Public M&A
2021

Contributing editor
Alan M Klein

LEXOLOGY®
Getting The Deal Through

© Law Business Research 2021

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer–client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between April and May 2021. Be advised that this is a developing area.

© Law Business Research Ltd 2021
No photocopying without a CLA licence.
First published 2018
Fourth edition
ISBN 978-1-83862-706-5

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Public M&A
2021

Contributing editor
Alan M Klein
Simpson Thacher & Bartlett LLP

Lexology Getting The Deal Through is delighted to publish the fourth edition of *Public M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Austria.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Alan M Klein of Simpson Thacher & Bartlett LLP, for his continued assistance with this volume.

London
May 2021

Reproduced with permission from Law Business Research Ltd
This article was first published in June 2021
For further information please contact editorial@gettingthedealthrough.com

© Law Business Research 2021

Contents

Global overview 5
Alan M Klein
Simpson Thacher & Bartlett LLP

Cross-border M&A: the view from Canada 7
Ian C Michael
Bennett Jones LLP

Introduction to public M&A in the United Kingdom 9
Mark Bardell, Antonia Kirkby, Robert Moore and Caroline Rae
Herbert Smith Freehills LLP

Australia 11
Simon Rear, Chris Rosario, Michael Van Der Ende, Connor McClymont and Alix Poole
Squire Patton Boggs

Austria 17
Florian Kusznier
Wolf Theiss

Bermuda 23
Stephanie Paiva Sanderson
BeesMont Law Limited

Brazil 28
Enrique Tello Hadad and Daniel Domenech Varga
Loeser e Hadad Advogados

Bulgaria 35
Ivo Alexandrov and Yonko Hristov
Kambourov & Partners, Attorneys at Law

Canada 40
Linda Misetich Dann, Brent W Kraus, John E Piasta, Ian C Michael, Chris D Simard and Beth Riley
Bennett Jones LLP

China 48
Caroline Berube and Ralf Ho
HJM Asia Law & Co

Denmark 54
Thomas Weisbjerg, Julie Høi-Nielsen and Adam Kara
Mazanti-Andersen

Egypt 62
Omar S Bassiouny and Mariam Auda
Matouk Bassiouny

France 67
Anya Hristova and Océane Vassard
Bersay

Germany 76
Gerhard Wegen, Christian Cascante and Jochen Tyrolt
Gleiss Lutz

Ghana 86
Kimathi Kuenyehia, Sr, Sefakor Kuenyehia, Valery Atuwo, Akua Serwaa Asomani-Adem, Kojo Amoako and Kafui Quashigah
Kimathi & Partners Corporate Attorneys

Greece 93
Catherine M Karatzas, Alexandra Th Kondyli and Eleana Rouga
Karatzas & Partners Law Firm

India 98
Rabindra Jhunjhunwala, Bharat Anand and Abhishek Dadoo
Khaitan & Co

Ireland 106
Madeline McDonnell, Susan Carroll Chrysostomou, Anna O'Carroll and Thomas Burke
Matheson

Israel 115
Michael Barnea, Zvi Gabbay and Ariella Dreyfuss
Barnea Jaffa Lande

Italy 121
Fiorella Federica Alvino
Nunziante Magrone

Japan 128
Sho Awaya and Yushi Hegawa
Nagashima Ohno & Tsunematsu

Luxembourg 136
Chantal Keereman and Frédéric Lemoine
Bonn & Schmitt

Mexico 142
Julián Garza and Luciano Pérez G
Nader Hayaux & Goebel

Nigeria 147
Gbolahan Elias SAN, Yemisi Falade and Oluwatosin Omobitan
G Elias & Co

© Law Business Research 2021

North Macedonia 154
Emilija Kelesoska Sholjakovska and Ivo Ilievski
Debarliev Dameski & Kelesoska

Norway 162
Ole K Aabø-Evensen
Aabø-Evensen & Co

Russia 176
Vasilisa Strizh, Philip Korotin, Valentina Semenikhina and Alexey Chertov
Morgan, Lewis & Bockius LLP

Sweden 184
Carl-Johan Pousette and Marcus Tipner
Advokatfirman Hammarskiöld

Switzerland 190
Claude Lambert, Reto Heuberger and Andreas Müller
Homburger

Taiwan 200
Susan Lo and Yvonne Hsieh
Lee and Li Attorneys at Law

Thailand 205
Wittaya Kaewkungsadan, Akeviboon Rungreungthanya and Pratumporn Somboonpoonpol
Weerawong, Chinnavat & Partners Ltd

United Kingdom 211
Antonia Kirkby and Robert Moore
Herbert Smith Freehills LLP

United States 217
Alan M Klein
Simpson Thacher & Bartlett LLP

Vietnam 223
Nguyen Anh Tuan, Phong Le, Ha Thi Hai and Nguyen Thu Huyen
Bizconsult LLC

© Law Business Research 2021

Nigeria

Gbolahan Elias, Yemisi Falade and Oluwatosin Omobitan

G Elias & Co

STRUCTURES AND APPLICABLE LAW

Types of transaction

1 How may publicly listed businesses combine?

Publicly listed companies may combine in Nigeria through acquisitions or schemes. An acquisition may involve the acquisition of the assets of the business of another company or the acquisition of shares of another company, 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 utilised to effect business combinations whether within one company or between or among respective companies involved in the business combination. These methods of business combinations are effected through the provisions of applicable law.

The combination structure to be adopted is largely dependent on time considerations, tax efficiency, confidentiality and the relevant regulatory or sector peculiarities.

The consideration for these transactions may be cash, securities or other assets made available by the parties to the transaction.

Statutes and regulations

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

The main laws governing business combinations and acquisitions of publicly listed companies are:

- the Federal Competition and Consumer Protection Act 2018;
- the Federal Competition and Consumer Protection Commission Merger Review Regulations 2020;
- the Federal Competition and Consumer Protection Commission Merger Review Guidelines 2020;
- the Investments and Securities Act 2007;
- the Companies and Allied Matters Act 2020;
- the Securities and Exchange Commission Rules 2013 as well as their various amendments;
- the Nigerian Stock Exchange Rule Book 2015;
- the Companies Income Tax Act 1979 (as amended);
- the Capital Gains Tax Act 1967 (as amended);
- the Value Added Tax Act 1993 (as amended);
- the Companies Proceedings Rules 1992;
- the Companies Regulations 2021; and
- the Federal High Court (Civil Procedure) Rules 2019.

Cross-border transactions

3 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 the Nigerian targets. The degree to which Nigerian legislation is applicable depends largely on the size of the stake acquired and the degree of control the stake will give the acquirer in the Nigerian target.

The Federal Competition and Consumer Protection Act 2018 is the main legislation applicable to cross-border transactions. Further to this legislation, the Nigerian merger regulator, the Federal Competition and Consumer Protection Commission, developed the Federal Competition and Consumer Protection Commission Merger Review Regulations 2020 (Regulations) and the Federal Competition and Consumer Protection Commission Merger Review Guidelines 2020 (Guidelines). These Regulations and Guidelines prescribe the requirements for obtaining the approval of the Federal Competition and Consumer Protection Commission where an acquisition or other form of business combination occurs in a foreign jurisdiction and changes the ultimate control of Nigerian entities. The applicability of the Federal Competition and Consumer Protection Act depends on whether the transaction will result in a change of control in the Nigerian target.

Under this legislation, an undertaking has control over another undertaking if it:

- beneficially owns more than one-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 or has the ability to control a majority of the voting rights directly or indirectly; and
- is a holding company, and the undertaking is a subsidiary as contemplated under the Companies and Allied Matters Act 2020.

Further, control is established where an undertaking is able to appoint or veto the appointment of a majority of the directors of the undertaking or, in the case 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.

In addition to the main merger control legislation, there is also sector-specific legislation applicable to cross-border transactions depending on the relevant sector. This includes:

- the Insurance Act 2003;
- the Investments and Securities Act 2007 (as amended)
- the Communications Act 2003;
- the Pension Reform Act 2014;
- the Banks and Other Financial Institutions Act 2020;
- the Electric Power Sector Reform Act 2005; and
- the Petroleum Act 1969.

© Law Business Research 2021

In addition, there are regulations and guidelines made pursuant to the main legislation that are also applicable to cross-border transactions. Further, the rules governing the securities exchanges where the relevant target public companies are listed will also be applicable. There is also ancillary legislation that is applicable after the cross-border transaction has taken effect but should be considered before the transaction is effective or while it is being structured.

There is 'local content' legislation that requires registration of foreign ownership or restricts the level of foreign participation in Nigerian targets. The Nigerian Investment Promotion Act 1992 requires foreign ownership of shares in a Nigerian company to be registered with the Nigerian Investment Promotion Commission. There are also statutes and regulations such as the Private Guard Companies Act 1986, Private Guard Companies Regulations 2018, the Civil Aviation Act 2006, the Nigerian Civil Aviation Authority Regulations, the Coastal and Inland Shipping Act 2003, the Nigerian Oil and Gas Industry Content Development Act 2010 that all have requirements for companies and licensees in their relevant sectors to be controlled by Nigerians.

This legislation, and the relevant regulations and guidelines, must be considered when determining the quantum of foreign ownership to be acquired in a Nigerian enterprise. Also, there are prohibited businesses for both foreigners and Nigerians, such as the production of arms, ammunition, narcotic drugs and psychotropic substances, military and para-military wears, etc, as contained in sections 17(2) and 31 of the Nigerian Investment Promotion Commission Act 1992.

The Foreign Exchange (Monitoring and Miscellaneous) Act 1995 regulates the importation and repatriation of capital in Nigerian businesses by foreigners.

Sector-specific rules

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

Business combinations involving specific industries are subject to additional sector-specific legislation and regulations, including:

- the Nigerian Communications Act 2003 and the Nigerian Communications Commission Competition Practices Regulations 2007;
- the Electric Power Sector Reform Act 2005;
- the Banks and other Financial Institutions Act 2020;
- the Insurance Act 2003;
- the Department of Petroleum Resources Guidelines for obtaining Ministerial Consent 2014;
- the National Broadcasting Commission Act 1992 (as amended);
- the Pension Reform Act 2014; and
- the National Health Insurance Scheme Operational Guidelines 2012.

Transaction agreements

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

The relevance of transaction agreements is determined by the business combination structure adopted by the parties. Where the parties elect to undertake a statutory scheme, there is no need for transactions agreements in the strict sense. The documents required are typical statutory forms and scheme documents, and documents related to court processes. The terms of a statutory scheme are set out in the scheme documents. The terms of the scheme are required to be approved by at least 75 per cent of the shareholders of the relevant company present at the court-ordered meeting convened for that scheme. 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 takeover requirements of the Investments and Securities Act 2007, a bid document is the main transaction document. The bid document sets out the terms of the formal offer to the shareholders of the target company. As with a transaction implemented by a scheme, the transaction parties may also enter into a transaction implementation agreement or some other form of memorandum of understanding that will set out the implementation steps for the transaction.

Other transactions that do not fall within the above categories may be implemented through a share purchase agreement, share subscription agreement or an asset purchase agreement.

Schemes and takeover bids are governed by Nigerian mandatory statutes and are therefore implemented under Nigerian law. In other instances, the choice of governing law is based on the agreement of the parties.

FILINGS AND DISCLOSURE

Filings and fees

6 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 are usually determined by the transaction structure and whether or not a change of control will occur. Where a business combination will result in the change of control of the target, a filing is required to be made with the competition regulator, the Federal Competition and Consumer Protection Commission, to obtain a merger control approval.

A business combination involving a public company and implemented by a scheme must be filed with the Federal High Court, which will sanction the transaction.

Where a mandatory takeover bid is triggered, a filing with the Securities and Exchange Commission is required to obtain (1) authorisation to proceed with the takeover bid and (2) approval of the bid document and its registration.

In addition to the foregoing, filings will also be required with (1) the securities exchange where the securities of the public company are listed and (2) the regulator of the public company (where it operates in a regulated sector). Post-transaction implementation filings will also be required at the Nigerian companies' registry – the Corporate Affairs Commission.

For all the filings stated above, the public company will be required to pay the relevant prescribed fees.

No stamp duty is payable on the 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 in asset sale and share subscription agreements.

Information to be disclosed

7 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?

The Nigerian Stock Exchange requires companies listed on it to immediately 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. M&A

© Law Business Research 2021

activity affecting a listed company directly or indirectly is considered to be a material occurrence that should be disclosed to the public. The breakdown of information to be disclosed is not prescribed. However, the listed company is required to provide as much detail as possible to the public. The listed company is also required to disclose any transaction that results in 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.

Generally, the company has the transaction disclosure obligation to the Nigerian Stock Exchange, the Securities and Exchange Commission and the relevant regulator. However, the Securities and Exchange Commission requires the directors, officers, employees and holders of at least 5 per cent of the securities of a relevant company to notify the Securities and Exchange Commission of any sale of their shares in the company or purchase of additional shares in the company no later than 48 hours after the activity.

In respect of filings with the Federal Competition and Consumer Protection Commission and the Securities and Exchange Commission, specific information is required to be disclosed. The information to be disclosed to the authority includes:

- detailed information about product lines or operations of the relevant companies;
- a list of major competitors in that product market and the market position or market share of each company;
- the financing arrangement of the acquirer in an acquisition;
- revenue information of the relevant companies;
- the structure and organisation of the relevant companies;
- arrangements for employees;
- settlement arrangements for shareholders and treatment of dissenting shareholders;
- material claims and litigation affecting the relevant companies;
- material contracts affecting the relevant companies;
- 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 takeover bid).

The above disclosures to the Federal Competition and Consumer Protection Commission and the Securities and Exchange Commission are required to obtain approval for the transaction and do not qualify as disclosures to the public.

Disclosure of substantial shareholdings

8 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?

The Securities and Exchange Commission requires holders of 5 per cent or more of any class of securities of a public company to notify it upon the sale of their shares in the company or acquisition of additional shares of the company within 48 hours of the transaction.

Also, the Companies and Allied Matters Act 2020 requires holders (whether holding directly or through a nominee) of at least 5 per cent of more of the issued shares of a public company to notify the public company of its holding and its full particulars within 14 days of becoming a substantial shareholder and within 14 days of ceasing to be one.

The above disclosure requirements are not affected by the company's direct involvement as a party to the business combination. Companies separately have their disclosure obligations under the rules of the Nigerian Stock Exchange. Public companies are required to notify the Nigerian Stock Exchange upon the occurrence of a transaction that brings the beneficial ownership of the company's shares to 5 per cent or more no later than 10 business days after the transaction. Companies are also required to disclose details of shareholders holding 5 per cent or more of its shares in its annual report.

DIRECTORS' AND SHAREHOLDERS' DUTIES AND RIGHTS

Duties of directors and controlling shareholders

9 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?

Under the Companies and Allied Matters 2020, directors have the following duties to the company (not its shareholders generally) in respect of a business combination or sale:

- to act at all times in the best interest of the company as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances;
- not to fetter his or her discretion to vote in a particular way;
- in connection with the transfer to any person of all or any of the shares in the company under an offer made to the shareholders of the company, to do all things reasonably necessary to secure 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;
- to notify the company of his or her interest in shares of the company, its holding company, subsidiary or affiliate (also applicable to officers of the company);
- 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 conflict with any of his or her duties as a director.

The Investments and Securities Act 2007 also requires the directors of a company that is the target of a prospective takeover bid to send a circular to each shareholder of the public company and the Securities and Exchange Commission at least seven days before the takeover bid will take effect. The circular is required to state the recommendation of the board of directors to the shareholders of the offeree company in respect of the takeover bid. The circular is also required to contain particulars of any payment made to an officer or former officer of an offeree company by way of compensation for loss of his or her office or any office in connection with the management of the company's affairs or of any office with the management of any subsidiary of the company, or as consideration for or in connection with his or her retirement from any office.

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.

Approval and appraisal rights

10 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 the shareholders depends primarily on the business combination structure adopted.

A business combination undertaken by a scheme requires the approval of 75 per cent of the shareholders of the relevant company present at the court-ordered meeting convened to approve the scheme.

© Law Business Research 2021

A takeover offer differs slightly. The approval of the shareholders is obtained on a one-on-one basis through the acceptance by each shareholder of the offer in the takeover bid. Under the Investments and Securities Act 2007, to fully implement a 100 per cent takeover 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. Upon receipt of 90 per cent acceptance, the offeror may notify the dissenting shareholders to either transfer their shares to the offeror on the terms in the takeover bid or demand payment of the fair value of shares held by the shareholders.

In structures other than schemes, the approval of the shareholders depends on the provisions of the articles of association of the relevant company. For instance, an asset sale transaction that will sell or acquire the assets of a business may require the approval of the shareholders of the public company.

COMPLETING THE TRANSACTION

Hostile transactions

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

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

Break-up fees – frustration of additional bidders

12 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?

Break-up fees or reverse break-up fees are currently not contemplated or regulated under Nigerian law for mandatory takeover bids. However, break-up fees may be negotiated between parties in a private share acquisition or asset acquisition transaction.

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

Government influence

13 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 under any public interest grounds with respect to any merger that is under consideration by the Federal Competition and Consumer Protection Commission. The representations of the Minister will be considered by the Commission when determining whether merger approval should be granted.

Conditional offers

14 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?

The conditions to a business combination may be mandatory or otherwise determined by the parties to the combination. In terms of approvals from the competition regulator, sector regulator and other regulators, these conditions are mandatory and the combination cannot be completed without these approvals. Corporate approvals of the combining parties are also mandatory.

For takeover offers, conditions may be associated with the acceptance of the offer. For instance, an offer may be subject to conditions such as the bidder being able to purchase a specified minimum number of shares within a specified time frame to ensure that it acquires control of the company. These conditions and their particulars must be stated in the bid document. However, the rules of the Nigerian Stock Exchange restrict offerors from making an offer conditional upon the payment of compensation for loss of the offer.

Financing

15 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 takeover offer, an 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 Investment and Securities Act 2007 requires the offeror to make adequate arrangements to ensure that funds are available to pay the cash consideration to the shareholders. The rules do not specify any minimum standards that these arrangements must meet.

In transactions other than takeover offers, the buyer will be required by the Federal Competition and Consumer Protection Commission or the Securities and Exchange Commission, or both, to provide adequate proof of financial capability to acquire the shares or the assets.

© Law Business Research 2021

Minority squeeze-out

16 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 Nigerian squeeze-out law provisions are section 129 of the Investments and Securities Act 2007 and section 712 of the Companies and Allied Matters Act 2020 on the one hand and section 715 of the Companies and Allied Matters Act 2020 on the other. Sections 129 and 712 set out a procedure for majority shareholders to compulsorily acquire the shares of minority shareholders: a majority of the shareholders holding at least 90 per cent of the value of the shares must approve it, 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 make an order against the squeeze-out attempt where it is satisfied that 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. Section 129 of the Investments and Securities Act and section 712 of the Companies and Allied Matters Act 2020 set out the procedure for the exercise of the option and preconditions for its exercise. These sections are restricted to a scheme or contract and exclude takeover bids involving the transfer of shares or any class of shares in a company.

Section 715 of the Companies and Allied Matters Act 2020 may also be used by majority shareholders to squeeze minority shareholders out. The provision empowers a majority representing not less than 75 per cent to pass a resolution agreeing to any 'arrangement'. The arrangement must be sanctioned by the court. If the scheme is approved then minority shareholders may be squeezed out through it.

A minority squeeze-out may also occur as part of a takeover bid under section 146 of the Investments and Securities Act. Where the offer is accepted by at least 90 per cent of the shareholders to whom the offer was made, the offeror may undertake a squeeze-out of the dissenting shareholders. Upon receipt of 90 per cent acceptance, the offeror may notify the dissenting shareholders to either transfer their shares to the offeror on the terms in the takeover bid or demand payment of the fair value of shares held by the shareholders. The intention to invoke the squeeze-out provisions must have been stated in the bid document.

Waiting or notification periods

17 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 mostly relevant to takeover offers. The relevant periods are:

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

OTHER CONSIDERATIONS

Tax issues

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

The tax issues in a business combination are largely dependent on the structure adopted by the parties. Share acquisitions are more tax efficient than asset acquisitions. The taxes that may be chargeable in business combinations are stamp duty, capital gains tax and value added tax.

Share sales or exchanges do not attract capital gains tax, value added tax or ad valorem stamp duty. Where the parties to the business combination effect the share sale/transfer under the terms of a share purchase agreement rather than a share transfer instrument, the Federal Inland Revenue Service, in practice, imposes ad valorem stamp duty on the purchase price stated in the share purchase agreement. The justification for this practice is unfounded.

Asset sales, on the other hand, have different tax implications. Section 32 of the Capital Gains Tax Act exempts the transfer of assets from capital gains tax where the transferor and transferee 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. Asset sales or transfers between unrelated companies, on the other hand, will attract capital gains tax at the rate of 10 per cent of the gain. 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 are commonly controlled by another entity that owns at least 90 per cent of their issue share capital). Other than between associated companies, stamp duty is chargeable on an asset sale or transfer.

The clearance of the Federal Inland Revenue Service with regard to income tax exposure on the commencement and cessation of business in certain entities is also required for business combinations.

Labour and employee benefits

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

The main laws governing labour and employee benefits in Nigeria are the Labour Act, the Pension Reform Act and the Employee's Compensation Act. These statutes do not have provisions governing employee benefits in a business combination. However, one of the requirements for filings with the merger control regulator is the plan for the treatment of employees after the combination is implemented.

© Law Business Research 2021

Restructuring, bankruptcy or receivership

20 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 liquidation or receivership respectively can make a business combination 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 (either with the sanction of the court or committee of inspection); or sell the property of the company of whatever nature by public auction or private contract, with the power to transfer all the property to any person or company or to sell it in parcels.

Where a liquidator ventures 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 resolution required by the directors must be obtained. Section 627(2) of the Companies and Allied Matters Act 2020 provides that if a liquidator is appointed under a members' voluntary winding-up, all the powers of the directors shall cease, unless the company, by way of a general meeting, or the liquidator sanctions the continuance of those powers.

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, or in the absence of such a committee, the creditors shall sanction the continuance.

Anti-corruption and sanctions

21 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. These laws generally provide for sanctions where government agents are induced, in cash or in kind, into acting in a specific way. This is important in a business combination as it deals with seeking general regulatory or sectoral approvals. The relevant laws include the Economic and Financial Crimes Commission (Establishment) Act 2004, the Money Laundering (Prohibition) Act 2011 (as amended), and the Corrupt Practices and Other Related Offences Act 2003.

UPDATE AND TRENDS

Key developments

22 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?

The market situation is unclear. The covid-19 pandemic has led to lockdowns, the devaluation of the naira, a reduction in business activities, loan accumulation, job losses and a crash in the international price of oil, which is Nigeria's primary export. Although these developments are likely to make many public companies cheaper to buy, the uncertainty and pessimism of the general business outlook is likely to mean that credible and enthusiastic buyers of these targets will be scarce.

No major changes to merger control or tax law are expected for the foreseeable future. The Federal Competition and Consumer Protection Commission (FCCPC) was established in 2019 after the Federal Competition and Consumer Protection Act was signed by the President. The FCCPC is now the principal merger control authority in Nigeria. Prior to November 2020, as a transitional arrangement, the Securities and Exchange Commission (SEC) (which had merger control power exclusively prior to 2019) and the FCCPC operated a joint desk on merger control. Currently, the SEC and the FCCPC no longer operate a joint desk on merger control as the FCCPC issued its regulations and guidelines in 2020. The FCCPC reviews all mergers and acquisitions and related transactions as competition regulator. The SEC regulates all mergers and acquisitions involving public companies in Nigeria. The objective of the review of mergers by the SEC is to ensure that shareholders or members are treated fairly. In the case of the FCCPC, the objective is to ensure that such transactions are not likely to reduce or stifle competition.

Interestingly, however, the Banks and Other Financial Institutions Act 2020 recently passed, ousted the application of the Federal Competition and Consumer Protection Act 2018 and the jurisdiction of the FCCPC in any dealings relating to mergers and acquisitions, reorganisation and reconstruction, among others, involving banks and other financial institutions licensed by the Central Bank of Nigeria. We wait to see the practicality of the relevant provisions of the Banks and Other Financial Institutions Act 2020 in relation to mergers and acquisitions in the coming months.

Coronavirus

23 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The pandemic precipitated a host of legislative responses from the government. For example, in the first quarter of 2020, the Federal Government of Nigeria announced fiscal stimulus responses that included a 500 billion naira Crisis Intervention Fund and the disbursement of monies to the states of the Nigerian Federation to finance their respective pandemic-related responses. There was also an amendment to the 2020 Appropriation Act to, among others, review the benchmark oil price downward from US$57 per barrel to US$30 per barrel and incorporate the Intervention Fund into the 2020 Appropriation Act.

The Central Bank of Nigeria (CBN) arguably led the government's wider response to the pandemic. The CBN, for instance, granted a moratorium of one year on principal repayments of all intervention facilities, effective from 1 March 2020. The CBN also reduced interest rates on intervention facilities from 9 per cent to 5 per cent per annum for one year, effective from 1 March 2020. The CBN by its circular dated 3 March 2021 further extended the discounted interest rate for CBN intervention facilities to 28 February 2022. Also, the CBN founded a 50 billion naira credit facility to be administered through the Nigeria Incentive-Based Risk Sharing System for Agricultural Lending for households and small and medium-sized enterprises that have been significantly affected by the pandemic.

Also, at the start of the pandemic, the Securities and Exchange Commission issued a circular directing all public companies to continue to make material disclosures to investors on the impact of covid-19 on

© Law Business Research 2021

their business operations. The national tax authority, the Federal Inland Revenue Service, also weighed in, extending the time for filing of tax returns, making provisions for online submission of tax returns via the Federal Inland Revenue Service's e-portal and allowing for a two-month delay in submission of audited financial statements.

Clients are to remain commercially aware and at the same time keep their professional advisers close, so as to remain aware of existing reliefs and programmes, future rollouts, extant pandemic-based economic and legal measures and laws that are detrimental to them. For example, section 45 of the Banks and Other Financial Institutions Act 2020 provides that 'No bank, specialised bank or other financial institution shall incur any liability to any of its customers by reason only of failure on the part of the bank, specialised bank or other financial institution to open for business during a strike, an epidemic or pandemic'. Other evidence (which was a necessitated response to the pandemic) includes the amendment of articles of association of public companies being undertaken by clients to allow for meetings of directors and shareholders to be held virtually.

Gbolahan Elias SAN
gbolahan.elias@gelias.com

Yemisi Falade
yemisi.falade@gelias.com

Oluwatosin Omobitan
oluwatosin.omobitan@gelias.com

6 Broad Street
Lagos Island
Lagos
Nigeria
Tel: +234 1 460 7890
www.gelias.com

© Law Business Research 2021

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Business & Human Rights
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
Drone Regulation
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
Healthcare M&A
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
Luxury & Fashion
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Partnerships
Patents
Pensions & Retirement Plans
Pharma & Medical Device Regulation
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

an LBR business

ISBN 978-1-83862-706-5

© Law Business Research 2021