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LEGAL ALERT

REFLECTIONS ON THE ANTICIPATED BANK OF ZAMBIA CURRENCY REGULATIONS, 2024

Introduction

In June 2024, the Bank of Zambia announced its intention to introduce the Bank of Zambia Currency Regulations, 2024 whose aim is to modernize and enhance the regulation of local currency operations within Zambia. While it remains unclear when the Regulations will be promulgated into law, the draft Regulations include measures aimed at improving local currency management, ensuring the availability and integrity of banknotes and coins.

Sole Legal Tender

Key provisions include the introduction of stricter controls on the issuance, distribution, and circulation of local currency, as well as measures to prevent counterfeiting and currency-related fraud. The Regulations will also seek to restrict domestic transactions to be conducted exclusively in Zambian kwacha, allowing only cross-border transactions to be carried out in foreign currencies. The Regulations will therefore re-enforce the role of the Kwacha as the sole legal tender for domestic transactions in Zambia.

Exemptions

Exemptions to the proposed foreign currency restrictions include the payment of sums of money towards satisfying foreign currency liabilities, including interest, due to and from financial service providers, taxes paid in foreign currency to the government, payments for tolling services in the mining sector, inter and intra mine sales of copper, trading of electricity in regional power pools, and payments by non-residents for tourism services offered by enterprises.

Treatment of existing foreign currency denominated agreements

Parties to a contract or agreement relating to a domestic transaction which is denominated in foreign currency will be required to transition to full compliance within one year from the date of commencement of the Regulations. This will entail parties amending all affected existing contracts or agreements. Prior to that, however, the Regulations prescribe a conversion formula to apply on the date of making payment. Specifically, the Regulations state that an existing contract or agreement relating to a domestic transaction which is denominated in foreign currency shall be deemed to be a reference to the corresponding amount of money expressed in the domestic currency and calculated at the Bank of Zambia daily average mid-rate.

Impact on Projects and other cross-border arrangements

The Regulations are not expected to have a direct impact on cross-border project financing arrangements since such arrangements would not qualify as domestic transactions. In particular, local companies will not be prohibited from servicing their foreign currency obligations owed to foreign based counterparties. Naturally, however, most local companies with foreign currency obligations might face currency mismatches given that their revenues are likely to be primarily from Kwacha or domestic transactions.

Mitigations

Legal Arguments

The expectation is that the Regulations will be issued in the form of subordinate legislation by the Minister of Finance on recommendation by the Bank of Zambia. A key argument is that the Bank of Zambia Act, 2022 only empowers the Bank of Zambia to regulate the foreign exchange market (i.e. the market where foreign currencies are bought or sold) to the extent that the proposed Regulations would be ultra vires the Bank of Zambia Act by attempting to target specific commercial transactions that utilize foreign currency as consideration or medium of payment.

The foregoing also aligns with the provisions of the Constitution of the Republic of Zambia (the "Constitution"). The functions of the Bank of Zambia are specifically outlined in Article 213 of the Constitution which does not include foreign exchange controls or regulation of commerce outside the banking and financial services sector. Any additional functions to be performed by the Bank of Zambia beyond what is currently prescribed are required to be enacted through principal legislation under Article 215 of the Constitution. Therefore, any attempt by the Bank of Zambia to regulate commerce outside the banking and financial services sector including private transactions between citizens may arguably be an overreach and a breach of the Constitution.

The concept of legal tender which is provided for under the Bank of Zambia Act prescribes the Kwacha as the sole legal tender. This effectively means generally that the offer to settle an obligation in Kwacha cannot be refused. This does not, however, mean that only Kwacha can be used as a medium of payment. The Constitution in this respect preserves and protects private transactions between parties and it is likely that the proposed Regulations attempting to extend beyond market regulation may be found to be unconstitutional.

Most of the countries that are used as 'peer review' examples in the motivation by the Bank of Zambia appear to have fully fledged foreign exchange control primary legislation to justify regulatory intervention as opposed to mere central bank administrative monitoring instruments. If Zambia intends to properly introduce foreign exchange controls, it needs to do so via separate principal legislation as a sovereign act through Parliament and not through an administrative or subordinate organ.

Seek Further Exemptions

It is likely that sectors such as mining, tourism, etc., are proposed to be exempted because they are export oriented or generally generate foreign currency independent of the domestic market. If this is the case, then the parameters for exemptions need to be extended to avoid discriminating other sectors that have similar impacts or that generate own foreign currency through exports or otherwise independent of the local foreign currency market.

To encourage foreign capital inflow, sectors or transactions that are driven by projects that require injection of foreign capital (e.g. energy sector) but rely on domestic transactions to generate cash flow for repayment need also to be added to exempt list.

In addition, it is not clear how purely private transactions that do not rely on the supply or demand of foreign currency from the market would impact the foreign currency market. These should also be exempted as they actually offer lazy balances which are a cheap source of foreign currency to the market.

Other

Strategies such as hedging, although costly, should be able to help mitigate potential losses arising from fluctuations in exchange rates.

We hope you found this alert useful. Please contact our Senior Partner, Charles Mkokweza, and Partner and Head of Banking & Finance, Lupiya Simusokwe at CMkokweza@corpus.co.zm and LSimusokwe@corpus.co.zm respectively, if you have any questions relating to this legal alert.

Charles Mkokweza
Senior Partner
Energy, Resources & Infrastructure Department
Corpus Legal Practitioners
Email: CMkokweza@corpus.co.zm
Tel: +2602 11 372300 / 01 / 04

Lupiya Simusokwe
Partner
Banking & Finance Department
Corpus Legal Practitioners
Email: LSimusokwe@corpus.co.zm
Tel: +2602 11 372300 / 01 / 04