THE REGULATORY FRAMEWORK FOR TAKEOVERS
IN THE UNITED KINGDOM AND NIGERIA: SHAREHOLDERS AND
EMPLOYEES PROTECTION IN PERSPECTIVE

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School of Law
List of Contents

List of Contents .................................................................................................................. 2
List of Tables and Figures ................................................................................................. 8
List of Cases ....................................................................................................................... 10
List of Abbreviations ....................................................................................................... 12
Legislations and Similar Instruments ............................................................................... 13
Abstract ............................................................................................................................ 18
Declaration ......................................................................................................................... 19
Copyright Statement ........................................................................................................ 20
Dedication .......................................................................................................................... 21
Acknowledgements ........................................................................................................... 22
PART I ................................................................................................................................. 23
CHAPTER ONE .................................................................................................................... 24
  1. GENERAL INTRODUCTION .................................................................................. 24
  1.1 Introduction ............................................................................................................ 24
  1.2 Background to the Problem .................................................................................. 26
  1.3 Theoretical Perspectives of Takeovers .................................................................. 28
  1.4 Aim of Study ........................................................................................................... 30
  1.5 Research Questions ............................................................................................... 31
  1.6 Research Methodology ......................................................................................... 33
  1.7 Major Contributions .............................................................................................. 41
  1.8 Outline .................................................................................................................... 46
PART I ................................................................................................................................. 46
PART II ............................................................................................................................... 49
CHAPTER TWO .......................................................................................................................... 53

2. THE REGULATORY FRAMEWORK OF INSTITUTIONS ........................................... 53

2.1 Introduction .................................................................................................................. 53

2.2 The Neo-classical Economics and the Old Institutional Economics Theories .................................................. 53

2.3 The Framework of the New Institutional Economics .................................................. 56

2.4 Institutions: Levels of Development and Change ...................................................... 58

2.5 Main Streams in Economics of Institutions ............................................................... 64

2.5.1 Property Rights of Shareholders ........................................................................ 65

2.5.2 Transaction Costs Economics (Costs of Takeovers) .......................................... 69

2.5.3 Agency Relationship between Managements and shareholders ..................... 73

2.6 How Institutions Can Influence Market Discipline ................................................. 77

2.7 Conclusion ................................................................................................................. 82

CHAPTER THREE ................................................................................................................ 84

3. THE THEORETICAL FRAMEWORK OF CORPORATE TAKEOVERS ........ 84

3.1 Introduction .............................................................................................................. 84

3.2 Types of Corporate Takeover: Nature and Characteristics .................................. 87

3.3 The Takeover Devices .............................................................................................. 89

3.3.1 Direct Purchase of Shares (Tender Offers) ....................................................... 89

3.3.2 Proxy Contests .................................................................................................. 94

3.4 The Takeover Hypotheses and Justification for Takeovers ................................... 100

3.4.1 The Disciplinary Hypothesis .......................................................................... 100

3.4.2 The Synergy Hypothesis .................................................................................. 106

3.4.3 The Hubris Hypothesis .................................................................................... 110
CHAPTER FIVE .................................................................................................................. 191

5     TAKEOVER REGULATION IN NIGERIA ................................................................. 191
5.1   Introduction ............................................................................................................. 191
5.2   The Historical Development of Takeover Regulation in Nigeria ....................... 191
5.3   Takeover Regulation and Shareholder Protection ............................................... 199
5.3.1  Shareholders of Target Companies ................................................................. 202
5.3.2  Shareholders of Acquiring Companies ............................................................ 211
5.3.3  Shareholder Remedies and Directors’ Duties .................................................... 222
      (a) Shareholder Remedies ...................................................................................... 222
      (b) Directors’ Duties .............................................................................................. 226
5.4   Employment Protection and Takeovers ............................................................... 228
5.4.1  Takeover Regulation and Employment Protection under the ISA ................... 228
5.4.2  Takeover Regulation and Employees Protection
       under the SEC Rules and Regulations .............................................................. 232
5.5.1  Shareholders ..................................................................................................... 236
5.5.2  Employees ......................................................................................................... 237
5.6   Conclusion ............................................................................................................ 240

CHAPTER SIX .................................................................................................................. 244

6     INSTITUTIONAL DEVELOPMENT AND
       THE REGULATORY CONTROL OVER TAKEOVERS
       IN THE UNITED KINGDOM AND NIGERIA ...................................................... 244
6.1   Introduction ........................................................................................................... 244
6.2   The Institutional Framework for Takeover Administration in
       the United Kingdom and Nigeria ......................................................................... 245
6.2.1  Administration of Takeovers: Nigeria and the United Kingdom ............... 249
6.3 Regulatory Control over Takeovers ................................................................. 255
6.4 Employment Protection: Efficient Capital Market Hypothesis and the
Effectiveness of the Market for Corporate Control ........................................ 260
6.4.1 Employment Protection Regulation and the Efficient Capital
Market Hypothesis ............................................................................................. 260
6.4.2 Employment Protection Regulation and the Effectiveness of the Market for
Corporate Control .............................................................................................. 264
6.5 The Common Interests of Shareholders and Company Employees ........ 266
6.6 Conclusion ....................................................................................................... 270

CHAPTER SEVEN .................................................................................................. 274
7 CONCLUSION .................................................................................................... 274
7.1 Introduction ....................................................................................................... 274
7.2 The Theoretical Frameworks: Importance and Application .................... 275
7.3 Opportunism, Uncertainties, Property Rights and
National Economic Interest .................................................................................. 278
7.3.1 Selective Protective Institutional Framework in the United Kingdom .... 279
7.3.2 A Confirmation of the Existing Problems in Nigeria is not the Solution.. 284
7.4 Towards an Effective Institutional Framework for Takeovers.................. 288
7.4.1 Legal Reforms and Shareholder Protection............................................... 288
   i) The Investments and Securities Act and SEC Rules .................................... 290
   ii) The Takeover Code .................................................................................. 292
7.5 Smart Regulation and Social Dialogue for Employment Protection ......... 292
7.5.1 Employment Protection under the Securities
   and Exchange Commission Rules ................................................................. 296
7.5.2 Institutional Function of Smart Regulation in Nigeria.............................. 298
7.5.3 Institutional Function of Smart Regulation in the United Kingdom ....... 299
7.6 Conclusion and Future Research ................................................................. 301

BIBLIOGRAPHY .......................................................................................... 306
Books ........................................................................................................ 306
Articles ...................................................................................................... 312
Newspaper and Other Online Reports ....................................................... 334
Appendix 1 .................................................................................................. 336

The final word count of the main text (including footnotes): 84,800 words.
List of Tables and Figures

Tables

1. Institutional Levels of Development and Change..........................62
2. The Main Streams of the NIE.........................................................77
3. Pre-Bid Takeover Defences..........................................................116
4. Post-Bid Takeover Defences..........................................................117, 118
5. Measure of Gains to Acquirers in the UK 1981-2001..................166, 167
6. Effect of Acquisitions on Labour demand (Pre 2006 period)............186
7. Statistics of Yearly Rate of Corporate Acquisition in Nigeria, 1983-2010.................................................................194
9. International Acquisitions Showing the Percentage of Traded Companies Targeted in a Completed Deal between 1990 and 2004......219

Figures

1. The NIE Framework for Takeover Regulation...............................65
2. The Three Level Schema of institutional Control of Governance Functions..........................................................72
<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>Nigerian Unemployment Rate (2006-2011)</td>
<td>239</td>
</tr>
<tr>
<td>9</td>
<td>The Regulatory Framework for Takeovers in the United Kingdom and Nigeria (Statutory and Administrative Rules)</td>
<td>246</td>
</tr>
<tr>
<td>10</td>
<td>Institutional Framework for Takeover Administration</td>
<td>248</td>
</tr>
</tbody>
</table>
List of Cases

New Zealand

Coleman v Myers [1977] 2 N.Z.L.R. 225 CA (NZ) ..............................161

Nigerian

Abubakari v Smith [1973] 6 SC 31 .......................................................222

Edokpolo & Company Ltd vs. Sem-Edo Wires Enterprises Ltd & Ors
[1984] 7 SC7 ........................................................................234

Isievwore v NEPA [2002] 13 NWLR
(Pt.784) 417 ..............................................................................234

NOM Ltd v Daura [1996] 8 NWLR (Pt 468) 601 ................................234

Olufosoye v Fakorede [1993] 1 NWLR (Pt 272) 747 ........................226

Phoenix Motors Ltd v NPFMB [1993] 1 NWLR (Pt 272) 718 ..........303

Union Bank of Nigeria v Ogboh [1995] 2 NWLR (Pt 468) 60 ..........234

Yalaju Amaye v Associated Registered Engineering Contractors Ltd [1990], 4 NWLR
(Pt 145), 422 .............................................................................222

United Kingdom

Aberdeen Railway Co. v Blaikie Bros [1854] 1 Macq. H.L. 461 .........159

Allen v Hyett [1914] 30 T.L.R. 444 ..................................................161

Automatic Self-Cleansing Filter Syndicate Co. v Cunninghame
[1906] 2 Ch. 34 CA. ..................................................................120

Briess v Woolley [1954] A.C. 333, HL ..........................................161

Charterbridge Corporation Ltd v Lloyds Bank Ltd [1970] Ch, 62 ......258

Company Re [1986] BCLC 382 ......................................................161

City Equitable Fire Insurance Co Ltd. Re [1925] Ch, 407 ..............156

D’Jan of London Ltd Re [1993] BCC 646 ........................................157

Foss v Harbottle [1843] 2 Hare 46 .....................................................222

Franbar Holding Ltd v Patel and Ors. [2008] EWHC 1534 (Ch) .......173
Gething v Kilner [1972] 1 All E. R. 1166.................................227
Giles v Rhind [2002] EWCA Civ 1428.................................173
Green v Walkling [2007] EWHC 3251.................................158
Heron International Ltd v Lord Grade [1983] BCLC 244...........172
Howard Smith Ltd. v Ampol Petroleum Ltd [1974] 1 All E. R. 1126 .................................................................208
Johnson v Gore Wood & Co [2002] 2 AC 1 HL........................172, 173
Kiani v Cooper [2000] EWHC 577 (Ch).................................173
Lesini v Westrip Holdings Ltd [2009] EWHC 2526 (Ch)..............173
Mission Capital v Sinclair [2008] EWHC 1339 (Ch) ..................173
Nokes v Doncaster Amalgamated Collieries Ltd [1940] A.C. 1014....233
Parke v Daily News [1963] 2 All E. R. 929.............................175
Peel v London & North Western Railway Co (No 1) [1907] 1Ch 5. ....227
Percival v Wright [1902] 2 Ch 421........................................160
Peskin v Anderson [2001] 1 BCLC 372................................160
Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1981] Ch 257...............................................................172
Stainer v Lee [2010] EWHC 1539 (Ch)..................................173
Stein v Blake (No.2) [1998] BCC 316(CA)..............................172
Towcester Racecourse Co. Ltd v The Racecourse Association Ltd [2003] 1 BCLR260..................................................160
Westlowe Storage and Distribution Ltd Re [2000] BCC 851...........157

United States of America

Ernst & Ernst v Hochfelder [1976] 425 US 185, 213....................303
List of Abbreviations

AER – Average Excess Return
BOFIA – Banks and Other Financial Institutions Act
CAAR – Cumulative Average Abnormal Return
CAMA – Companies and Allied Matters Act
CBN – Central Bank of Nigeria
CLR – Company Law Review
EC - European Commission
EU – European Union
ISA – Investments and Securities Act
ISAN - Independent Shareholders’ Association of Nigeria
LFN – Laws of the Federation of Nigeria
NDIC - Nigeria Deposit Insurance Corporation
NIE – New institutional Economics
NLC – Nigerian Labour Congress
NUBIFIE – National Union of Banks, Insurers and Financial Institutions Employees
OPEC – Organisation of Petroleum Exporting Countries
ROA – Return on Assets
ROE – Return on Equity
SEC – Securities and Exchange Commission
TCE – Transaction Cost Economics
TUPE – Transfer of Undertaking (Protection of Employment) Regulation
Legislations and Similar Instruments

European Union Legislative Instruments


European Council Directive of (14 February 1977/77/187/EC) which aims at ‘the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of Transfers of Undertakings, Businesses or Parts of Businesses


Paragraph 2........................................................................147, 154, 180
Paragraph 17........................................................................180, 206, 281
Article 9.................................................................................125, 145
Article 9(2).............................................................................147, 180
Article 9(5).............................................................................126, 180, 184

United Kingdom

Cadbury Report 1992

Code on Takeovers and Mergers 2013

Section A1.............................................................................145
Section A1(2)(a).....................................................................79, 125, 130, 154
Section B1(2) & (3).................................................................145
Section B1(3).........................................................................147
Rule 3.1...............................................................................146, 206
Rule 13.4(a).........................................................................153
Rule 24.2.............................................................................184
Rule 25.2.............................................................................184
Transfer of Undertakings (Protection of Employment) Regulations 2006 CAP 46

Regulation 3(1) (a) ..................................................................................182
Regulation 4(a) ..................................................................................183
Regulation 4(2) ..................................................................................182
Regulation 4(4) ..................................................................................182
Regulation 5 ......................................................................................183
Regulation 6 ......................................................................................183
Regulation 7 ......................................................................................183, 299
Regulation 7(1)(b) ............................................................................281
Regulation 10 ....................................................................................184

Nigeria

Banks and Other Financial Institutions Act 2004 Cap B3

Section 7 ..............................................................................................197

Central Bank of Nigeria Act 2007

Code of Corporate Governance for Public Companies in Nigeria 2011

Part B(2) .............................................................................................236

Companies and Allied Matters Act Cap C20 LFN 2004

Section 72 ..........................................................................................234
Section 244(1) ..................................................................................226
Section 279(1) ..................................................................................226
Section 279(3) ..................................................................................226, 227, 241
Section 279(4) ..................................................................................242
Section 279(9) ..................................................................................227, 242
Section 282 ........................................................................................227
Section 299 ........................................................................................222
Section 300 (a) – (f) ........................................................................222
Section 303(1) ..................................................................................223
Section 303-309 ................................................................................223
Section 311 ........................................................................................223
Section 311(2)(a) (i) .........................................................................224
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>311(2)(a)(ii)</td>
<td>224</td>
</tr>
<tr>
<td>312(1)</td>
<td>225</td>
</tr>
<tr>
<td>312(2)(a)-(j)</td>
<td>225</td>
</tr>
<tr>
<td>312(2)(d)</td>
<td>225</td>
</tr>
<tr>
<td>312(2)(f)</td>
<td>225</td>
</tr>
<tr>
<td>Investments and Securities Act 1999</td>
<td></td>
</tr>
<tr>
<td>Investments and Securities Act 2007</td>
<td></td>
</tr>
<tr>
<td>13 (p)</td>
<td>192</td>
</tr>
<tr>
<td>117</td>
<td>192</td>
</tr>
<tr>
<td>119 (1)</td>
<td>192</td>
</tr>
<tr>
<td>121 (4)</td>
<td>216, 302</td>
</tr>
<tr>
<td>121(5)</td>
<td>216</td>
</tr>
<tr>
<td>133 (4)</td>
<td>212</td>
</tr>
<tr>
<td>134 (6)</td>
<td>126, 229, 234</td>
</tr>
<tr>
<td>136 (1)(a)</td>
<td>216, 241</td>
</tr>
<tr>
<td>137 (1)</td>
<td>213, 224, 241</td>
</tr>
<tr>
<td>140 (1)</td>
<td>204</td>
</tr>
<tr>
<td>140 (1) – (6)</td>
<td>210</td>
</tr>
<tr>
<td>140 (2)</td>
<td>205, 241</td>
</tr>
<tr>
<td>140 (4)</td>
<td>207</td>
</tr>
<tr>
<td>140 (5)</td>
<td>205, 207</td>
</tr>
<tr>
<td>313</td>
<td>197, 213, 296</td>
</tr>
<tr>
<td>Labour Act 1990, Cap.198 LFN (cap. L1 LFN 2004 (as amended)</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>295</td>
</tr>
<tr>
<td>11(2)</td>
<td>243</td>
</tr>
<tr>
<td>Securities and Exchange Commission Decree 71 1979</td>
<td></td>
</tr>
<tr>
<td>Securities and Exchange Commission Decree 29 1988</td>
<td></td>
</tr>
<tr>
<td>SEC Rules and Regulations on Takeovers and Mergers 2013</td>
<td></td>
</tr>
<tr>
<td>Rule 445(2)</td>
<td>213, 241</td>
</tr>
<tr>
<td>Rule 446(a)</td>
<td>216, 224, 241</td>
</tr>
</tbody>
</table>
Rule 447(3) (d) ................................................................. 214
Rule 447(4) (B)(vii)(b) .............................................. 126, 232, 234, 242

**United States**

Sarbanes-Oxley Act 2002

Williams Act 1968
Abstract

The University of Manchester

Candidate: Francis Aigboviose Okanigbuan Jnr

Degree: Doctor of Philosophy

Title: The Regulatory Framework for Takeovers in the United Kingdom and Nigeria: Shareholders and Employees Protection in Perspective

Date: May 2016

This thesis critically examines the extent to which the interests of company shareholders and employees can be protected during takeovers in Nigeria. High costs of takeovers lead to losses or insignificant gains to shareholders of acquiring companies. To mitigate the effects of the costs on shareholder wealth, employees are often disengaged. This raises concerns about the effectiveness of takeover administration in Nigeria, especially in light of the high rate of unemployment. Consequently, an assessment of the role of company managements and the effectiveness of the current institutional framework for takeover administration in Nigeria is justified.

The thesis adopts a comparative approach to ascertain how similar takeover challenges in Nigeria are addressed in the United Kingdom. Takeovers in both jurisdictions are regulated by the combined effects of Statutory Rules and Administrative Rules and similar challenges can be experienced in both jurisdictions. Further to this, two issues were identified. First, to what extent are shareholders and employees currently protected during takeovers in Nigeria? This issue identifies the scope of the problems. Secondly, are there any peculiar or similar effects of regulatory control over takeovers in Nigeria and the United Kingdom? This determines the comparative function of the thesis, in relation to the scope of the problem that is identified by the first issue.

The relevance of the new institutional economics in the development of institutions was identified and illustrated using two main institutional aspects. First, the role of the informal institutions (unique societal factors) in influencing institutional developments is identified. Secondly, the thesis illustrates how the main themes of economics of institutions, namely, property rights, transaction costs economics and agency relationships can address the identified challenges. Company shares can be effectively protected as property rights of shareholders and the role of managements can be restricted to shareholder agents. Also, the thesis shows that uncertainties and incompleteness of employment contracts can indirectly lead to high costs of takeovers. This can undermine the interests of both shareholders and employees. Thus, the thesis proposes a complementary protection to shareholders and employees. It specifically recommends legal reforms to strengthen market efficiency. Further, it challenges the role of managements by constructing an administrative structure that includes employee representatives in the administration of takeovers through smart regulation and social dialogue.
Declaration

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Dedication

To the wonderful people who raised me and sponsored my education, my lovely parents;

Francis Aigboviose Okanigbuan Esq.

and

Mrs Elizabeth Abumere Okanigbuan
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The journey towards the successful completion of this thesis was made possible by the intellectual and academic support I received from my supervisors; Mrs Annette Nordhausen Scholes and Professor Andrew McGee. Your academic guidance throughout the duration of my research was very helpful. I am grateful indeed. I sincerely thank Dr (Reader) Pierre Schammo for his earlier supervisory role. I appreciate the support from the Administrative Officers at the Law School; Ms Jackie Boardman, Ms Helen Davenport and earlier support from Mr. Stephen Wardsworth, thank you indeed.

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PART I

General Introduction and Theoretical Framework(s)
CHAPTER ONE

1. GENERAL INTRODUCTION

1.1 Introduction

A company is a complex whole, so are its challenges. Among the several challenges facing a modern corporation are conflict of interests\(^1\) and issues of accountability. Managers may promote certain corporate objectives that may not be in the interests of their companies. The existence of these challenges and the threats that they pose to corporate values led to the development of internal systems of corporate control which is represented by the board of directors of companies.\(^2\) As an internal disciplinary mechanism, the board is expected to limit the incidence of conflict of interests through its effective monitoring and supervisory roles. However, despite the existence of boards of directors, these challenges have not been completely addressed. Conflict of interests remains a serious problem, and it can be responsible for the poor performance of firms. It may lead to the undervaluation of the assets of companies, exposing such companies to risks and external pressure from the market for corporate control. Corporate takeover is one of the ways that the market for corporate control is exhibited. It has become a recurrent feature in exerting external pressure on companies, directly or indirectly.\(^3\)

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\(^1\) Corporate managers as agents can be influenced by personal interests in making investment decisions. See generally R A Walkling and M S Long, 'Agency Theory, Managerial Welfare and Takeover Bid Resistance', The Rand Journal of Economics, 15/1 (1984), 54-68.


\(^3\) Even though a company is not a subject of a takeover bid, an indirect pressure may be signalled as soon as a competitor of similar economic strength becomes the target of a takeover bid. In Nigeria, takeovers are regulated by the combined effects of the Investments and Securities Act, (ISA) 2007 and the Securities and Exchange Rules and Regulations 2013. The SEC is empowered to administer and make rules with respect to takeovers, since the National Assembly may not have the required expertise to make regulations for takeovers. See B M Mitnick, The Political Economy of Regulation: Creating, Designing and Removing Regulatory Forms (New York 1980: Columbia University Press, 1980) at 328.
Although a corporate takeover is not essentially a new concept in Nigeria, the development of its regulatory framework is relatively new. The development of takeover regulations in Nigeria is meant to promote efficient market and to encourage the participation of investors in the market for corporate control. While this objective remains commendable, the main challenges of takeovers appear not to have been addressed. There are a plethora of interests involved in takeovers, this includes the interests of the major corporate constituents; managements’, shareholders’, and employees’. The extent to which employees are protected from being disengaged post-takeovers and the extent to which shareholders can be involved in decisions involving takeovers in Nigeria are largely unclear.

This chapter introduces the objective of the thesis. It comprises eight sections. In section two, the background to the challenges of takeovers in Nigeria is identified. Section three illustrates the theoretical perspectives of takeovers. Also, it introduces the new institutional economics as the theoretical framework of the thesis. In section four, the objective of the thesis is stated. This includes an illustration of why the research is based on a comparative study and why the United Kingdom and Nigeria are compared. In furtherance of the objective of the thesis, the research questions are outlined in section five. The research methodology is briefly discussed in section six. Section seven highlights the major contributions of the thesis to the ongoing debate on takeovers. Section eight concludes the chapter. It contains an outline of the thesis.
1.2 Background to the Problem

In Nigeria, the activities of the market for corporate control have not been firmly entrenched. Although takeover occurs in Nigeria, it is relatively in its developmental stages, especially in terms of its level of advancement when compared with several advanced corporate economies.

The market for corporate control has been identified as an alternative mechanism for regulating corporate behaviour. It operates as a parallel medium for controlling managerial behaviour. The traditional finance theory assumes that; where the internal mechanism of corporate entities fail to effectively direct managerial functions towards enhancing the value of the firm, the market for corporate control is inevitably invited to perform this role through the instrument of corporate takeovers. Takeovers perform significant roles in influencing the investment decisions of managers. It can lead to synergistic gains, or losses caused by managerial hubris. It can also have a disciplinary effect. The extent to which synergies or managerial discipline can occur may be determined by the regulatory framework of takeovers in any particular jurisdiction.

The nature of a corporation as a going concern has been identified as constituting a nexus of contracts among the various corporate actors. These contracts are embodied in the relationships which exist among the key participants in a company -

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shareholders, creditors, employees, directors and managers - 7. Among these key participants, the interests of managements and creditors may be protected without specific reference to takeover regulations. Company directors and managers are directly involved in the negotiation process during takeovers. They have the capacity to negotiate their compensation packages. Also, creditors can be protected by secured credit. The combination of the assets of firms through takeovers can enhance the security of the credit facilities that creditors provide to companies. However, shareholders and employees may not have the capacity to protect their interests, except by reference to specific regulations.

The regulatory framework for takeovers in Nigeria 8 appears to preserve the traditional role of company managements in making investment decisions in relation to takeovers. 9 Shareholder approval is apparently dispensed with when takeover bids are made by acquiring companies and board inputs are required when takeover bids are received by target companies. Consequently, company shareholders may not be expected to play significant roles during takeovers in Nigeria. This is capable of undermining investors’ confidence and it constitutes a challenge to a fair, efficient and transparent market.

Also, takeovers have led to the dismissal of several employees in Nigeria. This problem particularly raises concerns because of the high level of unemployment in Nigeria. While the ISA and SEC rules recognise the challenges that takeovers pose to

9 Arguably, takeovers may not be considered to be a usual investment decision of managements that should not require managerial supervision and regulatory control. They are affected by their sporadic nature, dissimilarity from managements’ regular experiences, opportunistic nature, limited access to information, risks involved, among other factors. See P C Haspeslagh and D B Jemison, Managing Acquisitions: Creating Value through Corporate Renewal (New York: Free Press, 1991) at 52-55.
employment, the extent to which employees can actually be protected by the ISA or the SEC Rules is largely unclear.

In light of the challenges that takeovers pose to the interests of shareholders and employees in Nigeria, they can be identified as the category of corporate constituents whose interests are most likely to be undermined during takeovers. Lack of investors’ confidence and unemployment crisis can affect national economic growth and stability. Thus, there is the need to identify the scope of the challenges of takeovers as it affects shareholder and employee interests.

Takeovers have been identified as a mechanism through which non-value yielding managers are disciplined for poor performance through loss of office post-takeover. However, the extent to which this can be applicable with regards to takeovers in Nigeria is doubtful in light of the limitations that can undermine the disciplinary role of takeovers. Also, where synergistic gains may be expected, managerial hubris can undermine such objectives. These challenges exist because the regulatory framework for takeovers in Nigeria does not seem to have challenged the domineering role of corporate managements. Thus, research into this problem is imperative.

1.3 Theoretical Perspectives of Takeovers

Takeovers can be used to create value, by replacing low productive management personnel with a different set of management that can raise the economic value of the firm. This is referred to as the value-creation hypothesis of takeovers. This hypothesis also emphasises that the value of firms can be enhanced by fusing the

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operations and assets of different companies into a single entity. A combination of the operations of two companies can save costs through economies of scale, whereby a combined firm can produce more resources in less time, using a more formidable input. This hypothesis is based on the synergistic gains and disciplinary role of takeovers.

Also, takeovers can be used as a tool towards redirecting and redistributing resources of the firm from one corporate constituent to another, without necessarily adding value. This may be referred to as the value-redistribution hypothesis of takeovers.\textsuperscript{12} When investors purchase shares at a premium and they gain control of corporate powers, they can renegotiate the existing contracts with the management and employees. The management of the acquired company may be dismissed; a large number of employees may also be disengaged. The underlying idea of this hypothesis is that; through takeovers, the interests of some corporate constituents may be ‘traded’.\textsuperscript{13}

\subsection{1.3.1 The New Institutional Economics}

The new institutional economics is a response to market challenges as they affect the interests of the different market participants. Particularly, it is concerned with the use of institutions to strengthen the role of the market to ensure efficiency. Effective institutional framework can mitigate transaction costs, it can ensure that property rights are safeguarded and this can limit the conflicts of interests that occur at the level of the market. The concept of the new institutional economics can be useful in


\textsuperscript{13}Premiums paid to shareholders of target companies may represent losses to shareholders of acquiring companies. These loses can be mitigated by a reduction of employees post-takeovers.
the determination of how the challenges of takeovers can be limited, especially with reference to shareholders and employees issues. This thesis identifies the main themes of the new institutional economics and they are used in providing suitable and practical response to the challenges of takeovers that are identified in the thesis.

1.4 Aim of Study

The thesis aims at ascertaining the extent to which the interests of company shareholders and employees can be protected during takeovers in Nigeria. In furtherance of this objective, the thesis is essentially a comparative study of the frameworks for takeover regulation in the United Kingdom and Nigeria.

Comparative research is necessary because of the nature of the thesis. Takeovers have a relative universal application. The occurrence of takeover is not limited to any particular jurisdiction. Also, takeovers affect virtually the same set of interests in a company in most jurisdictions, including Nigeria. Hence a comparative research can provide a focal point for understanding the challenges of takeovers and the interests that are affected by takeovers in a different jurisdiction relative to Nigeria.

Specifically, the United Kingdom is compared with Nigeria because of the following reasons. First, the Nigeria legal system is based on Nigerian customary laws and received English laws. Secondly, takeovers in both jurisdictions are regulated by the combined effects of Statutory Rules and Administrative Rules. Thus, the comparison will help to identify the scope of the problems that have been identified and the best ways to respond to the problems.
1.5 Research Questions

In a corporate takeover, several interests are affected; hence, its challenges are extensive. However, the focus of the research is restricted to the aim of the thesis which is essentially a complementary protection of shareholder and employee interests. In light of this; the scope of the thesis is limited to answering the following questions.

(i) **To what extent are the Interests of Shareholders and Employees Protected during Takeovers in Nigeria?**

A principal focus of the thesis is to identify how the interests of shareholders and employees can be promoted during takeovers in Nigeria. Hence, it is important to ascertain the current levels at which their interests are actually protected. The question helps in identifying and ascertaining the extent to which shareholders can be involved in takeover decisions, since such decisions affect their investments. Also, it illustrates how takeovers affect employment levels in Nigeria.

In addressing this question, the responsibilities of corporate managers and the board of directors are identified with particular reference to the scope of their authority during takeovers. Further, the question evaluates the regulatory function of takeovers. It identifies the effects, scope and limitations of the existing framework in relation to shareholders and employment protection during takeovers.

Currently, takeovers in Nigeria are regulated by the combined effects of the *Investments and Securities Act, 2007* and the *Securities and Exchange Commission (SEC) Rules and Regulations 2013*. Also, to determine the extent to which shareholder and employee remedies extend beyond the ISA and SEC Rules, the question helps to critically evaluate other regulatory measures that may aid shareholder and employee interests. These include the relevant provisions of the
Companies and Allied Matters Act (CAMA) 2004 (as amended), Labour Act 1990 and judicial decisions.

(ii) In view of the Similarities in the Nature and Effects of Takeovers in Different Jurisdictions, to what extent does the Regulatory Functions\textsuperscript{14} of Takeovers have Similar Effects in the United Kingdom and Nigeria, with particular reference to the Protection of Shareholders and Employees?

Ordinarily, the effects of takeovers in different jurisdictions are similar. A takeover can lead to synergy, it can perform disciplinary function, and it can lead to hubris. Any of these can be present irrespective of the jurisdiction where a takeover occurs. The extent to which any one or more of these can be enhanced or restricted is largely dependent on the role of the regulatory functions of takeovers in any particular jurisdiction.

This question will help to provide the basis for ascertaining how the regulatory framework for takeovers in the United Kingdom is similar or different in responding to the identical challenges of takeovers with respect to shareholder and employee interests in Nigeria.

The regulatory framework for takeovers in the United Kingdom and Nigeria include a mix of statutory and administrative rules. This question helps in identifying the particular factors that influenced the establishment of these frameworks in the United Kingdom and Nigeria. Also, the question is important because it creates the much needed insight into the extent to which the application of the framework for takeovers is capable of protecting employee and shareholder interests in Nigeria relative to the United Kingdom.

While the first question identifies the scope of the current challenges with respect to shareholder and employee issues in Nigeria, addressing the second question is

\textsuperscript{14} In this thesis, regulatory framework is used as a function of institutions.
important in the determination of how the identified challenges in Nigeria can be resolved.

The second question identifies the limits of the similarities of takeover regulation in both jurisdictions. Also, it identifies the reasons for the limitations. Identifying the relevant peculiar factors in the United Kingdom will be useful in identifying the relevant peculiar factors in Nigeria that should be considered with a view towards resolving the challenges in Nigeria. Thus, the second question supports the comparative objective of the thesis in resolving the challenges that are identified by the first question.

1.6 Research Methodology

The research is conducted using a combination of the tertium comparationis concept of the functional approach and the Hermeneutical approach to comparative law.

The functional approach identifies the similarities of the problems of takeovers in the United Kingdom and Nigeria. The meaning of takeovers is largely similar in both jurisdictions and the same categories of corporate constituents; shareholders, employees, managements, are affected by takeovers. The hermeneutical approach is also relevant because, different factors can influence the developments of the most suitable response to the problems in each jurisdiction.

Since comparative legal research can be conducted using different approaches, the focus of a comparative study should not be the extent to which one approach is better than another. The focus should be the extent of the practical application of the approaches, the objective of the comparison and the problems that the research seeks to address. Thus, the major function of the different approaches is to facilitate
legislation and the development of law. The development of law is not an end in itself; it is a means towards ensuring that identified problems are effectively addressed.

In relation to takeover regulations, the main objective is to ensure that legal institutions are generally responsive to existing problems or anticipatory challenges. It is to ensure that the beneficial objective of takeovers are promoted while the challenges are supressed and mitigated.

This means that an important objective of comparative legal research generally and in relation to takeover laws includes acquiring knowledge of foreign legal structures, identifying their similarities and differences and understanding the problems or challenges that the legal structures are responding to.

a) Functional Approach to Comparative Legal Research

Concept - Equivalence Functionalism (tertium comparationis comparative function)

The functional approach to comparative legal research is based on different interrelated concepts. This includes the equivalence functionalism and the function of determining how to respond to similar challenges that can be present in different

18 Note 16 above, at 679, citing M. Bogdan, Comparative Law (Springer, Netherlands, 1994) at 60.
19 The Functional Approach to comparative law was first mooted when it was observed that; "the basic methodological principle of all comparative law is that of functionality... Incomparable(s) cannot usefully be compared, and in law the only things which are comparable are those which fulfil the same function". See K Zweigert and H Hotz, An Introduction to Comparative Law, Trans. Tony Weir (3 edn.; Oxford: Oxford University Press, 1998) at 34.
jurisdictions. The equivalence functionalism provides one of the comparative functions of the thesis. The development of takeover regulation in Nigeria is aimed at promoting a fair and transparent market and to promote investors’ confidence among other reasons. The issue of shareholder protection and employment consideration during takeovers is not peculiar to the Nigerian corporate society. The functional approach is relevant to this thesis since it recognises that the challenges of takeovers are not restricted to any particular jurisdiction, hence the regulatory function in a different jurisdiction can be compared to identify how the different jurisdictions respond to a recognized problem. The focus of the thesis by reference to the functional approach to comparative law is on the similarity of the problem with less emphasis on the universality of the solution(s). Where the comparative objective of the functional approach extends beyond the similarity of the problems, the identification of a legal solution in a particular jurisdiction is a reference to how similar challenges can be addressed in other jurisdictions with reference to peculiar social and cultural factors.

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21 Ibid. at 358.
22 This does not necessarily imply that the legal systems of all countries always face the same problems in relation to all aspects of takeovers. However, it is ‘indicative’ that the functional approach can be an appropriate comparative tool, if different legal systems actually face similar problems. See J Gordley (ed.), *The Functional Method*, ed. P G Monateri (Methods of Comparative Law, Cheltenham, UK: Edward Elgar, 2012) at 117-19. J Gordley, ‘Comparative Legal Research: It’s Function in The Development of Harmonized Law’ *The American Journal of Comparative Law*, 43/4 (1995) 555-567 at 560.
b) Hermeneutical Approach to Comparative Law and Legal Transplant

Comparative legal research is not actually a straight-forward exercise when compared to other methods of research. The opposing concepts within the different approaches to comparative law are an indication that the subject of comparative law is still evolving. The hermeneutical approach to comparative law suggests that comparative legal research should assume the existence of differences in the legal systems that are compared. Also, it suggests that the primary objective of the comparatists should be to focus on the mentality and culture that influence laws; beyond the legal texts of laws.\(^\text{24}\) The mentalities and cultures are influenced by the informal institutions and local interests which are present in every given jurisdictions. This indicates that there is a tendency to interpret a foreign law in a subjective way. Comparatists may be influenced by the understanding of their own legal system in an attempt to interpret a foreign law.\(^\text{25}\) Thus, the hermeneutical approach suggest that comparative legal research goes beyond identifying a legal system or a foreign legal rule as an appropriate solution to problems in other foreign countries.\(^\text{26}\)

While it may be subjective to assume that a foreign law or rule can be successfully applied in another country, certain circumstances may permit the application of a foreign law in a different jurisdiction. It was suggested that one of the basic characteristics of laws is the ease with which they can be transplanted from one legal system to another.\(^\text{27}\) Not because these laws need to be copied or borrowed, but they

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\(^\text{25}\) Hence it was suggested that such interpretations may not be objective. Ibid (G Samuel), at 109.


are transplanted because of the benefits that could be derived from their application. Legal transplant appears reasonably permissible in the following circumstances. First, where the importance of legal rules are not connected to a particular society or where such rules did not evolve by reference to any particular factor or culture or mentality which is common or present only in that society. Secondly, where a legal framework which is of universal application is based on a concept, it may be successfully applied to different challenges in different jurisdictions. As observed;

The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn’t grow in his back garden.

However, a major limitation of legal transplant is that, the successful application of the received laws is largely dependent on whether local circumstances would permit its application. One of the greatest challenges of comparative law is an attempt to interpret a foreign law from the perspective of the comparatists. This can lead to a subtle imposition of the laws of one jurisdiction on another jurisdiction. This challenge arises because of the misguided belief that one legal rule is better than another. The hermeneutical approach is thus principally concerned with identifying the meaning of laws beyond mere legal text, to ensure that the comparatists is able to presume that however strange or scandalous a foreign law might seem, there is an underlying rationality that attaches to that law.

29 See note19, (K. Zweigert and H. Hotz) above at 17.
30 See note 23, (G. Samuel) above at 110.
The challenges of corporate takeovers may be common to many jurisdictions; but it is doubtful whether a particular legal means of redress can be suitable for different jurisdictions without reference to certain peculiar internal rationality.

Generally, takeovers can create synergies; they can also perform disciplinary functions. Also, managerial hubris can characterise takeovers because of the agency problems of conflict of interests.\(^1\) One of the main objectives of the comparative approach in this thesis is to identify how synergy and disciplinary effects of takeovers can be enhanced by restricting the extent to which hubris can occur. In view of the fact that hubris can occur, it is imperative to establish effective institutional framework to administer takeovers, to regulate managerial conduct. Since takeovers can have similar challenges in the UK and Nigeria with respect to the possibility of hubris in both jurisdictions, the functional approach to comparative law applies in relation to identifying the extent to which the problems can actually be present in the UK and Nigeria. However, in view of the limitations and challenges that may arise if the UK takeover laws are transplanted to Nigeria, the hermeneutical approach to comparative law is useful in determining how the takeover institutions that should apply in response to the takeover challenges in Nigeria can be developed. This is meant to ensure that the local circumstances; culture, mentality that are envisaged by the hermeneutical approach are considered in the development of effective takeover institutions in Nigeria. This is consistent with one of the major concepts of the new institutional economics theory.\(^2\) The new institutional economics which seeks to ensure that the functions of the market as a medium of exchange are promoted to ensure efficiency is concerned with the creation of effective institutional framework.

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\(^{1}\) The Synergistic, disciplinary and hubris effects of takeovers are examined in more details in Chapter Three.  
\(^{2}\) The New Institutional Economics and its relevance to the objective of the thesis are examined in Chapter Two.
This institutional framework aims at ensuring that transaction costs are minimized and the value attached to property rights are enhanced by mitigating the conflicts that characterises agency relationships. Importantly, the new institutional economics is not merely focused on the creation of institutions; it is also concerned with how the institutions are created. Thus, it identifies the relevance of informal institutions as important aspects of creating effective institutions. The informal institutions include culture, mentalities and local circumstances that are also contemplated by the hermeneutical approach to comparative law.

The approach to a comparative legal research is largely influenced by both the practicality of its application and ultimately, its usefulness to research objectives. Where a combination of approaches can be practically possible as well as achieve a research objective, it is permissible. Hence a combination of the functional and hermeneutical approaches is relevant because they provide a complementary support to the research objective. They identify the scope of the similarities and differences in the takeover regulatory framework in the UK and Nigeria. This can ensure that the creation of effective institutions in Nigeria, by reference to the similarities of the challenges in the UK and the peculiarities in Nigeria can largely promote synergies and the disciplinary effects of takeovers and it can address the problems of hubris.

Meanwhile, some other comparative methods which appeared to be relevant were also identified. However, they were not considered to be clearly relevant to the objective of the thesis. These include the dynamic approach, structural approach and legal transplant.\(^{33}\)

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\(^{33}\) Legal transplant was briefly examined in section 1.6 (b) above. It is not considered to be relevant to the objective of the thesis.
c) **Dynamic Approach to Comparative Law**

The dynamic approach to comparative law is important and useful in its own way. It suggests that legal rules in any jurisdiction do not refer to a single rule; different legal formants form a particular rule when the formants are put together. A comparative legal study must include a study of the different formants that make up a rule in the different jurisdictions that are compared.  

These legal formants include; constitutional rules, statutory rules, judicial decisions as precedents and scholarly opinions. All of these formants make up a legal rule in a particular jurisdiction. This implies that comparison between two or more jurisdictions can be based on legal formants such as, comparing the constitutional rules of the different countries or the statutory rules, rather than attempting to compare the legal rules of the different countries collectively.

This approach to comparative legal research appears justifiable since it restricts the comparative objective to the applicable legal formant(s). It is particularly useful where the subject matter of the comparison is restricted to a particular formant. For example, a comparison of how courts in different jurisdictions interpret statutory rules and interprets judicial rules / precedents. However, its application may be restricted. It may not be a useful method of comparison where the comparative objective is not focused on a particular rule or legal formant.

The comparative objective of this thesis is aimed at identifying the most appropriate legal response to an existing problem. It is not merely concerned with how a particular rule or formant is developed generally. It is particularly concerned with how they can be developed to respond to the specific problems identified during

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34 Note 17 above, at 21.
35 Ibid.
corporate takeovers. Hence, the dynamic approach is not quite relevant for the purpose of this thesis.

d) Structural Approach to Comparative Law

The structural approach to comparative law assumes that all laws relates either to persons, things or actions. These three elements act as institutional focal points and they interrelate to form a system.\(^{36}\) These main categories can be subdivided into other subcategories. Law of person can be further subdivided into legal personality and status. The law of things can also be subdivided into law of property and law of obligations. The law of property can further be subdivided into law of possession, ownership, etc.\(^{37}\)

While this approach may be appropriate as a method of comparison, for comparing jurisdiction-specific elements such as the law of possession in different jurisdictions, it is not very relevant to the objective of the thesis. Its use may extend the scope of the comparative objective of this thesis beyond the identified problems of takeovers as it affects employees and shareholders in the United Kingdom and Nigeria.

The next section outlines some of the major contributions of the thesis to the ongoing debate on takeovers.

1.7 Major Contributions

The objective of the thesis is to identify the extent to which shareholders and employees can be protected during takeovers in Nigeria. Attempts were made to obtain shareholder and employee responses to takeovers in Nigeria. There were no

\(^{36}\) Note 23, (G Samuel) above at 97.

\(^{37}\) See generally ibid.
responses from the shareholders’ association in Nigeria (The independent shareholders’ Association of Nigeria, ISAN) and the employees representatives (National Union of Banks, Insurance and Financial Institutions Employees, NUBIFIE, (the banking sector experienced majority of the acquisitions in Nigeria in recent times) and the Nigeria Labour Congress, (NLC). The views of shareholders and employees were sought to further highlight the obvious challenges that this group encounter during takeovers. The responses were meant to be used for the purpose of ‘solidarity’. Hence they are not actually relevant to the objective of the thesis. The thesis is not meant to conduct any empirical studies; it is essentially meant to be a comparative legal research.

It is not immediately clear why the organisations that are mentioned above failed to respond to the queries, however, lack of organisation and proper documentation has been a challenge in major institutions in Nigeria. Meanwhile, primary data on takeovers from the Securities and Exchange Commission were helpful. Some of the contributions of the thesis to the ongoing debate are outlined next.

The thesis collectively examines the interests of company shareholders and employees and identifies how the interests of shareholders and employees can be complementary. While existing literature examines shareholder and employee protection separately in relation to takeovers, this thesis identifies shareholders and employees as the most vulnerable group of corporate constituents during takeovers.38

Also, it showed that protecting the interests of employees during takeovers can also enhance shareholder value indirectly.39 By protecting employees, the extent to which managers may limit or attempt to mitigate the high costs of acquisitions through

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38 See Chapter One, section 1.2, Chapter Three, section 3.6.1 and Chapter Five, section 5.3.
39 Chapter Six, section 6.5.
employee dismissal can be limited. Thus, managements can be made to only engage in productive acquisitions and refrain from unnecessary acquisitions that would require employee disengagement, especially in Nigeria.

There is abundant awareness in the literature that corporate takeovers which function as an external mechanism for corporate control serves as an alternative to the internal control functions.\textsuperscript{40} Thus, traditional finance theory suggests that the lower the stock price, relative to what it could be with more efficient management, the more attractive takeover becomes to those who believe that they can manage the company more efficiently. While this thesis adopts this proposition, it further suggests that the role of company management is central to both the internal and external mechanism.\textsuperscript{41} Company managements are the drivers of the external mechanisms as much as the internal mechanism. The effectiveness of the external mechanism cannot be left entirely to the discretionary and supervisory roles of the (market) managements. Effective institutions can be used to define the roles of managements to achieve the desired effects of the external mechanisms for corporate control through takeovers.

Also, the thesis identifies the role of employee representatives as an important aspect of the takeover process. This form of protection for employees becomes necessary in view of the fact that employees cannot effectively protect their interests - like other corporate constitutes through negotiations - during takeovers. The thesis indicates that employment protection does not merely require strict regulation; rather it requires effective regulation that includes employee involvements in the takeover process.\textsuperscript{42}

This actually portrays the limitations of the current employment regulation for

\textsuperscript{40} See generally Chapter Three.
\textsuperscript{41} This underlines the important need for effective regulation as generally suggested in this thesis. See Chapter Three, section 3.1 and Chapter Seven, section 7.6.1.
\textsuperscript{42} Chapter Seven, section 7.5.
takeovers in the United Kingdom. It suggests that the development of the employment protection regulation should be designed to include employee representatives in the regulatory process.

Further, the thesis identifies employee dismissal as a function of managerial hubris. While existing literature indicates that losses or insignificant gains to shareholders of acquiring companies are signs of managerial hubris, this thesis further identify employee dismissal post-takeovers as a consequence of managerial hubris.\textsuperscript{43} The costs of acquisition in Nigeria during the period of consolidation in the banking industry led to mass dismissal of employees. The consolidation exercise was meant to ensure that banks remain in operation as bigger entities without actual regards to value creation for shareholders or employment protection. Thus, it is indicated by reference to the new institutional economics that the uncertainties that lead to higher transaction costs during takeovers are either caused by carelessness of management or by deliberate act. As long as managements can disengage employees to mitigate the needless takeover costs, they are more likely to continuously engage in needless and costly acquisitions. The level of the market where exchange occurs, which can be characterised by agency conflict can be regulated through effective institutions. This can make managements to effectively align the interests of the shareholders and employees without undermining corporate value.

The thesis also shows that the regulatory framework for takeovers in Nigeria cannot protect the interest of shareholders. While the regulatory mechanisms have the objective of investment protection, its framework was shown to suffer from institutional lapses. This undermines its capacity to actually ensure that shareholders

\textsuperscript{43} See Chapter Six, section 6.5.
are protected. With particular reference to Nigeria, it was revealed that the needed protection for investors is not limited to restricting managerial interference. The scope of the protection needs to be expanded to exclude the interference from government agencies. The intervention of the CBN in the determination of how banks were acquired indicates that the dominant role of managements is not the only problem of takeovers in Nigeria. Hence the attainment of market efficiency should include the restriction of the roles of managements as well as government agencies in the determination of how takeovers are conducted and concluded in Nigeria.  

Thus, the thesis builds on the current debate in the literature regarding managerial restricted intervention during takeovers with a view towards extending the restriction to government agencies.

The comparison identified certain similarities and differences of takeovers in the United Kingdom and Nigeria, with particular regard to the effects of regulatory control on the interests of shareholders and employees. It was indicated that the similarities in both jurisdictions are restricted to the existence of the problems; shareholder and employee issues. Both statutory and administrative rules have been established to regulate takeovers in both jurisdictions. It was revealed that the responses to be problems must be made to reflect the peculiarities in each jurisdiction. Thus, for example, it is recommended that the establishment of an employment protection regulation in Nigeria as a response to employee issues may not yield the desired results because of enforcement challenges. Further, the comparison showed that while the regulatory framework for takeovers in both jurisdictions have similar

44 See Chapter Five, section 5.5.
45 Chapter Four, Chapter Five. See particularly Chapter Six.
46 An amendment of the relevant section(s) of TUPE may be desirable to effectively protect employee interests in the United Kingdom. As suggested in this thesis, a similar employment protection regulation as applicable in the UK may not be appropriate to address employment issues in Nigeria. See Chapter Seven, section 7.5.1.
objectives, they cannot actually achieve the same objectives, except regard is had to the peculiar factors in each jurisdiction.

1.8 Outline

The thesis is divided into two parts; I and II. It comprises seven chapters.

In PART I, the general introduction and the background to the identified problems are illustrated. An analysis of the regulatory function of institutions as an appropriate remedy towards the challenges of takeovers as it affects shareholders and employees is presented. Finally, the theoretical framework for takeover is examined. It illustrates how the identified challenges arise, and how they can affect shareholder and employee interests. These are presented in chapters 1, 2 and 3.

In PART II, The framework for takeover regulations with respect to shareholder and employee interests in the United Kingdom and Nigeria is examined. The comparative function of the thesis is identified in this part. These include the similarities and areas of divergent of the regulatory control and effects of takeovers in the United Kingdom and Nigeria. Finally, the conclusions and recommendations are presented. These are contained in chapters 4, 5, 6 and 7.

PART I

Chapter One: General Introduction

Chapter one introduces the thesis. It identifies the background to the problem, the research questions, the research method and the structure of the thesis. Also, it briefly highlights some of the major contributions of the thesis to the on-going debate on
takeovers. The chapter illustrates the importance of the comparative study and need for comparison between the United Kingdom and Nigeria.

*Chapter Two: The Regulatory Framework of Institutions*

Chapter two examines the theoretical framework of the thesis; the new institutional economics. It identifies the role of institutions as a mechanism for regulating human behaviour and relationships from an economic perspective. It examines the framework of the new institutional economics (NIE) in relation to the objective of the thesis. It briefly illustrates the critical factors in earlier models of economic theories that lead to the development of the NIE; these include a critique of the neo-classical economics and the old institutional economics. The different levels from which institutions emerge are also illustrated in relation to how the regulatory functions of institutions can be developed in a particular society. Further, the chapter examines the main themes of the NIE namely; Property rights ownership, transactions costs and agency relationship. They are examined in relation to how their application determines the objectives of the NIE and how they can be applied to the takeover problems. The property rights and agency relationship concepts were examined in relation to company shares and ownership rights of shareholders and the relationship between company management and shareholders as agents and principals.

As the ‘owners’ of the property rights in shares and being the principals to company managements, it was illustrated that the need to provide an effective mechanism to protect shareholder interests during takeovers is justified. Also, mitigating transaction costs is one of the major objectives of the NIE. The chapter illustrates how employee disengagements during takeover may indirectly encourage managements to incur
higher transaction costs during takeovers. Thus it identifies the need to protect employee interest as a means of mitigating transactions costs during takeovers.

**Chapter Three: The Theoretical Framework of Corporate Takeover**

In chapter three, the theoretical framework for corporate takeovers is examined. The examination of the framework for takeovers is important because it identifies how takeovers affect the different interests in a corporate entity. The chapter includes an illustration of the nature and characteristics of the different modes through which takeovers can be activated. Also, it examines the different hypotheses of takeovers. It reviews some of the existing research on the factors that can influence takeovers. These include synergy, disciplinary role of takeovers and hubris hypothesis. The role of corporate managements is central to takeovers. They can largely determine the extent to which the interests of one or more of the corporate constituents can be enhanced. Thus, the chapter examines the role of management. It includes a review of some of the relevant studies on the role of management. It identifies the extent that synergy, the disciplinary role of takeovers and managerial hubris can be promoted or restricted. This includes the devises that can be used to ‘frustrate’ a takeover. Further, agency problems and employee issues are identified and briefly examined as one of the major problems of takeovers. In relation to the challenges of takeovers as they affect shareholders and employees, the contractual theory and entity theory of the firm are briefly examined in this chapter.
PART II

Chapter Four: Takeover Regulation in the United Kingdom

Chapter four examines the regulatory framework for takeovers in the United Kingdom. Particularly, it identifies the extent to which the interests of shareholders and employees can be protected during takeovers in the United Kingdom. Pursuance to this objective, it identifies how the current regulatory framework for takeovers was established and what led to the establishment of the regulation. It identifies the role of managements as an important factor that led to the development of takeover regulation in the United Kingdom. Managerial interference in takeover bids was indicated to have led to successive conflicts of interest between shareholders and management. Thus, the development of the takeover regulations was meant to essentially ensure that a free and competitive market operates in the United Kingdom. The chapter highlights the need for the role of managements to be restricted during takeovers to ensure that this objective is achieved. The City Code on Takeovers and Mergers 2013 and the European Council Directive on Takeovers and Mergers 2004 were examined in the chapter.

The effect of takeovers on employment has been an issue in the United Kingdom, despite the existence of employment protection regulation; the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). It was established pursuant to the European Commission Acquired Rights Directive 1977 amended in 2001. The chapter examines TUPE to ascertain the extent to which employee interests can actually be protected. While the EC Takeover Directive recognises the need to protect employees during takeovers, substantial provisions relating to employment protection can actually be found in TUPE. Thus the TUPE
which was established pursuant to the EC directive was examined substantially in relation to employment protection.

Chapter Five: Takeover Regulation in Nigeria

Chapter five examines the regulatory function of takeovers in Nigeria. It illustrates how the development of takeover regulation in Nigeria became important in light of developments in the capital markets sector in Nigeria. It identifies the need to protect and encourage capital market, trading and investments as the main reasons for the development of takeover regulation in Nigeria. It examines the current regulatory framework for takeovers as it affects the interests of shareholders and employees. With respect to shareholder interests, it identifies the dominant role of management as a major challenge of takeovers; their role remains largely unchallenged. This was illustrated pursuance to the examination of the relevant provisions of the Investments and Securities Act, (ISA) 2007 and the Securities and Exchange Commission (SEC) Rules and Regulations 2013.

Employee disengagement is a recurrent issue during takeovers in Nigeria. Despite the high level of unemployment in Nigeria, this challenge has not been given the desired consideration. The need to protect the interests of employees is identified by the Investments and Securities Act and the Securities and Exchange Commission Rules and Regulations. However, since no substantial provision has been made for employment protection, the chapter examines other mechanisms that can possibly protect employee interests.
Chapter Six: Institutional Development and the Regulatory Control over Takeovers in the United Kingdom and Nigeria

Chapter six conceptualises the comparative function of the thesis. It highlights the effects of takeovers from a universal perspective, to illustrate the extent to which the challenges of takeovers can be present in any jurisdiction including the United Kingdom and Nigeria. The chapter identifies the similarities and differences of the effects of takeovers in the United Kingdom and Nigeria from the examination and analysis of takeovers in chapters four and five. It restricts the similarities of takeovers in both jurisdictions to the problems that were identified and it emphasises that the regulatory framework cannot achieve the same objective even though similar problems may be present in both jurisdictions. It identifies the limitations in the regulatory framework of takeovers in the United Kingdom and in Nigeria with respect to shareholders of acquiring companies and employee interests. Also, it identifies the limitations for employment protection in the TUPE in the UK and particularly, it indicates the absence of a substantial employment protection mechanism in Nigeria.

Further, the chapter illustrates the relationship between employment protection and the effectiveness of the market for corporate control and the efficient capital market hypothesis. It explains the justification for employment protection and how it can enhance shareholder and corporate value. It also illustrates how a collective protection of the interests of shareholders and employees can be mutually beneficial to shareholders (especially shareholders of acquiring companies) and employees. Also, it identifies the special need for shareholder and employment protection in Nigeria.
Chapter Seven: Conclusions and Recommendations

The thesis is concluded in chapter seven. The chapter contains an exposition of the main themes of the preceding chapters. It illustrates the practical relevance of the identified problems. It shows how institutions can be strengthened to achieve effectiveness. While the United Kingdom takeover regulatory framework is identified to have been substantially developed, it identifies the need for a further minimal intervention through legal reforms. With regards to Nigeria, the chapter identifies the need for a substantial intervention in the form of legal reforms, smart regulation and social dialogue, towards addressing the identified challenges.
CHAPTER TWO

2. THE REGULATORY FRAMEWORK OF INSTITUTIONS

2.1 Introduction

This chapter examines the characteristics and functions of institutions as tools for regulating human behaviour and relationships. This is approached from the perspective of the new institutional economics.

The chapter comprises seven sections. The limitations of the neo-classical economics theory and the old institutional economics theory are briefly examined in section two. This is relevant because it identifies the factors that influenced the development of the new institutional economics theory. The framework of the new institutional economics (NIE) is illustrated in section three. Section four identifies the different levels of institutional establishment and the process of change of these institutions. In the fifth section, a brief evaluation of the main themes of the NIE is presented. It identifies the relevance of the new institutional economics to this research objective as it affects the regulation of corporate takeovers with reference to shareholder and employee interests. The influence of institutions over market behaviour is examined in section six. Section seven concludes the chapter.

2.2 The Neo-classical Economics and the Old Institutional Economics Theories

The new institutional economics is relatively new by reference to the development of economic theories. It emerged after the neo-classical economic theory and the ‘old economics theory’; however, it is not essentially a recent development.47 It is a

47 It’s title; ‘new’ institutional economics is meant to differentiate its concept from the previous economics theory which is now regarded as ‘old’ economics theory.
concept which attempts to explain economic behaviour from an institutional perspective. Prior to the emergence of this theory, the ‘old’ economics theory was developed as a critique to the much earlier neo-classical economics theory.

Neo-classical economics\textsuperscript{48} comprises certain assumptions about the human economic society. It assumes that humans have rational preferences among outcomes that can be identified and associated with a value. It assumes that individuals maximize utility, firms maximize profits and people act independently on the basis of full access to relevant information.\textsuperscript{49} Hence it assumes that institutions are unnecessary because economies are characterised by efficient markets, which depict a world of instrumental rationality where ideas do not matter. The neo-classical economics theory is based on the view that humans have perfect understanding of their surrounding environment and they have access to perfect information, hence transactions are regulated by a perfect market where such transactions are costless.\textsuperscript{50} Also, it is forward-looking; it depicts a world of functional and optimal efficiency and an ideal world. Generally, it fails to identify the characteristic-form of human relationship which is represented in the present human society of scarcity and competition. In view of this, a different proposition which completely rejects the neo-

\textsuperscript{48} ‘Neo-classical economics’ is believed to have been first used in reference to the theoretical assumptions of its hypothesis in T Veblen, ‘The Preconceptions of Economic Science’, *The Quarterly Journal of Economics*, 14/2 (1900), 240-69 at 261.


classical economic theory emerged. This became known as the ‘old’ institutional economics.\(^{51}\)

The old -classical - institutional economics is concerned with resource allocation and the level at which resources are utilized. Hence it argues that economics should be socially determined through cultural change. The market is seen as an invisible hand which is used as an unproductive tactics by businesses to generate income for the privileged few, as opposed to the general welfare of the people.\(^{52}\) This theory support the idea that the market should be replaced with institutions which are capable of enforcing and achieving social control for the purpose of ensuring that production and profits originates for purposes of social welfare.\(^{53}\) The major limitation of the old institutional economics theory is its exclusion of markets. The functions of the market can hardly be wholly replaced by institutions. The market forms the platform through which transactions and exchange occur. The old institutional economics fails to consider the important role which the market plays in this regard.

While the neo-classical institutional economics focused entirely on the view that the market is made up of an existing perfect framework which characterises economies, the old institutional economics assumes that markets are not perfectly characterised, hence institutions can determine economic factors. The extreme thematic approaches of these theories did not provide any satisfactory explanations of the present state of the economic society. The market is presently characterised with a lot of imperfections, but it remains relevant. Also institutions -as humanly devised


constraint- are important for purposes of regulating the economic players to achieve efficient outcomes.\textsuperscript{54} In view of these, another economics theory which attempts to strike a desirable balance between these theories emerged, namely, the ‘new’ institutional economics. The new institutional economics recognises institutions as the ultimate driving force of economic change and development. It recognises that transactions are costly as a result of inadequate information and scarcity, leading to the existence of imperfect markets and competition and individual choices can be influenced by the norms derived from cultural environments.\textsuperscript{55} In the absence of effective institutions, these norms which influence behaviour can promote market imperfections. Thus, since the market is relevant for exchange, yet imperfect, institutions become important as a regulator for the purpose of limiting certain behaviour. This can mitigate the uncertainties which lead to imperfect market towards ensuring an efficient market.

2.3 The Framework of the New Institutional Economics

The new institutional economics supports the view that choices made by individuals are derived from their cultural backgrounds and that these choices are based on norms and values which are peculiar to individuals or groups among ethnic lines.\textsuperscript{56} As a result of the differences in culture and mental attitudes, there are differences in perception. Hence, people often have different understandings as to how things work around the world, irrespective of any formal education which they may have had. In such a world, choices of rational decision-makers become largely unpredictable, since these choices are made on the bases of different individual modes. Information can be

difficult to access and this can lead to imperfect market which is characterised by competition. As such, human behaviour becomes largely unpredictable.

The unpredictable nature of human behaviour makes it difficult to incorporate expectations to guide behaviour. One of the main challenges of policy development process is to determine how human behaviour is expected to respond to new policies that are established by government. This challenge can be largely addressed by reference to the developmental framework of the new institutional economics. Particularly, it is possible to predict the behaviour of people from a certain geographical location, who have common customary practices. The incorporation of the cultural values and customs from the informal institutional environment into the main stream of the institutional framework can create a high level of valid expectations. The behaviours that are sought to be constrained by such institutional framework that has been developed pursuant to the relevant informal institutions can be expected to follow a certain pattern.\textsuperscript{57}

In recognition of these, the new institutional economics is essentially concerned with the possibility of limiting these uncertainties through established institutions.\textsuperscript{58} The use of institutions to administer and regulate human interactions and relationships is a form of state intervention. It is a response to the uncertainties and inadequacies of

\textsuperscript{57} See G M Hodgson, ‘The Approach of Institutional Economics’ Journal of Economic Literature 36 (1998) 166–192 at 179. For example, the ‘comply or explain’ approach to the UK Corporate Governance Code differs from the approach to regulating corporate governance in other jurisdictions. The UK approach was developed in view of the expectation that companies in the UK (that the code apply to), would abide by the approach without the need for strict regulation that apply elsewhere. The Financial Reporting Council is responsible for developing the codes, it is made up of different personalities from the financial and governance sector in the UK. This ensures that a wide consultation is made before the codes are developed. Thus, it creates an expectation that the codes would be obeyed and the approach that has been adopted would be respected by the ‘corporate players’.

\textsuperscript{58} While the ‘old’ institutional economics identifies institutions as settled habits of thought common to the generality of men, (a way of thought, of action embedded in the habits of a group), the ‘new’ institutional economics excludes the notion of habit. It regards institutions as humanly devised constraints that shape human interaction.
contracts and the inability of human relationships and interactions to predict future events and make anticipatory provisions for these occurrences. The need for state intervention is a major theme of the entity theory of the corporation. The new institutional economics is a form of state intervention; it essentially implements the objectives of the entity theory.

In view of the uncertain nature of human behaviour in a world where choices are based on cultural factors, the institutional framework which is made of rules is used to control behaviour and structure human interactions and relationships. These institutions are important because of the ultimate role which they play in governance. Since information is in fact uncertain and not easily accessible, transactions become costly. Costs are often determined by the legal system, political system, social system, educational system and other related factors of a country. In light of these, the performance of a given economy is largely determined by existing institutions. Consequently, the new institutional economics is not only concerned with the existence of institutions, it is also concerned with how the institutions are created and how they function. In response to this, four levels of institutional framework were developed. These levels of institution are illustrated below.

2.4 Institutions: Levels of Development and Change

The new institutional economics is different from previous economic theories because it accepts the market as a platform for economic interactions, strengthened by

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59 The contractual theory and entity theory of the corporation are briefly reviewed and examined in relation to takeovers in Chapter Three, sections 3.6.3 and 3.6.4.
60 Note 55 above, at 4.
62 Rules that regulate individuals and organisations.
institutions to ensure efficiency of the market functions. More importantly, it is further concerned with how the institutions are created and developed. 64 One of the hypotheses of the theory is that a study of the developmental processes of institutions will create an understanding of how institutions emerge and how they can be changed or transformed. 65 Since institutions are relevant because they can be used to regulate the market towards efficiency, institutions can be relevant only to the extent that they are actually capable of enhancing the market functions. As such, institutions must be tailored towards the needs of the markets.

The needed foundation of the structure for efficient markets can be determined by reference to cultural values and choices which govern human behaviour and relationships. 66 Cultural values and choices emerge from the practices of particular local customs and they influence the ways in which an entire institutional framework are created. The process of developing institutions has its foundation in informal institutions. These informal institutions comprise cultural value, culturally derived choices and other local practices. Since they influence the formation and development of formal institutions and the entire institutional framework, they can largely determine how institutional functions can effectively respond to the challenges that they were created to address. 67 Thus, institutions may effectively relate to the markets where reference is made to local practices which are based on human relationships. In view of this, institutions emerge through cultural evolution, trade practices and the constant value of human relationships. 68 In recognition of these, four levels of

65 Ibid at 234 -235.
66 Note 56 above, at 573.
67 See Chapter Six, Figure 10 below.
68 Cultural evolution depicts norms and values, and trade practices connects people of different cultural backgrounds through human relations.
institutional development and change have emerged. These levels illustrate how institutions emerge, how they can be changed or transformed and more importantly, how they affect economics. They include; informal institutions, formal institutions, level of governance and the level of resource allocation - the market -.

The first level consists of informal institutions, they include: customs, traditions, values, religion, and culture. At this level of institution, changes are very slow, because social institutions are largely embedded and they form part of the unique way of the peoples’ understanding of the environment around them. They are embedded because they are transmitted from generation to generation. At the second level is the formal institution. They consist of formal rules such as constitutions and property rights. They often change from time to time and they are basically derived from the informal rules of level one. The function of institutions at this level is to provide a mechanism for the unification of the differently close-knitted society within a larger macrocosm. Institutions at this level are not closely embedded; hence changes may occur more frequently when compared with informal institutions. But the changes are not often cumulative; they are triggered by a sharp break from established principles which may be caused by political, civil or financial turmoil.

The third level is the level of governance; it is the level where the formal rules which have been developed from the informal rules are applied. This is the level where

69 Human interactions designed by cultures have been described as the most enduring of human association. Such interactions are believed to confer benefit on close-knit group where individual actions are for the collective good, rather than for individual purposes. See S P Huntington, *The Clash of Civilizations and the Remaking of the World Order* (London: Simon & Schuster, 1996) at 43-44., V Nee (ed.), *Sources of New Institutionalism*, eds. M C Brinton and V Nee (New Institutionalism in Sociology, New York: Russell Sage Foundation, 1998) at 8-10.


71 Constitutions and property rights are often used as *grundnunus* in countries which have divers’ ethnic groups. They serve as a common restraint to the behavioural patterns of the different states or tribes which make up the national-state. It is impracticable to practice diverse cultural behaviour at the same time or to decide which culture should be adopted as supreme among different cultures.

72 Note 63 above, at 598.
human behaviour which is exhibited through established organisations is controlled
and co-ordinated through the formal rules. At this level, conflicts are mitigated since
organisations interact with the larger society. Ordinarily, in a perfect world, the rules
which have been established at level two should govern human interaction to the
exclusion of government intervention. But because of uncertainties and costs of
transactions, the mere creation of rules is not sufficient in itself. Governance becomes
necessary to enforce contractual relations for the purpose of mitigating conflicts to
realize mutual gains.\(^73\) This has been described as a unit of transaction which
encompasses conflict, mutuality and order.\(^74\) The fourth level is the level of the
market. It is the level of production which is carried out by a firm. It is the level of
output which is engineered by the productive capacity of the firm after the rules
which emerged from level two have been applied to level three.

These levels of institutional framework, as illustrated in Table 1 below, function
effectively through continuous interrelations.\(^75\) This is indicative of the major
concepts of the new institutional economics; namely, the formation of institutions, the
way they emerge and the way they influence economics.

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\(^73\) Note 63 above, at 599.


\(^75\) The preceding levels impose constraints on the subsequent levels. But the levels are nevertheless interconnected through the response which originates from the lower levels back to the higher levels by way of feedbacks.
### Table 1: Institutional Levels of Development and Change

<table>
<thead>
<tr>
<th>Levels</th>
<th>Frequency (Years)</th>
<th>Purpose</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>L1</strong></td>
<td>$10^2$ to $10^3$</td>
<td>Often non-calculative; spontaneous</td>
</tr>
<tr>
<td>Embeddedness:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>informal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>institutions,</td>
<td></td>
<td></td>
</tr>
<tr>
<td>customs, traditions,</td>
<td></td>
<td></td>
</tr>
<tr>
<td>norms, religion</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>L2</strong></td>
<td>$10$ to $10^2$</td>
<td>Get the institutional environment right</td>
</tr>
<tr>
<td>Institutional</td>
<td></td>
<td>1&lt;sup&gt;st&lt;/sup&gt; order economizing</td>
</tr>
<tr>
<td>environment:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Formal rules of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>the game- esp.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>property (polity,</td>
<td></td>
<td></td>
</tr>
<tr>
<td>judiciary,</td>
<td></td>
<td></td>
</tr>
<tr>
<td>bureaucracy</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>L3</strong></td>
<td>1 to 10</td>
<td>Get the governance structures right</td>
</tr>
<tr>
<td>Governance:</td>
<td></td>
<td>2&lt;sup&gt;nd&lt;/sup&gt; order economizing</td>
</tr>
<tr>
<td>play of the game-</td>
<td></td>
<td></td>
</tr>
<tr>
<td>esp. contract(aligning</td>
<td></td>
<td></td>
</tr>
<tr>
<td>governance</td>
<td></td>
<td></td>
</tr>
<tr>
<td>structures with</td>
<td></td>
<td></td>
</tr>
<tr>
<td>transactions</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>L4</strong></td>
<td>continuous</td>
<td>Get the marginal conditions right</td>
</tr>
<tr>
<td>Resource allocation and employment</td>
<td></td>
<td>3&lt;sup&gt;rd&lt;/sup&gt; order economizing</td>
</tr>
<tr>
<td>(price and quantities; incentive alignment)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

L1: social theory

L2: economics of property rights / positive political theory

L3: transactions cost economics

L4: neoclassical economics / agency theory

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Note 63 above, at 597.
As indicated in table 1 above, the framework of the new institutional economics is mainly concerned with the ways in which the institutions that are the determinants of economics are formed. Since organisations\textsuperscript{77} are expected to engage in transactions according to existing institutional framework - rules -, the extent to which institutions can function effectively may be largely determined by the relevance which the organisations attach to the institutions. As such, institutions may function effectively only to the extent that they can be suitably applicable to the challenges and problems which exist within a given society. In view of this, it was rightly observed that the institutional framework which has been developed as a response to the challenges of an economic problem may not be successfully applied to a different economy. They may only be successfully applied to the extent that they can be adaptable.\textsuperscript{78}

It can be observed from Table 1 that the new institutional economic theory is functional at levels two and three, while levels one and four represent institutions of existing norms and markets. Since the market factors are dependent on the institutional factors, the fourth level may be included as a functional part of the theory. In view of this, the interactions among levels two, three, and four in table 1 distinguishes the new institutional economics theory from the neo-classical and old economics theories. These levels which have been described as the main streams\textsuperscript{79} of the new institutional economics theory; property rights theory, transaction cost

\textsuperscript{77} Organisations are the actors. They consist of people or group of people who are connected by the same beliefs and views, such as political parties, religious organisations, trade unions and professional bodies.


economics and agency theory - contractual relations - are briefly examined in the next section.

2.5 Main Streams in Economics of Institutions

The new institutional economics consists of two basic foundations. First, that its theoretical framework should have the capacity to cause an interrelation of neoclassical economic theory with an analysis of the way institutions modify the choices which have been made available to humans. Secondly, that this framework must build upon the basic determinants of institutions so that the set choices can not only be defined, but also have the capacity to analyse the way in which institutions change and therefore alter the available choice which may be set. On their own, these theoretical foundations do not provide any tangible framework for achieving the collective objective of institutional economic functions. Rather, the central objective of these foundations has given rise to the needed tangible frameworks of property rights, transactions cost economics and agency theory - contractual relationship - .

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80 Note 64 above, at 230.
Figure 1 depicts the NIE framework for takeover regulations. It identifies the role of managements as central in the determination of the extent to which the interests of shareholders, employees and the company can be enhanced.

### 2.5.1 Property Rights of Shareholders

The importance which is attached to the value of properties both tangible and intangible is largely a function of the level of control which may be exerted over such properties. The level of control can be expressed as the rights to use, control\(^\text{81}\) and the

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\(^{81}\) These include the rights to change and transfer (a totality of right over property or the residual rights of control). O Hart and J Moore, ‘Property Rights and the Nature of the Firm’ *The Journal of Political Economy*, 98/6 (1990) 1119-1158 at 1121.
The new institutional economics is concerned with the level of control to which property rights can be put. Company Managements can determine the level of control, as shown in figure 1 above. Since scarcity leads to competition, allocation of resources should be determined by reference to established standard.\footnote{A Alchian, ‘Pricing and Society’, in The Institute of Economic Affairs (ed.), Occasional Paper (17; Westminster, 1967). Cited in E G Furubotn and S Pejovich, ‘Property Rights and Economic Theory: A Survey of Recent Literature’, Journal of Economic Literature, 10/4 (1972), 1137-62 at 1139.} As observed; ‘When it is too costly for one party to specify a long list of the particular rights it desires over another party's assets, it may be optimal for that party to purchase all the rights except those specifically mentioned in the contract’.\footnote{S J Grossman and O D Hart, 'The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration', Journal of Political Economy, 94/4 (1986), 691-719 at 692.}

Thus, as illustrated in table 2 below, property rights theory as a framework of the new institutional economics determines the standard which governs the relationship amongst people for the exchange of ownership rights. The role of property right is to determine the use of resources.\footnote{L J Alston and B Mueller (eds.), Property Rights and the State, eds. C Menard and M M Shirley (Handbook of New Institutional Economics, Dordrecht, Netherlands: Springer, 2008) at 573-90.} This role is important because it forms the basis of exchange of the scarce resources. It determines whether resources are to be put to permanent or temporary use.\footnote{It determines whether a property can be used as collateral to secure a loan. Also, the decision whether to turn a piece of land into a farm-land or to build estate on such land is determined by reference to property rights.} Also, it creates a platform for the use of scarce resources by demarcating the rights to use the resources where an exclusive right over the resources cannot be granted.\footnote{J Kim and J Mahoney, ‘Property Rights Theory, Transaction Costs Theory and Agency Theory: An Organizational Economics Approach to Strategic Management’, Managerial and Decision Economics, 26 (2005), 223-42 at 226.} Property rights determine the value of resources. When resources are exclusively held by a person or group of persons, there is a greater incentive to improve on the value of the asset by investment.\footnote{Alston and Mueller (eds.), Property Rights and the State at 574. See also H Demsetz, ‘Information and Efficiency: Another Viewpoint’ Journal of Law and Economics, 12/1(1969)1-22 at 12-13.} Also, it is illustrated that the property right of sale can improve allocation of resources in the
following ways. First, allowing sale, signals scarcity which invariably enhances the value of goods. Secondly, the existence of markets allows those who value the assets most to have the ability to purchase the assets. More importantly, the role of property right is largely dependent on the role of the state pursuance to its functions. It is not enough for states to create property rights. Where property rights are created, they must be clearly defined, enforced and protected by the apparatus of the state.

In takeovers, the interests of shareholders are directly related to the value of their investments in the company in the form of shares. Shareholders have property rights in the shares that are the main subject of transfer. The rights that are attached to shares, which include the right to vote, right to receive dividends, right to participate in capital distribution are important only to the extent that shareholders can actually enforce their rights, subject to company law and other regulations. These rights, which emanates from the property rights doctrine can only be meaningful if takeovers are included in the circumstances where the rights can be applied, enforced and enjoyed without hindrance. As indicated in figure 1 above, the role of managements is central in the determination of whether the property rights of shareholders can actually be freely exercised. The ability of the state to establish effective institutions that can regulate takeovers by challenging managerial behaviour towards enforcing property rights can determine the extent of the functions described above. Also, Figure 1 shows that the extent to which the interests of shareholders can be protected during takeovers depends on two main factors amongst other considerations. First,

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88 Ibid (H Demsetz).
Note 87 (Alston and Mueller) above, at 573. See also M Ugo, L Antoniolli, and A Rossato, Comparative Law and Economics, eds B Bouckaert and G D Geest (Encyclopedia of Law and Economics; Cheltenham, UK: Edward Elgar, 2000) at 515.
whether company managements can genuinely promote shareholder interests when they make takeover decisions where takeovers are considered to be a usual investment decisions for which managements are responsible to act as agents of shareholders. Secondly, alternatively, whether there are effective institutional mechanisms that can effectively regulate takeovers to ensure that managements promote the property rights of shareholders.

Managements can engage in acquisitions for the genuine reasons of seeking to promote corporate value and shareholder interests. However, in view of the fact that conflict of interests characterises the agency relationship of shareholders and managements, this may not always be guaranteed. Agency conflict which can be demonstrated in costly and overambitious acquisitions can lead to negligible or zero gains to acquiring shareholders.\textsuperscript{91} Hence it is imperative that effective institutional mechanisms are established to regulate and administer takeovers to ensure that property rights of shareholders can be protected from managerial hubris.

Property rights do not function independently of other institutional frameworks of transaction costs and agency costs, rather it provide the platform on which they function. This means that the transaction cost economics and agency theory - contracts - functions of the institutional economic theory are dependent on the scope of the property rights functions. Thus, as indicated in table 2 below, property right influence incentives and behaviour.\textsuperscript{92}

\textsuperscript{91} See the discussions in Chapter 3, section 3.4.3, Chapter 5, section 5.3.
\textsuperscript{92} Note 82 (E G Furubotn and S Pejovich) above, at 1139. They influence incentive at the level of governance; (transaction cost economics) and behaviour at the level of the Market (Agency theory).
2.5.2 Transaction Costs Economics (Costs of Takeovers)

Transaction cost economics is a basic feature of the new institutional economics theory. It is concerned with the transactions which lead to the exchange of property rights and their attendant costs. The existence of property rights invariably leads to transactions of which property rights are exchanged for value. These transactions are often influenced by both human - Figure 1 indicates that managements can determine how values are allocated - and environmental factors which increase the costs of these transactions. In a perfect world where these factors are absent, transactions where exchanges occur would be costless. The new institutional economics recognises that human and environmental factors influence the costs of transactions; hence it is concerned with the process of organising transactions towards minimizing these costs to attain efficiency. The existence of property rights is relevant to the new institutional economics theory to the extent that it provides an institutional framework for the clear definition of rules which govern human relations. The property rights will not be functional by its mere existence, rather a system of governance through which these rights can be positively organised towards its enforcement makes the transaction costs economics theory an indispensable unit of the framework of the new institutional economics theory. The protection of property rights becomes as important as its creation. As observed, ‘...the TCE - transaction costs economics - tries to explain how trading partners choose, from the set of feasible institutional alternatives, the arrangement that offers protection for their relationship-specific investments at the lowest total cost(s)’, to reduce transaction

93 These are endogenous factors within a firm such as bounded rationality and opportunism.
94 They are exogenous factors which affect a firm’s productivity and transactions, such as uncertainties and complexities.
costs.\textsuperscript{96} This implies that the transaction cost economics theory builds on the property rights theory because it indicates the existence of an institutional framework which defines the rights it sets out to implement and the intensity of relationships as indicated in table 2 below. The function of the transaction cost economics within the main stream of the new institutional economics is to eliminate or reduce the incompleteness which characterises contractual relations and transactions because of future uncertainties.

One of the greatest challenges of takeovers is the level of uncertainty that characterises employment issues. Even though all takeovers do not lead to employment reduction, as soon as negotiations for a takeover become apparent, there are often concerns for employment security. While shareholders may not experience gains that correspond with the size of the company post-takeovers, managements may decide to disengage some employees to mitigate the effects of the costs of the takeovers.\textsuperscript{97} In some cases, negotiating parties make promises to protect employment, only to renege on such promises post-takeovers. This uncertainty which characterises takeovers in relation to employment is often caused by lack of appropriate institutional structure that regulates takeovers and incorporate employment issues into takeover framework in specific corporate jurisdictions. This means that the incompleteness which characterises employment contracts can indirectly increase transaction costs during takeovers. Where appropriate regulatory mechanisms are established to ensure that employees are not easily disengaged by managements to


\textsuperscript{97} A Kuvandikov, A Pendleton, and D Higgins, ‘Causes of Employment Reductions after Corporate Takeovers’, (2012), 1-34.

mitigate transaction costs; company managements would make more prudent acquisitions. Also, they would focus on value-yielding takeovers that would not necessarily require reduction of employment post-takeovers. The objective of the regulation that is contemplated here is to ensure that the role of managements is clearly defined towards promoting corporate value during takeover. A regulatory framework that can effectively restrain managements from engaging in overambitious acquisitions can lead to lower takeover transaction costs. This would likely mitigate losses to acquiring shareholders.

As indicated in figure 1 above, the role of managements can largely determine the extent to which transaction costs can be high or low in relation to takeovers. Hence, it may be argued that as long as managements can freely engage in large scale employment reduction post-takeovers, they are likely to engage in costly acquisitions irrespective of whether or not such acquisitions would enhance shareholder wealth and corporate value. It is impossible for parties to draw up a complete contract that will clearly define their rights with regards to any possible future eventuality.\(^{98}\) because it is too costly to do so.\(^{99}\) Thus, as shown in table 2 below, transaction cost economics plays a governance role, to protect parties from the hazards which may occur by virtue of the uncertainties during exchange.\(^{100}\)

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Figure 2 illustrates how the role of governance is controlled by existing institutional mechanisms. While individuals interact at the level of the market, the market function is influenced by governance.

In figure 2, transaction cost which plays a governance role serves as an important link between institutions and the market. It governs relationships by applying established institutional guidelines to the level of the market. This can mitigate the extra costs of transactions which are caused by uncertainties arising from factors which are both internal and external to organisations. As shown in figure 2, these

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102 The institutions here refer to the established property rights and the market is the level where people actually interact (Agency and contractual relationships).
internal and external factors which influence individual behaviour can be controlled at the level of governance through effective institutions.

During takeovers, while institutional framework can protect the property rights of shareholders, the interests of other corporate constituents such as employees are also affected, and their interests can be related to shareholder interests. Takeovers are expensive, and when a takeover becomes more costly, the effects of the costs can be shared by shareholders, especially those of the acquiring companies - and the company employees. The institutional environment as shown in figure 2 can influence the level of governance and this can have a direct impact on transaction costs. Employment reduction can be influenced by costly takeover transactions; to mitigate corporate cash outflow and the loss to the shareholders of the acquiring company. The new institutional economics seeks to mitigate these costs. In the absence of an effective institutional framework that can mitigate the costs of takeovers, the interests of employees would remain uncertain. Thus, an appropriate institutional framework which can regulate takeovers, towards promoting shareholder value whilst defining and preserving employee interests during takeovers is desirable.

2.5.3 Agency Relationship between Managements and shareholders

The new institutional economics theory is generally concerned with the promotion of efficient market through established institutions and governance mechanisms. While the institutions define property rights, the governance functions ensure that the costs of transactions are minimized or eliminated. These important aspects of the new institutional economics have been briefly examined in the preceding sections of this chapter. But more important is the platform where transactions occur, namely; the market. It is the level where individuals interact through contractual relationships to
achieve mutual objectives. Usually, at the level of the market where contracts are concluded, there is often the problem with delegation of authority as a result of certain intervening factors. Since investors do not always have the capacity to manage their capital towards productive use, the intervening factors often prevent agents who have been appointed to manage the investments from achieving the objective of the investors. These include moral hazards which are often caused by information asymmetry\textsuperscript{103} and opportunism. These can cause agents to have conflicting objectives with their principals; hence, agents can pursue personal objectives to maximize their own value at the expense of the principal-investor. Agency problems\textsuperscript{104} interfere with the market functions by increasing the costs of transactions. This is depicted in Figure 1 above. The role of managements can determine how agency relationship is expressed, especially in relation to conflict of interests and shareholder value. This is a relevant aspect of the new institutional economics theory. When institutions are established at the level of property rights, and adequate governance mechanisms towards the enforcement of these rights are functional and agency costs can be reduced or eliminated, market efficiency will likely be achieved.

The agency theory which originated from the concept of ‘separation of ownership and control’\textsuperscript{105} uses a modern corporation as an analogy where ownership and control of investment capital resides in principals and agents respectively. As a result of the intervening factors, the objective of the firm becomes divided between the principal’s and the agent’s. In view of this, it becomes important to ensure that the agents act for

\textsuperscript{103} When information is asymmetric, only managements know the true position of the company. They can use this for their own advantage. See for example, S Mensah, The Impact of Asymmetric Information on Proxy Outcomes: An Empirical Test, The Financial Review, 33 (1998), 69-84 at 73-74.


the best interests of the principal. To encourage the agent to act in the best interest of the principal, the principal must engage certain mechanisms to ensure that the interests of the agents align with those of the principal. This may be achieved through improved information systems and incentive programmes. Incentive contracts often include the specification of residual rights of control, to determine who can make decisions on unforeseen matters relating to the contract between the principal and agent in the productive function of the firm. In achieving this objective, certain costs arise, these include; monitoring costs, bonding cost and residual loss. The monitoring costs represents the expenditure incurred by the principal in monitoring the business activities of the agent through mechanisms such as auditing, while bonding costs are those expenditure which accrues from the agency contract itself, including commitments from the agent and incentives offered to the agent to enhance performance output. The residual loss is different from those incurred from monitoring and bonding. They include loss which should have been counted as gains of trade but because of the inability to supervise all the actions of the agents these losses occur anyway.

The neo-classical economic theory emphasises that the market functions perfectly, hence it assumes that institutions are not needed, while the new institutional economics accept the important role of the market in arranging transactions. The market is not perfect because of several intervening factors. These intervening factors

109 Some of these aspects of loss are not caused by the agents, they occur because of circumstances beyond the control of the agent.
increase the costs of transactions and they further create uncertainties in human relationships. Importantly, the framework of the new institutional economics is concerned with how to reduce or eliminate the intervening factors which lead to uncertainties for the purpose of achieving market efficiency.

The function of institutions at the level of the agency theory with respect to takeovers is to properly define the role of management during takeovers. The definition of the role of managements can be done with an appropriate institutional framework with reference to property rights and transaction costs economics. It can help to provide a regulatory control over transaction costs by ensuring that the role of managements during takeovers aligns as best as possible with the interests of shareholders, managements and the company.

Table 2 below illustrates how property rights, transaction costs economics and agency relationships constitutes the tangible framework of the new institutional economics. As indicated in Table 2, the new institutional economics is particularly concerned with the principal agent-relationship because first, it is the level of the market in the institutional framework where resources are allocated. Also, it is concerned with promoting efficiency in contractual relationships by attempting to reduce the general costs of transacting - which is caused by opportunism -, through incentives alignments which determines how risks are allocated between principal and agent.\(^{110}\)

In view of the fact that one of the main objectives of the new institutional economics is to promote efficiency in the allocation of resources, it is also concerned with the elimination or reduction of the marginal deficiencies of contractual relationships. This means that the challenges of conflicts of interests which can be present in agency

relationship can hinder the effectiveness of managements as agents of their shareholders in relation to takeovers. Effective takeover regulations can be used to redefine the scope of managerial discretion and their role generally as agents. This can ensure that agency conflicts are mitigated and the decisions of managements can be made to reflect their positions as agents of their shareholders. Thus, a takeover can be made towards enhancing corporate value and shareholder interests ultimately.

Table 2 The Main Streams of the NIE\textsuperscript{111}

<table>
<thead>
<tr>
<th>Object of Study</th>
<th>Property-Right Theory</th>
<th>Transaction Costs Theory</th>
<th>Principal-Agent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Perspective used to optimise organisational design</td>
<td>Optimal situation between concentration and dilution of Property-Rights considering transaction costs, externalities and individual utility</td>
<td>Minimisation of transaction costs by defining the intensity of relationships and regarding the environmental and human behaviour factors</td>
<td>Compatibility between motivations of Principal and Agent, or between motivation and risk allocation</td>
</tr>
<tr>
<td>Criteria of Efficiency</td>
<td>Transaction Costs</td>
<td>Transaction Costs</td>
<td>Agent Costs (signalisation, control and other deadweight losses)</td>
</tr>
<tr>
<td></td>
<td>Externalities</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Influencing Factors</td>
<td>Bounded Rationality</td>
<td>Bounded Rationality</td>
<td>Bounded Rationality</td>
</tr>
<tr>
<td></td>
<td>Individual Maximisation of Utility</td>
<td>Individual Maximisation of Utility</td>
<td>Individual Maximisation of Utility</td>
</tr>
<tr>
<td></td>
<td>Indivisible production processes</td>
<td>Opportunism</td>
<td>Opportunism</td>
</tr>
<tr>
<td></td>
<td>Imperfect information, Institutional Boundaries</td>
<td>Uncertainty and Complexity</td>
<td>Division of risks</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Small numbers and strategic importance</td>
<td>Unknown Quality Characteristics</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Frequency</td>
<td>Non-Observeable Effort</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Transaction Atmosphere</td>
<td>Incompleteness of Contracts</td>
</tr>
<tr>
<td>Management Tools</td>
<td>Concentration and Dilution of Property Rights</td>
<td>Definition of the strength of bonds between market and hierarchy</td>
<td>Instruments for ameliorating information asymmetries and enhancing compatibility between Agent and Principal motivations</td>
</tr>
</tbody>
</table>

2.6 How Institutions Can Influence Market Discipline

While the new institutional economics is generally concerned with how institutions emerge and how they can be changed over time, it is also particularly concerned with

\textsuperscript{111} Note 106 above, at 2.
how institutions can be used to achieve a higher level of corporate productivity and market efficiency.

Two levels of institutional functions can be deduced here. First is the emergence and definition of institutions, which exist at the level of institutional environment. It is the set of fundamental political, social and legal ground rules that establishes the basis for production, exchange and distribution. It includes the rules governing property rights. At this level, institutions are seen as sets of ordered relationships among people, it defines their rights, exposures to the rights of other, privileges and responsibilities. Institutions function at this level as a constraints and act on a composite level.

At the second level of institutional function are institutions of governance. Here institutions operate at the level of individual transactions. It is the level where the first level of institution is applicable to human interpersonal relationships. This level determines whether established institutional framework can achieve the desired objective of market efficiency.

Ordinarily, the market is characterised by uncertainties in view of the principal-agency problems and market expropriation. The extent to which established institutional framework can reduce or eliminate these challenges depends on how it function at the level of the market.

The problems of principal-agent relationship occur as a result of lack of a definite contractual relationship between a principal and an agent. Where it is possible to

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define all the terms of a contract which determine the relationship between a principal and an agent, it would be unlikely for parties to be involved in any dispute when they enter into contractual relationships. Opportunism is another factor which undermines principal-agent relationship. As long as there is the expectation that individual advantage will be realized, the self-disbelieved promises will characterise individual transactions. Although, institutional framework may not create contracts between agents and principals, it can reduce the elements of uncertainty, complexity as well as opportunistic behaviour which characterise such contracts. Also, since a party cannot determine the level of satisfaction which is sought by another party as well as all contingent matters which may originate during the pendency of the contract, institutions can thus determine the extent to which compensation can be appropriated.

Market expropriation can occur where there is a relationship which confers economic benefit during exchange. Largely, expropriation occurs because of imbalance in contractual relationships. Parties with higher bargaining powers often consider their ability to expropriate as an added gain in the exchange which is different from the gains which they have earned from the contractual relationship. An employer-employee relationship is an example of an imbalanced contractual relationship where the employer occupies the position of advantage. It has been observed that one of the functions of institutions is to co-ordinate the relationship between a legal superior and a legal inferior; this includes managerial transactions which have been described as characterising the relationship between employers and

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116 The problems of principal-agent relationship (as it relates to shareholders of offeree companies during takeovers) was one of the factors which influenced he emergence of the City Code on Takeovers and Mergers in the United Kingdom. See City Code on Takeovers and Mergers 2 (a).
117 Market expropriation is a wide concept. It includes expropriation by suppliers and rivals. For the purpose of this thesis, expropriation of employees by employers will only be considered here.
employees.\textsuperscript{118} The relationship between employer and employee create deficiencies in bargaining powers. As a result of human asset specificity,\textsuperscript{119} economic conditions and psychological state of mind, it is often impracticable for employees to protect themselves from expropriation. Established institutional framework can be used to regulate this relationship, to limit the extent of expropriation by setting appropriate standards for compensation as ‘deemed’ protection for employees.

The principal-agent relationship and employer-employee relationship are clearly based on contractual relationships. The extent to which value is allocated in these contracts depends largely on how the contracting parties can effectively enforce their respective contractual rights. In view of uncertainties and other external factors considered above, the enjoyment of these rights invariably becomes a matter of the extent to which these rights not only exist but its enforcement guaranteed. Guarantees which characterises enforcement of contracts as binding obligations and protection of contractual parties in the event of contingencies introduces the framework of institutions into the market functions to attain efficiency. Thus the new institutional economics seeks to regulate the role of the market actors, using effective institutions, rather than merely replacing the market with institutions.

While the market function is given as a constant value\textsuperscript{120} in the framework of the new institutional economics, -being a platform for human interaction and exchange -, institutions are important to the extent that they can actually influence the market function towards efficiency. This means that market efficiency depends on the

\textsuperscript{119} This includes Firm’s specific knowledge that workers may accumulate that would make them essentially valuable only within one company. See Ibid. at 121.
\textsuperscript{120} The market function is regarded as constant because as a platform for exchange, interactions are always directed towards economic value. People interact and exchange property rights only to the extent that it would enhance their economic interests. Also, general contractual relationships can be created at the level of the market.
following; first, the effectiveness of established institutional framework, and secondly, the degree to which these institutional framework are responsive to the challenges posed by the market function. Institutions are necessary to promote market efficiency, and to preserve this efficiency, institutional frameworks must be regularly changed so that they can effectively respond to recent and recurrent challenges.

Corporate takeovers are an important aspect of the market for corporate control. In view of the plethora of interests which characterises takeovers, regulatory control over takeovers have been considered to be necessary. Since, takeover markets are regulated by established institutional frameworks, institutions must be continuously reviewed to suit current trends in takeover markets.

Although it may be a challenge to make changes and restructure institutions, the challenges which may occur from failure to restructure current institutions could be enormous. As such, it was rightly observed that failures to carry out institutional changes are obstacles to development for developing economies.

The concept of the new institutional economics forms the theoretical framework of this thesis, in light of its relevance to the identified problems. Its main stream of property rights, transaction costs and agency theory are used to examine the problems as it affects shareholders and employees. The next section concludes the chapter.

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2.7 Conclusion

Interactions at the level of the market characterises the high point of human relationship leading to exchange. The market is an important platform for exchange and its functions can be further strengthened to eliminate or reduce the effects of uncertainties. The new institutional economics is concerned with the creation of institutions to protect the market functions towards a more efficient system of human exchange. Institutions matter and without the appropriate institutions, no market economy of any significance is possible.\(^{124}\)

This chapter examined the institutional framework which supports market efficiency. The new institutional economics theory was briefly examined. It was revealed that the new institutional economics was established to build on the main concepts of the neo-classical economics theory. It accepts the market functions and identifies institution as a mechanism that can be used to strengthen the important function of the market. Also, it emerged that the new institutional economics is not merely concerned with the introduction of institutions; it is actually concerned with the ways through which institutions are created. This explains the importance of the informal institutions as forming a part of the levels of institutional development.

The chapter also revealed that aspects of the institutional framework are especially concerned with how established institutions can be defined, protected and enforced. This was examined by reference to the main streams of the new institutional economics of property rights, transaction costs and the principal-agent theory. In light of the focus of the thesis, the problems which characterises principal-agent relationship and market expropriation during takeovers were shown to persist as a

result of lack of a functional institutional framework that can effectively regulate takeovers. This problem affects the interests of company shareholders and employees at the level of the market. It showed the relevance of the new institutional economics to the research objective. It was identified to be capable of providing a platform for the creation of functional institutions or the strengthening of existing institutions to ensure that takeovers are effectively regulated and administered.

Chapter three concludes Part I. It examines the theoretical framework of takeovers. The chapter illustrates the problems that arise during takeovers and it shows the need for the establishment of the effective institutions that have been examined in this chapter.
CHAPTER THREE

3. THE THEORETICAL FRAMEWORK OF CORPORATE TAKEOVERS

3.1 Introduction

This chapter reviews the relevant literature on takeovers, for the purpose of examining the activities which may operate to influence or activate corporate takeovers. It aims at identifying the underlying effects of the takeover process, and its functions. Also, an identification of the challenges of conflict of interests and agency problems as a prominent feature of takeovers is included in the chapter in relation to the problems that are identified in chapter one.

Traditional finance theory recognises different mechanisms for corporate regulation, namely; the internal and external mechanisms. While the internal mechanism is based on managerial compensation, structure of the board of directors and control by large shareholders, the external control mechanisms consists of the activities of the market as a means of controlling corporate powers.\textsuperscript{125} In some jurisdictions internal corporate control has been largely regulated with statutes.\textsuperscript{126} In some other countries such as the United Kingdom\textsuperscript{127} and Nigeria,\textsuperscript{128} the internal mechanism of corporate control has been administered through corporate governance codes. This leaves enforcement powers with shareholders who have limited monitoring capacities by reasons of co-ordination problems, monitoring costs and different incentives.\textsuperscript{129} A failure of internal

\textsuperscript{126} The United States, partly regulates corporate governance with legislative provisions such as the Sarbanes-Oxley Act, 2002.
\textsuperscript{127} The first Corporate Governance Code was the Cadbury Report, 1992. The most recent code is The UK Corporate Governance Code, 2014) (Financial Reporting Council).
\textsuperscript{128} See The Code of Corporate Governance for Public Companies in Nigeria, 2011.
control may lead to the intervention of external control measures of takeovers as a function of the market for corporate control.

A corporate takeover is an important aspect of the market for corporate control. It functions as an external mechanism for corporate accountability. The market for corporate control refers to the entire processes leading to the transfer of control and ownership of companies from one set of investors and managers to another, through different mechanisms. In a broad sense, it connotes the rights to determine the management of corporate resources, which include the rights to hire, fire and set the compensation of top-level managers. When a company with publicly traded shares is poorly managed, this may effectively reduce the share prices, and the holders of the shares may respond to such mismanagement by selling their shares. Corporate raiders or outside investors may take the opportunity to buy as many shares as possible to enable them gain control.

However, the market for corporate control can also be largely controlled by corporate managements. Figure 1 depicts the extent to which the role of managements can be

See also D Seidl, P Sanderson, and R John, 'Applying 'Comply or Explain': Conformance with Codes of Corporate Governance in the UK and Germany', (Cambridge: Centre for Business Research, University of Cambridge 2009) at 2.

The internal mechanisms involve the use of codes of governance and / or mandatory rules to direct and control the internal affairs of companies.


In this thesis, companies and corporations are used synonymously, also, target companies and offeree companies are used interchangeably.

See the Organisation for Economic Co-operation And Development, 'Glossary of Statistical Terms', (2008), 1-605 at 323.


See Chapter Two, section 2.5.
central to takeovers. It indicates that managements can largely determine the extent to which value can be distributed in the firm amongst the various corporate constituents, including shareholders, employees and the managements during takeovers. Managements can create an ‘artificial’ role of the market by engaging in needless acquisitions that have not actually arisen as a natural response to managerial failures. The agency relationship objective of the new institutional economics identifies the potential conflict of interests that can give rise to this problem, whereby managements would seek to promote their objective. Hence, because of the central role that managements occupy, institutional control over managerial role during takeovers is necessary to ensure that they do not exert undue managerial control. This is important and it requires serious consideration and attention because of the influence of managements in the activities of corporate entities including takeovers. Where the role of managements can be successfully restricted, property rights which the new institutional economics seeks to protect can be freely transferred when the market for corporate control is activated without managerial influence. Also, transaction costs can be mitigated in the absence of needlessly-costly acquisitions and market efficiency can be promoted. Thus, market activities\textsuperscript{137} which may be aimed at taking over the control of a given company, either directly or indirectly can thrive in an efficient manner. Further to this, synergistic gains and the disciplinary effects of takeovers can be promoted.

The chapter is divided into seven sections. In section two, the nature and characteristics of the different types of corporate takeovers are briefly identified. The various devices that can be used to initiate the takeover process are examined in section three. Section four evaluates the different takeover hypotheses. This is done

\textsuperscript{137} Particularly, the purchase of shares.
by reference to the extent to which takeovers can enhance the value of a company or cause losses to companies. Some of the mechanisms that are used by company management to ‘frustrate’ takeovers are examined in section five. In section six, conflict of interests - agency problems - and employment issues in relation to takeovers are identified briefly. This section includes an analysis of the contractual relationship among managements, shareholders and employees. It identifies the limitations of the contractual theory and it briefly illustrates the role of the entity theory in response to the limitations of the contractual theory. Section seven concludes the chapter.

3.2 Types of Corporate Takeover: Nature and Characteristics

Investors seeking to gain corporate control may achieve their objective through friendly takeover, hostile takeover or reverse takeover. Friendly takeover may also be referred to as ‘a negotiated takeover’. It involves series of negotiations between the acquiring investors(s) and the target board. The shareholders of the target company receive cash and / or shares in the acquiring company as part of the process leading to the successful completion of the takeover. This type of takeover is not controversial, as its name suggests, its entire process aims at creating synergies between the acquirer and the target company. However, hostile takeovers are attempts by acquiring companies towards gaining control of corporate powers through different methods. These include direct negotiations with shareholders in the target company and the purchase of shares in the target company discreetly. A hostile takeover may be commenced directly, it could also commence as a result of failed

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negotiations of a friendly takeover attempt. In view of the nature of this type of
takeover, it has been suggested that hostile takeovers are the most effective ways of
getting rid of non-performing managers without bribing them.140

In light of the direct negotiations between the shareholders and the outside investors,
a hostile takeover has the characteristics of promoting private benefit to the
negotiating parties, rather than conferring any form of social value. As indicated,
hostile takeovers can be privately beneficial even though they are not socially
desirable.141 They can lead to a renegotiation of contracts of labour and employee
dismissal,142 contrary to the theory of a corporation as a nexus of contracts.143 While
the outside investor(s) negotiate with the shareholders of the target company on terms
suitable to both parties, managers could also seek to remain relevant with a view
towards protecting their interests by attempting to convince shareholders that they are
performing efficiently through increased reported earnings to avoid losing their
jobs.144 They are also more likely to engage in acts that would make them to entrench
themselves and remain in control of corporate powers.145 While friendly takeovers are
mainly non-controversial, hostile takeovers represent a control contest amongst the
incumbent managers, shareholders and the outside investors. In light of this, the
nature of this type of takeover suggests that it is mostly activated through the

140 A Shleifer and W Vishny, 'Value Maximization and the Acquisition Process', Journal of Economic
Perspectives, 2/1 (1988), 7-20 at 11.
141 See note 12 (Shleifer and Summers) above at 34 and 35.
142 Ibid (Shleifer and L H Summers). While it is contended that hostile acquisitions are largely
associated with job losses post-acquisition, it has also been suggested that friendly acquisitions can
also lead to intial decrease in job demand. See M Conyon et al, 'Do Hostile Mergers Destroy Jobs'?
143 E F Fama, 'Agency Problems and the Theory of the Firm', Journal of Political Economy, 88/2
144 C M Easterwood, 'Takeovers and Incentives for Earnings Management: An Empirical Analysis',
145 A Christie and J L Zimmerman, 'Efficiency and Opportunistic Choices of Accounting Procedures:
mechanisms of the direct purchase of shares, particularly tender offers and proxy contests.

A different type of takeover is the reverse takeover. It is the type of corporate takeover where the shareholder(s) of a private firm purchase a large majority of the stock of a public company for the purpose of gaining control over the latter. The next section examines the different methods through which the control of the corporate powers of a company may be sought and obtained.

3.3 The Takeover Devices

A takeover may become apparent through any of the following.

3.3.1 Direct Purchase of Shares (Tender Offers)

Direct purchase of shares represents the most obvious and direct method through which the controlling powers of a company may be acquired by outside investors. This method which enables investors to directly acquire the controlling powers of the company may be attempted through one or more of the following ways, namely:

(a) The direct purchase of shares from an individual or individuals who have a controlling block of shares.

(b) The gradual acquisition of a controlling number of shares through anonymous open market transactions.

(c) A tender offer to purchase shares at a specific price above the usual market price.

(d) An offer of marketable securities in exchange for the required number of shares.

The last method (d) above is often used by corporate investors instead of a cash tender offer which is commonly used by individuals or group of investors.\(^{147}\) (a) and (b) above are mainly used when the majority shares are held by a single or few individuals. For the purpose of this thesis, only tender offers in relation to (a), (c) and (d) above will be examined.

A tender offer occurs, when a prospective buyer offers, or invites the shareholders of a target company to offer for sale or tender their shares at a stated price, usually above the market price.\(^{148}\) As indicated above, tender offers may either be ‘cash tender offer’ or ‘a public exchange offer’. Cash tender offer involves the use of cash by outside investors to purchase certain number of shares directly from the shareholders of the target company through the bidding process, usually at a premium. Where a tender offer is made by exchange, the outside investors usually offer company securities to the shareholders of the target company in exchange for certain number of shares. It may include a combination of cash and shares.\(^{149}\) A tender offer may include an agreement to keep an offer for sale open within a specific period of time.\(^{150}\) The nature of the offer may also contain the condition that certain percentage of the total shares should be offered for sale. The conditions may also include the right of the investor to withdraw the offer.\(^{151}\)

The major challenge to successful tender offers is the opposition from the board of the target companies. A board that is composed of mainly executive directors may

\(^{147}\) See generally note 135 above at 239.
oppose a tender offer to prevent the successful completion of a takeover, to protect their personal interests.¹⁵² These managers who may also have certain percentage of shareholding in the company may not be concerned about their personal loss from such resistance. As suggested, they may be prepared to suffer a decline in the value of their shareholding in their bid towards maintaining control and enjoying the pecuniary and non-pecuniary benefits arising from the power of control.¹⁵³ On the contrary, a board, which is mainly composed of independent directors, may oppose the bid for the purpose of ensuring the enhancement of the wealth of the shareholders of the company.¹⁵⁴ An opposition to a bid is capable of leading to a renegotiation process by the outside investors, which could lead to an upward review of the price for the shares. Thus, the value of the target shareholder gains may be dependent on the characteristics and composition of the board of directors of the target company.

However, in certain circumstances, managerial resistance to a tender offer may have a negative impact on shareholder wealth. Resistance to a tender offer may not always lead to an upward review of the offer. It could discourage the bidder in continuing with the bid. The outside investors may be compelled to withdraw their bid, leading to a loss of shareholder wealth,¹⁵⁵ especially where there have not been suitable competing bids.

Where dispersed target shareholders are faced with only one potential buyer, they would be in a much more disadvantageous position compared to a single shareholder with majority shareholding. It may be difficult for dispersed owners to organize


¹⁵⁴ See note 152 (Cotter, Shivdasani, and M Zenner) above, at 205.

¹⁵⁵ Note 153 above, at 86.
themselves to form a major block of shareholders with the aim of threatening to frustrate the takeover, by insisting on receiving a higher price for their shares.\textsuperscript{156} While the effect of competing bids may show positive results for the shareholders of the target firms, it may derail the success of the takeover. Where there are multiple bids from several outside investors, the chances of each of the investors succeeding in the purchase of the sought-after shares decreases, as each bid is a threat to another. In view of this, one or more bidder will be unsuccessful in the bid to purchase shares from the target shareholders, since demand for shares among the bidders will exceed the available amount of the outstanding shares.\textsuperscript{157} This has the effect of fragmentising the shareholding amongst the different bidders, with the possible implication of the absence of a clear cut majority holder, thereby frustrating the purpose of the tender offer.

Another factor which may negate the objective of the tender offer process is the general nature of shareholding in the target firm. That is, the ratio of shareholding between the shareholders of the target firm and the managers and board of directors of the firm. The larger the fraction of shares held by the board members and managers of the target company, the greater the proportion of other shares that must be tendered for the tender offer to succeed, hence the less likely that the tender offer will succeed.\textsuperscript{158}

Competition among bidders makes tender offers to be more credible and it prevents any abnormally low bids and - although driven by self-interested pursuit of the

bargain-, it ensures that target shareholders are fairly compensated.\textsuperscript{159} However, it could be faced with many challenges. First, the problem of free-riding may be encountered. Free-riding by the shareholders of the target firm\textsuperscript{160} and free-riding by the competitive bidders may characterise a takeover bid. While some shareholders may be willing to sell their shares at a premium to an outside investor that is seeking to gain control of corporate powers, other shareholders may refuse to sell theirs. Some shareholders may refuse to sell their shares because of the general expectations that the outside investors, having gained control, would improve the value of the shares of the target company. Hence they would refuse to sell their shares even at a premium, thereby free-riding on the efforts of other shareholders who are willing to sell their shares to make the transfer of control possible. This has the effect of defeating the tender offer exercise.

It has been suggested that the free-rider problem could be mitigated by reducing the value of the remainder of shares after the successful completion of the tender offer. The initial shareholders may agree by way of a corporate charter, allowing the raiders to dilute the share value of the non-tendering shareholders, after they take over the firm. This can be done by either allowing the raider to be paid excess salary, issue new shares below the market value, or sell the outputs or some of the assets of the firm to another firm owned by the raider.\textsuperscript{161} This can effectively ‘dilute’ the value of the shares of the remainder of the shareholders that refused to sell their shares.

This suggested may not be justifiable to those categories of shareholders, who believe that the present managers are good enough to continue to run the firm. Also, shares may be considered to be the property rights of shareholders and they reserve the right to dispose or hold on to their shares. While tender offers appear to promote the interests of target shareholders and outside investors, the real motives of the outside investors may be difficult to identify. Proxy contest is examined next.

### 3.3.2 Proxy Contests

Proxy contests occur when there is active competition between two or more groups, usually the incumbent managers and a group of dissident shareholders. The aim is to either solicit proxies to elect their candidates or to vote in favour of desired policies or against such policies. Typically, proxy contests are between the management of the company and some dissident shareholders whereby company shareholders either vote for the slate of directors proposed by management or for a rival slate proposed by the dissidents who seek to replace them. Proxy contests may either be for the purpose of gaining control of the management of the company, by seeking a majority position of the board. It could be for the purpose of proposal contests, in which dissidents seek to vote to defeat a management-sponsored proposal or to initiate their own proposal. Where the dissident shareholders are successful with the election of new directors, a new management team is appointed, but where they fail to replace the directors, the management team retain their positions.

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165 This thesis is concerned with *Proxy Contest* that is aimed towards gaining control of the management of a company, which precedes a takeover.
Shareholders may increase their support for outside investors in proxy contests, where they believe that the current managers are not sufficiently promoting their interests. Companies which have a low rate of dividend payment, relative to other companies in the same industry are more likely to become targets of a proxy contest.\(^ {166}\) While this challenge may pose a threat to the incumbent managers, they may device alternative means of winning the support of the shareholders. The management may alter the capital structure of the company by sourcing for funds outside the company to finance an increase in the level of dividend payment. They may try to boost short-term distribution to shareholders by raising additional debts for the purpose of financing special dividends.\(^ {167}\) This may have an adverse negative effect on the long-term objectives of a company, since long-term values are used to promote short-term objectives. Capital restructuring may also be used by management to succeed in the proxy contests. They may choose to issue debts in exchange for the equities of the passive investors who are not necessarily interested in control contest. This increases the equity of the incumbent and provides them with more leverage to be successful in the proxy contest. Since they must control at least fifty percent of the votes to be certain of victory, they could issue the amount of debt required to achieve this purpose.\(^ {168}\)

Also, poor earnings can instigate a change in management when the earning capacity of the company experiences a downward trend.\(^ {169}\) This suggests that a firm with low earnings is more likely to be a subject of a proxy contest. The determinants of the


\(^ {169}\) Note 164 above, at 12.
earning powers of a company have been calculated with reference to earnings per share (EPS) and price earnings ratio (P/E).\textsuperscript{170}

The threat of a proxy contest may lead to an improvement in the operating performance of the firm.\textsuperscript{171} Managements can obtain shareholder support by dismantling unproductive empires and focusing on only those areas which can yield high level of productivity.\textsuperscript{172}

Although, these measures may lead to improved firm performance in the short term, as rightly observed, it has the effect of sacrificing the long term goals of the company for short term profits.\textsuperscript{173} The implication of the short term approach that can be used by managements to gain shareholder support during proxy context is an indication of the presence of agency conflict.\textsuperscript{174} Agency conflict can influence managers to promote their personal interests through short term objectives in disregard to the interests of shareholders. For example, certain corporate investments with long term value may be dismantled by managements through divestments to raise cash for dividend payment. In light of information asymmetry, shareholders may not be able to ascertain the true state of affairs and they would support managements in the proxy contests. This can undermine the disciplinary role of the market for corporate control,

\textsuperscript{170} EPS is calculated by dividing a company’s net income (dividend payments are excluded from a company’s earnings to determine the net income) with its outstanding shares. (P/E) is calculated by dividing a company’s market value per share with its earning per share. See generally note 160 at 544, note 158 at 12.


\textsuperscript{172} M C Jensen, 'Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers', The American Economic Review, 76/2 (1986), 323-29 at 328. The incumbent has the advantage of getting more votes in the proxy contest because they usually have the experience in maintaining shareholder lists, soliciting votes for annual meeting, as well as developing relationships with the shareholders, including the uninformed shareholders. See J Pound, 'Proxy Contests and the Efficiency of Shareholder Oversight', Journal of Financial Economics, 20 (1988), 237-365 at 240.


\textsuperscript{174} See Chapter Two, section 2.5.3 above and section 3.6.1 below.
which the proxy contest is meant to achieve in this regard, since managements are able to influence and gain shareholder support. The new institutional economics, seeks to address this challenge, to ensure that agency conflicts are mitigated. This can be achieved by ensuring that effective institutions are established to restrict and challenge the role of managements as agents, to promote shareholder interests and the overall corporate value.

Where the divestments occur as a justified response to actual unproductive empires, it may be argued that such unproductive empires could have earlier been created by management. When the empires are dismantled, they provide only an apparent gain to shareholders, since the existence of the empires and the dismantling of the empires may both serve the interests of managements. Since shareholders are not often aware of the existence of unproductive empires, the dismantling of the empires at the time that managements are seeking the support of shareholders in a proxy contest show that there is indeed the need to established appropriate and effective institutional control measures as indicated by the new institutional economics, to challenge the role of management. As long as managements can influence the decisions of shareholders in a proxy contest, the disciplinary role of proxy contest can be undermined.

Proxy contests are favourably viewed by the market as a medium through which poorly performing managers are removed from management responsibilities.\textsuperscript{175} This implies that only those proxy contests which successfully lead to a takeover enhances the wealth of the company, while companies which resist a takeover bid experience a

post-decline of value. \(^{176}\) This further suggests that proxy contests which lead to change of management are most likely to enhance shareholder wealth, through an improvement in the value of the company.

Contrary to the suggestion that only proxy contests which leads to successful takeover enhances shareholder wealth, shareholder value may be enhanced from the activities of the dissidents. \(^{177}\) The contests are capable of providing incentive to management from their lacklustre performance, by ‘waking them from their slumber’.

In response to the claim of inefficiency, the managers may develop a strategy towards a change of policy in pursuit of short-term economic growth, which may become visible to shareholders during the period that the company is faced with threats of proxy contests. If the shareholders are convinced, the outside investors may become unsuccessful in their bid to gain control. Even if they do not succeed in gaining control, the pressure exerted on management may have helped to raise the economic value of the firm. This can also occur where the dissidents gain a minority representation, where they fail to gain full corporate control. This suggests that proxy contests may be beneficial to shareholders irrespective of the result of the contests. \(^{178}\)

While management positions may be secured through the means that they use to persuade shareholders, their position in the company may be short-lived. Even if they retain their positions during and immediately after the proxy contests, these managers may nevertheless lose their positions through resignations in the manner which may be attributed to the earlier contests \(^{179}\) which have ended at the material time. The

\(^{176}\) Ibid at 303.


\(^{178}\) Ibid. 445-447.

apparent efficiency which they managed to show to gain shareholders support in the heat of the contest may begin to wane with the passage of time.

Proxy contests remain an important mechanism for gaining the power of corporate control as an alternative to the direct purchase of shares by tender offer. Although it tends to save costs of purchasing shares at a premium, as in the case in tender offer, the costs of access to information and contacting shareholders may be a setback to the exercise.

Meanwhile, it was indicated that proxy contests is the least used method of gaining corporate control for the purpose of managerial discipline.\(^{180}\) This may no longer represent the situation in recent times. The use of proxy contest has been on the increase. Proxy contests may be encouraged by the unavailability of capital for financing the financially motivated hostile takeovers.\(^{181}\) The antitakeover barriers\(^{182}\) which have been adopted by several corporations could also encourage proxy contests, as well as the increase in state legislations which regulates takeovers through tender offers, amongst other reasons.\(^{183}\)

Besides tender offer and proxy contests, mergers play an active role as a function of the market for corporate control. However, mergers are more of an agreement between different firms to combine their operations for the purpose of forming a single entity, hence; mergers will not be examined in this thesis.

Meanwhile, several factors influence takeovers. Companies are taken over as a result of the corporate strategy of the acquiring firm for reasons best known to them.

\(^{180}\) Note 148 above, at 114.
\(^{181}\) Note 177 above, at 430.
Developments in the fields of corporate finance and economics may have led to the emergence of certain theories which may explain the reasons for corporate takeovers; these are referred to as the takeover hypotheses. They are briefly examined next.

3.4 The Takeover Hypotheses and Justification for Takeovers

The takeover hypotheses identify the role of takeovers and their effects on companies, shareholders and other stakeholders. They include; the disciplinary role, synergistic gains and hubris hypothesis.

3.4.1 The Disciplinary Hypothesis

Since takeovers may lead to the dismissal of managers of target companies, there has been a wide consensus that a takeover is important for the elimination of inefficient managers, amongst other reasons. Often, when companies are taken-over, the usual contract of continuous employment is apparently terminated. Hence, managers may oppose takeover bids. The outside investors or corporate raiders, having identified those companies that perform poorly as a result of the inefficiency of the managers, would attempt to gain control with a view to improving the performance of the company. Thus, the disciplinary hypothesis of takeover promotes the idea that the value of the company is likely to be enhanced where there is a threat of takeover by a raider who actually knows that the present economic value of the company can be improved if the company has a better management team than it presently has.

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185 See generally D Scharfstein, 'The Disciplinary Role of Takeovers', *The Review of Economic Studies*, 55/2 (1988), 185-99 at 192. Some managers may pursue acquisitions even where such acquisitions may not enhance shareholder value, provided that such pursuit of growth is consistent with the corporation’s mission statement or it provides a utilitarian value in terms of the interests of the society at large. See generally J Dobson, 'Size Matters: Why Managers Should Pursue Corporate Growth, Even at the Expense of Shareholder Value', *Business and Professional Ethics Journal*, 23/3 (2004), 45-59.
support of this hypothesis, it was observed that managers who are slow to recognize that many old practices and strategies are no longer viable are finding that takeovers are doing the job for them. In view of this, corporate managers may be constrained to constantly review their managerial strategies and policies to meet the needs of their companies in terms of growth and productivity, to reduce the incidence of slow growth or underperformance. In this subsection, the disciplinary effect of takeovers will be examined in relation to whether a hostile takeover is caused by poor performance, the size-effects of companies on managerial competence and lastly, the effectiveness of the disciplinary functions of takeovers.

Generally, it appears that the managerial disciplinary hypothesis is a function of the hostile takeover. The disciplinary hypothesis has been linked with the hostile takeover because of the absence of any negotiations leading to the takeover, especially negotiations leading to job security or compensation. Hence managers tend to oppose bids, to protect their positions amongst other reasons. They resist the takeover bid because they are most likely to be replaced as managers post-takeover since they are regarded as being inefficient managers.

It was suggested that their inefficient character often originates from incompetent management which makes the assets of the company to be under-priced, as a result of managerial discretionary behaviour and the agency cost of free cash flow. While these views contend that the disciplinary hypothesis is related to hostile takeover, which is caused by poor performance, alternative arguments indicate

187 See generally, note 139 above.
188 Note 139 above at 120.
190 See note 166 (Jensen) above, 328-329.
otherwise. One of such alternative arguments failed to identify poor performance as a significant factor which leads to hostile takeovers. It reports that the link between underperformance and hostile takeover bids is the result of a miss-specified empirical model. It also contends that good firms could be targets for opportunistic bids and such bids may be resisted by managers initially to achieve higher share price premium.\textsuperscript{191}

Similarly, there is a contention that only little empirical evidence exists to support the claim that the disciplinary nature of takeovers is to be found only in hostile takeovers. It has been asserted that the post-takeover CEO turnover associated with hostile takeover is not related to past performance, but such CEO removal, by way of resignation or dismissal is likely due to disagreements about the bid price of the takeover and / or future expected performance of the target company.\textsuperscript{192} This conclusion was reached because the study found no positive relationship between CEO turnover and past performance in certain corporate takeovers.

By implication, takeovers could have no disciplinary motive. It also implies that; if there is any disciplinary effect of takeovers, such can be found both in hostile or friendly takeovers and not exclusively to hostile takeovers. Similarly, it was suggested that there is little evidence to show that takeovers leading to changes in power of control results from acts of past poor performance. Accordingly, it was argued that targets of hostile takeovers do not necessarily perform poorly than the

targets of accepted bids; this implies that some hostile takeovers may not necessarily perform disciplinary function.¹⁹³

While it may be right to assert that takeovers have no disciplinary motive from the perspective of the acquirers, it is different when viewed from the perspective of the acquired company.¹⁹⁴ First, takeovers can be influenced by the inefficiency of the management team of the acquired company.¹⁹⁵ This includes poor managerial decisions that lead to value-decreasing acquisition which subsequently reduces the value of the company to the level of a target company.¹⁹⁶ Hence such managers are not expected to be retained post-takeover. Secondly, because of the series of negotiations which characterises friendly takeovers, it may not be regarded as performing a disciplinary role, since managers can be compensated if they negotiate their exit or if their employment contracts require that they should be compensated.

A study which examined the role of takeovers in managerial discipline did not establish any difference between hostile and friendly takeovers with regards to dismissal of top managers. It further reported that on average, all takeover targets come from industries that are performing well, relative to the market, and while the targets of disciplinary takeovers are performing poorly within their industry, the targets of non-disciplinary takeovers are performing well as the average firm in their industry. This implies that the disciplinary effect of takeover is dependent on the

¹⁹⁴ Acquiring companies do not deliberately seek to ‘discipline’ managements of target companies through takeovers. The dismissal of managements of target companies is a necessary incidence since the managements of the acquiring company would take control of the newly acquired company.
benchmark of *industry peer group* rather than the *market*. Also, in its analysis, it contended that the dismissal of top managers is not exclusively related to either hostile or friendly takeover. However, it rightly emphasised that takeovers play a role in managerial discipline in view of the fact that targets of takeovers in which there is a change in top managers soon after the takeover are on the average performing significantly worse than those target firms in which there is no change in top manager.197

Meanwhile, it has been suggested that acquisitions which are value decreasing are mainly attempted by managers of larger firms than those of smaller firms. This is because managers of larger companies pay more for acquisition, since they have more resources and perhaps fewer obstacles, and are influenced by managerial hubris which they believe to be more socially important.198 Impliedly, it was thus hypothesised that managers are much more likely to indulge in value-destroying, empire building acquisitions, when they are in the positions that they would be less likely disciplined by the market for corporate control.199

From the foregoing it is indicative that the market for corporate control is less effective as a disciplinary mechanism for managers of larger companies than those of smaller companies. Alternatively, it was suggested that managers of larger firms are more likely to be disciplined by the market for corporate control; apparently they are easily spotted by the market because of their size-. Nonetheless, they are more inclined to indulge in value-destroying, empire building acquisitions than managers

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of smaller companies, apparently because of prestige and the access to capital. If the latter analysis is correct, it would mean that either different incentives make these managers to act in the way they do, including the view that managers make acquisitions as a means towards defending the company from being taken over.

Alternatively, the disciplinary effect of the market for corporate control is not severe enough to deter this behaviour; more research is needed in this area.

Meanwhile, there are suggestions that takeovers have not been adequately proven to be an effective disciplinary mechanism. The inability to clearly show that takeovers effectively discipline managers may be caused by the use of conflicting takeover motives presented in the studies. The methods used in measuring the performance of management, as well as the possibility of outdated results and data which may not be relevant to current economic trends may also be an influencing factor.

Contrary to these suggestions, it was indicated that takeovers act as major factors in the dismissal of poorly performing boards. The disciplinary effect of takeovers is caused by financial distress that requires issues relating to equity and capital restructuring which leads to full acquisitions in takeovers. Similarly, the disciplinary effect of takeovers are likely to occur in industries with overall poor performance, based on the view that it is one of the suitable means of inducing

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203 The study did not identify corporate takeovers as a definite effective disciplinary mechanism. Its findings revealed that takeovers could erroneously dismiss large numbers of managers in companies that are performing efficiently.

management of public corporations to work towards shareholder value amongst other reasons.

Although there has not been a universal consensus that the disciplinary hypothesis is responsible for managerial turnover, the effect of the takeover activities on target companies especially its disciplinary role cannot be denied. Whether the dismissal of managers of target companies is caused by poor performance prior to the takeover or by the initial rejection of bids by the managers to enhance the bid premiums, the effect of the takeover activities has a disciplinary character; it provides a profound opportunity for target shareholders to demonstrate that the property rights in their shares can be exercised in the way that the shareholders deem fit. The disciplinary nature of the exercise may extend to unsuccessful takeovers, since such threats could serve as incentives to managers to develop corporate policies towards enhancing shareholder value. This could be aimed at preventing the company from becoming or remaining a takeover target. In the next section the synergy hypothesis of takeovers is examined.

3.4.2 The Synergy Hypothesis

The synergy hypothesis suggests that corporate takeovers are motivated by the desire to create wealth through a combination of the resources of the acquiring company with those of the target company. This is done in such a way that the value of the combined entity is greater than the sum of the separate entities values. This includes; operating, managerial and financial synergies.

The hypothesis identifies takeovers as an avenue for corporate expansion, and value creation, through negotiable mutual agreements engaged by managers to enhance the wealth of their shareholders. In view of this, there are certain assumptions about takeovers which are motivated by synergistic gains. First, since the synergistic hypothesis aims at enhancing the value of the combining companies, and since the combination of their resources can lead to a greater value than the sum of their separate values, it may imply that the target companies are performing well with regards to the return on investment. Secondly, by the nature of the synergistic motive which requires a combination of resources through series of negotiations, between the managements of the target and acquiring companies, takeovers with synergistic character may be termed as friendly rather than hostile. Also, if companies which are targets in synergistic takeovers are economically stable prior to the takeover, it follows that such performance may well be attributed to managerial expertise. This is consistent with the analysis that the market disliked buyers that remove target management, since such managers are able to achieve opportunities for economic growth.

It has been suggested that synergies would be more effective in enhancing value when the target and acquiring firms are in the same line of business. This view suggests that the synergy hypothesis works more efficiently when firms with similar

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208 See note 139 above at 120.
resource-allocation pattern are combined. However, conflicting evidence suggest that acquisitions between unrelated companies can lead to higher returns for the shareholders of both the acquired and acquiring companies, than acquisitions of related companies. From the foregoing, the findings on the effect of relatedness of post-acquisition performance are inconsistent. The inconsistency may suggest that different factors may be responsible for the rate of success of corporate performance post acquisitions. However, it has been contended that acquisitions involving companies with differences in resource allocation patterns may provide unique and valuable synergy, in view of the fact that competitive bidders may be unaware of the potential synergy as a result of information asymmetry. This prevents the existence of an auction and a bid up of price, which places acquiring firms in an advantageous position to extract value from the synergy which will be created with the target firm. Also, different resources may become complementary in a build up to the synergy. The complementary character of the synergy from acquisitions which involves companies with differences in resource allocation pattern discussed above may lead to diversification soon after the acquisition if such synergy is not properly managed. The combined company may find it difficult to manage the demands of the different combined components especially since these components are not related in business lines, and where there is an overlap in the existing operating structure. Also,

where expected gains are not met, diversification may be needed to restructure the company to strengthen its financial position.\textsuperscript{215}

The effect of synergy in a concluded takeover is that it leads to productivity and an expansion of the investments of shareholders. Since shareholders have property rights in the shares, the role of managements in promoting the investment property in the shares shows that managements recognise the fact that the property rights in the shares resides with the shareholders. Also, it implies that managements understand that their responsibilities should be exercised in a way that should not infringe on the property rights of the shareholders. Thus, where takeovers are motivated by synergy, it can be argued that property rights of shareholders have influenced the role of managements in making prudent and well-considered investment decisions to raise corporate and shareholder value. However, where takeovers are motivated by other factors leading to negligible or zero gains, which may be caused by managerial careless or negligent act, then it is likely that the recognition of the property rights of shareholders have been undermined or ignored.

Generally, corporate takeovers have been vastly motivated by the synergy hypothesis. The disciplinary effect is merely an outcome which is not anticipated by the acquirers. While the synergy hypothesis seeks to promote corporate wealth through a combination of the resources of the target and acquiring companies,\textsuperscript{216} the disciplinary hypothesis ultimately applies to correct managerial failures by dismissing poorly performing managers. However, irrespective of their different motives, the

\textsuperscript{215} This may indicate a failure of the acquisition strategy of managements.
\textsuperscript{216} Economies of scale.
objectives of these hypotheses have the capacity to enhance the value of the shareholders of the acquiring and target companies.\textsuperscript{217}

There are instances where takeovers may not promote the value of shareholders; this is when takeovers lead to losses in shareholder wealth. This may be attributable to managerial hubris.

3.4.3 The Hubris Hypothesis

There may be no significant gain to the bidder company after a takeover has been completed. This could be caused by different factors, including an overestimation of the bid price, which makes the bidder to pay too much for the acquisition. When this occurs, it may be referred to as the hubris hypothesis of takeover. It implies that the average increase in the target firm’s market value should be more than offset by the average decrease in the value of the bidding firm, in such a way that the combined gain to the target and bidding firms is non-positive.\textsuperscript{218} Since each acquisition is meant to increase the value of companies, corporate managers who pursue takeovers are expected to take measures towards ensuring that the process achieves positive gains for their companies and shareholders. When managers care less or when they develop ulterior motives, using synergy as a cloak to promote the idea of a takeover, the chances of recording large scale losses post-takeovers becomes highly likely. Hence, it was contended that the arrogance and self-belief of managers as a result of past success may account for them taking less care in ensuring that takeover bids are

\textsuperscript{217} Depending on the actual motives of managements of target and acquiring companies.  
properly examined and evaluated towards success.\(^{219}\) This may cause managers to overestimate the synergistic benefit to be derived from a takeover which eventually leads to hubris. Although the hubris hypothesis does not suggest that management deliberately make higher premiums,\(^{220}\) however, the fact that managers are influenced by pride, previous successes, and their inability to focus on realistic gains by being overconfident\(^{221}\) may suggest that managers deliberately make costly acquisitions.

Loss of wealth by shareholders in takeovers may not necessarily affect the welfare of the managers; rather, it may lead to increase in remuneration by reason of increase in corporate size.\(^{222}\) If managers invest highly in companies in which they are employed, perhaps more care would be taken when making investment decisions,\(^{223}\) since any loss suffered by the shareholders would also be shared by the managers. Hence, corporate managers whose takeover exercises are defeated by hubris may have negligently paid higher premiums.

Consistent with this analysis is the view that managers of larger companies are much more likely to be involved in empire-building exercise towards achieving higher levels of perquisites. The acquisition-ambitions of managers of larger companies appear to suggest that their acquisition-related activities are geared towards


expanding the size of their companies with negligibly corresponding increase in shareholders wealth. This may partly be caused by the view that the economic interests of the shareholders and managers of smaller firms are better aligned, since managers of smaller firms have a higher level of firm ownership than managers of larger firms. The view that hubris is more of a factor for larger firms seems to be a reasonable assertion. Larger firms can engage in takeovers with high transaction costs, such firms have access to huge financial resources among other reasons.

From the analysis of the hubris hypothesis of takeovers, it appears that losses to company shareholders as a result of managerial hubris may not have been contemplated by the managers themselves, since their takeover objectives could have been directed towards synergy. Some investment decisions may have been taken rather carelessly or negligently which may suggest that managers who are responsible for making these decisions have acted deliberately. However, more evidence may be needed to show that hubris is a deliberate act of managers. Also, since wealth can be transferred from the acquiring firm to target firms, which may indicate losses to the shareholders of the acquiring firm and gains to the shareholders of the target firms, it is thus indicative of zero gains to the combined company post-takeover.

It may be observed that the synergy hypothesis of takeovers can be partly related to the disciplinary hypothesis through managerial synergy. The hubris hypothesis has no direct link with the disciplinary hypothesis, but it may indicate that managers are zero maximising agents of their firms. This could make such firms which have been

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225 Larger companies can make acquisitions to further expand their operations and to dominate the market.

226 See note 218 above,( E Berkovitch and M P Narayanam,) at 352.
combined with little or zero gains to be takeover targets with managerial discipline not necessarily a possible motive but an underlying effect.

While the motives of the managements that engage in acquisitions leading to hubris may not be clearly determined, the effects of hubris is that among other things, the value in the property rights of shareholders can be diminished as a result of high takeover transaction costs. When managers engage in ambitious acquisitions without sufficient reasons to believe that the acquisition will lead to an increase in corporate value and consequently increased shareholder wealth, it undermines the value attached to property rights. It implies that the property rights of the shareholders were not put into consideration by the managers when the acquisition was contemplated. Motive may include any undisclosed objectives which form part of their personal benefits that may be derived from acquisitions. Personal benefits may include the salaries and bonuses that are related to the volume of business that newly enlarged enterprise will generate rather than the business potentials in terms of returns to shareholders.\footnote{R B Reich, \textit{The Next American Frontier} (New York: Times Books, 1983) at 166.}

It may also include the prestige of managing ‘a bigger company’. Shareholder vote on executive pay may restrict the ability of managements to use corporate acquisitions to raise their level of salaries and bonuses in the UK.\footnote{\textit{The Enterprise and Regulatory Reform Act}, 2013, s. 79, entitles shareholders to vote to reject a company’s policy on pay. Also, \textit{The UK Corporate Governance Code 2012} (see Section D) recommends that executive remuneration should be appropriately linked to performance. This does not suggest that managers who pursue acquisitions should not be rewarded, but they should not be rewarded for merely making acquisitions. Rather, they should be rewarded based on the returns that the acquisitions have added to the firm.}

Even though managers may not be able to increase their salaries and allowances after an acquisition, they are likely to make subtle financial gains through outside
directorship. In light of these, managements can increase corporate size without a corresponding increase in wealth.

The role of managements as agents of shareholders is to ensure that they promote the interests of the shareholders by enhancing corporate value. The effect of hubris hypothesis shows that the problems of agency relationship can undermine the role of the market for corporate control. The problems persist because the conflicts between managers’ and shareholders’ interests derail managements from their agency responsibilities, as such; they lose focus of their responsibility. Thus, there is the need to define the scope of the role of managements, to ensure that they perform their responsibilities in the ways that the property right of shareholders are not only protected but preserved.

It was rightly suggested that managers should shun the habit of blindly increasing the size of their corporation. It is possible that managements may pursue acquisitions without value creation; nevertheless, a takeover remains an important investment-decision through which the economic value of companies can be enhanced. The value-creation objective of takeovers can be promoted where managements are made to shun the practice of engaging in needless high takeover transaction costs that can potentially undermine corporate value.

In the remaining sections, the challenges posed by conflict of interests in corporate takeovers are examined. The next section presents a brief examination of the devices that can be used by company management to frustrate takeovers.

3.5 Takeover Defences

Takeover defences may be broadly classified as pre-bid defences and post-bid defences. Pre-bid defences are actions taken by managements before an actual takeover bid is made. These are meant to prevent the successful acquisition of the company, they include; poison pills, staggered boards provision, fair price amendment, super majority provisions, and golden parachutes. Some of these defences may be referred to as shark repellents.

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<th>Pre-bid defence</th>
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<tr>
<td>1. Poison pill</td>
<td>Poison pills are strategies that are intended to make hostile takeover expensive and undesirable. They include the issuance of stock warrants or rights which allow shareholders (excluding acquiring shareholders) of a target company to buy shares (including those of the acquirer and the target) at a substantial discount from the market price. This right becomes exercisable when an acquirer buys more than a certain percentage of shares in the targets company preparatory to a takeover bid. These warrants or rights also allow the target's shareholders to purchase shares of the newly formed company at a discount, if the acquisition is successful. When the option is exercised before the acquisition, it is referred to as a <em>flip-in</em>, where it is exercised after the acquisition it is referred to as a <em>flip-over</em>.</td>
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<td>2. Staggered Boards</td>
<td>It is a device that may be incorporated in a company's constitution, which ensures that the majority of members of the board of directors are not available for election during any election period. The board of directors may be classified into three groups, and only one of the three groups is elected annually. This makes it difficult for a hostile bidder to gain immediate control of the target company, since only one third of the board is elected at a time.</td>
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<td>3. Super-Majority</td>
<td>This requires that the acquirer obtain certain percentage of shares before the merger or acquisition may be successful.</td>
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<td>4. Fair Price</td>
<td>This defence is used when the super majority tactics is relaxed and the acquirer is required to pay all the shareholders of the company the same price per share.</td>
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<tr>
<td>5. Golden Parachutes</td>
<td>It is a device which is included in contractual arrangements between managements and their companies. It entitles the management to large forms of compensation in the event of loss of office, which may be caused be a takeover. The compensation to be paid could be so large that it may discourage an acquirer from taking over a company, especially where it would lead to the dismissal of the management.</td>
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Table 3 Pre-Bid Takeover Defences

After an acquirer signifies its interest to acquirer the target company, certain measures may be implemented by the management to defeat the bid. Some of these include; *crown jewel, white knight & white squire, pac-man defence, green mail and standstill agreement.*

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<tr>
<td><strong>1. White Knight &amp; White Squire</strong></td>
<td>In <em>white knight</em> defence strategy, the target company invites another friendly company to make a bid towards acquiring the company, to prevent the hostile acquirer from acquiring the company. <em>White squire</em> is a modified form of the white knight defence. Instead of taking over the control of the company, the friendly company is invited to acquire a large percentage of shares in the target company called ‘a corner’ which is used to vote against the takeover bid of the hostile acquirer.</td>
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<td><strong>2. Crown Jewel</strong></td>
<td>A target company sells its important assets to another company to become less attractive to the acquirer. Sometimes the assets are sold to a white knight for a possible repurchase on an agreed price after the acquirer withdraws its bid.</td>
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<tr>
<td><strong>3. Greenmail &amp; Standstill agreement</strong></td>
<td>A defence tactics in which the target company repurchases certain amount of shares from its shareholders, usually at a premium to prevent the hostile bidder from acquiring a major percentage of the companies’ stocks. It is usually followed with a <em>standstill agreement</em> in which the shareholders agree not to re-buy any shares in the company for a given period of time. It can also be concluded without a repurchase and the shareholders agree not to buy any more shares. The shareholder(s) may be given some seats on the board to vote with management.</td>
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Table 4 Post-Bid Takeover Defences

Managements may resist bids with a view towards increasing the offer price or to retain their positions in the company. Despite the possibility of conflict of interests between managers and shareholders, management’s opposition to a takeover bid may increase shareholder value through competitive bids, leading to improved bid premiums, higher bargaining power and managerial incentives. The higher premium may only be sustained if the bid is successful. Hence, considering the intensity of some of the defences, it may be thought that managements intend to prevent the success of takeover bids to entrench themselves in office and undermine corporate value.

Although takeover defences may enhance the bargaining powers of the shareholders, through enhanced bid price, it is also important to consider the sensitivity of such defences on the overall value of the company. The bargaining power which may enhance takeover premiums may appear to show minimal benefits or a decline in earning. This may support the view that some defences may not necessarily enhance takeover premiums, but may serve as mediums through which inefficient
managers entrench themselves in managerial positions. Thus, takeover defences may be driven by conflict of interests between the managers and shareholders.

3.6 Contractual Relationships: Agency Conflicts and Employment Issues

3.6.1 Agency conflicts

The relationship between company management - directors and executive managers - and shareholders in the administration of the corporate entity as a going concern has been largely described as an agency relationship. Managers are contractually employed to use their professional competence to manage companies; they are expected to do so with regards to the welfare of their shareholders amongst other reasons. Since the contract of employment may not provide a clear direction for all possible outcomes, managers are left with a wide range of discretion in making certain decisions. These include decisions made during takeovers. In making such important decisions, managers may be driven by self-interests rather than by a considered corporate interest, leading to a conflict of the interests of these managers with the interests of their shareholders.

Agency problems may have been caused by the meaning of ‘agency’ which has been ascribed to the relationship between company shareholders and managers. Managers are expected to use their professional competence in the day to day running of the firm. They are also expected to act as ‘agents’ in performing this function. Generally, the role of managers as agents does not appear to fit into the ‘legal agency relationship’. An agent is expected to carry out the instructions of his principal, using his expert knowledge. Since managers do not actually take instructions from

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shareholders, they may not be referred to as agents *strictly speaking*. They are contracted to run the firm with a view towards productivity. Thus, legally, their services are essentially directed to the company as a going concern and not the shareholders. As such, they perform fiduciary duties.

However, managers may be regarded as agents to the extent that their investment decisions are informed by shareholder value. It is difficult to identify these intentions, except by the manifestations of the managers’ investment decisions through corporate growth or decline in firms’ value. The classification of a firm as a *nexus of contracts* appears to provide a better explanation of the relationship between corporate managers and shareholders; their agency relationship is only founded on economic grounds.

Managerial incentives may mitigate the agency problems caused by conflict of interests. One of such incentives is managers’ stockholding in the target firm. There is much debate about managerial incentives in form of rewards. For example, it is argued that when managers hold certain percentage of stocks in target companies, the agency conflict may likely be mitigated by incentives - including stock options or executive pay as motivation for long-term corporate value - presented by the economic gains to be derived from the bid premium. Consequently, managers with

240 See *Automatic Self-Cleansing Filter Syndicate Co. v Cunninghame* [1906] 2 Ch. 34 CA.


242 See B R Cheffins, *Company Law: Theory, Structure and Operation* (New York: Oxford University Press, 2000) at 45. It is not economically viable for a principal to monitor all the activities of an agent because of imperfect information held by the principal and perfect information held by the agent. Thus access to the right information is a major aspect of agency problems. See S A Ross, ‘The Economic Theory of Agency: The Principals Problem’ *American Economic Association* 63/2 (1973) 134-139.

higher stockholding may show little resistance to acquisition bids, since they may be less interested in seeking to entrench themselves in management functions. This is mainly encouraged if the benefit to be derived from the sale of their stocks to the bidders will enhance their economic interests. Alternatively, managerial incentives can be caused by agency problems. This can occur when firms have weak governance structures which encourage managements to extract incentives.

The importance to be attached to takeovers is determined by the extent that the interests of the key corporate constituents: the shareholders, creditors, employees, directors and managers are integrated in the scheme. These key corporate constituents are actively involved in promoting the success of a company as a going concern. As such, they are largely interested in the investment decisions of companies, including takeovers. Company directors and managers have the capacity to negotiate the protection of their interests during takeovers; this applies to target or acquiring.

246 See note 242 (Cheffins) above, at 47.
companies. Also, creditors may not likely be negatively affected by takeovers, in view of the fact that the combination of companies’ assets provides higher level of securities for their debt capital. For shareholders - especially shareholder of acquiring companies - and employees, the protection of their interests is not guaranteed, since they would have to depend on the company directors and managers to protect their interests during takeovers.

In view of this, the likelihood of conflict of interests is present, since managers could undertake low or non-value yielding acquisitions for the purpose of enhancing managerial gains. Shareholders and employees may be regarded as forming a distinct class of corporate constituent during takeovers in view of the fact that they do not have the capacity to enhance their interests during takeovers when compared to other active participants. As such, they may be regarded as having a collective interest in this regard. It may not be possible to device a single mechanism through which their interests may be protected in view of the differences in their status. Shareholders are corporate investors and principals, employees are not.

Managers of acquiring companies may be motivated by factors which may not create value for their firms. They could be motivated to expand the corporate investment by building empires using free cash flow to cause an increase in the size of their firms. They may also seek to expand the investment of their firm to decrease their employment risks, among other reasons. Also, agency conflict may prompt managers to acquire assets through takeovers to increase the level of their firm’s

dependence on their management skills. They may be inclined to acquire investments which clearly relate to their managerial competence, whether or not these investments will enhance the value of the corporation. Apart from increasing the level of firm’s dependence on their managerial skills, these investment decisions are likely to increase their salaries and allowances in view of the large business empire which they subsequently control post-takeovers. It was observed that such managerial decision can exploit this dependence to increase their perquisites consumption or defeat rivals who are better than them in running some of the operations of the firm. This can lead to agency costs which inevitably reduce the total value of the combined firm available to shareholders.

Despite the fact that takeovers can be an efficient mechanisms for corporate control, the challenges posed by agency conflict between the managers and shareholders may influence managers to make acquisitions which are geared towards the maximisation of their personal interests at the expense of shareholders and other corporate constituents.

Also, managers of target companies may oppose takeover bids from acquirers, even though it may be advantageous to the firm’s economic value. While some acquisition bids may be opposed by management for purposes related to shareholder value, such as enhancing the bid premium, others may be done with the intention of promoting the self-interests of management. Managers may resist a takeover bid for fear of being considered as having failed in their managerial responsibilities in promoting the economic value of the company, which may likely lead to their dismissal post-

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250 Note 218 (Berkovitch and Narayanan) above, at 350.
takeover, especially where they have only little incentive to endorse the bid. Such as absence of or inadequate compensation policy, or other gains which may mitigate their loss of employment and reputation.

Although, the agency problem of conflict of interests as illustrated above, with regards to the target and acquiring companies may not always influence managers during takeovers, however, its occurrence it highly likely. Conflict of interests may be present in the decision of the target company to accept or reject a bid, as well as the decision of the acquiring company to make a bid. Corporate takeovers are exposed to the problems of conflict of interests in view of the fact that company managements exercise much discretion during takeovers. Also, the problems persist because shareholders cannot personally manage their property rights in the shares. They require the services of managements to manage their investments towards productivity. Hence, as agents of the shareholders, managements may not always realise that the property rights in the investments that they control, resides with their shareholders.

An important justification for takeover regulations that protect the interests of shareholders from the challenges caused by agency conflicts is to ensure that the property rights of shareholders are protected. One of the major reasons that company managements are appointed is to manage the investments of their shareholders. Property rights in these investments reside in the investors - shareholders - and managements as agents of shareholders should be responsible for ensuring that the value of the property rights in the form of shares are not merely maintained, but enhanced by engaging in reasonable investments that are most likely to yield

\[\text{Note 231 above, at 52.}\]
productivity. Thus, the agency theory, seeks to ensure that conflicts of interests which characterises agency relationships can be eliminated or mitigated, to ensure that agents acts in the interests of their principals. One of the ways of ensuring that agents such as managements act in the interests of their shareholders is to establish effective institutional structures that can determine the scope of the responsibilities of managements. While managements manage investments of shareholders, the property rights over such investments would remain with the shareholders.

Thus, in a bid to ensure that the property rights of shareholders are protected, efforts are being made to restrict the role of managements by takeover regulations. Their level of discretion in opposing takeover bids has been largely curtailed.\textsuperscript{253} This is to ensure that the contractual relationship between managers and shareholders enhances corporate value in a way that can be directly beneficial to shareholders.

### 3.6.2 Employment Issues

Company employees are also parties to a contractual relationship. They are parties to contracts of employment. Employer / employee contractual relationship exists between employees and corporate entities. Employees are another class of corporate constituents that do not have the capacity to protect their interests during takeovers. The interests of company employees may not be derived from an agency relationship, as in the case with shareholders, but the interests of management may conflict with those of their employees in making certain investment decisions including takeovers. The decision to make acquisitions or to oppose or accept a bid is often made without due regard to the interests of company employees. In light of the threat which

\textsuperscript{253} Especially in the UK. See: City Code on Takeovers, A 2 (a). EU Takeover Directive article 9.
takeovers pose to employment, it may be indicative that employees should look elsewhere to protect their interests.

The concerns that have been elicited towards the impact of takeovers on employment show that there is indeed a link between takeovers and general employment levels. First, in Nigeria, the period of time when corporate acquisitions were concluded in the large scale, a large number of employees were dismissed in the same period. During this period, one of the highest levels of unemployment rate was recorded in Nigeria. While this may not necessarily imply that all takeovers lead to employee dismissal, it however shows that the higher the number of takeovers that are concluded, the higher the number of employees that are likely to be disengaged. Secondly, the effect of takeovers on employment led to the inclusion of the provision that the SEC in Nigeria should consider the effect of takeovers on ‘manpower’ before a takeover is approved. This provision was modified in the revised SEC Rules to specifically state that the SEC should consider the effect of a takeover on the employees of target companies. Also, even though the EU takeover Directive was mainly established for the protection of shareholders of target companies, it nevertheless recognises the impact that takeovers can have on employment. It requires managements of target companies to set out their opinions on how a takeover would affect employment, the acquirers’ strategic plan for the target company and their likely effects on employment. The establishment of employment protection regulation in the UK also show that takeovers are threats to employment. Despite

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254 See Chapter Five, section 5.4.1. See also Appendix 1 which shows the period of high level of acquisitions in Nigeria 2005-2010.
255 See generally Chapter Five, section 5.5.2, Figure 8. See also Table 7.
256 ISA 2007, s.134 (6).
257 SEC Rules and Regulations 2013 Rule 447 (4) (B) (Vii) (b).
the establishment of employment protection regulation, the Business Innovation and Skills Committee of the UK House of Commons have shown interests in the impact of takeovers on employment, by inquiring into the extent to which jobs may be affected by takeovers. This included takeovers involving AstraZeneca - Pfizer and Kraft - Cadbury.

The problems of integration post-takeovers have been a recurrent disadvantage of mergers and takeovers. It was observed that every merger creates as many problems, especially of people-related problems more than it would be, if the business were developed from within.\textsuperscript{260} One of the main causes of this problem is the level of uncertainty that arises when acquisition is imminent. The uncertainty appears to work in the favour of managements because it enables managements to exercise their discretion. The manner in which the discretion is exercised may not be in the interests of the corporate value generally, shareholders specifically or other stakeholders such as employees. The incompleteness of employment contract makes it unclear and uncertain as to whether employees will be retained post takeovers. This means that managements can exercise their discretion in the determination of whether employees should be dismissed or not. This is largely because company managements do not consider themselves as owing any duty to the employees of their company. The fiduciary duty of managements is generally owed to the investors of capital. Proponents of shareholder-value suggest that the only objective of managements is to

make profit and enhance the economic value of investors without regards to any external objective.  

The ability of company managements to ‘freely’ disengage employees post-takeovers suggest that managements can engage in large and unproductive acquisitions. Losses to acquiring shareholders that are caused by the high costs of acquisitions can be mitigated by a reduction of the corporate costs in the form of employee disengagement. High transaction costs can potentially reduce corporate value and shareholder wealth. The transaction costs economics suggest that transactions should be conducted in the least possible costs. Effective institutional arrangements can be used to ensure that transaction costs are mitigated towards strengthening the role of the market. Since employees play active roles in promoting the success of a company as a going concern, it is important to consider their interests, being investors of human capital to the extent that they may obtain skills that are less valuable to other employers but particularly valuable to the company. Also, protecting employee interests may be of beneficial value to shareholders and the general corporate interests.

The challenges of takeovers are clearly beyond the conflict of interest issues between managements and their shareholders. Employment issues remain one of the biggest challenges to takeovers in modern times. The challenges caused by employment issues pose a further challenge to governments and social institutions. It remains to be seen whether sufficient efforts have been made towards the strengthening of takeover institutional frameworks to address these problems.

263 See Chapter 6 (sections 6.5 and 6.6).
The relationships between shareholders and managements and employees and
managements are largely determined by reference to contracts; agency relationships
with respect to shareholders and employment contracts with respect to employees.
Thus, the extent to which shareholders and employees can be protected during
takeovers may be determined by reference to whether a company can be considered
to have evolved through the contractual theory of the firm and the extent of the
limitations of the contractual theory if any.

3.6.3 The Contractual Theory of the Corporation

The contractual theory\textsuperscript{264} of the corporation identifies a company as an organisation
that is characterised by a ‘nexus of contracts’ amongst the company’s major
participants.\textsuperscript{265} The relationship of these participants is determined by reference to the
existing contracts among the corporate constituents without state intervention. The
state may intervene for the purpose of enforcement of the contracts since the parties
to the intra-firm relationships may not have the capacity to enforce the contracts.
Even though the relationships amongst the corporate constituents may be determined
by reference to their contracts, it may not always be possible to determine the rights
and liabilities of all the parties in every situation,\textsuperscript{266} especially in unforeseen
situations, such as takeovers. Hence, when a company becomes the subject of a
takeover, negotiations leading to the takeovers may become characterised by conflicts

\textsuperscript{265} Directors / managers, shareholders, creditors and employees. See note 7 above. See also C Rose,
‘Stakeholder Orientation vs. Shareholder Value - A Matter of Contractual Failures’ \textit{Centre for Law
S M Bainbridge, ‘Director Primacy: The Means and Ends of Corporate Governance’ \textit{North-western
\textsuperscript{266} This problem, among others, has led to a challenge of the contractual theory. See M Klausner, ‘The
779-797.
of interests. The interests of some corporate participants may be ‘traded’, especially when they do not have the capacity to negotiate and protect their interests.

Shareholders appear to rank higher than employees in protecting and enforcing their contracts. Apart from the protection that may be provided under company law, an important objective of takeover regulation is to protect shareholders. Although shareholder protection is limited in scope, it is generally more extensive when compared with the form of employment protection during takeovers. Thus, even though the interests of shareholders and employees are capable of being undermined during takeovers, employees are more exposed to risks than shareholders.

Company employees lack the capacity to negotiate for the protection of their interests during takeovers. Hence, by reference to the contractual theory of the firm, it is a major challenge for company employees to protect their interests, especially the employees of target companies.

The contractual theory considers a firm to be an entity through which the collective objectives of individuals are brought into equilibrium within a framework of contractual relations. However, the extent to which the rights of the contractual parties can be clearly determined is not clear. Contracts within a company may be viewed from two perspectives; ‘an originating contract’ and an ‘operational contract’. The former includes the contracts that led to the establishment of a company, with defined rights and responsibilities. The latter refers to the contract that

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267 These are examined in Chapter 4, section 4.3 and Chapter 5 section 5.3 below.
268 The objective of the UK City Code on Takeovers 2013 and the EU Takeover Directive 2004 are stated to be for the protection of the interests of shareholders (shareholders of target companies specifically). See UK Takeover Code 2014 s. 2(a), see generally, EU Takeover Directive 2004.
269 The extent to which employees are protected during takeovers in the UK and Nigeria are examined in Chapter 4 section 4.4 and Chapter 5 section 5.4.
defines the applicable relationships among the parties in the originating contract and
other subsequent parties in the pursuit of the objectives of the company. Obviously,
the ‘nexus of contracts’ definition disregards this distinction. It merely classifies a
corporation as private contracts which do not require state intervention except for the
purposes of enforcement.\textsuperscript{272} One of the challenges of this contract is that the
corporate constituents have different rights and responsibilities attached to their
interests.

These rights and responsibilities are not evenly assigned to the constituents, - such as
the contractual rights and responsibilities of shareholders and employees -. Hence, the
nexus of contracts theoretical framework would not encourage any attempt to
investigate the extent to which these rights and responsibilities are shared and
vested.\textsuperscript{273} The nexus of contracts dwells more on the originating contract which
contains pre-defined rights and responsibilities subsequent to the operational contract.
Since the modern corporation as a going concern is mainly established for economic
reasons, it can be argued that emphasis should be accorded to the operational contract.
Within the operational contract are other corporate constituents - such as company
employees - who may not be parties to the originating contract of the firm,
nevertheless, they make important contributions in promoting the economic objective
of firms.

This operating contract generally enables parties to be able to determine their rights
and responsibilities outside the originating contract.

\textsuperscript{273} Note 271 above, at 418.
This may not always apply in practice because parties such as employees may not have the capacity\textsuperscript{274} to conclude contracts. They may not have the same bargaining powers as a company in obtaining a fair bargain,\textsuperscript{275} among other reasons. It was suggested that the contractual theory does not reside with stockholders; it is not logically tied to any set of rights for shareholders. All corporate constituents including employees should be able to obtain a bargain with reference to the contractual theory of the firm.\textsuperscript{276} However, employees may not be empowered to enforce this contract since their contract of employment limits the extent to which the contractual theory of the firm can operate to their advantage. Hence external intervention through legal institutions\textsuperscript{277} may be necessary to define their basic rights and rewards,\textsuperscript{278} to ensure that employees are not unfairly treated by corporate entities. This explains the need for regulation to determine minimum wage for employees, even though employees and employers are free to enter into contracts of employment. This form of legal institutions can be established through the instrument of the state, by reference to the entity theory of the firm.

3.6.4 The Entity Theory of the Corporation

The entity theory of the corporation is based on the view that a corporation exists at the pleasure of the state. It supports direct intervention by the state through

\textsuperscript{274} Employees usually do not have equal negotiating power with a company, especially in situations of 'economic downturn' where the urgent need to find a job can undermine the capacity of employees to make well-considered decision as to the terms of their employment contracts.


\textsuperscript{277} It has been suggested that implicit contracts between employees and companies are not contracts in the legal sense of the term, but mere unilateral promise from employers that are generally unenforceable., J E Parkinson, (eds.) 'The Contractual Theory of the Company and the Protection of Non-Shareholder Interests' in eds. D Feldman and F Meisel (\textit{Corporate and Commercial Law: Modern Developments}, Lloyd’s of London Press Ltd., London 1996) at 133.

\textsuperscript{278} Note 459 at 419.
regulations, since the state created the corporation by granting it a charter,\(^{279}\) to acquire the status of artificial personality. Such state intervention appears to negate the contractual theory of the firm. It was observed that statutes that permit company managements to consider the welfare of non-shareholder interests when making corporate decisions cannot be reasonably justified.\(^{280}\) This view may not have considered that every private contract requires the state to enforce its terms. Also, a contract is deemed valid by reference to the standard that has been set by the state.

Even though state intervention may not be encouraged in every situation, corporate contracts cannot be ‘entirely’ private. Hence, it is important that a balance should be created to ensure that the corporate contract is not used to promote unfair arrangements, especially when the parties do not have equal negotiating powers and capacities. In light of this, the entity theory of a corporation is as important as the contractual theory especially in investment decisions such as takeovers.

The objective of the entity theory is not to displace the contractual theory of the firm; rather it aims at preserving it by ensuring that parties are not treated unfairly as a result of any uncertain event(s) which may occur during the pendency of their contracts. This can be achieved with the establishment of effective institutions. It is actually relevant because it helps to provide the default solution to those circumstances which may not have been contemplated in the contract. The inability of contracting parties to determine future possible matters that may occur signifies that uncertainties are likely to characterise contractual relationships, including corporate contracts. The incompleteness of these contracts which causes uncertainties can be present in takeovers. This can lead to increased transaction costs of takeovers. The

\(^{279}\) Note 264 (Butler) above, at 100.

\(^{280}\) Note 272 above, at 800.
absence of effective institutional framework for takeover regulation can create a high level of uncertainty in relation to employment post-takeovers. This can serve as an incentive for managements to engage in costly acquisitions, with the potentials for managerial hubris. Further corporate costs can be mitigated in the short term by managements through the reduction of the wage bill of companies. The costs that are associated with the uncertainties are also indirectly borne by the shareholders of acquiring companies, since large premiums are paid to the target shareholders in pursuit of the acquisition. This can undermine the synergistic objective of takeovers.

Even though employees are disengaged and large amount of future wage bill is saved in the short term, it does not actually enhance shareholder or corporate value. It merely prevents further costs. The relevance and importance of the entity theory is to mitigate this problem that can be caused by uncertainty.

The entity theory objective is more extensively applied by the new institutional economics theory. The entity theory merely recognises the need for state intervention to ensure that contracting parties are protected without identifying the process towards achieving this objective. However, the new institutional economics, not only identifies the need for states to use institutions to strengthen the process of interactions and exchange, it is also concerned with how the institutions are created and the process of change of these institutions.

The ‘nexus of contract theory’ may not actually characterise a corporation in the absence of state recognition. As rightly observed; an entity can only assume the status of a corporation and recognised as such only if it acts in a legally authorised way, or is legally recognised.\textsuperscript{281} Hence, even though certain individuals agree to transact by

entering a contract, legal personality cannot be obtained *simpliciter*. It can only be conferred at the pleasure of the state. This same state intervention which confers individual status of legal personality is also used to restrict the use to which the legal personality can be put. This is necessarily to protect vulnerable parties and ensure that the corporation operates in a responsible way. Thus, effective institutional mechanisms can be used to moderate the relationship amongst the different corporate constituents. The objective of the established institutions is not meant to replace the market functions and free market competition. Rather, it is meant to strengthen the role of the market as a medium for exchange of resources. This is consistent with the objective of the new institutional economics theory, especially in relation to providing an appropriate framework for co-ordinating contractual relationships. This can be successfully applied to prevent conflict of interests and market expropriation as it affects the interests of shareholders and employees during takeovers.

The need to protect company employees during takeovers has not featured as much as the clamour for the protection of the interest of shareholders. Apparently, this is because the interests of shareholders appear to rank higher than those of employees, since the shareholders technically ‘own’ the company. Apart from the fact that shareholders have certain rights attached to their shares by which they may constrain management to act in their favour, regulatory measures are being developed to protect shareholders’ interests during takeovers. For employees that do not have tangible rights in shares like shareholders, not much has been done to protect their interests during takeovers, especially in Nigeria. They may be dismissed post-takeover to reduce the cost of acquisitions.

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283 See Chapter 2 above, section 2.6.
In Nigeria, takeover related restructuring often lead to the dismissal of company employees. Even though general level of unemployment is already on a high scale, mergers and acquisition does not provide any minimum level of protection to employees during takeovers.

3.7 Conclusion

Following the examination of the effects of takeovers, it emerged that hostile takeovers have managerial disciplinary character. Managers are believed to be generally hostile towards bids for fear of losing their positions. Managerial hostilities towards bids may emerge from lack of incentives to promote shareholder interests; hence managers tend to seek the path of entrenchment. It was also shown that takeovers which are actually directed towards corporate synergy are generally not hostile, but rather friendly. This is because of the fact that managers negotiate their contracts and the fusion of the firms may lead to the continuous employment of managers who may otherwise have been dismissed post-takeovers. Importantly, it emerged that the disciplinary function of takeovers is only relevant to the target company and not the acquiring company. It is the objective of the acquiring company to enhance their corporate investment and not to actually aid the investors of the target company in the pursuit of good corporate management. Also, it was observed that the disciplinary effect of takeovers does not apply to successful takeovers only; it may extend to unsuccessful acquisitions. The threat of dismissal post-takeovers may serve as an incentive to managements to enhance the value of their firms.

The hubris hypothesis of takeovers was suggested to be caused by ‘careless’ investment decision of managers. In view of the nature of takeovers which can be
influenced by managerial hubris, it is reasoned that the decisions of managers in this regard may be deliberately directed at hubris - empire building - contrary to the suggestions that it is an undesirable consequence of their decision.

Meanwhile, since takeovers do not often lead to negotiated agreements amongst the different corporate interests, managers often oppose takeover bids. The oppositions to takeover bids by corporate managers are prompted by reason best known to them. These reasons may not be far-fetched. In the analysis of the takeover defences that are adopted by managers to frustrate takeovers, it emerged that managerial oppositions to takeover bids could serve certain purposes. These include; to prevent a successful takeover or to increase the bid price in favour of their shareholders. While the former operate to promote their personal objectives, the latter is aimed at conferring benefit on their shareholders. However, as earlier noted, the latter purpose may be defeated if the bidder is not able to meet the higher bid-premium prices.

From these analyses, it can be observed that takeovers can be a medium for value creation for shareholders and the corporate entity generally. This can be achieved when managers actually promote synergy through takeovers. Also, takeovers can be used to either re-distribute or destroy corporate value. This can occur in those takeovers that are influenced by overestimation of bid prices, by overambitious managers, leading to costly acquisitions. This can lead to a mere increase in the size of corporate entity without a corresponding increase in the economic value of the combined company. Managerial hubris can promote the value-redistributing effect of takeovers, especially where the role of managements during takeovers is not restricted and challenged.
Generally, takeovers affect the same web of interests in the target and acquiring companies in essentially the same way in different jurisdictions. It emerged that shareholders and employees can be easily short-changed during takeovers relative to other corporate constituents. It was shown that the identified problems may have been caused by conflict of interests between corporate management and investors, as well as incomplete contracts and uncertainties in employer / employees relationships. The entity theory of the corporation was shown to justify state intervention in regulating the relationship amongst the corporate constituents. The relevance of the entity theory was identified as a response to the limitations of the contractual theory of the firm. Since the entity theory support state intervention, the establishment of effective institutions to administer and regulate takeovers was identified as an important way to address the challenges of takeovers. The new institutional economics was thus identified as fulfilling the important objectives of the entity theory of the firm, through effective regulatory and administrative institutions.\textsuperscript{284}

While efforts have been made to address these problems in some jurisdictions, not much has been done to resolve the same problems in some other jurisdictions. Nigeria is one of those jurisdictions which do not have effective mechanism to protect this group of corporate actors during takeovers. This is particularly worrisome because takeovers are on the increase in Nigeria. In spite of the recent takeover regulation, the extent to which shareholders and employees can be protected remains unclear.

In the next chapter, the takeover regulatory mechanism which is applicable in the United Kingdom is examined in relation to shareholder and employee interests.

\textsuperscript{284} See Chapter two, (Para 2.3).
PART II

The Comparative Function, General Conclusions and Recommendations
CHAPTER FOUR

4. TAKEOVER REGULATION IN THE UNITED KINGDOM

4.1 Introduction

This chapter examines the extent to which company shareholders are involved in decision-making during takeovers in the United Kingdom. Also, it examines takeovers as it affects employees with particular focus on the extent to which employee interests are incorporated into takeover arrangements.

The chapter contains five sections. Section two examines the historical development of takeover regulation in the United Kingdom. It evaluates the factors that led to the development of the takeover legal framework in the United Kingdom. In section three, the regulatory mechanisms that have been established for protecting the interests of shareholders is evaluated. This is done by reference to the effects of takeovers on shareholders of acquiring and target companies. The objective is to determine the extent to which the interests of shareholders in acquiring and target companies are protected by the current takeover regulations. Afterwards, the effects of takeovers on the employees of the combined company post-takeovers are examined in section four. Section five concludes the chapter.

4.2 The Historical Development of Takeover Regulation in the United Kingdom

During the nineteenth century, industries in Britain were mainly controlled and dominated by partnership and family-owned firms, which had the nature of a private entity. Afterwards, during the mid-twentieth century, there was a transformation of
this ownership structure into a more competitive ownership structure, with a reduction in the concentration of ownership. This led to a greater level of control with ownership powers residing in larger corporations.285 Despite the transformation of ownership structure which led to a rapid growth in the size of firms, the market for corporate control did not show much significant effect.

The post-war economic effects which heralded the need for investment opportunities led to the beginning of takeovers in the United Kingdom. The first takeover occurred in Britain in the early period of the 1950s. Before this period, the fusion of companies was known to occur only through amalgamation.286 This scheme was essentially not a takeover because of the series of negotiations which lead to agreements between companies. However, if they were takeovers, they were generally not hostile.

The emergence of hostile takeovers in the United Kingdom was influenced by certain factors which created the opportunity for investors to access the value of the corporate assets of companies as against the properties of these companies. One of such factors was the level of dividend payment. After the war, government imposed a voluntary dividend restraint, whereby companies were prevented from paying dividends except in accordance with the rise in profit of the companies.287 During this period, company managements did not consider it important to pay higher dividends as profits increased. The payments received as dividend did not generally reflect the rate of increase in company profits. Another factor which encouraged the emergence

286 Known as ‘the Scheme of Arrangement’, under the Companies Act, CAP 38 (1948). Sections 206 & 208 (as was applicable), now Companies Act, CAP 46 (2006). S. 900.
of hostile takeovers was the high undervaluation of corporate assets including freehold and leasehold property, as well as quoted investments. Certain businessmen who had knowledge of the prevailing financial status of these companies took advantage of the situation. Knowing that the companies were grossly undervalued, they attempted to acquire control to reap the gains of the true value of the corporate assets of these companies.288 The practise of restricted dividend payments and the economic downturn as an aftermath of the war caused a dwindling effect on the portfolio of a shoe company.289 Its share price was substantially undervalued, but this did not reflect in the market share-price because the value of corporate investment was determined by investors through dividend yields, rather than by share prices. In view of this, an investor290 who had knowledge of the undervaluation, made a tender offer directly to the shareholders of the company. The company’s board attempted to convince shareholders to reject the bid by increasing the rate of dividend payment.291 The majority of shareholders accepted the bid. This led to the first successful hostile takeover in the United Kingdom.

Later in the same year, another corporate control contest occurred. An investment financial specialist292 initiated a takeover bid. He commenced the purchase of a large number of shares in a company293 which he intended to convert to commercial offices. In response to the bid, the board of directors of the company arranged that the

289 The ‘J. Sears Holdings’.
290 Charles Clore.
291 Higher dividend payment and re-valuation of the value of the firm was reported to have been successfully used by managements to gain shareholder support in an earlier hostile bid by Charles Clore. See J Armour and D A Skeel, ‘Who Writes the Rules for Hostile Takeovers, and Why? - The Peculiar Divergence of US and UK Takeover Regulation’, *The GeorgeTown Law Journal*, 95 (2006-2007), 1727-94 at 1757.
292 ‘Harold Samuel’
293 ‘Savoy Hotel Limited’
company be sold to another company²⁹⁴ and leased back to the directors, on the agreement that the company’s building should be used only for the purpose of a hotel business. Such term was meant to frustrate the move of the investor since he intended to convert the hotel to commercial offices.

In the later part of 1958, two different investors²⁹⁵ made separate bids to take over a British company.²⁹⁶ Without the knowledge and input of the shareholders of the company, the company board rejected one of the bids and accepted the other bid. The company’s board effectively issued new shares which amounted to one-third of the shares in the company to the accepted bidder investor. The board of directors publicly revealed the deal only when the other investor whose bid was rejected by the board disclosed their intentions to deal directly with the shareholders of the company. At this stage the shareholders were furious and felt short-changed by the decisions of the management of the company. Efforts of the company’s board to appeal to the shareholders with dividends-increase failed. The shareholders sold their stocks to the opposing bidder. As with other earlier takeovers, the shareholders were not consulted by managements. The problems which occurred during this period include; the unequal treatment of shareholders, information asymmetries, the inadequacy of shareholder remedies and asset-stripping activities by bidders.²⁹⁷

The incidents that led to these takeovers showed that company shareholders have not been generally treated fairly. In the first three hostile takeovers in the United Kingdom, shareholders had to oppose the decisions of management. Shareholders’

²⁹⁴ ‘Worcester (London) Co. Ltd.’
²⁹⁵ Reynolds Metal Company in partnership with U.K.-based Tube Investments (“TI-Reynolds”) and the Aluminium Company of America (ALCOA)
²⁹⁶ ‘British Aluminium Ltd’
disenchantment appears to originate from the fact that when managers are meant to act with absolute discretion, there is no guarantee that their discretion will be exercised in favour of shareholders. Hence, in the United Kingdom, the market for corporate control from the early periods has been characterised with a contest, first between the management of the company and the bidders and secondly between the management of the company and their shareholders.

From the early period of takeovers, it appears that the interests of company employees were not incorporated into takeover arrangements. In one of the takeover attempts, the bidders sought to take over a hotel with the intentions of converting the hotel premises into commercial offices - Savoy Hotel Limited -. If the bid was successful, several employees may have been disengaged since the office spaces would be offered for rent. It is not clear whether the management of the hotel defended the bid in the interest of the employees or for their own personal interest since their services would not also be needed post-takeovers. Although the shareholders of the company felt aggrieved because they were not given the opportunity to make a decision on the bid, their interests would nevertheless have clashed with those of the managers and other corporate stakeholders such as the employees. The conduct of company management during corporate control contests as shown in the early periods of takeovers in the UK necessitated the need for takeovers to be regulated.298 A committee was inaugurated to administer takeovers. However, further conflicts between managements and shareholders necessitated the

298 See note 291 above, at 1758.
need for a more effective regulatory mechanism. Thus, the Takeover Panel was inaugurated to administer takeovers in the United Kingdom.\textsuperscript{299}

In the next section, the extent to which the interests of company shareholders are incorporated into takeovers is examined.

4.3 Shareholder Protection

Much of the conflicts which arise during corporate takeovers are between shareholders and corporate managements. The decision of company shareholders to accept or reject an offer from the outside investor may be impeded by the company management.\textsuperscript{300} Also, the decision to commence a takeover bid may be made without actually enhancing the investment of shareholders of the acquiring company.

4.3.1 Shareholders of Target Companies

From the time of the early development of takeovers in the UK, decisions of company management to accept or reject takeover bids have conflicted largely with the interests of their shareholders. This led to the establishment of the non-frustration rule.\textsuperscript{301} The rule seeks to exclude managements from interfering with a bid or making any decision on a bid without the prior authorisation of the general meeting of the shareholders. It is aimed at ensuring board neutrality when a takeover bid crystallizes. Although, this is aimed at protecting the property rights of shareholders during takeovers, the agency problems of conflict of interests may still persist.

\textsuperscript{299} The authority of the Takeover Panel to administer takeovers and other related matters in the UK is derived from the Companies Act. See Companies Act 2006, ss. 942-943.

\textsuperscript{300} In The UK, management cannot make any final decision to accept or reject a bid without the approval of shareholders. See EC Directive on Takeover Bid (2004) (The EC Takeover Directive) Article 9. See also The City Code on Takeovers, Section A1, B1, (2) and (3).

\textsuperscript{301} See The EC Takeover Directive and the City Code on Takeover and Mergers.
The non-frustration rule of takeovers as embodied in the *EC Takeover Directive* and *the City Code on Takeovers* prohibits managerial positive actions when a bid is made. The management board of a company is required not to do anything which may indicate that a bid is accepted or rejected without the authority of the shareholders of the company. They are also not required to do anything to enhance the interests of shareholders, except to the extent of outsourcing independent advice on the fairness of a bid which should be communicated to shareholders. The objective of this approach is to restrict the functions of management during takeovers to advisory roles to prevent managements from influencing the outcomes of bids. However, since management is merely required to advise shareholders on the implications of accepting or rejecting a bid, without any independent mechanism for determining the value of such advice, it is difficult to assess the value of such advice. Thus, advice on takeover bids that is provided by management may be influenced by personal interests since they are aware that such advice is not subject to any review. This is capable of misleading shareholders in view of the fact that managerial recommendations on whether to accept or reject a takeover bid may largely determine the outcome of takeovers. It was observed that the substance of such independent advice may not be free from managerial influence. This is an indication that restricting the role of company management to advisory roles for the

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302 The *UK Takeover Code*, Rule 3.1
303 The recommendation could be based on the characteristics and composition of boards. See generally N O'Sullivan and P Wong, 'Board Composition, Ownership Structure and Hostile Takeovers: Some UK Evidence', *Accounting and Business Research*, 29/2 (1999), 139-55. See note 152 (Cotter Shivdasani and Zenner) above, at 196.
purpose of limiting their influence over takeover is not an absolute guarantee that they would not influence takeover decisions.

The non-frustration rule may not apply to pre-bid defences. The objective of the rule is that the target board should refrain from taking any action as soon as the takeover bids have been made. 306 This means that the management of the target board are not prevented from taking or omitting to take any action which may also determine the effects of takeover bids provided such acts or omission occurred before any takeover bid has actually been made. This means that target management can undermine the effect of this rule by establishing mechanisms which pre-exist bids, with the aim of furthering their objectives. Some of the mechanisms which may be adopted include, employment contract which provide for lucrative compensation packages if there is a change in control leading to termination of their appointment. Although corporate governance rules recommends that payment of remuneration should be linked to performance, it also recommended that adequate payments should be made to attract the best persons for the job. 307

Other measures include adopting a staggered board appointment procedure or issuance of dual class voting stock. It appears that most of the above managerial entrenchment techniques have been largely restricted by company law and corporate governance principles. 308 However, they may apply to restrict pre-bid entrenchment practises. They may not be very effective, in view of the fact that they are only

306 See particularly The EC Takeover Directive, paragraph 2, and Article 9 rule 2; UK Takeover Code B1 General Principles 3.
307 See UK Corporate Governance Code 2014 Section D 1. This provision can encourage shareholders to vote against ‘unreasonable’ remuneration policies. However, binding shareholder votes on executive pay are limited to listed companies only.
308 Shareholders’ approval is required to issue new shares, dual-class voting stock is largely unsupported by institutional shareholders and staggered boards mechanisms is rendered ineffective in view of the fact that shareholders can remove directors at any time. Also, it is required that companies publish remuneration of directors and other executives for shareholders scrutiny. See note 291 above, 1736-1737.
generally applicable to regulate the relationship between the board and company shareholders as agents and principals respectively.\textsuperscript{309} Meanwhile, the requirement of publication of directors’ remuneration may not meet the desired objective, since it has no effect on the validity of the already concluded contracts between the company and director. Since companies cannot be compelled to reduce levels of compensations, this has the effect of making takeovers much more expensive for the acquiring companies, thereby impeding takeover attempts.

Operative rules which are aimed at preserving the interests of shareholders may nevertheless give the target management the opportunity to influence takeover bids. Rules which require companies to disclose the identities of the beneficial owners of voting shares, have been suggested to be capable of giving management extended time to devise accepted means of opposing bids.\textsuperscript{310} One of such means is the use of white knights\textsuperscript{311} which is permissible by the rules. The use of white knight may indicate that managements are interfering with the property rights of shareholders to decide on the merit of the bid. The first bidder may be frustrated by competition despite having incurred certain costs in furtherance of the bid, as a result of the white knights that is sought by the target board. It was suggested\textsuperscript{312} that the use of white knights by target boards may be controlled by making directors enter into contracts ‘not to seek’ white knights, followed by a commitment from the target company by way of an agreed fee for compensation for costs incurred if defeated by the rival. This may appear reasonable in protecting shareholder value. Ultimately, it may undermine

\textsuperscript{310} Ibid at 236.
\textsuperscript{312} See note 309 above, at 237-38.
the competition and free market. The emergence of a genuine competitor which may not actually be a white knight would require the payment of compensation to the first bidder. Also, it should be noted that once the offeror announces their bid, other potential acquirers become aware of the target’s identity, which may lead to competitive bids in the same way as if a white knight has been sought.  

The non-frustration rule, which seeks to give decision-making powers to company shareholders, can mitigate the agency problems. The view that company directors should contract not to seek white knights so as to protect first bidders and shareholders’ interests may not achieve the desired objective. This could make takeovers to be more expensive. Investors should not expect to succeed in a bid merely because they were the first bidders. Competition is a market characteristic. Also, shareholder value can be enhanced where competition for their shares is allowed to thrive since it can lead to enhanced premium. The presence or invitation of white knights have the same effects as genuine bid competitors who become aware of the existence of a target company by virtue of the announcement of a bid. The use of white knights remains an ideal option for management of the target company to frustrate takeover attempts from unwanted bidders.

The underlying objective of takeover regulations in the UK - under the EU Takeover Directive and the UK Takeover Code - is to protect the property rights of shareholders. This also forms the basis for regulating takeovers in some other jurisdictions, including the EU countries which are expected to apply the EU takeover directive.  

This objective applies to different regulatory frameworks because takeovers can have

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314 This objective also informed the development of takeover regulations in Nigeria, as indicated in the introductory objective of the Investments and Securities Act 2007.
similar challenges in different jurisdictions. The same categories of corporate interests are largely affected; shareholders, employees, managements amongst others. Also, takeovers in any of these jurisdictions, including the UK can either lead to either one or more of synergistic gains, disciplinary functions or hubris. Thus the regulatory functions of takeovers in different jurisdictions can have similar functions since they generally seek to ensure that an efficient market where property rights in shares can be freely exercised.\textsuperscript{315}

The non-frustration rule seeks to ensure that shareholders of target companies determine how control over their property rights in shares can be exercised, free from managerial manipulation and control. This can strengthen the role of the market for corporate control by ensuring that the disciplinary role oftakeovers and synergistic gains are not impeded by managements. From the account of the historical development of takeovers in the UK, it can be observed that the main challenges that were experienced during takeovers were caused by agency relationship between shareholders and managements. The agency problems were manifested in the form of conflict of interests. This influenced the creation of the non-frustration rule, to ensure that managements are confined to the objective of their roles as agents of shareholders. It also show that even though company managements owe their duty to their company directly, the importance of the property rights of shareholders cannot be undermined when managements exercise this duty, especially during takeovers. Thus, the property rights of shareholders can largely be protected and preserved where the agency conflicts that are caused by agency relationship are mitigated by takeover regulations such as the ‘non-frustration rule’.

\textsuperscript{315} One of the main concepts of the functional approach to comparative law is to determine how to respond to similar challenges that may be present in different jurisdictions. The challenges that can be present in takeovers are not limited to any particular jurisdiction. See Chapter One, section 1.6 above.
Meanwhile, the decision to make a bid is as important as the decision to accept or reject a bid. Companies make acquisitions for several reasons; it is not clear whether shareholders of bidder companies are actively involved in the decision to make bids. In the next section, this will be examined in relation to the existing regulatory framework for shareholder protection.

4.3.2 Shareholders of Acquiring Companies

Shareholders of acquiring companies face nearly as much challenges as those of target companies. It is not clear whether there are sufficient measures for protecting their interests during takeovers.\(^{316}\)

In certain exceptional circumstances, the approval of the shareholders of acquiring companies may be required. Where a listed company with premium listing\(^ {317}\) seeks to acquire another company, by issuing securities as consideration, shareholder approval must be sought and obtained if the takeover transaction is considered as a ‘class 1’ transaction.\(^ {318}\) ‘Class 1’ transactions are those transactions in which any of the following ratios, expressed as a percentage, is 25 percent or more:\(^ {319}\)

i) the gross assets of the offeree divided by the gross assets of the offeror;

ii) the net pre-tax profits of the offeree divided by the net pre-tax profits of the offeror;

\(^{316}\) Offerors may include individual investors and corporate entities. This thesis is concerned with offerors as corporate entities during takeovers.

\(^{317}\) Premium listing is one of the routes to trading on the main market in the Official List of the UK Listing authority. Companies trading on the London Stock Exchange with premium listing comply with the UK highest standards of regulation and corporate governance beyond the requirement of the EU regulations. The premium listing segment is open to commercial companies and investment entities wishing to list equity shares only.


\(^{319}\) UK Listing Rules 10.2 (3), R 10 (annex 1.1) (1G).
iii) the consideration divided by the aggregate market value of all of the offeror's ordinary shares; and

iv) the gross capital of the offeree divided by the gross capital of the offeror. Also, shareholder approval is required where a listed company acquires a business, an unlisted company or assets where any of the above percentage ratios is 100 percent or more or where such acquisition would result in a fundamental change in the business or in a change in board or voting control of the offeror.320

This requirement for shareholder approval is limited to transactions of the volumes indicated above and this means that the size of the target company should be at least 25 percent smaller than the size of the acquiring company. It implies that target companies in these kinds of transactions are relatively medium sized companies. This means that the requirement for shareholder approval is restricted. The approval is not generally required when a listed company is involved in a takeover. What is required is that; first the acquiring company must be a listed company with premium listing; secondly, the size of the acquirer should exceed the target company by at least 25 percent or more, 321 or 100 percent in reverse takeovers.322

This requirement for shareholder approval may not sufficiently challenge the roles of management of acquiring companies during takeovers. It applies to those categories of takeovers that would ordinarily draw the attention of the shareholders of acquiring companies in view of the size of the target. Also, since takeovers that fall into these categories do not occur frequently, it appears to indicate that takeovers generally

320 See UK Listing Rules 5.6.3, 5.6.4.
322 UK Listing Rules 5.6.3, note 283 above Ashurst LLP, at 25.
should be considered to be a usual investment decision, for which managements should be responsible for making decisions.

During the negotiations for the takeover of Cadbury by Kraft, one of the shareholders of Kraft indicated his opposition to the deal, but because of the inability of shareholder to vote on the issue, he could not successfully challenge the acquisition.\(^{323}\) The growing concern that shareholders of acquiring companies should be made to approve takeovers have not been given the needed consideration.\(^{324}\) The Takeover Panel suggested that protection is not extended to the shareholders of the acquiring companies mainly because of the following reasons. First, shareholders can avail themselves the protected afforded by company law and other regulatory rules (such as contract). Secondly, the code would be made to apply to foreign acquirers. Thirdly, some acquirers may be single investors with no shareholders and finally that it might provide offerors who subsequently wished to avoid an offer the opportunity to delay the bid without having to prove materiality as required under r. 13.4(a).\(^{325}\)

In response to the concerns above, first, the extent to which shareholders of acquiring companies can rely on company law and other regulatory mechanisms to protect their interests is limited. A reference to such remedies would be by way of a response to unproductive acquisitions, rather than preventing such acquisitions. Secondly, the application of the code to foreign acquirers would not likely raise problems because the approval from the panel would simply be based on the fact that the acquisition has


\(^{324}\) The Institute of Directors recommended that significant takeover transactions should be preceded by shareholder approval, partly because many takeovers do not lead to expected synergies. See the Institute of Directors ‘Review of Certain Aspects of the Regulation of Takeover Bids’ (July, 2010) http://www.iod.com/mainwebsite/resources/Document/Takeover_Panel_Review_0710.pdf accessed 14th June 2014.

been approved by the shareholders and it is not meant to serve managerial interests.

Thirdly, where an acquirer is a single investor, the approval of the investor would suffice as with the case of shareholder approval. Lastly, delays that are not related to materiality can be avoided when provision is made for shareholder approval to be obtained within a specific time. Thus, the case for protecting acquiring shareholders remains valid despite these reasons.

The main focus for takeover regulation remains in the direction of protecting the property rights of target company shareholders. Gains to acquirers are neither certain nor immediate, apparently because of the high costs of acquisitions. Shareholders of acquiring companies would have to hold on to their shares and remain in the company until such a time that gains possibly materialises. Thus, it is necessary to engage shareholders in decisions relating to acquisitions.

In view of the fact that the existing regulations which govern takeovers in the United Kingdom are mainly designed for the protection of the shareholders of target companies, certain assumptions are inevitable.

(i) Are Shareholders of Acquiring Companies Protected from Opportunistic Behaviour of Management?

Usually, the procedure for enforcing companies’ contracts is embodied in the articles of association. The UK company law outlines minimum standards for the enforcement of these contracts. The standard which is required from the conduct of companies’ boards during takeovers are not specifically outlined in the Act, thus


327 This is clearly indicated in these regulations. See The EC Takeover Directive, para. (2), The City Code on Takeover, s. A (1) 2 (a).

328 The Companies Act, 2006. (the Companies Act).
reference may be made to the general duties of directors.329 The decision of the board to expand corporate investments through takeovers fall under the *bona fide* duties of company directors as enshrined in the Act, some of these duties which may apply to takeovers are briefly examined.

The assumption that shareholders of acquiring companies have adequate protective measures against unwholesome board practices during takeovers may be derived from the duties of company directors. Only a few of these duties are arguably applicable to takeovers, these include; the duty to promote the success of the company, the duty to exercise reasonable care, skill and diligence and more specifically the duty to avoid conflict of interests.330

a) The Duty to Promote the Success of the Company

In the discharge of their responsibilities, company directors are required to act in the way that they consider in good faith would promote the success of the company for the benefit of the members as a whole.331 For purposes of takeovers, it may be contended that this duty requires the board to engage in acquisitions that would enhance the economic interests of the company and their shareholders. This means that corporate management should not merely focus on expanding corporate investments while making acquisitions, they should engage in acquisitions for the purposes of expanding corporate investments as well as ensuring a corresponding

329 *The Companies Act* ss. 171 – 177.
330 *Companies Act*, ss. 172, 174-177.
331 Their role is to be observed by reference to the enlightened shareholder value. They are required to consider the interests of certain stakeholders. However, this duty is required to be performed to the extent that it confers benefit on the members of the company. It is unlikely to include non-shareholder interests, except a winding-up is imminent. See L Sealy, "'Bona Fides' and 'Proper Purposes' in Corporate Decisions" *Monash University Law Review* 15/3&4 (1989) 265-278, at 269-271.
increase in corporate wealth.\footnote{More corporate investments can lead to larger corporate size. This may not necessarily enhance the value of shareholders.} It may be difficult to rely on this duty to hold directors to account for unproductive takeovers in view of the fact that the duty is defined by reference to what the directors consider to be in good faith.\footnote{This appears to be rather subjective. What the directors consider to be in good faith seem to be a lesser standard than that of a reasonable man’s test.} The duty as stated in the Act requires directors to promote the interests of company members. The ways in which the directors are to go about their duties in promoting the interests of their shareholders is relative. It appears to be dependent on the ways the directors themselves consider to be ideal in their own judgement. It is expected that the extent to which an investment decision will enhance the interests of the company members should be largely dependent on the effectiveness of the decision and the likelihood of value to be added. This is different from what the directors may merely consider to be ideal as provided in the Act. In light of this, recourse to this duty may not be helpful.

b) The Duty to Exercise Reasonable Care, Skill and Diligence

The duty to exercise reasonable care, skill and diligence requires company boards to exhibit a certain level of standard in the performance of their duties. Earlier, this duty was required to be interpreted subjectively. The level of duty of care and skill which was to be expected from company directors was that which a person who has the same knowledge and experience of directors could reasonably be expected to exhibit and no more.\footnote{City Equitable Fire Insurance Co. Re (1925) Ch. 407. Romer J.} Currently, the standard of the duty has been raised from subjective application to include objective interpretation. A director is required to exhibit the care, skill and diligence that would be exercised by a reasonable and diligent person. This means that a director is expected to have the general knowledge, skill and experience that may reasonably be expected of someone carrying out the same...
functions as the particular director in relation to the company. Also, the general knowledge, skill and experience that the director actually has may also be relevant. It has been suggested that the standard of these forms of duty; the general knowledge, skill or experience of a usual director or the director’s actual skill apply to the one that is higher.\textsuperscript{335} Since the level of diligence which is required from company directors is determined by reference to objective standard, the absence of objectivity in the discharge of their responsibilities as directors may be considered as negligent conduct. In \textit{D'Jan of London Ltd, Re}\textsuperscript{336} a director who signed an insurance proposal form without checking its contents was regarded as negligent. Also, in \textit{Westlowe Storage and Distribution Ltd, Re}\textsuperscript{337} a director who failed to ensure that the company benefited properly from a transaction it was engaged in when it was his responsibility to ensure that a proper accounting system was in place was held to have been negligent. This means that directors are expected to exhibit the standard which is expected of an objective director, whether or not they have such skill or experience and they may be held to be liable for negligence where they fail to act accordingly.\textsuperscript{338}

Whether company directors may be held liable in breach of this duty during takeovers is unclear. Since they are expected to perform their functions as directors according to the required standard, it is imperative that directors of acquiring companies ensure that the decision to expand corporate investment through acquisitions is done prudently. The exercise of this duty for the purpose of making acquisitions will direct

\textsuperscript{336} \textit{D Jan of London Ltd, Re} [1993] BCC 646.
\textsuperscript{337} \textit{Westlowe Storage and Distribution Ltd, Re} [2000], BCC 851.
the board of acquiring companies into making decisions which may reasonably be adjudged as one which is best for the interests of the company and its shareholders.\textsuperscript{339}

However, this duty may appear to have a limited application because directors have been held to be only liable where it can be shown that the loss occurred by the particular negligence of directors. This applies even if they have negligently failed to supervise others who may have committed an act of fraud.\textsuperscript{340} Also, a director who makes a decision to the best of his ability by acting on appropriate legal advice may not be regarded as having acted negligently,\textsuperscript{341} even when such decision leads to loss of corporate wealth.

Although, it is unlikely that directors who negligently cause loses by virtue of needless and unproductive acquisitions can rely on the decisions in these cases to be exempted from liability. Directors may be held liable for unproductive acquisitions where such acquisitions cause losses to the shareholders of their companies. Since the standard of performance has been raised, there is a good reason to believe that they can be held liable for their actions including decisions to make acquisitions. However, in spite of the raised standard of performance that is expected of company directors, it is unlikely that they can be held liable for unproductive acquisitions. It would have to be proved that directors intentionally set out to make acquisitions for purposes that would not promote shareholder value.\textsuperscript{342}

The major problem of takeovers that undermine the interests of shareholders of acquiring companies is associated with high costs of acquisitions. The high costs that

\textsuperscript{339} Losses to offeror companies post takeover can be avoided or mitigated if this duty applies in relation to takeovers.

\textsuperscript{340} \textit{Lexi Holdings Ptc. v Luqman} [2009] EWHC Civ 117.

\textsuperscript{341} \textit{Green v Walkling} [2007] EWHC 3251.

\textsuperscript{342} Such as ‘empire building’ acquisition objectives, to expand the control size of the managers.
are expended on takeovers can increase target shareholder value while acquiring shareholders may experience losses, zero or insignificant gains. It is unclear whether managements anticipate the high costs that they expend on acquisitions, especially as they are expected to manage shareholders’ investments in the manner that would mitigate transaction costs. Transaction costs economics suggests that transactions should be conducted in the least possible costs. Thus, if managements consider the costs of acquisitions in relation to the expected gains that can be made towards enhancing corporate value, the problems of high transaction costs associated with takeovers may be addressed by managements. However, because of the presence of conflicts of interest which characterises agency relationship between shareholders and managements, the role of managements can be largely unpredictable.

As such, it would be more reasonable to prevent directors from making unproductive acquisitions rather than making directors accountable for unproductive acquisitions by reference to this duty.

c) The Duty to Avoid Conflict of Interests

This duty applies to all aspects of decision-making by the board, including takeovers. The duty is particularly important when applied to acquisitions made by company management. Managers may pursue acquisitions even when such acquisitions are only capable of ensuring long term gains, irrespective of whether or not the management have any special expertise in running the acquired businesses.\(^{343}\) This has the capacity of depriving the immediate shareholders of the expected gains from their investments. In *Aberdeen Railway Co. v Blaikie Bros.*,\(^{344}\) it was observed that no one having - fiduciary - duties to discharge shall be allowed to enter into

\(^{343}\) See note 140 above, at 14.

\(^{344}\) [1854] 1 Macq H.L. 461. at 471.
engagements in which he has or can have personal interest conflicting with or which may possibly conflict with the interests of those of whom he is bound to protect.

The view that managerial restriction may stifle entrepreneurial activities in a company may not have considered the propensity of managements to be engaged in conducts that are opportunistic as opposed to shareholders’ welfare. Thus, it is appropriate to ensure that managerial decisions to pursue acquisitions should be reviewed. Although this may not eliminate the chances of management pursuing their own objective, it has the capacity to strengthen the duty to avoid conflict of interests.

The directors’ duties which have been examined above as it relates to takeovers may provide only a minimum protection to the shareholders that acquisitions made by company management are directed towards the interests of the company and the shareholders. This is because of the fact that the general duties of directors are stated to be owed to the company. The extent to which the duty may be distinguished for the purpose of determining whether the duty in a particular circumstance is owed to the company or to shareholders was considered in Peskin v Anderson. The fiduciary duties which are owed by directors to a company were distinguished from the fiduciary duties which are owed to shareholders which arise out of a ‘special factual relationship’ between the directors and the shareholders. It was stated that directors duties which are owed to individual shareholders and not to the company

349 Peskin v Anderson [2001] 1 BCLC 372. at 379, Mummery L.J.
would have to arise where directors place themselves as against shareholders individually in one of the established legal relationships to which fiduciary duties are attached. This includes agency relationship,\(^{350}\) in which directors are authorised to sell shares in a takeover bid.\(^{351}\) Despite the ‘special relationship’ exception, which operates to make directors’ duties in particular circumstances to be owed to shareholders rather than the company, the extent of application of such special relationship is unclear. There are no clear parameters for determining when such relationship arises, and each case may be its own example. However, it has been suggested to apply in cases where the company is small or family owned rather than companies with large shareholding.\(^{352}\) Alternatively, such relationship has been stated to exist in companies with large shareholding in circumstances where advice is given by directors in the course of a takeover bid. In *Company Re*,\(^ {353}\) it was observed that where directors offer advice to shareholders on a bid, they must do so with a view to enabling the shareholders to obtain the best bargain which is obtainable and not to promote the bids which the directors themselves are favourable to. Although, these cases dealt with the relationship between directors and shareholders as a target company, they nevertheless apply in the same way to acquiring companies. The underlying objective of the declared relationship is that the decisions of directors during takeovers have direct impact on the economic interests of the shareholders of their companies, whether target or acquiring companies.

Meanwhile, in the event of a significant loss leading to divestitures, the duties can only be enforced on behalf of the company after the losses may have occurred since

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\(^{351}\) *Briess v Woolley* [1954] A.C. 333, HL; *Allen v Hyett* [1914] 30 T.L.R. 444, PC.

\(^{352}\) Note 347 above, at 158. See *Coleman v Myers* [1977] 2 N.Z.L.R. 225 CA (NZ).

\(^{353}\) *Company Re* [1986] BCLC 382 Hoffmann J.
personal interests cannot be anticipated but only detected afterwards. Also, it is
doubtful whether the court would allow itself to be drawn into such dispute. Courts
are reluctant in second-guessing investment decisions of managers.\footnote{The attitude of the courts towards the rights and duties of corporate participants is to defer to the contract terms and related arrangements which the participants have made. See note 242 (Cheffins) above, at 322.} It becomes
particularly difficult where such decisions could be said to have been made in the
discharge of their duties in the ordinary course of enforcing the business objectives of
the company as a going concern.

Irrespective of whether there is a ‘special relationship’ between the managements and
shareholders, by virtue of their positions as managers, they are agents of shareholders
generally and they are expected to promote the value of the company for the interests
of their shareholders. Thus, the problem is not particularly the absence of a ‘special
relationship’ between the shareholders and managements; rather the problem exists
because the interests of managements conflict with those of the shareholders as a
result of the agency relationship between the shareholders and managements. Thus,
the agency theory as a major theme of the new institutional economics, suggest that
the conflicts can be mitigated through effective institutional arrangements. This can
ensure that the role of managements as agents is largely confined towards promoting
corporate value.

From the foregoing, it appears that shareholders of acquiring companies are not
protected from managerial domineering roles during takeovers. By reference to the
general duties of directors under the Act, shareholders cannot be protected. Hence,
the extent to which corporate acquisitions can enhance the value of shareholders of
acquiring companies is largely dependent on the objectives of managements. Since
the role of managements can be influenced by agency conflicts, there is the need for effective takeover regulations to protect the property rights of acquiring shareholders.

(ii) Do Shareholders of Acquiring Companies Always Gain From Takeovers?

The effects of a takeover may determine the actual motives or objectives that influenced the takeover. Generally, hostile takeovers have disciplinary character, in view of the fact that the management board of target companies are less likely to be retained post-takeover. Although the disciplinary function of takeovers has been largely mooted, the benefit of this function may not be shared by the shareholders of the acquiring and target companies. The disciplinary role of takeovers is primarily beneficial to the shareholders of the target companies, since their ‘poorly-performing’ management board are almost certainly to be dismissed post-takeover. Hence, the disciplinary function confers no benefit to the shareholders of the acquiring company.

Synergistic gains in takeovers are derived from the view that takeovers lead to the combination of the resources of the acquiring and target companies to form a pool of resources. This enhances the economic value of the combined companies post-takeover. While this may appear reasonable, it is not clear whether the shareholders of the acquiring company are guaranteed to gain from takeovers. Although, it may appear that synergistic gains are more likely to occur when firms of the same line of business are combined, other views suggests otherwise. It is possible for

355 These have been examined in details in Chapter Three, section 3.4 above. When managers make acquisitions, they often indicate that the acquisition is influenced by synergy. However, the extent to which an acquisition is actually influenced by synergy can only be determined post-takeovers; when the added value to shareholder and corporate wealth is determined.

356 Note 139 above, at 102.

357 See note 184 above, at 887, note 185 (Scharfstein) above, at 192.


359 E.g. managerial expertise, product and goodwill of the individual firms.
synergistic gains to occur, irrespective of whether the combined companies are in the same line of business. Where companies are in the same line of business, managerial skills can be efficiently harnessed towards the newly acquired company. Also, where companies of different lines of businesses combine resources through takeovers, synergistic gains can be manifested where the new resources which were previously outsourced possibly at a higher cost becomes an integral part of the company’s structure. The risk factors, costs of acquisitions as well as the existence of other different factors which may be responsible for synergistic gains may account for the above inconsistency. Hence it may be argued that shareholders of acquiring companies may record positive economic value from takeovers, but this may not always be guaranteed.

Figure 3  Statistics of Announced Mergers and Acquisitions in the United Kingdom from 1988-2013

360 Note 212, (Varadarajan and Dubofsky) above, at 605.
Figures 3 and 4 show the relative levels of M & A activities in the United Kingdom. They indicate that M & A were in their highest points during the periods of 1998-2001.

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| Holding period | Cash only bidders | | | Shares only bidders | | | Cash/shares bidders dummy | | |
|---------------|-------------------|---|---|-------------------|---|---|--------------------------|---|
|               | CAPM | 3-factor | CAPM | 3-factor | CAPM | 3-factor | CAPM | 3-factor |
| All bidders using a single payment method |          |             |        |          |        |             |    |           |
| Pre-event     | 0.4591<sup>a</sup> | 0.6737<sup>a</sup> | 0.8253<sup>b</sup> | 1.2971<sup>b</sup> | -0.4584 | -0.4514 |          |          |
| Around event  | 0.5493<sup>a</sup> | 0.5645<sup>a</sup> | 0.0497 | 0.1745 | 0.4775<sup>b</sup> | 0.4571<sup>b</sup> |          |          |
| Post-event    | 0.3164<sup>a</sup> | 0.6063<sup>a</sup> | 0.2376 | 0.5800 | 0.0361 | 0.1053 |          |          |
| Entire event  | 1.2913<sup>a</sup> | 1.8894<sup>a</sup> | 1.6140 | 2.9296<sup>a</sup> | -0.4935 | -0.4424 |          |          |
| N             | 4663 | 4663   | 726   | 726   | 5389   | 5389   |          |          |
| Bidders for listed firms |          |             |        |          |        |             |    |           |
| Pre-event     | -0.7424<sup>a</sup> | -0.5547 | 1.9562 | 2.1329<sup>a</sup> | -2.7670<sup>a</sup> | -2.6357<sup>a</sup> |          |          |
| Around event  | -0.3228 | -0.3075 | -2.1999<sup>a</sup> | -2.4744<sup>a</sup> | 1.8759<sup>a</sup> | 2.0555<sup>a</sup> |          |          |
| Post-event    | -0.3562 | 0.1108 | -0.4730 | -0.4563 | 0.0915 | 0.4891 |          |          |
| Entire event  | -1.4166<sup>a</sup> | -0.6852 | -0.5630 | -0.5120 | -0.7591 | -0.1305 |          |          |
| N             | 452 | 452    | 190   | 190   | 639    | 639    |          |          |
Table 5B: show the relative measure of gains to acquiring companies post-takeovers (between 1981-2001). As indicated, acquirers of listed company experience negative returns relative to the acquirers of private companies.

<table>
<thead>
<tr>
<th></th>
<th>Cash only bidders</th>
<th>Shares only bidders</th>
<th>Cash/shares bidders dummy</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>CAPM</td>
<td>3-factor</td>
<td>CAPM</td>
</tr>
<tr>
<td>Bidders for private firms</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pre-event</td>
<td>0.5883*</td>
<td>0.7993*</td>
<td>0.4564</td>
</tr>
<tr>
<td>Around event</td>
<td>0.6421*</td>
<td>0.6571*</td>
<td>0.8365</td>
</tr>
<tr>
<td>Post-event</td>
<td>0.3936*</td>
<td>0.6595*</td>
<td>0.4434</td>
</tr>
<tr>
<td>Entire event</td>
<td>1.5707*</td>
<td>2.1534*</td>
<td>2.3790*</td>
</tr>
<tr>
<td>N</td>
<td>4211</td>
<td>4211</td>
<td>536</td>
</tr>
<tr>
<td>Listed/private target dummy</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pre-event</td>
<td>-1.3276*</td>
<td>-1.2114*</td>
<td>1.3870</td>
</tr>
<tr>
<td>Around event</td>
<td>-0.9623*</td>
<td>-0.9600*</td>
<td>-3.0534</td>
</tr>
<tr>
<td>Post-event</td>
<td>-0.7720*</td>
<td>-0.5521*</td>
<td>-0.9290</td>
</tr>
<tr>
<td>Entire event</td>
<td>-2.9881*</td>
<td>-2.7587*</td>
<td>-3.6050*</td>
</tr>
<tr>
<td>N</td>
<td>4663</td>
<td>4663</td>
<td>726</td>
</tr>
</tbody>
</table>

Tables 5(A & B) show that managers that are driven by ambitious acquisitions may be tempted to ignore signs of post-acquisition effects and managers that are concerned with improved corporate value are more likely to be cautious when they make acquisitions. The period covered by the results in Tables 5 (A) & (B) included 1998 – 2001. This period recorded the highest levels of acquisition in the United Kingdom, as indicated in Figures 3 & 4 above. Thus, the combined effects of Tables 5 (A) & (B) and Figures 3 & 4 may indicate that while higher levels of acquisitions may show that the market for corporate control is active, it may not necessarily depict effectiveness and efficiency of the market for corporate control.

The hubris hypothesis of takeovers has also been identified as an underlying effect of takeovers. This hypothesis is based on the premise that the management of acquiring firms overestimate the benefit to be derived by synergistic gains. This often makes the managers to pay higher premiums, as a result of overestimation of the bid price, leading to non-positive gains post-takeover. Arguably, the overpayment which leads to hubris arises as a result of managerial error in their bid to maximize shareholder value. Whether or not the overpayment leading to hubris occurs as a result of honest mistakes of the managers, the shareholders of the acquiring firms can make zero gains from acquisitions. When shareholders of an acquiring company do not record gains post-takeovers, wealth is effectively transferred to the shareholders of the target companies. The wealth that is transferred to the shareholders of target companies is represented in the high bid premium paid by the management of the acquiring company in pursuit of the acquisition.

Figure 5 Relative Value of Bidder Post-Takeover between 1990 and 1998

Figure 6 Relative Value of Target Post-Takeover between 1990 and 1998
Figures 5 and 6 \(^{364}\) show the cumulative (daily) average abnormal return (CAAR) on a sample of successful takeovers in the UK between 1990 and 1998, (1998 signalled the early stages of increase in deals as indicated in figures 3 and 4 above). These cover a 26-day period. Collectively, they show a decline in the value of the bidder company, by reference to the performance of the combined company post-takeovers. Thus, figures 5 & 6 indicate that shareholders of acquiring companies may not record significant economic gains from takeovers and they do not have any guarantees that their managers would engage in acquisitions that would enhance their economic value. Despite this challenge, the extent to which shareholders can successfully make managements to be accountable for unproductive acquisitions is unclear. The derivative action procedure is examined next.

(iii) Derivative Claim and Personal Actions by Shareholders in Acquiring Companies

One of the changes that have been introduced in the Companies Act is the codification of the derivative action procedure. \(^{365}\) Through a derivative action, a company shareholder can file a claim against a director of their company, where the acts of the director include negligence, default and breach of duty or trust. The general duties of directors are stated to be owed to the company and not particularly to the shareholders. The existence of the derivative action procedure shows that the importance which is attached to the duties that the directors owe to the company is related to the extent that the duties are performed towards enhancing the interests of the shareholders. \(^{366}\) This is further affirmed by the codification of the derivative claim

\(^{364}\) Note 219 above, 9-11.
\(^{365}\) Companies Act 2006, ss. 260 – 269.
\(^{366}\) This is apparently stated in the Companies Act, s. 172.
procedure. The Companies Act recognises the need to balance the discretionary role of managements in the performance of their duties and the protection of shareholders from negligent and careless investments that are made by management. Thus the permission of the court must be obtained before a derivative action can be effectively commenced.\textsuperscript{367} The general duties of directors apply to general investment and managerial decisions and the derivative action procedure applies to all acts that involve negligence, default, and breach of duty or trust. It is not clear whether shareholders of acquiring companies can successfully commence derivative actions against directors in relation to takeovers. The importance to be attached to derivative actions for the purpose of protecting the interests of the shareholders of acquiring companies may not be significant after all. Where shareholders succeed in derivative actions against company management for loss caused by unproductive and needless acquisitions, the success of the action may not lead to an upward review of the value of the shares. Also, derivative claims are usually instituted on behalf of a company, the proceeds from the successful claim goes directly to the company. Successful actions may raise shareholders’ hope of redress against managements’ investments policies that undermine corporate values. Managements could be made to be more cautious when they make acquisitions if they can be held accountable for needless acquisitions through derivative action procedure.

While a derivative claim may not be appropriate, it is also doubtful whether a shareholder of an acquiring company can succeed in a claim for personal loss. It has been held that the losses that are suffered by shareholders as a result of the reduction in the value of their shares are only reflective of the loss that has actually been

\textsuperscript{367} \textit{Companies Act}, s 261-262.
suffered by the company. This means that shareholders may recover losses when such losses are independent of the losses that are suffered by the company, provided that the losses that they suffer occur as a result of the breach of a duty that is owed to them by the directors. Since losses to shareholders are merely reflective of the company’s loss, shareholders may not recover damage in respect of the loss of the value of their shares. Importantly, whether or not the loss which shareholders suffer is reflective of the company’s losses, shareholders actually suffer losses when the value of their shares are reduced by ‘poor’ investment decisions of management. It is difficult to measure gains or losses of a company without reference to the value of the shares, especially during takeovers.

Apparently, the ‘no reflective loss’ principle is meant to prevent multiple and frivolous action by shareholders and to ensure that company managements remain free to make discretionary investments decisions as they reasonably deem fit. Thus, it was rightly observed that the principle is justified to curtail excessive shareholder litigation, to protect the separate personality status of companies, by treating companies as the primary victims of the alleged wrong as the appropriate claimant.

This principle effectively distinguishes losses that may be said to have been suffered by the company and those that have been suffered by the shareholders. It preserves shareholders’ right of action to losses that directly affect them as shareholders. As such, it appears that the shareholders of acquiring companies may

368 No reflective loss principle. See Prudential Assurance Co. Ltd v Newman Industries Ltd (No. 2) [1981] Ch 257, See also, Stein v Blake (No.2) [1998] BCC 316 (CA) at 318, Johnson v Gore Wood & Co [2002] 2 AC 1 (HL).

369 It is also meant to guard against the risk of double jeopardy for the defendant who might be exposed to parallel claims from both the company and the shareholder. See D Milman, ‘Shareholder Remedies and the Scope of the Reflective loss (or No Reflective Loss) Principle’ Company Law Newsletter (Sweet & Maxwell) 4 (2005)1-5 at 3.

370 Heron International Ltd v Lord Grade [1983] BCLC 244 at 262, Lawton L.J. However, in certain circumstances, the ‘no reflective loss’ principle may not apply if a company is unable to pursue its own cause of action precisely because of the acts of the wrongdoer. Personal losses that arises from the
succeed in a personal claim for loss caused by needless acquisitions, if it can be proved that the loss specifically applies to the shareholder(s).

Apparently, the derivative claim procedure and personal actions do not appear to be appropriate remedies for shareholders of acquiring companies in relation to losses caused by needless acquisition. As indicated in Johnson v Gore Wood & Co, shareholders must establish that the breach of the directors’ duty which led to the losses that they have suffered was owed specifically to the shareholders and not to the company generally. Also, in view of the requirements of obtaining the permission of the court before continuing a derivative action, it is doubtful whether the hurdles created by the Act can be surmounted by derivative actions that are founded on takeovers. The courts have hardly granted the permission to continue derivative actions.371

While it remains a difficult task for shareholders to influence the motives of managers when they make acquisitions, the challenges of employees during takeovers may be more enormous. Whether the interests of company employees are actually protected during takeovers is largely unclear, in view of the fact that the takeover objectives of managers may not guarantee such protection. The extent to which the interests of company employees are incorporated into takeovers is examined next.

371 See Franbar Holding Ltd v Patel and Ors. [2008] EWHC 1534 (Ch), Mission Capital v Sinclair [2008], EWHC 1339 (Ch), Stimson v Southern Private Landlords Association [2009] EWHC 2072 (Ch); Lesini v Westrip Holdings Ltd [2009] EWHC 2526 (Ch). In certain cases, approval to continue derivative claim on terms have been granted. See Kiani v Cooper [2000] EWHC 577 (Ch); Stainer v Lee [2010] EWHC 1539 (Ch).
4.4 Employment Protection

As soon as a company becomes a target of a takeover, it becomes an issue as to whether employees in the company would retain their positions. As earlier mentioned, this problem exists because managements engage in costly acquisitions and they can dismiss employees to mitigate the costs of the acquisitions that have been concluded. This shows that there is a high level of uncertainty which characterises the interests of employees when a takeover becomes imminent; since their employment contract does not provide for all possible situations or outcomes during the pendency of their employment.

This is one of the challenges of takeovers in the UK. Although, corporate laws make provisions for some level of consultations in relation to the interests of corporate constituents including employees, there appears to be no real protection for the interests of employees. This may partly be caused by the idea that employees should look beyond the corporation to protect their interests.

In the United Kingdom, the general duties of company directors have been extended to include a consideration of the interests of company employees, in promoting the success of the company. The UK company law recognises the need to promote the success of the company as it affects the company stakeholders. Directors are required to consider the effect of their policies on the interests of other corporate constituents including company employees. No doubt, this enlightened shareholder value approach, recognises the fact that the corporate entity is embedded with multiplicity of interests. Nonetheless, it appears that directors are to focus on the interests of their

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373 Such as Labour / Employment Laws and Contract Laws.

374 *Companies Act 2006*, s. 172.
shareholders. They are required to promote the success of the company for the benefit of its members as a whole.

Company employees may not rely on this provision in view of the fact that the duty is stated to be owed by the directors to the company. Although, directors are required to consider the interests of the employees in this regard, they do not owe the duty to the employees. Employees may not successfully enforce the provisions of this duty to their particular advantage because this duty is a fiduciary duty, and it may only be enforced by the company.375

Employees appear to be in the same position as if their interests have not been actually considered. The duty is owed to the company and not to the employees. As such, it was observed that by reference to the provision concerning this duty, it may be misleading to refer to it as a duty owed by the directors to company employees. Rather it may be appropriate to refer to the provision as a defence which may avail company directors, where they are criticised by shareholders for acting with social responsibilities towards employees.376 This view strongly represents the classical interpretation of the duty; directors are to ‘have regard to’ the interests of the company employees in their ‘duty towards promoting the success of the company’.

The interests of company employees may not be genuinely considered by directors in their duty to promote the success of a company. Although the duty is owed to the company, nevertheless, the duty is expected to be carried out for the benefit of the

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375 Note 335 above, at 287. The extent to which directors may consider the interests of other stakeholders such as company employees is limited to the extent to which such consideration would promote the interests of the company and shareholders. See Parke v Daily News [1963] 2 All E. R. 929. It was held that generosity to employees can only be lawful where it can be justified by reference to the long term interest of the company. Thus, similar position of the old Companies Act 1985, s. 309 which requires directors to have regards to the interests of company employees in general when performing their duties, applies under the Companies Act 2006, s. 172.

376 Note 335 above, at 288.
members of the company.\footnote{Companies Act, s. 170. Thus, as rightly observed, s 172 appears to maintain the traditional shareholder-value approach. A Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom’s ‘Enlightened Shareholder Value Approach’ Sydney Law Review 29(2007) 577-612., A Keay, ‘The Duty to Promote the Success of The Company: is it Fit for Purpose?’ (2010) 1-36 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1662411 accessed 14th December 2013.} A company is an abstraction and an artificial person, hence it may not \textit{personally} enjoy any benefit or suffer any detriment, except to the extent that the interests of members as ‘owners’ are affected.\footnote{Although, the general duties of directors are stated to be owed to the company, and only the company may bring an action to enforce this duty, the company law recognises that the purpose of this is to enhance the interests of the members of the company. This is evident in the derivative claim provision. See \textit{Companies Act} ss. 260-264. The derivative claim procedure is a mechanism which can be used by shareholders to enforce their corporate rights. Company employees do not have such mechanism to enforce this duty, even where directors fail to consider their interests.} In pursuance of this objective, it is stated that the duty should be discharged for the benefit of the members of the company.

While company law recognises that stakeholders contribute to the success of a corporation as a going concern, this duty does not appear to accord the stakeholders particularly employees any special place in the corporation. Thus, where directors are of the view that certain investment decision would enhance the interests of the shareholders of the company, nothing in this duty prevents them from implementing such decision. It is immaterial that the decision would have any negative consequences on the interests of the company employees.\footnote{See J Birds et al. (eds.), \textit{Boyle and Bird's Company Law}, ed. A J Boyle (8 edn., Bristol: Jordan Publishing Limited, 2011) at 637.}

Specifically, the extent to which the interests of company employees may be considered by directors in promoting the success of a company appears to be given a limited application. Company employees have not been given exclusive protection as of right; their interests are only to be considered in such a way as to promote the interests of the shareholders of the company.\footnote{D French, S W Mayson, and C L Ryan, \textit{Company Law} (28 edn.; Oxford: Oxford University Press, 2012-2013) at 490.} This means that employees do not
enjoy any significant level of protection; their interests may only serve as an appendage to those of the shareholders.

However, by virtue of the fact that company employees were included for consideration by directors, it is not expected that their interests should be given less consideration than those of the shareholders. However, the Company Law Review (CLR) explained the reason for this approach. The pluralist approach as against the enlightened shareholder value approach was reasoned to be capable of diluting the obligations which the directors owed to shareholders among other things. It would enable directors to frustrate takeovers against the wishes of the shareholders and to distort the operation of the market for corporate control.\textsuperscript{381} It was thought reasonable to give mere recognition to the interests of stakeholders. The pluralist approach recognises the genuine concerns and interests of company shareholders and stakeholders in pursuit of corporate objectives. The objective of this approach is to ensure that the interests of company shareholders or stakeholders are not promoted or enhanced in disregard to the other. This means that they would have an equal claim to the benefits which may accrue from a corporate entity as a going concern. In view of this, the CLR considered that the pluralist approach would not be appropriate in the circumstance, especially with regards to the scope of the directors’ duties. Apparently, directors’ duties were thus codified to provide certainty to the scope of their functions and this was particularly meant to define their roles which are to be directed towards the interests of their shareholders. Thus, the CLR was not prepared to deviate from the underlying objective of the directors’ duties; rather it introduced the enlightened shareholder value which appears to incorporate the interests of company stakeholders including employees into the scope of directors’ duties. It remains to be seen whether

\textsuperscript{381} Note 347 above, at 192.
directors can actually consider the interest of employees in the discharge of their responsibilities to the company and their shareholders.

It may be reasonable to assert that enlightened shareholder approach was never intended for directors to promote the interests of company stakeholders or employees. It can also be reasonably inferred that the interests of stakeholders are to be considered only to the extent that the shareholders’ value are not eroded or possibly to consider the interests of stakeholders to the extent that it actually enhances shareholder value. If the above reasoning does not capture the objective of the CLR in the introduction of the enlightened shareholder value, it will be difficult to support the argument that the purpose for which it was introduced was for the actual enhancement of the interests of the company stakeholders. Having regard to the statutory provision under consideration, these stakeholders do not have the legal right to challenge directors in pursuit of their interests within the company. In light of the fact that employees as stakeholders cannot compel directors to defend their interests, arguably, the enlightened shareholder value -which presently characterises directors’ duty to promote the success of the company- does not seem to serve any useful purpose. There is no indication that directors can slightly enhance the interests of company employees by relying on this duty, particularly when such attempt may conflict with the interests of shareholders. Thus, employees may have to look elsewhere to protect their interest, especially during takeovers.

Meanwhile, in certain circumstances, the duty may not be enforceable against directors by shareholders, if the directors decide to consider employee interests. The duty is to be carried out in the way that the directors consider in good faith would be most likely to promote the success of the company. Arguably, what the directors
consider in good faith can be determined by reference to what a reasonable director acting in the same position would consider. In light of this, a slight amendment of section 172 can be done to require directors to actually consider the interests of employees. Thus, it was rightly suggested that the ‘shackles’ which prevent employees from approaching the courts to protect their interests by reference to the duties of directors to consider employee interests should be reformed to deter frivolous and unthinkable actions by company directors.\textsuperscript{382} One of the areas where ‘frivolous and unthinkable’ actions of directors can be manifested is in corporate takeovers, where employee dismissal can be used to promote needless acquisitions.\textsuperscript{383}

The duty to promote the success of the company becomes the responsibility of the directors of the acquiring company. However, it may appear that the directors of target companies are not entirely excluded from the responsibility of their employees during takeovers. They can incorporate the interests of their employees into the negotiations leading to takeovers. But the extent to which they can protect employee’s interests may be limited to the extent to which the interests of shareholders conflict with the interests of the employees as well as the interests of the corporate management themselves. The possibility of negotiating for the interests of the employees is highly unlikely in view of the fact that the managements do not have the incentive to engage in such negotiations. The higher bid premium which may be sought from the bidder company to enable them gain control and the negotiations for compensation for the management of the target company are impediments to the interests of employees. Demands from the target company to the acquirers that


\textsuperscript{383} See Chapter Six, Section 6.5.
employees should be retained or adequately compensated post-takeovers as part of
the negotiations may encourage the acquirers to demand for a variation of other
aspects of the negotiation.

Specifically, the Takeover Directive appears to incorporate the interests of employees
into takeover arrangements.\textsuperscript{384} The board of the target company is required to give its
opinion on the effects of the bid on the welfare of the employees of the company.
This should also include the acquirer’s strategic plans for the target company and the
repercussions on employment. This opinion is to be published by the board of the
target company apparently for the purpose of raising concerns about the effect of the
bid on the welfare of the employees of the target company. Even though the takeover
directive recognises the need for the interests of company employees to be protected
during takeovers, it is not clear whether the objective of the directive in this regard is
to actually protect the interests of company employees. The objective of the directive
is stated to be for the protection of the interests of holders of securities\textsuperscript{385} and
employees of target companies among other reasons. While the interests of holders
of securities are further strengthened in the directive,\textsuperscript{387} employees do not enjoy the
same protection. The directive may be conceived as a regulation which recognises the
need for protecting the interests of company employees during takeovers without any
actual protection. It is doubtful whether employees can actually protect their interests
during takeovers by reference to the provisions of the directive.

The combined effects of these provisions - the duties of company directors as it
affects employees as contained in the Companies Act and the relevant provisions of

\textsuperscript{384} See EC Takeover Directive art. 9 r 5. Also, the Fair Trading Act, 1973, s. 84, apparently recognises
the need to protect employee interests as part of public interests consideration during mergers.

\textsuperscript{385} Introductory Para (2)

\textsuperscript{386} Introductory Para (17)

\textsuperscript{387} See Article 9 r 2.
the Takeover Directive - may not have any significant effect on the interests of company employees during takeovers in the United Kingdom.

Although, the regulations may have recognised the need to protect company employees during takeovers, the relevant provisions in these regulations do not indicate how this should be achieved. The mere recognition of the need to protect employees would not likely be acted upon by company management. More so, the position of company shareholders as the focal point of the directors’ responsibilities is not shared by other constituent groups such as employees. Thus, it was rightly suggested that shareholder primacy has been further reiterated.\footnote{P L Davies (ed.), \textit{Gower and Davies’ Principles of Modern Company Law} (Ninth edn., London: Sweet & Maxwell, 2012) at 542.} As long as company employees cannot ‘positively’ enforce the protection of their interests by making directors to promote their interests, there appears to be no protection for employees and no justification for the existing provisions which are thought to protect employee interests.

In view of the fact that the framework for takeover regulations and the duties of directors under company law does not provide any protective measure for company employees during takeovers, recourse may be had to employment regulations which are established for the purpose of employment protection. In the United Kingdom, the EC Directive\footnote{European Council, ‘Council Directive on the Approximation of the Laws of the Member States Relating to the Safeguarding of Employees’ Rights in the Event of Transfers of Undertakings, Business or Parts of Undertakings or Business’, 2001/23/EC (European Community, 2001). (Acquired Rights Directive).} for safeguarding employees’ rights in circumstances similar to takeovers has been implemented.\footnote{The Directive has been domesticated in the United Kingdom; ‘The Transfer of Undertakings Protection of Employment Regulations’, (TUPE) CAP 46 (2006).} This regulation is examined in the next section.
4.4.1 The Transfer of Undertakings (Protection of Employment) Regulations (TUPE)

Company employees have not been accorded any significant measure of recognition in the determination of ‘who gets what’ within a company. Although, they make important contributions to corporate development, during takeovers, their recognition was not effectively demonstrated towards the protection of their interests until the introduction of a specific regulatory framework for this purpose.\(^{391}\)

The objective of TUPE is to protect employees in the event of a change of employer where there has been a transfer of a business or undertaking. First, it is made applicable to takeovers by virtue of its scope of application. This includes a transfer of undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person, where there is a transfer of an economic entity.\(^{392}\) Secondly, the effect of its application is to ensure that such transfers do not operate to terminate contracts of employment during takeovers. With regards to contracts of employment which affect the employees and the acquirer, the rights, duties and liabilities which are connected with the contract of employment are deemed to be transferred from the target to the acquirer.\(^{393}\) Where a contract of employment is varied by reasons of the transfer, such variation will be void and of no effects.\(^{394}\) Also, all collective agreements and trade union recognition agreements which had been concluded prior to the transfer are deemed to have effect as if the


\(^{392}\) See Regulation 3(1) (a). The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

\(^{393}\) Regulation 4(2)

\(^{394}\) Regulation 4(4)
transferee were a party to the agreements. However, agreements that are concluded after the transfer may be renegotiated by the incoming employers.\textsuperscript{395}

TUPE appears to fill the needed gap in takeover regulation with regards to company stakeholders particularly as it affects employees. It aims at addressing the uncertainty in relation to the interests of employees which enables managers to dismiss employees post-takeovers. It seeks to ensure that even though the employment contract may not make provisions for all possible outcomes, including takeovers, the interests of employees should not be uncertain; it should not be determined by reference to managerial preferences. This means that TUPE seeks to prevent employees from being dismissed by reason of takeovers.

However, the extent to which it can actually protect employees from dismissal as a result of takeovers is not clear. While the regulation considers dismissal of employees on grounds related to the transfer to an unfair dismissal, the scope of this protection is restricted to such dismissals which are not connected to economic, technical or organisational reasons entailing changes in the workforce.\textsuperscript{396} This means that an employer cannot dismiss employees as a result of a takeover except such dismissal is based on economic, technical or organisational reasons. This exception appears to ‘take away’ the protection which is provided for company employees by the regulation. Employee dismissal as a result of takeovers is largely caused by economic, technical or organisational reasons. The combined company post-takeover may likely carryout a re-organisation, especially where there is duplicity of employee

\textsuperscript{395} Regulations 5 and 6 preserve collective agreements that have been concluded before a transfer. See the amended Regulation 4A, which provides that TUPE does not operate to transfer any rights under collective agreements as long as the provisions of the collective agreement has been agreed after the transfer date and that the transferee (new employer) did not take part in the collective bargaining.

\textsuperscript{396} Regulation 7 (1).
positions. For the purpose of positioning the company towards the implementation of its new objective framework, it has been suggested that divestments may be adopted to reduce costs and enhance the economic value of the corporate entity post-takeover. Also, the costs of acquisitions has often contributed to diversification, which implies that costs would have to be cut through re-organisation for economic reasons, and employees dismissal is one of the ways of achieving this. Hence the objective of this regulation can be undermined because an acquirer can rely on one or more of the exceptions as a reason for staff dismissal post-takeovers to avoid liabilities under the regulation. Also, the pension rights of employees who have been transferred to the new employees are limited or largely excluded.

Unlike other regulatory frameworks, TUPE specifically deals with the rights and interests of company employees during takeovers and it set out to ensure that employees are not unfairly dismissed during takeovers. However, like other regulations, it can hardly protect employees from dismissal arising from takeovers. While other regulatory frameworks merely recognise the need to consider the interests of company employees, this regulation recognises and set out to protect their interests. It is doubtful if it can actually achieve its objective. The exemptions which allow company employees to be dismissed based on economic, organisational or

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400 Regulation 10, TUPE. The regulation may not preserve occupational pension schemes which may be applicable before the takeover occurred, except it is in relation to benefits for old age.

401 Companies Act, s 172 on duties of directors to consider the interests of stakeholders including employees., EU Takeover Directive 2004, Article 9 (5), The UK City Code on Takeovers and Mergers 2013, Rules 24.2 and 25.2.
technical reasons as well as their exclusion from pension-related agreements largely undermine the protective capacity of the regulation.

Clearly, effort has been made to address the uncertainty which characterise employee interests by establishing TUPE. This is to ensure that employees are not dismissed by reasons of takeovers. However, the level of uncertainty has not been effectively addressed by TUPE. Managements can dismiss employees post-takeovers and state that the reasons for the dismissals relate to economic and / or organisational reasons. They can achieve their employment-dismissal objective, which can indirectly influence takeovers, especially costly takeovers. This means that high transaction costs can continue to characterise takeovers, since employees can be dismissed to mitigate the high costs associated with takeovers. The objective of transaction costs economics is to enhance productivity and economic value of transactions, by mitigating costs that are associated with transactions. When the high costs of corporate acquisitions are mitigated, the possibility of gains to acquiring shareholders would be highly likely and the need to dismiss employees post-takeovers can be dispensed with or largely mitigated. This can ensure that managements are prevented from interfering with the actual role of the market for corporate control, leading to the ‘free’ occurrence of synergy and the disciplinary role and preventing or mitigating the occurrence of hubris.

TUPE as an employment regulation has not successful protected the interests of employees in some takeovers that have been concluded in the UK. As long as company managements can wilfully dismiss employees as a result of takeovers, they may influence the role of the takeovers as an important element of the market for
corporate control.\(^{402}\) However, TUPE creates sufficient awareness that takeovers are a threat to employment and regulating managerial roles can promote effective markets.

Table 6 *Effect of Acquisitions on Labour demand (Pre 2006 period)* \(^{403}\)

<table>
<thead>
<tr>
<th>Dependent variable: ln(Employment) (t)</th>
<th>Coefficient z-value</th>
<th>Coefficient z-value</th>
<th>Coefficient z-value</th>
<th>Coefficient z-value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Panel A: GMM estimates for Eq. (2)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ln(Employment) (t - 1)</td>
<td>0.341</td>
<td>0.345</td>
<td>0.341</td>
<td>0.341</td>
</tr>
<tr>
<td>ln(Output) (t)</td>
<td>0.347</td>
<td>0.346</td>
<td>0.347</td>
<td>0.347</td>
</tr>
<tr>
<td>ln(Output) (t - 1)</td>
<td>0.045</td>
<td>0.047</td>
<td>0.045</td>
<td>0.045</td>
</tr>
<tr>
<td>Merger (t)</td>
<td>-0.029</td>
<td>-2.74</td>
<td>-0.022</td>
<td>-1.56</td>
</tr>
<tr>
<td>Divest (t)</td>
<td>-0.050</td>
<td>-6.21</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Merger USA (t)</td>
<td>0.010</td>
<td>0.73</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Merger Europe (t)</td>
<td>-0.100</td>
<td>-5.39</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Divest USA (t)</td>
<td>-0.062</td>
<td>-6.59</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Divest Europe (t)</td>
<td>-0.022</td>
<td>1.46</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Merger USA (t)</td>
<td>0.010</td>
<td>0.75</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Merger UK (t)</td>
<td>-0.124</td>
<td>-4.63</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Merger CEU (t)</td>
<td>-0.079</td>
<td>-3.15</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Divest USA (t)</td>
<td>-0.062</td>
<td>-6.49</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Divest UK (t)</td>
<td>0.013</td>
<td>0.59</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Divest CEU (t)</td>
<td>-0.054</td>
<td>-2.61</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Merger USA (t)</td>
<td>0.010</td>
<td>0.75</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Merger UK (t)</td>
<td>-0.124</td>
<td>-4.63</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Merger Germany (t)</td>
<td>-0.076</td>
<td>-1.79</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Merger CEUwG (t)</td>
<td>-0.081</td>
<td>-2.63</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Divest USA (t)</td>
<td>-0.062</td>
<td>-6.49</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Divest UK (t)</td>
<td>0.013</td>
<td>0.59</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Divest Germany (t)</td>
<td>-0.094</td>
<td>-2.29</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Divest CEUwG (t)</td>
<td>-0.040</td>
<td>1.66</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Panel B: Chi-squared tests of differences in merger and divestiture impact (P-values)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>0.131</td>
<td>0.130</td>
<td>0.134</td>
<td>0.134</td>
</tr>
<tr>
<td></td>
<td>0.41</td>
<td>0.45</td>
<td>0.42</td>
<td>0.47</td>
</tr>
<tr>
<td></td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
</tr>
<tr>
<td></td>
<td>0.77</td>
<td>0.79</td>
<td>0.75</td>
<td>0.68</td>
</tr>
</tbody>
</table>

*Table 6* shows that acquisitions in the UK can reduce the need for labour demand by 12.4%. *z-value at column 7 is (12.4% z=4.63).* (the data and its result pre-dates 2006. *Table 6* indicates the position of employees before the 2006 amendment of TUPE. However, post- 2006 period does not indicate that employees are better off than they

\(^{402}\) See Chapter Six, section 6.5 and section 6.4.2 below.

were in the pre-2006 period. Kraft-Cadbury takeover led to the disengagement of over 400 employees of Cadbury, after the closure of Somerdale plant, this occurred post 2006. Also, the HP- Autonomy takeover employment casualties are waiting to happen, with about 27,000 employees short-term planned dismissals. The number of United Kingdom employees that will be affected has not been confirmed. Also, the Pfizer-AstraZeneca proposed takeover appeared to confirm job losses, even during negotiation stages. Since there appear to be no much difference between the analysis in table 6 and post 2006 period, it may be argued that employees in the United Kingdom may not be actually protected by TUPE. These examples provide compelling reasons for a more effective employment protection.

4.5 Conclusion

The effect of corporate takeovers on company shareholders and other corporate constituents is largely a function of the regulatory framework which governs takeovers. The regulatory framework determines the extent to which the interests of corporate constituents are promoted during takeovers. In the United Kingdom, the development of takeover regulations has been directed towards achieving this purpose, amongst other reasons. In light of this, this chapter sought an examination of the regulatory framework for takeovers in the United Kingdom with particular focus on the extent to which the interests of company shareholders and employees are protected.

406 See Chapter Seven below, note 623.
Takeover regulation in the United Kingdom emerged as a result of the need to limit the domineering influence of corporate management on takeovers. This was identified following the examination of the historical development of takeovers. Also, it was observed that the emergence of takeover regulation was mainly directed at protecting the interests of company shareholders, since the regulation is aimed at empowering shareholders to make independent decisions whether to accept or reject a takeover bid. This is generally meant to ensure that the property rights of shareholders are protected, to ensure that shareholders determine how control over their property rights in the shares can be exercised.

Although the emergence and the continuous development of takeover regulations tend to promote shareholder value, it remains to be seen whether it has actually achieved this purpose. This is in view of the fact that management may still be able to assert their influence over takeovers with a view towards determining the outcome of takeover bids. Particularly, it was revealed that certain pre-bid defences may be adopted by management to achieve this purpose. It emerged that shareholders of the acquiring companies are hardly protected from managerial excesses. This includes decisions to engage in acquisitions which may not show any reasonable prospect of enhancing the economic value of shareholders particularly and the company in general. It was observed that this problem can persist because the current takeover regulation was designed specifically to protect the interests of the shareholders of the target companies.407

The derivative action procedure and the option of personal claims by shareholders which were briefly examined may not actually provide remedies to shareholders of

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acquiring companies. Shareholders of acquiring companies are only generally protected in very restricted circumstances. Enhanced economic value of shareholders of acquiring companies may be dependent on the discretion of company managements.

Further, it was revealed that the importance of employment protection during takeovers have been recognised by various regulations. However, the extent to which employees are actually protected was shown to be doubtful.

Employee interests cannot be protected by general regulations.\textsuperscript{408} Thus, the view that directors should be required to genuinely consider employee interests was argued to be important, especially in light of unproductive acquisitions that can be supported by large-scale employee dismissals. It was also contended that employee interests appears to be protected by TUPE, but the extent to which they are actually protected by TUPE was identified as ‘inconclusive’.

The main conflicts which occur during takeovers are among company management, shareholders and employees. While takeover regulation was envisaged to address these problems, it may not have actually achieved the desired objective. Although the current regulatory framework is not actually a perfect solution to the takeover problems of conflict of interests, it is expected that future developments in the area of takeover regulation would address these problems. Also, it is expected that employees’ protection during takeovers will be given a more meaningful effect when the regulation for that purpose is reviewed.

The establishment of the UK Takeover Panel was meant to ensure that these challenges are confronted. Largely, the Takeover Panel has been constituted in a way

\textsuperscript{408} Such as \textit{Companies Act 2006, Takeover Code and the EU Takeover Directive.}
that would ensure that the objective of protecting shareholder interests is achieved. From the composition of the panel, it can be observed that regard is had to major interest groups, including those with expertise in takeovers, members from the securities market, industry, commerce and major financial and business groups. These represent the informal institutions that are relevant towards the effective actualisation of the objectives of the Takeover Panel as far as the UK is concerned. This implies that the establishment of the takeover regulations in the UK had regard to the peculiar factors that can influence the regulatory functions.  

The culture and mentality behind the legal text are important considerations that can influence the creation and implementation of legal institutions as envisaged by the hermeneutical approach to comparative law and the new institutional economics. Hence, the implementation of the Takeover Codes that are developed by the Takeover Panel, have been largely successful, especially with regards to its objectives.

The development of takeover regulation in the United Kingdom as it affects company shareholders and employees, continue to evolve. From the periods of early development of takeover to recent times, many improvements have been made to protect this vulnerable group of corporate constituents. This shows that there is a possibility of a greater level of protection for this group as takeovers develops further in the United Kingdom. In the next chapter, the takeover regulatory framework in Nigeria is examined.

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409 See particularly Chapter Six, section 6.2, *Figure 10* below.
410 See Chapter One, section 1.6 above.
411 The new institutional economics is not only concerned with the creation of institutions, it is also concerned with how the institutions are created. See Chapter Two, section 2.4 above.
CHAPTER FIVE

5. TAKEOVER REGULATION IN NIGERIA

5.1 Introduction

This chapter evaluates corporate takeovers in Nigeria. The regulatory framework which governs takeovers as it affects company shareholders and employees is examined.

The chapter is divided into six sections. In section two, the historical development of takeover regulation in Nigeria is examined. This includes an exposition of the emergence of the form of corporate takeovers in Nigeria, the development of takeover regulations, as well as the factors which influenced the developments. Section three reviews the current takeover regulatory measures. This is approached first from the general regulatory framework for takeovers in Nigeria. Afterwards, the section examines takeover regulation as it affects shareholders of target companies and shareholders of acquiring companies respectively. The extent to which employees are protected from disengagement during takeovers is examined in section four. Section five illustrates the justification for protecting the interests of shareholders and employees particularly in Nigeria. The chapter is concluded in section six.

5.2 The Historical Development of Takeover Regulation in Nigeria

The first attempt at business reconstruction in Nigeria was made in 1982, with the first successful reconstruction occurring in 1983 between AG Leventis Company Ltd

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and Leventis Stores Ltd.\textsuperscript{414} After the successful combination of these companies, corporate restructuring in Nigeria became a recurring event. The term that has been used to describe successfully concluded mergers and acquisitions in Nigeria is ‘business combination’. Although the businesses may have been combined through mergers or acquisitions, the distinction between mergers and acquisitions has not been clearly made by the list of business combination. Mergers refer to the amalgamation of the undertakings or any part of the undertakings of two or more companies.\textsuperscript{415} A takeover is the acquisition by one company of the sufficient shares in another company to give control to the acquiring company.\textsuperscript{416} This clarification is necessary in view of the fact that the statistics of takeovers and mergers in Nigeria that have been published by the Securities and Exchange Commission\textsuperscript{417} are headed; ‘business combination’.\textsuperscript{418} Mergers and acquisitions have been generally referred to as business combinations partly because some of the combinations were concluded by exchange of shares. Some were partial acquisitions’ rather than ‘full acquisitions.\textsuperscript{419} The acquisitions were generally ‘friendly’ and the actual mergers were included in the statistical table of corporate reconstruction that have been recorded by the Securities and Exchange Commission (SEC). The description of the companies that were

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\textsuperscript{414} Ibid.
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\textsuperscript{416} ISA, 2007, s. 117. It is simply the purchase of one company by another., F Agunbiade, ‘Nigeria’ in D Campbell (ed), \textit{Mergers and Acquisitions in North America, Latin America, Asia and the Pacific: Selected Issues and Jurisdictions} (Netherlands, Kluwer Law International 2011) at 395.
\end{flushright}

\begin{flushright}
\textsuperscript{417} The Securities and Exchange Commission (SEC) is responsible for regulating securities trading and corporate restructuring, including mergers and takeovers. See the ISA s. 13 (p).
\end{flushright}

\begin{flushright}
\textsuperscript{418} See Appendix 1 for a list of mergers and acquisitions in Nigeria between 1983 and 2010 which has been described as ‘business combinations’.
\end{flushright}

\begin{flushright}
\textsuperscript{419} Partial acquisitions require an acquiring company to acquire controlling interests of the shares of the target company, usually above 50% but less than 100%. Full acquisition occurs where the acquiring company buys the entire shares of the target company and obtain 100% controlling interests. See S F Akinbuli and I Kelilume, ‘The Effects of Mergers and Acquisition on Corporate Growth and Profitability: Evidence from Nigeria’, \textit{Global Journal of Business Research}, 7/1 (2013), 43-58 at 48.
\end{flushright}
involved in the acquisitions as ‘acquiring’ and ‘target’ companies respectively, confirms that most of the transactions were actually acquisitions - takeovers -. Where a transaction is clearly a merger, it is indicated as such.\textsuperscript{420}

Corporate acquisitions in Nigeria have played a prominent role in the increase of private equity ownership. While the first acquisition was followed with subsequent acquisitions, the trend of corporate acquisitions in Nigeria remained significantly low until mid-2005 when corporate restructuring became prominent. This is indicated in Table 7 and Figure 7 below.\textsuperscript{421} The banking sector was particularly responsible for the sudden upward trend in corporate acquisitions, apparently in response to the policy of the Central Bank of Nigeria on capital restructuring.\textsuperscript{422} Acquisitions and corporate restructuring in other sectors of the economy continued after the reform in the banking sector. Since 2005, there has been a steady increase in corporate acquisitions in Nigeria.


\textsuperscript{421} See generally Appendix I. Corporate acquisitions were prominent in Nigeria from 2005 to 2010.

\textsuperscript{422} In an attempt to strengthen banking operation and to safeguard depositors’ fund, the Central Bank of Nigeria (CBN) introduced a policy that required banks to shore up their paid up capital to a minimum of N25 billion (naira) by 31\textsuperscript{st} December 2005. Some banks could not meet the minimum requirement; these banks became acquired or merged with other banks to prevent a revocation of their licences. See appendix I which shows the dominant presence of the banking sector in the list of acquisitions in Nigeria from 2005.
<table>
<thead>
<tr>
<th>S/N</th>
<th>YEAR</th>
<th>NUMBER OF APPROVALS GRANTED</th>
<th>MODE OF SETTLEMENT</th>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>1983</td>
<td>1</td>
<td>Exchange of Shares</td>
</tr>
<tr>
<td>2</td>
<td>1984</td>
<td>1</td>
<td>Exchange of Shares</td>
</tr>
<tr>
<td>3</td>
<td>1985</td>
<td>7</td>
<td>Cash / Exchange of Shares</td>
</tr>
<tr>
<td>4</td>
<td>1987</td>
<td>2</td>
<td>Exchange of Shares</td>
</tr>
<tr>
<td>5</td>
<td>1988</td>
<td>2</td>
<td>Exchange of Shares</td>
</tr>
<tr>
<td>6</td>
<td>1990</td>
<td>3</td>
<td>Cash</td>
</tr>
<tr>
<td>7</td>
<td>1991</td>
<td>2</td>
<td>Cash / Exchange of Shares</td>
</tr>
<tr>
<td>9</td>
<td>1992</td>
<td>3</td>
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<tr>
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<td>1993</td>
<td>5</td>
<td>Cash / Exchange of Shares</td>
</tr>
<tr>
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<td>1994</td>
<td>1</td>
<td>Exchange of Shares</td>
</tr>
<tr>
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<td>1995</td>
<td>3</td>
<td>Cash / Exchange of Shares</td>
</tr>
<tr>
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<td>1996</td>
<td>4</td>
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<td>1997</td>
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</tr>
<tr>
<td>15</td>
<td>1998</td>
<td>1</td>
<td>Cash</td>
</tr>
<tr>
<td>16</td>
<td>1999</td>
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</tr>
<tr>
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<td>2000</td>
<td>2</td>
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<td>18</td>
<td>2001</td>
<td>3</td>
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<td>2</td>
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</tr>
<tr>
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<tr>
<td>23</td>
<td>2007</td>
<td>11</td>
<td>Cash / Exchange of Shares</td>
</tr>
<tr>
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<td>2008</td>
<td>11</td>
<td>Cash / Exchange of Shares</td>
</tr>
<tr>
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</tr>
<tr>
<td>26</td>
<td>2010</td>
<td>5</td>
<td>Cash / Exchange of Shares</td>
</tr>
</tbody>
</table>

Table 7: Statistics of Yearly Rate of Corporate Acquisition in Nigeria, 1983-2010
Table 7 shows that corporate acquisitions became more prominent in Nigeria from 2005. Table 7 is derived from the list of completed acquisitions in Nigeria between 1983 and 2010 (excluding mergers), from the Securities and Exchange Commission. See appendix 1.423

Source: Author

Figure 7 Percentage Increase in Corporate Acquisition in Nigeria (1983 2010)

From the data in Table 7, there has been a progressive increase in corporate acquisitions in Nigeria. Figure 7 identifies the level of percentage increase.

\begin{itemize}
  \item \textbf{1st Period} \hspace{10pt} 1983 – 2000 (17 yr. period) 42 acquisitions
  \item \textbf{2nd Period} \hspace{10pt} 2001 – 2010 (9 yr. period) 78 acquisitions
  \item Total: 120 acquisitions
\end{itemize}

Although the banking sector accounts for the highest data on corporate acquisition in Nigeria, other sectors of the Nigerian economy are also involved in takeovers.

423 Appendix 1 contains the full list of corporate acquisitions in Nigeria from 1983 to 2010.
Before the reform of the banking sector, corporate restructuring which was mainly characterised by mergers and acquisitions entered a new phase with the introduction of a single statute for the regulation of mergers and acquisitions - the Investments and Securities Act, (ISA). The introduction of the ISA and the banking reform exercise contributed to an increase in mergers and acquisitions in Nigeria. Meanwhile, prior to the introduction of the ISA 1999, takeovers have been partly regulated by Military Decrees. The move towards the effective regulation of company securities which affects the transfer of shares started with the promulgation of the *Securities and Exchange Commission Decree*. The establishment of this Decree led the Securities and Exchange Commission (SEC) to become apparently independent of the Central Bank of Nigeria, but it remained mainly funded by the Central Bank. The objective towards promoting investor confidence in the capital market, especially with regards to encouraging private equity-ownership and investor protection led to the re-enactment of the SEC Decree. Through the re-enacted Decree, the functions of the SEC were expanded to include the powers to review and approve corporate reconstructions, including mergers, acquisitions and other forms of business combinations.

Following the establishment of the Companies and Allied Matters Act (CAMA), the functions of the SEC, including the administration and regulations of mergers and

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424 *The Investment and Securities Act, 45 (1999).*
425 They were partly regulated because the regulatory mechanisms that operated at that time were Military Decrees. The Decrees left large aspects of takeovers unregulated, hence corporate restructuring through takeovers were contractually concluded between parties.
426 Nigeria was substantially under Military Rule prior to 1999.
427 *Securities and Exchange Commission Decree, 71 (1979).* The Capital Issues Commission was previously responsible for regulating the capital market activities. This administrative body was not independent because it was essentially an appendage of the Central Bank of Nigeria. Hence this apparently did not allow for an effective regulation of the capital market.
428 It was re-enacted as *Securities and Exchange Commission Decree, 29 (1988).*
429 1989, came into effect in 1990 as *Companies and Allied Matters Act, CAP 59 (1990).* Now CAP. C20 L.F.N. 2004 PART 1 (CAMA). The Act was established to regulate the incorporation of
acquisitions were transferred to the CAMA. However, the role of the SEC was preserved by the Act. After the expansion of the functions of the SEC to include powers to review and approve mergers and acquisitions, as well as the privatisation and commercialisation policy of the government, there became an increase in share listing in the Nigerian Stock Exchange. More companies sought listed status as private sector shareholding increased. Thus, it became imperative to strengthen the integrity of the capital market activity in Nigeria.

In response to this challenge, the Investment and Securities Act (ISA)\(^430\) was enacted. The Act effectively repealed Part XVII (17) of the CAMA that regulates mergers and acquisitions. It further preserved the role of the SEC as the administrative and regulatory authority. In furtherance of the objective of promoting investors’ confidence, the ISA was amended to include - in its objectives - the maintenance of fair, efficient and a transparent market. Pursuance to the ISA, the SEC was empowered to make Rules and Regulations (the SEC Rules) from time to time to provide administrative control over mergers and acquisitions in Nigeria. Thus, mergers and acquisitions in Nigeria are currently regulated by the combined effects of the ISA and the SEC Rules.\(^431\) Although the ISA and the SEC Rules are the principal regulatory mechanisms for corporate takeovers in Nigeria, the type of companies which are involved in a takeover may require that certain subsidiary legislative provisions should be complied with.\(^432\)

\[^{430}\text{The Investment and Securities Act, No. 45 of 1999 (ISA). The establishment of the Act was preceded by a comprehensive review of the capital market in 1996 by a Review Panel set up for that purpose. (a seven-man Panel headed by Dennis Odife).}\]

\[^{431}\text{The SEC Rules 2013 are additional Rules and Regulations which may be made by the SEC from time to time, pursuance to the ISA 2007 section 313.}\]

\[^{432}\text{E.g. The Banks and Other Financial Institutions Act (BOFIA), Cap B3 (2004). See s 7, which requires the authorisation of the Governor of the Central Bank for the acquisition or mergers of banks.}\]
The historical development of takeover regulations in Nigeria shows that there was the need to encourage more participation in the capital market by ensuring that the property rights of investors are protected, to promote investors’ confidence. With the introduction of the ISA, the framework for protecting and encouraging private equity investment emerged, and the important function of the market for corporate control was thus strengthened. In furtherance of this, the objective of the ISA is stated to ensure the protection of investors, maintain fair, efficient and transparent market and for the reduction of systemic risks.\textsuperscript{433} The maintenance of fair and efficient market and the protection of investors are recognised as world’s best practice in capital market operations and securities trading and this is what the Nigeria capital market sought to achieve with the Act. Whether or not the ISA that was established for that purpose has achieved or is capable of achieving this objective remains to be seen.

Also, from the historical development of takeovers in Nigeria, it can be observed that the objective of takeover regulation in the UK in Chapter Four above is similar to the regulatory objective for takeovers in Nigeria. Both jurisdictions seek to ensure that investors have confidence in the securities market, by ensuring that the property rights of investors are protected. This implies that the challenges of takeovers with respect to investors’ interests can be present in both jurisdictions. This is because of the effects of takeovers and its specific functions irrespective of the jurisdiction where takeovers occur.\textsuperscript{434}

\textsuperscript{433} ISA 2007, see introductory title.
\textsuperscript{434} See the brief discussion on the functional approach to comparative law. Chapter One, section 1.6 (a). See also the regulatory responses to takeover challenges in the UK and Nigeria. Chapter Six, section 6.2, Figure 9 below.
The next section evaluates the extent to which company shareholders are protected during takeovers. This is examined from the perspectives of target and acquiring companies.

5.3 Takeover Regulation and Shareholder Protection

Takeover regulation is capable of altering the default position during takeovers, especially with regards to the interests of company constituents. By virtue of their positions, company management -managers and directors- have the capacity to protect their interests.\(^{435}\) Apart from the fact that managements may oppose takeover bids, they may be compensated for loss of office post-takeovers. In light of the historical development of takeovers in the United Kingdom,\(^{436}\) takeover regulation became imperative to restrict the domineering influence of corporate management. The challenges of takeovers that were identified in the United Kingdom can be present in other jurisdictions, since company managements manage the business of companies irrespective of the jurisdictions where a company is registered. Thus, the similarity of takeover challenges by reference to the functional approach to comparative law is based mainly on the role of managers and the interests that are affected in corporate entities in different jurisdictions. This means that the extent to which the role of managements can be restrained largely depends on the regulatory control of managerial functions in each jurisdiction. However, since different jurisdictions have peculiar local circumstances that may influence the development and implementation of rules, it means that the development of takeover regulations

\(^{435}\) This can be done through employment contracts and contracts which are concluded as part of service contract of directors and senior managements. See generally J C Hartzell, E Ofek, and D Yermack, 'What's in for Me? CEOs Whose Firms Are Acquired', *The Review of Financial Studies*, 17/1 (2004), 37-61.

\(^{436}\) This was examined in Chapter Four.
should ideally be done by reference to the peculiar mentalities and culture that are present in different jurisdictions as indicated by the hermeneutical approach to comparative law, as briefly examined in Chapter One above.

Usually, a takeover involves the combination of assets of the acquiring and target companies. When this occurs, the debt obligations of the acquiring and target companies become the responsibility of the combined company post-takeovers. The ability of the combined company to meet its debt obligations is likely to be enhanced since the capital of the combined company would be higher than the capital of the separate companies based on financial synergies.437 Since the management of either the target company or the acquiring company are unlikely to be able to change this default position, creditors become largely protected from the perils of takeovers. In light of these, the interests of company management and creditors are apparently protected during takeovers. Thus, in the absence of an effective institutional framework to regulate and administer takeovers, the interests of company shareholders, particularly the property rights in their shares can be undermined. Also, employees can be unjustifiably dismissed to promote costly takeovers which may not actually enhance shareholder and corporate value ultimately. This can undermine the synergistic and disciplinary role of takeovers and managerial hubris can thrive.

It was suggested that regulations should be designed to protect investors in companies and ensure that they are not divested of their interests without recourse to rules of fairness and equity. Also, prospective yield on their investment should not be endangered by burdensome affiliations.438

One of the functions of takeover regulation is to restrict the role of company management during takeovers, to protect the interests of investors.\textsuperscript{439} This is particularly important in view of the possibility that there could be marginal positive impact of acquisitions on shareholder value. Acquisitions have not clearly enhanced shareholder value in Nigeria. This is indicated in some of the findings of the relationship between acquisitions and shareholder value.\textsuperscript{440} One of these results amongst other findings is illustrated in Table 8 below.

\textbf{Table 8 Value of Shareholders (in Percentage) in six large banks in Nigeria (1998 – 2012)}\textsuperscript{441}

<table>
<thead>
<tr>
<th>Year</th>
<th>Zenith</th>
<th>First</th>
<th>Access</th>
<th>UBA</th>
<th>Diamond</th>
<th>Skye</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998</td>
<td>78.6825</td>
<td>18.9552</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1999</td>
<td>39.5383</td>
<td>26.9033</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2000</td>
<td>54.329</td>
<td>29.4293</td>
<td>15.4394</td>
<td></td>
<td>43.3206</td>
<td>34.4503</td>
</tr>
<tr>
<td>2001</td>
<td>55.95</td>
<td>27.1767</td>
<td>8.4875</td>
<td>13.9958</td>
<td>41.3607</td>
<td></td>
</tr>
<tr>
<td>2003</td>
<td>34.9668</td>
<td>40.7687</td>
<td>23.5518</td>
<td>22.0119</td>
<td>6.7695</td>
<td>24.5944</td>
</tr>
<tr>
<td>2006</td>
<td>11.5458</td>
<td>23.9572</td>
<td>2.5507</td>
<td>23.7973</td>
<td>-541.872</td>
<td>7.6661</td>
</tr>
<tr>
<td>2009</td>
<td>7.9589</td>
<td>0.8399</td>
<td>-1.173</td>
<td>1.3084</td>
<td>-7.707</td>
<td>0.00908</td>
</tr>
<tr>
<td>2011</td>
<td>12.4561</td>
<td>5.3099</td>
<td>7.549</td>
<td>-0.761</td>
<td>-19.718</td>
<td>1.2271</td>
</tr>
</tbody>
</table>

\textsuperscript{439} The general role of company management is to run the company for the benefit of the investors among others. This role applies in relation to takeovers.


Table 8 shows a decline in shareholder value, measured as ‘percentage yield in profit of invested shareholder funds in six selected large banks that were involved in acquisitions in Nigeria. It shows the pre-acquisition periods (late 1990s to early years 2000s and post-acquisition periods mid 2000s till 2012).

The losses to acquiring shareholders in Nigeria as indicated in table 8 is similar to the decline in acquiring company performance in the UK in figure 5 above. Losses to shareholder value in both jurisdictions occurred at the time that corporate acquisitions were in large volumes in both jurisdictions. The result of figure 5 was based on acquisitions between 1990 and 1998 in the UK. 1998 was within the period of high level of acquisitions in the UK, - as indicated in figures 3 and 4 above -. Also, the losses indicated in table 8 were recorded at the time when acquisitions were at a high level in Nigeria, i.e. 2005-2012, which was covered in the study. These show the similarities of takeover challenges and it indicates that they are not limited to any particular jurisdiction.

The decision whether or not to accept a takeover bid and the decision to make acquisitions equally affect the interests of shareholders of acquiring and target companies. Despite the results of the findings that are indicated in Table 8 above, the role of managements with respect to acquiring companies, does not appear to have been actually challenged in Nigeria. 443

5.3.1 Shareholders of Target Companies

The disciplinary effect of takeovers can be activated when shareholders of target companies dispose their shares in a takeovers bid, to transfer corporate control to the acquiring company. It gives shareholders the opportunity to remove their

442 See ibid.
443 See section 5.3.2 below.
managements for failing to enhance the value of their investments. Since takeovers, including its disciplinary effects are important aspects of the market for corporate control, it implies that the effective functioning of the market through its disciplinary role is largely dependent on the extent to which the property rights of shareholders can be freely exercised without managerial intervention. While it is not in dispute that shareholders are at liberty to exercise control over their property rights in shares, the challenges caused by agency conflicts can undermine the extent to which this can be possible.

The failure on the part of the management of target companies to enhance corporate value leading to a takeover was suggested to be influenced by clumsy, deficient and weak internal and board-level control mechanisms. This suggests that a company can become a target for takeover when the company’s management-board fails to actually enhance the economic value of their companies, which invariably makes the incumbent managers to be dismissed post-takeovers.

A failed takeover bid may as well serve the disciplinary function of takeovers, since previous takeover attempt(s) would have exposed the company as a takeover target. Thus, company managements need to prevent their companies from remaining an easy target of a takeover, since there may be the possibility of future bids where an earlier bid was unsuccessful. As such, threat of a takeover could make managements to enhance their performance and service delivery towards increasing the value of their companies.

The development of a regulatory framework for takeovers in Nigeria is an indication of the need to promote an efficient capital market in Nigeria. One of the objectives of the ISA is to provide a platform for the smooth operation of the functions of the market for corporate control as exhibited through takeovers. The protection of investors, including the shareholders of companies which are the target of a takeover is an important step towards the achievement of this objective.

The extent to which this objective can actually be achieved is dependent on the relevant provisions of the ISA that are capable of activating investor protection and the maintenance of a fair and transparent market. Under the ISA,

\[\text{Where } \text{... a bid under a takeover bid is dispatched to each of the directors of an offeree company, the directors shall send a directors’ circular to each shareholder of the offeree company and to the Commission at least seven days before the date on which the takeover bid...is to take effect.}^{448}\]

While it may be expected that the shareholders of a target company may reserve the right to accept or reject a bid from a bidder, the opportunity to exercise this independent decision timeously is capable of being undermined by the role of the directors of the target company. This may be observed from the provisions of the ISA on directors’ circular in relation to a takeover bid. It provides that;

\[\text{Unless the directors of an offeree (target) company send a director’s circular as required by subsection (1) of this section within ten days of the date of a takeover bid, the directors shall forthwith notify the shareholders and the commission that the directors’ circular shall be sent to them and may}\]

\[^{448}\text{ISA 2007 s. 140 (1).}\]
recommend that no shares be tendered pursuant to the takeover bid until the directors’ circular is sent.\textsuperscript{449}

The directors of a target company could actually delay the directors’ circular from getting to their shareholders and the shareholders cannot actually make a decision on the bid without receiving the circular as required by the ISA. The effect of the directors’ circular is to provide ‘advisory role’ to the shareholders in the determination of whether shareholders should accept a bid, and this is determined by reference to the recommendations of the majority of the directors.\textsuperscript{450} This may not generally be in the interests of the shareholders.

First, since shareholders cannot generally ignore the recommendations and make a decision on a bid before the recommendations are received, they could wait until the directors’ recommendations have been received and they may ignore the recommendations to accept or reject the bid. However, the opportunity to act quickly may not be available to shareholders since directors could delay their recommendation while either making plans to frustrate a bid,\textsuperscript{451} or they may delay the recommendations while they make plans towards negotiating their compensation package. Secondly, since managements are not required to provide additional information to indicate the reasons for their recommendations, the independent input of shareholders can be undermined.\textsuperscript{452}

\textsuperscript{449} ISA 2007 s. 140 (2).
\textsuperscript{450} ISA 2007 s. 140 (5).
\textsuperscript{452} If it is envisaged by the ISA that the shareholders can independently make a decision whether or not to accept a takeover bid, the following should be considered; First, it should not be a compulsory requirement for the shareholders to wait for the recommendations of the directors before they can make a decision on a bid. Secondly, if the ISA intend the directors to use their managerial role to provide expert opinion ‘for the interests of the shareholders’ through their recommendations that is to be contained in the circular, then it is important that the circular should contain detailed information which informed the directors’ recommendations.
The ISA refers to the contents of the directors’ circular as a ‘recommendation’ to shareholders whether they should accept or reject a bid, the directors are not required to give further information that contain the reasons for their recommendations.

If the ISA intends that company shareholders should make decisions on a bid independently of the influence of the company management, it is expected that it would be clearly provided that the directors’ circular should contain the relevant information as to the reasons for their recommendations that is contained in their circular. This approach applies in relation to takeovers in the UK. Company managements are required to state the reasons for their decisions, which is to be assessed by shareholders while they make their independent decisions on a bid.453

This information can be assessed by the shareholders so that they can form their independent opinions with regards to the bid. Since directors are not mandated to provide further information on the reasons for their recommendation, it is doubtful whether the directors’ recommendation would be useful to the shareholders as a guide towards making their own independent decisions.454 Lack of the requirement that directors’ circular on a bid should include the reasons for the recommendation appears to suggest that the shareholders should accept - or reject - the recommendations without questions. Since shareholders - except institutional shareholders - may not have the required expertise to effectively determine the extent to which a bid would be beneficial to them, they may not be able to effectively assess managerial recommendations.

453 Detailed information that informed directors’ recommendation is required in the UK when a takeover bid is made. See EU Takeover Directive 2004 Introductory Paragraph 17, UK City Code on Takeovers and Mergers 2013, Rule 3, 3.1.
Meanwhile, the requirement is different when a director opposes the majority recommendation of the board as contained in the directors’ circular or where such director opposes the bid.\textsuperscript{455} The particular director who disagrees with the board as to whether a takeover bid should be accepted or not, is required to state the reasons for opposing the majority decision of the board. This is commendable since it enables the company shareholders to identify the reasons for such disagreement. It can be reasonably observed that the objective of this particular provision is to ensure that a dissenting director states the purpose for which his or her opinion is given. This particular provision may not actually achieve much objective for shareholders. The official directors’ circular that is to be sent to shareholders is required to be approved by the directors, and it is meant to contain the recommendations of the majority of the directors.\textsuperscript{456} It is not required to include the reasons for the majority recommendations and without this; shareholders may not have the opportunity to assess the reasons for the recommendations in the circular and the reasons for the dissenting opinion(s).

Also, it is presumed that the directors are to make their recommendations in the circular in support of, or in opposition to a bid by reference to whether the bid is advantageous to the shareholders. It is not clear whether the SEC can determine the extent to which the directors’ discretion has been exercised in favour of the shareholders. In view of the threats that takeovers pose to managerial positions, the possibility of conflict of interests between managements and shareholders is highly likely in takeovers. This is the main reason that shareholders are required to make independent decision on a bid, to ensure that they determine how the property rights in their investments are exercised. Shareholders remain the beneficial owners of the shares and they retain the property rights to sell or hold on to their shares when a

\textsuperscript{455} ISA 2007, s. 140 (4).
\textsuperscript{456} See ISA 2007, s 140 (5).
takeover bid is made. This right may be eroded if managerial discretion is not exercised in favour of their shareholders. Managements may not be able to compel shareholders to sell their shares in support of any bidder. However, they may frustrate a takeover bid since they play a significant role in a takeover process, especially when a majority of the shareholders are willing to accept a bid.

It has been suggested that the decisions that are made by managements during takeovers should be considered as forming part of the usual investment decisions that managements can make. This includes the role of the directors in considering the legality of the takeover process as well as the interests of other corporate constituents. In view of these, it was generally contended that it is not reasonable to remove the decision on a takeover bid from the business judgement of directors.

From the foregoing, the view that company management should not be challenged in their responsibility in making investment decision appears reasonable, especially in relation to their managerial expertise. However, the responsibility to make investment decisions during takeovers may not put managements in a position to actually decide whether a takeover bid should be accepted or not.

This was classically illustrated by Lord Wilberforce as follows:

“Just as it is established that directors, within their management powers, may take decisions against the wishes of the majority of shareholders, and indeed that the majority of shareholders cannot control them in the exercise of these powers while they remain in office... so it must be unconstitutional for directors to use their fiduciary powers over the shares in the company purely

457 See M Lipton, 'Takeover Bids in the Target's Boardroom', The Business Lawyer, 35 (1979), 101-34 at 113-120.
458 Ibid. at 118-119.
459 Ibid. at 115. It is also suggested that where shareholders are not satisfied by the decisions of management, they may exercise the option of removing them from their positions. See ibid. at 116.
460 Howard Smith Ltd v Ampol Petroleum Ltd. [1974] 1 All E.R. 1126 at 1135-6 (H.L.).
for the purpose of destroying an existing majority, or creating a new majority which did not previously exist. To do so is to interfere with that element of the company's constitution which is separate from and set against their powers.... The right to dispose of shares at a given price is essentially an individual right to be exercised on individual decision and on which a majority, in the absence of oppression or similar impropriety, is entitled to prevail. Directors are of course entitled to offer advice, and bound to supply information, relevant to the making of such a decision, but to use their fiduciary power solely for the purpose of shifting the power to decide to whom and at what price shares are to be sold cannot be related to any purpose for which the power over the share capital was conferred on them.”

It has been suggested that the interests of the company shareholders should be the primary concern of target management and that the shareholders should not be hindered by the actions of the management in deciding whether to accept a bid. 461 Also, shareholders should be able to determine whether or not they want to sell their shares as well as decide who runs the company free from the influence of the directors. 462 Negotiations leading to a takeover are part of their responsibilities as managements and unless their role during takeovers is specifically restricted, managements will remain very influential in the determination of a takeover bid. This default position can encourage corporate managements to enhance their private benefit since they wield enormous influence in their companies. This can effectively undermine the role of managements as agents of the shareholders, on whose interests the managements are expected to act. Thus, as rightly observed, it is desirable to

reduce the private benefit of control to protect investors and promote market efficiency.463

This default position seems to be applicable in Nigeria. The role of target management remains important in the takeover process.464 This appears to conflict with one of the objectives of the ISA, which is stated to include the protection of investors and to strengthen market efficiency in Nigeria. While this objective is similar to the takeover regulatory objective in the UK, the actual regulatory functions in both jurisdictions are not actually similar. The similarity of the objectives in both jurisdictions is clearly informed by the challenges caused by the agency conflict of interests between managements and shareholders, which the new institutional economics seeks to address. However, the regulation of takeovers as it affects shareholders of target companies appear not to have actually connected with the objectives of the regulatory framework for takeovers in Nigeria which is meant to protect investors amongst other reasons. This means that the scope of the comparative similarities of takeover regulations in the UK and Nigeria with respect to target shareholders protection is limited to the similarity of the problems.465 For example, while the UK has made efforts towards ensuring that target shareholders are protected from conflict of interests through the non-frustration rule, similar effort has not been made in Nigeria.

The extent to which shareholders of acquiring companies are protected during takeovers is examined next.

465 See Chapter One, section 1.6 (a) above, on the functional approach to comparative law. See also Chapter Six, section 6.2 below.
5.3.2 Shareholders of Acquiring Companies

Generally, takeovers affect the interests of company shareholders, but the extent to which they may be considered to add value or cause losses to shareholders cannot be determined by a general reference to ‘company shareholders’. To clearly determine *ex post* effects of takeovers on company shareholder value, they must be identified as shareholders of the target or acquiring companies. Lack of gains which effectively means losses to the shareholders of acquiring companies during takeovers may suggest that managements have not been cautious in the discharge of their duties.\(^{466}\) It may also show that takeovers reflect the decisions and motives of the management of the acquiring company, who may pursue acquisitions because they consider their company to be superior to the target company.\(^ {467}\)

Shareholder protection during takeovers is mainly addressed with reference to the target company shareholders. Since target managements have the capacity to oppose takeover bids in circumstances that may apparently undermine the interests of their shareholders, attention has been focused on the need to protect the interests of the shareholders of target companies.

Shareholders of acquiring firms have been reported to make fewer gains when compared with shareholders of target companies and competition among bidding firms may increase gains to the targets and decrease returns to the acquirer.\(^ {468}\) These losses are partly caused by over-confidence which make management to make over-payments in pursuit of acquisitions.\(^ {469}\) The overconfidence by management which is


\(^{467}\) Ibid. (Hayward and Hambrick,1997).

\(^{468}\) See generally note 358 above.

\(^{469}\) See generally note 218 (Roll) above.
suggested to undermine gains to the acquirers’ shareholders is reflected in the studies which show that the acquirers of larger targets are at a greater risk of incurring loses when compared with acquirers of smaller targets.\(^\text{470}\) Even though it was suggested that managements do not deliberately make overpayments to cause losses to shareholders,\(^\text{471}\) it is not clear whether they are actually prudent with respect to expected returns when they make acquisitions. Since acquirers’ managements are rewarded by acquisitions,\(^\text{472}\) it may indicate that they may use acquisitions to enhance their personal interests. Managerial hubris which may cause losses to the shareholders of acquiring companies suggests that the shareholders of acquiring companies need as much protection as their counterparts in target companies.

In recognition of the need to protect the interests of company shareholders during takeovers, the ISA included as its objective; the protection of investors and the reduction of systemic risk. The reduction of systemic risk can enhance the value of a company since threats to corporate failure and losses to shareholders would be limited to unforeseeable losses. During takeovers, ‘protection of investors’ arguably includes the reduction of managerial discretionary powers and the recognition of the input of company shareholders in deciding whether an acquisition should be made. The property rights of shareholders to vote in support of, or in opposition to managerial recommendation for acquisition are important. They can encourage managements to recommend only value-yielding acquisitions and this can mitigate

\(^{470}\) This shows that managerial overconfidence in making acquisitions can lead them to acquire larger targets with insignificant gains to their shareholders. Such overconfidence and needless acquisitions may be avoided if managements reasonably consider the interests of the shareholders of their companies. See generally note 363 (Draper and Paudyal) above; K Fuller, J Netter, and M Stegemoller, ‘What Do Returns to Acquiring Firms Tell Us: Evidence from Firms That Make Many Acquisitions’, *The Journal of Finance*, 57/4 (2002), 1963-1793.

\(^{471}\) Note 218 (Roll) above, at 214. In Nigeria, a takeover bid is prohibited where the shares to be acquired are in a private company. ISA 2007, s. 133 (4).

the opportunistic behaviour of management.\textsuperscript{473} Also, since acquisitions that are not likely to enhance corporate value, - especially costly acquisitions - are likely to be rejected by shareholders; managements would become cautious in recommending acquisitions.\textsuperscript{474}

Despite the objective of the ISA which include the protection of investors, - shareholders - apparently, from the ways that management exercise their discretion in making acquisitions, the dominant role of company managements appears to have been preserved by the ISA. The board of directors of a company must approve a takeover bid before the bid can be considered to be valid.

\textit{A corporation shall not make a take-over bid either alone or with any other person unless the making of the takeover bid has been approved by a resolution of the board of the directors of the corporation.}\textsuperscript{475}

Also, the \textit{SEC Rules and Regulations} which is applicable to takeovers pursuant to the ISA\textsuperscript{476} recognises and confirms the role of the board of directors of the acquiring company in approving a takeover bid.

\textit{Where a takeover bid is made by a corporate body, a resolution of the directors approving the bid shall accompany the bid. The resolution shall be signed by at least one director and the company secretary.}\textsuperscript{477}

The role of the board of directors of acquiring companies during takeovers may be considered to have been recognised by the regulatory mechanisms because of their


\textsuperscript{474} Although it is not clear whether company shareholders would have the competence to be able to determine whether any particular acquisition would be value yielding. They may have to resort to consultation or free ride on the influence of institutional shareholders.

\textsuperscript{475} ISA 2007, s. 137 (1).

\textsuperscript{476} ISA 2007, s. 313. \textit{The Securities and Exchange Commission, Rules and Regulations.}

\textsuperscript{477} \textit{The Securities and Exchange Commission, Rules and Regulations} 2013, rule 445 (2).
managerial authority. That is; the requirement for board approval may have been included in the ISA in line with the responsibility of company management as being responsible for managing the business of a company. Their role as contained in the Act and Rules may suggest that the board may independently determine when to make acquisitions. Also, the role of the board as contained in the Act and Rules may imply that a takeover bid is valid only when it has been approved by the board. It may further imply that; apart from the approval of the board, no other approval is required when a corporation makes a takeover bid. Although the Act and Rules provide that the board of an acquiring company should approve takeover bids, it is also requires a combined board and shareholder resolution. This is required to form part of the documents that are to be filed with the SEC in addition to a takeover bid. It provides thus;

_In addition to the takeover bid, the following document shall be filed with the Commission (SEC);_

_A copy of shareholders and board resolutions of the offeror certified by the company secretary approving the takeover (where applicable)._  

The requirement that the resolution of the board and shareholders should be added to a takeover bid may appear to show that shareholder approval is required for a bid to be made by the management of the acquiring company. This requirement is not contained in the Act. Since the Rules and Regulation are relatively recent when compared to the Act, it would appear that they are meant to be applicable. If they are meant to apply, that is; if shareholder approval is required, it is not clear whether their approval must actually be obtained by management before they can make a valid takeover bid. First, the Act clearly state that a bid can only be made after the approval

478 SEC Rules and Regulations 2013, rule 447 (3) (d).
of the board of directors of the acquiring company has been obtained. Secondly, the
Rules which have been recently developed, confirms the requirement of the approval
of the board. Thirdly, it is not provided in the Act or the Rules that the approval of the
compny shareholders must be sought and obtained before a bid can be made; board
approval is compulsory under the Act and Rules. The requirement to obtain the
approval of the shareholders was stated to apply jointly with the approval of the board,
and this provision is required to be observed ‘where applicable’.
Apart from the fact that the requirement to obtain the approval of the board is made to
apply mandatorily, the requirement is not stated to apply ‘where applicable’. It is
further confirmed by the Rules that the approval of the board of directors is required
and the circumstances where the approval of shareholders would apply were not
stated. The importance of the provision which requires joint shareholder and board
approval is doubtful. If the ISA intend that shareholder approval must be sought and
obtained, it would have been clearly stated in the same way that the requirement for
board approval was stated. Also, the requirements should not have been stated to
merely be included in a document ‘in addition to the bid’ it should have been clearly
stated to form an important part of the bid.
The rules further demonstrated the importance that has been attached to board
approval by requiring that evidence of the approval of the board of directors should
form part of the contents of a bid.

A bid being an invitation under a takeover shall be incorporated in a document that:

(a) (i) states the full names and addresses of the offeror;
(ii) the addresses should be a street address and post office box (if
any) where the offeror is a corporate body, the name of the current
head office address and a statement of the date at which the approval of the directors of the company was given.479

This shows that the approval of the board is a *sine qua-non* requirement for a valid bid. The non-inclusion of shareholder approval clearly shows that it may not be relevant to obtain shareholder approval when a company is to make a takeover bid, unlike a merger which clearly requires shareholder approval.480

In light of the provisions of the ISA and the SEC Rules and Regulations, it appears that a company cannot validly make a takeover bid without the approval of the board of directors of the acquiring company. Also, with regards to shareholder approval, it is not clear whether such approval is important as much as the approval of the board of directors. Even if shareholder approval is required, it is only required ‘where applicable’. It appears that such approval is not required in all circumstances, neither is such approval required to make a bid valid.

The current regulatory framework for takeovers in Nigeria does not seem to have altered the default position with regards to the role of the management of the acquiring company; rather it has preserved their role during takeovers. This means that the determinants of gains for takeovers to acquiring company shareholders may be based solely on the intentions of managements. The challenge posed by agency conflicts serves as a threat to the interests of shareholders, as long as managerial powers in making acquisitions cannot be effectively challenged. This has far reaching implications on the functioning of the market for corporate control in Nigeria. A principal objective of the market for corporate control is to provide an alternative medium for controlling managerial behaviour. This objective may be undermined in

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479 ISA 2007, s 136 (1) (a). See also SEC Rules and Regulation 2013, rule 446 (a). Meanwhile, shareholder approval is clearly required under a merger arrangement. See the ISA 2007, s 121 (4).
480 See the ISA 2007, s 121 (4) & (5).
relation to takeovers in Nigeria since managements can needlessly activate the market for corporate control by engaging in costly and unproductive acquisitions. Managers can become more ambitious, they can disregard their role as agents of shareholders by engaging in costly acquisitions that may not necessarily lead to gains for their shareholders. This can undermine the disciplinary role of takeovers indirectly. It can make companies to be too large to be acquired, since it may lead to an increase in corporate size without a corresponding increase in the economic value of the company and the value of shareholders ultimately. This clearly negates the synergistic objectives of takeovers and it can inevitably promote hubris. This is indicative of the result in Table 8 above, as well as other similar results from other studies.\textsuperscript{481} It shows that losses or insignificant gains can characterise takeovers. It also implies that managements should be prudent when they make acquisitions.

However, since managements are not subject to control or limitations when they make acquisitions, it remains a challenge for managements to be expected to engage in self-restraint, especially in view of the conflict of interests which characterises agency relationship. Thus, in light of the high transaction costs that may be associated with takeovers, which can be influenced by conflicts of interests in agency relationship, there is the need to challenge the domineering positions of managements during takeovers in Nigeria.

High costs of acquisitions would not deter managements from making acquisition that are apparently unproductive. In the absence of regulations, management may only ensure that such acquisitions are productive where their interests would be adversely affected. They may be more inclined to desist from acquisitions that would be more likely to reduce shareholder value if such acquisitions would also affect their

\footnotetext{481}{See note 441 above.}
economic interests. The current regulatory framework for takeovers in Nigeria may not achieve a clear objective, particularly with regards to the protection of shareholders of the acquiring companies during takeovers.

Investor protection does not necessarily prevent managers from performing their roles in a company; rather, it ensures that investors remain in control of their investments, to ensure that they determine how to exercise the rights over their investments property. It can send signals to prospective investors of the protection that they can be entitled to if they invested in a country where investment protection is provided and enforced.

Table 9 shows a large sample of mergers and acquisitions deals in 49 countries between 1990 and 2004. It was based on a study which showed that the higher rate of acquisition deals in a country is based on the extent to which investors are protected by regulations. It shows that better investor protection is associated with more attempted hostile takeovers and fewer cross-border deals.

In table 9, Nigeria ranks amongst the countries with the lowest level of acquisitions and hostile attempted acquisitions. Nigeria also ranks amongst the countries with the highest cross-border acquisition deals.

This has a direct influence on the extent to which investors would be willing to invest in a country, since particular attention is directed at private property rights and the

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Table 9 Data on International Acquisitions Showing the Percentage of Traded Companies Targeted in a Completed Deal (between 1990 & 2004)

<table>
<thead>
<tr>
<th>Country</th>
<th>Volume (%)</th>
<th>Hostile takeover (%)</th>
<th>Cross-border ratio (%)</th>
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extent to which expropriation can occur. The period under review in Table 9 was the period before the enactment of the 2007 ISA (the current regulatory framework for takeovers). Investor protection post 2007 period does not appear to be very different.

From the examination of takeover regulation in the UK, in Chapter Four above, it was observed that the specific objective of the regulatory framework is to protect the interests of shareholders in target companies. The UK did not consider the need to specifically protect the interests of shareholders in acquiring companies except in limited circumstances. Similarly, the framework for regulating takeovers in Nigeria does not specifically protect the interests of shareholders in acquiring companies.

From an analysis of takeovers in both jurisdictions, it can be deduced that managerial hubris can occur in both jurisdictions, in view of agency conflicts which can potentially arise in agency relationships. The importance of regulation in both jurisdictions is to prevent the occurrence of hubris, by ensuring that managements always act in the interests of shareholders when they make acquisitions, to avoid losses to shareholders. The similarity of this challenge in both jurisdictions indicates that acquiring shareholder protection is desirable in both jurisdictions. However, the particular ways that shareholders can be protected can only be effectively determined by reference to the peculiar circumstances in each jurisdiction. The UK responded to the challenges of hubris by providing limited protection. The limited protection that is applicable in the UK would likely be unsuitable to address and challenge the domineering role of managements in Nigeria. It is imperative that Nigeria respond

485 Limited protection is provided under the UK Listing Rules s 10.5, see Chapter Four, section 4.3.2.
486 See section 5.5.1 below.
to the threat from managerial hubris in view of the recorded losses to shareholder wealth as a result of acquisitions, to ensure that the objectives of the takeover regulatory framework in Nigeria are achieved.

The role of managements in acquiring companies currently forms an important part of takeovers; the resolution of the board is required before a takeover bid can be made in Nigeria. Also, in any case, shareholder approval is not required when a bid is made. This is apparently reflected in the post-acquisitions result of shareholder value as indicated in Table 8, section 5.3 above.

Following the review of takeover regulations in Nigeria, it appears that there is no significant change to the pre 2007 period in the ISA and SEC Rules. Shareholders of target and acquiring companies cannot rely on the ISA and the SEC Rules to restrict managerial interference during takeovers. This means that the implications depicted by Table 9 can characterise takeovers in Nigeria in current times since there has been no material change after the enactment of ISA 2007. This also implies that the extent to which the interests of shareholders can be protected is largely dependent on the intentions of corporate management when a takeover bid is made or received. In light of this, company shareholders may have to rely on the ‘traditional’ shareholders’ remedies to protect their interests during takeovers in Nigeria.
5.3.3 Shareholder Remedies and Directors’ Duties

(a) Shareholder Remedies

(i) Members’ Direct Action

The Companies and Allied Matters Act (CAMA) contain certain provisions in relation to shareholder remedies. Generally, acts of managements or external parties that are considered as a wrong that is done to the company can only be remedied by the company and not by shareholders. This rule has been codified in the CAMA. However, shareholders may file an action where one or more of the following circumstances are present:

(a) entering into any transaction which is illegal or ultra vires;

(b) purporting to do by ordinary resolution any act which by its constitution or the Act requires to be done by special resolution;

(c) any act or omission affecting the applicant's individual rights as a member;

(d) committing fraud on either the company or the minority shareholders where the directors fail to take appropriate action to redress the wrong done;

(e) where a company meeting cannot be called in time to be of practical use in redressing a wrong done to the company or to minority shareholders; and

(f) where the directors are likely to derive a profit or benefit, or have profited or benefited from their negligence or from their breach of duty.

Although these exceptions apply to limit the application of the proper plaintiff rule, from the way they are couched, they do not appear to be applicable with respect to

489 CAMA 2004 s 299.
490 CAMA 2004, s 300 (a) – (f).
takeovers. Hence shareholders may not successfully rely on members’ direct action to restrain management during takeovers, to protect their interests.

(ii) **Derivative Claim**

The derivative claim procedure allows shareholders - mainly minority shareholders - to institute an action on behalf of their company. It was created by common law to redress a wrong that has been done to the company by the persons in control, usually the directors. Derivative claim has been codified in the CAMA 2004, ss. 303- 309. This remedy limits the incidence of conflict of interests, since directors may not be willing to commence or continue a claim on behalf of the company especially where the wrongdoers are the directors themselves.

Although derivative claim is very important in protecting the interests of company shareholders from ‘wrong acts’ of directors, it is not likely to be applicable to shareholders as a remedy in relation to takeovers for the following reasons. First it can only be brought on behalf of the company, to remedy a wrong that has been done to the company and not to shareholders specifically. Derivative claim has been codified in the CAMA 2004, ss. 303- 309. Also, benefits of the action go to the company. This means that proceeds that emerge from the decision of the court would not be directly available to the shareholder(s) that brought the claim. In view of these, a derivative claim may not be successfully used by shareholders to protect their interest during takeovers.

(iii) **Relief on Grounds of Unfairly Prejudicial and Oppressive Conduct**

A member of a company may petition the court for relief if the affairs of the company are being conducted in an illegal or oppressive way. Derivative claim has been codified in the CAMA 2004, ss. 303- 309. The petition can be brought by a member who alleges that the affairs of the company are being conducted in a...
manner that is oppressive. This includes unfairly pre-judicial acts, or unfairly discriminatory acts against a member or members. It also includes acts that indicate that the company affairs are run in a manner that is in disregard of the interests of a member or the members as a whole.\textsuperscript{494} For a number of reasons, this remedy would likely not be available to shareholders or it would not be an appropriate remedy for shareholders in relation to takeovers.

First, takeovers are considered by directors as investment decisions, especially with regards to the acquiring company. The decision to acquire another company does not lead to oppressive or unfairly prejudicial conducts on a member, it does not discriminate against a member and the directors can assert that an acquisition was done for the interests of the company for the benefit of the members of the company.

Secondly, the approval of directors is all that is ‘mandatorily’ required to make a valid bid,\textsuperscript{495} hence, where a bid is made without the approval or authorisation of the company shareholders, such act would not necessarily amount to an illegal act.

Also, the target company shareholders cannot rely on this remedy to protect their interests. Since the recommendation of the directors is required before shareholders decide on a bid, directors may delay their recommendations, or make recommendations in total disregard to the interests of the shareholders. Arguably, these cannot be classified as oppressive, unfairly or discriminatory acts.

Importantly, the orders that the court can make in giving relief in respect of a petition brought by a member can only be made if the petition for relief is well founded. That

\textsuperscript{494} CAMA s. 311 (2) (a) (i). See also, s. 311 (2) (a) (ii) ‘that an act or omission or a proposed act or omission, by or on behalf of the company or a resolution, or a proposed resolution, of a class of members, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or would be in a manner which is in disregard of the interests of a member or the members as a whole’. This may not be applicable to takeovers since the act would have been done for or by the company, or by some other shareholders, as against acts of the directors during takeovers.

\textsuperscript{495} See ISA 2007, s.137 (1), see also SEC Rules and Regulation 2013, rule 446 (a).
is; if it falls within the purpose for which the remedy was established. Although the court can make orders as it deems fit, specifically, the court can make any one or more of the orders that have been enumerated in the Act. While the orders that the court can make would generally apply to safeguard the interests of company shareholders, they are not likely to be suitable to protect shareholders’ interests during takeovers. However, two of the orders appear applicable.

An order to purchase the shares of any member by the company and for the reduction accordingly of the company’s capitals appears to be applicable to target companies. This may apply where the target board decides to prevent a takeover by interfering with a bid. However, if the court orders that the shares of a member should be purchased by the company, it would not serve the purpose of the bid, the purchase by the company would further reduce the chances of the success of the bid and management would remain unchallenged in takeovers.

Also, an order of the court can be made to vary or set aside a transaction or contract to which the company is a party and to compensate the company or any other party to the transaction or contract. This appears to be applicable to acquiring companies. The remedy may be applicable if members of a company can petition the court for an order to set aside an acquisition that has been concluded by their company which they consider not to be in their interests. This remedy would unlikely be applicable.

Takeover transactions involve the transfer of shares by cash or share exchange. Setting aside the transaction would imply that the shares should be returned to the shareholders of the target company and the cash that have been paid should be refunded to the acquiring company. The shareholders of the target company cannot be

496 CAMA, 2004, s. 312 (1).
497 CAMA, 2004, s. 312 (2) (a) – (j).
498 CAMA, 2004, s. 312 (2) (d).
499 CAMA, 2004, s. 312 (2) (f).
compelled to return the cash that they have received, since the transactions would have been concluded as simple contracts.

The shareholder remedies that have been briefly examined are not conclusive of the remedies that may be available to company shareholders. Since directors are appointed to manage the business of the company, a breach of directors’ duties may entitle shareholders to certain remedies.

(b) Directors’ Duties

Directors are appointed to manage the business of a company; they owe certain duties to their companies. These duties are provided as general fiduciary duties and common law duty of care and skill. The whole of directors’ duties that are contained in the CAMA apply to general company administration. The duties that may be applicable to takeovers are examined briefly.

First, directors are in a fiduciary relationship with their companies and they are required to observe the utmost good faith in any transaction with the company or on behalf of the company. In the performance of their roles as fiduciaries, directors are required to act in the way that they believe is the best interests of the company as a whole. They are to direct the business of the company and promote the purpose for which the company was formed, among other reasons. Also, directors are required to exercise the duty of care and skill. They are to act in good faith and in the best interests of the company and they should exercise the degree of care, diligence and

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500 CAMA, S. 244(1), Olufosoye v Fakorede [1993] 1 NWLR (Pt 272) 747.
502 CAMA 2004, s. 279 (1).
503 CAMA 2004, s. 279 (3).
skill which a reasonably prudent director would exercise in comparable circumstances.\textsuperscript{504}

Since these duties apply to general corporate administration and investment decisions, they may also be applicable to takeovers. The fiduciary role of directors is capable of ensuring that the board act in the best interests of the target and acquiring companies during takeovers. Although directors may be regarded as having fiduciary responsibility to their shareholders directly;\textsuperscript{505} when providing advice to shareholders, the extent of their liability during takeovers is unclear.\textsuperscript{506} Directors are required to act in the way that they consider being the best interests of the company and the duty can only be enforced against a director by the company,\textsuperscript{507} not by any shareholder. Hence, it is unlikely for shareholders to successfully rely on this duty to make directors accountable in relation to takeovers. Also, directors may rely on the provision of section 279(3) to avoid liability, since they are required to act in the interest of the company as a separate entity.

The duty to exercise care and skill apply to takeovers, and directors are required to exercise the powers and duties of their office honestly, in good faith and in the best interests of the company as would a reasonably prudent director. Although the interests of the company should be ultimately beneficial to company shareholders, directors can assert that their actions during takeovers were directed towards the best interests of the company. Hence, shareholders may not successfully rely on a breach of this duty to protect their interests during takeovers.

\textsuperscript{504} CAMA 2004, s. 282.
\textsuperscript{505} A Charman and J Du Toit, Shareholder Actions (West Sussex, UK, Bloomsbury Profession Ltd 2013) 1st edn, at 84-85.
\textsuperscript{506} Peel v London & North Western Railway Co (No1) [1907] 1Ch 5, CA at 16, where it was observed among others that a directors’ duty may include providing advice to the individual ‘corporators’. See also Gething v Kilner [1972] 1 All E. R. 1166.
\textsuperscript{507} CAMA 2004, s. 279 (9).
In the absence of specific regulation that limits, restricts or defines the role of directors during takeovers, it is unlikely that the courts would intervene or vary the decisions of directors irrespective of the motives of the directors. The courts are not willing to be drawn into second-guessing the business decisions of company managements. This is based on the presumption that directors acted in good faith and in the honest belief that their actions were taken in the best interests of the company. 508 In light of these, an effective regulatory framework for takeovers remains important. The next section examines employee protection during takeovers in Nigeria.

5.4 Employment Protection and Takeovers

5.4.1 Takeover Regulation and Employment Protection under the ISA

Employee dismissal post-takeover is highly likely in Nigeria because employee issues are hardly considered as forming part of negotiations leading to the completion of takeover deals. One of the main reasons for this challenge is that the regulatory framework for takeovers does not substantially make provision with respect to employee interest. The substantive employment regulation in Nigeria; the Labour Act, 509 does not make provisions for employee issues that arise from takeovers. The ISA which is the principal legislation on takeovers does not contain specific provisions that deal with issues relating to employment. The ISA requires the SEC to consider certain matters before an authority to proceed with a takeover is granted;

For the purpose of deciding whether to grant an authority to proceed with a takeover bid, the Commission shall have regard only to the likely effect of the takeover bid if successfully made –

(a) on the economy of Nigeria and

(b) on any policy of the Federal Government with respect to manpower and development, and if the Commission is satisfied that none of the matters referred to in paragraphs (a) and (b) of this subsection would be adversely affected, it shall grant an authority to proceed with the takeover bid, but if not so satisfied it shall refuse to do so.  

In light of the above provision of the ISA, the SEC is only required to consider (a) and (b) above in determining whether or not to grant an authority to complete a takeover. ‘Manpower’ as used in (b) appears to refer to employment, but ‘the policy of the Federal Government’ in relation to ‘Manpower’ which the SEC is meant to consider has not been explained in the Act. Even though ‘manpower’ as used in the Act refers to employees, the extent to which the SEC should determine how the interests of company employees are to be protected during takeovers is not stated. The particular provision does not clearly outline the responsibilities of the acquiring company in dealing with employee issues during takeovers. The provision of the Act merely recognises that takeovers can have adverse effect on employment; it does not actually address the challenge.

In view of this, the uncertainty which characterises employee interests in takeovers has not been addressed in Nigeria; this has led to the dismissal of employees by reason of takeovers. Job losses as a result of takeovers are a major challenge in Nigeria. The effects of takeovers on job security were manifested during the banking consolidation exercises in the banking sector. This had a considerable effect on human resources. Employee dismissal in some of these consolidated banks occurred.

510 ISA 2007, s.134 (6).
by reason of the acquisitions through redundancies and other factors that can be linked to acquisitions. Between November 2005 and May 2006, over 2,900 employees were dismissed.\textsuperscript{511} These include an estimate of 450 in Wema Bank, 500 (224 retired) in Union Bank, 300 in Spring Bank and 385 in Afribank.\textsuperscript{512} These employees could not rely on the \textit{Labour Act} because it does not contain provisions on takeover-related dismissals. Employee dismissal during this period was indirectly caused by the overambitious tendencies of some of the banks managements. The high costs of the acquisitions informed the need for employees to be dismissed, to ensure that further corporate costs are mitigated. The acquisitions may be termed ‘overambitious’ because some of the acquired banks had the option of merging with other ‘weaker’ banks before they were actually acquired; after the Central Bank of Nigeria issued a directive that the banks should shore up their capital base. Also, the acquisitions were concluded at great costs. This explains why the post-acquisition shareholder values of some of the banks were not enhanced.\textsuperscript{513} Since there is no certainty regarding employee interests, managements of the banks engaged in overambitious acquisitions that led to high takeover transaction costs, which invariably led to employee disengagements. The overwhelming need to urgently reduce corporate costs is an indication that the transaction costs of the acquisitions were quite high. It implies that managements did not carefully consider the need to mitigate transaction costs as expected of them as agents of the shareholders. Although takeovers are generally costly, prudent managements would avoid takeovers that are too costly. This is because, managements that engage in ambitious acquisitions can be put under pressure from their shareholders to show the economic gains that have been

\textsuperscript{511} Note 260 (Fapohunda) above, at 73.
\textsuperscript{513} See Table 8, section 5.3 above.
added to the corporate value and shareholder wealth. Thus, managements would be
inclined to mitigate further costs by reducing the wage bill of the entity without
actually enhancing shareholder value in any significant way. While managements
may have genuinely engaged in the acquisitions to enhance shareholder wealth, it is
difficult to ascertain whether they have acted in shareholder interests, since conflict of
interests characterises agency relationships. Thus, efforts by managements to shun
over-ambitious acquisitions, thereby mitigating transaction costs of takeovers can
demonstrate that they are acting in the interests of their shareholders because, it can
actually mitigate the losses to shareholders and largely dispense with the need to
dismiss employees.

The continuous dismissal of company employees post-takeover after the
establishment of the ISA confirms the inability of the Act to protect employees during
takeovers. After the acquisition of Intercontinental Bank Plc. by Access Bank Plc. in
2012, over one thousand five hundred (1,500) staff of the target company
(Intercontinental Bank Plc.) were dismissed or subtly forced to resign their
positions.514 In total, an estimate of 45,000 employees is stated to have lost their jobs
in the banking sector as a result of takeover related issuers.515

514 See the following online reports: The Punch Newspaper 28th January, 2012.
http://www.punchng.com/business/access-bank-sacks-1500-intercontinental-employees-shuts-
branches-2/ , accessed 4th September 2013, http://lindaikeji.blogspot.co.uk/2012/01/access-bank-sacks-
515 See note 512 above, at 132. See also A O Kareem, G O Akinola and E A Oke, ‘Effect of Mergers
and Acquisitions on Employee Development: The Nigerian Banking Industry Experience’ Fountain
E Ekpenyong, ‘The Banking Sector Reforms in Nigeria: Issues and Challenges for Labour-
Gomes et al ‘HRM Issues and Outcomes in African Mergers and Acquisitions: A Study of the
2874–2900 at 2886.
5.4.2 Takeover Regulation and Employees Protection under the SEC Rules and Regulations

Earlier in 2010, the previous SEC Rules did not contain any provision in relation to company employees’. The development of the current Rules, which specifically mention ‘employees of the target company’ shows that the protection of company employees during takeovers is desirable. The Rules intend that the interests of employees should be considered during takeovers.

_The contents of an information memorandum_516 _shall include;_

_Likely effect of the takeover bid if successful on the staff of the target company._517

First, this provision is not mandatory. The information memorandum does not form part of a bid itself; it is merely an additional document that ‘may’ be filed with the SEC. Hence it is stated that it is to be filed ‘where applicable’. The qualification ‘where applicable’ was used without any further indication as to when or under what circumstances should the information memorandum be filed. The information memorandum is the only document that is required to contain references to employees; nevertheless, it has not been made mandatory.

Secondly, even though the term ‘likely effect of the bid on the staff of the target company’ is meant to make the interests of the employees of the target company to be considered in pursuit of a takeover, the extent which this can be achieved is not clearly outlined. In light of this, company employees, particularly those of target companies cannot rely on this provision to ensure that their interests are protected.

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516 The information memorandum is a document that is to be filed with the SEC in addition to a takeover bid.
517 SEC Rules and Regulations 2013 Rule 447 (4) (B) (Vii) (b).
Also, recourse to common law\textsuperscript{518} may not provide the needed solution to the problem. Under common law, contracts of service cannot be assigned, they are personal.\textsuperscript{519} A contract of employment cannot be transferred from the target company to the acquiring company. The acquisition of the target company by the acquiring company does not automatically make the acquiring company the new employers of the staff of the target company. This can be more challenging for employees because of the absence of mandatory severance pay in the Nigerian legal system. Except severance pay forms part of the agreement in the contract of employment, employees may not be entitled to any form of severance pay in Nigeria.\textsuperscript{520}

Disengagements of company employees continued after the enactment of the ISA and the development of the old Rules. In view of this, the New Rules apparently sought to address this challenge. Since the new Rules does not contain any provision that can ensure that the trend of employees’ dismissal post-takeovers in Nigeria does not continue, it can be argued that employees remain unprotected from the challenges of takeovers in Nigeria. One of the main reasons that employees are not actually protected is that an acquiring company is not a party to the contract of employment between the target company and their employees. This means that the positions of the employees whose companies have been acquired in Nigeria are largely in the same position as employees whose contract of employment cannot be made to be binding on the new owners of the company. The combined company was not ‘technically’ in existence when such contracts were made. Arguably, this has the same effect as a pre-incorporation contract. The company would not be bound by any contract which it

\textsuperscript{518} The Nigeria Legal System was developed pursuant to the English legal system.


\textsuperscript{520} Note 519 (Wilson & Osayande) above, at 43.
was not a party to, except the company ratifies the contract.\textsuperscript{521} In the absence of specific regulatory protection for employees, they can only rely on the provisions of their contracts of employment. As observed,

‘employment with statutory backing must be terminated in the way and manner prescribed in the relevant statute...but in other cases governed only by agreement of the parties and not by statute. Removal by way of termination of appointment or dismissal will be in the form agreed to’\textsuperscript{522}

This effectively means that the management of the combined company would retain the discretion to determine whether or not to continue with their services as employees.

Even though the \textit{Labour Act} does not provide any form of employment protection during takeovers, the legal framework for takeovers in Nigeria actually indicate the need for the interests of company employees to be protected. The importance of employment protection is indicated in the ISA and the SEC Rules. The ISA requires the Securities and Exchange Commission to consider the effect of a takeover if successfully made, on the policy of the federal government with respect to manpower. Similarly, SEC Rules require the acquiring company to state the effects of a proposed takeover bid, if successful, on the staff of the target company.\textsuperscript{523} These provisions do not only indicate the need to protect the interests of company employees, they also

\textsuperscript{521} See CAMA 2004, s 72; ‘Any contract or transaction purporting to be entered into by the company or by any person on behalf of the company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by and entitled to the benefit thereof as if it has been in existence at the date of such contract or other transaction and had been a party thereto’. Nnamani, J.S.C. (as he then was) held in Edokpolo & Company Ltd v Sem-Edo Wires Enterprises Ltd & Ors [1984] 7 S.C.. That: ‘it is now a settled principle of company law that a company is not bound by a pre- incorporation contract being a contract entered into by parties when it was not in existence. No one can contract as agent of such a proposed company there being no principal in existence to bind’.


\textsuperscript{523} ISA 2007, s. 134 (6), SEC Rules 2013, r 447 (4) (B) (Vii) (b).
expect company managements to include employment consideration in any policy in relation to takeovers.

Employment issues that arise from a takeover are not quite apparent until the takeover has been concluded. It cannot be determined from the outset whether the employment of the staff of the target companies will be terminated. Employee issues often arise after the takeover has been concluded, having been authorised by the SEC. This means that as currently provided, the ISA and the SEC Rules do not provide any reasonable form of employment protection. Company managements may include plans to retain and perhaps re-train employees as part of their application for authority to proceed with a takeover bid. After the takeover has been concluded, they may allege the existence of new facts or unexpected market conditions which may prevent them from implementing their earlier policy towards employment protection.

Obviously, the challenges of takeovers with respect to employment issues are similar in the UK and Nigeria, since hubris can characterise overambitious acquisitions in both countries. In both jurisdictions, takeovers have led to large numbers of employee dismissals. However, the extent to which the problem currently exists in both countries is different because the UK has attempted to address the problem, whereas, Nigeria has merely acknowledged the problem. First, efforts have been made to ensure that employees are not dismissed by reasons of takeovers in the UK. Also, genuine concerns about employment issues have been raised by the UK parliament to show that the interests of employees should be accorded reasonable consideration when a takeover bid is made. Despite the fact that Employment issues pose a greater challenge to Nigeria than in the UK, in view of the current rate of unemployment in

524 The effects and limitation of this process has been discussed in Chapter Four, section 4.4, above.
Nigeria, the response to employee issues that arises in takeovers have been poor. Although, the challenges in both jurisdictions may be similar, the response from Nigeria must reflect the local circumstances. A TUPE-styled regulation would likely be ineffective in Nigeria.\textsuperscript{525}

5.5 Why Company Shareholders and Employees should be Particularly Protected in Nigeria

5.5.1 Shareholders

Property rights would be irrelevant without the protection by the state. This protection enhances the value of the property and it invariably reduces transaction costs and agency costs,\textsuperscript{526} and it creates a freer and a more competitive market. Even though shareholder protection during takeovers is important for virtually all corporate jurisdictions, there are certain reasons why it is particularly important to protect the interests of company shareholders in Nigeria.

In Nigeria, company CEOs / Managing Directors have substantial control over the policies of companies, especially with regards to investment decisions. These CEOs become very powerful overtime and they often exert control over the board, this undermines the ability of the board to effectively supervise the CEOs.\textsuperscript{527} In light of this, the board is often unable to protect the interests of company shareholders as recommended by the Corporate Governance Code.\textsuperscript{528} Hence the powers of company management should not remain unchallenged. The Nigerian society is not particularly responsive to codes without appropriate sanctions; hence formal legal institutions can provide the minimum protection to shareholders during takeovers.

\textsuperscript{525} See Chapter Six, section 6.2; Chapter Seven, section 7.5.1 below.
\textsuperscript{526} The costs of personal protection of property rights may increase the costs of holding an assets. These costs includes the costs of monitoring the agents as well as other associated costs e.g. Insurance, taxes.
\textsuperscript{527} As indicated in Chapter Six, (section 6.2.1) below, CEOs dominate the board of directors.
\textsuperscript{528} Corporate Governance Code for Public Companies in Nigeria 2011 Part B 2.
The takeover of *Intercontinental Bank Plc* on the direction of the Central Bank Governor, in the exercise of his monitoring and supervisory role over banks, has continued to generate controversy.\(^{529}\) Some aggrieved shareholders of the defunct bank have instituted an action in the Federal High Court to challenge the takeover of the bank by Access Bank Plc. This suit was filed on the grounds that the takeover of the bank was done in disregard to the interests of the shareholders.\(^ {530}\) Even though the CBN has the responsibility to supervise banking operation in Nigeria, the SEC also has the responsibility to supervise and administer takeovers in Nigeria to protect the interests of investors. The manner that the exercise was conducted indicates that the SEC may not have actively supervised the takeover of the bank.

Also, Nigeria’s economy is over-dependent on the petroleum sector and this indicates why the national budget is based on the oil benchmark as set by OPEC. It is important for Nigeria to have diverse means of sustaining the economy. Protecting shareholders during takeovers would encourage participation in the capital market in Nigeria. It can also encourage foreign portfolio investment and foreign direct investment. This would contribute to the national economy which is in dire need of investors.

### 5.5.2 Employees

A framework for defining the relationship between companies involved in takeovers and their employees would reduce the incidence of uncertainties that characterises


\(^{530}\) See *Leadership* March 26th 2014 [http://leadership.ng/business/359547/intercontinental-bank-shareholders-sue-sanusi-take-bank](http://leadership.ng/business/359547/intercontinental-bank-shareholders-sue-sanusi-take-bank) accessed 27\(^{th}\) March, 2014. It is doubtful whether the former Central Bank Governor can be held personally liable. He acted under the authority of a person occupying the position of the office of the CBN Governor.
takeovers and this can be reflected in the national economic interest of Nigeria. This can mitigate transaction costs for companies. It is important because companies and their employees may not contemplate the possibility of a takeover and this would not be included in the contract of employment. Since it is usually not possible for parties to cover all possible eventualities that might occur during the pendency of a contract, transaction costs, and opportunism can be reduced by defining the responsibilities of companies and their employees during takeovers. One of the biggest challenges of Nigeria is the issue of large scale of unemployment. Unemployment reached an alarming level of over 20% in Nigeria in 2012. Mergers and acquisitions were prominent in Nigeria in the years leading to 2012. From 2001 to 2010 an estimate of 78 acquisitions was recorded.

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532 The problem of unemployment is a challenge to national development in Nigeria. Nigeria is not a ‘welfarist’ society. Unemployed people are not entitled to financial assistance from government; this can encourage criminal activities and other anti-social vices.

533 See Figure 7 above.
Figure 8 Nigeria Unemployment Rate (2006-2011)\(^{534}\)

<table>
<thead>
<tr>
<th>Actual</th>
<th>Previous</th>
<th>Highest</th>
<th>Lowest</th>
<th>Dates</th>
<th>Unit</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>23.90</td>
<td>21.10</td>
<td>23.90</td>
<td>5.30</td>
<td>2006 - 2011</td>
<td>Percent</td>
<td>Yearly</td>
</tr>
</tbody>
</table>

The unemployment rate measures the number of people actively looking for a job as a percentage of the labour force.

<table>
<thead>
<tr>
<th>Labour</th>
<th>Last</th>
<th>Previous</th>
<th>Highest</th>
<th>Lowest</th>
<th>Unit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unemployment Rate</td>
<td>23.90</td>
<td>21.10</td>
<td>23.90</td>
<td>5.30</td>
<td>Percent</td>
</tr>
<tr>
<td>Population</td>
<td>166.21</td>
<td>164.39</td>
<td>166.21</td>
<td>45.15</td>
<td>Million</td>
</tr>
</tbody>
</table>

In light of the level of unemployment in Nigeria, people can become very desperate to get jobs. Recently, the Nigeria Immigration Service sought for qualified persons to fill job vacancies for an estimate of 4,500 available positions. Over 500,000 unemployed Nigerians applied for these positions.\(^{535}\) The rate of unemployment in Nigeria is alarming; the problem can become worse if the government is unable to protect jobs which it cannot actually provide. From the list of acquisitions in


\(^{535}\) This led to stampede as the crowds at the different test centres across the country could not be managed. See Premium Times March 16th 2014, http://allafrica.com/stories/201403160073.html accessed 25th March 2014.
Appendix 1, it can be observed that the period under review as indicated in figure 8 is the same period that acquisitions were in their highest levels in Nigeria. While acquisitions may not have been solely responsible for the high level of unemployment during the same period, it nevertheless contributed to the high level of unemployment in Nigeria at that time.

5.6 Conclusion

A modern business corporation is faced with the prospect of a conflict of interests amongst the corporate constituents. These conflicts of interests are evident during corporate takeovers. This chapter examined the regulatory framework for takeovers in Nigeria, with particular reference to shareholder and employee interests from the perspective of the target and acquiring companies. It identifies the objectives of shareholder and employee protection during takeovers.

While takeovers can be considered to be important in the development of the Nigerian corporate society, its development, as an alternative to the internal corporate governance framework is relatively a new concept in Nigeria. This emerged from the examination of the historical development of takeovers in Nigeria from the period of the first attempted and successful corporate acquisition. It emerged that the increase in corporate acquisition in Nigeria influenced the need for the development of the regulatory framework for takeovers, including the establishment of regulatory agencies.

The examination of the regulatory framework for takeovers revealed that the objective of the Federal Government was to provide a fair and efficient market. This was stated to be aimed at protecting the property rights of shareholders, which would
encourage equity investment. This was shown to be clearly evident with the establishment of the SEC Rules and Regulations as a complimentary regulatory mechanism to the ISA. While the establishment of the regulations represent a major development of the market for corporate control in Nigeria, it emerged that the regulatory mechanism may not achieve the desired objectives. This was reflected in the examination of the extent to which the interests of shareholders are protected in target and acquiring companies. It was revealed that company managements are most likely to be able to determine whether their companies should acquire other companies.\textsuperscript{536} They can also interfere with a takeover bid.\textsuperscript{537} This implies that managerial control over decisions involving takeovers in Nigeria remains largely unchallenged. Accordingly, it was shown that the agency conflict of interests can undermine the role of managements in protecting property rights of shareholders, which can lead to high takeover transaction costs, with zero or negligible gains to acquiring shareholders.

In pursuit of an alternative remedy, it was revealed that shareholder remedies and directors’ duties that are contained in the CAMA do not provide any appropriate remedy during takeovers. Rather, it was found that company managements\textsuperscript{538} may rely on section 279(3) which require directors to act in the way that they consider best in promoting the business of the company. This further confirms the importance of a

\textsuperscript{536} The approval of the board is a compulsory requirement in determining whether a company should acquire another company, the approval of shareholders is not a compulsory requirement. This means that the board can solely determine whether an acquisition should be made. See ISA 2007, s. 137 (1), and s. 136 (1) (a), SEC Rules and Regulations 2013, r 445 (2) and 446 (a).

\textsuperscript{537} ISA 2007 s. 140 (2). Directors are required to provide a recommendation to their shareholders whether they should accept a bid or not. Shareholders are required not to make a decision on the bid until they receive the directors’ recommendations. Meanwhile, directors are no required to provide explanations on how they reached their recommendations. It would be difficult for shareholders to make independent decisions on a bid, especially in the absence of any explanations that accompany the directors’ recommendations.

\textsuperscript{538} Managements in target and acquiring companies can assert that the decisions they make in pursuit of a takeover was made with respect to their managerial responsibilities towards their companies.
specific regulation on takeovers, with the capacity to provide effective regulation. The ISA failed to contemplate the possibility of managerial interference with a takeover bid. Also, it has not specifically restrained managements from interfering with a takeover bid in a manner that would likely undermine shareholder interests.

The chapter also examined employment protection during takeovers in Nigeria. It emerged that the regulatory framework recognises the detrimental effects of takeovers on employment. This is indicated by the requirement to consider the impact of takeovers on the employees of target companies.\(^{539}\) It was further revealed that this requirement is a mere recognition of the vulnerability of company employees during takeovers, without any specific effort towards the actual protection of employees. Thus, the recognition can best be described as ‘a step’ towards protecting the interests of company employees during takeovers in Nigeria without any actual protection.

Meanwhile, in pursuit of an alternative remedy for employees, the provision with respect to employees protection in CAMA, in relation to directors’ duties was also identified as a mere recognition of the need to ‘consider’ the interests of employees.

\[\text{The matters to which the director of a company is to have regard in the performance of his functions include the interests of the company employees in general, as well as the interests of its members.}\]^{540}

Employees do not have the legal right to enforce this duty. The duty can only be enforceable against the director(s) by the company and not by its employees or any other stakeholders.\(^{541}\) In light of this, company employees in Nigeria are not protected from the threats of layoffs during takeovers. Their continuous employment is largely

\(^{539}\) SEC Rules and Regulations 2013 Rule 447 (4) (B) (Vii) (b).

\(^{540}\) CAMA 2004, s. 279 (4).

\(^{541}\) See CAMA 2004, s. 279 (9).
determined by contracts of employment, and they may only be entitled to the notice period\textsuperscript{542} at the most.

Relative to the UK, it was shown that the challenges of takeovers in the UK can be present in Nigeria, especially with respect to acquiring shareholders and employees. The similarity applies with respect to the effect of takeovers on the interests of shareholders and employees in both jurisdictions. While the challenges may be similar, the UK was shown to have made efforts towards protecting shareholder interests, especially shareholders of target companies, similar efforts are yet to be made in Nigeria. Meanwhile, since only restricted protection has been made with respect to acquiring shareholder protection in the UK and no effort has been made with respect to similar problem in Nigeria, it can be observed that while further efforts need to be made in the UK, a concrete effort is required to be made in Nigeria, to protect acquiring shareholders. Also, there appears to be a similar problem with respect to employment protection in the UK and Nigeria. However, with the establishment of TUPE in the UK, it was indicated that efforts towards effective employment protection is required in Nigeria, especially in light of the high rate of unemployment in Nigeria.

Chapter six illustrates the similarities and differences of the institutional functions and the effects of the regulatory control over takeovers in the United Kingdom and Nigeria.

\textsuperscript{542} The notice period is determined by reference to the terms of the contract of employment, subject to the compulsory notice period in \textit{the Labour Act, 2004}, s. 11(2).
CHAPTER SIX

6. INSTITUTIONAL DEVELOPMENT AND THE REGULATORY CONTROL OVER TAKEOVERS IN THE UNITED KINGDOM AND NIGERIA

6.1 Introduction

The institutional framework for takeovers in Nigeria includes the SEC as the administrative body for takeovers and the ISA and the SEC rules as regulatory guidelines. This is similar to the institutional framework in the United Kingdom which includes the Takeover Panel as the administrative organ, with the EC Takeover Directive and the UK City Code on Takeovers and Mergers performing regulatory functions.

This chapter illustrates the similarities and differences of the institutional control over takeovers in the United Kingdom and Nigeria. It includes a brief examination of the similarities in the institutional development and the peculiar factors in each jurisdiction that influenced the ways that the institutions were established. Also, the regulatory effects of the institutions on takeovers in both jurisdictions are illustrated. It identifies areas of similarities and differences.

It comprises six sections. In section two, the institutional framework for takeovers in the United Kingdom and Nigeria is illustrated briefly. The areas of similarities and differences are identified. It also identifies the institutional challenges that undermine the effectiveness of takeover administration in Nigeria. Section three briefly illustrates the regulatory function of takeover institutions with respect to shareholders and employee interests. The effect of employment protection on the market for corporate control is identified in section four. It identifies the extent to which
employment protection can promote market efficiency especially in relation to takeovers. An illustration of the mutual objectives that can be derived from shareholder and employment protection is contained in section five. Section six concludes the chapter.

6.2 The Institutional Framework for Takeover Administration in the United Kingdom and Nigeria

Takeover administrative function in the United Kingdom and Nigeria are ‘similarly different’. They are similar because they seek to achieve the same objectives. First, in both jurisdictions, a major objective of takeover administration is to protect investors - property rights of shareholders -. Secondly, the takeover laws in these jurisdictions recognise the need to protect the interests of company employees during takeovers. Thirdly, takeovers are administered by independent agencies in these jurisdictions and these agencies are empowered to develop rules to regulate takeovers.\textsuperscript{543}

\textsuperscript{543} The Takeover Panel and the Securities and Exchange Commission administer takeovers in the United Kingdom and Nigeria respectively.
**Figure 9 Frameworks for Takeover Administration in the United Kingdom and Nigeria (Statutory and Administrative Rules)**

Despite these similarities, as indicated in *figure 9*, the institutional frameworks in these jurisdictions are not capable of achieving the same objectives. Beyond the similarities in the functions of the institutions,⁵⁴⁴ there are certain peculiar factors in

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⁵⁴⁴ The institutional framework for takeovers in the UK and Nigeria are similar, and they have similar objectives since they respond to the same problem. This is a manifestation of the *tertium comparationis* concept of the functional approach to comparative law. The similarity of the challenges
each jurisdiction. These include the mentality and culture which characterises the informal institutions that influence the establishment of institutions. As depicted in figure 10 below, the elements in the informal institutions also determine the extent to which the institutional objectives can be implemented. Thus, the totality of these informal elements influences the ways that legal texts are developed. This means that the effectiveness of the takeover institutions in the UK and Nigeria, as exhibited in figure 9 is dependent on the factors that influenced their creation as shown in figure 10 below.

The United Kingdom takeover institutional framework is aimed at promoting fair markets, with less emphasis on employment protection. Less emphasis has been placed on employment protection apparently because of the existence of a separate employment protection regulation; TUPE. This appears reasonable since enforcement procedures in the United Kingdom are less cumbersome. Employees can enforce the provisions of TUPE if they have a good cause to do so.

The institutional framework for takeover administration in Nigeria is similarly aimed at promoting efficient market. Although it recognises the threat that takeovers pose to employment, no specific provision has been made for employment protection. Since employees have been identified as liable to being disengaged, it is not clear why employment protection has not been given proper recognition, especially in the absence of an effective mechanism for employment protection.

While it is desirable to protect employees during takeovers, it is doubtful whether a separate employment protection regulation as applicable in the United Kingdom can

is influenced the need for the regulatory framework as indicated in figure 9. See Chapter 1, section 1.6 (a) above.

545 The hermeneutical approach to comparative law identifies the importance of the peculiar factors that influence the development of regulations. These include the informal institutions as depicted in figure 10; culture, common values and mentality of particular societies. See Chapter 1, section 1.6 (b) above.

546 The New Institutional Economics is concerned with how institutions are created.
successfully protect employees in Nigeria. A TUPE-styled regulation would require individual employee to enforce its provision. This could be quite expensive to achieve in Nigeria. Thus, an employment protection regulation that considers the peculiarities in Nigeria, especially with respect to enforcement, is desirable. The costs and challenges of enforcement by employees may undermine the capacity of the regulation to protect employee interests.\footnote{See Chapter 7, section 7.5.1 below.}

Figure 10 Institutional Frameworks for Takeover Administration

Figure 10 illustrates the role of the informal institutions (culture, values, belief, norms, etc.) in the development of institutions (A). It also depicts how the informal institutions can determine the extent to which institutional objectives can be successfully implemented (B).
6.2.1 Administration of Takeovers: Nigeria and the United Kingdom

a) Nigeria

One of the problems of corporate administration in Nigeria is the approach to governance. In most instances, the approach to governance in Nigeria does not provide the needed workable framework for tackling individual problems as they arise. The modalities for tackling these problems are not designed to reflect the nature of the Nigerian society. There is a disconnection between the elite / ruling class and the working class. Regulatory frameworks are mainly implemented by agencies or governmental bodies that are composed of the elite class without a representation from the relevant associations that represent the working class. Hence, agencies such as the SEC usually fail to give the necessary consideration to matters that affect the interests of the working class. This subtly encourages the principal-agency conflict to be manifested. 548 This is a major problem in Nigeria.

To ensure that Nigeria keep up to speed with necessary and periodic changes in the development of the regulatory framework for takeovers, the SEC was empowered by the ISA to make rules for takeover administration. The legal department of SEC which is responsible for drafting the SEC Rules and Regulations 549 is not required to consult with shareholder, employee representatives or any other interests that may be affected by the outcomes of takeovers in Nigeria. This explains why the SEC rules are not particularly different from the provisions of the ISA. The Rules have been developed without regard to the informal institutions in the Nigerian society.

548 The working class mainly include; small business owners, employees and shareholders. They may not have the capacity to hold managements accountable. In certain circumstances, corporate managements can influence decisions of regulatory agencies. See B Ahunwan, ‘Corporate Governance in Nigeria’ *Journal of Business Ethics* 37(2002) 269–287, at 274.

Figure 10 depicts the importance of informal institution; both at the stage of creation and at the point where institutional objectives are to be applied. The pursuit of efficiency or the influence of vested interests can inspire a change in institutional frameworks. \(^5^{50}\) While the institutional framework for takeovers in Nigeria identifies market efficiency as its objective, it actually preserves the structure of vested interests. Its implementation cannot support the objectives of an efficient market. Class conflicts and lack of a connection between the elites and the working class prevents the successful protection of shareholder or employee interests by the SEC.

The empowerment of the SEC to administer takeovers and develop rules for takeovers was meant to ensure that the limitations of legal institutions do not affect developments relating to takeovers. This means that the development of takeover regulations by the administrative functions of the SEC and the interpretation of the rules by the judiciary \(^5^{51}\) are largely dependent on the administrative effectiveness of the SEC in relation to takeovers.

The challenges of takeovers in Nigeria are beyond the issue of agency conflict between company managements and shareholders. They extend to conflicts between shareholders and administrative agencies. \(^5^{52}\) Administrative agencies have a controlling authority to make certain decisions that directly affect the corporate existence of companies. The Central Bank of Nigeria (CBN) was involved in the process leading to the acquisition of some banks in Nigeria. The banks were believed to be ‘performing below required standards’. The CBN Act and the Banking and other

\(^5^{50}\) Note 118 above, at 140 -141.

\(^5^{51}\) Interpretation is not only influenced by the clear meaning of rules, it can also be influenced by the ‘intentions’ of the rules, i.e. in the absence of clear meanings, the court would have to determine what the rules seek to achieve.

\(^5^{52}\) Some shareholders of one of the banks that was involved in the takeovers have filed suits to challenge the takeover. See the report of Punch Newspaper of 26\(^{th}\) March 2014. http://www.punchng.com/news/intercontinental-bank-shareholders-sue-sanusi-for-n10bn/ accessed 13\(^{th}\) June, 2014.
Financial Institutions Act, - BOFIA empower the CBN to regulate banking operations and financial transactions and other related operations in Nigeria. In the absence of any specific provisions in these regulations, it is not clear whether the CBN has the authority to dispose the assets of the banks.

In August 2009, the Chief Executives of some commercial banks were removed from their positions by the CBN for engaging in corruption and financial mismanagements. The CEOs were accused of using corporate funds for their personal use. The CBN made arrangements for the banks to be acquired. Shareholders have challenged the CBN in the exercise of such powers. In some instances, the courts have resolved the disputes in favour of the CBN. With specific regards to the sale of the banks to third-party investors, it is not clear whether the CBN is empowered to authorise and arrange the takeovers. The problems that were identified by the shareholders of these banks remain unresolved. Some of the suits that were instituted by shareholders are still pending. Recently, the Court of Appeal set aside an order to wind up Afribank Plc, since the shareholders

557 The Court recently refused to dismiss a suit filed by shareholders of the defunct Bank PHB Plc to question the role of the CBN in the acquisition of the bank. See Leadership Newspaper, 9th March
are still challenging the role of the CBN in the takeover of the bank.\textsuperscript{558} The CBN has not clearly accounted for the funds and assets that were confiscated.\textsuperscript{559} The acts of the CBN reflect a failure of the institutional infrastructures in Nigeria. Failure to outline how the shareholders’ funds were re-invested makes the exercise a pyrrhic victory for the shareholders in the affected banks.

Banking operations involve different categories of interests, namely; depositors, shareholders, managers, employees and the national economy. It may be considered as a good practice for the CBN to be empowered to supervise the actions of bank managements; to protect depositors’ fund and the national economy. However, the powers of the CBN may be subject to abuse, especially where the CBN-arranged takeovers are not carried out with due regard to the interests of shareholders. Alternatively, the CBN can independently protect the interests of depositors through capital adequacy requirements. Lack of investor’s confidence in protecting their property rights can have a negative effect on national economy.

b) The United Kingdom

In the United Kingdom, the Takeover Panel is responsible for the development of the \textit{UK Takeover Code}. Although, the \textit{Takeover Code} is not a perfect administrative rule, nevertheless, it complements the \textit{EU Takeover Directive}, - in similar ways that the SEC Rules and Regulations are expected to complement the provisions of the ISA in Nigeria. - It contains provisions which clearly provides protective measures to shareholders of target companies as well as restricts managerial functions to advisory

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roles during takeovers. More importantly, the Takeover Panel represents the inputs of the different groups whose interests would likely be affected by takeover outcomes.\textsuperscript{560}

These include members that are appointed to the panel as representatives of eleven (11) major financial and business associations in the United Kingdom. This include; Association of Investment Companies, the Investment Association, Institute of Chartered Accountants in England and Wales, Association of British Insurers among others. The external members are appointed to contribute their expertise into takeover administration and to ensure that the interests of their members are protected.

This can mitigate the possibility of conflicts by ensuring that the groups that are affected by takeover outcomes would not have to protect their interests individually. This is a clear reflection of the peculiar condition of the United Kingdom and it shows that takeover institutional framework includes the informal institutions in the United Kingdom as represented by the different groups that make up the takeover panel. This is also a demonstration of the informal institutional functions that is indicated by the new institutional economics in the development of institutions.

Persons or groups whose interests would be affected should be considered when developing a framework to regulate takeovers. This has helped in creating the needed balance towards the development of the institutional framework for takeovers in the United Kingdom.

The role of SEC in Nigeria is not different from the role of the Takeover Panel. The informal institutions of the Nigeria society have been ignored in the administration of takeovers. One of the important functions of institutions is the unification of the mentalities in the informal institutions of the society with the formal institutions. The

\textsuperscript{560} The Panel has over 30 members that represent different interests in the UK. http://www.thetakeoverpanel.org.uk/structure/panel-membership accessed 19th March, 2014.
informal institutions consist of different mentalities characterised by different orientations. In Nigeria, this includes the ‘upper class’ that is made of government representatives, some employers and company managements. The lower class consists of the vast majority of employees and small scale investors. The conflicting interests of these groups can be unified by effective institutional framework.\textsuperscript{561}

The pending suits that have been instituted by some shareholders in Nigeria may have been avoided if the administrative function of takeovers in Nigeria considered the role of the informal institutions. This means that the CBN should not supervise takeovers of banks in Nigeria. Such responsibility can be performed by the SEC. Also, the SEC can be composed of investor representatives for the purpose of administering takeovers in Nigeria.

As indicated in figure 10 above, where the role of the informal institutions (A) is ignored in the development of institutions, challenges would likely arise in the process of implementation. The same informal institutions (B) would determine the extent to which the administrative objectives can be enforced.

The overwhelming objective of the administrative functions of SEC in Nigeria and the Takeover Panel in the United Kingdom is to achieve one of the functions of Regulations. This objective is to provide ‘a policing function’.\textsuperscript{562} This is to ensure that companies - through the management board - observe certain rules which they may ordinarily not observe when they are not supervised. This policing function includes the supervision of the resolution of any issues that may arise after a takeover has been concluded. One of the best ways of effectively carrying out this policing function is to ensure that different competing interests are considered in the

\textsuperscript{561} See Chapter Two section 2.5.2 above and Chapter Six, section 6.5 below.

administrative process. This has been largely implemented by the constitution of the membership of the takeover panel in the United Kingdom. Meanwhile, employee representatives have not been included in the membership of the United Kingdom Takeover Panel. Employee representatives are also not included in the membership of the SEC in Nigeria. The implication of non-inclusion of employee interests in the Takeover Panel and SEC depends on the extent to which employees interests can be protected by a different external mechanism. The TUPE is established for employment protection during takeovers in the United Kingdom. Hence, the non-inclusion of employee representative in the United Kingdom Takeover Panel may be justified even though it is undesirable.

6.3 Regulatory Control over Takeovers

From an examination of takeovers, it can be observed that the greater the value that is derived by one group of corporate constituents, the lesser the value that may be derived by other groups in the firm. Shareholders are interested in the value of their investments; they are not generally concerned with the interests of other stakeholders when they negotiate to sell their shares at premium rates. Employees would oppose takeovers if they could, irrespective of the synergy that may be derived from the combined companies, as long as takeovers remain a threat to their interests. These problems pose clear threats to takeovers. There is the need to strike an acceptable balance between the interests of these groups. The response to these challenges has

563 Corporate takeovers simpliciter without regulations can lead to a ‘a zero-sum game’. Losses to one or more of the corporate stakeholders may represent gains to other stakeholders. See generally S Sudarsanam, *Creating Value from mergers and Acquisitions: The Challenges* (Harlow, England, Pearson Education Limited, 2003) at 64.
been the introduction of takeover regulation in several jurisdictions,\textsuperscript{564} including Nigeria.

One of the problems of legal regulations is the costs of continuous alteration of rules to keep up with economic and technological change.\textsuperscript{565} These costs may be significant, especially where there is the need to make regulations that would affect a host of interests, or to regulate heterogeneous conducts,\textsuperscript{566} such as takeovers. However, failing to effectively regulate takeovers may be more costly, especially for an economy that is in need of investments such as Nigeria’s.

Some of the regulatory functions of takeovers have been questioned and challenged as misconceived poor public policy.\textsuperscript{567} Usually, takeover laws delay the completion of bids\textsuperscript{568} - especially hostile bids -, leading to an increase in competition and a corresponding hike in the bid price. This can reduce the possibility of a successful bid, since the target’s value increases with a decline in the bidders’ return, thereby reducing the effect of the disciplinary role of the market for corporate control as exhibited in takeovers.\textsuperscript{569} While it may be conceded that causing a delay in the completion of bids may encourage other bidders which could make takeovers

\textsuperscript{564} T Nenova, ‘Takeover Laws and Financial Development’, (World Bank Policy Research Working Paper 4029, October, 2006), 1-52 at 44, ibid. http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/10/05/000016406_20061005151909/Rendered/PDF/wps4029.pdf Accessed 14\textsuperscript{th} February, 2014. Some of the regulations have been amended. If managers are to adopt a policy that is different from enhancing the economic value of their company, especially by reference to the interests of other corporate stakeholders, they may be faced with the problems of lack of a clear focus in pursuing their corporate objectives. The stakeholders are numerous and they have different interests, hence it was contended that managers may be faced with the problem of lack of a single objective if they are to consider stakeholder value as the primary objective of a corporation rather than the objective of value creation. In light of this, the stakeholder interests can be incorporated into the value maximising objectives of firms to achieve an enlightened value-maximization objective. See generally M C Jensen, ‘Value Maximization, Stakeholder Theory, and the Corporate Objective Function’, Business Ethics Quarterly, 12/2 (2002), 235-56.


\textsuperscript{566} An ideal takeover regulation should consider the conducts of managements of target and acquiring companies.

\textsuperscript{567} Note 207 above, at 177.

\textsuperscript{568} Delays can be encountered in complying with the UK Takeover code and the Nigerian ISA.

\textsuperscript{569} Note 207 above, at 157.
expensive, it may not necessarily undermine the entire takeover process. First, competitive bids increase the bid premium, leading to higher value for the shareholders of target companies. Secondly, a higher bid price should not eliminate the possibility of a successfully bid. Rather, it can reduce the number of bidders to only those who know the true value of the target company and how they can successfully manage the company post-takeover to raise the value to its desired level. Thirdly, since the value of the bid can be raised by competition, the managements of acquiring companies should be made to be accountable to their shareholders in making acquisitions. Acquisitions that would most-likely enhance the economic value of a company as against the 'corporate size of a firm' should be the acquisition-objectives of managements. Managements would find it difficult to convince shareholders to support an undesirable acquisition.\footnote{That is, if shareholders are made to be actively involved in approving acquisitions.}

It has been suggested that regulations that introduce non-shareholder interests into decisions about takeovers would interfere with the coherent decision-rule of traditional shareholder-value maximization that managers are meant to follow.\footnote{Note 207 above, at 172.} Accordingly, it was argued that maximization of equity share-price gives management a clear sense of responsibility on which shareholders would agree to, in a perfectly competitive capital market.\footnote{Note 207 above, at 172, citing I Makowski, 'Competitive Stock Markets', \textit{The Review of Economic Studies}, 50/2 (1983), 305-30 at 311.} It is further suggested that a focus on shareholder value would lead to efficient allocation of resources and the maximization of social welfare\footnote{Note 207 above, at 172, citing generally: H R Varian, \textit{Microeconomic Analysis} (2 edn.; New York: Norton & Company Inc., 1984).} and shareholder utility, since other stakeholders can
be protected by contract. The extent to which stakeholders such as employees can be protected by contracts of employment is largely limited. Their bargaining powers cannot be compared to the bargaining powers of employers. This might explain why there is the need to set a limit for minimum wage for employees, even though there is usually a contract of employment between the employer and the employee. Weak governance mechanisms can lead to agency conflicts; this persists under poor institutional arrangements and it can encourage managements to promote their personal interests and disregard the property rights of their shareholders. Managements can find a way to enhance their personal interests in the absence of any regulation that introduces non-shareholder interests, if they decide to pursue their own interests. Also, managements can effectively promote shareholder value even though takeover legislations of non-shareholder interests are enacted. In light of the likelihood of agency conflicts, the interests of the shareholders of acquiring companies and ultimately the employees of the target company may not be protected. This could indirectly affect the disciplinary role of takeovers, since managements may pursue acquisitions to make it more difficult for their companies to be

An employee who is desirous of earning wages may show some form of desperation to get a job and employers may use the desperation as a bargaining tool.  
The limitation of the contractual theory of the firm is briefly examined in Chapter Three, section 3.6.3 above.  
The UK Companies Act 2006, s. 172 provides that directors should consider certain non-shareholder interests (including the interests of company employees), in their duty towards promoting the success of their companies in the way that the directors themselves consider to be in good faith. Although, it may be argued that this may encourage directors to promote their own interests, since they are required to act in the way that they consider to be in good faith, they may not escape liability if a reasonable man acting in the same position would have acted differently. See Charterbridge Corporation Ltd v Lloyds Bank Ltd [1970] Ch, 62.
acquired.\textsuperscript{579} They could pay large premiums for takeovers without actually adding value to their shareholders, leading to employee disengagement.\textsuperscript{580}

Another critique of regulatory policy\textsuperscript{581} has been suggested by the interests’ group theory. It suggests that regulatory policies can be influenced by organized interest groups or industries\textsuperscript{582} which can alter the probability that a political party or a candidate will acquire or retain power. Contrary to this view, regulations are not always generally influenced by interests groups. In certain circumstances, a group may be classified as influential and powerful only because that particular group got its way,\textsuperscript{583} perhaps because they benefited from a particular regulatory reform. Also, the view that regulations support particular interest group(s) does not represent a comprehensive test of all possible political reasons for regulations.\textsuperscript{584} Certain group may benefit from regulatory review without putting pressure on government to protect and promote their interests.\textsuperscript{585} Protecting certain interests may provide a utilitarian value. For example, employees in the United Kingdom are protected to some extent during takeovers, despite the fact that all company employees in the United Kingdom do not belong to a single organized union. Also, despite the fact that

\textsuperscript{579} See generally, note 201(Gorton, Kahl, and Rosen) above.


\textsuperscript{581} Arguably one of the most cited critique of regulations that are made to protect particular interests group(s).


\textsuperscript{585} This reiterates the fact that even though interests groups may ‘pressurise’ government with the aim of influencing regulations, government agencies have the autonomous powers to determine the extent to which the interests of any group can be promoted independent of the efforts of any particular group. S K Vogel, \textit{Freeer Markets, More Rules: Regulatory Reform in Advanced Industrial Countries} (New York: Cornell University Press, 1996) at 15-16.

259
the interests of employees in Nigeria are mainly protected by the organised labour; the Nigerian Labour Congress (NLC), the NLC has not successfully protected the interests of employees that have been disengaged as a result of takeovers.

Generally, corporate entities would likely support policies or regulations which appear to protect their corporate interests, such as tax relief policies. Alternatively, they are unlikely to support regulations that enhance the interests of stakeholders, such as company employee protection in the form of minimum wage. In the latter case, regulations become burdensome and unnecessary. Thus, it was rightly suggested that firms that have the capacity to influence political powers will use such influence to their advantage. 586 This is the reason that firms seek to control political powers or at least try to influence the way(s) that political powers are exercised. 587

The next session illustrates how employment protection during takeovers supports the efficient market hypothesis and the effectiveness of the market for corporate control.

6.4 Employment Protection: Efficient Capital Market Hypothesis and the Effectiveness of the Market for Corporate Control

6.4.1 Employment Protection Regulation and the Efficient Capital Market Hypothesis

A market where prices fully reflect all available information is an efficient market. 588 The efficient capital market hypothesis suggests that the prices of shares are determined by reference to the information about a company as they become

available. This suggests that the prices of shares are not generally determined by individual awareness or level of skills in the capital market. When uninformed investors buy diversified portfolio, based on the prices given by the market, they will obtain a rate of return as generous as those purchased by experts. Since prices of shares are determined by reference to available information, it implies that it is largely impossible to predict the prices of shares, since the availability of information does not follow any particular pattern. Thus, the following principles apply in relation to efficient markets; first, the market price of shares represents the market’s consensus as to the valuation of that security. Secondly, public information about the economy, financial markets, and the results and prospects of the individual company are widely available to investors. Also, no individual can dominate the market or influence the price of shares and transaction costs are low or zero.

In relation to corporate takeovers, the application of certain efficient market hypotheses may be difficult to justify especially with regards to premiums paid for takeovers, leading to costly acquisitions. The value of shares in an efficient capital market reflects the information that is available about the individual company. However, the costs of shares in takeovers are determined by factors that extend beyond such information.

These include the purchase of ‘control’ by the acquiring company. The extent to which the cost of ‘control’ can be determined by the general information that is available to the market is largely unclear. Acquiring managements make different

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590 D E Jenkins, Financial Decision Making (London, the Institute of Chartered Secretaries and Administrators 2012) at 166.
591 Ibid at 167.
592 Costs of control are the extra costs that are attached to shares in a takeover. It leads to an increase in the price of the shares because the transactions are to enable the investor to obtain control of the target company.
bids in a competitive bid, and the value of each bid is dependent on what each bidder estimates to be the true value of the target company. Assuming that the cost of control which causes high premium are based on general information that is available to the public, then, it can be argued that irrespective of the level of competition, the bid price should generally not exceed certain amount, since the general information that is available to the investors can be used to estimate the highest level of returns from the acquisition. 593 This would mean that any bid that is beyond certain level would be termed ‘costly and unrealistic’ acquisitions with prospective zero gains to the acquiring company. In light of this, it is difficult to determine why certain bidders are willing to pay very high premiums to acquire a target company by trying to out-bid other bidders. Thus, in relation to the efficient market hypothesis and takeovers, the general information that is available to investors appears to be ignored when investors make takeover bids.

The efficient market hypothesis suggests that there is low or zero transaction costs. One of the challenges of takeovers is the high transaction costs associated with takeover bids. As observed above, the link between information and low or zero transaction costs that is applicable in efficient markets appears to be justified. However, the extent to which takeover bids reflects available information about a company is unclear. Hence large premiums paid above the market price in takeovers may not necessarily reflect the assumption underpinning efficient market, especially where such takeovers are very expensive.

Since managements have unrestricted powers to disengage employees post takeovers, they are more likely to engage in ambitious acquisitions which may lead to losses or

insignificant gains for shareholders of acquiring companies. Thus, employment protection regulation can be used to restrict the powers of managements to ‘freely’ disengage employees post-takeovers.\textsuperscript{594}

The new institutional economics asserts that human factors\textsuperscript{595} can be responsible for higher transaction costs. The transaction costs economics suggests that costs can be mitigated by organising transactions in a process that can minimize costs. The ability to freely disengage company employees is an incentive for managements to engage in costly acquisitions. Restricting the powers of managers to disengage employees post-takeovers, can prevent managements from engaging in costly acquisitions that are not generally supported by the efficient capital market hypothesis. The transaction costs economics seeks to mitigate the costs of transactions that arise as a result of uncertainty and incompleteness of contracts.\textsuperscript{596} The uncertainty and incompleteness of contracts enables managers to exercise wide discretions in making costly acquisitions. This discretion can be exercised in promoting managerial hubris. Where managers are restricted from freely disengaging employees, the costs of takeovers can be mitigated, since they would have to focus mainly on acquisitions that do not necessarily require employees to be disengaged.

This can ensure that the market for corporate control thrives towards an ideal efficient market, especially operational efficiency, where transactions are conducted at the lowest possible costs, and costly acquisitions are clearly justified.

\textsuperscript{594} The objective of the employment protection regulation in this regard is not necessarily to prevent employees from being dismissed, rather it is meant to ensure that managements’ powers to dismiss employees are restricted. To ensure that managements do not use their extensive powers to disengage employees to support their over ambitious takeovers drive.

\textsuperscript{595} These are endogenous factors such as opportunism and conflict of interests.

\textsuperscript{596} See Chapter Two, section 2.5.2.
6.4.2 Employment Protection Regulation and the Effectiveness of the Market for Corporate Control

One of the main objectives of the market for corporate control is that it functions as an alternative mechanism to the internal corporate control measures.\textsuperscript{597} It is meant to influence the role of company managements towards promoting corporate value by ensuring that managements are challenged by external pressure when there is a failure of the internal control mechanisms. This implies that, in the absence of effective external control measures, the role of company managements may be largely unchallenged. In recognition of this, managements may seek to control or influence the role of the market for corporate control. One of the ways that managements can do this is by engaging in costly acquisitions to expand the size of their companies without necessarily increasing corporate value. This kind of acquisition is more likely to give rise to employee dismissal since it is likely to involve companies in the same line of business.\textsuperscript{598} These costs are generated largely because the role of managements during takeovers is mainly unrestricted and unchallenged. Thus, managements can use their managerial discretion to engage in costly acquisitions by suggesting that they are merely engaging in their usual investment decision-role. As long as managements have unrestricted powers to dismiss company employees during takeovers, they are more likely to influence the role of the market for corporate control. Effective employment regulatory measures can be used to mitigate the effects of managerial influence over the market for corporate control by ensuring that

\textsuperscript{597} See Manne above (n4). The internal control measures include the role of the board of directors and corporate governance rules among others.

\textsuperscript{598} This was the case with majority of acquisitions in Nigeria. Acquisitions in the banking sector in Nigeria led to massive level of employee dismissal. See Chapter 5, Section 5.4.1. Also, in the UK, Kraft and Cadbury takeover and Pfizer and AstraZeneca proposed takeovers are other similar examples of takeover involving companies in the same industry.
employees are not dismissed as a result of takeovers.599 This can ensure that managements do not control both the internal governance mechanisms and the external mechanisms of corporate control.

The implication of establishing an effective employment-protection regulation that would ensure that employees are not easily dismissed is that, the ultimate objective of the market for corporate control can thrive. Employment protection regulation would not necessarily prevent managements from preforming their role; rather, it would ensure that they discharge their responsibility efficiently and effectively by preventing managements from using employee dismissal to promote their personal objectives. Managements would be less inclined to engage in costly acquisitions. They would have to justify the need for a takeover and they would be constrained to engage in value-yielding acquisitions. This can reduce the possibility of managerial hubris, and it can increase the role of transaction costs economics as indicated by the new institutional economics, since costly acquisitions would have to be justified by managements. It can also enhance the synergistic and disciplinary roles of takeovers since the market can be made to operate free from managerial manipulations and losses to acquiring shareholders can be mitigated. It can further reduce the incidence of eat or be eaten, where acquisitions are made to be a defence to takeovers whereby managements acquire other companies to gain the status of a large firm and invariably make their companies to be very expensive to be acquired. This can be mitigated and the disciplinary effect of takeovers can freely thrive.

599 TUPE seeks to ensure that employees in the UK are not dismissed by reasons of takeovers. However, as argued in this thesis, the protection that is provided by TUPE is limited.
6.5 The Common Interests of Shareholders and Company Employees

The role of company managements during takeovers can determine the extent to which synergy; managerial discipline or hubris can be a feature of takeovers. Much focus has been directed towards promoting shareholder value during takeovers without realising that the interests of other constituents such as employees’ can indirectly be linked with the interests of shareholders, especially shareholders of acquiring companies. Managements of target companies cannot protect the interests of their employees. They are already engaged in negotiating for the interests of their shareholders in the form of higher premium. They may also be engaged in negotiations for their own interests, especially where they are less likely to be retained post-takeovers. Adding employees’ interests into the negotiations would reduce their negotiating powers. The view that employment reduction can be used to achieve synergistic functions of acquisition to achieve efficiency suggests that employee dismissal should be considered to be a necessary aspect of takeovers. In light of this, the extent to which employees should be compensated ought to be specially considered.

One of the ways of protecting the interests of shareholders of acquiring companies is to protect the interest of employees during takeovers. The new institutional economics support the view that, the market where exchange occurs is not perfect because of scarcity which can lead to competition and opportunism. It is at the level of the market that the agent and principal interact. Uncertainties which are envisaged by the new institutional economics can lead to an increase in the costs of takeovers.

There is much consensus in the literature that shareholders of target companies record

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significant gains post-takeover from share premium, while their counterparts in acquiring companies experience insignificant or zero gains. Opportunism and uncertainties through managerial hubris can influence employee disengagements post-takeovers. When a takeover is concluded, shareholders of target companies receive economic gains through the premiums that are paid for their shares. Also, managements gain the prestige of a bigger-sized firm in addition to any extra economic perquisites that accompanies a ‘bigger’ company. Thus, as rightly observed, the main beneficiaries of takeovers are managements and shareholders of target companies.

However, the shareholders of acquiring companies must wait until any possible synergy materialises. In the absence of any immediate gain, employees can be disengaged as a cost-saving measure. Since they do not have the capacity to negotiate for their interests they become ‘victims’ of takeovers. This implies that employee disengagements can be a direct consequence of managerial hubris.

Disengaging employees may prove to be beneficial only in the short term, as against the long-term corporate interests. The short-term and immediate goal is for

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managements to gain the support of their shareholders. Hence employees can be dismissed to demonstrate to the shareholders that managements seek to promote their interests by mitigating the overall corporate costs, whereas, the costs were actually caused by expensive acquisitions. The freedom to disengage employees to gain shareholder approval provides an opportunity for managements to undermine their agency responsibilities towards their shareholders. As long as managements are unrestricted in this regard, they can be indirectly encouraged to engage in costly acquisitions that can create uncertainty which is envisaged by the new institutional economics.\textsuperscript{606} The transaction costs economics of the new institutional economics, seeks to ensure that transactions are conducted in the least possible costs. Costly acquisitions have the potential of creating uncertainties, since higher premiums would mean an increase in the costs to acquiring shareholders; the extent to which gains can materialise could be unclear.\textsuperscript{607} This may not promote synergistic gains post-takeovers in view of the costs; managerial hubris and empire building may be promoted directly or indirectly.

It is not clear whether losses are anticipated by managements of acquiring companies. However, disengaging employees after a takeover has occurred may suggest that the interests of the employees have been ‘traded’ for the interests of shareholders of acquiring companies. Continuous long-term employment can make employees to be

\textsuperscript{606} While shareholders can be uncertain about the gains that can materials from a takeover, employees are largely uncertain about their continuous employment when a takeover is imminent.\textsuperscript{607} Costly and ambitious acquisition is associated with negative or zero gains to acquiring shareholders. See Chapter Four, Table 5 (a) and (b).
attached to a firm that they can hardly function effectively in a different firm. This can be caused by long-term commitment to the firm. Also, since employees bear more risks during takeovers more than shareholders, they occupy the position of ultimate risks bearers,608 not in respect to the corporation generally, but with respect to a corporation during takeovers specifically. Employees that have put long years of service into a company would be faced with the reality of having the firm as their only means of livelihood. Whereas, shareholders can sell their shares and they can invest in different companies at the same time without regard to the long-term objective of the company.609

The new institutional economics asserts that the existence of well-defined property rights can influence behaviours. Transactions between or among individuals occur at the agency theory level and these transactions are governed by transaction cost economics by reference to the established principles formulated under property rights. Employee dismissal during takeovers is mainly directly influenced by the existence of property rights in shares. A strict application of the property right doctrine is not practicable especially in relation to the interests of other stakeholders.610 Since there could be negligible gains to shareholders of acquiring companies, managements are constrained to reduce further costs through employment reduction. Managers can assert rightly or wrongly that employee disengagement is influenced by the property rights resident in the shareholders.

Acts of managements in employment reduction undermine their important role of conducting transactions at the least possible costs. Employment reduction as an aftermath of a costly takeover does not effectively reduce the costs of takeovers; rather, it transfers value from both the shareholders and employees to the managements.

Managements of acquiring companies benefit from takeovers, irrespective of whether it leads to gains. Reducing employment levels would reduce the operational costs of the company. While this can reduce further loss that that company may have suffered as a result of premiums paid during the takeover, the value of the acquiring shareholders may not be enhanced. This means that employment reduction serves the interests of the managements and this can undermine the objective of the market for corporate control as an alternative to the internal control mechanisms.

6.6 Conclusion

The effects of takeovers across different jurisdictions can be largely similar irrespective of the different cultural backgrounds that are present in the different jurisdictions. This was one of the major findings of this chapter. It emerged that the extent to which the effects of takeovers can be different from one jurisdiction to another is dependent on the regulatory framework of takeovers in different jurisdictions. This means that takeovers in most jurisdictions could lead to synergistic gains, disciplinary role or managerial hubris, and the extent to which any of these effects can be enhanced or mitigated is dependent on the regulatory functions of takeover in any given jurisdiction.
Further to the comparison of takeover regulations in the UK and Nigeria, it emerged that the regulatory frameworks for takeovers in both jurisdictions have the same legal structure for takeover administration and regulation.\textsuperscript{611} They virtually have the same objectives but they are not capable of achieving the same results because of the peculiarities of informal institutions in these jurisdictions. It was illustrated that no effective protection is provided for acquiring shareholders in both jurisdictions. However, the UK was shown to provide limited protection to acquiring shareholders.

Although the ISA and the SEC Rules in Nigeria recognise the need to protect the interests of shareholders and employees, no actual protection has been provided to this group of company stakeholders. This is shown to be caused by a failure of the institutional framework for takeover regulation in Nigeria. The development of takeover regulations without regard to the peculiar factors that characterises the Nigerian society as represented in the informal institutions affects the ability of takeover regulations to protect investors and employees during takeovers. It preserves the roles of managements and their influence remains unchallenged.

The comparison shows the role and importance of the informal institutions in the determination of the effectiveness of the regulatory functions of institutions. It was illustrated that the Takeover Panel has been largely successful because of the inclusion of some investor representatives and other external groups in the development of the Takeover Code. It was also illustrated that some of the challenges of takeovers are present in Nigeria because the informal institutions have been largely ignored by the SEC. Shareholder litigations in Nigeria that challenges takeovers may

\textsuperscript{611} In both jurisdictions, takeover is administered by independent bodies; Takeover panel in the UK and SEC in Nigeria. These bodies are empowered to make rules towards the administration of takeovers; \textit{The Takeover Code} and the \textit{SEC Rules and Regulations} (Administrative Rules). Also, there are substantial legislations that govern takeovers in these jurisdictions; \textit{The EU Takeover Directive} and the ISA (Statutory Rules).
have been avoided if similar inclusive approach in the UK were adopted in Nigeria. These include; transferring the role of the CBN in organising the takeover of banks to the SEC and the constitution of the SEC of investor representatives for the purpose of the development of the SEC Rules.

Further, it emerged that the role of managements during takeovers can actually undermine the principles that underpin the efficient capital market hypothesis, especially in relation to the high costs of takeovers. Since the prices of shares in an efficient market are determined by reference to available information it is not clear why certain bidders make costly and desperate acquisitions. This implies that the role of managements can distort the effective functions of the market for corporate control. It was thus contended that since managements largely control the internal corporate control framework, attempts by managements towards controlling or influencing the functions of the market for corporate control must be resisted with effective institutional framework. Where the role of managements remains unchallenged, efficient takeover markets may not be attained.

Also, the chapter identified the complementary role that employment protection can have over shareholder value. It illustrates how uncertainty over employment contracts can lead to higher transaction costs for acquiring companies. It also shows how this can encourage managements to engage in costly acquisitions, which would necessitate the disengagements of employees post-takeover without any real gains to the acquiring shareholders.

Even though the present framework for takeover regulation in Nigeria does not actually provide the needed protection to shareholders and employees, it recognises the need to protect their interests. Arguably, this might indicate that future reforms
may lead to substantial protection of this group. However, the major challenge posed by the informal institutions in Nigeria which undermines the capacity of the present legal framework to protect these groups remains a major problem towards takeover regulation in Nigeria. Chapter seven concludes the thesis. It contains the general conclusions and recommendations.
CHAPTER SEVEN

CONCLUSION

7.1 Introduction

This thesis is a comparative study of corporate takeover regulation in the United Kingdom and Nigeria with respect to employment protection and shareholder interests. The objective of the thesis is to ascertain the extent to which the interests of shareholders and employees can be protected during takeovers in Nigeria. A comparative study towards this objective became necessary in view of the universal functions of takeovers\textsuperscript{612} and the position of the United Kingdom with respect to the Nigerian legal system\textsuperscript{613}.

This chapter concludes the thesis. It contains an exposition of the main themes of the preceding chapters and importantly, it provides recommendations and it identifies areas for future research. It is presented in six sections. Section two highlights the importance of the main frameworks of the thesis in relation to the problems and the objective of the thesis. This includes an illustration of the relationship between the function of the research method and the importance of the theoretical framework of the thesis in relation to the problems. Section three illustrates the main findings of the thesis on the regulatory framework of takeovers in the United Kingdom and Nigeria as it affects employment protection and shareholders. It highlights the problems and it identifies why the problems are actually relevant. The recommendations are provided in sections four and five. Section six contains the concluding statements and some identified areas for future research.

\textsuperscript{612} See Chapter One, section 1.6 (a).

\textsuperscript{613} The Nigerian Legal System comprises local Customary Laws and received English Laws, and takeovers in both jurisdictions are regulated by statutory rules and administrative rules.
7.2 The Theoretical Frameworks: Importance and Application

The thesis identified company shareholders - especially shareholders of acquiring companies - and employees as the most vulnerable group of corporate stakeholders whose interests are likely to be ignored during takeovers. This was identified from a theoretical examination of corporate takeovers in Chapter Three. It was also illustrated that takeovers can be characterised by uncertainties and opportunism, which are capable of undermining synergistic gains and its disciplinary role. It showed that one of the major causes of the challenges with respect to shareholder and employee interests during takeover is the limitation of the contractual relationships in the firm. These include the relationship between the managements and shareholders and the relationship between employees and managements as employers. In view of the limitations of the contractual theory, the entity theory was argued to be capable of providing an appropriate response to the problem; by ensuring that states establish effective institutions to regulate the relationships. Thus, the new institutional economics theory was identified as an effective theoretical model towards achieving this objective. This is because the new institutional economics is not only concerned with the creation of institutions; it is also concerned with how the institutions are created. This can ensure that the institutions that are created consider the local circumstances that are present so that the problems can be effectively addressed with specific regard to each particular jurisdiction.

Specifically, Chapter One illustrates the problems of takeovers in Nigeria and the justification for a comparative study in relation to the problems that were identified in Nigeria. Takeover regulation in Nigeria was shown to exhibit the identified problem, even though the regulatory framework for takeovers has been recently reviewed. As
indicated earlier, in furtherance of a clearer understanding of the nature of the general problems of takeovers with respect to shareholders and employees, the comparative legal research method became necessary. Further to the comparative approach, it can be deduced that the challenges of takeovers in Nigeria can be present in any other jurisdiction, subject to the regulatory framework for takeovers in that other jurisdiction. That is; irrespective of the jurisdiction where a takeover occurs, there are certain challenges that may arise.

First, it emerged that these problems may occur because of the variety of interests that are affected by takeovers. It is a challenge to promote the interests of all the corporate constituents during takeovers; hence some interests’ may be promoted at the expense of others’. Secondly, it was illustrated that the problems may be caused by company managements who may be interested in the outcome of takeover bids, irrespective of whether or not they would retain their positions post-takeovers. Where managements decide to promote their personal objectives, the problems can be more complicated. All of these can occur from the perspective of the target and acquiring companies.

In view of the forgoing, it was demonstrated that these problems are not peculiar to any jurisdiction. The extent to which their occurrences can actually be mitigated is largely dependent on the regulatory framework of takeovers in a specific jurisdiction. Even though the United Kingdom and Nigeria are two separate and distinct corporate jurisdictions, comparing the legal regimes of both countries revealed some important facts in relation to takeovers.614 The comparison provided insights into the ways that the challenges can be addressed, with particular reference to the circumstances in these countries.

614 See Chapter Six, sections 6.2 and 6.4.
Although a takeover directly affect the interests of certain corporate constituents, it can also have an underlying effect on national economy, since shares are investments and they can be considered as property rights. Also, employee disengagements can raise levels of unemployment in any country. Hence the importance of the regulatory and institutional administration of takeovers cannot be ignored.

Chapter Two identified and examined the main theme of the new institutional economics and its relevance to takeovers, with respect to shareholder value and employment protection. The new institutional economics supports the framework of the thesis from two perspectives. The first aspect is in the area of property rights of shareholders, transaction costs economics, -costs of takeovers- and agency relationship in a company. These are the main theme of the new institutional economics theory and they are importantly applicable to shareholder and employee interests in relation to takeovers.\textsuperscript{615} The second aspect provides the theoretical basis for the development of the institutions that regulate and administer takeovers.\textsuperscript{616} First, it identifies the importance of institutions and how they can be developed specifically by reference to the jurisdiction where takeovers are to be regulated - informal institutions -. Secondly, it provides an exposition of the functions of the takeover rules that have been established -formal rules, such as the Takeover Code and the EU Takeover Directive in the UK and the ISA in Nigeria-. Thirdly, it identifies how the developed rules are applied by government agents or administrative bodies. The fourth and most important aspect of the new institutional economics in relation to this thesis is that; negotiations and decisions that lead to the conclusion of takeovers would ideally be based on compliance with effective takeover rules that have been

\textsuperscript{615} See Chapter Two, section 2.5 above, for an illustration of property right, transaction costs and agency relationship as they affect shareholders and employees in relation to the objective of the thesis. See also Table 2 above.

\textsuperscript{616} These are the levels of institutional development as illustrated in Chapter Two, section 2.4 above.
established - the level of the market where exchange occurs -. This is where the interests of the corporate constituents can be aligned as best as possible.

7.3 Opportunism, Uncertainties, Property Rights and National Economic Interest

Bounded rationality and information asymmetry can hinder the ability of market participants to organise transactions in a costless manner. As a medium through which exchange of resources can occur, the market can be characterised by competitions and transaction costs. Competition is a characteristic of corporate takeovers and it can promote conflicts among the different corporate constituents whose interests are affected during takeovers. The new institutional economics seeks to reduce or eliminate the conflicts, including agency conflicts that characterise exchange at the level of the market through effective institutions.617 Chapters Four and Five specifically identified the extent to which takeover competitive market can enhance or undermine the interests of shareholders and employees in the United Kingdom and Nigeria respectively.


7.3.1 Selective Protective Institutional Framework in the United Kingdom

The UK Takeover Code and the EU Takeover Directive directly address the need to protect the interests of shareholders of target Companies. They contain provisions that ensure that shareholders of target companies are responsible for determining whether a takeover bid should be accepted or rejected. The role of managements were sought to be limited to advisory roles, to ensure that shareholders remain in control of their investments. The UK Takeover Panel which has been established to administer takeovers and ensure that the rules are observed has successfully sought to preserve this position. The overriding objective is to limit the powerful influence of managements during takeovers, to ensure that the synergistic and disciplinary roles of takeovers can apply.

However, while the current institutional framework for takeovers in the United Kingdom is commendable, it was shown that it cannot sufficiently limit the scope of managerial powers during takeovers, to promote synergy and the disciplinary function.

The value to be derived from takeovers with reference to synergy should ideally be shared between the shareholders of the target and acquiring companies. The current institutional framework for takeovers is essentially established and developed to protect the interest of the shareholders of target companies - to mitigate agency conflicts -. This is evidently contained in the objectives of the EU Takeover Directive and the UK City Code on Takeovers. This means that there seem to be no material differences between the regulatory effect of takeovers in the United Kingdom and
Nigeria with particular reference to shareholders of acquiring companies. The decisions to make acquisitions are largely determined by managerial preferences. Enforcing directors’ duties and an action for derivative claim is largely of limited relevance. The effect of this is that the challenges caused by managerial hubris are ignored and this can have far reaching implications. First, managerial hubris can be the basis of takeovers. Although managerial hubris may occur independently of managements, through ‘honest mistake’, it is difficult to determine whether managements intended to pursue acquisitions to enhance the corporate size of their companies without reference to whether such acquisitions would lead to economic gains. As long as competition, opportunism, and conflict of interests characterises the level of the market where takeovers occur, the extent to which corporate managements can promote the economic value of their companies without their personal consideration cannot be clearly determined. For this reason, effective institutions are necessary to limit the possibility of such occurrences. A major theme of the new institutional economics is that institutions are necessary, not for the purpose of replacing the important functions of the markets, but they are necessary to strengthen the role of the markets.

Meanwhile, the threats posed to employments by takeovers are a recurrent challenge. Efforts have been made in the UK to address this challenge. The regulatory framework for takeovers recognises the need for employment protection. The EU Takeover Directive requires managements of target companies to state their opinions on a bid, the strategic plans of the acquiring company for the target company and the

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618 This means that shareholders of acquiring companies must be particularly vigilant towards managerial decisions to make acquisitions in both jurisdictions.
619 Subject to the extent to which institutional shareholders can influence managerial decisions and the limitations applicable to companies with premium listing under the UK Listing Rules. See Chapter Four, section 4.3.2.
effects of the takeover policy on employment in the target company.\textsuperscript{620} The major setback of this requirement is that the opinion of the board of the target company would not likely be helpful. The managements of the target company cannot possibly be certain about the policy and the intentions of the acquiring company. Even if they were informed of such policy, by the time the policy would be implemented, other factors may influence the decisions of the acquiring company. Also, the management of the target company may not retain their positions post-takeovers; hence they may not be present in the combined company to see how the policy would be implemented. This provision merely ‘asks’ company managements to consider the interests of employees when they make plans towards a takeover. It is not a mandatory requirement for employment protection.

Even though employment protection does not form part of the substantive provisions of the \textit{Takeover Directive}, employees in companies which are the subject of a takeover may resort to the substantive regulation on employment protection that is concerned with the sale of business undertaking.\textsuperscript{621} The Regulation -TUPE- aims at transferring the employment of the employee from target companies to the combined company post-takeover. The major setback of TUPE is that the scope of the protection that is extended to employees is limited. It is limited to circumstances that neither includes economic, technical nor organisational reasons. This means that employees may have their contract of employment revoked validly if the reasons can be linked to economic, technical or organisational reasons.\textsuperscript{622} The main reason for employee dismissal post-takeovers is to reduce the costs of the takeover. The management of the company post-takeover may seek to reduce the general overhead

\textsuperscript{620} \textit{EU Takeover Directive 2004}, paragraph 17.
\textsuperscript{621} \textit{Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 2006}.
\textsuperscript{622} TUPE r 7 (1) (b).
costs that were incurred in acquiring control of the target company. This is an economic reason. Thus, TUPE has not generally prevented takeovers from remaining a threat to employment in the UK. \(^623\) especially takeovers involving companies in the same industries. \(^624\) Redundancies would likely arise post-takeover from a combined workforce in the same industry.

The establishment of TUPE clearly demonstrates the need to protect employment during sale of business. It implies that sale of business or takeovers remain a big threat to employment protection. However, the substantive provisions of the regulation appear to be in favour of employers; economic, technical or organisational reasons can be given wide definitions and varied application.

In light of the development of TUPE, there is a substantial difference between employment protection during takeovers in Nigeria and in the United Kingdom. The legal framework for takeovers in the United Kingdom and Nigeria recognise the need to protect the interests of company employees during takeover, apparently in light of the threat to the continuous employment of the staff of target companies. The United Kingdom has taken a major step to provide a framework for employment protection, even though further protection remains desirable. Nigeria has not developed any policy towards employment protection during takeovers. Large scale unemployment

\(^{623}\) The unsuccessful attempt by Pfizer to take over Astra-Zeneca may appear to be in the interests of employees, at least from the perspective of the employees. During negotiations for the takeovers, concerns were raised for the interests of the employees of Astra-Zenica. Ian Read, Chief Executive of Pfizer stated (while appearing before the House of Commons to give evidence before the Business, Innovation and Skills Committee) that Pfizer cannot guarantee that the jobs in Astra-Zeneca would be ‘safe’. See the Guardian report, Tuesday 13 May 2014, http://www.theguardian.com/business/2014/may/13/pfizer-astrazeneca-uk-job-cuts-mps-hostile accessed 19th June, 2014.

currently constitutes one of the greatest challenges to economic and national
development in Nigeria.

From the analysis of the general effects of takeovers\textsuperscript{625} and its application in the UK, it can be observed that takeovers are likely to be a medium for value creation. The institutional framework for takeovers in the UK has been developed in the way that operates to promote shareholder value, by mitigation agency conflicts. Also, generally, employees are not to be dismissed by reasons of takeovers. This implies that the role of managements during takeovers in the UK is being challenged by takeover regulation. This can promote the value-creation objective of corporate takeovers; it can also promote the disciplinary role of takeovers in the UK, since the property rights of shareholders in shares can be protected. However, the limitations of the institutional framework can undermine the value creation objective of takeovers in the UK. Takeovers in the UK may be the product of ambitious managements. The regulatory control over the role of managements is largely limited to target companies. The role of managements in acquiring companies is restricted only in limited circumstances.\textsuperscript{626} This means that agency conflicts can be present when a takeover bid is made by acquiring company managements. Also, despite the employment protection regulation in the UK, employees are still being dismissed apparently by reasons of takeovers. In light of these, while the thesis support the view that takeovers in the UK can actually be directed towards creating value, the effect of certain takeovers on shareholder value and general corporate value\textsuperscript{627} show that takeovers in the UK can be used to redistribute or destroy value because of managerial actions, especially in the areas where their roles during takeovers have not been effectively

\textsuperscript{625} In Chapter Three.
\textsuperscript{626} See Chapter Four, section 4.3.2.
\textsuperscript{627} See for example, Tables 5A & 5B, Figures 5 & 6 in Chapter 4 above.
challenged. Thus, it may be contended that the institutional framework for takeover in the UK, which has been established towards achieving the objective of value creation can be further strengthened towards ensuring that the role of managements are effectively challenged towards promoting corporate value.

7.3.2 A Confirmation of the Existing Problems in Nigeria is not the Solution

The current institutional framework for the administration of takeovers in Nigeria is relatively a new development. It was identified in the thesis that the development of takeover institutions in Nigeria was aimed at ensuring among other things; the protection of investors and to ensure efficient markets. Even though the development of the current takeover institutional framework in Nigeria confirms this objective, investment protection and fair markets cannot be guaranteed by reference to the current framework. At best, the current framework identifies the risks that takeovers pose to investments, employees and the attainment of fair and efficient markets.

One of the greatest threats to takeovers is the inability of shareholders of target companies to determine whether their companies should be acquired or not before receiving managerial recommendations. This challenge is a feature of takeovers and it is one of the characteristics of the market. While the ISA recognises this challenge, company managements remain unchallenged. The current institutional framework preserves the powers and influence of managements during takeovers. The ISA requires the input of target management before the shareholders can make any

628 Competition, opportunism, information asymmetry, amongst others.
629 It can ‘encourage’ managements to undermine the interests of their shareholders in dealing with prospective investors. This problem once led to a ‘solidarity’ opposition by minority shareholders towards the acquisition of a large block of shares in GlaxoSmithKline Consumer Nigeria Plc. The board of the company accepted the arrangements to sell the stake without reference to the shareholders. The minority shareholders had to obtain a court order to compel an extra-ordinary general meeting. See The Herald Report, August 5th 2013 http://www.theheraldng.com/hostile-takeover-how-shareholders-scuttled-glaxo-uks-plan-to-delist-its-nigerian-unit-from-the-nse/ accessed, 23 June, 2014.
decision on a bid. Even though it may appear that the shareholders of the target company are to make independent decisions, their independence can be undermined, since they must receive managerial recommendations before making a decision on a bid. There is no requirement for managements to explain the reasons for their advice to the shareholders. Explaining the reasons for managerial advice would aid shareholders to reach a well-considered decision.

Apart from the fact that managements can have much influence over takeovers, the influence of government agency 630 in the determination of whether a company should be acquired - through administrative fiat- without reference to the shareholders of the companies is another challenge of takeovers in Nigeria.

Also, shareholders of acquiring companies are not required to approve a takeover bid. The authority of the board of directors of the acquiring company is required to approve a takeover bid, through board resolution. Both the ISA and the SEC Rules and Regulations confirm this requirement. This means that takeovers are considered to be a usual investment decision of managements. It means that as long as the managements of the acquiring company make a takeover bid, the SEC would approve the bid as valid, without the need for shareholder approval. As observed earlier, the need for shareholder input is necessary to mitigate the possibility of agency conflicts and to ensure that shareholders remain in control of their property rights in their shares.

630 Some banks in Nigeria were acquired through the arrangement of the CBN Governor, pursuance to the CBN Act and BOFIA). The powers of the CBN in this regard are not required to be exercised with reference to the interests of the shareholders of the banks that are to be acquired. The affected banks include; Intercontinental Bank, Oceanic Bank, FinBank, Afribank, Spring Bank, Bank PHB and Union Bank. The shareholders of some of the affected banks are reported to have petitioned the IMF and World Bank. It is further reported that the international financial institutions are putting pressure on the government of Nigeria to intervene and investigate the acquisitions that were conducted by the CBN in 2009-2012. The shareholders are concerned about losses that they have incurred as a result of the acquisition. See the report of The Sun, 17 June, 2014. http://sunnewsonline.com/new/?p=68216 Accessed 23, June, 2014.
Employment protection is not specifically included in the objectives of the institutional framework for takeovers in Nigeria. However, the pursuit of a fair market as its objective and its recognition of the threats that takeovers can cause to employment seems to suggest that employee’ interests were contemplated by takeover regulation in Nigeria. The contemplation of the interests of employees is restricted to the identification and recognition of the threats that takeovers pose to employment. While the ISA requires companies to consider the effect of takeovers on labour, the SEC Rules requires companies to specifically consider the effect of takeovers on the staff of the target company. It is not in doubt that takeovers pose a threat to employment in Nigeria, and because of a failure of institutional functions this challenge has not been addressed. This is a major problem in Nigeria because of the high level of unemployment.

The challenges that have been identified with respect to takeovers in Nigeria have certain implications. Among the implications is that takeovers in Nigeria may not largely promote the objective which takeovers are generally set to achieve, namely: value creation through synergistic gains. First, takeover in Nigeria have led to losses or insignificant gains to shareholders. This problem has been caused by the combined challenges posed by managerial influence and administrative agencies. Although, not all takeovers in Nigeria destroy shareholder and corporate value, there is the likelihood that the more takeovers that are concluded in Nigeria the more losses or insignificant gains that may occur. This means that while takeovers in Nigeria can create value, the potential for value destruction that is caused by managerial hubris is high. Also, large scale of employee disengagement as a result of takeovers shows that

631 See Chapter Five, section 5.3, Table 8 above.
632 Company managements play important roles during takeovers in Nigeria. Also, Agencies such as CBN can influence the acquisition of Banks in Nigeria. Some shareholders are challenging the role of the CBN in the acquisition of their banks.
the interests of employees are being undermined to promote alternative interests. Since managements would rather engage in costly acquisitions and seek to mitigate future corporate costs by reducing the corporate wage bill through employee disengagements, it can be argued that value redistribution can be a feature of takeovers in Nigeria. This means that unless the institutional framework for takeovers is reviewed, takeovers in Nigeria can be largely characterised with value destruction and redistribution.

7.4 Towards an Effective Institutional Framework for Takeovers

Unlike the takeover institutional framework in the United Kingdom where the objectives were stated to be for the protection of the shareholders of the target company, the institutional framework for takeovers in Nigeria is stated to be established for the protection of investors generally. This includes the shareholders of target and acquiring companies. The United Kingdom has responded to the threats posed by takeovers to employment, Nigeria is yet to respond to the same threat. One of the common features of takeover regulation in both jurisdictions that was identified in this thesis is that, the interests of the shareholders of acquiring companies are not protected. Arguably, while institutions may not provide the ultimate answer to all problems of economic growth, nevertheless, institutions that are developed relative to particular needs of a given society are important for economic growth.634

633 High level of employee disengagements characterised high levels of takeovers in Nigeria. See Chapter Five, section 5.4.1 above.
7.4.1 Legal Reforms and Shareholder Protection

Private contracts can enhance flexibility and competitive free market, but in a society where the contractual parties do not have the same negotiating powers, state intervention is important. Limited liability is not obtainable by private contract; it is a creation of the state. Thus, a continuous but minimal state intervention through corporate regulation is desirable for objective reasons. As rightly observed, state intervention may lead to the formulation of corporate arrangements by judges and politicians who lack incentives compared to the parties themselves. 635 Nigeria requires institutional change through state intervention. This intervention is for the purpose of determining the appropriate framework for an efficient private contract. To protect the parties that requires protection. 636 Since politicians and judges may not have the same incentives as the parties themselves, institutional frameworks can be made to include a link of all the parties that may be affected by the outcome of the private contract. Also, free market can only be guaranteed when the participants in the market are actually free to negotiate for the satisfaction of their private preferences. These private preferences can be negotiated and perhaps traded at the level of the market if the individual private preferences are guaranteed by the instrument of regulatory function. This can be used to provide incentives and to possibly achieve the same results that would have been achieved by effective competition if it were feasible. 637

635 Note 272 above, at 777.
637 A E Kahn, The Economics of Regulation: Principles and Institutions (Massachusetts: Massachusetts Institute of Technology, 1988) at 17.
Regulatory interventions are not necessarily meant to impose government decision on the investor, neither are they intended to undermine the role of the managers.\textsuperscript{638} Regulatory intervention is meant to allow the investors to take charge of making the best decisions by relying on their own devices in the determination of how their objectives and welfare can be enhanced.\textsuperscript{639} This can be achieved through inclusive institutional arrangements. Individuals or groups cannot enjoy any private rights or benefits, except to the extent that such rights or benefits have been created and conferred by the state.\textsuperscript{640} Even though takeovers are expected to operate in a free market without government regulatory bureaucracies, certain minimal protection is required for the participants to preserve their private preferences.

In the United Kingdom, the extent to which state intervention would be currently needed is restricted to strengthening the existing institutions. The current institutional framework for takeovers in the United Kingdom can appropriately respond to the inherent challenges of takeovers when they are reviewed. The foundation for an effective institutional framework for takeovers in the United Kingdom exists in the current framework for takeovers. Takeovers can be used to achieve different


objectives by the corporate constituents, but to protect shareholders and employees, a more effective institutional forum is required.

I) The Investments and Securities Act and SEC Rules

The Investments and Securities Act, 2007, requires some important amendments to conform to the objectives of the institutional framework for takeovers in Nigeria. The role of managements during takeovers should be clearly restricted to advisory roles in the ISA. Also, the role of the Central Bank of Nigeria should be restricted. The powers of the SEC to make Rules and Regulations in furtherance of takeovers have not actually achieved the desired objectives of ensuring a fair market. The amendments should include the following amongst others.

First, managements of target companies should be specifically required to abstain from acting in any way that would suggest that they are interfering with or opposing a takeover bid without the input of their shareholders. Their roles should be limited to advisory roles and importantly, they should be required to set clearly the reasons for giving any particular recommendations to their shareholders. This would enable the shareholders to clearly understand the reasons for the recommendation, so that the shareholders can form their own independent opinion.

Secondly, the current position of the ISA and SEC Rules which require mandatory board approvals for takeover bids should be reviewed and amended. While mandatory approval of boards is currently required, shareholder approval is stated to be jointly required with board approval, ‘where applicable’. Shareholders of

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641 While this thesis does not advocate that the responsibility of the SEC with respect to rule-making should be abolished, it argues that the responsibility should be reviewed. See M P Fiorina (ed.), Group Concentration and the Delegation of Legislative Authority, ed. R G Noll (Regulatory Policy and the Social Sciences, Berkeley and Los Angeles: University of California Press, 1985) 175-99 at 196.
acquiring companies should be required to approve takeovers without the need for a further or joint board approval. Company boards should not be required to approve takeover bids. The requirement for a combined approval of bids by shareholders and the board ‘were applicable’ should be reviewed and ‘where applicable’ should be deleted.

Alternatively, the requirement for approval from shareholders of acquiring companies can be waived by the shareholders through the provisions of the articles of association of a company or by a resolution of the shareholders. This can be made to be effective for a specific period of time, subject to renewal. This option to waive shareholder approval can also be included in the review of the ISA and the SEC Rules. Shareholder approval would limit the expropriation and exploration of the property rights of the shareholders. One of the themes of the new institutional economics theory is to limit the expropriation of property rights, by ensuring that property rights remain in the firm grip and control of those who have the ultimate rights over such properties.

Also, the role of the CBN in the acquisition of banks and other financial institutions should be reviewed. It is important to ensure that all forms of takeovers are conducted under the supervision of SEC. This can ensure that takeovers are carried out in accordance with the provisions of the ISA and the SEC rules. Also, it can mitigate the challenges that led to the conflicts between the shareholders of the banks that were acquired under the supervision and arrangement of the CBN. 642

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642 See Chapter Six, section 6.2.1 above.
ii) The Takeover Code

The scope of the takeover code is limited to the protection of the shareholders of the target companies. This means that hubris is capable of influencing takeovers in the United Kingdom. To limit the effect of hubris which can lead to employment reduction, the scope of the Takeover Code should be extended to require shareholder approval before a company can acquire another company.

7.5 Smart Regulation and Social Dialogue for Employment Protection

The concept of smart regulation can be used to address the challenges of takeovers. Smart regulation is concerned with the effectiveness of a regulatory process. It does not only focus on the rule itself, but it considers the design of the rule, its implementation, enforcement, evaluation and revision. The function of any regulation depends on the extent to which the regulatory objective is not diverted away or hijacked by certain interests. Transparency and accountability procedures can be used to prevent this challenge. Smart regulation can be used as transparency and accountability models with the presence of employee representatives to ensure that employee interests are protected during takeovers.

Smart regulation can ensure that identified problems are successfully addressed by regulation. This can be done by ensuring that the class of people that are to be affected by the regulations take part in the development of the regulation. These

include; public interest groups, professional bodies and industry associations.\textsuperscript{645}

Smart Regulation can reduce administrative burden and it can create a sense of belonging by assuming a quasi-self-regulation position, since the persons that are to be affected by the regulation are part of the regulators.

Social dialogue refers to all forms of negotiations and consultations and the exchange of information between the representatives of different groups on issues of common interests.\textsuperscript{646} It is a forum that can facilitate a formal or informal direct meeting between the representatives of the companies that are involved in a takeover and representatives of the employees of the target companies. Social dialogue can be used as a follow-up to the objectives of smart regulation. It can be particularly helpful in Nigeria because the National Union of Banks, Insurance and Financial Institutions Employees (NUBIFE) or / and the Nigeria Labour Congress, or other affected union can meet directly with the representatives of the employees of the target company to communicate the measures that are being put in place to ensure that the interest of the employees are protected.

This can reasonably be done during the transitional period between the time that the bid announcement is made and the time that the deal is completed,\textsuperscript{647} ideally before the completion.

\textsuperscript{645} R Baldwin, M Cave, and M Lodge, \textit{Understanding Regulation: Theory, Strategy and Practice} (New York: Oxford University Press, 2012) at 266. Smart regulation is used by the European Union to promote the effectiveness of EU regulations.


When employees are consulted on issues that may affect their working conditions, they would likely be more commitment to the objective of the firm. This is particularly important for Nigerian employees when acquisitions are anticipated, to mitigate the level of fear and uncertainty which suddenly arises when a takeover becomes imminent. Where employees are involved in the determination of how certain investment decisions would affect their interests, they are less likely to be undermined by the implications of the investment decisions. During takeovers, this approach can reduce the incidence of employee disengagements.

Employee representatives can be appointed as part-time members of SEC, for the purpose of ensuring that employee interests are protected. This can also be considered to be a form of monitoring device and it can reduce transaction costs. When employee representatives are privy to managerial investment decisions and employees form part of decision-makers, they would have the opportunity to evaluate the decisions, to ascertain how the interests of employees are protected.

This means that managements would have to justify how the economic interests of their shareholders can be enhanced without necessarily undermining the interests of other stakeholders to promote shareholder value. Takeovers that require employees to be dismissed to ensure that the company can remain financially stable post-takeover are undesirable. Company managements would more likely focus on those takeovers


649 The response to employment problems with respect to takeovers has been protests by National Union of Banks, Insurance and Financial Institutions Employees (NUBIFE) and the Nigerian Labour Congress.

that would lead to gains for the shareholders of acquiring company, without the need for employee disengagement\textsuperscript{651} where their roles during takeovers are effectively challenged.

This thesis does not suggest that employees should never be disengaged; rather it argues that the option of employment reduction post-takeover can serve the interest of management. Reduction of operational costs would reduce the effects of non-real gains to shareholders of the acquiring company. Smart regulation would encourage managements of acquiring companies to focus on takeovers that would lead to gains without the need to dismiss employees. Alternatively, where employees would be dismissed, smart regulation can provide the needed platform for adequate compensations to be paid. Adequate compensation for employees is important because, whereas shareholders have the opportunity to retain their investments in the company and still hope that the investment fortunes of the company can be improved, employees that are dismissed in Nigeria are at best entitled to one month salary.\textsuperscript{652}

This is hardly adequate. As observed,

‘If the corporation is conceived in relatively narrow terms as an operating institution combining all factors of production to conduct an ongoing business, then the employees who provide labour are as much members of that enterprise as the shareholders who provide the capital. Indeed, the employees may have a much greater investment in the enterprise by their years of service,

\textsuperscript{651} This can reduce the number of acquisitions to mainly value-yielding acquisitions.
may have much less ability to withdraw and have a greater stake in the future of the enterprise than many of the stockholders'.

Employees are recognised as having tangible and valid claims in a company. Shareholders can retain the residual rights to claim the economic value of the company, while being subordinate to a number of other claims by other corporate constituents, including labour. The recognition of employees, together with shareholders as ‘valid claimants’ would create the platform for ensuring that the interests of employees are given reasonable considerations during takeovers.

7.5.1 Employment Protection under the Securities and Exchange Commission Rules

The development of specific rules for employment protection during transfer of businesses, can address the challenges associated with employment issues during takeovers in Nigeria. Consultations for the development of the rule can be made to include the wider business community, corporate representatives and employees' representatives. The SEC Rules are made pursuant to the ISA. The scope of this rule-making authority under section 313 empowers the SEC to make specific regulations. This means that the SEC can make specific rules relating to employment-protection.

The employment protection rules can function as a guide to the SEC in the administration of takeovers. Since the legal department of SEC is responsible for drafting SEC Rules, the same department can be empowered to develop the employment-protection rules. In developing these rules, the employee representatives

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655 S. 313 of the ISA 2007.
in SEC would be consulted to ensure that the rules are capable of protecting employee interests during takeovers. Whenever there is need to amend any part of the rules, the employee representatives would also be consulted. One of the main themes of the new institutional economics is the reduction or elimination of uncertainties that characterises markets. The input of employee representatives can limit the level of uncertainty that arises with respect to employee interests during takeovers in Nigeria.  

The development of a separate employment protection regulation - as applicable in the United Kingdom - in Nigeria may not provide the necessary response to the problem. Enforcement procedures could be challenging in Nigeria. Disengaged employees would be required to protect their interests individually. While it may be relatively easy for aggrieved employees in the United Kingdom to seek legal redress by reference to the provisions of a specific employment protection regulation such as TUPE, enforcement procedure in Nigeria could be challenging and expensive. Litigation costs and the general apathy towards litigation may undermine the effectiveness of an employment protection regulation in Nigeria. Institutions that regulate human relationships must reflect the particular social factors that are present in that society. When legal institutions are developed or transplanted, the laws do not merely precede the existing development of the country’s enterprise. The structural differences in the different countries; including the ways stocks are held,

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656 Currently, the legal department of SEC is not constituted of employee representatives. The inclusion of employees’ representatives on ad hoc basis is part of the recommendations of this thesis. See H P Minsky, ‘Uncertainty and the Institutional Structure of Capitalist Economies: Remarks upon Receiving the Veblen-Commons Award’ Journal of Economic Issues, 30/2 (1996) 357-368, at 364-365.


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the ways that government exerts control, can put countries on different development paths.658

Establishing a specific employment protection regulation in Nigeria as applicable in the United Kingdom may not provide the desired results in Nigeria. Alternatively, an employment protection rule that is developed as an amendment to the SEC Rules can appropriately respond to the challenges.

7.5.2 Institutional Function of Smart Regulation in Nigeria

The new institutional economics is not only concerned with the establishment of effective institutions, it is also concerned with how the institutions are established through the levels of institutional development. Smart regulation can ensure that takeover institutions in Nigeria include a mix of the informal and formal levels of institutional matrix, while preserving the level of governance. The unwritten norm in the Nigerian society is that the interests of the elites rank higher than the interests of the working class. It is very typical of the Nigerian society that the interests of the working class are not protected except there has been series of protests and strike actions by employees.

In the private sector, an opportunity for industrial action is not feasible, because of contracts of employment and fear of victimization. With smart regulation, the institutional framework of takeovers in Nigeria can apply in favour of employees.

Generally, takeover regulation 'frowns' at takeovers that eliminate or stifle competition. Issues relating to competitions are usually resolved before a takeover is approved. Employment issues can also be resolved in the same way. Employee

representatives who are appointed as part-time members of SEC can ensure that matters that affect employee interests are given appropriate consideration. In determining whether a takeover should be approved, the SEC, having employee representatives as members, can largely determine the extent to which the aspect of the SEC Rules on employment protection has been complied with. This would dispense with the need for individual employees to protect their interests; rather, a collective protection of their interests can be envisaged. Also, the role of the CBN during takeovers can be deferred to the SEC. While the CBN can be responsible for monetary policies, as soon as the CBN is of the opinion that a bank faces liquidity risks, it can send its recommendations to the SEC. the SEC can commence the process leading to the acquisitions of the assets of the bank. This would effectively strip the CBN of its powers to arbitrarily decide how banks should be acquired. It can lead to transparency and it can reduce transaction costs that are envisaged by the new institutional economics. Also, it can help to achieve the objectives of the ISA in pursuit of a transparent and fair market.

7.5.3 Institutional Function of Smart Regulation in the United Kingdom

The current institutional framework for employment protection during takeovers in the United Kingdom has not been totally successful in the protection of employees. The provision which allows employees to be disengaged for economic and organisational reasons undermines the entire protection that is contemplated by the regulation.\footnote{See TUPE r. 7.} The concern for employment issues caused by takeovers in the United Kingdom remains subject to effective regulatory review. It was suggested that government should pay more attention to the problems of layoffs that are associated
with mergers and acquisitions. In addition, the constitution of the Takeover Panel should be expanded to include employee representatives. Currently, the panel is made up of different interests groups within the financial and investments industry. Employee representatives would ensure that the interests of employees are protected during takeovers.

Further, the panel can be empowered to consider the extent to which employees would be protected as a necessary prerequisite before a takeover would be approved. The protection that is contemplated here is not necessarily to prevent the reduction of workforce post-takeovers. Rather, it is meant to ensure that managements of acquiring companies are discouraged from using reduction in workforce as a means towards enhancing their takeover objectives. This means that in the event that employees must be dismissed, adequate compensation would be assured and the panel would be satisfied with the level of compensation as part of the approval process.

Smart regulation in the United Kingdom and Nigeria - including social dialogue in Nigeria - as it affects employees can reduce transaction costs and the incidence of uncertainties and incompleteness which characterises contractual arrangements. This is a function of transaction costs economics, which is one of the main themes of the new institutional economics. Since employees cannot completely protect their employment with employment contracts, smart regulation can eliminate or mitigate

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661 See the constitution of the Takeover Panel; http://www.thetakeoverpanel.org.uk/structure/panel-membership
the uncertainties that may operate to undermine the interests of employees during the pendency of their employment contracts.

7.6 Conclusion and Future Research

Property right is valid to the extent that it does not affect the interest of other corporate constituents. It is not an absolute right; hence the need for competition laws to prevent acquisitions from leading to substantial lessening of competition. Similarly, employment can be protected during takeovers with employment regulations since employees cannot be protected by default. The objective of employment regulation can also protect the interests of shareholders by limiting the acquisitions ambition of managers. This can reduce the incidence of hubris. Since investment protection can attract further investments and employment protection can mitigate unemployment issues; both can serve national interests.

The dominant and common factor of the internal and external control mechanisms in a company is the role of managements. While the role of company management is central to internal control, the external control which serves as an alternative to the internal control mechanism through the market for corporate control can also be largely dependent on the role of managements. This implies that without effective takeover regulations that can successfully challenge the role of managements, the objectives of the internal and external control mechanisms of corporate entities would be determined by managements as they deem fit.

The roles of managements during takeovers are based on whether the company involved in the takeover is a target or an acquiring company. This can determine the
synergistic and disciplinary roles of takeovers and it can lead to a disregard of the interests of shareholders, employees and the corporate value ultimately.

The view that the social responsibility of a company is to make profit⁶⁶² can be used to undermine the interests of shareholders and employees during takeovers. While managements can make costly acquisitions without reference to shareholder interests, they can dismiss employees to mitigate the costs that have been incurred apparently to protect shareholder interests. However, as argued in this thesis, this serves the interests of managements, having to manage a bigger entity. This problem remains central to the takeover debate. To effectively protect shareholders, constituents group such as employees who contribute to the development of corporate entities should be protected to ensure that they are not used as a tool by managements to promote the pursuit of costly acquisitions. This can strengthen the role of the external mechanism of corporate control as a credible alternative to the internal mechanism since the internal mechanism largely operate under the control of company managements. Appropriate remuneration and compensation packages for executives, satisfaction for customers, sustainable development for the local community, appreciable asset-base for credit security –creditors- and employment protection are important issues that have constantly demanded the attention of corporate entities. These issues balance the structural framework of a modern company.

Currently, shareholder approval is required before a merger can be approved by the SEC in Nigeria.⁶⁶³ Similar shareholder approval is necessary for takeovers, to ensure that the roles of company managements are not only challenged, but also specifically defined to promote the overall value of corporate entities. Without amending the ISA

⁶⁶³ See the ISA 2007, s 121(4)
and/or the SEC Rules, the SEC cannot insist that certain requirements that are not contained in the principal Act or Rules should be complied with, before authorising a takeover. Mere administrative order or subsidiary legislation cannot amend a principal Act.

Effective institutions can eliminate or mitigate corporate mismanagements and fraud by ensuring that corporate objective generally and shareholder and employee welfare specifically is protected. This can be largely achieved when the actions of those who are responsible for securing these interests - managements - are controlled towards achieving this objective. One of the most important aspects of institutional frameworks is the outcome of their applications as it affects the parties that are involved in the issues that the institutional objectives are responding to. The level of productivity of the outcomes determines the extent to which the parties commit to institutional arrangements - rules, norms. Legal reform, smart regulation and social dialogue as identified and applied above can provide the needed level of productivity for shareholders, employees, the company and the company managements. Managements can retain their powers to manage the business of a company, including making informed decisions on corporate acquisitions;

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664 It may be thought that the SEC Rules can be amended or extended validly without the need to amend the provisions of the ISA since the authority to make the SEC Rules are derived from the ISA. Whenever the SEC Rules are amended or extended, it would ordinarily be expected that the amended or extended portions should form part of the main Rules that should be complied with. However, since the requirement for shareholder approval is a substantive matter, it can be regarded as a new law.

665 Such as ‘shareholder approval for takeovers’.

666 See Phoenix Motors Ltd v NPFMB [1993] 1 NWLR (Pt 272) 718. See also Ernst & Ernst v Hochfelder [1976] 425 US 185, 213. Where a United States court held that the rule-making power of an administrative agency is not the power to create new law.


shareholders can be protected from managerial hubris. Also, employees can be protected from avoidable dismissals. Alternatively, they can be adequately compensated. Also, the long-term value of the company as a going concern can be preserved.

While employee dismissal may be inevitable in certain circumstances, the extent of compensation that would suffice remains a challenge. This is an area for future research in view of the fact that employees’ vested interests in their continuous employment would be dependent on their year(s) of employment, and other factors peculiar to their employment in a company. Also, shareholders are considered ‘owners’ of company investment in the form of property rights. Thus, while it may be contended that the level of employment reduction post-takeovers should be mitigated and that compensation should be paid to disengaged employees, the extent to which shareholders’ wealth should be used to pay compensation to employees is arguably contentious. 669

Also, the thesis identifies managerial hubris as an indirect cause of employee dismissal. It argues that non-restriction of the powers of managements to dismiss company employee post-takeovers may not generally enhance shareholder interests; rather it may actually promote managerial interests. 670 However, there could be certain circumstances when employee dismissal may be necessary. It is not desirable for managements to be responsible for determining when such dismissals may be absolutely necessary. Thus, it is necessary to ‘construct’ an appropriate medium for

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669 Large premiums that are paid to shareholders of target companies may signify a transfer of wealth from the shareholders of acquiring companies to the shareholders of target companies. Payment of compensation to employees can further reduce the wealth of the shareholders of acquiring companies.

670 As indicated earlier, one of the main beneficiaries of takeovers are company managements. See note 602 above.
determining when such dismissals may be desirable without ultimately promoting managerial objectives.
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Online Reports


*Guardian, Tuesday 13 May 2014.*


Telegraph Report of 24 May 2011  


Appendix 1

Acquisitions in Nigeria 1983-2010

<table>
<thead>
<tr>
<th>S/N</th>
<th>Acquiring company</th>
<th>Target company(ies)</th>
<th>Year of Approval</th>
<th>Terms of Conversion/Business Combination Type</th>
<th>Mode of settlement</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>A.G. Leventis &amp; Company (NIG.) Limited</td>
<td>Leventis Stores Ltd.</td>
<td>1983</td>
<td>A price of N10 per share of A.G. Leventis &amp; Co. (NIG.) Ltd. and a par price of N1 each for the shares of Leventis Stores Ltd. Dividend was paid to existing shareholders of Leventis Stores Ltd. for 8% ordinary shares of A.G. Leventis &amp; Co. (NIG.) Ltd.</td>
<td>Cash</td>
</tr>
<tr>
<td>2</td>
<td>Lever Brothers Nig. Ltd</td>
<td>Lipton Nig. Ltd.</td>
<td>1984</td>
<td>A price of N8 per 50% share for Lever Brothers Nig. Ltd. And N/70 per 50% share for Lipton Nig. Ltd. Dividend was paid to existing shareholders of Lipton Nig. Ltd. for 10% ordinary shares of Lipton Nig. Ltd.</td>
<td>Cash</td>
</tr>
<tr>
<td>3</td>
<td>John Holt Ltd.</td>
<td>British Bottling Co. Ltd.</td>
<td>1985</td>
<td>Payment of N6,185,000 to clear British Bottling Co. Ltd. outstanding debt and N12,200,000 to pay off the shareholders of the company in respect of their initial capital by cash.</td>
<td>Cash</td>
</tr>
<tr>
<td>4</td>
<td>SCOCA Nig. Ltd</td>
<td>Nig. Automotive Components Ltd.</td>
<td>1985</td>
<td>The ordinary shares of NACO were offered for N10.50 and SCOCA was to manage NACO co. as to ensure the remittance of N30,000,000 as full and final settlement of the debt of N3,000,000 due from NACO to FINBAR.</td>
<td>Cash</td>
</tr>
<tr>
<td>5</td>
<td>Intra motors (Nig.) Ltd</td>
<td>West coast Fisheries Ltd.</td>
<td>1985</td>
<td>A price of N1.50 per share for West Coast Fisheries Ltd. was approved. This put the total value of West Coast Fisheries Ltd. at N19,500,000 and it was settled by cash.</td>
<td>Cash</td>
</tr>
<tr>
<td>6</td>
<td>IT (Nig.) Ltd</td>
<td>Harvest Spinning Mills Ltd.</td>
<td>1985</td>
<td>A price of N6.50 per 100 ordinary shares of Harvest Spinning Mills Ltd. was approved for the entire 74,573 shares of N2.50 each acquiring IT (Nig.) Ltd.</td>
<td>Cash</td>
</tr>
</tbody>
</table>

Source: Securities & Exchange Commission


TABLE 23 CONT'D. BUSINESS COMBINATION APPLICATIONS HANDLED BY SECURITIES & EXCHANGE COMMISSION (1982 – 2010)

<table>
<thead>
<tr>
<th>S/N</th>
<th>Acquiring company</th>
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</tr>
</thead>
<tbody>
<tr>
<td>7</td>
<td>Niger Match Co. Ltd (now Associated Match Industries Nig. Ltd.)</td>
<td>United Match Co. Ltd. (a subsidiary of Macton Ltd)</td>
<td>1985</td>
<td>A price of N10 per share of United Match Co. Ltd. and N10.50 per share of Macton Ltd. was considered. There was a minimum consideration of N30.00 per share of Macton Ltd. As it had been issued at initial capital and its existing assets were transferred entirely with loan from Niger Match Co. Ltd.</td>
<td>Cash</td>
</tr>
<tr>
<td>8</td>
<td>IT (Nig.) Ltd</td>
<td>Harvest Spinning Mills Ltd.</td>
<td>1985</td>
<td>A price of N6.50 per N2.00 share of Harvest Spinning Mills Ltd. was considered for the entire 74,573 shares of N2.50 each acquiring IT (Nig.) Ltd.</td>
<td>Cash</td>
</tr>
<tr>
<td>9</td>
<td>SCOCA Nig. Ltd</td>
<td>Motor Services Engineering Ltd. (MODEL)</td>
<td>1985</td>
<td>A price of N12.00 per N10.00 share was approved for the acquisition of the entire 760,000 ordinary shares of MODEL.</td>
<td>Cash</td>
</tr>
<tr>
<td>10</td>
<td>John Holt (Ltd. (JHL))</td>
<td>John Holt Investment Ltd. (JHL)</td>
<td>1987</td>
<td>A price of N1.70 per 50% share for JHL and N4.50 per share for JHL was approved. This approved price that gave an exchange ratio of 235 ordinary shares of JHL for 100 ordinary shares of JHL.</td>
<td>Cash</td>
</tr>
<tr>
<td>11</td>
<td>Ng. Bolting Co. PLC</td>
<td>Ng. Bolt (Zinc) Ltd.</td>
<td>1987</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>12</td>
<td>Standard Breweries Nig. Ltd. (SBN)</td>
<td>United Beverages Nig. Ltd. (UBS)</td>
<td>1989</td>
<td>An exchange ratio of 300 ordinary shares of UBS for 100 ordinary shares of SBN was approved. Under this arrangement, UBS issued 3,333,334 ordinary shares of SBN effective at N100 per share in exchange for 1,000,000 ordinary shares of UBS at par price of N1.50 per share.</td>
<td>Cash</td>
</tr>
<tr>
<td>13</td>
<td>Lever Brothers Nig. Ltd (LBN)</td>
<td>Cheshunt Products Investment Ltd. (CPI)</td>
<td>1989</td>
<td>An exchange ratio of 5,000 ordinary shares of CPI for 100 ordinary shares of LBN was approved. The new ordinary shares of LBN exchanged was an approved price of N150 per 50% share of CPI.</td>
<td>Cash</td>
</tr>
<tr>
<td>14</td>
<td>Comfort (NIG.) Ltd</td>
<td>Foundation Engineering Nig. Ltd. (private company)</td>
<td>1989</td>
<td>A price of N12.50 per N10.00 share was approved for the acquisition of the entire 1,050,000 ordinary shares of Foundation Eng. Nig. Ltd.</td>
<td>Cash</td>
</tr>
<tr>
<td>15</td>
<td>Foly Product Nig. PLC (Public-utility company)</td>
<td>R.H. Plastic Ltd (Private Company)</td>
<td>1990</td>
<td>A price of N10.50 per share of N1.00 was approved for the acquisition of the entire 400,000 ordinary share of R.H. plastic Ltd.</td>
<td>Cash</td>
</tr>
</tbody>
</table>

Source: Securities & Exchange Commission
### TABLE 23 CONT'D: BUSINESS COMBINATION APPLICATIONS HANDLED BY SECURITIES & EXCHANGE COMMISSION (1982 – 2010)

<table>
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</thead>
<tbody>
<tr>
<td>16</td>
<td>Prudential Merchant Bank</td>
<td>Prudential Finance Ltd</td>
<td>1990</td>
<td>A price of N1.43 per N1.00 ordinary shares was approved for the acquisition of the entire 1,295,000 ordinary shares of Prudential Finance Ltd.</td>
<td>Cash</td>
</tr>
<tr>
<td>17</td>
<td>Gas Producers</td>
<td>Gas &amp; Welding Ltd</td>
<td>1990</td>
<td>An exchange of 100 ordinary shares of Gas &amp; Welding for every 68 shares of Gas producers was approved.</td>
<td>Cash</td>
</tr>
<tr>
<td>18</td>
<td>Leventis Technical P/L</td>
<td>E fraught Ltd</td>
<td>1991</td>
<td>Exchange ratio of 60 ordinary shares of Leventis Technical for 100 of E fraught Ltd.</td>
<td>Exchange of shares</td>
</tr>
<tr>
<td>19</td>
<td>Eastern Beverages Plc</td>
<td>Continental Beverages Ltd</td>
<td>1992</td>
<td>Exchange ratio of one (1) ordinary share of Continental Beverages Ltd. For one (1) share of Eastern Beverages plc.</td>
<td>Exchange of shares</td>
</tr>
<tr>
<td>20</td>
<td>Aera Seeds Ltd</td>
<td>Aera Food Processing Ltd</td>
<td>1992</td>
<td>Exchange of 100 ordinary shares of Aera Food processing Ltd. For 130 shares of Aera Seeds Ltd.</td>
<td>Exchange of shares</td>
</tr>
<tr>
<td>21</td>
<td>Nig. Fabricating &amp; Milling Co. Plc.</td>
<td>Nig. Synthetic Fabrics Ltd. (NSIF)</td>
<td>1992</td>
<td>An exchange ratio of 100 ordinary shares of N.S.I.F. for 200 shares of N.S.F.</td>
<td>Exchange of shares</td>
</tr>
<tr>
<td>22</td>
<td>A.G. Leventis &amp; Co. Ltd.</td>
<td>Leventis Technical Plc</td>
<td>1993</td>
<td>An exchange ratio of 100 ordinary shares of Leventis Technical and 125 ordinary shares of Leventis Motors for 100 new ordinary shares of A.G. Leventis.</td>
<td>Exchange of shares – a cash payment of 8% per share for Leventis Technical and 12% per share for Leventis Motors was approved for any shareholder not interested in participating in the merger scheme.</td>
</tr>
<tr>
<td>23</td>
<td>Nigerian Tobacco Plc</td>
<td>N.A.S.C. Tobacco Ltd</td>
<td>1993</td>
<td>An exchange ratio of 100 ordinary shares of尼乐烟草 for every 60 ordinary shares of N.A.S.C. Tobacco Ltd.</td>
<td>Exchange of shares</td>
</tr>
<tr>
<td>24</td>
<td>Lenoa Bottling Ltd</td>
<td>Plaisance Bottling Company Ltd</td>
<td>1993</td>
<td>A price of N0.50 per share was approved for the acquisition of the entire 2,600,000 ordinary shares of Plaisance Bottling Company Ltd.</td>
<td>Cash</td>
</tr>
<tr>
<td>25</td>
<td>Nigerian Breweries Plc</td>
<td>Diamond Breweries Plc</td>
<td>1993</td>
<td>The purchase of assets of Diamond Breweries Ltd. By Nigerian Breweries Plc as approved by the Commission which was valued at N236,000,000</td>
<td>Cash</td>
</tr>
<tr>
<td>26</td>
<td>养老服务 Engineering Ltd</td>
<td>All motor engineering services Co. Ltd (AMESCO)</td>
<td>1993</td>
<td>An exchange ratio of one (1) new ordinary share of养老服务 for every one (1) ordinary share of AMESCO</td>
<td>Exchange of shares</td>
</tr>
</tbody>
</table>

Source: Securities & Exchange Commission

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### TABLE 23 CONT'D: BUSINESS COMBINATION APPLICATIONS HANDLED BY SECURITIES & EXCHANGE COMMISSION (1982 – 2010)

<table>
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<tbody>
<tr>
<td>27</td>
<td>United Nig. Ltd (UNIL)</td>
<td>United Nig. Ltd (UNIL)</td>
<td>1994</td>
<td>A share exchange ratio of 100 ordinary shares of UNIL for every 125 ordinary shares of UNIL was approved.</td>
<td>Exchange of shares</td>
</tr>
<tr>
<td>28</td>
<td>Lenoa Bottling Plc.</td>
<td>Lenoa Bottling Plc.</td>
<td>1994</td>
<td>A share exchange ratio of 100 ordinary shares of Lenoa Bottling for every 100 ordinary shares of Lenoa Bottling was approved.</td>
<td>Exchange of shares</td>
</tr>
<tr>
<td>29</td>
<td>Emenish &amp; Co. Ltd.</td>
<td>Emenish &amp; Co. Ltd.</td>
<td>1994</td>
<td>A share exchange ratio of 100 ordinary shares of Emenish &amp; Co. Ltd. for every 100 ordinary shares of Emenish &amp; Co. Ltd. was approved.</td>
<td>Exchange of shares</td>
</tr>
<tr>
<td>30</td>
<td>Multichem Ltd.</td>
<td>Multichem Ltd.</td>
<td>1994</td>
<td>A share exchange ratio of 100 ordinary shares of Multichem Ltd. for every 100 ordinary shares of Multichem Ltd. was approved.</td>
<td>Exchange of shares</td>
</tr>
<tr>
<td>31</td>
<td>NLC Foods Ltd.</td>
<td>NLC Foods Ltd.</td>
<td>1994</td>
<td>A share exchange ratio of 100 ordinary shares of NLC Foods Ltd. for every 100 ordinary shares of NLC Foods Ltd. was approved.</td>
<td>Exchange of shares</td>
</tr>
<tr>
<td>32</td>
<td>Smithke Beechee Plc.</td>
<td>Smithke Beechee Plc.</td>
<td>1994</td>
<td>A share exchange ratio of 100 ordinary shares of Smithke Beechee Plc. for every 100 ordinary shares of Smithke Beechee Plc. was approved.</td>
<td>Exchange of shares</td>
</tr>
<tr>
<td>33</td>
<td>Nigerian Bottling Company Plc (NBC)</td>
<td>Nigerian Bottling Company Plc (NBC)</td>
<td>1994</td>
<td>A share exchange ratio of 100 ordinary shares of NBC for every 100 ordinary shares of NBC was approved.</td>
<td>Exchange of shares</td>
</tr>
<tr>
<td>34</td>
<td>Federation Investments Ltd.</td>
<td>Federation Investments Ltd.</td>
<td>1994</td>
<td>A share exchange ratio of 100 ordinary shares of Federation Investments Ltd. for every 100 ordinary shares of Federation Investments Ltd. was approved.</td>
<td>Exchange of shares</td>
</tr>
<tr>
<td>35</td>
<td>Continental Metal Box Nigeria Ltd.</td>
<td>Continental Metal Box Nigeria Ltd.</td>
<td>1994</td>
<td>A share exchange ratio of 100 ordinary shares of Continental Metal Box Nigeria Ltd. for every 100 ordinary shares of Continental Metal Box Nigeria Ltd. was approved.</td>
<td>Exchange of shares</td>
</tr>
<tr>
<td>36</td>
<td>Royal Niger Insurance Co. Ltd.</td>
<td>Royal Niger Insurance Co. Ltd.</td>
<td>1994</td>
<td>A share exchange ratio of 100 ordinary shares of Royal Niger Insurance Co. Ltd. for every 100 ordinary shares of Royal Niger Insurance Co. Ltd. was approved.</td>
<td>Exchange of shares</td>
</tr>
<tr>
<td>37</td>
<td>International Textile Industries Ltd.</td>
<td>International Textile Industries Ltd.</td>
<td>1994</td>
<td>A share exchange ratio of 100 ordinary shares of International Textile Industries Ltd. for every 100 ordinary shares of International Textile Industries Ltd. was approved.</td>
<td>Exchange of shares</td>
</tr>
<tr>
<td>38</td>
<td>Delta Glass plc</td>
<td>Guinness Group Ltd</td>
<td>1994</td>
<td>A share exchange ratio of 100 ordinary shares of Delta Glass plc for every 100 ordinary shares of Guinness Group Ltd. was approved.</td>
<td>Exchange of shares</td>
</tr>
</tbody>
</table>

Source: Securities & Exchange Commission
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<tbody>
<tr>
<td>39</td>
<td>A.O. Levente Ng. Plc</td>
<td>Idio Investment Ltd, London Afrika &amp; overseas Ltd (LAIFOR), Victoria Search Hotel Nig. Plc (VSNH)</td>
<td>1999</td>
<td>69 million ordinary shares of 5k each of A.O. Levente were to be issued to the shareholders of Idio, LAIFOR and VSNH in exchange for 21.6 million, 2.4 million and 0.8 million ordinary shares of 5k each respectively.</td>
<td>Exchange of shares</td>
</tr>
<tr>
<td>40</td>
<td>Ng Westminster Drilling &amp; Marine Ltd. (NWDM)</td>
<td>Ng. Westminster Drilling &amp; Marine Ltd (NWDM)</td>
<td>1999</td>
<td>The company's shareholders of NWDM were to receive 30% (i.e. 9 million ordinary shares) for each share in NWDM.</td>
<td>Exchange of shares</td>
</tr>
<tr>
<td>41</td>
<td>British American Tobacco Limited (BATN)</td>
<td>Nigerian Tobacco Co. Plc (NTC)</td>
<td>2009</td>
<td>The company's shareholders of NTC were to receive 1 ordinary share of NTC for each share of 50%</td>
<td>The acquisition was effected partly through 75% of the equity share in NTC.</td>
</tr>
<tr>
<td>42</td>
<td>Société Mondelezi Banque Nig. Plc (SMBN)</td>
<td>Financial Equities Ltd (FEL)</td>
<td>2009</td>
<td>The company's shareholders of FEL were to receive 1 ordinary share of NTC for each share of 50%</td>
<td>The acquisition was effected partly through 75% of the equity share in NTC.</td>
</tr>
<tr>
<td>43</td>
<td>Total Nigeria Plc</td>
<td>F1 Nig. Ltd</td>
<td>2009</td>
<td>The company's shareholders of F1 were to receive 1 ordinary share of NTC for each share of 50%</td>
<td>The acquisition was effected partly through 75% of the equity share in NTC.</td>
</tr>
<tr>
<td>44</td>
<td>United Nig. Textile Ltd. (UNITL)</td>
<td>Niconitex Industries Plc</td>
<td>2001</td>
<td>All the assets, liabilities &amp; undertakings of Niconitex be transferred to UNITL, the entire share capital of Niconitex be converted and disposed of.</td>
<td>The acquisition was effected partly through 75% of the equity share in Niconitex.</td>
</tr>
<tr>
<td>45</td>
<td>FZ Investments</td>
<td>FZ Nig. Limited, Ekoasia Nig. Limited, Grace Properties Nig. Ltd.</td>
<td>2009</td>
<td>All assets, liabilities &amp; undertakings of FZ, Ekoasia, and Grace Properties be transferred to FZ Investments, in turn paid in cash to investor shareholders.</td>
<td>The acquisition was effected partly through 75% of the equity share in FZ.</td>
</tr>
</tbody>
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<tr>
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<tbody>
<tr>
<td>46</td>
<td>Edo Cement Co. Ltd</td>
<td>Benin Cement Co. Ltd</td>
<td>2002</td>
<td>All the assets, liabilities of Benin Cement were transferred to Edo Cement, while Edo State Government assumed liabilities of Benin Cement.</td>
<td>Unpaid balance of N3.75 per share was exchanged for every ordinary share of 50 kobo each in Edo Cement.</td>
</tr>
<tr>
<td>47</td>
<td>Unipoly Ng. Plc</td>
<td>App.Ng. Plc</td>
<td>2002</td>
<td>All the assets, liabilities, and undertakings of App were transferred to Unipoly.</td>
<td>Unpaid balance of N3.75 per share was exchanged for every ordinary share of 50 kobo each in Unipoly.</td>
</tr>
<tr>
<td>48</td>
<td>Lexington Int’l Co. Ltd</td>
<td>Express Insurance Gateway Insurance Co. Ltd</td>
<td>2004</td>
<td>One ordinary share of expanded Lexington Insurance Company was issued in exchange for one ordinary share of Expanded Insurance Company and one ordinary share of Express Insurance Company Ltd.</td>
<td>Cash</td>
</tr>
<tr>
<td>49</td>
<td>United Bank for Africa Plc</td>
<td>Standard Trust Bank Plc</td>
<td>2005</td>
<td>All assets, liabilities, and undertakings including real property, intellectual property rights of STB be transferred to USA and the entire share capital of 8,000,000,000 ordinary share of 50 kobo each of STB be cancelled and dissolved without winding up.</td>
<td>Ordinary share of 50 kobo each in USA 4 pic. be credited and fully paid in exchange for 2 ordinary shares of 50 kobo in STB.</td>
</tr>
<tr>
<td>50</td>
<td>United Bank for Africa Plc</td>
<td>Standard Trust Bank Plc</td>
<td>2005</td>
<td>All assets, liabilities, and undertakings including real property, intellectual property rights of STB be transferred to USA and the entire share capital of 8,000,000,000 ordinary share of 50 kobo each of STB be cancelled and dissolved without winding up.</td>
<td>Ordinary share of 50 kobo each in USA 4 pic. be credited and fully paid in exchange for 2 ordinary shares of 50 kobo in STB.</td>
</tr>
<tr>
<td>51</td>
<td>First Atlantic Bank Plc</td>
<td>First City Bank Nig. Plc</td>
<td>2005</td>
<td>All the ordinary shares of First Atlantic Ltd were surrendered for the holders and cancelled, and all the assets, liabilities and undertakings of First Atlantic were merged with those of First City Bank.</td>
<td>3 ordinary shares of 50 kobo each in First City Bank Nig. Plc. for 2 ordinary shares of 50 kobo each of First Atlantic Bank Plc.</td>
</tr>
</tbody>
</table>

Source: Securities & Exchange Commission

**Table 23 CONT'D: BUSINESS COMBINATION APPLICATIONS HANDLED BY SECURITIES & EXCHANGE COMMISSION (1982 – 2010)**

<table>
<thead>
<tr>
<th>S/N</th>
<th>Acquiring company</th>
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<th>Mode of settlement</th>
</tr>
</thead>
<tbody>
<tr>
<td>52</td>
<td>Access Bank of Nigeria Plc</td>
<td>Meka International Bank Ltd</td>
<td>2005</td>
<td>All assets, liabilities, and undertakings, including real property, intellectual property rights of Capital Bank and Meka Bank are transferred to Access Bank Plc, and the entire share capital of Meka Bank plc is cancelled. Capital Bank and Meka Bank will then be dissolved without winding up.</td>
<td>One ordinary share of Intercontinental Bank Plc at 50 kobo each in Access Bank Plc.</td>
</tr>
<tr>
<td>53</td>
<td>Intercapital Equity Bank of Nigeria Plc</td>
<td>Citibank Nigeria Plc</td>
<td>2006</td>
<td>The entire share capital of Equity Bank of Nigeria Plc, Citibank Nigeria Plc, and Global Bank Plc are transferred for the holders and cancelled, and all the assets, liabilities, and undertakings including real property, intellectual property rights will be transferred to Intercontinental Bank Plc, and the banks will be dissolved without winding up.</td>
<td>Ordinary share of 50 kobo each in Global Bank Plc.</td>
</tr>
<tr>
<td>54</td>
<td>Equatorial Trust Bank Limited</td>
<td>Equatorial Trust Limited</td>
<td>2006</td>
<td>All assets, liabilities, and undertakings including real property, intellectual property rights of Equity Bank, Global Bank, and the banks will be dissolved without winding up.</td>
<td>Share exchange ratio of 1 ordinary share of 50 kobo of Equatorial Trust Bank Limited for 50 kobo of First City Bank Nig. Plc.</td>
</tr>
<tr>
<td>55</td>
<td>First City Monument Bank Plc</td>
<td>First City Monument Bank Plc</td>
<td>2005</td>
<td>All assets, liabilities, and undertakings, including real property, intellectual property rights of CDB and NAMCO are transferred to FCMB and the entire share capital of First City Monument Bank Plc is cancelled.</td>
<td>3 ordinary shares of FCMB for 9 ordinary shares of Co-operative Bank Nig. Plc.</td>
</tr>
<tr>
<td>56</td>
<td>First Bank of Nigeria Plc</td>
<td>First Bank of Nigeria Plc</td>
<td>2005</td>
<td>All assets, liabilities, and undertakings, including real property, intellectual property rights of TRAMCO and MDC are transferred to First Bank Plc and the entire share capital of Transformer Banks Plc is cancelled.</td>
<td>2 ordinary shares of LAG for 5 ordinary shares of LAG and 2 ordinary shares of MDC for 5 ordinary shares of LAG.</td>
</tr>
<tr>
<td>57</td>
<td>Sterling Bank Plc</td>
<td>Sterling Bank Plc</td>
<td>2005</td>
<td>All assets, liabilities, and undertakings, including real property, intellectual property rights of Sterling Bank, NIMB Bank and NNB Bank are transferred to NAL and the entire share capital of the transformed banks is cancelled and dissolved without winding up.</td>
<td>3 ordinary shares of NAL for 1 ordinary share of 3 ordinary shares of NIMB Bank Plc. for 1 ordinary share of NNB Bank Plc.</td>
</tr>
</tbody>
</table>

Source: Securities & Exchange Commission
### Table 23 Cont'd: Business Combination Applications Handled by SEC (1992 – 2010)

<table>
<thead>
<tr>
<th>S/N</th>
<th>Acquiring company</th>
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</tr>
</thead>
<tbody>
<tr>
<td>58</td>
<td>Unity Banks Plc</td>
<td>Integricity Bank Plc</td>
<td>2005</td>
<td>All assets, liabilities &amp; undertakings, including real properties and intellectual property rights of IRTB are transferred to Unity Bank and the entire share capital of IRTB is cancelled.</td>
<td>8 ordinary shares of Unity for 1 share of IRTB.</td>
</tr>
<tr>
<td>59</td>
<td>IBTC Chartered Bank &amp; Trust Plc</td>
<td>Chartered Bank of Regent Plc</td>
<td>2005</td>
<td>All assets, liabilities &amp; undertakings, including real properties and intellectual property rights of Chartered Bank and Regent Bank are transferred to IBTC. The entire share capital of Chartered Bank and Regent Bank is cancelled and subsequently dissolved without winding up.</td>
<td>4 IBTC ordinary shares for 5 Chartered Bank and 2 shares of IBTC for 1 share of Regent Bank.</td>
</tr>
<tr>
<td>60</td>
<td>Platinum York Bank Plc</td>
<td>Platinum York Bank Plc</td>
<td>2005</td>
<td>All assets, liabilities &amp; undertakings, including real properties and intellectual property rights of Halib are transferred to Platinum York Bank and the entire share capital of Halib is cancelled.</td>
<td>13 Halib shares for 17 Platinum York Bank.</td>
</tr>
<tr>
<td>61</td>
<td>Fidelity Bank Plc</td>
<td>Fidelity Bank Plc</td>
<td>2005</td>
<td>All assets, liabilities &amp; undertakings, including real properties and intellectual property rights of FIDG and later Bank are transferred to Fidelity and the entire share capital of FIDG and later Bank is cancelled.</td>
<td>8 Fidelity shares for 15 FIDG and 2 Fidelity shares for 9 later Bank.</td>
</tr>
<tr>
<td>62</td>
<td>SKYE Bank Plc</td>
<td>Prudential Bank Plc</td>
<td>2005</td>
<td>All assets, liabilities &amp; undertakings, including real properties and intellectual property rights of Prudential Bank are transferred to SKYE and the entire share capital of Prudential Bank is cancelled.</td>
<td>1 Prudential share for 9 SKYE shares.</td>
</tr>
<tr>
<td>63</td>
<td>Aboki Nigeria Plc</td>
<td>Aboki Nigeria Plc</td>
<td>2005</td>
<td>All assets, liabilities &amp; undertakings, including real properties and intellectual property rights of Aboki are transferred to Aboki Nigeria Plc and the entire share capital of Aboki is cancelled.</td>
<td>1 Aboki Nigeria share for 10 Aboki shares.</td>
</tr>
<tr>
<td>64</td>
<td>Diamond Bank Plc</td>
<td>Lone Bank Plc</td>
<td>2005</td>
<td>All assets, liabilities &amp; undertakings, including real properties and intellectual property rights of Lone Bank are transferred to Diamond Bank and the entire share capital of Lone Bank is cancelled.</td>
<td>1 Diamond Bank share for 28 Lone Bank shares.</td>
</tr>
<tr>
<td>65</td>
<td>First Indel Bank Plc</td>
<td>First Indel Bank Plc</td>
<td>2005</td>
<td>All assets, liabilities &amp; undertakings, including real properties and intellectual property rights of Indel are transferred to First Indel Bank and the entire share capital of Indel is cancelled.</td>
<td>1 First Indel share for 15 Indel shares.</td>
</tr>
<tr>
<td>66</td>
<td>Oceanic Bank Int'l Plc</td>
<td>Oceanic Bank Int'l Plc</td>
<td>2006</td>
<td>All assets, liabilities &amp; undertakings, including real properties and intellectual property rights of Oceanic Bank are transferred to Oceanic Bank and the entire share capital of Oceanic Bank is cancelled.</td>
<td>The entire 1 billion ordinary shares of Oceanic Bank were exchanged for a nominal value of N1.00.</td>
</tr>
</tbody>
</table>

Source: Securities & Exchange Commission

### Table 23 Cont'd: Business Combination Applications Handled by SEC (1992 – 2010)

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<tbody>
<tr>
<td>67</td>
<td>Oceanic Bank Int'l Plc</td>
<td>Oceanic Bank Int'l Plc</td>
<td>2006</td>
<td>All assets, liabilities &amp; undertakings, including real properties and intellectual property rights of Oceanic Bank are transferred to Oceanic Bank and the entire share capital of Oceanic Bank is cancelled.</td>
<td>The entire 1 billion ordinary shares of Oceanic Bank were exchanged for a nominal value of N1.00.</td>
</tr>
<tr>
<td>68</td>
<td>United Bank for Africa Plc</td>
<td>Continental Trust Bank Ltd</td>
<td>2006</td>
<td>Acquisition</td>
<td>Cash</td>
</tr>
<tr>
<td>69</td>
<td>SKYE Bank Plc</td>
<td>Cooperative Bank Plc</td>
<td>2006</td>
<td>All assets, liabilities &amp; undertakings, including real properties and intellectual property rights of Cooperative Bank are transferred to SKYE Bank and the entire share capital of Cooperative Bank is cancelled.</td>
<td>7 SKYE Bank shares for 10 Cooperative Bank shares.</td>
</tr>
<tr>
<td>70</td>
<td>Citibank Int'l Plc</td>
<td>CitiBank Int'l Plc</td>
<td>2006</td>
<td>All assets, liabilities &amp; undertakings, including real properties and intellectual property rights of CitiBank are transferred to Citibank and the entire share capital of CitiBank is cancelled.</td>
<td>The entire 1 billion ordinary shares of Citibank were exchanged for a nominal value of N1.00.</td>
</tr>
<tr>
<td>71</td>
<td>First City Union Investment Bank Plc</td>
<td>First City Union Investment Bank Plc</td>
<td>2006</td>
<td>Acquisition</td>
<td></td>
</tr>
<tr>
<td>72</td>
<td>First City Union Investment Bank Plc</td>
<td>First City Union Investment Bank Plc</td>
<td>2006</td>
<td>Acquisition</td>
<td></td>
</tr>
<tr>
<td>73</td>
<td>Wema Bank Plc</td>
<td>National Bank Ltd</td>
<td>2006</td>
<td>Acquisition</td>
<td></td>
</tr>
<tr>
<td>74</td>
<td>Unity Bank Plc</td>
<td>Unity Bank Plc</td>
<td>2006</td>
<td>All assets, liabilities &amp; undertakings, including real properties and intellectual property rights of NIBA and NIBA were transferred to Unity Bank Plc. The entire share capital was cancelled and subsequently dissolved without winding up.</td>
<td>5, 4 and 1 Unity Bank shares for every 5 ordinary shares of Unity Bank Plc.</td>
</tr>
<tr>
<td>75</td>
<td>Custodian and Allied Insurance Plc</td>
<td>Custodian and Allied Insurance Plc</td>
<td>2006</td>
<td>All assets, liabilities &amp; undertakings, including real properties, intellectual property rights of Guardian Life and the entire share capital of Guardian Life is cancelled.</td>
<td>50 ordinary shares of Custodian for every 50 ordinary shares of Guardian Life.</td>
</tr>
</tbody>
</table>

Source: Securities & Exchange Commission
### TABLE 23 CONTD: BUSINESS COMBINATION APPLICATIONS HANDLED BY SECURITIES & EXCHANGE COMMISSION (1982 – 2010)

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<tbody>
<tr>
<td>76</td>
<td>Custodian and Allied Insurance Plc</td>
<td>Custodian and Allied Inc. Plc, Fire Equity &amp; Capem Ins. Ltd</td>
<td>2006</td>
<td>All assets, liabilities &amp; undertakings, including real properties, intellectual property rights of FEICG be transferred to Custodian &amp; Allied Inc. and the share capital of FEICG be cancelled</td>
<td>52 ordinary shares of 5% of Custodian for every 80 ordinary shares of N1.00 0f FEICG</td>
</tr>
<tr>
<td>77</td>
<td>International Energy Insurance Co Ltd</td>
<td>Int’l Energy Insurance Co. Ltd, Eko Insurance Co. Ltd</td>
<td>2006</td>
<td>All assets, liabilities &amp; undertakings, including real properties, intellectual property rights of Int’l Energy be transferred to International Energy Insurance and the entire share capital of Eko Insurance be cancelled</td>
<td>42 ordinary shares of 5% of IC1 for exchange for every 25 ordinary shares of N1.00 of Int’l Energy</td>
</tr>
<tr>
<td>78</td>
<td>Standard Trust Assurance Plc</td>
<td>Standard Trust Assurance Plc, Custodian Assurance Co Ltd</td>
<td>2006</td>
<td>All assets, liabilities &amp; undertakings, including real properties, intellectual property rights of Standard be transferred to STAO and the entire share capital of Standard be cancelled</td>
<td>1 ordinary share of 5% of STAO for every 1 ordinary share of 5% of Standard</td>
</tr>
<tr>
<td>79</td>
<td>Royal Exchange Assurance Plc</td>
<td>Royal Exchange Assurance Plc, Primefin Assurance Plc, Westland Co &amp; African Prudential Co Ltd</td>
<td>2006</td>
<td>All assets, liabilities &amp; undertakings, including real properties, intellectual property rights of Primefin and African Prudential be transferred to Royal Exchange and the entire share capital of Westland and African Prudential be cancelled and the companies dissolved without winding up</td>
<td>4 and 1 ordinar shares of 5% each in Royal Exchange for every 11 and 1 ordinary shares of 5% each in Primefin and African Prudential respectively</td>
</tr>
<tr>
<td>80</td>
<td>Alico Insurance Plc</td>
<td>Alico Insurance Plc, NFI Insurance Co. Plc, Nairia Life Assurance Co Ltd</td>
<td>2006</td>
<td>All assets, liabilities &amp; undertakings, including real properties, intellectual property rights of NFI and Alico be transferred to Alico and the entire share capital of NFI and Alico not be cancelled while the companies will be dissolved without winding up</td>
<td>2 and 100 ordinary shares of 5% each in Alico for every 2 and 117 ordinary shares in NFI and Nairia Life respectively</td>
</tr>
<tr>
<td>81</td>
<td>Flower Mills of Nigeria Plc</td>
<td>Flower Mills of Nigeria Plc, Golden Fertilizer Co. Ltd, Nairia Life Assurance Co Ltd</td>
<td>2006</td>
<td>All assets, liabilities &amp; undertakings, including real properties, intellectual property rights of Golden Fertilizer to be transferred to Flower Mills and the entire share capital of Golden Fertilizer be cancelled while the company dissolved without winding up</td>
<td>Normal transfer of Golden Fertilizer is wholly own by Flower Mills</td>
</tr>
<tr>
<td>82</td>
<td>Kunde Lebanon Holding S.A.L.</td>
<td>Kunde Lebanon Holding S.A.L., Beirut Nig. Plc</td>
<td>2006</td>
<td>Acquisition of Beirut Nig. Plc to Kunde Lebanon</td>
<td>Kunde Lebanon acquired 3,000,000 ordinary shares of Beirut Telecommunications Plc at N1.00 per share</td>
</tr>
<tr>
<td>83</td>
<td>Joy Telecommunications Ltd</td>
<td>Joy Telecommunications Ltd, Cairo Telecommunications Ltd</td>
<td>2006</td>
<td>Acquisition of Cairo Telecommunications Ltd to Joy Telecommunications Ltd</td>
<td>Kunde Lebanon acquired 3,000,000 ordinary shares of Beirut Telecommunications Plc at N1.00 per share</td>
</tr>
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Source: Securities & Exchange Commission

### TABLE 23 CONTD: BUSINESS COMBINATION APPLICATIONS HANDLED BY SECURITIES & EXCHANGE COMMISSION (1982 – 2010)

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<tbody>
<tr>
<td>84</td>
<td>Frensham Overseas Holdings Ltd</td>
<td>Frensham Overseas Holding Ltd, Regency Overseas</td>
<td>2006</td>
<td>Acquisition</td>
<td>Frensham acquired 10,000,000 shares of Regency at N50.00 per share</td>
</tr>
<tr>
<td>85</td>
<td>Gotlink Insurance Co. Ltd</td>
<td>Goldfinch Insurance Co. Ltd, Lexington Brl Insurance Ltd, Lister Insurance Ltd</td>
<td>2006</td>
<td>Acquisition</td>
<td>Gotlink acquired the assets, liabilities and business undertakings of Lexington and Lister based on issuance of 49,456,545 Gotlink shares to Lexington shareholders and payment of N260,000,000 to Lister shareholders in exchange for their shares</td>
</tr>
<tr>
<td>87</td>
<td>Sterling Assurance Nig. Ltd</td>
<td>Sterling Assurance Nig. Ltd, Naiwawa Insurance Co. Ltd, Umunah Reinsurance Co. Ltd</td>
<td>2007</td>
<td>Merger</td>
<td>1 ordinary share of N1.00 of Sterling Assurance for every 2 ordinary shares of N1.00 of Naiwawa Insurance and 10,000 ordinary shares of N1.00 of Umunah Reinsurance for every 1 ordinary share of N1.00 of Umunah Reinsurance</td>
</tr>
<tr>
<td>88</td>
<td>Linkage Assurance Plc</td>
<td>Linkage Assurance Plc, Central Insurance Company Ltd</td>
<td>2007</td>
<td>Merger</td>
<td>200 ordinary shares of 5% each of Linkage Assurance for every 1 ordinary share of 5% each of Central Insurance Company</td>
</tr>
<tr>
<td>89</td>
<td>Regency Alliance Insurance Plc</td>
<td>Regency Alliance Insurance Plc, Electricity Co. Ltd, Nigerian Alliance Ins. Corp Ltd, Capital Express Gen. Ins. Ltd</td>
<td>2007</td>
<td>Merger</td>
<td>8 ordinary shares of 5% each of Regency Alliance for every 5 ordinary shares of Regency Insurance, 28 ordinary shares of 5% each of Regency Alliance for every 20 ordinary shares of Distilleries Insurance, 14 ordinary shares of Regency Alliance for every 10 ordinary shares of N1.00 of Nigerian Alliance Assurance and 24 ordinary shares of 5% each of Regency Alliance for every 25 ordinary shares of Capital Express.</td>
</tr>
<tr>
<td>S/N</td>
<td>Acquiring company</td>
<td>Target company (line)</td>
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</tr>
<tr>
<td>85</td>
<td>Capital Express Insurance Company Ltd</td>
<td>Capital Express Ins. Co. Ltd</td>
<td>2007</td>
<td>1 ordinary share of N10 each of Capital Express for every 5 ordinary shares of 5% each of Transcorp Life Assurance.</td>
<td>Merger</td>
</tr>
<tr>
<td>81</td>
<td>NEM Insurance Plc</td>
<td>NEM Insurance Plc, Vigilant Insurance Co. Ltd</td>
<td>2007</td>
<td>1 ordinary share of N10 each of NEM Insurance for every 10 ordinary shares of Vigilant Insurance Company.</td>
<td>Merger</td>
</tr>
<tr>
<td>82</td>
<td>Kapital Insurance Company Ltd</td>
<td>Kapital Insurance Company Ltd, Intercontinental Asia, Co. Ltd, Global Commerce &amp; Assur. Co. Ltd</td>
<td>2007</td>
<td>3 ordinary shares of N1 each of Kapital Insurance for every 2 ordinary shares of N10 each of Intercontinental Asia Assurance and 5 ordinary shares of N1 each of Kapital Insurance for every 2 ordinary shares of 5% each of NEM Insurance &amp; General Assurance.</td>
<td>Merger</td>
</tr>
<tr>
<td>83</td>
<td>Equity Indemnity Insurance Plc</td>
<td>Equity Indemnity Insurance Co. Plc, First Assurance Plc</td>
<td>2007</td>
<td>5 ordinary shares of 5% each of First Assurance for every 2 ordinary shares of Equity Indemnity Insurance.</td>
<td>Merger</td>
</tr>
<tr>
<td>84</td>
<td>Crusader Insurance Plc</td>
<td>Crusader Insurance Co. Plc, Admiral Insurance Company Ltd</td>
<td>2007</td>
<td>1 ordinary share of 5% each of Equity Indemnity Insurance for every 3 ordinary shares of Crusader Insurance.</td>
<td>Merger</td>
</tr>
<tr>
<td>85</td>
<td>Stanbic IBTC Bank Plc</td>
<td>Stanbic IBTC Bank Plc</td>
<td>2007</td>
<td>Extra-ordinary share of 5% each of Steelcase in exchange for the assets and liabilities of Stanbic Bank.</td>
<td>Merger</td>
</tr>
<tr>
<td>86</td>
<td>Aiko Insurance Plc</td>
<td>Alico Insurance Plc, Laima Insurance Company Ltd</td>
<td>2007</td>
<td>2 ordinary shares of 5% each of Alico Insurance for every 5 ordinary shares of N10 each of N1 Insurance and 1 ordinary share of 5% each of Alico Insurance for every 11 ordinary shares of N1 each of Laima Insurance.</td>
<td>Merger</td>
</tr>
<tr>
<td>87</td>
<td>Royal Exchange Assurance Plc</td>
<td>Royal Exchange Assurance Plc, Phoenix Assurance of Nigeria Plc, African Prudential Plc</td>
<td>2007</td>
<td>4 ordinary shares of 5% each of Royal Exchange for every 11 ordinary shares of 5% each of Phoenix Assurance and 1 ordinary share of 5% each of Royal Exchange for every 1 ordinary share of 5% each of African Prudential.</td>
<td>Merger</td>
</tr>
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<tr>
<td>98</td>
<td>Custodian &amp; Allied Insurance Plc</td>
<td>Custodian &amp; Allied Insurance Plc, Fire, Equity &amp; General Ins. Co. Ltd</td>
<td>2007</td>
<td>Merger</td>
<td>52 ordinary shares of 50k each of Custodian Insurance for every 63 ordinary shares of N1.00 each of Fire, Equity &amp; General Insurance.</td>
</tr>
<tr>
<td>99</td>
<td>Leadway Assurance Company Ltd</td>
<td>Allianz Assurance Ltd</td>
<td>2007</td>
<td>Acquisition</td>
<td>Shareholders of Allianz Assurance received N335.7 million for the acquisition of the entire shares of the company by Leadway Assurance.</td>
</tr>
<tr>
<td>100</td>
<td>Crusader Insurance Plc</td>
<td>Golden Insurance Ltd, Royal Trust Assurance Ltd</td>
<td>2007</td>
<td>Acquisition</td>
<td>50 ordinary shares of Crusader Insurance for every 291 ordinary shares of Golden Insurance, 100 ordinary shares of Crusader for every 215 ordinary shares of Royal Trust and 100 ordinary shares of Crusader for every 274.9 ordinary shares of Royal Trust Insurance.</td>
</tr>
<tr>
<td>101</td>
<td>Diamond Bank Plc</td>
<td>Diamond Bank Plc, Allianz Development Int. Co. Ltd</td>
<td>2007</td>
<td>Acquisition</td>
<td>Shareholders of African Development Insurance Company received N153.75 million for the acquisition of the 85% of the company’s shares by Diamond Bank.</td>
</tr>
</tbody>
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<tbody>
<tr>
<td>103</td>
<td>Industrial &amp; General Insurance Co Ltd</td>
<td>Nige Insurance Ltd</td>
<td>2007</td>
<td>Acquisition</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1 ordinary share of NIG for every 7 ordinary shares of Nigeal.</td>
</tr>
<tr>
<td>104</td>
<td>Cande Marketing Ltd</td>
<td>Cande Plc</td>
<td>2007</td>
<td>Dis-merger</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Cande Marketing Ltd received assets worth N19,506 billion for 19,750,000 ordinary shares of N10 each of Cande Plc. Cande Marketing then became a separate entity from Cande Plc.</td>
</tr>
<tr>
<td>105</td>
<td>Nige Delta Exploration &amp; Production Plc</td>
<td>Nige Delta Petroleum Resourses Ltd</td>
<td>2007</td>
<td>Acquisition</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Payment of net consideration of $4,227,447 by issuance of 7,419,222 ordinary shares of Nige Delta Exploration &amp; Production Plc, representing 50% of the amount and $2,223,062 worth Nige Delta Petroleum Resourses Ltd Preference Participating Investment Notes (PIN).</td>
</tr>
<tr>
<td>106</td>
<td>Nige Delta Exploration &amp; Production Plc</td>
<td>Chemar Ltd</td>
<td>2007</td>
<td>Acquisition</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Payment of net consideration of $2,361,550 by issuance of 2,750,000 ordinary shares of 9.023% each in Nige Delta Exploration &amp; Production Plc to the shareholders of Chemar Ltd.</td>
</tr>
<tr>
<td>107</td>
<td>Cande Plc</td>
<td>Cande &amp; Oli Investment Ltd</td>
<td>2007</td>
<td>Acquisition</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Issuance of 119,377,998 ordinary shares of Cande Plc for 117,765,809 fully paid ordinary shares of Cande &amp; Oli Investments in Cande Energy Services Ltd, Cande Production &amp; Development Co Ltd, Cande Exploration &amp; Production Ltd, Cande Supply &amp; Trading Ltd and Cande Trading (Benefits) Ltd. 12 identified minority shareholders of Gasline Nig Ltd received 83,497,623 ordinary shares of Cande Plc for 403,916,320 ordinary shares of Gasline Nig Ltd.</td>
</tr>
<tr>
<td>108</td>
<td>Nige Delta Exploration &amp; Production Plc</td>
<td>Chemar Ltd</td>
<td>2007</td>
<td>Acquisition</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Payment of net consideration of $2,361,550 by issuance of 2,750,000 ordinary shares of 9.023% each in Nige Delta Exploration &amp; Production Plc to the shareholders of Chemar Ltd.</td>
</tr>
</tbody>
</table>

Source: Securities & Exchange Commission
<table>
<thead>
<tr>
<th>S.N.</th>
<th>Acquiring company</th>
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<th>Year of Approval</th>
<th>Terms of Conversion/Business Combination Type</th>
<th>Mode of settlement</th>
</tr>
</thead>
<tbody>
<tr>
<td>109.</td>
<td>Niger Delta Exploration &amp; Production Plc</td>
<td>Chevron Ltd</td>
<td>2007</td>
<td>Acquisition</td>
<td>Payment of non-convertible $2,361,163 by issuance of 8,746,143 ordinary shares of JV,0 each in Niger Delta Exploration &amp; Production Plc to the shareholders of Chevron Ltd.</td>
</tr>
<tr>
<td>110.</td>
<td>Gencor Plc</td>
<td>Ocean &amp; Oil Investment Ltd/Gazlink Nig Ltd (previously 12 identified shareholders)</td>
<td>2007</td>
<td>Acquisition</td>
<td>Issuance of 118,197,999 ordinary shares of Gencor Plc for 11,765,850 fully paid ordinary shares of Ocean &amp; Oil Investments in Gencor Equity Services Ltd, Gencor Exploration &amp; Development Co. Ltd, Gencor Exploration &amp; Production Co. Ltd, Gencor Equity &amp; Trading Ltd and Gencor Trading (Nigerian) Ltd.2 of identified minority shareholders of Gazlink Nig Ltd received 85,591,630 ordinary shares of Gencor Plc for 85,591,630 ordinary shares of Gazlink Nig Ltd.</td>
</tr>
<tr>
<td>111.</td>
<td>Tower Aluminium Nigeria Plc</td>
<td>Trust Nig Ltd/Niger Plc</td>
<td>2008</td>
<td>Acquisition</td>
<td>Cash payment of N5.4 billion in exchange for every 10 ordinary shares of Trust Nig Ltd.</td>
</tr>
<tr>
<td>112.</td>
<td>Sovereign Trust Insurance Plc</td>
<td>Sovereign Trust Insurance Plc/Pro Mutiti Insurance Company Ltd</td>
<td>2008</td>
<td>Merger</td>
<td>15 ordinary shares of Sovereign Trust for every 1 ordinary share of Pro Mutiti Insurance Company Ltd.</td>
</tr>
<tr>
<td>113.</td>
<td>MTN Nigeria Ltd</td>
<td>VGC Communications Ltd</td>
<td>2008</td>
<td>Merger</td>
<td>No new shares were issued and no cash payment (VGC wholly acquired)</td>
</tr>
<tr>
<td>114.</td>
<td>Transact Ltd</td>
<td>Wapiti Nig Ltd</td>
<td>2008</td>
<td>Acquisition</td>
<td>The transaction was a normal transfer of 100% equity in Wapiti Nig Ltd involving 35 million ordinary shares of MTN Nigeria Ltd.</td>
</tr>
</tbody>
</table>

Source: Securities & Exchange Commission

Table 23 Cont’d: Business Combination Applications Handled by Securities & Exchange Commission (1982 – 2010)

<table>
<thead>
<tr>
<th>S.N.</th>
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<th>Mode of settlement</th>
</tr>
</thead>
<tbody>
<tr>
<td>118.</td>
<td>Standard Alliance Insurance Plc</td>
<td>Perpetual Assurance Company Ltd</td>
<td>2008</td>
<td>Acquisition</td>
<td>1 ordinary share of Standard Alliance Insurance Plc for every 4 ordinary shares of Perpetual Assurance Company Ltd.</td>
</tr>
<tr>
<td>119.</td>
<td>Delti Prime Foods Ltd</td>
<td>Da United Foods Industries Ltd</td>
<td>2008</td>
<td>Acquisition</td>
<td>Stockholders of Delti Prime received 60,000,000 ordinary shares of Da United Foods Ltd for 1,000,000 ordinary shares of Delti Prime.</td>
</tr>
<tr>
<td>120.</td>
<td>FCMB Capital Markets Ltd</td>
<td>CGL Stockbrokers Ltd/City Securities Registrar Ltd</td>
<td>2008</td>
<td>Acquisition</td>
<td>All shareholders of CGL Stockbrokers Ltd and City Securities Registrar Ltd received 2,223,303 ordinary shares of FCMB Capital Markets Ltd.</td>
</tr>
<tr>
<td>121.</td>
<td>MTN Communications Ltd</td>
<td>VGC Communications Ltd</td>
<td>2008</td>
<td>Acquisition</td>
<td>The entire equity holdings of VGC Communications Ltd was purchased at the cost of N35 billion by MTN Nigeria Ltd.</td>
</tr>
</tbody>
</table>

Source: Securities & Exchange Commission
### TABLE 23 CONT’D: BUSINESS COMBINATION APPLICATIONS HANDLED BY SECURITIES & EXCHANGE COMMISSION (1982 – 2010)

<table>
<thead>
<tr>
<th>S/N</th>
<th>Acquiring company</th>
<th>Target company(ies)</th>
<th>Year of Approval</th>
<th>Terms of Conversion/Business Combination Type</th>
<th>Mode of settlement</th>
</tr>
</thead>
<tbody>
<tr>
<td>112</td>
<td>Oyedele Community Bank Ltd</td>
<td>Kubadan Community Bank Ltd</td>
<td>2006</td>
<td>Acquisition</td>
<td></td>
</tr>
<tr>
<td>113</td>
<td>Bank PHB Plc</td>
<td>Spring Bank Plc</td>
<td>2006</td>
<td>Takeover</td>
<td></td>
</tr>
<tr>
<td>114</td>
<td>West Africa Households Utilities</td>
<td>Battery Manufacturing Company Limited</td>
<td>2006</td>
<td>Merger</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Manufacturing Company Limited (BAMCO)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>115</td>
<td>Crown Flour Mills Ltd</td>
<td>Interstate Flour Mills Ltd and Mix</td>
<td>2006</td>
<td>Merger</td>
<td></td>
</tr>
<tr>
<td></td>
<td>and Boul Flour Mills Industries</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>116</td>
<td>Lagos Insurance Plc</td>
<td>Relic Insurance Company Ltd</td>
<td>2006</td>
<td>Acquisition</td>
<td></td>
</tr>
<tr>
<td>117</td>
<td>Niger Delta Exploration and Production</td>
<td>Intorsor in the Imponderable</td>
<td>2009</td>
<td>Acquisition</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Plc</td>
<td>Participating Investment Vehicle (IPAV)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>of Niger Delta Exploration and Production Plc</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>118</td>
<td>Eko Bank Nigeria Plc</td>
<td>African International Bank Ltd</td>
<td>2009</td>
<td>Acquisition</td>
<td></td>
</tr>
<tr>
<td>119</td>
<td>Bank Phl Plc</td>
<td>GTI Insurance</td>
<td>2009</td>
<td>Acquisition</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(51% equity holding)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>120</td>
<td>Mutual Benefits Assurance Plc</td>
<td>WorldWide Insurance Company</td>
<td>2009</td>
<td>Acquisition</td>
<td></td>
</tr>
</tbody>
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Source: Securities & Exchange Commission

### TABLE 23 CONT’D: BUSINESS COMBINATION APPLICATIONS HANDLED BY SECURITIES & EXCHANGE COMMISSION (1982 – 2010)

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</thead>
<tbody>
<tr>
<td>131</td>
<td>FCBN Plc</td>
<td>CSL Stockbrokers Limited, CSL</td>
<td>2009</td>
<td>Acquisition</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Registrars Limited</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>132</td>
<td>Renaissance Securities (Nigeria) Ltd</td>
<td>Renaissance Securities (Nigeria) Ltd</td>
<td>2009</td>
<td>Acquisition</td>
<td></td>
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<tr>
<td></td>
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<td></td>
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<td></td>
</tr>
<tr>
<td>133</td>
<td>SWB Investment Ltd</td>
<td>Wema Bank Plc</td>
<td>2009</td>
<td>Acquisition</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(50% equity holdings)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>134</td>
<td>Consolidated Breweries</td>
<td>DL Malacos Nigeria Plc</td>
<td>2009</td>
<td>Acquisition</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(52.5% equity holdings of GTI Plc)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Management Buy Out</td>
<td>(72% equity holdings of GTI Bank Plc in ARM)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>136</td>
<td>ARM Pension Managers</td>
<td>First Alliance Pension &amp; Benefit Ltd</td>
<td>2010</td>
<td>Merger</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>137</td>
<td>Rubber Estates Nigeria Ltd</td>
<td>Anwani Rubber Estates Ltd</td>
<td>2010</td>
<td>The merger transaction involved the transfer of assets, liabilities and undertakings of the four target companies to Rubber Estates Nigeria Ltd</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Oladeji Rubber Estates Ltd</td>
<td></td>
<td>Prior to the merger Rubber Estates Nig Ltd held 80% shareholding in Oladeji, Ugolka-Iti and Water Side respectively and 60% in Anwani</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Water Side Rubber Estates Ltd</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>138</td>
<td>Ogbonn Central Plc</td>
<td>Bueh Central Company Plc</td>
<td>2010</td>
<td>The merger transaction involved the transfer of assets, liabilities and undertakings of Ogbonn Central to Bueh Central Company Plc</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(Ogbonn Central Plc)</td>
<td></td>
<td></td>
<td>Exchange of shares</td>
<td></td>
</tr>
<tr>
<td>139</td>
<td>INM Insurance Plc</td>
<td>Lomands Insurance Company Plc</td>
<td>2010</td>
<td>Acquisition of 100% equity of Lomands Insurance</td>
<td></td>
</tr>
<tr>
<td></td>
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<tr>
<td>541.</td>
<td>Emerging Telecommunication Services Ltd</td>
<td>Athnet Mobil Ltd</td>
<td>2010</td>
<td>Acquisition of 100% equity stakeholding in Athnet by Emerging Telecommunication Services Ltd</td>
<td>Cash</td>
</tr>
<tr>
<td>542.</td>
<td>Flour Mills of Nigeria Plc</td>
<td>Nigeria Eagle Flour Mills Ltd</td>
<td>2010</td>
<td>Involved the acquisition of 10% equity holding of Nigeria Eagle Flour Mills by Flour Mills of Nigeria Plc.</td>
<td>Cash</td>
</tr>
<tr>
<td>543.</td>
<td>Dangote Cement Plc</td>
<td>Dangote Rail Ltd</td>
<td>2010</td>
<td>Restructuring of Dangote Cement Business</td>
<td>Consolidation</td>
</tr>
</tbody>
</table>