

UNDERSTANDING THE LEGALITY OF THE NEW OFFER LETTER CLAUSE FOR NIGERIAN BANKS CREDIT FACILITIES

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1. INTRODUCTION

In 2019, the CBN issued a directive to all banks in Nigeria vide a circular titled, **Letter to All Banks – New Offer Letter Clause for Credit Facilities**² dated August 26, 2019 in which the CBN stated that terms and conditions in offer letters and loan agreements must among other things contain certain provisions before they can be signed by prospective obligors.

This article sets out to discuss the legality of the directive in the light of recent developments in the financial sector.

2. THE CBN DIRECTIVE

The CBN directive required that the following covenants and undertakings be included in offer letters and loan agreements to be signed by prospective obligors:

- (a). a covenant to repay the loan as and when due;
- (b). a covenant that in the event of failure to repay the loan and the loan becomes delinquent, the bank shall have the right to report the delinquent loan to the CBN through the Credit Risk Management System or by any other means;
- (c). an undertaking authorising the bank to request the CBN to exercise its regulatory power to direct all banks and other financial institutions to set off the obligor's indebtedness from any money standing to the obligor's credit in any bank account and from any other financial assets they may be holding for the obligor's benefit;
- (d). a covenant that the bank shall have the power to set-off the obligor's indebtedness under

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² Central Bank of Nigeria, Supervision Circulars & Guidelines, Ref: BSD/DIR/GEN/LAB/12/054 available at <https://www.cbn.gov.ng/Documents/bsdcirculars.asp?beginrec=1&endrec=20>



the loan agreement from all such monies and funds standing to the obligor's credit/benefit in any and all such accounts or from any other financial assets belonging to the obligor in the custody of such bank;

- (e). a waiver of all rights of confidentiality arising whether under common law or statute or in any other manner whatsoever;
- (f). An undertaking that the obligor shall not argue to the contrary before any court of law, tribunal, administrative authority or any other body acting in any judicial or quasi-judicial capacity.

The CBN circular further directs that all loan documentation must from the date of the circular contain the Bank Verification Number (**BVN**) of the obligor for individual loans and Tax Identification Number for corporate loans for ease of identification of other deposits of the individual or corporate borrower as the case may be. Upon default on a credit obligation by a borrower, the bank that originated the credit shall request the CBN to invoke the utilization of the defaulting borrower(s) deposits in other banks in repayment of the obligation.

3. Does the Central Bank of Nigeria have the power to make directives

and regulations to bind banks in Nigeria?

In order to understand if the Central Bank of Nigeria has the power to make directives and regulations binding on banks, it is important to examine the enabling laws of the Central Bank.

The Central Bank of Nigeria (CBN) Act and the Banking and Other Financial Institutions Act (BOFIA)³

The CBN Act of 2007 establishes the CBN as the regulating body for all banking matters in Nigeria. The main objects of CBN includes the following: ensuring monetary and price stability; issuing legal tender currency in Nigeria; maintaining external reserves to safeguard the international value of the legal tender currency; promoting a sound financial system in Nigeria; and acting as banker and providing economic and financial advice to the Federal Government⁴.

Section 33 of the CBN Act provides that:

"(1) In addition to any of its powers under this Act, the Bank may –

- (a) require persons and institutions having access thereto at all reasonable times, to supply, in such forms as the Bank may from time to time direct,*

³ Chapter B3, Laws of the Federation of Nigeria 2004.

⁴ Section 2 of the CBN Act, 2007



information relating to or touching or concerning matters affecting the economy of Nigeria; and

- (b) **issue guidelines to any person and any institutions under its supervision.**
(emphasis ours)

Furthermore, the CBN Act authorises the CBN to wherever necessary seek the co-operation of and to co-operate with other banks in Nigeria to promote and maintain adequate and reasonable financial service for the public, to ensure high standards of conduct and management throughout the banking system and to further such policies not inconsistent with the CBN Act which the CBN deems to be in the national interest.⁵

The BOFIA confers on the Governor of the CBN the authority to make regulations for the operation and control of all institutions under the supervision of the CBN.⁶ In addition, the CBN is also authorised to create departments for the purpose of enforcing these regulations.

Based on the provisions of the CBN Act and the BOFIA as set out above, it is it may be deduced that the CBN is authorised to make regulations and issue directives that are binding

on banks. This is because banks are corporate entities that are established to provide banking and are thus under the supervision of the CBN. We may therefore conclude that CBN is able, in publishing the August 26 circular to require that Nigerian banks and financial institutions act or do business in a certain manner without acting outside the scope of its legal authority under the provisions of its governing laws.

The Credit Risk Management System

The Credit Risk Management System (CRMS) was set up by the CBN pursuant to section 57 of the CBN Act. The CBN, in furtherance of its mandate to promote a sound financial system in Nigeria⁷ is authorized to license, and regulate credit bureaux to collect, in such manner as it may deem fit, credit information on the customers of banks and other financial institutions.⁸ For the purpose of licencing and regulating credit bureaux, the CBN is further empowered to collect in such manner it may deem fit from any person or any such credit bureau, credit information on the customers of banks and other financial institutions and the CBN may disclose the information so collected in such manner as may be deemed appropriate by the it.⁹

⁵ Section 42 of the CBN Act, 2007.

⁶ Section 61(1)(a) BOFIA, LFN 204.

⁷ Section 2(d) of the CBN Act

⁸ Section 57(1) of the CBN Act

⁹ Section 57(2) of the CBN Act



In addition to the above, any bank in Nigeria shall, before granting a loan, advance or credit facility to any customer, obtain from the CBN credit information on that customer where the amount of the loan, advance or credit facility is up to NGN1 million (one million naira) or such sum as may be set from time to time by the CBN.¹⁰

These credit information provisions were enacted as a result of the financial distress experienced in the Nigerian banking sector in the late 1980s and early 1990s which was due to a large extent by increasing non-performing credit portfolios in Nigerian banks. In addition to this, it was discovered that there were predatory debtors in the banking system whose modus operandi involved the abandonment of their debt obligations in some banks only to contract new debts in other banks. Furthermore, the use of status enquiries on bilateral basis between banks was characterised by some weaknesses. Status enquiries were regarded as business courtesies to which some banks either did not respond to or gave vague replies. In spite of the systemic weakness, many banks continued to extend fresh facilities to customers who already had extensive and un-serviced debt portfolios with other banks and financial institutions. On the part of the regulators, the paucity of credit information had inhibited consistent

classification of credits granted to certain borrowers and their associated companies.

Consequently, it was imperative that a central database be developed from which consolidated credit information on borrowers could be obtained. It was against this background that the CRMS was established pursuant to the provisions of section 57 of the CBN Act. The enabling legislation empowered the CBN to obtain from all banks, returns on all credits with a minimum outstanding balance of ₦1,000,000.00 (One Million Naira only and above of principal and interest), for compilation and dissemination by way of status report to any interested party (i.e. operators or regulators). The Act made it mandatory for all financial institutions to render returns to the CRMS in respect of all their customers with aggregate outstanding debit balance of N=1,000,000.00 (One million naira) and above. It also required banks to update these credit reports on a monthly basis as well as make status enquiry on any intending borrower to determine their eligibility or otherwise. Banks are penalized for non-compliance with the provisions of the Act.

Objectives of the CRMS

¹⁰ Section 57(3) of the CBN Act



The following have been stated as the objectives of the CRMS:¹¹

- (a). Strengthening the credit appraisal procedures of banks:

This is achieved by generating accurate and reliable credit information on bank borrowers from a central database. With such information available, banks will be in a better position to appraise the repayment capabilities of customers seeking new or additional credit facilities from them. This will reduce or eliminate the granting of loans to customers who have no capacity to repay and/or already have non-performing and sometimes abandoned loans in other banks.

- (b). Storage and dissemination of credit data:

The CRMS captures all credits of N1 million (principal and interest) and above from banks' monthly returns on all their customers. Banks are also required to provide all other relevant data on the facilities such as names of borrowers, directors of borrower companies, credit limit, outstanding amount, status of credit, securities pledged, etc. These data are collated in the CRMS

database, and made available to banks through a credit status enquiry/report. The CRMS provides objective responses to status enquiries to promote a responsive borrowing culture. The customers who meet their obligations as contracted will consequently continue to have access to credit facilities, while delinquent customers are denied access to new facilities from other banks until they make good their outstanding delinquent credits.

- (c). Monitoring of over-exposure to borrowers:

The consolidated credit information generated by the CRMS will enable banks to identify borrowers who have contracted debts in excess of their repayment capabilities. Banks are thus put on notice to avoid putting their funds into areas or sectors that are already experiencing a lull or declining prospects. It will also assist banks in the evaluation of the viability or otherwise of proposals on loans from customers.

- (d). Facilitating consistent classification of credits:

The CRMS will facilitate regulators' consistent classification of credits

¹¹ Credit Risk Management System. Retrieved from

<https://www.cbn.gov.ng/Supervision/crms.asp> and accessed on 10 November 2019



granted to the same borrower(s) by different banks.

- (e). Grant CBN first-hand information on a customer's global debt profile:

CBN will have first-hand information on a customer's global debt profile thereby eliminating the erroneous classification of a customer's loan as performing in one bank and doubtful or lost in another bank.

Based on the foregoing, commercial banks in Nigeria are authorised to provide credit information on a borrower to the credit bureau which information shall be provided to the CBN. In addition, the Act mandates banks in Nigeria to obtain from the CBN, credit information on a customer before granting such customer a loan, advance or credit facility where such loan, advance or credit facility of up to one million naira or such sum as may be set by the CBN from time to time.

4. Can the debt of a bank's customer can be set off from the customer's account in another bank?

A set-off is generally in the form of a cross-claim for a liquidated amount and it can only be pleaded for a liquidated claim.¹² Usually, a banker's right to set-off is said to arise in a situation where a customer has more than one account with his bank, at least one of which is in debit and one of which is in credit. It is also known as the right to combine accounts.¹³ Thus, in this situation, when money is held by a bank in one account and the payer in respect of these moneys owes the Bank on another account, the banker's lien and the right of the banker to set off the money by way of adjustment of the accounts gives the bank a charge on all the moneys of the payer in its hands, so that they may be transferred to whatever account the bank may choose to set off the debt. This right of the banker to give effect to a set off by way of combination of the accounts concerned is based on the principle of equity¹⁴ and has been well espoused under Nigerian case law. In the case of *Alabi v Standard Bank of Nigeria*,¹⁵ a banker's right to set-off was defined as the right to retain a credit balance in customer's account against a debt owed to the bank or to treat the fund

¹² Milosevic Fiske LLP (2019) A Set-Off in Litigation: A Shield or a Sword. Retrieved from <https://www.mflitigation.com/media/a-set-off-in-litigation-on-a-shield-or-a-sword/> accessed on 11 November 2019.

¹³ Set-off. Retrieved from <https://uk.practicallaw.thomsonreuters.com/4-107-7242?transitionType=Default&contextDa>

[ta=\(sc.Default\)&firstPage=true&bhcp=1](ta=(sc.Default)&firstPage=true&bhcp=1) accessed on 11 November 2019.

¹⁴ Equitable Right to Set-Off – Law and Definition. Retrieved from <https://definitions.uslegal.com/e/equitable-right-to-set-off/> accessed on 11 November 2019.

¹⁵ (1967-1975) 2 N.B.L.R 551 (High Court of Kaduna State)



in the customer's account as not available to meet drawings.¹⁶

In the case of *Barbedos Ventures Limited V First Bank of Nigeria Plc*,¹⁷ the court held that the right of set-off is usually available to a banker when it assumes the position of creditor in banker-customer relationship. In the case of *Adejuwon v. Cooperative Bank Limited*,¹⁸ the court, restating the decision in the celebrated case of *Garnett v. M'Kewan and Greenhalgh*¹⁹ held that

"If a banker agrees with his customer to open two or more accounts, he has not, in my opinion, without the assent of the customer, any right to move either assets or liabilities from the one account to the other..."

5. Does the CBN have the right to require a bank's customer to waive his right of confidentiality?

The extent of banker-customer relationship was expounded by Lord Atkin LJ in case of *Tournier v. National Provincial & Union Bank of England*,²⁰ where the learned Judge described the duty of confidentiality in a banker-customer relationship as follows:

"It clearly goes beyond the state of the account, that is whether there is a debit or a credit balance and the

amount of the balance. It must extend, at least, to all credit balance that go through the account, and to the securities, if any, given in respect of the account, and in respect of such matters it must, I think extend beyond the period when the account is closed or ceases to be an active account...I further think that the obligation extends to information obtained from sources other than the customers actual account, if the occasion upon which the information was obtained arose out of the banking relations of the bank and its customers, for example, with a view to assisting the bank in coming to decisions as to its treatment of its customers..."

From the above, every bank customer has the right to freedom from disclosure of the customer's account details by the bank as well as intrusion into the customer's account by third party. In other words, the customer's bank must not divulge the customer's account information to a third party; the bank must also protect the customer's information from unauthorised access by a third party. There are, however, exceptions to this right. For instance: (a) where the bank is required by law to make disclosure; and (b) where the

¹⁶ Bankers of Tomorrow. Banker's Right of Set-Off. Retrieved from <https://bankersoftomorrow.blogspot.com/2015/06/banker-right-of-set-off.html?m=1> accessed on 11 November 2019.

¹⁷ SC 337/2013
¹⁸ 3PLR/1992/4 (CA); 3 NWLR (Pt.228) 251
¹⁹ (1872) 2 L.R. 8 Ex. 10
²⁰ (1942) 1 KB 461



customer consents to the disclosure.²¹

In discharging its duties, the CBN Act mandates the CBN to take account of matters of a confidential nature supplied, but where the CBN is satisfied that it is in the national interest and that the person supplying the information does not object to a proposal to publish it within a reasonable time of becoming aware.²² The CBN may also, in the exercise of its powers, enter into an agreement or arrangements with other regulatory authorities in Nigeria to require an exchange of information for the purpose of enhancing the supervision and regulation of financial institutions.²³

Although confidentiality is implied from the very beginning of the banker-customer relationship, banks and other financial institution have started to include in their contracts with customers terms dealing with confidentiality under different headings, such as the use of customers' personal information, personal information or simply by reference to term confidentiality. Thus, confidentiality has become an explicit legal term in the banker-customer contract.

The nature of the relationship between the banks and their

customers was recently reiterated in the case of *UBA Plc v. Bakare Wasiu*,²⁴ where the court held that a bank in possession of a customer's money by an analogous reasoning is in the position of a trustee and it can thus not be underestimated that one of the functions the bankers owe its customers is to maintain secrecy concerning the customer's account and other affairs. Secrecy of customers account is fundamental. Banks have to be careful not to divulge account details of their customers to a third party, including another bank. The obvious rationale for this proposition is that disclosure of matters related to the financial position of a customer may cause considerable harm to his credit and business.²⁵

There are many logical reasons for obliging the banks to keep customers' confidential data private before, during, and after their relationship. First of all, information provided to the bank at any period during the banker-customer relationship does indeed fall under the bank's duty of confidentiality according to the common law definition of confidence. Secondly, the customer's right of privacy must certainly be respected and a most important aspect of a person's rights is the right to keep his/her information private. There is the

²¹ Bank Customers' Bill of Rights. Retrieved from https://www.cbn.gov.ng/Devfin/Bank_Customers_Bill_of_Rights.pdf accessed on 11 November 2019.

²² Section 33(2) of the CBN Act

²³ Section 33(6) of the CBN Act

²⁴ (2017) 4 NWLR (pt. 1555) 318 C.A

²⁵ Adejuwon v. Cooperative Bank Limited, 3PLR/1992/4 (CA); 3 NWLR (Pt.228) 251



further possibility that disclosure of any confidential information after the termination of the banker-customer relationship may cause loss or damage to the person. Finally, a customer's confidential information could be of a commercially sensitive nature, and disclosure might adversely affect his/her subsequent business or commercial activities.

Given the above exemptions, it seems that the bank's duty of confidentiality should be maintained indefinitely, even after the customer's death, provided the law does not indicate a specific time for the termination of the duty. In *Tournier v. National Provincial & Union Bank of England*,²⁶ disclosure of a customer's information may be mandated by law and in such cases, the bank has no choice but to adhere to the rules of law. Further, the case of *Tournier*²⁷ also gives another instance where the bank will not be in breach of disclosure – where a customer gives explicit approval for the revelation of confidential information.

Thus, the import of the CBN circular dated August 26, 2019 is that the CBN, exercising its powers by virtue of the CBN Act and the BOFIA mandates banks to include a covenant permitting bankers' set off and waiving the customers' rights to confidentiality. On the other hand, the customer enters into a

contractual agreement (voluntarily) where the customer permits the bank to set-off his debt and agrees to waive his right to confidentiality. This, in essence, fulfils the conditions set out in the famous *Tournier*²⁸ case.

Furthermore, in Nigeria, there are little to no provisions of the law which protects parties from onerous terms in a contract compared to the English legal system where the Unfair Contract Terms Act 1977 applies. Thus, in Nigeria, where a customer agrees to the terms of a contract (in the absence of vitiating elements of a contract) in the course of applying for a loan or credit facility from a bank, such customer will therefore be deemed to have consented to the terms contained in the letter, however onerous.

Overall, it is fair practice to obtain the customer's express consent before passing any confidential information to another party and if the bank fails to obtain consent, it will be liable for breach of a duty of confidentiality. Moreover, unless there is a legal reason, the bank has no right to refuse to disclose customer's information if such disclosure is in accordance with the customer's request.

6. CONCLUSION

The CBN is authorized to regulate the banking sector by virtue of the CBN Act which establishes it. It is

²⁶ (1942) 1 KB 461
²⁷ Supra

²⁸ Supra



further authorized to issue guidelines to any person and any institutions under its supervision in order to promote a sound financial system in Nigeria. In fulfilling this obligation, the CBN acted well within its jurisdiction in issuing the circular dated August 26, 2019.

In addition, the circular took into consideration the decision of the court in the *Tournier*²⁹ case thus ensuring that the covenant to permit the bankers' set off and waive confidentiality is a contractual term between the customer and the bank.

²⁹ Supra

