ALUKO & OYEBODE

Money Laundering (Prevention and Prohibition) Act 2022

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Overview

On 12 May 2022, the President of the Federal Republic of Nigeria, Muhammadu Buhari as part of the efforts to strengthen the AML/CFT regime in Nigeria signed into law the following Bills; (i) Money Laundering (Prevention and Prohibition) Bill, 2022 (ii) Terrorism (Prevention and Prohibition) Bill, 2022 (iii) Proceeds of Crime (Recovery and Management) Bill, 2022. These laws seek to address the issues arising from Nigeria's poor ratings in the Mutual Evaluations by the Financial Action Task Force ("FATF") and provide measures for effective implementation.

Money Laundering (Prevention and Prohibition) Act 2022 (the "Act")

The Act repeals the Money Laundering (Prohibition) Act 2011 ("Repealed Act") and provides a more comprehensive legal and institutional framework for the prevention and prohibition of money laundering in Nigeria.

Key Amendments to the Law

Linked Transactions and Split Payments

A significant introduction is that the Act prohibits a person from conducting two or more transactions separately with one or more financial institutions or designated non-financial ("DNF") businesses and professions with the intent to— (i) avoid the duty to report a transaction which should otherwise be reported under the Act; and (ii) breach the duty to disclose information under the Act by any other means. There was no express provision on linked transactions/split payments under the Repealed Act.

Reporting Foreign Transfers

The report of transfers to or from a foreign country of funds or securities by a person or body corporate including a Money Service Business of a sum exceeding US$10,000 is required to be made to the Nigerian Financial Intelligence Unit ("NFIU"), Central Bank of Nigeria ("CBN") or the Securities and Exchange Commission ("SEC") and shall now be made within 1 (one) day from the date of the transaction. This is a significant reduction from the previous window of 7 (seven) days from the date of the transaction.

Declaration

The Act requires the Nigeria Customs Service to report any declaration of transportation of cash or negotiable instruments above US$10,000 to the CBN and the NFIU rather than to the CBN and the Economic and Financial Crimes Commission ("EFCC") which was the case under the Repealed Act. The EFCC is therefore no longer a direct recipient of such information.

Verification

In the identification of customers, financial institutions and DNF businesses and professions are now required to take "reasonable measures" to verify that any person purporting to act on behalf of a customer is so authorised, identified and the identity of such person is verified. However, the Act does not expressly define what such reasonable measures entail. Under the Repealed Act, reasonable measures on the verification of identity was limited to beneficial owners and did not extend to persons purporting to act on their behalf.

Politically Exposed Persons ("PEPs") and Persons Entrusted with a Prominent Function by an International Organisation

The Act now provides in addition to the senior management level approval and the existence of an appropriate risk management system provided under the Repealed Act, requirements to: (i) take reasonable measures to establish the source of wealth and the source of funds of customers who are PEPs; and (ii) conduct enhanced ongoing monitoring on that relationship.

Duties Incumbent Upon Casinos

The Act amends the definition of a casino to include, whether licenced or not, an internet casino, ship-based casino, a building or room used for meetings, entertainment, gambling or dancing and equipped with gambling devices, gambling tables .

The register detailing transactions and customer details of casinos are now required to be forwarded to SCUML whereas under the Repealed Act, it was forwarded to the Federal Ministry of Trade and Investment.

Occasional Cash Transaction by DNF Businesses and Professions

The declarations by DNF businesses and professions involved in cash transaction are required to be made to the SCUML and the register is to be submitted to the NFIU.

Under the Repealed Act, it was to be made to the Ministry of Trade, Industry and Investment and the register forwarded to the EFCC. service on the website.

Suspicious Transaction Reporting ("STR")

The definition of STR has now been expanded to include a transaction that is inconsistent with the known pattern of the account or business relationship. In addition, under the Repealed Act, the STR report was made to the EFCC. Reporting institutions are now required to notify the NFIU immediately on transactions deemed suspicious as the case may be immediately and thereafter, a written STR drawn up and submitted within 24 hours.

[1] PEPs include —

(a) individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or Government, senior politicians, senior government, judicial or military officials, senior executives of State owned corporations and important political party officials, (b) individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or of Government, senior politicians, senior government, judicial or military officials, senior executives of State owned corporations and important political party officials, and (c) persons who are or have been entrusted with a prominent function by an international organisation and includes members of senior management such as directors, deputy directors and members of the board or equivalent functions and their family members and close associates, other than middle ranking or more junior individuals in the foregoing categories.

[1] Section 4(7-9) of the Act
[1] Section 5 of the Act
[1] Section 30 of the Act
[1] Section 6 of the Act

Internal Procedures[1]

The Act now stipulates a penalty of not more than NGN1,000,000.00 (One Million Naira) for DNF Businesses and Professions for the failure to develop programmes to combat the laundering of the proceeds of crime or other unlawful acts. Under the Repealed Act, the penalty only applied to capital brokerage firms and other financial institutions.

DNF Businesses and Professions

The Act now uses the term, Designated Non-Financial businesses and professions as opposed to Designated Non-Financial Institutions used under the Repealed Act. It also goes further to list the businesses and professions that fall under this category[2].

It should be noted that lawyers are still listed under the category of DNF Businesses and Professions. Lawyers had also been identified as DNFI's under the Repealed Act, however, the Court of Appeal in the case of Central Bank of Nigeria v. Registered Trustees of the Nigerian Bar Association & Attorney General of the Federation[3] upheld the decision of the Federal High Court deleting Legal Practitioners from the definition of DNFIs. The court stated that; (i) if the legislature had intended to make the Repealed Act supersede the Legal Practitioners Act[4] ("**LPA**") and Section 192 of the Evidence Act[5] ("**EA**"), it would have expressly stated so; (ii) the LPA already provides extensively for the registration, regulation, and discipline of legal practitioners; (iii) the LPA contains specific provisions on legal practitioners which override the general provisions of the Repealed Act.

The rationale for the resolute inclusion lawyers in the Act may be linked to the issues raised and recommendations given in the Mutual Evaluation Report recommending legal practitioners to be listed as a DNF Business and Profession. The Report states that, "***Furthermore, despite the gatekeeper role of lawyers in Nigeria's economy, particularly***

[1] Section 10 of the Act
[2] Designated non-financial business and profession" include— (a) automotive dealers, (b) businesses involved in the hospitality industry, (c) casinos, (d) clearing and settlement companies, (e) consultants and consulting companies, (f) dealers in jewelries, (g) dealers in mechanised farming equipment, farming equipment and machineries, (h) dealers in precious metals and precious stones, (i) dealers in real estate, estate developers, estate agents and brokers (j) high value dealers, (k) hotels, (l) legal practitioners and notaries, (m) licensed professional accountants, (n) mortgage brokers, (o) practitioners of mechanised farming, (p) supermarkets, (q) tax consultants, (r) trust and company service providers, (s) pools betting, or (t) such other businesses and professions as may be designated by the Minister responsible for Trade and Investment.
[3] CA/A/202/2015
[4] Cap L11 LFN 2004
[5] Cap. E14, Laws of the Federation of Nigeria, 2004

concerning legal persons, PEPs and high net worth clients, AML/CFT requirements are inoperative against lawyers". However, it would have been expected that in drafting the Act and classifying legal practitioners as a DNF Business and Profession, the legislature would have specifically addressed the issue and indeed subordinated the provisions of the LPA and EA as they affect legal practitioners and make the Act specifically supersede its provisions.

Mandatory Disclosure[6]

The new Act now provides for a limitation to legal professional privilege and the invocation of client confidentiality. The limitation includes mandatory disclosures in connection with: (i) the purchase or sale of property; (ii) the purchase or sale of any business; (iii) the managing of client money, securities or other assets; (iv) the opening or management of bank, savings or securities accounts; (v) the creation, operation or management of trusts, companies or similar structures; or (vi) anything produced in furtherance of any unlawful act. We again link this to the recommendations contained in the Mutual Evaluation Report which further stated that, ***"Lawyers do not file STRs due to a decision of a High Court which declared the filing of STRs as a breach of the legal professional privilege between lawyers and their clients."***

The EA[7], Rules of Professional Conduct[8] made pursuant to the LPA already have extensive provisions on attorney-client privileges and its limitations. To the extent that these laws of equal jurisdiction conflict and that there was judicial guidance subsisting on how an act could attain superiority , the draftsman did not heed the instruction of the judges of the FHC[9] and the Court of Appeal[10] (in the case of *Registered Trustees of Nigerian Bar Association V. AGF & CBN*) on the need for the express mention and subordination by the Act in order to supersede the applicable existing laws- the LPA and EA in regulating the practice of legal practitioners. There is certainly no express provision in the Act for the subordination of the LPA and EA in relation to attorney-client privilege.

Risk Assessment of New Products Business Practices and Technologies[11]

Financial institutions and DNF businesses and professions are now required to identify and assess the money laundering and terrorism financing risks that may arise in relation to the development of new products and new business practices, including new delivery mechanisms, and the use of new or developing technologies for both new and pre-existing products in accordance with the requirements specified by the regulatory authorities.

Furthermore, financial institutions and DNF businesses and professions must; (i) undertake the risk assessments prior to the launch or use of such products, business practices and technologies; and (ii) take appropriate measures to manage and mitigate the risks.

[6] Section 11 of the Act
[7] Section 192(2) Evidence Act provides for the following limitations: i) any such communication made in furtherance of any illegal purpose; or ii) any fact observed by any legal practitioner in the course of his employment as such showing that any crime or fraud has been committed since the commencement of the employment.
[8] Rule 19(3) of the RPC provides for the following limitations: i) Consent of the client after full disclosure confidence or secrets necessary ii) When permitted under the rules or required law or a court order; iii) The intention of his client to commit a crime and the information necessary to prevent the crime; and iv) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.
[9] FHC/BS/173/2014
[10] CA/A/202/2015
[11] Section 13 of the Act

Part III- Special Control Unit on Money Laundering ("SCUML")[12]

Part III of the Act focuses on SCUML and establishes it as a department under the EFCC to be responsible for the supervision of DNF businesses and professions in their compliance with the provisions of the Act, relevant laws and applicable regulations. Previously, SCUML was statutorily under the Federal Ministry of Industry, Trade and Investment but operationally domiciled within the EFCC. SCUML was created under the Repealed Act to implement specific sections of the Repealed Act in line with the FATF recommendations for the implementation of AML/CFT measures within the Designated Non- Financial Institutions (DNFIs) Sector in Nigeria. This should make for a smoother escalation of money laundering reports to cases for investigation or prosecution by the EFCC where merited.

Money Laundering Offences[13]

The Act introduces a reduced minimum term of imprisonment for offending individuals by stipulating a minimum of 4 years and retaining the maximum term of 14 years imprisonment thereby giving the courts a broader range of discretion in sentencing. Previously, it was a minimum term of 7 years and maximum term of 14 years imprisonment upon conviction.

For body corporates, the Act increases the fine to an amount not less than five times the value of the funds or the properties acquired as a result of the offence committed, which is in effect 500%. Under the old Act it was 100% of the funds and properties acquired as a result. The fine has therefore increased 5-fold.
In addition, the Act now provides that, knowledge, intent, purpose, belief or suspicion are now required as elements to be considered in proving the offence of money laundering under the Act and these may be inferred from objective factual circumstances[14]. This was not provided for under the Repealed Act.

Jurisdiction to Try Offences[15]

The Act now extends the jurisdiction of the Federal High Court in relation to the Act and related laws, where such alleged offence was committed on a ship, vessel or aircraft registered in Nigeria. This was not addressed under the Repealed Act.

Corroboration[16]

The Act now provides that in any trial of an offence, the fact that a defendant is in possession of pecuniary resources or property for which he cannot satisfactorily account and which is disproportionate to his known sources of income, or that he had at or about the time of the alleged offence obtained an increase to his pecuniary resources or property for which he cannot satisfactorily account, may be proved and taken into consideration by the Court as corroborating the testimony of any witness in the trial. This may assist the prosecution in its case against a defendant and in satisfying the burden of proof. There was no provision for corroboration under the Repealed Act.

[12] Section 17 of the Act
[13] Section 18 of the Act

Reports on Money Laundering – Money Laundering Strategy Report[17]

The Act provides that every 2 (two) years, the Attorney General of the Federation shall submit a Nigerian Money Laundering Strategy Report to the President, which shall contain contributions from all competent authorities. The Report must include the details of —(i) the number of currency transactions and activities undertaken during the period; (ii) convictions made for money laundering offences and financing of terrorism; (iii) areas of high-risk concerns encountered; and (iv) amounts of moneys frozen, retrained or confiscated for trafficking in drugs, corruption, and other criminal activities.

The required Report must also include further plans to substantially reduce the extent of money laundering in Nigeria, develop a better coordinated response to money laundering, implement mechanisms to improve the discovery, investigation and prosecution of money laundering offences, improve coordination between financial institutions and designated non-financial businesses and professions and improve on inter-agency (law enforcement) cooperation. This new provision is consistent with the Federal Government's objective to strengthen the existing system for combating money laundering and related offences and address poor implementation as exposed in the Fourth Round of Mutual Evaluation Report.

Administrative penalties

Supervisory and regulatory authorities are empowered to impose administrative penalties on financial institutions, DNF businesses and professions or any of its officers for any breach of a requirement under the Act as may be prescribed by a regulation made by the Attorney General of the Federation pursuant to the Act.

Conclusion

Nigeria's poor ratings in the Fourth Round of Mutual Evaluation by the Financial Action Task Force exposed the low level of implementation which prejudiced the anti-money laundering and anti-terrorism financing regime in Nigeria. The Act is an attempt to streamline and consolidate efforts in the fight against corruption, money laundering and terrorist financing in Nigeria and to address those pertinent national challenges. The Act is a much needed piece of legalisation but however, as identified in this article, there are still some conflicts and loopholes that need to be addressed quickly. Finally, beyond the enactment of the Act, is the critical need for effective implementation using modern methods, technology and best practices that do not hinder or impede legitimate activity or business.

Refer to the link to access the Act.

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