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***Why the Central Bank is  
Legally Wrong on Dollarisation***



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The Central Bank of Nigeria (the "CBN") has taken a number of extreme measures in recent months that effectively amount to capital control, all presumably intended to slow the decline in foreign reserves arising from the global drop in oil price.

One of these measures was to severely limit what Nigerian-based exporters are allowed to spend their foreign currency export revenue on. Another has been to declare it illegal for persons and businesses in Nigeria to price goods and services supplied in Nigeria in foreign currency.

Through a number of public statements, releases, letters and circulars, the CBN has correctly restated that the Naira is legal tender in Nigeria, but then declared (incorrectly, as would be shown in the rest of this article) that *"it is illegal to price or denominate the cost of any product or service (Visible or Invisible) in any foreign currency in Nigeria and no business offer or acceptance should be consummated in Nigeria in any currency other than the Naira"*.

In the circular from which the above quotation was taken, titled "Currency Substitution and Dollarisation Of The Nigerian Economy" (dated 17 April, 2015 with reference No BSD/DIR/GEN/LAB/08/013) (the "Dollarisation Circular"), the CBN went further to direct that: *"deposit money banks operating in Nigeria are advised 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 (fees, charges, licenses e.t.c.) originating and consummated in Nigeria"*.

The Dollarization Circular is further expressed to supersede "the provisions of Memorandum 16 of the Central Bank of Nigeria Foreign Exchange Manual [the 'CBN Forex Manual']". That Memorandum had recognized the freedom of persons and businesses resident in Nigeria to choose to pay for local goods and services in foreign currency as long as they obtained the required foreign currency from sources outside the CBN-regulated foreign exchange market. By the provisions of the Dollarisation Circular however, the CBN purports to have taken away this freedom.

A lot of concern has been expressed, mostly in banking and business circles, about the impact of the Dollarisation Circular on the implementation of transactions that predated the circular as well as on new and future transactions. How, for example, does the CBN expect two local parties who have entered into a long-term import-dependent supply or service contract to price that contract without reference to the foreign currency input?

In a more recent circular of the same title of "Currency Substitution and Dollarisation Of The Nigerian Economy" (dated 21 May, 2015 with reference No BSD/DIR/GEN/LAB/08/024), the CBN restated that the "pricing of goods and services in Nigeria shall continue to be in Naira only and that it is a criminal offence as stipulated in Section 20(5) of the Central Bank of Nigeria Act, 2007 for any person or body corporate to refuse the acceptance of the Naira as the legal tender currency for payments for goods and services in Nigeria."

A common feature of all of the above circulars and statements of the CBN on this subject has been to make heavy weather of the fact of the Naira being legal tender in Nigeria and effectively conclude that local transactions expressed or conducted in a currency other than the legal tender are for that reason illegal.

That thinking unfortunately completely misunderstands or at least misapplies the concept of legal tender and its implications on the freedom of contracting parties to elect their preferred medium of exchange.

As a matter of law, legal tender simply and squarely means such money as cannot legally be rejected locally in settlement of debts expressed in local currency. In relation to debts expressed in foreign currency but payable locally, the harshest impact that the concept of legal tender could have is that the debtor may have a general right of conversion to local currency. In other words, the debtor may either pay in the stated foreign currency (if he so chooses) or he may exercise his right of conversion and pay in the local currency equivalent and, given that the legal tender cannot legally be rejected, the creditor may be compelled to accept the local currency payment.<sup>1</sup>

Although the CBN has never fully explained the legal basis for the steps it has taken to date on this subject, it is very likely that it has relied on a certain provision of the CBN Act that appears to give the CBN the power to prescribe when foreign currencies may be used in Nigeria.

This provision is to be found in the proviso to the penalty for the breach of the legal tender rule. By section 20(5) of the Act, it is provided that:

“A person who refuses to accept the Naira as a means of payment is guilty of an offence and liable on conviction to a fine of N50,000 or 6 months imprisonment:

***Provided that the Bank shall have powers to prescribe the circumstances and conditions under which other currencies may be used as medium of exchange in Nigeria.”***

*(Emphasis added.)*

Read in a vacuum, it is possible to conclude that the above-highlighted proviso empowers the CBN without limitation to make prescriptions on or (as it appears to have done) proscribe the use of currencies other than the Naira as means of exchange in Nigeria. However, if the proviso is read within the specific context of the penalty section to which it is appended and if also account is taken of the true meaning of the concept of legal tender, the proper conclusion should be different. As the courts in Nigeria and England have decided consistently in a long line of cases, *“as a general rule, a proviso is of necessity limited in its operation to the ambit of the section which it qualifies .... The object of a proviso is normally to cut down or qualify what has been stated before in a section. A proviso does not set out to allocate powers or jurisdiction .... Its function is to create exceptions or relax limitation in a defined sense, or to throw light on any ambiguous import in an enactment...”*<sup>2</sup>

As already stated, the fact of the Naira being stipulated by law as legal tender does not amount to the exclusion of the voluntary adoption of other media of exchange between contracting or trading parties. Indeed, parties may well decide to exchange goods and services for non-monetary considerations without offending the provisions of the CBN Act relating to the Naira as legal tender. It would therefore have been totally unnecessary for the lawmaker to, in introducing the penalty for refusal to accept the legal tender, go to the trouble of creating a proviso that would have the effect of empowering the CBN to grant the public a right that the public always had and that had not been taken away by the CBN Act in the first place or any other law for that matter.

<sup>1</sup>Charles Proctor, *Mann on the Legal Aspect of Money* (Sixth edition) para 1.63(2), p46. and para 7.56, p192.

<sup>2</sup>*NDIC v Federal Mortgage Bank of Nigeria* [1997] 2 NWLR 735 at 755 per Uwaifo JCA. See also *Lloyds & Scottish Finance Limited v. Modern Cars & Caravans (Kingston) Limited* [1964] 2 All ER 732 at 740 and *Re Tabriskey ex parte Board of Trade* [1947] 2 All ER 182 at 183-184.

Hence if the proviso is read within its proper context, it can only reasonably mean that the CBN is by that section empowered to specify certain circumstances under which currencies other than the Naira may be used as a medium of exchange in Nigeria in a manner akin to the legal tender – so that if a party were to refuse to accept the Naira in such prescribed circumstance, that party would not have acted in contravention of clause 20(5) of the CBN Act. In other words, the proviso only empowers the CBN to specify exceptions or circumstances under which the refusal to accept the Naira as a means of payment in Nigeria would not constitute an offence under the CBN Act. So for example, the CBN could on the basis of this proviso specify that United States dollars or, if you like, Russian rubles may be used as a medium of exchange in the Nigerian bond market, and that way any broker or dealer in that market would be at liberty to refuse to accept Naira in exchange for bonds without risking the penalty for such refusal under the CBN Act.

Any attempt by the CBN or anyone else to read more into the proviso would be patently wrong.

Now one would have thought that it was sufficient for the CBN to, as it had done for several years now, simply continue to make the official foreign exchange market inaccessible for the settlement of foreign currency obligations between local parties. Going as far as it now has to purport to prevent everyone in Nigeria from freely agreeing to settle local debts with foreign currency that is properly obtained from sources outside the official foreign exchange market is rather extreme. Asking banks to get into the business of policing the currency in which people transact business, or to re-write the payment terms in their customers' contracts, or *to desist from collecting or paying out foreign currencies on behalf of their customers for local transactions* is even more extreme and downright draconian.

Quite apart from the legal objections to the CBN's recent actions on this subject, there appear to be other sound reasons for the CBN to rethink its position. As the International Monetary Fund concluded in a recent study on dollarisation in sub-Saharan Africa, "administrative measures aimed at forcing de-dollarization can easily backfire and could encourage capital flight and reduce financial sector intermediation, ultimately hindering growth".<sup>3</sup> "An effective de-dollarization strategy requires a mix of sound macroeconomic policies, microprudential measures, and sustained efforts to create the conditions for longer-term domestic capital market development. Measures that provide market-based incentives are most successful."<sup>4</sup> The CBN would do well to pay heed.

<sup>3</sup>Mauro Mecagni et al, *Dollarization in Sub-Saharan Africa: Experience and Lessons*, p. 42. (Washington, D.C.: International Monetary Fund, 2015).

<sup>4</sup>Ibid.