



Does The CBN Have The Power to Freeze Fintech Company Bank Accounts? What You Should Know

6 September 2021

Introduction

On 18 August 2021, the Governor of the Central Bank of Nigeria (the “Governor” or “CBN”) obtained an interim freezing order against the bank accounts of some Fintech companies at the Federal High Court, Abuja. The court issued the said order on the back of an ex-parte application filed by the CBN urging the court to freeze the bank accounts of the companies for a period of 180 days pending investigations by the CBN¹.

As basis for obtaining the freezing order – the CBN alleged that the Fintech companies had played roles in 'illegal foreign exchange (FX) trading, accessing/procuring of foreign exchange, foreign securities and cryptocurrency via their bank accounts, from the Nigerian FX Market via Bureaux de Change (BDCs), International Money Transfer Operators (IMTOs) and Commodity Exporters', in contravention of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act (“FEMMPA”), the CBN Foreign Exchange Manual 2018, and the CBN Circular to banks prohibiting financial institutions from trading in cryptocurrencies². Remarkably, CBN's allegations against the Fintech companies do not constitute a crime under the FEMMPA relied upon and the allegations would seem to only relate to breaches or infractions of the CBN FX Manual 2018 and the CBN circular(s) prohibiting financial institutions from trading in cryptocurrencies.

There is no legal basis for the freezing order

Section 97 of the Banks and Other Financial Institutions Act, 2020 (“BOFIA”) empowers the CBN – to apply ex-parte³ to the Federal High Court, for an order freezing any account “... where it has reasons to believe that the transactions undertaken in any account with any bank or other financial institutions are such as may involve the commission of any criminal offence under any law...” The “proviso” (rider) to subsections 3 further allows the CBN to obtain such ex-parte order in furtherance of ongoing investigations where the

¹See copy of Motion ex parte filed by the CBN on 4 August 2021 and order of court granted on 17 August 2021.

²CBN Circular referenced TED/FEM/FPC/GEN/01/012 and BSD/DIR/PUB/LAB/014/001 dated Feb. 5, 2021 and July 01, 2015.

³Exparte means without prior notification to the targeted party, in this case the Fintech companies.

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allegations relate to contravention of the provisions of the BOFIA or any other law administered by the CBN. If for any reason the investigation is not concluded within the period stipulated in the order, the CBN may apply for an extension of the order⁴.

However, it bears mentioning that this power of the Governor to apply for freezing orders and that of the court to grant such orders, is restricted to only where the CBN Governor believes that the transactions under investigations involve **an actual commission of a criminal offence under a written law – not merely a breach/infracton of a CBN directive/manual**.⁵

While the CBN may have obtained the freezing order based on an alleged breach of its FX Manual, it is important to state that by virtue of section 36 (12) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (“the Constitution”), an act will not constitute a crime unless it is clearly defined in, and the punishment for the act is prescribed by a written law.⁶ It therefore follows from the above provision of the constitution that as a matter of law, a person/corporation can only be punished for an offence where the definition and punishment for that offence are contained in a written law - a written law is a law enacted by the National Assembly or the law of a state – and the CBN FX Manual – regrettably fails to qualify as a written law for this purpose⁸. Contrary to the allegations of the CBN, it seems that none of the infractions alleged against the Fintech companies form part of the offences provided under the FEMMPA or any other extant law(s).

The Constitution also presumes the innocence of an accused person until proven guilty⁹, and that presumption implies that the fundamental rights of an accused person – including the right to own and use property – cannot and should not be infringed upon beyond the permissible limits stipulated in the Constitution.

While the CBN argues that the actions of the Fintech companies continue to undermine the CBN's efforts to maintain a stable foreign exchange regime and that the Fintech companies are engaged in illegal activities, it fails to satisfactorily tie the alleged activities of the Fintech companies to any known criminal offence as would support the issuance of the freezing orders by the court.

Premised on the above, we are of the view that the freezing order obtained by the CBN against the Fintech companies is legally unsustainable because the CBN did not meet the threshold for the grant of the freezing order.

The freezing order poses an existential threat to the Fintech Companies

Beyond the legality or otherwise of the freezing order, the action of the CBN, being the apex bank and primary regulator of banks in the country, leaves a bad taste in the mouth and spells doom for Nigeria's ease of doing business reputation. Moreover, the apex bank seems to have taken a course that may hamper the growth and development of Fintech Startups in the country and discourage foreign direct investment and funding opportunities for these startup.

⁴Section 97(4) of the BOFIA:

⁵An act is only adjudged in law as being a “criminal offence”, where that act is prohibited by written law (i.e. a legislation passed by either the National Assembly or a State House of Assembly). See: *Aoko v Fagbemi* (1961) 1 ALL NLR 40; *Paulson v. State* (2012) 6 NWLR (Pt. 1297) 456; *Asake v. Nigerian Army Council* [2007] 1 NWLR 409

⁶*Prince Joshua Paulson v. The State* (2012) 6 NWLR [PT 1297] 456; *Omoju v. The Federal Republic of Nigeria* 2007) LPELR-CA/A/31/C/2005

⁷Section 36 (12) of the 1999 Constitution.

⁸A written law has been defined in the case of *Okafor v. Lagos State Govt.* (2017) 4 NWLR (Pt. 1556) 404 to be an Act of the National Assembly or the law of the State

⁹Section 36(5) of the 1999 Constitution, as amended

As a general rule, where applications are made to court ex-parte, particularly seeking injunctions from the court, the court is obligated to be judicious in its exercise of discretion on whether or not to grant the injunction. Being judicious requires the court to, amongst other things, consider the balance of convenience and generally the public policy implications of granting/refusing the order.

Undoubtedly, the continued maintenance of the freezing order poses a significant existential risk to the survival of the Fintech companies. Additionally, as admitted by CBN in its motion ex-parte to the court, the Fintech companies carry an onerous responsibility of managing investments of members of the public. As such, maintaining the freezing order would appear to be in complete disregard of the interest of members of the public who subscribe to the services of these Fintech Startups.

CONCLUSION

Overall, we reckon with the powers of the CBN to regulate and control the banking sector but find relevant to note that the CBN may have no legal basis to procure the order in the first place. Also, the CBN as a regulator ought to be regulating Startups for scalability and not to be perceived to be regulating them to death, as could be the case if the freezing order is maintained for longer than necessary.

