

POST-NO-DEBIT ORDERS ON THE ACCOUNTS OF CUSTOMERS: LIMITATION TO THE POWERS OF REGULATORY AGENCIES AND FINANCIAL INSTITUTIONS

ARTICLE SERIES



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## **INTRODUCTION**

There are several government agencies regulating various sectors of the Nigerian economy. Most of these regulatory agencies are creation of statutes which usually specify their functions, powers and general mode of operations.

While some of these agencies are responsible for sensitising the citizens about government policies,[1] a good number are charged with the task of enforcing policies, programmes and laws enacted by the Government.[2] These latter agencies usually have established procedures and coercive powers to enforce compliance with their directives. Consequently, they also have different sanctions that carry out unlawful activities

One of the sanctions usually adopted by these agencies, especially where the infraction warranting the sanction involves money, is the issuance of a directive to the financial institution that is in custody of the money to freeze and impose a post-no-debit alert on the account holding the funds.

# LIMITATION TO THE POWERS OF REGULATORY AGENCIES AND FINANCIAL INSTITUTIONS TO ISSUE A POST-NO-DEBIT ORDER

A post-no-debit simply means that all debit transactions, including those involving the use of automated teller machines (ATMs) and cheques, on an account have been blocked. However, money can be deposited into the account.

Thus, it is not unusual for the Central Bank of Nigeria (CBN), as the regulatory agency overseeing the financial sectors of the Nigerian economy to order financial institutions to freeze accounts of individuals it suspects to have committed financial infractions.[3]



For instance, the National Orientation Agency is created to ensure that government programmes and policies are better understood by the general public.
The Central Bank of Nigeria; the Economic and Financial Crimes Commission; the Independent Corrupt Practices and Other Related Offences Commission, et cetera.
The CBN recently instructed banks to place post-no-debit on the accounts of 38 companies, including that of Premium Lotto over various foreign exchange infractions. See CBN memorandum dated 4 September 2020 and signed by Bello Hassan, the Director of Banking supervision.

Similarly, the anti-graft agencies—the Independent Corrupt Practices and Other Related Offences Commission (ICPC) and the Economic and Financial Crimes Commission (EFCC)—have on several occasions instructed banks to freeze accounts of individuals under investigation.[4]

These directives are issued through letters, circulars, or memoranda pursuant to powers derived under the relevant law; and in most occasions, without an order of court authorising same.

However, the recent decisions from the courts appear to have fettered the power of regulatory agencies to freeze and place a post-no-debit alert on bank accounts. For instance, the Lagos State High Court, on 13 August 2020, delivered a landmark decision which could potentially change the tides.

### Blaid Construction Limited & Anor. v. Access Bank Plc.

#### Fact of the case

The Defendant in this suit, Access Bank Plc, (the bank), placed a post-no-debit alert on the accounts of Blaid Construction Limited and Blaid Properties Limited (the Claimants)

pursuant to a letter from the ICPC. Similarly, the EFCC obtained an interim forfeiture order before Justice Adenivi Ademola of the High Court Federal in Suit No: HC/ABJ/CS/432/2016 pursuant to which the bank was also instructed to place a post-nodebit alert on accounts held by the Claimants. This order was meant to last for three (3) months: from 1 July 2016 to 30 September 2016. However, the restraints on the Claimants' access to their accounts continued afterwards thereby prompting this action against the bank.

The action was instituted in May 2017 before the Lagos State High Court wherein the Claimants sought a declaration that the postno-debit order and continued denial of the Claimants' right to access or operate their bank accounts was illegal and unlawful; an order directing the bank to immediately remove and take down the post-no-debit order placed on the accounts; and N500 million damages for breach of bank-customer relationship, among other reliefs.



In their court processes, the Claimants contended that the bank, with which they had long standing banker-customer relationship, was obligated to allow unrestrained access to their accounts and give value to all cheques drawn on the accounts. They alleged that the bank's action made them suffer and that the funds in their accounts have diminished in value and lost over forty percent of its purchasing power.

In its defence, the bank argued that the postno-debit order was placed on the Claimants' accounts in compliance with the letter from ICPC directing it in that regard. It further contended that the ban was extended to the 2nd Claimant's account because both companies use the same Bank Verification Number (BVN) and have the same signatories. The bank submitted that it was in the process of lifting the post-no-debit order when it received another letter from the Special Presidential Investigators' Panel for the Recovery of Public Fund further instructing it to place a post-no-debit alert on the accounts. Thus, it placed the alert on the accounts while it sought clarification from the Attorney General of the Federation as it unclear which directive it was expected to follow.

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#### **Court's Decision**

In its decision, the court held as follows:

a) that ICPC lacked the power to order banks to place a post-no-debit order on bank accounts without first obtaining an order of court;

b) that the only time the claimant's accounts were lawfully frozen was pursuant to the order obtained by the EFCC from the Federal High Court between 1 July 2016 and 30 September 2016; and



c) that the conduct of the bank to "unilaterally" freeze and place a post-nodebit alert (either based on ICPC letters or even the Special Presidential Investigators' Panel) on about seven accounts belonging to the claimants (even though the letter by the ICPC only referred to two accounts) is illegal and in breach of the banker-customer relationship between the parties.

Thus, the court held that the Companies have suffered loss as a result of this breach and ordered the bank to pay N5 Million Naira to the Claimants.

#### Comments

This judgment touches on the power of regulatory agencies, such as the Central Bank of Nigeria and the anti-graft agencies (ICPC, EFCC, et cetera.) to unilaterally, either by way of a letter or circular issue directives to financial institutions to place a post-nodebit alert on the accounts of bank customers, as was the practice with some regulatory agencies.[5] It should be noted, however, that this judgment appears to have limited the unfettered powers given to institutions like ICPC to issue such directive. For instance, Section 45 (1) Corrupt Practices and Other Related Offences Act 2010 (the "ICPC Act") empowers ICPC Chairman to direct seizure and freezing of properties and assets which are subject matter of investigation under the ICPC Act. Section 45 of the ICPC Act provides as follows:

"(1) where the chairman of the commission is satisfied on information given to him by an officer of the Commission that any movable property, including any monetary instrument or any accretion thereto which is the subjectmatter of any investigation under this Act or evidence in relation to the Commission of such offence is in the possession, custody or control of a bank or financial institution, he may, notwithstanding any other written law or rule of law to the contrary by order direct the bank or financial institution not to part with, deal in, or otherwise dispose of such property or any part thereof until the order is revoked or varied."



follows:

Furthermore, this decision appears to have made compliance with the above provision (and similar provision contained in other laws) confusing despite the protection provided for them under subsection (2) of Section 45 of the ICPC Act which provides as follows:

"(2) No bank, agent or employee of a bank shall on account of such compliance, be liable to any prosecution or to any civil proceedings or claim by any person under or by virtue of any law, contract, agreement, or arrangement, or otherwise."

Thus, banks may be torn in two regarding whether they should comply with a freezing directive of a regulatory agency made pursuant to the provision of a law, or to disobey such directive where same is not backed by an order of a competent court.

Recent trend from the courts appears to favour the latter option as in the case of Blaid Construction Limited & Anor. v. Federal Republic of Nigeria,[6] Hon. Justice Binta Nyakoa of the Federal High Court reversed the directive of ICPC which froze and placed a post-no-debit order on the accounts of the Plaintiffs in that suit. This is a directive that was issued pursuant to the power granted under Section 45 (1) ICPC Act 2010.

Looking at the bigger picture, decisions of this nature appear to challenge the function of the legislature, in that powers conferred on a regulatory agency by an Act of the National Assembly may be rendered nonexercisable by the courts in performance of its own judicial function.

### CONCLUSION

In essence, regulatory agencies may now be required to obtain a court order, in addition to their statutory power, if any, before they can validly direct that a post-no-debit order be placed on accounts of individuals that are subject to their regulatory oversight.

Although, this judgment appears to have imposed a multi-layer authenticator by way of a "court order", in the sense that it serves as a means of checking the excesses and abuses of regulatory power by some agencies; it nonetheless has a deeper effect that may run through the fibre of governance and the principle of separation of power.



However, on the basis of the recently delivered decisions of the Courts, financial institutions are advised to always request that any regulatory agency directing it to place a post-no-debit alert on the account(s) of any of its customers, obtains an order of a competent court before it complies with such directives







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