

INVESTING IN WEST AFRICA

THE FOREIGN EXCHANGE LEGISLATION OF THE WAEMU

The exchange rate stability as well as the possibility to transfer capitals are conclusive for the completion of investments abroad. In this purpose, the West African Economic and Monetary Union (WAEMU) established a harmonized legal regime securing, amongst other, currency convertibility and money transfer for its Member States, Mali, Niger, Senegal, Guinea-Bissau, Benin, Togo, Burkina Faso, and the Ivory Coast.

1. A SINGLE MONETARY POLICY FOR ALL WAEMU MEMBER STATES

Initially, the WAEMU Member States mentioned above¹ founded or adhered to the West African Monetary Union (WAMU) which instituted the principles of a single currency, the CFA Franc (FCFA),² a single central bank, the Central Bank of West African States (BCEAO), and a single monetary policy for all Member States, in the terms of the WAMU Treaty³ dated November 14th 1973, which was later substituted by the terms of the revised WAMU Treaty dated January 20th 2007.⁴

The WAMU Treaty was completed by a Treaty instituting the West African Economic and Monetary Union (WAEMU Treaty) initially signed in 1994,⁵ and replaced by the terms of the revised WAEMU Treaty dated January 29th 2003.

1.1 Principles

The objectives of the WAEMU include harmonizing the legal regime and strengthening the Union's economic competitiveness.⁶

Thus, a common external tariff was set up and custom duties within the Union eliminated.⁷ This includes the elimination of the dividend taxation. The WAEMU Treaty also guarantees free movement of capital.⁸ All restrictions to the movement of residents' capital within the Union are prohibited.⁹

¹ Hereinafter referred to as: "Member States".

² Article 4 WAMU Treaty (see below).

³ Treaty Establishing the West African Monetary Union.

⁴ Article 42 WAMU Treaty.

⁵ Article 2 WAEMU Treaty.

⁶ Article 4 WAEMU Treaty.

⁷ Article 76b WAEMU Treaty.

⁸ Article 76d WAEMU Treaty.

⁹ Article 96 WAEMU Treaty.

The Union's monetary politics is in particular directed by the dispositions of the WAMU Treaty,¹⁰ which entails a distribution of the competences amongst different institutions.

1.2 The Conference of Heads of State and Government

The supreme authority of the WAEMU is the Conference of Heads of State and Government.¹¹

The Heads of State and Government of all Member States confer at least once a year to decide unanimously on general political matters.¹² Hence, the Conference issues additional acts that complete the treaties without modifying them and are to be respected by all member state authorities.¹³

1.3 The Council of Ministers

A Council of Ministers gathering the Ministers of Finance of all Member States supervises the implementation of the decisions of the Conference of State Heads and Governments.¹⁴

Moreover, it ensures the direction of the Monetary Union and defines the regulatory environment of the banking sector.¹⁵ Together with the Director of the BCEAO, the Council defines the Union's foreign exchange politics.¹⁶ This includes the execution and control of the Member States' financial relations with non-member States.¹⁷

In this purpose, the Council of Ministers can edict obligatory regulations, immediately enforceable in all Member States, or directives that must be enacted in the Member States' legal systems in respect of the result to be attained.¹⁸ To ensure the accomplishment of its missions, the Council of Ministers can also formulate recommendations and opinions.¹⁹

1.4 The BCEAO

The BCEAO is the central bank for all Member States of the WAEMU with the exclusive competence to print currency.²⁰

Concerning foreign exchange, the BCEAO is in charge of implementing the WAEMU Forex regulations with the possibility to clarify them.²¹ It is responsible for managing the foreign exchange reserves of

¹⁰ Article 62 WAEMU Treaty.

¹¹ Article 6 WAMU Treaty.

¹² Article 17 WAEMU Treaty.

¹³ Article 19 WAEMU Treaty.

¹⁴ Article 16 WAMU Treaty ICW Article 20 WAEMU Treaty.

¹⁵ Articles 10 and 17 WAMU Treaty.

¹⁶ Article 18 WAMU Treaty.

¹⁷ Article 34 WAMU Treaty.

¹⁸ Articles 34 WAMU Treaty ICW Articles 42, 43 WAEMU Treaty.

¹⁹ Article 15 WAMU Treaty.

²⁰ Article 26 WAMU Treaty and Article 12 of the Statutes of the Central Bank of West African States (hereinafter "Statutes"; integrated by Article 27 WAMU Treaty).

²¹ Article 9 Statutes.

WAEMU Member States,²² supervises all organisations conducting foreign exchange transactions,²³ and has the right to request all information of residents' entities in the WAEMU Member States.²⁴

2. A STABLE CURRENCY: THE FCA FRANC

In accordance to the Monetary Cooperation Agreement (MCA) between France and the WAMU dated December 4th 1973 the FCFA rate is linked to the rate of the French Franc and now to the Euro.

Additionally, the French Treasury guaranteed unlimited convertibility of the FCFA. In exchange, the WAEMU States must deposit half of their foreign exchange reserves in individual operational accounts opened at the French Treasury.

Furthermore, all foreign exchange reserves of Member States are pooled in the BCEAO. This facilitates and harmonizes the WAEMU monetary politics.

Lastly, the parties to the MCA agreed to provide freedom of transfer within the WAEMU, an incentive for investment and economic growth.

On December 21st 2019, these principles were partly revised by the Franc CFA Reform.

The Council of Ministers decided to change the name of the common currency of the WAEMU from FCFA to ECO, the latter remaining pegged to the Euro and unlimitedly convertible.²⁵

Furthermore, the reform ends the WAEMU States' obligation to deposit parts of their foreign exchange reserves in France. France also abandons its role in the administration of the BCEAO.

Even though this reform is applicable for all WAEMU Member States, its implementation is yet to come.

3. A SINGLE FOREX REGIME

The Council of Ministers harmonizes the foreign exchange regulation within the WAEMU through the Regulation No. 09/2010/CM/UEMOA/ on external financial relations for Member States of the West African Economic and Monetary Union²⁶ entered into force on October 1st 2010.

The purpose of this Regulation was to set up a clear regime especially for the Forex aspects of the investments in the WAEMU area.

Investments in line with the Regulation are widely defined as

²² Article 9 Statutes.

²³ Article 4 Schedule I of the Regulation No. 09/2010/CM/UEMOA/ on external financial relations of Member States of the West African Economic and Monetary Union (WAEMU): Intermediaries Conducting Financial Transactions with Foreign Countries.

²⁴ Article 33 Statutes.

²⁵ Ref.: Article 19 WAMU Treaty.

²⁶ Hereinafter: "Regulation".

- the purchase, creation or expansion of businesses, branches or any other enterprise of a personal nature;
- any other transactions which, individually or taken together, concomitantly or successively, result in one or more people taking out or increasing their interest in a firm engaged in industrial, agricultural, trade, financial or property business of any form, or in the expansion of such a firm already under their control.²⁷

Residents are defined as all natural persons having their area of interest in a WAEMU Member State and WAEMU Member State subsidiaries of national or foreign legal entities.²⁸

3.1 Capital transactions

Within the WAEMU, capital transactions such as

- capital movements,
- investment transactions,
- loan transactions

are free and unrestricted.²⁹

Between WAEMU and foreign countries, restrictions vary depending on the type of capital transaction.

Type of capital transaction	Procedural and formal requirements	Legal basis ³⁰
<ul style="list-style-type: none"> • Non-residents' investments in Member States <ul style="list-style-type: none"> ○ Constitution and sale of FDI³¹ 	<ul style="list-style-type: none"> • Unrestricted • Declare to the EFD³² and the BCEAO for statistical reasons 	Art. 10§7
<ul style="list-style-type: none"> ○ Liquidation in form of transfer between resident and non-resident 	<ul style="list-style-type: none"> • Provide justifying supporting documents • Conducted through a local bank 	Art. 10§8
<ul style="list-style-type: none"> • Payments to non-member States <ul style="list-style-type: none"> ○ Proceeds from liquidation of investments ○ Sale of foreign securities by non-residents ○ Repayment of contractual debts 	<ul style="list-style-type: none"> • To be done by local banks • Provide necessary supporting documents 	Art. 7§1

²⁷ Article 1 Regulation.

²⁸ Article 1 Regulation.

²⁹ Article 6 Regulation ICW Articles 76d, 96, 97 WAEMU Treaty and Article 3 WAMU Treaty.

³⁰ Within this chart, all articles without citation are those of the Regulation.

³¹ Foreign Direct Investment.

³² External Finance Directorate.

<ul style="list-style-type: none"> ○ Reimbursements of short-term credits granted to finance trade or industrial transactions 		
<ul style="list-style-type: none"> ○ Others 	<ul style="list-style-type: none"> ● Apply for authorization of MoF³³ ● Provide supporting documents certifying transaction's nature and genuineness 	Art. 7§2
<ul style="list-style-type: none"> ● Residents investing in non-member States <ul style="list-style-type: none"> ○ Subscribing to the initial capital when a new company is created ○ Acquiring or increasing an interest in an existing company ○ Creating, acquiring, or expanding an unincorporated firm 	<ul style="list-style-type: none"> ● Apply in letter form for authorization of MoF (sample in Schedule VII³⁴) ● At least 75% financed through foreign loans 	Art.10§1-4
<ul style="list-style-type: none"> ○ Liquidation of residents' investment transactions made abroad 	<ul style="list-style-type: none"> ● Declare to the MoF and the BCEAO for information purposes 	Art. 10§6
<ul style="list-style-type: none"> ○ Reinvestment of the proceeds of the liquidation 	<ul style="list-style-type: none"> ● Apply for prior authorization of MoF 	Art. 10§6
<ul style="list-style-type: none"> ● Loans from non-residents made to residents (f. ex. from holding company to subsidiary) 	<ul style="list-style-type: none"> ● To be done through local banks ● Declare to the EFD and the BCEAO for statistical reasons 	Art. 11§ 1, 2
<ul style="list-style-type: none"> ○ Repayment in foreign currencies ○ Repayment by crediting foreign accounts in Francs or Euro 	<ul style="list-style-type: none"> ● To be done through local banks ● Declare to the EFD and the BCEAO for statistical reasons 	Art. 11§3
<ul style="list-style-type: none"> ● Loans, overdrafts in Francs or Euro, all advances made to non-residents (f. ex. loans granted to the holding company) 	<ul style="list-style-type: none"> ● Granted by local banks ● Apply to prior authorization by EFD upon approval by BCEAO³⁵ 	Art. 32 Schedule II ³⁶

³³ Minister of Finance.

³⁴ Schedule VII of the Regulation No. 09/2010/CM/UEMOA/ on external financial relations of Member States of the West African Economic and Monetary Union (WAEMU): Request for Authorization or Declaration of Investments or Loans.

³⁵ Exceptions in Article 33 Schedule II.

³⁶ Schedule II of the Regulation No. 09/2010/CM/UEMOA/ on external financial relations of Member States of the West African Economic and Monetary Union (WAEMU): Specific Procedures for the Execution of Certain Payments.

3.2 Current transactions

Current payments to foreign countries must be carried out through local banks.³⁷ The different transactions individually require complementary procedures, as listed in the following chart.

Type of current transaction	Procedural and formal requirements	Legal basis ³⁸
<ul style="list-style-type: none"> • Payment toward foreign countries of <ul style="list-style-type: none"> ○ Commissions, brokerage, advising fees and business entertainment expenses ○ Interest and dividends, shares and profits from companies or partnerships, operating income from business, any other regular return on capital ○ Payments for the delivery of goods ○ Patent, licence, and trademark fees and royalties, copyright fees, audiovisuel royalties, etc. ○ Similar current payments 	<ul style="list-style-type: none"> • Conducted through local banks • Provide appropriate supporting documents 	Art. 4

3.3 Sale of foreign currencies

Foreign currencies held within the WAEMU belonging to residents or non-residents are to be sold or deposited with a local bank within one month of the payment due date.³⁹

The same applies for the sale of foreign currencies belonging to residents, that are collected abroad or paid by a non-resident.⁴⁰

³⁷ Article 4 ICW Article 2 Regulation.

³⁸ Within this chart, all articles without citation are those of the Regulation.

³⁹ Article 3 § 1, 3 Regulation.

⁴⁰ Article 3 § 2, 3 Regulation.

3.4 Foreign accounts and securities

The opening, operation or closing of foreign accounts, meaning accounts held by non-residents within the WAEMU, is conducted through local banks upon presentation of appropriate supporting documents.⁴¹ The compliance with regulations governing such accounts must be assured.⁴²

Foreign accounts in Francs or Euros are authorized by local banks to non-residents if their status and actual residence can be proven.⁴³ For accounts in other currencies, the BCEAO must give its authorization.⁴⁴

Offshore accounts, meaning accounts outside the WAEMU held by residents, can be opened by WAEMU residents when authorized by the Minister of Finance, upon approval of the BCEAO.

Lastly, deposits of domestic and foreign securities held by non-residents in a foreign account are unrestricted when

- transferred from another foreign account
- purchased with or replacing securities held in a foreign account
- purchased using foreign currency or by debiting a foreign account in Francs or Euro.⁴⁵

Once they are registered, they can be made available to the account holder abroad without prior authorization.⁴⁶

4. CONCLUSION

The WAEMU presents a reassuring and clear Forex regime for non-resident investors. Convertibility guarantee, a common currency pegged to the Euro, and single foreign exchange control characterize its harmonized legal framework. The WAEMU legislation thus provides astonishing stability for foreign investors.

Nevertheless, the fragility of some of the Member States' banking systems is not to be underestimated. In practice, the hereabove presented regime cannot prevent all risks that investors may consequently face in the individual countries.

⁴¹ Article 4.2 Regulation.

⁴² Article 4.2 Regulation.

⁴³ Article 34 II Schedule II.

⁴⁴ Article 35 Schedule II.

⁴⁵ Articles 36, 37 Schedule II.

⁴⁶ Article 38 § 1 Schedule II.