African Private Equity and Venture Capital Association

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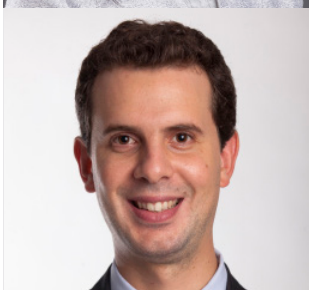
LETTER FROM THE CHAIR



In its mission statement, the Legal and Regulatory Committee committed to support AVCA's efforts to provide information to its membership on significant legal or regulatory developments affecting the African private equity and venture capital industry. This first edition of the **AVCA Legal and Regulatory Bulletin** aims to provide bi-annual updates and insights from experienced industry professionals across the AVCA membership on topical issues and developments that impact on the legal and regulatory landscape for private capital in Africa.

AVCA's **2016 Annual African Private Equity Data Tracker** indicates that the long term outlook for private equity and venture capital in Africa remains positive, demonstrating the resilience of the continent's economies.

We hope that the **Bulletin** will help participants understand and navigate the African private equity and venture capital environment and the unique opportunities that the different jurisdictions present.

In this issue, contributors consider the impact of East African competition regulations; South African broad based Black Economic Empowerment; Nigerian foreign exchange and market developments; FCPA enforcement in Libya and sub-Saharan Africa; Algerian investment framework reforms; and new Tunisian investment laws. We are grateful to the contributors for their input and support. We invite comments and suggestions, and, from our membership, contributions to future editions, which may be sent to **avca@avca-africa.org**.

Best wishes,
Folake Elias-Adebowale and Rafik Mzah

ABOUT AVCA | CHAMPIONING PRIVATE INVESTMENT IN AFRICA

The African Private Equity and Venture Capital Association (AVCA) plays an important 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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IMPACT OF COMPETITION REGULATION ON PRIVATE EQUITY TRANSACTIONS IN EAST AFRICA

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Although competition regulation dates back to the Sherman Anti-Trust Act 1890, in Africa, the regulation of anti-competitive behaviour has not been at the forefront of many a Government agenda simply because it was seen as the epitome of "first world problems".

However, the position has changed in the last few years, with national governments and regional groupings reacting to the buzz of inward investment in Africa, including by private equity (PE) investors, by enacting or overhauling competition legislation and extending the powers of the authorities who are mandated to enforce it.

a. The effect is that in the East African region, there are multiple regulators and laws governing competition matters, including mergers, acquisitions, and joint ventures. At the regional level, these are: The COMESA Competition Commission (the CCC) and the COMESA Competition Regulations (2004) (the COMESA Regulations). COMESA comprises of: Burundi, the Comoros, Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe; and

b. The East African Community Competition Authority (EACA) and the EAC Competition Act. This has however not yet been operationalised although advanced plans are underway to bring the regime into effect. The EAC comprises of: Burundi, Kenya, Rwanda, South Sudan, Uganda and Tanzania.

At the national level, these are:

a. The Kenya Competition Authority (the CAK) and the Kenya Competition Act (2012) (the KCA); and

b. The Fair Competition Commission (the FCC) of Tanzania and the Tanzania Fair Competition Act (2003) (the TFCA).

The other members of the EAC do not have national competition laws yet.

The multiple regulatory regimes are requiring parties to educate themselves on the principles of Competition Law and how they may impact their transactions. So how does the regulatory framework impact PE investments?

To what extent are the regimes harmonised?

The introduction of regional competition regulators such as the CCC and the EACA was perhaps well intended and would have resulted in a one-stop shop. However, this has played out rather differently and currently there is no one-stop shop for merger notifications. The effect is that parties to a transaction are required to notify multiple regulators (each of which applies different merger notification tests and timelines, has different procedural requirements for filings, and attracts different filing fees).

This has led or is likely to lead to various challenges such as: increased costs in terms of legal fees and filing fees; delays in concluding transactions; uncertainty – for instance, questions arise as to what would happen if one regulator approves a transaction and the other fails to approve the transaction. There is therefore an urgent need to harmonise the regimes. Until that happens, parties need to familiarise themselves with the various regimes and we have highlighted below some of the key requirements.

What is a "merger" and to which regulators is it notifiable?

KENYA

In Kenya, all mergers within or outside Kenya which result in a direct or indirect "change of control" in an entity or section of a business in Kenya require the approval of the CAK. Change of control can occur through various means, including acquisition of a majority shareholder, the right to appoint a majority of the directors, or acquisition of a minority interest (say 20%) coupled with significant reserved powers or veto rights over key decisions of the target company such as its business plan, budget, and the appointment of key management.

Mergers are normally approved within 60 to 75 days (although the CAK under law can extend these timelines) and attract filing fees of between KES500,000 – KES2mn (approximately US$5,000 to US$20,000).

There are no monetary or market-share thresholds under the KCA, but the CAK issued Merger Threshold Guidelines which are not legally binding but provide guidance to parties on the circumstances under which a merger may be considered for exclusion and where a full merger notification is required.

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Generally, where the combined turnover of the parties is below KES1bn (approximately US$1mn), the parties may apply to the CAK for an exclusion which is normally granted within 2 weeks and does not attract filing fees. There are specific threshold guidelines for certain industries such as the healthcare sector and the carbon based mineral sector.

TANZANIA

In Tanzania, all mergers and acquisitions within or outside Tanzania which result in a situation where one party acquires the possibility of exercising "significant or decisive influence" over an entity or section of a business in Tanzania, involving a combined turnover or assets above a prescribed threshold (currently TZS800mn (approximately US$360,000) must be notified to, and may be examined by, the FCC. "Significant or decisive influence" is widely interpreted by the FCC and a minority acquisition can be deemed to constitute a merger if the same is coupled with veto rights or reserved powers or a majority of the board. A merger is prohibited if it creates or strengthens a position of dominance (where the relevant market share exceeds 35%) in the market.

The process of seeking merger clearance in Tanzania is slightly different from that in Kenya. On submission of the relevant documentation, the FCC has 14 working days to determine if the merger should be examined and if not will issue a letter of no objection to the parties.

> **The introduction of regional competition regulators such as the CCC and the EACA was well intended and would have resulted in a one-stop shop. However, this has played out rather differently and currently there is no one-stop shop for merger notifications.**

If the FCC determines that the merger should be examined, then the FCC has 90 days (extendable by a further 30 days) to do so. Applications attract filing fees based on the combined annual turnover of the merging firms of between TZS25mn – TZS100mn (approximately US$11,000 – US$45,000).

Both the Kenyan and Tanzanian regimes are "suspensory" in nature, which means that parties are prohibited from completing the transactions without prior approval of the competition regulators.

EAC

If and when the EAC Competition Act is operationalised, parties to transactions affecting more than one EAC jurisdiction will be required to make separate applications to the EAC.

COMESA

A transaction occurring in one or more of the COMESA countries may require the approval of the CCC. Notification to the CCC is required where either the acquirer or the target operates in at least two or more COMESA countries, and both of the following thresholds are met: (1) the combined annual turnover or combined value of assets in COMESA (whichever is higher) of all parties to the merger exceeds US$50mn, and (2) the annual turnover or value of assets in COMESA (whichever is higher) of at least two of the parties exceeds US$10mn, unless each of the parties to a merger achieves at least two-thirds of its aggregate or assets in the same member country.

Notification to the CCC must be made within 30 days of entering into the legally binding transaction documents. The CCC normally takes between 90 – 120 days to approve transactions and the regime attracts a filing fee of up to US$200,000. However, the regime is non-suspensory and parties can complete their transactions without awaiting the CCC approval.

Key considerations for PE investors

In the context of anti-trust regulation, PE investors can be distinguished from ordinary investors in that PE investors are primarily interested in the financial reward of a merger and not monopolistic conduct. Whereas in the EU a simplified merger process has been adopted to deal with PE transactions, this has yet to occur in the East African region. This means that for PE transactions, little consideration is given to the nature of the PE investment but rather the traditional criteria i.e. whether a direct or indirect "change of control" is occurring in the target.

Almost inevitably, PE investors will acquire such control in portfolio companies by acquiring either a majority shareholding in the target, or minority interests coupled with reserved powers or veto rights.

As such, for both national and regional merger applications, PE investors have faced some unique problems. For example: (a) the existence of diversified investment portfolios require PE investors to explain the nature of their investments in detail when making a merger application, necessitating significant time to be devoted to merger control review, which may result in added costs and delays; (b) challenges identifying which turnover is "relevant turnover", particularly if the PE fund has a wide range of minority interests in portfolio companies owned by its different funds; and (c) confidentiality concerns with the requirement to reveal who the ultimate legal and beneficial shareholders of the fund are and to release the financial reports of each the companies in the PE investor group.

To avoid the competition law framework in Africa from evolving in a manner that deters PE investors, more attention should be paid by lawmakers and regulators to the objectives of PE funds, and the particular workings of M&A transactions. This will undoubtedly ensure that Africa remains a dynamic and innovative player within the global market.

To avoid the competition law framework in Africa from evolving in a manner that deters PE investors, more attention should be paid by lawmakers and regulators to the objectives of PE funds, and the particular workings of M&A transactions.

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IN FIRST MAJOR FCPA ENFORCEMENT ACTION AGAINST A HEDGE FUND, US SETTLES WITH OCH-ZIFF CAPITAL MANAGEMENT

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On September 29, 2016, the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) entered into a US$412mn settlement with Och-Ziff Capital Management Group (Och-Ziff) and its wholly-owned subsidiary, OZ Africa Management GP, LLC (OZ Africa). The DOJ and SEC allege that Och-Ziff paid tens of millions of dollars in bribes, through intermediaries, to government officials in Libya, the Democratic Republic of the Congo (DRC), Chad, and Niger in order to obtain investments and other business[1].

The settlement marks the first time the U.S. authorities have brought a major FCPA enforcement proceeding against a hedge fund and may signal increased anti-corruption scrutiny for investment advisors.

RELEVANT CONDUCT

The conduct alleged in the government's settlement documents primarily focuses on two main bribery schemes – one in Libya, and another in the Democratic Republic of Congo (DRC). In addition, the SEC order also refers to corrupt payments that were made in connection with certain Och-Ziff transactions in Chad, Niger and Guinea.

Libya

As described in the settlement documents, beginning in 2007, Och-Ziff sought to secure investments from the Libyan Investment Authority (LIA) in its hedge funds. An Och-Ziff employee engaged the services of an unnamed third-party Libyan agent to facilitate such investments. The Libyan agent operated through a Special Purpose Vehicle (SPV) based in the British Virgin Islands, which Och-Ziff never conducted due diligence on. The Libyan agent facilitated meetings between the Och-Ziff employee and Libyan officials, including officials of the LIA, although the Libyan agent's role on behalf of Och-Ziff, or the amount of fees he was paid, was not disclosed to the LIA. According to the settlement documents, the Och-Ziff employee knew that the Libyan agent would need to pay bribes to government officials to facilitate the investments.

Ultimately, in December 2007, the LIA invested US$300mn in two Och-Ziff funds. From this investment, Och-Ziff ultimately received approximately US$100mn in fees and incentive income. The Libyan agent was paid a US$3.75mn commission. The agent, in turn, provided some US$2.5mn to accounts held for the benefit of the Libyan officials.

In addition, in October 2007, about a month before the LIA's US$300mn investment, the Och-Ziff employee arranged for a US$40mn investment by Och-Ziff in a Libyan real estate development project founded by the Libyan agent. Och-Ziff paid a US$400,000 "deal fee" to an entity controlled by the Libyan agent, which it knew would compensate the Libyan agent for bribes it had to pay in connection with the project. The Gaddafi family also was involved with the development project, and the Och-Ziff employee and other Och-Ziff investment professionals in London knew of the Gaddafi family's involvement.

DRC

In addition to the Libya-related conduct, the settlement documents state that in late 2007, two Och-Ziff employees engaged in discussions with an Israeli businessman (DRC partner) operating in the DRC in order to obtain "special access" to certain investment opportunities in that country's diamond and mining sectors. The DRC partner informed the two employees that it would have to bribe DRC officials and local partners to secure such access, and that it expected Och-Ziff to help fund these payments. The company did conduct certain due diligence on this DRC partner and learned that the partner had been willing to use political influence to facilitate, among other things, acquisitions.

According to the settlement documents, despite the company's awareness of the corruption risk surrounding its involvement with the DRC partner and its business in the DRC, it moved forward on several transactions with the DRC partner between March 2008 and February 2011. The DRC partner provided the promised access to these transactions by – with the knowledge of the two Och-Ziff employees – paying bribes to senior government officials in the DRC. Och-Ziff allegedly received more than US$90mn in profits from the DRC-related investment opportunity in exchange for payments of "tens of millions of dollars" in bribes to DRC officials.

Inadequate Accounting Controls

Both regulators alleged that Och-Ziff failed to maintain adequate internal accounting controls to

1 Unless otherwise noted, these alleged facts are drawn from statements of fact accompanying the Deferred Prosecution Agreement and subsidiary plea agreement. *See United States v. Och-Ziff Capital Management Group LLC*, Cr. No. 16-516, Deferred Prosecution Agreement (E.D.N.Y. Sept. 29, 2016) (DPA), Attachment A (Statement of Facts), https://www.justice.gov/opa/pr/och-ziff-capital-management-admits-role-africa-bribery-conspiracies-and-agrees-pay-213. The SEC's administrative order largely tracks the facts set forth in the DOJ's papers. *See In the Matter of Och-Ziff Capital Management Group LLC, et al.*, SEC Admin. Pro. 3-17595 (Sept. 29, 2016) (SEC Order), https://www.sec.gov/news/pressrelease/2016-203.html.

prevent the bribe payments detailed above. Moreover, where improper transactions were flagged, Och-Ziff did not take corrective measures such as verifying certain payments or exercising audit or cancellation rights.

SETTLEMENT WITH U.S. REGULATORS

Och-Ziff agreed to pay a total of US$412mn to settle with the DOJ and the SEC for its conduct in Africa. This fine is the sixth largest imposed in any FCPA resolution.

DOJ Resolution

Och-Ziff entered into a three-year deferred prosecution agreement (DPA) with the DOJ for two counts of conspiracy to violate the anti-bribery provisions of the FCPA, one count of violating the FCPA's books and records provisions, and one count of violating the FCPA's internal controls.

The DOJ cited the following as relevant considerations when entering into the DPA: (1) Och-Ziff's failure to voluntarily self-disclose, which resulted in its ineligibility "for a more significant discount on the fine amount or the form of resolution"; (2) Och-Ziff's cooperation with the DOJ, which resulted in a 20% discount off the bottom of the U.S. Sentencing Guidelines (the Guidelines) range of penalties; (3) Och-Ziff's provision to the DOJ of all of the relevant facts of which it was aware, including facts relevant to individual misconduct; (4) Och-Ziff's significant remediation, including improving its compliance program and internal controls and its demonstrated commitment to improve compliance going forward; (5) Och-Ziff's agreement to the imposition of an independent compliance monitor for the pendency of the DPA; (6) the seriousness of the offense, including the high value of bribes paid and the involvement of a high-level Och-Ziff employee; (7) Och-Ziff's lack of criminal history; and (8) Och-Ziff's commitment to continue cooperating with the DOJ. The fact that the DOJ expressly referred to Och-Ziff's failure to self-report and its corresponding ineligibility for a further reduction in its penalty, while at the same time praising Och-Ziff's cooperation, is instructive – particularly in the absence of any legal obligation for the company to self-report.

In assessing Och-Ziff's cooperation, the DOJ praised the investigation conducted by the company's audit committee and counsel, which included regular reports to the DOJ, production of "voluminous evidence located in foreign countries," and the company's efforts to make available current and former employees for interviews.

However, the DPA notes that Och-Ziff "did not receive additional credit because of issues that resulted in a delay to the early stages of the investigation, including failures to produce important, responsive documents on a timely basis, and in some instances producing documents only after the [DOJ and SEC] flagged for the Company that the documents existed and should be produced, and providing documents to other defense counsel prior to their production to the government.[1]" The DOJ's reference to the sharing of documents with other defense counsel is particularly striking given that it appears to be undisputed that the DOJ received the very same documents and that Och-Ziff's sharing of documents with defense counsel before the DOJ in no way hampered or impaired the DOJ's investigation.

With respect to the criminal penalty calculation, the DOJ's calculation of Och-Ziff's fine began with US$222mn – the amount of pecuniary gain, i.e., Och-Ziff's gross revenue from the transactions at issue – then applied several mitigating and aggravating factors, most importantly the participation of senior personnel in the offense and Och-Ziff's cooperation and acceptance of responsibility, ultimately yielding a penalty of US$213mn.

While the DPA focuses on Och-Ziff's conduct in both Libya and the DRC, the subsidiary's guilty plea relates only to its conduct in the DRC. OZ Africa pled guilty to one count of conspiracy to violate the FCPA's anti-bribery provisions. In the plea agreement, the DOJ listed substantially the same factors considered as those set forth in the DPA.

> The Och-Ziff resolution reinforces the importance of robust anti-corruption policies, procedures, and controls [for] ompanies in industries not previously subject to significant anti-corruption activity.

1 DPA ¶ 4(b).

SEC Resolution

To resolve the SEC's claims, Och-Ziff and OZ Management agreed to pay approximately US$199mn, comprised of approximately US$173mn in disgorgement and approximately US$26mn in interest. The Administrative Order specifically notes that "Och-Ziff acknowledges that the Commission is foregoing a one-time [US$173mn] civil penalty for these charges based upon the imposition" of the US$213mn penalty assessed in connection with Och-Ziff's settlement with the DOJ.

The SEC found that Och-Ziff violated the FCPA through its intentional payment of bribes to Libyan officials, its failure to accurately record these bribes on its books and records, and its failure to keep a system of internal accounting controls that would ensure that the company would not pay bribes. OZ Management's violation of the Investment Advisers Act was predicated on its failure to prevent the use of managed investor funds by a business partner in corrupt transactions and its omission of material information in certain transactions in its disclosures to investors.

Enforcement Activity Involving Individuals

The SEC also entered into settlement agreements with Och-Ziff's CEO, Daniel Och, and CFO, Joel Frank. It has separately charged Michael Cohen and Vanja Baros, two former Och-Ziff employees, in a civil complaint filed in January 2017.

Enforcement proceedings also may be brought against other individuals in connection with this matter. Indeed, the DOJ already has charged a Gabonese national, Samuel Mebiame, with conspiracy to bribe foreign government officials in connection with obtaining mining rights in Chad, Niger, and Guinea[1]. The DOJ alleges that Mebiame worked as a "fixer," paying bribes to high-ranking government officials in Niger and Chad on behalf of a mining company owned by a joint venture between Och-Ziff and a separate entity.

CONCLUSION

Although it is too soon to say whether the Och-Ziff resolution marks the beginning of a series of FCPA enforcement actions involving investment advisors, it reinforces the importance of robust anti-corruption policies, procedures, and controls even for companies in industries not previously subject to significant anti-corruption enforcement activity.

Anti-corruption training, including of senior personnel, is essential. Hedge funds, private equity firms, and other investment advisors also would be well-advised to ensure that they have in place appropriate procedures for anti-corruption diligence on transactions and investments. Appropriate oversight of agents and other third-party intermediaries *after* they are hired takes on particular significance in light of the Och-Ziff resolution, making the vigorous exercise of audit rights in high-risk jurisdictions, with findings reported to both the legal and compliance functions, especially important.

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1 Press Release, Department of Justice, Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay US$213mn Criminal Fine (Sept. 29, 2016), https://www.justice.gov/usao-edny/pr/och-ziff-capital-management-admits-role-africa-bribery-conspiracies-and-agrees-pay-213#_ftn1.

ALGERIA: REFORM OF THE LEGAL FRAMEWORK APPLICABLE TO INVESTMENTS

Samy Laghouati & Rym Loucif
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The adoption of Law No. 16-09 on the promotion of investment dated 3 August 2016 (hereinafter the Law 16-09) is part of an approach to improve the business climate in Algeria, that was first initiated by the government in 2016.

1.1. A Two-Phased Reform

The reform of the legal framework for investments initiated in 2016 was carried out in two phases:

- **At the beginning of the year**, the Finance Law for 2016 (the 2016 FL) reproduced some provisions of Ordinance No. 01-03 regarding the development of investment dated 20 August 2001 (the Ordinance 01-03), such as the "49/51" rule, and modified some existing rules, such as the relaxation of the law concerning the obligation to resort to local financing;

- **Then, during the summer**, Law 16-09 merely repealed Ordinance 01-03, save for certain provisions. Certain obligations, (which were not applied in practice) disappeared, such as the requirement that foreign investments should generate a foreign currency surplus for the benefit of Algeria during the entire tenor of the relevant project, and the requirement to provide information annually in respect of the shareholding of foreign legal entities that owned shares in Algerian companies.

Today, the new legal framework applicable to investments includes three components: Law 16-09, 2016 FL and some remaining provisions from Ordinance 01-03 related to the National Agency of Investment Development (*Agence nationale pour le développement de l'investissement*, ANDI) and to the National Investment Council (*Conseil National de l'Investissement*, CNI).

1.2. Main Contributions of 2016 FL and Law 16-09

The contributions of the new framework applicable to investments can be summarised as follows:

- The transfer of the following rules to the 2016 FL may suggest easier modification in the future through an annual finance law in the future;

- **The "49/51" rule**, and the obligation that companies that are majority-owned by foreign

- A softer version of the **obligation to resort to local financing** for investments is set out in Article 55 of 2016 FL;

- **Privatisation through opening up of share capital** of state-owned companies, formerly governed by Article 4 quater of Ordinance 01-03, is now governed by Article 62 of 2016 FL.

Modification of existing principles whose scope is sometimes difficult to assess given the non-publication of implementing texts:

- **The obligation to resort to local financing for investments (except for the constitution of the share capital for companies)** has been relaxed. Article 55 of 2016 FL allows external financing that is necessary for the realisation of strategic investments by Algerian companies, subject to a case-by-case authorisation given by the government. An implementing text defining the modalities of this measure is expected;

- **The invested capital and investment proceeds transfer guarantee has been modified:** the transfer guarantee refers to the right for a foreign investor to transfer into foreign currencies the investment proceeds and dividends resulting from his investment in an Algerian company, through any local bank (having the status of an approved intermediary) without the prior approval by the Bank of Algeria where certain conditions are met. Eligibility for such transfer guarantee is now subject to a capital contribution in cash equal to, or in excess of, minimum thresholds defined according to the project's global cost. The reinvestment in capital of transferable profits and dividends are considered external contributions that benefit from the transfer guarantee, and contributions in kind are eligible to the transfer guarantee under certain conditions;

- **The State's right to repurchase has been clarified**: any sale of 10% or more of shares of a foreign company owning an interest in an Algerian company that enjoyed advantages or benefits at the time of establishment, triggers the requirement for prior notification of the State Holding Council (*Conseil des Participations de l'Etat,* CPE). Non-compliance with this obligation, or the reasoned objection of the CPE within one month of receipt of information, confers on the State a right to repurchase a portion of the interest held by the foreign company in the share capital of the Algerian company equivalent to the portion of the share capital of the foreign company that is being sold abroad (without exceeding naturally the total interest actually held by the foreign company in the Algerian company). In the absence of specifications regarding conditions for its implementation, the Algerian State's right to repurchase should not be applicable 'as is', unless reference is made to past practice;

- **The competence of the Algerian jurisdictions has been affirmed** in the event of disputes between foreign investors and the Algerian State, except where bilateral or multilateral conventions or an agreement including an arbitration clause are in place (Ordinance 01-03 referred to "competent jurisdictions").

Improvement of the following investment incentive regimes:

- **Investments registered with the National Agency for the Development of Investment (*Agence Nationale de Développement de l'Investissement*, ANDI),** and that are not included on the lists of activities excluded from all advantages (negative lists), **automatically** benefit from the advantages provided for by Law 16-09, except (i) investments whose amount is equal to or higher than five billion Algerian dinars (approximately EUR 45,000,000) and which are subject to prior CNI approval; (ii) investments with a specific interest in the national economy, subject to the derogation regime of the investment agreement; and (iii) activities with their own regime of advantages (such as the hydrocarbons sector);

- **The share of profits to be reinvested,** which corresponds to tax exemptions or rebates obtained in the context of investment incentive mechanisms offered by the ANDI, is reduced from 100% to 30% (Articles 2 and 51 of 2016 FL); a ministerial order dated 28 November 2016 lays down the procedures for its application and will be detailed in our next newsletter on the 2017 Finance Law;

- **The offer of land to economic operators is increased by Article 58 of 2016 FL,** which allows all private natural and legal persons to create, fit out and manage industrial or activity parks on non-agricultural land that belongs to them, under conditions defined by a specifications document drafted by the ministry in charge of investment, in line with the national development plan. Such plots of land may be the subject of ownership transfers;

- With the exception of investments conducted in the high plateaux and the South of the country, and job creation assistance mechanisms that remain unchanged, **the interest rate subsidies granted by the Treasury for loans** granted by banks and financial institutions to finance investment projects are now limited to 3% of the interest rate (as opposed to 2% previously for certain types of investment), and their duration is limited to 5 years (Article 94 of 2016 FL).

An executive decree No. 16-196 dated 4 July 2016 specifies the level, terms and conditions for granting the interest rate subsidies for investment loans. This decree provides, in particular, that the rates and the interest rate subsidies period, whose maximum levels are set respectively to 3% and 5 years including the deferred period, are granted depending on the classification of eligible activities and the nature of the loan granted.

In addition to the reform of the applicable framework for investments, the other key measures of 2016 related to import restrictions (§2).

Faced with falling oil revenues in 2016 the Algerian government implemented an import restriction policy which is materialised by the introduction of a specific regime of import licences (quotas and contingents). The import licences regime and the volumes quota regime, as provided for by Law No. 15-15 dated 15 July 2015 and Executive Decree No. 15-306 dated 6 December 2015, saw their first practical application with a list, published on 5 January 2016 by the Algerian Ministry of Commerce, of food and agricultural products from the EU subject to the licences regime. Then, such import restriction policy was extended to vehicles, cement and concrete reinforcing bars. According to the Algerian Press Agency, these restrictions have saved approximately US$6bn since their implementation.

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Nigerian law, including the Foreign Exchange (Monitoring & Miscellaneous Provisions) Act 2004 and the foreign exchange regulations of the Central Bank of Nigeria (CBN), guarantees investors the unconditional transferability of dividends, and of capital on disinvestment for equity investments, and of principal and interest on foreign loans and securities, in convertible currency, provided that inflow and repatriation are effected through CBN-authorised dealers - subject to meeting appropriate documentation requirements.

In practice, however, there are current challenges with sourcing foreign exchange that have arisen from, and are exacerbated by, the country's dependence on foreign exchange earnings from crude oil arising from the global decline in oil prices among other macroeconomic factors. This has, in turn led to the devaluation of the Naira and an inflationary peak of 18.72%, the highest in about 11 years.

Measures intermittently adopted by the CBN from 2015 onwards in a bid to address currency volatility and regulate foreign exchange dealings such as the establishment of multiple markets with differing exchange rates, have been criticised as inadequate to definitively address the prevalent challenges with foreign exchange availability, which negatively impacts the real, manufacturing and other sectors and discourages investment.

Since June 2016, when the CBN published new guidelines governing the operation of the Nigerian interbank foreign exchange market, transactions declared by the CBN to be eligible, and which are adequately supported by appropriate documentation, are eligible to purchase forex in the interbank market. This effort to partially liberalise the foreign exchange market means that investors are, at least as a matter of law, currently able to convert capital brought into Nigeria for investment into Naira at a market-determined exchange rate, since rates are no longer fixed by the CBN, as was the case prior to June 2016. Availability challenges remain for persons seeking to purchase foreign currency for repatriation from the interbank market in the immediate to short term.

The deceleration in fund raising activity and investment from about 2015 onwards, relative to the preceding highs of 2013 and 2014, have been attributed to these challenges, among other factors, in Nigeria.

Such challenges have also arisen from, and been exacerbated by, the country's dependence on foreign exchange earnings from crude oil, the resulting inflation and the recent decline in GDP growth and wider macroeconomic climate, which have contributed to what the Minister of Finance described as a 'technical recession'; the first in about 25 years.

Notwithstanding these challenges, however, the continuance of investment activity in 2016 suggests that there is still considerable appetite, and growth opportunity, for private equity investment across different sectors; and that a nuanced, longer-term assessment of the subsisting viability of Nigeria as a private equity destination remains in the medium to longer term. Notable deals since 2016 include Abraaj's investment in Indorama Fertilisers; Sahel Capital, fund managers for the Fund for Agricultural Finance in Nigeria and Cardinal Stone Capital Advisers entered into arrangements relating to a proposed investment in Crest Agro Products Limited; African Capital Alliance, 8 Miles and DEG's co-invested in Belloxi; IHS Holdings invested in HTN Towers; Synergy Capital invested in Africa Terminals, the MSY Analytics Group, and Suburban Fiber Company Limited respectively; SwissRe invested in Leadway Assurance Limited; Atlantic Coast Regional Fund invested in FSDH Merchant Bank Limited, and Helios invested in Oando Gas & Power.

> Efforts to partially liberalise the foreign exchange market mean that investors are, at least as a matter of law, currently able to convert capital brought into Nigeria for investment into Naira at a market-determined exchange rate.

The continuance of investments perhaps illustrates that the broader enabling framework for investment and the legal rights protecting private equity investment remain broadly unchanged. Foreign lending is also protected; the availability of options concomitant with, or independent of, equity investment, such as direct lending, credit support and alternative capital structures appear to be helping to sustain private sector interest and activity, and to provide opportunities to diversify and creatively mitigate the perceived risks of doing business in Nigeria.

In relation to debt for instance, the legal framework means that while tax is generally required to be withheld on interest payments on loans and dividends at the rate of 10%, or 7.5% if the lender or shareholder is resident in a country with which Nigeria has entered into a double taxation agreement, such as the United Kingdom, Belgium, France, Canada, South Africa, China and the Netherlands. Depending on how such loans are structured, interest payments may also be wholly tax exempt; for example on foreign currency loans to Nigerian companies that meet the prescribed moratorium and tenor requirements.

Nigerian companies can also provide credit support such as guarantees and third party security if permitted by constitutional documents. Foreign lenders can hold security, except title to land and to assigned interests in insurance policies, for which local agents may be appointed (and to help with enforcement). Nigeria has no thin capitalisation rules; companies are therefore not, generally, restricted to any debt to equity ratio except as may be prescribed by their constitutional documents. Interest rates, fees and other charges may be negotiated, except where parties are related, in which case transfer pricing rules will apply to require arms' length terms.

It remains to be seen whether, and to what extent, the federal government's recently published plans for Nigerian economic recovery and growth by 2020 (which include - for the first time - the proposed sale of its joint venture oil interests) will be implemented in the short term, and whether the CBN will take bolder steps to fully liberalise the foreign currency market.

There is still a need for a discrete private equity specific regulatory framework and to address other practical issues including bureaucracy, capacity building and structural reforms.

Notwithstanding these issues and the recent slowing of momentum, however, continuing private sector activity suggests that the enabling framework and the legal rights that it confers on private sector participants remain broadly unchanged. Investors continue to identify and to seek opportunities that offer promising, risk-adjusted returns in the current buyers' market in the medium to longer term, and remain drawn to the evolving Nigerian growth story.

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BROAD BASED BLACK ECONOMIC EMPOWERMENT (BEE) IN THE SOUTH AFRICAN MARKET

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BEE is a process driven by the South African Government through legislation and policy, which aims to remedy historical racial imbalances and achieve economic transformation by increasing the number of black people who participate in the mainstream South African economy. BEE is fundamental to economic activity in South Africa and encourages the opening up of the economy to those previously excluded by the system of apartheid through a mix of economic persuasion and incentive.

The Codes of Good Practice on Broad-Based Black Economic Empowerment (the Codes) now make provision for the recognition of equity instruments held by private equity funds (the Fund), to be treated as equity that is held by Black People[1], if the Fund and the Private Equity Fund Manager[2] meet certain criteria, as discussed below.

The importance of being classified as a Black Person is realised where a Private Equity Fund Manager wishes to make a BEE investment. Previously, it used to be very difficult for a Fund to qualify given the nature of the capital that it raises from international and institutional investors. Black fund managers were therefore prejudiced if they raised outside capital. The new regime disregards the capital commitments (equity) of the fund and looks only at the BEE ownership/voting rights of the fund manager.

Private Equity Fund Criteria

Management

At least 51% of the Fund's Executive Management and Senior Management must be Black People[3]. The Codes define "*Senior Management*" as *"employees of the measured entity who are members of the occupational category "senior management" as determined using the Employment Equity regulations*". The Employment Equity regulations refer to the various job grading systems developed by Paterson, Peromnes, Hay and Castellion. There is no definition of "Executive Management", however "executive members of the board" are defined as those members of the board who are executive as defined in the King Report.

Private Equity Fund Manager Criteria

Exercisable Voting Rights

At least 51% of any of the Private Equity Fund Managers' voting rights (which are not subject to any limitation) (**Exercisable Voting Rights**) associated with the equity instruments through which the Fund holds rights of ownership must be held by Black People[4]. It is our interpretation of the Codes that as the General Partner bears the responsibility for the day-to-day management of the Fund, and effectively outsources some of its management and administrative services in relation to the Fund to the Investment Advisor. Both the General Partner and the Investment Advisor fulfil a managerial function in relation to the Fund and should both be regarded as Private Equity Fund Managers in relation to the Fund. In practical terms, it is the directors/management of the Private Equity Fund Manager who will determine the manner in which the voting rights associated with the equity instruments that are acquired by the Fund will be voted, and as such, assuming that each director of the Private Equity Fund Manager is entitled to exercise one vote on resolutions before the board, at least 51% directors/management of the Private Equity Fund Manager should be Black People.

Profit Distribution

At least 51% of the profits made by the Private Equity Fund Manager after realising any investment made by it, must by written agreement accrue to Black People[5].

The term "profit" refers to profit from the operations of the Private Equity Fund Manager and the carried interest that the Private Equity Fund Manager (and/or its associated entities accrue to the Private Equity Vehicle Manager) receives after realising any investment made by it.

This practically means that both the General Partner and the Investment Advisor must enter into written agreements with their respective shareholders such that at least 51% of the profits accrued by the Private Equity Fund Manager will accrue to their shareholders who are Black People and/or Black People who are not shareholders in the Private Equity Fund Manager.

1 African, Coloureds and Indians who (a) are citizens of the Republic of South Africa by birth or decent; (b) became citizens of the Republic of South Africa by naturalisation (i) before 27 April 1994; (ii) on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date
2 The term "Private Equity Manager" has not been defined in the Codes
3 Source: paragraph 3.10.1.2, Amended Code Series 100, Statement 100 of the B-BBEE Codes
4 Source: paragraph 3.10.1.1, Amended Code Series 100, Statement 100 of the B-BBEE Codes
5 Source: paragraph 3.10.1.3, Amended Code Series 100, Statement 100 of the B-BBEE Codes

B-BBEE Owned Company[1]

Black People must be entitled to exercise at least 51% of the Exercisable Voting Rights in the Private Equity Fund Manager and should be entitled to at least 51% of the claims against the Private Equity Fund Manager representing a return on ownership of the Private Equity Fund Manager, which is similar in nature to a dividend right (**Economic Interest**).

Investment Targets

The BBBEE Codes require that a Private Equity Fund Manager must invest at least 51% of the value of funds under management in companies that have at least a 25% direct Black shareholding using the Flow Through Principle and measured with reference to the cost of the investment made by the Fund[2].

The Private Equity Fund Managers can facilitate direct Black shareholding at the time of entering into the transaction should the target company not meet the requirement of at least 25% Black shareholding at the time the transaction is concluded[3].

In recognition of the fact that it is currently a challenge for Private Equity Fund Managers to find companies to invest in that already have a significant Black shareholding, the Codes provide that the Private Equity Fund Managers are allowed to achieve the 51% target over a period of time[4], as follows:

- within one year from the later of 11 October 2014 and the date of establishment of the Fund (Commencement Date), more than 5% of the value of funds invested by the Fund must at all times be invested in enterprises that have at least 25% direct Black shareholding;
- within two years from the Commencement Date, more than 10% of the value of funds invested by the Fund must at all times be invested in enterprises that have at least 25% direct Black shareholding;
- from the first day of the third year and the last day of the fourth year from the Commencement Date, more than 20% of the value of funds invested by the Fund must at all times be invested in enterprises that have at least 25% direct Black shareholding;
- from the first day of the fifth year and the last day of the sixth year from the Commencement date, more than 30% of the value of the funds invested by the Fund must at all times be invested in enterprises that have at least 25% direct Black shareholding;
- from the first day of the seventh year and the last day of the eighth year from the Commencement Date, more than 40% of the value of the funds invested by the Fund must at all times be invested in the enterprises that have at least 25% direct Black shareholding;
- from the first day of the ninth year and beyond from the Commencement Date, at least 51% of the value of the funds invested by the Fund must at all times be invested in enterprises that have at least 25% direct Black shareholding[5].

Once a year, an accredited verification agency will determine whether the Private Equity Fund Manager and the Fund meet the criteria set out above and the status given to the Private Equity Fund Manager (i.e. that the equity instruments held by the Fund are deemed to be held by Black People) will be valid for a period of 12 months.

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1 Source: paragraph 3.10.2, Amended Code Series 100, Statement 100 of the B-BBEE Codes
2 Statement 100-12, paragraph 3.10.14 of the BBBEE Codes
3 Statement 100-10 paragraph 3.10.5 of the BBBEE Codes
4 Statement 100-10 paragraph 3.10.7 of the BBBEE Codes
5 Source: paragraphs 3.10.4 to 3.10.13, Amended Code Series 100, Statement 100 of the B-BBEE Codes

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Before the "Tunisia 2020" Conference on Development and Investment, which took place in Tunis on 29-30 November 2016, the Tunisian legislature adopted law n°71-2016 dated 30 September 2016 (Loi sur l'Investissement 2016 – the Investment Law), which aims to promote investments and business in Tunisia.

The Investment Law came into force on 1 January 2017 and repeals and replaces the former Tunisian investment incentive code (Code d'Incitations aux Investissements – the Former Investment Code) enacted by law n°93-120 dated 27 December 1993. This legislative reform aims to promote investments in Tunisia, especially foreign investment, by enhancing both freedom to invest and investors' protections. The Investment Law reorganises the governance of investments by establishing new institutions and incentive bonuses. The text that sets out this new legal framework is relatively short and shall be completed by way of decree.

Liberalisation of the Legal Framework

Principle of Freedom to Invest

The Investment Law reiterates the principle of freedom to invest in Tunisia. This principle, which had already been laid down by the Former Investment Code, is now combined with a guarantee of non-discrimination: under comparable conditions, a foreign investor will not be treated less favourably than a Tunisian investor. Therefore, the scheme of prior approval, which was only applicable to some foreign investors under the Former Investment Code, has now disappeared under the Investment Law.

As an example, the Investment Law sets out the principles of free acquisition, rental and exploitation of non-agricultural lands by investors. However, the statement that "investment is free", included in Article 4 of the Investment Law, does not mean that all legal and administrative barriers have been removed from Tunisian legislation. It is worth noting that a decree will be adopted by no later than 1 January 2018 to establish an exhaustive list of all activities that will require prior approval. This list should provide some clarity on the different administrative authorisations, procedures, delays and conditions required for the realisation of an investment in Tunisia. Besides equal treatment, the Tunisian legislature wants to guarantee equal access to information for both domestic and foreign investors.

Guarantees Granted to Investors

The Investment Law states that both Tunisian and foreign investors benefit from the same protection as far as possessory and intellectual property rights are concerned. It prohibits expropriation, unless it is in the public interest and subject to fair and equitable compensation (although the text remains silent on the preliminary nature of this compensation).

Foreign investors will have be particularly interested in certain guarantees, such as the free transfer of funds abroad or the possibility to recruit foreign management. The Former Investment Code had already granted the possibility to recruit four foreign managers for each business. The Investment Law extends this provision by allowing any business to have 30% of its management staff composed of foreign managers during the first three years of its incorporation or effective entry into operation, and 10% from the fourth year onwards, under certain conditions.

Finally, the Investment Law contains guarantees regarding the relationship between investors and the Tunisian administrative authorities. Decisions relating to administrative authorisations for investments will have to be reasoned and explained in writing.

The Will to Improve Tunisia's Attractiveness to Investors

The new governance of investments in Tunisia. The Investment Law reorganises the governance of investments in Tunisia, which, until now, has been assumed by the higher commission for investment (Commission Supérieure d'Investissement).

The Investment Law institutes the higher council for investment (Conseil Supérieur de l'Investissement - the Council), which, composed of ministers connected to the field of investments and presided over by the Tunisian Prime Minister, determines the State policy for investments and be responsible for the promotion of investments and the improvement of the business environment in Tunisia. The Council will award incentive bonuses related to projects of national interest.

The Tunisian agency for investment (Instance Tunisienne de l'Investissement – the Instance) is also introduced and placed under the authority of the minister in charge of investment and the Council. It analyses the applications for bonuses and make the grant decisions.

A unique position within the Instance has been created for someone to liaise with, orientate and inform investors, providing them with assistance on how to obtain the required authorisations.

Finally, the Investment Law establishes a Tunisian fund for investment (Fonds Tunisien de l'Investissement – the Fund) that will pay the bonuses mentioned below and be entitled to make subscriptions, directly or indirectly, in risk mutual funds, venture capital funds and seed funds. A decree will specify the rates, ceilings and conditions concerning the benefit of participations in the capital.

Bonuses and Other Incentives to Invest

The Investment Law provides for many bonuses to be granted under certain conditions to be determined by decree. These bonuses will be granted in respect of direct investments made in Tunisia. Such investments are defined as any creation of a new independent project for the purpose of producing goods or providing services or any extension or renewal operations made by an active company as part of that same project seeking to increase its production capacity. There is a range of different bonuses on offer: the payment of one or many sums of money, the assumption by the Tunisian State of part of the salaries and / or employer's contributions, etc. The investments with national interest, which will be determined by way of decree, may grant investors a reduction of the tax rate for a maximum period of ten years, the payment of a bonus and the assumption of infrastructure expenses by the Tunisian State.

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