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SANCTIONS

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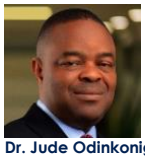
Key contacts



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Lack of Effective Sanctions Regime in Nigeria and Its Impact on Multinationals

First, sanctions are coercive measures deployed by States and/or supranational organisations against a recalcitrant State, non-state entities and/or individuals to do or refrain from doing an act considered illegal, undemocratic or for whatever reason by a sanction giver. In the main, the objective of such sanction(s) is to modify the behavior, reduce the capacity for manoeuvre, weaken the position and publicly denounces the conducts of an erring State, non-state entities, and/or individual(s).

Very often we see States – like the United States, United Kingdom etc – and supranational organisations, such as the United Nations ("UN"), the European Union ("EU"), African Union ("AU"), Economic Community of West African States ("ECOWAS") impose sanctions on erring States, non-state entities and/or individuals. For instance, on 24 February 2022, Russian President, Vladimir Putin, launched a comprehensive invasion of Ukraine by Russian military forces[1].

[1] Russia-Ukraine war live updates: Moscow vows renewed attacks on Kyiv after warship sinks (nbcnews.com)

As a reactionary measure, countries and international organizations – such as the United States (US), the United Kingdom (UK) and the European Union (EU) – immediately imposed economic sanctions on Russia as a means of compelling it to withdraw its forces from Ukraine.

Similarly, the recent contagion of military coups in West Africa over the last year has led to the imposition of economic sanctions against the offending nations by ECOWAS.[2] Some of the economic sanctions include: an embargo on trade against the offending countries; freezing of the countries' assets in member states and regional financial institutions; and total closure of borders against the offending States.

Lack of an established regime for the Enforcement of sanctions in Nigeria

Sanctions are effective and, perhaps, predictable when there is an effective sanctions regime in a State where it is expected to be enforced. Therefore, targets are likely to disobey sanction resolutions when enforcement is or perceived to be weak and/or non-existent. This position is generally blamed on the lack of an effective enforcement regime. Indeed, without an effective sanctions' enforcement regime, no State can validly lay claims to using sanctions – either unilaterally or multilaterally – in compelling a target's change of behavior.

There is little doubt as to the efficacy or enforcement of the sanctions imposed by the United States and the United Kingdom against Russia – especially within both countries' territories and in other Western nations – because of the developed sanctions regimes that they have. In the United Kingdom, sanctions are applicable and enforceable by various regulations. The Sanctions and Anti-Money Laundering Act 2018 provides the legal basis for the imposition, updates and lifting of sanctions in the United Kingdom. The Office of Financial Sanctions Implementation (OFSI), which is part of the HM Treasury, is responsible for ensuring that financial sanctions are understood, implemented, and enforced in the United Kingdom. Put differently, the OFSI ensures proper comprehension of financial sanctions, monitors compliance, and assesses suspected breaches. In the US, sanctions are administered primarily by the US Department of the Treasury's Office of Foreign Asset Control (OFAC). OFAC administers and enforces economic sanctions based on US foreign policy and national security goals. OFAC also has the responsibility of licensing transactions that would otherwise be prohibited by US Sanctions.

In contrast, there is no established legal regime for the administration and enforcement of economic sanctions in Nigeria; and while Nigeria is a member of various international and regional organizations, such as the UN, ECOWAS, AU etc, the imposition of sanctions by these bodies may result in uncertainties primarily related to the effectiveness or otherwise of the enforcement of

sanctions due to lack of, or non-existence of effective enforcement regimes therein.

Further, the effect of this uncertainty is far-reaching on multinationals and businesses operating in Nigeria, since certain transactions or business dealings may be deemed to have contravened international law – even though a State with weak regime may allow it only to be punished elsewhere. There is a potential for loss of reputation and revenues for multinationals or cross-borders businesses caught in the web of Nigeria's weak or non-existent enforcement sanctions regime because a defaulter with presence in the United States or any Western country will surely be punished for the violation that occurred in Nigeria. Of course, the jurisdiction of where the violation occurs does not, in most cases, matter to the sanction giver. For Nigeria, the bad news is that there may be loss of investments and revenues arising from lack of predictability and businesses' fears of being entangled in a weak regime that may give false hopes.

The current legal regime for the enforcement of sanctions in Nigeria

The Nigerian Constitution requires treaties and international instruments to be ratified and domesticated before they could be enforced in the country.[3]

Unlike the US and UK, it appears that – despite the recent creation of the Sanctions Committee – Nigeria does not have something close to the US' OFAC and UK's OFSI. We shall come to the limitation of the Sanctions Committee created under the Terrorism (Prevention and Prohibition) Act 2022 to show that Nigeria does not have a central body charged with the responsibility of administering and/or enforcing economic sanctions in the country.

It appears that the presumption is that enforcement in Nigeria will be decentralized and sector specific. Thus, regulatory agencies may, if directly or impliedly authorised to do so, adopt international sanctions and measures, and, accordingly, enforce them in Nigeria. In recent times, following the absence of a specific legal regime, sanctions appear to be haphazardly enforced and communicated by sectors via circulars. For example, in 2016, the Central Bank of Nigeria directed banks and other financial institutions in Nigeria via a circular dated 21 September 2016 to implement the United Nations Security Council Resolution ("UNSCR") 2270. By this resolution, the UN Security Council adopted Resolutions 2270/2016 to impose sanctions on the Democratic People's Republic of Korea. The circular directed banks and other

[2] ECOWAS slaps sanctions on Mali (african.business).

[3] Section 12 of the Constitution of the Federal Republic of Nigeria. Some examples of domesticated international instruments in Nigeria include: the Child Rights Act No. 26 of 2003; the Geneva Correction Act, Cap G3 LFN 2004 and the International Convention on Civil Liability for Oil Pollution Damage, (Ratification and Enforcement) Act, 2006.

financial institutions to put measures in place to ensure maximum compliance with its provisions[4].

Further, in 2019, the Nigerian Customs Service via Circular No. 013/2015 implemented the ECOWAS Common External Tariff (CET) 2015-2019 and Fiscal Policy Measures[5]. The measures, amongst other things, included an import prohibition list. Despite the uncoordinated nature of this form of sanctions enforcement in the country, it is relevant to note that the referred measures were taken without the domestication of some of the principal international instruments.

This means that regardless of Nigeria's international obligations amongst committee of nations, such sanctions cannot be validly enforced in the country when challenged for failure to comply with the provisions of the Constitution.[6]

It is fundamental that we question the legal viability of implementing sanctions through circulars. The settled position of the law in Nigeria is that circulars do not command the force of law; thus, they cannot validly inform the enforcement of international sanctions when there is no principal legislation providing and/or authorising it. In *FBIR vs. Haliburton (WA) Ltd* 9 All NTC 565[7], the Court of Appeal held that circulars and similar instruments issued by the Federal Board of Inland Revenue (now the FIRS) merely form the opinion of the FBIR as to the interpretation of tax law and do not command the force of law. In essence, circulars cannot be the basis for imposing obligations of pecuniary or similar nature on Nigerians.

The Creation of the Sanctions Committee and its Limitations

A step towards the establishment of a legal regime was somewhat taken by the implementation of a National Sanctions Committee. The pre-cursor to the inauguration of the sanctions committee was the enactment of the Terrorism Prevention Act, 2011 (as amended) ("2011 Act") and subsequently, the Terrorism Prevention (Freezing of International Terrorists Funds and Other Related Measures) Regulations 2013 (the "2013 regulations") made pursuant to the 2011 Act. This law (2011 Act) was later repealed by the Terrorism (Prevention and Prohibition) Act, 2022 (the "Act") and a regulation for the Implementation of Targeted Financial Sanctions Related to Terrorism, Terrorism Financing and Other Related Matters 2022, (the "Regulations") made pursuant to the Act. Both the Act and Regulations incorporate the Nigeria Sanctions Committee (the "Sanctions Committee" or "NSC") earlier established by the 2013 regulations made pursuant to the repealed Terrorism (Prevention) Act, 2011 (as amended).

[4] Nigeria - Global Sanctions Guide (eversheds-sutherland.com)
[5] https://customs.gov.ng/?p=314
[6] See footnote number 4 above.
[7] A similar decision was followed by the Tax Appeal Tribunal in Essay Holdings Limited v FIRS APPEAL NO: TAT/LZ/VAT/029/2019

Under the extant Act, the Sanctions Committee is empowered to provide policy guidelines on the implementation of United Nations Security Council Resolutions (UNSCR); provide a forum for examining any operational or policy issues that have implications for effectiveness or efficiency of the counter-proliferation financing system; take measures to discharge Nigeria's obligations related to targeted financial sanctions imposed by the UNSCRs on Proliferation of Weapons of Mass Destruction; and recommend to the Attorney General appropriate sanctions including travel ban, freezing of funds, assets and other economic interests of persons and entities designated under the United Nations Consolidated List[8] or under the Nigeria List. Further, the Sanctions Committee may recommend (under reasonable grounds) to the Attorney-general that a person, entity or group be designated as a terrorist, terrorist group, terrorist entity or terrorist financier.

From the above, it is clear that a major stumbling block to the efficacy of the Sanctions Committee is that its functions and powers are severely limited in scope. The powers of the Sanctions Committee border on the regulation of financial and other sanctions imposed against the proliferation of weapons of mass destruction and its financing; terrorism and terrorist financing; designation of persons, groups or entities as international terrorists and the implementation of the United Nations Security Council Resolutions in this regard.

The guidelines of the Sanctions Committee are also limited to matters on terrorism financing; unfreezing of funds; and terrorism prevention etc. It does not appear that the mandate of the NSC contemplates the imposition of sanctions by bodies other than the United Nations. For example, bearing in mind the recent imposition of sanctions against Mali, although the Federal Republic of Nigeria is a major player in ECOWAS, there was no mention of any steps towards the enforcement of these sanctions by the NSC. Expectedly, the ECOWAS sanctions imposed solely on the disruption of civil rules in the West African nations concerned do not fall within the jurisdictional scope of the Sanctions Committee. Indeed, without the amendment of the extant Act or the enactment of a new one to cover economic and/or financial sanctions generally, the scope of the current Sanctions Committee is severely limited.

[8] The United Nations Consolidated List which includes all individuals and entities subject to measures imposed by the Security Council in accordance with the (UNSCR) related to Terrorism, Terrorism Financing

Conclusion/Recommendations

The lack of a legally empowered body with wider powers to go beyond terrorism prevention and financing impedes the enforcement of economic and sundry sanctions in Nigeria; and, thus, sends negative signals to treaty partners, supranational organisations that Nigeria belongs to, multinationals and/or ethically responsible cross-border businesses that do not want to be caught in another country violating sanctions with regional and/or global reach mainly because an inadvertence violation of such sanctions are likely to be punished elsewhere.

The obvious implication of the above is that where businesses continue to be uncertain of the enforceability or otherwise of sanctions, there is a potential for loss of investments and profits. The government has already taken a step in the right direction by the establishment of the NSC. However, the mandate of the NSC must be broadened, through an amendment of the Act, to take cognizance of sanctions on other subject matters imposed by friendly countries, regional and/or international organizations. Alternatively, an entirely new legislation should be enacted to establish a body with wider powers to administer and enforce all kinds of international sanctions in Nigeria.

Apart from widening the objectives and powers of the NSC, there must also be mechanisms for the involvement of other regulators for complete enforcement of international sanctions – particularly the Central Bank of Nigeria, Nigerian Investment Promotion Commission, and other bodies regulating trade and investment in Nigeria.

Finally, the Nigerian government must ensure that any regional or international commitments in the form of treaties must be domesticated in accordance with the Constitution to foreclose the adverse opportunity of unenforceability likely to be raised by defaulters.