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THE EUROBOND: A CRITIQUE OF ITS INCREASING UTILITY AS A GLOBAL DEBT INSTRUMENT IN NIGERIA

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ABSTRACT

Government external borrowing is no new phenomenon in Africa. Many African countries, including Nigeria, often explore external financing whether to fund domestic projects or out of a need for foreign currency. In fact, Nigeria's debt history with the World Bank and the International Monetary Fund is common knowledge. However, in addition to loans, governments also adopt instruments such as bonds to raise capital in the international capital market. One of such instruments is the Eurobond. The Eurobond is a type of bond sold to investors in domestic markets outside the country of the currency in which the bond is denominated. In Nigeria, the Eurobond has become a major instrument of external borrowing accounting for up to one-third of Nigeria's total external debt. Since its adoption by the federal government, many private organisations have also followed suit. The Eurobond is simpler when compared with other instruments, due to the absence of strict regulation. However, despite its attractions, the increasing use of the Eurobond raises several economic implications for the country. With relatively simpler conditions, the frequent use of the Eurobond is increasing the country's external exposure at a rapid pace. This article provides an overview of the Eurobond, its key features as well as its application in Nigeria. It further discusses the attractions to and identifies legal issues in connection with the Eurobond. Finally, this article presents economic implications of the increased use of the Eurobonds and recommends alternative options of financing.

Keywords: EuroBond; Utility; Global Debt; Government, Nigeria.

1. INTRODUCTION

Since 2011, Nigeria has forayed into the international capital market for Eurobonds at least five times. In 2011, the Federal Republic of Nigeria ("Nigeria") listed its debut Eurobond on the London Stock Exchange Plc, through which it raised US$500 million.[1] The notes were 2.6 times[2] oversubscribed and redeemed in January 2021[3]. The proceeds of this issue were intended to serve general budgetary purposes.[4] In 2013, it returned to the market to raise US$1 billion with a five-year maturity period. This time, the proceeds of the issue were intended to fund various projects in the power sector.[5] Subsequently, in February 2017, Nigeria issued a US$1 billion notes towards funding capital expenditures in the 2017 Appropriation Act. Recently, in March 2022, Nigeria has raised US$ 1.5 billion to finance projects on the 2022 budget, making it the first African country to access the international capital markets this year. Together with Egypt and South Africa, Nigeria is one of the largest issuers of Eurobonds in Africa.[6]

The Eurobond has become an attractive source of financing in Nigeria for the federal government for its ease of access to foreign currency and relatively simpler process. However, whilst it appears to be a jackpot for foreign currency, it further whets an already large appetite for external borrowing. This year, servicing external debts constitutes 22.6% of the national budget.[7] The

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1 Debt Management Office Nigeria, Annual Report 2011, p. 6 <https://dmo.gov.ng /index.php/publications/reports/dmo-annual-report-statement -of-accounts/1766-dmo-2011-annual-report> accessed on May 28, 2022.

2 Ibid.

3 Debt Management Office Nigeria, Press Release: Nigeria Redeems $500million Eurobonds (January 27, 2021) <https://dmo.gov.ng/news-and-events/circulars-releases/3444-press-release-nigeria-redeems-usd500-million-eurobond/file> access ed on May 28, 2022.

4 The Federal Republic of Nigeria US$500,000,000 6.75 per cent. Notes due 2021 Issue Price 98.223 per cent. Prospectus (January 26, 2011), p.1.

5 The Federal Republic of Nigeria US$500,000,000 5.125 per cent. Notes due 2018 Issue Price 98.917 per cent. And US$500,000,000 6.375 per cent. Notes due 2023 Issue Price 98.193 per cent Prospectus (July 10, 2013), p. 1.

6 Gregory Smith, Africa's Hard Won Market Access (International Monetary Fund, December 2021) <https://www.imf.org/en/Publications/fandd/issues/2021/12/ Africa-Hard-won-market-access> accessed on May 28, 2022.

7 The Appropriation Act, 2022.

government currently supplements the financing of the national budget with external borrowing including the Eurobonds. There is no evidence that the debts created by the Eurobonds will be serviced without recourse to borrowing to further supplement Nigeria's revenue. Thus, the ensuing question is, at what cost is the ease and relative simplicity of the Eurobond to Nigeria? Whilst there is no doubt that Nigeria suffers an infrastructure deficit, and the proceeds of some of these bonds are targeted at infrastructure projects, this exposure has long term implications on the economy of the country.

Following the debut of the sovereign Eurobond, several corporate organisations have threaded the same path. Corporate organisations in Nigeria, particularly banks have explored the international capital market. Over the years, the market has seen offers from banks such as Fidelity Bank Plc, Access Bank Plc, United Bank of Africa Plc, and non-banking organisations such as Renaissance Capital Limited, Bank of Industry Limited among others. In some cases, these organisations have returned to the markets after their first issuance. For example, Fidelity Bank raised Eurobonds in 2017 and it returned in 2021[8]; Access Bank also had note issuances in 2014 and in 2021 respectively.[9]

With a focus on Nigerian sovereign Eurobonds, this article analyses the cost of Eurobonds in Nigeria and is divided into four sections. The first section provides an overview of Eurobonds including a definition, a summary of its origination and some of the key features of a Eurobond. In the next section, this article highlights how Eurobonds are applied in Nigeria, as well as what appears to be the attraction to this type of bond. In the third section, this article also discusses some of the legal issues associated with the Eurobond. Finally, this article critiques the increasing utility of Nigerian sovereign Eurobonds by highlighting the economic implications for the country, whilst

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[8] Chima Nwokoji, "Fidelity Bank Completes Successful Eurobond Offering, Raises $400m" (Tribune Online, October 23, 2021) <https://tribuneonlineng.com /fidelity-bank-completes-successful-eurobond-offering-raises-400m/> accessed on June 1, 2022.

[9] Afolabi Sotunde, "Nigeria's Access Bank issues $500 mln Eurobond, priced at 9.125% -bookrunner" (Reuters, October 4, 2021) <https://www.reuters.com/ world/africa/nigerias-access-bank-issues-500-mln-eurobond-priced-9125- bookrunn er-2021-10-04/> acessed on June 1, 2022.

suggesting ways the government may improve alternative means of financing.

2. EUROBONDS - MEANING, ORIGINATION AND USE IN NIGERIA

2.1 Meaning

A Eurobond is a bond underwritten by a multinational syndicate composed of financial institutions and is sold simultaneously in various national markets other than that of the country in whose currency it is denominated.[10] Put simply, they are bonds denominated in a particular currency, but sold to investors in domestic markets other than the country of issue. They are cross-border and do not follow the rules of a particular domestic market.[11] The market however is divided according to the currency of issue. For example, Eurobonds denominated in the US dollar are referred to as Eurodollar bonds, sterling as Eurosterling bonds.[12]

Together with domestic bonds and foreign bonds, Eurobonds may be issued by a government or a corporate entity. A foreign bond is one which is issued in a domestic market by a foreign entity and sold to investors in the country in the country of issue i.e. a corporation not incorporated in the country in which the bonds are issued, but in the domestic market's currency.[13] For example, a dollar bond issued by a foreign company in New York is a foreign bond, otherwise nicknamed a "Yankee Bond". A

[10] Emmanuel Roussakis (ed) International Banking – Principles and Practice, (Abbey Publishing 1983) pp 39, 72.

[11] Chris O'Malley, Bonds without borders: A History of the Eurobond Market, (John Wiley & Sons Ltd 2015), p. xi.

[12] Moorad Choudhry, The Bond and Money Markets (Butterworths-Heinemann 2003), part III, p.6

[13] Ravi C. Tennekoon, The Law and Regulation of International Finance (Butter worths 1991) page 147.

foreign bond in a Japanese market is called a "Samurai bond", and in an Australian market, a "Kangaroo bond".[14]

Bonds issued as securities are simply a promise by the issuer to repay a specified sum at a fixed date in the future, and a commitment by the bondholder to agree to lend a certain amount of money to the issuer for a fixed period.[15]

2.2. Origination

The history of the Eurobond is traced to the Australian issue for the Italian motorway network in 1963.[16] It was issued by the Italian state highway authority, Autostrade. The issuance was for US$15 million with a 15-year final maturity date[17] and it was listed on the London Stock Exchange.[18] Although the term "euro" originated from the issue of special bonds in continental Europe by American corporations[19], the term is used now for all bonds issued outside the country of the currency in which the bonds are denominated. Today, the largest Eurobond market is denominated in the US dollars.[20]

2.3. Key Features

Firstly, Eurobonds are commonly issued as vanilla bonds. They have a set maturity date and a coupon (which is fixed at launch) expressed as a percentage of the issue amount and often paid

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[14] Chris O'Malley, Bonds without borders: A History of the Eurobond Market, (John Wiley & Sons Ltd 2015), p. xi.

[15] Phillip Wood, Law and Practice of International Finance, (Sweet & Maxwell 2007) page 159.

[16] International Capital Market Association, 'A History of the Eurobond Market' <https://www.icmagroup.org/About-ICMA/history/history-of-the-eurobond-market/> accessed on March 6, 2022.

[17] Ibid.

[18] Leslie David Marshall, 'Contractual Relations and Issuing Procedures in the Eurobond Primary Market' (PhD Theses Simon Fraser University, 1996), p. 6.

[19] Versluysen Eugene, 'Financial Deregulation and the Globalization of Capital Markets', Policy Planning and Research Department working papers; no. WPS 40 Washington, D.C.: World Bank Group < https://documents.worldbank.org/en/publication/documents-reports/documentdetail/235201468764398871/financial-dere gulation-and-the-globalization-of-capital-markets> accessed on May 30, 2022.

[20] Corporate Finance Institute, International Bonds <https://corporatefinanceinstitu te.com/resources/knowledge/finance/international-bonds> accessed on March 6, 2022. This is connected to the use of the dollar as the principal international trade, and settlement and investment currency.

annually.[21] The coupon payments are made on specified dates over a stated number of years. The typical maturity period of vanilla bonds ranges from five to ten years although there have been instances where the terms of the bonds were up to thirty years or more.[22] On the maturity date, the interest payment includes a repayment of the principal as well. Eurobonds are typically unsecured, and rank equally with other debt obligations.[23] Secondly, another key feature of Eurobonds is transferability and intention to be tradeable. Consequently, majority of Eurobonds are issued as bearer bonds. In this case, the issuer makes a promise to pay the coupon and principal to the bearer of the note, that is the physical holder of the note. It is however not uncommon for Eurobonds to be registered bonds payable to the person whose name appears on the register as the holder of the bond.[24]

Furthermore, another peculiarity of the Eurobond is that the bonds are not subject to regulations by the country of the currency of denomination.[25] At its introduction, London's City became the primary place of business owing to its sophisticated infrastructure and long history of international finance.[26] The UK monetary authorities did not subject the market to regulations or restrictions. With trading and the bonds being offshore, Eurodollars were also not within the direct jurisdiction of the US Authorities.[27]

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[21] Leslie David Marshall, 'Contractual Relations and Issuing Procedures in the Eurobond Primary Market' (PhD Theses Simon Fraser University, 1996).

[22] Moorad Choudhry, The Bond and Money Markets (Butterworths-Heinemann 2003), part III, p.8

[23] Christopher H. Robinson, "International Financing with Eurobonds", (1968) 14 Touche Ross Publications, p. 15.

[24] Virginia Trioa, 'An Overview of the Eurobond Market', (1987) 12 North Carolina Journal of International Law, 331. <https://scholarship.law.unc.edu/ncilj/vol12/iss3/2> accessed on May 28, 2022.

[25] Emmanuel Roussakis (ed) International Banking – Principles And Practice, (Abbey Publishing 1983) page 77.

[26] Moorad Choudhry, An Introduction to Bond Markets (John Wiley & Sons Ltd, 2008), p. 153; Versluysen Eugene, 'Financial Deregulation and the Globalization of Capital Markets', Policy, Planning and Research Department working papers; no. WPS 40 Washington, D.C.: World Bank Group, p. 7 < https://documents.worldbank.org/en/publication/documents-reports/documentdetail/235201468764398871/financial-deregulation-and-the-globalization-of-capital-markets> accessed on May 30, 2022.

[27] Ibid. Dollar-denominated bonds issued outside the United States did not require registration with the Securities and Exchange Commission.

Moreover, although the bulk of the trading in Eurobonds is done over the counter (OTC),[28] the bonds are listed to attract investors who are required to invest only in listed securities. They are listed on a national stock exchange, and commonly admitted to trading on the London, Luxembourg or Irish Stock Exchanges by the UK Financial Services Authority, the Luxembourg Commission de Surveillance du Secteur Francier or the Irish Financial Services Regulatory Authority.[29] Similarly, the relevant payments are made through the Euroclear or Clearstream, Luxembourg which are the main euromarket clearing systems.

Finally, the structure of the Eurobond is seen in the terms and conditions guiding the issue. The structure is made up of terms including covenants, which reflect the peculiarities of the issuer, the conditions of the market, payments of interests free of withholding tax imposed in the country of issuer,[30] etc. The bonds may also make use of a fiscal agent or a trustee, but not both. A fiscal agent acts on behalf of the issuer, oversees the "administration" of the bond and acts as the paying agent. On the other hand, a trustee acts in the interest of the bondholders and as a representative in any legal action that may ensue. Where there is a trustee, there will be a separate paying agent appointed to act on behalf of the issuer. The Eurobond is used in different countries; however, this article only covers the details of its application in Nigeria.

2.4. Uses in Nigeria

All Eurobond issuances out of Nigeria have been denominated in US dollars. The bonds are purchased in dollars and the coupons as well as the principal are repaid in dollars. Typical of Eurobonds, the notes are not regulated by the laws of any country, including

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[28] The buyers of the bonds are typically the financial institutions (the syndicate) in the first instance. The bonds are usually not offered directly to the public but are mostly offered to banks, financial institutions for placing with qualified institutional buyers and high net worth private investors. Frank Graaf. Euromarket Finance: Issues of Euromarket securities and syndicated Eurocurrency loans (Kluwer Law and Taxation Publishers, 1991), p. 53.

[29] The Nigerian Eurobond issued in 2021 was also listed on the Nigerian Exchange Limited.

[30] Virginia Trioa, 'An Overview of the Eurobond Market', (1987) 12 North Carolina Journal of International Law, p. 337. <https://scholarship.law.unc.edu/ncilj/vol 12/iss3 /2> accessed on May 28, 2022; Allan Beller and Gall Berney, Eurobonds, 19 SEC & Commodities Regulation 39, 40 (February 19, 1986).

the United States. Consequently, they are not registered under the United States Securities Act of 1933 (as amended). Subject to an exemption from, or in transactions not subject to registration requirements of the US Securities Act, the notes are also not permitted to be offered or sold within the United States.
Eurobonds by Nigerian issuers are usually offered and sold in reliance on the exemptions in Rule 144A and Regulation S of the US Securities Act. The notes are made available to (1) Qualified Institutional Buyers ("QIBs") within the meaning of Rule 144A[31] under the US Securities Act or (2) non-US persons located outside the United States within the meaning of Regulation S of the US Securities Act.

It is notable that the notes are also not required to be registered with or approved by the Securities and Exchange Commission, or under the Investment and Securities Act, 2007 as amended. Thus, they may not be offered or sold in Nigeria or to residents of Nigeria except where the securities have been registered with the SEC and the approval of the SEC has been obtained under the extant law. The notes may however be sold by private placement in Nigeria to investors under Section 69(2) of the ISA subject to the prior approval of the SEC.

Although the Issuer is not required to file periodic reports under the US Securities Act, the issuer sometimes agrees to provide the required information under Rule 144A(d)(4) of the US Securities Act, upon request by any holder or beneficial owner of the securities.

In terms of structure, many of the bonds adopt a trustee structure. Per ranking, they often constitute direct, general, unsubordinated and (subject to provisions on negative pledge) unsecured obligations of the issuer ranking *pari passu* with other unsecured

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[31] This is an exemption from the provisions of Section 5 of the US Securities Act. In the Foreign Offering Release No. 33-4708 issued by the US SEC in 1964, it was stated that the "registration requirements of section 5 were primarily intended to protect American investors" and that the SEC would decline to take action "for failure to register securities of United States corporation distributed abroad to foreign nationals" "where the offering is made under circumstances reasonably designed to preclude distribution or redistribution of the securities within, or to nationals of the United States." See also Virginia Trioa, 'An Overview of the Eurobond Market', (1987) 12 North Carolina Journal of International Law, p. 331. <https://scholarship.law.unc.edu/ncilj/vol12/iss3/2> accessed on May 28, 2022.

obligations of the issuer. The notes may be issued in bearer or registered form, as global notes or definitive notes[32]. Definitive notes certificates are issued in limited circumstances. The issuers may also be required to obtain no-objection letters from relevant regulatory bodies such as the Central Bank of Nigeria and the Securities and Exchange Commission.[33]

3. EUROBOND ATTRACTIONS

The major attraction of the Eurobond market is the lack of regulation by any one country;[34] as such the players enjoy freedom from stringent registration requirements of domestic regulatory bodies. Often, these registration requirements may also be time-consuming. The absence of regulation also provides anonymity to the investor coupled with the fact that many of the bonds are issued in bearer form. Since there is no requirement to list the identity of the beneficial owner of the bonds with any regulatory authority, investors enjoy anonymity which would be impossible otherwise.

Furthermore, the absence of registration requirements also translates to lower overall costs associated with the issuance and trading of Eurobond for the issuer.[35] Sometimes, the terms of the Eurobond may be preferable to the terms of domestic bonds in terms of interest rates and maturity.

As market practice and a standard feature of the Eurobond, interest paid on the bonds are free of withholding taxes.[36] For

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[32] A global note is defined as a single document which represents an entire issue of securities. It is deposited with a custodian for safekeeping. On the other hand, a definitive note refers to a certificate issued directly to a noteholder.

[33] Where the issuer is a bank or a public company respectively.

[34] It is notable, however, that the Association of International Bond Dealers (AIBD) and the International Primary Market Association (IPMA) have rules and recommendations from time to time for self-regulation in the market. See Association of International Bond Dealers, Recommendations (1986); International Primary Market Association, Recommendations and Booklet (1985).

[35] Virginia Trioa, 'An Overview of the Eurobond Market', (1987) 12 North Carolina Journal of International Law p. 364. <https://scholarship.law.unc.edu/ncilj/vol12/iss 3/2 > accessed on May 28, 2022

[36] This is subject to exceptions in certain jurisdiction such as Nigeria.

example, in Australia, interest payments on Eurobonds held by overseas investors are exempt from withholding taxes.[37] They may however be subject to taxation on the interest in their own countries. Yet, because Eurobonds are often issued in bearer form and clouded in anonymity, the bondholders can take advantage of the fact that their identity is not recorded with regulatory authorities to evade paying taxes in their home countries.[38]

In Nigeria, the Eurobond is particularly attractive to the issuers (sovereign and corporate) as it offers an inflow of foreign exchange. As stated in the Debt Management Office Press Release following the Nigerian 2021 Eurobond Issue, the issuance was expected to increase the external reserves thereby supporting the Naira exchange rate and Nigeria's sovereign rating.[39] It also provides an opportunity to reduce the budget deficit and raise money for capital projects in the absence of domestic resources.[40] Generally, the Eurobond is less restrictive and offers more control over the proceeds in comparison with loans from foreign lenders. For corporate issuers especially banks, it is a relatively easier and faster medium of raising capital in the international capital markets to strengthen their capital base whilst keeping with the bounds of regulatory requirements.

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[37] Johannes Juttner, Norman, Carlsen, "Taxing International Capital Income: Interest Withholding Tax" (1998) 1:3 Journal of Australian Taxation, p. 219. This exemption still applies where the bonds pass the public offer test pursuant to Section 128F of the Australian Tax Act.

[38] Steven Plaut, Federal Reserve Bank of San Francisco Weekly Letter – The Eurobond Market–Its Use and Misuse, June 10, 1988 < https://fraser.stlouisfed.org /files/docs/historical/frbsf/frbsf_let/frbsf_let_19880610.pdf > accessed on June 10, 2022.

[39] Debt Management Office Nigeria, 'Press Release: Nigeria Back at International Capital Market with Eurobond Offer' (September 16, 2021) <https://www.dmo .gov.ng/news-and-events/dmo-in-the-news/press-release-nigeria-back-at-international-capital-market-with-eurobond-offer > accessed on April 15, 2022.

[40] 'Special Report: Eurobonds, an Opportunity or a Curse for African Economies' (October 25, 2015) <https://web.northeastern.edu/econsociety/eurobonds-an-opportunity-or-a-curse-for-african-economies/> accessed on June 10, 2022.

4. LEGAL ISSUES IN CONNECTION WITH THE ISSUANCE OF EUROBONDS

4.4. Taxation

As earlier mentioned, one of the intricate features of the Eurobond is the payment of interests free of withholding taxes. This is directly linked to the history of the Eurobonds. At its origin, the first Eurobond was designed to avoid taxes and controls in place to regulate money moving across borders.[41] In order to achieve this, the bond was created using different aspects of different countries' regulations. The first Eurobond was issued in Netherlands to avoid a 4% tax[42] which would have been imposed in Britain; paid in Luxembourg to further avoid tax in Britain and listed on the London Stock Exchange. Finally, to avoid any form of deduction of tax at source, the issuer was Autostrade[43], a subsidiary of IRI, the Italian body controlling the state's participation in industry, rather than IRI itself which would have had to deduct tax at source.[44] The characteristics of this first issue became standard features of the Eurobond. Subsequently, it would appear that many governments also realised the importance of the Eurobond market as a source of capital and do not want to

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[41] At the time, there was an Interest Equalization Tax in the US that raised the cost of foreign borrowing in the US market by 1% - Oliver Bullough, 'The Real Goldfinger: The London Banker who broke the World' (September 7, 2018) <https://www.theguardian.com/news/2018/sep/07/the-real-goldfinger-the-lon don-banker-who-broke-the-world > accessed on June 12, 2022.

[42] Stamp duties on bearer bonds in Britain at the time was 4 per cent and it was believed this was going to significantly reduce the attraction of the new bonds - Oliver Bullough, 'The Real Goldfinger: The London Banker who broke the World' (September 7, 2018) <https://www.theguardian.com/news/2018/sep/07/ the-real-goldfinger-the-london-ban ker-who-broke-the-world > accessed on June 12, 2022.

[43] Autostrade was permitted to pay interest gross. See Jo Richards, Toby Fildes, "Mighty Eurobond Market celebrates 50th anniversary" (June 28, 2023) accessed at <https://www.icmagroup.org/assets/documents/About-ICMA/Eurobond-anniver sary/Euroweek-Mighty-Eurobond-market-celebrates-50th-anniversary-28-June-2013.pdf> on July 30, 2022.

[44] Ibid. The first Eurobonds were often issued by subsidiary finance corporations in Luxembourg, the Netherlands, the American state of Delaware or in the Netherlands Antilles, where no withholding taxes are levied on the interest payments. See C.W.M. van Ballegooijen, "The Units of Account in Eurobonds" (1975) Netherlands International Law Review, 22, pp 51-68.

put their own companies at a disadvantage by imposing a withholding tax on the interest payments.[45]

Nevertheless, the approach to taxation of Eurobonds is not always straightforward. In relation to Eurobond issuances by companies in Nigeria, prior to the enactment of the Companies Income Tax (Exemption) Act (the "CIT (Exemption)") in 2012, Eurobonds by corporate organisations were issued using special purpose vehicles (SPVs) incorporated in countries with double taxation treaties (DTT) with Nigeria. Ordinarily, the corporate organisations would have been required to withhold tax on interest payments to noteholders. The proceeds of the bond issued by the SPV were however loaned to the corporate organisations and structured in a manner that ensured interest payments to the SPV lender were free of withholding tax.[46] However in 2012, the CIT (Exemption) was enacted exempting bonds and securities from the deduction of withholding tax. The validity period of the new law was only 10 years ending January 1, 2022. Subsequently, the Federal Inland Revenue Service (FIRS) issued a public notice[47] on the payment of income tax on bonds, other than bonds issued by the Federal Government. Consequently, withholding tax is expected to be deducted at source for corporate Eurobond issuances, while the income received is expected to be included in self-assessment returns and tax computation of companies. The implication of this is that corporate organisations may revert to the old structure or adopt other tax efficient structures.

Notwithstanding the fact that withholding tax is now deductible in respect of Eurobonds (other than those issued by the Federal Government), the terms and conditions of the Eurobonds contain

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[45] Brian Quinn, The New Euromarkets: A Theoretical and Practical Study of International Financing in the Eurobond, Eurocurrency and Related Financial Markets (The Macmillan Press Ltd, 1979) p. 84.

[46] For example, prior to 2012, the Nigerian tax laws granted exemption from withholding tax to interest payments on loans with a maturity period of up to 7 years. See Daniel Agbor and Joseph Eimunjeze, 'MINT Guide: Euro risks and reward' (2015) <https://www.iflr1000.com/NewsAndAnalysis/2015-mint-guide-euro-risks-and-reward/Index /2967> accessed on April 17, 2022.

[47] Federal Inland Revenue Service, 'Public Notice on Payment of Income Tax on Profit from Bonds and Short-Term Government Securities' <https://pwcnigeria.typepad.com/files/firs-public-notice-on-taxation-of-bonds-and-government-securities_feb2022.pdf> accessed on May 29, 2022.

tax gross-up provisions[48] which ensure that the bondholders are put in the same position they would have been prior to the deductions. Such tax gross-up clauses help in maintaining the standard features of the Eurobond, i.e., exemption from taxation, and are enforceable in Nigeria.

In some countries, Eurobonds enjoy exemptions from withholding taxes subject to specific regulatory requirements. For example, in the UK, there is in place a "quoted Eurobond" exemption. Thus, where (x) the Eurobond is issued by a company, (y) it carries the right to interest and (z) is listed on a recognised stock exchange, it is exempt from the deduction of withholding tax on the interest payable.[49] In other countries, parties adopt tax gross-up clauses, as is the case in Nigeria.

4.5. Determination of Applicable law

By the nature of the Eurobond, it involves entities from different jurisdictions - from the process of its issuance to its listing and the participants involved in the process - which constitute foreign elements[50]. Where there are foreign elements, a eurobond issuance presents a unique conflicts of laws issue. Some of the questions which have been asked in this regard border on the law which will be applied for determining the validity of a Eurobond; the right and liabilities of the issuer and the bondholder; transfer of title subject to or free from any defects in the title of the transferor, etc[51]. Vygovskyy,[52] suggests some solutions to the arising conflicts of law issues in the form of pointers to the applicable legal systems notably – *lex societatis* (law of the place of incorporation of the issuer), *lex loci contractus* (law of the place of closing the issue of the Eurobonds); *lex monetae* (referring to the country of the currency of denomination); *lex solutionis* (law of the place of payment under the Eurobonds). In other words, the courts may

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[48] A tax gross up clause is one which requires payments in full irrespective of any tax deductions, whether the liability of the tax rests on the recipient.

[49] Deloitte Legal, 'Quoted Eurobonds and Withholding Tax Exemptions', <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/legal/deloitte-uk-legal-eurobonds.pdf> accessed on May 29, 2022.

[50] Georges R. Delaume, 'Choice of Law and Forum Clauses in EuroBonds', (1972) Columbia Journal of Transnational law, 11:240-266.

[51] O.I. Vygovskyy, 'Conflict of Laws Aspects of International Bonds Transactions', (2021) 1 (147) Actual Problems of International Relations, p. 47, 49. <https://doi.org/10. 17721/apmv.2021.147.1> accessed on June 30, 2022.

[52] Ibid.

make recourse to any of these legal systems. Whilst Vygovskyy's approach appreciates the multi-jurisdictional nature of Eurobonds, it creates further uncertainty as to the position of the law and does not appear to answer the question of applicable law. Furthermore, it suggests that the applicable law can only be determined retrospectively after the court makes a determination. It has also been suggested that different legal systems should apply to the aspects of the Eurobond. For example, Tosunian[53] suggests that the national laws of the country of the issuer should apply to the terms and conditions while the rules of the stock market or listing authority should apply to the circulation of the Eurobond. This creates some level of certainty and attempts to ensure that the applicable law is that with which the facts have a strong connection. There is no uniform approach to the determination of applicable laws as there are no international conventions governing such issues. Owing to the minimal regulation of the Eurobond, its international regulation has generally been with the use of recommendations by and rules of international associations.[54]

Notwithstanding the conflicts of laws issues, in practice, what is often the case is an express choice of governing law for at least the contractual aspects of the Eurobond. In Nigeria, common law countries and many other jurisdictions, parties have the autonomy to choose the proper law to govern the terms and conditions. However, in some other jurisdictions, in the interests of national investors and for the protection of such interests, the court may disregard the choice of proper law in favour of the *lex fori* (law of the forum).[55]

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[53] G. A. Tosunian 'Banking Law of the Russian Federation'. (2002) 2, Special Part, Manual. p. 23.

[54] Horn N. 'A Uniform Approach to Eurobond Agreements', (1977) Law and Policy in International Business, 9 p.753

[55] Vygovskyy, at page 53.

5. ECONOMIC IMPLICATIONS OF THE INCREASING UTILITY OF EUROBONDS IN NIGERIA

In February 2017, when Nigeria returned to the ICM to borrow US$1 billion through the issuance of Eurobonds, the primary motivation was the need for foreign investment and where to get the cheapest possible type of funding.[56] The Eurobond issuance was oversubscribed at an interest rate of 7.875%. That same year, in April, Nigeria issued a second tranche of US$500 million Eurobonds. Yet again, in November 2017, a dual tranche of US$3 billion Eurobonds was issued. The first tranche of US$1.5 billion with a 10-year term, and the latter US$1.5 billion with a 30-year term. In a similar fashion, many of the sovereign Eurobond issuances up to 2022 have been oversubscribed with interest rates between the range of 5.125% and 8.375%. Perhaps in 2017, borrowing was the solution to the need for foreign investment and Eurobonds were the cheapest option for foreign borrowing, but the real question is, how cheap is cheap?

5.4. Use of Proceeds

As of December 31, 2021, the total external debt profile of Nigeria accounted for 40.08% of total public debt.[57] Yet, the debt position continues to worsen as borrowings are not always used for long term capital expenditure or long term uses. Recently, in March 2022, it was reported that about US$2.2 billion from the Eurobond proceeds of 2021 would be used to fund fuel subsidy.[58] Over the years, it has been stated that the proceeds of the issuances would be applied towards funding the Appropriation Act (or financing capital projects), the reality is 40.3% of the fiscal

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[56] Feyi Fawehimi, "Why Nigeria was left with little choice but to do a $1 billion Eurobond deal" (Quartz Africa, February 13, 2017) <https://qz.com/africa/908946/nigerias-eurobond-deal-raises-more-questions-for-kemi-adeosun-emefiele-and-president-buhari/> accessed on May 29, 2022.

[57] Debt Management Office Nigeria, 'Nigeria's Total Public Debt Portfolio as at December 31, 2021' <https://www.dmo.gov.ng/debt-profile/total-public-debt/3856-nigeria-s-total-public-debt-stock-as-at-december-31-2021/file > accessed on May 29, 2022.

[58] Oladehinde Oladipo, 'Nigeria will use Eurobond cash to fund 2022 petrol subsidy – Minister of Finance' (Business Day, March 16, 2022) <https://businessday.ng/energy/oilandgas/article/nigeria-will-use-eurobond-cash-to-fund-2022-petrolsubsidy-minister-of-finance/ > accessed on May 29, 2022.

budget is applied towards recurrent expenditure and 22.6% for debt servicing[59]. So, while Eurobonds may be the cheapest option for foreign reserves, if debts continue to rise without substantial capital projects, Nigeria will soon be borrowing simply to service outstanding debts.[60]

5.5. Associated Risk with Investment in Nigeria

One of the push factors for the recurrence of the Eurobond issuance is the seeming success of each. As stated by the Ministry of Finance, "the successful pricing demonstrates continued strong market appetite for Nigerian securities".[61] Whilst this may hold true, it is important to also look deeper into global factors that may contribute to this success. Interest in bonds in Sub-Saharan Africa, including Nigeria by foreign investors has been high partly due to their high yields when compared to the lower interest rate levels obtainable in the developed markets.[62] However, with the increasing risks associated with investing in Nigeria and the rising insecurities, foreign investors may demand even higher rates to maintain their appetite.[63]

5.6. Associated Risk with Participating in the International Capital Market

Furthermore, one of the pros of participating in the international capital market is the expectation of a positive effect on domestic capital markets in the form of foreign investments, which in turn improves the growth of domestic capital markets. For this reason, since 2017, the sovereign Eurobond issuances have also been listed

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[59] The Appropriation Act, 2022. About 31.9% is expected to be spent on capital expenditure.

[60] David Whitehouse, 'Nigeria's Eurobond sale weakens public finances as debt service swallows resources' (Africa Report, October 12, 2021) <https://www.the africareport.com/135551/nigerias-eurobond-sale-weakens-public-finances-as-debt-service -swallows-resources/> accessed on April 18, 2022.

[61] Maggie Fick, 'Nigeria sells $500m Eurobond as it looks to boost infrastructure spending' (Financial Times, March 17, 2021) <https://www.ft.com/content/d991f 019-8498-3f5a-ac4b-ef054e3d0fab> accessed on April 18 2022.

[62] John Mbu, 'Why Eurobonds are an important Source of finance for Africa' (World Economic Forum, February 12, 2016) <https://www.weforum.org/agenda/2016 /02/overview-of-the-sub-saharan-african-eurobond-market/> accessed on May 30, 2022.

[63] 'Nigeria to make Eurobond Call as FX Scarcity Deepens' (Marketforces Africa, May 18, 2021) <https://dmarketforces.com/nigeria-to-make-eurobond-call-as-fx-scar city-deepen s/> accessed on June 5, 2022.

on Nigerian stock exchanges. However, owing to the challenges which the global economy suffers, interest rate on bonds have been relatively high. Thus, raising funds in the international capital markets is costly and it comes with its own risks. This includes debt service obligations, currency risk or even crowding out of domestic markets[64]. In other words, while access to international capital markets is often expected to improve the growth of the domestic capital market, increased government participation in the international capital market may reduce the incentive to participate in the domestic markets. For these reasons, the proceeds of these issuances must be used for purposes that yield high returns, eliminating risks of budget deficits arising from such issuance.

5.7. Foreign Currency Risk

The Eurobonds issued in Nigeria have been in US dollars. This is the case with most, if not all Eurobonds issued by sub-Saharan African countries. With the rapidly depreciating nature of the naira, the nominal value of the Eurobonds significantly increases above the values of the Eurobonds at the time of issuance. For example, in 2011, the naira rate per dollar was N151.9/US$1.[65] However, in 2021 when the first Nigerian sovereign Eurobond was redeemed, the currency exchange rate had become N387.2/US$1.[66] Thus, not only are there high interest rates, but currency depreciation also further adds to the cost of borrowing.[67]

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[64] Chuku Chuku, Mustafa Yasin Yenice, 'Eurobonds, Debt Sustainability and Macroeconomic Performance in Africa: Synthetic Control Experiments', (2021), Working Paper Series, no 356, African Development Bank Group, Abidjan, Cote d'Ivoire < https://www.afdb.org/sites/default/files/documents/publications/wps_no_356_eurobonds_debt_sustainability_and_macroeconomic_performance_in_africa_synthetic_control_experiments_f.pdf> accessed on June 5, 2022.

[65] As at January 2011, 'US Dollar to Nigerian Naira Spot Exchange Rates for 2011' <https://www.exchangerates.org.uk/USD-NGN-spot-exchange-rates-history-2011.html> accessed on May 29, 2022.

[66] As at January 28, 2021, 'US Dollar to Nigerian Naira Spot Exchange Rates for 2021'<https://www.exchangerates.org.uk/USD-NGN-spot-exchange-rates-history2011. html> accessed on May 29, 2022.

[67] John Mbu, 'Why Eurobonds are an important Source of finance for Africa' (World Economic Forum, February 12, 2016) <https://www.weforum.org/agenda/2016/02/overview-of-the-sub-saharan-african-eurobond-market/> accessed on May 30, 2022.

5.8. Eurobonds versus Loans

Over the years, Nigeria has had a penchant for foreign debt and Eurobonds appear to be the new addition to the mix. Perhaps it has become a way of "distancing from the traditional aid". So, while the option of going to the International Monetary Fund (IMF) may be easily ruled out[68] because of the conditions that may be imposed or the necessary reforms that may be required, the obvious reality is that the option of Eurobonds is putting new wine in old wineskins. Eurobonds constituted 33.33 percent to the total external debt stock in 2017[69]. As at December 31, 2021, the proportion of Eurobonds to the total external debt stock was 37.4 percent.[70]

Contrary to the perception the increasing utility of Eurobonds may create, pursuant to the Fiscal Responsibility Act (FRA)[71], external borrowings are required to be on concessional or at relatively low interest rates. Under the FRA, "concessional terms" is defined as interest rates which do not exceed 3 percent. In line with this, for example, one of the factors for the increase in the loans from China is the concessionality of the terms.[72] However, Eurobonds are not bound by the requirements of concessionality as the government is not bound by these provisions of the FRA in borrowing from the capital market[73]. Therefore, as shown above, interest rates on Eurobonds are sometimes as high as 8%. Furthermore, bilateral loans especially from development agencies

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68 Feyi Fawehimi, 'Why Nigeria was left with little choice but to do a $1billion eurobond deal', (Quartz Africa, February 13, 2017), <https://qz.com/africa/908946 /nigerias-eurobond-deal-raises-more-questions-for-kemi-adeosun-emefiele-and-presi dent-buhari/ > accessed on May 28, 2022.

69 Debt Management Office Nigeria, Annual Report 2017, page 11 <https://dmo .gov.ng/index.php/publications/reports/dmo-annual-report-statement-of-accounts /1766-dmo-2017-annual-report > accessed on May 28, 2022.

70 Debt Management Office Nigeria, 'Nigeria's External Debt Stock as at December 21, 2021 in Millions of USD' <https://www.dmo.gov.ng/debt-profile/external-debts/ external-debt-stock/3852-nigeria-s-external-debt-stock-as-at-december-31-2021/file > accessed on May 29, 2022.

71 Section 41(a), Fiscal Responsibility Act, 2007 (as amended by the Finance Act 2021).

72 Debt Management Office, Nigeria, "Facts about Chinese Loans to Nigeria" <https://www.dmo.gov.ng/facts-about-chinese-loans-to-nigeria> accessed on June 1, 2022.

73 Section 41(2), FRA.

often come with technical assistance, knowledge services and policy advice[74] which the Eurobonds do not offer.

5.9. Debt Ratio

Some economists have argued that the debt situation of Nigeria is justified, and that the debt situation is wrongly emphasized. The argument is made on the strength that Nigeria suffers an infrastructure deficit which external borrowing often targets.[75] The assessment of the Nigerian situation can be done using the metrics of debt to GDP ratio and the debt service to revenue ratio. Proponents of the sustainability of Nigeria's debt often rely on Nigeria's debt to GDP ratio. In the first quarter of 2022, Nigeria's debt to GDP ratio was 23.37%.[76] This was an increase from the ratio of 22.47% in the previous quarter ending December 2021.[77] It is true that the debt to GDP ratio has not exceeded Nigeria's self-imposed limit of 40% neither has it exceeded the 55% advised by the IMF.[78] Also, comparisons are often made with other countries such as South Africa, which has a debt-to-GDP ratio of 68.8% in December 2021.[79] The deb-to-GDP ratio compares a country's gross national debt to its gross domestic product, in other words, how much it owes compared to how much it produces. The limitation to this metric however is that it only speaks to the likelihood of repayment of debt. On the other hand, the debt service to revenue measures how much of a country's

[74] Chukwuka Onyekwena, Precious Akanou, Anointing Momoh, "Infrastructure Financing in Nigeria: Engagement with MDBs and Recommendations on How Lending Processes could be Improved" (2016), Working Paper, WPS/16/03, Centre for the Study of the Economies of Africa <https://cseaafrica.org/wp-content/uploads /2017/11/Infrastructure-Financing-in-Nigeria-2813.pdf> accessed on August 29, 2022.

[75] Somkele Awa-Kulu, "Much Ado About Nothing?" (The Republic, June 29, 2022), <https://republic.com.ng/june-july-2022/reviewing-nigerias-debt-situation/> access ed on August 29, 2022.

[76] Samuel Oyekanmi, "Nigeria's Debt-to-GDP Ratio rises to 23.3% as debt stock rises to N41.6 trillion in Q1 2022" (Nairametric, June 9, 2022) <https://naira metrics.com/2022/06/09/nigerias-debt-to-gdp-ratio-rises-to-23-3-as-debt-stock-rises-to-n41-6-trill ion-in-q1-2022/> accessed on August 29, 2022.

[77] Ibid.

[78] Somkele Awa-Kulu, "Much Ado About Nothing?" (The Republic, June 29, 2022), <https://republic.com.ng/june-july-2022/reviewing-nigerias-debt-situation/> accessed on August 29, 2022.

[79] Emmanuel Abara Benson, "20 countries with the highest debt-to-GDP ratio in Africa" (Business Insider Africa, March 21, 2022), <https://africa.businessinsider.com/local/markets/20-countries-with-the-highest-debt-to-gdp-ratio-in-africa /8qdmrsq> accessed on August 29, 2022.

revenue is spent on debt service. In April 2022, data from the Federal Ministry of Finance, Budget and National Planning revealed that Nigeria spent 118% of its revenue in the first four months of 2022 on debt service.[80] Therefore, while Nigeria may show a comfortable propensity to repay its loans, the reality is that a large part of the revenue is already being spent on debt servicing. It is highly doubtful that this is sustainable.

5.6 Alternative Source of Financing

There is no gainsaying that Nigeria suffers an infrastructure deficit. However, with the constant fall of crude oil prices, and consequently, a significant reduction in income for Nigeria, it is not sustainable to continue to finance capital projects largely with full recourse to the government. It is important that the government explores other means of financing especially on non-recourse terms. Whilst Nigeria already sources finance through public private partnerships, the size of this line of credit is yet to significantly reduce the deficit. Through government assurances (especially regarding contractual obligations of the government) expressed in a legal/regulatory framework, more public-private partnerships can be formed. For example, the Nigerian Investment Promotion Commission Act[81] contains certain government assurances such as repatriation of proceeds to encourage foreign participation in Nigeria. In similar fashion, the regulatory framework for PPPs in Nigeria should include assurances to further promote private participation in capital projects. Nigeria runs a federal system of government, so such framework should also be replicated at sub-national levels. Through incentives such as guarantees and tax holidays, the government can also encourage private investments in infrastructure.

6. CONCLUSION

There is no doubt that Eurobonds offers some advantages to Nigeria and many African countries. When compared with

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[80] Samuel Oyekanmi, "Nigeria spends 118% of revenue on debt service" (Naira metrics, July 21, 2022) <https://nairametrics.com/2022/07/21/nigeria-spends-118-of-revenue-on-debt-service/ > accessed on August 29, 2022.

[81] Cap N117, Laws of the Federation of Nigeria, 2004.

traditional loans from international institutions, Eurobonds are less restrictive and allows the government more control over its assets and the money obtained. Also, the fact that the Eurobond issuances have been oversubscribed in recent years speaks to the continued eagerness of investors to invest in emerging markets and in Nigeria, even though some investors still regard the bonds as risky.

However, these benefits are only substantial in the long run where the pros are not outweighed by the cons. Nigeria has had a chequered history with sovereign borrowings and there is no guarantee the bonds will be any better in the near future, given the degrading economic situation of the country.

In order to mitigate the risk of an increase in the budget deficit, proceeds of issuance should be applied to specific high yield capital projects and not recurring expenditure. With the rapid increase in Nigeria's debt ratio, there is a more pressing need for the government to explore alternative options, especially in the private sector to financing capital projects and its development policies.