

TEMPLARS LEGISLATIVE WATCH: THE PROCEEDS OF CRIME BILL 2020 A NEW WEAPON IN THE ANTI-CORRUPTION WAR IN NIGERIA?

In a bid to boost Nigeria's waning anti-graft war, the Nigerian President, Muhammadu Buhari, has presented an Executive bill, known as the Proceeds of Crime Bill, 2020 (the "Bill"), to the Nigerian Parliament.

The Bill contains comprehensive provisions for seizure, confiscation, forfeiture and management of properties derived from unlawful activities and other related matters. Although a number of laws in Nigeria make provisions for law enforcement agencies to apply for the forfeiture of proceeds of unlawful activities,¹ the Bill, if passed into law, will be the first comprehensive Nigerian legislation that deals with seizure, confiscation, forfeiture and management of properties derived from unlawful activities.

It is believed that the Bill will be a critical tool for building a sustainable foundation for the fight against white collar crimes, particularly corruption, money laundering and illicit movement of stolen funds through the Nigerian banking system and across Nigeria's borders.

The salient provisions of the Bill relating to: (1) the establishment of the Proceeds of Crime (Recovery and Management) Agency ("Agency"); (2) non-conviction based recovery of the proceeds of crime; (3) recovery of imported or exported cash; (4) confiscation of proceeds of crime—conviction based recovery of the proceeds of crime; and (5) investigation, search and

seizure of proceeds of crime, are summarized below.

Establishment of the Agency

The Bill establishes and vests the Agency² with exclusive power to deal with the management of seized, confiscated and forfeited properties by all Relevant Organisations³ who must also inform the Agency of any property seized in the course of investigation within thirty (30) days for documentation.⁴ Properties seized, confiscated or forfeited to the Federal Government pursuant to any civil or criminal forfeiture proceedings are also vested in the Agency for and on behalf of the Federal Government.⁵

¹ For example, National Drug Law Enforcement Agency Act, Cap. N30, LFN, 2004; the Corrupt Practices and Other Related Offences Act, Cap. C31, LFN, 2004; the Economic and Financial Crimes Commission (Establishment) Act, Cap. E1, LFN 2004; and the Advance Fee Fraud and Other Related Offences Act 2006.

² See Section 3 of the Bill.

³ Relevant Organisations are outlined in Section 135 and they include but not limited to the Economic and Financial Crimes Commission; the Independent Corrupt Practices and other Related Offences Commission; the Nigerian Police Force; and such other organisations as the Attorney General of the Federation may designate from time to time.

⁴ Section 18(1) of the Bill.

⁵ Section 18(3) of the Bill.

Non-Conviction Based Recovery

The Agency has the power to make non-conviction based recoveries. These are recoveries made without a corresponding or preceding order of conviction. The Agency has the power to obtain preservation orders, forfeiture orders and discovery orders.

Preservation Order

If the Agency believes that a property is either: (i) the proceeds of unlawful activity; (ii) represents the proceeds of unlawful activity; (iii) is involved in the facilitation of unlawful activity; or (iv) is intended to be used to facilitate unlawful activity, the Agency may make an *ex parte* application seeking a preservation order to restrain a person from dealing, in any manner, with the property except as allowed by the order.⁶ The Agency need not show that there is any likelihood that the property will be dissipated or transferred out of jurisdiction.

Forfeiture Order

The Bill also provides that “[w]here a preservation order is in force and before the expiration of the stipulated time, the Agency or the relevant organisation may apply to the court for a forfeiture order against all or any part of the property that is subject to the preservation order.” Where a forfeiture order is granted, the property covered by the order shall be forfeited to the Federal Government and the Agency shall take possession of the property from any person in or entitled to possession of the property and may appoint a receiver to do so.⁷ The Bill also allows the making of multiple preservation or forfeiture orders on the basis of the same unlawful activity or conduct.⁸

Discovery Order

In investigating non-conviction based recoveries, the Agency may apply to the court for discovery orders authorising the Agency to

demand for specified information and document in aid of prosecution or investigation from any person.⁹ Statements made by a person in response to a requirement imposed on him under a disclosure order will not be used in evidence against him in criminal proceedings except as it relates to offences committed in respect of the discovery order or perjury.¹⁰

Recovery of Imported or Exported Cash

The Bill grants a designated officer¹¹ the power to seize and detain any cash¹² in the process of being imported into or exported from Nigeria, if there are reasonable grounds of suspicion that same represents proceeds of unlawful activity, or is intended to be an instrumentality of an offence, or exceeds the prescribed amount under the law and has not been declared to the appropriate authorities.¹³ Cash seized may be detained initially for a period of 72 hours (excluding Saturday, Sunday or any period which is a public holiday in Nigeria) which may be extended by an order of court for a period not exceeding three (3) months from the date of the order.¹⁴

Confiscation of Proceeds of Crime — Conviction Based Recovery of the Proceeds of Crime

Restraint Order

Where a defendant has been convicted of an offence and a confiscation order has been made or is reasonably envisaged to be made, the court may, upon an application made *ex parte* by the Relevant Organisation or the Agency, make a restraint order preventing the disposition of a realisable property or dealing with same in a manner other than as specified in the order.¹⁵

Where the Agency or Relevant Organisation reasonably believes that the property covered by the order will be disposed of or removed,

⁶ Section 21 of the Act. This is quite similar to an interim forfeiture order.

⁷ Section 30(4), 38 (1) & (2) of the Bill.

⁸ Section 40 of the Bill.

⁹ Section 43(3) of the Bill.

¹⁰ Section 43(6) of the Bill.

¹¹ Officer of the Nigerian Customs Service, National Drug Law Enforcement Agency, Nigerian Police Force or Nigerian Immigration Service.

¹² Includes: notes and coins in any currency, cheques of any kind, including travellers’ cheques, bankers’ draft, bearer bonds and bearer shares, or any kind of monetary instrument so specified by the CBN.

¹³ Section 47(1) of the Bill.

¹⁴ Section 41 (2) (3) of the Bill.

¹⁵ Section 57 of the Bill.

the Bill authorises them to enter into the premises and seize the property in a bid to prevent it from being disposed or removed contrary to the restraint order.

Confiscation Order

Where a person has either been convicted of an offence or the court is satisfied that such a person has benefitted from the offence, the Agency or any Relevant Organisation may make an application to the court for a confiscation order, requiring a person to pay to the Agency for deposit into the Confiscated and Forfeited Properties Account, an amount equal to the total proceeds of the person's criminal activities.¹⁶ Where the Agency or Relevant Organisation fails to make the application, the court may, if it considers that it is in the public interest, order the Agency to make an application for the confiscation order.¹⁷

Investigation, Search and Seizure

The Bill provides the Relevant Organisations and the Agency with additional investigative tools, including production order, search and seizure warrant, customer information order and account monitoring order.

Production Order

The Agency or Relevant Organisations may apply for a production order, requiring the person specified in the application and order to either produce a material to an authorised officer or grant access to an authorised officer within the period stated in the order.¹⁸ The order also empowers the authorised officer to inspect, take extracts from, make copies of or retain documents produced or made available under the order.¹⁹ This type of order may also be made in respect of documents in the possession of a Ministry, Department or Agency of Government.²⁰

¹⁶ Section 70(1) of the Bill. Generally, by Section 71 of the Bill, the value of a defendant's proceeds of criminal activity is the sum of the values of the property, services, advantages, benefits and rewards received, retained or derived by him at any time, whether before or after the commencement of the Bill when passed into law, in connection with the criminal activity carried on by him or any other person connected with the criminal activity.

¹⁷ Section 70(2) of the Bill.

¹⁸ Section 88(1) of the Bill.

Search and Seizure Warrants

The Agency or Relevant Organisations may, by *ex parte* application, obtain a search and seizure warrant from the court.²¹ Where an authorised officer enters a premises in execution of a search and seizure warrant, (s)he may seize and retain any material; take a photograph or video record of the premises and its contents; inspect, make copies of, take extracts from any books, record or document; search any person who is on the premises, seize and detain any incriminating article found on him/her; or stop, search and seize any vehicle or conveyance.²² This warrant, however, does not generally confer the right to seize material that is subject to legal privilege.²³

Customer Information Order

The Agency or Relevant Organisations may also, by application, obtain a customer information order from the court with respect to a person who is subject to investigation,²⁴ ordering a financial institution or designated non-financial institution to provide any such customer information it has in relation to the person specified in the application.

Account Monitoring Order

The Agency or Relevant Organisations may obtain an account monitoring order from the court, requiring the financial institutions to provide account information of the description specified in the order to the authorised officer of a Relevant Organisation or the Agency, in the manner and at or by the time, stated in the order.

Confiscated and Forfeited Properties Account

The Bill establishes a special designated account opened and maintained at the Central Bank of Nigeria known as the Confiscated and Forfeiture Property Account.²⁵ The account

¹⁹ Section 90 and 91(1) of the Bill.

²⁰ Section 92 of the Bill.

²¹ Section 98 of the Bill.

²² Section 98(5) of the Bill.

²³ Section 98(3) of the Bill.

²⁴ Confiscation, forfeiture, detained cash, money laundering, civil recovery or terrorist financing investigations.

²⁵ Section 120 of the Bill.

will be managed by the Director-General of the Agency who is responsible for providing reports to the Minister of Finance. The account is designed for the payment of monies and proceeds prescribed under the

Bill. The President may, subject to the approval of the Federal Executive Council, authorise payments out of the account for specific purposes.²⁶

Conclusion

Based on the foregoing, it is clear that the Bill seeks to improve already-existing anti-corruption legislation in Nigeria by generally preventing criminals from profiting from their unlawful conduct. It also seeks to consolidate the various (and uncoordinated) efforts of the numerous Relevant Organisations in tracing, freezing, restraining, seizing, and/or confiscating the proceeds of crime. Interestingly, the Bill also seeks to give wide ranging powers like the granting of Preservation Orders with a relatively low threshold of proof that would need to be monitored to prevent abuse if these powers are retained when the Bill becomes law.

At the moment, the Bill has not been passed for the first reading. Therefore, there are still a number of legislative stages to scale through, including obtaining the concurrence of the two chambers of the Nigerian Parliament before a harmonised Bill is presented to the President for assent. However, given that it is an Executive Bill, we envisage that minimal changes and time will be required. The Bill will likely be given accelerated consideration and may become law by the end of Q3 2021.

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²⁶ Section 122 of the Bill.