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# THE MERGERS & ACQUISITIONS REVIEW

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SIXTH EDITION

EDITOR  
SIMON ROBINSON

LAW BUSINESS RESEARCH

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# THE MERGERS & ACQUISITIONS REVIEW

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Sixth Edition

Editor  
SIMON ROBINSON

LAW BUSINESS RESEARCH LTD

# THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

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# CONTENTS

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<b>Editor's Preface</b>	.....xi
<i>Simon Robinson</i>	
<b>Chapter 1</b>	EUROPEAN OVERVIEW ..... 1
<i>Simon Robinson</i>	
<b>Chapter 2</b>	EUROPEAN COMPETITION..... 15
<i>Götz Drauz and Michael Rosenthal</i>	
<b>Chapter 3</b>	EUROPEAN PRIVATE EQUITY ..... 22
<i>Thomas Sacher, Steffen Schniepp and Guido Ruegenberg</i>	
<b>Chapter 4</b>	US ANTITRUST ..... 33
<i>Scott A Sher, Christopher A Williams and Bradley T Tennis</i>	
<b>Chapter 5</b>	US ENERGY TRANSACTIONS ..... 46
<i>Sarah A W Fitts</i>	
<b>Chapter 6</b>	SHAREHOLDERS AND BOARDS OF DIRECTORS IN US MERGERS & ACQUISITIONS ..... 61
<i>George A Casey and Cody L Wright</i>	
<b>Chapter 7</b>	ARGENTINA..... 75
<i>Ricardo W Beller and Agustina M Ranieri</i>	
<b>Chapter 8</b>	AUSTRALIA ..... 90
<i>Nicola Wakefield Evans and Lee Horan</i>	
<b>Chapter 9</b>	AUSTRIA ..... 101
<i>Christian Herbst</i>	
<b>Chapter 10</b>	BAHRAIN..... 113
<i>Haifa Khunji, Jessica Lang Roth and Sumana Abdelkarim</i>	
<b>Chapter 11</b>	BELGIUM..... 129
<i>Koen Geens and Marieke Wyckaert</i>	

<b>Chapter 12</b>	BRAZIL .....	137
	<i>Marcus Fontes, Max Fontes, Paulo de Tarso Ribeiro and Julia Elmôr</i>	
<b>Chapter 13</b>	BRITISH VIRGIN ISLANDS .....	150
	<i>Leonard A Birmingham and Simon Hudd</i>	
<b>Chapter 14</b>	BULGARIA .....	158
	<i>Yordan Naydenov and Nikolay Kolev</i>	
<b>Chapter 15</b>	CANADA .....	168
	<i>Robert Yalden, Ward Sellers and Emmanuel Pressman</i>	
<b>Chapter 16</b>	CAYMAN ISLANDS .....	183
	<i>Wendy L Lee</i>	
<b>Chapter 17</b>	COLOMBIA .....	203
	<i>Sergio Michelsen Jaramillo</i>	
<b>Chapter 18</b>	COSTA RICA.....	217
	<i>John Aguilar Jr and Alvaro Quesada</i>	
<b>Chapter 19</b>	CYPRUS.....	224
	<i>Nancy Ch Erotocritou</i>	
<b>Chapter 20</b>	CZECH REPUBLIC.....	229
	<i>Lukáš Ševčík, Jitka Logesová and Bohdana Pražská</i>	
<b>Chapter 21</b>	DENMARK.....	237
	<i>Henrik Thouber and Anders Ørjan Jensen</i>	
<b>Chapter 22</b>	ESTONIA.....	247
	<i>Anne Veerpalu</i>	
<b>Chapter 23</b>	FINLAND .....	259
	<i>Jan Ollila, Anders Carlberg and Wilhelm Eklund</i>	
<b>Chapter 24</b>	FRANCE .....	269
	<i>Didier Martin</i>	
<b>Chapter 25</b>	GERMANY .....	282
	<i>Heinrich Knepper</i>	

<b>Chapter 26</b>	GREECE ..... 294 <i>Cleomenis G Yannikas, Vassilis-Thomas G Karantounias and Sophia K Grigoriadou</i>	294
<b>Chapter 27</b>	HONG KONG ..... 305 <i>Jason Webber</i>	305
<b>Chapter 28</b>	HUNGARY ..... 314 <i>Péter Berethalmi and Balázs Karsai</i>	314
<b>Chapter 29</b>	INDONESIA ..... 322 <i>Yozua Makes</i>	322
<b>Chapter 30</b>	IRELAND ..... 335 <i>Fergus Bolster</i>	335
<b>Chapter 31</b>	ISRAEL ..... 343 <i>Clifford Davis and Keith Shaw</i>	343
<b>Chapter 32</b>	ITALY ..... 353 <i>Maurizio Bernardi, Roberta di Vieto and Luca Occhetta</i>	353
<b>Chapter 33</b>	JAPAN ..... 366 <i>Hiroki Kodate and Kenichiro Tsuda</i>	366
<b>Chapter 34</b>	KOREA ..... 374 <i>Sang Hyuk Park and Gene (Gene-Oh) Kim</i>	374
<b>Chapter 35</b>	LATVIA ..... 386 <i>Baiba Vaivade and Sabīne Andzena</i>	386
<b>Chapter 36</b>	LITHUANIA ..... 395 <i>Audrius Žvybas</i>	395
<b>Chapter 37</b>	LUXEMBOURG ..... 404 <i>Marie-Béatrice Noble and Stéphanie Antoine</i>	404
<b>Chapter 38</b>	MALTA ..... 417 <i>Jean C Farrugia and Bradley Gatt</i>	417
<b>Chapter 39</b>	MEXICO ..... 427 <i>Aarón Levet V and Alberto Solís M</i>	427

<b>Chapter 40</b>	MONTENEGRO .....	437
	<i>Slaven Moravčević and Jovan Barović</i>	
<b>Chapter 41</b>	NETHERLANDS .....	447
	<i>Onno Boerstra and Guus Kemperink</i>	
<b>Chapter 42</b>	NIGERIA .....	465
	<i>L Fubara Anga</i>	
<b>Chapter 43</b>	NORWAY .....	470
	<i>Ole K Aabø-Evensen</i>	
<b>Chapter 44</b>	PANAMA .....	495
	<i>Julianne Canavaggio</i>	
<b>Chapter 45</b>	PERU .....	503
	<i>Emil Ruppert and Sergio Amiel</i>	
<b>Chapter 46</b>	POLAND .....	514
	<i>Paweł Grabowski, Gabriel Olearnik and Rafał Celej</i>	
<b>Chapter 47</b>	PORTUGAL .....	525
	<i>Rodrigo Almeida Dias</i>	
<b>Chapter 48</b>	ROMANIA.....	535
	<i>Corina G Ionescu and Costin Teodorovici</i>	
<b>Chapter 49</b>	RUSSIA .....	545
	<i>Evgeny Maslennikov and Björn Paulsen</i>	
<b>Chapter 50</b>	SAUDI ARABIA.....	553
	<i>Johannes Bruski and Zeyad Khoshaim</i>	
<b>Chapter 51</b>	SERBIA.....	566
	<i>Matija Vojnović and Vojimir Kurtić</i>	
<b>Chapter 52</b>	SINGAPORE .....	576
	<i>Lee Suet-Fern and Elizabeth Kong Sau-Wai</i>	
<b>Chapter 53</b>	SLOVAKIA.....	587
	<i>Petra Starková</i>	
<b>Chapter 54</b>	SOUTH AFRICA.....	595
	<i>Ezra Davids and Ashleigh Hale</i>	

<b>Chapter 55</b>	SPAIN.....	607
	<i>Christian Hoedl and Javier Ruiz-Cámara</i>	
<b>Chapter 56</b>	SWEDEN.....	622
	<i>Biörn Riese, Eva Hägg and Cecilia Björkwall</i>	
<b>Chapter 57</b>	SWITZERLAND.....	631
	<i>Lorenzo Olgiati, Martin Weber, Jean Jacques Ah Choon, Harun Can and David Mamane</i>	
<b>Chapter 58</b>	TURKEY.....	642
	<i>Tunç Lokmanbekim and Nazlı Nil Yukaruç</i>	
<b>Chapter 59</b>	UKRAINE.....	651
	<i>Anna Babych and Artem Gryadushchyy</i>	
<b>Chapter 60</b>	UNITED ARAB EMIRATES.....	664
	<i>DK Singh and Laena Rahim</i>	
<b>Chapter 61</b>	UNITED KINGDOM.....	675
	<i>Simon Robinson</i>	
<b>Chapter 62</b>	UNITED STATES.....	701
	<i>Richard Hall and Mark Greene</i>	
<b>Chapter 63</b>	UNITED STATES: DELAWARE.....	730
	<i>Rolin P Bissell and Elena C Norman</i>	
<b>Chapter 64</b>	URUGUAY.....	743
	<i>Fernando Jiménez de Aréchaga (Jr), Ignacio Menéndez and Ignacio Mendiola</i>	
<b>Chapter 65</b>	VENEZUELA.....	753
	<i>Guillermo de la Rosa, Juan D Alfonso, Nelson Borjas and Adriana Bello</i>	
<b>Appendix 1</b>	ABOUT THE AUTHORS.....	767
<b>Appendix 2</b>	CONTRIBUTING LAW FIRMS' CONTACT DETAILS...	811

# EDITOR'S PREFACE

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Deal-making has remained on the agenda in the past year, although the first half of 2011 showed a stronger performance than the second half, which saw a significant fall in transactional activity. In the wake of continuing economic uncertainty, opportunities for acquisitions remain limited to companies and institutions on a stable financial footing. At the same time, corporates are beginning to focus on their core business and looking for ways to return value. Valuations remain favourably low for purchasers, and the prospect of striking a bargain makes cross-border M&A attractive for those who can afford it. While access to the loan market has remained difficult, cash-rich corporations have begun to swing the balance in their favour. Shareholder participation and a desire for control and accountability are on the rise, and an atmosphere of increased regulation, reform and austerity is building. We remain in a state of geopolitical flux, and these factors continue to complicate the global economic scenario. The period of widespread unrest in the Middle East and North Africa seems to be reaching a settled conclusion, although the situation in Syria (and possibly Mali and Sudan) is still volatile. A number of countries have seen fresh elections and a transition of leadership, including France and Russia, and a change of leadership in China is expected following the 18th National People's Congress this autumn, when the US presidential elections will also take place. The sovereign debt crisis and the ongoing uncertainty over the fate of the eurozone are further contributing to the lack of confidence in the markets.

All is not doom and gloom, however, and whereas the global picture remains difficult, there are signs of hope. The emerging markets have shown a persistent growth in outbound investment, spurred on by a desire to build a more prominent global presence and for the purpose of accessing new markets. European targets remain of interest to both US and Middle and Far-Eastern buyers. Inbound investment from the emerging markets into both Africa and Australia is on the rise, and this has strengthened activity in the energy, mining and utilities sector. The technology, media and telecoms sector has also shown signs of promise with some high-profile deals, and must be watched with interest in the coming year. There is hope that, as political and economic factors

stabilise, M&A activity will once more gather pace and momentum, and enter a new era of resurgence. We shall see.

Once again, I would like to thank the contributors for their continued support in producing this book. As you read the following chapters, one hopes the spectre of the years past will provide a basis for understanding, and the prospect of years to come will bring hope and optimism.

**Simon Robinson**

Slaughter and May

London

August 2012

## Chapter 42

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# NIGERIA

*L Fubara Anga<sup>1</sup>*

### I OVERVIEW OF M&A ACTIVITY

Nigeria continues to experience a lull in mergers and acquisitions, even though there have been some deals in the past 12 months that are worthy of mention. The most notable deals took place in the banking sector and resulted from regulatory interventions by the Central Bank of Nigeria ('CBN').

CBN policy and regulatory intervention has continued to drive M&A activity in the sector. By the first quarter of 2012, the recapitalisation of five distressed banks through business combinations had been concluded. The acquisition of a controlling stake in GT Assurance by Africa Assur Holdings was also completed early this year. In August 2011, the CBN in conjunction with the Nigeria Deposit Insurance Corporation (NDIC) nationalised three distressed banks (Afribank plc, Bank PHB and Spring Bank). These banks had failed to enter into arrangements with new investors to provide recapitalisation funding. The CBN set up three bridge banks to acquire the assets and liabilities of the trio, which were then sold to the Asset Management Company of Nigeria ('AMCON') for about 679 billion naira, thereby fully recapitalising the banks. In August 2009, the CBN had injected 620 billion naira into eight distressed banks in order to recapitalise them and restore confidence in their operations.

The Nigerian Oil & Gas Industry Content Development Act 2010 seeks to increase indigenous participation in the oil and gas industry. It prescribes minimum thresholds for the use of local services and materials. It is expected that local companies will enter into strategic alliances in order to maximise the opportunities resulting from the Act. Although the merger of AOS and Orwell Oil & Gas International has been consummated, we are yet to see a significant effect of the Act on M&A in the sector. International private equity firms such as Actis, Citigroup Venture Capital International

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<sup>1</sup> L Fubara Anga is a partner at ÆLEX. The author would like to acknowledge Chinyerugo Ugoji for his assistance in preparing this chapter.



(‘CVCI’) and Helios have increasingly been involved in acquisition deals in the textile, banking and telecommunications sectors.

There have also been a number of offshore acquisitions that have had significant effect on the Nigerian market largely because the target has a Nigerian subsidiary. An example is the acquisition by Heineken NV of two holding companies from the Sona Group, which have controlling interests in each of the Sona, IBBI, Benue, Life and Champion breweries.

## **II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A**

The laws that regulate M&A activity in Nigeria are the ISA, the Companies and Allied Matters Act and the Rules and Regulations of the SEC made pursuant to the ISA. Amendments were made to the SEC Rules and Regulations in March 2010. The Listing Requirements of the Nigerian Stock Exchange also contain provisions that have an impact on M&A transactions.

Additionally, there are sector-specific laws that add to the M&A regulatory requirements for the sectors they apply to. For example, the Banks and Other Financial Institutions Act and the CBN Guidelines and Incentives on Consolidation in the Banking Industry are relevant to M&A in the banking sector, the Nigerian Communications Act regulates the telecommunications sector and the National Insurance Commission Act regulates the insurance industry. Pursuant to Section 118(4) of the ISA, the SEC’s approval will still be required even where the approval of the sector regulator has been obtained. The Companies Income Tax Act also requires the consent of the Federal Inland Revenue Service to a proposed merger or acquisition in relation to the capital gains tax payable. Common law will apply to the extent that there is no relevant provision in statute.

## **III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT**

The SEC Rules and Regulations were amended in March 2010. The amendments appear to be aimed at improving corporate governance in public companies and aligning the rules with the ISA, which repealed the Investment and Securities Act 1999. With respect to the rules governing M&A, the new Rules provide that the lower threshold for merger reporting will be 250 million naira. This reduces by 50 per cent the 500 million naira provided as the lower threshold in Section 120(4) of the ISA.

The prescription of the thresholds in the ISA 2007 was a transitional provision, which expired when the SEC prescribed the relevant thresholds in the new Rules. In accordance with the ISA, mergers of a value below the lower threshold are small mergers and do not require prior notification to the SEC. However, the new Rules require that the SEC be informed of small mergers at the conclusion of the merger. They also contain provisions on how the turnover and assets of merging entities should be calculated.

The Rules also provide that the executive directors of market operators must be approved by the Commission prior to their appointment. The SEC is also preparing to issue a new Code of Corporate Governance for public companies.

#### **IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS**

The need to sustain market share in the breweries sector has led to some foreign involvement in M&A transactions. As previously mentioned, a very significant foreign M&A transaction in the 2010/2011 period was the acquisition by Heineken NV of two holding companies from the Sona Group. Heineken has now effectively consolidated the newly acquired breweries into its existing business structure in Nigeria with the recently concluded merger of both companies with Nigerian Breweries plc, a company in which Heineken has a controlling stake. There are also ongoing plans for the offshore acquisition of parent companies of some Nigerian entities in the breweries sector.

Some offshore acquisitions of the parent companies of Nigerian entities were also recorded in the insurance and oil and gas industries. There are also prospects of mergers of medium-sized Nigerian companies with values ranging from \$100 million to \$200 million. In the banking sector, the merger talks between South Africa's second-biggest financial-services company, First Rand Limited and Sterling Bank Plc fell through after the two firms could not agree on terms for the deal. The sources of these investments are Europe, South Africa and Asia (India and China).

Nigerian banks, prior to the global financial crisis, had been very aggressive in expanding their bases, with some banks opening branches in London and acquiring other banks in western Africa, with Ghana being their preferred destination. However, following the illiquidity in the system, the appetite of Nigerian banks for offshore investments has been greatly subdued. No significant offshore investment by a Nigerian bank was recorded in 2010 or 2011.

When the US and European economies officially entered into a recession, many foreign investors liquidated their investments in Nigeria in order to service the cash flow demands they faced in their home countries. This in turn placed a liquidity squeeze on the financial markets in Nigeria. With global constraints on access to credit, there has been very little outbound or inbound investment activity.

#### **V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES**

Market-driven M&A activity is currently at a low level and no industry can be described as very 'hot' at this point in time. Prior to the financial crisis, the hot industries for M&A were the banking and telecoms sectors. However, there has been some M&A activity in the banking sector in 2011 and 2012. The past 12 months have witnessed a flurry of mergers in the banking and financial services sector. Spurred by an ultimatum to distressed banks to either recapitalise or be nationalised, five banks had, as of the last quarter of 2011, signed transaction implementation agreements with potential investors, all of which have now been implemented. So far in 2012, Intercontinental Bank, Finbank, Equitorial Trust Bank and Oceanic Bank have, by way of merger, been

absorbed into Access Bank, First City Monument Bank, Sterling Bank and Ecobank respectively. Also, African Capital Alliance, a Nigerian private equity firm, completed its \$750 million acquisition of the controlling shares in Union Bank of Nigeria.

In compliance with the CBN's directive reversing the universal banking model, GT Bank plc recently divested its holding in GT Assurance Ltd. selling its 67.68 per cent stake in the company to Assur Africa Holdings for 11.91 billion naira.

The pension industry may witness a new wave of consolidations following the recent increase of the capital base of Pension Fund Administrators ('PFAs') from 150 million naira paid up share capital to 1 billion naira shareholders fund by the National Pension Commission ('PenCom'). The increase in share capital is the government's strategy to prevent the sort of crisis that rocked the nation's banking sector. The deadline for compliance has been fixed for 30 June 2012 and many firms may see mergers or acquisitions as the most viable solution in order to meet the deadline and avoid liquidation. In 2010, two PFAs, namely, ARM Pension Limited and First Alliance Pensions & Benefits Limited merged to form ARM Pension Managers.

A recent trend is the buy out of Nigerian minority shareholders by foreign majority shareholders of Nigerian public companies. For example in 2011, companies like Nampak Nigeria Plc and Nigerian Bottling Company Plc have seen their minority Nigerian shareholders bought out by Nampak International, South Africa and Coca-Cola Hellenic Bottling Company, South Africa respectively.

## **VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS**

The relevance of Nigerian banks in the financing of M&A dwindled considerably in the past year owing to the liquidity crisis. Moreover, owing to the high cost of funds locally (the interest rate could be as high as 24 per cent), borrowers prefer to source funds abroad. Private equity continues to be active in Nigeria. As highlighted above, there has been private equity involvement in the banking and finance, textile, telecommunications and oil and gas sectors in the past year.

## **VII EMPLOYMENT LAW**

There have been no recent changes to employment law in Nigeria relevant to M&A. The Labour Act provides, with relevance to M&A, that the transfer of any contract from one employer to another shall be subject to the consent of the worker and the endorsement of the transfer of the contract by an authorised labour officer.

## **VIII TAX LAW**

There have been no recent changes to tax law in Nigeria relevant to M&A. In an M&A context, stamp duty is the relevant tax. Where new share capital is issued, a stamp tax of 0.75 per cent of the value of the newly issued capital is payable to the Stamp Duties Office.

## **IX COMPETITION LAW**

No new competition legislation relevant to M&A was introduced in the past year. Nigeria does not have a competition law but industry regulatory authorities are generally given the power to refuse to grant consent to mergers if they are satisfied that competition in the sector will be significantly reduced as a result. Thus, the SEC will not approve a merger if it is satisfied that the merger will substantially lessen competition in the relevant sector. Other industry-specific regulators also have this power; for example, under the Nigerian Communication Commission's ('the NCC') Competition Practices Regulations 2007, the NCC will review proposed mergers if it determines, based on the preliminary information provided by a licensee in its initial transaction notification, that the transaction may result in a substantial lessening of competition in one or more communication markets, or may result in a licensee or any successor company having a dominant position in one or more communication markets.

## **X OUTLOOK**

It is envisaged that there will be more acquisition deals in the banking industry. With regard to the healthy banks, only a few of them have opted for a non-operational holding company structure under the CBN restructuring plan. It is expected that some of the other healthy banks that have not adopted the holding company structure (those that have opted to dispense with their non-core banking subsidiaries) will be looking to sell their subsidiaries to interested investors.

In the transportation sector, specifically aviation, it is expected that business combinations will occur as a result of the crisis currently rocking the industry in Nigeria. This has been induced by large-scale indebtedness to financial institutions and tighter safety regulations in the industry. It is also anticipated that there will be increased interest from international airlines who may desire to take advantage of opportunities in Nigeria.

In the power sector, the resurgence of the privatisation programme is expected to stimulate some M&A activity in 2011 and 2012. The federal government of Nigeria intends to complete the sale of six generation companies and 11 distribution firms by the first quarter of 2012. The federal government of Nigeria intends to sell 100 per cent of its equity in three of its generation companies and 51 per cent in another; the other two will be concessioned on a long-term basis. Also, between 51 per cent and 70 per cent of its equity interest in the 11 distribution companies will be sold.

## Appendix 1

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# ABOUT THE AUTHORS

### **L FUBARA ANGA**

#### *ÆLEX*

L Fubara Anga heads the banking, finance and transportation practice groups at ÆLEX. He advises on M&A strategy, as well as on financial, corporate and commercial issues affecting projects and companies especially in the oil, gas, electricity, aviation, maritime, banking and financial services sectors.

Mr Anga has been involved in project finance, banking and capital market transactions for several years. He is the immediate past chairman of the Capital Markets Solicitors Association.

He advised the government on the review of the Investment and Securities Act and was a member of the National Committee on the Review of Capital Market Structure and processes.

He was invited to become a member of the Presidential Policy Advisory Committee, where he was a member of the sub-committee on finance and investment. He authored the committee's policy paper on foreign investment and privatisation.

Mr Anga was educated at Yale University and the University of Cambridge. He is admitted to practise in Nigeria, England and Wales, and Ghana.

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