

Transactions and Capacities:

A Note on the Legality of Foreign
Exchange Rates Publication in Nigeria



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Following the plunge in value of the Naira against the United States Dollar (Dollars) and other foreign currencies², the Central Bank of Nigeria (CBN), pursuant to its objects³, deployed several measures in a bid to prevent further depreciation and maintain a stable exchange rate. Some of them included limiting foreign exchange (forex) deposits and withdrawals over the counter⁴, allowing foreign remittances to be paid in Dollars⁵, introducing stringent documentation for forex utilisation⁶, and banning the sale of forex to Bureau De Change (BDC) operators.⁷ Also, the CBN had kicked against ‘dollarisation’ of the Nigerian economy via circulars reiterating that the pricing of goods and services in Nigeria should generally continue to be

1 Whilst the author is grateful for the helpful comments of *Afolabi Elebiju, Esq.* (Principal, LeLaw Barristers & Solicitors) to this article; the author is responsible for the views expressed herein.
2 See for example, Abdulkareem Mojeed, ‘Naira Down to 557 Against Dollar; Gains at Official Market’, *Premium Times*, 14.09.2021: <https://www.premiumtimesng.com/business/business-news/484877-naira-down-to-557-against-dollar-gains-at-official-market.html> (accessed 23.09.2021).
3 Per section 2 *Central Bank of Nigeria Act (Establishment) Act Cap. C4, Laws of the Federation of Nigeria (LFN) 2004 (CBN Act)*: “The principal objects of the Bank shall be to - (a) ensure monetary and price stability; (b) issue legal tender currency in Nigeria; (c) maintain external reserves to safeguard the international value of the legal tender currency; (d) promote a sound financial system in Nigeria; and (e) Act as banker and provide economic and financial advice to the Federal Government.”
4 Titobioluwa Okunade, ‘Corrections: Cash Deposit into Domiciliary Account Can Only be Withdrawn Over the Counter’, *Nairametrics*, 26.02.2020; <https://nairametrics.com/2020/02/23/cbn-restricts-withdrawal-of-foreign-currency-deposits/> (accessed 07.10.2021).
5 CBN Circular, ‘Amendment to Procedures for Receipt of Diaspora Remittance’, 20.11.2020: <https://www.cbn.gov.ng/out/2020/ted/ted.fem.fpc.gen.01.011.pdf> (accessed 07.10.2021).
6 Femi Asu, ‘Forex supply: Banks’ Documentation Process Cumbersome, Says FDC’, *Punch*, 06.08.2021: <https://punchng.com/forex-supply-banks-documentation-process-cumbersome-says-fdc/> (accessed 07.10.2021).
7 Oge Udegbonam, ‘CBN Bans Sales of Forex to BDCs’, *Premium Times*, 27.07.2021: <https://www.premiumtimesng.com/news/headlines/475998-breaking-cbn-bans-sales-of-forex-to-bdcs.html> (accessed 07.10.2021).



denominated in Naira only.⁸

Most recently, the CBN launched a scheme tagged, the “**RT200 FX Programme**”, which stands for the “Race to US\$200 billion in FX Repatriation”⁹. One of the objectives of the scheme is to ameliorate forex supply and ease the pressure on the exchange rate. In line with this, the CBN has notified Deposit Money Banks (DMBs) that it will stop selling foreign currency to them by the end of 2022.¹⁰

In an attempt to stop forex manipulations, the CBN reported that it was investigating the activities of a popular website ‘*Aboki fx*’ that published daily movement in the forex market and its founder, for “*illegal foreign*

exchange transactions.”¹¹ The CBN alleged that its founder uses the website for forex manipulations and speculations by purchasing forex to make a profit thereby “*milking the economy by manipulating the exchange rate.*”

This article examines the evolution of Nigeria's foreign exchange regime, the legality of publication of forex rates by individuals and corporate organisations and the extent to which they can involve in forex transactions.

Evolution of Nigeria's Foreign Exchange Regime

The evolution of the foreign exchange market in Nigeria was influenced by factors such as the changing pattern of international

trade, institutional changes in the economy and structural shifts in production. The evolution of the Nigerian forex has seen shifts from *laissez faire* to strict, and variants of liberalisation.¹² Prior to the establishment of the CBN, forex was earned by the private sector and held in balances abroad by commercial banks who acted as agents for local exporters.¹³

All these changed with the establishment of the CBN in 1958 and the enactment of the very restrictive **Exchange Control Act 1962 (ECA)**¹⁴. The emergence of crude oil in the early 1970s enhanced official foreign receipts and led to economic agents patronising the CBN for foreign exchange allocation. The **ECA** forbade the buying, selling and lending of foreign currency in Nigeria by persons other than authorised dealers except with the permission of the Minister.¹⁵

However, these policies distorted the economy as it became too reliant on oil and vulnerable to external factors. The **Exchange Control (Anti-Sabotage) Act¹⁶ (ECAS)** also stipulated penal sanctions for the contravention of the **ECA**. In **Melwani v. Chanhira Corporation**,¹⁷ a transaction to

⁸ CBN Circular, ‘**Currency Substitution and Dollarisation of the Nigerian Economy**’, 17.05.2015: <https://www.cbn.gov.ng/out/2015/bsd/circular%20on%20currency%20substitution%20final%20.pdf> (accessed 07.15.2021). For a general discussion on the CBN stance on anti-dollarisation of the Nigerian economy see: Tochukwu Chikwendu and Chuks Okoriekwe, ‘**Anti-Dollarization Policy: Managing Reality-Issues and Discontents**’, December 2016: https://lelawlegal.com/add111pdfs/LeLaw_-_Anti_Dollarisation_Article.pdf (accessed 07.15.2021); originally published in *BD Legal Business*, 08.12.2016, p.34).

⁹ Emma Ujah, ‘**CBN Unveils RT200 Programme to Attract \$200bn Non-oil Export Revenue**’, *Vanguard*, 10.02.2022: <https://www.vanguardngr.com/2022/02/cbn-unveils-rt200-programme-to-attract-200bn-non-oil-export-revenue/> (accessed 28.02.2022).

¹⁰ Amarachi Orjiude ‘**CBN to Stop Sale of Forex to Banks by December**’ *Punch*, 10.02.2022: <https://punchng.com/just-in-cbn-to-stop-sale-of-forex-to-banks-by-december/> (accessed 28.02.2022).

¹¹ Aderemi Ojekunle, ‘**We Can't Allow You to Kill Our Economy**’, *The Cable*, 17.09.201: <https://www.thecable.ng/cbn-confirms-investigation-of-oniwinde-adedotun-abokifx-founder> (accessed 23.09.21).

¹² For a detailed discussion, see Afolabi Elebiju, ‘**Nigeria: Settling the Foreign Currency Claims Issue**’ [2011] *JIFM* Vol. 3 Iss. 4 (especially at) pp. 155-157.

¹³ See CBN, ‘**Foreign Exchange Market in Nigeria**’, <https://www.cbn.gov.ng/intops/fxmarket.asp#:~:text=Before%20the%20establishment%20of%20the,as%20agents%20for%20local%20exporters.> (accessed 28.03.2022).

¹⁴ **Cap. 113, LFN 1990.**

¹⁵ **Section 3 ECA.** The authorisation of foreign exchange disbursement was shared between the Federal Ministry of Finance and the CBN. The Ministry had charge over public sector applications whilst the CBN dealt with that of private sectors. See **Section 29(1)(e) and (2) ECA**

¹⁶ **Cap. 114, LFN 1990.**

¹⁷ [1995] 6 *NWLR (Pt.438)*, 438 at 460.

transfer shares in a Nigerian company to a foreign company for a consideration in US Dollars without the requisite ministerial consent in line with **section 10(1)(a) and (c) ECA**, was held to be void.¹⁸

The Government then introduced incentives to boost non-oil exports and then subsequently led to the evolution of an exchange rate mechanism to reflect the macro-economic realities. Thus, the Second-Tier Foreign Exchange Market (SFEM) was introduced on 26th September 1986 by the **Second-Tier Foreign Exchange Market Decree 1986 (SFEM Decree)**¹⁹ in line with the Structural Adjustment Programme (SAP) reforms by the Babangida administration.²⁰

The regulatory regime then begun its path towards liberalisation with the enactment of the **Foreign Currency (Domiciliary Accounts) Act (FCDA)**.²¹ Under the SFEM, the determination of the Naira exchange rate and allocation of forex were based on market forces. BDC operators were introduced in 1989 for dealing in privately sourced forex in order to enlarge the scope of the foreign exchange market.²² This then culminated in the enactment of the **Foreign Exchange (Monitoring and Miscellaneous Provisions) Act**²³ (FEMMPA) which repealed the **ECA, FCDA and SFEM Act**.

Currently, going by the CBN's **Monetary, Credit, Foreign Trade, and Exchange Policy Guidelines for Fiscal Years**



2020/2021,²⁴ the CBN acknowledges the interbank, Investors & Exporters FX Window (I&E) and BDC segments of the forex market.²⁵

As previously stated, one of the objects of the CBN enshrined in **section 2 CBN Act** is to ensure monetary and price stability as well as to safeguard “the international value” of the Naira. In furtherance of these objectives, the CBN is empowered to determine the exchange rate of the Naira as stipulated in **section 16 CBN Act** that: “the exchange rate of the Naira shall be determined from time to time by a suitable

mechanism devised by the Bank for that purpose.”

Legality of individuals and corporate bodies publishing exchange rates different from that of CBN

It appears, from an interpretation of the provisions of **National Economic Intelligence Committee (Establishment etc.) Act**²⁶ (NEICA), that individuals and corporate bodies are prohibited from publishing rates different from that of the CBN. **Section 11(1) NECA** states that:

“It shall be an offence for any person, association of individuals or body corporate (whether public or private) to-

a) Engage in foreign exchange transactions other than through the official foreign exchange market; or

¹⁸ For a detailed analysis, see: Bamidele Sanya, ‘The Illegal Transfer of Shares from Nigeria: Melwani and Another v Chanhira Corporation’, [1995] JIBL Vol. 10 Iss. 12, pp.533- 536. See also, Afolabi Elebiju (supra), at pp. 157 -159.

¹⁹ The SFEM Decree No. 23 of 1986 later became the SFEM Act Cap. 405, LFN 2004, pursuant to section 315(1) 1999 Constitution of the Federal Republic of Nigeria (as amended) (1999 Constitution).

²⁰ See Feyi Fawehinmi, ‘A (Not so) Brief History of the Fall of the Nigerian Naira’, Quartz Africa, 06.12.2021: <https://qz.com/africa/564513/a-not-so-brief-history-of-the-fall-and-fall-of-the-nigerian-naira/> (accessed 14.10. 2021).

²¹ Cap. 151, LFN 1990.

²² Ibid.

²³ Cap. F34, LFN 2004.

²⁴ ‘Monetary, Credit, Foreign Trade, and Exchange Policy Guidelines for Fiscal Years 2020/2021’, April 2020, CBN Monetary Policy Circular [No 43] <https://www.cbn.gov.ng/Out/2020/CCD/Credit%20Guidelines%202020-21.pdf> (accessed 27.09.2021).

²⁵ The CBN established the I & E FX window via a circular on 21st April 2017: CBN, ‘Establishment of Investors & Exporters FX Window’ 21.04.2017: <https://www.cbn.gov.ng/out/2017/fmd/establishment%20of%20investors%27%20&%20exporters%27%20of%20window.pdf> (accessed 27.09.2021). Its purpose is to boost liquidity in the FX market and ensure timely execution and settlement for eligible transactions.

²⁶ Cap. N31, LFN 2004.

b) Engage in foreign exchange transactions at a rate higher than that approved by the Bank; or

c) Publish or cause to be published exchange and interest rates other than the rates determined by the Bank from time to time..." Emphasis supplied.

Section 11(2) NEICA then went on to penalise infringement by a fine of ₦100,000 or imprisonment for a term of two (2) years or both, for individuals upon conviction; and a fine of ₦500,000 and the suspension or revocation of certificate of incorporation, for corporates.

However, as stated previously, the **FEMMPA** established an autonomous forex market for transactions in forex.²⁷ **Section 2 FEMMPA** then authorises the CBN to regulate the procedures for transactions in the forex market

by issuing guidelines with the approval of the Minister.

Section 9 FEMMPA permits an "Authorised Dealer"²⁸ or an "Authorised Buyer"²⁹ to trade foreign currency with an "Applicant Purchaser" at a rate mutually agreed by the parties. Thus, **section 9 FEMMPA** seems to conflict with **section 11(b) and (c) NEICA** as the former allows a Purchaser and an Authorised Buyer or Dealer to mutually agree an exchange rate, which may be higher than that approved by the CBN. If the exchange rate is subject to agreement, the likely consequence is that rates (which may be higher than that approved by the CBN), would possibly be published (albeit or at least in a bilateral context, if not to specified third parties or to 'the whole world').

Also in practice, rates for sale and purchase of forex are on display

boards within commercial banks; thus only those within bank premises will see them.³⁰ It is pertinent to state that most newspaper dailies have stopped the publication of parallel market rates for forex, presumably due to the CBN stance on the activities of Aboki fx.

The pertinent question then is which legislation will prevail? **Section 37 FEMMPA** attempts to resolve this contradiction by stating:

"(1) Notwithstanding the provisions of this Act, the relevant provisions of all existing enactments, including the following, that is-

- (a) The Bills of Exchange Act;
- (b) the Central Bank of Nigeria Act;
- (c) the Banks and Other Financial Institutions Act;
- (d) the National Economic Intelligence Committee (Establishment, etc.) Act,

Shall be read with such modifications as to bring them into conformity with the provisions of this Act.

(2) If the provisions of any other law, including the enactments specified in subsection (1) of this section, are inconsistent with those of this Act, **the provisions of this Act shall prevail and the provisions of that other law shall, to the extent of the inconsistency, be void.**"³¹ Emphasis supplied.

From the above, prior legislation



"Only Authorised Dealers and Buyers are constructively authorised to publish forex rates other than the official exchange rate"

²⁷ See **section 1 FEMMPA**: "There is hereby established an Autonomous Foreign Exchange Market (in this Act referred to as 'the Market') where transactions in foreign exchange shall be conducted in accordance with the provisions of this Act".

²⁸ Per **section 14 FEMMPA**, "Authorised Dealer" means any bank licensed under the Banks and Other Financial Institutions Act and such other specialised bank and issued with licence to deal in foreign exchange."

²⁹ "Authorised Buyer" is defined as "any bureau de change, hotel or other corporate body appointed as such by the Central Bank under the provisions of this Act."

³⁰ A current check through the websites of various banks in Nigeria shows that most of them do not publish exchange rate on their websites, however banks like Access Bank Plc that publish, only publish the rate at Investors & Exporters (I&E) window, which is now the CBN rate. Thus, such publication does not fall under the ambit of the NEICA prohibitions. Also, banks publish the forex utilisation (fx sale transactions) to customers.

³¹ Considering that the **Central Bank of Nigeria Act** referred to in **section 37(1)(c) FEMMPA** was re-enacted in 2007 as **Central Bank of Nigeria Act (Establishment) Act Cap. C4, Laws of the Federation of Nigeria (LFN) 2004 (CBN Act)**, the supremacy clause in **section 37(2) FEMMPA** does not apply to the CBN Act. Supremacy clauses in can only affect subsisting laws as at the time the legislation was enacted and not subsequent legislation; given the principle of sovereignty of parliament. This of course does not apply to the supremacy clause contained in **section 1(3) 1999 Constitution** - as the **constitution** is the groundnorm. See: *Uyo Local Govt. v. Akwa Ibom State Govt.* [2021] 11 NWLR (Pt.1786), 1 at 39F-G.

such as the **NEICA** shall be read with such modifications as to bring it into conformity with **FEMMPA** and if there is any inconsistency between it and other legislation, **FEMMPA** would prevail to the extent of such inconsistency.³² Also it is trite that a specific legislation which is later in time, prevails over a general prior one.³³

Since the **FEMMPA** supremacy clause provision does not affect the **CBN Act**, can it still be argued that an Authorised Dealer is not only permitted to publish forex rates, but they can publish a rate higher than determined by CBN?³⁴ If so (assuming but not conceding that same is possible), who then is not permitted to publish exchange rates higher than the CBN rate? From the combined reading of the provisions of the **CBN Act**, **FEMMPA** and **NIECA** it is apparent that an individual or corporate body who is neither an Authorised Dealer nor an Authorised Buyer, is prohibited from publishing forex rates other than the official rate which is the CBN rate.

Can **section 39 1999 Constitution** provision that “every person shall be entitled to freedom of expression including freedom to hold opinions and to receive and impart ideas and information

without interference” be a basis to argue that individuals are at liberty to publish forex rates for their transactions? The “answer” appears to be in the negative.


This is because **section 39 1999 Constitution** (if applicable at all), is not an absolute right; as can be seen from **section 45 1999 Constitution** stipulation that: “nothing in **sections 37, 38, 39, 40 and 41 of the Constitution shall invalidate any law that is reasonably justifiable in a democratic society- in the interest of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedom of other persons.**”³⁵ But does the **NEICA** provisions fall under the exceptions provided by **section 45 1999 Constitution**?

The most probable exception that would justify the curtailing of this right is the interest of “public order”. It could be argued that the indiscriminate publication of forex rates would be chaotic for the economy (as alleged by the CBN Governor), and ultimately lead to a breakdown of public law and order, if the situation is left unaddressed. Notably, **section 29(1)(c) FEMMPA** provides that any person who negotiates any draft, foreign bank note, other forex or any other trading instrument otherwise than

as permitted by **FEMMPA** is guilty of an offence. **Section 92(2) FEMMPA** then stipulates a term of imprisonment of five years or a fine of five times the amount of foreign currency involved; and in the case of a body corporate, to a fine of ten times the foreign currency involved.

Conclusion

As discussed, only Authorised Dealers and Buyers are constructively authorised to publish forex rates other than the official exchange rate. Thus, the CBN is right to investigate the activities of any unauthorised dealers who publishes parallel forex rates.

However, it seems Nigerian corporates can transact with their foreign clients (in a bilateral context only) and advise their counterparties of the forex rate they wish to use, or proceed to negotiate same. Since this would not be published on such corporate bodies’ websites and such forex transaction will be a necessary incident of dealing with non-resident clients who wants to pay in foreign currency, such may be permissible. 

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³² *NDIC v. Okem Ent. Ltd.* [2004] 10 NWLR (Pt.880), 107 at 182H per Uwaifo, JSC: “when the term notwithstanding is used in a section of a statute, it is meant to exclude an impinging or impeding effect of any provision of the statute or other subordinate legislation so that the said section can fulfil itself.” See also *FBIR v. Halliburton* [2016] 4 NWLR (Pt.1501), 53 at 90C-E; *Ndaba (Nig.) Ltd. v. UBN Plc* [2009] 13 NWLR (Pt.1158), 256 at 304B-C.

³³ *A-G Lagos State v. A-G Federation & Ors* (2014) LPELR-22701 (SC); *The Governor of Kaduna State v. Kagoma* (1982) LPELR-3176 (SC). In *Nobis- Elendu v. INEC & Ors.* (2015) LPELR-25127 (SC) at 40A-D Muhammad, JSC held that “the applicable principle in the present circumstance where a specific provision of the statute is subsequent to a general provision, the specific provision prevails in the event of any conflict between the two.”

³⁴ Note also that the CBN is unlikely to use its **section 2 FEMMPA** authority to issue regulations with the approval of the Minister in a manner that will undermine its authority and oversight of the forex market.

³⁵ Emphasis supplied. It is arguable that freedom of expression is a fundamental human right and not “an economic right”.