



DUALE, OVIA &
ALEX-ADEDIPE



Understanding the Banks and Other Financial Institutions Act 2020: Key changes and Implications

Introduction

On the 13th of November 2020, President Muhammadu Buhari signed into law, the Banks and other Financial Institutions Act 2020 (the “Act”) which ushered in significant modifications to the Nigerian banking sector and the financial services market in general. The Act repealed the Banks and Other Financial Institutions Act 1991 (“BOFIA 1991”) and introduced key provisions (incorporating international best practices and recent global legal developments) in relation to the regulation of banks and other financial institutions in Nigeria.

In this edition of *Understanding the Banks and Other Financial Institutions Act 2020: Key Changes and Implications for Businesses*, we present some of the major highlights of the Act and their implications for the banking industry in Nigeria.

Provisions	Annotations
Banking Business	<p>The Act reiterates the need for obtaining a valid banking license for the purpose of carrying on the business of banking in Nigeria. Whilst the Act retained traditional banking activities in the definition of banking business, it expanded the scope of the term to accommodate the “<i>the provision of finance and advisory services relating to corporate and investment matters, making or managing investments on behalf of any persons whether such businesses are conducted digitally, virtually or electronically.</i>” These additions risk straddling with the jurisdiction of the Securities and Exchange Commission (“SEC”) over capital market operators such as fund/portfolio managers and investment advisers that provide investment advisory services and/or manage funds on behalf of investors. Similarly, the definition risks accommodating brokers or sub-brokers who make investments on behalf of investors, irrespective of the fact that the services are provided digitally or virtually.</p> <p>Whilst the Act in defining the terms “Specialized Bank” and “Other Financial Institution” exempted capital market operators licensed by SEC from the definition of “Specialized Bank” and “Other Financial Institution”, same exemption does not apply to the definition and regulation of “banking business”.</p>
Foreign Banks/ Offshore Banking	<p>A foreign bank can now be licensed by the Central Bank of Nigeria (“CBN”) to undertake domestic or offshore banking business within a designated free trade or special economic zone in Nigeria. It should be noted that the CBN in 2015 issued the Guidelines on Banking Operations in the Free Trade Zones in Nigeria (the “Guidelines”) to fill the specific statutory lacuna on operation of banking business within the free trade zone under the BOFIA 1991.</p> <p>The introduction of this provision has, thus, statutorily filled the lacuna by empowering the CBN to license Nigerian and/or foreign banks to carry on business within the free trade zones. It has also statutorily codified the key intention of the Guidelines and the Guidelines will continue to apply to all banks wishing to register in the free trade zones. Any such bank may thus be required to obtain license from both the Nigeria Export Processing Zone Authority and the CBN.</p>

<u>Provisions</u>	<u>Annotations</u>
Mergers and Corporate Restructure	<p>Whilst the Act retains the provisions of the BOFIA 1991 to the effect that the prior written consent of the CBN Governor (the “Governor”) is required for any change in control of a bank, sale or transfer of the whole or part of a bank’s business, mergers or amalgamation, restructuring or reconstruction of the Bank, the Act however subject the transfer of significant shareholding in a bank to the prior consent of the Governor. The Act defines the term “significant shareholding” to mean (a) beneficial ownership of 5% or more in the paid-up share capital of a bank, specialized bank or other financial institutions (b) the ability to cast a majority of the votes that may be cast at a general meeting of a bank, specialized bank or other financial institutions or has the ability to control such majority voting either directly or through an entity it controls or (c) is able to appoint or to veto the appointment of a majority of the directors of a bank, specialized bank or other financial institutions.</p> <p>Whilst the Act incorporates by reference the merger control provisions in Sections 92(1)(2) and (3), 94 and 98 of the Federal Competition and Consumer Protection Act (FCCPA), merger control involving a bank, specialised bank or other financial institutions shall be the exclusive preserve of the CBN and not the Federal Competition and Consumer Protection Commission as contemplated by the FCCPA. Furthermore, the Governor is empowered to prescribe additional or other rules and procedures for mergers, acquisition and other business combinations involving banks, specialised banks and other financial institutions.</p>
Shareholding by way of Trust	<p>The Act codifies the decision of the Supreme Court in Saraki v Kotoye (1994) LPELR-1708 (SC) in respect of holding shares in a bank by way of a trust arrangement. The Act provides that no legal proceedings shall be maintained against any person registered as the holder of shares in a bank on the ground that the title to the said shares is vested in any person other than the registered holder except for instances where the shares are held on behalf of a minor or a person affected by mental illness.</p>
Voting Right of Shareholders	<p>Whilst the Companies and Allied Matters Act 2020 (“CAMA”) vests shareholders with the right to vote at meetings, the Act qualifies such voting rights to the extent that shareholders in a bank shall have voting rights proportional to their individual contribution to the paid-up share capital of the bank.</p>

<u>Provisions</u>	<u>Annotations</u>
Revocation of Banking License	<p>The Act retains the provision of the BOFIA 1991 that the CBN may revoke the license of a bank, where the bank ceases to carry on banking business for which it was licensed. The Act however warrants a revocation of license where there is a cessation of such business not only be for a continuous period of six months but also where the bank ceases to carry on banking business for an aggregate period of six months in a continuous period of twelve months.</p> <p>The Act also includes additional grounds of revocation such as (i) conducting business in an unsound manner or unsafe practices by directors (ii) undercapitalization with a capital adequacy ratio below the prudential minimum or such other ratios as the CBN may prescribe.</p> <p>Any legal proceeding challenging the revocation of a license issued by the CBN must be commenced not later than thirty days from the date of the revocation. And the only remedy available for any wrongful revocation of license is monetary compensation not exceeding the equivalent value of the paid up capital of the bank at the time of revocation as the court will not order a restorative or similar relief.</p>
Minimum Capital Ratio	<p>The CBN is now allowed to prescribe a higher or lower capital adequacy ratio for banks, and where appropriate, prescribe an additional capital depending on the nature and severity of specific risks.</p> <p>In addition, the Act has further expanded the scope of prohibited activities of the defaulting banks to specifically include the payment of bonus to the directors other than the approved emoluments and/or benefits.</p>
Prohibition of Interlocking Directorships	<p>The Act makes certain changes in respect of inter-locking directorship. The prior approval of the CBN is required for the appointment of a person as a director of a bank, if such person is a director of any company or entity which has a significant influence over a bank. In this regard, significant influence is defined to mean a direct or indirect ownership of five (5) percent or more of the voting rights in the bank or controlling influence in the decision-making process of the bank.</p> <p>In the case of a financial holding company structure, the aggregate number of directors from the company's subsidiaries and associates shall not exceed 30% of the board of the financial holding company. Also, the number of directors of the financial holding company on the board of the company's subsidiary and associates shall not exceed 30% of the members of the board of such subsidiaries and associates.</p>

<u>Provisions</u>	<u>Annotations</u>
Restriction on certain Banking Activities	<p>In addition to the extant restriction on the grant of credit facility in excess of 20 percent of the shareholders' funds unimpaired by losses and grant of facility against the security of its own shares, the Act now provides that the Bank shall not grant any unsecured advance, loan or credit facility without the prior written approval of CBN unless it is in accordance with the collateralisation regulations as may be issued by the CBN.</p> <p>The Act further introduces stringent conditions in relation to the grant of credit facilities by a bank to its directors or significant shareholders as follows;</p> <ol style="list-style-type: none"> The credit facility will not exceed five percent (5%) of the paid-up capital such that the aggregate exposure of the bank to the directors and significant shareholders will not exceed ten (10) percent of its paid-up share capital; The terms of the facility are in line with prevailing conditions for comparable transactions with third parties; The facility does not present greater risk than the normal risk of repayment; It follows the standard credit appraisal procedures as applicable to comparable third-party credit arrangement; There is no undue or preferential treatment for any director or shareholder.
Display Obligation	<p>The Act imposes on the banks an additional obligation, in addition to the extant obligation to display interest rates, to display at their offices and on their website their Anti-Money Laundering/Terrorist Financing combating reporting obligations, foreign exchange rates, certified true copy of its certificate of incorporation, abridged version of its last approved audited accounts and any other document as may be required by the CBN.</p>
Restriction on the use of Certain Names	<p>The Act restricts banks from being registered or incorporated with any tribal or ethnic name or any name with specific words which include central, federal, federation, national, Nigeria, reserve, state, Christian, Islamic, quranic, or biblical.</p> <p>The Act also prohibits businesses or entities not being a bank licensed under the Act from using the word "Bank" or any of its derivatives in English or any other language in its name or description under which it carries on business. This restriction also extends to the use of the word "Fintech" by entities established with the objects to provide payments and/or other financial services required under the Act.</p>

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	A fine of not less than N2,000,000.00 (Two Million Naira) and N100,000.00 (One Hundred Thousand Naira) per day of default shall be paid upon conviction where an entity contravenes the provisions of the Act in connection with the restriction on use of the specified names.
Accounts of Non-Interest Banks	<p>Given the introduction of non-interest banking in Nigeria, non-interest banks are now required to forward to the CBN for approval an independent report of the advisory committee of experts on the compliance status of the banks' activities with non-interest banking principles in addition to its financial statements not later than three (3) months after the end of its financial year.</p> <p>It is important to note that a non-interest bank (otherwise called the profit and loss sharing bank) is a bank which transacts banking business, engages in trading, investment and commercial activities as well as the provision of financial products and services in accordance with the principles and rules of Islamic finance.</p>
Specialised Banks and other Financial Institutions	<p>The Act reiterates the requirement for a CBN license to carry on the business as a Specialised Bank or Other Financial Institution ("OFI"). The Act corrected some anomalies in the BOFIA 1991 definition of OFI by removing fund managers and pension fund administrators from the definition OFIs.</p> <p>The Act however included additional businesses that will be categorised as OFIs, such as bureau de change, credit bureau, international money transfer services, mortgage refinance company, mortgage guarantee company, credit guarantee company, financial holding company and payment service providers.</p> <p>Any firm carrying on business without a license prior to the commencement of the Act is required to apply in writing to the CBN not later than three months from the commencement of the Act.</p>
Payment Service Provider	The Act now characterises payment service providers as OFIs. Payment service providers are defined in the Act as firms that provide technical or technology infrastructure and software solutions or services for facilitating end-to-end electronic payment to third parties and now constitute payment services. It is uncertain whether firms that currently hold licenses as a payment solutions service provider ("PSSP") or a Payment Terminal Service Provider ("PTSP") will be required to get a license as an OFI in addition to their subsisting PSSP and PTSP licenses or if these licenses will be sufficient for compliance with the Act. This definition of "Payment

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	Service” removes the dichotomy that hitherto existed between a payment service solutions provider on the one hand and payment infrastructure service provider on the other hand, as the Act collectively defines them as Payment Service Providers.
Competition	<p>The Act effectively exempts the application of the provisions of the FCCPA to any function, act, financial product or services and transaction by a bank or other financial institutions or the CBN, the Governor or other executive officer or staff of the CBN. This appears to negate the inter-agency collaboration mechanism enjoined in the FCCPA.</p> <p>Notwithstanding any other provision of the contrary in the Act or in any other enactment, such as the FCCPA, the Governor is vested with the power to issue subsidiary enactments on matters such as (i) protection of the interest of consumers of products and services of banks, specialized banks and other financial institutions (ii) promotion of competition in the Nigerian financial system.</p> <p>The Act specifically provides that notwithstanding the provisions of the CAMA and FCCPA or other enactments, the provisions of the Act shall apply in so far as it relates to banks, OFIs and specialized banks. And where the provision of the Act conflicts with the provisions of CAMA, FCCPA and other enactments, the provisions of the Act shall prevail.</p> <ol style="list-style-type: none"> Where there is a conflict between a general law (being the FCCPA) and a specific law (the Act), the specific law will take priority. In this regard, the Act will take priority over the FCCPA see America Specifications Autos Limited v AMCON (2017) LPELR-44016 (CA) 10. Where there is a conflict between a statute first in time and a statute subsequently enacted, the latter statute shall take precedence over the earlier statute. In this regard, the Act being latter in time will take priority over the Act.
Power to compound offences	<p>One of the major innovations of the Economic and Financial Crimes Act (“EFCC Act”) is the introduction of the power of the Economic and Financial Crimes Commission to compound a criminal offence. The Act contains a similar provision that confers on the Governor the power to accept sums not exceeding the minimum amount of penalty payable by any culpable persons for infractions of the Act, the CBN Act, the Foreign Exchange (Monitoring and Miscellaneous) Provisions Act, the Credit Reporting Act and other enactments. However unlike the EFCC Act that directs that monies recovered be remitted to the Consolidated Revenue Fund of the Federation, the Act directs that monies recovered by the CBN be remitted to a CBN penalty account.</p>

<u>Provisions</u>	<u>Annotations</u>
Power to freeze accounts	<p>The Act gives statutory expression to the decision of the court in the case of <i>Olagunju v EFCC (2019) LPELR – 48461 (CA) 18-26</i> by specifically conferring on the Governor the power to direct banks, specialised banks or OFI to freeze an account(s) domiciled with it if it is suspected to have been used for the commission of an offence pursuant to an order issued by the Federal High Court (“Order”) and all such transactions relating to the accounts shall be suspended. The Order will be granted in furtherance of an ex parte application by the Governor.</p> <p>Where any account has been frozen, the Act requires the Governor to refer the matter to the Nigeria Police Force, National Drug Law Enforcement Agency, the Economic and Financial Crimes Commissions (“Law Enforcement Agencies”) for investigation, and where the infraction concerns the breach of the Act, the CBN shall investigate such matters. Where the Law Enforcement Agencies or the CBN are unable to conclude their investigations within the period stated in the Order, the Governor can apply to the court for an Order continuing the freeze on the account.</p>
Un-claimed Funds/Abandoned Property	<p>The Act requires the approval of two authorised signatories of the bank, specialised bank or OFI to make a withdrawal from a current or savings account which has been dormant for a period of one (1) year. Any such dormant accounts shall be transferred to a separate register of dormant accounts and will be treated as the deposit liabilities on the books of the Banks subject to notifying the account holder of the dormancy of the account.</p> <p>Where an account has been in the register of dormant accounts for a period of ten (10) years, the Act requires the bank to notify the public by way of advertisement in two (2) national newspapers of the fact of the transfer of such account(s) to a register of dormant accounts. In the absence of any claim to such accounts, the unclaimed funds including any interest earned shall be transferred to an account earmarked by the CBN subject to investing the unclaimed funds in a federal government securities.</p>
Avoidance of Transactions	<p>The Act effectively establishes a regime for avoidance of certain pre-liquidation transactions, being an aspect of insolvency regime. The liquidator, with the attendant right to recover assets from the transferee or beneficiary, can set aside the following transactions:</p> <ol style="list-style-type: none"> Gratuitous transfers to affiliates, insiders or key management personnel consummated within five (5) years prior to the liquidation; Related party transactions detrimental to the interests of depositors and creditors consummated within five (5) years prior to the liquidation;

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	<ul style="list-style-type: none"> c Gratuitous transfers to third parties made three (3) years prior to the effective date of the liquidation; d Fraudulent transactions or transactions based on forged documents executed detrimental to the creditors; e Any transactions withholding assets or impairing the rights of the creditors done within five (5) years prior to the effective date; f Asset transfer for the benefit of a creditor on account of a debt incurred within one (1) year prior to the effective date of liquidation; g Attachment or security interest save for one existing six (6) months prior to the effective date of the liquidation.
Banking Sector Resolution Fund	<p>The Act establishes the Banking Sector Resolution Fund (the “Fund”) domiciled with the CBN into which all bank, specialised banks and other financial institution shall be liable to pay an annual levy in an amount equivalent to ten (10) basis points of its total assets as at the date of its audited financial statements from the commencement date on or before 30th day of April in every financial year. The Fund shall be used inter alia to pay the operating cost of a bridge bank; provide loan or credit facility to a bank, specialised bank or OFI that is under resolution or a bridge bank; pay any other costs reasonably incurred in the resolution measure including legal costs, cost of advisory services, cost of an independent valuation etc</p> <p>Pertinently, the annual levy paid by the banks, specialised banks and other financial institutions shall constitute deductible expenses for the computation of the Companies Income Tax. This will expand the universe of deductible expenses that banks would be entitled to.</p>
Establishment of a Special Tribunal	<p>The Act establishes the Special Tribunal for the Enforcement and Recovery of Eligible Loans (“the Tribunal”) and confers on the Tribunal the jurisdiction to determine matters relating to the enforcement and recovery of eligible loans by financial service banks, specialised banks or OFIs and the enforcement of security or guarantee or attachment of assets under an eligible loan. An eligible loan under the Act is defined to mean any credit facility, overdraft, loan, risk asset to the tune of at least N25,000,000.00 (Twenty-Five Million Naira) falling due for not less than 90 days and designated by the Governor of CBN as being eligible for enforcement and recovery before the tribunal.</p> <p>This provision of the Act may have significant impact on the decision of the Supreme Court in NDIC v Okem Enterprises Limited (2004) 10 FWLR (Pt.880) 107 which interpreted Section 251(d) of the Constitution to the effect that both the Federal High Court, State High Courts and the High</p>

<u>Provisions</u>	<u>Annotations</u>
	<p>Court of the Federal Capital Territory, Abuja ("High Courts") shall have concurrent jurisdiction on bank-customer relationship. The Act appears to limit the jurisdiction of the High Courts in debt recovery matters between banks and their customers to loans below the sum of N25,000,000.00 (Twenty-Five Million Naira). This provision of the Act and the jurisdiction of the Tribunal may thus be subject to judicial challenge in the nearest future.</p> <p>From a read of the relevant provisions of the Act, the establishment of the Tribunal does not appear to supplant the jurisdiction of the Federal High Court, State High Court or the High Court of the Federal Capital Territory ("the Courts") to the extent that the Courts still retain the judicial powers to hear and determine all debt recovery matters.</p>



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Highlights of the Companies and
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