



DELUXE LEGAL

ANALYSIS OF THE BANK AND OTHER FINANCIAL INSTITUTIONS (AMENDMENT) ACT

Before the advent of the pandemic (COVID-19), Nigeria's banking sector has been experiencing some structural and institutional lapses which experts have projected might lead to a possible destabilisation of Nigeria's economy if not addressed. Furthermore, Central Bank of Nigeria (“CBN”) has over the years released guidelines, regulations and policies to address some of these lapses but as the technological age continues to advance these regulations, guidelines and policies have appeared inadequate. This situation has rendered a review of the primary law in the banking sector necessary, the law is the Bank and Other Financial Institutions Act 2020 (“BOFIA” or the “Act”).



Flowing from the above, the National Assembly recently passed the Act in order to strengthen the legal framework for the regulation of banks and prevent distress especially during these turbulent period of COVID-19 and in order for the country to adequately prepare and deal with potential post COVID-19 challenges in the banking sector. Given the critical role of the banking sector in determining the health of a modern economy, the review of the BOFIA which personifies the regulatory environment, remains justified.

We will examine the provisions of Act and expatiate on some of its provisions in order to bring to light the

meaning and effect of the said Act. On this note, we start with section 1(2) of the Act which gives credence to the effect that the duties donated by the CBN Act are enforceable under the Act. Interestingly, the Nigeria Deposit Insurance Corporation (“NDIC”) has also been recognized in the Act with regards to some functions it is already carrying out in the banking sector so as to create synergy between CBN and NDIC. Interestingly, the CBN has also been given the power to appoint NDIC as liquidator for distressed banks, with CBN playing a level of supervisory role over NDIC under Section 12(4) of the Act.

By creating the synergy between NDIC and CBN with regards to regulation of banking business, the holders of deposits are more secured because under Section 2 the Act, transacting banking business without valid license is an offence with the offender being liable to refund moneys deposited to the holders of such moneys



and also a minimum term of 10 years imprisonment or and a fine of not less than ₦20, 000, 000 (Twenty Million Naira) Only. We must also mention that in order to create synergy between NDIC and CBN in the performance of their respective duties, the Act identifies acts or steps NDIC can take in respect of distressed banks and NDIC's relationship with CBN. See Section 34, 35, 36 and 37 of the Act.

It is not only the NDIC that has been brought under the CBN by the Act as previously mentioned but also every statutory banking institution. The difference therein is that NDIC is with respect to its statutory duties with distressed banks, while other banking institutions is with respect to examining their books and accounts along with bureau de change and discount houses. See Section 30 of the Act which stipulates as follows:

- (1) As from the commencement of this Act, the Governor shall have power to examine, from time to time, the accounts and other books of the Nigeria Industrial Development Bank, the Nigeria Agricultural and Cooperative Bank, the Nigeria Bank for Commerce and Industry, the Urban Development Bank, all Mortgage Institutions, Community Banks and such other Specialised banks.
- (2) The Bank shall also have power to examine the accounts of bureau de change, discount houses and such other financial institutions and in that regard have power to issue reports, from time to time, regarding the accounts of such financial institutions.
- (3) the periodic reports and findings of the Bank in relation to the said specialized banks and other financial institutions shall be forwarded to the President through the Minister.
- (4) For the purpose of implementation of this section, the specialised banks and other financial institutions shall be treated in the same manner as other banks with respect to the requirements of section 24 of this Act.

While CBN has power to issue license to carry on banking business, it also has the power to revoke such license if the bank fails to comply with the provisions of the Act or any other CBN Regulation. With regards to instituting an action relating to revocation of license to carry on banking business by CBN, such action must be instituted within 30 days from the day of revocation, determined within 180 days from the day of such revocation and 90 days with respect to an appeal of the judgment of the first court of instance. **This provision is quite ambiguous to say the least as it does not cover instances of further appeal to the Supreme Court due to the fact that the Court of Appeal is not the final court in such matters involving revocation of license.** See Section 12(5) and (6) of the Act which provides thus:

(5) *An action to challenge the revocation of the license of a bank on any ground whatsoever shall only be instituted in the Federal High Court and such action shall be heard and determined within a maximum period of 180 days from the date of the revocation to which the action relates.*

(6) *Where an appeal is filed against the decision of the court, the appeal shall be heard and disposed of by the appellate court within a maximum period of 90 days from the date the appeal is filed.*

(7) *No action in respect of the revocation of the license of a bank shall be maintainable unless such action is filed within a period of thirty days from the date of the revocation.*

(8) No action, suit or proceedings shall be proceeded with or commenced against any bank over which the Corporation acts as liquidator or against the Corporation as liquidator of any bank except by the leave of court given on such terms as the court may impose.

The Act has also recognized the innovativeness in taking banking business online at this technological age and it is in this respect that there is prohibition of strictly online or offshore banking business without any physical presence which has been prohibited pursuant to Section 3(6) of the Act. Section 3(6) provides thus:

Any bank or its subsidiaries without physical presence in the country where it is incorporated and licensed and is not affiliated to any financial services group that is subject to effective consolidated supervision shall not be allowed to operate in Nigeria and no Nigerian bank or its subsidiary shall establish or continue any relationship with such bank or subsidiary



Section 8 further provides thus:

(1) *Except with the Prior approval of the Bank, no foreign bank shall operate branch offices or representatives' offices in Nigeria*

(2) *The Bank may, subject to such-conditions as it may impose, from time to time, grant to any bank registered in Nigeria or a foreign bank a license to undertake off-shore banking business from Nigeria.*

(3) *Subject to the provisions of subsection (1) of this section, nothing in the provisions of the Nigerian Investment Promotion Commission Act or any other law or enactment shall be construed as authorizing any person whether as a citizen of Nigeria or a non-Nigerian to carry on any banking business in Nigeria without a valid banking license issued by the Bank under this Act.*

(4) Any person who contravenes the provisions of subsection (1) or (3) of this section is guilty of an offence and liable on conviction in the case of subsection (1) to a fine not less than ₦10,000,000

and in the case of subsection (3) to a fine not less than ₦5,000,000 or imprisonment for a term not less than 3 years or for both such fine and imprisonment. In the case of a continuing offence an additional fine of ₦500, 000 for each day during which the offence continues.

In addition to restriction on operating online or offshore without physical branch or office, the Act has stipulated that banks are incapable of shutting down a branch except and until 6 months' notice has been given to the Governor of CBN notifying him of such intention. It is noteworthy that where such closure is a result of pandemic for example, COVID-19 currently being experienced in the Country, there can be emergency closure and subsequent notification to the Governor. It is also to be noted that the act of banks giving notice to customers of temporary closure or closing earlier than banking hours such customers are familiar with, has not really been expressly addressed by the Act under Section 6 of the Act.



Section 6 states thus:

(1) No bank or its subsidiaries may open or close any branch office, cash centre or representative office anywhere within or outside Nigeria except with the prior consent in writing from the Bank. Any bank intending to close any of its branches or subsidiaries outside Nigeria shall give notice in writing to the Governor, of its intention, at least six months before the date of the intended closure, or within such shorter period as the Governor may, in any particular case, allow.

(2) Any bank which contravenes the provisions of subsection (1) of this section is guilty of an offence and liable to a fine exceeding ₦2,000,000 and the closure in case of the opening of a branch office and the re-opening in the case of closure of a branch office and in addition to a fine of N100,000 for each day during which the offence continues.

Section 46 stipulates as follows:

(1) No bank shall incur any liability to any of its customers by reason only of failure on the part of the bank to open for business during a strike or pandemic.

(2) If as a result of a strike or pandemic, a bank fails to open for business, the bank shall, within 24 hours of the beginning of the closure, obtain the approval of the Bank for any continued closure of the bank

Furthermore, CBN plays a very large role in every restructuring, mergers, disposition or reorganization involving banks pursuant to the Act. CBN, not Federal High Court, orders meetings to be had by banks in any arrangement and grants approval of such arrangement where it is satisfied that such arrangement will not cause substantial restraint of competition or create monopoly in the banking industry and in public interest.



Section 7 provides thus:

(1) Except with the prior consent of the Governor no bank shall enter into an agreement or arrangement-

(a) which results in:

(i) a change in the control of the bank;

(ii) the transfer of a significant shareholding in the bank;

(b) for the sale , disposal or transfer howsoever, of the whole or any part of the business of the bank;

(c) for the amalgamation or merger of the bank .with any other person;

(d) for the reconstruction of the bank

(e) to employ a management agent or to transfer business to any such agent.

(2) Where any bank proposes to enter into an agreement or arrangement pursuant to subsection (1) of this section, the Bank may on the application of any of the banks to be affected, order separate meetings of the banks to be summoned in such manner as the Bank may direct.

(3) The Bank may approve an agreement or an arrangement in subsection (1) if and only if the Bank is satisfied that —

(a) such agreement or arrangement is not likely to cause a substantial restraint of competition, or tend to create a monopoly in the banking industry; or

(b) the significant shareholders or Directors of the bank that results from the said agreement or arrangement are not disqualified under Section 45 of this Act;

(c) the agreement or arrangement is consistent with public interest; and

(d) the bank that results from the agreement or arrangement meets the minimum total capital as prescribed in Section 9 of this Act.

(4) Upon the grant of a new banking license by the Bank to a bank which results from the agreement or arrangement, all the assets and liabilities of the banks that are parties to the said agreement or arrangement shall, by virtue of the grant of the new banking license, be transferred to and become the assets and liabilities of the new bank.

(5) The provisions of this Act shall apply without prejudice to the provisions of the Investments and Securities Act in so far as they relate to a compromise, arrangement or reconstruction between two or more banks.

(6) Where any of the provisions of the Investments and Securities Act is inconsistent with the provisions of this Act, the provisions of this Act shall prevail.

(7) Any person who breaches the provisions of subsection (1) of this section is liable to a fine of ₦10,000,000 and in the case of a continuing breach to an additional fine of ₦100,000 for each day during which the breach continues

With regards to restructuring mentioned above, every acquisition of shares by a bank in other sectors must be done with the approval of CBN. See Section 21 of the Act which provides as follows:

(1) Subject to the approval of the Bank, a bank may acquire or hold part of the share capital of any agricultural, industrial or venture capital company subject to the following conditions, that is —

(a) the venture capital company is set up for the purpose of promoting the development of indigenous technology or a new venture in Nigeria;

(b) the shareholding by the bank is in small or medium-scale industries and agricultural enterprises as defined by the Bank;

(c) the shareholding by the bank in any medium scale industry, agricultural enterprise or venture capital company or any other business approved by the Bank shall not be more than ten per cent of the bank's shareholders fund unimpaired by losses and shall not exceed forty percent of the paid up share capital of the company or such other percentage as the Bank may prescribe from time to time.

(d) without prejudice to the provisions of section 18 (6) (b) (ii), (c) and paragraph (c) of this subsection the aggregate value of the equity participation of the bank in all enterprises both domestic and foreign shall not at any time exceed 40 per cent of its shareholders fund unimpaired by losses or such other percentage as the Bank may prescribe from time to time.

(2) Subject to the prior written approval of the Bank, a bank may hold shares acquired in the course of the satisfaction of any debt owed to it, provided the shares acquired are not those of

the bank's subsidiary, holding company, associate or such other related party as the Bank may by regulation prescribe from time to time.

(3) Without prejudice to the provisions of subsection (1) of this section, a bank may hold or acquire share capital of any other business, subject to the approval of the Bank.

(4) Any bank which fails to comply with the provisions of this section is guilty of an offence and liable on conviction to a fine not less than ₦500,000 for each day during which the offence occurs.

In addition to powers being granted by the Act to CBN, CBN must approve all adverts any bank is putting out to the public and it is only banks that can advertise banking businesses. See Section 44 of the Act which provides thus:

(1) No person other than a bank or any other person authorised to take deposits shall issue any advertisement inviting the public to deposit money with it.

(2) Any person who issues an advertisement in contravention of the provisions of subsection (1) of this section is guilty of an offence and liable on conviction to a fine of ₦500,000 or to imprisonment for a term of 10 years or both such fine and imprisonment.

(3) Where any bank proposes to issue any advertisement, the bank shall deliver to the Bank the text of the proposed advertisement together with the bank's latest published accounts, and shall thereafter comply with such directives and conditions as the Bank may prescribe and such text shall be regarded as confidential information.

(4) Any bank which fails to comply with the provisions of subsection (3) of this section is guilty of an offence and liable to a fine of ₦50,000 and the bank shall in addition pay a fine of ₦1,000 for every day during which an advertisement issued in contravention of subsection (3) of this section continues.

(5) In this Act, "advertisement" includes any form of advertising whether in publication or by the display of notice or by means of circular or other documents or by any exhibition of photographs or cinematograph or by way of sound broadcasting or television or loudspeakers or other public address systems and references to the issuing of an advertisement shall be construed accordingly; and for the purposes of this Act, an advertisement issued by any person by way of display or exhibition in a public place shall be treated as issued by him on every day on which he causes to permits it to be so displayed or exhibited.

(6) An advertisement which contains information calculated to lead directly or indirectly to the deposit of money by the public shall be treated as an advertisement inviting the public to deposit money.

(7) An advertisement issued by any person on behalf of or to the order of another person shall be treated as an advertisement issued by that other person and for the purpose of any proceedings under this Act, an advertisement inviting the public to deposit money with a person specified in the advertisement shall be presumed, unless the contrary is proved, to have been issued by the person.

With respect to shareholding and voting rights in banks, Shareholders Agreement for banks need to be taken more lightly due to the fact that the Act has stipulated voting to be proportionate to the shareholding (individual contributions to the paid-up share capital of the bank) notwithstanding the provision of any law regulating Companies and any Agreement. See Section 10 of the Act which states thus:

Notwithstanding the provisions of the Companies and Allied Matters Act or any agreement or contract, the voting rights of every shareholder in a bank shall be proportional to individual contributions to the paid-up share capital of the bank.

In order to strengthen the liquidity position of banks, Section 13 of the Act requires every bank to maintain at all times, capital funds unimpaired by losses as may be specified by the CBN failing which such bank may be prohibited from paying cash dividends to shareholders. Section 15 and 16 of the Act gives credence (statutory force) to CBN's guidelines on minimum cash reserves and fund reserves to be held by banks. Section 17 further imposes restriction on the payment of dividends by any bank until all reasonable expenses have been written off. Furthermore, the Act has made provisions to safeguard the asset quality of banks, reduce non-performing loans and insider dealings. While Section 18 of the Act imposes a heavy fine of ₦10 million or prison term of 3 years on any Director, Manager or Officer of a bank who fails to disclose his interest in any credit facility, Section 20 (1) of the Act precludes banks from granting credit facility to any person in excess of twenty per cent of the shareholders fund unimpaired by losses.

It is a fact that Investors require timely information to be able to take calculated risks, Section 27(1) of the Act facilitates timely submission of financial statements required for investing decisions. Under this section, banks are required to prepare financial statements in accordance with the relevant accounting standards and to forward to the CBN, for approval to publish its financial statements, not later than three months after the end of its financial year.



In addition to the foregoing, the Act strengthens Banking Supervision by empowering the Governor under section 33(1) to “order a special examination or investigation of the books and affairs of a bank where he is satisfied that it is in the public interest to do so or the bank has been carrying on its business in a manner detrimental to the interest of its depositors and creditors”.

Section 33 provides thus:

(1) The Governor shall have power to order a special examination or investigation of the books and affairs of a bank, Other Financial Institutions and Specialized Banks where he is satisfied that —

(a) it is in the public interest so to do; or

(b) the bank has been carrying on its business in a manner detrimental to the interest of its depositors and creditors; or

(c) the bank has insufficient assets to cover its liabilities to the public; or

(d) the bank has been contravening the provisions of this Act; or

(e) an application is made therefore by —

(i) a director or shareholder of the bank: or

(ii) a depositor or creditor of the bank:

Provided that in the case of paragraph (e) of this subsection, the Governor may not order a special examination or investigation of the books and affairs of a bank if he is satisfied that it is not necessary to do so.

(2) For the purpose of subsection (1) of this section, the Governor shall have power to appoint one or more qualified persons other than the officers of the Bank to conduct special examination or investigation, under conditions of confidentiality, of the books and affairs of the bank.

(3) The Governor shall have power to order that all expenses of or incidental to an examination or investigation be paid by the bank examined or investigated.

The Act not only ensures the ability of the Governor of CBN to supervise books of banks as mentioned above, it also establishes a Crisis Management Committee in times of financial troubles in the banking sector. More particularly, the inclusion of the Director General of the Securities and Exchange Commission in the Crisis Management Committee (the “**Committee**”) to be set up by the Governor of the CBN. Under Section 38 (1) of the Act the Committee will avail the CBN the opportunity of getting evidenced-based inputs on the best way crisis can be handled in order not to destabilize the capital market. Section 38 provides thus:

(1) The Governor shall have power to constitute a Crisis Management Committee whenever:

- (a) banks that are critically distressed control 30 per cent or such percentage of the total assets of all licensed banks as the Bank may from time to time prescribe;
 - (b) 15 per cent or such percentage of the deposit liabilities of all licensed banks as the Bank may from time to time prescribe is threatened; or
 - (c) 35 per cent or such percentage of the total loans and advances of all licensed banks as the Bank may from time to time prescribe become non-performing; or
 - (d) such other conditions as the Governor may from time to time prescribe arise.
- (2) The membership of the Committee shall consist of the following:
- (a) the Governor of the Bank who shall be Chairman;
 - (b) a representative of the Minister of Finance not below the rank of a Director;
 - (c) the Managing Director, Nigeria Deposit Insurance Corporation;
 - (d) the Director General, Securities and Exchange Commission;
 - (e) the Commissioner for Insurance, National Insurance Commission; and
 - (f) the Chairman, Economic and Financial Crimes Commission.
- (3) The functions of the Committee shall be to:
- (a) manage systemic distress by coordinating the actions of regulatory and supervisory agencies of any sub-sector of the financial services Industry;
 - (b) establish a single channel of communication and prepare official statement to forestall misinformation;
 - (c) restore confidence in the banking industry; and
 - (d) take any other action that may be necessary for the attainment of its objective.
- (4) The Committee shall keep the President informed in writing from time to time of all actions it intends to take or has taken under subsection (3) of this section.
- (5) The Federal Government together with the Bank shall take measures to deal with systemic crisis.

There is a seeming conflict between Section 58(1) of the Act and Sections 13(a) and 38(1b) of the Investment and Securities Act 2007 (“ISA”). Whereas the latter empowers the SEC “to regulate investments and securities business in Nigeria as well as register and regulate the workings of venture capital funds and collective investments schemes in whatever form” by virtue of **Section 13(a) ISA**. It also provides in **Section 38(1b) of ISA** that “no persons shall carry on investments and securities business unless the person is registered with the Commission”, meanwhile **Section 58 (1) of the Act 2020** stipulates that “no person shall carry on specialized banking or business of other financial institution in Nigeria other than insurance, pension

fund management, collective investment schemes and capital market business as defined respectively in the Insurance Act, the Pension Reform Act and the Investment and Securities Act except it is a company duly incorporated in Nigeria and holds a valid license granted under the provisions of this Act. The contradiction is contained in **Section 58 (2) of the Act** where it goes on to define “business of other financial institutions” to include: fund management and investment management, which fall under investments and securities business mentioned in **Section 38 (1b) of the ISA 2007**.

Notwithstanding the foregoing conundrum presented by the Act, the Act brings innovation into the banking



sector. One of such innovative aspects of the Act can be found in Section 69 which makes allowance for the promulgation of regulations with respect to the operations of Fintech Companies which is increasingly becoming visible in the country’s financial space. Subsection (2) makes it a punishable offense for any person transacting Fintech business without a valid license. The sanction for violation, which is in the nature of “a fine not exceeding ₦50,000 (Fifty Thousand Naira) only for each day during which the offence

continues”, is rather ambiguous and should be made more specific. Provisions of Section 69 is stated below:

1. Financial technology (hereinafter referred to as “Fintech”) is used to describe new technology that automates the delivery and use of financial services.

2. Fintech Business

- (1) No person shall carry on any FinTech business in Nigeria except if it is a company duly incorporated in Nigeria and holds a valid license issued under Act

- (2) Any person who transacts FinTech business without a valid license under this Act is guilty of an offence and liable to a fine not exceeding N50,000 for each day during which the offence continues

3. Application for Grant of License for Fintech Businesses

- (1) Any person desiring to undertake FinTech business in Nigeria shall apply in writing to the Governor for the grant of a license and shall accompany the application with the following.

- (a) a feasibility report of the proposed business

- (b) a draft copy of the memorandum and articles of association of the proposed bank

- (c) a list of the shareholders; directors and principal officers of the proposed business and their particulars;

- (d) the prescribed application fee; and

(e) such other information, documents and report as the Bank may, from time to time; specify

(2) After the applicant has provided all such information, documents and reports as the Bank may require under subsection (1) of this section, the shareholders of the proposed bank shall deposit with the Bank a sum equal to the minimum share capital that may be applicable under section 9 of this Act.

(3) Upon the payment of the sum referred to in subsection (2) of this section, the Bank may issue a license or refuse to issue a license and the Bank is required to give reasons for the refusal within 60 days.

(4) Where the Bank grants an application for license:

(i) it shall give written notice of that fact to the applicant;

(ii) it shall indicate the scope of business in which the applicant can engage in;

(iii) the applicant shall pay the license fee.

In conclusion, strengthening the Banks and Other Financial Institutions law through the 2020 amendment Act will go a long way in enhancing the role of banks in supporting medium-to-long term funds' mobilization in the economy which ensures the overall stability of the financial system. The Act will achieve this and many more previously highlighted when it becomes law eventually.

