BANWO & IGHODALO

ARE EXCHANGE CONTROL RESTRICTIONS NOW IN FORCE IN NIGERIA?

*In late 2014, following persistent and continuous record drops in the price of crude oil globally the value of the currencies of virtually all oil dependent countries began to experience significant downward pressure. Losing more than 7.5% of its value in 2014, and around 13% compared to its value in mid-June 2014, the Naira was one of the worst hit of these currencies. Since pressure began to mount in October 2014, the Central Bank of Nigeria ("**CBN**") has been employing a cocktail of measures, ranging from direct intervention through the sale of foreign exchange to official devaluation and the introduction of various restrictions on the sale and use of foreign currencies to check the depreciation.*

After an initial devaluation of circa 8.4% in 2014 had failed to check the depreciation in the value of the Naira, the CBN in February 2015, closed both its retail and wholesale auction windows, effectively ceasing its routine direct intervention in the Nigerian foreign exchange market in a bid to end speculation fueled by the widening gap between the CBN and interbank exchange rates. Prior to the closure of the retail and wholesale auction windows, the CBN had revised the foreign exchange trading position required to be maintained by banks at the close of business on each day and imposed time limits for utilization of foreign exchange procured from the CBN interbank markets. The CBN also sought to limit the categories of eligible transactions for which foreign currencies could be procured directly from the CBN.

Still, neither the closure of CBN intervention windows nor the other restrictions were able to fully stem the depreciation. Rather the gap between the interbank and the parallel market foreign exchange rates, widened.

The CBN then turned to domiciliary account positions in Nigeria, requesting that commercial banks supply details of their corporate and individual domiciliary accounts. At the time, the CBN had sought to allay concerns about imposition of restrictions on the use of domiciliary accounts by stating that it would neither restrict access and application of funds held in domiciliary accounts in Nigeria, nor engage in other capital controls. Since then, however, the CBN has, by circulars issued in February and more recently in April, 2015, backtracked on its commitment not to restrict application of funds held in domiciliary accounts.

First, by a circular dated February 20, 2015, the CBN sought to clarify that "unfettered access" to funds in Export Proceeds Domiciliary Accounts (the account into which export proceeds are to be repatriated) meant that such funds could only be used for either (i) financing eligible and other related trade transactions (supported with appropriate documentation); or (ii) sold to authorized dealers (banks) for eligible transactions only. The main impact of this was that exporters with funds in such accounts were essentially barred from selling those funds to affiliates and or third parties.

98 Awolowo Road, South-West Ikoyi, Lagos, Nigeria
Afri-Investment House, Plot 2669, Aguiyi-Ironsi Street, Maitama, Abuja, Nigeria
T +234(0) 700LAWYERS F +234(1) 4615205 E banwigho@banwo-ighodalo.com W www.banwo-ighodalo.com

BANWO & IGHODALO

As a follow-on from the February circular, and in a bid to checkmate the "dollarization" of the Nigerian economy, the CBN on April 17, 2015[1], issued a further circular (the "**Circular**") to deposit money banks, warning the public that it is **"illegal"** to **"price"** or **"denominate**" the cost of any product or service (visible or invisible) in any foreign currency in Nigeria. Further, the Circular stated that ***"no business offer or acceptance***" should be consummated in Nigeria in any currency other than Naira. Finally, the Circular specifically advised deposit money banks to desist from the collection of foreign currencies for payment of domestic transactions on behalf of their customers and the use of their customers' domiciliary accounts for making payments for visible and invisible transactions **"originating and consummated"** in Nigeria.

More than all of the previous measures, these last two circulars, which effectively fetter use of and access to funds in domiciliary accounts in Nigeria have thus far been the source of serious concern for account holders and businesses and leave many unanswered questions in their wake.

Legal issues raised by the Circular mainly hover around:

(i) whether indeed the CBN has power to make pricing and or denominating costs of products or services in foreign currency in Nigeria illegal; and

(ii) what impact (if any) the new rules will have on transactions and arrangements concluded prior to the issuance of the circular but in respect of which payments are yet to be made.

On a preliminary note, in order to address Issue (i), it is noteworthy that the Press Release which was issued prior to the Circular, simply sought to reinforce the position of the law with respect to the use of foreign currency for making payments in Nigeria. In this regard, the Press Release refers to ***Section 20 of the Central Bank of Nigeria (Establishment) Act, 2007*** ("**CBN Act**") which stipulates that the Naira is the **"*legal tender in Nigeria…for the payment of any amount*"** and reiterates that failure to comply with the relevant provisions of the CBN Act is an offence punishable by conviction of 6 (six) months, or a fine. Finally, the Press Release advises the general public to report any contravention of the law in this regard to the Economic and Financial Crimes Commission or the CBN for appropriate action. Further, the Press Release seeks to clarify that foreigners, visitors and tourists are not subject to the restriction on the use of foreign currency in Nigeria and thus may continue to utilize their bankcards for payment or exchange foreign currency for local currency at any authorised dealer. Finally, the Press Release advises the general public to report any contravention of the law in this regard to the Economic and Financial Crimes Commission or the CBN for appropriate action.

Where the language in the Press Release is relied on without more, then it could be interpreted that Nigerians living in Nigeria are prohibited from paying for goods and services in Nigeria with foreign currency even where same are sourced from their domiciliary accounts.

In fact, from the relevant provisions of the law highlighted above, it is clear that the intention of the law is that ***no person be allowed to refuse or reject the Naira in Nigeria***. Further, the offence actually

[1] Prior to April 17, 2015 (circa 1st week in April), the CBN issued an official press release titled "The Use of Foreign Currency as a Medium of Exchange in Nigeria" (the "**Press Release**") to clarify the position of the law as it relates to the use of foreign currency in Nigeria. The Circular of April 17, 2015 built on the statements contained in said Press Release and further expanded on same.

prescribed under Section 20(5) of the CBN Act, highlighted above (i.e. refusing to accept a Naira payment) ***presupposes that an offer to pay in Naira must have been made to the relevant person and such offer has been refused***.

For the avoidance of doubt, the Press Release did not state that foreign currency transactions between willing parties are prohibited, (although this lacunae was subsequently cleared up by the Circular), but rather, reiterates the position of the CBN Act that a person cannot demand payments in foreign currency, rather than the local currency, (the Naira).

Now on the strength of the Press Release alone, it may have been argued that, whilst the CBN is empowered by Section 20(5) of the CBN Act to prescribe the circumstances under which foreign currency may be used as a means of exchange in Nigeria, the Press Release did not impose any restriction on the use of foreign currency other than as prescribed in the CBN Act, to wit, in circumstances where the person making the payment insists on paying in Naira. Indeed, relying specifically, on Memorandum 16 of the **Central Bank of Nigeria Foreign Exchange Manual, 2007** ("**Forex Manual**"), issued pursuant to the **Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, Cap F34 Laws of the Federation of Nigeria ("LFN"), 2004** ("**FEMMA")**, which provides that **"***payment in foreign exchange for products and* services *provided by a Nigerian company to another Nigerian company is optional, it may be argued that in all cases where the payer opts to make the payment in foreign currency, and such funds are from his ordinary domiciliary account or offshore sources only, then he can freely enter into contracts to so pay in foreign currency.*

However, the foregoing can no longer be the case as the Circular expressly makes it **"illegal"** to **"price"** or **"denominate**" the cost of any product or service (visible or invisible) in any foreign currency in Nigeria. More importantly, the Circular states unequivocally that the statements therein supersede the provisions of Memorandum 16 of the Forex Manual and Paragraph (XI) Section 4.2.1 of the Monetary, Credit, Foreign Trade and Exchange Policy Guidelines for Fiscal Years 2014/2015.

In addressing particularly the statements in the Circular, it is important to note that the main statute that regulates foreign exchange transactions in Nigeria remains the FEMMA. The FEMMA contains general provisions as regards dealings in foreign exchange but provides ***that transactions in the foreign exchange market shall be as prescribed by the CBN***. The FEMMA also specifically provides that the CBN shall supervise and monitor the operation of the foreign exchange market to ensure its efficient performance. Based on these provisions it is *arguable* that the CBN does have extensive powers in relation to the regulation of foreign exchange transactions in Nigeria.

As regards domiciliary accounts, the FEMMA specifically provides in section 17(3) that "*Except as provided under any other enactment or law, a person making an application to open a domiciliary account under this Act [FEMMA]* ***shall not be obliged to disclose the source of the foreign currency sought to be deposited in the account.***" This provision may be construed in at least two diverging ways. On the one hand, it can be restrictively interpreted as implying that the freedom from obligations to disclose sources is only applicable in respect of ***funding for the establishment*** of the domiciliary account whilst the holder of the account may be obliged to disclose ***subsequent funding*** sources. Alternatively, it can be interpreted broadly as applying to all funds to be deposited in a domiciliary account whether or not In relation to the establishment of the account.

It would appear that CBN has adopted the more restrictive interpretation of the section as the new restrictions in relation to the use of funds in domiciliary accounts effectively require banks to request information in relation to the sources of such funds. Given the difficulties likely to result from the implementation of the circular, it is not infeasible that the CBN's interpretation of the FEMMA and the circular issued pursuant thereto may subsequently be challenged by aggrieved account holders.

Even assuming that the CBN does indeed have the requisite authority to impose such restrictions on the operation of domiciliary accounts in Nigeria, the Circular does not provide any guidance as to the commencement of the new restrictions and whether or not there are any grandfathering arrangements in relation thereto. In the absence of specific provisions in this regard, it would appear that the CBN's expectation is that the circular take immediate effect. The absence of any specific grandfathering provisions implies that contracts and arrangements which were concluded prior to the issuance of the circular but in respect of which payments are only to be made subsequently, ***could potentially be facing a "change of law" or "force majeure" event which triggers an automatic variation of payment terms***. The effect of this in individual cases will vary with the actual contractual terms and the specific circumstances. It is thus difficult to draw any broad conclusions in this regard. In some cases, parties may be able to revise payment terms and arrangements such that payments can be made between offshore accounts of the relevant parties, as this does not appear to be restricted by the Circular. However, in many other cases, the applicable currency for payment will need to be changed in order to ensure compliance with the Circular.

Premised on the foregoing, parties may thus need to expressly agree the applicable exchange rate and or benchmark for determination of the exchange rate for payments. In this regard, it is pertinent to note that the Circular appears to focus on the currency for pricing ***and payment but does not preclude parties from indexing such prices or payments to a particular foreign currency***.

CONCLUSION

In summary, whilst parties remain free to enter into contracts any obligation to pay in foreign exchange, is now unenforceable. Furthermore, it is pertinent to note that while the provisions of the recent Circular go some way to alter the manner of operation of domiciliary accounts in Nigeria, there does remain some window for parties to hedge against foreign exchange risks (albeit to a somewhat more limited extent) in structuring, agreeing and implementing pricing and payment terms for Nigerian contracts. Parties to Nigerian contracts thus need to carefully examine their particular circumstances to identify remaining available options, which are not prohibited by the new rules.

Notwithstanding the foregoing, we envisage that there is likely to be significant push back from account holders in relation to the new rules. Further, as the CBN continues to explore options to defend the Naira and check speculation, it is not unlikely that there may be further revisions to the rules and restrictions regarding the operation of domiciliary accounts. We would thus strongly recommend that parties thread with caution in making any adjustments to payment terms and contracts.

BANWO & IGHODALO

BANWO & IGHODALO

Banwo & Ighodalo ("**B&I"**) is a full service commercial law firm known for providing innovative, competent, cost-effective and well-timed solutions. B&I is frequently ranked as one of the leading law practices in Nigeria and the Firm has advised, and continues to provide legal advisory support in its chosen areas of practice.

Contact Persons

Stella Duru
sduru@banwo-ighodalo.com

Dipo Akinbode
dakinbode@banwo-ighodalo.com