International
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Legal Guides

Mergers & Acquisitions

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Contributing Editors:
Lorenzo Corte & Denis Klimentchenko
Skadden, Arps, Slate, Meagher & Flom (UK) LLP

glg Global Legal Group

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Olawunmi Olamide Ojo


Deborah Onafadeji


Adeife Omolumo


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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

The role played by regulatory agencies and institutions, as well as professional parties, in the M&A process is pivotal. Many legislations, institutional and regulatory agencies must be approached and their guidelines and requirements met before an M&A scheme can sail through in Nigeria.

These legislations include the Federal Competition and Consumer Protection Act, 2018 (FCCPA), the Investment and Securities Act, 2007 (ISA), the Companies and Allied Matters Act, 2020 (CAMA) and sector-specific regulations.

The institutional and regulatory agencies are the Federal Competition and Consumer Protection Commission (FCCPC), Securities and Exchange Commission (SEC), Central Bank of Nigeria (CBN), Federal High Court of Nigeria (FHC), Nigerian Stock Exchange (NSE) and Corporate Affairs Commission (CAC).

1.2 Are there different rules for different types of company?

The rules and regulations governing M&A can differ depending on their industry and whether the companies involved are public or private; for instance, the Insurance Act (2003), the CBN Revised Operational Guidelines for Bureaux de Change (BDCs), and the Banks and Other Financial Institutions Act (2020), which require participants to seek applicable regulatory approval before entering into an M&A deal. Similarly, publicly quoted companies are subject to rules set by the SEC.

1.3 Are there special rules for foreign buyers?

In M&A deals involving foreign buyers, there are specific rules and regulations that foreign investors must consider. The regulatory environment is designed to ensure that foreign investments align with the country's economic policies, protect national interest and comply with existing laws. Regulations included under the Nigerian Investment Promotion Commission (NIPC) encourage foreign investors to register with the NIPC.

Under the FCCPC and Consumer Protection Commission Guidelines on foreign-foreign mergers, the FCCPC will oversee any change in control of a business, part of a business, or assets of a business in Nigeria that arises from the acquisition of shares or other assets outside the country.

1.4 Are there any special sector-related rules?

There is certain sector-specific legislation that regulate M&A schemes in Nigeria. These rules complement the major legislations governing M&A schemes. Specific sector-related rules apply in the oil and gas, telecommunication, banking, aviation, mining, insurance and energy sectors.

For instance, the Department of Petroleum Resources (DPR) provides certain rules for companies involved in M&A in the oil and gas sector. M&A transactions involving banks and financial institutions are subject to the regulations of the CBN and Banks and Other Financial Institutions Act, 2020. The Nigerian Communications Commission (NCC) regulates M&A activities in the telecommunications sector. Companies involved in M&A in this industry must comply with NCC regulation and approval from the NCC may be required. Besides oil and gas, there are other parts of the energy sector, such as power generation and distribution. Regulatory bodies like the Nigerian Electricity Regulatory Commission (NERC) may have specific rules for M&A transactions within this sector.

Thorough due diligence is usually conducted to identify and ensure compliance with any sector-specific rules that may apply to the M&A deal.

1.5 What are the principal sources of liability?

M&A transactions in Nigeria can involve various sources of liability. The specific sources of liability can vary depending on factors such as the nature of the transaction, the industries involved and the conduct of the parties involved.

Some principal sources of liability arise from contractual obligations, existing litigation or claims on the target company, tax liabilities, financial misrepresentation and regulatory compliance.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

Company acquisition refers to the takeover of an entity by another entity. There are diverse alternative means of acquisition, which include:

- Merger: two businesses come together to form a new company through a merger. Both businesses may merge as equals and contribute to the new corporation, or one business may buy the other out.
- Acquisition of assets: a buyer may decide to buy particular assets from the target company rather than the complete

business. This could apply to technology, real estate, intellectual property (IP), or other valuable assets.

- Purchase of stock: in a purchase of stock, the acquiring company acquires control and ownership of the target company by purchasing all or most of the shares of the target company.
- Hostile takeover: this transpires when the purchasing firm proceeds with the acquisition in opposition to the desires of the target company's board and management. This may entail obtaining the vast majority of the shares.
- Leveraged buyouts (LBOs): in an LBO, a company is purchased with a sizable loan, frequently with the target firm's assets acting as collateral. Private equity firms frequently employ this strategy.
- Joint venture: two businesses may decide to form a joint venture in place of a full purchase to create a new company that both of them would own. Through joint ventures, businesses can work together on particular initiatives or endeavours while keeping their unique identities.
- Management buyouts (MBOs): an MBO is when a company's current management team purchases a majority stake in the enterprise, frequently with the aid of outside funding.
- Reverse merger: a reverse merger allows a private company to go public without having to go through the initial public offering process. This is done by a private company acquiring a public company.

2.2 What advisers do the parties need?

A number of strategic, financial, and legal factors must be taken into account during the acquisition process. Consequently, parties to an acquisition usually enlist the services of a group of expert advisors to help them navigate the process. The following important advisors could be involved in an acquisition:

Investment bankers and financial advisors/auditors
Financial advisors and investment bankers help organise the transaction, negotiate the financial terms, and offer financial advice on the target company's valuation. Additionally, they are essential in locating possible buyers or sellers, evaluating the target company's financial standing and financial statements, and carrying out due diligence on the business.

Attorney consultants
Attorneys specialising in corporate law offer legal counsel regarding deal structuring, contract drafting and negotiation, regulatory compliance, and risk management. They also undertake due diligence on the target company, investigating its directors' and shareholders' legal status, ensuring regulatory compliance, and identifying any potential or ongoing litigation or claims against the company.

Advisors on taxation
Tax advisors: tax advisors assist in structuring the transaction to minimise taxes by taking into account the tax implications for both the seller and the buyer. They also offer guidance on tax compliance and planning.

Industry experts: depending on the specifics of the acquisition, industry experts might be contacted to offer opinions regarding the marketplace and market trends.

Advisers on regulation and compliance
Regulatory Consultants: experts with experience in industry-specific rules and matters of compliance such as the SEC, FCCPC, federal inland revenue service, CAC and CBN, etc. can assist in navigating regulatory obstacles and guaranteeing that the acquisition conforms with legal standards.

2.3 How long does it take?

In Nigeria, the length of an acquisition process might vary greatly based on a number of variables. The length of time might vary depending on the intricacy of the deal, discussions, regulatory approvals, due diligence procedures, and other factors. Usually, there are multiple steps in the purchase process, each with a certain deadline. Here are a few broad things to think about:

Phase of preparation
This stage entails preliminary conversations, bargaining, and research.

Duration: A few weeks to a few months, based on the parties involved and the intricacy of the agreement.

Exercise due diligence
Due diligence is a process whereby the target and acquiring companies evaluate each other's operational, legal, financial, and other elements.

Duration: It can range from a few weeks to a few months, depending on the extent and depth of the due diligence.

Negotiation of terms
The acquisition price, terms, and any other pertinent agreements are negotiated by the parties.

Duration: depending on the intricacy and quantity of issues to be settled, negotiations may take from weeks to months.

Documentation and regulatory approval, completing other legal procedures, getting regulatory permissions, and drafting and finishing legal documentation
Duration: timelines for regulatory approval vary and it could take weeks or months to complete the documentation procedure. For instance, the timeline for the SEC approval for mergers varies from 10–12 weeks, while that of an acquisition varies from three to four months. Also, the FCCPC approvals timeline for a merger can range from one month to six months.

It is crucial to remember that the schedules listed above are only estimates, and that real times may differ depending on the particulars of each transaction.

2.4 What are the main hurdles?

- Antitrust and regulatory compliance: in industries where concentration may give rise to competition issues, regulatory obstacles, such as antitrust approvals, can have a substantial impact on the timeframe and outcome of a merger. Securing some other regulatory approvals like that of the SEC and the CBN (where applicable) can also prove a hurdle.
- Issues with due diligence: having trouble getting thorough and accurate data during due diligence might make it more difficult to evaluate the operational, legal, and financial stability of the target organisation.
- Exercising due diligence can also take a lot of time and waiting for the required information can increase the slowness of the process.
- Variations in valuation.
- Differentiating valuation expectations: it might be difficult to come to a mutually agreeable purchase price when there are disagreements regarding the target company's valuation.
- Concerns with contracts and law: unexpected legal problems; disagreements over contracts; or difficulties drafting and negotiating agreements can provide difficulties during an M&A process.

2.5 How much flexibility is there over deal terms and price?

In general, M&A transactions in Nigeria may allow for some degree of flexibility with regard to deal terms and price, but in order to reach mutually agreeable agreements that optimise value and reduce risks for all parties involved, parties must navigate regulatory requirements, market dynamics, and negotiation dynamics.

2.6 What differences are there between offering cash and other consideration?

Parties are normally allowed to negotiate conditions and prices as they see fit. However, in Nigeria, a number of considerations – including the preferences of the parties involved, tax ramifications, legal requirements, and strategic objectives – influence the decision between providing cash and other types of compensation in M&A deals. There are benefits and drawbacks to each type of consideration, so the buyer and seller must carefully analyse their options and negotiate a price.

2.7 Do the same terms have to be offered to all shareholders?

Yes; however, in cases where an acquisition is arranged through a statutory merger or scheme of arrangement, shareholders may receive different consideration.

2.8 Are there obligations to purchase other classes of target securities?

There are no statutory obligations to purchase other classes of target securities.

2.9 Are there any limits on agreeing terms with employees?

In Nigeria, there are no legal or statutory limits on agreeing terms with employees.

2.10 What role do employees, pension trustees and other stakeholders play?

Although the employees or pension trustees do not play significant roles in an M&A transaction, there are, however, major changes that would influence an employee's employment, such as mergers, acquisitions, or restructuring efforts; employers are usually compelled to notify and discuss these with the employee. Providing information regarding the possible effects on employment, terms of employment, and any suggested adjustments to benefits or working conditions for employees may fall under this category.

2.11 What documentation is needed?

Non-disclosure agreement (NDA) to ensure confidentiality of the entire process

- A letter of intent (LOI)/term sheet that expresses the parties' intention to proceed with negotiations, outlines key terms and conditions, including the purchase price, transaction structure, and any exclusivity arrangements.
- Due diligence documents such as financial statements, tax records, and other financial documents.
- Legal documents, including contracts, licences, the target company's incorporation documents and post-incorporation documents, and litigation records.
- Operational documents, such as employee contracts, organisational charts, and business plans
- A share purchase agreement or asset purchase agreement, which outlines all of the transaction's terms and conditions, including the purchase price, the terms of payment, and any prerequisites specifying the range of shares or assets being transferred, along with any guarantees and assurances made by the parties.

Regulatory filings and approvals

- Records needed to be submitted to the CAC and other pertinent regulatory agencies.
- Approvals from regulatory bodies, if any, like the SEC, FCCPC, CBN (where applicable) and the NCC (where applicable).

Closing documents

- Board resolutions and shareholder resolutions approving the transaction from both the target company and the acquiring company.
- Closing checklist and documents required for the transfer of ownership.

IP documents

- IP assignment agreements for the transfer of IP rights.
- Documentation related to trademarks, patents, and copyrights.

A joint venture agreement or shareholders' agreement

- Regulates the interactions between the participants, particularly when there are several stockholders or joint venture partners.
- May cover topics including decision making, managerial organisation, and conflict resolution procedures.

2.12 Are there any special disclosure requirements?

Mergers and Acquisitions (M&A) in Nigeria are mainly governed by the FCCPA, SEC Rules and Regulations 2013 and the ISA. Regulations and disclosure requirements pertaining to M&A are supervised by the SEC of Nigeria.

Pre-merger notification: before finalising a merger or acquisition, businesses must normally notify the FCCPC and the SEC and get their clearance.

Public disclosure: following the proposal of a merger or acquisition, businesses are frequently obliged to inform both their shareholders and the wider public of the specifics of the deal.

Procedure for approval: M&A agreements are examined by the FCCPC and SEC to make sure they abide by applicable rules and laws.

Fairness opinion: in certain situations, businesses engaging in M&A would need to ask an impartial financial expert for a fairness opinion. The fairness of the transaction's terms to the participating companies' shareholders is evaluated in this view.

2.13 What are the key costs?

Key costs related to M&A transactions are costs, such as transaction fees, due diligence costs, tax-related costs, regulatory and compliance costs, integration costs and employee-related costs.

2.14 What consents are needed?

For M&A done through a scheme – either a scheme of merger or a scheme of arrangement – the approval of the plan by the FHC, the consent of 75% of the shareholders present, and voting at the court-ordered meetings of the merging corporations is required. Also, the consent of the regulatory authorities like the FCCPC and the SEC is required, and, for M&A within specific industries like banks, telecommunications and insurance, consent from the CBN, the NCC and the Nigeria Insurance Commission is also needed.

2.15 What levels of approval or acceptance are needed?

The same approvals listed in question 2.14 apply, as well as approvals from the shareholders and board from both the target company and the acquiring company.

2.16 When does cash consideration need to be committed and available?

In M&A, cash consideration must be committed to and available at a transaction's closure. The parameters negotiated between the deal's parties and the regulations controlling the transaction will determine when cash compensation must be committed to and made accessible.

3 Friendly or Hostile

3.1 Is there a choice?

While businesses can choose to pursue a friendly or hostile approach to acquisitions, the decision between the two approaches is influenced by a number of variables, such as the regulatory environment, the target company's openness to negotiations, the acquisition's strategic significance, and the availability of alternative targets.

Companies frequently choose friendly deals over hostile takeovers because they typically produce greater interest alignment, more seamless integration procedures, and lower legal and reputational concerns. However, a hostile takeover may be attempted, albeit with more complexity and possible difficulties, in cases where amicable negotiations break down or when the acquiring business feels that a hostile approach is required to secure the desired acquisition target.

3.2 Are there rules about an approach to the target?

Approaches to target companies in the context of M&A in Nigeria are regulated by customary business practices, legal frameworks, and regulatory bodies. Companies that engage in M&A transactions often follow specific guidelines and best practices to ensure compliance with applicable legislation and ethical standards, even though there may not be clear laws defining the precise ways of approach. It is required of businesses engaging in M&A deals to conduct themselves honestly and openly at all times, considering the interests of all parties involved, including shareholders, staff members, clients, and regulatory bodies. Any such conflicts of interest must be declared and handled properly.

3.3 How relevant is the target board?

Whether a merger or acquisition is carried out through a scheme of arrangement, statutory merger, equity purchase, or asset acquisition, the directors of the target firm will play a crucial role.

The business's directors will need to accept the conditions of any statutory merger or asset acquisition on behalf of the company. Similarly, in the case of a scheme of arrangement, the company must approve the scheme, which will inevitably require the directors' assent.

However, when deciding on a proposed takeover, the directors of a Nigerian firm must adhere to their fiduciary duties, which include (i) acting honestly in the best interests of the business as a whole, and (ii) refraining from allowing their personal interests to interfere.

3.4 Does the choice affect process?

Indeed, the decision of whether to pursue an M&A transaction as a friendly or hostile takeover can have a big impact on the dynamics and process of the acquisition as a whole. For example, the negotiation dynamics are usually more clear and cooperative in a pleasant transaction; together, the target and acquiring corporations come to a mutually beneficial deal. Conversely, in a hostile takeover, the target company's board and management typically oppose the acquisition attempt, making the negotiations contentious.

Time and velocity: in general, friendly transactions move more smoothly than aggressive takeovers. Friendly deals can speed up the negotiation and due diligence processes because the parties have already built a connection. On the other hand, hostile takeovers could extend the period because of legal obstacles, activist shareholders, and regulatory oversight.

Due diligence and information access: during the due diligence phase, a favourable transaction usually results in the target company being more ready to grant access to its books, records, and management team. A hostile takeover might make it difficult for the acquiring business to obtain sensitive data, which would leave due diligence unfinished and raise questions about the dangers and real worth of the target.

Approval and support from shareholders: in contrast to hostile takeovers, friendly mergers frequently receive greater support from shareholders. The purchasing business in a hostile takeover must persuade shareholders to willingly tender their shares, failing which it may use proxy battles and other strategies to seize control.

4 Information

4.1 What information is available to a buyer?

The buyer may carry out due diligence based on information available publicly. A public search can be conducted at the CAC to obtain corporate information on the target. Where real estate is involved, a search may be conducted at the land registry of the State in which the real estate is based to verify title. Searches can also be conducted in respect of IP rights such as trademarks, patents, copyrights and industrial designs at their respective registries. Searches at the court registries may be necessary where the target is involved in material litigation.

For information not in the public domain, such information may be requested from the target upon signing a confidentiality agreement, which is usually contained in a term sheet, an LOI or a pre-merger agreement. This preserves the confidentiality of information disclosed in the course of the transaction. Where the buyer is unable to find certain answers based on the information provided by the target company, then the buyer can request additional information from the target company.

4.2 Is negotiation confidential and is access restricted?

Negotiations are usually conducted on a confidential basis. For listed companies, the giving or receiving of a notice of the intention to make a takeover, merger, acquisition, tender offer or divestment is regarded as price-sensitive information. While a listed company is not prohibited from disclosing a deal to the relevant advisers, it is required to advise such advisers or any relevant third party of the confidential nature of the information and that it constitutes insider information.

Where a listed company is required to disclose price-sensitive information to a third party or regulator and such information enters the public domain, the company must ensure that the information is simultaneously released to the market.

4.3 When is an announcement required and what will become public?

A target company is required to announce a proposed transaction after its board has approved the terms of the definitive agreements for the deal.

Furthermore, it is required that a takeover bid be: advertised in at least two newspapers with nationwide circulation; advertised on the company's website; and announced on the floor of the exchange on which the shares are listed or its securities are traded.

In addition, the directors must send a directors' circular to each shareholder of the target and to the SEC at least seven days before the date on which the takeover bid is to take effect. The circular will state the opinion or disagreement of the directors and the reasons for such opinion or disagreement.

For private companies or public companies that are not listed on the NSE, there is no requirement for announcements to be made. Whether or not announcements would be made would be subject to any confidentiality agreements that may exist.

4.4 What if the information is wrong or changes?

Where the information is wrong, the offeror may be able to withdraw from the offer if appropriate conditions have been included in the offer and the mistake in the information has been discovered before the completion of the offer.

Where the information changes after an offer has been launched, the offeror may, under certain circumstances, be able to withdraw from the offer, provided that the appropriate conditions have been included in the offer.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Stake building prior to making a takeover bid or a mandatory offer is neither prohibited nor considered unusual. The offeror may acquire shares outside the offer process. However, the offeror will have to take cognisance of regulatory disclosure requirements and legal thresholds as discussed under question 5.3 below.

5.2 Can derivatives be bought outside the offer process?

Dealing in derivatives is permitted under Nigeria law but is subject to compliance with the derivatives market rules of the relevant exchange, SEC Rules on the Regulation of Derivatives Trading (SEC Rules on Derivatives) and the Rules on Central Counterparty, and the CBN's Guidelines for FX Derivatives in the Nigerian Financial Markets.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

Under the CAMA, the rules of the SEC, and Nigerian Exchange (NGX), provision is made for material shareholding disclosure thresholds and filing obligations. Under the CAMA, any person holding shares in a public company, directly or indirectly, that entitle them to exercise 5% of the unrestricted voting rights at a general meeting (a "Substantial Shareholder") is required to give notice in writing to the company within 14 days of becoming aware that they are a Substantial Shareholder. Upon receipt of the notice, the company is required to also give notice to the CAC within 14 days.

Any person with significant control (PSC) over a company is also required, within seven days, to give notice of this fact to the company, following which the company must itself give notice to the CAC within one month of receipt of the notice from the shareholder with significant control. A PSC is defined under the CAMA to include any person directly or indirectly: holding at least 5% of the shares, interest or voting rights of a company or limited liability partnership (LLP); holding the right to appoint or remove a majority of the directors or partners of a company or LLP; or having the right to exercise or actually exercising significant influence or control over a company or LLP.

The SEC also mandates the disclosure of the particulars of holders of 5% or more of the shares of public companies to SEC and the NGX. The Rulebook of the NGX contains a similar disclosure requirement in relation to listed companies. Under the Rulebook of the NGX, a listed company is required to notify the NGX of any transaction that brings the beneficial ownership in the company's shares to 5% within 10 business days after such transaction. A listed company is also required to disclose, in its annual report, details of the holders of 5% or more of the shares of the company.

The Merger Review Regulations and Guidelines require that the FCCPC be notified of transactions involving the acquisition of minority shareholding that grants the acquirer material influence over a company. Under these regulations, acquiring a 25% shareholding in a company leads to a rebuttable presumption of material influence. Any subsequent transaction resulting in *de facto* or legal control will create a new relevant merger situation, requiring FCCPC approval once more.

Where a person, due to their derivatives holding, becomes a substantial shareholder or a PSC of a company, such person will be required to comply with the notification requirements discussed in question 5.3 above and may be required to obtain the approval of the FCCPC.

5.4 What are the limitations and consequences?

Purchasing shares and derivatives outside the offer process may affect the price and type of consideration to be offered. Furthermore, the offeror will have to take cognisance of regulatory disclosure requirements and thresholds as discussed under question 5.3.

Stake building may be restricted by the terms of any confidentiality agreement entered into between the offeror and target in the early stages of the transaction.

6 Deal Protection

6.1 Are break fees available?

Yes, they are; break fees are used in M&A deals for a few reasons. They serve as a form of compensation to the party that suffers financial loss if the other party backs out of the deal. They also provide a measure of protection to the party that has invested time, effort, and resources in the negotiation process. By imposing a financial penalty, break fees can help ensure that parties think twice before reneging on the agreement.

6.2 Can the target agree not to shop the company or its assets?

Yes, the target company can agree not to "shop" itself or its assets. This means they can agree to not actively seek out other potential buyers or engage in negotiations with them while the current deal is being pursued. This helps maintain confidentiality and ensures a fair chance for the parties involved to complete the transaction.

6.3 Can the target agree to issue shares or sell assets?

The target company can agree to issue shares or sell assets as part of the transaction. The specifics will depend on various factors such as the jurisdiction, applicable laws, and the terms negotiated between the parties.

6.4 What commitments are available to tie up a deal?

There are various commitments available to tie up a deal. These commitments can include:

- Non-disclosure agreements (NDAs): these agreements ensure that confidential information shared during the deal process remains protected.
- Exclusivity agreements: these agreements grant the buyer a period of exclusivity during which the target company cannot negotiate or enter into discussions with other potential buyers.
- Break-up fees: these fees are paid by the target company to the buyer if the deal falls through due to certain specified circumstances, providing an added incentive for the target company to proceed with the transaction.
- Material adverse change (MAC) clauses: these clauses allow the parties to terminate the deal if there is a significant adverse change in the target company's financial condition or business operations.
- Conditions precedent: these are specific conditions that must be fulfilled before the deal can be completed, such as obtaining regulatory approvals or shareholder consent.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

In an acquisition agreement, deal conditions can vary depending on the specific terms negotiated between the parties involved. These conditions outline the requirements that must be met for the transaction to proceed. Here are some common deal conditions:

- Regulatory approvals: the acquisition may be subject to obtaining necessary approvals from government authorities or regulatory bodies. These approvals ensure compliance with applicable laws and regulations.
- Shareholder approval: if the target company is publicly traded, the acquisition may require approval from the shareholders of the target company. This is typically done through a vote at a shareholders' meeting.
- Financing conditions: if the buyer is relying on external financing to fund the acquisition, the agreement may include conditions related to securing the necessary financing, such as obtaining loan commitments or meeting certain financial criteria.
- Due diligence: the buyer may include conditions related to the completion of satisfactory due diligence, which involves a thorough examination of the target company's financial, legal, and operational aspects.
- MAC: the agreement may include a condition that allows the buyer to back out of the deal if there is a significant negative change in the target company's financial condition or business operations before the closing of the transaction.
- The invocation of deal conditions can be restricted based on the specific terms negotiated in the agreement. For example, there may be limitations on the buyer's ability to invoke certain conditions or requirements for the buyer to act in good faith when evaluating the fulfilment of conditions.

7.2 What control does the bidder have over the target during the process?

During the process of acquiring a majority stake, the bidder typically gains a significant level of control over the target company. This control can vary depending on the specific terms negotiated between the parties involved. Here are some aspects of control that the bidder may have:

1. Board representation: the bidder may have the right to appoint members to the target company's board of directors, giving them influence over important decision-making processes.
2. Voting power: with a majority stake, the bidder can exercise control over key corporate decisions by voting on matters such as the election of directors, major transactions, and changes to the company's bylaws.
3. Strategic decision making: the bidder can have a say in the company's strategic direction, including decisions related to business operations, investments, M&A, and other significant corporate actions.
4. Management changes: the bidder may have the ability to influence or make changes to the target company's management team, including the appointment or removal of key executives.
5. Financial control: as a majority stakeholder, the bidder can have a significant impact on the company's financial decisions, such as dividend distributions, capital allocation, and financing activities.

7.3 When does control pass to the bidder?

During the M&A process, the bidder typically has limited control over the target company until the transaction is completed. The level of control can vary depending on the specific terms negotiated between the parties.

Prior to the completion of the transaction, the bidder may have some influence over the target through the negotiation process. They may conduct due diligence to assess the target's financials, operations, and legal aspects. However, the target company is usually managed independently by its existing management team and board of directors until the deal is finalised.

Once the transaction is completed, and if the bidder successfully acquires a controlling stake in the target company, they can exercise more control over its operations and decision-making processes. This may include appointing new directors, implementing strategic changes, or integrating the target into their existing business.

7.4 How can the bidder get 100% control?

To acquire 100% control of a target company, the bidder typically needs to acquire all of the outstanding shares or ownership interests of the target. This can be achieved through various means, such as:

1. Share purchase agreement: the bidder can negotiate with the target company and its shareholders to purchase their shares or ownership interests, gradually increasing their ownership stake until they reach 100%.
2. Tender offer: the bidder can make a public offer to purchase shares from the target company's shareholders. If enough shareholders accept the offer, the bidder can acquire a majority stake and potentially reach 100% ownership.
3. Merger or acquisition: the bidder and the target company can agree to merge or be acquired, resulting in the consolidation of ownership and control. This can be structured as a stock-for-stock transaction, cash acquisition, or a combination of both.

8 Target Defences

8.1 What can the target do to resist change of control?

Target companies can engage in a number of strategic defence moves to resist a change of control. These include:

Crown jewel

The crown jewel strategy is a defensive strategy that involves the sale of the target company's most valuable assets. In practice, companies are mostly the target of a hostile takeover, particularly because of their high-valued assets and divisions. In response to a hostile takeover threat, the target sells these assets to make the company less attractive for the bidder. To ensure the company remains a going-concern after the sale, the property could be sold to a "white knight" – a friendly company that gives the target the option to repurchase those assets at an agreed price in the future. Alternatively, the target could enter a "sale and lease-back agreement" with the purchaser of the assets.

Interestingly, a crown jewel provides immediate response to a hostile takeover threat and has the potential to obstruct the takeover, but it has its own risks.

Poison pill

This strategy involves the issuance of shares to other shareholders (to the exclusion of the potential acquirer – assuming the acquirer is already a shareholder in the target) at a discount or for free. The rationale behind this strategy is to dilute the shares of the potential acquirer and discourage the acquisition. Notably, the CAMA prohibits the issuance of shares at a discount and so, to the extent that the target is a Nigerian entity, the shares can only be issued for free as bonus shares or rights. The language of the CAMA is that all shareholders should be treated equally. However, in relation to rights attached to shareholding, the CAMA gives companies the right to limit the rights and/or liabilities attached to shares either through the terms of issue of such shares or the articles of the company. In light of this, a company looking to adopt this strategy will need to first alter its articles of association to include provisions mandating the issuance of bonus shares to some shareholders, to the exclusion of shareholder(s) holding a certain percentage of shares in the company. Alternatively, this limitation could be inserted in the terms of the share issue of every shareholder.

Privatisation

This option is only feasible where the target is a public entity. Where the target is a public entity and is listed, it is easy for the potential acquirer to purchase the shares of the target on the stock market substantially and then issue a tender offer to existing shareholders. To foreclose this, the company can make necessary moves to be delisted.

Adoption of the "Greenmail" strategy

Simply put, this involves an increase in the management's shareholding in order to resist a hostile takeover and consequently increase the shareholding in the company. This strategy allows such majority shareholders, including management, to easily vote in favour of defensive strategies as well as block a potential takeover offer. Alternatively, the company can, subject to any limitations, repurchase its own shares under the share buy-back provisions in the CAMA (section 184 of the CAMA contains provisions on share buy-back).

The blowfish

This defence tactic involves strategies of buying new assets with an underlying purpose of forcing the growth of the company. This leads to the value of the company increasing at the same time as the liquid assets decrease. The reason behind this defence tactic is that the increased value will intimidate acquiring companies with limited financial resources to place a bid. The reduced financial resources of the target company act as a secondary effect, reducing the acquiring company's incentives even more for a takeover.

Increase in PSC shareholding

The entity with a significant shareholding in the target can simply increase its shareholding in the company, which significantly shields the company from a change in control. Also, the company's management can borrow money to purchase shares/invest in the company to further dissipate the shares of the company that are open for acquisition. Another viable option of achieving the acquisition of shares by the management of a company to wade off a change of control is to issue sweat equity to the management of the company.

8.2 Is it a fair fight?

To the extent that the shareholders or target company are resistant to the change of control of the target company, any remedy adopted by the company and or shareholders to repel the change of control that is not contrary to the provisions of any law in Nigeria will be deemed a fair fight. However, caution must be taken to ensure that the best interest of the company is always safeguarded.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

Principally, the success of an acquisition will be premised on the following:

- Shareholders' willingness to sell: an acquisition may be triggered by varying factors. However, where the shareholders in the target company are willing to sell the shares outright, it makes it easy for an acquisition to go through successfully.
- Drag-along and tag-along rights: a drag-along right is a provision mandating that the minority shareholders should sell their shares to the same acquirer in the event that such acquirer acquires the majority of the shares of that company. A tag-along right, on the other hand, is voluntary and not mandatory. These provisions in the constitutional documents of the company or the shareholders' agreement ease the difficulty of dealing with shareholders who are unwilling to sell in an acquisition.

However, it is noteworthy that a combination of factors can make for a successful acquisition. These factors can be categorised into the following three:

a. Pre-transaction success factors:
   i. Choice of the right target partner company.
   ii. Mutual trust between the parties.
   iii. Due diligence and qualitative valuation the target company.
   iv. Experience from previous M&A.
   v. Open and clear communication before the execution of the merger or acquisition.
b. Post-transaction success factors:
   i. Quality of the plan.
   ii. High quality of execution and implementation of merger plan.
   iii. Swiftness of integration of entities.
   iv. Open and clear communication during the implementation.
   v. Strategic fit of target and initiator.
   vi. Organisational fit of entities.
   vii. Cultural fit of entities.
   viii. Calculation and realisation of synergies.
c. Macroeconomic success factors:
   i. Local and international legislation enabling the merger or acquisition.
   ii. General state of the economy.

9.2 What happens if it fails?

Where an acquisition fails, the target company and potential acquirer return to the *status quo*. Parties return to the position they were in prior to the commencement of acquisition steps.

If strategies to wade off a change in control fail, the target company will yield to the acquisition/change in control, unless a shareholder or interest holder (i.e., a creditor) can prove that the acquisition is not in compliance with laid down laws of Nigeria.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

1. The 2023 Business Facilitation (Miscellaneous Provisions) Act

The 2023 Business Facilitation (Miscellaneous Provisions) Act (BFA) was enacted to promote the ease of doing business in Nigeria. It amended 21 relevant business-related legislations to ensure transparency and efficiency in the public sector. These amendments include:

- pre-emption rights: section 142 of the CAMA was amended so that mandatory pre-emption rights will only apply to private companies; consequently, parties to M&A deals involving public companies will not have to give pre-emption notices to a large number of shareholders, which is typically the case;
- pre-emption notice: the BFA has also specified a pre-emption notice period of 21 days in place of the ambiguous "reasonable notice" as previously provided for in the CAMA;
- financial statements: the standard prescribed by the Financial Reporting Council of Nigeria (FRCN) is now acknowledged as the approved standard of financial statements, and companies are no longer required to comply with the form and content set out on the First Schedule to the CAMA;
- independent directors: at least one-third of a public company's board must be independent directors; when nominating candidates for board appointments (who will comprise a majority of the members of the board), the person making the nominations must ensure that at least one-third of these candidates are independent directors (previously, the minimum requirement for independent directors was three);
- definition of form of share certificate: share certificates are now defined to include certificates issued in electronic form;
- filing of return on allotment: the timeline for filing a return on allotment has been shortened to 15 days as opposed to the previous one-month requirement; this is mainly relevant to timelines for completing post-completion steps for a transaction; and
- method of increasing share capital: in addition to the powers of the general meeting to increase the issued share capital of a company by allotting new shares, the issued share capital of a company can now be increased by a resolution of the board of directors subject to conditions or directions that may be imposed in the articles of association or by the company in a general meeting; this amendment offers more flexibility in managing transaction timelines requiring a share capital increase.

2. Persons with Significant Control Regulations 2022

In November 2022, the CAC with the approval of the Minister of Trade, Industry and Investment issued the Persons with Significant Control Regulations (PSC Regulations) to provide a framework for obtaining details on PSCs and beneficial owners of a company, LLP and any other relevant entity.

The PSC Regulations broaden the definition of a PSC to encompass beneficial owners who ultimately own or control a company or LLP, or on whose behalf a transaction is conducted. This includes individuals who exercise ultimate effective control over a legal person or arrangement. However, the definition now excludes juristic persons. As a result, PSCs under the PSC Regulations are natural persons who:

- are beneficial owners of a company or LLP;
- hold at least 5% of the issued shares in a company or interest in a limited LLP either directly or indirectly;
- exercise at least 5% of the voting rights in a company or LLP directly or indirectly;
- hold a right directly or indirectly, to appoint or remove a majority of the directors of the company or partners of the LLP;
- exercise significant influence or control, directly or indirectly, over the company or LLP; and
- have the right to exercise, or actually exercise, significant influence or control over the activities of a trust or firm, regardless of whether it is a legal person, but would satisfy any of the first four conditions if it were an individual.

The PSC Regulations also amended existing CAC forms to include more detailed information on PSCs.

3. CBN's guidance on ultimate beneficial ownership of legal persons and legal arrangements

The CBN issued guidance to financial institutions on the procedure for identifying and verifying the beneficial owners of legal persons and arrangements in line with the 2022 CBN Regulations on Anti-Money Laundering, Combatting the Financing of Terrorism and Countering Proliferation Financing of Weapons of Mass Destruction in Financial Institutions) (AML/CFT/CPF Regulations).

The guidance lists several red flags to help identify the beneficial owners of companies and legal arrangements, including:

- an extract of a shareholder registry showing ownership;
- any nominee agreement that shows who exercises real control behind a shareholder arrangement;
- a shareholders' agreement that shows a natural person can control the shares of more than one shareholder, effectively giving control;
- documentary evidence that a natural person is able to exercise a dominant influence over a legal person;
- documentary evidence that the natural person has the power to appoint senior management;
- documentary evidence (for example, an employment contract) that a director or employee is able to influence a legal person; and
- documentary evidence of exercise of dominant influence over the transactions of the legal entities/arrangements.

4. Regulations for Further Growth of Indigenous Capacity 2021

The Minister of Petroleum issued the Regulations for Further Growth of Indigenous Capacity (Local Content Regulations) 2021, which took effect on 26 February 2021. The Local Content Regulations provide that an indigenous company shall mean a Nigerian company formed and registered under the CAMA with at least 51% of its shares beneficially owned by Nigerians. It is unlikely that a party could successfully challenge this beneficial ownership requirement in a Nigerian court.

To qualify as a Nigerian company, at least 51% of the beneficial ownership of a company's shares must be held by Nigerians. Nominee shareholders will not satisfy this requirement. Moreover, the Nigerian Content Development and Monitoring Board (NCDMB) may require the company to provide proof of the beneficial ownership of its shares.

5. The SEC Rules

On 30 August 2021, the SEC released new rules and amendments to the SEC Rules and Regulations 2013 (as amended) relating to mergers, acquisitions, divestments, share capital reconstructions and takeovers (the Amended Rules). These amendments are consequential to the changes introduced by the FCCPA, which repealed the provisions of the ISA and took away M&A from the regulatory purview of the SEC. The amendments seek to address the issues arising from the repeal of the provisions of the ISA on M&A, particularly in connection with the SEC's role in the approval of these transactions.

However, mergers involving public companies and their subsidiaries may fall within the purview of both SEC and the FCCPC. While SEC focuses on whether the merger meets the conditions mentioned above, the FCCPC will concentrate on whether the merger could significantly prevent or reduce competition.

Acknowledgment

The authors would like to thank Chiamaka Ogbonnaya-Osibie for her contribution to this chapter. Chiamaka Ogbonnaya-Osibie is an Associate at The Trusted Advisors, known for delivering exceptional legal services with a strong work ethic. Specialising in corporate/commercial, finance, and ICT and media matters, she advises both local and international clients on various aspects, including business planning, corporate matters, contract drafting, financial institution regulation, M&A, permits, licences, and regulatory compliance. With a keen interest in corporate finance transactions, Chiamaka has garnered valuable experience, consistently achieving outstanding results for her clients. Her educational background includes completion of the Nigerian Law School and obtaining a degree from the University of Calabar. She has also been a member of the Institute of Chartered Mediators and Conciliators since 2019. Chiamaka's professional expertise extends to tax-related transactions and finance, showcasing her intelligence, ability to learn quickly and analytical mind, making her a valuable asset to the firm.
Tel: +234 81015 99159 / Email: cdo@trustedadvisorslaw.com

Olawunmi Olamide Ojo is a Legal Practitioner with over 10 years of commercial and advisory experience gained in private practice and in-house positions. Overseeing legal, regulatory, internal compliance, governance processes, transaction advisory, and dispute management, she currently heads the Corporate and Commercial practice group at the Trusted Advisors, where she advises clients on corporate and commercial transactions. She has consistently assisted businesses and companies in diverse industries to mitigate their legal risk with her professional expertise in Corporate Law. Her core expertise includes regulatory compliance, M&A, contract drafting, contract life cycle management, corporate restructuring, corporate governance.

The Trusted Advisors
14th floor, Western House, 8/10 Broad Street
Lagos Island
Nigeria

Tel: +234 81015 99159
Email: ooo@trustedadvisorslaw.com
URL: www.trustedadvisorslaw.com

Deborah Onafadeji is a Senior Associate at the firm known for her brilliant and timeous delivery of task. A second-class upper graduate from the Babcock University, Deborah distinguished herself by graduating with a distinction from the University of Kent. She advises both local and international client on corporate and commercial transactions, corporate governance and regulatory compliance, corporate restructuring and insolvency, and M&A. Deborah is results-oriented and a smart lawyer who delivers result on even the most difficult transactions.

The Trusted Advisors
14th floor, Western House, 8/10 Broad Street
Lagos Island
Nigeria

Tel: +234 81015 99159
Email: doa@trustedadvisorslaw.com
URL: www.trustedadvisorslaw.com

Adeife Omolumo is an Associate in the firm's Corporate and Commercial, Banking, Fiscal and Finance practice. She is creative, thorough and tenacious, with an insatiable drive for excellence. Her interest spans across arbitration, energy, taxation, IP, M&A and corporate finance. She graduated with a second class (upper division) degree from both the Nigerian Law School and the prestigious University of Lagos. As an undergraduate, she received a number of accolades and awards reaffirming her skill in the art of advocacy, research and legal writing.

The Trusted Advisors
14th floor, Western house, 8/10 Broad Street
Lagos Island
Nigeria

Tel: +234 81015 99159
Email: oaa@trustedadvisorslaw.com
URL: www.trustedadvisorslaw.com

Maureen Izibevie Esegie is an Associate at The Trusted Advisors, with a distinct focus and interest in fiscal and finance, M&A, corporate and commercial. Dedicated to providing comprehensive legal counsel, Maureen serves a diverse clientele that includes prominent corporations and esteemed organisations.

The Trusted Advisors
14th Floor, Western House, 8/10 Broad Street
Lagos Island
Nigeria

Tel: +234 81015 99159
Email: mie@trustedadvisorslaw.com
URL: www.trustedadvisorslaw.com

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