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NIGERIA

LAW AND PRACTICE:

Contributed by Udo Udoma & Belo-Osagie

The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Contributed by Udo Udoma & Belo-Osagie **Authors:** Folake Elias-Adebowale, Mary Ekemezie, Christine Sijuwade

Law and Practice

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NIGERIA LAW AND PRACTICE

Contributed by Udo Udoma & Belo-Osagie ***Authors:*** Folake Elias-Adebowale, Mary Ekemezie, Christine Sijuwade

Udo Udoma & Belo-Osagie is a full-service commercial law firm with offices in Nigeria's key commercial centres. The firm is a corporate and commercial law firm with offices in Nigeria's business centres, which has been described in international rankings as one of Nigeria's "Magic Triangle" law firms. We aim to structure timely, practical and creative legal solutions founded on a philosophy of seeking to provide tailored legal advice that is accessible, commercially oriented and consistently sound on principle.

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1. Trends

1.1 M&A Market

Following Nigeria's declared emergence from economic recession in the second quarter of 2017, its M&A market is open for business.

Economic, political, currency, regulatory and other challenges and uncertainties had prevailed from 2016, deriving from, and exacerbated by, the Nigerian economy's historical dependence on crude oil and the impact of global volatility in crude pricing. These, and other factors, set the context for a decline in Nigerian M&A market activity, with only 28 completed domestic and cross-border deals per year in each of 2016 and 2017.

The sharp contrast between M&A market activity in 2016/2017 and the record-breaking highs and market buoyancy that had characterised 2014 and 2015 respectively are notable, together with the total absence of completed domestic IPOs between 2015 and 2017 compared with approximately USD651 million raised via IPO activity in 2014.

1.2 Key Trends

Significant bond market activity – including increased investor interest in eurobonds and government bonds (with a reported 800% oversubscription for government bonds in early 2017) and the adoption of deal structures geared at mitigating exposure to heightened political and currency risk – helped to maintain some market momentum in 2016/2017.

Current expectations are of a marked increase in M&A activity, with 40 deals of approximately USD3.98 billion value projected for 2018 and 44 deals totalling approximately USD3.936 billion value estimated for 2019, demonstrating the resilience and continuing recovery of the Nigerian M&A market in 2018/2019.

Industry analysts currently assess key economic indicators such as expected improvements in cyclical and structural variables including stock market capitalisation, trade/GDP growth, legal structure, freedom to trade and other indicators as potential growth drivers in the Nigerian M&A market in 2018/2019.

Similarly, surveyed global acquirers with Nigerian market-specific exposure appear currently to characterise Nigeria as a comparatively attractive destination for inbound M&A investment in 2018, with features including potential targets' domestic distribution channels, customer base and restructuring ranked highly as primary drivers for deal making. Beneficiary industries and sectors include those indicated in the response to **1.3 Key Industries** below, with growing interest in diverse sectors including technology (particularly fintech), agriculture, mining and education, among others.

1.3 Key Industries

Dealmakers identified return-generating opportunities and reported activity across increasingly diverse sectors of the Nigerian economy in 2017.

Based on the Nigerian M&A market in the second and third quarters of 2017, analysts recorded significant activity in the following fast-moving sectors: consumer goods, financial services, technology, media and telecommunications, oil and gas, the industrial and chemicals, leisure, agriculture, infrastructure and construction, mining, pharmaceuticals, medical and biotech, real estate, transportation and logistics, utility/power generation and renewables, education and healthcare.

In relation to deal values, however, M&A activity is reported to have been strongest in the energy sector, followed by the telecommunications, materials, financial services, utilities, consumer goods, IT, real estate, industrial and healthcare sectors.

2. Overview of Regulatory Field

2.1 Acquiring a Company

Bilateral engagement between buyers and sellers, supported by their respective legal and financial advisers, are the most prevalent method for commencing acquisition negotiations and transactions in Nigeria. Negotiated off-market buy-outs were reported to account for approximately 74% of M&A activity in Nigeria, with auctions and other alternative sale methods reported as accounting for an estimated 26% of M&A activity. Mergers, schemes of arrangement and takeover bids (mandatory or voluntary) are not uncommon.

2.2 Primary Regulators

The primary regulator of both private and public M&A activities in Nigeria is the Securities and Exchange Commission (SEC). Mergers, acquisitions and business combinations between or among companies are generally subject to prior review and approval by the SEC, other than in specific circumstances. It is a condition that applications for such approval must include evidence that the relevant sector regulator (where applicable) has "no objection" to the relevant transaction.

For instance:

- the Central Bank of Nigeria regulates participants in the banking financial services sector;
- the Nigerian Communication Commission regulates participants and certain transactions in the telecommunications, media and technology sector;
- the National Pension Commission regulates participants in the pensions sector;
- the National Insurance Commission regulates participants in the insurance sector;
- the National Agency for Food and Drug Administration regulates participants in the food, beverages and drugs sectors;
- the Minister of Petroleum Resources – usually acting through the Department of Petroleum Resources (DPR) – regulates M&A activity in the oil and gas sector together with the Nigerian Content Development and Monitoring Board, which regulates local content matters in all transactions; and
- the National Electricity Regulatory Commission regulates participants in the energy sector.

In addition, sector regulators, such as the CBN, the DPR (acting for the minister for petroleum), the NCC and NAICOM independently regulate M&A activity in their relevant sectors, subject to prescribed triggering conditions and/or thresholds. M&A activity involving publicly listed companies is also subject to the regulation of the Nigerian Stock Exchange.

2.3 Restrictions on Foreign Investments

The Nigerian Investment Promotion Commission Act generally permits non-Nigerian investment and participation in the operation of any enterprise in Nigeria in any convertible foreign currency – other than the "negative list" of sectors of investment in which both Nigerians and non-Nigerians are prohibited from investing, namely:

- the production of arms, ammunition, etc;
- the production of, and dealing in, narcotic drugs and psychotropic substances;
- the production of military and para-military wear and accoutrements, including those of the Nigerian Police Force, the Nigeria Customs Service, Nigeria Immigration Service and Nigeria Prison Services; and
- such other sectors as the Federal Executive Council may, from time to time, determine.

The enterprise in which foreign participation is permitted may only commence business, however, after it is incorporated or registered in accordance with the Companies and Allied Matters Act.

In addition to these general restrictions, sector-specific restrictions on foreign participation include the following:

- in the private security sector, the prohibition of the acquisition of any equity and of any board participation in a Nigerian private security guard company;
- in the advertising sector, the requirement that at least 74.9% of the equity of an advertising agency must be Nigerian-owned as a condition for that agency to advertise to the Nigerian market;
- in the petroleum sector, preferential – and in specific instances, exclusive – consideration being required to be given to companies that are at least 51% Nigerian-owned, and the additional prescription of other minimum local content criteria to be applied in awards of licences, contracts, etc, in the Nigerian petroleum sector, in a bid to increase indigenous participation in the petroleum sector;
- in the shipping sector, cabotage laws prohibit the use of foreign-owned or foreign-manned vessels on Nigerian waters;
- in the broadcasting sector, a company requiring a broadcasting licence must demonstrate that it not representing foreign interests and that it is substantially Nigerian-owned and operated;
- in the aviation sector, the Nigerian Civil Aviation Authority only issues aviation licences or permits to Nigerian citizens or to Nigerian companies in which the majority shareholder is a Nigerian;
- in the engineering sector, all companies engaged in, or proposing to provide engineering services in Nigeria are required to be registered with the Council for the Regulation of Engineering in Nigeria (COREN), with COREN registration subject to the strict requirement that 55% of every applicant company must be held by Nigerian director(s) of the same company who must in turn be COREN-registered;
- in the pharmaceutical sector, foreigners may only register with the Pharmacist Council of Nigeria where their home country accords a reciprocal right of registration to Nigerians and subject also to the applicant having been resident in Nigeria for at least 12 months prior to the application.

2.4 Antitrust Regulations

Nigeria does not currently have discrete anti-trust or competition legislation. There is, however, a Federal Competition and Consumer Protection Bill (the FCCP Bill), which aims to promote competitive markets and protect consumer rights, among other factors. The FCCP Bill has been passed by both chambers of its National Assembly (ie, the Senate and House of Representatives) but has not, however, received presidential assent. The FCCP Bill will not become operative until presidential assent is granted or the National Assembly, at its discretion, exercises its constitutional veto power to pass the bill into law.

Until the FCCP Bill becomes law, the provisions of the ISA (ISA) and, pursuant to it, the rules and regulations of the SEC 2013 (as amended) (SEC Rules) empower the SEC to determine whether any merger, acquisition or business combination is likely to prevent or lessen competition substantially.

Various sector-specific laws, guidelines, and provisions also deal with competition-related issues involving participants in their respective sectors. For example:

- the Nigerian Communications Commission (the NCC), which regulates the Nigerian telecommunications sector, issued the Competition Practices Regulations in 2007 (NCC Regulations which, in addition to the anti-competition provisions of the Nigerian Communications Act, regulate competitive activity in the Nigerian telecommunications sector including in the context of M&A transactions);
- the CBN's Point of Sale Card Acceptance Services Guidelines 2011 prohibit card associations and card schemes from engaging in activities that are either anti-competitive, or could lead to an abuse of a dominant position. The guidelines also prohibit collusion between two or more card associations, card schemes or payment schemes in connection with the issuance, acquisition, processing and switching of payment cards;
- the CBN's Guidelines on Mobile Money Services in Nigeria prohibit mobile money operators from engaging in anti-competitive conduct in any aspect of mobile money services;
- the CBN's Operational Rules and Regulations for the Nigeria Central Switch prohibit anti-competitive activities including exclusivity agreements, tie-in agreements, refusals to deal, predatory fees and any other activities that are likely to have an adverse effect on competition in Nigeria;
- the Public Procurement Act 2007 prohibits suppliers, contractors, and consultants from colluding on prices quoted in public tenders, proposals or quotations. This Act also forbids bid-rigging – this is defined as an agreement between persons in which offers submitted have been prearranged between them, or where their conduct has had the effect of directly or indirectly restricting free and open competition, distorting the competitiveness of the procurement process or causing an escalation or increase in costs or loss of value to the national treasury; and
- the Civil Aviation Act 2006 confers the power to investigate and determine – either by its own initiative or upon the receipt of a complaint by any air carrier, air travel agent, consumer of air transport services or other allied aviation service provider – whether any air service provider has engaged in unfair or deceptive practices or unfair methods of competition in air transportation or in the sale of tickets or in the provision of other allied aviation services on the Nigerian Civil Aviation Authority (NCAA); the act also

vests the NCAA with the power to order that air service providers desist from such practices.

2.5 Labour Law Regulations

Generally, acquirers will need to ensure that targets are compliant with, and have made adequate provision for: all unpaid employer obligations and liabilities (and any attendant penalties) under or in relation to all instruments constituting the target's employees' contracts of employment; the provisions of any relevant collective bargaining agreements between the target and any sectoral trade unions; applicable laws and regulations to which the target is mandatorily subject including, in particular, the Employees' Compensation Act, the Industrial Training Fund Act, the Pension Reform Act, and – in relation to manual and clerical employees specifically (defined as "workers") – the Labour Act.

The transfer to a new employer or company, including any such transfer that is required as part of an M&A transaction in Nigeria, will generally require the express consent of the employee and, in the case of workers, labour officers' endorsement of the contract that proposes the transfer of such employees (eg, from the target to a new employer as part of the proposed transaction). Transfers of contracts of employment may, in effect, be novated via the sanction of a court order where M&A transactions are effected as part of a scheme of arrangement.

Acquirers that propose to engage or to retain existing expatriate employees of a target must be mindful of the requirements of the Immigration Act, which requires employers of foreign nationals to obtain expatriate quota approvals.

2.6 National Security Review

Other than the activities outlined in **2.3 Restrictions on Foreign Investments** above, participation in which is both generally and specifically prohibited or restricted for national security among other concerns, there is no general requirement for any national security review of acquisitions in Nigeria.

3. Recent Legal Developments

3.1 Significant Court Decision or Legal Development

In 2015, the SEC released a Nigerian Capital Market Master Plan with a ten-year strategy to stimulate growth in the capital market. The general expectation is that, within this period, the implementation of the strategy will lead to improvements in: investor protection and education; the attractiveness of Nigeria's capital market to investors; capital raising; and the legal and regulatory framework of the market.

Significant developments relating to M&A activities in Nigeria include the 60-day action plan of the Federal Government of Nigeria's Presidential Enabling Business Environment Council (PEBEC) released in February 2017, with the purpose of facilitating doing business in Nigeria. The action plan proposed 31 reforms across eight priority areas: starting a business; construction permits; getting electricity; registering property; getting credit; paying taxes; trading across borders; and entry and exit of people. Reforms implemented by the Corporate Affairs Commission include online business registration and company incorporation. Other proposed reforms include simplifying existing business and tourist visa processes.

In addition, in April 2017, the CBN liberalised the foreign exchange (FX) market by introducing an importers and exporters "FX window" with the objective of increasing liquidity in the FX market and enabling investors to buy and sell FX at market-determined rates. The FX window has helped to boost and to facilitate (i) the supply of foreign exchange by portfolio investors, exporters, authorised dealers and other parties, and (ii) the offshore repatriation of proceeds from investments.

3.2 Significant Changes to Takeover Law

In April 2015, the SEC, which regulates mandatory or voluntary tender offers in public companies, amended its rules and regulations (the SEC Rules) governing mergers and takeovers to impose a requirement on offerors in relation to proposed takeover bids to announce the intention to make the bid on the floor of the exchange.

In November 2017, the SEC Rules were amended to require that mandatory tender offers be made through a SEC-registered capital markets operator where any party either directly or indirectly:

- acquires shares or an interest in shares in a public company, whether by a series of transactions over a period of time or otherwise, which (taken together with shares held or acquired by persons acting in concert with him or her) carry 30% or more of the voting rights of a public company; or
- together with persons acting in concert with him or her, holds not less than 30% but not more than 50% of the voting rights and such person or any person acting in concert with him or her, acquires additional shares or an interest in shares, or is interested in additional shares which increase his or her percentage of the voting rights of a public quoted company.

The SEC Rules were also revised to provide that where an announced offer has lapsed or failed or (in the case of a voluntary tender offer) has been withdrawn, no bidder or party acting in concert shall, within the succeeding 12 months from the date of announcement of the offer:

- make a takeover bid for the voting shares or voting rights that had been the subject of the previous takeover bid;
- acquire any further voting shares or voting rights in the company except with the authority of the SEC;
- acquire any of the target's voting shares or voting rights if the bidder holds voting shares or voting rights carrying over 30%, but not more than 50% of the class of voting shares or voting rights that had been the subject of a previous takeover bid; or
- acquire any interest in the voting shares or voting rights on more favourable terms than those made available under its lapsed offer until any competing offers have been declared unconditional, or have lapsed.

The SEC Rules now provide that, where an acquirer withdraws from making (or is unable to make) a bid, having acquired the number of shares that will have triggered the obligation to make a bid under this rule, the SEC shall require the acquirer to dispose of sufficient shares in the company within a period of six months to unrelated persons, which shall bring the holding of the acquirer to below 30% (or 50%) as applicable.

Also, in the event of withdrawal of the open offer, an acquirer is now required to do the following within 48 hours, through the agent to the offer:

- make an announcement in the same newspapers in which the public announcement of the open offer was published, providing grounds and reasons for the withdrawal of the offer; and
- simultaneously with the announcement, inform in writing the board of the target;
- ensure that such information is disseminated to the public through the exchanges on which the target's shares are listed; and
- notify the target company in writing at its registered office.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies
Prior to launching a tender offer in a public company, it is customary and, in certain circumstances, legally required, that a bidder should acquire an equity stake in the target company. The ISA provides that where any person either:

- acquires shares, whether by a series of transactions over a period of time or not, which (when taken together with shares held or acquired by persons acting in concert with it), carry 30% or more of the voting rights of a company; or
- together with persons acting in concert with it, holds not less than 30% but not more than 50% of the voting rights of a company and such person or persons acting in concert with it acquires additional shares which increases its percentage of the voting rights, then such person must make a take-over bid (mandatory tender offer or "MTO") to the holders of any class of the target's equity share capital in which such person or any person acting in concert with it holds shares.

These statutory MTO requirements only apply to public companies in Nigeria. There is no requirement to make an MTO where:

- a public company that is "ailing" undertakes a private placement which results in the strategic investor acquiring more than 30% of the voting rights of the company; or
- the acquisition or holding, or entitlement to exercise or to control the exercise of more than 30% of the equity shares of the target that is disclosed in the first prospectus for an IPO of that target granted to the IPO promoter in respect of a prospectus that has been registered with the SEC; or
- an acquisition of shares or of rights over shares which would not increase the percentage of the voting rights held by that person; or
- where shares are acquired upon the conversion of convertible securities issued with the approval of shareholders in a general meeting.

Stakebuilding strategies include: purchasing a sufficient number of shares on the floor of the secondary market to enable the bidder to acquire the minimum required to trigger the statutory requirement to make a mandatory tender offer; making a voluntary tender order; and obtaining irrevocable undertakings from existing shareholders stipulating that they will tender their shares during the offer. This facilitates the availability of the pre-agreed quantum of shares to the bidder during the offer period.

4.2 Material Shareholding Disclosure Threshold
Requirements relating to the disclosure of major shareholdings are set out in the Companies and Allied Matters Act (CAMA) and in the SEC Rules.

CAMA Requirements
Any person who holds 10% or more of the voting rights at any general meeting of a public company is regarded as a substantial shareholder, and is obliged to give notice of this fact to the company, within 14 days of becoming aware that he or she is a substantial shareholder. A public company may also require any registered shareholder to disclose the capacity in which it holds any shares in company.

If any shareholder to whom such notice is issued is not the beneficial owner of the shares, the company may also request that the shareholder provides particulars of the parties interested in the shares, and confirmation on whether such persons are party to any arrangement connected with the exercise of any rights that attach to such shares.

The failure to comply with a notice issued by a company under this section is an offence for which a shareholder shall, upon conviction, be liable to a term of imprisonment for six months or to a daily fine of NGN25 for every day the default continues. Defences available to a shareholder acting in breach of these provisions include establishing that the company already had the requested information or that the request was made for a frivolous or vexatious reason.

SEC Rules
The SEC Rules require the registrars of every public company to file information on beneficial owners of 5% or more of the shares of a public company, with the SEC, the company and the securities exchange, annually.

In addition to this annual report, public company registrars are required to file information on any transactions that bring the beneficial ownership of shares in the public company to 5% or more with the same institutions as and when such transactions occur.

Notice of any subsequent transactions by beneficial owners of 5% or more of the company's shares are also required to be filed with the SEC by the registrar, within five calendar days of the transaction. Beneficial ownership is defined as the power to control decisions regarding whether or not to buy or sell the shares and how the shares are voted.

An "insider" in a public company is required to notify the SEC of the sale of its shares in the company or of any purchase of shares in the company, not later than 48 hours after such activity.

NSE Rules
Every public-listed company is required to disclose in its annual report details of shareholders who hold 5% or more in the company. Failure to make this disclosure attracts a penalty of 50% of such company's annual listing fee from the year of the non-disclosure.

Sector-Specific Disclosures
In addition to the requirements under the CAMA, the SEC Rules and the NSE Rules, there are sector-specific requirements. The CBN Code of Corporate Governance for Banks and Discount Houses in Nigeria, for instance, requires banks to disclose details of shareholders who hold at least 5% of the shares of a bank in their annual returns.

4.3 Hurdles to Stakebuilding
The reporting requirements outlined in **4.2 Material Shareholding Disclosure Thresholds** above are mandatory, and will bind public companies. Sector-specific reporting requirements bind all companies. Any lower or higher reporting thresholds to be set by companies will be subject to, and superseded by, such rules where the requirements conflict.

Beyond reporting, a Nigerian company's capacity to introduce different rules is subject to the provisions of the CAMA where such provisions are expressed to be mandatory, in which case the CAMA provisions will have effect and override any contrary rules or arrangements purported to be introduced by a company – for instance, in its memorandum and articles of association, resolutions or contractual arrangements executed by it, or in any resolution passed by it in general meeting or by its board of directors.

Ensuring that compliance with the rules of the SEC and the relevant exchange, and that key stakeholders of the target are carried along, may be strategically important where an acquirer's objective is to hold a significant majority interest in a target.

4.4 Dealings in Derivatives
Other than in very limited circumstances, Nigerian law generally permits dealings in derivatives subject to sector-specific restrictions relating to Nigerian counterparties that are banks, insurance companies and pension fund administrators.

The CBN's Scope, Conditions and Minimum Standards for Commercial Bank Regulations and guidelines, including the Guidelines for FX Derivatives in the Nigerian Financial Markets (the Derivatives Guidelines), permit commercial banks to enter into specific derivatives transactions subject to such transactions having a maximum tenure of five years and to obtaining the approval of the CBN. Specified transactions include FX Options, forwards (outright and non-deliverable), FX swaps, NDFs and cross-currency interest rate swaps.

Specific CBN approval is required for transactions of a longer tenure, which must also be backed by trade and eligible transactions. All non-deliverable forwards are required to be settled in naira.

Insurance companies may, with the prior approval of NAICOM, and subject to their constitutional documents and to obtaining applicable corporate approvals, enter into derivative transactions.

Derivatives transactions do not, however, fall within the permitted assets/securities in which licensed pension funds are permitted to invest pension fund assets.

A key challenge for corporates, and for financial and non-financial institutions proposing to enter into derivatives transactions, is the inability to settle payment obligations with FX sourced from official sources because the CBN does not categorise derivatives transactions as "eligible transactions" that are authorised by the CBN to access official FX markets. FX obligations in derivatives transactions must therefore be settled with funds obtained from independent sources.

4.5 Filing/Reporting Obligations
Other than the requirement to file reports of FX derivatives transactions with the CBN, we are not aware of any other such filing obligations specific to derivatives under Nigerian law.

4.6 Transparency
Existing shareholders in target companies that seek to acquire additional shares in and/or to control such companies will be required to disclose the purpose of the acquisition and the extent of the proposed equity participation in the proposed targets in application submissions (including the information memoranda) that are required to be made to certain regulators for approval in regulated transactions.

These include, for instance, applications submitted to the SEC, specifically acquisitions that will result in a change of control of the target (eg, where an acquirer proposes to hold more than 50% equity in a private company or more than 30% in a public company), and tender offers that are triggered by the attainment of such equity holding. In relation to tender offers, bidders are required to state the purpose of the bid in the offer document. The rationale for the acquisition could either be to gain control or to comply with statutory requirements for making an offer.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal
The NSE Listing Rules require listed public companies to immediately disclose, on an immediate basis, all information on any material circumstance(s) that are likely to affect its financial condition. "Material circumstance(s)" would include the receipt of a notice of intention from a bidder to make an offer for the company's shares. In practice, a target company may only announce a proposed transaction to the NSE at the point where its board approves the terms of the definitive transaction agreements in respect of the deal. Thereafter, target companies are required to disclose the deal to the public as soon as definitive agreements have been signed. In the event of a leak, the target is required to make an announcement. The announcement does not, however, need to include the name of the potential bidder or to contain details of the status of any negotiations where the transaction would be prejudiced by such disclosure.

5.2 Market Practice on Timing
As indicated in **5.1 Requirements to Disclose a Deal** above, the requirement under the NSE Listing Rules is for "immediate disclosure" of all information on any material circumstance(s) that are likely to affect its financial condition. This has been interpreted by the market to mean the point at which the board approves the terms and conditions of definitive transaction documents.

5.3 Scope of Due Diligence
The scope of legal due diligence investigations conducted in Nigeria in connection with negotiated business combinations will vary depending on the requirements of the party(ies) commissioning the review, the target and any risks associated with it, the nature of the transaction, and the sector in which the target operates.

Legal due diligence reviews conducted in connection with negotiated business combinations will typically include, at a minimum, a review of the corporate information and regulatory compliance practices of the target. Other typical areas of inquiry for such reviews include material contracts, assets (including real estate), employees, financial arrangements, intellectual property and disputes.

Where the relevant transaction is proposed to be structured as a scheme of arrangement, information regarding corporate documents, material contracts and litigation and claims involving the relevant target would typically be included in the relevant scheme documents, and this will determine the scope of the legal due diligence review.

5.4 Standstills or Exclusivity
While exclusivity agreements are permitted and common in M&A deals in Nigeria, standstill provisions and agreements are not common as hostile takeovers do not typically occur in this market.

5.5 Definitive Agreements
The ISA and the SEC Rules require that the tender-offer bid documents must contain details of the terms and conditions of the offer, and are subject to the SEC's prior review and approval before the bidder can make the tender offer.

A bidder in a tender offer may seek commitments from principal shareholders before formally announcing its intention to acquire shares in a target. The terms of such undertakings or arrangements are not regulated and are subject only to negotiation and agreement between the bidder and the relevant principal shareholder(s).

6. Structuring

6.1 Length of Process for Acquisition/Sale
The duration of the acquisition process varies from one deal to the next deal and will depend on a variety of factors.

These include: the target and any risks associated with it (such as may be identified in the course of legal, financial, tax, technical, commercial and other due diligence reviews); the scope and complexity of such reviews; the preparedness and co-operation of the target and the relevant parties; the process for negotiating commercial and deal terms; the acquirer's knowledge of, and familiarity with, the target's operating environment and the local market; the experience and sophistication of the parties; the acquisition structure; the extent and processes for obtaining corporate and third party/contractual approvals; the regulatory review process (where applicable), the timing of which is subject to the discretion of the relevant regulators; the economic environment; and the involvement, knowledge and experience of M&A advisers.

Subject to these and other factors, it is usually possible to complete the due diligence process, agree definitive transaction documents and to close the transaction within three to six months of signing a term sheet.

6.2 Mandatory Offer Threshold

The ISA provides that where:

- a person acquires shares (in a public company), whether by a series of transactions over a period of time or otherwise which, when taken together with shares already held or acquired by persons acting in concert with him or her, carry 30% or more of the voting rights of a company (or such higher or lower threshold as may be prescribed by the SEC from time to time); or
- a person, together with persons acting in concert with him or her, holds not less than 30% but not more than 50% of the voting rights and then acquires either alone or together with persons acting in concert with him or her, additional shares which increase the percentage of his or her voting rights, such person has an obligation to make a takeover bid to the holders of any class of equity share capital in which such person or any person acting in concert with him or her holds shares.

The SEC Rules also provide that where a person or group of persons acquires or wishes to acquire shares in a target company with the intention of taking over control of that company, a takeover bid must be made by such person or group to the shareholders of the target company, except in the following circumstances:

- where a public company that is ailing undertakes a private placement which results in the strategic investor acquiring more than 30% of the voting rights of the company;
- where there is an acquisition or holding of, or entitlement to exercise, or to control the exercise of, more than 30% voting shares of a company that is disclosed in the first prospectus for an initial public offer of that company, which is granted to the promoter in respect of the prospectus, where the prospectus has been registered with the SEC;
- where there is an acquisition of shares or of rights over shares which would not increase the percentage of the voting rights held by that person (eg, if a shareholder takes up his or her entitlement under a fully underwritten rights issue); and
- where shares are acquired upon the conversion of convertible securities.

6.3 Consideration

Cash is the most common form of consideration utilised in acquisition transactions in Nigeria. Share swaps are also not uncommon, particularly where an acquisition is preceded by a restructuring, and in schemes of mergers.

6.4 Common Conditions for a Takeover Offer

This would depend on whether the takeover offer is mandatory or voluntary. A mandatory takeover offer may not generally be conditional as it is statutorily required. In the case of a voluntary takeover offer, all conditions attached to an offer must be clearly stated in the offer document and, in particular, whether the offer is conditional upon acceptance being received in respect of a minimum number of shares.

With respect to listed companies, there are certain conditions that are not permitted in the context of a takeover bid. For example, the rule book of the Nigerian Stock Exchange ("NSE") provides that no takeover offer may be conditional upon the payment of compensation for loss of offer, and if any such payment is proposed then the full details of the proposal must be disclosed.

6.5 Minimum Acceptance Conditions

It is common for the minimum acceptance condition to be fixed at a level that will ensure that the offeror is able to acquire control of the company. This could be anything from the attainment of simple majority control (ie, 50% plus at least one share) to a higher degree of control of special resolutions (75%) or up to 80% (the maximum freefloat threshold) in a listed company.

6.6 Requirement to Obtain Financing

It is not unusual for a business combination to be conditional on the bidder obtaining financing, but it is generally subject to the agreement of the parties. In the context of a takeover offer, however, the ISA requires the bidder/offeror to have made adequate arrangements to ensure that the required funds are available to pay for any tendered shares and the SEC would, typically, expect to see evidence of such arrangements.

6.7 Types of Deal Security Measures

Deal security measures are subject to negotiation. A bidder may seek to include the following provisions in the relevant deal documentation: (i) lock up; (i) exclusivity; (iii) break fees; and (iv) irrevocable undertakings either to tender shares under a takeover offer or to vote in support of any corporate resolutions that may be required in connection with a business combination. These are all common forms of deal protection in Nigeria. Historically, "force the vote" provisions that require a target's directors to submit a proposed transaction to the target's shareholders, even where the board does not recommend or consider the deal to be advisable, are not common.

6.8 Additional Governance Rights

A bidder may seek to enter into shareholders' agreement with other key/controlling shareholders of a target, in order to form a voting block and/or require consensus in relation to specified matters. Bidders can also seek to be mandatorily included in meeting quorums where decisions on specific matters are proposed to be voted on, and to entrench rights to nominate the chairman of the board of directors or a specific number of directors or even key management positions (such as chief executive officer, chief financial officers and company secretaries) to target boards under such shareholder agreements or, subject to mandatory provisions of the CAMA, in the memoranda and articles of association of target companies. It is not unusual for the bidder to seek veto rights in relation to certain reserved matters such as changes to the company secretary or any change to the auditors or the accounting period of the company.

6.9 Voting by Proxy

Under the CAMA a shareholder with a right to attend and vote at a general meeting of the company is entitled to appoint another person, who is not required to be a shareholder, to attend and vote, and if required, speak at such meeting as his proxy.

6.10 Squeeze-out Mechanisms

Section 129 of the ISA prescribes a compulsory acquisition process where a shareholder (transferee) can seek to acquire the shares of the remaining shareholders in a target company in which the transferee has already acquired up to 90% of the equity share capital (ISA squeeze-out rights).

The acquisition of the 90% shareholding must be either by way of a scheme of arrangement (which requires court and SEC sanction as well as the approval of 75% of the shareholders of the target company present and voting at the court-ordered meeting) or by way of an agreement, the terms of which have been negotiated and agreed between the shareholders whose shares are sought to be acquired, the transferor and transferee.

The ISA squeeze-out rights cannot be used in the context of a takeover, and the ISA expressly prescribes a separate procedure for acquiring the shares of dissenting shareholders in the context of a takeover bid. In order for an acquirer to be entitled to squeeze out minority shareholders in a takeover bid, 90% of the shares that were the subject of the bid must have been tendered. In computing, whether this threshold has been met, any shares already held by the acquirer will not be included.

Dissenting shareholders may transfer their shares to the transferee at the price indicated in the bid document or demand a fair value for such shares. Where a dissenting shareholder elects that a fair value for the shares should be determined, an application is required to be made to the Federal High Court, which would make this determination. The shares would then be acquired by the offeror on such terms as the court deems fit.

6.11 Irrevocable Commitments

It is not unusual for a bidder to seek to obtain irrevocable commitments from certain principal shareholders that they will tender their shares under the takeover bid. Such irrevocable commitments may provide some degree of deal certainty in relation to the outcome of an offer, and the relevant negotiations would typically be undertaken prior to a formal takeover offer being made to all of the shareholders of the target. These undertakings would usually take the form of irrevocable commitments to tender a prescribed number of shares at the bid price and could include commitments from the principal shareholders to continue to control their shares with corresponding undertakings not to dispose of these shares and not to accept a competing offer, unless the bidder's offer has been withdrawn.

Under the ISA, all the shareholders of the target are required to be treated equally, and as such the bid document would provide for the same offer to be made at the same price to all shareholders. It is not unusual, however, for the irrevocable undertaking to include provisions that permit the principal shareholders to retain their shares in the event that a higher offer is made by a third party. In such circumstances, the bidder would typically require that the relevant third party should meet certain conditions such as the third party acquiring a majority shareholding, at a higher share valuation, under the competing offer.

7. Disclosure

7.1 Making a Bid Public

A takeover bid is made public by: (i) dispatching it to the shareholders of the target company; (ii) advertising the bid in two national newspapers; and (iii) announcing the bid on the floor of the stock exchange on which the shares of the target company are traded.

A bid is usually made public after the SEC has authorised the bidder to proceed with the takeover offer.

In relation to listed companies, where the board of a listed company receives a notice of an intention to make a takeover offer, the listed company will be required to make an appropriate disclosure to the NSE immediately after the relevant board meeting where the bid is discussed. Regarding immediate disclosure, the NSE Rulebook requires that, where a listed company is required to make an announcement, but is not yet in a position to confirm its implications and believes that the information has been or is likely to be leaked, that company must make an interim announcement.

7.2 Type of Disclosure Required
For the purposes of making a takeover bid, various disclosures are required. For example, the offeror is required to disclose background information about itself, the quantum and price of shares which it proposes to acquire under the offer, its rationale for the offer, whether it will concurrently acquire additional shares in the secondary market during the offer period, its plans for employees, as well as details of any proposal to pay any compensation for loss of offer.

In relation to a merger involving the issuance of shares, disclosures would be required in relation to the following matters:

- the share capital of the resultant entity;
- shareholding structure/ratio of the shareholders in the resulting entity;
- directors' beneficial ownership of the shares of the company; and
- any arrangements for the treatment of employees, treatment of assets and liability of the combining entities.

7.3 Producing Financial Statements
Bidders are required to include their audited financial statements for the preceding five years in bid documents. In practice, however, excerpts of the relevant portions of the financial statements are usually included in the bid document in the form of a financial summary. As of 1 January 2012, financial statements are required to be prepared in accordance with IFRS accounting principles.

7.4 Transaction Documents
Transaction documents do not necessarily have to be disclosed in full. Certain documents are permitted to be incorporated by reference and do not have to be expressly disclosed in the bid document or in the scheme document (in the case of a merger). The relevant documents would usually be available for inspection at a designated location – typically, the registered address of the relevant companies.

8. Duties of Directors

8.1 Principal Directors' Duties
Under the CAMA, a director stands in a fiduciary relationship towards the company, and must observe utmost good faith and act in the best interests of the company in any transaction on the company's behalf. In carrying out these duties, the directors should generally consider the interests of company shareholders, as well as the employees.

In addition to this, the responsibilities and duties of the directors in a business combination would depend on the structure of the business combination. For instance, in a merger, the board of directors of the respective merging entities would be required to consider and to approve the merger. In relation to acquisitions, the directors of both companies (ie, the buyer and the seller) are required to approve the companies' entry into the transaction documents that will govern the terms of the transaction. In the context of takeover bids, the directors of the target company are required to issue a circular to each shareholder of the company in connection with the bid, which should state, amongst other matters, the effect of the takeover bid on the company's operations and employees, as well as the opinion and recommendation of the directors in relation to the takeover bid.

8.2 Special or Ad Hoc Committees
It is not unusual for boards to establish special or ad hoc committees in business combinations; such committees would typically be responsible for negotiating the terms and conditions of the transaction before the transaction is presented to, and approved by, the entire board. These committees may be used even where there are no conflicts of interest.

8.3 Business Judgement Rule
Nigerian courts do not typically interfere with the decisions of the board in the context of a takeover bid. Where a business combination is being carried out under a scheme of merger, however, the Federal High Court would order the shareholders of both entities to hold meetings to approve the transaction. Once these meetings are held and the requisite shareholders' resolutions have been passed, an application is made to the court to sanction the scheme and, unless there are prevailing reasons for not doing so (such as if the court considers the scheme to be unfair), the court would usually sanction the scheme.

8.4 Independent Outside Advice
The most common forms of independent advice given to directors in a business combination are legal, tax and financial advice. Technical and commercial advice may also be sought depending on the nature of the transaction and the target's sector of operation. Reporting accountants may also be retained, depending on the nature of the business combination.

More specifically, in a takeover involving a listed entity, the NSE Rulebook requires that a recommendation from a financial adviser (for or against acceptance of the takeover offer) should be included in the offer document/circular to be distributed to the shareholders of the company and submitted to the NSE.

8.5 Conflicts of Interest
Conflicts of interest have sometimes been the subject of regulator scrutiny in Nigeria. For instance, in 2009 the CBN removed the managing directors of certain commercial banks on the basis of various malpractices, including transactions that reportedly involved conflicts of interest on the part of such directors. The directors were found to have approved the provision of loans from their respective banks to private companies in which they held interests without any collateral being provided by such related parties, particularly where a number of these loans were non-performing.

9. Defensive Measures

9.1 Hostile Tender Offers
Nigerian law does not provide a framework for hostile acquisitions, hostile takeovers or hostile tender offers.

9.2 Directors' Use of Defensive Measures
There are no specific anti-takeover provisions under applicable Nigerian laws that are expressly prescribed as defensive measures by directors in the context of mergers and acquisitions in the country.

Having said that, a company may, however, restrict access to information that may be pertinent to the proposed merger or acquisition. It is also not clear whether it is possible to complete a takeover bid if the target's directors do not issue a directors' circular as discussed in **9.5 Directors' Ability to "Just Say No"** below.

9.3 Common Defensive Measures
Please see **9.2 Directors' Use of Defensive Measures** above.

9.4 Directors' Duties
Please see **9.2 Directors' Use of Defensive Measures** above.

9.5 Directors' Ability to "Just Say No"
As the concept of hostile takeovers is not recognised under Nigerian law, there are no relevant provisions in relation to directors' powers to take action to prevent a business combination. Having said this, in the context of a takeover bid, the directors are required to issue a directors' circular to shareholders in which the directors would state whether or not they are recommending the takeover offer to the shareholders. Also, where a target company in an acquisition is a private company, its directors are required to approve the transfer of the shares from the seller to the acquirer and, in these circumstances, the directors could refuse to approve the transfer of such shares.

10. Litigation

10.1 Frequency of Litigation
The costs of instituting an action in Nigeria are relatively modest and, as a result, litigation in connection with M&A deals is not uncommon in Nigeria.

10.2 Stage of Deal
These suits could be instituted at any stage of the transaction, although, in the context of schemes of arrangement in particular, they are typically instituted before the transaction is concluded.

11. Activism

11.1 Shareholder Activism
Shareholder associations exist in Nigeria and their objectives typically include seeking to derive optimum economic value for the shareholders that they represent. These associations are considered important to the extent that they could act as disruptors in general meetings, particularly in relation to the quantum and timing of declarations of dividends, or in relation to transactions that could have the effect of diluting or otherwise having a significant impact on the interests of other shareholders.

11.2 Aims of Activists
This likelihood of a shareholder association encouraging the company to enter into an M&A deal would depend largely on the nature of the company concerned, the terms of the deal proposed, and whether the shareholders are likely to derive any profit from the transaction (if successful). If the deal terms are favourable the shareholder associations are more likely to support the transaction.

11.3 Interference with Completion
There have been instances in which shareholder activism has disrupted or interfered with the completion of announced transactions, but such instances are fairly uncommon.

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