




## **NEWSLETTER**

# **BOFIA 2020 AND THE NEW REGIME FOR BANKS' INSOLVENCY AND RESTRUCTURING IN NIGERIA**

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## **BOFIA 2020 AND THE NEW REGIME FOR BANKS' INSOLVENCY AND RESTRUCTURING IN NIGERIA**

### **1.0 INTRODUCTION**

Nigeria passed the Banks and other Financial Institutions Act 2020 (BOFIA 2020) into law on 13 November 2020, repealing the erstwhile Banks and other Financial Institutions Act 1991 (BOFIA 1991). The new Act (BOFIA 2020) makes provisions for a more modern, more conducive and business-friendly legal framework for the insolvency and restructuring of banks and other financial institutions in Nigeria. This edition of the newsletter highlights some of the provisions.

### **2.0 SPECIAL TRIBUNAL FOR THE ENFORCEMENT AND RECOVERY OF ELIGIBLE LOANS**

BOFIA 2020 introduces a Credit Tribunal for the expeditious resolution of loan-related matters.<sup>1</sup> The Tribunal is tasked with the resolution of actions for the enforcement and recovery of Eligible Loans and actions connected with the enforcement of security or guarantee, or attachment of any assets under an eligible loan made by any bank.<sup>2</sup>

An eligible Loan in this regard is any credit facility, overdraft, loan, or risk asset of at least NGN25,000,000:00 (Twenty-Five Million Naira) or such other amount as may be prescribed by the Central Bank of Nigeria (CBN) which repayment obligations have become due for not less than 90 (ninety) days and which has been designated by the CBN Governor as being eligible for enforcement and recovery before the Tribunal. The Act gives the

Tribunal a wide range of power to properly discharge its functions.

### **3.0 RESOLUTION OF FAILING BANKS (RESCUE TOOLS AND WINDING UP)**

BOFIA 2020 extends the power of the CBN with regards to the rescue tools that may be employed in the bid to keep failing banks afloat. The new Act gives the CBN Governor the power to -upon being informed of the status of a failing bank - (a) suspend any payment or delivery obligations under any contract to which the bank is a party; (b) require third-party service providers to the bank to continue to provide services to the bank for such period as may be set out in the order; (c) transfer the bank or the whole or part only of the bank's business to third-party private purchaser; and (d) employ any other intervention tools as the Central Bank of Nigeria may deem fit to improve the state of affairs of the failing bank.<sup>3</sup> The CBN is also empowered to acquire, at any time, the shares of any failing bank up to a level that confers control on CBN although it must dispose of such equity investment in such bank at "the earliest suitable time."<sup>4</sup>

However, if after taking any or all of the steps or exercising any of the powers stipulated in the Act, the state of affairs of the bank concerned does not improve, the Central Bank may proceed to revoke the license of the concerned bank.

It is particularly noteworthy that the CBN's power to revoke the license of an unsalvageable failing bank is a noticeable departure from the procedure under the repealed BOFIA 1991 which provided instead that where the measures contained in the Act do not improve the situation of the failing bank after having been employed, the CBN may vest the control and management of such a failing bank in the NDIC to continue to run and manage its business. In contrast, BOFIA 2020 empowers CBN to first and foremost revoke the license of the bank before handing such bank over to the NDIC for liquidation according to Section 35.

### **3.1 Liquidation by the NDIC**

Where the license of a bank has been revoked under Section 39 of the Act, the NDIC shall immediately apply to the Federal High Court for an order for winding-up of the affairs of the bank.<sup>5</sup>

### **3.2 Action to Challenge Revocation of Banking License**

The Act provides that any action to challenge the revocation of the license of a bank on any ground whatsoever must be instituted within thirty (30) days from the date of the revocation<sup>6</sup> at the Federal High Court and such action and any appeal arising therefrom shall be heard and determined on an expedited and accelerated basis.<sup>7</sup>

The Act also precludes the Court from granting any Order that seeks to restore the revoked license of a bank, setting out the remedy available to aggrieved parties in the circumstance to monetary compensation not exceeding the equivalent of the value of the paid-up capital of the bank at the time of the revocation of its license.<sup>8</sup>

This provision has generated a lot of comments and reactions from stakeholders and commentators with many taking the position that the provision will not stand the test of judicial scrutiny. However, only time will tell when the issue is eventually set before the courts for a determination as to whether or not the provision ousts or limits the scope of the Court's jurisdiction in matters of this nature.



### **4.0 RESTRUCTURING AND REORGANIZATION OF BANKS**

BOFIA 2020 provides that no restructuring, reorganization, merger, etc. shall be carried out without the consent of the CBN Governor, otherwise it will be void and any transfer of interest thereunder shall be ineffectual except where it is ratified in writing by the Central Bank.<sup>9</sup>

To restructure or reorganize the business of a failing bank, the Central 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 it may direct. The Act further provides that the Central Bank may approve any such agreement or arrangement if and only if it is satisfied that — (a) such agreement or

arrangement is not likely to cause a restraint of competition, or tend to create a monopoly in the banking industry; (b) the significant shareholders or directors of the bank that results from the agreement or arrangement are not disqualified under the Act; (c) the agreement or arrangement is consistent with public interest, and (d) the bank that results from the agreement or arrangement meets the capital requirements as prescribed under the Act.

Once the CBN grants a new banking license to a bank which results from the agreement or arrangement, all the assets and liabilities of the banks that are parties to the agreement or arrangement shall, by the grant of the new banking license, be transferred to and become the assets and liabilities of the new bank.

### **5.0 ESTABLISHMENT OF THE BANKING SECTOR RESOLUTION FUND / BAIL-IN TOOL**

BOFIA 2020 introduces the (Banking Sector) Resolution Fund to give support (regulatory and financial) to failing or distressed banks. The resolution fund will be funded annually by the CBN and the commercial banks and managed by the CBN who will determine the start date. The fund aims to eradicate or, at least, minimize recourse to public funds for the resolution of crises in the banking sector and of failing or failed banks.

The Act also gives the CBN the power to debit, for the benefit of the Fund, the account of any bank which fails to pay its quota into the fund. It also provides for stringent sanctions and penalties for directors and officers of banks whose fraud or negligent action triggers recourse to the Resolution Fund to resolve or otherwise fund a bank.

### **6.0 OTHER RESOLUTION TOOLS**

BOFIA 2020 has also introduced further banking sector resolution tools. These include:

- a) Stay of termination of rights tool - The Act empowers the Central Bank to impose temporary stays on the right of counterparties to a bank that is subject to a resolution measure to exercise early contractual termination rights.
- b) Asset separation tool – The Act empowers the Central Bank to transfer the assets of a bank to one or more private asset management vehicles to manage to maximize their value for an eventual sale or

organized and measured winding-up process.

- c) Sale of business tool – The Act empowers the CBN to sell the securities, assets and liabilities of a failing bank to a third party after having taken reasonable steps to obtain “commercial” (fair) terms in the circumstances.

### **7.0 FINALITY OF NETTING AGREEMENTS**

BOFIA 2020 has introduced a netting provision that protects netting agreements if a bank or financial institution is wound up.<sup>10</sup> It provides that where a bank has its license revoked or is wound up, any provision contained in a written netting agreement to which the bank is a party or any netting rule or practice applicable to the bank shall be binding upon the liquidator.

### **8.0 DESIGNATION OF SYSTEMICALLY IMPORTANT BANKS (SIBS)**

The Act has also empowered the CBN to designate some banks as systemically important (SIBs), and to prescribe the policy measures considered appropriate to address the risks posed by such designated banks including liquidity standards, stress testing requirements, recovery and resolution plan, enhanced supervision, and disclosure requirements.<sup>11</sup>

### **9.0 COOPERATION OF AGENCIES WITH THE CENTRAL BANK DURING BANKING CRISIS**

The new Act provides that notwithstanding the provisions of any other enactment, relevant agencies shall cooperate with and render such assistance or grant such waivers or forbearances to the CBN, which in the opinion of the CBN Governor are necessary or expedient to resolve a banking crisis.<sup>12</sup> This novel provision was not contained under the old Act and is aimed at improving the

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regime for the resolution of potential banking crises in the country.



### **10.0 CONCLUSION**

Economies all over the world rely on the sanity and stability of their financial system for growth and development. In that regard, BOFIA 2020 has indeed introduced a worthy and commendable legal framework for banks’ insolvency and restructuring in Nigeria in a way that promises to bring sanity, serenity, and stability to the Nigerian financial system going forward.

### **REFERENCES**

1. Sections 102 – 129
2. See Sections 105(1)(b) and 115(1)(a)
3. Section 34(2).
4. Section 34(3)
5. Section 35. See also Section 12 BOFIA 2020.
6. Section 12(5)
7. Section 12(4)
8. Section 12(6)
9. Section 7
10. Section 54
11. Section 70 of the Act
12. Section 36

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-Take Responsibility-**

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