

THE REQUIREMENTS FOR DEALING IN FOREIGN SECURITIES IN NIGERIA AND THE ROLE OF THE REGULATORS



INTRODUCTION

The Nigerian FinTech Industry has been booming with focus on payment services, wealth management and investment technology companies (investment tech [1]). An area of the industry that has gained attention recently is investment tech with the emergence of platforms offering securities of foreign companies to investors in Nigeria using technology.

Although the public has been enthusiastic about taking advantage of this opportunity to widen their investments by buying foreign stocks, the Securities and Exchange Commission (“SEC”) and the Central Bank of Nigeria (“CBN”) – have been more conservative in their acceptance.

THE SECURITIES AND EXCHANGE COMMISSION

On 19 December 2020, SEC released a statement on the decisions of the Investments and Securities Tribunal (“IST”) restraining Chaka Technology Ltd from advertising or offering securities of companies or other entities [2]. The facts of the matter showed that SEC had applied to the IST for the interim order on the grounds that Chaka’s activities – *‘providing a platform for the purchase of shares in foreign companies such as Google, Amazon and Alibaba’* – was outside the regulatory purview of the SEC and without the required registration. Nevertheless, this appeared resolved in March 2021, when Chaka announced that it had obtained a licence from the SEC, created to enable it to provide its services – the Digital Sub-Broker Licence [4].

However, on 8 April 2021, SEC issued a statement warning providers of online investment and trading platforms, with access to securities of foreign companies registered in other jurisdictions, to desist from offering their services to the investment public in Nigeria, even where they are partnered with capital market operators registered with the SEC [5].

The SEC went on to state that only foreign securities listed on an Exchange registered in Nigeria may be offered to the Nigerian public.

This statement by the SEC seemed to confuse investors and FinTech companies who had thought the issue of selling foreign securities was resolved with the issuance of the Digital Sub-Broker Licence to Chaka.

However, a careful review of the surrounding facts will show that the statements made by the SEC are not in conflict.

[1] Fintech companies that provide software tools and solutions to facilitate investing. They also include companies that provide financial data and related analytics
[2] The Securities and Exchange Commission, ‘The Investments and Securities Tribunal Restrains Unregistered FinTech Company from Stock Trading’ (SEC Website, 19 December 2020) < <https://sec.gov.ng/the-investments-and-securities-tribunal-ist-restrains-unregistered-fintech-company-from-stock-trading/> >
[3] ‘Chaka Receives SEC’s First FinTech Licence’ (Chaka’s website) < <https://chaka.com/license> > accessed 27 August 2021
[4] Oluwapelumi Omoniyi, ‘Nigeria’s SEC Introduces Digital Sub-Broker Regulations’ (AELEX Article Series, April 2021) < <https://www.aelex.com/nigerias-sec-introduces-digital-sub-broker-regulations/> > accessed 27 August 2021
[5] The Securities and Exchange Commission, ‘Proliferation of Unregistered Online Investment and Trading Platforms Facilitating Access to Trading in Securities Listed in Foreign Markets’ (SEC Website, 08 April 2021) < <https://sec.gov.ng/proliferation-of-unregistered-online-investment-and-trading-platforms-facilitating-access-to-trading-in-securities-listed-in-foreign-markets/> > accessed 27 August 2021

It is therefore important to examine the regulatory framework of the Nigerian capital markets to understand the parameters under which FinTech companies may offer foreign securities to the Nigerian investing public.

Offering of Foreign Securities - Regulatory Framework

The sale or offering of foreign securities to the Nigerian public is regulated by the Investments and Securities Act 2007 (“ISA”) and the Rules and Regulations of the SEC (“SEC Rules”). Section 67 of the ISA provides that invitations to the public to acquire or dispose of any securities of a company must be on securities of public companies, whether quoted or unquoted, while section 313 of the ISA empowers SEC to issue rules and regulations on the procedure and criteria for regulating cross border offerings, listing and trading of securities by foreign issuers (i.e. foreign securities).

The SEC Rules provide that a company incorporated in a foreign country may issue, sell or offer for sale or subscription its securities to the public through the Nigerian Capital Market and the securities may be denominated in Naira or in any convertible foreign currency [6]. Such securities must be registered with the SEC [7], except where SEC grants an exemption to the registration requirement as provided in Rule 416 of the SEC Rules.

Under this Rule, the SEC has the power to grant exemptions from compliance with the registration requirements, if it is in the public interest to do so and where a reciprocal agreement exists between Nigeria and the issuer’s country, or the issuer’s country is a member of the International Organization of Securities Commission.

A joint reading of these provisions means that the securities of a foreign company may be offered to the Nigerian public, provided the foreign securities are registered with the SEC. We also note that the SEC’s statement issued on 8 April 2021 states that only foreign securities listed on an exchange registered in Nigeria may be offered to the Nigerian public.

This means that Nigerian capital market operators, including Digital Sub-Brokers such as Chaka, may aid investors in buying, selling or dealing in securities of foreign companies provided those securities are registered with the SEC and listed on an exchange in Nigeria. In other words, in the current regulatory landscape, a FinTech company wishing to set up a platform to facilitate the sale of foreign securities to Nigerians must obtain the appropriate licence from the SEC and also be aware of the restrictions on the foreign securities it may offer on its platforms unless an exemption applies.

Of course, this poses a challenge to the kind of disruption FinTech companies are looking to garner with their innovation, in terms of the limited number of foreign securities that are currently registered with the SEC or are likely to be registered

with the SEC in the near future.

While industry stakeholders continue to engage with the SEC on how best to resolve these issues to ensure innovation in the Nigerian capital markets flourishes while adequately protecting the Nigerian investing public, the industry was shaken by the actions of another regulator in the financial sector – the Central Bank of Nigeria.

THE CENTRAL BANK OF NIGERIA

On 17th August 2021, news broke that the CBN had obtained an exparte order from the Federal High Court of Nigeria, freezing the bank accounts of certain Nigerian FinTech companies – including, Rise Vest Technologies Ltd, Bamboo Systems Technology Ltd, Trove Technologies Ltd and Chaka Technologies Ltd – for six months [8] (“the FinTech Order”). According to the news reports, in its exparte application to court, CBN alleged that the companies were operating as asset management companies without the required licences and were utilizing foreign currency from the Nigerian FX market to purchase foreign securities in contravention of the CBN’s foreign exchange policy – thus, weakening the Nigerian Naira against the United State Dollars.

The companies have released statements assuring their users that their investments and funds remain safe and readily accessible.

For example, RiseVest, through its CEO Eke Eleanya Urum, issued a statement on Twitter to its users that investments and funds are safely managed, and funding and withdrawals will continue to be processed as normal, with all its United States operations intact [9].

While the industry and FinTech companies grapple with the effect of the CBN’s actions on their operations going forward, we analyse what may have informed the CBN’s actions, including the Nigerian foreign exchange control regime.

THE NIGERIAN FOREIGN EXCHANGE CONTROL REGIME

Under Nigerian law, the CBN has wide powers on matters concerning Nigeria’s fiscal and monetary policies, including foreign exchange control. The primary legislation that empowers the CBN to regulate exchange control is the Foreign Exchange (Monitoring & Miscellaneous Provisions) Act of 1995 (“the FX Act”).

The FX Act established and designated the ‘Autonomous Foreign Exchange Market’ (the “Official FX Market”) as the market for conducting foreign exchange (“FX”) transactions in Nigeria and empowers the CBN to regulate transactions in the Official FX Market. The FX Act also empowers the CBN to appoint ‘Authorised Dealers’ (typically commercial banks) to act as intermediaries or market makers within the Official FX Market.

[8] Daniel Adeyemi, ‘Nigeria’s Central Bank Freezes Bank Accounts of FinTech Platforms Risevest, Bamboo, Trove and Chaka’ (Tech Cabal, 17 August 2021) <<https://techcabal.com/2021/08/17/cbn-freezes-accounts-fintech-risevest-bamboo-trove-and-chaka/>> accessed 27 August 2021

[9] https://twitter.com/eldivyn/status/1427701527972548613?ref_src=twsrc%5Etfw

In pursuance of its powers, the CBN typically issues manuals, guidelines, and circulars to regulate FX transactions in the Official FX Market. The Revised Foreign Exchange Manual issued in March 2018 (“the FX Manual”) is the primary guide published by the CBN to regulate FX transactions in the Official FX Market.

Under the FX Manual, the purchase of FX from the Official FX Market is limited to “eligible” items/transactions. The FX Manual specifies the items/transactions that are eligible for FX and their documentation requirements. An Authorised Dealer is required to obtain the prior approval of the CBN in respect of any item/transaction that is either unclear or not addressed in the FX Manual and which is not explicitly designated as ineligible for FX by the CBN.

Important to note is that investments in foreign securities are ineligible for funds from the Official FX Market [10]; however, this does not preclude investors from financing the purchase of foreign securities from private sources (such as offshore accounts).

In view of the continued devaluation of the Naira and scarcity of FX in the market, the CBN has been forceful in its enforcement of the exchange control regime and has released several circulars in the past year on the subject. FinTech entities with investment tech platforms must remain mindful of the Nigerian foreign exchange control in their offers to users re dealing in foreign securities.

While we cannot say at this point whether the affected FinTech companies were using funds from the Official FX Market to purchase foreign securities, the question remains whether an exparte order freezing accounts which possibly held investors’ funds was ill advised.

Freezing the Bank Accounts of FinTech Entities – a Fumble?

The power of regulators to freeze the bank accounts of users subject to their regulatory oversight or under investigation, is subject to the provision of the empowering statutes and directives of a competent court of law.

The Banks and Other Financial Institutions Act 2020 (“BOFIA 2020”) provides that the Governor of the CBN, where he/she has reason to believe that an account has been used for transactions involving the commission of a criminal offence under the law, may make an exparte application to the Federal High Court for an order to freeze such accounts issued to the relevant bank or financial institution [11]. Once the account has been frozen, the Governor is to refer to the matter to the Nigeria Police Force, National Drug Law Enforcement Agency, Economic and Financial Crimes Commission or any other appropriate enforcement authority or regulatory authority, or where the matter relates to contravention of any enactments administered by the CBN, then the CBN may be the investigating authority [12]

[10] See Page 85 of the FX Manual and CBN's List of Items Not Valid for Foreign Exchange from the Nigerian Foreign Exchange Markets <https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.cbn.gov.ng/out/2015/ted/ted.fem.fpc.gen.01.011.pdf&ved=2ahUKEwi99uT9r7LxAhUxDGMBHS-DnoQFjADegQIFhAC&usq=AOvVaw0UmbWSOKH-LRAOM08P9N7n&csid=1624610243971>

[11] Section 97(1), BOFIA 2020

[12] Section 97(3), BOFIA 2020

Converting any foreign currency to a use not intended under the FX Act or negotiating any foreign exchange or other trading instrument other than as permitted under the FX Act are offences under the FX Act [13] – a criminal offence which attracts in the case of a body corporate, a fine of ten times the amount of the foreign currency involved [14], plus the foreign currency involved shall be forfeited to the Federal Government of Nigeria (“FGN”) and all the assets, movable or immovable, of a person convicted of an offence under the FX Act shall also be forfeited to the FGN. In addition, for offences committed by a body corporate, every director, manager, secretary or other similar officer of the body corporate, will also be guilty of that offence and liable as stipulated by the FX Act, unless proven that the offence was committed without their consent or connivance, and they had exercised all diligence required of their functions in the body corporate.

With the above provisions, the Governor of the CBN does have the power to apply to the Federal High Court for an exparte order to freeze bank accounts believed to have been involved in foreign exchange transactions not permitted by the FX Act as this is a criminal offence.

However, this is not the first time the CBN has been criticized for using exparte orders to freeze bank accounts indiscriminately. In October 2020, the CBN applied to freeze 20 bank accounts linked to individuals and a company alleged to have sponsored the #EndSARS protests in Nigeria [15],

for the investigation of claims of suspected terrorism financing. Interestingly, the same Honourable Justice who granted the ex parte order in the #EndSARS matter, also heard and granted the FinTech Order.

ExParte Orders

The Federal High Court (Civil Procedure) Rules 2019 (“FHC Rules”) provides that an order made on a Motion ExParte, shall not be valid for more than 14 days after any person affected by the order has applied to the court to vary or discharge the order, unless the court directs otherwise in the interest of justice [16]. In addition, an application to vary or discharge an order made ex-parte may be made by the party affected within 14 days of being served the exparte order and shall not last for more than 14 days after the application has been argued unless the court otherwise directs, while, where a motion to vary or discharge an exparte order is not taken within 14 days of its being filed, the ex parte order shall lapse unless the court otherwise directs in the interest of justice.

It is a settled legal position that exparte orders are meant to serve as stop gap measures in cases of emergency or where it is expedient to do so, and such orders are to be for short periods while an application on notice [17] is brought before the court [18].

[13] Section 29(1), the FX Act

[14] Section 29(2)(b), the FX Act

[15] Alfred Olobunmi: “#EndSARS: Lawyers, activists condemn Nigerian govt. for freezing accounts of protesters” <<https://www.premiumtimesng.com/news/headlines/424971-endsars-lawyers-activists-condemn-nigerian-govt-for-freezing-accounts-of-protesters.html>>; Fikayo Olowolagba: “End SARS: Nigerians threaten protest as court grants CBN request to freeze Rinu, others’ accounts” <https://dailypost.ng/2020/11/07/end-sars-nigerians-threaten-protest-as-court-grants-cbn-request-to-freeze-rinu-others-accounts/>

[16] Order 26 Rule 10 of the FHC Rules.

[17] Where the respondent has been properly served and notified of the court proceedings

[18] Abdulmajied Abolaji, ‘Governor, Central Bank of Nigeria b. 20 Others: An Examination of the Issues Arising’ (Aelex Article Series, November 2020) https://www.aelex.com/wp-content/uploads/2020/11/Governor-Central-Bank-of-Nigeria-v.-20-Others_-An-Examination-of-the-Issues-Arising.pdf accessed 27 August 2021

The Supreme Court of Nigeria in ***Group Danone & Anor v. Voltic (Nigeria) Limited*** [19] explained this further when it held that:

“An ex-parte injunction, is expected to last for a very short time moreso, as the procedure, is likely to be abused by litigants. This is why, the order, must be very sparingly made and only when the circumstances, are urgent and compelling such as to leave the court with no other alternative in preventing an anticipated injury of a grave nature.”

The FinTech Order for 180 days conflicts with the long held principle of the Nigerian courts that ex parte orders are expected to last for short periods, also reiterated in the number of days stipulated in the FHC Rules.

While it may be argued that the FinTech Order lasting for 180 days is ‘in the interest of justice’ as allowed under the FHC Rules, this discretion exercised by the court appears to have been drawn far beyond what could be envisaged under our laid judicial precedents and legal principles.

CONCLUSION

Operating in a developing economy with innovative products and services aimed at disrupting the market certainly comes with its own hurdles. By the nature of a developing economy, regulators in financial sectors are hyper focused on protecting the public and financial stability. It is a difficult task balancing this responsibility with ensuring and fostering innovation in the market.

FinTech entities have to also be responsible in ensuring they remain compliant with the applicable regulatory framework while engaging with the regulatory authorities for better and more effective regulations.

Furthermore, while the SEC is the primary regulator for investment tech platforms offering foreign securities to Nigeria, the role of the CBN in overseeing some aspects of the well-structured operation vis-à-vis foreign exchange considerations cannot be overstated. It is therefore necessary that FinTechs ensure they have strong compliance processes in place so they can be safeguarded against some of these issues that are bound to arise in this emerging market.

[19] (2008) LPELR-1341(SC)



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