

Banking and Investments

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Asset Management Corporation Act, 2010:

A Review of the Act

The Asset Management Corporation of Nigeria Act, 2010 (AMCON Act) was recently signed into law by the President of the Federal Republic of Nigeria, Dr Goodluck Ebele Jonathan on 19 July 2010. The Act creates an Asset Management Corporation of Nigeria for the primary purpose of efficiently resolving the problems associated with non-performing loan assets of Nigerian banks.

Stakeholders in the industry have lauded the passage of the bill as a long overdue crisis-resolution mechanism for the seemingly beleaguered financial sector of the Nigerian economy. The Asset Management Corporation of Nigeria (AMCON) established pursuant to section 1 of the Act is charged with the responsibility of acquiring the non-performing loans from banks and other financial institutions, or as more appropriately termed under the Act, eligible financial institutions (EFIs). Whereupon AMCON resolves through receiving the underlining collaterals and filling the remaining capital inadequacy challenges necessary to make the Nigerian economy stronger and viable.

As part of its overall supervisory functions through AMCON, the Central Bank of Nigeria (CBN) is empowered to act with AMCON to provide a myriad of functions intended to improve the liquidity of the toxic assets by purchasing them using secondary market mechanisms, thus allowing the affected institutions to stabilize their balance sheets and avoid further losses.

In précis, the essence of AMCON is to provide for an entity that will help to stimulate the recovery of Nigeria's financial system by purchasing illiquid, difficult-to-value assets from banks and other financial institutions so that banks would once again be encouraged to resume lending to consumers and businesses without worrying about the unforeseen losses from troubled assets.

Acquisition of Eligible Bank Assets

In order to create liquidity in the banking sector, AMCON is empowered to purchase or acquire Eligible Bank Assets ("EBA") from Eligible Financial Institutions (EFIs). To aid AMCON in its efforts, the corporation is empowered to issue bonds or other forms of debt instruments as consideration for the acquisition of toxic assets of banks and other financial institutions. In purchasing the EBAs, AMCON has the discretion to choose the assets to be purchased; however the valuation of and subsequent purchase or acquisition of the EBAs are to be determined in accordance with guidelines issued from time to time by the CBN.

The Act also makes provisions for a category of assets known as tainted EBAs. These are basically EBAs which comprise of loans, credits and other financial accommodation obtained by insiders of or persons connected with the EFIs that granted the loan in situations where: the loans were obtained in breach of the rules and regulations of the EFIs; secured against the shares or other securities of the EFIs or in breach of the prevailing rules and regulations of the CBN.

Effect of acquisition of EBAs

Following the acquisition of the EBAs, the acquired assets automatically become vested in AMCON, and the corporation is then empowered to exercise all the rights and obligations previously enjoyed by the EFIs in relation to the purchased assets. In exercising this power, AMCON can among other things, institute court actions to protect, perfect or enforce any existing security rights or obligations, realise any security interests that the EFI could exercise, call up any guarantee and exercise all powers conferred by any document that forms part of the bank asset.

The consideration mechanism for the acquisition of the EBAs centres on the issuance of bonds and other debt securities by AMCON as consideration for the acquired toxic assets. In carrying out its debt issuance mandate, AMCON is empowered to borrow or raise money with or without the guarantee of the CBN, with the effect that the issuance would be backed by the FGN pursuant to the Fiscal Responsibility Act 2007.

Establishment of Purchasing Standards.

To ensure consistency and credibility in the valuation of the EBAs, the CBN is mandated to prescribe program guidelines for the valuation and purchase of the EBAs. The guidelines will set forth amongst other things: the mechanisms for purchasing EBAs, methods for pricing and valuing EBAs, procedures for selecting asset managers in the event that AMCON chooses to manage the EBAs prior to disposal, and the criteria for identifying troubled assets for purchase. However, it is useful to mention that no EBAs may be purchased at a higher price than what the seller paid to purchase the troubled asset (unless the troubled asset was acquired from the financial institution under receivership, conservatorship or bankruptcy).

In preparing the guidelines, the CBN is: (x) to be guided by independent advice from consultants, (y) to publish the valuation basis, and, (z) to monitor compliance with the valuation parameters prescribed.

Special Powers of AMCON

Asides from the clear purchasing mandate given to AMCON, the corporation is also cloaked with special powers in certain instances. The Act gives AMCON the power to act as, or appoint, a receiver for a debtor company whose assets have been charged or mortgaged as security for an EBA acquired by AMCON. The job of the receiver in this instance includes: (x) realizing the assets of the debtor company, (y) enforcing the individual liabilities of the shareholders and directors of the debtor company, and (z) managing the affairs of the debtor company.

In order to ensure liquidation of debts, AMCON has the power to apply to court by way of a motion ex parte (without notice to the debtor) for an order vesting it with the possession of the movable or immovable property of the debtor. It also has the power to apply in the same manner for an order freezing the accounts being held in an EFI by the debtor.

In both instances above, the order is deemed to have lapsed if after 14 days of the order being made; AMCON does not begin debt recovery proceedings against the debtor. Where debt recovery proceedings are concluded and an order is made against the debtor requiring him to pay any sum and such sum is not paid over to AMCON within 30 days of the order, then the AMCON may further pray the court for a receiving order against the debtor. AMCON does not have to satisfy the requirements set out in the Bankruptcy Act before the court grants a receiving order. Where the order is granted, the Court is able to adjudge the debtor as being bankrupt and on the strength of the application by AMCON, appoint an official receiver, or authorise AMCON to assume the role of a trustee of the debtor's property.

Where however, the order of court in debt recovery proceedings is made against a company or other legal personality, and the debt is not liquidated within 30 days of the order, then AMCON can petition the court for a winding up order. If a winding up order is granted by the court, the court may appoint an official receiver or liquidator to wind up the affairs of the debtor company.

For the purposes of the Act, the appropriate court vested with jurisdiction to hear all applications is the Federal High Court. The Act does not create a separate court to hear applications for the recovery of debts owed to AMCON or EFIs, rather it vests the Chief Judge of the Federal High Court with the power to assign such matters to a designated Judge, who shall only hear such matters to the exclusion of all others for a term to be prescribed by the Chief Judge.

OVERSIGHT AND MANAGEMENT OF AMCON

AMCON Board

The Act establishes a Board of Directors for AMCON responsible for the attainment of the objects of AMCON, formulation of policies and general supervision of the affairs of the AMCON, and also performing other functions conferred on it under the Act.

All the Board members of AMCON are appointed by the President of the Federal Republic of Nigeria, subject however to confirmation by the Senate.

The composition of the Board is as follows:

1. The Chairman of the Board, who is to be nominated by the Ministry of Finance in consultation with the Minister,
2. The Managing Director is nominated by the CBN.
3. 3 Executive Directors are nominated by the CBN in consultation with the Minister of Finance.
4. 5 Non-Executive Directors, 2 of whom are to be nominated by the Ministry of Finance, 2 by the CBN and 1 by the NDIC.

To be appointed as a Board member, the nominee must possess 10 years cognate experience in a senior management position or such other experience as prescribed by the CBN. The term of office of the Directors is for an initial 5 years, renewable only once for another term of five years.

CBN Oversight

The CBN is responsible for supervising and regulating the activities and functions of AMCON. In carrying out its supervisory role, the CBN may appoint independent examiners to carry out special or routine examinations on the books of AMCON. The CBN may also make regulations to give effect to the provisions of the AMC as and when necessary.

In summary, the essence of the Act can thus be summarized as one which seeks to restore liquidity and stability to the financial system of Nigeria. However, it must be borne in mind that the overall broad authority granted to AMCON under the Act must be exercised in a manner that cultivates, promotes and protects economic growth and in turn maximizes overall returns for the exercise of such authority.

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