PANORAMIC

PRIVATE EQUITY (TRANSACTIONS)

Nigeria

LEXOLOGY

Private Equity (Transactions)

Contributing Editor

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TRANSACTION FORMALITIES, RULES AND PRACTICAL CONSIDERATIONS

Types of private equity transactions

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, leveraged buyouts (by way of acquisition of shares via subscription or transfer 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.

Law stated - 13 January 2025

Corporate governance rules

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 (NCC). 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) 2020 and any code of corporate governance adopted by the company.

The Securities and Exchange Commission (SEC) Code on Corporate Governance Guidelines (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 to the public, 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. The SEC also provides the penalty of a fine, and any other sanction as it may deem fit, for any company in violation of the Nigerian Code of Corporate Governance (NCCG) and 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 Exchange (NGX Rulebook).

The Financial Reporting Council’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 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, when a private company becomes a public company, that company would become subject to the application of the SEC Rules and Regulations (SEC Rules), the SEC Code, the NCCG and, if listed, the NGX Rulebook.

Law stated - 13 January 2025

Issues facing public company boards

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 judgement, act in the best interest of the company as a whole – 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 conflicts of interest 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 voted, approve the transaction. This works particularly in a situation where the transaction is one of the 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 a merger in accordance with the provisions of the Federal Competition and Consumer Protection Act (FCCPA) 2018 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.

Law stated - 13 January 2025

Disclosure issues

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

The provisions of CAMA require a person with significant control of a company or a person who is a substantial shareholder in a public company to disclose their interest to the company within seven days of becoming aware that they have significant control or is a substantial shareholder. The company in turn upon receiving such notification or coming into possession of such information 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 person with significant control is defined as one who directly or indirectly holds at least 5 per cent of the shares of a company, at least 5 per cent of the voting rights at any general meeting of the company, or a person who directly or indirectly holds the right to appoint or remove a majority of the directors in a company. A substantial shareholder of a public company as defined under CAMA is a person who by themselves or through their nominee 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 in a public company is also required to notify the company in writing and the latter is required to notify the commission within 14 days of becoming aware of the fact. Under the SEC Rules, the provisions guiding the operation of private equity funds in Nigeria provide for the submission of quarterly returns, the 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 must be prepared with the highest standard of care and accuracy and must contain all information relevant to the transaction. Further, listed companies must 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 a material effect on market activity, the prices or value of listed securities, and details of any major changes in the business or other circumstances of the company, to shareholders and the Nigerian Exchange (NGX). The NGX Rulebook requires all listed companies to maintain publicly accessible websites whereon companies are required to display conspicuously, information submitted to the NGX.

The NGX Rulebook stipulates, among other things, that for a public company to voluntarily delist its securities from the NGX, 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 should notify the SEC of its intention to delist. The NGX is also required to consider and dispose of the application within 10 days and notify the SEC when it is approved.

Law stated - 13 January 2025

Timing considerations

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

Timing considerations for private equity transactions are subject to the nature and complexity of the transaction. Specifically, timing considerations would 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 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; and
- the exit time projections.

Sector-specific regulations and approvals also form part of the key timing considerations of such transactions, for instance an approval from the FCCPC in the case of a merger may take between four and 16 weeks, depending on the scope of the merger. The FCCPC also provides for an optional expedited process which takes about three weeks. An approval from the SEC may take two to three weeks while an approval from the NCC may take four to six weeks.

With respect to going-private transactions, a company seeking to voluntarily delist from the NGX is required by the NGX Rulebook to have been listed on the NGX 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 NGX for less than three years will have to factor in this timing requirement with respect to voluntary delisting. The SEC Rules require the NGX 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 and register the proposed bid with the SEC before 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 apply for an extension of this period before the expiration 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 FCCPA, which is enforced by the FCCPC, provides that a merger or a takeover bid shall not be implemented unless it has first been notified to and approved by the FCCPC.

Delays caused by addressing issues such as the rights of dissenting shareholders may form part of the timing considerations in private equity transactions.

Law stated - 13 January 2025

Dissenting shareholders' rights

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 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 a 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.

Law stated - 13 January 2025

Purchase agreements

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 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.

Law stated - 13 January 2025

Participation of target company management

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, the 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.

Discussions on management participation should be held as early as possible to ensure completion is not delayed following deadlocks on compensation issues.

Law stated - 13 January 2025

Tax issues

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 private equity 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 of more than 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. 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. 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.

Stamp duties may also arise on the transaction documents at a flat or ad valorem rate. Investors also need to pay attention to transfer pricing rules when the transaction involves connected entities.

Interest payments are generally (but not wholly) tax deductible. When foreign loans are used to finance a private equity transaction, interest on such loans that have a repayment period (including a moratorium) of two years and above will enjoy certain tax exemptions. Based on the Finance Act 2020 and the Federal Inland Revenue Service (FIRS) Information Circular on the Clarification on Sundry Provisions of the Finance Act 2020, the rate of the withholding tax exemption on the interest could, depending on the tenor of the loan and the moratorium period, be at a maximum of 70 per cent. Importantly, foreign companies resident in countries with which Nigeria has a double tax treaty will be taxed under the terms of the treaty.

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 percent withholding tax. Management fees also incur withholding tax, while carried interest incurs capital gains tax. Where the transaction results in loss of office, compensations for such loss of office are taxable subject to a de minimis rule on 10 million naira and below. Proceeds that accrue from disposal of shares in a Nigerian company is subject to capital gains tax. However, where such proceeds are reinvested in the same company or other Nigerian company, within the same year of assessment, it shall subject to the fulfilment of certain conditions, be eligible for rollover relief or capital gains tax deferral.

Share acquisitions worth 100 million naira or more would be considered assets acquisitions and subject to capital gains tax in special circumstances depending on the timing of reinvestment and the target.

Law stated - 13 January 2025

DEBT FINANCING

Debt financing structures

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?

Loans may be sought to finance a private equity transaction. Such loans may be convertible or non-convertible, senior or subordinated debts.

In practice, some 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 the repatriation of repayments.

The 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 of credit in relation to the acquisition of its shares. There are also restrictions on margin loans with respect to banking institutions and brokerage firms.

Law stated - 13 January 2025

Debt and equity financing provisions

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 some combination of the above. 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, the 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 an investment or loan agreement, share sale and subscription agreement, sale and purchase agreement, and shareholders' agreement.

Law stated - 13 January 2025

Fraudulent conveyance and other bankruptcy issues

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.

Law stated - 13 January 2025

SHAREHOLDERS' AGREEMENTS

Shareholders' agreements and shareholder rights

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:

- engaging in any action that will authorise, create (by reclassification or otherwise), issue or incur any obligation to issue any securities;
- any alteration in share capital;
- acquisitions, disposals, mergers and consolidation, borrowing and giving guarantees or security, or related-party transactions;
- the approval of budgets;
- alteration of the size of the board;
- a change of business plan;
- effecting the sale or purchase of the substantial assets of the company;
- effecting a liquidation; and
- alteration of the constitution.

The agreement may also make provision for breaking deadlocks, and tag-along or drag-along rights.

There is also 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:

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:

- engaging in any action that will authorise, create (by reclassification or otherwise), issue or incur any obligation to issue any securities;
- any alteration in share capital;
- acquisitions, disposals, mergers and consolidation, borrowing and giving guarantees or security, or related-party transactions;
- the approval of budgets;
- alteration of the size of the board;

- a change of business plan;
- effecting the sale or purchase of the substantial assets of the company;
- effecting a liquidation; and
- alteration of the constitution.

The agreement may also make provision for breaking deadlocks, and tag-along or drag-along rights.

There is also statutory protection under 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, or a variation of class rights.
- a reduction of share capital;
- rendering the liability of the directors unlimited; and
- an arrangement or reconstruction on the 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.

Law stated - 13 January 2025

ACQUISITION AND EXIT

Acquisitions of controlling stakes
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 when 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 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.

For transactions covered by the Federal Competition and Consumer Protection Act (FCCPA), there is an obligation to notify the Federal Competition and Consumer Protection Commission (FCCPC) and obtain its approval of the transaction. Transactions resulting in a company establishing direct or indirect control over the whole or part of any company through an acquisition of shares or assets are considered mergers and therefore subject to the approval of the FCCPC. In certain instances, pre-notification enquiries are required to be made to the FCCPC for clearance before the transaction.

For private companies, requirements for the acquisition of control will be governed by the provisions of the articles of association of the company, any shareholders' agreement entered into by the shareholders, investment agreement entered with prior investors in the company and industry-specific regulations.

Law stated - 13 January 2025

Exit strategies

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 pre-emption rights, tag-along rights, restrictions on drag-along rights, and put options. These rights are usually set out in shareholders' agreements, in addition to pre-emptive rights of shareholders in private companies provided in the Companies and Allied Matters Act (CAMA).

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 on the Growth Board of the Nigerian Exchange (NGX), promoters and directors must 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 NGX Rulebook.

Contractual time limitations may be agreed upon concerning 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 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), the firm must determine whether the sale will be considered a merger under the provisions of the FCCPA. As such, it may have to confer with the FCCPC to make such a determination before taking major steps in such a transaction.

Law stated - 13 January 2025

Portfolio company IPOs

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;
- the Securities and Exchange Commission Rules and Regulations;
- the Financial Reporting Council; and
- the NGX Rulebook.

In respect of lock-up restrictions, the Listing Requirements provide that the issuer in respect of an IPO must 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 private equity entity, an institutional investor or the management.

Law stated - 13 January 2025

Target companies and industries

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. The companies were typically within the fast-moving consumer goods, oil and gas, and banking industries.

Transactions involving companies in 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.

Law stated - 13 January 2025

SPECIAL ISSUES

Cross-border transactions

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 private equity (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 a 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 (eg, defence) in which private participation, both local and foreign, is prohibited except with a licence from the federal government.

Law stated - 13 January 2025

Club and group deals

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.

Concerns will 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 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.

Law stated - 13 January 2025

Issues related to certainty of closing

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 private equity 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.

Law stated - 13 January 2025

UPDATE AND TRENDS

Key developments of the past year

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

From a regulatory perspective, the Securities and Exchange Commission (SEC) released an exposure draft proposing amendments to the rules governing private equity funds, which is undergoing review by the SEC following stakeholders inputs. The draft expands the scope of private equity funds to include collective investment schemes in private or unlisted companies, regardless of whether they aim to gain control of the company. The amendment recognises private equity funds that make investments for purposes other than gaining control. Investments guided by a defined strategy and timeline are recognised as private equity. Another key proposal is to exempt private equity fund managers with a target fund of 5 billion naira or less from mandatory registration with the SEC registration. However, these fund managers must submit their governing documents to the SEC and obtain a 'no objection' approval prior to commencing operations. This represents a shift from the current threshold of 1 billion naira.

The draft also proposes changes to the restrictions on private equity funds. In addition to the existing rules – prohibiting solicitation of funds from the general public and limiting investments in a single asset to 30 per cent of the fund's total assets – the new amendments aim for private equity fund managers to maintain a minimum 3 per cent stake in the fund when pension assets are involved, limit total management fees and expenses at 2 per cent of the total amount raised in Nigeria and restrict performance fees to 20 per cent of the total amount raised. These amendments are intended to enhance regulatory oversight while promoting transparency and accountability within the private equity sector.

The SEC Proposed New Rules on the Issuance and Allotment of Private Companies' Securities, permits private companies to issue and trade bonds, debentures, and alternative assets, such as ***sukuk***, through public offers, private placements, or other SEC-approved methods, provided they meet the eligibility criteria in the proposed rules. However, the proposed rules impose restrictions, including limiting the issuance of debt securities to qualified investors – such as institutional investors and high-net-worth individuals; and prohibiting private companies from offering equity securities (shares) to the public under any circumstances, among others.

If implemented, the rules will have the effect of allowing private companies to issue debt instruments like bonds, debentures, and ***sukuk***, through public offers and private placement.

Law stated - 13 January 2025