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COMMERCIAL & ENERGY LAW PRACTICE

SHARE SALE VS ASSET SALE: THE DEAL STRUCTURE DECISION THAT CHANGES EVERYTHING IN NIGERIAN M&A

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ABSTRACT

In Nigerian M&A, a business may be sold either by transferring the shares in the company that owns it or by transferring a defined package of assets and, where agreed or imposed by law, liabilities. That choice is not just documentary. Under the FCCPA 2018,[1] a merger can arise through the acquisition of shares, interests or assets, as well as by amalgamation or joint venture; under CAMA 2020,[2] share transfer mechanics are formal and register-based; employee transfer issues in an asset deal can engage section 10 of the Labour Act; and any movement of customer, employee or user data must be tested against the Nigeria Data Protection Act 2023[3] and the NDPC's General Application and Implementation Directive 2025 ("GAID").[4] For cross-border deals, the Nigerian angle matters even where signing happens offshore, because FCCPC guidance expressly reaches shares in Nigerian companies, domestic businesses, local IP, local plant and equipment, and foreign companies selling goods or services into Nigeria.

1. STRUCTURE IS A RISK-TRANSFER MODEL, NOT A LABEL

Boards often treat structure as something lawyers tidy up after commercial terms are agreed. In reality, structure is one of the commercial terms. It determines whether the buyer is taking the target as a going legal entity with its history attached, or building a new business perimeter around selected assets and negotiated liabilities. In Nigeria, that decision can also determine whether merger notification is required before implementation, whether standstill obligations will delay closing, and whether employee, data and regulatory issues become closing conditions rather than post-signing housekeeping.

That is why a sensible board-level discussion asks five questions early: where historical risk should sit; what approvals are needed; how much operational disruption can be tolerated; how much value may leak through tax and separation costs; and whether the business can function seamlessly on Day One after completion. Nigerian law does not treat these questions as abstract.

The FCCPA threshold notice and merger framework, the Labour Act's transfer rule, and the NDPA's data-processing and transfer obligations all turn structure into a timing, risk and execution issue.

2. THE TWO STRUCTURES AT A GLANCE

SHARE SALE

In a share sale, the buyer acquires the shares in the target company. Under CAMA 2020,[5] the transfer is by instrument of transfer, the company may not register the transfer without a proper instrument, the transferor remains the holder until the transferee is entered in the register of members,[6] the articles may impose restrictions, and a refusal to register must be notified within two months.[7] The commercial consequence is broad continuity: the company remains the same legal person, so its contracts, licences, employees and liabilities generally stay where they already sit, subject to change-of-control clauses in material contracts and finance documents, and to consent or notification

requirements attached to regulated licences, which can still disrupt practical continuity even though legal ownership of the entity is unchanged. What changes is ownership of the shares.

That continuity is the share sale's main attraction. It is also its main danger. The buyer gets the business more intact, but also acquires the company with its compliance history, disputes, tax exposures and operational baggage. In Nigeria, a share sale is therefore often preferred where continuity matters most, but it is not immune from merger-control, change-of-control or regulatory review. FCCPA section 92 is broad enough to treat an acquisition of shares or control as a merger in the right circumstances.

ASSET SALE

In an asset sale, the buyer does not buy the corporate vehicle. It buys a perimeter: selected assets, and selected liabilities if they are expressly assumed or otherwise follow by law. The FCCPA makes clear that a merger may be achieved through the purchase or lease of shares, interests or assets, and the FCCPC Merger Review Guidelines expressly identify shares in Nigerian companies, domestic businesses, local IP, and local plant and equipment as covered acquisitions in the appropriate case.

The commercial appeal is selectivity. The buyer can aim at the valuable business components and leave behind non-core assets or unwanted legacy exposure. But that selectivity comes with more transfer mechanics: contract transfer, employee migration, permit portability, data transfer, and separation planning. In practice, asset sales are often more execution-sensitive precisely because the buyer is moving a business rather than merely acquiring the company that already owns it.

3. WHAT TRANSFERS, AND WHERE DEALS BREAK IN PRACTICE

LIABILITIES

In a share sale, historical liabilities stay inside the company and therefore pass to the buyer economically with the shares. In an asset sale, the general starting point is that liabilities stay with the seller unless assumed but this is only the starting point, and not a rule the parties can draft around in every case. Certain liabilities can follow the business itself rather than the seller entity: by statute (e.g. specific successor-liability provisions), by regulatory condition attached to an approval, through tax treatment (such as joint-and-several exposure in some tax contexts), or under a successor-liability analysis a court may apply regardless of contractual allocation. Nigerian law does not let parties draft around every statutory consequence. Employment transfer issues, data compliance obligations, and regulatory conditions can still follow the business activity or the transfer steps. That is why an asset sale can produce the illusion of a clean exit without always delivering one.

CONTRACTS

A share sale usually preserves contracts more easily because the contracting entity remains the same. The real contractual issue in a share sale is not assignment but change-of-control: termination rights, pricing resets, consent clauses, and lender controls. In an asset sale, the problem is sharper. The buyer often needs assignments or novations, and key counterparties acquire leverage over the timetable. Where an important contract is governed by English law, as is common in cross-border financing and technology licensing arrangements, anti-assignment language must be read under that governing law. Linden Gardens Trust Ltd v. Lenesta Sludge Disposals Ltd[8] remains a useful comparative English authority for the proposition that transfer restrictions are capable of real effect and are not

mere boilerplate. It is not Nigerian law and does not govern contracts silent on choice of law or governed by Nigerian law, where the analysis should proceed under ordinary Nigerian contract principles on assignment and privity.[9]

IP AND TECHNOLOGY

In a share sale, the key question is usually ownership: does the target actually own the software, trade marks, domain names, databases, inventions and know-how on which the valuation depends? Founders' assignments, contractor clauses, open-source usage and related-party tech arrangements matter enormously. In an asset sale, the issue becomes transfer mechanics as well as ownership: what exactly is being assigned, what licences are needed, and what remains stranded in the seller. The FCCPC Guidelines underline the importance of this by expressly treating local intellectual property as property within Nigeria for merger-review purposes.

DATA AND PRIVACY COMPLIANCE

Data is now a core deal asset in many Nigerian transactions, especially in fintech, healthtech, e-commerce, media, logistics and platform businesses. The NDPA 2023 makes the analysis more disciplined than many deal teams assume. Personal data must be processed fairly, lawfully and transparently, for specified purposes, with appropriate security and accountability. Before collecting directly from a data subject, the controller must provide specified information, including the lawful basis, purposes and recipients. Where processing is likely to result in high risk to rights and freedoms, a data privacy impact assessment is required before processing. These obligations now sit within a firmer operational framework. The NDPC's General Application and Implementation Directive 2025 ("GAID"), effective from 19 September 2025, replaced the earlier NDPR as the operative implementing instrument[10] and sets out more detailed, binding requirements on DPIA methodology,[11] the form and content of data processing agreements,[12] compliance documentation and audit returns,[13] and the permitted bases and recordkeeping for cross-border transfers.[14] Deal teams should treat GAID compliance, not just NDPA compliance in the abstract, as part of the data-protection diligence and closing checklist for 2026 transactions, since it is now the primary source of practical guidance the NDPC will apply.

That matters in both structures. In a share sale, the controller often remains the same legal entity, so operational continuity may be easier; but data-room disclosure, buyer access, integration planning and post-closing analytics still need a lawful basis, security controls and proper records. In an asset sale, the difficulty is often greater because customer or employee data may move to a different legal entity. If data will be transferred outside Nigeria, section 41 of the NDPA requires adequate protection or another permitted basis, and the controller or processor must record the transfer basis. Cross-border buyers used to UK practice will recognise the same practical questions the ICO raises in M&A due diligence: what data is moving, why it was originally collected, what lawful basis supports sharing, how transparency is maintained, and how security risk is managed.

EMPLOYEES

Employee continuity is one of the clearest places where Nigerian law diverges from the UK model. In a share sale, the employing entity usually remains the same, so employment continuity is ordinarily easier in practical terms. In an asset sale, that assumption is unsafe. Section 10 of the Labour Act provides that the transfer of a contract from one employer to another is subject to the worker's consent and the endorsement of the transfer by an authorised labour officer. That is a fundamentally different framework from the UK's TUPE regime, which is built around a statutory transfer model.

There is an additional Nigerian nuance that good M&A lawyers should show on the page: the Labour Act

definition of "worker" is not unlimited. It covers manual and clerical workers, but excludes, among others, persons exercising administrative, executive, technical or professional functions. So in a Nigerian asset deal, the employment workstream is often split. For Labour Act "workers", section 10 is central. For more senior or professional staff outside that definition, the analysis becomes more contract-specific and may require separate consent, resignation-and-rehire, termination, benefits continuity and retention planning.

The FCCPA adds a second employee lens. In line with Section 96(3) of the FCCPA, in a large merger the primary acquirer and target must each provide the merger notice to relevant trade unions or, if there are none, to the employees or their representatives, consistent with current FCCPC merger notification materials. This obligation is tied to notifiability, it does not arise for every change of control, only for a merger that clears the applicable threshold. The Act also requires the Commission to consider public-interest factors including employment, a particular industrial sector or region, the ability of national industries to compete internationally, and the competitiveness of SMEs. In Nigeria, then, employee risk is not just an HR or labour issue; in some deals, it is part of the merger-control analysis itself.

LICENCES, PERMITS AND APPROVALS

A share sale often preserves the licensed entity, which can make continuity easier. But that should never be confused with a universal exemption from approvals. If FCCPC thresholds are met, notification may still be required before implementation, and the Merger Review Regulations allow a party that is uncertain whether a transaction is a relevant notifiable merger to seek negative clearance. The FCCPA also contemplates concurrent and coordinated jurisdiction with other regulators in regulated industries.

In an asset sale, the licensing issue can be more severe because the holder of the licence may change entirely. Some permits can be reissued, some assigned with consent, and some require a more elaborate approval path. The cross-border lesson is straightforward: Nigerian approval risk is not always confined to a local signing step. It can sit inside the structure itself.

REAL ESTATE

Real estate often looks secondary until it delays completion. In a share sale, the tenant or landholding entity may remain unchanged, which can reduce friction. In an asset sale, leased premises, fit-out arrangements, landlord consents, deposits, access rights and site dependencies need separate attention. In carve-outs, that workstream frequently determines whether the business can actually operate on the Monday after closing.

LITIGATION AND COMPLIANCE HISTORY

In a share sale, litigation, investigations, compliance weaknesses and unresolved disputes remain inside the target. In an asset sale, some of that can be ring-fenced, but only to the extent the perimeter is properly drafted and the law allows it. This is also why accuracy of disclosure matters beyond private claims between buyer and seller: under section 99 of the FCCPA, the Commission may revoke its approval if it was based on incorrect information, obtained by deceit, or if a party breaches an obligation attached to the approval.

4. PRICE IS NOT THE PRICE: ECONOMICS, TAX AND VALUE LEAKAGE

The headline price is rarely the economic result. In practice, value leakage in Nigerian deals often comes from four places: tax, failed or delayed consents, separation and transition cost, and regulatory timing. A share sale and an asset sale may produce the same headline enterprise value while leaving the seller with very different net proceeds once the parties price in

permit migration, employee re-papering, transitional services, data remediation, landlord consents and closing delay.

Tax is part of that analysis, but it should be handled as a modelling exercise rather than a slogan. No serious board should assume that "asset sale means cleaner" or "share sale means cheaper" without transaction-specific tax input. The right point for a commercial article is simply this: structure can change the tax result materially, and tax should be modelled before price is treated as fixed.

Cross-border parties should also remember that the Nigerian merger-control question is not avoided simply because the deal is global. FCCPC guidance states that the merger provisions apply to foreign companies, even if not registered in Nigeria, where they produce goods and services sold into Nigeria, but this is subject to the same two-part test as any other merger: the control element and the turnover/notifiability threshold.[15] A foreign company selling into Nigeria is not automatically captured; it is captured only where the transaction meets the threshold and involves a qualifying change of control. The same guidance identifies foreign-to-foreign mergers with limited Nigerian presence as a category that may be eligible for expedited review, which is helpful, but still confirms that the Nigerian analysis has to be done.

5. LIABILITY ALLOCATION TOOLKIT: HOW THE STRUCTURE CHANGES THE PAPERWORK

Structure is not just a risk-allocation choice, it dictates the shape of the transaction documents themselves.

In a share sale, the SPA is usually history-heavy. The buyer is buying the company with its operating past, so warranties and indemnities focus on accounts, tax, litigation, employment, compliance, material contracts, data protection, sanctions, anti-bribery, title to shares and IP ownership. Disclosure becomes central because it reshapes what risk remains actionable after closing.

In an asset sale, the agreement becomes perimeter-heavy. The real drafting burden shifts to identifying purchased assets, excluded assets, assumed liabilities, excluded liabilities, transfer instruments, employee schedules, contract consents, IP assignments, property mechanics and any transition services. The question is not only "What risk sits inside the company?" but "What exactly is moving, what is staying, and what must be done to make the purchased business operable?"

The commercial tools remain familiar in either structure: caps, baskets, survival periods, escrow, holdback and specific indemnities. But they are used differently. In a share sale, indemnities often target identified legacy risk that remains inside the company. In an asset sale, they are often used to police the boundary between assumed and excluded liabilities.

Pre-closing covenants also need to be drafted with Nigerian merger control in mind. The FCCPC Guidelines distinguish between legitimate integration planning and unlawful implementation before approval. In notifiable deals, parties should avoid behaving as though the merger has already happened while approvals are still pending.

6. ASSIGNMENT VS NOVATION: WHY THE DISTINCTION DRIVES EXECUTION RISK

This distinction deserves its own section because it is where many asset deals quietly unravel.

An assignment ordinarily transfers the benefit of a contract. It does not, by itself, relieve the seller of the burden of performance. A novation replaces the outgoing party with the incoming party and transfers both rights and obligations, usually with the

counterparty's consent. That difference is technical only until the transaction depends on a handful of key customer agreements, software licences, outsourced service contracts or leases. Then it becomes the deal timetable.

In Nigerian transactions, the practical lesson is simple: identify early which contracts can be assigned, which require novation, and which are effectively non-transferable without leverage from the counterparty. Where a material contract is governed by English law, the transfer-restriction analysis above applies with equal force here.

7. DILIGENCE FOCUS SHIFTS BY STRUCTURE

The structure determines the diligence agenda.

In a share sale, diligence is usually directed at history: tax exposures, litigation, shareholder issues, related-party dealings, compliance maturity, data-protection practice, employment disputes, contract risk and IP chain of title. The buyer is asking whether it can underwrite the company's past at the agreed price and on the negotiated liability package.

In an asset sale, diligence starts with transferability and operability: title by asset class, consents and novations, assumed versus excluded liabilities, employee mapping, permit portability, data migration, site dependency and transitional services. The FCCPC Guidelines make the cross-border point especially clear: shares in Nigerian companies, domestic businesses, local IP and local plant and equipment can all be covered acquisitions, and foreign companies selling into Nigeria are not outside the regime merely because the transaction was negotiated elsewhere.

For Nigerian deals with international sponsors or offshore holding structures, this is where local counsel adds real value. The elegant global signing structure can still fail if the Nigerian perimeter, employee position, data flows and approvals path were misunderstood.

8. CLOSING TAKEAWAYS AND EARLY ACTIONS

The first question is not "Which structure sounds cleaner?" It is "What is the value driver in this business, and which structure moves that value with the least friction under Nigerian law?"

A share sale will often be the better route where continuity is everything: the same entity, the same staff employer, the same licences, the same banking and customer footprint. An asset sale will often be more attractive where selectivity matters: a carve-out, a distressed acquisition, a business-unit separation, or a buyer that cannot afford to inherit the company's full history.

The best early actions are consistent across deals: run an FCCPC control and threshold analysis at the start, a merger is currently notifiable where the combined annual turnover of the acquirer and target in, into or from Nigeria equals or exceeds NGN 1 billion, or the target's annual turnover in, into or from Nigeria equals or exceeds NGN 500 million[16]; build a real consents matrix; clean up IP ownership; map employees and identify who falls within the Labour Act definition of "worker"; test the NDPA position on data-room sharing, migration and any cross-border transfers; identify sector approvals; and model tax and transition cost before price hardens. Where notifiability is genuinely uncertain, negative clearance and early engagement with the FCCPC can be a practical tool.

REFERENCES

1. Section 92.
2. Section 175 – 177
3. Section 28, 29, 33 and 41 – 43 of NDPA 2023.
4. Article 28 and 45 of the GAID
5. Section 175
6. Section 176
7. Section 177
8. [1994] 1 AC 85
9. Note that Nigerian courts often enforce parties right to freely make contract and where the words in a contract are clear and unambiguous, the court must give them their plain and ordinary meaning. See Onyemenam v. Imperial Homes Mortgage Bank Ltd
10. Article 3(3) GAID 2025.
11. Article 28 GAID 2025.
12. Article 34 GAID 2025.
13. Article 8 – 14 GAID 2025.
14. Article 45 GAID 2025.
15. See Sections 92, 93(4) and 95(1) of the FCCPA. See also Section 1(1) of the FCCPC Notice of Threshold for Merger Notification.
16. Ibid



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