

POTENTIAL IMPACTS OF BOFIA 2020 ON NIGERIAN BANKING AND FINANCE SECTOR

BACKGROUND

On November 13, 2020, President Muhammadu Buhari assented to the Banks and Other Financial Institutions Act (BOFIA) (amendment) Bill 2020. This action effectively repeals BOFIA 2004 and enacts BOFIA 2020. The legislation provides a more stringent regulatory regime, especially in the banking sector. Nevertheless, it strengthens the legal framework for the regulation of banks and other financial institutions, increases the powers of the Central Bank of Nigeria (CBN) and its Governor as well as increases the instances where these powers can be exercised.

This article provides an analysis of key changes introduced by BOFIA 2020, the potential impact of the Act in the banking and finance sector as well as



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some recommendations with respect to the new provisions.

KEY CHANGES IN BOFIA ACT, 2020

 <p>Refusal of Banking License Without Reason The CBN Governor can now refuse the grant of a banking license to an applicant without giving reasons for the refusal</p>	 <p>Penalty for Managers/Directors who Fail to Ensure Compliance with Conditions for License Grant The penalty for bank directors/manager who fail to ensure compliance with the conditions for the grant of the bank's license is now imprisonment for a term not less than three (3) years or a fine of not less than two million naira (N2,000,000) or for both such imprisonment and fine.</p>	 <p>Ouster of the Jurisdiction of the Federal Competition and Consumer Protection Commission (FCCPC) The Bill contains provisions that now excludes the jurisdiction of the FCCPC from matters relating to the banking sector.</p>	 <p>Limitation of Remedy Available to Aggrieved Bank for Revocation of License The remedy available to such aggrieved bank is now limited to only monetary compensation not exceeding the equivalent of the value of the paid-up capital of such bank at the time of the revocation of its license.</p>
 <p>Limitation on Bank Directorship The law now provides that persons who are directors of other companies not being subsidiary of a bank or engaged in any other business or vocation shall not be managers of such banks, except for personal or charitable causes as may be determined by the CBN.</p>	 <p>Immunity from Judicial Intervention The Federal Government, CBN or any of its officers are now immune to any action against them in respect of any of their actions done in good faith in execution of any of their duties conferred under the Bill, the CBN Act or any related guidelines.</p>	 <p>Establishment of a Special Tribunal for the Enforcement and Recovery of Eligible Loans There is now established a Special Tribunal for the Enforcement and Recovery of Eligible Loans (the Tribunal). The jurisdiction of the Tribunal includes matters pertaining to the enforcement and recovery of eligible loans by financial services banks, specialized banks or other financial institution.</p>	 <p>Penalty for Foreign Banks Operating in Nigeria without a License The law now provides that any foreign bank that operates in Nigeria without being licensed is now to be liable to a fine not less than ten million naira (N10,000,000) and every director of any such foreign bank shall be liable to imprisonment for a term not less than three (3) years or a fine not less than two million naira (N2,000,000) or both imprisonment and fine.</p>

 <p>Additional Grounds for Revocation of Licenses There are now new grounds for which a bank's license can be revoked. These include the conduct of a bank's business in an unsound manner or its directors engage in unsafe practices, failure to comply with an obligation imposed on such bank by the CBN Act, the Bill or other legislations or regulations etc.</p>	 <p>Time Limit for Challenging a License Revocation The law now provides a time limit of thirty (30) days for a bank whose license has been revoked to challenge the revocation.</p>	 <p>Exclusive Jurisdiction of the CBN The CBN now has exclusive jurisdiction to regulate and supervise all banks, financial institutions and specialized banks to the exclusion of other agencies or institutions.</p>	 <p>New Provisions for the Intervention of the CBN in Failing Banks As part of the CBN's power to intervene in the affairs of failing banks, the CBN Governor can now suspend any payment pursuant to any contract to which such bank is a party, transfer such bank's entire or part of its banking business to third party private purchasers, as well as employ any other intervention tools as the CBN may deem fit.</p>
 <p>Acquisition of the Shares of a Failing Bank by the CBN The CBN now has the power to acquire the shares of any failing bank up to a level that guarantees its control over such Bank.</p>	 <p>Proscription of Trade Unions The power of the president to proscribe trade unions under section 45 of the extant Act has now been removed under the new Bill.</p>	 <p>Closure of Banks during a Pandemic/Epidemic The law now contemplates the possibility of the closure of banks not just during a strike action, but also during pandemics/epidemics and protects such banks from being liable to its customers in the event of such.</p>	 <p>Penalty for Opening New Bank Branches without Permission The new penalty for opening bank branches without obtaining prior permission from the CBN is a fine of not less than five million naira (N5,000,000) and an additional penalty of one hundred thousand naira (N100,000) for each day during which the contravention continues. The CBN Governor is also now empowered to close such branches.</p>
 <p>New Conditions for Bank Restructuring There are now new conditions to be met for the restructuring of bank. These include consistency with public interest, the likelihood of creating a monopoly, etc.</p>	 <p>Prohibition of Certain Persons from being Directors The law now prohibits persons who have been dismissed from the service of the Federal, State or Local Governments from being a director or manager of banks.</p>	 <p>Anti-Money Laundering Provision There is now a provision for the adoption of policies by banks to comply with Anti-Money Laundering (AML) and Combating Financing of Terrorism (CFT) obligations under subsisting laws. The CBN Governor is also now empowered to issue regulations from time to time to combating financing terrorism.</p>	 <p>Appointment of the Nigeria Deposit Insurance Commission (NDIC) as Liquidator The CBN Governor is now empowered to appoint the NDIC as a liquidator of a bank whose license has been revoked and the NDIC shall be deemed to have been appointed by the Federal High Court.</p>
 <p>New Minimum Voting Rights The new minimum voting rights or controlling interest in the decision-making process of the bank is now five (5) per cent or more.</p>	 <p>Shareholding of Banks in Small and Medium Enterprises The new shareholding by the bank in any medium scale industry, agricultural enterprise or venture capital company or any other business approved by the CBN, shall not exceed twenty (20) per cent of the paid-up capital of the company or such other percentage as the CBN may approve from time to time.</p>	 <p>Provision for Cyber-Security There is now provision empowering the CBN to issue regulations/guidelines addressing cybersecurity issues in the delivery of financial or banking services.</p>	 <p>Penalty for Breach of Minimum Holding Reserve The new penalties for failure to comply with the provision for minimum holding reserves as specified under the Bill is now to be a fine five million naira (N5,000,000) and an additional one hundred thousand naira (N100,000) for each day the default continues.</p>
 <p>Operating Banking Business in Nigeria without a License The new penalty for conducting banking operations or receiving deposits in Nigeria without obtaining a license is imprisonment for a term of not less than five (5) years or a penalty of the higher of fifty million naira (N50,000,000) or two times the cumulative deposits or other amount collected or to both such imprisonment and fine.</p>	 <p>Establishment of a Banking Sector Resolution Fund There is now established a Banking Sector Resolution Fund, referred to as the "Resolution Fund" into which shall be paid all contributions and levies imposed under Part IX of the Bill.</p>	 <p>Power to Freeze Accounts The CBN Governor is now empowered to make an ex-parte application asserting the Governor's belief that a particular account has been involved in the commission of a criminal offence and as such obtain an order of court to freeze such accounts.</p>	

POTENTIAL IMPACTS OF BOFIA ACT 2020 ON THE BANKING AND FINANCE SECTOR

a) The Impact of the New Regime on the Receipt of Deposits for Private Companies Involved in Debt Transactions

The BOFIA 2020 extends the scope of the CBN's regulatory oversight and licensing authority. The Act provides that no person shall conduct banking business without a licence issued by the CBN and stipulates sanctions for any contravention of the provision. Section 2(5) of the Act provides that the conduct of banking business typically entails receipt and solicitation of money as deposits from the general public. Banking business is also deemed to be the receipt of deposits, which are limited to fixed amounts, or for which certificates or other instruments are issued in respect of any such amounts providing for the repayment to the holder the amount of the deposits at specified or unspecified dates, amongst others.

It is assumed that the intention of the legislature as regards this new provision is to extend the CBN's regulatory ambit to all forms of banking business (in the ordinary sense of the expression) whether done electronically or otherwise. However, it should be noted that there are several activities in the business world where an entity receives deposits as contemplated under section 2(5)(a) and (b) of the Act without conducting banking business. This includes companies collecting money either as deposits for shares or loans notes, or other similar transactions. The implication of this is the resultant difficulties and interpretational issues for these other forms of businesses or transactions, by the application of the Act.

b) Introduction of Measures to Check Criminal Activities in the Banking and Finance Sector

Under the previous Act, there was no express provisions defining measures to check criminal activities in the banking and finance sector. However, the new Act introduces provisions for anti-money laundering and combating of financing terrorism. These provisions are similar to the CBN's Anti-Money Laundering & Combating the Financing of Terrorism Policy (AMF/CFT) Policy and Procedure Manual (2018). A major implication of these novel provisions of the law is that they promote a safer banking and finance sector, especially as investors and transacting parties in the sector would tend to be more at ease and

assured that their transactions are protected against money-laundering activities. The provisions would also act as a check on persons/corporations involved in sponsoring terrorist activities.

c) Improved Accountability and Responsibility of Banks and their Key Officers

The new law seeks to hold banks and their officials liable for any failures to comply with the conditions for obtaining a licence, as well as other key obligations imposed on the banks. The fines for non-compliance have been adjusted to reflect new financial realities, especially given the profitability of banks in recent times. The upward adjustment in the fines is applicable to every policy breach with a penalty of a fine. Without a doubt, the new BOFIA would result in improved accountability and responsibility of banks and their key officers as they would most likely sit up to their duties of compliance, as opposed to the old days when the banks were summarily fined peanuts for non-compliance.

d) Limitation of the Exercise of Judicial Authority

The new Act grants immunity to the Federal Government (FG), the CBN, or any officer of the FG or the CBN from any action, claim or liability to any person in respect of anything done or omitted in good faith in the exercise of its/the person's duties under the Act, the CBN Act or any rules, regulations, guidelines or directives issued pursuant to any other relevant law. It should be noted that while a similar immunity provision is found in section 53 of BOFIA 2004, which specifically provides that the immunity applies only to action, claim or liability arising under BOFIA, this new Act seeks to extend the immunity to action, claim or liability arising under BOFIA, the CBN Act or any rules, regulations, guidelines or directives issued in accordance with any other relevant laws.

The wide extension of this immunity under the new BOFIA invariably suggests that neither the FG nor the CBN nor any officer of the FG or the CBN will ever be held liable for wrongful actions or omissions under any law in Nigeria. This shows the new provision is draconic and unreasonably wide.

Furthermore, it is important to note that that where there is a wrongdoing, there should be a

remedy. In other words, where the action of a person or government body causes an injury into any person, the party in default should be held to account for his/its actions. It is also important to note that the requirement of an aggrieved party to prove bad faith for acts/omissions on the part of the purportedly immune officers/authorities before such a party is entitled to redress is an onerous task, especially since the subject of “good faith/bad faith” is a matter requiring proof of intent. However, even the devil knows not the intention of man.

Also, the possibility of defective acts/omissions, however, done in good faith by the officers/authorities becoming non-justiciable makes this provision even more grievous. Indeed, allowing a provision of this nature to exist in our law in this day and age will certainly be inimical to investments (foreign/local) in this critical sector of the economy. It is also noted that Section 12(5) of the Act provides that “no action in respect of the revocation of the license of a bank, specialized bank or other financial institution shall be filed or maintained unless such action is filed within a period of thirty days from the date of the revocation.” This 30-day limitation period is too short and should be extended given the possibility of instances where an aggrieved licensee may be unable to institute an action due to events beyond its control such as a pandemic.

(e) Issuance of Banking License by the CBN

The provisions of section 3(1) of the Act stipulates that any person desiring to undertake banking business in Nigeria shall apply in writing to the Governor of CBN, while section 3(3) of the Act provides that the Governor of CBN may, with the approval of the Board of CBN, issue a license with or without conditions to the person or “refuse to issue a license and the Governor need not give any reason for such refusal.” It is asserted that this provision above appears arbitrary and unreasonable because it creates undue subjectivity on the part of the CBN.

Godwin Owoh, an advisor to Charles Soludo when the latter was Governor of the apex bank, stated that this new provision of the new law would rob Nigeria of the Savannah Bank experience. “Savannah was in the court for seven years before its license revocation, which when later discovered to have been done in error, was reversed,” Owoh said, according to the Guardian newspaper (November 16, 2020).

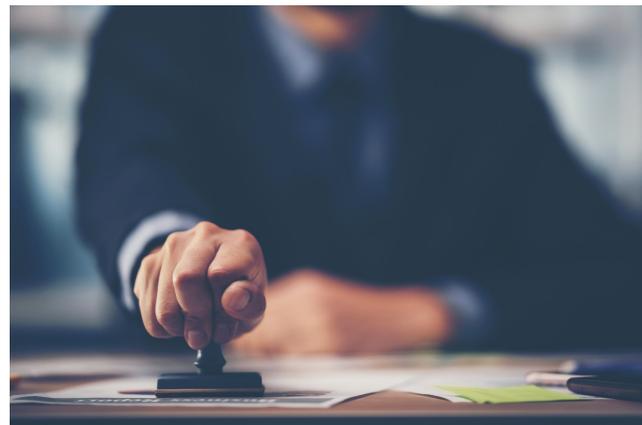


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A juxtaposition of the above provision of the Act with similar provisions in the laws of other regulated sectors of the Nigerian economy shows that section 3(3) of the Act is not in line with industry best practices and does not also meet the fair hearing requirement as guaranteed under section 36 of the 1999 Constitution of the Federal Republic of Nigeria.

(f) Introduction of a Debt Recovery Tribunal

The Act establishes a Tribunal for adjudicating on debt collection matters. This is laudable and should positively impact on the financial health of the industry as a whole, and it also appears to be borne out the need to expedite issues of credit. However, Section 118 of the Act provides that the case fee payable by banks, specialized banks or other institutions shall be 0.5 per cent of the amount of their claim. This amount is exorbitant and will adversely impact the effectiveness of the Tribunal. The fee should be a flat rate for all claims or based on a graduating scale. Charging advalorem case fees ignores the fact that the banks are already dealing with bad loans and might have had to make loan loss provisions in their books. It is also a major concern that the establishment of this Tribunal amounts to a duplication of the responsibilities of the Asset Management Corporation of Nigeria (AMCON), the Economic and Financial Crimes Commission (EFCC), the Nigeria Police Force and the Judiciary.

Recommendations

A proper examination of the new BOFIA shows that it is part of the Nigerian government’s efforts to improve the business climate. These efforts have seen

our country rise in the now-suspended World Bank Doing Business Index. The government also aims to provide a much healthier banking and finance sector. However, the new BOFIA has certain provisions that would make the assertion that there are no perfect laws, ring true. There are certain provisions in the Act which, if not deleted or amended, may be inimical to the fulfillment of the government's intention of creating an enabling environment to attract foreign and domestic investments, promote industrialization, increase trade and export, and develop enterprises in Nigeria.

The provision of the Act stating that the receipt of deposits is deemed to be banking business is recommended for amendment to align it with the intendment of the legislature, which is to extend CBN's regulatory ambit only to all forms of banking business whether done electronically or otherwise. This is to avoid causing difficulties and interpretational issues for other forms of businesses or transactions. Furthermore, not only does the new law increase the powers of the CBN and its Governor; it also increases the instances where these powers can be exercised. Littered in the sections of the new law are cases of wider CBN controls, ranging from approval for shutting down of branches to the consent for the transfer of significant shareholding of banks. The discretionary powers of the CBN in matters of approval and revocation of licence, minimum capital ratio requirements per time, the appointment of bank auditors, and scope for sanctioning erring banks are also covered in the new

law, culminating in the immunity from legal proceedings against the FG, the CBN, or any of its agents in carrying out their duties.

We recommend that these overreaching provisions should be amended to include measures to check excesses as well as arbitrariness on the part of the CBN, its Governor and related agencies. The immunity clause has generated a major outcry against this new law. Economists, financial advisors, and other stakeholders have opined that the immunity enshrined in the new law could lead to recklessness on the part of the regulators. There is, therefore, the need for an amendment. We also recommend that the provisions, which seem to be in conflict with the jurisdictions of other laws, regulations and regulators, should also be amended to attain a level of uniformity.

Conclusion

The law, as we know, is made for man and not the reverse. Bearing in mind that there are currently no infallible banking systems anywhere in the world, the provisions of the BOFIA 2020 have both the potential to tilt towards or away from a better banking and finance sector in Nigeria. It is hoped that with the clamour by various stakeholders for the review of key provisions of the new Act, as well as for efficient implementation of other provisions, a stronger banking and finance sector would emerge.

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