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A Critical Analysis of the Conformity of Extant Banking and Related Laws with Electronic Banking in Nigeria

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Abstract
It is instructive that most of the laws in the Laws of the Federal Republic of Nigeria (LFRN) 2010 are made without giving due regard to the emergence and fast development of Information and Communications Technology (ICT) in the country. This is so because the LFRN 2010 is virtually a replica of the Laws of the Federation of Nigeria (LFN) 2004. This informs the reason why banking laws and those laws related thereto in the LFRN 2010 are not fully e-compliant, save for the Central Bank of Nigeria (CBN) Act and Nigeria Deposit Insurance Corporation (NDIC) Act which were amended in 2006 and CBN Act further amended in 2007. The laws generally need to be reviewed to incorporate ICT so as not to be isolated in the global trend. The paper analyses the various laws in order that they are made to be e-compliant.

1. Introduction

The focus of this paper is on examination and appraisal of the conformity of some extant banking laws such as the Bank and Other Financial Institutions Act (BOFIA), 1999 and the CBN Act, 2007; and other laws related thereto such as the NDIC Act, 2006 and Foreign Exchange Act, 1995 with electronic banking in Nigeria.

The banking industry in Nigeria which started as far back as 1862, though with neither Nigerian nor foreign legislation, became well established and duly regulated by series of legislation.[1] Taking into cognizance the importance of the business of banking in Nigerian economy and the series of corporate malpractices and financial scam in the then banking institutions, the first banking legislation in Nigeria – the 1952 Banking Ordinance was passed into law. By 1958, another Banking Ordinance was passed, section 25 of which repealed the 1952 Act.[2] Subsequent banking legislations prescribed rules, regulations and principles which any corporate person willing to partake in banking business must observe before it is authorized to do so. These legislations equally impose certain duties and obligations on licensed banks and equally put in place series of rules and conventions empowering the CBN and other related bodies to supervise and control banking institutions so as to ensure smooth running of the business; avoid all the problems experienced by banking institutions prior to 1952; and to safeguard members of the public from losing their funds. The banking sector being a conspicuous and significant partner in every nation's economy needs to be regulated for its stability, reliability, confidence and above all tranquility. The fundamental question is how and to what extent these various legislations guarantee safety in banking business and to what extent do these legislations achieve their aims and philosophical objectives. It may be concluded that to a larger extent, these legislations have played a greater role in enhancing and promoting the conduct of banking business in Nigeria though not without the need for constant review in order to meet up with the global trend. The paper analyses the various laws in order that they are made to be e-compliant. It begins with BOFIA, 1999.

2. Banks and Other Financial Institutions Act, 1999

On the 20th of June, 1991, the Federal Government of Nigeria promulgated Decree No. 25 of 1991 to regulate banking and other financial institutions. The Decree was amended by Decree No. 4 of 1997. In 1998, the Decree was further amended to strengthen the regulatory powers of the CBN. Through the amendments, the CBN may vary or revoke any condition subject to which a licence was granted or may impose fresh or additional condition to the granting of a licence to transact banking business in Nigeria. By the Bank and Other Financial Institutions Decree No. 38 of 1998, the CBN was empowered to withdraw licence of distressed banks and appoint liquidators of these banks, including NDIC.[3]

The Decree was furthermore amended by the Bank and Other Financial Institutions Decree No. 40 of 1999 which makes the provisions relating to failing banks applicable to other financial institutions. It also empowers the Governor of the CBN to remove any manager or officer of a failing bank or financial institution.[4]

BOFIA, Cap 32, LFRN 2010 is the current operative law in this regard. It currently contains sixty-seven (67) sections. Some of the sections in the Act seem to be e-compliant, while some need to be further amended to

[1] <http://dspace.unijos.edu.ng/bitstream/10485/1/266-279.pdf> (08 December 2012).
[2] Ibid.
[3] <http://www.cenbank.org/AboutCBN/history.asp> (08 December 2012).
[4] Ibid.

take cognizance of ICT as earlier highlighted.

Section 23(1) of the Act provides thus:

> Every bank shall display at its offices its lending and deposit interest rates and shall render to the Bank (CBN) information on such rates as may be specified from time to time by the Bank (CBN).

The display of lending and deposit interest rates of a bank should not be limited to the bank offices, but rather the rates should also be displayed on its official website. Hence, the section should be amended to incorporate website of a bank in addition to its office, as part of where the rates should be displayed.

Section 24 of the Act refers to keeping of books of account of a bank, by the bank. Subsection 3 reads thus:

> The books of account shall be kept at the principal administrative office of a bank and at the branches of each bank in the English language or any other language approved by the Federal Government.

The subsection strictly refers to hard copy, and no more, of the books of account of a bank when it talks about the principal administrative office of a bank and its branches. The subsection needs to be amended to include the soft copy of the books of account of a bank kept in its official website so that the head office of the bank could access the books of account of any of its branches worldwide.

The Act could be said to be e-compliant when in section 8(2), it provides thus:

> The Bank (CBN) may, subject to such conditions as it may impose, from time to time, grant to any bank registered in Nigeria or a foreign bank a licence to undertake offshore banking business from Nigeria.

The Act further provides in section 25(1) thus:

> Every bank shall submit to the Bank (CBN) not later than 28 days after the last day of each month or such other interval as the Bank (CBN) may specify, a statement showing-
>
> a) the assets and liabilities of the bank; and
> b) an analysis of advances and other assets, at its head office and branches in and outside Nigeria in such form as the Bank (CBN) may specify, from time to time.

These may truly be said to be impliedly referring to electronic form of banking as section 8(2) of the Act makes reference to offshore banking; and paragraph (b) of section 25(1) of the Act makes reference to branches outside Nigeria from which monthly analysis of advances and other assets of the bank are expected, and these are easily attainable through electronic form of communication.

Section 31(2) of the Act refers to the supervisory duties of Director of Banking Supervision, and it reads thus:

> The Director of Banking Supervision shall have power to carry out supervisory duties in respect of banks and other financial institutions and specialised banks and for that purpose shall -
>
> a) under conditions of confidentiality, examine periodically the books and affairs of each bank;
> b) have a right of access at all times to the books, accounts and vouchers of banks.

The section should be drafted to include, in paragraph (b), electronic record of a bank and not limit the duties of Director of Banking Supervision to examination of books, accounts and vouchers of a bank.

Section 44(5) of the Act deals with general restriction on advertisement for deposits and it reads thus:

> In this Act, "advertisement" includes any form of advertising whether in publication or by the display of notice or by means of circular or other documents or by any exhibition of photographs or cinematograph or by way of sound broadcasting or television or loudspeakers or other public address systems and reference to the issuing of an advertisement shall be construed accordingly; and for the purposes of this Act, an advertisement issued by any person by way of display or exhibition in a public place shall be treated as issued by him on every day on which he causes or permits it to be so displayed or exhibited.

The subsection here while explaining what constitutes advertisement should have simply included electronic advertisement which would have covered exhibition of photographs or cinematograph… as contained in the subsection.

3. Central Bank of Nigeria Act, 2007

In 1948, an inquiry under the leadership of G.D Paton was established by the colonial administration to investigate banking practices in Nigeria. Prior to the inquiry, the banking industry was largely uncontrolled. The G.D Paton report, an offshoot of the inquiry became the cornerstone of the first banking legislation in the country – the Banking Ordinance of 1952. In 1958, a bill for the establishment of CBN was presented to the House of Representatives of Nigeria. The Act was fully implemented on July 1, 1959, when the CBN came into full operation. The CBN Act was further promulgated in 1991 as Decree No. 24.[1]

[1] Ibid.

In 1997, the Federal Government of Nigeria enacted the CBN [Amendment Decree No. 3 and BOFI (Amendment)] Decree No. 4 to remove completely the limited autonomy which the Bank enjoyed since 1991. The CBN (Amendment) Decree No. 37 of 1998 repealed the CBN (Amendment) Decree No. 3 of 1997.[1]

The current legal framework within which the CBN operates is the CBN Act, Cap 50, LFRN 2010 which repealed the CBN Act of 1991 and all its amendments. The Act provides that the CBN shall be a fully autonomous body in the discharge of its functions under the Act and the BOFIA with the objective of promoting stability and continuity in economic management thus:

> The operational autonomy of the Bank is now clearly expressed in line with international best practice. This will not only facilitate the achievement of its mandate but will also engender stakeholder confidence.[2]

In line with this, the Act widened the objects of the CBN to include ensuring monetary and price stability as well as rendering economic advice to the Federal Government. It provides thus:

> The objective of price stability has now been distinctly included in the core mandate of the Bank. This is informed by the fact that the core function of every Central Bank is the maintenance of price stability. It should be noted that macroeconomic stability is essential for growth and development in any economy. Macroeconomic stability is itself a function of price stability which is the ability of a Central Bank to moderate inflation, attain stable interest and exchange rates and create a conducive investment climate for long term growth and development. In order to achieve and maintain this objective however, it is imperative to keep a close watch on government spending as persistently huge budget deficits tend to lead to volatility in prices which in turn negatively impacts the standard of living. The price stability objective will therefore enable the CBN to adopt the necessary measures, in collaboration with the fiscal authorities, to control the rate of inflation.[3]

Throughout the history of legislating CBN Acts, regard was for the first time given to ICT in 2003 when in August, guidelines on electronic banking in Nigeria were designed by the CBN. The CBN recognized that e-banking and e-payments services were still developing in Nigeria. Arising from the three major roles of the CBN in the areas of monetary policy, financial system stability and payments system oversight, the CBN Technical Committee on e-banking produced a report, which anticipated the likely impact of the movement towards e-banking and e-payments on the achievement of CBN's core objectives. Following from the findings and recommendations of the Committee, four categories of guidelines were developed as follows:[4]

- Information and Communications Technology (ICT) standards, to address issues relating to technology solutions deployed, and ensure that they meet the needs of consumers, the economy and international best practice in the areas of communication, hardware, software and security.
- Monetary Policy, to address issues relating to how increased usage of internet banking and electronic payments delivery channels would affect the achievement of CBN's monetary policy objectives.
- Legal guidelines to address issues on banking regulations and consumer rights protection.
- Regulatory and Supervisory, to address issues that, though peculiar to payments system in general, may be amplified by the use of electronic media.

The Guidelines were expected to inform the much envisaged conduct of financial institutions in e-banking and e-payments delivery.

The 2007 Act has also made a landmark achievement in e-banking as it provides thus:

> In furtherance of the objective of promoting a sound financial system and in addition to facilitating a cheque clearing system, the Bank now has the power to develop efficient and robust systems of transactions settlement including electronic payment systems.[5]

4. Nigeria Deposit Insurance Corporation Act, 2006

Nigeria Deposit Insurance Corporation (NDIC) has its origin in the report of a committee set up in 1983 by the Board of CBN, to examine the operations of the banking system in Nigeria. The Committee in its report recommended the establishment of a Depositors Protection Fund. Consequently, the NDIC was established through the promulgation of Decree No. 22 of 15th June 1988. This was part of the economic reform measures taken by the then government, to strengthen the safety net for the banking sector following its liberalization policy and the introduction of the 1986 Structural Adjustment Programme in Nigeria.[6]

> The phenomenal increase in the number of banks from forty (40) in 1986 to one hundred and twenty

[1] Ibid.
[2] Section 1(3), CBN Act, Cap 50, LFRN 2010.
[3] Ibid, section 2.
[4] <http://www.cenbank.org/out/publications/bsd/2003/e-banking.pdf> (05 December 2010).
[5] Section 47 CBN Act, Cap 50, LFRN 2010.
[6] <http://www.ndic-ng.com/about_ndic.htm> (08 December 2012).

(120) in 1992 led to among others – increased competition amongst banks leading to sharp practices; people of questionable integrity becoming bank owners and managers; inadequate manpower; and the coming together of strange bedfellows due to the licensing requirement that banks maintain adequate geographical spread.[1]

All these led to serious breakdown in corporate governance and boardroom squabbles. The unpredictable policy environment, downturn in the economy and political upheavals at the time, also exacerbated the difficult situation the Corporation found itself in. The banking industry was therefore, already in distress by the time the Corporation commenced operations in March 1989. The Corporation operated under a difficult terrain at the time and was immediately saddled with the management of distress in the banking industry, to avert the impending systemic crises and its resultant consequences. Some of the measures undertaken by the Corporation at the time to manage distress in the interest of the depositors and the system included:

- continuous interaction with bank managers/owners;
- imposition of holding actions on distressed banks to restrict operations and encourage self-restructuring – about fifty-two (52) distressed banks had holding actions imposed on them at that time;
- rendering of financial assistance to banks – in 1989 alone, NDIC in collaboration with the CBN granted facilities to the tune of ₦2.3 billion to ten banks with serious liquidity problems;
- takeover of management and control of twenty-four (24) distressed banks between 1991 and 1996;
- acquisition and restructuring of seven (7) distressed banks which were handed over to new investors in 1999 and 2000;
- implementation of Failed Banks Decree No. 18 of 1994. At the end of 1995, about one out of every two banks in Nigeria was distressed. The Decree was intended to assist distressed banks recover their classified assets and punish the malpractices that contributed to the distress. As at June 1996, the Corporation had recovered about ₦3.3 billion.[2]

By January 1998, a total of thirty-one (31) banks had been closed and the Corporation successfully paid depositors their insured deposits. The Corporation also recovered over ₦3 billion from state governments and their agencies, being long outstanding debts owed to the banking industry, hitherto left unpaid. The level of distress was subsequently reduced, while bank owners and managers were challenged to be more responsible in the discharge of their duties.[3]

Consequently, the NDIC Act No. 22 of 1988 was repealed in 2006 and NDIC Act No. 16 of 2006 was subsequently enacted. The Act of 2006 which is now NDIC Act, Cap 390, LFRN 2010, contains in it some aspects of ICT in sections 28 and 29(2) where the sections mentioned accessibility at all times to the books, accounts and vouchers of insured institution including its management information system; and production to examiner by insured institution, of all books, accounts, documents, management information system and all other information.

Section 28 reads thus:

> The Board shall have power to appoint on the recommendation of the Managing Director, such number of examiners who shall-
>
> a) be officers of the Corporation with powers to examine periodically, and under conditions of secrecy, the books and affairs of every insured institution;
> b) have right of access at all times to the books, accounts and vouchers of the insured institution including its management information system;
> c) be entitled to require and obtain information and explanations from the officers, directors and auditors of an insured institution as they may deem necessary in the performance of their duties; and
> d) have access to any accounts, returns and information with respect to any insured institution under the provisions of this Act, which are in the possession of the Central Bank of Nigeria.[4]

Section 29(2) also reads thus:

> An insured institution shall produce to the examiner as and when required, all books, accounts, documents, management information systems and all information as the examiner may deem necessary or request in the exercise of his functions.[5]

The Act however falls short of being e-compliant when it provides thus:

> Where the licence of a failed insured institution is revoked, payment of the insured deposit in such institution shall be made by the Corporation within 90 days either by-
>
> a) cash, negotiable instrument; or

[1] Ibid.
[2] Ibid.
[3] Ibid.
[4] NDIC Act, Cap 390, LFRN 2010.
[5] Ibid.

b) making available to each depositor a transferred deposit in another insured institution in an amount equal to the insured deposit of such depositor provided that where the Corporation is-

i. liable to make payment in pursuance of this section, it shall, at its discretion, require proof of claim from all depositors with the failed insured institution; and

ii. not satisfied as to the validity of a claim for an insured deposit, it may require the final determination by a court of competent jurisdiction before paying such claim.[1]

The Act does not include e-payment or e-transfer in payment of the insured deposit of a failed insured institution whose licence has been revoked.

Furthermore, the Act provides thus:

> If, after the Corporation shall have given at least three months notice to pay to every depositor by mailing a copy to his last known address appearing in the records of the failed insured institution, and publishing a general notice in at least two National Dailies and two electronic media houses with national coverage, notifying insured depositors of the particular failed insured institution of the dates and venue for payment, any depositor of the failed insured institution who-
>
> a) fails to claim his insured deposit from the Corporation within six years after the notice of the Corporation has been sent to the depositor and the notice of payment to the depositors is published in two National Dailies and electronic media houses, shall forfeit such sums to the Corporation; or
>
> b) fails within such period to claim or arrange to continue the transferred deposit with the new insured institution, all the rights of the depositor against the failed insured institution or its shareholders or the receivership estate to which the Corporation may have become subrogated shall thereupon revert to the Corporation.[2]

The Act here also does not contain electronic mailing of copy of notice of payment to depositor. It only talks of the conventional manual mailing system.

5. Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, 1995

The evolution of the foreign exchange market in Nigeria up to its present state was influenced by a number of factors such as the changing pattern of international trade, institutional changes in the economy and structural shifts in production. Before the establishment of the CBN in 1958 and the enactment of the Exchange Control Act of 1962, foreign exchange was earned by the private sector and held in balances abroad by commercial banks which acted as agents for local exporters. During this period, agricultural exports contributed the bulk of foreign exchange receipts. The fact that the Nigerian pound was tied to the British pound sterling at par, with easy convertibility, delayed the development of an active foreign exchange market. However, with the establishment of the CBN and the subsequent centralization of foreign exchange authority in the Bank, the need to develop a local foreign exchange market became paramount.[3]

The increased export of crude oil in the early 1970s following the sharp rise in its prices enhanced official foreign exchange receipts. The foreign exchange market experienced a boom during this period and the management of foreign exchange resources became necessary to ensure that shortages did not arise. However, it was not until 1982 that comprehensive exchange controls were applied as a result of the foreign exchange crisis that set in that year. The increasing demand for foreign exchange at a time when the supply was shrinking encouraged the development of a flourishing parallel market for foreign exchange.[4]

The exchange control system was unable to evolve an appropriate mechanism for foreign exchange allocation in consonance with the goal of internal balance. This led to the introduction of the Second-tier Foreign Exchange Market (SFEM) in September, 1986. Under SFEM, the determination of the Naira exchange rate and allocation of foreign exchange were based on market forces. To enlarge the scope of the Foreign Exchange Market, Bureaux de Change were introduced in 1989 for dealing in privately sourced foreign exchange.[5]

As a result of volatility in rates, further reforms were introduced in the Foreign Exchange Market in 1994. These included the formal pegging of the Naira exchange rate, the centralisation of foreign exchange in the CBN, the restriction of Bureaux de Change to buy foreign exchange as agents of the CBN, the reaffirmation of the illegality of the parallel market and the discontinuation of open accounts and bills for collection as means of payments sectors.[6]

The Foreign Exchange Market was liberalized in 1995 with the introduction of an Autonomous Foreign

[1] Section 21(1), NDIC Act, Cap 390, LFRN 2010.
[2] Ibid, section 22(4).
[3] <http://www.cenbank.org/intops/fxmarket.asp> (10 December 2012).
[4] Ibid.
[5] Ibid.
[6] Ibid.

Exchange Market (AFEM) and the promulgation of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Decree No.17 of 1995 on the 16th of February 1995, for the sale of foreign exchange to end-users by the CBN through selected authorized dealers at market determined exchange rate. In addition, Bureaux de Change were once more accorded the status of authorized buyers and sellers of foreign exchange. The Foreign Exchange Market was further liberalized in October, 1999 with the introduction of an Inter-bank Foreign Exchange Market (IFEM).[1]

The Decree No.17 of 1995[2] has repealed all the previous Acts such as the Exchange Control (Anti-Sabotage) Act; the Foreign Currency (Domiciliary Account) Act and the Second-Tier Foreign Exchange Market Act, and is currently the operative Act in this regard.

The Foreign Exchange (Monitoring and Miscellaneous Provisions) Act[3] needs to be further reviewed to take into consideration the latest global development in the ICT.

Section 2(2) of the Act reads thus:

> Without prejudice to the generality of the provisions of subsection (1) of this section, transactions in the Market shall also be conducted through the usual money market instruments, that is –
>
> a) foreign bank notes;
> b) foreign coins;
> c) travellers' cheques;
> d) bank drafts;
> e) mail or telegraphic transfers; and
> f) such other money market instruments as the Central Bank may, from time to time, with the approval of the Minister, determine.

Paragraph (e) of the subsection should simply be drafted to read 'mail or electronic transfers' which will include the telegraphic transfers.

Section 4 of the Act, while explaining sources from which foreign currency may be sold in the market, provides as follows:

> For the avoidance of doubt, foreign currency from the following sources may be sold in the Market, that is –
>
> a) foreign currency domiciliary accounts maintained in authorised banks in Nigeria;
> b) foreign currency held or imported by –
> i. Nigerian citizens returning home from any other place outside Nigeria;
> ii. foreign nationals resident in Nigeria;
> iii. agency commissions, professional fees and other forms of invisible earnings;
> iv. non-oil export proceeds earned by exporters of Nigerian commodities;
> v. foreign currency held by Nigerian citizens resident in Nigeria;
> vi. foreign currency imported by foreign nationals to purchase goods in Nigeria;
> vii. foreign currency imported or held by foreign embassies, high commissions and international organisations from external sources;
> viii. foreign currency held in external accounts by individuals, bodies corporate and unincorporated, commission agents, professional bodies, insurance companies and other similar bodies;
> ix. foreign currency imported by tourists into Nigeria;
> x. foreign currency provided by the Central Bank;
> xi. foreign currency imported for direct investment in Nigeria; and
> xii. foreign currency from such other sources as the Minister may, from time to time, specify by order published in the Gazette.

The sources should specifically include electronic transfer of foreign currency from outside Nigeria. Therefore, a paragraph should be added in the subsection to reflect the above.

Finally, the phrase "telegraphic transfer" in section 21(1) of the Act should also be replaced with "electronic transfer", which covers the telegraphic transfer. The subsection provides as follows:

> A person who imports foreign currency in excess of US $10,000 or its equivalent in cash and not by means of a bank draft, mail or telegraphic transfer and deposits the foreign currency in a domiciliary account with an Authorised Dealer shall only make cash withdrawals from the account.

[1] Ibid.
[2] Cap 181, LFRN, 2010.
[3] Ibid.

6. Conclusion

The paper traced the history of banking industry as far back as 1862 during which time there was neither Nigerian nor foreign legislation to regulate the industry. The very first banking legislation in Nigeria was in 1952. Subsequently, several legislations were made, as considered in the paper, prescribing rules, regulations and principles regarding the banking industry. Some of the legislations are purely banking while others are related thereto.

The areas in the banking and related legislations which need to be reviewed and amended in order to be in tune with the current and fast global development especially in ICT, were considered in the paper. The areas include some provisions in the BOFIA, 1999; CBN Act, 2007; NDIC Act, 2006; and Foreign Exchange Act, 1995.

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