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THE ESTABLISHMENT OF THE ASSET MANAGEMENT CORPORATION OF NIGERIA.

Late yesterday President Goodluck Jonathan of the Federal Republic of Nigeria signed into law “**The Asset Management Corporation of Nigeria Act 2010**”.

This review provides an insight into the key aspects of the new law.

ESTABLISHMENT:

The Act is to establish the Asset Management Corporation of Nigeria (AMCON) for the purpose of efficiently resolving the incidence of non-performing loan assets of Banks, in Nigeria and ancillary matters.

It is noteworthy that this legislation was strongly pursued by the Governor of the Central Bank of Nigeria (CBN), as part of the apex Banks on-going reform package.

The Corporation shall be a body corporate with a common seal, may sue and be sued, may acquire, hold and dispose of movable and immovable property for the benefit of the functions and objects of the Corporation.

AUTHORISED CAPITAL:

The authorised capital of the Bank shall be the sum of Two Hundred and Fifty Billion Naira (250,000,000,000.00 Naira) to be subscribed to by the CBN and the Ministry of Finance divided on the basis of ninety (90) percent and ten (10) percent, respectively.

OBJECTS AND FUNCTIONS OF THE CORPORATION:

The objects of the Corporation are as follows:

- a) Support eligible Financial Institutions in the disposal of eligible assets;

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- b) Manage and dispose of, in an efficient way, said acquired bank assets;
- c) Obtain best financial returns from the acquired bank or other assets;

In pursuing the objects the Corporation is mandated to perform the following functions:

- a. Acquire eligible assets from eligible financial institutions in accordance with the provisions of the Act,
- b. Hold, manage and dispose of such assets
- c. Pay coupons and or redeem at maturity, bonds and debt securities issued by the Corporation
- d. Perform other functions to do with the management and realisation of the eligible bank assets
- e. Take necessary steps to protect, enhance or realise the value of the assets acquired by the Corporation
- f. Perform other functions considered necessary by the board as necessary, incidental or conducive to the attainment of the object.

POWERS OF THE CORPORATION:

The Powers of the Corporation considered to be wide ranging include the following:

- a. Issue bonds or debt instruments in consideration for the acquisition of eligible Bank assets
- b. Maintain a portfolio of diverse assets
- c. Provide equity capital
- d. Borrow or raise money, with or without the guarantee of the Central Bank, and/or secure the payment of money in any manner
- e. Initiate or participate in any enforcement, restructuring, reorganisation, arrangements or

compromises

- f. Enter into contract options and other derivative financial instruments for the purpose of eradicating the risk of losses attributable to changes in interest rates, currency exchange rates etc, cost of borrowing or other transactions or increasing returns on investments.
- g. Guarantee the indebtedness of other entities
- h. Draw, accept and negotiate negotiable instruments
- i. Accept any guarantees, security or indemnity
- j. Compromise any claim
- k. Open and maintain Bank accounts in any currency
- l. Form or acquire a wholly owned subsidiary or interest in a holding Company and give security for any debt obligation or liability of such Company
- m. Enter into, a partnership or joint venture and trusts
- n. Borrow or lend debt securities, invest in funds, sell or dispose property or parts of a Corporation and;
- o. Engage consultants or advisers for the purpose of carrying out the above activities.

What's interesting is the fact that the Corporation¹ has the power to carry out its functions and exercise its powers within and outside Nigeria and with the support of subsidiaries, agents or trustees. More interesting is the provision² empowering the Corporation to carry out its functions without the consent or approval of any other person or organisation and irrespective of any other enactment of law.

Naturally we understand that this provision takes cognisance of the need to prevent the usurpation of the Corporations power, however it is imagined that acts by the Corporation

¹ Section 7(2) of the AMCON Bill

² Section 7(3) of the AMCON Bill

outside Nigeria must be subject to the laws and regulations of other Countries, as recognised under international law.

In the exercise of its functions the Corporation is empowered to appoint asset managers and recovery agents provided they are selected on a competitive basis.

The Governor of the Central Bank is empowered to issue guidelines to the Corporation³.

ADMINISTRATION AND MANAGEMENT:

The terms relating to the establishment of the Corporation's Board of Directors and its activities are comparable to other Government Bodies.

However there are key additions, for example a member of the Board of Directors shall cease to hold office if found to be a debtor of an eligible financial institution and the debt owed qualifies as an eligible Bank asset⁴, all members of the Board are mandated, within one month of appointment, to disclose in writing details of their personal debts and pecuniary obligations to eligible financial institutions (the disclosure must also relate to the indebtedness of family members, close associates and companies in which board members have significant share holding)⁵ and if a member has a financial or beneficial interest material to a matter under the consideration of the Board the member is required to disclose his interest instantly and shall not attempt to partake in considering the matter, nor seek to influence other members⁶.

ELIGIBLE BANK ASSETS ACQUISITION, MANAGEMENT ETC:

This portion of the law is perhaps the most important in the sense that it elucidates on the key aspect of the statute being the "eligible Bank asset".

³ Section 9 of the AMCON Bill

⁴Section 14(d) of the AMCON Bill

⁵ Section 17(1) of the AMCON Bill

⁶ Section 17(2) of the AMCON Bill

The CBN is free to determine the scope of Bank assets to be deemed as eligible Bank assets. Such Bank assets shall, under the Act, be regarded as an eligible Bank asset if secured by collateral and duly entered on the financial balance sheet of an eligible financial institution⁷.

Most significant is the fact that within three months after the designation of a Bank asset, as eligible Bank assets, the Corporation may purchase such eligible assets, on a voluntary basis, from any willing eligible financial institution at a price to be determined by the CBN. However the Governor of the CBN may extend the period to three years.

The aforesaid willing eligible financial institution intending to dispose its eligible bank assets must apply to the Corporation in the prescribed form and manner, to be determined by the Corporation by way of regulation. It is required that applicant Bank must fully disclose, in utmost good faith, all information, warranties, representation and indemnities. It is expected that such openness would assist the Corporation in its decision to purchase the eligible Bank asset and the value to be placed upon such asset⁸.

Naturally the Corporation is not bound to acquire the assets and may only do so if it is necessary or desirable.

In exchange the Corporation shall issue seven year bonds, or other debt securities or consideration to be determined by CBN, to be guaranteed by the Federal Ministry of Finance.

Under Section 27(2) the consideration be it bonds, debt securities etc are useable as instruments of investment by the CBN and under the Pension funds scheme.

As expected upon the purchase of the eligible Bank asset the Financial institution is required to transfer to the Corporation or its nominee all books, records, documents of

title, duly executed instruments of acquisition of the asset, as well as asset purchase agreement with an indemnity clause.

Under section 34 (1) after the acquisition of the asset the eligible financial institution is mandated to make reasonable efforts to notify any debtor, guarantor, surety and any other person deemed necessary by the Corporation, of the acquisition. Importantly the Corporation cannot be liable for the financial institutions failure to effect notification and such failure cannot nullify the asset. It is imagined that by this provision the process of transfer of the eligible asset cannot be, in any way, forestalled by the debtor and, unlike cases relating to the sale of mortgage properties by Banks, the debtor/guarantor cannot invalidate the sale in the event of lack of notice.

The Act recognises that upon the acquisition of the eligible Bank asset the Corporation shall acquire, from the eligible financial institution, all rights and obligations relating to the asset. Accordingly, the Corporation is empowered to do the following:

- Engage any action, including legal action, to protect, perfect, or enforce any security, rights, interests, obligations or liability
- Realise any security, call up any security and participate in any resolution, work outs, arrangements, restructuring, reorganization and insolvency proceedings.
- In general exercise any powers conferred by any document of title or ownership to which the eligible Bank asset relates⁹.

The statute appears to grant unfettered rights of disposition to the Corporation by endorsing the Corporations decision to dispose the acquired Bank asset irrespective of contrary requirements as to the manner of disposition or indeed any

⁷ Section 25(1) and 25(2) of the AMCON Bill

⁸ Section 30 of the AMCON Bill

⁹ Section 36 of the AMCON Bill

outright bar¹⁰. More importantly failure, by the eligible financial institution, to disclose obligations or undertakings in favour of the debtor will not vitiate the disposition by the Corporation, but may well render the eligible financial institution liable in damages¹¹. The drafters have essentially stripped the debtors of any cause of action against the Corporation or its privies by stating that “Nothing in this Act shall render the Corporation liable for any breach of contract, misrepresentation, breach of duty or other legal or equitable wrong committed by an eligible financial institution”¹² and have even gone as far as making provisions for indemnification of the Corporation, by the eligible financial institution, in the event of error, omission, misstatement provided to the Corporation or in relation to any legal claims preceding the date of transfer of the eligible assets.

Section 44 contains perhaps the most challenging provision of all. This is because the section forgoes the requirement of formal registration of assets as a prerequisite for ownership and powers over the asset, this is irrespective of any law in force. Quite simply the Corporation under the statute can lease, sell and or dispose of land and in so doing pass on good title, without having to have registered its interest and obtained the Governors Consent, as stipulated under the Land Use Act of 1978.

SPECIAL POWERS OF THE CORPORATION:

Under this section of the law the Corporation is endowed with wide ranging powers all aimed at achieving timely liquidation of the charged assets.

Accordingly, the Corporation has the following powers:

- a. The power to act as or appoint a receiver of the debtor Company whose assets have been charged, mortgaged or pledged; in so doing the receiver

may realize the assets of the debtor Company, enforce the individual liability of the shareholders/directors and manage the affairs of the Company

- b. Take custody of any movable or immovable assets believed to belong to the debtor or debtor Company subject to seeking an order (from the Federal High Court) granting possession to the Corporation, within 7 days and thereafter commencing recovery proceedings
- c. Facilitate the stoppage of further transactions in respect of Bank accounts believed to belong to a debtor or debtor Company subject to seeking, within 24 hours, an Order freezing such account and thereafter commencing recovery proceedings within 14 days from the date of the freezing Order¹³.

As part of its efforts to ensure the expeditious liquidation of assets the drafters provide that where the Court delivers a decision requiring the debtor or debtor Company to pay a certain sums to the Corporation and the said sum remains unpaid a month after the Order of Court the Corporation may apply to the Court for a receiving Order or in the case of a Company a winding up Order.

Interestingly, unlike the lengthy process involved in the grant of receiving or winding up orders as known under the Bankruptcy Act or the Company and Allied matters Act respectively, in this case it is unnecessary for the debtor or debtor Company to commit requisite acts for the grant of the receiving or winding up orders under the respective Acts.

Under the proposed statute it is most certain that non-payment, after a month after the order of Court for payment in debt recovery proceedings, warrants the issuance of the receiving/winding up order and the debtor

¹⁰ Section 38 of the AMCON Bill

¹¹ Section 41 of the AMCON Bill

¹² Section 42 of the AMCON Bill

¹³ Section 49 of the AMCON Bill

or debtor Company is deemed bankrupt/wound up and thereafter an official receiver is duly appointed or in the alternative the Corporation acts as trustee of the confiscated property.

It is thought provoking that an Official Receiver or Trustee selected under the proposed legislation is deemed to have the same powers as if appointed under the Bankruptcy Act or the Companies And Allied Matters Act¹⁴. Equally the debtor or debtor Company under the circumstances is deemed bankrupt or wind up respectively, in the same manner under the respective Bankruptcy Act and Company and Allied Matters Act.

Under section 52 the Chief Judge of the Federal High Court has the option of designating a Judge of the Federal High Court, to hear matters brought under the Act.

CONCLUSION:

Upon signing the Act the President said the legal establishment of the Corporation was in line with his administration's determination to ensure the stability of Nigeria's financial sector and stimulate national economic recovery. It is generally expected that the Corporation once fully operational will **"take toxic assets off banks"** and free them for lending. However it is yet to be seen how effective the Corporation will be in dealing with the larger Bank debtors often known to be politically and socially influential.

¹⁴Section 50(5),(6),(7) of the AMCON Bill