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CERTIFICATE OF CAPITAL IMPORTATION (CCI) USE & VALIDITY – What an Investor Should Know

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Introduction

At a recent business forum with potential investors in the Nigerian market, one question that lit up the room was how to legally repatriate returns on investment from Nigeria. This question as simple as it appears, weighs so much on the minds of investors in Nigeria, potential or otherwise, particularly given the experience in the telecommunications sector of the Nigerian economy, where the Apex Bank and regulator of the banking industry Central Bank of Nigeria (CBN), ordered one of the leading telecommunications companies, MTN Nigeria Communications Limited (MTN Nigeria) to "refund a total of US$8.134 Billion repatriated from the country in breach of the foreign exchange regulations".

In summary, the CBN had alleged that its investigation into the activities of 4 Banks in Nigeria had revealed that between 2007 and 2015, the Banks used irregular CCIs to illegally repatriate foreign exchange in the sum of US$8.134 billion on behalf of some offshore investors of MTN Nigeria. The CBN reasoned that the act was in violation of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act 1995 and the Foreign Exchange Manual made pursuant to the Act. The affected Banks were fined a total sum of NGN 5.87 billion and MTN directed to return the sum of US$8.134 Billion to Nigeria.

What is a CCI?

This may sound elementary, but it may interest you to note that from experience, a good number of foreign investors are oblivious of this important document. A CCI is a foreign exchange control document which is issued upon the importation of foreign capital into Nigeria for investment or otherwise in an enterprise. It represents capital inflow (which can be in the form of cash, plant or machinery or any combination) as well as, indicating the purpose of the capital inflow which may be or loan, equity or investment purposes.

Following the CBN's decision to introduce Electronic CCIs (eCCI) in 2017, investors now receive eCCI which are issued, managed and monitored via an electronic platform referred to as the Electronic Certificate of Capital Importation System (eCCIS). The platform is administered by the CBN, and the Authorized Dealers and investors have access to same. The eCCI will replace all paper CCIs already issued to investors through an automated process by migrating to electronic CCIs (e- CCIs). The original physical CCI will be dematerialized after full details of the records have been captured electronically into the eCCIS.

How and When Issued?

An eCCI is usually issued ***upon request*** by a foreign investor or the beneficiary of such foreign investment. Such a request must be accompanied by the requisite documentation supporting the inflow of capital and undertake the process as contained in the Foreign Exchange Manual as issued by the CBN.

With respect to cash inflow, the timeline for the issuance of a CCI is **within 24 hours of the receipt of the funds,** and for Plant & Machinery, it is **24 hours of the submission of final shipping and other documents.**

Benefit

A CCI is a mandatory document to be produced for the purpose of access of the Official Foreign Exchange Market to enable the repatriation of dividends, profits, interest/coupon and capital or other investments by foreign investors, through an Authorized Dealer (i.e. any bank licensed by the Central Bank of Nigeria to operate in the foreign exchange market subject to such terms and conditions as the CBN may specify from time to time).

How it is Utilized

Foreign investors, in the event of capital outflows, outward transfers of dividends, profit and divestments, are allowed unrestricted repatriation through an Authorized Dealer, subject to payment of all relevant taxes, of their investments and proceeds of divestment in any convertible currency, provided a CCI was issued in respect of such investment at the time of inflow into Nigeria.

In respect of repatriation of capital, repayment of a loan, or in the event of a partial sale/transfer of equity or total divestment, two things are integral, First the investor/beneficiary must provide the CCI or evidence of the capital inflow and secondly, the value of a CCI is marked down to reflect the current transaction value.

Transferability

Another pertinent question for foreign investors is what happens in the event of a share transfer to another entity or a loan transfer from one foreign entity to another foreign entity? Transfer of equity/debt CCI is allowed from one investor to another provided that the CBN is notified of such occurrence and the relevant documents as stipulated in the Foreign Exchange Manual are provided to the CBN through an Authorized Dealer.

Additionally, the CBN also allows for the transfer of a CCI issued by one Authorized Dealer to another, on the application by the customer to the first issuing Authorized Dealer.

Conversion of CCI from Debt to Equity

Situations may arise where a foreign lender, in order to extinguish the debt of a borrower, agrees to exchange part or whole of the debt for equity in the borrower entity. The question now arises as to the treatment of the debt CCI already issued for the loan inflow which is now being converted to equity.

For a debt, the CCI issued allows for the repatriation of the interest and principal sum in line with the loan agreement, whilst the equity CCI allows for repatriation of dividends and the proceeds of the sale of the shares.

In this situation, approval of the CBN would be required to achieve the CCI conversion. It would be obligatory for the foreign investor, through the Authorized Dealer by which the funds where inflowed, to provide the CBN with detailed documentary evidence. to show that the funds for the debt CCI were indeed inflowed into Nigeria and that the investor/beneficiary of the funds complied with the conditions stated in applicable foreign exchange legislation at the time of the inflow of the funds. In addition, the CBN would require documentary evidence of the debt-equity conversion to be able to authorize conversion of the CCI.

Question of validity of CCI?

The powers of the CBN to regulate the process for transactions in the Foreign Exchange Market (Market) is derived from the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act 1995

CAP F34 Laws of the Federation of Nigeria 2004 ("The Act"). The Act also authorizes CBN to appoint Authorized Dealers and authorized buyers to operate in the Market subject to such terms and conditions as the CBN may specify.

Further to the above, it has been argued that by the combined reading of all the provision of the Act and Foreign Exchange Manual, Authorized Dealers are delegates of the CBN and as such, the acts of an authorized Dealer carried out in furtherance of the exercise of its

delegated authority, is carried for and on behalf of the CBN. Another legal argument infers the existence of an agency

relationship between the Authorized Dealers and the CBN. Therefore, being an agent of a disclosed principal, the disclosed principal (i.e. CBN), is bound by any act done by the agent on the principal's behalf.

The above legal arguments appear to support a position that a foreign investor is not under any duty to verify the validity or otherwise of the CCIs issued by an Authorized Dealer, or to confirm whether all conditions precedent to the issuance of the same as stipulated by relevant legislation and or by the CBN, has been completely fulfilled before the issuance.

Although it is the law that when an official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with. It should be noted however that this principle of presumption of regularity applied in evidentiary evaluation is not absolute and is subject to a rebuttal by evidence to the contrary. More so, in the event, a CCI is valid or invalid, the party that would take the benefit or incur a liability will be the foreign investor in whose favour the CCI was issued.

On this basis, JEE is of the opinion that it is incumbent on the foreign investors to ensure that all relevant documents for the issuance of a CCI or to achieve a conversion thereof are provided to the Authorized Dealer.

Secondly, for already issued CCIs, a CCI Audit should be carried out to confirm that all steps and all document required by law or practice are complied with.

From our practical experience, the process of the CCI Audit should entail a confirmation of the status of a CCI in the light of existing corporate documents, existing legislation, to confirm its validity or otherwise.

Conclusion

Clearly, a robust knowledge of the dynamics and intricacies of a CCI is key for any potential investor in the Nigerian market and therefore, it is necessary for such an investor to ensure that from the point of inflow of capital to repatriation, that a review of the position of the CCI(s) viz-a-viz existing legal and regulatory framework as well as corporate documentation is carried out at intervals, to ensure the CCI(s) are valid for repatriation of funds.

Finally, the institutionalizing a diligence audit process where the validity of existing CCIs are routinely confirmed is important for all investors.

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