

# TNP Insights



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## A Review of the CBN Guidelines on Global Standing Instructions (GSI)

of the GSI, the creditor PFI (Bank A) and the other PFIs (Banks B, C and D) will, without any recourse to Mr Idoh, transfer all the credit balances in Banks B, C and D and apply them towards the defrayment of the loan taken from Bank A by Mr Idoh, once it can be shown that these accounts are linked to his BVN.

### Issues arising from the Guidelines

#### 1. Constitutional Concerns

Questions have been raised on whether or not the Guidelines breach Section 44 of the 1999 Constitution which provides that no law shall allow for the compulsory acquisition of any property without allowing the property owner the right to access a court or tribunal for the determination of his rights. However, the Guidelines require that a borrower must first execute a GSI in favour of the creditor PFI before the PFI can enforce such a GSI against the loan defaulter. Where the borrower does not execute a GSI, his accounts in other PFIs cannot be attached even where he defaults in his loan obligations. By requiring the borrower to execute a GSI in favour of the PFI, the Guidelines have taken the construction of the rights of the PFI out of the realm of constitutional law and reduced it to a question of contractual rights.

The GSI is designed to operate as a form of power of attorney donated by the borrower in favour of the PFI. The question to then ask is what happens where the borrower disputes the indebtedness? Will the creditor PFI and the other PFIs still go ahead to attach the borrower's other accounts? If yes, will this not amount to a usurpation of the power of the court to determine citizens' rights and obligations? The creditor PFI also appears to be in a position where it is the accuser, prosecutor and judge in its own cause. This is likely to be viewed by the courts as a breach of the customer's right to a fair hearing.

#### 2. Joint Accounts

It is our view that the implementation of the GSI will infringe on the constitutional rights of a co-joint account holder. Imagine a scenario where Mr Emmanuel Oseni (a borrower) has taken a loan of ₦15 Million from Bank A. Mr Oseni operates a joint account with his wife at Bank B where both contribute monthly into the account. Upon default by Mr Oseni to liquidate his loan with Bank A, Bank A triggers the GSI and requests Bank B to apply the money in the joint account domiciled with Bank B towards the settlement of Mr Oseni's debt with Bank A. Will Mrs Oseni's constitutional rights to own property not have been infringed upon by the application of the GSI? After all, Mrs Oseni did not obtain any loan from Bank A nor did she give any personal guarantee. Yet, her money in the joint account in Bank B has been taken without her consent. Will Mrs Oseni not have a legal remedy against Bank B? The Constitution as we've seen provides explicitly that no moveable property of a person shall be taken possession of compulsorily except in the manner and for the purposes prescribed by a law.

It is our opinion therefore that a GSI cannot override the long-established principle of law that execution cannot be levied against

a joint account where the debt is only due from one of the holders of the joint account. Both individuals hold joint interest in that account and a GSI cannot purport to attribute a portion to one party and another percentage to another. It is irrelevant that all the deposits into that linked account may have been made by the defaulting borrower. The Guidelines fail to state how monies jointly owned with unconnected third parties who are not loan defaulters as seen in the scenario above will be dealt with. This omission may allow for the encroachment by PFIs on an unconnected third party's constitutional protection from compulsory acquisition under Section 44 of the Constitution.



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#### 3. Can the Guidelines and GSI apply retroactively?

GSI's are not entirely novel. Loan agreements by banks usually contain clauses similar in effect to a GSI. Similarly, the CBN circular titled: New Offer Letter Clause for Credit Facilities which was issued on 26th August 2019 authorized banks to include clauses similar to the GSI in their loan offer letters. The Guidelines merely give bite to the GSI and other similar clauses – provided the banks and other financial institutions subscribe to the Guidelines and execute the GSI Master Agreement. It is foreseeable, that PFIs will begin to re-examine their loan agreements to ascertain whether they contain clauses similar in effect to a GSI and whether they can now be used within the framework of the Guidelines.

#### 4. Privity Concerns

The doctrine of privity of contract states that only parties to a contract shall have the right to claim any benefit from that contract. An account opened by a customer is premised on a contract between the customer and the financial institution. Therefore, the right of a creditor PFI to access monies held by a defaulting borrower in another PFI under a separate agreement with another PFI is questionable.

Furthermore, the Guidelines fail to provide any protection to the PFIs in the event that they release monies in the borrower's account upon any GSI trigger and a court subsequently finds in favour of the borrower. The transfer of a borrower's money with a PFI to a creditor PFI does not validly discharge the PFI from any subsequent liability to the customer.

#### 5. Confidentiality

Financial institutions, especially banks owe their customers a duty of confidentiality and a fiduciary duty to keep the money deposited with them and produce the same on demand. Financial institutions must balance the contractual interest of the customer in keeping his affairs confidential with the duty to disclose imposed by the Guidelines.

#### Other Concerns

Outside of the legal concerns examined above, there are additional aspects of the Guidelines worthy of note which we have considered below:

1. The glaring omission of corporate accounts from the list of qualified account types to which a GSI will be applicable to. Given that the bulk of delinquencies are attributable to corporate organizations, it is unclear why the CBN did not make any provision for application of the GSI to corporate organizations.
2. The Guidelines increase the already onerous reporting obligations of PFIs by requiring PFIs to file monthly GSI returns with the CBN no later than the 8th day after each month.
3. The Guidelines do not provide adequate protection to borrowers or third parties who have been wrongfully subjected to GSIs. There is no clear guideline on how a borrower who has been wrongfully subjected to a GSI may seek redress. The Guidelines merely provide that the offending PFI shall refund the monies wrongfully deducted. There is no time limit within which the PFI must make this refund. The Guidelines are unclear as to whether fines or penalties imposed for GSIs which are wrongfully triggered should be paid to the CBN or to the borrower.

#### Conclusion

In the final analysis there is no doubt that the Guidelines, if effectively implemented, while taking into careful consideration its legal implications, have the potential of addressing the problem of loan delinquency in Nigeria. The CBN however needs to be cautious in implementing these Guidelines so as not to create a bigger problem whilst trying to resolve the issue of loan delinquency.

On 13th July 2020, Nigeria's apex bank, the Central Bank of Nigeria (the "CBN") issued Guidelines on the Global Standing Instruction (the "Guidelines" or "GSI") for individual accounts. The Guidelines which shall be implemented from 1st August 2020 seek to facilitate an improved loan repayment culture, reduce non-performing loans, watch-list consistent loan defaulters and generally enhance loan recovery across Nigeria's banking industry.

The Guidelines provide that at the point of executing loan agreements, borrowers must also execute a GSI mandate in favour of the participating financial institution (PFI). In the event of default by the borrower, the GSI shall serve as a last resort by the PFI, without recourse to the borrower, to recover past due obligations (principal and accrued interests only, excluding any penal charges) from a defaulting borrower through a direct set-off from deposits or investments held in the borrower's accounts with any other PFI.

In order to qualify as a PFI for this purpose, an institution must:

1. be a financial institution duly licensed by the CBN;
2. have adequate information technology infrastructure to meet all the connectivity and protocol requirements at Nigeria Inter-Bank Settlement System Plc (NIBSS) and CBN;
3. provide access to customers' NUBAN accounts; and
4. execute the GSI Master Agreement with NIBSS with a copy sent to CBN.

The GSI can only be triggered for the purpose of recovering loans (principal sums and interest) granted to natural persons (individuals) and may be triggered in respect of savings accounts, current accounts, domiciliary accounts, investment or deposit accounts, and electronic wallets (whether held individually or jointly). The biometric verification number (BVN) system shall be used to track linked accounts in other financial institutions. The Guidelines however provide that where a borrower's BVN is not linked to any of the qualifying account types listed above, such an account will be "watch-listed".

Only PFIs may exercise the rights conferred by a GSI. The Nigeria Inter-Bank Settlement System (the "NIBSS") is appointed by the Guidelines as the primary facilitator through which GSIs will be carried out. The NIBSS upon receiving an electronic instruction from a creditor PFI to activate a GSI mandate (a "GSI trigger"), will confirm the balance in the targeted account and then complete the GSI mandate by transferring funds from the targeted account to the creditor PFI.

To put the Guidelines in better perspective, Mr Idoh takes a loan of ₦20 million from Bank A and fails to pay the bank at the agreed time. Mr Idoh also maintains an account with Bank B with a credit balance of ₦7 million, another account with Bank C with a credit balance of ₦5 million and operates a joint account with his wife in Bank D with a credit balance of ₦2 million. With the implementation