

TOWARDS AN ENABLING LEGAL AND REGULATORY FRAMEWORK FOR PRIVATE EQUITY AND VENTURE CAPITAL IN NIGERIA



Folake Elias Adebowale, Partner, Udo Udoma & Belo-Osagie Nigeria



Olakunle Faisal Uthman, Associate, Udo Udoma & Belo-Osagie Nigeria



Pamela Onah, Associate, Udo Udoma & Belo-Osagie Nigeria



Chisom Okolie, Associate, Udo Udoma & Belo-Osagie Nigeria

Research and data from private equity industry associations such as the Emerging Markets Private Equity Association (EMPEA), the African Venture Capital Association (AVCA) and the Private Equity and Venture Capital Association (PEVCA) highlight the impact of challenges including global commodity price fluctuation, foreign exchange volatility, security and insufficient diversification of the economy, among other factors, on the pace of activity in the Nigerian private equity and venture capital (PE) industry.

Encouragingly, however, Nigeria remains an established anchor market for PE in sub-Saharan Africa (SSA) with attributes that are still largely unique in SSA outside South Africa: a relatively evolved ecosystem comprising over 20 fund managers active in Nigeria and a growing secondaries market. Targeted PE investments in fast-growing sectors such as technology, verticals, oil and gas, consumer goods, fertilisers, health, FinTech, insurance and industrials, underscore PE's strategic importance for transforming businesses and as a potential enabler of economic, business and social development.

The development of an enabling PE-specific legal and regulatory framework for Nigeria is crucial to the achievement of such goals. The EMPEA Guidelines developed by EMPEA's legal and regulatory committee, advocate principles including the ability to contract freely, with minimum prescription by statute and an efficient, transparent and fair regulatory environment as key to attracting private capital to emerging markets like Nigeria.

In this respect, Nigeria is arguably a little further ahead of the curve than its neighbours. While PE investment has been largely regulated within the generic investment framework, including the companies legislation, the Presidential Enabling Business Environment Council (PEBEC) reforms for business and investment, and (if it receives Presi-

dential assent) by the potentially greater flexibilities and minority protections envisaged by the Companies and Allied Matters Act (Repeal and Re-Enactment) Bill, the Securities and Exchange Commission (SEC) on PE and PENCOM regulations governing investment in fund assets are uniquely among the earliest PE industry-specific regulations to have been developed in sub-Saharan Africa outside of South Africa.

There has been some debate regarding certain features of the nascent Nigerian PE-specific framework that are regarded as impacting negatively or being unduly restrictive of PE activity and investment. These include minimum commitment prescriptions for local funds hoping to attract PFA investment; National Pension Commission (PenCom) restrictions on the investment of pension fund assets in funds that are not SEC-registered or which are not managed by SEC-licensed fund managers; the availability of perceived lower risk assets such as treasury bills; and the tough competition presented by fiscal, business and legal environment in Mauritius, the Cayman Islands and the British Virgin Islands.

In order to achieve its fully potential, Nigeria must have sustainable and enabling legal and regulatory framework and policies including for private equity. For instance, the availability of different partnership structures under the CAMA Bill should provide flexibility for fund structuring and establishment, if the Bill receives Presidential assent. Ideally PE investors should have the flexibility to choose preferred structures for investment e.g. to include open-ended investment companies, real estate investment companies, unit trusts, real estate investment trusts, limited partnerships, limited liability partnerships (without having to use domestic vehicles as intermediaries for committing capital to partnerships).

Efforts made to deepen specialised knowledge and

capacity building for stakeholders including regulators, participants and beneficiaries are commendable and should continue. Procedures and processes for registration and for obtaining regulatory approvals should continue to be streamlined: online company registration at the CAC are a good beginning. Managers urge that there should be less burdensome monitoring requirements with thresholds set below which such registration may not be required. An internationally competitive and transparent tax regime that is specific to private equity and venture capital investment would be required to support other proposed initiative and to equip Nigeria to compete with global financial and fund administration centres such as Mauritius, the Cayman Islands and the British Virgin Islands.

The adoption of the Nigerian Code of Corporate Governance 2018 for regulated, listed and public entities on the order of the Honourable Minister for Industry, Trade and Investment – an African PE pioneer—Dr. Okey Enelamah— will hopefully facilitate alignment with international best practices.

There is a need to develop and adopt measures that are specifically designed to boost regulator, PFA and other institutional investor confidence in providing capital for PE investments. PENCOM's Regulation on Investment of Pension Fund Assets has increased allocations by pension funds to PE to 10%, which is encouraging, but sector participants argue, should be much greater. Certain critics have also advocated a reduction in the minimum paid up share capital requirements for fund managers and that the investment of more than the prescribed percentages of pension fund assets in single investments should be permitted.

There have been notable achievements, but the evolution of a discrete legal and regulatory framework for PE in Nigeria that is designed to address the very real challenges and modern realities faced by industry, investors and other participants is important if PE is to properly achieve its potential as a tool for transforming business and social development in Nigeria.



Contributors' Profiles

Folake Elias Adebowale is a partner on the corporate advisory/M&A and private equity team at Udo Udoma & Belo-Osagie, and co-heads its oil and gas teams. Folake sits on the legal and regulatory council of EMPEA and represents the firm (a founding member) on the inaugural board of the Private Equity and Venture Capital Association of Nigeria (PEVCAN). She previously acted as co-chair of the African Venture Capital Association (AVCA)'s legal and regulatory committee and headed the legal committee of the Federal Ministry for Industry Trade and Investment's Nigerian Private Equity and Venture Capital Development project. Folake is ranked by Chambers Global, the IFLR1000, Legal 500 and Who's Who Legal and commended in The Lawyer's 'Africa Elite' Private Equity Report. She graduated with a degree in jurisprudence from Oxford University and holds a Master of Laws degree from University College, London. She is a member of the Nigerian Bar.

Olakunle Faisal Uthman is an associate and a member of the firm's corporate/M&A, private equity and oil and gas teams. With a background in dispute resolution, he is a core member of various teams advising on cross-border and domestic equity and asset acquisitions, divestments and strategic alliances, and routinely advises on regulatory and environmental matters relating to the energy (oil and gas and power) sector.

Pamela Onah is an associate and a member of the firm's corporate advisory team, with transactional and advisory experience in M&A, private equity, capital markets, energy and banking matters. She is a key member of various teams advising on various merger, acquisitions, energy and petroleum transactions and on the regulatory environment for the establishment of mutual funds, feeder funds, funds of funds, and registering foreign listed funds on the Nigerian Stock Exchange.

Chisom Okolie is an associate and a member of the firm's corporate advisory team, with experience advising on M&A, PE, capital markets, oil and gas and tax matters. She is a core member of various teams that advising local and international companies and PE firms on equity investments including in the insurance and manufacturing sectors. She has also advised on international lending transactions including syndicated loans and on the establishment of mutual funds.