PUBLIC M&A

Nigeria

LEXOLOGY
Getting The Deal Through

Consulting editor
Simpson Thacher & Bartlett LLP

Public M&A

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights into public M&A issues worldwide, including types of business combination; principal laws and regulations; cross-border and sector-specific considerations; governing laws; filing and disclosure requirements; duties of directors and controlling shareholders; shareholder approval and appraisal rights; hostile transactions; break-up fees and frustration of additional bidders; government influence; conditional offers; financing; minority squeeze-outs; waiting and notification periods; tax; labour and employee benefits; restructuring, bankruptcy or receivership; anti-bribery, anti-corruption and sanctions issues; and recent trends.

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STRUCTURES AND APPLICABLE LAW

Types of transaction

How may publicly listed businesses combine?

Publicly listed companies may combine in Nigeria through acquisitions or schemes of arrangements. An acquisition may be an acquisition of either assets (with or without the liabilities) or shares, whether through transactions on the securities exchange where the relevant public company is listed or in one-on-one transactions. In Nigeria, schemes that involve court sanctions are also widely used to effect business combinations whether within one group of company or between or among hitherto unrelated companies.

It is also possible for (1) companies to be combined under a statute made specifically for the purpose, and (2) for the business operations of two entities to be combined using a purely contractual joint venture. These last two methods are not discussed further in this publication.

The combination structure to be adopted depends on time considerations, tax efficiency, acquisition lender preferences, confidentiality and regulatory or sector peculiarities.

Law stated - 04 April 2022

Statutes and regulations

What are the main laws and regulations governing business combinations and acquisitions of publicly listed companies?

The main laws and regulations governing business combinations and the acquisition of publicly listed companies are:

- the Companies and Allied Matters Act 2020 (CAMA);
- the Federal Competition and Consumer Protection Act 2018;
- the Federal Competition and Consumer Protection Commission Merger Review (Amended) Regulations 2021;
- the Federal Competition and Consumer Protection Commission Merger Review Guidelines 2020;
- the Investment and Securities Act 2007 (ISA);
- the Securities and Exchange Commission Rules 2013 as well as their various amendments (SEC Rules);
- the Nigerian Stock Exchange Rule Book 2015;
- the Companies Income Tax Act 1979 (as amended);
- the Capital Gains Tax Act 1977 (as amended);
- the Value Added Tax Act 1993 (as amended);
- the Finance Act 2021 (as amended);
- the Nigeria Investment Promotion Commission Act 1995;
- the Foreign Exchange Monitoring and Miscellaneous Provisions Act 1999;
- the Companies Regulations 2021; and
- the Federal High Court (Civil Procedure) Rules 2019.

Law stated - 04 April 2022

Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border transactions may be structured as direct acquisitions by foreign entities in Nigerian companies or indirect acquisitions in foreign targets that ultimately control or have stakes (whether significant or not) in Nigerian entities. The degree to which Nigerian legislation is applicable depends largely on the size of the stake acquired and the degree of control that the stake will give the acquirer In the Nigerian target.

The Federal Competition and Consumer Protection Act 2018 (the Act) is the main merger control legislation applicable to cross border transactions in Nigeria. Further to this legislation, the Nigerian competition law regulator, the Federal Competition and Consumer Protection Commission has developed two sets of regulations: the Federal Competition and Consumer Protection Commission Merger Review (Amended) Regulations 2021; and the Federal Competition and Consumer Protection Commission Merger Review Guidelines 2020.

The applicability of the Act depends on whether the transaction will result in a change of control in the Nigerian entity.

Under this legislation, an entity has control of another entity if it:

- beneficially owns more than half of the issued share capital or assets of the undertaking;
- is entitled to cast a majority of the votes that may be cast at a general meeting;
- has the ability to control a majority of the voting rights directly or indirectly;
- in respect of a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust;
- has the ability to materially influence the policy of the undertaking; or
- is a holding company, and the undertaking is its subsidiary.

Other statutes to be considered include the ISA, which would apply to public companies and other regulated entities whose securities are required to be registered with the Securities and Exchange Commission.

In addition, there are regulations and guidelines made pursuant to the main legislation that are also applicable to cross-border transactions. Further, the rules, often self-made but officially endorsed, governing the securities exchanges where the relevant public companies are listed will also be applicable.

Also, the Nigerian Investment Promotion Commission Act 1992 prohibits both Nigerians and foreigners from carrying out certain businesses such as the production of arms, ammunition, military and para-military wears, among others. The Foreign Exchange (Monitoring and Miscellaneous Provisions) Act 1995 regulates the importation and repatriation of capital in Nigerian businesses by foreigners.

Law stated - 04 April 2022

Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Business combinations involving specific industries are subject to additional sector-specific statutes and regulations. These include:

- the Banks and Other Financial Institutions Act 2020;
- the Petroleum Industry Act 2021;
- the Guidelines and Procedures for Obtaining the Minister's Consent to the Assignment of Interest in Oil and Gas Assets 2021;
- the Nigerian Oil and Gas Industry Content Development Act 2010;
- the Electric Power Sector Reform Act 2005;
- the Nigerian Communications Commission Act 2003;

- the Nigerian Communications Competition Practices Regulations 2007;
- the National Broadcasting Commission Act 1992 (as amended);
- the Pension Reform Act 2014;
- the Insurance Act 2003;
- the National Health Insurance Scheme Operational Guidelines 2012;
- the Private Guard Companies Act 1986;
- the Private Guard Companies Regulations 2018;
- the Civil Aviation Act 2006;
- the Nigerian Maritime Administration and Safety Agency Act 2007;
- the Federal Highways Act, CAP F13, Laws of the Federation of Nigeria 2004;
- the Coastal and Inland Shipping Act 2004; and
- the Nigerian Civil Aviation Authority Regulations.

There are also some state-specific statutes that may apply to business combinations in certain sectors.

Law stated - 04 April 2022

Transaction agreements

Are transaction agreements typically concluded when publicly listed companies are acquired? What law typically governs the agreements?

Yes. Transaction agreements are typically concluded when publicly listed companies are acquired. The most widely used documents are share purchase agreements, share subscription agreements and asset purchase agreements.

Parties can and often do use English law where the deal has a foreign element and Nigerian law where it does not. However, mandatory Nigerian statutes (eg, CAMA and the ISA) will apply on specific issues covered by those statutes, whatever law the parties may choose.

What transaction agreements are to be concluded is determined by the deal structure adopted by the parties. Where the parties opt for a court-sanctioned scheme of arrangement under CAMA, there is no need for any other transactions agreements in the strict sense. The documents required are typical statutory forms, scheme documents, and documents related to court processes to apply for a court sanction.

In some cases, the parties may elect to enter into a transaction implementation agreement prior to the scheme being carried out. The transaction implementation agreement sets out implementation steps for the scheme and allows the parties to obtain representations and warranties from each other. Where the transaction will trigger the mandatory tender offer requirements of the ISA, a bid document is the main transaction document.

Law stated - 04 April 2022

FILINGS AND DISCLOSURE

Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination or acquisition of a public company? Are there stamp taxes or other government fees in connection with completing these transactions?

The relevant filings to be made are usually determined by the deal structure adopted by the parties and whether the

transaction would involve a change of control.

Where a business combination will result in a direct or indirect change of control of the target company, whether any of the parties is foreign or not, a filing must be made with the Federal Competition and Consumer Protection Commission (FCCPC) to obtain merger control approval.

Combinations or acquisitions involving a public company will require the approval of the Securities and Exchange Commission (SEC). This is, however, subject to certain exceptions that include (1) where the shares of the public company are not issued as consideration for the acquisition and (2) divestments below 15 per cent of the total assets of the public companies or of assets and/or liabilities which do not constitute a business line of the company.

Where a tender offer is used, the parties would be required to file with the SEC to obtain (1) authorisation to proceed with the tender offer and (2) approval of the bid document and its registration. Filings will also be required with (1) the relevant stock exchange (eg Nigerian Exchange Limited), where the securities of the public company are listed and (2) the specific sector regulator of the public company (where applicable). Post-transaction implementation filings will also be required at the Nigerian companies' registry, the Corporate Affairs Commission to reflect the new changes in the shareholding and structure of the target company.

Further, where the business combination is implemented by a scheme of arrangement, it must be filed with the Federal High Court, which will need to sanction the transaction.

For all the filings stated above, the public company will be required to pay various prescribed fees. No stamp duty is payable on a transfer instrument transferring shares. However, the Federal Inland Revenue Service charges ad valorem duties at 1.5 per cent of the purchase price on the relevant share sale or purchase agreement that governs the transfer of shares. Stamp duty is also chargeable at a similar rate on asset sale and subscription agreements.

Capital gains tax of 10 per cent is payable on the disposal of shares after 2021. This will, however, not apply where (1) the proceeds from such disposal are re-invested within the same year of assessment in the acquisition of shares in the same company or other Nigerian companies, (2) the disposal proceeds, in aggregate, are less than 100 million naira (roughly US$200,000) in any 12 consecutive months, or (3) the gains realised are in respect of shares transferred between an approved borrower and lender in regulated securities lending transactions under the Companies and Allied Matters Act 2020 (CAMA).

Law stated - 04 April 2022

Information to be disclosed

What information needs to be made public in a business combination or an acquisition of a public company? Does this depend on what type of structure is used?

An M&A deal affecting a listed company, whether directly or indirectly, is considered a material occurrence and therefore should be disclosed to the securities trading public, with as much details as possible. The Nigerian Exchange Limited, requires a listed company to disclose information to the market that might reasonably be expected to have a material effect on market activity, the price or value of listed securities and the financial condition of the listed entity.

Public companies typically owe transaction disclosure obligations to the SEC, FCCPC and the relevant sector regulator. In respect of the disclosure to the SEC and FCCPC, the information required to be disclosed typically includes:

- detailed information about the product line or operations of the relevant companies;
- a list of its major competitors in that market and the market position or market share of each company;
- revenue information of the relevant companies;
- the structure and organisation of the relevant companies;
- arrangement for employees;

- settlement arrangements for shareholders and the treatment of dissenting shareholders;
- material claims and litigation affecting the relevant companies;
- the interest of directors in the transaction;
- the method of valuation of the shares or assets to be acquired (as applicable);
- the details and price of the shares or assets to be acquired; and
- the contact information of an offeror (in a tender offer).

The above disclosures to the FCCPC and SEC are required to obtain approvals for the transaction and need not be made to the public.

In the case of a tender offer, the intention to make the tender offer must be advertised in at least two (2) national daily newspapers and on the company's website, and announced on the floor of the exchange on which the companies' shares are listed or its securities traded.

Corporate actions and documents of public listed companies typically are registered and published on the relevant stock exchange where the company is listed as well as other acceptable media in line with applicable law and the company's articles of association. Thus, documents such as notices of meeting for transactions requiring the approval of the shareholders, corporate approval and minutes, when passed must be published publicly.

Law stated - 04 April 2022

Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a public company? Are the requirements affected if the company is a party to a business combination?

There are requirements under CAMA, SEC Rules, NGX Rules and sector specific regulations.

CAMA requires any person who is a substantial shareholder in a public company to give a notice in writing within 14 days after such a person becomes aware that he or she is a substantial shareholder and within 14 days of ceasing to be one. In the notice to the company, the substantial shareholder is required to state his or her name, address and full particulars of the shares as held by him or his or her nominee by virtue of which he or she is a substantial shareholder. For this purpose, a person is a substantial shareholder in a public company if he or she holds him or herself or by his or her nominee, shares in the company which entitle him or her to exercise at least 5 per cent of the unrestricted voting rights at any general meeting of the company.

The SEC also require shareholders who own 5 per cent or more of any class of securities of a public company (whether listed or not) to notify SEC upon the sale of their shares or purchase of additional shares in the company not later than 48 hours after such sale. A listed company is also required to disclose to the Nigerian Exchange Limited any transaction that results in a change of the beneficial ownership of 5 per cent or more of its shares no later than 10 business days after the transaction occurs and subsequently in its annual report.

Further, some sector specific legislation often requires the disclosure of a substantial interest in a company. Some of these include the Code of Corporate Governance for Banks and Discount Houses in Nigeria, the Insurance Act and the Pension Reform Act.

The above disclosure requirements are not affected if the company is a party to a purely contractual business combination.

Law stated - 04 April 2022

DIRECTORS' AND SHAREHOLDERS' DUTIES AND RIGHTS

Duties of directors and controlling shareholders

What duties do the directors or managers of a publicly traded company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination or sale? Do controlling shareholders have similar duties?

In the courts of equity and under the Companies and Allied Matters Act 2020 (CAMA), directors owe fiduciary duties to the company. In a merger or acquisition, the directors have the following duties to the company (not to its shareholders generally):

- to act at all times in the best interest of the company as a faithful, diligent, careful and ordinarily skillful director would act in the circumstances;
- not to fetter his or her discretion to vote in a particular way;
- to notify the company of his or her interest in shares of the company, its holding company, subsidiary or affiliate;
- to disclose any personal interest in a transaction and not misuse corporate information to his or her own benefit; and
- not to allow his or her personal interest to conflict with any of his or her duties as a director to the company.

The foregoing duties are all owed to the company, not to the shareholders. The latter have no legal rights to enforce them. The one set of statutory duties that is clearly owed to shareholders is in respect of tender offers.

In relation to a tender offer, in connection with the transfer to any person of all or any of the shares in the company under a tender offer made to the shareholders of the company, directors must do all things reasonably necessary to ensure that particulars with respect to the proposed payment and the amount are included in or sent with any notice of the offer dispatched to the shareholders.

Under the Investment and Securities Act (ISA), directors also owe obligations to the shareholders in a takeover transaction, upon receipt of the tender documents, to send a circular to each shareholder of the company and to the SEC at least seven days before the date on which the tender offer is to take effect.

Under the Nigerian Code of Corporate Governance 2018 applicable to public companies, the board of directors generally owe a legal duty to ensure effective communication with the shareholders. They also have a responsibility to ensure that all shareholders are treated fairly and are given equal access to information about the company. The extent to which the shareholders may enforce these duties directly is unclear.

Controlling shareholders do not have duties similar to those of directors or any fiduciary duties to the company generally. Controlling shareholders may, however, in limited cases, owe fiduciary duties to other shareholders, creditors or stakeholders of the company contractually.

Law stated - 04 April 2022

Approval and appraisal rights

What approval rights do shareholders have over business combinations or sales of a public company? Do shareholders have appraisal or similar rights in these transactions?

The approval rights of shareholders depend primarily on the type of deal structure adopted. A business combination undertaken by a scheme of arrangement requires the approval of not less than three quarter by value of the

shareholders of the relevant company present at the court-ordered meeting convened to approve the scheme.

However, in the case of a tender offer, the approval of the shareholders is obtained on a one-on-one basis through the acceptance by each shareholder of the offer in the tender offer bid. Under ISA, to fully implement a 100 per cent tender offer and acquire the shares of all the shareholders through a squeeze-out, the offeror must have received at least 90 per cent acceptance from the shareholders to whom the offer was made.

CAMA has introduced certain restrictions with respect to the transfer of assets. By a combined reading of sections 342(2) and 22(2)(a) CAMA, 'major asset transactions' (ie, transactions outside the ordinary course of business), representing 50 per cent or more of the book value of the company's assets require a unanimous shareholders' approval. However, there appears to be a contradiction on the approval thresholds in sections 342(2) (which provides for 75 per cent threshold) and 22(2)(a) (which provides for unanimous consent) for such asset transactions.

In other structures, the approval of the shareholders depends on the provisions of the articles of associations of the relevant company. The manifest contradiction is as yet unresolved.

Law stated - 04 April 2022

COMPLETING THE TRANSACTION

Hostile transactions

What are the special considerations for unsolicited transactions for public companies?

Hostile transactions are permitted but uncommon under Nigerian law and practice. There are mechanisms that can be undertaken by the management of a target company to resist a hostile tender offer. The directors may, through the circular they are required to issue to shareholders, provide recommendations that will discourage shareholders from accepting the tender offer. Where the acceptance of the shareholders is below 90 per cent, the offeror will not be able to trigger the squeeze-out provisions under the Investment and Securities Act 2007 (ISA). Also, under Rule 445(3)(g) of the Rules and Regulations of the Securities and Exchange Commission, dissenting shareholders may, where they constitute at least 50 per cent of the shareholders of a company, state in writing that they would not accept a mandatory tender offer.

Law stated - 04 April 2022

Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a public company's ability to protect deals from third-party bidders?

Deposits that will be forfeited where the bidder fails to complete are not strange, but break-up fees or reverse break-up fees are currently not widely used in Nigeria. However, break-up fees are sometimes negotiated between parties in a private share acquisition or asset acquisition transaction where either party is in an especially strong bargaining position.

Where the transaction is structured as a share subscription and a break-up fee is payable by the target under the transaction, the payment of the break-up fee by the target company may trigger the prohibited financial assistance rule. Under the Companies and Allied Matters Act (CAMA), a company and its subsidiaries are prohibited from rendering financial assistance directly or indirectly to any person for the purpose of the acquisition of the shares of the company. This assistance could be in the form of a gift, guarantee, security or indemnity, loan or any form of credit. Financial assistance is, however, only prohibited where the net assets of the company are reduced by up to 50 per cent or completely by the assistance.

Law stated - 04 April 2022

Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations or acquisitions are regulated, may government agencies influence or restrict the completion of such transactions, including for reasons of national security?

The Minister of Trade and Investment is empowered under section 100 of the Federal Competition and Consumer Protection Act 2018 to make representations on public interest grounds with respect to any merger that is under consideration by the Federal Competition and Consumer Protection Commission (FCCPC). The representations of the Minister will be considered by the FCCPC when determining whether merger approval should be granted. No publicly available history of this rule has ever been invoked.

Law stated - 04 April 2022

Conditional offers

What conditions to a tender offer, exchange offer, merger, plan or scheme of arrangement or other form of business combination are allowed? In a cash transaction, may the financing be conditional? Can the commencement of a tender offer or exchange offer for a public company be subject to conditions?

Parties are at liberty to set their own preconditions, and the law (especially regulations from agencies) impose preconditions that the parties cannot avoid. In practice, the most common precondition are regulatory approval, corporate approval, financing and third-party (or earlier lenders) approvals.

In a cash transaction, financing may be conditional. For tender offers, parties' conditions may be associated with the acceptance of the offer. These conditions and their particulars must be stated in the offer document and in line with the relevant rules. However, the rules of the Nigerian Exchange Limited, restrict offerors from making an offer conditional upon the payment of compensation for the loss of the offer.

Law stated - 04 April 2022

Financing

If a buyer needs to obtain financing for a transaction involving a public company, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

In a cash tender offer, the offeror is required to state in the bid document that steps have been taken to ensure that the offer will be implemented if all the offerees accept the offer. Also, the ISA requires that the offeror make adequate arrangements to ensure that funds are available to pay the cash consideration to the shareholders. In the eyes of SEC, historically, the ability to pay turns on the evidence of sufficient funds in bank accounts of the potential acquirer but there is no stated rule saying that available lines of credit cannot be taken into account.

In the transaction documents, parties are at liberty to agree terms regarding financing. They may contain provisions subjecting completion to the buyer obtaining the relevant financing as a condition precedent.

Law stated - 04 April 2022

Minority squeeze-out

May minority stockholders of a public company be squeezed out? If so, what steps must be taken and what is the time frame for the process?

The key provisions on squeeze out in Nigeria are (1) sections 129 and 146 of the Investments and Securities Act 2007 and (2) sections 712 and 715 of CAMA. Sections 129 and 712 respectively outline the procedure for majority shareholders to compulsorily acquire the shares of minority shareholders. A majority of the shareholders holding 90 per cent in value of the shares (other than the shares already held) must approve and a fair price that equals the amount or price offered to the majority shareholders for their shares must be paid to the minority shareholders.

Dissenting shareholders may approach the courts for relief, and the courts may nullify or prevent the squeeze-out attempts where the procedure laid down was not followed or the price being offered is less than what was paid on the most recent acquisition of shares by the 90 per cent holders. These provisions are restricted to a scheme or contract and exclude tender offers involving the transfer of shares or any class of shares in a company.

A squeeze-out of minority shareholders may also be used by the majority under section 715. This provision empowers a majority holding not less than three-quarters in the value of the shares of members or class of members to pass a resolution agreeing to the arrangement. Such arrangement must be sanctioned by the court.

Sections 146 of the ISA may also be used to squeeze out the minority shareholders as part of a tender offer.

Law stated - 04 April 2022

Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations or acquisitions involving public companies?

Waiting and notification periods are relevant to tender offers but ordinarily not to other forms of business combinations. The relevant periods are:

- the seven-day period within which the directors are required to send their circular on the offer;
- where the offer is for all the shares in a class:
  - the 10-day period after the date of the offer within which the offeror must not take up the shares deposited pursuant to a tender offer; and
  - the 60-day period within which the shares deposited pursuant to a tender offer may be withdrawn by the shareholder where the offeror does not take up the shares;
- where the offer is for less than all the shares in a class:
  - the 35-day period within which shares may be deposited by shareholders; and
  - the 20-day period after the date of the tender offer within which the offeror must not take up the shares deposited pursuant to a tender offer;
- where the offer is for less than all the shares or all the shares in a class:
  - the 14-day period within which deposited shares must be taken up by the offeror;
  - the 10-day period within which the shares deposited pursuant to an offer may be withdrawn by the shareholders where the offeror does not take up the shares; and
  - the one-month period after which the offeror may commence a squeeze-out process.

Law stated - 04 April 2022

OTHER CONSIDERATIONS

Tax issues

What are the basic tax issues involved in business combinations or acquisitions involving public companies?

In an acquisition by sale of shares after 2021, capital gains tax is chargeable at the rate of 10 per cent and is payable to the Federal Inland Revenue Service, pursuant to Finance Act 2021, which amended the Capital Gains Tax Act. There are exemptions where (1) the proceeds of such acquisition are reinvested in the acquisition of shares in the same company or in another company within the relevant year of assessment; (2) the disposal proceeds are less than 100 milion naira (about US$200,000), in any 12 consecutive months; and (3) the shares are transferred between an approved borrower and lender in a regulated securities lending transaction.

Share disposals through share transfer forms do not attract value added tax or ad valorem stamp duty. Withholding taxes (income tax) are not applicable on the gains realised from a sale of shares because the receipts are not income but withholding tax deduction may generally be applicable in respect of commission, legal fees, audit fees, and other professional fees payable by the party in connection with a corporate restructuring transaction at the rate of 10 per cent.

Mergers by schemes of arrangement and asset sales are exempted from capital gains tax where the acquiring company and target company are affiliates and are controlled by the same entity or one controls the other for at least a period of 365 days before the transaction. This exemption is also applicable to asset transfers that are effected through a scheme of arrangement. Asset sales or transfer between unrelated companies, on the other hand, will attract capital gains tax at the rate of 10 per cent of the gains.

Ad valorem stamp duty is not chargeable on asset sales or transfers between associated companies (companies in which one owns at least 90 per cent of the issued share capital of the other or that are commonly controlled by another entity that owns at least 90 per cent of their issued share capital). Other than between associated companies, stamp duty is chargeable on an asset sale or transfer.

Law stated - 04 April 2022

Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination or acquisition involving a public company?

There are no specific laws governing employee benefits in a business combination. The main laws governing labour and employee benefits in Nigeria are:

- the Labour Act 2004;
- the Pension Reform Act 2014; and
- the Employee's Compensation Act 2010.

However, the Labour Act, which applies to manual and technical workers provides for certain compensatory benefits such as redundancy payments for workers in situations where such workers are laid off. One of the requirements for filings with the merger control regulator is the plan for employees after the business combination is implemented.

Law stated - 04 April 2022

Restructuring, bankruptcy or receivership

What are the special considerations for business combinations or acquisitions involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Only a receiver or liquidator who has been appointed as a manager for a company in a liquidation or receivership respectively can make an asset transfer business combination or acquisition decision. In a winding up by the court, the property of the company in liquidation may not be disposed of except with the order of the court. Consequently, a liquidator who is appointed by the court pursuant to a winding-up petition has the power to carry on the business of the company to the extent necessary for its beneficial winding-up or sell the property of the company.

Where a liquidator enters into a business combination for the benefit of the company, it must be in accordance with the guidelines and procedure stipulated under the applicable laws. Any board resolutions required by the directors must be obtained. Where a company is under administration, the administrator is empowered to appoint or remove the directors of the company.

Where a voluntary winding-up is proposed by the creditors, separate meetings of the creditors and company will be held. The creditor may at this meeting nominate a liquidator for the purpose of winding up the affairs and distribution of the assets of the company. Where no liquidator is appointed by the creditors, the liquidator nominated by the company shall be the liquidator. On the appointment of the liquidator, the powers of the directors shall cease, except if there is a Committee of Inspection. In the absence of such committee, the creditors may sanction the continuance.

Law stated - 04 April 2022

Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations with, or acquisitions of, a public company?

There are general laws that govern anti-corruption and anti-bribery acts in Nigeria, regardless of whether a business combination is involved. The relevant laws include:

- the Economic and Financial Crimes Commission (Establishment) Act 2004;
- the Corrupt Practices and other Related Offences Act 2000;
- the Money Laundering (Prohibition) Act 2011 (as amended); Criminal Code Act, CAP C38, LFN 2004;
- Penal Code (Northern States) Federal Provisions Act, CAP P3, LFN 2004; and
- Lagos State Public Complaints and Anti-Corruption Law 2021.

In addition, section 111 of the ISA prohibits insider trading in a company with a view to benefiting from unpublished price-sensitive information. By law, 'insider' includes directors, officers and shareholders holding more than 5 per cent of the issued shares.

Law stated - 04 April 2022

UPDATE AND TRENDS

Key developments

What are the current trends in public mergers and acquisitions in your jurisdiction? What can we expect in the near future? Are there current proposals to change the regulatory or statutory framework governing M&A or the financial sector in a way that could affect business combinations with, or acquisitions of, a public company?

Recently, there have been a significant number of public M&A transactions. In the banking sector, Titan Trust Bank Limited announced in December 2021 its acquisition of majority shareholding in Union Bank of Nigeria Plc, a century-old bank in Nigeria; within the oil and gas industry – Ardova (formerly Forte Oil), which had earlier been purchased by Prudent Energy in 2019, also took over one of its rivals, Enyo, another oil company in Nigeria. Seplat Energy, Nigeria's biggest independent oil and gas firm by market value, announced in February 2022, its intention to purchase ExxonMobil, which was marked for sale.

On laws and regulations, by the amendments made to the Securities and Exchange Commission (SEC) Rules in August 2021, the prior approval of the SEC is required before the financial close of M&As or corporate restructurings by public companies. Prior to the SEC Rules, the competition regulator, the Federal Competition and Consumer Protection Commission (FCCPC) was the principal merger control authority in Nigeria. With the SEC Rules, public M&As deals are now regulated by both the SEC and the FCCPC.

Pursuant to the SEC Rules, the SEC is to ascertain how fairly shareholders have been treated under the proposed transaction. The FCCPC would examine the anticompetitive effect the proposed transaction may have in the relevant market pursuant to the competition regulations. Also, pursuant to the Banks and Other Financial Institutions Act 2020, the Central Bank of Nigeria has replaced, and assumed the regulatory powers of, the FCCPC with respect to M&A deals in the financial sector. Thus, the competition law aspects of M&As deals in the financial sector are now regulated by the CBN only.

In addition, by the Finance Act 2021, generally, capital gains tax is now applicable to a disposal of shares by both private and public companies. There had been no capital gains tax for such disposals for the previous 20 years.

Law stated - 04 April 2022

Jurisdictions

Australia	Squire Patton Boggs
Austria	Wolf Theiss
Bermuda	BeesMont Law Limited
Brazil	Loeser e Hadad Advogados
Bulgaria	Kambourov & Partners, Attorneys at Law
Canada	Bennett Jones LLP
China	HJM Asia Law & Co LLC
Ghana	Kimathi & Partners Corporate Attorneys
Greece	Karatzas & Partners Law Firm
India	Khaitan & Co
Israel	Barnea Jaffa Lande
Italy	Nunziante Magrone
Japan	Hibiya-Nakata
Luxembourg	Bonn & Schmitt
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North Macedonia	Debarliev Dameski & Kelesoska
Norway	Aabø-Evensen & Co
Sweden	Advokatfirman Hammarskiöld
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Taiwan	Lee and Li Attorneys at Law
United Arab Emirates	IN'P Ibrahim & Partners
United Kingdom	Herbert Smith Freehills LLP
USA	Simpson Thacher & Bartlett LLP
Uzbekistan	Azizov & Partners
Vietnam	Bizconsult Law Firm