Private Equity
2021

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LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the seventeenth edition of *Private Equity*, which is available in print and online at www.lexology.com/gtdt.

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

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Russia. The report is divided into two sections: the first deals with fund formation in 13 jurisdictions and the second deals with transactions in 18 jurisdictions.

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

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

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Atif Azher of Simpson Thacher & Bartlett LLP, for his continued assistance with this volume, and also extend thanks to Bill Curbow of Simpson Thacher & Bartlett LLP, the former contributing editor, who helped to shape the publication to date.

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Getting The Deal Through

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TRANSACTION FORMALITIES, RULES AND PRACTICAL CONSIDERATIONS

Types of private equity transactions

1 What different types of private equity transactions occur in your jurisdiction? What structures are commonly used in private equity investments and acquisitions?

Private equity (PE) transactions in Nigeria can generally be classified into angel investing, venture capital, growth capital, buyouts (including management buyouts) and mezzanine financing. Available structures commonly used for private equity investments are equity investments and quasi-equity investments, which would include taking preferred stock or convertible notes by the private equity fund entity. Limited liability companies and limited partnerships are most typically used as investment vehicles for PE investments.

Corporate governance rules

2 What are the implications of corporate governance rules for private equity transactions? Are there any advantages to going private in leveraged buyout or similar transactions? What are the effects of corporate governance rules on companies that, following a private equity transaction, remain or later become public companies?

There are no special corporate governance rules applicable to private equity transactions other than those imposed by sector-specific regulators such as the Code of Corporate Governance for the Telecommunications Industry 2016 issued by the Nigerian Communications Commission. Corporate governance issues relating to private companies in Nigeria, including companies with private equity participation, are generally addressed by contractual agreements, memorandum and articles of association subject to the Companies and Allied Matters Act (CAMA) and any code of corporate governance adopted by the company.

The Securities and Exchange Commission (SEC) Code on Corporate Governance (SEC Code) is applicable to public companies whose securities are listed on a recognised exchange in Nigeria, companies looking to raise funds through the issuance of securities and other public companies. The SEC Code gives guidelines for disclosure and reporting requirements. Where the SEC considers a company non-compliant, it is empowered to notify the company of its non-compliance, albeit with no direct penalty for non-compliance with the SEC Code. In addition, there are regulatory and disclosure requirements if a public company is listed, as such companies are also subject to the Rulebook of the Nigerian Stock Exchange (NSE).

The Financial Reporting Council's (FRC's) Nigerian Code of Corporate Governance, which applies to public companies, private companies that are holding companies of public companies or other regulated entities, as well as private companies that are termed 'public interest entities' (private companies that file returns to regulatory authorities other than the Federal Inland Revenue Service (FIRS) and the Corporate Affairs Commission (CAC)), may apply in the event that the private equity transaction involves a company that is a public interest entity.

There are obvious advantages when a public or listed company goes private as this will mean less regulation and disclosure obligations.

Where a target company with private equity participation remains a public company, nothing changes. However, where a private company becomes a public company, such company would become subject to the application of the SEC Rules and Regulations (SEC Rules) and the Rulebook of the NSE (NSE Rulebook).

Issues facing public company boards

3 What are some of the issues facing boards of directors of public companies considering entering into a going-private or other private equity transaction? What procedural safeguards, if any, may boards of directors of public companies use when considering such a transaction? What is the role of a special committee in such a transaction where senior management, members of the board or significant shareholders are participating or have an interest in the transaction?

Some of the issues facing the board of a public company considering going-private relate to reducing the risk of litigation by dissenting or minority shareholders, choosing the structure to adopt in the transaction, disclosures, and conflicts of interest. The issues of disclosure and conflict of interest are at the core of the board's considerations because they relate to the fiduciary duties of the directors. The fiduciary duties of the directors under CAMA include a duty to act in good faith, exercise independent judgment, act in the best interest of the company as a whole – so as to protect its assets and promote its business – and avoid conflict of interest, thus mandating that directors declare any interest in any proposed transaction or arrangement. In addition to the requirements of CAMA on disclosure of conflicts of interest by directors, companies generally have rules or policies on conflict of interests and duties of the board, management, and other personnel of the company.

In addition to the use of a special committee as a procedural safeguard, the company may also adopt a 'majority of minority approval' approach to certain types of transactions, ensuring that a majority of all of the minority shares that are entitled to vote, not merely a majority of the shares that are actually voted, approve the transaction. This works particularly in a situation where the transaction is one of significant shareholders looking to buy up minority shares and take the company private.

A special committee of the board, which may consist of independent non-conflicted directors, may be constituted for this purpose. The special committee may be charged to objectively evaluate, review and approve the private equity transaction on behalf of the company.

The role of the special committee is to ensure fairness by determining that the transaction is in the best interest of the company and delivers value to all shareholders.

There may also be the question of whether the transaction will be considered as a merger in accordance with the provisions of the Federal Competition and Consumer Protection Act (FCCPA) and its attendant regulations. The answer to this question and the size of the transaction will determine whether the approval of the Federal Competition and Consumer Protection Commission (FCCPC) ought to be sought for the transaction.

Disclosure issues

4 Are there heightened disclosure issues in connection with going-private transactions or other private equity transactions?

The provisions of the CAMA 2020 require a person with significant control of a company or is a substantial shareholder in a public company to disclose his or her interest to the company within a stated period of becoming aware that he or she has significant control or is a substantial shareholder. The company in turn is required to notify the CAC within one month (in the case of significant control) and 14 days (in the case of substantial shareholding) of receipt of the notice. A substantial shareholder is defined as a person who holds at least 5 per cent of the unrestricted voting rights at any general meeting of the company. A person who ceases to be a substantial shareholder is also required to notify the company and the latter is required to notify the commission.

Under the SEC Rules, the provisions guiding the operation of private equity funds in Nigeria provide for submission of quarterly returns, annual report of the fund to the SEC and semi-annual reports to its investors.

A company for which a takeover bid has been made is required to provide sufficient time and information to all its shareholders to enable them to reach a properly informed decision in respect of the bid. Such disclosures are required to be prepared with the highest standard of care and accuracy and must contain all information relevant to the transaction. Further, listed companies are required to ensure that investors and the public are kept fully informed of all factors that may affect their interest and to make immediate disclosures of any information that may have material effect on market activity in, and the prices or value of, listed securities as well as details of any major changes in the business or other circumstances of the company to shareholders and the NSE. The NSE requires all listed companies to maintain publicly accessible websites whereon companies are required to display conspicuously, information submitted to the NSE.

The NSE Rulebook stipulates, among other things, that in order for a public company to voluntarily delist its securities from the NSE, the prior approval of the shareholders must have been obtained by way of a special resolution passed at a duly convened general meeting of the company. The company must have given its shareholders at least three months' notice of the proposed withdrawal of the listing including the details of how to transfer the securities. The public company going private must also give the shareholders who so elect, an exit opportunity before the shares are delisted.

SEC Rules mandate a public company seeking to delist to notify the SEC of its intention to delist. The NSE is also required to consider and dispose of the application within 10 days and notify the SEC when it is approved.

Timing considerations

5 What are the timing considerations for negotiating and completing a going-private or other private equity transaction?

Timing considerations for private equity transactions include the time within which the board of the target company will consider or delay its response to an offer or make a counter-offer, the time within which proper due diligence can be concluded, the length of time required for the formation or structuring of the vehicle to be used for the execution of the transaction, length of time required for SEC approval (where required) and the exit time projections. Sector-specific regulations and approvals also form part of key timing considerations of such transactions.

With respect to going-private transactions, a company seeking to voluntarily delist from the NSE is required by the NSE Rulebook to have been listed on the NSE for a minimum of three years prior to when it seeks to delist. Consequently, private equity investors seeking to go into a private equity transaction with a public company that has been listed on the NSE for less than three years will have to factor in this timing requirement with respect to voluntary delisting. The SEC Rules require the NSE to consider and dispose of applications to delist within 10 days.

Where a private equity transaction involves a takeover, the offeror is required by the Investments and Securities Act and the SEC Rules to seek the approval of the SEC as well as register the proposed bid with the SEC prior to making a takeover bid. Where the approval is granted, the offeror is required to make the approved bid within a period of three months following the date of approval. The offeror may thereafter apply for an extension of this period before the expiry of the three-month period. Where a takeover bid is made for all the shares of a class in an offeree company, the offeror is proscribed from taking up shares deposited pursuant to the bid until 10 days after the date of the takeover bid. Where the bid is made for less than all the shares in a class of the offeree company, the offeror is proscribed from taking up shares deposited pursuant to the bid until 21 days after the date of the takeover bid. A takeover bid is required when the shares being acquired are not less than 30 per cent of the shares of the company.

Further, the period between which notification is made to the FCCPC (if applicable) and when it responds (a maximum of 40 days), and delays caused by addressing issues such as the rights of dissenting shareholders, may form part of the timing considerations in private equity transactions.

Dissenting shareholders' rights

6 What rights do shareholders of a target have to dissent or object to a going-private transaction? How do acquirers address the risks associated with shareholder dissent?

Shareholders who do not accept the terms of a going-private transaction may vote against it at the general meeting of the company at which the issue is considered or may choose not to accept a takeover offer. However, where a takeover offer is accepted by the shareholders of a company holding not less than 90 per cent of the shares of the company or the class of shares in respect of which the bid is made, the dissenting minority shareholders' shares may be bought by the offeror at the same price as the other shares or at fair market value after notifying the dissenting shareholders of its intention to do so. The fair market value will be determined by a court at the instance of the acquirer or the dissenting shareholder, respectively. Reference should also be made to the company's articles or other constitutional documents as they may contain provisions that deal with such a situation.

Further, such shareholders, are empowered to apply to court to object to a going-private transaction. Such an application may be sustained only where it can be shown that proceeding with the transaction is illegal, oppressive, unfairly prejudicial, or discriminatory against such shareholders' interests.

To deal with any issues that may arise from shareholders' dissent to going-private transactions, acquirers should be careful to comply with the relevant provisions of the law and regulations, particularly as they relate to the procedures and the duties of notification, to avoid creating possible grounds upon which the dissent may subsist.

Purchase agreements

7 What notable purchase agreement provisions are specific to private equity transactions?

Notable purchase agreement provisions include provisions on issues such as warranties, default, anti-dilution, lock-up period, redemption or conversion of preferred equity, composition and powers of the board and management of the company, matters exclusively reserved for shareholders' decision, finance and accounting regime, non-compete, confidentiality and disclosures, tag-along and drag-along rights, exit options and corporate governance. Arbitration is often favoured as the dispute resolution mechanism in the purchase agreements.

However, the specific terms of these provisions would largely depend on whether the target company is a private or public company or a listed company that seeks to delist following the transaction.

Participation of target company management

8 How can management of the target company participate in a going-private transaction? What are the principal executive compensation issues? Are there timing considerations for when a private equity acquirer should discuss management participation following the completion of a going-private transaction?

The management of target companies undergoing a going-private transaction plays a major role to ensure a smooth transition. While bargaining power may determine compensation, it is not unusual to seek to retain key officers after the transaction is completed. These could be in form of employment agreements or equity-based incentives.

Among the concerns of private equity investors is the need to ensure that the interests of management align with the interests of the investors with a view to the growth of the company. To this end, management of the offeree company may also be required to execute employment agreements with non-compete and confidentiality provisions. The terms of employment of management may constitute part of the pre-closing covenants in a going-private transaction such that management participation and compensation issues are dealt with prior to the completion of the transaction.

Timing considerations for the participation of management in a going-private transaction are often a product of the provisions of the purchase agreement entered in respect of the transaction.

Tax issues

9 What are some of the basic tax issues involved in private equity transactions? Give details regarding the tax status of a target, deductibility of interest based on the form of financing and tax issues related to executive compensation. Can share acquisitions be classified as asset acquisitions for tax purposes?

The tax issues involved in a PE transaction are determined by the structure of the transaction, the legal vehicle the target operates and the exit model adopted. Limited liability companies bear the tax as an entity, while the individual investors (which could be corporate or individual) are liable to tax on their investment income. Income such as dividends, interest and management fees are subject to withholding tax. Prior to 2019, for non-resident investors, such taxes withheld were treated as their final tax obligation. With the passage of the Finance Act 2020, transactions whose structure involves the non-resident investor company providing digital services in Nigeria and deriving a gross income in excess of 25 million naira, using a Nigerian domain name or customising its platform to target persons in Nigeria could be deemed to have a significant economic presence and thus be exposed to income tax.

The target and investors will also need to note that stamp duties may arise on the transaction documents. Transaction documents are stamped at flat rate or ad valorem, depending on the nature of the documents. Investors also need to pay attention to transfer pricing rules when investing in connected entities.

When foreign loans are used to finance a PE transaction, interest on such loans that have a repayment period (including moratorium) of two years and above will enjoy certain tax exemptions. Prior to the Finance Act 2020, the rate of the withholding tax exemption on the interest could, depending on the tenor of the loan, be 100 per cent. The new Act has now capped the withholding tax exemption at a maximum of 70 per cent. Another tax issue on debt finance is that interest payment on sums borrowed and employed as capital in acquiring profits is tax deductible. Consequently, some businesses prefer debt financing to equity financing to enable them to benefit first from the loan and subsequently from the tax deductibility of interest payments. Notably, the Finance Act caps tax deductions in respect of interest on loans from a foreign related party at 30 per cent of earnings before interest, tax, depreciation and amortisation (EBITDA). The revenue authorities have, however, clarified that the thin capitalisation rule will not apply to Nigerian banks and insurance companies that are subsidiaries of foreign entities.

Equity financing, whether in the form of preferred or ordinary stocks, will entitle the shareholders to dividends. Such dividends will be subject to a 10 per cent withholding tax. Management fees also incur withholding tax, while carried interest incurs capital gains tax. Capital gains tax payable on gains earned on the disposal of assets is not applicable to the disposal of shares. Accordingly, with respect to this tax, share acquisitions are not asset acquisitions.

DEBT FINANCING

Debt financing structures

10 What types of debt financing are typically used to fund going-private or other private equity transactions? What issues are raised by existing indebtedness of a potential target of a private equity transaction? Are there any financial assistance, margin loan or other restrictions in your jurisdiction on the use of debt financing or granting of security interests?

Depending on the structure of a private equity transaction, loans may be sought to finance a PE transaction and such loans may be senior or subordinated debts. In practice, such loans are often in the form of senior debt. Foreign loans are subject to the relevant foreign exchange regulations and should be brought in through approved channels to enable repatriation of repayments.

Existing indebtedness of a potential target would play a role to the extent of the priority ranking of such debts and whether such debts are being serviced at the time of the proposed private equity transaction. As part of the structure, it may be decided to either keep or repay the existing indebtedness depending on how such repayment may affect the cash flow of the target company. The consent of the provider of the existing indebtedness would usually be required before new financing would be taken by the company.

There are restrictions under the Companies and Allied Matters Act on the provision of financial assistance by a company whether by way of loan, guarantee, security, indemnity or any form or credit in relation to the acquisition of its own shares. There are also restrictions on margin loans.

Debt and equity financing provisions

11 | What provisions relating to debt and equity financing are typically found in going-private transaction purchase agreements for private equity transactions? What other documents typically set out the financing arrangements?

The financing provisions will depend on whether the structure is pure equity, debt, quasi-debt, leveraged or a combination. As such, it could range from straightforward to very complex credit documentation.

In a debt and equity financing arrangement, provisions creating conditions precedent to the investment are very usual, following the outcome of due diligence on the target entity. Further, provisions on redemption of shares, pre-emptive rights, restrictions on indebtedness, tenor, interest rate, reporting requirements, obligation of parties, tag-along rights, drag-along clauses, share transfers, anti-dilution and closing or exit, among others, are typical. The documentation may include investment or loan agreement, share sale and subscription agreement, sale and purchase agreement and shareholders' agreement.

Fraudulent conveyance and other bankruptcy issues

12 | Do private equity transactions involving debt financing raise 'fraudulent conveyance' or other bankruptcy issues? How are these issues typically handled in a going-private transaction?

Some transactions made prior to an insolvency may be avoided under certain circumstances, for example conveyances, mortgages, payments or other acts relating to property that amount to a fraudulent preference of creditors. Also, any conveyance or assignment of a company's property to trustees for the benefit of all its creditors shall be void.

These concerns are often mitigated with representations and warranties by the target company that there are no ongoing, threatened or imminent winding-up or liquidation proceedings and that a receiver or manager has not been appointed and with a provision for indemnity upon breach. The scope of the warranties would further be determined by the outcome of the due diligence on the target company.

SHAREHOLDERS' AGREEMENTS

Shareholders' agreements and shareholder rights

13 | What are the key provisions in shareholders' agreements entered into in connection with minority investments or investments made by two or more private equity firms or other equity co-investors? Are there any statutory or other legal protections for minority shareholders?

To protect the interest of minorities, a shareholders' agreement may provide that certain decisions may be taken only if approved by a super-majority or qualified majority of the body or organ of the company making the decision. The voting threshold would therefore typically include an affirmative vote from a part of the minority. Such matters may include decisions as to the issuance of new shares, increase in share capital, acquisitions, disposals, mergers, borrowing and giving guarantees or security, related party transactions, approval of budgets, change of business plan and alteration of the constitution. The agreement may also make provision for breaking deadlocks.

There is also some statutory protection under the Companies and Allied Matters Act (CAMA) that requires a special resolution (a resolution passed by not less than three-quarters of the votes cast) of shareholders to take the following decisions:

- a change of name of the company;
- an alteration of the articles of association;
- a change of the objects of the company;
- variation of class rights;
- rendering the liability of the directors unlimited; and
- an arrangement or reconstruction on sale of the assets of a company.

CAMA also has provisions that stipulate how the company is to go about handling a 'major asset transaction'. Among other notification requirements, it requires that such a transaction must be approved via a special resolution. This requirement will be applicable where the transaction involves the assets of the company.

ACQUISITION AND EXIT

Acquisitions of controlling stakes

14 | Are there any legal requirements that may impact the ability of a private equity firm to acquire control of a public or private company?

A takeover bid is required where a person intends to acquire 30 per cent or more of the voting rights in a public company irrespective of whether it was acquired in a single transaction or a series of transactions over time. A takeover bid can be made only if the Securities and Exchange Commission (SEC) grants authority to proceed to that effect. In deciding whether or not to grant authority to make a takeover bid, the SEC would consider the likely effect of the proposed takeover bid on the economy of Nigeria and on any policy of the federal government with respect to manpower and development. A takeover bid shall not be made to fewer than 20 shareholders representing 60 per cent of the members of the target company, but it can be made to such a number of shareholders holding in the aggregate a total of 51 per cent of the issued and paid up capital of the target company. There is no need for a takeover bid where the shares to be acquired are shares in a private company.

The obligation to notify the Federal Competition and Consumer Protection Commission (FCCPC) and obtain its approval will have an impact on such a transaction if the transaction is covered by the Federal Competition and Consumer Protection Act (FCCPA). For instance, a company may be considered to be in a merger if it establishes direct or indirect control over the whole or part of any company through an acquisition of shares or assets. It is therefore necessary to note that in certain instances, it is required that a pre-notification enquiry be made to the FCCPC for the parties to obtain clearance from the FCCPC before they proceed with the transaction.

For a private company, save for companies in certain sectors that are subject to industry specific regulations, any requirements for the acquisition of control will primarily be governed by the provisions of the articles of association of the company, any shareholders' agreement entered into by the shareholders or investment agreement entered with prior investors in the company.

Exit strategies

15 | What are the key limitations on the ability of a private equity firm to sell its stake in a portfolio company or conduct an IPO of a portfolio company? In connection with a sale of a portfolio company, how do private equity firms typically address any post-closing recourse for the benefit of a strategic or private equity acquirer?

Contractual limitations on the ability of a private equity firm to sell its stake in a portfolio company or conduct an IPO of a portfolio company may include provisions such as pre-emption rights, tag-along rights, restrictions on drag-along rights and put options. These rights are usually embedded in shareholders' agreements.

TRANSACTIONS

Also, listing requirements may limit the ability of a private equity firm to sell its stake in a portfolio company or conduct an IPO of a portfolio company. To list on the Main Board, on the Alternative Securities Market or the Growth Board of the Nigerian Stock Exchange (NSE), promoters are required to retain 50 per cent of shares held at IPO for the first 12 months from the date of listing.

Further, the company must meet at least one of the Initial Listing Standards in the NSE Rulebook.

Contractual time limitations may be agreed with respect to representations or warranties, or both, given by a private equity firm to a buyer. A private equity firm investing in a portfolio company would usually require warranties from sellers and from the management team of the target company. The said warranties may relate to compliance with applicable laws, the power to contract, title to shares and to assets.

In the context of competition and the implications of such transactions (ie, selling its stake), it is necessary for the firm to determine whether the sale will be considered a merger by virtue of the provisions of the FCCPA and the regulations made thereunder. As such, it may have to confer with the FCCPC to make such a determination before taking major steps in such a transaction.

Portfolio company IPOs

16 What governance rights and other shareholders' rights and restrictions typically survive an IPO? What types of lock-up restrictions typically apply in connection with an IPO? What are common methods for private equity sponsors to dispose of their stock in a portfolio company following its IPO?

The holdings of the existing shareholders may be restructured for purposes of the IPO and some of the governing rights of the shareholders will survive the IPO such as representation on the board and non-compete rights. However, the company will be subject to more regulations including the Investments and Securities Act, Securities and Exchange Commission Rules and Regulations, the Financial Reporting Council and the NSE Rulebook.

In respect of lock-up restrictions, the Listing Requirements provide that the issuer in respect of an IPO shall ensure that the promoters and directors will hold a minimum of 50 per cent of their shares in the company for a minimum period of 12 months from the date of listing and will not directly or indirectly sell or offer to sell such securities during that period.

Subject to the lock-up restrictions, private equity sponsors or investors may dispose of their stock through a buyout, which may be by another PE entity, institutional investor or the management.

Target companies and industries

17 What types of companies or industries have typically been the targets of going-private transactions? Has there been any change in industry focus in recent years? Do industry-specific regulatory schemes limit the potential targets of private equity firms?

There are not many going-private transactions in Nigeria as there are few instances of public companies that have gone private, although some investors who want to strengthen their control of, and investments in, the companies tend to want to go private.

Transactions involving companies in some sectors such as telecommunications, electricity, insurance, financial services and the petroleum industry will be subject to further industry-specific regulation. It is yet to be verified that industry-specific regulations have limited the potential targets of private equity firms, even though such regulations make the process more elaborate.

SPECIAL ISSUES

Cross-border transactions

18 What are the issues unique to structuring and financing a cross-border going-private or other private equity transaction?

There are few financing concerns that are unique to cross-border private equity transactions. These include tax considerations, importation of capital and repatriation at the point of exit. Where capital is to be imported in a PE transaction, the investors require a certificate of capital importation that is issued by a bank within 24 hours of the entry of the capital into the country. Obtaining the certificate of capital importation is a prerequisite for repatriation. There are no foreign investment restrictions on cross-border private equity transactions in Nigeria except for certain industries in which private participation, both local and foreign, is prohibited except with a licence from the federal government (eg, defence).

Club and group deals

19 What are some of the key considerations when more than one private equity firm, or one or more private equity firms and a strategic partner or other equity co-investor is participating in a deal?

There are no restrictions preventing multiple private equity firms, or a private equity firm and its strategic partner, from participating in a club or group deal.

The concerns, however, depend on the relative size and interests of the parties to the transaction. In a takeover context, a key consideration for parties to such transactions is that they will likely be scrutinised for the purposes of assessing whether the obligation to make a mandatory takeover offer is triggered. The threshold for triggering this obligation is an aggregate holding of 30 per cent of the voting shares.

Similar considerations should be made in the context of competition, particularly as it relates to the structure of control in the target company or the resulting entity. These factors would inform whether or not the transaction is a covered transaction in the context of the Federal Competition and Consumer Protection Act and thus within the remit of the Federal Competition and Consumer Protection Commission.

Issues related to certainty of closing

20 What are the key issues that arise between a seller and a private equity acquirer related to certainty of closing? How are these issues typically resolved?

Several issues may arise during the closing of a PE transaction. Such issues may include failure to obtain mandatory clearances or regulatory approvals and failure to satisfy financing closing. Where these closing issues arise, the non-defaulting party can grant an extension of time, with or without a provision for costs, to enable the resolution of the issues, or it can terminate the agreement in accordance with its terms. In the latter instance, the inclusion of a reverse termination fee clause in the agreement will be prudent.

UPDATE AND TRENDS

Key developments of the past year

21 Have there been any recent developments or interesting trends relating to private equity transactions in your jurisdiction in the past year?

On the regulatory front, there have been a few consequential changes. There is a new law regulating the formation and operation of companies known as the Companies and Allied Matters Act 2020. Among other things, it requires that where a person obtains significant control of a company or becomes a substantial shareholder of a company, the person must within the stated time notify the company of its stake in the company and the company must in turn inform the Corporate Affairs Commission.

The Federal Competition and Consumer Protection Act (FCCPA) was also passed into law. It creates the Federal Competition and Consumer Protection Commission (FCCPC), which has jurisdiction over the occurrence of mergers in Nigeria. The definition of mergers under the FCCPA and attendant regulations is quite generous, with the effect that the acquisition of shares (even where the said acquisition does not result in a new entity or change of control) may be considered a merger. As such, transactions that will give the acquirer of the shares 'material interest' in the target company ought to be considered carefully to ascertain whether the approval of the FCCPC will be required.

There have been several transactions through which private equity firms have, individually or as part of groups, acquired substantial interests in Nigerian companies. There has been a preponderance of these transactions in technology-enabled companies (especially fintech).

The Nigerian Stock Exchange launched a new board known as the Growth Board. The threshold for listing on the Growth Board is less than that of the Main Board and the Alternative Securities Market. The disclosure requirements are less stringent and less frequent. Since its inception, the market has seen a few companies that were previously listed on the Main Board migrate to the Growth Board.

Coronavirus

22 What are some of the significant developments and initiatives relating to the covid-19 pandemic that have impacted private equity transactions in your jurisdiction?

Other than measures relating to restrictions on movement of persons into and out of Nigeria and interventions for the benefit of small and medium enterprises and the resultant economic slowdown, there is no initiative or development that impacts on private equity.

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