MERGERS AND ACQUISITIONS TERMS & CONCEPTS – UNDERSTANDING THE WORDS THAT MAKE THE DEAL

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Introduction

In my first day in the M&A class, my teacher, Professor Rodrigo Olivares Caminal, asked the class a simple question – *what is the difference between an acquisition and a takeover?* More than 20 students attempted to answer this question without success. This is a simple but yet very fundamental question that goes to the root of the transaction. Yes, I know you may be thinking that the answer to this question is really straightforward. I agree that it is, however, many M&A writers, teachers and/or practitioners appear to have a view which may not be entirely correct.

M&A practitioners (also known as deal practitioners) use a lot of fancy words which add to the flare and grace of deal making. However, the meanings ascribed to these words may become imprecise and, in some cases (at least amongst non-deal practitioners) lost from their usage. Knowledge of the precise meaning of these deal terms is important especially for business owners who have need to embark on business purchase, sale or combination. It is also important for deal practitioners at all levels to understand the precise meaning of these deal terms so that they can better add value to the deal ecosystem.

The purpose of this paper is to analyse few terms and concepts frequently used in the M&A space, in order to provide you with a firm grasp of their meanings and ensure that you better appreciate deal nuances. In the following sections, we will identify a list of terms and concepts, and will try to define them with examples from concluded deals and existing laws.

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The Terms and Concepts

a. Acquisition

An acquisition, as the name implies simply means the purchase of a business either wholly or in part. An acquisition may be of shares or assets depending on numerous factors. Where it is of shares, it invariably includes the assets owned by the company selling its shares. However, an acquisition of assets means that the company which owns the assets is not necessarily sold as part of the deal. The major advantage of asset acquisition is that generally, liabilities attached to the company do not move to the purchaser but remain with the company (save for certain liabilities such as employee claims on the transferred business as prescribed by certain regulations e.g., the *Transfer of Undertakings Protection of Employment [TUPE] Regulation* in the United Kingdom). Acquisitions may be effected with cash or non-cash considerations. The point to note is that an acquisition is a commercial transaction and as with such transactions, parties seek trade-offs which may involve cash or other non-cash considerations.

For instance, Capitec Bank's acquisition of Mercantile Business Bank in 2018 for 7 billion South African Rands is a cash-based acquisition deal. Mercantile Business Bank was sold to Capitec by its Portuguese parent bank Caixa.[1] Also, as far back as 1998 shares accounted for 67% of acquisition considerations in the United States.[2] Shares are valuable consideration where the acquiring company's shares are valued well above that of the target. Imagine that Elon Musk's Tesla is desirous of acquiring Nigeria's Innoson Vehicles Manufacturing Limited (IVM), do you think IVM will prefer cash or shares in Tesla? IVM could also ask for a hybrid of cash and shares given the value of Tesla's shares.

b. Merger

A merger simply speaking is a combination of two companies or businesses. This combination may produce one entity, retain the two entities or result in three entities at the close of the transaction. So, 1+1 may become 1, or 1+1 may be 2 (preferably written in roman numerals as II to show they are still two different companies); or 1+1 will become 3 (or III). The point should be made that in commercial transactions, no term or concept is ever so rigid. They continue to evolve according to the creativity of the contracting parties. So, while ordinarily a merger should mean two companies combining to become one, there are instances where both parties combine by exchanging shares in each other at a pre-agreed valuation, while retaining their different operations and/or brand identities. The Daimler/Chrysler merger in 1998 is a good example. Following this merger, Mercedes and Chrysler retained their production lines and the brands were not combined to form one brand. Hence, it was easy for Daimler to move on with its Mercedes brand when the merger failed.

A merger may not involve exchange of shares strictly speaking. A mere agreement by two companies to combine the operations of their business units in order to consolidate market share or to purchase supplies as one unit, may amount to a merger, subject to regulatory approval, depending on the governing antitrust laws. In Europe, Article 101(1) of the Treaty on the Functioning of the European Union (TFEU)[3] generally prohibits such agreements unless parties can establish an exception under Article 101(3) TFEU. In *ACF Chemiefarma NV v. Commission of the European Communities*,[4] it was held that a gentleman's agreement between different companies in which they agreed to preserve local markets and fixed production and export quotas for the production and sale of quinine and quinidine, was capable of restricting trade in the internal markets of the EU. In light of this, it is important to have a fluid understanding of the term 'merger' in order to anticipate when regulatory issues may arise.

c. Takeover

The definition of takeover is one of the inspirations behind this paper. The reason is

[1] https://businesstech.co.za/news/banking/345460/capitec-acquires-mercantile-bank/ accessed 18/06/21

[2] Fortune, *'The Year of the Mega Merger'*, 11th January 1999 available at https://money.cnn.com/magazines/fortune/fortune_archive/1999/01/11/253799/index.htm accessed on 6/07/2021

[3] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML accessed 18/06/21

[4] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61969CJ0041 last accessed 17/06/21

that many writers and law teachers have the notion that the word takeover ipso facto connotes hostility in the M&A process. The correct view however is that takeover simply means the process of purchasing publicly traded shares. In simple terms, publicly traded shares are not acquired, rather they are said to be taken over. A look at Section 3 of the Introduction to UK's Takeover Code[5] is instructive. Section 3(a)(i) and (ii) is to the effect that the Code applies to only companies which are trading on a UK regulated market or the stock exchange. The code also applies to private companies where their securities have been admitted to trading on a regulated market or stock exchange, or where the private company has filed a prospectus for the offer of securities to the stock market. This supports the view that takeover is only in respect of shares in the public domain as opposed to acquisition which is for private shares. Also, section 133(4) of the Investment and Securities Act (2007) of Nigeria, specifically provides that a takeover bid shall not be made in any case where the shares to be acquired are shares in a private company. This shows that privately held shares cannot be the subject of a takeover strictly speaking. Takeovers are usually regulated by some codes or rules given that they affect the 'public' whose shares are the subject of purchase and who cannot directly partake in discussions with the purchaser(s).

A takeover may also be referred to as a "take private" or a "public to private". The reasoning behind this definition is simple. Acquisition in the M&A context means purchasing privately held shares (in a private company). This usually happens through negotiation between the shareholders of the private company and the purchaser(s) following which a share purchase agreement is signed and the purchaser assumes control of the company. In a takeover, the purchaser does not have the convenience of negotiating with the shareholders who are likely numerous and scattered across the globe. Hence, negotiations are typically done with the management of the public company following which the purchaser makes an offer for the shares of the public company and the management presents the offer to the shareholders. Where the shareholders vote in favour of the offer, the purchasers will pay and *take over* the shares of the shareholders, thereby taking the company into private ownership (hence why it is called a take-private). In 2013, following poor performance in previous years,[6] Michael Dell, the founder and CEO of Dell, in partnership with Silver Lake Partners, a private equity firm, offered to purchase the shares of the company from its public shareholders for a consideration of $13.88 per share, valuing the company at $24.9 billion.[7] This purchase took the company from public ownership back into the private ownership of Michael Dell, this time with Silverlake Partners. After a successful private management, Michael Dell took the company back into public ownership in 2018.

A takeover is said to be 'hostile' where the management of the public company is not in support of a sale of the company to a particular bidder or to any bidders usually because they

[5] The City Code on Takeovers and Mergers – Introduction – Page A2

[6] https://www.theverge.com/2018/8/13/17644234/michael-dell-enterprise-technology-consumer-laptop-private-public-emc accessed 15/06/21

[7] https://www.dell.com/learn/us/en/uscorp1/secure/acq-dell-silverlake accessed 17/06/21

believe the company will get into wrong management following the sale, or they (the management) may be out of job following the takeover. Where this is the case, the bidders will take their offer directly to the shareholders and will typically bid for their shares at a premium. The management will on the other hand seek to apply several takeover defence mechanisms such as issuing additional shares at a discount (the famous poison pill) or issuing bonds redeemable before maturity in the event of a hostile takeover (poison put). The purpose of these mechanisms is to scuttle the takeover.

d. Completion

The process of deal making has a calendar which usually begins (broadly speaking) with pre-contract negotiations and ends with post-deal integration. Typically, after parties have negotiated and executed an agreement, there may be other conditions to be met before the deal is concluded. Some of these conditions may include obtaining regulatory approvals from merger control authorities or, for deals in regulated industries such as power or banking, from the industry regulator. The deal is said to be completed when the conditions precedent as stated in the acquisition documents have been satisfied or expressly waived. Before then, the buyer may still be able to walk away from the deal depending on the terms of the agreement signed. For instance, there may be a no-MAC[8] (no-material adverse change) clause as a condition to completion in the agreement. This clause stipulates circumstances that will qualify as material adverse change and will give the buyer the option to elect either to opt out or to proceed with the transaction. A typical no-MAC condition will be the loss of a major customer which then makes the deal less commercially attractive especially from a financier's perspective. The mechanism for completion in a share purchase will typically differ from that in an asset purchase. It is also possible, though rare, that completion may occur simultaneously with signing.

e. Buyer's out

As stated in the definition of 'completion' above, there is usually some time gap between the execution of the deal and the completion of the deal. During this period, the dynamics of the deal may change or the basis upon which the deal was negotiated may disappear thereby making the deal unviable. To forestall a situation where a buyer is stuck to a deal which has grossly changed between execution and completion, deal makers include the buyer's out in the acquisition agreement, which in effect is a condition that the buyer can rely on to pull the deal before completion.[9] Some of these conditions may include the failure to obtain regulatory approval or even the no-MAC clause as discussed above. For instance, in 2016, few days before the US Elections that returned Donald Trump as US President, Qualcomm, a US company entered a deal to acquire Netherlands-based NXP for $47 billion. Regulatory approval was sought and obtained in every jurisdiction (including US and the EU) except China. In the face of the China-US trade disputes, China's State Administration for Market Regulation (SAMR) simply failed to communicate its approval or disapproval.[10] Having extended the completion date severally in order to obtain regulatory approval from China, Qualcomm exercised its 'out' in 2018 and

[8] Tom Speechley, (2015) 'Acquisition Finance', 2nd Ed. Kent UK, at p. 82.
[9] Ibid.
[10] https://www.reuters.com/article/us-nxp-semicondtrs-m-a-qualcomm-idUSKBN1KF193 last accessed on 30/06/2021

pulled the deal, but not without paying a $2 billion 'breakup fee' to NXP.

f. Due Diligence

The meaning of due diligence need not be discussed in-depth here, as it had been discussed extensively in our paper titled '*Due Diligence and Business Intelligence – The Art and Strategy for Deal Success*'.[11] Due diligence is simply a fact-finding process whereby a party to the transaction elicits facts from the counterparty and other external sources, to verify or ascertain the deal parameters and drivers. This process aids decision making as to whether to proceed with the deal; what should be the proper valuation of the deal; how the deal should be structured; how the deal should be completed; whether any security should be given by the seller on completion; how post-deal integration should be handled; and other issues that may affect the success of the deal. Due diligence is fundamental to every M&A process and usually has ramifications for other aspects of the deal. For an in-depth discussion on due diligence and its relationship with other parts of the deal, please see our paper referred to above.

g. Management Buyout (MBO)

MBO is a type of deal where the management of the target, in collaboration with a sponsor, buys the target from its shareholders. To make sense of an MBO, it is best to create a scenario. Reliance Industries Limited (RIL) the Indian conglomerate owned majorly by Indian Billionaire, Mukesh Ambani, has (as at 31st March 2021) a total number of 3.03 million shareholders inclusive of promoter, promoter group and public shareholders.[12] RIL also has a 10-man management team including Mr. Mukesh Ambani its Chairman and Managing Director.[13] Now, imagine that the management of RIL envisions huge opportunities to compete with the likes of Amazon, Google, Facebook and Alibaba in global markets in US, the EU, China and Africa thereby requiring a huge capital outlay plus aggressive investment strategies. RIL's current shareholders may not support such massive expansion plans if they have a lower risk appetite. But RIL's management sees that there is clear opportunity for expansion and global dominance. In this scenario, RIL's management will approach a large private equity company or fund manager (say New York City's Blackstone Group) and propose to it to sponsor an acquisition of RIL (the private equity company or fund manager is usually called the '*sponsor'*). This proposal will be backed by a business plan making a case for the acquisition. Blackstone and the management of RIL will typically discuss the terms under which both sides can participate through a special purpose vehicle (SPV), to acquire RIL from the non-management shareholders (recall that in this case, Mr. Ambani, the MD is already a shareholder). The SPV will usually be owned (say 80:20) by Blackstone and the management of RIL respectively. The SPV will then make an offer to the other shareholders of RIL to sell their shares to the SPV to enable the new ownership and the existing management to implement the new business plan.

Because the funding requirements for acquiring RIL and implementing the business

[11] Available at www.niccomllp.com

[12] https://www.ril.com/DownloadFiles/Shareholding%20Pattern%20-%2031.03.2021.pdf last accessed on 1/07/2021

[13] https://www.marketscreener.com/quote/stock/RELIANCE-INDUSTRIES-LTD-9058833/company/ last accessed on 1/07/2021

plan will typically be enormous, Blackstone will approach a finance house, usually a large bank (say, JP Morgan) to provide debt finance for funding the acquisition and implementing the business plan. Blackstone will provide equity contribution in the SPV, and RIL's management will also provide equity contribution (what is called their '*skin in the game*') to cover their 20% stake in the SPV. In this simple scenario, the SPV will combine the equity and debt to purchase RIL's shares from the other shareholders and implement the business plan. Where this happens, it is said that the management has bought out RIL from its shareholders, hence the name MBO. This process was deployed by Michael Dell, as CEO of Dell, in buying out Dell from its public shareholders in order to take it private in 2013.[14]

Note that there may be a secondary buyout which involves the existing management and a new set of sponsors buying out the target from the existing sponsors, just the same way the management teamed up with the initial sponsors to buy out the target from the original shareholders.

h. Management Buy-in (MBI)

Recall that in the MBO scenario above, it was the management of RIL that bought out the company from its shareholders. The acquisition was carried out with the support of existing management. The major difference between an MBI and an MBO is that in an MBI, the management team that partners with the sponsor to form an SPV to purchase RIL will be an external management team; not RIL's existing management. The management team may be from a different company, or it may be assembled for the purpose of the acquisition, to assess the opportunities of RIL in the global market and come up with a business plan that could reposition the business and yield sufficient ROI that will warrant a buy-decision. In this case, the external management will, with the assistance of Blackstone and debt from JP Morgan, buy into RIL as opposed to buying it out in the MBO scenario. This is the meaning of MBI.

i. Acquisition Finance

Acquisition finance is simply the debt provided by a finance house to fund a sponsor's acquisition of a target. Recall that in the RIL example above, JP Morgan was approached by Blackstone to provide a loan to support the SPV's acquisition and business plan implementation funding. That loan provided by JP Morgan is simply called '*acquisition finance*'. An acquisition finance is different from a corporate debt provided by a bank to a trade buyer in order to fund an acquisition. The considerations for an acquisition finance and a corporate debt are different. Therefore, it is important to understand the dichotomy between the two types of debt which could be deployed towards an acquisition, because such understanding will aid in negotiating the finance agreement as well as the acquisition agreement in the interest of the relevant stakeholders. Given that a sponsor is only acquiring the target to improve its value and subsequently exit, the security for acquisition finance will usually be the assets and business of the target, which will also be the revenue stream for repaying the debt. For a trade buyer, the funds will be borrowed on the strength of its balance sheet and it can repay from any of its businesses or assets. Hence, as expected, a lender of acquisition finance will

[14] (n 5)

be particularly interested in the due diligence reports and the negotiation of the acquisition agreement given the nature of its exposure to the deal. A lender of corporate debt to a trade buyer will be less interested in the finer details of the acquisition agreement because it would have taken its security over the trade buyer's general business (perhaps by way of debenture).

A sponsor may be called a financial buyer while a trade buyer could be referred to as a strategic buyer. For a better appreciation of the difference between both types of buyers, please see our paper titled '*Before you sell your business, think like a buyer*'.[15]

j. Earnout

An earnout is a deal arrangement which enables parties to agree on a value/price for the target but requiring that only a part of the purchase price is paid at completion, while the remaining part is paid post-deal, in an agreed structure depending on the happening of some pre-agreed events.[16] The operative part of this definition is that earnout enables parties to agree on value/price. It is safe to say that earnout was devised as a cure to valuation and pricing issues in M&A deals. Imagine that Gazprom, the Russian global energy giant desires to acquire Seplat Petroleum, Nigeria's leading indigenous oil and gas exploration company. Parties are in talks over the deal and a key issue is the valuation of the Nigerian target. The valuation determines the price to be paid for the acquisition. Typically, the shareholders of Seplat will put forward a very optimistic valuation clearly setting out the potentials of Seplat and why it is a value creating deal for Gazprom. Gazprom on the other hand will be ruthlessly pragmatic, and will point out different risk factors in the deal including external factors such as the uncertainty around the implementation and workings of the recently passed Nigerian Petroleum Industry Bill. Also, imagine that part of the basis for Seplat's valuation is that it is in advanced stages of developing a new engine lubricant which it believes will do well in the sub-Saharan markets. It therefore believes that the future success of the lubricant should be factored into valuing the deal. However, Gazprom wants to limit its exposure to the uncertainties surrounding the regulatory environment and Seplat's product-in-development. There will therefore be a deadlock as to the value to be ascribed to Seplat for the purpose of completing the deal. In the circumstance, parties will use the earnout device to agree on a valuation and an initial percentage of the valuation to be paid (say 60%) while payment of the remaining 40% is deferred until after the deal is completed and/or those uncertain circumstances have materialised or failed to materialise. The deferred amount may be paid in lump sum or in tranches depending on the agreement of the parties.

Earnouts are common in deals involving businesses where R&D is crucial and the industry changes very fast (for instance tech businesses and pharmaceuticals). Earnouts are responsible for most post-deal disputes. It requires a very critical understanding and appreciation; else one side of the deal may find that earnout has eroded the value it hoped to realise from the deal. For a critical analysis

[15] Available at www.niccomllp.com

[16] Chike Obimma (2020) '*A Critical Appraisal of Earnout Provisions as a Source of Post-Closing Disputes in Mergers and Acquisitions*' available at www.niccomllp.com

of earnout and its proclivity for post-deal disputes, please see the author's paper.[17]

k. Completion Accounts Mechanism

In negotiating a deal, one of the major questions revolve around the price to be paid for the target. The price of the target is usually reflective of the target's balance sheet and other financial statements (that is, its assets and liabilities as well as net cash and working capital[18]). At the point of negotiation and executing an agreement, parties will usually agree on a price based on an assumed position of the balance sheet and information revealed by due diligence. Given that the buyer is not in control of the books of the target and can only rely on the seller's representations as to the position of the balance sheet, buyer will be happy to proceed with negotiations and even complete the deal provided that once it takes control after completion, it will verify the bases of the assumptions (on which the price was agreed) and parties will revisit the price paid for the target. This process of verification of the books of the target and the balance sheet in order to confirm that the right amount was paid for the target is what deal practitioners refer to as 'completion accounts'. Given that a deal is not done until it is completed, (as distinct from signing; it has been shown that a deal can still be pulled even after signing) it is the position of the balance sheet at completion that is relevant to the parties. Typically, the acquisition agreement will define the procedure for performing the completion accounts, i.e., whether parties will appoint an independent accounting firm to perform the process; or the buyer will perform the process but where the seller disagrees, an independent accountant will be retained to give an independent binding opinion. The outcome of completion accounts will typically be one of three things: a) that the position of the balance sheet at completion reflects the price paid for the target; b) that the position of the balance sheet at completion shows a lower financial state than what was paid for the target and as such, the seller needs to refund some money to the buyer in order to restore parties to the true position of the balance sheet; c) that the position of the balance sheet at completion shows a higher financial state than what was paid for the target, in which case the buyer needs to make more payment to the seller in order to meet the actual price of the target as determined by the completion accounts.

Completion accounts may have been simplified in this definition; however, it is a major source of post-completion disputes. it requires finesse, skilled negotiation and drafting.

l. Locked-box Mechanism

In certain deals, parties may wish to agree on a definite price before completion and to avoid revisiting the price post completion (by way of completion accounts as discussed above). This is usually the case in secondary buyouts or a sale of target to a trade-buyer by a sponsor, where the sponsor desires to have a clean-break from the target. To do this, parties will rely on the Locked-box price setting mechanism as an alternative to the completion accounts mechanism. With the locked-box mechanism, price is determined based on a balance sheet prepared by the seller and agreed to by the buyer on a date prior to completion. The purchase price of the target is set/locked on the date agreed to by the parties based on the balance sheet. It is important to state that before agreeing to the seller-balance

[17] Ibid.

[18] (n7) at page 30

sheet, buyer would have conducted satisfactory due diligence especially since the price will not be revisited.

To understand this, imagine that the parties after perusing the seller-balance sheet (in paper form), decide to write the agreed price behind the paper and deposit same in a box, which is locked and kept away so that no one is able to revisit same. This is in a way, how the locked-box mechanism determines price. Yes, the target will continue to carry on business from the locked-box date till completion. The question is, what happens to the earnings made in that period, especially since the deal can still be pulled before completion, and alternatively, the seller will be paid a price which does not take into account all subsequent earnings made before completion. Will those earnings be for the benefit of the buyer or seller? Usually, the buyer may agree to pay the seller a 'daily earnings amount' reflecting the daily earnings of the target from the locked-box date to the completion date.[19] Alternatively, buyer may agree to pay the seller, an agreed rate of interest on the purchase price for the period between the locked-box date and the completion date.[20] To assure the buyer that there will be no leakages from the target from the locked boxed-date (especially given that price has been agreed and risk has 'passed'), buyer will request a specific set of undertakings backed by indemnity, to the effect that seller will preserve the business of the target and avoid leakages. Leakages may include payment of dividends, sale of asset at an undervalue, or such other dealings which may erode the value of the balance sheet as predetermined.

m. Exit

Exit refers to the realisation of the investment made towards the acquisition of the target. Exits in this context connotes more than just the realisation of investments, it is also somewhat about moving on from the investment having realised the anticipated returns on same. Here again it is important to distinguish between strategic purchasers and financial purchasers. A strategic purchaser acquires a company to either fill a void in its operations, or to meet an expansion plan or simply to forestall falling behind competition. Amazon's recent acquisition of MGM Holdings (MGM Studios) for $9billion[21] is a classic example of a strategic purchase. The rationale for the deal is simple; Amazon has in its portfolio, Amazon Prime which, among other shopping benefits, has become a major streaming platform. Members pay a subscription fee which entitles them to early deliveries on shopped items, shopping discounts and importantly, video streaming. To the extent that Prime is a streaming platform, it is in competition with services such as Netflix and Disneyplus. For streaming services, content is king and the more content you have, the more attractive your platform becomes. Acquiring MGM (which partly owns the James Bond Franchise) is as strategic as it gets for Amazon's Prime services. For deals such as this, the investment may be realised from the purchaser's synergy with the target, yet the purchaser may not exit (in the strict sense of it) by moving on from the target.

[19] ibid
[20] ibid
[21] https://www.wsj.com/articles/amazon-nears-deal-to-buy-hollywood-studio-mgm-11621880759 accessed on 23/06/2021

For financial purchasers, an acquisition is a means to an end – returns on investment – determined by specific rates of return. Thus, the aim upon acquisition is to improve the position of the target and make sufficient money that meets that rate of return in order to justify the investment. In financially motivated deals, private equity sponsors acting as general partners, pull resources from other investors (known as limited partners) for the purpose of investing in the acquisition of a target, with the promise that the target's fortunes will be improved and the invested sums will be returned with interest. Hence, the acquisition is only with a view to oversee the positive performance of the target within a period of time (usually ten years) after which the sponsor will exit the investment and make returns to its investors. Exit here could be by way of floatation of the target's shares, selling the target to a strategic buyer – a trade sale, selling the target to another sponsor through a secondary buyout, or embarking on a dividend recapitalisation (dividend recap) – using leverage to pay special dividend to investors thereby freeing up equity and increasing debt in the target.

n. Debt Pushdown

Sometimes (if not most times) debt is used as part of the funding to acquire a company. This debt comes from finance houses who are interested in making an upside on the future performance of the target. Recall that the acquirer will not be in control of the target at the time of discussing the funding requirements of the deal with the finance house. This means that the debt will be taken by the acquirer (or its SPV) for the purpose of acquiring the target. However, even prior to the acquisition, the finance house will base its decision to provide debt on the future performance of the target given that the debt will be repaid mainly (if not entirely) from target's cashflow. Simplistically, target will pay dividend to acquirer, and acquirer will repay the debt to finance house from the received dividend. But before dividend goes up to acquirer, other deductions including taxes would have been made from the earnings of the target thereby reducing the cash which would have otherwise been available to repay the finance house. Thus, the finance house will prefer that the debt is given directly to the target so that the target can repay the debt directly from its cashflows before deductions are made from the said cashflow. Corporate benefit and financial assistance laws[22], which prohibit a company (in this case, the target) from borrowing money to fund its own acquisition, will prevent target from undertaking such debt from finance house irrespective of any arrangement it may have with the sponsors.

The challenge that arises is, how can debt taken by the acquirer be pushed down to the target, to enable the finance house to be paid directly from the cashflow of the target before deductions are made which may reduce the available cashflow? This is the gist of debt pushdown. One easy way of pushing debt down is by using part of the purchase price to refinance the target's debt. Imagine that in the course of its business, MGM has incurred debt of about $4billion. Since the purchase price is $9billion, Amazon (assuming it is financing the acquisition with debt) may agree with its

[22] See for instance, section 183 of the Nigerian Companies and Allied Matters Act 2020 for both public and private companies; and section 678 of the UK Companies Act 2006 (as amended) for public companies.

finance house to lend $4billion directly into MGM to refinance its debt obligations (thereby paying off and taking over those obligations). The remaining $5billion is then lent to Amazon for it to pay to the shareholders of MGM to complete the $9billion acquisition. By doing this, part of the acquisition finance will have been pushed down directly to the books of MGM and the finance house will be repaid to such extent, from MGM's direct cashflow. What about the remaining $5billion, can it be pushed down? The answer will depend on the peculiarities of the particular deal, the jurisdiction of the deal and the adeptness of the transaction solicitor. Generally speaking however, the remaining acquisition finance can be pushed down through some post-deal restructuring.

Conclusion

The aim of this paper has been to ground the reader on some of the terms associated with M&A deals. Merely defining the terms would not have achieved this aim, hence the need for detailed classroom-like explanations backed by examples. This paper could not have exhaustively defined relevant deal terms. However, it is hoped that it is a good start. It is also hoped that by appreciating these terms, one will better appreciate pertinent deal issues, thereby leading to better deals which will return value to shareholders and investors.

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At Niccom LLP, we advise on Mergers and Acquisitions, and we understand the intricacies of deal making and structuring. We are happy to advise you on structuring and negotiating that deal irrespective of the side of the deal you are negotiating from, be it the finance-side, the buy-side, the sell-side or even a merger properly so-called.

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