African Private Equity and Venture Capital Association

AVCA

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AVCA

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BULLETIN

LETTER FROM THE CO-CHAIRS

We are writing to you as the new co-chairs of your Legal and Regulatory Committee (Committee) having assumed responsibility from former chair, Geoff Burgess, in late 2022. We start by thanking Geoff and his former co-chair, Cindy Valentine, for their stellar work on your behalf during their co-leadership. We hope to build on that work.

The purpose of the Committee is to reflect and report on changes in the African legal and regulatory environment, which impact the way private credit and equity capital is raised and invested on the continent. The Committee aims to advocate, educate, and inform. Not only you, the AVCA membership, but also others who have an interest in the deepening and development of the private capital asset class.

The Committee, comprising senior lawyers from law firms, fund managers, development finance institutions and institutional investors, is well placed to highlight (and perhaps influence changes in the environments in which you, as African private capital market participants, operate. We share a common interest. We want to see easier, more efficient, and more effective investing engendering the good, the impact, that well regulated and structured private capital investment can have on African business.

In this, AVCA's 8th Committee Bulletin, and the first under our leadership, we travel the length and breadth of Africa to flag legal, regulatory and taxation changes – domestic and international – which will impact private capital fund raising for and investment in African businesses in the coming years.

We cover the liberalisation of the banking sector for private capital investment in Ethiopia, the introduction of a new partnership law in Ghana, regulatory and financial changes in Nigeria and Zambia, the case for locally domiciled private capital funds in Uganda, the evolution of private capital fund regulation in Rwanda, a new operational framework for pension fund administrators in Nigeria, and a new regulatory and registration framework for digital lending in Nigeria.

We also focus on four key areas of growing importance with thoughtful articles on: (i the enforcement of environmental, social and governance rights in private capital fund documentation, (ii) the taxation of private capital investments, (iii) merger control considerations in Nigeria, and (iv) the impact of European regulation, notably the Sustainable Finance Disclosure Regulation and Sustainable Disclosure Requirements, on those seeking to raise and manage capital from and for European investors.

The Committee not only comments and reports but engages with policy makers and regulators. A current focus is understanding the merger control regime across the continent, which impacts so many cross-border investment activities. We are assessing several regimes as we seek to understand what and where changes might be sought to benefit African businesses and their investors. As the African venture capital industry matures, we are also exploring the benefits of developing standardised documents for early stage venture capital investment. More on this soon.

We hope that you find this Bulletin illuminating. If there is anything that really piques your interest or you think should be covered in a future issue, please let us know. We anticipate covering North African, South African, and Francophone West African developments in the next edition. Our contact details are below.

We look forward to supporting AVCA and your efforts to invest profitably, impactfully and widely across the continent we all love.

Yours


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ABOUT AVCA

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

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

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

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

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Should I stay or should I go?

As equity investors get increasingly sophisticated in their environmental, social and governance (ESG) requirements, the question from their legal advisers is: what happens if things go wrong?

This article explores how ESG requirements are incorporated into legal agreements, and the options for equity investors if those requirements are breached. Do they try to resolve the issues? Or do they run for the hills? What can an equity investor do to improve its position in this situation?

What's in a name?

As we have seen in the US, the expression 'ESG investing' is increasingly loaded with assumptions not only as to what it means, but also the political inclinations of the investor. For this article, ESG encapsulates:

> In the 2000s, many investors saw ESG risks as being adequately covered by a simple promise to comply with environmental, social and anti-corruption laws.

"Environment" means protection of the physical environment, including air, water and the climate. Legal requirements will be centred around compliance with relevant environmental protection laws.

"Social" originally referred to treatment of employees, and International Labour Organisation (ILO) standards remain the benchmark. These require employees to be protected against discrimination, forced labour and so forth. Investors typically expand this to protect people employed in supply chains and others affected by the investee company's activities.

"Governance" can be misleading. It often refers to two distinct concepts: (1) the corporate governance of the investee company; ensuring that there is effective board independence and oversight, and (2) maintaining high standards of business integrity, with appropriate standards to avoid corruption, fraud and other financial crime. In practice, private equity investors will not require the standards of corporate governance seen at a listed company. They will use their normal board and shareholder rights to oversee management. Therefore, the focus in terms of legal rights is on business integrity.

'ESG' in this article therefore means 'environmental, social and business integrity' requirements. Environmental and social (i.e. 'E&S') standards are often grouped together, as environmental and social standards often overlap. They are typically monitored by the same team within investors. Business integrity ('BI') risks are of a different nature to E&S risks. Investee company BI compliance may therefore be the responsibility of a different team. However, the legal responses to non-compliance are often similar.

Great expectations

ESG clauses have got longer and more sophisticated over the past decade, particularly for investments in emerging markets. In the 2000s, many investors saw ESG risks as being adequately covered by a simple promise to comply with environmental, social and anti-corruption laws. In emerging markets, investors realised that:

- environmental and social laws were often absent or outdated. Therefore, objective defi itions and international benchmarks were needed, and
- requiring compliance with these benchmarks was not enough; investors had to focus on the processes adopted by investee companies to make sure the benchmarks could be achieved.

Consequently, emerging markets investors often had a more sophisticated approach to ESG requirements than their developed market counterparts. However, as ESG requirements have become more mainstream globally, and there is increasing regulation of ESG standards and reporting in the US and EU, we are seeing developed markets catch up.

Most emerging markets investors refer to International Finance Corporation (IFC) Performance Standards (PS) on environmental and social sustainability. These were issued in 2012 and form the core E&S policies for many investors in Africa and beyond. They cover a broad range of E&S requirements. They incorporate the ILO labour standards but also cover environmental and social issues such as biodiversity, resettlement and resource efficiency. Other development finance institutions (DFIs), as investors in many African private equity funds, typically require those funds to ensure that their investee companies comply with IFC PS. Consequently, they are a requirement for most equity investors in Africa. However, not all DFIs have identical requirements to IFC. Over the last decade, emerging issues have caused DFIs and other investors to use IFC PS as a base, but then augment them with their own requirements. Examples include restrictions on the use of fossil fuels and greater protection of people from harassment and abuse in supply chains.

On the business integrity side, investors have moved from legal compliance to more general descriptions of corrupt or fraudulent behaviour that can apply anywhere. They've also enhanced these requirements to ensure compliance with US, European and UK sanctions laws and money laundering rules. The latest development has been around tax policies, where DFIs are concerned not just with illegal tax evasion, but with ensuring that investee companies are not engaged in egregious (but legal) tax avoidance; for example, through the inappropriate use of tax havens and profit ransfers.

Do as I say, not as I do

There are three main ways in which investor ESG requirements manifest themselves in the legal agreements:

Representations and warranties:

These are statements about the company at the point of investment. At a minimum, the company is expected to say it complies with relevant laws and has not been involved in corruption or sanctions breaches. Investors could – in theory - sue for damages if these statements are untrue. In practice, warranties are used to encourage disclosure of issues. If issues are revealed, investors might seek specific indemnities for fines or other risks. More commonly, investors will require the company to adopt an action plan to address any ESG compliance issues identified from due diligence and disclosure.

Covenants:

The investee company will promise to comply with agreed ESG standards during the life of the investment. These obligations are usually broader than the warranties; they reflect the post-investment standards the investee company is expected to comply with. As well as compliance with laws and IFC PS, there will be other investor policies and requirements. For example, most investors have exclusion lists. These prohibit the investee company from engaging in specific activities, such as using certain chemicals, arms-dealing or prostitution. (DFI exclusion lists are a revealing study of the moral priorities of different countries.) Investee companies must also have the management systems necessary to meet the investor's requirements. This means dedicated individuals or teams, and appropriate internal policies and procedures for the sector in which the business operates. The ESG risks of a construction company will be very different to those of a technology company. Sophisticated investors will reflect this in their ESG requirements.

The ESG risks of a construction company will be very different to those of a technology company. Sophisticated investors will reflect this in their ESG requirements.

Reporting:

The best ESG covenants in the world are of little use if the investor does not know what is going on in the investee company. It will be too late to address issues if the investor first hears about them in the press. The company will be required to issue periodic ESG reports on an agreed template and promptly notify investors of any ESG incidents.

Art of the covenant

Covenants in shareholder agreements (SHAs) are notoriously hard for minority investors to enforce. This applies particularly to ESG covenants. An investor may struggle to demonstrate that they have lost money as result of a breach. In the short term, their shares may have increased in value if the bad behaviour has saved the company money or won them a contract.

This contrasts with the situation with debt investments or majority equity investments. With a debt investment, if there is a covenant breach, the lender has the blunt, but legally effective, instrument of demanding their money back. From a legal perspective, this is an unambiguous right with little doubt as to its enforceability. A majority equity investor is the company's owner: they have no effective way of getting their money back (unless they can sue the seller of the business for a historical issue). But at least an owner can implement board and operational changes with a view to remedying issues.

Even if a lender or minority equity investor has an effective legal claim, bringing an action may not be a viable commercial option. Legal action against an investee company is likely to destroy the investor's relationship with management. And a claim could reduce the overall value of the investment. A loan demand may trigger cross-defaults resulting in the company becoming insolvent and unable to repay all of the original loan.

This is where equity investments may present an opportunity to include other legal remedies in the SHA which stop short of these "nuclear buttons". They should nevertheless provide:

- meaningful incentives to comply,
- a structured process for investigating and remedying issues, and
- opportunities for the investor to exit in the worst-case scenario.

Broadly, options for dealing with ESG breaches fall into two categories: (1) fix it, or (2) exit. Often these are drafted sequentially, so exit rights kick in if the ESG breach is not remedied or is not capable of remedy. Of course, an investor may choose to ignore or waive a breach. Whether an investor is willing to do so will depend on the significance of the breach and the risks (financial and reputational) that might flow from it.

Living in a material world

If the investor has strong remedies for an ESG breach, investee companies may ask that the investor can only exercise these rights if the breach is material. The lawyer's challenge is to define 'material'. In SHAs, this is often tied to a financial impact. In the ESG world, this is less effective; the financial loss to the investor might be relatively small. For example, poor safety measures might result in loss of life, but the fines or compensation paid by the company may not have a significant impact of the value of the investor's investment. Proper safety measures might have been cheap to implement. On financial measures of 'materiality', a horrifying incident does not necessarily trigger a legal remedy.

Then there is the 'rogue employee' scenario. A company could have the best processes and training. But an individual employee might nevertheless misbehave, for example by paying a bribe. Should the investor be given an exit if management have done all they could?

A hybrid approach is to focus on impacts rather than breaches: if there is a breach and a 'material impact' occurs, only then are the additional investor rights triggered. Such a clause lists the more egregious outcomes (e.g. death, fines, permanent environmental damage) that would trigger the investor's rights. We might address the 'rogue employee' concern by saying that the rights are only triggered if there were a failure of process, or if the behaviour were authorised by senior management. The challenge with this approach is that it becomes an exhaustive list; certain behaviours or impacts might be missed. And it is very difficult to measure harm to an investor's reputation. For that reason, the investor with a strong bargaining position may simply say that materiality is in their judgement, rather than take the risk of something falling between the cracks. The investee company may have to trust the investor not to exercise these rights in bad faith. In practice, an investor will not do this lightly: they may not recover all their losses and the process could take months, if not years, to implement. And any investor will not want to harm its reputation in the market by being seen to be 'trigger-happy' in enforcing ESG breaches.

Can we fix t? Yes, we can

Many ESG breaches will be remediable. For example, inadequate personal protective equipment can be purchased or replaced, cash management systems can be made more secure and so on. Many ESG requirements are risk management matters. As long as the issue is rectified promptly, investors may be satisfied with a remediation approach.

'Remedy' may have to be defined for certain contexts. For example, if an employee pays a bribe, the company cannot unwind that transaction. However, if the incident is low value and not evidence of a broader systemic problem, investors may regard it as remediable. Remedy might involve disciplinary action against the individuals involved, reviews of processes and/or employee training. A majority shareholder should have sufficient clout through its implied power to sack the board to achieve this without specific legal rights. For a minority equity investor, a more structured approach is necessary.

Investors typically become aware of issues or incidents through the board or through their reporting rights. But an investor may receive a complaint independently, for example through its whistleblowing process. The investor should have the right in the legal documents to appoint a consultant on the investee company's behalf to investigate the issue and make recommendations. The type of consultant should be left open-ended. It could be an environmental consultant or a forensic accountant, depending on the issue that has arisen.

The contentious question is typically: what happens next? Must the board follow the consultant's recommendation? Can a minority investor force remedial action through, for example, enhanced governance rights such as additional directors or control over an ESG sub-committee of the board? This is a matter of negotiation. Stronger governance rights are easier to achieve for an investor with a 49% joint venture holding, rather than one with a 5% stake. However, even without formal rights to force action, obtaining the report and presenting evidence of ESG breaches to the board creates moral pressure on the majority shareholders. Its effectiveness should not be underestimated. Furthermore, an investor with significant negative rights (such as vetoes over budgets or capex) may be able to use these as leverage to ensure ESG issues are addressed. It could decline to consent to a business plan which doesn't incorporate actions to remedy ESG issues.

I'm an ESG investor, get me out of here

If the ESG breach is material, or unremedied, the investor may decide that they cannot be in the investment any longer. This is rare. Either the investor has lost faith in the investee company's ability to manage ESG risks going forward, or the underlying incident is reputationally toxic. In that situation, the investor sees the risk to its reputation as being greater than the value of the investment.

Despite it being very rare for investors to exercise exit rights on ESG defaults, most minority investors see strong rights to exit on an ESG breach as a 'must have'. Not just for the worst-case scenarios, but also to act as a powerful incentive to comply with the ESG requirements. These are examples of post-breach exit provisions:

- lifting of any share transfer restrictions, so rights of first refusal or prohibitions on transferring to competitors fall away,
- ability to sell the whole business, including the shares of the majority shareholders (a drag along), and
- an ability to sell the investor's shares to the company or the majority shareholder (often known as a 'policy put').

DFIs and similar institutions often seek a policy put. But it can be difficult to agree the detail in SHAs and to enforce them in practice. The issues of materiality and remedy can result in protracted and complex negotiations. In addition, the SHA must set a price at which the investor's shares are purchased. Often this is fair market value just before the breach, but some investors seek the greater of this amount and their original investment. Other investors, mindful that they may only enforce a put in the 'toxic investment' scenario, are content to offload their shares for a nominal amount and write off the investment entirely. However, that looks like a perverse incentive to cause an ESG breach. For that reason, some investors include a simple 'dollar put' with no link to a breach. This can be exercised at the investor's discretion.

> Strategic owners will not wish to see a competitor as a minority shareholder in one of their subsidiaries.

Leaving aside the commercial elements, exit rights have legal challenges. In most countries there are restrictions on company buybacks unless you have shareholder approvals and available profi s or assets (exact legal tests vary). Even if they are legally enforceable, both buybacks and drag along rights depend in practice on a degree of shareholder and company cooperation which may not be available. Fallbacks such as the unrestricted ability to sell to third parties remain important. Strategic owners will not wish to see a competitor as a minority shareholder in one of their subsidiaries.

How about some carrots?

This article has focused on legal remedies, but there are other tools available to the equity investor. We are increasingly seeing financial instruments and incentive plans which are structured to encourage good ESG practice. In the debt context, this might manifest itself in a lower interest rate if certain climate or other ESG targets are achieved.

It is rarer in the equity context to link climate or ESG performance directly to financial returns at the shareholder level. A company's share price is based on its overall financial performance. Private equity funds are incentivised through fees and carry, which require selling investments and achieving financial returns. Therefore, at an investee company level, a fund manager is unlikely to structure an incentive that doesn't prioritise strong financial performance. However, we are increasingly seeing ESG requirements as conditions to payment under management incentive plans or equity ratchets. The amount of upside is still linked to financial outcomes. But management won't receive that upside if there have been ESG issues in the business, or if certain ESG targets have not been met.

It's not me, it's you

For minority investors, ESG covenants are more effective if they are reinforced with a clear set of escalating steps and remedies if a breach occurs. Whilst investors rarely exercise their rights of last resort, whether that is litigation or a policy put, incentives are important to ensure good ESG practice. As with other aspects of private equity investing, there is no substitute for choosing an aligned partner who shares the investor's ESG goals. This in turn requires an effective due diligence exercise. Due diligence on the investee company's ESG compliance and its ability to move to best practice is critical. Even more critical is ensuring that the management team and shareholders share the same objectives, and see the same benefits, from achieving the investor's ESG standards.

The views in this article are those of the author and not necessarly those of British International Investment plc.

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TAXATION OF PE FUNDS: NAVIGATING THE LABYRINTH

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With immense growth in volume, value and publicity of investment activities by venture capital and private equity funds (PEFs) in Africa, revenue authorities are increasingly looking to cash in on tax proceeds of the said transactions, including the local activities of the private equity fund managers. In this article, we explore some of the tax issues posed by these investments that players in the industry should give serious consideration to in their operations, to mitigate against potential risks.

The Tax Challenges

The tax challenges arise from cross border financial transactions which carry a domestic tax implication, depending on the applicable rules in each country. Tax rules are not always aligned, which has a potentially damaging impact on the investment climate across the continent, due to potential double taxation.

A typical PEF would be structured as below:

To overcome potential double tax related challenges, most PEFs with a focus on Africa tend to be domiciled in tax favourable offshore countries. In this regard, Mauritius has been a key jurisdiction for a fund's domicile, for various reasons, including its established track record, investor safeguards, deal structuring and low tax structure. Varied corporate structures are available, including global business companies, limited partnerships and protected cell companies (PCC). These offshore investment structures help mitigate against double tax liability in the portfolio companies' jurisdiction, including corporation taxes based on trading income from purchase and sale of businesses, taxes on capital gains, stamp duty and VAT, which are often associated with having a taxable presence in those jurisdictions.

With the increased focus on Base Erosion Profit Shifting, taxation of capital gains, taxation of carried interest, deductibility of interest expenses and management fees, withholding taxes on interest and dividends, economic and juridical double taxation[1] and the applicability of anti-avoidance rules are being reviewed by the tax regulators in many African jurisdictions.

While most African states have entered into double taxation treaties (DTTs), which should normally allocate taxing rights to prevent the occurrence of double taxation, the often-complex commercial structures used in PEFs are not always accommodated, leading to double taxation, tax treatment uncertainties and administrative obstacles.

Both the OECD and the UN have sought to address the issue of taxation of Collective Investment Schemes (CIVs) which constitute one of the largest categories of investors in foreign capital markets. However, there is no specific reference to measures to protect PEFs which are broadly categorised as "non-CIVs" (a term coined by the OECD) which are not regulated because they do not hold a diversified portfolio of securities and only involve institutional investors such as banks, insurance companies, pension funds which do not require investor protection. A non-CIV would include, for instance, a private equity fund set up as a limited partnership in order to acquire specific assets, such as all the shares of an under-performing publicly-listed company, with the limited partners being institutional partners that provide most of the capital and the general partner being the specialized investment firm set up and manages the fund. It may also include a PEF that would be similarly structured to seek private equity participations in start-up enterprises with growth potential.

Regarding the tax treatment applied to PEF Managers and investments in PEFs the general trend in most countries is towards less favourable terms to those applied to public equity managers and investments in public equity such as through the stock exchange. Specific questions arising for PEFs and application of treaty benefi s under tax treaties include the following:

Are PEFs caught by the limitation of benefits (LOB) provisions?

LOB provisions are set out in domestic legislation with the aim of preventing treaty shopping, and usually set out a criterion for DTTs to be applicable, by for example requiring a foreign entity claiming DTT benefi s to meet certain substance or underlying ownership requirements in the foreign jurisdiction. LOB concerns could arise with the use, by investors of third states of foreign PEFs established in states with which the portfolio companies concludes treaties. Given that PEFs are generally not addressed in existing tax treaties and in the UN and OECD models, the antitreaty-shopping rules should be of a particular concern for PEFs with investors in many different countries.

Are PEFs 'resident persons' capable of claiming DTT benefits?

There is often lack of clarity on whether PEFs are entitled to apply preferential DTT rates when receiving dividends, interest and capital gains from the state of a portfolio company into a third country with which it has a DTT.

Are PEFs entitled to the exemptions in the DTTs touching on public investments?

Given that the interests in the PEF are not publicly-traded there are questions arising as to whether PEFs are entitled to the treaty exemption rules (even though these interests are widely distributed).

The reality is that PEFs remain largely out of scope for most concessions designed to make capital markets more attractive including tax incentives. In our view many of the incentives granted to promote development of capital markets should also apply to private equity investments.

In this section we narrow down to two specific tax issues which arise in the context of PEF operations:

- those touching on the liability to tax of income generated by the investments by the PEFs in the countries where the portfolio companies are bought and sold; and
- those touching on the tax implications of having a local representative of the PEFs Investment Manager in the local jurisdiction of the portfolio companies.

Question 1: Tax liability of PEFs

It is the case that transfers of investments in portfolio companies are undertaken by way of transfer of shares in an offshore investment company. Tax authorities in the jurisdiction of portfolio companies / source state are increasingly looking into subjecting to tax any such offshore transfer of shares where majority of the underlying assets are within their jurisdictions. Questions have also arisen whether to treat the income earned from investments as trading income or capital gains, which are subject to significantly different tax rates. In some instances capital gains may be legally exempted from taxation or have a marginal rate applied while tax on trading income is charged at rates of up to 40% for non-resident entities. From our experience in Kenya, the lack of an express regime to enable the tax authority to subject such transactions to tax in the manner set out above has not dampened their appetite to explore avenues to do so.

Question 2: Tax implications of having a resident Adviser of the Fund Manager in the local jurisdiction

By their very nature, a PEF's cross-border investments require a local presence (i.e., in the state of the portfolio company) to help the PEF's Fund Manager source new investments in those states and look after investments made by the PEF. Often, the activity at the local level will also include full management functions (basically the capacity to make or actively contribute to investment decisions and manage the portfolio companies).

However, the current tax rules on creation of a dependent agent permanent establishment are such that a PEF has to resort to restricting its activities artificially, in order to avoid additional tax at the management level, and this greatly reduces the effectiveness of the PEF in the portfolio state. The PEF's Fund Manager will wish to avoid this permanent establishment risk so as to prevent double taxation (i.e. to prevent taxation of the investment in the country where the investment takes place and also in the country where the investors are located).

Such double taxation can make investing in private markets uneconomic for investors. PEF's Fund Managers will usually set up separate advisory companies which analyses the local market, identifies, and evaluates potential investment opportunities and prepares investment proposals, with appropriate input from the PEF's Fund Manager, even where it does not carry out full management functions of the PEF. From our experience, there are increasing instances where this arrangement is challenged by the tax authorities implying that the permanent establishment risk is not completely eliminated by the arrangement.

Finally, issues have arisen around whether a PEF's Fund Manager bears liability for any taxes accrued by the PEF they manage on behalf of investors. This can pose an onerous financial and legal burden for the PEF's Fund Manager, especially where the proceeds have already been distributed to the PEF's partners or shareholders.

To provide certainty in this area and to attract foreign investors to locally managed funds, a few countries have unilaterally clarified that they would not consider that the activities of a local fund manager would constitute a permanent establishment for foreign investors.

The Way Forward

There is need for concerted action towards a more stable and certain fiscal regime for PEFs in Africa including elimination of tax obstacles to cross-border investments such as economic and juridical double taxation of the profi s of PEFs. African policymakers should give proportionate tax treatment to PEFs similar to that granted to domestic CIVs, low risk capital (e.g. bank deposits, bonds) and capital markets. A stronger move in this direction is desirable as Africa stock markets present a viable exit for most PEFs through initial public offerings which would significantly boost market activity as is the case in most developed jurisdictions.

The UN Committee of Experts on International Cooperation in Tax Matters have argued that, if developing countries want to encourage portfolio investment in their territories, it would be useful to clarify whether and how tax treaties will apply to 'non CIVs' and/or provide domestic tax provisions that clarify tax treatment of these entities and in particular to specifically exclude non-CIVs from the general treaty anti-abuse rules and LOB provisions.

While some of the tax issues may be adequately addressed through DTT provisions, African governments may also expressly address these concerns through domestic legislation, unilateral administrative guidance or seek mutual recognition of the classification of legal forms for tax purposes through a mutual agreement procedure between competent authorities[2].

[1] The term juridical double taxation is generally described as the imposition of comparable taxes in two (or more) states on the same taxpayer in respect of the same income and for identical periods. Economic Double taxation arises if more than one person is taxed on the same income

[2] 2 The UN Committee of Experts on International Cooperation in Tax Matters Nineteenth session Geneva, 15-18 October 2019 provides in its annex an example mutual agreement between Netherlands and Switzerland.

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DO NEW ESG FUND REGULATIONS HELP OR HINDER MANAGERS IN AFRICA?

British International Investment

Environmental, social and governance (ESG) investing has rapidly grown in popularity among asset owners and retail investors in recent years. To attract those investors, many fund managers have made bold claims about their ESG risk management capabilities and the environmental and social (E&S) impact of their investment strategies.[1] This has created a problem: how can asset owners and retail investors distinguish between genuine good performance and spurious marketing jargon?

To address this problem, several jurisdictions have introduced ESG regulations targeting funds and fund managers. The European Union (EU) was the first mover with its Sustainable Finance Disclosure Regulation (SFDR). SFDR requires funds to align with one of three ESG standards, and for funds and their managers to make various ESG-related disclosures.

SFDR came into force in March 2021, but only partially. The roll-out has been convoluted, with the European Commission regularly providing additional guidance about how to interpret the rules. To add complexity, SFDR is closely intertwined with other "green" regulations, which are still a work-in-progress. Nonetheless, SFDR has had far-reaching effects, with 53.5% of in-scope assets – as tracked by Morningstar – now in funds aligned with the top-two ESG categories: Article 8 (light green) and Article 9 (dark green).2

Meanwhile, the United Kingdom's Financial Conduct Authority (FCA) published a consultation paper on its broadly comparable Sustainability Disclosure Requirements (SDR) regime in October 2022.[3] The FCA appears to have learnt some valuable lessons from SFDR. For example, the proposals allow fund managers to opt out of the regime, while managers that opt in have the flexibility to align with a "credible E&S standard".

Extraterritorial reach into emerging markets

SFDR applies extraterritorially, including to funds and managers that are domiciled and investing outside the EU. The key question is whether it is marketed to asset owners – such as limited partners (LPs) – in the EU. This is logical given SFDR's raison d'être: protecting asset owners and retail investors from mis-

> SFDR is closely intertwined with other "green" regulations, which are still a work-in-progress.

selling. However, it also causes confusion for many fund managers in emerging markets who – justifiably – may not be keeping a close eye on a labyrinth of dense EU regulation.

The FCA's proposed regime has yet to be finalised and a separate public consultation on overseas funds is planned. Therefore, it is unclear whether SDR will apply extraterritorially in the same way as SFDR. However, it is conceivable that some Africa-focused funds – among others – will be required to comply with both SFDR and SDR. Throw in another comparable regime under development from the United States Securities and Exchange Commission (SEC) and some funds could find themselves having to comply with multiple overlapping regimes.

Is compliance worth it for Africa-focused fund managers?

To answer this question, fund managers need to consider the costs and benefi s of compliance with their legal counsel and prospective LPs. In some circumstances, fund managers might choose to avoid compliance by excluding certain LPs or relying on reverse solicitation (where LPs ask to enter the fund, rather than being marketed to).

There are clear negatives to complying with fund regulations such as SFDR. Additional legal fees and annual reporting requirements generate costs and consume time. Non-compliance after opting in could lead to regulatory penalties and legal action from LPs.

Perhaps more fundamentally, it is structurally harder for funds investing outside the EU to comply with the detailed "principal adverse impact" (PAI) reporting expected of most Article 8 and 9 funds.[4] For funds investing in the EU, PAI reporting should become easier because many EU-based companies will be required to disclose relevant ESG data, which can then be collected and aggregated by investors. In comparison, even finding appropriate proxy data is hard in many emerging markets. Similarly, SFDR promotes alignment with the EU Taxonomy, a benchmark that defines minimum thresholds for sustainability in various industries. However, compliance with the EU Taxonomy often requires companies to meet EU regulatory standards, which is unrealistic for many firms operating in different jurisdictions. These structural difficulties may be resolved over time. For example, the European Commission launched a "high-level expert group" on sustainable finance in low and middle-income countries in March 2022, which provides some reason for optimism.5

SDR will hopefully avoid some of these pitfalls. For instance, allowing funds to align with a "credible E&S standard" will presumably mean that the International Finance Corporation Performance Standards – widely used by private equity and venture capital funds in Africa – will be compatible with SDR. The FCA's regime is also expected to rely on the International Sustainability Standards Board's upcoming sustainability standards for reporting metrics. This would be a significant change for many fund managers but would create alignment with standards that are expected to become the global norm.

The primary benefit to fund managers of complying with SFDR – and potentially SDR – is the potential to attract more capital. Indeed, asset owner commitment targets for Article 8 and 9 funds are becoming more common. And with some LPs asking all investee funds for PAI reporting – regardless of their SFDR category – it would be a relatively small jump to full compliance.

Conclusion

In principle, ESG fund regulations should be beneficial for Africa-focused funds. Managers in Africa typically have strong track-records on ESG management, partly driven by an LP base which is skewed to development finance institutions. These funds should standout if ESG fund regulations truly provide greater transparency and comparability. Similarly, Africa-focused funds offer – by most measures – among the best opportunities for meaningful impact, given the relative need.

In practice though, there is a real risk that ESG fund regulations will further reduce inflows of capital to Africa-focused funds. Cautious LPs might invest their impact allocation to developed-market Article 8 and 9 funds which are perceived to be safer. Africa-focused funds are likely to find it harder to align with the top-two categories of SFDR.

Fund managers in Africa and other emerging markets will increasingly need to consider the costs and benefits of aligning with one or more ESG regulatory regimes.

The views in this article are those of the author and not necessarly those of British International Investment plc.

[1] "ESG investing" is used here to mean the integration of ESG considerations into the investment decision-making process. It is important to make a distinction between ESG risk management (which focuses on the operations of fund managers and companies) and E&S impact investing (which focuses on the outputs of an investment strategy or business model). For example, funds strongly aligned with an impact theme – such as gender or climate – do not always perform well on ESG risk management. Conversely, some multinational tobacco companies – for instance – perform well on ESG risk management (with a strong approach to labour, climate, security etc), but their carcinogenic products clearly do not have a positive impact.

[2] Morningstar, "SFDR Article 8 and Article 9 Funds: Q3 2022 in Review" (October 2022): https://www.morningstar.com/en-uk/lp/sfdr-article8-article9

[3] Financial Conduct Authority, "Sustainability Disclosure Requirements (SDR) and investment labels" (October 2022): https://www.fca.org.uk/publication/consultation/cp22-20.pdf

[4] PAI are a set of environmental and social topics defined under SFDR that some managers and funds are expected to report on.

[5] European Commission, "International Partnerships: Scaling up sustainable finance in low and middle-income countries – High-level expert group": https://international-partnerships.ec.europa.eu/scaling-sustainable-finance-low-and-middle-income-countries-high-level-expert-group_en

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A NEW POLICY IN ETHIOPIA LIBERALISING THE BANKING SECTOR FOR FOREIGN INVESTORS

ALN Ethiopia | Mesfin Tafesse and Associates

Background

The first bank established in Ethiopia was the Bank of Abyssinia in 1905 and it was owned and managed by the British-owned National Bank of Egypt. The National Bank of Ethiopia (the NBE) was established in 1963 and several other privately owned banks also existed until the overthrow of the imperial regime in 1974. Since then, until 1994, government policy and the legal regime did not allow Ethiopian citizens to own and manage banking businesses and the banking sector was wholly owned and operated by the government. In 1994, new banking laws were enacted allowing private domestic investors to engage in banking business however the sector remained closed to foreign investors. Further, the financial sector was primarily focused on the traditional bank led system and does not include or offer different financial services and businesses in the sector. Until 2020, only banks were permitted to offer digital financial services such as mobile money. The legal regime did however permit a limited number of commercial representative offices of foreign banks undertaking promotional activities and recent developments in the capital goods financing therefore allowing investment by foreigners in this regard. More recently, in December 2022, the law on payment systems has been amended to allow foreign operators to engage in the financial technology sector.

> Defining the roles of the various participants in the governance process is an important starting point, and there is no "one-size-fits-all" model

Existing Structure of the Banking Sector in Ethiopia

Left to Ethiopian citizens and shielded from any competition in the sector, Ethiopia's banking sector has enjoyed high growth over the past few years with improvements in total assets, deposits, loans and advances, bonds, capital, and branch outreach. Currently, there are thirty banks operating in the country, consisting of 8,250 branches, serving the country's population of nearly 115 million. According to figures reported in the New Policy opening the banking sector for foreign investors, assets of the banking system reached Birr 2.04 trillion, deposits Birr 1.48 trillion, loans and advances Birr 896.69 billion, and capital Birr 167.06 billion, compared to assets of Birr 184.49 billion, deposits Birr 110.72 billion, loans and advances Birr 61.71 billion, and capital Birr 13.63 billion a year ago (2022).

Despite this expansion, the industry is still characterised by a lack of resources (capital, technology, skilled labour and other technical deficiencies), low accessibility, a very low credit supply, a dearth of specialised goods and services for consumers and businesses, inadequate financial market infrastructure, lack of capacity, and a lack of banking expertise. This is primarily due to the fact that domestic banks have been safeguarded from any competition by overseas banks in terms of new and innovative financial service products and procedures. The sector further faces rigorous regulations from the NBE.

Opening the Banking Sector for Foreign Investors under the New Policy

With the change of political leadership in April 2018, privatisation has been promoted as one of the reform agenda items in Ethiopia across a number of industries. As a way of implementing this reform agenda, the Council of Ministers made a historic decision in early September 2022 to announce a new Banking Sector Liberalization Policy allowing foreign banks to enter the Ethiopian banking industry for the first time since the overthrow of the imperial regime. The National Bank of Ethiopia is also in the process of drafting an amendment to the Banking Business Proclamation, which will serve as a basis for the implementation of the New Policy opening the banking sector to foreign investors. The New Policy is prepared with the main objective of setting policy directions and outlining the next phases to allow foreign investors to engage in the banking sector. It is aimed at, among others, ensuring sustainability of economic growth by achieving increasing credit and foreign currency supply, bringing diversified and modern banking services to the country supported by developed technologies, specialised products, and marketing know-how. The focus of the New Policy right now appears to be on banks as there is no mention of other players, e.g. micro finance institutions, insurance companies, etc in the broader meaning of the financial services sector.

The New Policy sets out that the first year following the adoption of the New Policy shall be allocated to complete policy formulation, development of relevant laws, and enhancement of regulatory capacity of the NBE. This has also an objective of offering an opportunity for domestic banks by way of a grace period to enhance their capacity and develop competition strategy.

Rationale for Foreign Entry into the Ethiopian Banking Sector

The need to develop a more efficient and resilient financial system by introducing and spreading technology, providing new services and products, the country's demand for foreign currency, the access to credit ratio, the less competitive environment, the untouched market opportunities in the sector, and the banks' preparedness to transform themselves into world-class standards are among the compelling factors for the government to introduce a suite of reforms and prepare themselves for the entry of foreign banks.

The potential efficiency gains to the local banks, increased credit access to the private sector, sustainability of economic growth through increased credit and foreign currency supply in the economy, increased interaction with foreign markets and economies, and ensuring supply of adequate finance are also among the rationales considered in opening the banking sector for foreign investors.

Modalities for Foreign Investment in the Banking Sector

Four modalities of foreign investment are recognised under the New Policy.

A. Subsidiary of a Foreign Bank/new bank: banks with an existing reputation in their country of incorporation and with good rating results by the international rating agencies may be allowed to establish a subsidiary in Ethiopia with full ownership. The New Policy recognises the possible inherent risks associated with the liberalisation of the banking sector and proposes a gradual approach by providing a limit on the number of licences for foreign branches and subsidiaries. The government is currently targeting to provide 3 to 5 licences in five years.

B. Acquisition of shares of existing Ethiopian Banks: In eliminating the current restrictions, the New Policy adopts a wider, yet cautious approach. Foreign shareholdings in existing and under-formation banks are planned to be maintained at the minimum acceptable level in order to ensure that the banking system remains majority owned and controlled by Ethiopians. The share of equity allowed to be owned by foreigners is up to 5% by a nonbank foreign national and up to 30% by a foreign bank. The aggregate foreign ownership in an existing Ethiopian bank cannot exceed 40%. A single foreign bank, as a strategic investor, may own shares up to 30% in an existing bank.

C. A Branch of a Foreign Bank: foreign banks with a good reputation in their country of origin and/or state-owned banks will also be allowed to open branch offices in Ethiopia fulfilling the capital equivalency and other requirements of the NBE. These requirements are yet to be developed.

D. Representative Office of a Foreign Bank: The government sustained its current position by restating that foreign banks can have a commercial representative office in Ethiopia which will be engaged in promotional activities.

Opportunities for Foreign Investors

Despite the high growth recorded over the past years, various reports still show that the banking sector in Ethiopia is less developed due to several factors such as lack of resources, specialisation, capacity, and expertise by domestic banks. These gaps mean that the market opportunities remain untapped. Such untouched markets in the region offer potentially good profit and growth prospects for foreign banks. Foreign banks can easily use their comparative advantages to explore the opportunities by generating improvements in operational efficiency, facilitating a reduction in cost structures, deploying better risk management tools, and application of new technologies and banking products.

Despite the growth recorded on the branch-to-population ratio, only a small portion of the population still have access to formal credit and Ethiopia still records low rates of bank account ownership. This is an advantage for foreign entrants to direct their marketing toward those sectors of society underserved by the current banking arrangement in Ethiopia.

The foreign investment inflow in Ethiopia has substantially increased in recent years. Large scale investments in the country have resulted in an increased demand for infrastructure to support this growth. This has resulted in greater demand for finance, a growing need for developed and specialised financial services, and high-level operational efficiency and flexibility. Foreign banks, by using their advanced technology, sophisticated marketing strategy, and capital resources, will be able to penetrate the underserved areas, and they will have the opportunity to create a considerable impact in the existing marketing structure.

Additionally, the entry of foreign banks may have an advantage of promoting healthy competition, resulting in efficient and dynamic market and the provision of commercial and retail credit to large number of domestic consumers to Ethiopia. This will help boost economic growth by promoting innovation, exports, and job creation by making loans available to individuals and businesses.

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THE CASE FOR LOCALLY DOMICILED PRIVATE EQUITY FUNDS IN UGANDA

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Uganda's private equity and venture capital sector continues to evolve with the spotlight now shifting to the status of locally domiciled PE and VC funds and whether Uganda has a sufficiently enabling environment to attract their growth.

As at January 2023, Uganda has 3 locally domiciled PE/VC funds in contrast with South Africa that stands at over 80 funds as at December 2022. This status, when placed within the context of investments generated by PE in the region, or better still globally, prompts the need to look into and address the bottlenecks (if any), to what would otherwise be a thriving sector, driving real growth across businesses and the economy. According to reports by McKinsey, Africa Capital Digest and Tracxn, PE and VC funds are estimated to have raised up to $1.2 trillion globally in 2022 alone. Uganda came in at $53.5 million in PE investments. This begs the question why?

In 2022, PE in Uganda suffered a blow following a series of rulings by the Ugandan High Court in a dispute between a Ugandan investee company and a PE fund domiciled in South Africa, raising issues around the legal capacity of a foreign domiciled PE fund to make investments in Uganda, also taking into account the fact that it operated as an unregistered fund in Uganda. While a subsequent ruling of the court alluded to the fact that the PE fund did not need to be registered in Uganda to invest and/or enforce the contractual terms of its investment, a final decision remains pending. The sum of the decisions of the courts is that for a foreign investor or lender to recover their investment or to enforce a debt, they have to establish presence in Uganda.

Uganda's PE sector is largely dominated by foreign domiciled PE funds which fact perhaps speaks to why following the decisions of the court discussed above, stakeholders in the PE sector have sought to lobby and propose reforms to the PE regulatory regime in a bid to motivate for an attractive environment for PE investment and in particular, locally domiciled PE funds.

Market research shows that locally domiciled funds in Uganda are largely inhibited by two factors: an unattractive regulatory framework for the legal vehicle to set up the fund, and a tax regime with minimum to no incentives to encourage PE investment.

Legal Vehicles

While PE funds are generally across the world popularly set up as partnerships, the law in Uganda by definition only seems to recognize venture capital funds incorporated in Uganda as companies. Not only

The sum of the decisions of the courts is that for a foreign investor or lender to recover their investment or to enforce a debt, they have to establish presence in Uganda.

does this law (the Capital Markets Authority Act (Cap 84 as amended), exclude other forms of private equity investments beyond venture capital, it also effectively leaves out funds set up as partnerships under the Partnerships Act 2010. The ambiguity therefore surrounding structure and whether or not the regulator, Capital Markets Authority recognizes funds set up as partnerships (as opposed to companies) lends to the slow traction in the growth of locally domiciled funds. The proposal in this instance is for consideration to be given to widening the defi ition of funds to include mainstream PE funds in addition to venture capital funds. Another proposal seeks to open up the statutorily prescribed structure of PE fund to cater for funds set up as partnerships or trusts as seen in other jurisdictions.

For funds set up as partnerships under the Partnerships Act 2010, they have the option of adopting either a general partnership structure or a limited liability partnership structure. The latter are required to register with the Uganda Registration Services Bureau - a fairly streamlined process, that does not provide for a separate legal identity for the partnership. Failure to register renders a partnership general, exposing all its partners to the liabilities of the fund. The pain point with the LLP structure then seems to center around what constitutes management of a fund, and the fact that an LLP cannot be dissolved without a court order. According to the Partnerships Act 2010, only general partners can participate in management, a concept that remains undefined. Limited liability partners in these funds enjoy limited liability as long as they steer clear of any involvement in management of the fund.

Another proposal is an amendment of the Partnership Act 2010 to allow dissolution of PE funds without a court order and/or voluntary winding up that circumvents the winding up process for companies under the Insolvency Act. This is particularly pertinent considering the fact that the PE fund model does not envisage creditors when a fund is dissolved. Addressing these challenges among others would go along way in encouraging local domiciliation of funds in Uganda.

Tax

The company status bestowed on venture funds exposes those funds to corporate tax at 30%, withholding tax on dividends, on interest and on the sale of shares in an investee company. Income tax is also payable by investor partners as well as income tax on the individual investor distributions.

For funds set up as partnerships (whether general or limited liability or foreign partnerships), a uniform tax regime applies to the profi s in the hands of the partners. The proposal raised here is for a preferential tax regime for locally domiciled funds (in contrast to foreign domiciled funds), and perhaps one that grants exemptions or incentives for PE investments in priority sectors.

These incentives that also include provision for a tax transparent structure would align with fiscal policy adopted in jurisdictions such as Singapore, Mauritius and the Cayman Islands where PE funds enjoy preferential tax treatment to create optimal environments for PE funds and venture capital investments, thereby positioning themselves as hubs for the establishment of PE funds and venture capital.

It remains to be seen which proposals and reforms will be adopted as policy and enacted into statute to promote the growth of local funds in Uganda's PE market. In the meantime, as the regulatory framework plays catch up, Ugandan businesses that are seeking PE investment and funds seeking to do business in Uganda need to be mindful of the stronger assurances needed around the enforceability of their mutual contractual obligations in the agreements underlying the investments. The pending decision by the Ugandan courts will also close the door on the current uncertainty in the PE market in Uganda, hopefully resulting in increased growth of the sector.

The pending decision by the Ugandan courts will also close the door on the current uncertainty in the PE market in Uganda.

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INSIGHTS INTO THE RECENT REGULATORY DEVELOPMENTS IN RWANDA RELEVANT TO PRIVATE EQUITY INVESTORS

K-Solutions | ALN Rwanda

Rwanda has been on the path to transform itself into an international financial destination that is attractive to investors seeking opportunities across the region and the African continent. One of the most notable developments is the setting up of the Kigali International Financial Centre (KIFC) which has ensured the introduction of an investment oriented legal and regulatory framework that is fully compliant to international standards. Against this background, we have provided insights into the latest laws enacted that are likely to be of relevance to Private Equity Fund Investors.

I. The new Income Tax Law.

Rwanda published a new law on income taxes in October 2022 (the **New Income Tax Law**) that repealed the previous law enacted in 2018. Some of the notable changes that will be of interest to a Private Equity investor include:

- **Tax treatment of an expert or a professional directly working for an entity carrying out KIFC licensed activities:**

> An expert or professional directly working for an entity carrying out KIFC licensed activities is exempted from personal income tax on foreign sourced income for first five (5) years before becoming Rwanda resident

The general rule is that a resident taxpayer is liable to personal income tax from all domestic and foreign sources during each tax period.

Under the New Income Tax Law, a resident taxpayer who was not resident in Rwanda in the five (5) years immediately prior to becoming resident and who works as an expert or a professional directly for an entity carrying out KIFC licensed activities, is exempted from personal income tax on foreign sourced income during the first five (5) years following the date of becoming resident.

A non - resident taxpayer is only liable to personal income tax which has a source in Rwanda.

- **Non - deductible expenses from taxable income:**

The New Income Tax Law has increased the number of non-deductible expenses from taxable income to include:

1. realised foreign exchange loss arising from total loans between related persons in excess of four (4) times of the amount of paid-up equity which excludes provisions or reserves and retained earnings according to the balance sheet, which is drawn up in accordance with the generally accepted accounting principles
2. unrealised foreign exchange losses.

- **Transfer pricing between related persons:**

The previous law provided that related persons involved in controlled transactions must have documents justifying that their prices are applied based on the arm's length principle. A failure to do so would result in the Tax Administration adjusting transaction prices in accordance with the general rules on transfer pricing, issued by an Order of the Minister.

The New Income Tax Law has expanded this same provision by stating that "before determining the price arrangement between related persons, the taxpayer may request the tax administration to enter into an advance pricing agreement for a fixed period to determine modalities of setting prices and profit complying with arm's length principle."

- **Expansion and exemption of tax payers of Corporate Income Tax (CIT):**

The New Income Tax Law has added the following as new tax payers of corporate income tax:

- A trustee, enforcer or protector of a trust;
- A foundation; and
- A protected cell company or a cell of a protected cell company depending on the choice of the investor at the time of company registration.

The following are exempted from paying CIT:

- special purpose vehicles, unless the revenue received exceeds the corresponding expenses;
- common benefits foundations; and
- resident trustees for income earned by a foreign trust.

The New Income Tax Law also provides that dividends paid between resident companies and unrealised foreign exchange gains on outstanding loans will be excluded from corporate taxable income.

> Corporate partners are subject to corporate income tax, while individual partners are subject to personal income tax

- **Taxation of Partnerships**

Rwanda has for the first time recently enacted the Partnerships Law whose legal framework set out three forms of partnerships in Rwanda: general partnerships; limited partnerships; and limited liability partnerships. Previously partnerships were subject to Corporate Income Tax (CIT) however the New Income Tax Law excludes Partnerships from paying CIT.

The New Income Tax Law provides that income generated from general partnerships, limited partnerships and limited liability partnerships are taxable on a see through basis at the level of each partner.

The partnership prepares its financial accounts, determines and declares the taxable share in profit of each partner, withholds and remits corresponding tax to the tax administration in accordance with the procedure prescribed by the tax administration. The partnership and the partners are jointly liable in case of a failure to meet these obligations.

In determination of tax liability, corporate partners are subject to corporate income tax, while individual partners are subject to personal income tax.

- **Exemption from paying withholding tax for newly registered tax payers:**

A new provision has been introduced providing exemptions from paying the withholding tax of 15% for newly registered taxpayers who are subject to withholding tax on payments, on goods imported for commercial use and on public tenders during the concerned annual tax period. Previously, the Repealed Income Tax Law did not provide withholding tax exemptions to newly registered tax payers on the above-mentioned payments.

- **Introduction of anti-abuse rules on avoidance arrangements:**

This is a new concept and lists acts that constitute avoidance arrangements between persons to include:

- an arrangement whose principle purpose is to obtain a tax benefit;
- an arrangement that, in whole or in part, lacks commercial substance;
an arrangement that creates rights or obligations
- that would not normally be created between persons dealing at arm's length; and
- an arrangement that may result directly or indirectly in the abuse of the provisions of tax laws

in Rwanda.

In cases where there exists a form of an avoidance arrangement between persons, the Tax Administration determines tax after taking at least one of the following actions:

- treating the avoidance arrangement as if it had not been carried out;
- recharacterising the nature of any income, payment, expenditure or any other transaction;
- disallowing or reallocating any income, loss, deduction, allowance, relief, credit, exemption, or exclusion in whole or in part; and
- deeming any two or more persons to be related persons or to be the same person.

2. The New Law on Collective Investment Schemes

Rwanda enacted a new law governing Collective Investment Schemes (CIS) therefore broadening the structures which can be utilised by Private Equity investors.

The new law defines a collective investment scheme as "a type of scheme where there is an arrangement for collecting and pooling funds from investors or participants for the purpose of investment in the interest of each participant or investor represented by his or her proportional ownership in the scheme".

The CIS Law's scope applies to the following;

A **Unit trust scheme** established by a trust deed executed between the operator and the trustee and has the following forms:

- a single scheme that may be an open ended or interval scheme; or
- an umbrella scheme where the subschemes are open-ended or interval schemes

An investment company scheme established as:

- an investment company with fixed capital which must be a single scheme;
- an investment company with variable capital which may be a limited or indefinite life scheme; or
- a protected cell company, a single scheme or an umbrella scheme with sub-schemes which do not exist as separate legal entities to such an extent that in the event of any subscheme being unable to meet its liabilities, these may be met out of the assets of the other sub-schemes.

A partnership scheme formed under a partnership agreement between partners. It is established by registration as provided for by the law governing partnerships and must be a limited partnership. However, the regulatory authority may issue regulations authorising other types of partnerships to operate as a collective investment scheme.

A contractual scheme established by an agreement concluded between the operator and the depositary and may take the following forms:

- an umbrella scheme where the sub-schemes are open ended or interval schemes; or
- a single scheme that may be an open-ended or interval scheme.

This scheme must not have a separate legal personality and its assets must be held by the depositary or the custodian for the benefit of the participants as tenants in common.

3. Kigali International Financial Centre (KIFC) Tax Incentives

KIFC has tailor made incentives targeting particular groups of investors including Private Equity Investors.

- **Pure holding company**

A pure holding company is defined as a company that only owns assets or subsidiary and that company is not involved in any other commercial activities.

An Investor who establishes a pure holding company with total net assets consolidated in Rwanda of not less than USD 1,000,000, annual expenditure in Rwanda of at least USD 15,000, a physical office of the company in Rwanda and with a minimum of 30% of the professional staff being Rwandan, shall be entitled to tax incentives of 3% preferential corporate income tax rate and 0% preferential withholding tax on dividends, interest and royalty payments.

- **A Special Purpose Vehicle (SPV) registered for investment purposes**

An SPV is defined as a separate legal entity created by another existing entity with its own balance sheet and with a specific objective.

An investor who registers a SPV for investment purposes with the following substances: in projects which are meant to last for more than two years, with total net assets consolidated in Rwanda being not less than USD 1,000,000, an annual expenditure in Rwanda of at least US D15,000, a physical office of the company in Rwanda, at least 30% of the professional staff are Rwandan is entitled to tax incentives that include 3% preferential corporate income tax rate and 0% preferential withholding tax on dividends, interest and royalty payments.

- **Collective Investment Scheme**

A CIS is defined as a type of scheme where there is an arrangement for collecting and pooling funds from investors or participants for the purpose of investment in the interest of each participant or investor represented by his or her proportional ownership in the pool.

To qualify for tax incentives, the following are required: minimum funds size of not less than USD 1,000,000 within the first three years, minimum expenditure in Rwanda of USD50,000 per year, Collective Investment Scheme manager, custodian and operator established in Rwanda and at least 30% of the professional staff being Rwandan. The tax incentives include a 3% preferential corporate income tax rate and 0% preferential withholding tax on dividends, interest and royalty payments.

- **Global trading/Paper trading**

This is defined as a commercial entity making deposits in financial entities in Rwanda to finance its trading activities outside Rwanda and is not authorized to import or export goods in Rwanda.

In order to qualify for tax incentives, it must demonstrate an annual turnover or trade volume of not less than USD10,000,000, an annual expenditure in Rwanda of at least USD50,000, at least 30% of the professional staff are Rwandan and a physical office of the company in Rwanda.

The tax incentives are a 3% preferential corporate income tax rate and 0% preferential withholding tax on dividends, interest and royalty payments.

- **Intellectual property company**

This is defined as a commercial entity that is established for the sole purpose of owning intellectual property rights.

It has to demonstrate annual expenditure in Rwanda of at least USD10,000, a physical office in Rwanda, to have a bank account in a bank operating in Rwanda, and at least thirty percent (30%) or three (3) of the staff are Rwandan residents, whichever is higher.

The tax incentives are a 3% preferential corporate income tax rate and 0% preferential withholding tax on dividends, interest and royalty payments.

- **Other investment sectors**

The KIFC also grants tax incentives of 15% preferential corporate income tax rate and 0% preferential withholding tax on dividends, interest and royalty payments to a registered investor licensed to operate under the following; fund management entity, collective investment scheme, wealth management service provider, financial advisory commercial entity, family office services entity, fund administrator, financial technology commercial entity, CIS entity, private bank, mortgage finance institution, finance lease commercial entity, asset backed securities entity, reinsurance company, trust and corporate service providers.

Conclusion

These new regulatory developments coupled with the operationalisation of the KIFC will help position Rwanda towards its status as an emerging financial powerhouse and create an attractive environment for investors.

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AN UPDATED REGULATORY LANDSCAPE FOR PRIVATE EQUITY FUNDS IN ZAMBIA

ALN Zambia I Musa Dudhia & Company

Prior to May 2022, the Zambian regulatory framework did not make provision for the regulation of private equity funds. Therefore, private equity funds functioned as ordinary companies with no special regulations attached to their operations. To this extent, foreign private equity funds looking to invest in Zambia could either invest in Zambia directly or could incorporate special purpose vehicles (SPV's) through which to channel their investments.

However, on 1 May 2022 the Securities (Private Funds) Guidelines (the "Private Funds Guidelines") were enacted into law by the Securities Exchange Commission ("SEC"). The SEC is a government body tasked with the regulation of the capital markets in Zambia. The SEC's primary role as a regulator is to ensure the supervision and development of the Zambian capital markets, as well as the licensing, registration and authorization of financial intermediaries, issuers of debt and equity instruments, collective investment schemes and private funds.

> This private sector driven approach is aligned with the SEC's ultimate goal for Zambia to signal market integrity so that investors are confident about channelling investments to the Zambian capital markets.

The Private Funds Guidelines set out, in specific terms, the rules that apply to private equity funds involved in providing funding to investee companies through issuance of securities and through debt. The Private Funds Guidelines also apply to private funds which do not come within the purview of the rules governing collective investment schemes or other rules and regulations for the regulation of management activities. Generally, the Private Funds Guidelines provide for the following, among others:

- the structure and form of a private equity fund, i.e., it could either be set up as a private limited company or a trust;
- the need for local and foreign private equity funds to apply for authorisation and the requirements therein;
- the requirement for a foreign private equity fund to have a representative in Zambia throughout the period within which it is authorised to operate in Zambia;
- the qualifications, duties and responsibilities of the fund manager;
- the qualifications, duties and responsibilities of the directors/trustees, depending on the form that the private equity fund takes;
- restrictions on fundraising;
- the requirement to verify the source of funds and investments;
- the investment limits that apply to private equity funds and other types of private funds;
- other continuing obligations of private equity funds; and
- the winding up of a private equity fund.

It is quite clear from the Private Funds Guidelines that private equity funds are now regulated by the SEC. However, as the Private Funds Guidelines are fairly recent, it remains unclear how and the extent to which the SEC intends to monitor and enforce compliance, as well as the consequences for breaching the Private Funds Guidelines. As it stands, the Private Funds Guidelines provide that all private equity funds that were in operation prior to 1 May 2022 are required to comply with the Private Funds Guidelines within 12 months of their enactment, i.e., by 1 May 2023, unless they exempted from doing so by the SEC.

Nevertheless, with a new government in Zambia which is private sector driven, it is anticipated that there is likely to be a positive outlook on investment in the country. This is evidenced by some of the measures, such as tax incentives, put into place to further stimulate and promote investments since the new government was ushered into power.

This private sector driven approach is aligned with the SEC's ultimate goal for Zambia to signal market integrity so that investors are confident about channelling investments to the Zambian capital markets. This could potentially attract more investments to Zambia through private equity funds. This, in turn, would mean that more regulatory measures would be put in place to ensure that these investment funds are not subject to risks such as self-interest and market manipulation, that are usually characteristic of an under regulated sector.

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AN ANALYSIS OF FCCPC'S LIMITED INTERIM REGULATORY & REGISTRATION FRAMEWORK & GUIDELINES FOR DIGITAL LENDING IN NIGERIA

ALN Nigeria | Aluko & Oyebode

Introduction

There has recently been a proliferation of digital lending platforms in Nigeria, many of which are focused on retail lending. Arguably, this trend has been driven by increased digital adoption, enhanced smartphone penetration, a cashless policy driven by the Central Bank of Nigeria (CBN) and the Covid-19 pandemic. Consequently, the adoption of digital banking in Nigeria has increased significantly. Moreover, the activities of digital lending platforms in Nigeria have met with limited regulatory restrictions.

There have, however, been complaints about the unethical conduct of certain digital lenders whose operations are reminiscent of loan sharks targeting vulnerable consumers. Examples of this abusive and unethical behaviour include:

- breach of privacy obligations;
- illegal debt recovery methods;
- exploitative interest rates;
- arbitrary methods of calculating loan balances; and
- lack of avenues for customer feedback.

These issues have caused great concern for consumers and have led to heightened regulatory scrutiny of credit institutions.

It is in the light of the above that the Federal Competition and Consumer Protection Commission (FCCPC) released a statement titled "Further and Continuing Investigation of Rights Violations in Money Lending Industry; and Release of Interim Regulatory Framework" (the directive) and the "Limited Interim Regulatory / Registration Framework and Guidelines for Digital Lending 2022" (the guidelines) as a step towards regulating digital lending in Nigeria. For context, the FCCPC is a federal agency with regulatory purview over consumer protection and the prevention of unfair business practices.

This article analyses the contents of the directive and the guidelines, against the backdrop of the CBN's broad statutory powers in the lending space.

Directive

Through the directive, the FCCPC ordered operating payment systems in Nigeria to stop providing payment or transaction services to lenders who were under investigation as well as lenders who had been operating without the requisite regulatory approval. Similarly, telecommunications and technology companies, including mobile network operators, have been directed to stop providing server, hosting, or other key services such as connectivity to unlicensed digital lenders. The FCCPC disclosed that it had ordered Google to take down specific applications (apps) and would continue to monitor hosting platforms with a view to detecting non-compliant apps that were not on the Google Play store. The directive also stipulates that service providers in the digital lending ecosystem such as banks, access or download platforms, technology providers, and payment systems should obtain evidence of regulatory approval before providing services to such lenders.

Guidelines

According to the directive, the guidelines were developed and adopted by the joint regulatory and enforcement task force as an interim step prior to establishing a clear regulatory framework for the digital lending space.1 The guidelines require digital lenders to register with the FCCPC by completing Form DLG 001 and Form DLG 002 both of which are provided in the guidelines.

Form DLG 001 is the registration form that requires the applicant company to provide identification and operational information2 to the FCCPC, while Form DLG 002 contains declarations relating to:

- legitimacy;
- compliance with applicable regulatory requirements;
- lawful source of funds and conformity with anti-money laundering; and
- data protection laws.
- Regulatory framework for digital lending

Broadly, there are four types of entities involved in digital lending in Nigeria.

Deposit money banks

Deposit money banks are financial institutions licensed by the CBN to carry out general banking activities. These include deposit mobilisation and lending to retail and corporate customers.

Microfinance banks

A microfinance bank (MFB) is a financial institution that is licensed to provide financial services to microfinance clients such as:

loans;

- savings and deposits;
- domestic fund transfers; and
- certain non-financial services.

Finance companies

Finance companies are licensed by the CBN to offer financial services including consumer lending, asset finance and debt factoring to individuals and businesses. Consumer lending entails the provision of consumer and business loans to individuals and micro, small and medium enterprises. Finance companies are precluded from receiving deposits from the public.3

Money lending entities

Money lending was originally regulated by the Money Lenders Act,4which was enacted to protect borrowers and debtors from the exploitative tendencies of money lending entities. In 1990, the Act was repealed, leaving the regulation of money lending to the Money Lenders Laws of various states in Nigeria.5

With the rise in technology, it has become increasingly common to provide certain financial services through digital means. Consequently, a number of digital lending businesses tend to obtain money lending licences and then proceed to conduct their lending businesses under the licences. As most state money lending laws were enacted many years ago, they may not adequately cater for today's realities. For example, while other regulated financial institutions are required to make periodic returns and filings that enable their regulators monitor their activities, money lending entities are not generally subject to such requirements.

Regulatory powers of the FCCPC and the CBN

The FCCPC's proactiveness in releasing the directive and the guidelines is laudable given the practices of operators in this space. However, it is broadly understood, to the extent that lending businesses fall within the regulatory scope of the CBN, that it is necessary to consider the interaction between the CBN's regulatory powers over its licencees and the FCCPC's powers to advance consumer protection in general.

In particular, the FCCPC is empowered to:

- protect and promote consumer interests;6
- act generally to reduce the risk and injury that may occur from the consumption of certain products and services;
- restrict and prohibit service providers;7
- ensure that consumers' interests receive due consideration at appropriate fora; and
- provide redress for obnoxious practices or the unscrupulous exploitation of consumers by companies, firms, trade associations or individuals.8

Specifically, the FCCPC is authorised to make regulations and issue guidelines and notices for the effective implementation and operation of the provisions of the Federal Competition and Consumer Protection Act (FCCPC Act). This includes the power to prescribe procedures to be followed, forms of applications and related documents, and fees, penalties or charges.9 The regulations, guidelines or notices may include procedural and enforcement rules and regulations pertaining to consumer protection under the FCCPC Act.[10] From the foregoing, the FCCPC is empowered to make regulations, and carry out other incidental actions for the advancement of consumer protection in Nigeria.

The CBN has regulatory oversight over financial institutions whose objects include advancing credit and lending. These financial institutions include MFBs and other financial institutions such as finance companies and other corporate bodies that carry on business with a licence issued by the CBN, regardless of whether such businesses are conducted digitally, virtually or electronically.[11] With regard to consumer protection, the Banks and Other Financial Institutions Act (BOFIA) specifies that the CBN governor will have the power to make regulations, policies and guidelines to ensure responsible conduct and protect the interests of consumers of products and services, notwithstanding provisions of other laws.[12]

Indeed, the CBN has issued a Consumer Protection Framework and Consumer Protection Regulations pursuant to its powers under the BOFIA. Particularly, the Consumer Protection Regulations (CBN Regulations) stipulate minimum standards for fair treatment of consumers, disclosure and transparency, business conduct, and handling of complaints with a view to protecting consumers' rights and holding institutions accountable. The CBN Regulations also require licensed entities to comply with responsible lending practices. These include assessments of the capability of potential borrowers to sustainably repay their loans, early engagement of clients on alternative repayment options where there are repayment difficulties and deployment of debt recovery processes that are transparent, courteous and fair, and devoid of undue pressure, intimidation, harassment, humiliation or threat.

Therefore, there is seemingly an overlap between the FCCPC's general powers on consumer protection and the CBN's supervisory authority over the licensed financial institutions that fall within its regulatory ambit. Notably, the BOFIA provides that the provisions of the FCCPC Act will not apply to financial products, functions or services licensed and regulated by the CBN.[13] Although the supremacy of the FCCPC Act in matters of consumer protection has been established by some of its provisions,[14] such supremacy may not comport with the CBN's power to exclusively regulate consumer protection as it pertains to CBN-regulated financial institutions.[15]

It should also be noted that the BOFIA was enacted in 2020 after the enactment of the FCCPC Act in 2018. Based on the legal principle that a latter statute would prevail over an earlier one when there is an inconsistency,[16] the BOFIA's provisions on this point would appear to supersede the FCCPC Act. Additionally, where there is a specific and a general statute on the same subject, the specific legislation prevails.[17] Consequently, the provisions of the BOFIA (being specific) are likely to prevail on issues of consumer protection in the financial services sector as it relates to CBN-regulated entities.

Therefore, it would appear that advancing robust consumer protection regulation in the digital lending space may be best carried out by the FCCPC adopting a collaborative approach with the CBN, given that the latter is the principal regulator of financial institutions in Nigeria. The FCCPC can only exercise absolute powers in regulating digital lenders who are not licensed by the CBN, that is, money lending entities operating under state-issued money lending licences.

Although the FCCPC's recent regulatory activities have been primarily targeted at the activities of digital money lenders and the need to protect the interests of the users of such services, the scope of the directive and guidelines also extend to ancillary services providers in the digital lending ecosystem such as banks, application stores, technology providers and payment systems, as they are required to ensure confirmation of regulatory approval before providing support services to digital lenders. This incites several issues which the directives and guidelines may not have comprehensively addressed, such as the appropriate approach that should apply to non-traditional forms of lending, such as buy now, pay later products.

> The BOFIA specifies that the CBN governor will have the power to make regulations, policies and guidelines to ensure responsible conduct and protect the interests of consumers of products and services, notwithstanding provisions of other laws.

Other key points

Extent of moratorium under guidelines

The directive indicates that the guidelines would provide a limited moratorium period for existing businesses to comply with the guidelines' requirements. The FCCPC initially set a ninety (90) days compliance period which expired on November 14, 2022 and which was subsequently extended.

Implication of non-compliance

Although section 163(1)(c) of the FCCPC Act empowers the FCCPC to make regulations on fees, administrative penalties, charges or levies, and such other related matters, there are no clear provisions in the guidelines or the directive concerning penalties for non-compliance.

Sequencing of approval process

Neither the guidelines nor the directive indicate whether registration with the FCCPC would precede the procurement of a relevant operational licence. It should be noted that the CBN has strict regulations in connection with the latter. It is not clear that potential licencees can deviate from these without recourse to the CBN.

Comments

The regulatory intervention of the FCCPC is a notable development in addressing the excesses and exploitative behaviours of some digital lending businesses in Nigeria. The regulatory framework for digital lending as outlined above indicates that any business carrying on digital lending activities will fall under the purview of the CBN, the FCCPC and/or a relevant state government. The FCCPC has general powers to make regulations on consumer protection in Nigeria. However, what remains imprecise is the scope of the application of the FCCPC's powers, given the CBN's broad statutory powers in this space. In particular, digital lenders operating under a CBN licence may not be subject to the powers of the FCCPC due to the exclusion of the provisions of the FCCPC Act under the BOFIA. Interestingly, the FCCPC recently released a list of digital lenders, including a finance company and a microfinance bank, that it has granted full or conditional approvals under the guidelines.

It appears that, regardless of whether a digital lending entity is operating under a money lending licence or a CBN licence, it is still a regulated entity that must comply with the extant laws that have been put in place to protect consumers. It follows that a comprehensive and uniform regulatory framework specifically enhancing cohesion between the various regulatory agencies is necessary. Given that the FCCPC has indicated that the guidelines are only an interim measure, it is expected that the relevant regulators will drive a collaborative effort to provide a robust regulatory framework for the digital lending business in Nigeria.

[1] It is unclear if the CBN is one of the regulatory agencies that make up this task force.
[2] These include physical address, contact details, identity of promoters, directors and initial key role players, affiliated companies, source(s) of funding, proposed interest rate regime, service providers and service level agreements, and a list of all applications in the business operations or intended for operation.
[3] CBN Revised Guidelines for Finance Companies 2014.
[4] Cap 124, Laws of the Federation of Nigeria (1958), now repealed.
[5] In Lagos State, for example, the relevant law is the Money Lenders Law, Chapter M7, Laws of Lagos State 2003.
[6] Section 17(l) of the FCCPC Act.
[7] Section 17(x) of the FCCPC Act.
[8] Section 17(s) of the FCCPC Act.
[9] Section 163(1) of the FCCPC Act.
[10] Section 163(2)(e) of the FCCPC Act.
[11] Section 131 of the BOFIA.
[12] Section 30 of the BOFIA.
[13] Section 65(1)(a) of the BOFIA.
[14] Section 104 of the FCCPC Act states that: 'Notwithstanding the provisions of any other law but subject to the provisions of the Constitution of the Federal Republic of Nigeria, in all matters relating to competition and consumer protection, the provisions of this Act shall override the provisions of any other law.' Section 105(2) of the FCCPC Act also provides that for industries that are regulated by another government agency, such primary agency would have concurrent jurisdiction with the FCCPC in matters of consumer protection and the FCCPC would have precedence.
[15] Sections 30 and 65 of the BOFIA.
[16] CBN v Registered Trustees, NBA (2021) 5 NWLR (part 1769) page 268 at 344.
[17] NDIC v Governing Council, ITF (2012) 9 NWLR (part 1305) page 252 at 273.

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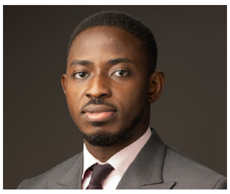

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LEGAL AND REGULATORY DEVELOPMENTS SHAPING FUNDRAISING AND INVESTMENTS IN NIGERIA

Jackson, Eti & Edu & Udo Udoma & Belo Asagie

Introduction

AVCA's Q3 2022 Industry Quarterly Review reports that a total of 318 completed private capital deals with a reported value of US$3.9 billion were completed in Nigeria between 2016 and H1 2022, with 256 of such deals being completed between 2021 and H1 2022 alone accounting for 95% of the total private capital deal investment into in Nigeria in that period. This update highlights notable legal, regulatory and fiscal reforms and developments that are currently shaping the fundraising, investment, and operating environment for private equity and venture capital in Nigeria, several of which aim to foster and support and enabling environment for investment and business operations (including for micro, small, and medium enterprises (MSMEs)) and to further facilitate the ease of doing business and adherence to global best practices for transparency and efficiency.

In February 2023, the Federal Government of Nigeria New Business Facilitation (Miscellaneous Provisions) Act amends 21 business laws

> The Omnibus Act aims to clarify the regulatory framework and to encourage the establishment, development, and operation of startups in the country

in its drive to ensure the ease of doing business and to promote transparency, efficiency, and productivity in Nigeria signed into law the Business Facilitation (Miscellaneous Provisions) Act 2023 also referred to as Omnibus Act (Omnibus Act).

The Omnibus Act generally seeks to remove various bureaucratic constraints to doing business in Nigeria by streamlining time, cost and procedures and eliminating bottlenecks for doing business, removing outdated provisions and incentivising the participation of MSMEs by amending 21 key business-related laws, including the Companies and Allied Matters Act (CAMA), the Investments and Securities Act, the Customs and Excise Management Act, the Financial Reporting Council of Nigeria Act, the National Agency for Food and Drug Administration and Control Act, the National Office for Technology Acquisition and Promotion Act, and the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act. It also codifies Executive Order 001 on Transparency and Efficiency in Public Service Delivery (EO1).

New startup act

Nigeria enacted a Startup Act in October 2022 that aims to foster an enabling environment to launch and scale startup offerings. It aims to clarify the regulatory framework and to encourage the establishment, development, and operation of startups in the country through tax incentives for investors and startups, government loans, and credit guarantee schemes including for 'Labelled Startups' - Nigerian companies that are not older than ten years, in which one-third of the indigenous shareholding is held by a founder or co-founder). The statute also establishes a startup investment seed fund that will be used for funding the operations of early-stage startups; supports the creation of accelerator and incubator programmes to drive participation in the startup ecosystem, and of the creation of start-up innovtion clusters, hubs, physical and virtual innovation parks to assist FinTech companies with understanding the regulatory framework and to prepare all startups for expansion into foreign markets.

Expiration of December 31, 2022 statutory deadline for issuing unissued shares

Nigerian companies that failed to meet the December 31, 2022 deadline set by the Corporate Affairs Commission (CAC) for issuing their unissued share capital are liable to general and daily fines for every day that the default continues. Any portion of the share capital of defaulting companies that had not been issued as at December 31, 2022 is also not recognised as forming part of any relevant company's share capital.

Statutory rights of pre-emption for existing shareholders of public and private companies

Investment transactions that are structured to include subscriptions for new shares are subject to a CAMA requirement that confers mandatory rights of first offer (proportionate to their shareholdings) on the shareholders of any target Nigerian public and private companies for any proposed new issue of shares to a prospective investor. For public companies, this means that any issuance of new shares, whether by way of a public offer or a private placement, must be preced-ed by a rights offer to existing shareholders, which may be onerous and time-consuming and may also require transactional structuring to provide for sce-narios in which existing shareholders of a company decide to take up the shares that are offered to them during such a rights issue to an extent that reduces the number of shares available for the original trans-action.

Withholding tax on dividends, interest, and royalties

Before July 1, 2022, residents of countries with which Nigeria has tax treaties countries had enjoyed a lower withholding tax (WHT) rate than the regular WHT rate that had applied to Nigerians and residents of non-double tax treaty (DTT) countries. With effect

> The PENCOM framework establishes criteria, standards and procedures regulating licensed PFA co-investments of pension funds with qualifying PE or VC funds as a viable option for improving pension fund allocation

from July 1, 2022, the reduced 7.5% withholding tax (WHT) rate applicable on dividends, interest, and royalties earned by taxable persons resident in countries with double tax agreements with Nigeria was terminated, and a 10% WHT rate imposed on dividends, interest, and royalties payable to corporate residents of treaty countries other than entities resident in South Africa, China, Spain, Singapore, and Sweden, which continue to enjoy a reduced 7.5% WHT rate. Countries that have executed double tax treaties with Nigeria will have to negotiate with Government to codify the reduced WHT in their respective DTTs with Nigeria, or have the applicable WHT rate of 10%.

Imposition of 10% Capital Gains Tax on share disposals and transfers

The Finance Act 2021 amended the Capital Gains Tax Act (CGTA) to impose capital gains tax at 10% on gains accruing to any person or the proceeds of such sale are reinvested in the acquisition of shares in the same company or any other Nigerian company within the same year of assessment; or (ii) where the total proceeds from the disposal of shares are less than ₦100,000,000 (One Hundred Million) (approximately $214,000) in any consecutive 12-month period; or (iii) where shares are transferred between an approved borrower and lender in certain regulated securities lending transactions under the Companies Income Tax Act (CIT Act).

New operational framework for co-investment by pension fund administrators in private equity

In a bid to address issues including the over-concetration of pension fund assets in government securities, market price distortions of such securities and to optimise returns on pension fund investments in private equity - which it recognises as an asset class with the lowest asset allocation by pension funds- Nigeria's National Pension Commission (PENCOM) issued an Operational Framework for Co-Investment by Pension Funds Administrators (the Framework). The Framework establishes criteria, standards, and procedures regulating licensed Pension Fund Administrators (PFA) co-investments of pension funds with qualifying private equity or venture capital funds as a viable option for improving pension fund allocation to private equity as an asset class. A key provision is that under any co-investment arrangement, a PFA's exposure may not exceed 50% of its investment in the main private equity fund.

Mandatory disclosure of direct and indirect beneficial owners and persons with significant control

On November 23, 2022, the CAC, issued the Persons with Significant Control (Regulations) further to section 868 of the CAMA, the expressed objective being to provide an effective framework and procedure for obtaining relevant information on persons with sig-nificant control (PSCs) and beneficial owners (BOs) of any Nigerian company, limited liability partner-ship, and any other relevant entity. The requirements impose mandatory, extensive, and potentially oner-ous disclosure obligations and potentially significant sanctions on Nigerian-registered portfolio companies and limited partnerships, as well as the individuals and entities that directly and indirectly own and control them, and the networks to which such entities be-long. Such Nigerian entities must now disclose, main-tain, and update exhaustively detailed information and particulars of all PSCs and BOs that are direct or indirect shareholders or holders of ownership inter-ests in a publicly-accessible CAC central register and in internally maintained registers. The disclosure obli-gations extend beyond the ultimate beneficial owner to include the full network of group entities (wherever located) that have such interests – whether they are direct or indirect. The Regulations prescribe a broad range of sanctions for non-compliance, ranging from restrictions of the relevant interests of PSC and BOs that fail to notify mandatory information wherev-er they may happen (including offshore Nigeria) to the relevant Nigerian entity or the CAC, to gener-al, administrative and daily fines, status designation on CAC portals as 'inactive', and ineligibility to make filings or to be issued with letters of good standing, among other sanctions. It is not clear when sanctions for non-compliance with the PSC and BO disclosure obligations will be fully enforced, but entities are tak-ing steps to notify portfolio entities and ultimately the CAC of notifiable changes and developments.

Foreign persons exempted from new CAC mandatory identification requirements

The CAC, by a public notice dated 21st November 2022, mandated the use of the National Identifica-tion Numbers (NINs) as the only accepted means of identification for CAC filings and processes with effect from January 1, 2023, - part of a drive to inte-grate data collection efforts and to verify the integrity of the data submitted to the CAC. Notably, foreigners in Nigeria who intend to register a company or be appointed as company officers are exempted from this requirement, in keeping with the Government's commitment to facilitate the ease of doing business in Nigeria. All other persons, however, are no lon-ger able to present International Passports, Driver's Licences, and Permanent Voter's Cards as identifica-tion.

Withholding tax on income earned from real estate investment trusts

Withholding tax on interest earned from Real Estate Investment Trusts (REITs) is now treated as a final tax. Before the Finance Act 2019, dividends and income received by Real Estate Investment Companies (RE-ICs) were subject to taxation both in the hands of the REICs and their shareholders as the eventual recip-ients. The Finance Acts of 2019 and 2020, however, now exempt dividend and rental income received by REICs (expanded to include REITs duly approved by SEC as real estate investment schemes) on behalf of shareholders from taxation, provided that at least 75% of the dividend and rental income is distributed and that the distribution is made within 12 months of the end of the fiscal year in which the dividend or rent-al income was earned. Imposition of National Agency for Science and Engineering Infrastructure (NASENI) levy of 0.25% of profit before tax in specified sectors Resident and non-resident companies operating in the Nigeri-an banking, mobile telecommunication, ICT, aviation, maritime, and oil and gas sectors with a turnover of ₦100,000,000 (Hundred Million Naira) and above, and which are subject to tax in Nigeria, are required to pay a NASENI Levy at a fixed rate of 0.25% of the organisation's profit before tax, collected by the FIRS pursuant to an amendment of the National Agency for Science and Engineering Infrastructure Act by the Finance Act 2021. An FIRS Information Circular on the NASENI Levy requires NASENI Levy returns to be filed together with CIT returns under the CIT Act within 6 months of a company's financial year-end. The levy, together with a 1% charge from the federation account, will be used, to finance the cost of establishing and op-erating infrastructures for science and development complexes, research and development institutions, capital goods production plants, and other research, development, and production activities to achieve NASENI's objectives, among other things.

Tax treatment of non-residents in Nigeria

The Federal Inland Revenue Service (FIRS) on April 11, 2022 released the Information Circular on the Taxation of Non-Residents in Nigeria (the "Circular"). The Circular withdraws and replaces FIRS Information Circular No. 2021/07 of June 3, 2021. The Circular was released to clarify the extent of tax liability appli-cable to non-residents, that is companies, individuals, and diplomats who are within Nigeria, and to provide clarity and illustrations on how income derived from Nigeria can be taxed. For individuals, the residency rule under the Personal Income Tax Act (as amend-ed) is extended to non-residents provided they are not diplomats, who by the Vienna Convention are only to pay tax to the countries they are representing while companies will, where incorporated in Nigeria, be chargeable to tax in Nigeria and where a foreign company, be chargeable to tax on the income derived from Nigeria.

Increase in the corporate tertiary education tax rate

On April 11, 2022 the FIRS released the Information Circular on Administration of the Tertiary Education Tax (TET Circular) following the amendment of the Tertiary Education Trust Fund (Establishment, Etc) Act 2011 by the Finance Act, 2021 The amend-ment has increased the rate of the Tertiary Education Tax (TET) to 2.5% and is chargeable on the assessable profit of any company registered in Nigeria, other than a small company as defined by the CIT Act. The TET Circular, which stipulates the effective date of the amended TET rate to be the 1st day of January 2022, also clarifies that TET filings must be done at the same time as the income tax returns specified under CIT Act.

New Regulations for Digital Lending Analysts[3] project that transaction value in Nigeria's marketplace lending (consumer) sector will reach US$67.07m in 2023. This demonstrates the rapid in-crease in digital lending in Nigeria and its growth potential for investors. The Federal Competition and Consumer Protection Commission (FCCPC), which is the consumer protection authority in Nigeria, has issued the Limited Interim Regulator/Registra-tion Framework and Guidelines for Digital Lending 2022 (the Guidelines) to address oppressive lending pra tices, fraud, and increasingly recurrent privacy breaches experienced by users of digital lending pla forms. The Guidelines require applicants including investors that seek to engage in digital lending bus siness to register with and obtain the approval of the FCCPC. The Guidelines generally seeks to enable the FCCPC to identify the business and the officials of such businesses for continuous regulatory checks. There is some doubt regarding the application of the Guidelines to financial institutions engaged in digital lending business given their regulation by the Cen-tral Bank of Nigeria (CBN) which, under the Banks and Other Financial Institutions Act, 2020 is the primary regulator of the financial industry and has unfettered discretion to regulate all financial services providers. Regardless, other digital lenders in Nigeria that fall outside the purview of CBN regulation such as those operating under the respective States' money lenders laws, however, remain subject to the FCCPC regulation and sanctions.

New rules on the issuance, offering platforms, and custody of digital assets

In May 2022, the SEC issued new rules on the issu-ance, offering platforms, and custody of digital assets which, among other things, regulate digital and virtual assets including their issuance as securities; prescribe registration requirements for digital asset-offering platforms and digital asset custodians; the regulation of virtual asset providers; and the regulation of digital asset exchanges. These rules have not yet been im-plemented, partly due to CBN prohibitions on finan-cial institutions and other institutions falling under its regulatory purview dealing in crypto assets and man-dated closures of accounts of all persons dealing in crypto assets. The Finance Act 2023 however suggests a change in the CBN's position as it subjects gains on digital assets (including cryptocurrency) to capital gains tax at a rate of 10%.

New Money Laundering (Prevention And Prohibition) legislation

A new Money Laundering (Prevention and Prohibi-tion) Act 2022 (ML Act) amending the Money Laun-dering (Prohibition) Act, 2011 was enacted on the recommendation of the global Financial Action Task Force to enable competent authorities to freeze or seize and confiscate laundered properties and the proceeds thereof. A significant ML Act provision im-pacting investment in Nigeria is the reporting obliga-tion imposed on all individuals and organisations to immediately report all foreign transfers and receipts of sums exceeding US$10,000 or more to the Spe-cial Control Unit Against Money Laundering under the Economic and Financial Crimes Commission, the CBN, and the SEC within a day of the occurrence of such activity. Other pertinent provisions include cash payment limits to which businesses or individuals are subject, restrictions on split transactions undertaken to circumvent reporting thresholds, customer due dil-igence obligations, and the reporting obligations to Nigerian Customs authorities regarding the tran por-tation of cash or negotiable instruments more than US$10,000 in and out of Nigeria.

> Competant authorities are to freeze or seize and confiscate landered properties and the proceeds thereof

The Naira Redesign Policy And Revised Cash Withdrawal Limits

The CBN recently announced the redesign of new naira notes to replace existing ₦200, ₦500, and ₦1,000 denominated notes, consequently issuing two circulars to deposit money banks and other financial institutions on cash withdrawal limits. The initial circular pegged the maximum over-the-counter cash withdrawal per week for individuals at ₦100,000 and ₦500,000 for corporate organisations while the maximum cash withdrawal was limited to ₦20,000 daily and ₦100,000 weekly through automated teller machines and the point of sales. The later circular increased the maximum weekly cash withdrawal limit across all channels by individual and corporate organisations to ₦500,000 and ₦5,000,000.00 respectively but allows further withdrawals above the stipulated limits in compelling, legitimate circumstances subject to processing fees of 3% and 5% for individual and corporates respectively. The restrictions have impacted the business environment, particularly for MSMEs.

Conclusion

Notwithstanding macroeconomic challenges and increased fiscal obligations, the spate of recent reforms generally reflects dynamic Nigerian

market trends including in relation to MSMEs, FinTechs, and digital assets and technological transformation. The reforms signal policy efforts to optimise the business environment, boost investment (including in private equity and venture capital) and to foster global best practices for AML and general transparency and efficiency. They also suggest that there is room for optimism that the current spike in fundraising and investment activity for which Nigeria is ranked first in Africa will be sustained.

[1] file:///C:/Users/fea/OneDrive%20-%20Udo%20Udoma%20&%20Belo-Osagie/Documents/AVCA%20Q3%202022%20Report.pdf.
[2] Contributed by the law firms of Jackson, Etti, & Edu and Udo Udoma & Belo-Osagie.
[3] https://www.statista.com/.

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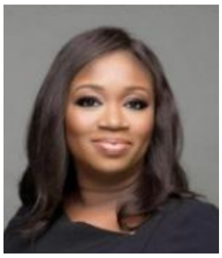

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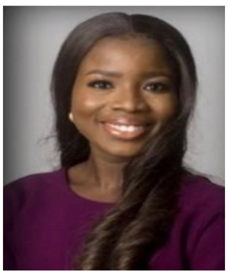

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THE MATERIAL INFLUENCE APPROACH FOR DETERMINATION OF CONTROL IN THE NIGERIAN MERGER CONTROL REGIME

Jackson, Etti & Edu

For the first time in Nigeria, a codified set of rules, focused on the regulation of competition law officially came into effect on January 30, 2019 with the gazetting of the Federal Competition and Consumer Protection Act 2018 (the "Act"). The objectives of the Act include the promotion and maintenance of competitive markets in the Nigerian economy, the promotion of economic efficiency and the proscription of restrictive or unfair commercial practices which are inimical to competition, or constitute an abuse of a dominant market position in Nigeria. Further to this, the Act also established the Federal Competition and Consumer Protection Commission (the "Commission") to administer and enforce the provisions of the Act (which includes merger control), vesting the Commission with the power to make rules and regulations and any other enactment pertaining to competition. In keeping with its function as the Nigerian competition regulator, the Commission undertakes an assessment of transactions which constitute mergers under the Act[3] , to ensure that such transactions do not restrict competition in the Nigerian market. Pursuant to its powers under the Act, the Commission has prescribed detailed guidelines and regulations to regulate merger control requirements in Nigeria, being the Merger Review Guidelines 2020 (the "Guidelines") and Merger Review Regulations 2020 (the "Regulations").

Under the Act, a merger is notifiable where two key conditions/requirements are satisfied.

NOTIFIABLE MERGERS UNDER NIGERIAN COMPETITION LAW

Under the Act, a merger is notifiable where two key conditions/requirements are satisfied. The conditions/requirements are discussed below:

(a) Threshold/turnover requirement - Under this requirement, where the combined annual turnover of the acquiring entity and the target entity in, into, or from Nigeria equals or exceeds N1,000,000,000 (One Billion Naira), such a merger shall be considered notifiable by the Commission.

(b) Control requirement - Under the Act, an enterprise is deemed to control the business of another enterprise in certain circumstances, including where the acquirer:

i. Beneficially owns more than one half of the issued share capital or assets of the target entity [5];

ii. Is entitled to cast a majority of the votes that may be cast at a general meeting of the target entity, or has the ability to control the voting of a majority of the target or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that target entity [6];

iii. Is able to appoint or vet the appointment of a majority of the directors of the target entity [7] ;

iv. Is a holding company, and the target entity is a subsidiary of that company as contemplated under the Companies and Allied Matters Act [8];

v. In the case of a target entity that is a trust, has the ability to control majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust [9]; and

vi. Has the ability to materially influence the policy of the target entity in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in the foregoing.

Note that in sub-paragraph VI above, "material influence" is identified as a form of control. Under Section 6(1) of the Regulations, the ability to exercise material influence is identified as the lowest level of control that may give rise to a relevant merger situation". This criterion therefore may bring under the purview of the Commission, transactions which typically would not qualify as notifiable mergers under the merger control regime. To properly appreciate the concept of material influence in merger control and its application in the Nigerian merger control regime, we will consider the concept as adopted in other jurisdictions.

PREMISE FOR DETERMINING CONTROL IN OTHER JURISDICTIONS

In a bid to describe what amounts to "control" in the European Community, the Council Regulation (EC) No. 139/2004 of 20 th January 2004 on the control of concentrations between undertakings (the "EC Merger Regulation") states that control shall be constituted by rights, contracts or any other means which confers the possibility of exercising decisive influence on an

> The rationale behind the material influence standard appears to take into consideration, the ability of a company to exercise significant influence over another company, thus allowing the relevant competition regulator to review a more extensive range of transactions.

undertaking. In particular:

- Ownership or the right to use all or part of the assets of an undertaking; and
- Rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking

From the foregoing, the European Commission adopts the decisive influence criterion in determining control. This approach determines what amounts to control by examining the acquiring entity's ability to exert effective influence over the management and resources of the target entity; primarily through veto rights, majority shareholding and acquisition of assets. This broad approach however, allows a high number of parties to escape the scrutiny of the European Commission and its Directorate General for Competition. The material influence approach, on the other hand, hardly leaves any wiggle room in computing the level of control an acquiring entity has over a target entity. This standard of control sets a l ower bar for assessing, on a case-by-case basis, an entity's ability to influence the management, policy, and affairs of another entity through a non-exhaustive list of factors such as shareholding, board representation, financial and/or contractual arrangements and exclusive rights, among other things. The rationale behind the material influence standard appears to take into consideration, the ability of a company to exercise significant influence over another company, thus allowing the relevant competition regulator to review a more extensive range of transactions. This informs the adoption of the material influence standard as a more appropriate test for assessing merger transactions in several competition regimes, including Nigeria. The Competition Act, 1998 (as amended) of the Republic of South Africa provides that a person controls a firm if that person:

(a) beneficially owns more than one half of the issued share capital of the firm:

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;

(c) is able to appoint or to veto the appointment of a majority of the directors of the firm;

(d) is a holding company, and the company is a subsidiary of that firm;

(e) in the case of a firm that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees, to appoint or change the majority of the beneficiaries of the trust;

(f) in the case of a close corporation, owns majority of the members' interest, or controls directly, or has the right to control the majority of members' votes in the close corporation; or

(g) has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

Under the South African regime, the Competition Commission, the Competition Tribunal and the Competition Appeal Court, determine the concept of control by assessing the ability of a company to significantly influence another company in the ordinary course of its business.

The Enterprise Act 2002 (as amended), which is the primary legal basis for merger control in the United Kingdom, provides that a person or group of persons able to directly or indirectly control or materially influence the policy of a body corporate, but without having a controlling interest in that body corporate, may be treated as having control of it [14]. Pursuant to this, the Competition Markets Authority (CMA), being the competition regulator in the United Kingdom, issued the Merger Guidance on the CMA's jurisdiction and procedure which provides in paragraph 4.17 that the CMA, in making its assessment of control, will focus on the acquirer's ability to materially influence policy relevant to the behaviour of the target entity in the marketplace. It further explains that the policy of the target entity extends to the management of its business including the strategic direction of the target entity and its ability to define and achieve its commercial objectives.

From the foregoing, it is apparent that the Nigerian merger control regime was influenced by the South African merger regime and, to a lesser extent, that of the United Kingdom.

MATERIAL INFLUENCE UNDER THE NIGERIAN COMPETITION REGIME

The Commission attempts to provide some clarity on the application of material influence in a merger review. The Regulations provide that the Commission, in its assessment of what constitutes material influence, will first consider shareholding and voting power and may also extend its consideration to other relevant factors, including, but not limited to, other forms or material ability of the acquiring party to exercise indirect control or exert influence on policy, key decisions and direction of the business.

To buttress the validity of this position, the Regulations also provide that where an acquirer has acquired shareholding or voting rights above twenty-five percent (25%) in a target entity, it raises a rebuttable presumption (in the view of the Commission) that such an acquirer has been granted the ability to materially influence the policy of the target entity. This means that an acquirer in a transaction of this nature is deemed to have the ability to exercise material influence over the target entity based on first impression unless this consideration is disproved by contrary evidence. Furthermore, the Regulations add that an acquisition by an acquirer of shareholding or voting rights below fifteen percent (15%) will not, in general, subject such a transaction to the Commission's scrutiny. In a bid to elucidate on the possible extension of the Commission's considerations beyond matters relating to shareholding and voting rights, the Regulations outline factors that it considers relevant in its assessment of material influence, and these include:

(a) The distribution of the remaining shareholding, including ordinary and preference shares and any special classes of shares, particularly where the acquiring undertaking's shareholding makes it the largest shareholder;

(b) Patterns of attendance and voting at shareholders' meetings based on recent shareholder returns (to establish whether other shareholders are active or passive participants at company meetings), and in particular whether voter attendance is such that the shareholder under consideration would be able, in practice, to block special resolutions;

(c) The existence of any special or preferential voting or veto rights associated with the shareholding under consideration;

(d) The status and expertise of the acquiring undertaking and its corresponding influence with other shareholders;

(e) The existence of any convertible loan arrangement or other shareholder loan arrangement that confers influence over certain decisions;

(f) Any other special provisions in the Memorandum and Articles of Association of the target undertaking, conferring an ability on the acquiring undertaking to materially influence policy;

(g) The extent of information rights available to the acquiring undertaking;

(h) Any restrictive covenants or special benefits attaching to the acquired shares;

(i) Any pre-emption rights in relation to the sale of shares or assets [26];

(j) The rights and influence of any significant debt holders;

(k) The composition of the board of directors; and

(l) Any other contracts or arrangements between the parties.

ISSUES ARISING FROM THE APPLICATION OF THE MATERIAL INFLUENCE STANDARD OF CONTROL IN NIGERIA

The Commission, like competition regulators in all merger control regimes, faces the challenge of finding a delicate balance between using assessment criteria that are objective and transparent, and criteria that single out potentially harmful transactions. The ultimate objective of any competition regime in setting merger control thresholds is to minimise the number of merger notifications that do not raise any competition concerns, while concurrently capturing the maximum possible number of transactions that raise competition concerns. The challenge being that flexible standards allow for fact-specific inquiries into transactions but can undermine the goal of greater transparency and predictability. On the other hand, an objective standard can provide greater clarity as to which mergers require the notification of the Commission but fall short in its appraisal of whether a transaction is likely to prove anticompetitive. There is the argument as to whether a minority shareholding that confers less than outright control over the target entity should be deemed a merger transaction which falls within the scrutiny of the Commission. The Commission, in an attempt to provide certainty as to what constitutes an acquiring party's ability to materially influence the policy of a target entity, made provision for the 25% and 15% acquisition of minority shareholding in the target entity. Ironically, however, those provisions give rise to some uncertainty as to:

(a) Whether any transaction involving the acquisition by an acquirer of shareholding or voting rights above 25% in a target entity automatically renders such a transaction notifiable to the Commission or if prior submission of evidence by the transaction parties to the Commission confirming that the notifiable triggers do not apply to the transaction would be sufficient to avoid regulatory scrutiny; and

(b) Whether there may be exceptional circumstances where transactions involving an acquirer of shareholding or voting rights below 15% may be considered notifiable by the Commission, as suggested by the phrase "in general".

It would be helpful for the Commission to clearly distinguish between those instances of minority shareholdings that could adversely impact on competition in the Nigerian market, and those that most likely would not and therefore should stay outside the Commission's concept of a merger transaction, to forestall unnecessary costs. It is important to recognise that not all minority acquisitions would warrant a notification to the Commission, as that will prove to beunduly inconvenient for parties to transactions.

Several jurisdictional thresholds serve to limit costs and expenditure by avoiding the notification and review of mergers which are unlikely to raise any competition concerns. The Commission, in its determination of notification thresholds, will need to find a balance between the desire to review as many transactions that may harm competition in specific markets as possible, and the need to keep the review process and related costs predictable and reasonable for the pertinent parties involved.

RECOMMENDATION AND CONCLUSION

The International Competitive Networks (ICN) Recommended Practices for Merger Notification and Review Procedures I-XIII 30 provide guidance that could prove useful in addressing the issues arising from the application of the material influence standard of control in Nigeria. Some relevant recommendations include:

1. Jurisdictions should use clear definitions to identify transactions which fall within the scope of their merger laws. Jurisdictions that rely on concepts such as the acquisition of "control", or of "competitively significant influence" to determine what transactions are within the scope of their merger laws, should seek to maximize legal certainty and predictability.

2. Notification thresholds should be clear and understandable: Clarity and simplicity are essential features of well-functioning notification thresholds. Both the business community and the relevant competition authorities are best served by clear, understandable, easily administrable, "bright-line" tests that allow parties to readily determine whether a transaction is subject to notification. As recommended by the ICN Practice Recommendations, it would be beneficial for the Commission to ensure that the material influence approach in determining whether a merger transaction falls within its purview, is clear and objective, for instance, in respect of the 25% and 15% acquisition of minority shareholdings discussed above. To this end, it would be helpful for the Commission to provide more comprehensive guidance on what would constitute material influence and to clearly outline the types of minority rights acquisitions that will qualify for notification exemptions. Furthermore, the Commission can assist transaction parties by providing publicly available written guidance or practice notes on the application of their merger notification thresholds, as well as enabling transaction parties to obtain free guidance by contacting the relevant staff at the Commission to discuss the application of the notification thresholds to their transactions.

[1] Section 1 of the Act.
[2] Section 17 (b) of the Act.
[3] Section 92 of the Act
[4] Section 93 (1) of the Federal Competition and Consumer Protection Act (FCCPA) and paragraph 1 of the Notice of Threshold for Merger Notification
[5] Section 92(2)(a) of the Act
[6] Section 92(2)(b) of the Act
[7] Section 92(2)(c) of the Act
[8] Section 92(2)(d) of the Act
[9] Section 92(2)(e) of the Act
[10] Section 92(2)(f) of the Act
[11] Article 3, sub-article 2 of the EC Merger Regulatio
[12] Paragraph 1.2 (16) of the Commission Consolidated Jurisdictional Notice pursuant to the EC Merger Regulation states that the exercise of such influence over one entity by another must be effective.
[13] Section 12(2) (a) -(g) of the Competition Act 1998 (as amended)
[14] Section 26(3) of the Enterprise Act 2002 (as amended) 15 Section 6 (2) of the Regulations
[16] Section 6 (4) (a)
[17] Section 6 (4) (b)
[18] Section 6 (5) (a) of the Regulations
[19] Section 6(5)(b) of the Regulations
[20] Section 6(5)(c) of the Regulations
[21] Section 6 (5)(d) of the Regulations
[22] Section 6 (5)(e) of the Regulations
[23] Section 6 (5)(f) of the Regulations
[24] Section 6 (5)(g) of the Regulations
[25] Section 6 (5)(h) of the Regulations
[26] Section 6 (5)(i) of the Regulations
[27] Section 6 (s
[29] Section 6 (5)(l) of the Regulations. In furtherance of the notion contemplated in this provision, the Regulations further provide that the Commission may consider other relevant factors such as the existence of certain commercial agreements or arrangements between the parties, that enable the acquiring entity to materially influence the policy of the target entity in certain circumstanc
es including, but not limited to, the provision of consultancy services, outsourcing, financial arrangements, licensing agreements and other arrangements delineated in Sections 6 (6) (a) – (g) of the Regulations
[30] http://icn.flywheelsites.com/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf

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THE NEED FOR A LIMITED PARTNERSHIP LAW IN GHANA

The PE/VC sector in Ghana has grown significantly since its inception in 1991 with the creation of the Ghana Venture Capital Trust Fund. In 2022, it is es-timated that PE/VC funds invested USD 391 million in Ghanaian businesses in a wide range of sectors, from fintech to agribusiness. Major players in the Ghanaian market include emerging markets focused funds such as Actis, Acumen, Amethis, LeapFrog and AfricInvest; African focused funds like Adenia, AFIG and I&P; West-Africa focused funds such as Fortiz, Oasis, Injaro and PCM Capital and increasingly lo-cal funds. In March of last year, Injaro launched the first cedi denominated fund focused exclusively on Ghana and raised from Ghanaian pension funds and other institutional investors, marking a significant milestone in the development of the PE/VC industry in Ghana.

Although there is a lot to celebrate, many industry players believe that Ghana has the potential to attract a larger share of the pan-African PE/VC investments and that there is an opportunity to deepen the local market with a few changes to the legal and regulatory environment that would bring it in line with leading PE/VC jurisdictions such as Nigeria, South Africa and Kenya.

One such change is the introduction of a limited partnership law. Late last year, working alongside the Ghana Venture Capital Association, we participated in a workshop with a range of Governmental stake-holders including the Venture Capital Trust Fund, the Securities and Exchange Commission, the Ministry of Finance and the Office of the Registrar of Companies, to present on the business and legal case for a limited partnership law in Ghana.

The lack of a limited partnership law is a critical gap in the legal and regulatory framework. Its absence prevents funds operating in Ghana from adopting the general partner/limited partner structure that is fun-damental to the PE/VC business elsewhere across the continent and globally. Instead, funds must incorpo-rate a limited liability company and operate under the company law, which, as one might imagine, creates numerous challenges for funds because it is not fit for their purpose.

The Companies Act, 2019 (Act 992) imposes rules around governance that limit funds' ability to tailor their governance arrangements to fit their needs. This includes restrictions on what a company and its mem-bers may agree in a company's constitution and the basic management and governance structure, which is prescribed by the Companies Act. For example, all limited companies must have a board of directors, which is generally responsible for the management of the company; the decision-making process for direc-tors and the members of a company is prescribed in detail. In addition, all members holding the same class of share are required to be treated equally, and there are strict rules regarding the variation of class rights, and all equity shares in a company carry one vote per share.

By comparison, because they are primarily contrac-tual in nature, limited partnerships generally allow in-vestors a much freer hand to tailor their governance arrangements to suit their needs. A limited partner-ship agreement can set bespoke rules, for example, on how profi s will be shared, how the partnership will be governed, how limited partners will participate in decision-making processes and the rights and obliga-tions of limited partners.

> Many industry players believe that Ghana has the potential to attract a larger share of the pan-African PE/VC investments and that there is an opportunity to deepen the local market.

The Companies Act also restricts the return of capital to investors, which is a fundamental part of the PE/VC funds' business. The capital maintenance rules under the Companies Act impose procedural steps that can be onerous, time consuming and costly to do such things as the payment of a cash or non-cash dividend, a return or distribution of assets, a reduction of capital, or a share buy-back, which in any case is limited to fifteen percent of the company's equity and must be funded out of retained earnings.

In most jurisdictions with a limited partnership law, limited partnerships, are generally free to return capital contributions to their limited partners in accordance with the arrangements agreed between the partners themselves in their limited partnership agreement and related documents.

A further challenge presented by a limited company structure is the complexity involved in the winding-up of the company at the end of its investment period. Private or voluntary liquidation under the Companies Act is a multi-stage process, that not only requires the company to make detailed enquiries into the affairs of the company and its creditors, but also other mandatory costly and laborious processes such as the realization of assets by a private, third-party liquidator, the discharge of the company's debts and the distribution of the net assets of the company to its members and the subsequent striking-off of the company from the register of companies. Official or compulsory liquidation under the Corporate Insolvency and Restructuring Act, 2020 (Act 1015) is a similarly involved process, which also requires the Registrar of Companies to act as the official liquidator and may also require the involvement of the Court. Typically, in a limited partnership structure there is significant flexibility in the winding-up process, making the return of capital to investors at the end of the fund life a more straightforward process.

To address these challenges, and to make Ghana a more attractive jurisdiction for funds formation, and following last year's workshop, the Securities and Exchange Commission is considering a range of regulatory reforms, including the introduction of a limited partnership law. We anticipate that the new law could be enacted by the third or fourth quarter of 2024.

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