OVERVIEW

Being a volatile ecosystem, susceptible to external shocks and global uncertainties, not the least because it is a mono-economy determined mainly by oil revenues, the Nigerian economy has come under additional strain on account of the COVID-19 pandemic, presenting an uncertain outlook for many businesses.

In broad terms, given the general economic slowdown occasioned by the spread of the coronavirus and the extraordinary measures put in place by governments across the world in order to contain the virus and prevent its spread, different businesses and industry sectors are likely to be impacted in one form or the other. Quarantines, travel restrictions, disruption in global supply chains and the volatility of global markets will impact a broad spectrum of industries, including the private equity (PE) industry. The general expectations are that deal activity will slow down considerably, valuation of target companies will be impacted, more deals will feature liquidation preferences and other investor-friendly terms, and investments made on projections which are no longer feasible will be impacted.

In this paper, we examine the overall impact of the COVID-19 pandemic on the PE industry, particularly in Nigeria, and we provide key legal insights that stakeholders at different ends of the value chain need to keep in mind for the immediate future, including the impact of the pandemic on the key aspects of PE - fundraising and investments.
FUNDRAISING

On the fundraising side, the effects of the economic slowdown brought on by COVID-19 will likely be seen in PE both for ongoing fundraising and new fundraising efforts.

New Fundraising

PE funds are likely to confront and navigate a number of issues in the coming months as their capacity and appetite to invest is largely tied to their ability to pool resources from their limited partners (LPs) - investors who commit capital to them, including institutional and strategic investors, pension funds, family offices and high net worth individuals (HNIs).

A glimpse at a survey conducted by the Africa Private Equity and Venture Capital Association (AVCA) on the impact of COVID-19 on the African PE industry suggests, inter alia, that most general partners (GPs) expect funding from LPs to be impacted at about 67%. We have also seen a number of HNIs across the world, including Nigeria, committing significant sums of money into relief efforts for COVID-19, hence, it is reasonable to anticipate that there will be a limited pool of funds that GPs may be able to raise funds from. However, given the changing economic landscape, PE funds may likely shift their fundraising and investment objectives to address new opportunities, particularly in industries that have proven resilient amidst the current crisis or those that rebound quickly thereafter.
Ongoing Fundraising

For ongoing fundraising efforts, we also expect that there will be significant impact. In view of the global economic slowdown, there is a good chance that some of the funds may not eventually close while others may take a longer period to close. However, given the impact of the pandemic on different sectors, we envisage that fundraising efforts focused on resilient sectors, such as healthcare, telecommunications, technology, etc., will close faster than others. For sector-agnostic funds that have secured core investors before the current crisis and are seeking additional investors, such funds are also expected to close, though at a slower pace.

With particular reference to pension funds, we expect that every investment in the PE market will need to be carefully analysed. With a relatively more stable economy in 2019, Nigerian pension fund administrators (PFAs) invested about 71% of the N9.9 trillion total pension assets in Federal Government securities with another 28% in state government and corporate bonds, and about 0.03% in PE investments. However, with the monetary policies recently adopted by the Central Bank, it is expected that investments in Federal Government securities by PFAs will witness a downward trend from which the PE industry would likely benefit. Additionally, the economic downturn and the consequent slowdown on secondary markets are factors that we expect would drive increased interest of PFAs in PE investments.

INVESTMENTS

PE transactions in Nigeria are typically in the form of venture capital investments, growth capital, buyouts and mezzanine financing and the more common structures for these transactions often involve the acquisition of shares (through subscription or transfer from existing shareholders), quasi-equity instruments and, more recently, debt.

1. See https://nairametrics.com/2019/12/01/pfas-invest-71-4-total-assets-in-fg-securities/
In recent times, there have been very considerable PE investments in Nigeria, with PE deals rising as high as N277 billion between January and March 2019. At the end of 2019 and crossing over into 2020, the general projections by analysts was that bullish investor sentiment will be witnessed in Q1 2020 - likely to be driven by early positioning on the part of investors seeking investment in stocks with high-yield dividends. Additionally, following declining yields on fixed income instruments, investors were expected to look the way of investment in stocks in the short term.

With the spread of COVID-19 and the consequent economic slowdown, amid rising exchange rates and interest rates, there are certain investment considerations that fund managers would want to bear in mind, depending on whether a proposed investment is already in the pipeline or a new investment, while the relationship with portfolio companies would be impacted significantly.

Transactions in the Pipeline

For ongoing transactions, depending on the stage where negotiations are currently at, there are a number of factors and considerations that would apply. Deals in the preliminary stages of negotiations may slow down, pause or come to an abrupt end. In other transactions, where preliminary documentation has been executed (i.e. term sheets, transaction implementation agreements etc.) with commonly binding provisions, such as exclusivity, non-solicitation, and confidentiality, there is likely to be some level of interference and disruption. Completion dates based on projected timelines may no longer be feasible. Exclusivity periods, if any, may also need to be extended.

Fund managers may need to consider if the business case forming the basis of a proposed investment still exists or remains valid, whilst also revisiting the valuation methodology for such investments. PE investors may need to consider taking a minority stake in the first instance, with terms allowing them to increase their stake as events pan out. In addition, the inclusion of Material Adverse Effect or Material Adverse Change (MAE/MAC) clauses should be considered as well as liquidation preference provisions.

Some additional legal issues also need to be borne in mind in view of the present realities, a key issue being that significant adjustments may need to be made in the due diligence process for transactions. A risk-based approach to due diligence becomes very critical for investors looking to invest in sectors that have been directly or indirectly affected by the pandemic. Some of these key sectors include travel and hospitality, tourism, retail, oil and gas, supply chains, transportation etc.

In the due diligence process, potential buyers should pay closer attention to more granular pieces that directly impact on the target’s business. Obligations under existing contracts must be carefully reviewed, especially the extent of the obligations, the scope of the force majeure clauses (where any), etc.  

For transactions where binding agreements have been executed but which may require regulatory approval, shareholder approvals, third-party consents or satisfaction of other conditions precedent, the processes for fulfilling such conditions may be affected as well, thereby triggering the exercise of some contractual rights and remedies. Notably, the lockdown has impacted on the ability of companies to convene to approve transactions, as well as the ability of key regulators such as the Securities and Exchange Commission (SEC) and Federal Competition and Consumer Protection Commission (FCCPC) to review and approve transactions. It may be necessary also, on the part of the target, to make certain disclosures at closing (e.g. in light of MAC provisions), due to circumstances which have emerged following the signing of transaction documents.

Transactions that have closed but are subject to post-closing adjustments, payments, or transitional services agreements (e.g., payroll, subleasing, accounting, customer relationship management), may also be impacted in the current circumstances requiring the parties to position themselves differently than they might have in less disruptive times.

**New Investments**

As the economic climate continues to evolve, we expect that PE companies will likely delay the acquisition of new portfolio companies and look to make strategic investments in new markets, jurisdictions or asset classes instead. For new investments, the legal considerations previously highlighted in relation to pipeline transactions are also relevant and will need to be borne in mind all through the process.

---

For companies looking to raise capital - either in form of venture capital or other forms of PE investments, we expect significant delays and increased transaction timelines and costs. With travel and movement restrictions in most countries in the world, delays in capital raising efforts are inevitable. Among other things, the lack of in-person meetings is likely to slow down sourcing and due diligence considerably. Further, the mandatory work-from-home policies that many organisations have been forced to adopt could also delay investors’ investment committee meetings and internal diligence processes. Also, appropriate mechanisms will need to be put in place to hedge possible risks associated with foreign currency fluctuations, dwindling oil prices and a Nigerian economy that is likely to be unstable in the months after the COVID-19 pandemic.

An overarching concern for companies seeking to raise capital is the fact that most PE firms are likely to be focused on keeping their current portfolio companies afloat, rather than sourcing new opportunities.

However, it is not all doom and gloom. Analysts have predicted that long term, after the COVID-19 pandemic passes over, PE can be the biggest winner. The reasoning is that fund managers have vast pools of capital at their disposal and will be on the lookout for assets in resilient sectors that are either less likely to be affected adversely by the pandemic (e.g. technology, telecommunications, and business services), or where its impact can at least be quantified. However, there will be a premium for stability above growth and it is likely to take some time before PE firms begin to search for opportunities in manufacturing industries with complex, international supply chains and other sectors significantly impacted by the pandemic.5

Overall, we expect that COVID-19 would impact deal structures going forward. Apart from PE investors being very conservative with valuations, it is expected that MAC clauses and liquidation preference provisions would feature more regularly in PE documentation. COVID-19 may also create in investors, preference for completion accounts over the locked box mechanism or fixed price, in determining consideration. Generally, one may also envisage the advent of more investor-friendly terms in transaction documentation in the post COVID-19 era.

Portfolio Companies

Current portfolio companies will likely experience serious economic carnage stemming from the COVID-19 fallout. Accordingly, for portfolio companies to stay afloat during this period, it is important that good investor relations are maintained. Regular communication and information sharing between the PE firms and their portfolio companies becomes more critical now more than ever. It is important that portfolio companies communicate adequately and in timely fashion on how the pandemic is impacting on their business and the kind of support that will be required, especially where additional capital or credit, or certain waivers or consents need to be procured in order to keep the business afloat.

Besides providing finance and liquidity, PE firms may also provide support to their portfolio companies in providing strategic direction during this crisis, assisting with business continuity processes for companies with less contingency plans, workforce planning and structuring, cybersecurity, operations and supply chain, among other areas.\(^6\) Notwithstanding the impact of COVID 19 on the sector a portfolio company operates in, PE investors may be required to extend the term of their investment to accommodate more time to realize the value on their investments.

**STRATEGIC ACTION BY PE FIRMS**

For fund managers, who are a very important part of the ecosystem, it has been advised that a number of key steps should be taken to mitigate the impact of COVID-19. First, recapitalisation and the implementation of capital calls to help mitigate against funding constraints, in line with the provisions of shareholders agreements and fund documents, may be advisable. Second, a review of currently existing staffing arrangements and employer obligations of portfolio companies should be conducted, as well as rent relief measures and arrangements with key suppliers for the business, in form of flexible payment terms in exchange for other future commitments, etc. Now may also be a useful time to utilise credit lines and draw down on working capital facilities in advance of immediate need.\(^7\)

Additionally, for Nigerian-registered fund managers, it is important that notwithstanding the COVID-19 pandemic, the right structures are in place to ensure their ability to meet reporting and compliance obligations to SEC (i.e. submission of quarterly returns, annual report of the fund to the SEC and semi-annual reports to investors) and other relevant regulatory bodies are not hampered.

---


\(^7\) See “COVID-19 | 6 Key Actions for PE Fund Managers” by Ricky Casali, Glen Sauer and Chris Allen – MinterEllison; available at https://aic.co/AIC/Articles/News/COVID-19-6-Key-Actions-for-PE-Fund-Managers.aspx
CONCLUSION

COVID-19 will inevitably change the way business is done forever. The effects of the global economic downturn and the extent of the impact on different stakeholders in the PE industry will become clearer in the coming months. While the prospects for many companies may look bleak now and for a few months, we expect that the global economy will bounce back and eventually stabilize. We also expect deal activity to pick up eventually. In the meantime, it is important that players in the PE industry assess the possible extent of damage that they may face and put in place pragmatic measures, first to mitigate the negative effects of the pandemic on their portfolio companies and potentially, to capitalize on the investment opportunities that present themselves in the period following COVID-19.

In the meantime, you can keep up to date with the ongoing COVID-19 related developments and their legal implications on our dedicated COVID-19 Resource Centre.

For further information, please contact:

**Anu Balogun**
Partner  
+234-1-2702551 Ext 2609  
abalogun@olaniwunajayi.net

**Comfort Agboola**  
Senior Associate  
+234-1-2702551 Ext 2612  
cagboola@olaniwunajayi.net

**Rilwan Shittu**  
Associate  
+234-1-2702551 Ext 2649  
rshittu@olaniwunajayi.net