



Mergers & Acquisitions

PRO In-Depth

Mergers & Acquisitions: Nigeria

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22 December 2023

**AELX**

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Introduction

Merger and acquisition (M&A) activities in Nigeria continue to shape the nation's corporate landscape. For private companies, these transactions are primarily structured as share acquisitions through subscription or purchase from existing shareholders. In contrast, acquisitions involving public companies predominantly rely on court-sanctioned schemes of arrangement and schemes of merger pursuant to the Companies and Allied Matters Act 2021. These schemes necessitate the approval of 75 per cent of the shareholders of the affected companies present and voting at the court-ordered meeting, followed by the sanction of the court itself.

Key regulatory oversight for M&A activities in Nigeria is provided by several entities:

- the Federal Competition and Consumer Protection Commission (FCCPC), which is the agency that oversees merger control and antitrust-related matters;
- the Securities and Exchange Commission (SEC), the agency responsible for regulating capital markets and involved in M&A concerning public companies and their subsidiaries;
- the Corporate and Affairs Commission (CAC), the regulatory agency for companies' operations; and
- sector-specific regulators for various industries, such as banking, telecommunications, electricity, and oil and gas, which have their own regulatory bodies that oversee M&A transactions within their sectors.

The FCCPC places an obligation on merging parties to give notice of a merger when the combined annual turnover of the merging entities exceeds stipulated thresholds. This threshold is reached if the combined annual turnover from the previous financial year for the acquirer and target, in or from Nigeria, equals or exceeds 1 billion naira or if the annual turnover of the target entity in or from Nigeria equals or exceeds 500 million naira.

Within the global M&A market, foreign portfolio investment in Nigeria is encouraged, as foreign individuals and companies are generally permitted to invest in all sectors and businesses in Nigeria. However, there are exceptions, notably in sectors related to national security and public interest.

These exceptions include:

- a. the production of arms and ammunition;
- b. the production and sale of drugs and narcotics and other psychotropic substances;
- c. the production of military and paramilitary wares and accoutrements; and
- d. such other items as determined by the Federal Executive Council from time to time.

Other restrictions also apply within industries such as oil and gas and aviation, which require minimum local content thresholds and incentives for Nigerian-controlled companies.

Year in review

i Overview of M&A activity

As 2023 unfolds, M&A activities have encountered challenges stemming from economic and political factors. These challenges included cash shortages earlier in the year, general elections, fluctuating foreign exchange rates, rising inflation and the removal of fuel subsidies, which negatively impacted the economy. However, among these challenges, several significant deals emerged, encompassing both local and cross-border businesses.

A notable transaction occurred in the oil and gas sector, with the acquisition of the Nigerian Agip Oil Company by Oando Plc. This transaction signals potential future acquisitions in the oil industry under the new political administration.

The financial services sector also witnessed some activity with Access Holdings acquiring stakes in other financial services businesses, both within and outside Nigeria. Moreover, the cryptocurrency ecosystem saw its inaugural acquisition, with BlockFinex securing a 100 per cent stake in Fluidcoins, a Nigerian cryptocurrency startup that provides crypto payment experience and infrastructure for African businesses. Although the first and second quarters of 2023 experienced some completed deals, the new government's economic revitalisation plans have instilled optimism, which should foster a favourable environment for M&A transactions in the latter part of the year and beyond.

ii Developments in corporate and takeover law and their impact

Since the enactment of the Federal Competition and Consumer Protection Act in 2019, powers of oversight and approval of M&A transactions are vested in the FCCPC. In the exercise of its powers, the FCCPC has released the following:

- a. the Merger Review (Amended) Regulations 2021, which amend the 2020 Merger Review Regulations and provide a regulatory framework for the notification and review of mergers in accordance with the provisions of the Federal Competition and Consumer Protection Act. They also modify the applicable fees for notifications under the Regulations. Under the amended Merger Review Regulations, merger notification fees are based on the combined annual turnover of the merging entities or on the consideration for the transaction, whichever is higher, and are calculated as follows:
 - 0.45 per cent of the first 500 million naira;
 - 0.4 per cent of the next 500 million naira; and
 - 0.35 per cent of the balance;²
- b. the Guidelines on Simplified Process for Foreign-to-Foreign Mergers with Nigerian Component in November 2019, which serve to bring mergers and acquisitions of foreign entities that would result in a change of control of a Nigerian business under the regulatory purview of the FCCPC; and

- c. the Notice of Threshold for Merger Notification in September 2019, which prescribes the thresholds of annual turnover that would trigger the requirement to give the FCCPC notice of a merger before implementation.

In August 2020, the President of the Federal Republic of Nigeria signed the Companies and Allied Matters Act (CAMA) 2020 into law. CAMA introduced several changes to the practice of corporate law in Nigeria. Some of the changes introduced include the introduction of single-member companies, which allows for the formation of private companies with only one member. Under the Act, small companies can carry on business with only one director and are exempted from the requirement to appoint a company secretary and to hold annual general meetings. CAMA also permits private companies to hold their general meetings electronically.

Under CAMA, the circumstances under which a company is permitted to provide financial assistance for the acquisition of its own shares have been expanded so that financial assistance may be given where there is non-reduction of net assets.³ In cases where net assets are reduced, such assistance should be financed out of distributable profits. Additionally, such financial assistance must be approved by a special resolution of the company. Directors of the company are also required to make a statutory declaration in a form prescribed by the Corporate Affairs Commission.

CAMA also introduced mandatory pre-emption provisions for new share issuances, which will have implications for the transaction timelines for M&A deals and is expected to feature as a mandatory completion condition for transactions that involve in share issuances.

The Securities and Exchange Commission (SEC) published an amendment to its Rules on Mergers, Takeovers and Acquisitions, which is intended to guide its new role in mergers and acquisitions. Among other things, the amendment extends the definition of affected transactions under Rule 1 of the extant rule to cover carve-outs, spin-offs and split-offs of a public company. It stipulates that the SEC's approval must be obtained prior to undertaking any merger involving a public company and its subsidiaries. The obligation to obtain the approval is that of the public company involved in the transaction, whose approval will only be given if the SEC is satisfied that all shareholders are fairly, equitably and similarly treated, and are given sufficient information regarding the transaction. The SEC also published proposed new rules on special purpose acquisition companies (SPACs). Under the proposed rule, among others:

- a. the size of a SPAC IPO may not be less than 10 billion naira;
- b. up to 15 per cent but no more than 20 per cent of the post-issue paid up capital may be held by the promoters;
- c. a minimum subscription size of 25 million naira is prescribed for a SPAC IPO;
- d. to be deemed successful, a SPAC offer must be, at a minimum, 75 per cent subscribed and have at least 50 subscribers; and
- e. no single subscriber may be allotted more than 10 per cent of the post-issue capital.

The proposed rules on SPACs are yet to be finalised and the expectation is that relevant stakeholders will be consulted before the final rules are issued.

To promote the ease of doing business in Nigeria, the Business Facilitation (Miscellaneous Provisions) Act (BFA) was enacted in 2023 and amended 21 relevant business-related legislation to ensure transparency and efficiency in the public sector. The Act made certain notable changes that will affect M&A transactions, including the amendment of Section 142 of the CAMA, which now ensures that the mandatory pre-emption rights will only apply to private companies. Consequently, parties to M&A deals involving public companies will not have to give pre-emption notices to a large number of shareholders, which is typically the case. The

BFA also specified a pre-emption notice period of 21 days (previously, CAMA had only provided that reasonable notice should be given), eliminating ambiguity in determining what constitutes reasonable notice. Furthermore, the standard prescribed by the Financial Reporting Council of Nigeria (FRCN) is now acknowledged as the approved standard for the preparation of financial statements, and companies are no longer required to comply with the form and content set out on the First Schedule to CAMA.

Other changes in the BFA include the change in the definition of share certificates to include certificates issued in electronic form and the timeline for filing a return on allotment has been shortened to 15 days as opposed to the previous one-month requirement. This is mainly relevant to timelines for completing post-completion steps for a transaction. In addition to the powers of the general meeting to increase the issued share capital of a company by allotting new shares, the issued share capital of a company can now be increased by a resolution of the board of directors, subject to conditions or directions that may be imposed in the articles of association or by the company in a general meeting. This amendment offers more flexibility in managing transaction timelines requiring a share capital increase.

Legal framework

The legal framework governing M&A in Nigeria consists of various laws and regulations, including:

- a. the Federal Competition and Consumer Protection (FCCP) Act 2019;
- b. the Merger Review Regulations, 2021;
- c. the Merger Review Guidelines, 2019;
- d. the CAMA 2020;
- e. the Companies Regulations 2021;
- f. the Investments and Securities Act (ISA) 2007;
- g. the Rules and Regulations of the SEC; and
- h. the Nigerian Stock Exchange Rulebook.

The FCCP Act is the primary legislation that regulates mergers and acquisitions in Nigeria. This Act establishes the FCCPC and the Competition and Consumer Protection Tribunal. The FCCP Act will be discussed further in Section III.

The CAMA is also an important piece of legislation that impacts on M&A deals. In addition to the regulation of companies, CAMA includes provisions on share acquisitions, schemes of arrangements and other forms of business disposals. The provisions in CAMA cover, inter alia, schemes of merger, share buybacks by companies, pre-emptive rights of shareholders and financial assistance by companies to shareholders.

The Nigerian Stock Exchange also plays a significant role in M&A involving publicly quoted companies that are required to comply with its listing requirements.

Some sector-specific laws also regulate M&A transactions, including:

- a. the Banks and Other Financial Institutions Act and the Central Bank of Nigeria's Guidelines and Incentives on Consolidation in the Banking Industry, which are relevant to M&A in the banking sector;
- b. the Nigerian Communications Act regulates the telecommunications sector;
- c. the Electric Power Sector Reform Act regulates the electricity sector;
- d. the Petroleum Industry Act 2021 in the oil and gas industry; and
- e. the National Insurance Commission Act regulates the insurance industry

These sector-specific laws operate in addition to the provisions of the FCCP Act, the CAMA, the ISA and the SEC Rules and Regulations. In the oil and gas industry, for example, any M&A activity that would effect a change in the ownership of an oil mining lease, an oil prospecting licence or a marginal field requires the consent of the Honourable Minister of Petroleum Resources.

M&A transactions may also be subject to the provisions of various tax laws, including the Companies Income Tax Act and the Capital Gains Tax Act. The Finance Act 2021, which was passed into law in December 2021, made significant changes to existing tax laws in the country. In addition to legislation, common law applies to the extent that there is no relevant provision in the statutes.

Foreign involvement in M&A transactions

Foreign involvement in M&A transactions has been a critical driver of economic growth in Nigeria. However, in recent times, several factors have affected foreign investments, including uncertainty in the foreign exchange regime, slower economic growth and the emergence of alternative frontier markets. The volatility of the Nigerian naira and difficulties in obtaining foreign exchange have led foreign investors to adopt a more selective approach to Nigerian investments.

The recent government has taken measures to stabilise the foreign exchange regime. Uncertainty as to the value of the naira coupled with recent difficulties in obtaining foreign exchange in Nigeria has made foreign investors focus on Nigerian investments that generate revenue in foreign currency. Because of the depreciation of the naira, Nigerian investments are cheaper for foreign investors. However, there are concerns about viable and profitable exit strategies because of the difficulty in obtaining foreign currency to repatriate capital and profits. Policy uncertainty around foreign exchange management is currently fuelling exits while at the same time limiting the number of fresh foreign investments into Nigeria.

The recently elected Nigerian government has, among its first steps, tried to stabilise the volatile foreign exchange regime by putting some monetary policies in place, such as unifying exchange rates and promising to ensure liquidity and price stability. Despite these concerns, Nigeria continues to attract foreign investment, particularly in sectors generating revenue in foreign currency.

Notable foreign-involvement M&A deals in 2023 include UAE-based cryptocurrency exchange Blockfinex's acquisition of a 100 per cent stake in Fluidcoins, a Nigerian cryptocurrency startup that provides crypto/web3 payment experience and infrastructure for African businesses.

Significant transactions, key trends and hot industries

Some of the notable M&A deals of 2023 involved the startup technology space, which received PE/VC funding, the oil and gas sector, the financial services sector inclusive of banking, insurance and pensions, and the healthcare sector.

In the oil and gas sector, a significant transaction was Oando Plc's acquisition of 100 per cent stake in Nigerian Agip Oil Company Limited from Eni.⁴

In the energy sector, Africa Finance Corporation (AFC), acquisition of 100 per cent shares of Pecan Energies AS (formerly Aker Energy AS) from Aker ASA, a Norwegian Industrial Investment Company, and The Resource Group TRG AS,⁵ while Verod Capital exited Daystar Power Group to Shell Plc.

Key transactions in the financial services sector included Access Holdings's acquisition of a majority stake in Finibanco Angola SA⁶ and Verod announced in July 2023 that it had sold its minority stake in Central Securities Clearing Systems Plc⁷ in a full exit. In September, Fidelity Bank Plc announced that it had completed its 100 per cent acquisition of Union Bank UK, a subsidiary of Union Bank Plc.⁸

Transactions in other sectors include in the logistics sector, Haul247, a platform for connecting businesses to haulage and warehousing assets raised US\$3million in a seed funding round. Moove,⁹ the mobility tech startup supply partner for Uber in EMEA raised US\$16.8 million in financing from Emso Asset Management to aid its UK operations launch. Furthermore, in January, DriveMe, a mobility startup acquired a 100 per cent stake in Go! TwentySix, a valet service provider in Lagos.¹⁰

In the fast-moving-consumer-goods sector, AfricInvest acquired a minority stake in Justrite Superstores, a leading Nigerian family-owned retail department store.¹¹ Furthermore, Aruwa Capital Management invested US\$2million in Fastizers Food, a female indigenous local manufacturer of snack foods and confectioneries in Nigeria.

The cryptocurrency sector also witnessed its first acquisition as Blockfinex acquired a 100 per cent stake in Fluidcoins, a Nigerian cryptocurrency startup that provides crypto/web3 payment experience and infrastructure for African businesses.¹²

Qualified – a technical skills assessment platform – was acquired by Andela, a global job placement network for software developers for an undisclosed figure in March 2023.

Financing of M&A: main sources and developments

M&A transactions in Nigeria are commonly financed with debt or equity, or a combination of both. The cost of locally sourced debt funding for acquisitions is very high, with interest rates as at May 2023 at approximately 18.54 per cent. As a result, the majority of acquisitions in Nigeria are funded using cash reserves while the rest are funded with equity or debt, especially from foreign sources.

Employment law

There have been no recent changes to employment law that are relevant to M&A. The statutes governing this are the Labour Act, the Pension Reform Act and the Personal Income Tax Act. However, it should be noted that as a result of disruptions caused by the covid-19 pandemic, there have been significant lay-offs and redundancies across several sectors. This has led to increased judicial activism, especially at the National Industrial Court.

Tax law

The Finance Act, 2023, which took effect on 1 September 2023, introduced some changes to the existing tax laws. The Capital Gains Tax (CGT) Act was amended to expressly specify 'digital assets' as 'chargeable assets' in respect of which capital gains tax can arise upon disposal. The intention of this amendment is to avoid any doubt regarding the taxation of the gains accruing to a person on the transfer of digital assets under an M&A deal. Furthermore, the amended CGT Act now allows for capital losses on the disposal of chargeable assets to be deducted from chargeable gains arising from the disposal of assets of the same class, and any unutilised capital loss can be carried forward for a maximum of five years.

Furthermore, the Finance Act, 2021, which took effect in January 2022, introduced some changes to the existing tax laws. The CGT Act was amended to remove the CGT exemption on the sale of shares. By virtue of the amendment, the gains accruing to a person on disposal of shares in any Nigerian company are now subject to CGT at the rate of 10 per cent, except in limited circumstances. Before the Finance Act 2021, a disposition of shares did not attract capital gains tax. The exceptions to the requirement to pay CGT are where:

- a. the proceeds from the sale of shares are reinvested for the purchase of shares in the same or any other Nigerian company within the same year of assessment. The portion that is not reinvested will remain subject to CGT;
- b. the proceeds from the disposal are, in aggregate, less than 100 million naira in any 12 consecutive months, provided that the person making the disposal renders appropriate annual tax returns; and
- c. the shares are transferred between an approved borrower and lender in a SEC-regulated securities lending transaction.

Competition law

The Federal Competition and Consumer Protection Act received presidential assent in early 2019. The Act aims to promote competition, curb restrictive trade practices and protect the interests of consumers. The Act establishes the FCCPC, which is now responsible for the approval of M&A. The Act divides mergers into small and large mergers and gives the FCCPC the power to determine the threshold of annual turnover to determine what constitutes a small and large merger. In the exercise of this power, the FCCPC issued the Notice of Threshold for Merger Notification, which prescribes that the FCCPC shall be notified of a merger, if, in the preceding financial year, the entities involved had a combined annual turnover of 1 billion naira or more. Alternatively, the FCCPC must be notified if the annual turnover of the target entity in the preceding financial year was 500 million naira or more.

The FCCPC launched its online portal for merger notifications and pre-notification consultations in October 2021. In addition to receiving merger notifications via the portal, the FCCPC publishes non-confidential summaries of notifications that have been completed, which are accessible to the public. The introduction of the online filing system has certainly simplified the process for making submissions.

In February 2023, the FCCPC executed a Memorandum of Understanding (MOU) with the Egyptian Competition Authority (ECA) in furtherance of its mandate to enhance competition law on the continent.¹³ This MOU is intended to address crucial issues and seek to progress both agencies through joint investigation, capacity development and sharing of information and experiences to ensure consumers and businesses derive the protection and benefits that are inherent in the economic expansion that this engagement enhances.

The FCCPC has also taken up an active role in regulating and registering Digital Money Lenders (DMLs) under the Inter Agency Joint Task Force's Limited Interim Regulatory/Registration Framework and Guidelines for Digital Lending 2022.¹⁴ All DMLs are required to register and complete their compliance requirements to avoid the risk of being delisted and removed from the Google Playstore. This has added a layer of regulatory scrutiny to acquisitions in the Nigerian digital lending industry.

Outlook and conclusions

Despite the challenges faced in 2023, Nigeria's M&A landscape is poised for transformation. The new government's commitment to revitalise the economy, to put into place regulatory reforms and to attract foreign investment promises a bright future for M&A transactions. Continued activity in sectors such as technology, finance, consumer goods and energy makes Nigeria an enticing destination for M&A in the foreseeable future. As Nigeria navigates economic and political shifts, M&A practitioners should stay attuned to evolving regulations and market dynamics, positioning themselves for success in this dynamic environment.

Footnotes

¹ Lawrence Fubara Anga, SAN is a partner, and Edidiong Antai and Al-Ameen Sulyman are associates at ÁELEX.

² Note that prior to the Merger Review (Amended) Regulations 2021, merger notification fees based on combined annual turnover were calculated as follows: (1) 0.3 per cent of the first 500 million naira; (2) 0.225 per cent of the next 500 million naira; and (3) 0.75 per cent of the balance, where fees were based on combined annual turnover or 0.15 per cent of the balance where fees were based on consideration.

³ Section 183 Companies and Allied Matters Act 2020.

⁴ Oando, 'Oando Plc Announces Agreement With Eni For The Acquisition Of 100% Of The Shares Of Nigerian Agip Oil Company Limited' (4 September 2023) https://www.oandopl.com/press_release/oando-plc-announces-agreement-with-eni-for-the-acquisition-of-100-of-100-of-the-shares-of-nigerian-agip-oil-company-limited/ accessed 25 September 2023.

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⁶ Chris Ugwu, 'Access Bank gets approval for majority stake acquisition in Finibanco Angola' (Nairametrics, May 2023) <https://nairametrics.com/2023/05/03/access-bank-gets-approval-for-majority-stake-acquisition-in-finibanco-angola/#:~:text=Access%20Holdings%20Plc%20disclosed%20last%20year%20that%20its,had%20previously%20granted%20its%20approval%20to%20the%20transaction.> accessed 25 September 2023.

⁷ Verod, 'Verod exits CSCS Nigeria' (AVCA, 16 July 2023) <https://www.avca.africa/news-insights/member-news/verod-exits-cscs-nigeria/> accessed 25 September 2023.

⁸ *The Guardian*, 'Fidelity completes 100% acquisition of Union Bank UK' (*The Guardian*, 14 September 2023) <https://guardian.ng/business-services/fidelity-completes-100-acquisition-of-union-bank-uk/> accessed 25 September 2023.

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¹¹ Africinvest, 'AfricInvest Fund IV invests in Justrite, a leading Nigerian retail store, to support footprint Expansion' (AfricInvest, 16 January 2023) <https://www.africinvest.com/news-and-media/news/africinvest-fund-iv-invests-in-justrite-a-leading-nigerian-retail-store-to-support-footprint-expansion/> accessed 25 September 2023.

¹² Johnstone Kpilaakaa, 'How Fluidcoins acquisition will enable Nigerian-led crypto exchange Blockfinex' (Benjamin Dada, 17 February 2023) <https://www.benjamindada.com/blockfinex-acquires-fluidcoins/> accessed 25 September 2023.

¹³ RELEASE-FCCPC-ECA-MoU.pdf.

¹⁴ FCCPC, 'The Status of Registration of Fintech/Digital Companies with FCCPC on the Limited Interim Regulatory/Registration Framework and Guidelines for Digital Lending 2022' The Status of Registration of Fintech/Digital Companies with FCCPC on the Limited Interim Regulatory/Registration Framework and Guidelines for Digital Lending 2022 - Federal Competition & Consumer Protection Commission 4 August 2023) accessed 25 September 2023.