Foundation National Practice Group 'Nonprofit Mergers & Acquisitions: 5 Points to Consider' <www.pnc.com/insights/corporate-institutional/manage-nonprofit-enterprises...> accessed 10 February 2023.

[47] The Endowment & Foundation National Practice Group, ibid.

[48] Ibid.

[49] S 307(3) of the Charities Act 2011.

[50] S 307 (4) of the Charities Act 2011.

[51] Ibid.

[52] Ibid.

6.2 Merger of Non-Profit Companies in South Africa

Non-profit companies[53] in South Africa are regulated by the South Africa's Companies Act 71 of 2008 (CA 2008) and the Non-Profit Organizations Act of 1997 (NPO Act). Under the NPO Act, non-profit organisation means a trust, company or other association of persons established for a public purpose; and the income and property of which 'are not distributable to its members or office-bearers except as reasonable compensation for services rendered.[54] Similarly, the CA 2008 defines non-profit company as a company incorporated for a public benefit or other object, and the income and property of which are not distributable to its incorporators, members, directors, officers or persons related to any of them except to the extent permitted by item 1(3) of Schedule 1 of the NOP Act. Item 1(1) of Schedule 1 of the NPO Act, on the other hand, provides that the Memorandum of Incorporation of a non-profit company must set out at least one object of the company, and each such object must be either a public benefit object; or an object relating to one or more cultural or social activities, or communal or group interests. Although the scope of activities covered under the South African law seems to be limited compared to those of Nigeria and the UK, "group interests" as used in the provision is wide enough to cover the ground, since other interests can be accommodated under group interests.

Under the CA 2008, merger between a non-profit company and a profit company is prohibited.[55] Accordingly, transfer of property from a non-profit company to a profit company is void except the transfer is for a fair value. According to Item 2 of Schedule 1,

> A non-profit company may not— (a) amalgamate or merge with, or convert to, a profit company; or (b) dispose of any part of its assets, undertaking or business to a profit company, other than for fair value, except to the extent that such a disposition of an asset occurs in the ordinary course of the activities of the non-profit company.

A merger between two or more non-profit organisations is regulated by the same provisions that govern merger of profit companies are, with, of course, necessary modifications. By Item 2(2) of Schedule 1 of the NPO,

> If a non-profit company has voting members, any proposal to— (a) dispose of all or the greater part of its assets or undertaking; or (b) amalgamate or merge with another non-profit company, must be submitted to the voting members for approval, in a manner comparable to that required of profit companies in

[53] Non-profit companies can be likened to a company limited by guarantee in Nigeria. What this means is that, in South Africa, all associations which promote interests as defined under the law are regulated as non-profit companies. In Nigeria, as already explained, some associations may be floated as companies limited by guarantee while most of them may be floated as incorporated trustees.

[54] See s 1(1) of the NPO Act.

[55] See Item 2(1) of CA 2008.

> accordance with sections 112 and 113, respectively. (3) Sections 115 and 116, read with the changes required by the context, apply with respect to the approval of a proposal contemplated in sub item (2).

While sections 112 and 113 provide for proposals to dispose of all or greater part of assets or undertaking, and proposals for amalgamation or merger respectively, sections 115 and 116 deal with required approval for transactions contemplated in Part, and the implementation of amalgamation or merger.

Pursuant to section 112, a proposal to dispose of a nonprofit company must be approved by special resolution (or 75%)[56] of its members. A notice of a members meeting to consider a resolution to approve a disposal is to be delivered within the prescribed time, and in the prescribed manner to each member of the non-profit company; and must include or be accompanied by a written summary of the precise terms of the transaction or series of transactions, to be considered at the meeting.[57]

By section 113(2), two or more companies proposing to amalgamate or merge must enter into a written agreement setting out the terms and means of effecting the amalgamation or merger. The terms must include details of the proposed allocation of the assets and liabilities of the amalgamating or merging companies among the companies that will be formed or continue to exist when the merger agreement has been implemented.[58]

The resolution can be opposed by 15% of those entitled to vote but who did not exercise such votes in favour of the merger. Where there is such opposition to the merger, the merger will not be implemented without the approval of a court where the opposing member so seeks the court's intervention.[59] The court may, also, grant any person leave to apply to a court to seek review of the merger transaction.[60]

Once the merger has been approved by members of the merging entities as required under section 115, a notice of the merger must be sent to every creditor of the merging entities.[61] A creditor has 15 business days from the date of receipt of the notice to apply to the court for a review of the merger.[62] Where no notice was filed within the 15 business days as stipulated under section 116(1)(b), or where the court has disposed of the request where there is an application for leave to review the merger, a notice must be filed with the Commission. After the Commission has received the notice, it issues a certificate of registration to the new entity, where applicable, and then

[56] See s 64 (9) of CA 2008.
[57] See s 112(3) CA 2008.
[58] See 113(2)(f) CA 2008.
[59] S 115 (3) (b) CA 2008.
[60] S 115 (3) (b) CA 2008.
[61] S 116 (1)(a) CA 2008.
[62] S 116 (1)(a) CA 2008.

deregisters any of the merging entities that did not survive the merger. It appears the merger takes effect after notification to the Commission.[63]

When an amalgamation or merger agreement has been implemented, the property of each amalgamating or merging company becomes property of the newly amalgamated, or surviving company or companies; and each newly amalgamated, or surviving company becomes liable for all of the obligations of every amalgamated or merged company.[64]

By subjecting merger of non-profit organisations to the same regulation as commercial mergers, the South African provisions seem to have taken care of most of the concerns raised under the regime governing merger of associations in Nigeria. Issues such as treatment of liabilities, content of the scheme of merger, rights of dissenting members and creditors are within the purview of South Africa's regulatory framework.

7. Conclusion

Merger of associations or charities, as the case may be, though relatively novel, is gaining momentum globally.[65] This is largely due to the imperativeness of sustaining and expanding charities in the face of dwindling financial resources, and inability of government to provide essential services for the people. Nigeria, in its efforts to embrace international best practices, introduced merger of associations in the CAMA 2020, In spite of the importance of this innovation, it comes with certain shortfalls which are capable of undermining the very policy objectives it was meant to achieve. The provisions on merger of associations under CAMA, apart from being scanty, omit certain key elements of mergers. For instance, CAMA does not define merger of associations. This lacuna is a major omission and is capable of labelling activities such as partnership or joint ventures, often undertaken by associations, as mergers.[66] The potential challenge will be that such corporate agreements between and among associations may be subjected to regulation as mergers. The UK Charities Act of 2011 and the South Africa Companies Act of 2008 are both unequivocal and

[63] See generally s 116 (2)-(6).

[64] This is however subject to subsection (8) of 116, the requirements of s 113(1), and any provision of the merger agreement, or any other agreement. See s 116 (7).

[65] Between 1999 and 2008, for instance, there had been association mergers involving Parent Connection (1999) Child Haven (2000), Las Familias (2002), Golden Gate Community Center (2004), New Directions Institute for Infant Brain Development (2004) and Southern Arizona Center Against Sexual Assault (2008) in the US alone. See Jean Butzen, 'An Example of Strategic Mergers in the Nonprofit Sector: Arizona Children's Association' <An Example of Strategic Mergers in the Nonprofit Sector: Arizona Children's Association (ssir.org)> accessed 02 March 2023.

[66] Under s 92 of the Federal Competition and Consumer Protection Act 2019, for instance, a merger includes a joint venture. See also Edith Ogonnaya Nwosu, (n 6) 40.

elaborate on what a merger of associations means.[67] Nigeria should not only borrow a leaf in this regard, but also make elaborate provisions on the treatment of dissenting members and creditors of the merging entities. Finally, the provisions should cover transfer of liabilities of the trustees of the exiting entities, as may be necessary.

[67] It will be noted that in the UK and South Africa, associations are regulated as charities and non-profit companies respectively. Charities and non-profit companies can be likened to companies limited by guarantee in Nigeria. What this means is that, in the UK and South Africa, all associations which promote interests as defined under the respective laws are regulated as charities and non-profit companies respectively. In Nigeria, as already explained, some associations may be floated as companies limited by guarantee while most of them may be floated as incorporated trustees.