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LETTER FROM THE CO-CHAIRS

We are delighted to share another issue of the AVCA Legal and Regulatory Bulletin, which includes insightful contributions from expert contributors on topical regulatory, fiscal and market developments impacting the African private equity and venture capital industry.

Deveboise and Plimpton examines fiscal considerations arising from the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Sharing (BEPS) Action Plan. Charles Russell Speechlys considers the impact of the Anti-Tax Avoidance Directive (ATAD) for Africa-focused Luxembourg private equity funds. AELEX outlines the implications of recent amendments to tax legislation for investors, and Trident Trust and PriceWaterhouseCoopers respectively highlight the main changes following the Global Business Sector reforms in Mauritius following the Mauritius Finance (Miscellaneous Provisions) act 2018. O'Melveny & Myers LLPshares an insightful commentary on an evolving trend of private equity funds seeking expanded forms of borrowing facilities including longer-term and asset-backed facilities that may afford fund managers and investors comparatively more significant benefits than more traditional subscription facilities. We are also grateful to the working group of law firms including Aluko & Oyebode, Banwo & Ighodalo, Jackson Etti & Edu, Olaniwun Ajayi LP and Udo Udoma & Belo-Osagie who have together reviewed the implications of the Nigerian Stock Exchange Growth Board Listing Rules for private equity exits and provided their findings in this Bulletin.

As we approach the end of our tenure as co-chairs of the AVCA Legal and Regulatory Committee, we warmly welcome our dynamic successors, Geoffrey Burgess (Deveboise & Plimpton) and Cindy Valentine (Simmons & Simmons) and take this opportunity to congratulate and remain grateful to AVCA and all contributors and readers of the Bulletin for their unstinting input and continuing support of this initiative.

Please continue to provide feedback, comments and suggestions to: **avca@avca-africa.org.**

Very best wishes for a happy and prosperous 2019.

Folake Elias-Adebowale & Rafik Mzah
Co-chairs, AVCA Legal & Regulatory Committee

ABOUT AVCA

The African Private Equity and Venture Capital Association is the pan- African industry body which promotes and enables private investment in Africa.

AVCA plays a significant role as a champion and effective change agent for the industry, educating, equipping and connecting members and stakeholders with independent industry research, best practice training programmes, and exceptional networking opportunities.

With a global and growing member base, AVCA members span private equity and venture capital firms, institutional investors, foundations and endowments, pension funds, international development finance institutions, professional service firms, academia, and other associations.

This diverse membership is united by a common purpose: to be part of the Africa growth story.

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THE OECD BEPS ACTION PLAN AND TAX CONSIDERATIONS FOR INVESTORS

Richard Ward, Wendy J. Miles QC, Geoffrey P. Burgess, Jonny McQuitty and Emily Lodge
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International trends against aggressive tax avoidance and tax evasion have affected and continue to affect business practices around the world, not least through the application of the OECD's Action Plan on Base Erosion and Profit Shifting ("BEPS") (the "OECD BEPS Action Plan").

Africa is no exception. International development efforts have increasingly focussed on measures to improve developing countries' tax bases. The last years have seen significant steps to this end, particularly for multinational enterprises and international investors investing in Africa. Such measures are also politically popular. For investors, however, the prospect of changing tax rules creates uncertainty and risk. Investors in states in Africa would be well advised to have a clear understanding of the adoption of the OECD BEPS Action Plan, wider developments in tax policy, law and regulation, and the associated risks that these trends may pose.

The OECD BEPS Action Plan and the Inclusive Framework

The OECD BEPS Action Plan is designed to tackle gaps and mismatches in national and international tax rules to shift profits to low or nil-tax regions. In particular, the 15 so-called 'Actions' which are the basis of the OECD's attempt to tackle behaviours it deems problematic. The OECD BEPS Action Plan is principally directed towards multinational enterprises: nevertheless, many of the Actions have the potential to impact other investors and investment structures.

While the OECD and the G20 were responsible for the creation of the BEPS Project, it is becoming increasingly relevant for developing countries, and in particular for states on the continent of Africa. Indeed, at the urging of G20 leaders, the OECD established the 'Inclusive Framework' (the "BEPS Inclusive Framework") to involve interested non-G20 countries, particularly developing economies. The BEPS Inclusive Framework is now taking on ever greater significance in efforts to build the capacity of developing countries' tax and revenue authorities.

Context: The increasing overlap between international development efforts and taxation reform

In recent years, there has been a number of significant developments in tax policy, law and enforcement in countries in Sub-Saharan Africa ("SSA"). These include changes in tax policy and legislation, as well as more stringent and proactive enforcement action by state authorities.

These developments have taken place in the context of a growing international consensus that improving developing countries' abilities to collect tax revenue is critical to developing states' economic development. Measures to improve revenue have been expressly linked to achieving development targets. For example, in December 2017, the UN Development Programme (the "UNDP") stated that tackling tax avoidance is a key priority to achieving the UN's 2030 Sustainable Development Goals. The UNDP has drawn particular attention to the fact that tax collection as a percentage of GDP averages just 19% for the continent of as a whole, which is significantly less than the average of OECD states at 34%.

This mirrors the domestic agenda of African states. For example, the Minister of Finance for Nigeria, Mrs. Kemi Adeosun, recently described "[a] collective awakening on the African continent that Africans needed to end their dependency on commodities (e.g., oil) and broaden their tax bases if countries were to improve low tax to GDP ratios, which is an imperative for all African countries".

Developing countries including those in Africa are supported in efforts to improve tax and revenue collection by a range of international and regional actors, including international institutions like the IMF and the OECD, regional bodies like the Africa Tax Administration Forum, and international NGOs like Tax Inspectors Without Borders (a joint project of the OECD and the UNDP) and the Tax Justice Network. Tax Inspectors Without Borders alone claims to have assisted with the collection of more than US$328m in additional taxes since its inception in 2016. The Kenyan Revenue Authority has also noted how international assistance had led to a doubling of revenue collected by its international tax office in just three years[1].

Measures to combat BEPS play an increasingly prominent role in these efforts, and BEPS and the practice of multinational enterprises ("MNEs") have become a focal point for public and political discourse in developing states. For example, the Vice-President of Nigeria recently called for action against "the use of aggressive and often suspicious tax planning and transfer mis-pricing" by which the Vice-President alleged "multinationals minimize their tax payments, or put more graphically, dodge taxes".

1 http://oecdobserver.org/news/fullstory.php/aid/4959/Tax_inspectors_without_borders.html

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Africa and BEPS: A framework for action

The focus on BEPS by states in Africa is by no means a negative development in and of itself. Such focus may potentially improve stability and clarity for fiscal and tax affairs for certain states on the African continent. Depending on how measures to tackle BEPS are implemented, it may also facilitate harmonised and standardised taxation practices. Nonetheless, it is clear that certain measures taken to counter BEPS have the potential negatively to impact investors and trade and investment protections put in place pursuant to contracts and treaties. Indeed, a number of states have already taken actions corresponding to BEPS Actions (or indeed had taken such steps prior to the creation of the BEPS Inclusive Framework), some of which run counter to contractual or other legal obligations.

Take as an example BEPS Action 4, which addresses tax revenue lost by allowing interest deductions for highly leveraged (a.k.a. thinly capitalised) companies. The idea of this plank of the BEPS Inclusive Framework is to prevent excessive interest deductions designed by related parties to lower profits in high-tax jurisdictions (where interest paid is deducted from taxable income)

> The OECD BEPS Action Plan also envisages a number of measures to encourage transparency in tax matters

and shift it to lower tax jurisdictions (where interest is received and added to profit that is taxed at a lower rate). A significant number of SSA countries have in place such measures against thin capitalisation that pre-date (or draw upon methods that pre-date) the OECD BEPS Action Plan. For example, Uganda, Ghana and Rwanda have applied rules to limit interest deductions based on maximum debt/equity ratios of 2:1, 3:1 and 4:1 respectively, while South Africa has adopted a 3:1 debt/EBITDA ratio as an indicator of potential thin capitalisation and a trigger for further enquiry.

However, some states are already moving towards the implementation of thin capitalisation rules which align with BEPS Action 4 (namely, by limiting how much interest will be deductible, as a proportion of EBITDA). For example, Uganda has moved to restrict the deductibility of interest which exceeds 30% of a taxpayer's EBITDA. It is expected that more SSA states will adopt and develop similar rules. Some of these measures have the potential to impact acquisition and financing structures used in investments, particularly highly leveraged transactions and/or transactions by shareholder affiliates.

The OECD BEPS Action Plan also envisages a number of measures to encourage transparency in tax matters, including as regards taxpayers' relationships with tax authorities (for example, the disclosure of preferential tax deals), but also to enable tax authorities to challenge the artificial diversion of profits between jurisdictions. In particular, BEPS Action 13 provides for so-called Country-by-Country Reporting ("CbCR"), in which MNEs provide financial reporting for each jurisdiction in which they operate. This corresponds to BEPS Action 13. A number of states in Africa have taken measures to implement CbCR. For example, in January 2018, Nigeria announced that it had introduced CbCR regulations for MNEs. Other states which have implemented CbCR reporting include South Africa, Gabon and Cote d'Ivoire. A significant number of other states have announced their intention to introduce CbCR legislation, including Uganda, Kenya, Rwanda and Mauritius. While there is a relatively high threshold for CbCR to be engaged (BEPS Action 13 sets a revenue threshold of US$650m), it is clearly a growing area for risk exposure.

Another area for action has been the reform of double taxation treaties ("DTTs") to prevent their abuse, the objective of BEPS Action 6. A number of states in Africa have taken steps to reform DTTs. This has included measures as serious as terminating double taxation treaties[2], but also has included a moratorium on entering into new DTTs, and the renegotiation of existing treaties. For example, some 23 developing nations globally, including Ghana, Kenya and Zambia, have renegotiated DTTs with the Netherlands to include anti-abuse provisions based on the 'principal purpose test' ("PPT"). The principal purpose test enables the benefits of a DTT (for example, reduced withholding tax) to be disallowed for a foreign investor, where the principal purpose for using a vehicle in the treaty counterparty is to obtain the benefits of the DTT. A number of African states have also signed a multilateral convention to address BEPS Action 6, which provides for minimum standards

2 In 2013, Malawi terminated its DTA with the Netherlands (although it subsequently signed a new DTA with the Netherlands in 2014).

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against treaty abuse using similar mechanisms to the PPT[3]. Further attention to reform and development of DTTs is expected. These and future reforms clearly have the potential to impact investment structures involving conduits in low tax jurisdictions, for example as a result of increased withholding taxes and reduced eligibility for treaty benefits.

African states have also made significant efforts in respect of other BEPS initiatives, including to improve the regulation of transfer pricing (corresponding to BEPS Actions 8-10), with a number of states introducing new law and regulations[4], capacity building efforts within revenue authorities[5], and increase activity in investigating potentially abusive transfer pricing structures[6].

It is likely that there will be significant future developments on other BEPS initiatives. . Indeed, domestic observers in African states have specifically raised the issue of the abuse of permanent establishment status as a key area for action (which is the subject of BEPS Action 7). Any changes may impact current structuring arrangements used by investors (particularly in the context of investments in groups operating across multiple jurisdictions).

Beyond BEPS: Other developments in Africa tax policy, law and regulation

Measures in respect of BEPS are only part of the movement in many African states toward developing their tax systems. Observers have commented that the OECD BEPS Inclusive Framework and the OECD BEPS Action Plan neither take into account all of the key challenges facing developing states nor address them in the manner necessarily most appropriate for implementation in developing states. As such, some African states have taken action in areas in addition to or at variance with those set out the BEPS Action Plan. These steps include attempts to increase the scope and rates of withholding tax (including through the renegotiation of DTTs, as noted above), so as to improve tax collection in an administratively straightforward manner. Certain African states have also sought to assess foreign investors for capital gains on the disposal of investments, even where the investment is in a holding company located out of the jurisdiction.

There are also efforts to develop domestic tax policy, law and regulation at a more general level, including through the use of General Anti-Avoidance Rules ("GAAR")[7].

In addition, there have been significant efforts to grow capacity and to build skills within revenue and fiscal authorities. As noted above, capacity building partnerships with other states, international bodies and NGOs have encouraged more proactive intervention by revenue and fiscal authorities.

Finally, developments in public discussions and narratives surrounding tax reform should not be ignored. As issues of tax reform enter political discourse, there is a risk that such reforms may serve as a basis for legitimising sharp conduct, or worse, against investors (particularly foreign investors) and MNEs. The use of abusive taxation measures for populist ends in developing markets is well known, particularly in the energy and natural resource sectors. However, in light of the growing realisation of value associated with intangible and assets other than energy and commodities, it is not unreasonable to expect that such conduct may yet repeat itself – including for sectors of the economy other than energy and natural resources.

Investors: Mitigating risk

As noted above, changes associated with the OECD BEPS Action Plan and the BEPS Inclusive Framework are certainly not, in and of themselves, a negative change, not least in terms of the potential long term stability that such changes may bring about. Investors would, however, be well advised to consider the potential risks that this process may pose to current and future investments, and what strategies may be adopted to mitigate any such risks.

At a fundamental level, the changes that are being introduced have the potential to affect returns on investments through increased taxation burdens (for example, as a result of tightening thin capitalisation rules). Changes to the tax regulatory and enforcement framework therefore have the potential materially to affect investment decisions. As such, it would be prudent for investors to have a detailed understanding of actual and likely changes to the legal and

3 States which have signed the convention include Burkina Faso, Cameroon, Cote d'Ivoire, Egypt, Gabon, Nigeria, Senegal, South Africa and Tunisia.

4 For example, Mozambique and Zambia both introduced new transfer pricing guidelines and regulations with effect from 1 January 2018.

5 For example, the Large Taxpayers Directorate of the Angola General Tax Administration launched a transfer pricing unit in September 2017

6 South Africa's Davis Commission, a Special Commission established to investigate South Africa's tax policy framework, recommended in its final report that "specialist tax assessors/auditors be tasked to look at all the companies in a group, as a whole, in order to evaluate complex intra-group transactions and structures that large groups are able to implement". Since 2012, the South African revenue authority has initiated more than 35 transfer pricing investigations.

7 For example, Ghana introduced a GAAR in 2015.

regulatory framework. This understanding is essential to the proper evaluation of investment opportunities, including how such factors may affect predicted returns and key aspects of investments, for example, financing models.

Care must be taken to ensure that investment structures take into account these risks, and that such structures are sufficiently resilient and robust to respond to changes in the tax, legal and regulatory framework. This applies equally for current and for future investments.

The apparently increasing appetite for enforcement action emphasises the risk associated with aggressive structures, which may have long term consequences for the value of investments. The growing prevalence of enforcement action also reiterates the need for investors to ensure that both they and investee companies maintain sufficient documentary evidence to defend audits and enforcement actions.

Further, in recognition of the growing populist narratives around tax reform, and in light of some developing nations' past use of tax assessments to capture a greater share of wealth in the energy and natural resources sector, investors should consider what protections may be available to them to guard against the use of tax measures under the guise of BEPS or otherwise to expropriate investments. A key protection potentially available is the use of contractual safeguards subject to dispute resolution outside the host country, and government by international law and investment treaty protections. Such safeguards and protections should be monitored to ensure that they protect against risks as they evolve.

Investors should be aware that, notwithstanding the overall trend towards BEPS implementation, tax reform is an area of (increasing) complexity, and that there are likely to be tensions between the OECD BEPS Action Plan, the BEPS Inclusive Framework, and individual states' concerns and priorities. Investors should be careful not to assume that tax reforms and regulatory developments will mirror the OECD BEPS Action Plan or the BEPS Inclusive Framework – or indeed, even that developing states will adopt the same approach to particular issues.

The scope, complexity and extent of current and future developments in the policy, law and enforcement of tax, draw into sharp relief the need for investors to consider fully the wider political, legal and regulatory picture of each relevant jurisdiction, at all stages of the investment process.

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IMPACT OF ATAD FOR LUXEMBOURG PE FUNDS INVESTING IN AFRICA

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Impact of ATAD for Luxembourg PE funds investing in Africa

A new set of rules should apply in Luxembourg as of 1 January 2019. These new provisions may have an impact on some structures in Luxembourg. This evolution of the Luxembourg tax rules results from recommendations made by the Organisation for Economic Co-operation and Development (OECD) in order to tackle tax avoidance and profit shifting schemes. That being said, at first sight the impact of these new set of rules for Luxembourg fund raising vehicles implemented by private equity houses investing in Africa, should be marginal but nonetheless important to be appraised of.

The OECD has issued an action plan known as the Base Erosion and Profit Shifting (BEPS) action plan. At the EU level, this is set out under the Anti-Tax Avoidance Directive (ATAD). Luxembourg should implement ATAD at the latest on 1st January 2019.

> With more than EUR 4.16 trillion assets under management, Luxembourg is a key asset management jurisdiction.

Luxembourg – natural hub for PE investing in Africa

With more than EUR 4.16 trillion assets under management (the largest investment fund centre in Europe and the 2nd largest in the world after the US), Luxembourg is a key asset management jurisdiction. The flexible legal, tax and regulatory Luxembourg framework has attracted a wide range of fund raising vehicles and top holding companies of private equity houses. In this context, many investors targeting African markets have an increasing presence in Luxembourg.

It is also interesting to note that Luxembourg is also a European political centre where one of the most active DFIs investing in Africa (the European Investment Bank) is headquartered.

While from a tax perspective, Luxembourg does not have a vast number of double tax treaties concluded with African jurisdictions, the appetite for Luxembourg - of investors investing in African - seems to be growing. This interest results (at least partially) from the increasing sensitivity of investors towards the reputational risk related to tax avoidance schemes. The main reason to locate an investment vehicle in a jurisdiction should not be the absence of tax upon profit repatriation but more the proximity with investors (including DFIs), the local standards in terms of transparency, anti-tax evasion/avoidance measures and the stability of the legal tax and regulatory framework. Obviously, the tax efficiency remains an important element though.

Brief description of the main set of rules related to ATAD

- **Deductibility of interest payments**

The purpose of this provision is to discourage groups from reducing the taxable basis of a subsidiary located in a high-tax jurisdiction with debt financing. Based on such a provision, as from 1 January 2019, interest deductibility will be limited (on an annual basis) for interest expenses exceeding interest income (exceeding borrowing costs) to the higher of 30% of the taxpayer's taxable earnings before interest, tax, depreciation and amortization (taxable EBITDA) and EUR 3million. This limitation applies both for financing granted between related and unrelated parties.

This provision will mainly impact Luxembourg holding companies heavily funded with interest bearing debt instruments (PPLs, tracking loans, etc.) used to finance assets which are not qualifying for a Luxembourg participation exemption (such as distressed loans, etc.).

- **General anti-abuse rule (GAAR)**

This provision aims at tackling non-genuine arrangements implemented for the main purpose, or one of the main purposes, of obtaining a tax advantage that defeats the purpose of the applicable tax law. In this context, these arrangements shall be disregarded. Arrangements are typically considered as "non-genuine" if they are implemented without valid commercial reasons reflecting economic reality.

As from 1 January 2019, the Luxembourg abuse of law principle will be replaced by a new GAAR in line with the rule as defined in ATAD. Please note that the new GAAR rule, as included in the Luxembourg income tax law, will apply to any type of Luxembourg taxes and taxpayer.

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- **Controlled foreign companies (CFCs)**

Based on such provision, under certain conditions, income derived by a low-taxed controlled subsidiary (or permanent establishment) is re-allocated to its parent company even if this income has not been effectively distributed.

- **Hybrid mismatches**

This provision provides for a specific rule regarding hybrid mismatches. The purpose is to eliminate the double non-taxation created by the use of certain hybrid instruments or entities. A hybrid mismatch structure is a structure where a financial instrument or an entity is characterized differently for tax purposes in two different jurisdictions. The impact of such mismatches is often a double deduction or a deduction of the income in one jurisdiction without inclusion in the taxable amounts in the other jurisdiction.

A specific analysis of the Luxembourg entities financed with hybrid financing instruments (e.g. CPECs, etc.) will have to be carried out. In order to be able to deduct a payment in Luxembourg and upon request by the Luxembourg tax authorities, the Luxembourg tax resident companies will have to show that there is no hybrid mismatch situation, i.e.:

- the payment is not deductible in the other member state which is the source state, or
- the related income is taxed in the other member state (e.g. the jurisdiction of the investor investing in the Luxembourg holding vehicle).

Luxembourg SOPARFI: The non-regulated Luxembourg typical vehicle

Until now, Luxembourg resident holding companies (SOPARFIs) are entities typically used by private equity houses.

Regarding the financing of the SOPARFIs, Luxembourg income tax law does not provide for a minimum debt equity ratio. That being said, according to administrative practice, the maximum debt equity for the financing of share capital participations amounts to 85 (debt) 15 (equity). In some specific circumstances (i.e. taking into consideration some of the characteristics of the debt) it may even be stretched to 99 (debt) and 1 (equity). If properly structured, it may typically allow a profit repatriation strategy mainly based on interest payments which are, in principle, withholding tax free in Luxembourg.

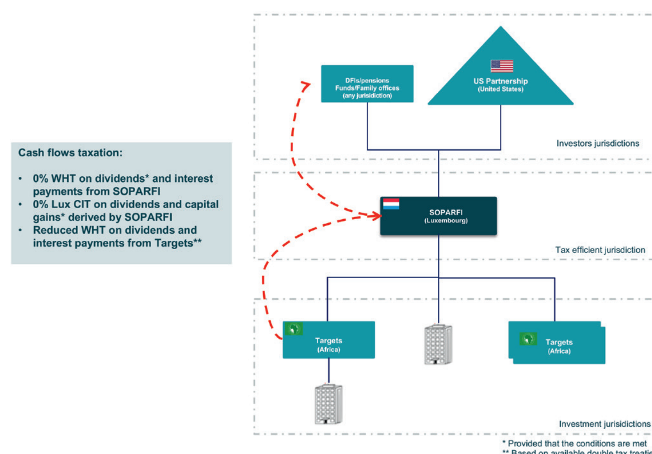
As far as shareholdings activities are concerned, provided certain conditions are observed, income from share capital participations are tax exempt, regardless of the jurisdictions where they are tax resident - provided they are opaque entities subject to tax at a rate which could be considered as comparable with Luxembourg law (at least 9%). In order to benefit from this exemption, the shareholding (or participation) must be held for a minimum period of 12 months - assuming the Luxembourg SOPARFI has a business rationale and the only (or the main) purpose of the company is not to benefit from an advantageous tax treatment).

As far as the minimum subject to tax test is concerned, this condition should not, in principle, be difficult to observe for investments in African jurisdictions as the standard corporate income tax rates applicable in the African jurisdictions are generally significantly higher to 9%.

Taking into consideration the above, even though Luxembourg does not have a wide double tax treaty network with African jurisdictions, Luxembourg SOPARFIs could benefit from a full exemption from Luxembourg corporate income on shareholding income derived from stakes in African operating companies.

The fact that Luxembourg does not have a significant footprint in terms of double tax treaties in Africa could have a practical consequence for example no reduced withholding tax rate on dividends, should be available. However, it is worth noting that the difference between the standard withholding tax rates and the rates typically provided for by double tax treaties may be marginal, depending on the jurisdictions considered. Furthermore, and unfortunately, it still happens, in some jurisdictions for the tax authorities to deny the application of the withholding rates stated in the double tax treaty and to apply the domestic withholding tax rate instead.

For illustrative purposes, see below a simplified chart illustrating a SOPARFI structure for investments in Africa:



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Regarding the new set of rules which should be applicable in Luxembourg, by 01 January 2019:

- the provisions relating to the limitation of interest deductibility should not, in principle, impact the SOPARFIs implemented by private equity houses investing in Africa as, in principle and if properly structured, these companies are exclusively designed to hold shareholdings or participations qualifying for Luxembourg participation exemption. In this context, the interest linked to the financing of such participations are de facto not deductible from a Luxembourg tax standpoint.
- the provisions relating to the GAAR should be carefully monitored. In order to mitigate material exposure, the economic substance at the level of the Luxembourg holding vehicles should be bolstered and one should make sure that they are managed out of Luxembourg (e.g. majority of Luxembourg tax resident directors, board of managers meetings held in Luxembourg in presence of all the directors, etc.) and that there is a business rationale to locate the holding in Luxembourg. Structures may have to be reviewed in order to make sure that these companies will not fall within the scope of the new GAAR.
- The provisions regarding CFC rules should not impact, in principle, investments in jurisdictions which are generally heavily subject to tax (as – in principle – some African jurisdictions are).
- The provisions regarding hybrid mismatches will have to be carefully monitored for structures financed with hybrid instruments such as convertible preferred equity certificates (CPECs) commonly used by US investors in Luxembourg holding vehicles. That being said, as mentioned above, to the extent that the Luxembourg SOPARFI is exclusively investing in entities qualifying for the Luxembourg participation exemption regime, the non-deductibility of the expense recognized upon repurchase and cancellation of CPECs at fair market value (on a fully diluted basis) should not impact the tax position of the SOPARFI.

Taking into consideration the above, while a monitoring of the Luxembourg holding structure will have to be carefully carried out, we are not anticipating that the implementation of ATAD should significantly impact the attractiveness of Luxembourg as a structuring jurisdiction for private equity funds targeting investments on the African continent.

Luxembourg SICAR: The semi-regulated Luxembourg typical vehicle for private equity funds

The current trend of "migration" from non-regulated vehicles to (semi) regulated funds should not be ignored. Some investment houses are deciding to operate under Luxembourg semi-regulated funds such as the Société d'Investissement à Capital Risque (SICAR). The SICAR operates under the supervision of the Luxembourg regulator (Commission de Surveillance du Secteur Financier). While providing for an additional level of protection for the investors and typically designed for private equity activities, this vehicle is per se not subject to tax in Luxembourg, provided certain conditions are observed.

Please note that the SICAR is subject to corporate income tax and municipal business tax (26.01%) and the minimum net wealth tax charge.

However, provided that the SICAR is only investing in assets which could be considered as "risk capital" in accordance with the Law of 15 June 2004, any income derived from such assets should be fully exempt from Luxembourg income tax (i.e. corporate income tax and municipal business tax).

Distributions or payments made by a SICAR to investors as well as any payments of proceeds made upon the redemption of shares do not trigger any Luxembourg taxation.

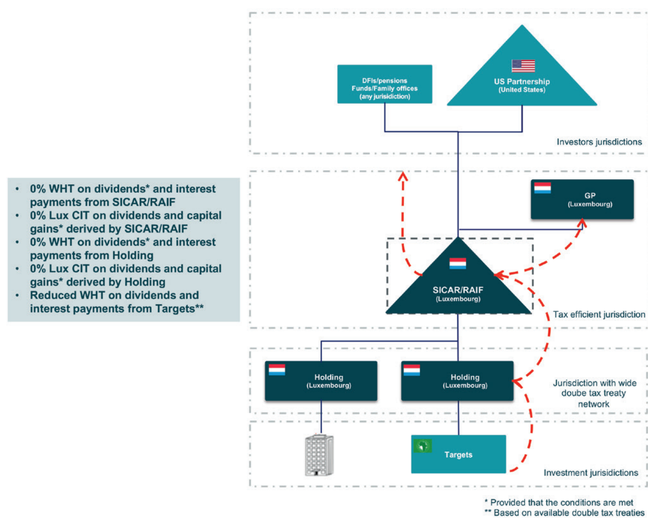
Taking into consideration the fact that the SICAR is fully subject to tax (while, if properly structured its qualifying income are fully tax exempt) it should in principle benefit from the application of the double tax treaties.

As far as the SICAR is concerned, it is important to confirm if the activity to be carried out falls within the scope of the definition of "risk capital" based on the Law of 15 June 2004. Private equity investments are typically considered as risk-taking activity for the purposes of the application of the Law of 15 June 2004. In this context, the SICAR is a vehicle which typically suits the needs of private equity funds targeting African jurisdictions. Do note though that this vehicle is out of the scope of the new measures implementing ATAD in Luxembourg, discussed above.

For completeness though the SICAR could be implemented under the regime of a reserved alternative investment fund (RAIF). This would not impact the tax treatment of the fund, per se. The main difference is that the RAIF SICAR is not subject to authorisation of the Luxembourg regulator (CSSF) as it is managed by an external authorized alternative investment fund manager. In other words, the RAIF

is not subject to CSSF approval before it is launched. The "time to market" is therefore its main advantage.

For illustrative purposes, please see below a simplified chart illustrating a SICAR/RAIF structure for investments in Africa:



The implementation of ATAD in Luxembourg should not impact its position as a key jurisdiction for the structuring of fund raising/holding companies for private equity houses investing in Africa. The SOPARFI (non-regulated) vehicles should still be an efficient and flexible option to the extent properly structured and implemented. The semi-regulated SICAR should not be impacted by this new set of rules aiming at tackling tax avoidance schemes.

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Tax structuring for investments into any country in Africa from Luxembourg requires specific advice and careful analysis, and the team are available to discuss matters arising from this article with interested parties.

BUILDING BRIDGES – NEW TRENDS FOR EXPANDED FUND FACILITIES

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New trends are emerging for private equity funds to seek expanded forms of borrowing facilities, including longer-term borrowing facilities and asset-backed facilities, which afford fund managers and investors significant benefits as compared to more traditional subscription facilities. Although certain legal and structural challenges can arise with the implementation of these products into existing structures, the benefits they afford are proving popular and may be of particular interest in the African PE market. Lenders have become increasingly keen to offer these new products and have become comfortable with asset-backed loans, including where the assets are in the emerging markets, such as Africa, and we expect this to be an area which continues to evolve with increasing innovation.

Traditionally, private equity funds have benefitted from short-term subscription facilities which allow managers to borrow pending receipt of capital calls from investors and which are accordingly secured against uncalled commitments. Borrowings under these facilities are generally limited in time (usually from around three to nine months) and capped in amount at the lower of 100% of the uncalled commitments and 10% to 30% of total commitments. Their use is therefore limited and availability deteriorates over time as uncalled commitments decrease. In addition, the requirements of lenders have become increasingly onerous, particularly in terms of increased information requests and requests for investors to provide direct undertakings.

In the current market, longer-term facilities are being offered which allow for much less frequent drawdowns from investors, for example on an annual rather than monthly or quarterly basis. This reduces the administrative burden on managers and investors alike, whilst improving IRRs.

Another type of facility has become available where lenders lend to funds pending receipt of distributions that would be recyclable under the terms of the fund documents. This gives great potential to add additional investments to a fund's portfolio - even to the extent that a fund's terms allow the recycling of contributions applied to management fees and expenses, such facilities may take into account recyclable distributions in respect of both historic and future fees and expenses, which will add up to a material amount. Subject to the fund's specific strategy, such amount is likely to allow the fund to make a number of new investments it would otherwise be unable to complete. This type of product is particularly helpful in resolving the mismatch between a fund's ability to reinvest proceeds into new investments and the point in time at which proceeds are likely to be received by the fund - near the end of the fund's life, when its investment powers are limited. This type of product may be of particular interest in the African PE market. Firstly, given that the holding period of investments is traditionally longer, meaning that the mismatch in recycling ability can be accentuated. Secondly, where the fundraising environment for a potential successor fund is less stable, these products allow managers to carry on deploying capital at a time when the fund may otherwise have no undrawn commitments available - meaning the portfolio can be further diversified and the proportion of investors' commitments actually invested can be increased.

> In the current market, longer-term facilities are being offered which allow for much less frequent drawdowns from investors, reducing the administrative burden

In addition, the desire for greater borrowing power, particularly for more mature managers whose funds are well invested, has paved the way for increasingly popular asset-backed facilities. With these products, the borrowing is secured by the value of the underlying assets of the fund rather than the uncalled commitments, meaning there is no recourse against the investors and better security for lenders - a win-win from a risk perspective, which affords the fund longer-term and greater borrowing power to maximize deployment and increase returns. This borrowing is generally incurred at a level below the fund and in practice is secured against the receivables and bank account of a holding company which ultimately owns the fund's assets. The secured value can include the new investments that are made, meaning the lenders are ultimately well secured by the expanded portfolio whilst further increasing the fund's borrowing power. The size of such facilities will remain subject to certain concentration limits and the process will likely involve a certain level of due diligence on the assets by the lender, however this seems well worth the rewards on offer.

Certain products also lend to funds in order for them to make distributions to investors, helping to reach the preferred return more quickly, boost IRRs and generate carried interest more quickly - highly beneficial for managers. The possibility of some form of hybrid facility which begins as a traditional subscription facility but has the capability to become an asset-backed facility as the fund matures has also been raised, hinting at the further innovation to come in this space.

A bridge too far?

The advantages of these new types of facilities are clear and apply to managers and investors alike - longer-term and greater borrowing power, greater overall returns, improved IRRs, maximum deployment of capital, an expanded portfolio and more widespread diversification as a result, quicker access to carried interest, quicker ability and flexibility to close deals and no recourse against investors. However, such facilities are not without their challenges.

The first is investor sentiment - despite the improved IRRs and lack of recourse against the investors, some investors simply do not like the idea of increased leverage, and to the extent a fund is performing badly, this augments the risk of losses. Secondly, the cost of borrowing must always be borne in mind, although with current levels of interest rates this remains an efficient option, for now. There are also more technical legal challenges. The terms of the fund documents will need to allow for the specific type of borrowing. Where applicable, the risk that longer term borrowings are less likely to be seen as "temporary" for the purposes of whether a fund in considered leveraged under AIFMD will need to be considered. In addition, there are potential tax issues - notably, the risk of UBTI (unrelated business taxable income) increases with longer-term borrowing. Where problematic, this can be solved with structuring, including the establishment of parallel or feeder fund vehicles to block UBTI, and ideally such structuring should be thought about at the time of fundraising to give managers maximum flexibility to adopt facilities in the future. Generally speaking, if not addressed during initial structuring of a fund, the implementation of such a facility may require some restructuring of the interests held by investors and the underlying assets, and all of this will need to be assessed against the benefits of the proposed facility. That said, in the current climate it seems that the numerous advantages of these facilities are likely to outweigh the efforts required to implement them, and we expect to see appetite for these products continue to grow in the near future.

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THE MAURITIUS FINANCE (MISCELLANEOUS PROVISIONS) ACT 2018

A Collective of Authors
Trident Trust

The Finance (Miscellaneous Provisions) Act (the "Finance Act"), which was enacted on 31 July 2018, introduced a number of major legislative changes that affect the Global Business Companies regime in Mauritius. The Mauritius Financial Services Commission ("FSC") has not yet issued any guidelines to provide further clarity on the changes. This memo summarises the principal changes, which are:

- The abolition of the GBC2 regime and the creation of a new Authorised Company Regime; and
- The renaming of the GBC1 regime to GBC and the introduction of additional substance requirements for GBCs.

Abolition of GBC2 Companies

The Category 2 Global Business Licence ("GBL2") and Category 2 Global Business Company will be abolished on 1 January 2019 and a new type of company, the Authorised Company, is being introduced on the same date.

From 1 January 2019, the Category 1 Global Business Company will be known as the Global Business Corporation ("GBC") and the Category 1 Global Business Licence ("GBL1") will be known as Global Business Licence ("GBL").

Existing GBC1 and GBC2 companies, where licences were issued on or before 16 October 2017, will be able to continue under the provisions of the Financial Services Act 2007 until 30 June 2021.

Existing GBC1 and GBC2 companies, where licenses were issued after 16 October 2017 will be grandfathered only until 31 December 2018.

After 31 December 2018 or 30 June 2021 as applicable, GBC2 licences will lapse and companies will need to comply with the prescribed requirements of an Authorised Company.

Rules for GBCs

Section 71 of the Financial Services Act has been repealed and replaced by a new section.

The major changes that have been introduced are:

- The majority of shares/voting rights/legal/ beneficial interest should be held or controlled, as the case may be, by a person who is not a citizen of Mauritius.
- The GBC should conduct business principally outside Mauritius.
- The GBC should at all times carry out its core income generating activities in, or from, Mauritius.
- The GBC should employ either directly or indirectly, a reasonable number of qualified persons to carry out the core activities.
- The GBC should have a minimum level of expenditure, which is proportionate to its level of activities.
- A corporation which conducts business without holding a GBL shall commit an offence and shall, on conviction, be liable to a fine of up to one million rupees.

Tax Measures Applicable to GBCs

A company holding a Category 1 Global Business Licence was subject to 15% income tax in Mauritius on its chargeable income. It was however entitled to a tax credit equivalent to the higher of the actual foreign tax paid or 80% of the Mauritius tax payable on its foreign source income (deemed Foreign Tax Credit).

The Foreign Tax Credit ("FTC") regime available to GBC1 companies will be abolished as from 1 January 2019. Instead, there will be an introduction of an 80% exemption regime on the following income of the GBC (provided that the FSC's substance requirement criteria are met):

- Foreign dividend, subject to amount not allowed as deduction in source country
- Foreign source interest income
- Profit attributable to a permanent establishment of a resident company in a foreign country
- Foreign source income derived by a Collective Investment Scheme ("CIS"), Closed End Fund, CIS manager, CIS administrator, investment adviser or asset manager licensed or approved by the FSC
- Income derived by companies engaged in ship and aircraft leasing

Authorised Company

Activity

An Authorised Company is a company which proposes to conduct or conducts business principally outside Mauritius (or with such category of persons as may be specified in the FSC rules) and which has its place of effective management outside Mauritius.

Shareholding/Control/Beneficial Interest

The majority of shares/voting rights/legal/beneficial interest (other than bank, licensed by the Bank of Mauritius, and incorporated under the Companies Act 2001) should be held or controlled by a noncitizen of Mauritius.

Registered Agent

An Authorised Company shall, at all times, have a registered agent in Mauritius which shall be a management company. One of the main responsibilities of the management company will be record keeping, including board minutes and resolutions, transaction records and such other documents as the FSC may require.

Authorisation

The FSC must authorise an Authorised Company and the application for authorisation must be made through a Mauritius management company.

Tax Measures Applicable to Authorised Company

An Authorised Company will be deemed nonresident for tax purposes (and thus be exempted from income tax) in Mauritius. However, it will be required to submit a return of income to the Mauritius Revenue Authority within six (6) months of its year-end.

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MUCH ADO ABOUT CCIs

A Collective of Authors
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It has been almost four hundred years since William Shakespeare wrote the comedy Much Ado About Nothing and although we have taken inspiration from its title, there is nothing even remotely funny about the recent confusion around Certificates of Capital Importation (CCIs). To explain, CCIs are issued, on application, to parties (such as foreign private equity investors), that inflow foreign currency equity or debt capital into Nigeria and provide such parties with access to Nigeria's official foreign exchange market for the purpose of repatriating dividends, interest, principal and capital as the case may be. This brief note is an attempt to clear the current confusion and assuage the understandable concerns of the numerous foreign private equity and other investors that have made investments in Nigeria, been issued with CCIs, who may be wondering whether they can still rely on those CCIs. Hopefully, this note will also assuage the doubts and concerns of prospective private equity and other investors who plan to invest in Nigeria and to obtain CCIs in connection with such investments. This note is not, however, about MTN Nigeria Communications Ltd (MTNN), and the reference to the Central Bank of Nigeria's (CBN) recent sanction against MTNN is mentioned below, only by way of background.

Recent events

It is fairly well known that in the last week of August 2018, the CBN wrote a letter to MTNN, the operator of Nigeria's largest mobile network, in which the CBN alleged that following an investigation carried out by the CBN on Standard Chartered Bank Limited, Stanbic IBTC Bank PLC., Citibank Nigeria Limited and Diamond Bank PLC. ('the Banks), it had been determined by the CBN that between 2007 and 2015, the Banks used illegally issued CCIs to illegally repatriate US$8.13 billion to MTNN's shareholders. Following the above determination, the CBN decided, among other things, that MTNN and the Banks had breached Nigeria's foreign exchange laws and regulations and that the illegally repatriated sum of US$8.13 billion should be refunded to the coffers of the CBN immediately. The CBN also imposed fines totaling NGN 5.87 billion on the Banks.

Are you a worried (past or prospective) foreign private equity and other investors?

If an Authorised Dealer (more on that shortly) has issued you with a CCI in the past, or the recent events have made you concerned about whether the CCI regime can be relied on, then to borrow a phrase (or more accurately: part of a phrase) used by William Shakespeare in the play Cymbeline, fear no more.... We shall explain why below.

The Law: The Femm Act

If you have had any contact with the Nigerian banking system, or plan to do so, you will have come across (or will soon come across) the term Authorised Dealer. Quite simply, an Authorised Dealer is a Nigerian bank that is licensed by the CBN to deal in foreign exchange under the provisions of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act (Chapter F34) Laws of the Federation of Nigeria 2004 (the FEMM Act).

A little more (boring but necessary!) background. Section 1 of the FEMM Act establishes the Nigerian Foreign Exchange Market (the Market) where transactions in foreign exchange can be conducted, and empowers the CBN to issue guidelines to regulate the procedures for transactions in the Market and in relation to such other matters as the CBN may deem appropriate for the effective operation of the Market. One of such guidelines is the Foreign Exchange Manual (strictly speaking, a collection of foreign exchange guidelines issued by the CBN), which was first issued in 1990, reissued in 2004 and 2006, and updated in 2018.

Section 8(1) of the FEMM Act also empowers the CBN to supervise and monitor the operation of the Market in order to ensure that the Market performs efficiently. In order that the CBN can effectively discharge its functions, sections 5(1) and (2) of the FEMM Act empowers the CBN to appoint banks that have adequate resources and capacity as Authorised Dealers, and to delegate to the Authorised Dealers such powers as may be specified by the CBN in their respective letters of appointment. The role of the CBN under the FEMM Act is consistent with one of its powers under section 2 of the Central Bank of Nigeria Act 2007, which is to maintain external reserves to safeguard the international value of the Naira.

By virtue of their appointment Authorised Dealers apply the FEMM Act, the Foreign Exchange Manual, and other regulations issued by the CBN in relation to their dealings in foreign exchange. In doing so Authorised Dealers will, from time to time, have to make decisions and create enforceable contracts with third parties - all the time while acting as delegates of the CBN. And where power has been lawfully delegated it is for the delegate to act within the scope of the actual power that has been delegated. Even where an Authorised Dealer exceeds such powers, however, the CBN has a responsibility to affirm the approvals granted, and the transactions processed, on its behalf by its delegate. And where the Authorised Dealer has exceeded or

wrongly exercised its delegated powers the CBN's proper recourse is to sanction the Authorised Dealer, in such manner as is provided in the FEMM Act.

The Law: Delegation of Authority

A little more about the delegation of authority. As already indicated above, Section 1 of the FEMM Act empowers the CBN to regulate the procedures for transactions in the Market, while Section 8(1) of the FEMM Act empowers the CBN to monitor and supervise the operations of the Market in order to ensure its efficient performance. We have also indicated that Section 5 of the FEMM Act permits the CBN to appoint Authorised Dealers that will operate in the Market on the terms and conditions prescribed by the CBN. And whenever, in the exercise of such authority, an Authorised Dealer is not clear about any issue in relation to a foreign exchange transaction, the Foreign Exchange Manual requires the Authorised Dealer to seek clarification / approval from the CBN. The seeking of such clarification is entirely for the Authorised Dealer to do - or not do as the case may be. It is clear from the Nigerian case law on the subject that whatever an Authorised Dealer does, pursuant to its delegated authority, is done for and on behalf of the CBN. This was the position of Nigeria's Supreme Court in the case of Ondo State University v. Folayan [1]where the late Justice Coker said: ''It is a trite principle of Administrative Law that where a power has been delegated, the delegating authority will be bound by the decision of its delegate and will be therefore incapable of rescinding that decision."

The Law: Agency

The relationship between the CBN and Authorised Dealers also has elements of agency, in the sense that the CBN can be regarded as a principal and the Authorised Dealers as its agents. This is consistent with the decision of the Supreme Court in the case of Tunde Bamgboye v. University of Ilorin & Anor. [2], where Justice Onu stated that: ''An agent, in my view, means more or less the same thing as a delegate … Under the Nigerian law of agency, a person or entity that has been disclosed by an agent to be the agent's principal, (a disclosed principal), is bound by any decisions made or contracts entered into by the agent on the principal's behalf.''

Although not expressly stated in these terms by the FEMM Act, Authorised Dealers are, in our opinion, the agents of the CBN in relation to dealings in foreign exchange and the CBN is a disclosed principal. We have arrived at this conclusion after considering whether the key characteristics of agency are present in the relationship between the CBN and an Authorised Dealer. Such characteristics include: (a) the fact of the agent providing a service or doing an act on behalf of its principal; (b) the fact of the agent representing its principal; and (c) the creation, by an agent, of legal rights and liabilities on behalf of the principal.

These principles have been considered by the Supreme Court in cases such as Niger Progress Ltd v. N.E.L. Corp[3], where the court held that agency is a relationship which exists between two persons, one of whom expressly or impliedly consents that the other should represent him or to act on his behalf and the other of whom similarly consents to represent the former or so to act. It does not matter that the parties have not described themselves or their relationship as that of principal and agent but, rather, a determination as to whether the relationship of agent and principal exists will depend on the true nature of the agreement between agent and principal and on the exact circumstances of the relationship between the alleged principal and the alleged agent.

The Law: Delegation has been confirmed by the CBN

But forget about legal theories, opinions and Supreme Court decisions! The good news is that the CBN itself has confirmed that it delegated its decision-making powers to Authorised Dealers, particularly in relation to the issuance of CCIs. This was confirmed by the CBN in a press release dated 19th September, 2018, where the CBN stated that:

…the delegation of the issuance of Certificates of Capital Importation (CCIs) to commercial and merchant banks some years ago was done to instill confidence in the investor community and encourage the flow of foreign direct and portfolio investments into the Nigerian economy.

The CBN also confirmed in the same press release that:

…the integrity of the CCI regime remains sacrosanct and there shall be no retroactive application of foreign exchange rules and regulations.

1 (1994) 11 NWLR (Pt. 168) 1 – 41.
2 (1999) 10 NWLR (Pt.622) 290 @ 329 para g.
3 (1989) 3 N.W.L.R (Part 7), Pages 68-100.

Where does that leave private equity and other foreign private equity and other investors?

- Foreign private equity and other investors, including private equity investors, have only two obligations. The first is to ensure that the bank they are dealing with is an Authorised Dealer - an easy obligation to satisfy since the banks that are Authorised Dealers are well known. The second obligation is to ensure that they provide the Authorised Dealer with all the supporting documents that the Authorised Dealer requires in order to issue the CCI.
- Foreign private equity and other investors, including private equity investors, have no obligation under the FEMM Act, the Foreign Exchange Manual, or other relevant regulations to take steps to 'verify' that the CCIs issued to them are genuine or valid, or that the Authorised Dealers have first complied with all the conditions stipulated by the CBN before issuing the CCIs. They are entitled to assume that such Authorised Dealers are validly exercising the authority conferred on them by the CBN.
- As we have indicated elsewhere in this note, the CBN is bound by decisions taken by Authorised Dealers on its behalf pursuant to the authority conferred on them by the CBN. As the Court of Appeal rightly held in the case of F.G.N v. Shobu (Nig.) Ltd.[4], he who does an act through another is deemed in law to do it himself.
- Foreign private equity and other investors (including private equity investors) and other third parties are legitimately entitled to rely on steps taken and documents issued by Authorised Dealers. Where an Authorised Dealer incorrectly or improperly issues a CCI, through no fault of an investor, the investor cannot, lawfully, be made to bear the consequences of that action.
- If an Authorised Dealer has in some way exceeded its authority, or breached the regulations applicable to the issuance of CCIs and dealings in foreign exchange transactions, the Nigerian courts should not allow a foreign private equity and other investor to be punished for what is, in effect, a breach by the CBN itself - albeit through its delegates / agents.
- We are not saying anything new or novel. This is the law. This has been the law since 1995. Nothing has changed!

Conclusion

In closing we shall again quote Shakespeare, who said, in Measure for Measure, that "our doubts are traitors, and make us lose the good we oft might win, by fearing to attempt." We hope we have been able to clear the doubts of foreign private equity and other investors, in relation to CCIs and that, as regards their past or prospective investments in Nigeria, foreign private equity and other investors will "fear no more".

This article is for general information only and does not constitute, and should not be construed as constituting legal advice.

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4 [2014] 4 N.W.L.R (Part 1396) 45-64.

MAURITIUS: NON-HARMFUL TAX PRACTICE FOLLOWING TAX REFORMS IN THE GLOBAL BUSINESS SECTOR

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Mauritius has brought tax reforms in the Finance Act 2018, in order to comply with the Base Erosion and Profit Shifting ('BEPS') initiatives of the OECD. A new 80% partial exemption regime has been introduced on certain income streams and enhanced substance requirements have been put in place by the regulators in Mauritius for the Global Business companies, effective as from the 1st January 2019.

Following the tax reform updates, on 15th November 2018, the OECD has also concluded that Mauritius is in line with international standards and does not have a harmful tax regime.

Under the old regime, the typical holding structures used by foreign investors are a Category 1 Global Business Licence ("GBC1") or a Category 2 Global Business Licence ("GBC2").

We highlight the main changes following the recent tax reform as follows:

A. Category 1 Global Business Licence

- The GBC1 will be renamed as Global Business Licence ("GBL").
- Effective from the 1st January 2019, the Deemed Foreign Tax Credit ("DFTC") regime available to GBC1 companies will be abolished and GBL companies will thereafter be taxed at the rate of 15%
- Existing GBC1 companies, where licenses were issued on or before 16 October 2017, will be grandfathered until 30 June 2021. The current system of DFTC will continue during the grace period.
- An 80% partial exemption regime will be applicable on the following income streams:
  - Foreign dividend
  - Interest income
  - Profit attributable to a permanent establishment of a resident company in a foreign country
  - Income derived by a Collective Investment Scheme ("CIS"), Closed End Fund, CIS manager, CIS administrator, investment adviser or asset manager licensed or approved by the Financial Services Commission ("FSC")
  - Income derived by companies engaged in ship and aircraft leasing
- The 80% exemption is available upon meeting the pre-defined substance requirements as issued by the FSC and the Income Tax Act ("ITA") in Mauritius.

B. Category 2 Global Business Licence

- Effective from the 1st January 2019, the GBC2 will be abolished.
- Existing GBC2 companies, where licenses were issued on or before 16 October 2017, will be grandfathered until 30 June 2021.
- After 30 June 2021, GBC2 licenses will lapsed and companies will need to comply with the prescribed requirements of the GBL or apply for an Authorised Company licence.

C. Introduction of Authorised Company

- Companies, conducting business and having their place of effective management outside of Mauritius, will be required to apply for an authorisation from the FSC to be registered as an Authorised Company.
- An Authorised Company is treated as a non-resident for tax purposes in Mauritius.

D. 5-8 years tax holidays

- A 5 or 8 year tax holiday is available for companies undertaking certain activities such as Global Treasury, Family Office, Global Legal Advisory services or Global Headquarter Administration.

E. Enhanced Substance Requirements

- Effective as from 1st January 2019, GBL companies must at all times carry out their core generating income activities in or from Mauritius.
- The core income generating activities depend on the activities undertaken by the GBL in Mauritius.
- The minimum level of expenditure in Mauritius is based on the licence type and ranges from USD 12,000 to USD 100,000.
- The minimum number of employees in Mauritius can vary from zero up to a maximum of 3 persons depending on the level of annual turnover or AUM.

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AVCA WORKING GROUP FINDINGS ON LISTING ON THE GROWTH BOARD OF THE NIGERIAN STOCK EXCHANGE – A VIABLE OPTION FOR PRIVATE EQUITY EXITS IN NIGERIA?

Avca Working Group

The AVCA Legal and Regulatory Committee constituted a working group to review the Nigerian Stock Exchange Growth Board rules [1] and to consider the implications of such rules for the private equity sector in Nigeria, in particular, the viability of listing on the Growth Board of the Nigerian stock exchange as an option for exits. The working group consisted of the AVCA member law firms that responded to the invitation to provide commentary on the issue, namely: Aluko & Oyebode, Banwo & Ighodalo, Jackson Etti & Edu, Olaniwun Ajayi LP, The New Practice and Udo Udoma & Belo-Osagie, which has collated and incorporated received comments into its findings in this paper for further review and consideration.

Overview

The Nigerian government and regulatory agencies have, in the immediate past, acknowledged the clamour for a more enabling business environment in Nigeria. With a view to facilitating the ease of doing of business and creating a more conducive environment for capital market transactions in Nigeria, the Nigerian Stock Exchange ("NSE") recently released its proposed rules for 'Listing on the Growth Board of the NSE' (the "Proposed Growth Board Rules").

The Proposed Growth Board Rules provide a platform that seeks to increase the visibility of eligible corporate entities, as well as to improve the ease with which medium-sized companies attract investment. Historically, IPOs are generally the least common exit options utilised by private equity ("PE") funds when realising the returns on an investment. In 2017, PE funds utilised the following exit options to various degrees in Africa:

(a) sales to PE funds and other financial buyers (accounted at 37%);

(b) trade sales (27%); and

(c) IPOs (4%).

None of the IPOs reported above in 2017 were in relation to Nigerian PE deals[2] and information released by the Securities and Exchange Commission (the "SEC") via its Statistical Bulletin reveals that Nigerian corporates have only been able to raise approximately =N=319 billion from IPOs between 1990 and 2017[3]. Despite having access to the NSE, which is the second largest stock exchange in Africa in terms of market capitalisation and liquidity[4], the Nigerian PE market is not dependent on capital market exit strategies for some of the reasons listed below:

(a) Listing on the main board of the NSE involves complying with the cumbersome requirements set out in the NSE Listing Rules.

(b) Timing implications: When a PE fund is preparing for an exit, the delays associated with the listing process act as a deterrent for the PE fund, as its goal would naturally be to obtain the highest value for its investors in a timely manner. IPO-backed PE exits are usually slower exit strategies and involve PE funds having to sell off their shares in tranches[5].

(c) Costs: When assessing viable exit options, PE funds are looking to obtain the cheapest exit approach. Listing the company on an exchange, however, involves regulatory costs which could otherwise be avoided.

(d) Pricing: PE funds are looking for the most cost-effective exit strategy and the band limits (i.e. +/- 10%) imposed by the NSE often mean that PE funds are not able to sell (without regulatory approval) their shares in the listed company at a price freely determined by them.

(e) Investment Timing: In the Nigerian market, PE funds often invest in smaller companies, at an earlier stage than their contemporaries in Western markets. Given that the PE funds investment lifecycle is only 5-7 years, often at an exit, the company is still not in a position to be listed on an exchange.

The lack of sufficient IPOs in the Nigerian capital markets occasioned by some of the reasons listed above, has put pressure on the NSE to make the process for listing companies on the main board more attractive, and thereby, encourage smaller companies, and private equity funds, to utilise the exchange as a means of trading securities. We understand that, the Proposed Growth Board Rules were introduced to the market to provide, as an alternative to the stock exchange, 2 (two) platforms on which eligible companies, both local and foreign, can publicly list their securities (the "Growth Board"). These platforms are referred to as the:

(i) Entry Segment – the platform for listing eligible entities and financing medium-size businesses with

1 A copy of the rules is attached may be accessed here: http://www.nse.com.ng/regulation-site/IssuersRules/Proposed%20Rules%20for%20Listing%20on%20the%20Growth%20Board%20of%20The%20Nigerian%20Stock%20Exchange%20-%2031%20May%202018.pdf.

2 (http://mail.nasdng.com/media/publications/downloads/pe_materials/Challenges%20of%20PE%2 0Exits_Feb_2015_v6%20by%20Synergy%20Capital%20Managers.pdf)

3 https://newtelegraphonline.com/2017/08/market-operators-clamour-return-ipos/

4 http://www.nse.com.ng/NSEPresentation/VVIP%20PRESENTATION_CME_final.pdf

5 http://fortune.com/2011/01/25/private-equity-ipos-are-rarely-quick-exits/.

market valuation of between =N=50,000,000.00 (fifty million Naira) and =N=500,000,000.00 (five hundred million Naira); and

(ii) Standard Segment – the platform for listing eligible entities and financing medium-size businesses with market valuation of between N=500,000,000.00 (five hundred million Naira) and =N=4,000,000,000 (four billion Naira).

The Growth Board provides an alternative to listing on the main board of the NSE and, as we understand it, a replacement to the Alternative Securities Market ("ASeM") board of the NSE by seeking to reduce the strict regulatory requirements and restrictions associated with the typical listing of securities on the stock exchange. Sharing their thoughts on the success of the ASeM, Jackson, Etti & Edu ("JEE") stated that there is a general consensus that the ASeM has not fulfilled its objective and has been credited with poor performance as only 10 (ten) companies have listed on the ASeM and as at 2017, there had been no new listings since the board's launch in 2013[6]. According to the NSE, the ASeM board will eventually be discontinued and current issuers on the ASeM board will be migrated to the Growth Board within 12 to 18 months from its launch.

Following the migration, the annual evaluation of the eligible criteria to be used by the NSE will be based on the criteria set out in the Proposed Growth Board Rules and as amended from time to time, provided that each issuer will continue to comply with all other continuing listing obligations as specified under the NSE Listings Rules. The NSE further explained that companies that do not apply to be migrated to the Growth Board or issuers that fail to meet the requirements of the Growth Board will be recommended for a regulatory delisting in line with the NSE's delisting process

The Proposed Growth Board Rules set out the listing standards as well as disclosure and notification requirements in respect of the Growth Board. We have highlighted in the table below some of the listing requirements for the Growth Board, compared against the Main Board and ASeM Board.

No.	Requirement	Main Board/ASeM Board	Growth Board
1.	Operating track record	Main Board: the issuer is required to be in operation for a minimum of 3 (three) years and where the issuer has not been in operation for 3 (three) years, it is required to provide evidence that one of its core investors has been in operation for a minimum of 3 (three) years. ASeM Board: the issuer is required to be in operation for a minimum of 2 (two) years.	Entry Segment: the issuer is required to be in operation for at least 2 (two) years. Standard Segment: the company is required to be in operation for at least 4 (four) years.
2.	Free Float of its issued share capital	Main Board: The issuer must ensure that a minimum of 20% of its issued share capital is made available to the public. ASeM Board: The issuer must ensure that a minimum of 15% of its issued share capital is made available to the public.	Entry Segment: Minimum free float of 10% of its issued share capital. Standard Segment: Minimum free float of 15% of its issued share capital.
3.	Market Capitalisation/ Shareholders' equity	Shareholders' equity of at least =N=3 billion under initial listing standard A and B and at least =N=4 billion for standard C	Entry Segment: The issuer is required to achieve a market capitalisation that is equal to, or in excess of =N=50,000,000.00 (fifty million Naira) Standard Segment: The issuer is required to achieve a market capitalisation that is equal to, or in excess of =N=500,000,000.00 (five hundred million Naira).

6 https://www.vanguardngr.com/2017/12/alternative-securities-market-records-decline/

4.	Pre-tax profit	The issuer is required to have a pre-tax profit of a minimum of =N=300,000,000.00 (three hundred million Naira) for the last 3 (three) fiscal years of its continued operations. Where the issuer has been in operations for 2 (two) years, it is required to have a minimum pre-tax profit of =N=100,000,000.00 (one hundred million Naira) under Initial Listing Standard A and a minimum of =N=600,000,000.00 (six hundred million) for the last 1 (one) or 2 (two) fiscal years under Initial Listing Standard B	The issuer is not required to have a pre-tax profit in order to qualify for listing under the Growth Board.

In addition to the above, Banwo & Ighodalo ("B&I") has drawn attention to the requirement in paragraph 2.2.3 (a) (ii) of the Proposed Growth Board Rules that provide that one of the entry requirements for listing on the Entry Segment of the Growth Board is that the company has grown its revenue by a minimum rate of twenty per-cent (20%) in its last year of operation. B&I suggest that this 20% threshold may exclude well performing companies that may (even marginally) not have achieved up to 20% growth in revenue in the year prior to seeking listing. To avoid such an outcome, B&I urge the NSE to consider an alternative higher, cumulative threshold which spans a longer period.

Another provision that Aluko and Oyebode ("A&O") has highlighted is in relation to the requirement to "have appointed a 'Designated Adviser' or such relevant professional as the NSE may prescribe from time to time" as criteria to be listed in either of the Segments of the Growth Board. This raises an ambiguity and exposes the NSE to arbitrary interpretation, as the term 'Designated Adviser' is not defined also, the role and remit of the Designated Adviser is not expressly stated. In B&I's opinion, the Designated Adviser is a broker firm which would be responsible for the applicant's compliance with the post-listing requirements throughout the duration of its listing on the Growth Board. This is yet to be confirmed by the NSE.

According to The New Practice, ("TNP"), one of the advantages of the Growth Board for PE funds and Venture Capitalists is in relation to 'good governance'. TNP has expressed that an important advantage of the Growth Board is that it is likely to drive major reform on how start-ups and small to medium enterprises approach good corporate governance as listing on the Growth Board will require such companies to implement effective governance structure which in turn would make such companies more viable and attractive to PE investors. A&O note, however, that the Proposed Growth Board Rules are silent on whether the approval of the SEC will be required for the listing of securities on both the entry and standard segments.

JEE also point out that companies that list on the Growth Board will still be required to comply with the Investment and Securities Act and the Rules and Regulations of the NSE that are mandatory for public companies generally seeking to list on any exchange. This raises the question of whether the process of listing on the Growth Board for smaller companies would actually be less stringent.

Despite its proposed advantages, JEE's view is that the Proposed Growth Board Rules do not do enough to arouse the interest of start-ups and eliminate the lingering investors' apathy in the market. In their commentary titled 'Impact and Implication of the Nigerian Stock Exchange Growth Board Rules on the Nigerian Private Equity and Venture Capital Sector', JEE records that regulators in other markets are doing much more to stimulate growth in this space. The London Stock Exchange, for example, was able to persuade the Inland Revenue to treat companies listed on the London Stock Exchange Alternative Investment Market as unquoted companies for tax purposes, thus enabling such companies qualify for the tax reliefs that are available under the Business Expansion Scheme.

The requirements of the Growth Board are less stringent and, with the implementation of the Growth Board Rules, it is hoped that the requirements for the listing of a company's shares on the board will encourage smaller companies to convert to public companies and to list their shares on the Growth

Board. It is less clear, the role of the SEC in the listing of companies on the Growth Board and as stated by A&O, the NSE will need to clarify whether the approval of the SEC will be required for listing of securities on the Growth Board.

It is also expected that the Growth Board Rules will facilitate the re-emergence of IPOs which should, ultimately, encourage private equity funds to consider listing as a viable exit option at the end of the life cycle of their investments, as a resurgence of IPOs thanks to the Growth Board would not only deepen the availability of capital in the PE market, but also provide a greater opportunity for PE funds to realise the highest return on their investments. Notwithstanding this, however, it is unclear whether, as a practical matter, the Proposed Growth Board Rules adequately address PE fund concerns regarding exits structured through IPOs.

Please send any feedback or suggestions on the content of this article to the AVCA Legal and Regulatory Committee at avca@avca-africa.org.

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GHANA: RECENT AMENDMENTS TO TAX LEGISLATION AND IMPLICATIONS FOR INVESTORS

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Following the passing into law of the Income Tax Act, 2015 (Act 896), a number of amendments have been introduced. Amendments of possible interest to the international investor community are highlighted here.

Income exempted from tax has been extended to include:

i. Interest paid to an individual by a resident financial institution or paid on bonds issued by the government.

By virtue of the Income Tax (Amendment) Act, 2016 (Act 907), tax is no longer required to be withheld on interest from investment paid by a resident financial institution or from bonds issued by the government. Such income is exempt from tax.

ii. Interest or dividend paid by an approved unit trust scheme or mutual fund;

Also, by virtue of Act 907, the interest or dividend paid by an approved unit trust scheme or mutual fund, is exempt from tax. Previously, there was also an exemption for the dividend of a venture capital financing company that satisfies the eligibility requirements for funding under the Venture Capital Trust Fund Act, 2004 (Act 680) - this was repealed by Act 896.

iii. Interest paid to a non-resident person on bonds issued by the government and gains from the realisation of such bonds;

A non-resident person is exempt from tax on interest on bonds issued by the government and gains derived from the sale of such bonds [Income Tax (Amendment)(No.2) Act, 2016 (Act 924)].

iv. Gains from the realisation of securities listed on the Ghana Stock Exchange, up until 2021;

Gains derived from the realization of securities listed on the Ghana Stock Exchange are exempt pursuant to Income Tax (Amendment) Act 2017 (Act 941).

v. WHT on service fees paid by one resident person to another has been reduced to 7.5%.

Withholding tax on service fees paid by a resident to another resident is now 7.5%, pursuant to Act 907.

The Value Added Tax Act, 2013 (Act 870) has also been amended with the most noteworthy amendment being:

vi. Supply of financial services now an exempt supply.

The amendment of 2017 defines 'financial services' as 'the provision of insurance; issue, transfer, receipt of, or dealing with money whether in domestic or foreign currency or any note or order of payment of money; provision of credit; or operation of a bank account or an account with a similar institution'. By this amendment, financial institutions are no longer required to charge VAT on their service fees. Prior to this amendment, the VAT rate was 17.5%.

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