



South African Reserve Bank

Financial Surveillance Department

2020-02-27

Circular No. 2/2020**Statement on the new capital flow management framework**

As announced during the 2019 Medium Term Budget Policy Statement, the attention of Authorised Dealers and Authorised Dealers in foreign exchange with limited authority is drawn to the proposed new framework pertaining to the cross-border capital flows outlined in the 2020 Budget Speech. An extract is attached for ease of reference as Annexure A.

Following the review and benchmarking of the current exchange control system against best practices in other developing economies and fast-growing markets, the new capital flow management framework is hereby announced. This involves a shift from the current negative bias framework to a positive bias framework where all cross-border transactions will be allowed, except for those that are subject to the capital flow management measures and/or pose a high risk in respect of illegitimate cross-border financial flows.

Red tape on legitimate flows will be reduced whilst more robust measures will be introduced to detect, deter and disrupt illegitimate cross-border financial flows. As stated in Annexure A, legislative and regulatory proposals are being prepared to combat sophisticated financial crimes, unexplained wealth and suspicious financial flows.

The main features of the new capital flow management framework will, inter alia, include the following:

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- a shift from exchange controls to capital flow management measures to regulate cross-border capital flows;
- a more modern, transparent and risk-based approvals framework;
- stronger measures to fight illegitimate financial cross-border flows and tax evasion;
- strengthen co-operation between the Financial Intelligence Centre, South African Reserve Bank, South African Revenue Service and other law enforcement agencies; and
- enhanced cross-border reporting requirements.

The new capital flow management framework and regulations will be implemented within a period of 12 months. This will, inter alia, allow for the drafting and finalisation of the new capital flow management regulations, implementation of the relevant tax amendments as well as further engagements with other relevant stakeholders.

Attached hereto as Annexure B, is a document outlining the proposed remaining capital flow management measures to be implemented within the above-mentioned period. In the interim, the existing exchange control system remains extant.



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Financial sector update

This annexure provides an update on regulatory changes in the financial sector, including changes announced in the 2019 *Medium Term Budget Policy Statement* to promote investment and reduce burdensome regulation.

Fighting financial crime and corruption

South Africa's financial intelligence system is undergoing a mutual evaluation by an assessment team from the Financial Action Task Force (FATF). This review, which takes place regularly in all FATF member countries, evaluates national systems to prevent money laundering, terror financing and financing of the proliferation of weapons of mass destruction. The review will conclude in September 2020, at which time the review team will provide an evaluation and recommendations to the South African authorities.

Concurrently, government is preparing legislative and regulatory proposals to combat sophisticated financial crimes, unexplained wealth and suspicious financial flows. These may include expanding the scope of suspicious transaction reporting, facilitating greater cooperation and information sharing between relevant authorities, and expanding capacity in the areas of analysis, enforcement and investigation. These proposals will complement the recommendations emerging from the FATF review.

Simplifying cross-border trade and financial flows

In 2019, South Africa was one of 54 countries that signed up to an African free-trade area encompassing 1.2 billion people and more than US\$3 trillion in output. African countries have agreed to cut tariffs to zero on 90 per cent of goods, which, alongside other trade-facilitating measures, is expected to increase intra-continental commerce by more than 50 per cent over four years, according to the United Nations Economic Commission for Africa. The free-trade area presents an opportunity to speed up development on the continent, and represents a potentially large market for South African goods and services.

In this context, the National Treasury proposes modernising the foreign-exchange system. Since 1933, South Africa has operated a "negative list" system. By default, foreign-currency transactions are prohibited, except for those listed in the *Currency and Exchanges Manual*. As a result, even small individual transactions – such as for travel – require onerous approval processes. This regime constrains trade and cross-border flows, particularly in relation to fast-growing African economies.

Over the next 12 months, a new capital flow management system will be put in place. All foreign-currency transactions will be allowed, except for a risk-based list of capital flow measures summarised in the box overleaf. This change will increase transparency, reduce burdensome and unnecessary administrative approvals, and promote certainty. The capital flow measures take account of the Organisation for Economic Co-operation and Development best-practice *Code of Liberalisation of Capital Movements*¹ and

¹ Available online at <http://www.oecd.org/daf/inv/investment-policy/Code-capital-movements-EN.pdf>

are aligned with similar approaches in other developing countries. The detailed list of remaining capital flow measures will be published on the Reserve Bank website.

Remaining capital flow and macroprudential measures

To ensure financial stability, some macroprudential and capital management measures will remain. These include:

- South African corporates will not be allowed to shift their primary domicile, except under exceptional circumstances approved by the Minister of Finance.
- Approval conditions granted by the Minister of Finance for corporates with a primary listing offshore, including dual-listed structures, will be aligned to the current foreign direct investment criteria and/or conditions to level the playing field.
- Cross-border foreign-exchange activities will continue to be conducted through dealers authorised and regulated by the Reserve Bank.
- Prudential limits on South African banks and institutional investors will remain, but the limits will be reviewed regularly.
- Banks' unhedged foreign-currency exposures will remain limited to 10 per cent of liabilities (known as the net open foreign exchange position) and will remain regulated by the Prudential Authority of the Reserve Bank.
- The domestic treasury management company policy, which allows South African companies to establish one subsidiary as a holding company for African and offshore operations without being subject to exchange control restrictions, will remain in place, as will the international headquarter company regime.
- The export of intellectual property for fair value to non-related parties will not be subject to approval.
- The current policy of certain loop structures, which relates to the acquisition by private individuals of equity and/or voting rights in a foreign company, will remain until tax amendments are implemented to address the risks.

The foreign-exchange treatment of individuals will be aligned to the tax treatment, which is discussed below and in Annexure C.

Tax and exchange control treatment of individuals

Following reforms to the income tax treatment of South African tax residents who receive remuneration outside the country, government proposes to remove the exchange control treatment for individuals, while strengthening the tax treatment. The intention is to allow individuals who work abroad more flexibility, provided funds are legitimately sourced and the individual is in good standing with the South African Revenue Service. Individuals who transfer more than R10 million offshore will be subjected to a more stringent verification process. Such transfers will also trigger a risk management test that will include certification of tax status and the source of funds, and assurance that the individual complies with anti-money laundering and countering terror financing requirements prescribed in the Financial Intelligence Centre Act (2001). This will be phased in by 1 March 2021.

Under the new system, natural person emigrants and natural person residents will be treated identically. Additional restrictions on emigrants – such as the restrictions on emigrants being allowed to invest, and the requirement to only operate blocked accounts, have bank accounts and borrow in South Africa – have been repealed. The concept of emigration as recognised by the Reserve Bank will be phased out, to be replaced by a verification process based on the requirements above. Tax residency for individuals will continue to be determined by the ordinarily resident and physically present tests as set out in the Income Tax Act (1962). Under existing international standards, South Africa participates in the automatic sharing of information between tax authorities on individuals' financial accounts and investments. These cooperative practices will remain in place to ensure that South African tax residents who have offshore income and investments pay the appropriate level of tax.

Other reforms

State bank

In 2019, Parliament passed legislation to allow state-owned companies to apply for banking licences. Postbank is in the process of applying for such a licence. The decision to grant a licence is ultimately the

prerogative of the Prudential Authority, which will assess each applicant on its merits. The design of any state bank will protect the fiscus in the event of poor governance, non-performing loans or shortages in capital funding.

Sovereign wealth fund

The National Treasury is conducting a feasibility study for a sovereign wealth fund, possibly from the proceeds from the allocation of spectrum and the sale of non-core assets to capitalise such a fund. In addition, a fiscal rule that saves fiscal surpluses in the fund could help to manage volatile revenues.

Alignment with Basel Committee on Banking Supervision principles

In line with the Basel Committee on Banking Supervision's core principles on corporate governance, South Africa has strengthened the regulatory framework by enforcing stricter independence requirements for directors on bank boards. In 2019, government updated banking regulations relating to a securitisation framework, total loss-absorbing capacity holdings, capital requirements for equity investments in funds, capital requirements for bank exposures to central counterparties and the standardised approach for measuring counterparty credit-risk exposures. In addition, consultation with the banking industry has started on the *Fundamental Review of the Trading Book*, a comprehensive set of capital rules applied to a bank's wholesale trading activities. The economic effects of implementing these rules will be comprehensively assessed.

Third-party cell captive insurance

In December 2019, the Financial Sector Conduct Authority published a position paper² to address concerns about third-party cell captive insurance, in which insurance is provided through cells, rather than directly to a client. Improving its regulation and supervision will protect consumers by ensuring that a financial advisor can no longer earn commission and share in the profits of the cell captive arrangement.

Deposit insurance for financial institutions

Following extensive consultation, the Minister of Finance has submitted final legislation to introduce a comprehensive deposit insurance scheme that protects depositors when banks fail. This safety net will also support the growth of smaller banks. In addition, systemically significant payment systems, as defined in the National Payment System Act (1998), will be considered. The Corporation for Deposit Insurance, which will be located at the Reserve Bank, is being created to manage and administer the deposit insurance fund. Further details of the tax treatment of this fund are contained in Annexure C.

The Conduct of Financial Institutions Bill and retail distribution review

In 2018, the Conduct of Financial Institutions Bill was published for public consultation. Public workshops were held during 2019. Over 800 pages of comments were received, including feedback on governance requirements, retirement funds, payment services, financial markets and wholesale banking. A revised draft of the bill will be published for public comment and tabled in Parliament in 2020.

The Financial Sector Conduct Authority published an update of its retail distribution review in December 2019.³ The report indicates significant progress in implementation, which establishes requirements for product sales and ongoing support to the consumer, and ends "sign-on" bonuses.

Financial markets legislation

In the context of rapidly evolving financial markets, South Africa needs to update its legislative and regulatory framework. An extensive review of the Financial Markets Act (2012) highlighted gaps in the

² Available at <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Position%20Policy%20Papers.aspx>

³ Available at

<https://www.fsca.co.za/Regulatory%20Frameworks/Temp/RDR%20General%20Status%20Update%20December%202019.pdf>

current framework and proposed changes. The National Treasury has consulted with market participants, the Prudential Authority and the Financial Sector Conduct Authority. A consultation paper will be published on the National Treasury website, and legislation will be drafted for public comment and tabled in Parliament by 2021.

The framework for regulating over-the-counter derivative markets has been finalised, in line with South Africa's commitment to the Group of Twenty. The final joint standard on margin requirements will take effect on 1 October 2020.

Levies

The Financial Sector Levies Bill, to be submitted to Parliament during 2020, will propose the collection of levies to ensure that the Prudential Authority, the Financial Sector Conduct Authority and ombuds are sufficiently resourced to carry out their duties and functions.

Transformation and financial inclusion

The Financial Sector Transformation Council has established eight subcommittees to review the targets in the Financial Sector Code to strengthen transformation of the financial sector. To date, the committees have developed targets for management control, skills development, socioeconomic development, consumer education and retirement funds.

A paper to establish a policy framework for financial inclusion in South Africa will be published for public comment in 2020.

Innovation hub

The Intergovernmental Fintech Working Group is introducing an online fintech portal with an innovation hub, which will clarify the applicability of financial services regulation and support the testing of new products and services.

Unclaimed benefits

Retirement funds and the Guardian's Fund are sometimes unable to trace beneficiaries, resulting in the money remaining unclaimed. The money is invested in government bonds and other instruments. These investments are being considered in the mobilisation of funding for infrastructure. Government will introduce legislation later this year to centralise such funds and establish a central registry of all members of retirement funds.

Retirement fund reform

Government and the National Economic Development and Labour Council have agreed to proceed with retirement reform related to the harmonisation of all retirement benefits, including provident funds. Government will take steps to ensure the development of annuity products more suitable for the low-income market. Further reforms will include improving oversight and governance of commercial umbrella funds, fund consolidation and auto-enrolment.

Annexure B

2020 Budget Speech

New Capital Flow Management Framework

26 February 2020



South African Reserve Bank

Policy basis of the new Capital Flow Management Framework

- **Background**

- Since 1995, National Treasury and the South African Reserve Bank embarked on a process of gradual and sequenced liberalisation of exchange controls with a resultant shift from exchange controls to prudential regulation of foreign exposure for banks and institutional investors as well as the introduction of a cross-border reporting system.
- The approach has enabled South Africa, over two decades, to progressively modernise its capital flows and investment framework to benefit from global integration while safeguarding domestic interests and management of offshore subsidiaries.
- In the 2017 Budget Speech, Minister of Finance announced the review and benchmarking of the current capital flow management framework against best practices in other developing economies and fast-growing markets.
- It was agreed that the South African Reserve Bank should enlist the services of the Organisation for Economic Co-operation and Development (OECD) to benchmark South Africa's capital flow management framework against the OECD Code of Liberalisation of Capital Movements (Code).
- The Code has provided a balanced framework for the gradual removal of barriers to capital movement while providing flexibility to cope with situations of economic and financial instability.

Policy basis of the new Capital Flow Management Framework

- **Minister of Finance 2019 *Medium Term Budget Policy Statement***

- "In order to promote investment and reduce unnecessary burdensome approvals, by Budget Day, the South African Reserve Bank will propose a more modern, transparent and risk-based approvals framework for cross-border flows."

- **National Treasury (version 2) policy paper**

- "In order to promote investment and reduce unnecessary burdensome administrative approvals and to promote certainty, a more modern approvals framework for cross-border flows is to be implemented by early 2020, in line with international best practice. The default for the approval process will be switched to a more limited, transparent and risk-based list, including mergers and acquisitions."

- **The main features of the new framework**

- A shift from the current negative bias framework to a positive bias framework where all cross-border transactions will be allowed, except for those that are subject to capital flow management measures.
- A move from exchange controls to capital flow management measures to regulate cross-border capital flows.
- A more modern, transparent and risk-based approvals framework.
- Stronger measures to fight illegitimate financial cross-border flows and tax evasion.
- Strengthen cooperation between the Financial Intelligence Centre, South African Reserve Bank, South African Revenue Service and other law enforcement agencies.
- Enhanced cross-border reporting requirements.
- The framework takes into consideration the outcomes of the OECD capital flow management review and benchmark project announced by the Minister of Finance in the 2017 Budget Speech.

New Capital Flow Management Framework

Capital flow management measures	Detailed description
Legal framework/legislation that forms the basis of the new capital flow management measures	Stronger measures to fight illegitimate financial cross-border flows, base erosion and profit shifting as well as tax evasion. A shift from the current negative bias framework to a positive bias framework where all cross-border transactions will be allowed, except for those that are subject to capital flow management measures. A move from exchange controls to capital flow management measures to regulate cross-border capital flows. New capital flow management regulations (currency and exchanges regulations) to be issued under the Currency and Exchanges Act, 1933. The intention of the new legal framework will be, inter alia, to attract, retain and monitor foreign investments. Furthermore, the legal framework should reduce red tape and prevent risks associated with illegitimate financial flows, while meeting international best practice benchmarks. The aim is, inter alia, to strengthen cross-border transactions reporting requirements as well as cooperation between the Financial Intelligence Centre, South African Reserve Bank, South African Revenue Service and other law enforcement agencies. Under the new capital flow management framework, natural persons (emigrants) and natural persons (South African private individuals) will be treated identically.

New Capital Flow Management Framework

Capital flow management measures	Detailed description
Participation in the foreign exchange market Appointment of: • Authorised Dealers • Authorised Dealers in foreign exchange with Limited Authority • Over-the-counter derivatives providers • Treasury outsourcing companies • Foreign exchange brokers • Non-banks	Cross-border foreign exchange activities will continue to be conducted through Authorised Dealers authorised by the Financial Surveillance Department (FinSurv) of the South African Reserve Bank. Other foreign exchange market participants (including non-banks) will also require appointment in concurrence with the Financial Sector Conduct Authority.
Institutional investors – prudential limits (foreign exposure)	Prudential limits on institutional investors will remain but the limits will be reviewed on a regular basis, as and when necessary. Current prudential limit: Institutional investors' foreign exposure may not exceed 30% of total retail assets under management for retirement funds and the non-linked underwritten business of long-term insurers. Institutional investors' foreign exposure may not exceed 40% of total retail assets under management for investment managers, collective investment scheme management companies and the investment-linked business of long-term insurers. In addition to the foreign portfolio investment allowance, institutional investors also qualify for an additional 10% African allowance.

New Capital Flow Management Framework

Capital flow management measures	Detailed description
Authorised Dealers – macro-prudential limit for banks (foreign exposure)	Banks will still have a limitation on their unhedged foreign currency exposures, currently at 10% of net qualifying capital and reserve funds (known as the net open foreign exchange position of a bank) and will remain regulated by the Prudential Authority of the South African Reserve Bank. Current macro-prudential limit: Authorised Dealers may acquire direct and indirect foreign exposure up to a macro-prudential limit (MPL) of 25% of their total liabilities, excluding total shareholders' equity. Authorised Dealers are also allowed to invest an additional 5% of their total liabilities, excluding total shareholders' equity, for expansion into Africa. The macro-prudential limit for the Authorised Dealers will remain but the limit will be reviewed on a regular basis, as and when necessary. Branches of foreign institutions operating as banks in South Africa are regulated in their entirety by the Prudential Authority of the South African Reserve Bank.

New Capital Flow Management Framework

Capital flow management measures	Detailed description
South African residents (corporates and individuals) – inward foreign loans	Currently, requests that fall outside the set criteria are referred to FinSurv. Authorised Dealers may approve requests within the set criteria, provided the loans are reported to FinSurv using the Loan Reporting System. Inward foreign loans criteria and approvals will be reviewed once relevant tax amendments are finalised.
South African residents (corporates) – bond/notes issuance offshore	Corporate bonds/notes issuance offshore is subject to prior notification and reporting requirements.
South African corporates – re-domiciling and primary listing offshore	Corporates may not shift their primary domicile offshore, except under exceptional circumstances approved by the Minister of Finance. Policy will be retained and modernised as and when required.
South African corporates – primary listing on offshore stock exchanges, including dual-listed corporate structures	Approval conditions granted by the Minister of Finance are to be aligned to the current foreign direct investment criteria/conditions to level the playing field.
South African corporates – outward foreign direct investment (FDI)	Retain the R1 billion limit for adjudication by Authorised Dealers. Any amount above R1 billion will be subject to prior notification to FinSurv, for verification and reporting for statistical purposes. A distinction for FDI below 10% and above 10% will remain for reporting purposes. Mandated state-owned companies (SOEs) are also subject to the requirements of the Public Finance Management Act, 1999 (Act No.1 of 1999).

New Capital Flow Management Framework

Capital flow management measures	Detailed description
South African corporates – outward FDI (intellectual property)	The transfer of South African-owned intellectual property (IP) by way of sale, assignment or cession and/or the waiver of rights in favour of related non-resident parties in whatever form, directly or indirectly, is not allowed without the prior approval of FinSurv.
Sale of intellectual property to related non-resident parties	Authorised Dealers may, however, approve the outright sale, transfer and assignment of IP by South African residents, excluding mandated SOEs as defined in Schedule 2 of the Public Finance Management Act, 1999 to unrelated non-resident parties at an arm's-length and a fair and market-related price, provided Authorised Dealers view the sale, transfer or assignment agreement and an auditor's letter or IP valuation certificate confirming the basis for calculating the sale price.
South African corporates – outward FDI	The policy of the Domestic Treasury Management Company (DTMC) (formerly HoldCos) to hold offshore subsidiaries and conduct treasury management operations on a domestic market or platform will remain extant. The policy of the International Headquarter Company (IHQ) to promote South Africa as a gateway into Africa will remain extant.
South African corporates – outward FDI	Outward loans by South African corporates to subsidiaries/related parties are allowed; however, outward loans to third-party companies will be subject to prior approval by FinSurv.
Loop structures above 40% – individuals and corporates	Current policy will remain, pending the implementation of the relevant tax amendments legislation.

New Capital Flow Management Framework

Capital flow management measures	Detailed description
South African trusts investing directly offshore	Restrictions will remain.
South African residents – exportation/migration of shares from the South African register (corporates and individuals)	The physical movement of securities to an offshore exchange requires prior approval from FinSurv, however, this requirement will be reviewed once relevant tax amendments are finalised.
South African companies – securities control	A distinction between residents and non-residents owned securities will remain, subject to review.
Credit and/or debit cards	The policy for credit and/or debit cards remains extant, but will be reviewed in line with the proposed new framework.
South African corporates – travel omnibus	The current dispensation for business travel will remain extant.
South African residents – disposal of legal foreign assets held offshore	South African residents with legally held foreign assets may not dispose of/sell such assets to other residents, whether settlement takes place in rand or foreign currency, without the specific prior written approval of FinSurv.

New Capital Flow Management Framework

Capital flow management measures	Detailed description
South African individuals – single discretionary allowance (SDA)	An SDA of R1 million for all purposes, including travel, gifts, investments and donations will remain extant. The limit will be reviewed on regular basis, as and when required.
Foreign capital allowance for investments purposes	Individuals who transfer above R1 million and up to R10 million offshore in respect of foreign investment do not require prior approval but will be subject to tax compliance.
South African individuals and emigrants	Under the proposed new system, natural persons (emigrants and South African private individuals) will be treated identically, subject to capital flow management measures. The aim is to level the playing field between South African private individuals and emigrants, subject to tax obligations being met. Individuals who transfer more than R10 million offshore will be subjected to a more stringent verification process. Such transfers will also trigger a risk management test that will include certification of tax status and the source of funds, and assurance that the individual complies with anti-money laundering and counter-financing of terror requirements prescribed in the Financial Intelligence Centre Act, 2001. Under the proposed new system, natural persons (emigrants and South African private individuals) will be treated identically, subject to capital flow management measures. The aim is to level the playing field between South African private individuals and emigrants, subject to tax obligations being met.

New Capital Flow Management Framework

Capital flow management measures	Detailed description
South African residents – export of currency coins and/or numismatic items and/or South African bank notes	The status quo remains, subject to review.
South African corporates – import and export of rand and foreign currency notes	The status quo remains, subject to review.
South African residents – transfer of Krugerrands (legal tender and gold)	Status quo remains, subject to review.
Crypto assets	A policy paper on crypto assets will be issued in due course which will, inter alia, include recommendations relating to FinSurv.
South African corporates – trade and settlement in foreign exchange among residents	South African residents may invoice each other locally in foreign currency, however, settlement must be in rand to avoid dollarisation of the South African market. Exemption will be granted on application to companies to settle locally in foreign currency via the customer foreign currency accounts for certain trade transactions and services rendered. Tourist industries are exempted, on application.

New Capital Flow Management Framework

Capital flow management measures	Detailed description
South African corporates – hedging under active currency management (no firm commitment)	For a period above 12 months, documentation has to be presented within 14 days (confirmation of a firm and ascertainable commitment). Speculation is still not allowed.
South African corporates – hedging offshore by South African corporates	Hedging offshore is not allowed, except for producers and end-users in commodities. Therefore, requests to hedge offshore must be referred to FinSurv for prior approval.
Trade (imports and exports)	The current policy remains extant. No limits apply, but documentary evidence is required. The Export Verification System and Import Verification System (IVS) will be retained to monitor and macro match South African Revenue Service's customer data with the South African Reserve Bank's cross-border data. Imports Undertaking Dispensation (exemption to submit documentation to Authorised Dealers) will be retained. An advance payment for imports of capital goods exceeding R10 million is limited to 50% of the ex-factory cost. Any amount in excess of this amount requires approval by FinSurv.
Sale of foreign currency (repatriation and surrender)	Repatriation of export proceeds - prior approval is required by exporters to receive their export proceeds after a period of six months. For export proceeds or services rendered offshore where the South African party does not have a customer foreign currency account, such funds are required to be offered for sale to an Authorised Dealer within 30 days after becoming entitled thereto. Individuals rendering services offshore from South Africa are also subject to the 30-day conversion rule.

New Capital Flow Management Framework

Capital flow management measures	Detailed description
Inward listing policy – non-resident and South African resident issuers: listing instruments on domestic exchanges	The approval process is retained for non-resident and South African resident issuers to list shares, bonds, debt and derivative instruments on South African exchanges. The policy is, however, currently under review.
Non-residents – local financial assistance (LFA)	Foreign investors may borrow domestically, without restriction, in order to finance FDI. Non-residents who use the funds for financial transactions and/or to acquire residential property in South Africa must adhere to the 1:1 ratio. Authorised Dealers may grant LFA facilities to non-residents living and working in South Africa in respect of the acquisition of residential property, subject to normal lending criteria.

New Capital Flow Management Framework

- **Implementation**

- The proposed new capital flow management framework and regulations will be implemented within a period of 12 months.
- This will, inter alia, allow for the drafting and finalisation of the new capital flow regulations, implementation of the relevant tax amendments as well as further engagements with other relevant stakeholders.
- In the interim, the current exchange control system remains extant.