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NIGERIA

Law and Practice

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1. Legal System and Regulatory Framework

1.1 Legal System

Nigeria is a common law jurisdiction. It is a Federation of 36 states. The chief sources of Nigerian law are, in broad order of priority, the federal Constitution, state and federal statutes, Nigerian judicial precedents, customary (including Islamic) law, the English common law and those English statutes that were in force in 1900. It was in 1900 that Nigeria became a British protectorate.

In very broad terms, Nigerian political law has been heavily influenced by the constitutional law of the United States of America. Nigerian business law owes much to English statutes and the common law. Nigerian personal law is essentially an updated version of pre-1900 customary (including Islamic, for persons with Islamic personal law) law.

Nigerian Federal Government agencies that regulate business across virtually all industry sectors include the Corporate Affairs Commission, the Nigerian Immigration Service, the Federal Competition and Consumer Protection Commission, the Nigerian Investment Promotion Commission, and the Financial Reporting Council of Nigeria.

Federal regulators with a more industry, sector-specific focus include the Central Bank of Nigeria, the Nigerian Upstream Petroleum Regulatory Commission, the National Communications Communication, the National Agency for Food and Drugs Administration, the National Pensions Commission, and National Insurance Commission.

1.2 Regulatory Framework for FDI

FDI in Nigeria is subject to several regulatory approvals and reviews. While some of these approvals are applicable to businesses in Nigeria regardless of the sector, most of them are largely dependent on the sector in which the investor operates or intends to carry on business. The required reviews and approvals are typically set out in the applicable legislation which establishes the relevant regulatory agency (whether at federal or state level). The general legislation includes the following:

- the Nigeria Investment Promotion Commission Act (1995) (NIPC Act), which established the Nigeria Investment Promotion Commission (NIPC) to encourage, process and monitor foreign investment;
- the National Office for Technology Acquisition and Promotion Act, which regulates the "transfer" of foreign technology into Nigeria and establishes the National Office for Technology Acquisition and Promotion (NOTAP);
- the Companies and Allied Matters Act (2020) (CAMA), which created the Corporate Affairs Commission and principally regulates corporate affairs such as the incorporation, operation, management and winding-up of companies and business partnerships;
- the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act (1995) (FEMMPA), which regulates foreign investment particularly in relation to foreign exchange – with the Central Bank of Nigeria as the regulator; the FEMMPA contains provisions regulating sales of foreign exchange, and the remittance of dividends, interest and principal payments in foreign currencies; and
- the Immigration Act, which provides for permits for foreign investors and their families to enter, live and work in Nigeria – the Nigerian

Immigration Services oversees all immigration activities in Nigeria.

Other principal statutes regulating investments in Nigeria are the Central Bank of Nigeria Act, the Investment and Securities Act, and the Federal Competition and Consumer Protection Act. These regulatory agencies and their approval requirements for foreign investment in Nigeria are discussed in further detail throughout this article.

2. Recent Developments and Market Trends

2.1 Recent Developments and Market Trends

Current Political and Economic Climate

Nigeria operates a federal system of government made up of three tiers: the federal, state, and local governments. Each tier of government is structured such that the powers of government are divided among the executive, legislative and judicial branches. At the federal level, Nigeria's constitution sets out the powers of the executive (the President), the legislature (National Assembly) and the judiciary (the court system).

Executive powers may be exercised by the President either directly or through the Vice-President and/or any officer(s) in the public service of the federal government. The legislative powers of the federal government are vested in the National Assembly, which consists of a Senate and a House of Representatives. Judicial authority is vested in the courts.

Nigeria is Africa's largest economy by GDP. According to the IMF (as reported by Dataphyte), Nigeria ranks 27 out of 195 countries in the world on a purchasing power parity basis. In Q3 of 2022, Nigeria's nominal GDP was USD440.8 billion, and GDP per capita was USD2,085.03. Nigeria's inflation rate has, however, increased to an all-time high of 21.09% as at October 2022 compared to 16.96% at the end of 2021. The Monetary Policy rate also stood at 16.5% as at November 2022.

Although Nigeria today has a relatively strong and stable political system, this stability is being threatened by weak law enforcement and insufficient export earnings. Despite these challenges, Nigeria has strong underlying demographics, significant investment opportunities and abundant human and natural resources. Nigeria is also committed to continuing to make reforms, which has resulted in improved rankings for it in the now-discontinued World Bank's Ease of Doing Business Index.

Foreign Exchange Liquidity Challenges

For at least the past few years, there has been insufficient foreign exchange available to meet demand and the open market value of the naira has been falling. There has been a further devaluation of the naira. The recent redesigning of naira currency notes and the withdrawal from circulation of the old notes, to take effect in January 2023, is unlikely to strengthen the value of the naira significantly.

The Central Bank of Nigeria (CBN) ordinarily allows access to foreign exchange at the relatively favourable exchange rates that can be obtained on the markets that the CBN has regulated for decades, but now only partially funds. However, the limited supply of foreign exchange (FX) in that market has long failed to meet the demand in it, and the CBN has now shut down or reduced the access that actors in 41 purportedly not-so-deserving sectors have to that market. The disadvantaged sectors include rice, cement and margarine. Many actors in these sectors are disaffected.

The CBN has also introduced incentive schemes for non-oil exporters. For example, it has established the RT200 rebate scheme which encourages the export of semi- finished and finished non-oil produce to promote the repatriation and sale of export proceeds into the FX Market. The scheme would involve funding the construction of certain non-oil export terminals to eliminate delays experienced by exporters and providing loans to non-oil exporters at 5% for a ten-year period with two years' moratorium. The scheme is aimed at enhancing foreign exchange inflow, diversifying the source of FX inflow and ensuring stability and sustainability of FX inflow into Nigeria.

Regulatory Development

In recent times, there have been several new enactments and regulations as part of the efforts of the government to improve the economy and increase the ease of doing business. Perhaps the most significant of these was the repeal in 2020 of the Companies and Allied Matters Act (CAMA) (1990) and its replacement with a new CAMA (2020).

The new CAMA modernises the substantive law on many points of detail. For example, share buybacks, single shareholder companies and limited partnerships with juristic personality are now allowed. The new CAMA also reduces the time and official costs arising in forming companies, other business vehicles and making filings.

Also of great significance are the repeal of the Banks and Other Financial Institutions Act (1990) (now replaced by the Banks and Other Financial Institutions Act (2020), and, after 2018, the practice of revising the Federal tax statutes every year (the Finance Acts of 2019, and 2020 and 2021). The Finance Act (2021), which came into law on 31 December 2021, introduced changes such as extending capital gains tax to transfers of shares and stamp duty to electronic documents.

In October 2022, the Nigeria Start Up Act was passed into law. The Nigerian Start up Act aims to attract foreign investors and open up the technology market in Nigeria. The Act describes the nature of start-ups regulated under the Act, their operations, incentives and limitations. It provides for labelled start-ups to apply for Pioneer Status Incentives (an incentive tax holiday regime) and an exemption from the contribution to the Industrial Training fund (essentially a payee tax).

3. Mergers and Acquisitions

3.1 Transaction Structures

Mergers and acquisitions may be structured in a broad variety of ways that are also available in most Western common law jurisdictions. They may or may not use special purpose vehicles organised abroad and/or in Nigeria and may involve transfers of assets and/or shares in one or more steps in one or more jurisdictions.

Assets transfer structures range from contractual transfers of assets (excluding liabilities) to court-ordered schemes of arrangement that transfer assets as well as liabilities. Shares transfer structures may involve one or more of the following: fresh subscriptions, private sales, public offers for sale, tender offers, squeeze-outs of dissenting minorities and other schemes of arrangement, in each case whether on or off securities exchanges.

The transaction structure to be used on any particular facts will depend in effect on a weighted, situation-specific compromise assessment of variable time, regulatory approval, corporate approval, tax and acquisition lender preference factors. There is a large mass of rules to consider here. Suffice it to mention only four sets of the basic ground rules.

- On tax, capital gains tax is chargeable on transfers of assets and shares although relief from it is typically available where the parties are willing to wait for a year before making any disposal of the sale shares or assets. Moderate stamp duty is chargeable on sales of shares, and substantial stamp duty and other state-level perfection taxes are chargeable on sales of real estate.
- Approvals from both the general merger control regulator and a sector-specific regulator in point are typically needed where there is a change of control.
- On corporate approvals, ordinarily sales of shares need only the consent of the owner of the shares to be sold, but squeeze-outs need 90% shareholder approval excluding the party initiating the squeezing out; schemes of arrangement need 75% approval; and offers for subscription need 50% approval.
- The threshold for making a mandatory tender offer is the acquisition, whether alone or in concert, of 30% of a public company.

Concerns, where such concerns are material, about minimising the buyer's exposure to the sellers' pre-existing liabilities are also material. For example, a buyer who seeks to be shielded from the past liabilities of the seller will ordinarily buy shares without more, but a buyer who plans to acquire the target's liabilities will use a scheme of arrangement rather than simply buy shares.

3.2 Regulation of Domestic M&A Transactions

An M&A transaction must be approved by the general merger control regulator, the Federal Competition and Consumer Protection Commission (FCCPC), where two conditions are met. The conditions are that (i) the combined annual turnover of the acquirer and/or the target equals or exceeds prescribed thresholds as stated in **6. Antitrust/Competition** and (ii) the transaction results in a "change of control". See **6. Antitrust/Competition** for more details on merger control rules in Nigeria.

In addition, mergers and acquisitions involving public companies must be concluded in accordance with the provisions of the Investments and Securities Act (2007) and regulations made pursuant to it by the Securities and Exchange Commission (SEC). As the key regulator of public companies, merger schemes and takeovers of public companies must be approved by the SEC.

In addition to the sector-neutral regulatory reviews and approvals of the SEC and FCCPC, mergers and acquisitions in Nigeria may be subject to the approval of sector-specific regulators. These include:

- the CBN, for the banking and lending financial services sector;
- the Nigerian Communications Commission, for the telecommunications sector;
- the National Insurance Commission, for the insurance sector;
- the Nigerian Electricity Regulatory Commission, for the electric power generation, transmission or distribution subsector;
- the National Pension Commission, for pension fund administrators and pension fund custodians; and

- the Nigerian Civil Aviation Authority, for the aviation sector.

Furthermore, parties to a merger or acquisition typically need the consent of the Federal Inland Revenue Service (FIRS) in relation to capital gains and income tax payable on transfers of assets and/or shares.

See **6. Antitrust/Competition** for other approvals from the securities regulators.

4. Corporate Governance and Disclosure/Reporting

4.1 Corporate Governance Framework

Corporate Governance Codes

The Companies and Allied Matters Act (2020) (CAMA) is the principal legislation on corporate governance in Nigeria. It sets forth minimum standards for all companies with respect to decision-making (voting, vetoes) and disclosure by the boards of directors, officers and shareholders of companies.

The SEC also recently issued a revised SEC Corporate Governance Guideline and a compliance reporting template for public companies. Public companies are to comply with the CAMA, the SEC Corporate Governance Guideline, the Code (defined below) and applicable sector-specific corporate governance "codes".

Also important is the Nigerian Code of Corporate Governance (2018) (the "Code") which has been issued by the Financial Reporting Council of Nigeria. The Code was enacted to institutionalise "best practice", especially on accounting and financial disclosure. The Code applies even where there is also a corporate governance code in place specifically for the sector in issue.

Adopting and complying with the Code is obligatory only for:

- public companies;
- private companies holding majority stakes in public companies;
- all companies that hold government concessions or have been privatised; and
- all private companies that have sector regulators.

Some of the sector-specific corporate governance codes in force, all issued by sector-specific regulators, are:

- the Code of Corporate Governance for Banks and Discount Houses (2014);
- the Code of Corporate Governance for Finance Companies (2019);
- the Code of Corporate Governance for the Telecommunications Industry (2016);
- the Corporate Governance Guidelines for Insurance and Reinsurance Companies (2021); and
- the Guidelines on Corporate Governance for Pension Fund Operators (2001).

Legal Entity Forms

Private businesses may be organised as sole proprietorships, trusts, limited liability partnerships under state law (having only one general partner), under recent Federal law, limited partnerships having at least one general partner (with unlimited liability) and one limited partner, and limited liability partnerships having at least two designated partners, or limited liability companies (public or private).

Nigerian law recognises corporations created directly by statute, public companies and the private vehicles set out in the preceding paragraphs. Statutory corporations, companies (public and private) and limited liability partnerships under Federal law have juristic personality and perpetual succession. The other vehicles set out in the previous paragraph do not.

The law on companies (public and private) is far better developed than the law on using trusts and partnerships as vehicles for organising businesses. Every sector regulator insists on licensing only vehicles organised as companies. Other key considerations in selecting the right vehicle for organising a given business include tax, capital and governance factors.

For instance, trusts and partnerships are, unlike public and private companies, and arguably also limited partnerships organised under Federal law, not subject to corporate income tax at the corporate level. Rather, income, gains, losses, deductions and credits are passed through to the partners and taxed under the Personal Income Tax Act (1993) (PITA) for individual partners or the Companies Income Tax Act (1977) (CITA) for partners that are companies.

In respect of governance, limited partners (whether in limited partnerships or in limited liability partnerships) are forbidden to take part in the management of the partnership business. If a limited partner takes part in the management of the business, that partner will be liable for all of the debts and obligations of the firm incurred by the partnership while the partner took part in management. The rules on corporate governance set out in **4.1 Corporate Governance Code** above apply to companies but not to partnerships, trusts and sole proprietorships.

4.2 Relationship Between Companies and Minority Investors

Organs of companies typically make decisions by the votes of simple majorities of their members. In principle, this gives ample room for the abuse of power and the oppression of the minority by the majority. CAMA provides certain reliefs to minority shareholders where majority shareholders operate the company or takes decisions in an "unfairly prejudicial, discriminatory or oppressive manner".

Where a minority investor believes that it has been "unfairly prejudiced, discriminated against or oppressed" in a remediable manner, it can file a petition at the Federal High Court for relief. Remedies available include the reversal of the wrongdoing (where possible), the buying out by either the company or the majority of the minority's shares at a price adjudged by the court to be fair, damages for loss incurred, injunctions to restrain the company and its directors from doing a particular act, and even winding up the affairs of the company.

These protections are available to minority investors in both private and public companies. As is the right of the minority investor to petition the Corporate Affairs Commission (CAC) to investigate the affairs of the company. The CAC is statutorily empowered to do that.

4.3 Disclosure and Reporting Obligations

Depending on the transaction structure adopted, different disclosure and reporting obligations will apply. Listed companies are required by the Nigeria Exchange Limited (formerly the Nigerian Stock Exchange) (NGX) publicly to disclose information that may have a material effect on the market activity of listed securities and the financial conditions of listed entities. This will include material information relating to a merger deal being undertaken by such listed companies. A listed company is also required to disclose details of sales of 5% or more of its shares no later than ten business days after the conclusion of such sales, and subsequently also in its annual reports.

Furthermore, under the Investments and Securities Act (2007) (ISA) and the Rules and Regulations of the Securities and Exchange Commission (2013) (SEC Rules), persons holding 5% or more of the shares of a public company are obligated to notify the SEC of any sale of shares or purchase of additional shares in the company within 48 hours of such a sale or purchase. Under CAMA, persons owning 5% or more of the issued shares of the company must disclose the details to the CAC.

By virtue of the Banks and Other Financial Institutions Act (2020), the prior written consent of the CBN Governor is required for the transfer of a significant shareholding in a bank where that bank is a party to the agreement or arrangement. Additionally, by reason of the Code of Corporate Governance for Banks and Discount Houses in Nigeria (2014), the approval of the CBN is required for the acquisition of 5% or more of the shares of a bank or other financial institution. Where such shares are acquired on a bourse, the bank is required to obtain the "no objection" of the CBN immediately after such acquisition.

Requiring prior approval for major transactions by a sector regulator (such as the CBN, NAICOM, the NCC, National Pension Commission, NERC and the SEC (for capital market operators)) is very common.

5. Capital Markets

5.1 Capital Markets

In the NGX, Nigeria has one of the largest stock exchange markets in Africa, with a value of over USD66 billion. According to Bloomberg, Nigeria's stock exchange, the NGX, was the world's best-performing stock market in 2020. It closed the year at 40,270 points, a 50% increase from the end of 2019 in local currency terms. In 2021, the NGX All Shares Index closed at a 6.1% gain. The primary market witnessed a boom with two large equity listings:

- Nigeria's largest telecommunications company, MTN Nigeria Communications Plc, listed its shares by introduction in May 2019; and
- Airtel Africa Plc completed an initial public offering in July 2019.

By the end of 2021, BUA Cement and LFTZ Funding SPV became the largest and longest (20 years) corporate bonds respectively at NGN115 billion and NGN10 billion.

The oldest clearing and settlement vehicle of the Nigerian stock and bond markets is the Central Securities Clearing System Plc (the CSCS). The NGX owns 30% of the CSCS. The CSCS also acts as an integrated central securities depository for all share certificates of quoted securities including new issues on the NGX, and a sub-registry for all quoted securities in conjunction with the registrars of quoted companies. The NGX recently launched NG Clearing Limited, as the first central counter-party clearing house (CCP) in West Africa.

The regulator of the Nigerian Capital Market is the SEC. It derives its powers from the Investment and Securities Act, 2007 (ISA), and is responsible for the registration of securities and capital market operators and professionals, developing rules and regulations, conducting investigations into alleged breaches and prescribing sanctions. It is an agency overseen by the Federal Ministry of Finance.

Other securities exchanges include the FMDQ OTC Securities Exchange and the NASD OTC Plc which are set up for trading in both listed and unlisted equities and bonds as well as commercial paper securities. There are commodities exchanges, all fairly new, such as the AFEX and the Lagos Commodities and Future Exchange (LCFE). On these are traded agricultural, oil and gas and solid minerals commodities, and currencies.

Apart from these exchanges, there are also large numbers of professionals and operators in the capital market. These include issuing houses, underwriters, registrars, stockbrokers, legal advisers, trustees, accountants, rating agencies and collateral managers. There are approximately 100 licensed issuing houses and stockbrokers in the capital markets. They ensure that the securities issuances are properly structured and meet applicable regulatory requirements.

5.2 Securities Regulation

The ISA established the SEC which is the regulator of the capital markets. The SEC was originally created in 1988. The ISA also re-established the Investment and Securities Tribunal. The Tribunal hears and determines capital market disputes. Persons aggrieved with the decisions of the Tribunal can appeal to the Court of Appeal. Appeals lie from the Court of Appeal to the Supreme Court.

The Securities and Exchange Commission Rules and Regulations (2013) collect and set out Nigeria's capital markets' secondary legislation. These rules and regulations are regularly amended and complemented by new rules. Other statutes regulating securities in Nigeria are the CAMA, sector-specific legislation such as the NAICOM Act, the Pension Reform Act and the CBN Act. All securities exchanges such as the NGX, the FMDQ and the NASD also have their own listing rules for shares, bonds and commercial paper offerings.

A foreign investor cannot buy foreign currency on the markets that the CBN regulates and subsidises and repatriate income or capital proceeds with such currency unless at about the time of making the investment it obtains an electronic Certificate of Capital Importation ("e-CCI") in respect of the investment. The e-CCIs are issued by authorised dealers which are banks licensed by the CBN in respect of foreign capital brought into Nigeria and converted into naira. The rates obtainable on currency sales in the markets in issue are far more favourable to investors than those obtainable elsewhere, and there is no doubt about the legality of trades in these markets.

Apart from this e-CCI requirement, there are no significant separate regulatory restrictions for how foreign investment flows into the capital markets. Foreign investors too are subject to the requirements of the relevant capital market statute and rules that are applicable to local investors. However, some sector regulators insist on Nigerian majority control of companies (eg, in the oil service, shipping and aviation sectors), and foreigners are not allowed to invest in companies involved in production of arms and ammunition, narcotics, military and para-military uniforms and other items which the Federal Executive Council my determine from time to time.

5.3 Investment Funds

The rules set out in **5.2 Securities Regulation** apply here.

6. Antitrust/Competition

6.1 Applicable Regulator and Process Overview

The Nigerian merger control regime has no exemption for foreign investors as the law applies to both direct and indirect foreign investments that have an impact in Nigeria, wherever the transaction may be concluded. The main law on the regime is in the Federal Competition and Consumer Protection Commission Act (FCCPA) and rules and regulations made under the FCCPA by the Federal Competition and Consumer Protection Commission (FCCPC).

Notification must be given to the FCCPC and its approval sought where:

- it results in a direct or indirect "acquisition of control" in the target; and
- the combined annual turnover of the acquirer and/or the target equals or exceeds NGN1 billion (approximately USD2.4 million), or the annual turnover of the target undertaking in, into, or from Nigeria equals or exceeds NGN500 million (approximately USD1.2 million) ("notification thresholds").

An "acquisition of control" may arise in several ways including the beneficial acquisition or ownership of a majority of the shares or assets of the company. Other ways include acquiring the ability to cast or control the votes of a majority of the votes or to appoint or veto the appointment of a majority of the directors. Also caught is acquiring the "catch all" ability to "materially influence the policy" or "direction" of the target.

Where it is not clear whether or not a transaction is "notifiable", parties may engage the FCCPC by way of a preliminary assessment for negative clearance or by pre-notification consultations with the FCCPC. The parties to a "notifiable" merger must not take any steps to implement the merger either prior to or after notification until the transaction has been approved by the Commission.

After the merger approval, the FCCPC report is published in the Federal Government Gazette, for small mergers, and in at least two national newspapers, for larger mergers. Where the FCCPC prohibits or conditionally approves of a merger, it issues a report of its reasons for its decision within 14 days of the conclusion of the notification process.

Where either the acquirer or the target is a public company, as stated in **3.2 Regulation of Domestic M&A Transactions**, the SEC too must be notified of the merger. The draft document for a merger to be concluded by a scheme of arrangement must also be submitted to the SEC for its confirmation that the valuation of the respective companies is fair and reasonable. The terms of the transaction must be such that it satisfies the SEC that all shareholders of the acquirer and/or the target are fairly, equitably, and similarly treated and given sufficient information regarding the transaction.

6.2 Criteria for Review

In evaluating an application for its approval to a merger, the FCCPC will consider whether the proposed merger is likely to substantially prevent or lessen competition.

The FCCPC looks at factors such as the characteristics of the market in issue including growth rates, innovation, product differentiation, the nature and extent of vertical integration in the market, whether the business or part of the business of a party to the proposed merger has failed or is likely to fail, and whether the proposed merger will result in the removal of an effective competitor.

Where the FCCPC finds that the merger will substantially lessen or prevent competition, it will consider whether the proposed merger should nonetheless be allowed on grounds of public interest, such as employment rates in the country, a sector or region, the ability of national industries to compete in international markets and the ability of small and medium-scale enterprises to become competitive.

6.3 Remedies and Commitments

In the event that the FCCPC resolves that a proposed merger is likely to prevent or substantially lessen competition, where the merger presents competition concerns that are remediable, the acquirer/target may be required to remedy such concerns to the satisfaction of the FCCPC.

On the other hand, where the competition concerns cannot be remedied, the FCCPC will undertake a further detailed review of the merger by considering possible counterweighting beneficial effects of the merger and the existence of any public interest factors. Where these factors exist, the FCCPC may approve the merger subject to specifying additional conditions that must be satisfied before the merger can be implemented.

6.4 Enforcement

Where a notifiable merger is implemented without the notification and/or the approval of the FCCPC, the FCCPC may pronounce such a merger void and the violators will be required to pay a fine of up to 10% of the total turnover of the target or acquirer for the preceding year. Where a party to the merger is aggrieved by a decision of the FCCPC, it may appeal to the Competition and Consumer Protection Tribunal (the Tribunal) within 30 business days of being notified of the FCCPC's decision, and subsequently to the Court of Appeal.

Additionally, the FCCPC may revoke its decision to approve or conditionally approve a merger where the parties fail to implement the merger within 12 months from the approval date or breach an obligation or condition attached to the approval.

7. Foreign Investment/National Security

7.1 Applicable Regulator and Process Overview

Foreign Investment Regulator

Nigeria has an investor-friendly legal and regulatory environment facilitating foreign investment. No single body has responsibility over all aspects of foreign investment. Responsibility is shared among a number of bodies. Some of those bodies are sector-neutral (eg, the Corporate Affairs Commission (CAC), the Nigerian Investment Promotion Commission (NIPC), the National Office for Technology and Promotion (NOTAP) and the Ministry of the Interior). Foreign investors typically need to contend with these bodies, whatever their sector for the investment may be.

Other bodies regulate only business activity in specific sectors (eg, the National Communications Commission (NCC), the Nigerian Electricity Regulatory Commission (NERC) and the CBN). These bodies will be relevant to a foreign investor if, but only if, the investor plans to do business in the given sector.

Procedure and Requirements for Investment

In addition to incorporating a company in Nigeria at the CAC, foreign investors in Nigeria are also required to register their direct investments with the NIPC for record and statistical purposes, before commencing business operations in Nigeria. The registration process with the NIPC involves the submission of documents such as the application form and the incorporation documents and the payment of the prescribed registration fees. The entire registration process can, in principle, be completed in 24 hours, once all appropriate documents are submitted. After that, a certificate of registration will be issued to the investor. It costs less than the equivalent of USD30.

Every foreign investor seeking to "carry on" business in Nigeria must incorporate a Nigerian company before doing so. Incorporating a local company enables the foreign investor freely to open and operate bank accounts in Nigeria. The incorporation procedure is completed on the CAC online portal. It usually takes 3–15 days from reserving the proposed name of the company to receiving a certificate of registration evidencing incorporation. The CAC also issues a Tax Identification Number (TIN) on completion of incorporation. The TIN will be validated with the FIRS for tax payment purposes.

Business Permits

Foreigners who "establish" or "take over" a business in Nigeria are also required to obtain the consent of the Minister for the Interior. This consent is granted by way of a business permit issued by that Minister. Failure to obtain such consent is an offence punishable with a fine of NGN1 million.

The Federal Ministry of Interior recently introduced some changes to the administration of Business Permits and Expatriate Quotas in its recently published Revised Handbook. According to the Revised Handbook, the minimum paid-up share capital of a company seeking a business permit has now been increased from NGN10 million to NGN100 million. The validity period for an expatriate quota has been reduced from ten years to seven years.

Prohibited Investments

Foreign investors are permitted to own all forms of business either alone or with Nigerian participation, excluding businesses on the negative list. That list includes the manufacturing of military uniforms and accoutrement, the production of arms and ammunition, the production and dealing in narcotic drugs and psychotropic substances, and such other items as the Federal Executive Council may from time to time determine.

Foreign investment in certain sectors is partially or fully prohibited. See **8. Other Review/Approvals** for a more detailed review of sector restrictions on foreign investment in Nigeria.

7.2 Criteria for Review

Please see **7.1 Applicable Regulator and Process Overview**. In addition, foreign investors may be exempted from incorporating a Nigerian company before commencing operations in Nigeria where they are:

- foreign companies invited into Nigeria by or with the approval of the federal government to execute any specified project;
- foreign companies in Nigeria to execute specific loan projects on behalf of a donor country or international organisations;
- foreign government-owned companies engaged solely in export promotion activities; and

- engineering consultants and technical experts engaged on any specialist project under contract with any government in Nigeria or its agencies or any person with the approval of the federal government.

7.3 Remedies and Commitments

Apart from the commitments outlined in **7.1 Applicable Regulator and Process Overview** and across this article, there are no other commitments or remedies required from foreign investors.

7.4 Enforcement

Where a foreign investor, who has not been granted an exemption, carries on business in Nigeria without incorporating a Nigerian company, all contracts entered into by such investor are void and of no effect under the law. The investor would also be liable to pay a fine.

Banks and other authorised dealers in foreign exchange are prohibited from engaging in repatriating funds for foreign investors who are not registered with the NIPC.

8. Other Review/Approvals

8.1 Other Regimes

On foreign exchange regulation, see **5.2 Securities Regulation**.

Real Estate

Certain conditions and procedures must be fulfilled before a foreigner can own land or acquire interest in land in Nigeria. These limitations are provided under the land laws of different states. For example, in Lagos state, the Acquisition of Lands by Alien Law (2015) provides that foreigners are not to acquire an interest in land except with the approval of the State Governor in writing; otherwise the acquisition will be deemed void and will have no effect.

There is a state statute saying that the approval of the Governor will not be required where the interest or right in the land to be acquired is for less than three years including the option for renewal. However, it is not clear that that statute passes constitutional muster because the requirement for approval by the Governor is in effect in the constitution.

Furthermore, where a foreigner has lawfully acquired title to land, such land may not be transferred to any other foreigner without the approval of the Governor in writing. Where the Governor declines approval, the sale may only be made to a Nigerian citizen.

However, a Nigeria-incorporated company may purchase and hold interests in land, as Nigerian individuals may do, even if the company is wholly owned by foreigners.

Admiralty

Marine vessels which are not wholly owned and manned by Nigerians, and made and registered in Nigeria, are ordinarily not permitted to engage in the carriage of cargo and passengers within the coastal territorial inland waters, island or the exclusive economic zone of Nigeria, or to trade in the inland waterways. The Federal Transport Minister is, however, empowered to waive this limitation where it is satisfied that no wholly-owned Nigerian vessel is available and suitable for the required services.

Engineering

A company and its employees who are engineers engaged in engineering services must be registered with the Council for the Regulation of Engineering in Nigeria (COREN). For a company to be registered with COREN, a majority of the directors of the company must be Nigerians registered with COREN. Furthermore, expatriate engineers who are granted provisional registration cannot register a 100% foreign-owned engineering consulting firm in Nigeria.

Broadcasting
For a company or business enterprise owned by a foreign investor to acquire a broadcasting licence in Nigeria, a majority of its equity must be held by Nigerians, it must be operated by Nigerians, and it must not represent foreign interests.

Oil and Gas
The upstream petroleum acreage regulator in practice will not allow a foreigner to acquire a majority stake in any oil mining licence or lease. The local oil and gas sector regulators give Nigerians a preference in the award of oil sector contracts and government leases, but foreigners whose offers are not matched by Nigerians as to price and quality may still get such contracts.

Investors investing in particular sectors are also often mandated to obtain licences for those sectors before validly operating. For example, companies in the banking, insurance, oil and gas, mining, money-lending, electric power generation, transmission and distribution, and telecommunication industries must obtain and maintain appropriate licences and permits from the applicable agencies of government.

9. Tax

9.1 Taxation of Business Activities
There are several categories of relevant taxes. Among these are the company income tax, capital gains tax, personal income tax, value added tax, stamp duties tax and withholding tax. The federal legislature recently passed the Finance Acts of 2019, 2020 and 2021, each of which amended many primary tax laws in Nigeria. The administration of a tax depends on whether it is a federal or state tax. Federal taxes are administered by the FIRS, and state taxes by the relevant state boards of internal revenue service (SIRS). The local governments also charge rates and levies such as tenement rates.

Companies Income Tax
The companies' income tax (CIT) is the primary annual tax payable by private and public companies doing business in Nigeria. It is governed by the Companies Income Tax Act (1977) which has been amended by the Finance Act of 2019, 2020 and 2021. The CIT rate is 30% for companies whose gross turnover is greater than NGN100 million (approximately USD200,000) and 20% for companies with turnover between NGN25 million and NGN100 million. Small companies earning less than NGN25 million as turnover are excluded from paying CIT by the Finance Act.

Companies Income Tax for Foreign Investors
A foreign company in Nigeria with a "fixed base of business" in Nigeria is required to pay CIT on its income derived from Nigeria. Foreign digital sector companies who have a significant economic presence in Nigeria (SEP) are also required to pay CIT for their profits "derived from" Nigeria.

A company is deemed to have SEP where it derives an annual income of NGN25 million or its equivalent in other currencies from Nigeria, uses a Nigerian domain name or website address or has purposeful and sustained interactions with persons in Nigeria by customising its digital platform to target persons in Nigeria. A foreign company with SEP in Nigeria and providing professional, consultancy, management and technical services to Nigerian residents must pay

10% withholding tax (WHT), provided that it is not otherwise liable to pay Nigerian income tax.

Personal Income Tax

Personal income tax (PIT) is governed by the Personal Income Tax Act (1993) (PITA). The tax is imposed by Federal statutes but collected by the states. It is a tax charged on the income of individuals, sole proprietors and partners (be they human individuals or juristic persons). For human individuals employers (whether sole proprietorships or partnerships), the tax payable is computed on a self-assessment basis for the preceding year, with administrative assessment intervening in cases of suspected under-assessment.

For employees, tax is paid on a Pay as You Earn (PAYE) basis where employers "deduct" the tax "at source" and remit directly to the respective state tax authorities. PIT is charged on a taxpayer's annual taxable income at rates rising from 7% on sums NGN300,000 or more, to 24% on sums above NGN3.2 million (taxable at 24%).

Personal Income Tax for Foreign Investors

A foreign non-resident firm, partnership or individual doing business in Nigeria or deriving income in Nigeria is required to pay PIT on their income derived from Nigeria. An individual, executor, or trustee outside Nigeria who provides technical, management, consultancy or professional services to a person resident in Nigeria, and who has significant economic presence in Nigeria, must pay PIT in Nigeria.

Hydrocarbon Tax

The Petroleum Industry Act (2020) (PIA) repealed the old "petroleum profit" tax regime and introduced a new "hydrocarbon tax" regime. It also extended the application of the CIT to all operations in the petroleum sector. The PIA replaced the petroleum profit tax (maximum rate of 85%) with a new hydrocarbon tax (maximum rate of 30%) for upstream operators. Under the PIA, upstream companies are now liable to pay (i) CIT (maximum rate 30%) on both core "petroleum operations" and other activities, plus (ii) a hydrocarbon tax of 30% on "petroleum operations" only.

Under the repealed Petroleum Profit Tax Act (PPTA), CIT did not apply to "petroleum operations". With this new regime, the maximum tax rate for operators in the upstream sector (excluding operators in the deep offshore and frontier basin) has changed from 85% of profits under the PPTA to 60% of profits. Deep offshore and frontier basin operations are excluded from hydrocarbon tax.

However, this does not immediately translate to lower taxes throughout the industry, as certain hitherto allowable deductions and expenses are no longer allowed under the PIA. Among these are natural gas flare fees or imposition relating to natural gas flare and financial or bank charges, arbitration and litigation costs, bad debts and interest on borrowing.

Value Added Tax

VAT is chargeable on all goods and services consumed or otherwise supplied in Nigeria irrespective of whether the entities involved are foreign or local. It is charged at the rate of 7.5% and governed by the VAT Act. Medical and pharmaceutical products, basic food items, books and educational materials, sanitary pads, baby products, land, buildings, money and securities are among the items exempted from VAT.

Non-resident companies (NRCs) carrying on business in Nigeria and supplying "VATable" goods or services to Nigeria must register with the FIRS for VAT purposes using the address of the persons with whom they have subsisting contracts as their respective addresses for the purposes of correspondence relating to the tax. However, non-registration with the FIRS for VAT purposes does not exclude liability to pay VAT and does not relieve the consumer of taxable supplies from remitting the VAT on behalf of the NRC.

Stamp Duties

Stamp duties are taxes payable on documents. The stamp duty rate is dependent on the type of document and the value of the transaction. It may be nominal or based on the value of the item (ad valorem). For example, a charge on corporate assets is charged at an ad valorem rate of 0.375%, but only nominal stamp duty is payable on a facility agreement where the agreement creating the charge has been stamped ad valorem.

Other taxes include withholding tax, education tax, custom and excise duties, employee compensation deductions, industrial training fund, national social insurance trust fund contributions and police levies.

9.2 Withholding Taxes on Dividends, Interest, Etc

Withholding tax (WHT) is payable by several categories of persons and on items such as dividends, interest, rent, directors' fees, professional fees, royalties and commissions. WHT is deducted at varying rates ranging between 5% to 10% depending on the transaction and whether it involves a company or an individual and the countries involved.

For dividends paid by a Nigerian company to a non-resident company, withholding tax of 10% is deductible whether the country in question has a double tax treaty with Nigeria or not at the rate of 7.5% or 10% depending on the country.

9.3 Tax Mitigation Strategies

It is not unlawful for individuals and companies to undertake strategic planning and activities that result in the reduction or avoidance of tax liabilities so long as this does not involve tax evasion. Companies often adopt strategies to mitigate their tax liability, some of which will be discussed briefly below.

Tax Incentives and Holidays

Companies eligible for specific tax holidays, incentives and allowances often maximise these incentives, thereby reducing their tax obligations. These incentives include pioneer status (in effect five-year income tax holidays for manufacturers establishing factories and innovators) and rural investment allowance (in effect deductions for sums spent building infrastructure in rural areas).

Tax Havens

It is common practice for companies to set up offshore subsidiaries in tax-advantaged jurisdiction "tax havens" including those havens having tax treaties with Nigeria. This practice is deemed to be permitted by the words of Sections 11 and 23(1)K of the PITA and CITA, respectively, which exempts from taxation the proceeds of foreign investment that are brought into Nigeria through the banks.

Double Taxation Treaties

Non-resident companies located in countries with whom Nigeria has entered into a DTT enjoy a reduced WHT rate between 7.5% and 10% depending on the agreement between Nigeria and the countries involved. Nigeria has a DTT agreement with each of Belgium, Canada, China, Czech Republic, France, the Netherlands, Pakistan, Philippines, Romania, Singapore, Slovakia, South Africa, Spain, Sweden and the United Kingdom.

Group Taxation

Nigerian law does not recognise group income and value-added taxation, and consequently transfers of losses and/or reliefs among group companies is not permitted under Nigerian law. However, stamp duty is not payable on transactions between related entities who have at least 90% common ownership by value. Intercompany loans and other services rendered among related entities must be (a) disclosed to the tax authorities on pain of having to pay fines and (b) rendered on arm's length terms if income tax deductions are to be allowed on them: there is a detailed body of transfer pricing regulations.

9.4 Tax on Sale or Other Dispositions of FDI

Pursuant to the Capital Gains Act (1967), capital gains tax (CGT) is payable by both companies and individuals on gains realised from the disposal of chargeable assets, whether tangible or intangible. The tax rate is 10%. Like CIT, CGT is payable by non-resident companies where a gain from the disposal is derived from or brought into Nigeria.

Capital gains tax is payable on gains derived from the disposal of real estate by residents and non-residents except where the gains derived are from the main or only private residence of the individual, and provided that the real estate does not exceed one acre in size. Also, CGT is not applicable to real estate investment trusts securities.

9.5 Anti-evasion Regimes

There are general anti-avoidance rules (GAAR) provided under the tax laws in Nigeria. For example, Sections 17 of the PITA and 22 of the CITA provide for the re-characterisation of any transaction by the tax authority which is deemed to produce a result which artificially reduces the taxable income in Nigeria.

The tax authorities have recently put in place additional measures to combat tax evasion. By virtue of Section 49(1) of the PITA as amended, all businesses are now mandated to provide a tax identification number (TIN) before operating or continuing to access their bank accounts. The TIN will be used to track the tax compliance of such individual or company. Also, by virtue of Section 8 of the VAT Act, refusal to register with the FIRS for remittance of VAT will subject the defaulter to fine and imprisonment penalties.

As part of its ongoing efforts to fight tax evasion, especially among related entities, the FIRS enacted Nigeria's transfer pricing regulations, the Income Tax (Transfer Pricing) Regulation, in 2012 (amended in 2018) (TPR), to ensure transactions among related entities are conducted at arms' length, particularly those between a Nigerian company and its foreign affiliate.

10. Employment and Labour

10.1 Employment and Labour Framework

Employment and labour law in Nigeria are grounded in a number of statutes as well as case law, chief among which is the Nigeria Labour Act. Other secondary, employment-related legislation in Nigeria includes the Constitution, the Employment Compensation Act, the Factories Act, the Pension Act, the Industrial Training Fund Act and the Trade Union Act.

The Labour Act does not apply to all categories of employees. It applies only to "workers" who have entered into or work under contracts with employers for manual labour or clerical work, whether in the private or public sector. It specifically excludes persons exercising administrative, executive, technical or professional functions, whether as public officers or otherwise.

Collective bargaining is common in both the formal and informal sectors where the employees are members of a trade union. The trade union representatives regularly negotiate terms in the interests of their members through industry or company-specific collective bargaining agreements (CBA).

CBAs are commonly used in the oil and gas and banking sectors. These CBAs are often short-tenured so as to allow for renewal on terms that will meet realities that change for union members from time to time. For example, in 2020 the National Union of Banks, Insurance and Financial Institutions and the Association of Senior Staff of Banks, Insurance and Financial Institutions threatened to shut down all banking and other financial activities in Nigeria. They demanded that their employers agree to review and renew the expired collective bargaining agreement for the banking, insurance and financial services sector. The existing CBA was updated to address medical care issues and expanded the scope of coverage to include more robust treatment of HIV and better medical care for other diseases and infections such as COVID-19.

10.2 Employee Compensation

The employment laws in Nigeria protect employees' interests in the workplace by obligating every employer to provide a safe working environment and conditions for its employees. The terms of an employment contract are also enforceable against an employer where there is a breach of contract.

Employees are entitled to various forms of compensation as prescribed under legislation or the employment contract, or as decided by the courts. In most cases, remuneration is a monthly salary, along with housing, transport and other allowances, pension contributions and bonuses which may accrue to the employee during the tenure of their employment. It is usual to see senior management officers and early start-up employees receive equity-linked compensation, such as share option schemes with stipulated vesting periods, in addition to the monetary compensation package.

Statutorily, employers in the public and private sectors are compelled to pay 1% of each employer's total monthly payroll into the Employee Compensation Fund managed by the Management Board of Nigeria Social Insurance Trust Fund. The Employee Compensation Fund is intended for the compensation of employees in the event of injury, accidents, mental stress, terminal disease or death suffered during the period of employment.

Employees also have the right to file actions in the National Industrial Court (NIC) (a court with the exclusive jurisdiction to entertain labour and employment-related matters in Nigeria) for breach of contracts, injury suffered in the course of employment, negligence, discriminatory treatment and other wrongs. The NIC is seen by many as a pro-employees' court.

In the event of a merger or acquisition, the compensation of the employee in cases of redundancy will be regulated by the relevant provisions of the Labour Act (where the employee is a lower-level "worker"), and by the terms of contracts of the employees and relevant collective bargaining agreements (in other cases).

10.3 Employment Protection

No special protection is provided under Nigerian law for employees in the event of a merger, acquisition, change-of-control or other investment transactions. Employment contracts are typically contracts of personal service and are employer specific. Nothing in law automatically obligates the surviving entity in a merger (or the controlling entity) to maintain the services/contracts of employees where the employment contract is silent.

The Nigerian Labour Act provides limited protection for employees during redundancy. The Act only requires that the Minister make regulations providing for the compulsory payment of redundancy allowances on the termination of a worker's employment because of his redundancy. The rights of employees during redundancy are sometimes also entrenched in collective bargaining agreements with the companies.

Customarily, employees are granted the right of information and fair representation in the merger process. The ISA and the FCCPA also require the merging entities in a merger to inform the trade union or employee representatives of the merger process before its implementation.

11. Intellectual Property and Data Protection

11.1 Intellectual Property Considerations for Approval of FDI

There are no special provisions which affect FDI under the intellectual property laws in Nigeria. However, the National Office of Technology Acquisition and Promotion (NOTAP) screens FDI which involves the importation of foreign technology into Nigeria. The NOTAP Act requires that technology transfer agreements (TTA) for the "importation" of foreign technology into Nigeria are registered with the NOTAP. Contracts for technical support and to licence intellectual property are the most pervasive kinds of TTAs.

Failure to register such a TTA would make the foreign investor unable to use naira to buy foreign currency in the financial markets regulated and subsidised by the Central Bank of Nigeria. These markets tend to have more favourable exchange rates, as well as greater transparency in fact and assurance of legitimacy in law, than other markets. It has also been suggested that non-registration with NOTAP makes a TTA unenforceable in law, but this is not the better view.

NOTAP assesses TTAs for registration with itself by considering their economic and technical value to the Nigerian economy. Of great importance are TTAs' consistency with Nigerian law, prevailing prices and terms for such technology, their duration, and the seat and venue for resolving disputes arising in connection with them. Following review of a TTA, NOTAP may require amendments to be made to the TTA as condition for its registration. Upon registration, a NOTAP certificate is issued.

11.2 Intellectual Property Protections

Nigeria's intellectual property rights statutes codify intellectual property rights and protections largely adequately. These statutes include the Trademarks Act, the Patents and Designs Act, the Copyright Act and the Merchandise Act.

The Copyright Act protects literary works, musical works, artistic works, cinematograph films, sound recordings and broadcasts. To be eligible for protection, the works must be original and must be expressed in a definite medium. Although registration is not required for protection, copyright works are often in fact "registered" with the Nigerian Copyright Commission (NCC) through the NCC's copyright notification regime.

The Trademarks Act protects trademarks and service marks which are distinctive, not deceptive, scandalous, or contrary to public policy, and registered at the Trademarks Registry in Nigeria.

The Patents and Designs Act is designed to protect inventions on the conditions that such inventions are (i) new, (ii) innovative, and (iii) capable of industrial application. The Patents and Designs Act also protects industrial designs by the registration of such designs provided that such designs are (i) new and (ii) not contrary to public order or morality. Registered patents have a validity period of 20 years. For now at least, computer software and biologically-engineered products appear not to be patentable.

Although Nigeria possesses strong institutions for the enforcement of intellectual property rights, weak law enforcement and chronic delays in the court system have contributed to an increase in piracy and counterfeiting. Although each applicable statute has extensive provisions on what constitutes the infringement of a right as well as the remedies for infringement, the enforcement of these remedies has been slow and not very effective.

There are ongoing efforts to revise Nigeria's intellectual property statutes. The Copyright Act (2022) was recently passed into law by the National Assembly and is awaiting the assent of the President to become law. The Industrial Property Commission Bill, Trademarks Bill and Patent Bill are currently being considered by the National Assembly, Nigeria's federal legislature.

11.3 Data Protection and Privacy Considerations

There is a panoply of laws that regulate data privacy and the protection of consumer data in Nigeria. Some of these are:

- the Nigeria Data Protection Regulation (NDPR) (2019);
- the Constitution, which guarantees citizens' right to "privacy" but without giving detail on the scope of that term;
- the Nigerian Communications Commission (NCC) Code of Practice Regulation (2007), which deals with the protection of consumers' data in the telecommunications sector;
- the Cybercrime (Prohibition, Prevent, etc) Act (2015), which prevents and penalises cybercrimes in Nigeria;
- the CBN Consumer Protection Framework (2016); and
- the National Identity Management Commission (NIMC) Act (2007).

In February 2022, the President established the Nigeria Data Protection Bureau (NDPB). The NDPB is primarily responsible for regulating data and privacy protection and enforcing the provisions of the NDPR as well as the Nigeria Data Protection Bill 2022, when passed into law. There is as yet no enabling statute for the NDPB. It has, however, been working with NITDA to provide breach-reporting services and registering Data Protection Compliance Organisations.

The NDPR, which is one of the primary statutes for data privacy and protection, has limited extraterritorial scope. It applies only to natural persons residing in Nigeria and natural persons residing outside Nigeria but who are citizens of Nigeria. It does not protect non-natural persons or foreigners.

Persons in custody of personal data are permitted to transfer such data to other countries subject to restrictions, such as (i) the supervision of the Honourable Attorney General of the Federation, (ii) the data subject's explicit consent to the transfer, (iii) the transfer being necessary for the conclusion or performance of a contract between the data subject and the controller, (iv) reasons of public interest, (v) the exercise or defence of legal claims, and (vi) the need to protect the vital interests of the data subject.

However, the regulation does not cover foreign controllers and processors; it also does not extend to the data privacy and processing of non-Nigerians.

The agencies set up under the various data protection laws are empowered to enforce the provisions of the applicable statutes and to impose penalties. For example, the NITDA may impose fines up to 2% of the gross revenue of the defaulting company for the preceding year in addition to civil remedies. In 2021, the NITDA imposed fines of NGN5 million (approximately USD12,000) and NGN10 million (approximately USD25,000) on two digital lenders for various violations of the NDPR. It also placed a ban on the activities of both companies, pending the remedy of the breaches, to the satisfaction of the regulator, NITDA.

Other agencies too have been keen to protect consumers' data and privacy in the fintech sector. The FCCPC recently issued the Limited Interim Regulatory/Registration Framework and Guidelines for Digital Lending, 2022 (the "Interim Guidelines"). The FCCPC has now ordered all payment systems operators to cease and desist from providing payment or transaction services to lenders who are either under investigation by the FCCPC or operating without the FCCPC's approval. The FCCPC has also recently served multiple orders on certain global players found to have violated consumers' privacy rights.

There is now an inter-agency Joint Regulatory and Enforcement Task Force including the FCCPC, NITDA, CBN and the Independent Corrupt Practices Commission. It has been formed to co-ordinate the investigation, prosecution and sanctioning of violations of consumers' data and privacy rights by fintech sector players.

12. Miscellaneous

12.1 Other Significant Issues

There have been some significant changes in legislation affecting investment in Nigeria across various sectors. For example, the Finance Bill of 2022 was introduced in December 2022. The 2022 Bill amends certain provisions in the existing Finance Acts and also has introduced a number of novel provisions. For example, i) the 2022 Bill imposes capital gains tax on the sale of digital assets, ii) allows losses as a deductible from gains accruing to a person on the disposal of an asset, and iii) introduces a 50% companies' income investment tax credit for companies involved in activities that encourage the reduction of gas flaring.

Also, the CAC, through a circular dated 21 November 2022 (but effective on 1 January 2023), mandated that all Nigerians and foreigners resident in Nigeria will be required to use their National Identification Number (NIN) for identification purposes for all business to be conducted with the CAC (the "Circular"). This will include company incorporation and other post-incorporation filings.

Prior to the release of the Circular, the CAC accepted other forms of identification such as driver's ID, international passport and voter's card, in addition to the NIN. With the issuance of the Circular, these other forms of identification will no longer be acceptable for registration or other filing purposes for Nigerian citizens (resident and otherwise) and resident foreigners. The Circular does not apply to foreigners not resident in Nigeria. Therefore, foreigners who intend to incorporate a Nigerian company can proceed to do so using other means of identification such as an international passport. On the other hand, foreigners resident in Nigeria are obligated to comply with the Circular.

Furthermore, the FCCPC issued three regulations, namely:

- the Restrictive Agreements and Trade Practices Regulation 2022, which provides for the process for authorisation of exempted agreements and practices among undertakings and sets out the guidance on the regulatory review process for agreements or decisions;
- the FCCPC Leniency Rules 2022, which provides for the principles, conditions and procedures to be considered by the FCCPC in granting leniency under the FCCPA. Possible leniency includes reduced penalties, waiver of prosecution/non-prosecutorial understandings, or immunity from penalties. This applies to corporate entities, individuals, associations, groups or other entities; and
- the Abuse of Dominance Regulations, 2022 which provide for rules relating to abuse of dominance and all related matters.

There have also been some regulatory changes in the Nigerian aviation sector. The recently enacted Civil Aviation Act 2022 repealed the Civil Aviation Act 2006. In addition, Nigeria's federal parliament has proposed amendments to several other aviation sector legislations such as the Federal Airports Authority of Nigeria Act, the Nigerian Airspace Management Agency Act and the Nigerian Meteorological Agency Act. The objective of these amendments, it is asserted, is to improve the aviation sector and encourage investments in the sector.

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Trends and Developments

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Nigerian Shares Buy-Back Law

Abstract
The repealed Companies and Allied Matters Act of 1990 prohibited companies from acquiring their own shares except in certain limited circumstances. With the enactment of the Companies and Allied Matters Act of 2020 (CAMA), companies are now permitted to buy back their own shares provided that the conditions stipulated in the CAMA are satisfied.

This article examines the position of the law on shares buy-back in Nigeria.

Introduction

A company can re-acquire its shares by either buying back such shares or otherwise. A company may re-acquire its shares without necessarily buying back its shares, by giving its existing shareholders shares in another company pursuant to a reorganisation of the company. A company may also carry out actions that are similar to a re-acquisition such as cancelling, redeeming or consolidating the shares. Other than shares, a company may choose to return the capital invested by the shareholders, cancel or reduce its share capital.

Conceptually, shares buy-back is a process whereby a company acquires a number of shares in its issued share capital. On the re-acquisition of the shares, they become vested in the company. Historically, companies were not allowed under common law to repurchase their shares, the primary reason being to protect the interest of creditors in the event of a winding-up of the company. The repurchase by a company of its shares meant that the company puts the interest of its shareholders ahead of that of its creditors. This was the rationale for the decision in the case of Trevor v Whitworth (1887) 12 APP Cas 409. However, the risks to creditors would only arise in instances where, as part of the purchase, the assets of a company end up with its shareholders rather than the company's creditors. There are usually no risks where a company's assets are not distributed to its shareholders. The common law position failed to make this distinction.

Other reasons why companies buy back their shares include to prevent a competitor or hostile shareholder from acquiring control of the company, to set up a compensation plan for its shareholders, tax benefits and the return of unutilised capital to shareholders.

The Position Under the Companies and Allied Matters Act, 2020

The CAMA now permits companies to buy back their shares subject to the fulfilment of certain conditions. The CAMA requires that:

- the company's articles of association must authorise a share buy-back;
- the shareholders of the company must pass a special resolution authorising the share buy-back;
- a public notice of the proposed share buy-back must be given in two national newspapers within seven days of the passing of the special resolution authorising the share buy-back;

- the directors of the company must make a statutory declaration of solvency within 15 days of the publication in two national newspapers, as referred to above; and
- the shares to be purchased must be fully paid up and the shareholders must be given the opportunity to sell their shares to the company proportionate to their shareholdings in the company.

The special resolution by the shareholders authorising the share buy-back may be cancelled by the Federal High Court (the "Court") if an aggrieved creditor or shareholder of the company applies to the Court to cancel the shareholders' resolution authorising the buy-back. The application must be brought within six weeks of the giving of the notice in the newspaper (Section 184(2) of the CAMA).

Payments for shares buy-back

A buy-back of the shares of a company can only be effected using the distributable profits of the company (Section 185 of the CAMA). To prevent the circumvention of this rule, there is a general prohibition restricting a company from providing "financial assistance" to any person desirous of purchasing the company's shares, unless in certain prescribed circumstances. For the avoidance of doubt, financial assistance is defined as "a gift, guarantee, any form of security or indemnity, a loan or any form of credit or any other financial assistance given by a company, the net assets of which are thereby reduced by up to 50% or which has no net assets" (Section 183 of the CAMA).

A private company, however, is permitted to provide financial assistance for the buy-back of its shares where the financial assistance is provided out of the company's distributable profits and providing the financial assistance will not lead to a reduction of the company's net assets by more than 50%.

Persons from whom a company may purchase its shares and limit on the shares to be repurchased by a company

A company may buy back its shares from:

- existing shareholders or security holders on a proportionate basis;
- existing shareholders in a manner permitted pursuant to a court-sanctioned scheme of arrangement;
- its employees pursuant to an employee stock option scheme; or
- from the open market (Section 186 of the CAMA).

Holders of a security interest, for example, a mortgage of the shares of the company, would ordinarily have legal title in the shares conveyed to them. Because the shares of private companies are closely held and are subject to pre-emptive rights, it does not appear that the purchase of shares in the open market specified above would apply to the shares of a private company. It would, however, definitively apply to the shares of a public company.

It is noteworthy that the right granted to a company by the CAMA to buy back its shares is not a carte blanche for a company to acquire all of its issued shares. Section 187(1) of the CAMA stipulates that a company cannot buy back and hold more than 15% of its issued shares. Although bonus shares can be allotted in respect of the repurchased shares, no right to attend shareholders' meetings or votes can be exercised in respect of them. No dividends can be paid on those shares either.

A buy-back of shares by the company above the 15% limit is a contravention of the CAMA. If the company re-acquires more than 15% of its shares, the company must, within 12 months from the buy-back date:

- re-issue the excess shares;
- cancel the excess shares; or
- re-issue and cancel the excess shares to such an amount that would bring the purchase to no more than 15% (Section 187 of the CAMA).

It makes sense that the requirement that the shares can be purchased by the company on a proportionate basis should apply equally both to the existing shareholders and the holders of security interests over those shares.

Other Shares Buy-Back Rules: The Securities and Exchange Commission Rules and Regulations, 2013 ("SEC Rules")

The Securities and Exchange Commission (SEC) is established by the Investments and Securities Act, 2007. The SEC is the primary regulator of securities issued by public companies (including companies whose securities are listed on a securities exchange). The SEC does not register the securities or regulate the issuance of securities by private companies.

Rule 398 of the SEC Rules provides for shares buy-back. SEC Rule 398 is dissimilar to the CAMA in three ways. First, it applies only to publicly quoted companies, that is, companies whose securities are listed on a securities exchange. As such, a public company whose shares are not listed on an exchange can only exercise its right to buy back its shares pursuant to the CAMA provisions. Second, the buy-back of shares by a company to which the SEC Rules apply can only be effected either through a purchase in the open market or a self-tender, that is, a direct offer to the company by its shareholders. Third, it would also appear that the SEC Rule 398 mandates the cancellation of the repurchased shares. The CAMA stipulates that the repurchased shares can either be re-issued or cancelled.

The SEC Rules appear narrower in scope than the CAMA buy-back provisions. What is not clear is whether a publicly quoted company can only buy back its shares within the narrow confines of the SEC Rule 398 or whether it could employ the wider provisions in the CAMA to buy back its shares. The better view is that a company could employ any of the means stipulated either under the CAMA or SEC Rule 398.

Scope of the Nigerian shares buy-back

The legislature seems to have adopted a very cautious approach in its reform of the shares buy-back regime in the CAMA. The buy-back rules can be widely misunderstood or misinterpreted. It is instructive to state that whilst statutory buy-back of shares is novel in Nigeria, the practice of shares buy-back is not new.

Prior to the statutory introduction of shares buy-back in section 184 of the CAMA, shares buy-back in Nigeria was typically conducted through a scheme of arrangement by companies returning capital to shareholders pursuant to a court order sanctioning the scheme.

The 15% limit on the amount of its issued shares that a company can acquire and hold pursuant to the CAMA and the SEC Rules is also restrictive. There is no identifiable parameter or indicative formula for arriving at this limit. A company should be allowed to repurchase more than 15% of its issued share capital.

Furthermore, the legal status of the company in relation to the repurchased shares is unclear considering that the CAMA prohibits the exercise of voting rights and payment of dividends on the repurchased shares. These are rights a shareholder of a company would ordinarily have and exercise.

Recommendations and Conclusions

Although the shares buy-back provisions in both the CAMA and the SEC Rules are a considerable improvement from the prior position, they represent a good starting point. There is still work to be done for companies to maximise and enjoy the benefit of the shares buy-back rules. Key amongst this work is the need for a statutory alignment of the provisions in both the CAMA and SEC Rule 398.

The provisions on shares buy-back under the CAMA and the SEC Rules should be aligned to eliminate the possibility of confusion in the interpretation of the scope and the effect of their respective provisions. Alternatively, the SEC Rules can be amended to delete the shares buy-back provisions since the CAMA makes shares buy-back applicable to all companies without limitation. The CAMA may also be reconciled with the SEC Rules to include the disclosure requirements in the SEC Rules since the SEC Rule 398 contains stringent provisions on the funding of the acquisition which must be from the distributable profits as stipulated by the CAMA.

Conclusion

The shares buy-back rule under the CAMA is a welcomed development. There are numerous benefits accruable from shares buy-back.

The rule on shares buy-back would have a positive impact on companies in Nigeria as it provides an opportunity to reduce a company's earnings ratio and increase earnings per share which ultimately leads to an increase in the share price, enhances gearing, provides a seamless exit option for shareholders and increases share liquidity amongst other benefits.

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