Nigeria
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Foreign currency controls

Recent Central Bank of Nigeria (CBN) interventions in the Nigerian forex market have led to criticisms of the apex bank's actions. Segments of the economy and international watchers have labelled the series of interventions as knee-jerk reactions to a volatile market, and unsustainable in the long run. Instituted in a number of bold measures, the policies aimed at stabilising the Naira include: the closure of the WDAS (Wholesale Dutch Auction System) and the RDAS (Retail Dutch Auction System) foreign exchange trade windows; the restriction on the use of funds purchased from the Interbank Foreign Exchange Market by authorised dealers; discouraging the payment and receipt of foreign currencies for domestic transactions originating and consummated in Nigeria; the exclusion of importers of certain goods from accessing foreign exchange at the Nigerian foreign exchange markets; and foreign currency spending limits on naira payment cards.


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In the context of cross-border transactions, these actions have grave implications on the ability of a Nigerian counterparty to fulfil a contractual obligation using foreign currency. For example, where payment of foreign currency is required in the settlement of obligations under a contract involving an activity caught under any of the restrictions above, such obligor will be unable to source for foreign currency from the official foreign exchange market and will face the risk of default in the absence of alternative sources of foreign currency. In reaction to this development, parties have explored various options, including amending the contract to be naira based or indexed in dollars with the option of settling in naira where possible.

There are other practical considerations that can arise: is there a legal basis for the CBN to restrict the use of foreign currency in Nigeria? Will affected contracts and transactions (such as forward contracts) initiated prior to the issuance of the CBN directives be allowed to extinguish? The foreign exchange controls employed by the CBN are prescriptive to the nature of foreign currency transactions that authorised dealers can engage in rather than individuals or entities seeking to carry out these transactions. As a consequence, whilst it may not be unlawful for those parties to carry out such transactions, the practical considerations may mean that they are unable to perform contractual obligations which are dependent upon their execution. Consequently, the doctrines of frustration, impossibility and force majeure may be more important than illegality.

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