

AN APPRAISAL OF THE ASSET MANAGEMENT CORPORATION OF NIGERIA (AMCON) ACT, 2010



1. INTRODUCTION

The AMCON Bill was signed into law on the 9th day of July, 2010 as an Act to establish the Asset Management Corporation of Nigeria for the purpose of efficiently resolving the non-performing loan assets of Banks in Nigeria and for related matters.

President Goodluck Jonathan in a brief speech delivered after the signing ceremony declared that AMCON would “help to stimulate the recovery of the financial system from the recent crisis by boosting the liquidity of troubled banks through buying their non-performing loans, helping in the recapitalization of banks in which the CBN was forced to intervene, and increase access to restructuring/ refinancing opportunities for borrowers”. It would be recalled that as at the end of November, 2009, CBN Governor Sanusi Lamido Sanusi had sacked the chief executive officers and directors of eight of the Nation’s 25 banks for allegedly imperilling the financial health of their organizations. Sanusi had also disclosed that at the time, the rescued banks had an aggregate toxic assets’ portfolio in excess of N2Trillion. The act of the CBN Governor was perceived by many as an interventionist manovre to stem the haemorrhage that rocked the banking sector then. The AMCON Act could therefore be seen as a child born out of circumstance to ensure the affected banks remained a going concern. This write-up seeks to do an appraisal of the AMCON Act, with an examination of some of the salient provisions of the Act and ancillary issues.

The AMCON 2010 Act:

The Act contains a total of 62 sections, divided into 8 parts

Section 1 (1) of the Act establishes the Corporation.

Section 1(2) and (3) provide that the Corporation shall be a body corporate with a common seal, perpetual succession and may sue and be sued in its corporate name. The Corporation may acquire, hold and dispose of movable and immovable property for the purpose of its functions and objects.

Section 1 (4) provides for the independence of the Corporation in the discharge of its duties.

The Authorized share capital of the Corporation as provided in Section 2(1) shall be 10 Billion Naira, which shall be fully subscribed to by the Federal Government and held in trust by the Central Bank of Nigeria and the Ministry of Finance incorporated in equal proportion of fifty percent each.

OBJECTIVES OF THE CORPORATION

The objects of the Corporation are:

- a) To assist eligible financial institutions to efficiently dispose of eligible bank assets in accordance with the provisions of the Act.
- b) To efficiently manage and dispose of eligible bank assets acquired by the Corporation in accordance with the provisions of the Act.
- c) To obtain best achievable financial returns on eligible bank assets or other assets acquired by it in pursuance of the provisions of the Act.

Section 5 of the Act goes further to list the functions of the Corporation as:

- a) To acquire eligible bank assets from eligible financial institutions in accordance with the provisions of the Act.
- b) To purchase or otherwise invest in eligible equities on such terms and conditions as the Corporation, with the approval of the Board of Central Bank of Nigeria may deem fit.
- c) To hold, manage, realize and dispose of eligible bank assets (including the collection of interest, principal and capital due and the taking over of collateral securing such assets) in accordance with the provisions of the Act.
- d) To pay coupons on, and redeem at maturity, bonds and debt securities issued by the Corporation as consideration for the acquisition of eligible bank assets in accordance with the provisions of the Act.
- e) To perform such other functions, directly related to the management or the realization of eligible bank assets that the Corporation has acquired, including managing and disposing assets acquired with the proceeds derived by the Corporation from managing or disposing of eligible bank assets acquired by it.
- f) To take all steps necessary or expedient to protect, enhance or realise the value of the eligible bank assets that the Corporation has acquired.
- g) To perform such other activities and carry out such other functions which in the opinion of the Board are necessary, incidental or conducive to the attainment of the objects of the Corporation.

From the foregoing, it would seem that the intervention of the government through AMCON in the purchase of toxic debts is to enable financial institutions to be replenished with funds to further and enable financial transactions.

The powers of the Corporation are wide and include, but not limited to: issue bonds or other debt instruments as consideration for the acquisition of eligible bank

assets; maintain a portfolio of diverse assets including equities, fixed income bonds and real estate; borrow or raise money, with or without the guarantee of the Central Bank of Nigeria(including money in a currency other than the naira); initiate or participate in any enforcement , restructuring , re-organisation, programme of arrangement or other compromise.

A pertinent question to ask at this point is: how does the Corporation operate to achieve the stated objectives and functions?

The Act expressly establishes a Board of Directors to carry out the functions of the Corporation.

The Board of Directors consists of 10 members and the minimum qualification for the membership of the Board is possession of 10(Ten) years cognate financial experience at a senior management level or such other relevant as may be prescribed by the Central Bank of Nigeria.

It may be instructive to note that the Corporation shall have a Secretary appointed by the Board who shall be a legal practitioner and has been so qualified for not less than ten years.

Section 21 of the Act makes it mandatory for the Corporation to file Annual report to the Ministry of Finance and the Central Bank of Nigeria of its activities during a financial year not later than three months after the end of each financial year.

Eligible Bank Assets Acquisition and Management

Section 24 of the Act provides that the CBN may designate through guidelines any class of bank assets as eligible bank assets and Section 26 provides that the consideration to be furnished by the Corporation for an eligible bank asset shall be 7 years bonds or such other debt securities of such other tenor as the CBN may prescribe.



Procedure to be followed:

Any eligible financial institution desirous of disposing of its eligible bank assets shall follow the procedure as laid down in Section 28 (a-c) of the Act, which is:

Apply to the Corporation in such form and manner as the Corporation may by regulation prescribe;

Provide the Corporation with information, warranties, representations and indemnities in such form and in such manner as may be required by the Corporation and disclose in utmost good faith, all matters and circumstances that may materially affect either the Corporation's decision to acquire the eligible bank asset or the value that the Corporation may place on the asset;

Produce to the Corporation for inspection the credit facility documentation, books and records kept in connection with the eligible bank asset.

The Corporation is not under an obligation to purchase all eligible bank asset. Where however, the Corporation has acquired an eligible bank asset, the financial institution from which the eligible bank asset was acquired shall deliver to the Corporation its nominee books and records, documents of title pertaining to the assets and execute all such instruments necessary to properly document the acquisition.

As soon as possible, after the acquisition of an eligible bank asset from an eligible financial institution, the financial institution shall notify the relevant debtor, guarantor or surety of the debtor and any other person the Corporation directs. The Corporation shall not be liable for any failure or delay in notifying any person, and such delay shall not invalidate the eligible bank asset concerned.

Section 36 of the Act is most instructive as it relates the acquisition of eligible bank assets to the effect of acquisition under the Land Use Act. The purport of Section 36 is that where the Corporation acquires an eligible bank asset, such asset shall become vested in the Corporation and the Corporation shall exercise all the rights and powers and become subject to all the financial institution's obligations in relation to the debtor concerned, any guarantor, surety or receiver, liquidator or examiner and the financial institution shall cease to have those rights and obligations.

Tainted Eligible Bank Assets:

Section 37 of the Act provides that where there is a tainted eligible asset, the borrower or obligor of such tainted eligible asset shall not be entitled to, and shall not be granted any forbearance, waiver, or debt forgiveness by the Corporation. The Section further provides that the Corporation shall pursue, to the fullest extent possible, all lawful civil and criminal remedies against any such borrower or obligor connected with such tainted eligible bank asset.

Sub-section 2 lists out the categories that shall be deemed to be tainted eligible bank assets.

They include:

Loans, credits or other financial accommodation obtained by insiders of, or persons related to or otherwise connected to the eligible financial institution which granted the loan in breach of the provision on financial assistance rules under the Companies and Allied Matters Act.

Issuance of pre-action notice on the Corporation:

Section 43(3) of the Act provides that an Action shall not be brought against the Corporation until after the expiration of 30 days' notice in writing to the Corporation giving details of the alleged wrong, date and remedy sought.

Corporation not required to be registered as owner of security:

By virtue of the provisions of Section 45 of the Act, the Corporation is not required to be registered as owner of any security that is part of the eligible bank asset acquired by it and shall none the less have the powers and rights of a registered owner.

Redemption of Debt Securities:

The Corporation may from time to time after consultation with the Minister of Finance and the Governor of the CBN, redeem and cancel debt securities issued by the Corporation under the Act. What happens to the assets of the Corporation upon dissolution of the Corporation?

Section 47 of the Act provides that the assets of the Corporation remaining after the redemption of all debt securities and discharge of all payments and repayment obligations shall at its eventual dissolution be transferred to the Fund of the Corporation and distributed by the Governor of the Central Bank of Nigeria between the subscribers to the capital of the Corporation in proportion to their respective stake in the authorized share capital of the Corporation.

Special powers of the Corporation:

In addition to the powers of the Corporation earlier listed, the Corporation has special powers to act as, or appoint a receiver for a debtor company whose assets have been charged, mortgaged or pledged as security

for an eligible bank asset acquired by the Corporation. Where the Corporation has reasonable cause to believe to believe that a debtor or a debtor company has funds in any account with any eligible financial institution, it may apply to the court by motion ex-parte for an order freezing the debtor or debtor company's account.

Debt Recovery Procedure under Section 53 of the Act:

The Chief Judge of the Federal High Court may designate any judge of the Federal High court to hear matters for the recovery of debts owed to the Corporation or an eligible financial institution and other matters arising from the provisions of the Act to the exclusion of any other matter for such period as may be determined by the Chief judge.

Central Bank to supervise and regulate the Corporation:

By the provisions of Section 58 of the Act, the Central Bank of Nigeria shall have power to supervise and regulate the activities of the corporation and may in this regard appoint examiners and any other person to carry out special or routine examination of the books and affairs of the Corporation.

Exemptions of the Corporation from capital gains:

Section 60 of the Act expressly exempts the Corporation from the provisions of the Capital Gains Tax Act or such other law of the National Assembly on capital gains, the Companies Income Tax Act and the Stamp Duties Act.

The reason for these exemptions may not be unconnected with the fact that the Corporation is not a profit making one.



Some Criticisms of the AMCON Act

Having examined some salient provisions of the Act, one cannot but appreciate the passage into law of the Act.

As expected however, there are some criticisms of the Act and by implication, the Corporation the Act establishes. For example, there seems to be some overlapping between the objectives of the Corporation as set out in Section 4 and the objectives of CBN's Expanded Discounted Window (as rolled out by former CBN Governor Charles Soludo in 2007 and maintained by the Sanusi team). Such an overlap has a tendency of creating difference in prices and unintended arbitrating opportunities for banks.

Another issue raised by the AMCON Act is the provision of Section 30 of the Act which provides:

“The Corporation may acquire an interest in an eligible bank asset or an eligible financial institution if the Corporation considers it necessary or desirable to do so and shall acquire any eligible bank asset if so requested by the Nigerian Deposit Insurance Corporation acting in consultation with the Central Bank of Nigeria in pursuance of Section 38(2) of the Nigerian Deposit Insurance Act.”

The question becomes what the determining factor/ considerations would be before the Corporation can “consider it necessary or desirable to do so”. One therefore wonders what role high-wire politicking will play or not play in the choice of eligible bank assets to purchase since it seems to be absolutely discretionary with no particular requirements.

Recommendation and Conclusion:

The passage of the AMCON Bill into law is a desirable and welcome development. It however only remains a means to the desirable end of sanitizing and strengthening the Nation's banking sector, and not an end in itself. Significantly, ridding financial institutions of their bad debt portfolios should not – and must not be seen as a green light for them to revert to their winning ways. The Nation's financial regulatory bodies must, therefore, step up their game in the area of proactive supervision as it is only then the emergence of the Asset Management Corporation of Nigeria (AMCON) would be a resounding success.

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Mosun is Tope Adebayo LLP's Managing Partner, and she leads the firm's Corporate & Commercial Practice Group.

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Mosun is passionate about the intersection of intellectual property and innovation in policy making and is currently researching the efforts made in some jurisdictions to expand the scope of secured credit transactions to cover security interests over intellectual property and the barriers thereto, with the goal of determining the appropriate policy framework for Nigeria.

She is a registered Capital Markets consultant with the Securities and Exchange Commission (SEC) and a registered member of the Financial Reporting Council of Nigeria (FRCN). Mosun is member of the Nigerian Bar Association (NBA), International Bar Association (IBA) and Intellectual Property Law Association of Nigeria (IPLAN).

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