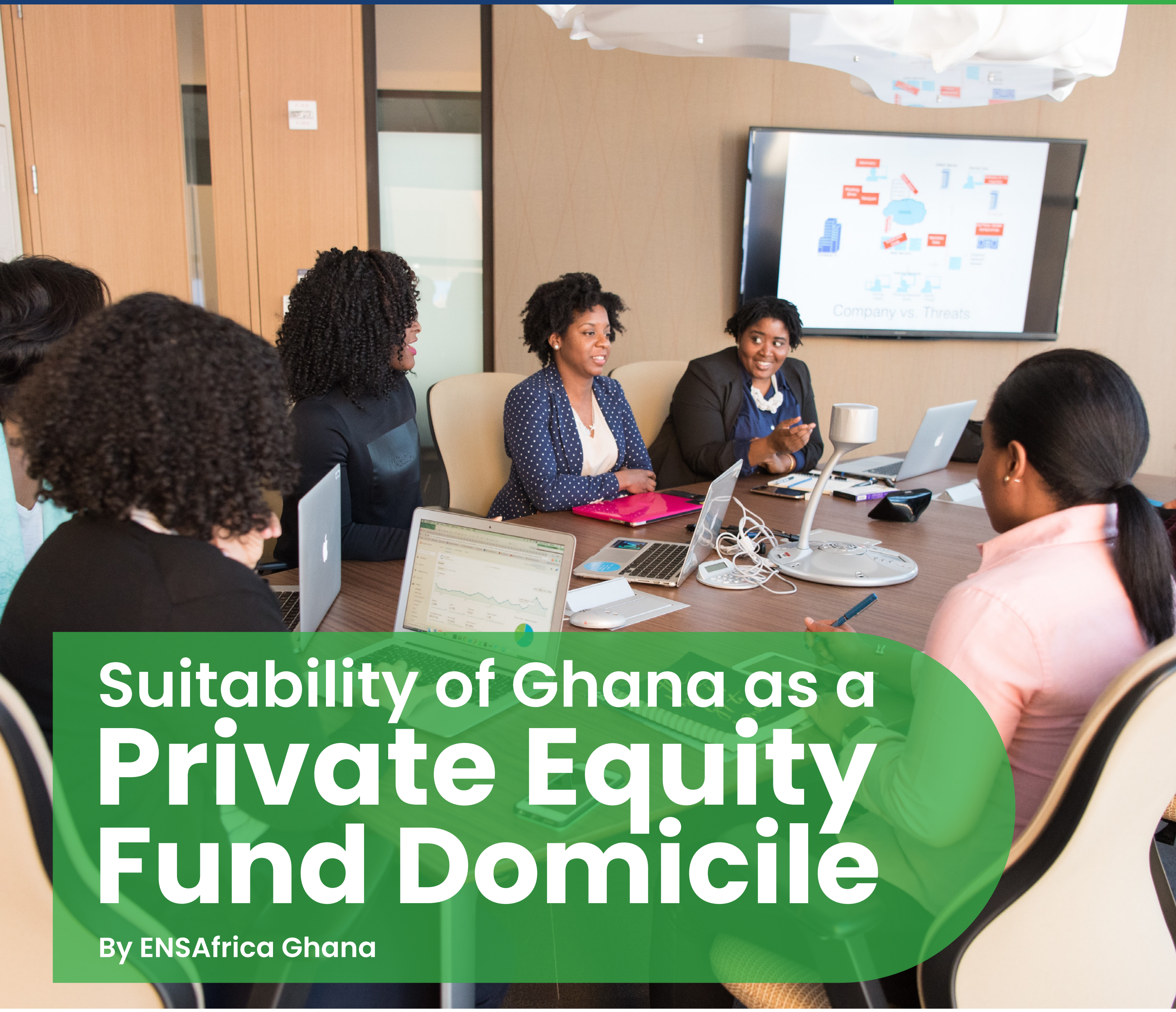
Ghana Venture Capital
AND PRIVATE EQUITY ASSOCIATION



Suitability of Ghana as a Private Equity Fund Domicile

By ENSAfrica Ghana

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Introduction

In 1991, the United States Agency for International Aid (USAID), together with the Commonwealth Development Corporation (CDC) (now British International Investment), sponsored the formation of the first venture capital fund in Ghana, the Ghana Venture Capital Fund (GVCF). The GVCF is the first venture capital fund to be set up in sub-Saharan Africa, outside South Africa. Between 1995 and 2004, GVCF invested in 13 companies in Ghana, some of which have since grown to become major industry players in the country.

In 2004, the Venture Capital Trust Fund Act, (Act 680) established the Venture Capital Trust Fund (VCTF) with the aim of providing funding for the development of small and medium enterprises in Ghana. Since then, private fund activity in Ghana has continued to grow steadily, especially in recent years. This has been influenced by multiple factors, including, Ghana's political stability and regulatory regime which make it an attractive investment destination.

Private funds in Ghana are regulated by the Securities and Exchange Commission ("SEC"). SEC's mandate ensures that private funds comply with the requirements of the law without imposing rigid requirements on fund structuring.

This paper provides an overview of the current legal regime for setting up and managing a fund domiciled in Ghana. The paper also makes a case for why Ghana is a good domicile for funds by highlighting key regulatory, legal and tax protections and incentives that make Ghana as attractive as any private equity or venture capital destination.

This paper is an abridged version of the actual paper which you may obtain from the Ghana Venture Capita and Private Equity Association (GVCA).

Ghana as a Suitable Fund Domicile

7 INDICATORS

THAT GHANA IS A SUITABLE FUND DOMICILE

1. LICENSING
2. CORPORATE GOVERNANCE STRUCTURES
3. INVESTMENT CATEGORIES
4. INVESTOR AGREEMENTS AND PROTECTIONS
5. REGULATORY REGIME FOR FOREIGN INVESTMENTS
6. TAX INCENTIVES
7. EXIT OPTIONS

Licensing

A private equity fund must be licensed by SEC to operate. To obtain the licence, the private equity fund must be incorporated as a limited liability company or registered as an external company in Ghana and be determined by SEC to be a "fit and proper person. The private equity fund must also meet the other requirements set out in the Private Funds Guidelines issued by SEC, some of which are, to:

(i) meet the initial minimum fund size of GHS10,000,000 (approximately US$1.3 million); and

(ii) meet SEC's corporate governance requirements which include having a board of directors with at least one independent director and a fund manager. Once a fund complies with the requirements, SEC would issue the license in approximately 3 months, a relatively short time.

Corporate governance structures

Private equity funds are managed and administered by a fund manager and a board of directors. The board of directors are appointed by the shareholders or investors and guided by securities laws and the private equity fund's constitution and other agreements. Directors who fail to act accordingly are liable to the fund, its investors and SEC.

The fund manager, who is appointed by the board of directors, must be licensed by SEC to operate.

This oversight of the fund manager by the board of directors and SEC ensures that fund administrators are held accountable and investors' interests are protected.

Investment categories

SEC, in its regulatory and oversight role, does not designate categories of securities for private funds. Thus, private equity funds can determine how to operate their businesses and in which securities to invest. The most common securities in private funds are equity, debt and everything in between such as convertible debt.

This regulatory flexibility SEC provides enables investors in Ghana to have a choice of fund structures which align with their interests.

Investor Agreements and Protections

Shareholders or investors in private equity funds are offered significant rights and protections under Ghanaian law, which include the power to appoint and remove directors, to determine fees of directors, participate in the decision making process of the company and to share in the assets of the company in the event of liquidation. They also have the right to negotiate the terms in the private equity fund's transaction documents which include the constitution, shareholders' agreement and share subscription agreement. These documents are contractual and thus binding and enforceable just as any other contract. Investors in private equity funds in Ghana are therefore assured that the Ghanaian courts will enforce their rights under any of these agreements, if the agreements are breached.

Investors are also afforded statutory protections (including minority protections) under Ghanaian law including the right to:

(i) sue for a wrongful act done by or against the company;

(ii) require a buy-out by the company or an acquirer in certain instances; and

(iii) block unfavourable special resolutions, if the investor holds 25% of the shares of the fund.

Regulatory regime for foreign investments

Most sectors in Ghana are open to foreign equity participation, and in some sectors, subject to local participation requirements. A company with foreign investment is required to meet specified minimum capital requirements and register with the Ghana Investment Promotion Centre ("GIPC"). The GIPC registration offers private equity funds guarantees and incentives such as automatic expatriate quotas, guarantee against expropriation and the right to repatriate funds unconditionally and in freely convertible currency through authorised dealer banks.

Tax Incentives

In Ghana, private equity funds are entitled to tax benefits including tax exemptions on:

(i) dividends payable where the fund controls at least 25% of the voting power in the investee company;

(ii) interest payable to the fund from investment in an approved unit trust scheme or mutual fund; and

(iii) value added tax (VAT) exemption on the provision of financial services. Qualified venture capital financing companies are entitled to extra tax benefits of a reduced tax rate of 1% on income, dividends and interest for the first 10 years.

Private equity funds also benefit from tax exemptions and concessions if they invest in free zone enterprises and other sectors such as export of non-traditional goods and agro-processing, which have concessionary tax rates. In addition, foreign investors in private equity funds who are tax resident in any of the countries with double taxation agreements ("DTAs") with Ghana may rely on the terms of the DTAs and claim reduced tax rates on any matter, including withholding tax on interest and dividends.

Exit Options

Private equity funds and investors in private equity funds can exit or dispose of their interests in investee companies through various exit options.
The most common exit option for private equity funds is sale of shares as it has little to no risks associated with it. Other options are share buyback, secondary buy-backs, initial public offerings, liquidation of the investee company, and the repayment of loan sums in the case of debt.
Some exit options such as share buyback come with a limitation on the company not to buy back more than 15% of shares issued to shareholders.
This process of exiting the fund may require the fund to seek the approval of the court, if the exit leads to a reduction in the fund's stated capital.

An investor may also exit by transferring its shares to another shareholder in accordance with the terms of the transaction documents and subject to board approval. Where the investor is unable to find a buyer or where all investors intend to exit the fund, liquidation of the fund may be an exit option. In the case of share buyback of the investor's shares, the limitation discussed under 2.1.7.1. applies.

Challenges

Although Ghana is a growing private equity funds domicile, lack of knowledge about private equity funds in Ghana may not inspire investor confidence. Other limiting factors include the lack of alternative business vehicles (such as limited liability partnerships) and the qualification requirements for tax incentives.

Recommendations

It is recommended that the Ghana Venture Capital and Private Equity Association lobbies and partners with relevant ministries, regulators and stakeholders to provide innovative solutions to these challenges. For example the concept of limited liability partnerships needs to be introduced to make it easy for investors to exit from funds.
Hopefully, the solutions will position Ghana as a fund domicile of choice.