AVCA The African Private Capital Association

AVCA L&R

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LETTER FROM THE CHAIRS

We are delighted to introduce to you the 10th Edition of the African Private Capital Association's Legal and Regulatory Committee Bulletin. We do so in the same month as the Association's annual conference, which is to be held in Johannesburg, South Africa this year. We shall be there. We hope to see you too.

We start by expressing our appreciation for the efforts of the lawyers who have contributed to this Bulletin. They have generated an excellent selection of articles, sharing valuable insights on legal and regulatory developments across the African continent.

We are committed to keeping you abreast of changes and trends impacting the private capital investment community in Africa. Through this Bulletin and the wider work of our committee, we encourage the adoption of favourable laws, policies, and regulations, provide training and other educational resources to our members, and disseminate information to a wider audience interested in the development and impact of private capital markets. This Bulletin explores market trends as well as legal, regulatory, and tax changes that shape the private equity and credit environments we call home.

Our committee comprises senior legal practitioners at law firms, development finance institutions and institutional investors. All are knowledgeable, experienced professionals well-placed to provide insights and potentially influence change in the markets where they operate.

In this edition, we travel to **Kenya**, where we highlight developments in the country's insolvency laws. Then to **Zambia** for a regulatory update on its real estate investment trust framework. Next, we arrive in **Morocco** where we reflect upon the country's merger control landscape before landing in **Nigeria** where we consider: (i) the state of play in the fintech merger and acquisition world; (ii) foreign exchange reforms and their impact on foreign direct investment; (iii) considerations for acquisitions of Central Bank of Nigeria's regulated entities; and (iv) the newly proposed regulatory framework for private equity funds. We then venture to **Ethiopia** to take a closer look at recent regulatory developments in its capital markets.

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Other issues covered in this Bulletin include: (i) developments in Artificial Intelligence on the continent; (ii) the impact of the EU Corporate Sustainability Due Diligence Directive on some African companies; and (iii) the private capital market in Nigeria covering key trends in fundraising, dealmaking and compliance as well as developments in the tax and financial services sectors.

We trust that you will find this Bulletin insightful. If you require further information on anything you read or would like to suggest future topics, please don't hesitate to contact us.

We look forward to seeing you at the Conference. If not this year's, next year's!

Yours,

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ABOUT AVCA | CHAMPIONING PRIVATE INVESTMENT IN AFRICA

As the pan-African industry body, AVCA plays a significant role as an effective change agent for the industry and acts as the trusted independent source of information, insight, and intelligence inspiring investor confidence; making the case for both commercial returns and impact of private capital in Africa.

AVCA represents a community of capital allocators, investors, fund managers, advisors, entrepreneurs and professional services committed to our shared vision of a prosperous Africa that is sustainable, inclusive, and innovative. AVCA – The African Private Capital Association is the nexus of private capital in Africa, championing and enabling private capital investment in Africa.

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BALL AND CHAIN: UNPACKING THE IMPACT OF THE EU CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE ON AFRICAN BUSINESSES

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Backgrounds

On 15 March 2024, the Council of the EU approved the final text of the EU Sustainability Due Diligence Directive (the Directive).

The Directive requires EU member states to introduce mandatory obligations for qualifying EU and non-EU companies to integrate environmental and human rights due diligence into their global operations and value chains.

The Directive also requires the integration of risk-based due diligence into the activities of all

Significance of the Directive

The Directive has been under negotiation since 2021 and sets out obligations regarding actual and potential adverse impacts of company, group, and business partners' operations on the environment and on human rights across their respective global value chains.

The Directive sets out rules on liability for violations of the due diligence obligations in the Directive, and imposes an obligation on affected companies to adopt and put into effect transition plans for climate change mitigation.

These rules and requirements will be effected by EU member states, which are required to adopt national legislation that will give effect to the obligations and requirements set out in the Directive within 2 years of its coming into force.

Impact of the Directive

The Directive has sweeping application to the conduct of EU-domiciled and non-EU domiciled companies that meet certain thresholds, as well as their respective business partners for up-stream and down-stream activities.

The Directive will apply to EU-domiciled companies with more than 1000 employees and net worldwide turnover of EUR 450 million and EU-domiciled parent companies of groups with annual turnover of EUR 450 million on a consolidated basis.

Non-EU domiciled companies will also have to comply with the Directive if they generate net turnover of more than EUR 450 million within the EU or are ultimate parent companies of a group that generates more than EUR 450 million in turnover on a consolidated basis.

For both EU and non-EU domiciled actors, companies or parent companies of groups with licensing and franchising agreements in the EU generating royalties of more than EUR 22 million and net worldwide turnover of more than EUR80 million will also be required to comply with the Directive.

Implications of the Directive on African business

Africa is a critical partner in EU business value chains. Sixty-five percent of goods exported from African markets into EU member states are primary goods and raw materials. Seventy-two percent of goods imported into Africa from EU markets were manufactured goods and chemicals.

The Directive's obligations on due diligence risk-mapping and mitigation extend across affected companies' "chain of activities" and will significantly affect African businesses. Consequently, direct business partners, who have commercial arrangements with affected companies, and indirect business partners, whose operations provide support to EU and non-EU domiciled companies will also be required to comply with various obligations under the Directive based on their role in the affected companies' chain of activities.

The chain of activities covered under the Directive includes activities of upstream business partners covering elements such as extraction, sourcing, manufacture, transport, storage and supply of raw materials, products or parts and development of products or services. Downstream business partner activities covered by the Directive's obligations include distribution, transport and storage of products either for or on behalf of an affected company.

Affected companies will need to critically evaluate the collaboration and support required to enable compliance with preventive and corrective measures adopted across the value chain. Commercial agreements with upstream business partners will need to incorporate elements of corrective and preventative action plans, and contractual assurances allocating risk and liability. Where appropriate, affected companies will also need to consider financial and non-financial commitments to enable business partners in their value chains to comply with the financial exposure arising from costs of complying with various obligations.

Enhanced group and company compliance and stakeholder engagement

The Directive enhances group level risk and compliance obligations for environmental and human rights impacts of business across value chains.

Building on the framework outlined in the OECD DD Guidelines, affected companies are required to undertake various steps to:

1) Integrate risk-based due diligence into company policies and risk management systems

2) Identify and assess actual and potential adverse impacts on environment and human rights arising from business operations

3) Prioritize identified actual and potential adverse impacts

4) Take measures to prevent actual and potential adverse impacts and bring such impacts to an end

5) Develop notification mechanisms and complaints procedures

6) Monitor and independently verify effectiveness of appropriate measures to avoid, prevent, or mitigate such adverse effects; and

7) Communicate their corrective and preventive action plans in relation to identified actual or potential adverse impacts on their business.

Parent companies may fulfill compliance obligations on behalf of their subsidiaries and group companies. However, subsidiaries are required to integrate due diligence obligations into all policies and risk management systems and to fulfil remediation and preventive measures in relation to their operations.

Parent companies will also be required to cascade climate transition plans across subsidiaries within the group.

Key mandatory Obligations

Affected companies will be required to develop due diligence policies and develop a code of conduct to be followed through out the company and its subsidiaries and their respective business partners.

Due diligence policies and codes of conduct will require regular review and updating. Businesses will face significant compliance obligations as direct and indirect business partners of affected companies.

Direct and indirect business partners may be required to bear the costs of independent monitoring and evaluation of compliance with corrective and preventive action plan measures and contractual assurances regarding prevention or correction of potential or actual adverse impacts.

Notification and complaints procedures under the Directive give persons or organisations with legitimate concerns regarding actual ro potential adverse impacts with respect to the operations of a company, its subsidiaries, or its business partners within its chain of activities to submit complaints to national authorities in the relevant Member States. These representatives include human rights defenders and civil society organisations, as well as trade unions and workers representatives representing individuals working int eh chain of activities concerned.

Affected companies are also required to conduct "meaningful stakeholder engagement" during all phases of risk identification, prioritization, and implementation of corrective or preventive plans. Diverse stakeholder groups are identified in the Directive and include employees, trade unions, local communities, indigenous peoples and other defined stakeholder groups.

Remediation and Civil liability

Affected companies shall have mandatory obligations to remediate actual adverse impacts, and will face civil liabilities for intentional or negligent failures to comply with their obligations under the Directive.

Business partners and affected companies may face joint and several liability where the actual or potential adverse impacts of their activities are jointly caused.

The liability threshold provided in the Directive imposes a maximum limit of not less than 5% of worldwide turnover for affected companies.

> **"The Directive has a sweeping impact on the conduct of affected EU-domiciled and non-EU domiciled companies, with its obligations on due diligence risk-mapping and mitigation extending across such companies' global value chains, which will consequently affect African businesses in these chains. Affected companies will need to evaluate the collaboration and support required to enable compliance with the Directive."**

Timeline for Implementation

The Directive is expected to be approved by the EU Parliament by the end of April 2024.

There is a two-year phase in period for EU Member States to adopt national legislation giving effect to the Directive's requirements.

EU companies with more than 5000 employees and worldwide turnover of EUR 1.5 billion will be required to comply with the Directive within three years of it coming into force. Non-EU companies with worldwide turnover of EUR 1.5 billion will be required to comply with the directive within a similar period.

EU companies with more than 3000 employees and worldwide turnover of EUR 900 million will be required to comply with the Directive within four years of it coming into force.

Conclusion

The Directive represents an important step in the EU's journey towards fulfilling the ambitions of the EU Commissions European Green Deal and sustainability objectives. The step will have significant and irreversible impacts on business and operations of African players in global value chains and will accelerate diverse aspects of the mainstreaming of sustainability and climate transition-related objectives into all areas of private sector engagement.

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TAKING STOCK OF KENYA'S DEVELOPING INSOLVENCY JURISPRUDENCE- PREFERENCE TRANSACTIONS

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Introduction

Kenya's insolvency law was completely overhauled in 2015 when the Insolvency Act was introduced (along with the country's revised Companies Act introduced in the same year). Both the Insolvency Act and the Companies Act are modelled on equivalent statutes in the UK and amongst many other things, include statutory duties and obligations on directors. The law on directors' duties was carved by the judiciary in the UK over the course of the 1800s and 1900s by transplanting and adapting the law applicable to trustees. To that extent, directors were equated with trustees under the common law and the duties of directors were developed by analogy with the duties of trustees. This may not have been the perfect analogy since the overarching duty of a trustee under the law of equity is to preserve and conserve the assets of the trust, whereas a director of a company, is often risk-taking with the assets of the company. The duties of directors have in more contemporary times expanded to encompass broader responsibilities towards various stakeholders, including employees, creditors, regulators and the community .

One of the key aspects of directors' duties that have been inscribed in insolvency law is that directors may be held personally liable for any actions they take (or may fail to take) that results in the insolvency of a company or that may prejudice stakeholders such as creditors, that puts them in a worse off position. These are prescribed as reviewable transactions and an example of a reviewable transaction is a preference.

What are preference transactions?

A company gives a preference if it does anything or suffers anything to be done that has the effect of putting a creditor or a guarantor of its debts in a position that, if it were to go into insolvent liquidation, would be better than the position that person would have been in if the thing had not been done. The company must have been influenced by a desire and/or intention to produce the preferential effect in order for the transaction to be vulnerable. Any such transaction may be set aside, in the case of an unconnected person, if it was entered into in the six (6) month period before the commencement of the winding up of the company or its entry into administration. This period extends to two (2) years in the case of a person connected to the company. For the transaction to be set aside, the company must have been insolvent at the time it was entered into or to have become so because of entering into it.

If a transaction is found to be a preference, the court has powers to restore the parties to the position they were in before the transaction was entered into.

Developing jurisprudence

The jurisprudence on reviewable transactions has been limited given the relative newness of the Insolvency Act but just a few weeks ago and for the first time in reported case law in Kenya, the High Court has pronounced itself on preference transactions. The ruling offers some valuable insights on what the courts would look out for in determining whether there is preference. We share some of the key findings from that case below .

The case concerned an application made by the administrator for whom our firm was acting (the Applicant) of an insolvent company (the Company) against the directors of the Company and a tenant of the Company requesting the court to void preferential payments made by and for the benefit of the directors of the Company and a third party, who were all unsecured creditors, during the period of two years immediately preceding the onset of insolvency of the Company.

The Company's secured creditor, a commercial bank (the Bank) successfully made an application to place the Company under administration and the Applicant was appointed as the Company's administrator.

Upon taking up the reigns as administrator of the Company, the Applicant discovered that there were several payments that had been made by the directors in dubious circumstances. In his application to the court, the Applicant alleged that despite the fact that the directors were all aware of the pending application by the Bank to place the Company under administration, they orchestrated several fraudulent assignments of debts and made preferential payments to themselves and third parties in breach of Section 683 of the Insolvency Act.

The Applicant further submitted that one of the parties to benefit from the transactions was a company that was a tenant at the Company's premises, and which had common directors and shareholders as the Company. The Company's directors had passed resolutions to assign fictitious debts purportedly owed by the Company to some of its directors to be offset from current and future rental payments due from the tenant to the Company. These rental payments would otherwise have accrued to the Bank as a secured creditor holding security over the premises. The Applicant alleged that these transactions amounted to fraudulent preferences to the directors of the Company and connected persons.

In response, the directors contended that the debt assignments were for legitimate commercial reasons and were made in the ordinary course of business. undertaken while the Company was solvent.

Ruling

The High Court stated that the purpose of Section 683 (3) of the Act is "geared towards putting all creditors on the same pedestal……. to bring sanity in corporate governance…. [and] to correct situations where owners of companies pile debts on the company and discriminate on who is to be preferred in settlement".

The Court defined a preference as a transaction, "where there is evidence of intent on the part of the company to prefer one creditor over others". In this case, the persons to whom the assignments of debts were made were not only shareholders but were also directors of the Company and their alleged debts were not secured.

The court pointed out that the shareholders who doubled as directors knew of the ongoings of the company, its debt portfolio and its ability or inability to pay the same in future and used this knowledge to advance their own interests.

The court ruled that the said assignments and resolutions were made in bad faith and were fraudulent and therefore liable to be nullified. The court further held that the preferential payments were done to defeat the interests of other creditors of the Company and proceeded to void them.

This case serves as a warning to directors of companies who use their privileged position to siphon funds from distressed companies or attempt to prefer certain creditors over others. It also offers comfort to insolvency practitioners whilst they scrutinize transactions of distressed companies, in the knowledge that they can hold directors responsible for engaging in dubious transactions whilst the entity is insolvent and, importantly, have those transactions reversed. The fraud in this case was apparent, however, transactions can be voided under preference rules without there being fraud. Therefore, it is important for transactions entered into when a company is in distress to be carefully thought out and considered by the directors beforehand in the context of whether they could be challenged by a liquidator or administrator in the future.

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REAL ESTATE INVESTMENT TRUSTS IN ZAMBIA - THE NEXT INVESTMENT FRONTIER?

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Zambia's property market has been rapidly expanding with the development of, inter alia, high-end malls and leased office space in urban areas. To attract further investment, the Securities (Real Estate Investment Trust) Guidelines, 2020 (the "REIT Rules") were enacted to govern, inter alia, the authorization and establishment of income real estate investment trusts ("I-REITS") that are authorised by the Securities and Exchange Commission ("SEC"). The Securities (Collective Investment Scheme) Rules, Statutory Instrument No 161 of 1993 (the "CIS Rules") further govern the authorization, establishment and operation of REITS in Zambia, alongside the REIT Rules (collectively, the REIT Rules and the CIS Rules will be referred to as the "Rules").

A brief overview of REITs in Zambia

REITs are a form of "collective investment scheme" ("CIS") that owns, operates or finances real estate properties that generate a consistent, recurring revenue in the form of dividends, interest or cash distribution i.e., "income-generating real estate".

The Ins and Outs of REITS in Zambia

The REIT Rules apply to I-REITS authorized by SEC, but do not apply to development real estate investment trusts, mortgage real estate investment trusts or other forms of REITS.

To qualify as a REIT, a CIS must, inter alia, ensure that:

1. it is structured as a closed ended fund and is listed on an exchange licensed by SEC;
2. it has a minimum of 2 investors;
3. the minimum value of the initial assets of the real estate investment are not less than ZMW50 million (approximately USD2 million);
4. at least 80% of the total assets of the REIT comprise of real estate;
5. at least 80% of the REIT's revenue is derived from rent and investment income; and
6. the operating costs of the REIT are not more than 30% of the revenue derived from rents and investment income.

Benefits of attaining REIT status

REITs by their nature, are able to access a wider pool of investors, including institutional funds, pension funds and individual investors seeking exposure to real estate assets. Acquiring REIT status in Zambia would therefore provide a REIT with increased liquidity and the ability to raise capital at a more competitive cost, thereby supporting the relevant REIT's growth and any future acquisitions.

Acquiring REIT status may further enhance the trust and confidence of shareholders and investors as REITs are subject to stringent regulatory requirements, which include but are not limited to, financial reporting standards and independent audits.

REITs are further required to distribute at least 75% of their distributable income to their unit holders which makes a REIT an attractive option for investors that are seeking passive income, owing to the regular and consistent stream of income the investors would be able to receive from the REIT. In addition, unit holders of REITs are likely to receive enhanced returns, owing to the fact that REITs approved by SEC are exempted from paying corporate income tax.

Practical challenges of establishing REITs in Zambia

In attaining REIT status, an applicant must appoint a trustee/ custodian who must take into his custody/ control all the property of the CIS and hold it in trust for the holders (in the case of a unit trust) or the CIS (in the case of any other type of CIS). However, while a CIS that is constituted as a trust with no legal personality of its own would be capable of complying with the requirement for a trustee to hold all the property of the CIS in trust for the holders, the requirement for a trustee to hold all the property of the CIS poses serious practical and regulatory challenges for a CIS that is legally constituted as a company with limited liability and separate legal personality.

Specifically:

1. although the CIS (which is a company) can appoint a trustee as required by the CIS Rules, the company itself would not become a legal trust and neither would the company have its legal personality vested in the trustee. As a company, the relevant CIS would retain its separate legal personality and the capacity to hold its own property and as such, the relationship between the company and the trustee would need to be appropriately structured and approval obtained from SEC;
2. if the company's property was transferred to the trustee, the company's valuation and the value of the shares held by the shareholders in the company would be greatly diminished as the value of the company is linked to the assets that it owns. In addition, the transfer of the real estate to the trustee may pose a commercial challenge for investors as they would lose control/ oversight over their investment in the real estate;

3. there are currently only a few entities in Zambia which have the capacity to act as a trustee in the manner contemplated under the Rules. Trust services are currently being offered by financial service providers and are limited to the management of escrow accounts and liquid assets. The said providers are therefore reluctant to actually have a portfolio of real estate properties transferred to them as envisaged by the Rules; and

4. it is not possible for a company to maintain dual legal personality as a corporate entity and as a trustee, thereby bringing into question the justification of a trustee holding the property of a CIS (which is a company).

Despite the above identified practical challenges, parties can engage and seek guidance/ exemptions of certain provisions of the Rules from SEC and once approved, the parties would be able to enjoy the benefits of REIT status as indicated in this article.

The development of the REIT market in Zambia

Despite the enactment of the REIT Rules, the REIT market is still relatively new in Zambia and as at the date of this article, a REIT is yet to be established in Zambia. It must however be noted based on a cautionary announcement made on 22 May 2023 to shareholders and the market. that Real Estate Investments Zambia Plc intended on applying and subsequently attaining REIT status in accordance with the REIT Rules. It therefore remains to be seen whether the REIT Rules will have the intended effect of enhancing investment in Zambia’s real estate sector.

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RECENT REFORM OF MOROCCAN MERGER CONTROL RULES

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Competition law in Morocco, in particular merger control rules, has recently undergone a series of amendments which entered into force in 2023 and have been completed by recently published merger control guidelines.

Taking into account the experience of the Moroccan Competition Council after its first five years of activity, this reform clarifies notably the thresholds applicable, introduces filing fees and provides greater visibility on the procedure.

With almost 200 merger control decisions adopted each year, the Moroccan Competition Council is particularly active. This reform comes at a time where it has also started to impose gun jumping fines for failure to notify.

The main takeaways of the amended regulations and guidelines are presented below.

Merger notification thresholds

Revised thresholds. The reform introduces the following three new alternative notification thresholds:

- the total combined worldwide turnover, excluding taxes, of all undertakings or groups of legal or natural persons party to the contemplated concentration exceeds MAD 1.2 billion (approx. EUR 109 million) and the individual turnover in Morocco of at least one of the parties exceeds MAD 50 million (approx. EUR 4.5 million); or
- the parties' combined Moroccan turnover exceeds MAD 400 million (approx. EUR 37 million), and the individual turnover in Morocco of at least two of the parties exceed MAD 50 million (approx. EUR 4.5 million); or
- the undertakings that are parties to the concentration, or that are the subject of the concentration, or the undertakings that are economically linked to them, have generated altogether, during the previous calendar year, more than 40% of the sales, purchases or other transactions on a national market of identical or substitutable goods, products or services, or on a significant part of such market.

These three criteria are alternative, which means that if one of them is met, parties are required to notify the contemplated concentration in Morocco, irrespective of the existence of local presence or overlap of activities between the parties in the country.

The reform has removed the previous alternative threshold which was only based on the combined worldwide sales of the parties concerned, which should reduce the number of transactions triggering a notification requirement in Morocco. However we note that the Moroccan turnover threshold remains low (MAD 50 Million). In addition, the first alternative threshold can still be met by one party alone

> "With almost 200 merger control decisions adopted each year, the Moroccan Competition Council is particularly active. This reform comes at a time where it has also started to impose gun jumping fines for failure to notify."

Introduction of an exemption in limited circumstances. No foreign-to-foreign exemption is applicable in Morocco. However, an exemption to the notification requirement has been introduced in limited cases. It can apply in case the turnover thresholds are met but the "target company has in Morocco no direct or indirect legal or commercial links, either horizontally or vertically".

This exemption is strictly applied: for example it cannot apply if the target achieves some turnover (even if minimal) in Morocco. In addition, cases involving the acquisition of joint control of a target abroad, and the creation of a joint venture abroad not intended to operate in Morocco, are not covered by this exemption. For those cases, however, the simplified procedure should be applicable (see below).

Possible consultation. The merger control guidelines provide that the parties may now consult the Moroccan Competition Council in the event of doubt as to the notifiable nature of a merger. To this end, the parties may send a presentation of the transaction and the parties involved, together with the documents required to assess its controllability. In the light of the information presented by the parties to the transaction, the Moroccan Competition Council may (i) inform the parties on the non-notifiable nature of the transaction or (ii) invite the parties to formally notify the operation.

Introduction of possible fast track procedures and filing fees

The Moroccan Competition Council's review is split into two phases (Phase I and Phase II). Transactions not raising competition concerns (Phase I without conditions) would be expected to be cleared during Phase I, with a review period of up to 60 days after the file is declared complete.

The reform has introduced the possibility for the Moroccan Competition Council to suspend the review period notably in case the parties fail to provide information. Transactions requiring more detailed review are referred to Phase II with a longer review period.

The reform has also introduced two fast track procedures: the simplified procedure as well as the accelerated procedure. The Moroccan Competition Council can revert to the normal procedure, notably depending on the parties' reactivity to provide information or in case of difficulty to define markets.

The simplified procedure which is a logical extension of the Moroccan Competition Council's efforts to issue decisions within shorter timeframes when examining transactions that do not raise any particular difficulties.

This procedure has entered into force in December 2023 and can apply in the following circumstances:

- if there are no horizontal / vertical links between the parties in Morocco;
- in case of passage from joint to exclusive control provided the acquisition of joint control was notified to the Moroccan Competition Council.

In terms of timing, if accepted, the guidelines indicate that decisions under the simplified procedure are adopted in 30 days on average (instead of 60 days).

The accelerated procedure, which is subject to a reasoned submission filed by the parties and to the approval of the Moroccan Competition Council.

If accepted, the decision is adopted before the legal deadline (i.e. in less than 60 calendar days from the declaration of completeness). There are no more indication provided in the law but in practice, we note that the review period is indeed shorter.

If the Moroccan Competition Council accepts the parties' request to benefit from the accelerated procedure, the filing fee doubles compared to the normal procedure. There are two scenariis:

- In case of acquisition of a controlling stake, it amounts to 2/1000 of the transaction's value with a minimum filing fee of MAD 40,000 (approx. EUR 3,600) and a maximum filing fee of MAD 300,000 (approx. EUR 27,300) instead of MAD 150,000 for the normal procedure (+ VAT);
- For the creation of a new company (i.e., creation of a full-function joint venture), it amounts to MAD 40,000 (approx. EUR 3,600) instead of MAD 20,000 for the normal procedure (+ VAT).

The payment of the filing fee must be made within one month of receipt of the decision.

First gun jumping decisions

Fines correspond to up to 5% of the turnover achieved by the parties in Morocco during the last financial year where an economic concentration has been implemented without notification, or where the parties have closed a transaction before the clearance of the Moroccan Competition Council. In the first case (i.e. absence of a notification), parties can be compelled to file the transaction subject to a daily penalty payment up to 5% of their average daily turnover (unless they revert to the situation prior to the transaction).

At this stage, the Moroccan Competition Council has adopted in 2022 its first gun-jumping decisions (3 in total), with fines amounting to approx. EUR 1 million in each case.

The Competition Council has recently opened new proceedings concerning a merger which took place in 2019.

These proceedings were initiated ex-officio by the Competition Council.

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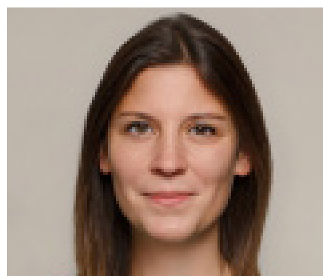

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INSIGHTS INTO THE PROPOSED REGULATORY FRAMEWORK FOR PRIVATE EQUITY FUNDS IN NIGERIA

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International

In the dynamic landscape of private equity, regulatory frameworks serve as the bedrock for investor confidence, market integrity, and sustainable growth. In recognition of the importance of robust regulations, the government body established as the principal regulator of the capital markets in Nigeria, the Securities and Exchange Commission (the "SEC"), issued an exposure draft of new and sundry amendments to the SEC rules and regulations of 2013 (as amended) (the "SEC Rules") on 8 December 2023, including proposed amendments to the rules on private equity funds (the "Proposed Rules"). The SEC Rules make provision for the regulation of private equity funds in Nigeria with a minimum commitment of N1billion investors' funds . Save for the amendments to the registration fee for private equity funds and the provision of Form SEC QR8 in respect of filing quarterly return for private equity funds pursuant to the new rules and amendments to the SEC Rules issued by the SEC on 23 December 2019, no amendment or new provision has been issued or proposed in respect of private equity funds by the SEC until the Proposed Rules.

The Proposed Rules represent a significant evolution in regulatory thinking, aiming to modernize and enhance the regulatory framework to better serve the needs of market participants, in keeping with international best practice. This article briefly analyses the contents of the Proposed Rules, assessing their potential impact and benefits for the private equity landscape in Nigeria.

Overview of the Proposed Amendments

1. Definition Refinement

Under the SEC Rules, the definition of private equity funds primarily focuses on investments in private equity/unlisted companies without specific criteria for investment strategy or horizon . The Proposed Rules introduce criteria related to investment strategy and defined investment horizon, enhancing clarity and aligning regulatory expectations with industry practices.

It is apparent that the SEC aims to provide clarity regarding the operational objectives and scope of private equity funds, thereby facilitating better understanding among stakeholders and regulatory authorities. By explicitly outlining the investment strategy and horizon, the amendment enhances transparency and regulatory oversight within the Nigerian private equity landscape.

2. Threshold Adjustment

Another key amendment under the Proposed Rules is the adjustment of thresholds for regulatory oversight. Under the SEC Rules, all private equity funds with a minimum commitment of N1 billion (One Billion Naira) investors' funds are subject to regulatory oversight . The Private Equity and Venture Capital Association of Nigeria (PEVCA) expressed its opinion regarding what it considered a narrow definition of what constitutes a private equity fund. In response to PEVCA's observation, the SEC provided under the Proposed Rules that private equity funds below a target fund size of N5 billion (Five Billion Naira) are exempt from registration but are required to file governing documents for regulatory review. This adjustment strikes a balance between regulatory oversight and the diverse needs of smaller funds, thereby encouraging market participation while maintaining investor protection standards. The Proposed Rules exempt private equity funds below a target fund size of N5 billion (Five Billion Naira) from registration but requires them to file governing documents for regulatory review, balancing oversight with market participation. By adjusting thresholds and introducing exemptions for smaller funds, the amendments would significantly improve market participation from a broader range of investors and fund managers, thereby promoting inclusivity and diversity within the private equity ecosystem.

3. Investment Restrictions

The proposed amendments introduce investment restrictions, such as limiting single investments to not more than 30% of the fund's assets and mandating a minimum investment of 3% in pension fund assets. These restrictions aim to promote diversification, risk management, and alignment with investor interests, thereby enhancing the resilience of private equity investments in Africa and mitigating risks associated with concentrated exposures. Under the SEC Rules, investment restrictions are limited to not investing more than 30% of the fund's assets in a single investment.

The Proposed Rules introduce additional restrictions, such as mandating a minimum investment in pension fund assets and limiting total management fees and expenses, promoting diversification and investor protection.

4. Enhanced Reporting Requirements

In addition to refining the definition and thresholds, the proposed amendments enhance reporting requirements for private equity fund managers. Under the SEC Rules, reporting requirements focus on quarterly and annual returns to the regulatory authority.

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The Proposed Rules enhance reporting requirements, ensuring regular disclosure of fund performance, investment activities, and fee structures to empower investors and facilitate regulatory oversight. These enhanced reporting requirements ensure regular disclosure of fund performance, investment activities, and fee structures. By providing greater transparency, these amendments empower investors to make informed decisions and facilitate regulatory oversight, ultimately contributing to market integrity and investor confidence. The proposed standardization of valuation methodologies and alignment of regulatory frameworks with international best practices would significantly enhance the attractiveness of Nigerian private equity investments to global investors.

5. Valuation Methodology Standardization

A notable change is the standardization of valuation methodologies based on principles approved by the fund's advisory board. While under the SEC Rules, valuation was based on fair value regime with limited standardization, the Proposed Rules standardize valuation methodologies based on principles approved by the fund's advisory board, enhancing consistency, reliability, and accountability. This departure from the fair value regime enhances consistency, reliability, and accountability in valuing fund assets, thereby aligning with international best practices and investor expectations. Standardized valuation methodologies also promote comparability across funds and facilitate investor due diligence.

6. Conflict of Interest Provisions

Lastly, the proposed amendments introduce robust conflict of interest provisions, requiring disclosure of potential conflicts and establishing policies to manage and mitigate such conflicts. While the provisions regarding conflict-of-interest disclosure and management in the SEC Rules are limited , the Proposed Rules introduces robust conflict of interest provisions, requiring disclosure and management of potential conflicts, strengthening governance and market integrity. These provisions enhance governance, integrity, and trust in fund management practices, safeguarding investor interests and promoting market confidence.

Implication for Private Equity in Nigeria

The proposed amendments hold significant implications for stakeholders kindly in the Nigerian private equity ecosystem. Fund managers, investors, and regulatory authorities must adapt to the evolving regulatory landscape, ensuring compliance, transparency, and accountability. Moreover, these amendments are poised to enhance the attractiveness of Nigerian private equity investments, fostering increased capital inflows, market development, and economic growth across the continent. By promoting diversification, risk management, and accountability, the Proposed Rules contribute to the resilience and sustainability of private equity investments, thereby fostering economic growth, job creation, and innovation in Nigeria.

Conclusion

The Proposed Rules are a welcome development and represent a significant step towards fostering regulatory clarity, transparency, and investor protection within the Nigerian private equity landscape. Through a comparative analysis with the existing rules and an assessment of their potential impact and benefits, it is evident that the Proposed Rules hold the potential to drive positive change, stimulate market growth, and enhance the overall integrity of the private equity ecosystem in Nigeria. By refining regulatory frameworks, aligning with industry best practices, and addressing emerging challenges, the Proposed Rules pave the way for a more resilient, inclusive, and sustainable investment environment in Nigeria. As stakeholders collaborate to implement these reforms, Nigeria's private equity is poised for continued growth, innovation, and socioeconomic impact.

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ACQUIRING CENTRAL BANK OF NIGERIA REGULATED ENTITIES – THE CORE OF THE DEAL

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Amidst Nigeria's recent economic realities; foreign exchange market reforms, local and international investments and divestments, the Central Bank of Nigeria (the "CBN") keeps its eyes on the ball in regulating the activities of banks and other financial institutions[1] (the "Regulated Entities(y)").

From recent guidelines and circulars revising the capital requirements and operational modalities for various financial institutions, the CBN has ushered in a new phase in the regulatory landscape for Regulated Entities. Putting its regulatory oversight and authority into perspective, the CBN is like an African parent, who wants to oversee the affairs of its child and append its stamp of approval when that child is making a major life decision; career (being products), or relationships (being partnerships, mergers, acquisitions, and other restructuring deals).

Acquiring a Regulated Entity is an uphill task, not only because of CBN's overarching presence throughout the process but also, because of the enormity of the financial risks to the acquirer/investor post-closing. As such, beyond the regular matters an investor should look out for in a typical merger and acquisition (M&A) deal, acquiring a Regulated Entity requires the investor to consider other significant issues; in particular, the risks arising from the acquisition of a company or assets primarily dedicated to highly regulated activities backed by licences and authorisations that could be suspended or even revoked. Consequently, it is necessary to allocate sufficient resources, time, and attention to assessing these risks.

> **"It is worthy to note that Section 65 of the BOFIA effectively empowers the CBN to replace the Federal Consumer and Competition Protection Commission (the "FCCPC") in regulating anticompetition and trust concerns in M&As involving Regulated Entities."**

We will attempt to give a brief overview of considerations to be kept in mind in M&A transactions that feature Regulated Entities and discuss some risk mitigation strategies.

Special Considerations when Acquiring Regulated Entities

Approvals

Closing an M&A deal involving a Regulated Entity requires the approval of the CBN. According to Section 7 of the Banks and Other Financial Institutions Act, 2020 (the "BOFIA"), the CBN must give its consent before any agreement or scheme of arrangement resulting in a change of control ,a transfer of significant shareholding, sale and disposal of the business, and amalgamation and restructuring of a Regulated Entity can be concluded.

A contravention of this provision will void any related deal, and the transfer of any interest from the Regulated Entity to the investor will be ineffectual, except it is subsequently ratified b y the CBN. This sort of contravention further exposes the Regulated Entity to a penalty of N20, 000, 000.00 (Twenty Million Naira) upon conviction, and the sum of N500, 000.00 (Five Hundred Thousand Naira) for each day the contravention continues. This is a risk the parties to the transaction do not want to be exposed to.

It is worthy to note that Section 65 of the BOFIA effectively empowers the CBN to replace the Federal Consumer and Competition Protection Commission (the "FCCPC") in regulating anticompetition and trust concerns in M&As involving Regulated Entities. Notwithstanding that the FCCPC is the primary body regulating anti-competition, consumer protection and M&A activities in Nigeria, the BOFIA confers exclusive regulatory oversight on the CBN in relation to matters such as these involving Regulated Entities.

There is also an additional hurdle[2] for some Regulated Entities seeking any other CBN issued licence as the CBN specifies that licenced payment companies identified as Mobile Money Operators, Switching and Processing companies, Super-Agents, Payment Terminal Service Providers, and Payment Solutions Service Providers seeking any additional licence; must obtain a "no-objection" from the Payments System Management Department.[3]

Licence Specific Requirements

The CBN has specific requirements for the various categories of its licences; thus, a target's licence is the first step in determining the specific requirements an investor should look out for when acquiring a Regulated Entity. These may range from minimum share capital requirements to compliance with the CBN regulations on Anti-Money Laundering/Combating the Financing of Terrorism , Know Your Customer, Customer Due Diligence, Risk-Based Cybersecurity Framework, etc.

That said, a birds-eye standard attention must be adopted when reviewing licence approvals, as well as the relevant circulars, guidelines, and frameworks applicable to the Regulated Entity. This is because the CBN periodically issues directives through circulars and regularly updates its guidelines and frameworks.

For instance, the Guidelines on The Regulation and Supervision of Microfinance Banks (MFB) in Nigeria, 2020 limits the number of branches MFBs may operate depending on the relevant licence class. Where the target is an MFB, it would be necessary, among other factors, to confirm the MFB is operating within the scope of its licence as it relates to the number of its branches. In addition, the BOFIA requires banks to obtain the prior approval of the CBN before changing the location of its branches.[4] This informs the need to know both former and current branches of the MFB, and to confirm requisite approvals (where applicable), were obtained for each of these.

In a landmark move towards market recapitalisation, the CBN recently revised the minimum share capital for Commercial, Merchants, and Non-interest Banks;[5] while this takes effect f rom 3 1st March 2026, it is worthy to note that in raising this capital, these Regulated Entities will be looking to several structures including possible M&A deals. Flowing from this, the CBN has specified acquirers will "assume responsibility for all liabilities and obligations,[6] including the protection of depositors"; this is a pertinent issue to be considered by potential investors.

Data Protection Compliance

The value chain of Regulated Entities essentially involves the collection and processing of the personal data (sensitive data inclusive), of customers. Compliance with data protection requirements entails specific data protection and privacy requirements applicable to data controllers/processors of major importance.[7] The fact is, Regulated Entities more often than not, process a mine of personal data. As a result, compliance with this should be top of mind for any Regulated Entity.

As a potential investor, there is a need to ensure the Regulated Entity is data protection compliant and has adequate structures to prevent data breaches. For instance, there is a requirement for data controllers/ processors of major importance to register with the Nigeria Data Protection Commission (the "NDPC"). In addition to data protection laws being primarily the Nigeria Data Protection Act, 2023 and relevant regulations issued by the NDPC, the CBN also mandates Regulated Entities to give utmost regard to data protection rights of customers.[8]

"A birds-eye standard attention must be adopted when reviewing licence approvals, as well as the relevant circulars, guidelines, and frameworks applicable to the Regulated Entity. This is because the CBN periodically issues directives through circulars and regularly updates its guidelines and frameworks."

Cyber Security

Data protection and privacy is only assured where a company has best-in-class cybersecurity infrastructure to protect such data. The CBN Risk-Based Cybersecurity Framework and Guidelines for Deposit Money Banks (DMBs) and Payment Service Providers (PSPs), 2019 sets the minimum standards and requirements to be implemented by all DMBs and PSPs in their respective cybersecurity programmes. However, whilst one may find the cybersecurity framework adequate, it may not be foolproof. For additional protection, prudence dictates the investor obtains relevant indemnities from the selling/merging Regulated Entity.

Operational Structures Required to Maintain the Licence

CBN regulations require several operational structures to be in place for the maintenance of a licence as this helps the Regulated Entity stay compliant with its obligations to the CBN. A good example is the CBN's Corporate Governance Guidelines, 2023 applicable to Commercial, Merchant, Non-Interest, Payment Service Banks, and Financial Holding Companies which contain strict provisions on risk management, compliance, and related party transactions. Generally, Regulated Entities must have an internal audit unit, a compliance officer, a chief information security officer, an anti-fraud unit, a money laundering reporting offi cer, etc.

It is crucial for an investor to confirm that these structures are already in place prior to the close of the deal. In the event they are not, it can decide on how the operational cost for establishing these structures would be managed.

Other Considerations:

Some other key issues to consider are:

- **are there any incidents of non-compliance identified by the CBN during periodic audits and have they been remedied?** Section 12 of the BOFIA enlists non-compliance with a CBN directive as grounds to revoke a licence;
- **are there ownership restrictions in the Company's Articles?** Picture this – Company A just acquired Company B. This deal is regarded as one of Nigeria's largest acquisition deals in the Financial Services sector. Post-closing, after money has exchanged hands, Company A surprisingly discovers from Company B's Articles of Association – Company B can only be owned by members of a specific society. Unfortunately, Company A is not a member of the specified society! Wahala![9] Watch out for clauses that restrict ownership of a company to a defined set of people which may not include the potential investor!;
- **are the objects of the Regulated Entity in line with its permissible activities?** The objects of payment companies must be limited to its permissible activities;[10]
- **are the target's shareholders' funds at par with the minimum share capital requirement for the licence?** Where this is not the case, the Regulated Entity runs the risk of its licence being revoked for non-compliance with its minimum share capital requirement;
- **Material Contracts.** You want to know that the products, activities, and partnerships of the Regulated Entity are in line with its permissible activities.

Conclusion

After considering these key issues, an efficient step would be to categorize them into high risk, medium risk, and low risk.

High risk issues may include non-compliance with CBN directives and regulations, non-compliance with the BOFIA, ownership restrictions, and engagement in non-permissible activities. The penalties here are typically grounds for revocation of the licence, fines, or both. Given that high risk issues affect the core of the deal, a potential investor must consider how these risks can be limited and whether the deal is worth closing.

On the other hand, medium risk issues such as non-compliance with data protection regulations, pending litigation (depending on the nature of the suit), pending tax liabilities etc., would typically expose the Regulated Entity to monetary fines. Once these risks are identified, the investor can decide which risks could be remediated as conditions precedent or subsequent and obtain relevant indemnities from the selling Regulated Entity.

Finally, low risk issues are such that do not affect the core of the deal and can be remedied at the pace of the parties.

The core of the deal is, the investor wants the licence. This makes it expedient to confirm the licence is valid and is being used in line with its regulator's directives. Like every major life decision, duty calls to have clarity and comfort in taking that next step. The investor must have clarity and confidence with the status of the licence, which gives the comfort needed in taking the next steps.

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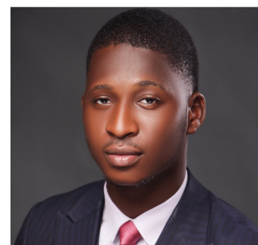

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[1]Comprising entities other than banks. These include Finance Companies, Bureau de Change Operators, Payment Service Providers, and other entities holding a CBN licence

[2]CBN Circular on the "New Licence Categorizations for the Nigerian Payments System", 2020.

[3]Note that non-compliance with a CBN directive is a ground for licence revocation.

[4]Section 6, BOFIA.

[5]CBN Circular on the "Review of Minimum Capital Requirements for Commercial, Merchant., and Non-interest Banks in Nigeria", 2024

[6]Presumably, of the Regulated Entity being acquired.

[7]Definition extends to parties who process personal data as an organisation or a service provider in the finance sector.

[8]Paragraph 5.4, Central Bank of Nigeria Consumer Protection Regulations, 2019.

[9]Nigerian Pidgin English. Loosely translates to "There is a huge problem"!

[10]Backing that up, carrying out activities outside the scope of a licence is also a ground for revocation.

NIGERIA - 2024 PRIVATE CAPITAL OUTLOOK: KEY FISCAL DEVELOPMENTS IMPACTING INVESTMENTS AND INVESTMENT FUNDS

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Overview

Nigeria's fiscal landscape is undergoing rapid transformation, with profound implications for private capital investment and business ventures. The inauguration of the Presidential Fiscal Policy and Tax Reforms Committee (Committee) in August 2023 marked a pivotal moment, as it embarked on a comprehensive review aimed at reshaping Nigeria's fiscal policy and tax system.

Addressing critical areas such as fiscal governance, revenue transformation, and economic growth facilitation, the Committee's mandate is particularly significant against the backdrop of Nigeria's significant budget deficit exceeding N9 trillion.

However, the Federal Government's disclosure, through the Committee and the Federal Inland Revenue Service (FIRS), of an intention to widen the tax net and streamline tax payments seems at odds with the FIRS's ambitious revenue generation target of N19 trillion - its highest to date.

The implications of these reforms, coupled with the amendments introduced by the Finance Act 2023 (FA), have profound effects on investment vehicles such as limited liability partnerships (LLPs), as detailed in the 9th Edition of this Bulletin. In this update we highlight some of the latest fiscal trends and developments impacting investments and investment funds in Nigeria.

As Nigeria navigates these dynamic changes, private capital investors and investment funds must carefully assess the evolving fiscal landscape to capitalise on emerging opportunities and mitigate potential risks to achieve sustainable growth and profitability in the Nigerian market.

Ongoing implementation of the Finance Act 2023

The FA introduced amendments to 11 existing laws which impact clients' businesses in the following ways:

Capital Gains Tax

- **Gains made from Digital Assets:** Prior to the enactment of the FA, digital assets were not recognised as assets subject to capital gains tax. This has, however, changed with the amendment of the Capital Gains Tax Act, Cap. C1 LFN 2004 (as amended) (CGT Act), and gains made from the disposal of digital assets are subject to capital gains tax (CGT) in Nigeria. One question that arises is whether cryptocurrency qualifies as a digital asset for capital gains purposes because the policy direction for this amendment signalled an intention to impose CGT on cryptocurrency-related transactions. While digital assets are not defined in the CGT Act, the Securities and Exchange Commission in Nigeria (SEC) issued Rules on Issuance, Offering Platforms and Custody of Digital Assets on 11th May,2022, where it defined digital assets as digital tokens that represent assets such as a debt or equity claim on the issuer. This definition suggests that cryptocurrency assets may not qualify as digital assets for CGT purposes, since it does not give the holder a right to a debt or equity claim against the issuer. Regardless of this definition, the CGT Act recognises currencies other than the Nigerian Naira as assets for CGT purposes. This means that if any currency other than the Nigerian Naira (which could include cryptocurrency) is sold at a gain, CGT will apply at 10%.

> **"As Nigeria navigates dynamic changes, private capital investors and investment funds must carefully assess the evolving fiscal landscape to capitalise on emerging opportunities and mitigate potential risks to achieve."**

- **Utilisation of Capital Losses:** With the amendment introduced by the FA, taxpayers are allowed to deduct losses incurred on the disposal of assets from gains that accrue from the disposal of assets of the same class. This is a new and laudable development because, prior to this amendment, the company could not utilise capital losses. This denied investors actual returns on their investment because it meant that tax assets were lost. The capital losses can also be carried forward for a maximum of 5 (five) years. Corporate and individual investors are now entitled to roll-over relief for stocks and shares if the proceeds from the disposals are reinvested in the acquisition of eligible shares in the same or other Nigerian companies within the same year of assessment.

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Implementation of the Business Facilitation (Miscellaneous Provisions) Act 2022 (the BFA)

With the amendment introduced by the Business Facilitation (Miscellaneous Provisions) Act 2022 to the Pension Reform Act, 2014, pension assets are now eligible for securities lending as may be approved by the National Pension Commission (PENCOM). The BFA grants a Pension Fund Administrator power, subject to guidelines issued by PENCOM, to apply a percentage of pension assets in the retirement savings account for the purpose of securities lending. This presents fresh opportunities for Pension Fund Administrators to increase profitability, which in turn creates more value for investors.

Taxation of Limited Liability Partnerships (LLP)

- On 14 August 2023, the FIRS released an information circular with number 2023/06 on the taxation of Limited Liability Partnership (LLP Circular). The LLP Circular now provides that LLPs are to be taxed as companies, considering that they have a corporate personality as conferred on them under the Nigerian Companies and Allied Matters Act, 2020 (as amended).
- LLPs are required to pay companies income tax on profits accrued in, derived from, brought into or received in Nigeria for each year of assessment. It is important to note that the profits of LLPs, which are taxable under the Capital Gains Tax Act, the Petroleum Profit Tax Act and the Personal Income Tax Act, are excluded from tax under the provisions of the Companies Income Tax Act. However, if the LLP's yearly turnover falls below the 25-million-naira threshold, such an LLP is exempt from payment of companies' income tax. This is unlike most jurisdictions where LLPs are treated as tax-transparent vehicles, with income taxed in the hands of the partners or members and not the LLP.
- If the LLP is set up as an investment vehicle in equities only, the tax impact would not be significant because dividends received from investee companies are treated as franked investment income, which means that no further taxes apply when they are redistributed to the partners of the LLP. If the LLP earns interest income from debt investments, it will have to first pay companies income tax at 30% of the interest income before paying dividends to partners. A further withholding tax of 10% on the dividend applies, thus increasing the tax cost for investments using an LLP. In summary, the LLP confers no additional benefits when compared to structuring investments through a company limited by shares.
- Additional taxes and levies that apply to LLPs further to the LLP Circular include:
  1. Nigeria Police Trust Fund Levy at the rate of 0.005% on the LLP's net profit
  2. Tertiary Education Tax at 3% of the LLP's assessable profits; and
  3. Capital Gains Tax at the rate of 10% of gains that accrue when the LLP disposes assets.
- Unlike most jurisdictions where tax-transparent LLPs do not suffer capital gains tax in their name but in the hands of their partners, in Nigeria, LLPs are liable to capital gains tax on the disposal of any assets they hold, and where the gains are distributed as dividends to partners, a further withholding tax of 10% applies.
- LLPs also have an obligation to file the relevant returns, maintain proper books of account, and maintain a record of their partners and employees, among other obligations.

New incentives for non-associated gas

On March 6, 2024, President Bola Ahmed Tinubu signed the Oil and Gas Companies (Tax Incentives, Exemption, Remission, etc.) Order 2024 (referred to as the Order). The Order aims to specify incentives applicable to Non-Associated Gas (NAG) and to promote investments in NAGs greenfield development. These incentives can significantly enhance the profitability of companies involved in Non-Associated Gas (NAG) greenfield development, potentially rendering projects of this nature highly appealing to investors bearing in mind the recognised potential of the gas sector to unlock economic gains.

> **"The BFA grants a Pension Fund Administrator power to apply a percentage of pension assets inthe retirement savings account for the purpose of securities lending. This presents fresh opportunities for Pension Fund Administrators to increase profitability, which in turn creates more value for investors."**

Implementation of the Committee's Recommendations

The Committee has published several recommendations in a "quick wins" report, including the following with implications for investment:

- discontinue the FX verification portal, requirements for Certificate of Capital Importation and restrictions on export proceeds
- impose excise tax on FX transactions outside the official market
- digitalise Nigeria's FX regime
- discourage speculative demand and FX cash hoarding
- expand the official FX market to incorporate Bureaux des changes, FX apps and retail FX dealers, and outlaw black-market transactions
- suspend multiple taxes on the poor and small businesses (compensate with windfall revenues of certain agencies)
- reform and streamline withholding tax regulations to ease pressure on businesses' working capital
- comprehensively review tariffs on the 43 items permitted to access official market FX forex and import prohibitions (implemented)
- remove impediments to global/remote employment opportunities for Nigerians resident/based in Nigeria.

Conclusion

Q1 2024 continues ongoing tax reforms and recommendations that reflect a transformative shift towards transparency and alignment with global standards. These changes not only present opportunities for growth and innovation but also contribute to creating a more favourable business environment in Nigeria, with positive implications for investments and investment funds.

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NIGERIA 2024: PRIVATE CAPITAL INVESTMENT OUTLOOK

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Against a backdrop of macroeconomic challenges including high inflation, currency depreciation, FX challenges, and tightening fiscal policies, Nigeria's private capital investment landscape for 2024 offers a blend of challenges and opportunities. This tempered optimism is characterized by cautious investment strategies and a focus on smaller ticket sizes, potentially resulting in shifts in sector preferences and regional dynamics. However, despite these challenges, promising signs of growth in sectors such as ICT, manufacturing, and banking are emerging, particularly with the recent directive by the Central Bank of Nigeria (CBN) for new bank recapitalization requirements, which offers investment opportunities in the sector.

Additionally, there are glimmers of hope for increased Foreign Direct Investment (FDI). The CBN announced a surge in foreign exchange inflow in February 2024, with overseas remittances surpassing previous levels and foreign investors actively participating in sovereign debt instruments in the Nigerian market, instilling some confidence in the country's economic prospects.

As the CBN continues to implement strategies aimed at stabilizing the economy, the key legislative and regulatory developments outlined in the 9th edition of this bulletin, including the Business Facilitation (Miscellaneous Provisions) Act (BFA) and the Finance Act (FA), significantly impact tax obligations and business operations in M&A transactions. Regulatory interventions by entities like the Corporate Affairs Commission (CAC) and the CBN further influence market dynamics.

Fund Formation: Implementation of LP and LLP structures under The Companies and Allied Matters Act 2020 (CAMA)

The inclusion of limited partnerships (LPs) and limited liability partnerships (LLPs) in the Companies and Allied Matters Act 2020 (CAMA) marks a significant milestone, offering a structured and flexible framework for private capital funds. LPs and LLPs provide tax advantages while limiting liability, attracting both domestic and international investors. However, compliance with CAMA (including registration prerequisites, disclosure standards, and operational protocols tailored to these partnership structures) and CAC requirements presents challenges. Compliance hurdles arising under the CAC's guidelines, including the prohibition of the use of the term 'fund' in LP and LLP names, contrary to global best practices, must be addressed.

New CAC Capitalization Requirements

On 5th December 2023, the CAC, in line with the requirements of the Revised Handbook on Expatriate Quota Administration, 2022, issued by the Nigerian Federal Ministry of Interior, issued a public notice (the CAC Public Notice), implementing the requirement of a minimum paid-up share capital of N100 million for companies with foreign shareholders. According to the CAC Public Notice, companies with foreign participation will need to have a paid-up share capital of NGN100 million at incorporation, while existing companies are granted six months to comply with the requirement. Following engagement with stakeholders, the CAC retracted the CAC Public Notice on 8th December 2023. Despite this retraction, the CAC has recently commenced enforcement efforts against non-compliant companies.

Higher capitalization requirements may enhance financial stability and companies' credibility within the Nigerian business landscape. By ensuring that companies have sufficient capital reserves, they may be better equipped to withstand economic pressures. However, they may also present challenges for startups and smaller companies, as well as for foreign private capital investors seeking investment opportunities in the Nigerian market. The implementation of higher capitalization requirements could lead to a shift in the composition of the market, with larger, more established companies dominating and smaller companies facing greater challenges in accessing capital and competing effectively. Companies that fail to meet the new capitalization requirements due to higher entry barriers may face difficulties accessing funding from foreign investors, potentially limiting investment opportunities for portfolio companies and potentially stifling innovation and growth.

It will be important to strike a balance between promoting financial stability and credibility within the Nigerian business landscape and fostering an investment-friendly commercial environment that preserves Nigeria's appeal as a hub for early-stage company funding.

> **"Nigeria's private capital investment landscape for 2024 offers a blend of challenges and opportunities."**

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NIGERIA'S FOREIGN EXCHANGE POLICY REFORMS: A BOOST FOR FOREIGN INVESTMENTS

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Nigeria's foreign exchange policy raised concerns in the business community both domestic and international. The multiple exchange rate regime generated significant concerns with respect to the attendant market distortions, perceived limited transparency and arbitrage ensuing from the price differentials of the respective exchange rates. The Central Bank of Nigeria ("CBN") introduced the multiple exchange rate regimes between 2014 and mid-2023 with the objective of allocating foreign exchange to exporters and SMEs under different foreign exchange windows such as the Investors & Exporters (I&E) window. The exchange rate system had its benefits and negatives, however, it would appear that in recent times the negatives were considered to outweigh the benefits.

In particular, the multiple exchange rate regime was considered to restrict foreign investment inflows into Nigeria as investors became wary of the uncertainties associated with the exchange rate regime. The lack of clarity and transparency was believed to have discouraged foreign investment. In addition, the foreign exchange regime did not help to provide the much-needed foreign exchange supply which is critical to guarantee the repatriation of the proceeds of investment by foreign investors and this constituted a major deterrent for foreign investment inflows.

The CBN under the President Tinubu administration embarked on a number of foreign exchange policy reforms which are geared towards boosting foreign investment with the objective of providing transparency, certainty and eliminating inconsistency in rates.

1. **Elimination of the Multiple Foreign Exchange Rates**

The Foreign Exchange Reforms

Prior to mid-2023, Nigeria operated up to five (5) exchange rate systems. The exchange rate systems are the following: (a) NAFEX rate which was a rate set by the CBN and utilized for government transactions, official foreign reserves and some priority sectors; (b) Interbank rate being the rate by which commercial banks traded foreign currencies; (c) Investors and Exporters (I&E) Window was created to attract investors and encourage export earnings. Investors and exporters were allowed to trade foreign currencies at market determined rates; (d) Bureau De Change ("BDC") rate. BDCs are licensed by the CBN to carry out retail foreign exchange business. BDCs source foreign exchange from the CBN and independently and their rates are usually reflective of the price at which they source foreign exchange; and (e) Parallel market rate. Parallel markets typically develop when central banks' foreign exchange supply is unable to meet legitimate demands for foreign exchange. Players in the parallel market would source foreign exchange through informal channels and the rates are usually higher than NAFEX and interbank rates. The premium on parallel market rates (i.e. the difference between the official and parallel markets rates) prior to mid-2023, was as high as 61.93%.

On 14th June, 2023, the CBN announced the abolition of the multiple exchange rate system and collapsed all segments of the multiple exchange rate regime into the I & E window. The abolition of the multiple exchange rate system sought to remove market distortions and created a level playing ground in the foreign exchange market. The single market-driven rate helps to create transparency and certainty allowing businesses to clearly understand the value of the Naira and make informed decisions regarding investments.

2. **Re-Introduction of the "Willing-Buyer, Willing-Seller" Model**

The CBN in its announcement of 14th June, 2023 also re-introduced the "willing-buyer, willing-seller" model. The re-introduction of the "willing-buyer, willing-seller" model implies that the market forces of demand and supply will determine the exchange rate rather than the initial foreign exchange allocation and set price model mechanism. Further to the re-introduction of the "willing-buyer, willing-seller" model, the official market moved from about N474 per dollar to N664 per dollar on the same day thereby significantly closing the premium on the parallel market. The decision of the CBN to re-introduce the "willing-buyer, willing-seller" model was widely celebrated as the right move towards achieving a unified exchange rate system or at least substantially eliminate the rate differential between the official market and the parallel market.

> **"The CBN under the President Tinubu administration embarked on a number of foreign exchange policy reforms which are geared towards boosting foreign investment with the objective of providing transparency, certainty and eliminating inconsistency in rates."**

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In addition, the CBN in its official circular dated 31st January, 2024, directed that in line with its commitment to liberalize the Nigerian Foreign Exchange Market, International Money Transfer Operators ("IMTOs") be required to quote exchange rate for naira payouts to beneficiaries based on the prevailing market rates at the Nigerian Foreign Exchange Market on a "willing-seller, willing-buyer" basis. The CBN thereby superseded its earlier circular dated 13th September, 2023 requiring IMTOs to quote exchange rates within allowable limits.

The "willing-buyer, willing-seller" model creates a level-playing ground across players within the Nigeria Foreign Exchange Market and will curb speculation and restore investors confidence in the Nigerian economy.

> **"... with a more vibrant foreign exchange market based on transparency, efficiency and certainty, Nigeria will be able to attract both foreign direct and portfolio investments which will also serve as a veritable source of foreign exchange..."**

3. Strengthening of the Regulation and Operations of IMTOs and BDCs

Reports indicate that diaspora remittances in Nigeria were at an all-time low. The report indicated that the substantial premium on the parallel market rates might have diverted diaspora remittances to unofficial foreign exchange channels. Diaspora remittances into Nigeria at its peak stood at US$24.31 Billion . However, in 2023 the diaspora remittances amounted to about US$20 Billion (i.e. a reduction of over US$ 4 Billion) and reports have indicated that only a fraction of the amount was inflowed into the Nigerian Foreign Exchange Market while a substantial portion of the amount was externalized through several means. The CBN on 31st January, 2023 released the Reviewed Guidelines on IMTOs in Nigeria. The objectives of the revised guidelines includes (a) to boost diaspora remittances and other capital inflows into Nigeria; (b) promote efficient price discovery mechanism and the evolution of appropriate market determined exchange rate; and (c) enhance the ease of doing business for IMTOs in Nigeria and money transfer recipients.

The guideline increased the minimum capital of the foreign IMTOs to US$1 Million and required the IMTOs licensed to operate in Nigeria to have the naira equivalent in share capital. The guideline also expanded the scope of target users from a "person-to-person" basis to "business to person" and "business-to-business" basis. The guideline also restricted IMTOs to undertake only in-bound activities and would have to work with commercial banks as agents to effect outbound international money transfers. In addition, IMTOs would only make payout in Nigerian currency and not foreign currency.

The CBN on 23rd February, 2024 released the exposure draft of the Revised Regulatory and Supervisory Guidelines for Bureau de Change Operations in Nigeria. The guidelines sought to eliminate arbitrage, ensure adequate capitalization of BDCs and efficiency and transparency in the regulation of BDCs. The guideline amongst others (a) carved-out 16 categories of person who cannot partake in the ownership of BDCs such as commercial banks, other financial institutions, payment service providers, etc. The guideline also introduced two categories of BDCs (Tier 1 – having national operation with authority to open branches or appoint franchisees; and Tier 2 – authorized to operate in one State and may have up to three (3) locations with the approval of the CBN). In addition, the guideline increased the capital requirement of BDCs. Tier 1 BDCs will have a minimum capital of N2 Billion (circa US$1.4 Million) while Tier 2 will have a minimum capital of N500 Million (circa US$350,000).

4. Raising Bond Yields on Nigeria Government Local Currency Securities

The CBN raised the interest rates on Nigerian government local currency debt instruments. This move is aimed at attracting foreign investors, and on the broader effect, to address excess liquidity, combat inflation and stabilize the value of the Nigerian currency. Nigeria's Debt Management Office in February, 2024 received a record high of N1.9 Trillion (circa US$1.3 Billion) in two (2) Federal Government of Nigeria bond auctions from both domestic and foreign investors. The Government sold 7-year bond at a yield of 18.5% compared to 15% in January while the 10-year bond was auctioned at 19% as against 16% for a similar bond in January.

The move by the CBN to reprice Nigeria's debt instruments will attract foreign portfolio investments into Nigeria and will serve as an important source of foreign exchange for the country thereby shoring up foreign exchange supply.

Conclusion

The CBN foreign exchange policy reforms is set to restore investor-confidence in the Nigerian economy. The re-introduction of the "willing-buyer, willing-seller" model creates efficiency and certainty, and provides transparency to investors. The CBN in the first quarter of 2024 cleared all valid foreign exchange backlog payments amounting to about US$7 Billion which was a further step by the CBN to fulfil its promise to stabilize and restore confidence into the Nigerian economy. Also, since the implementation of the foreign exchange policy reforms, the premium between the parallel market and the official market has narrowed to 12.0% since the end of January 2024 from 61.93% in January, 2023.

It is envisaged that with a more vibrant foreign exchange market based on transparency, efficiency and certainty, Nigeria will be able to attract both foreign direct and portfolio investments which will also serve as a veritable source of foreign exchange and alongside with complimentary reforms in other sectors of the economy, Nigeria will be able to improve supply of foreign exchange, meet its daily foreign exchange demands and restore confidence into the economy.

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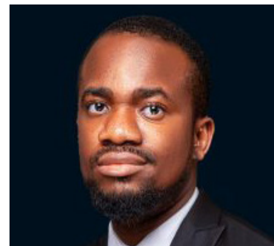

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TRENDS IN AI DEVELOPMENT IN AFRICA

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Trends in AI development in Africa

Africa is home to multiple tech unicorns, with valuations exceeding the $1 billion mark. These players have created a blueprint for AI success in Africa across diverse sectors. Investors are excited about the unique AI opportunities that herald a new era for African AI leadership. But where are challenges emerging that could frustrate this?

Diverse use cases are emerging

AI investments in Africa and the Middle East are projected to balloon to $6.4 billion dollars by 2026.

Basic AI systems are already being developed and used in African countries. This includes AI that can perform specific tasks (e.g. smartphones).

Now African developers and industry players are developing and deploying more advanced AI.

Emerging AI applications span enhancing customer engagement and decision-making experiences, tackling challenges in health, climate, and agriculture, and content creation.

Togo is using AI to distribute social funds, while Zambia is using AI to counter disinformation and misinformation during elections.

There is space for further investment in this 'narrow AI' – investors and industry has not fully tapped the potential. For example, simple smartphone software that can efficiently enhance customer payment experiences. This narrow AI is more familiar to investors globally and the associated regulatory, geopolitical and social risks are well-known.

Investors are also shifting their gaze towards the more advanced AI prospects, acknowledging that infrastructural investment is crucial to scale these opportunities.

Enthusiasm is spreading

It is estimated that more than a third of the world's young people will live in Africa by 2050, intensifying the spotlight for AI investors on African AI opportunities, including digital infrastructure development to support this demographic surge and the anticipated demand.

Emerging focal points for investors and industry include:

- **Talent and youth development:** With a population exceeding 1.4 billion people, Africa has a youthful population of digital natives – accustomed to connected devices and contributing to the rise of digital and AI hubs across the continent (Rwanda is one example). Investors are particularly aware of investment opportunities that nurture new AI talent and develop opportunities for Africa's young population (e.g. through digital literacy and skills).
- **Powering AI computers:** The significance of raw materials and energy resources to power AI computers that operate globally (GPUs) is a focus for both investors and governments in developed economies. The availability of natural resources such as minerals essential for AI components like chips, could become critical negotiation topics in the geopolitical and commercial context. The scarcity of these resources in global AI supply chains will be a decisive factor in AI computing and data centre deals.
- **Data as a foundation:** AI goes far beyond just personal data; it encompasses all data. Investors are exploring opportunities where there are rich data sources to power African AI (and enhance, non-African AI systems with African data). There is an increased geopolitical and commercial focus in companies making the most of local and proprietary data to produce relevant, market-specific solutions. Data sovereignty will continue to be an area of regulatory focus in Africa.

"It is estimated that more than a third of the world's young people will live in Africa by 2050, intensifying the spotlight for AI investors on African AI opportunities."

- **Long-termism:** AI investments in Africa demand broader and long-term thinking. This means more openness to collaborative opportunities (e.g., with Development Finance Institutions (DFIs)/ Multilateral Finance Institutions (MFIs), financial investors and venture capital firms, which give founders the latitude to expand their AI products and services). African MFIs can play a significant catalytic role in promoting the growth and development of AI in Africa.

Successful AI investment in Africa requires awareness of how in-country players perceive the opportunities and priorities for AI infrastructure, computing power, and governance.

TRENDS IN AI DEVELOPMENT IN AFRICA

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Knowing the market

AI investment in African countries necessitates a nuanced approach – not a 'one-size-fits-all' mentality. Country-specific insights on data, infrastructure, and talent challenges is vital. Emerging challenges and trends for investors include:

- **Data collection:** AI systems are currently predominantly trained on Western data. That means that some solutions will not scale well in an African context – even sometimes within different parts of a country – where individual countries and regions will have multiple languages, symbols, and systems. This means a tailored data diligence to assess viability and valuation.
- **Infrastructure:** AI requires consistent energy and infrastructure to function. This means developing technology and cybersecurity infrastructure to keep pace with the potential for the collection and curation of Africa-specific data for AI development. Smartphones are one example of effective sources for gathering real-time, personalised data, and they can serve a critical role in translating AI innovation into everyday impact. However, data centres and compute projects are necessary for supercharging AI investment.
- **Constrained financial markets:** Africa has a highly constrained fiscal space. Investors and industry need to consider how to structure AI investments so that they are mutually attractive. Industry is focussed on how they can fund AI infrastructure projects without taking on additional debt. If debt is taken on, infrastructure-backed structures our public-private partnerships may be more attractive to sellers.

AI policy and geopolitics

Right now, there is not a one-size-fits-all AI policy in any country globally. Nations are defining their own approach. However, investors are also aware that AI law is taking shape globally.

China has published rules on generative AI. The European Union (EU) is one example where an AI-specific law is set to be finalised in 2024. The EU AI rules can apply to companies outside of their originating borders in some cases, which could have the effect of setting a 'gold standard' worldwide.

What does this mean for investors in African AI?

Mauritius and Rwanda are two examples of African countries that have launched national AI strategies, and these and other African policy initiatives explore themes such as collaborations, leadership, job creation, sustainable development, policy and regulation, and investment.

Given this current state, investors are also focussing on diligencing the application of existing laws and regulations in the countries they invest in. This is enhanced with an additional awareness of the importance of applying an AI-specific lens. Particularly as authorities will likely more rigorously enforce existing laws in the absence of AI specific rules.

Whilst AI-specific regulation is not yet a reality in African countries, investor due diligence will increasingly centre around people and governance. What do leadership teams value and implement in their AI systems and deployment – and how will this impact the investors valuation, reputation and growth potential?

As industry and investors focus on governance safety, balancing the harms and benefits of AI for African countries in AI will help to ensure the necessary safeguards.

AI adoption, policy and regulation in African countries is generally at earlier stages of maturity, presenting meaningful opportunities and challenges for investment. To realise these opportunities, investors will need to situate African AI opportunities in their market context whilst distinguishing them from AI approaches and lessons learned in other global markets.

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NIGERIA - 2024 PRIVATE CAPITAL OUTLOOK: KEY DEVELOPMENTS IN THE FINANCIAL SERVICES SECTOR

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The recent and ongoing reforms by the Central Bank of Nigeria (CBN), including its prescription of new bank recapitalization requirements; changes in the Monetary Policy Rate; proposed Q2 2024 comprehensive reassessment of 100 (one hundred) Payment Service Providers (PSPs) and Microfinance Banks (MFBs) (following the revocation of 42 MFB licenses in 2023); the tightening of regulatory oversight in the remittances sector; and the evolving regulation of Virtual Asset Service Providers (VASPs), among others, create myriad opportunities for strategic investment. The reforms outlined in this update potentially provide avenues for boosting digital innovation and developing inclusivity initiatives to further catalyse the transformation of the banking and fintech sectors, fostering sustainable growth and compliance with evolving standards and global best practices.

1. Recapitalisation Requirements for Commercial, Merchant and Non-Interest Banks in Nigeria

In a bid to propel achievement by the Nigerian economy of a US$1 trillion gross domestic product (GDP) milestone by 2030, the CBN, by a circular dated 28th March 2024 (the Recapitalisation Circular) announced the following increases in the minimum capital requirements for commercial, merchant, and non-interest banks operating in Nigeria:

Type of Bank	Scope of Authorisation	Previous Minimum Capital Requirement	New Minimum Capital Requirement
Commercial Bank	International	₦50,000,000,000.00	₦500,000,000,000.00
	National	₦25,000,000,000.00	₦200,000,000,000.00
	Regional	₦10,000,000,000.00	₦50,000,000,000.00
Merchant	National	₦15,000,000,000.00	₦50,000,000,000.00
Non-interest	National	₦10,000,000,000.00	₦20,000,000,000.00
	Regional	₦5,000,000,000.00	₦10,000,000,000.00

The Recapitalisation Circular, with a 24-month compliance timeline commencing April 1, 2024, mandates affected banks to explore several options to achieve compliance, including issuing new common shares (via public offers, rights issues, or private placements), pursuing mergers and acquisitions, or by adjusting their licence categorisation or authorisation.

Moreover, the circular explicitly stipulates that the new minimum capital requirements must be met through paid-up capital and share premiums. It is estimated that approximately NGN4 trillion (four trillion Naira) in fresh capital injection will be necessary to ensure compliance within the prescribed timeline. Consequently, a palpable surge in mergers, acquisitions, and investment activity within the sector is expected.

The Recapitalisation initiative is commendable, as it is strategically designed to enhance the financial stability of Nigerian banks. This move aims to cultivate a more robust financial system capable of withstanding macroeconomic shocks and effectively catering to the evolving needs of the Nigerian economy. While meeting the new capital requirements may pose immediate financial hurdles for banks, the potential for increased market stability and growth opens avenues for private capital participation through strategic investments and partnerships within the banking sector, leveraging thorough due diligence and strategic planning to optimise returns.

2. Changes in Monetary Policy

On March 26, 2024, the CBN raised the Monetary Policy Rate (MPR) from 22.75% to 24.75%, having previously raised the benchmark rate from 18.75% in July 2023 and 22.75% in February 2024 in a bid to combat inflation and attract Foreign Portfolio Investment (FPI). The implementation of this adjustment implies heightened borrowing costs for both businesses and individuals, as the elevated MPR translates to increased interest rates. This strategic play appears to be yielding positive outcomes already, as the CBN reported in March that total portfolio inflow for 2024 had already surpassed $2.3 billion, in contrast to the sum of $3.9 billion recorded for the entirety of 2023, possibly fuelled by heightened attraction to short-term sovereign debt resulting from higher interest rates. According to the CBN, this action was necessary to reduce inflation and attract FPI.

Notably, the CBN also recently announced that it had resolved a backlog of FX claims of $7 billion, and intensified efforts to enhance liquidity in the Nigerian FX market, leading to discernible gains in the value of the Naira against other currencies. It is anticipated that these initiatives will help fortify investor confidence and Foreign Direct Investment flows into Nigeria.

3. Remittances

With new initiatives designed to achieve transparency in FX market transactions, and to boost diaspora remittances, the CBN, on January 31, 2024, issued the Reviewed Guidelines of International Money Transfer Services in Nigeria (the 2024 Guidelines). The 2024 Guidelines revise the CBN's Guidelines for International Money Transfer (IMTO) services that were issued in September 2014 (the 2014 Guidelines), which had established a framework for the licensing and operations of IMTOs in Nigeria.

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The CBN, through the 2024 Guidelines, specifies minimum standards, requirements, and regulatory framework for IMTOs in Nigeria, with changes including, among other things, new requirements:

1. for IMTO companies to have obtained both an Approval-in-Principle and final approval from the CBN before commencing business;
2. to renew such approvals within the first quarter of every year paying renewal fees of NGN10,000,000 on or before 31st January every year (but no later than the first quarter);
3. for the inclusion of the facilitation of inbound money transfers for business-to-person and business-to-business transactions in the permissible activities of IMTOs;
4. for the express prohibition of outbound transfers; and
5. prohibiting banks and FinTech companies from rendering international money transfer services.

4. Blockchain and Cryptocurrency

The CBN's Guidelines on the Operation of Bank Accounts for Virtual Asset Service Providers issued on December 2023 (VASP Guidelines), aim to prescribe minimum standards for banking relationships with VASPs in Nigeria. They include:

1. to monitor Financial Institutions (FIs) providing services to the Securities and Exchange Commission (SEC) - licensed VASPs, digital asset custodians, digital asset offering platforms, digital asset exchanges, and their operators (together known as "Eligible Entities");
2. to offer guidance on Eligible Entities' account operations; and
3. to ensure robust risk management practices in the sector.

With the issuance of the VASP Guidelines, the regulator effectively reversed its previous prohibitions of banks and other FIs facilitating the settlement of transactions in virtual assets and opening and operating bank accounts for virtual assets exchanges (FIs are, however, still prohibited from holding virtual assets).

The Guidelines permit only eligible stakeholder FIs like commercial banks, merchant banks, and payment service providers involved in the settlement of transactions for third parties, to operate the relevant accounts. In operating accounts for VASPs, the Guidelines permit FIs to:

a. open designated accounts;
b. provide non-interest-bearing designated settlement accounts and settlement services; and
c. act as channels for foreign exchange flows and trade.

The Guidelines have brought much needed clarity to cryptocurrency regulation in Nigeria and resolved inconsistencies between the CBN and the SEC's preceding positions on cryptocurrency. Previous CBN restrictions on the SEC's issuance of licences to virtual and digital asset operators under its Rules on Issuance, Offering Platforms, and Custody of Digital Assets, have now been removed.

These and other legal and policy reforms in Nigeria's financial sector, alongside active efforts to transform Nigeria's financial sector, offer strategic investment opportunities for private capital investors, align regulators' approaches, proffer technological advancement, and underscore transparency and innovation – all of which contribute to enhancing the investment-friendliness of the Nigerian business environment.

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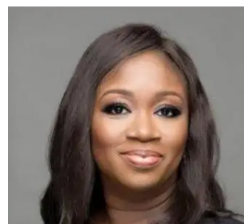

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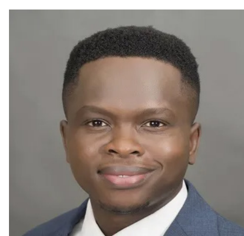

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FINTECH M&A IN NIGERIA – KEY CONSIDERATIONS AND PROJECTIONS

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Introduction

Nigeria's financial technology (fintech) industry has experienced unprecedented growth over the last decade, and this has transformed the country's financial landscape. The fintech industry offers innovative solutions by facilitating financial payments, access to credits and consumer financing solutions, flexible savings, and investment products. A sizeable youth population, increased smartphone penetration, and regulatory developments have engineered a thriving fintech industry in Africa, particularly in Nigeria. Between 2014 and 2019, the fintech industry in Nigeria raised more than $600 million in funding, and in 2019, the total value of investments in fintech companies worldwide reached $216.8 billion. However, from 2020 to date, the industry has experienced a downward investment trend. In 2023, the global fintech market experienced some challenges such as global economic instability, high levels of inflation and interest rates, foreign exchange fluctuations, depressed valuations, and other macroeconomic issues. There was also the general scepticism and cutbacks from international private equity investors and venture capital firms.

In spite of these challenges and uncertainties, there have been notable collaborations and partnerships in the fintech sector. Some of the collaborations have taken the form of corporate reorganisations, such as spinoffs, carve-outs, buy-outs, mergers and acquisitions (M&As), thereby creating strategic avenues for companies to gain a competitive edge, expand market presence, and explore new technologies.

These reorganisations appear to be driven not only by cost efficiency and increased profitability but the need to stay afloat in spite of the recent funding drought, significant increase in cash burn rates, and failed financial projections for growth. Reorganisations have also been driven by regulations, tax efficiency, and investor-compelled corporate governance imperatives that must be met.

Despite the seemingly sluggish state of the funding of the fintech industry, the long-term outlook for the transformation of financial services remains positive, and many fintech companies are seeking to reinvent themselves through strategic partnerships, collaborations, and innovative corporate re-organisations, and it is expected that this will continue to shape the industry over the next decade.

Statistics show that the chances of a business being acquired in the fintech industry are higher than in other sectors and there have been a significant number of startup acquisitions in Africa in the past 3 to 5 years. Nigeria has been the location for flagship startup acquisitions, with the Paystack/Stripe acquisition leading the wave in 2020. In 2023, there were a number of acquisitions that occurred and this Article highlights three:

a) Blockfinex's acquisition of Fluidcoins - Fluidcoins, a Nigerian crypto payment gateway startup, was acquired by Blockfinex, a crypto exchange company registered in the United Arab Emirates. It was structured as an acquihire, as the founding team at Fluidcoin was absorbed into Blockfinex to continue to develop and improve the product.

b) Fairmoney's acquisition of Payforce - Fairmoney, a fintech company in Nigeria that provides loans to retail customers through its digital lending product acquired Payforce which provides merchant payment services. The purpose of the acquisition was to deepen financial inclusion in Nigeria and increase the avenues for accessing loans and other credit products.

c) Autochek's acquisition of Autotager - Autocheck, a vehicle financing technology company in Nigeria acquired a majority stake in Autotager, an Egyptian automotive technology company. The purpose of the acquisition was to take advantage of the large demand for cars and auto financing solutions in Egypt.

In view of the above-mentioned position, there was a clamour for the decentralisation of the NESI. Lagos, Edo, and Kaduna States led the charge by setting up frameworks for the operation of the electricity sector within their respective States.

Key considerations for M&As

Fintech companies seeking to acquire other business undertakings, or investors seeking to invest in a fintech company will need to consider the following, either as part of a due diligence investigation or when generally looking out for indicators of financial viability in a fintech business.

a) Regulatory approvals

Regulatory considerations are critical to any M&A transaction, whether it relates to anti-trust and competition law, company law, securities law, data privacy laws, labour and employment laws, or laws that pertain to foreign investments.

In Nigeria, the Central Bank of Nigeria ("CBN") has regulatory oversight over entities that provide financial services, and any M&A transaction that will trigger any change of control (direct or indirect) or change of a significant shareholding in a fintech company licensed by the CBN will require approval from the CBN.

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Prior to the enactment of the Banks and Other Financial Institutions Act 2020 ("BOFIA"), fintech companies had to have recourse to the Federal Competition and Consumer Protection Commission (FCCPC) for an assessment of how an M&A can potentially affect competition in Nigeria. In 2020, the BOFIA established that the CBN has exclusive regulatory oversight over merger transactions involving banks, specialised banks, and other financial institutions ("CBN-Licensed Entities"). Hence, the approval of the FCCPC is no longer required for M&As involving fintech companies. If the fintech company to be acquired is a public company or deals in virtual assets, it will require the approval of the Securities and Exchange Commission.

Sectoral approvals may also be required for fintech M&A transactions. Where a fintech business or some segments of it is licensed by a sectoral regulator, e.g. a fintech company that facilitates payments through the use of USSD (Unstructured Supplementary Service Data) codes, such business will come under the regulatory purview of the Nigerian Telecommunications Commission ("NCC"), or it will have to collaborate with another business that has a licence from the NCC.

An acquisition may also necessitate new licenses or modifications to existing ones, especially if it will result in the integration of financial services regulated under different regulatory bodies.

b) Assets, Liabilities and Value

Due diligence investigations usually cover legal, financial, tax, and governance considerations. At the core of any type of due diligence is the need for the investor/purchaser to understand the scope of the potential assets and liabilities that the acquiring company will be taking on post-acquisition and the value that the target company will be bringing to the collaboration.

(i) **Assets** - they add economic value to a business, and this may be in the form of intangible assets such as goodwill, intellectual property, technical skills of key employees, tax credits, or tangible assets such as real estate and equipment.

(ii) **Liabilities** - they can potentially generate losses or have damaging financial or reputational effects on the company post-acquisition. This may be in the form of compliance deficiencies, debts, litigation, and claims from third parties.

(iii) **Value** - it is important for the acquirer to understand the true value of the target company. This will include considerations such as the growth potential, the size, and positioning of the market, current customer base, etc. of the target company.

A comprehensive due diligence investigation underpins any successful M&A transaction, as it ensures that the acquiring entities have a clear and full understanding of the present value and future potential of the target companies. M&A is not merely an integration of business structures, but a fusion of values, goals, and visions and it is for that reason that the companies in an acquisition journey must understand and mitigate all potential risks.

Projections

As the fintech industry in Nigeria continues to evolve, the following are the projected trends that will shape M&As in 2024 and beyond:

a) Focus on financial inclusion and payment innovation

Fintech companies that focus on solutions to address challenges of financial inclusion are likely to attract attention from investors and potential acquirers. M&A deals in this space could pave the way for innovative products and services that cater to the unbanked and underbanked.

The payments space is expected to continue to evolve and witness disruption. Additionally, as cashless transactions gain popularity in Nigeria, there will be an increased demand for the acquisition of fintech companies that offer seamless payment solutions.

b) Blockchain and decentralised finance (DeFi) opportunities

Blockchain technology and decentralised finance (DeFi) have the potential to revolutionise the financial services industry. Fintech startups that utilise blockchain for applications like border remittances, identity verification, and smart contracts may attract interest from both local and international acquirers.

As DeFi gains momentum worldwide, Nigerian fintech companies are likely to explore opportunities within this domain. Additionally, the recently issued CBN's Guidelines on the operation of bank accounts for Virtual Assets Service Providers (VASPs) indicates CBN's adoption of a clearer regulatory regime for banking transactions involving digital/virtual assets and the activities of VASPs. This could potentially give rise to M&As aimed at harnessing the benefits of blockchain technology and DeFi.

> "As the Nigerian fintech ecosystem grows, market consolidation through M&A is likely to continue."

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c) **Collaborations between fintechs and traditional financial institutions**

Collaboration between fintech startups and traditional financial institutions is likely to become more prevalent. Established banks can adapt to change and embrace fintech innovation while fintechs can leverage the resources and customer base of established banks.

This collaboration can create an ecosystem where both fintech startups and traditional financial institutions can thrive and grow together benefiting from each other's strengths and promote innovation.

d) **Clarity of regulatory framework**

Regulatory developments and government support will continue to play a significant role in shaping the future of M&A in the fintech sector in Nigeria. Regulatory clarity and stability are crucial for attracting foreign investors, as regulatory clarity instils confidence in potential acquirers. It will be useful for the CBN to outline a standalone regulatory framework for the assessment of competition and consumer protection arising from the M&A activities of CBN-Licensed Entities.

e) **Cross-border M&A opportunities**

The Nigerian fintech industry has been identified as an industry with immense potential. Cross-border M&A deals may increase as foreign fintech companies recognise the potential in collaborating with or acquiring Nigerian fintech startups to gain access to the country's evolving and growing market.

Conclusion

As the Nigerian fintech ecosystem grows, market consolidation through M&A is likely to continue. Larger and more established fintech players may seek to acquire promising startups to expand their service offerings, customer base, and geographical reach. Additionally, startups may look for strategic partnerships or M&A opportunities to gain access to the resources and expertise of more established players, driving further consolidation within the sector.

To seize these opportunities and navigate potential challenges, fintech companies must remain agile, innovative, responsive to market trends and keep in mind that investors are not only looking out for big valuations, but resilient founders, sustainability, and companies with good corporate governance. By staying informed and adopting a strategic approach, domestic and international players can position themselves for success in the exciting future of fintech M&A in Nigeria.

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ETHIOPIA'S NEW CAPITAL MARKETS IN THE MAKING

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Background

In Ethiopian economic history, the roots of the Capital Markets can be traced back to the Imperial era. Share companies began to emerge in the 1960s, initially conducting share transactions through the National Bank of Ethiopia (NBE). By 1965, the Addis Ababa Share Dealing Group was established, facilitating both share and government bond trading. Initially, the group listed 15 companies and four government bonds, with notable listings including the Addis Ababa Bank, Ethiopia Abattoirs, Bottling Company of Ethiopia, and Tendaho Plantation. This promising start was brought to a sudden halt with the rise of a socialist government in 1974, leading to the collapse of Ethiopia's stock market following the nationalization of traded companies. Since then, except for the post-1991 establishment of a Commodities Exchange Market, there has been no stock market. Trading has been fragmented and unregulated, lacking the necessary legal framework, despite the conducive economic environment.

Following the change of government in 2018, as part of the wide-ranging economic reforms encapsulated in what is known as the Home-grown Economic Development Strategy, the Government has been taking concrete policy measures and enacting legislation with a view to establishing and operating an effective capital market in Ethiopia. The Capital Market Establishment Proclamation of 2021 is one of the key outputs of this reform. This legislation underscores the Government's commitment to fostering a dynamic environment within the Capital Markets and established the Capital Market Authority (ECMA) as an autonomous regulatory entity to spearhead the initiative and get it off the ground. Mandated with the task of safeguarding investors, promoting transparent securities trading, and fostering long-term investments, the ECMA assumes a pivotal role in shaping the landscape of the capital markets.

Establishment and Advancement of the Capital Markets

Together with the establishment of the ECMA, the establishment of the Ethiopian Securities Exchange (ESX) also signifies a major milestone, attracting initial investments from both government and private entities. On 4th April, ESX announced the successful conclusion of its capital-raising campaign, exceeding its targeted funds by more than double to initiate its operations. Encouraged by governmental support, local banks have embraced the opportunity to invest in the ESX, signaling a burgeoning private sector engagement in the market. Noteworthy partnerships with regional investors like FSD Africa, Trade and Development Bank, and others further underscore the burgeoning momentum of Ethiopia's Capital Markets.

Earlier this year, the ECMA introduced a comprehensive directive to regulate service providers in the Capital Markets. This detailed directive introduces 15 types of licences, including Investment Banks, Crowdfunding Intermediaries, Collective Investment Scheme Operators, Securities Digital Sub-Brokers, Securities Investment Advisers, and others. The directive provides a structured framework for market participants, ensuring compliance and clarity in their operations. In fact, the ECMA has recently issued the first of its investment advisory licence in March 2024 to Deloitte, the international consulting giant.

Opening of the Sector to Foreigners and Opportunities

Within the legal framework of the Capital Markets, the designation "Foreign Investor" extends to any individual or entity that has invested foreign capital in Ethiopia. This category encompasses foreign nationals, enterprises with foreign ownership, enterprises registered outside of Ethiopia by an investor, enterprises formed collaboratively by two or three investors specified in the sub-article, and Ethiopian citizens permanently residing abroad who elect to be regarded as foreign investors. All entities falling within these parameters are capable and indeed encouraged to engage in any services listed and regulated under the new directive issued by the ECMA.

> **"This legislation underscores the Government's commitment to fostering a dynamic environment within the Capital Markets and established the Capital Markets Authority to spearhead this initiative.'**

Coinciding with the liberalization of the finance and telecommunications sectors to foreign investors and the development of public-private partnership (PPP) frameworks, the establishment of a capital markets framework in Ethiopia marks a substantial advancement in its economic development. Anticipated monetary reforms, particularly the expected exchange rate liberalization, are poised to bolster investment opportunities within the Capital Markets sector. This presents an enticing prospect for foreign investors keen on tapping into Ethiopia's emerging Capital Markets.

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In general, the liberalization measures, highlighted by the banking liberalization policy introduced in 2022 and the ongoing privatization efforts taking place since 2018, coupled with the opening of the telecoms sector, the launching of public-private partnerships (PPPs) opportunities in various sectors, and discussions regarding exchange rate liberalization, hold promising prospects for investors aiming to invest in Ethiopia's capital markets. As a litmus test for the market's potential, ESX's very first capital-raising campaign, which was launched in November 2023, has been considered a success in surpassing its capital raise target by securing a substantial amount ETB 1.51 billion (US$ 26.6 million) from 48 institutional investors.

State-owned enterprises are also gearing up to offer shares through public listings, presenting a substantial opportunity, particularly for Capital Markets service providers aiming to broaden their reach in this new market. Notable in this regard is Ethio Telecom's plan to list on ESX by offering 10% of its shares to the public. Furthermore, Ethiopian Investment Holding, a sovereign wealth fund with a portfolio valued at US$34 billion, is anticipated to initiate the listing of select businesses within the newly established securities market.

As industries like telecommunications progressively open up and state-owned enterprises prepare for listing, a range of professionals, including investment bankers, advisors, market makers, and portfolio managers, will play pivotal roles. They will guide firms through the listing process, structure offerings, and underwrite securities, showcasing their expertise in this emerging market. This underscores the growing demand for skilled Capital Markets service providers, offering ample opportunities for specialized investors.

Modalities for Foreign Investors to Enter the Capital Markets Sector

Foreign companies possessing significant expertise in capital markets in general and stock markets in particular can maintain a local presence by forming subsidiary entities recognized under the Commercial Code of Ethiopia. These subsidiaries will have the flexibility to adopt various legal structures, including Private Limited Companies (PLC), Share Companies (SC), or One Member Private Limited Companies. Alternatively, they may opt to establish a Branch Office. The choice among these options will depend on the specific requirements outlined within the regulations governing each service provisioning regime.

Taking the forms of one of the limited liability companies such as a PLC or SC, investors can provide securities brokerage services enabling the facilitation of buying and selling of securities on behalf of clients or invest as securities dealers engage in trading securities for their own accounts. Additionally, through the same establishment, foreign investors specializing in digital securities trading platforms can offer sub-brokerage services, extending access to online trading and investment opportunities to investors.

The legal framework also allows investment banks to invest and play a crucial role in facilitating capital raising activities for companies through debt or equity issuances, mergers and acquisitions, and comprehensive advisory services. Likewise, investment advisers can access the market by providing tailored advice to local investors, aiding in securities selection, portfolio management, and risk mitigation strategies. For shariah-compliant investors, the framework allows specialized foreign firms in Islamic finance to extend advisory services over sharia compliant capital markets products.

Furthermore, providing automated investment advisory services through digital channels, which offer algorithm-based recommendations for asset allocation and investment decisions, is also licensable under the directive and an investment opportunity. The framework also allows foreign asset management firms to establish collective investment schemes, which pool funds to create diversified portfolios of securities. Crowdfunding platforms operated by foreign entities can significantly participate as crowdfunding intermediaries and contribute to fundraising for businesses, thereby promoting capital formation and entrepreneurship. By engaging in these activities, foreign entities can not only generate investment gains but also establish a foothold in the new market.

"State-owned enterprises are also gearing up to offer shares through public listings, presenting a substantial opportunity, particularly for Capital Markets service providers aiming to broaden their reach in this new market. "

Securities appraisal firms' licences are also regulated under the framework. Such firms stand to benefit from a market opportunity created by regulatory requirements for thorough security appraisal before public share sales. Previously, companies, including major private banks, often determined share values without undergoing rigorous appraisal. However, the new framework alters this practice, emphasizing the necessity for securities appraisal. Consequently, these firms are poised to experience heightened demand and can strategically invest to establish a notable presence in the evolving capital markets. In engaging in these and other licensable activities, foreign investors can access investment opportunities by providing valuable services to local investors and businesses, thus fostering its development and growth.

Conclusion

Success in Ethiopia's new capital markets hinges on laying robust foundations, including platform readiness, public awareness campaigns, capacity building, and bolstering institutional capacities within the ECMA. Learning from global capital markets successes and tailoring strategies to Ethiopia's context are vital for its maturation. Meanwhile, both local and foreign investors can seize emerging opportunities of investments through meticulous due diligence and expert advice from professional advisers well-versed in local regulations. In essence, while the journey towards a fully functional and vibrant capital market in Ethiopia may be fraught with challenges, the collective commitment of stakeholders, coupled with strategic initiatives and a conducive regulatory environment, holds the promise of unlocking vast economic opportunities and driving sustainable development for participants and for the nation.

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