

The Revised AMCON Debt Recovery Approach Vis-a-vis The AMCON Special Powers – A Critical Review of AMCON Amendment Act 2019

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Brief History of AMCON

Asset Management Corporation of Nigeria (AMCON) was established on the **19th July 2010**, when the President of the Federal Republic of Nigeria signed the **AMCON Act No. 4, 2010** into Law on the same day. The AMCON Act was also amended in 2015 and known as the AMCON Amendment Act, 2015 precisely on **25th May 2015**. AMCON was created to be a key stabilizing and re-vitalizing tool aimed at reviving the financial system by efficiently resolving the non-performing loan assets of the banks in the Nigerian economy.

Mission

- To positively impact and improve the economy of Nigeria by;
- Complementing the recapitalization of affected Nigerian banks;
- Providing an opportunity for banks to sell off Non-Performing Loans(NPLs);
- Freeing up valuable resources and enabling banks to focus on their core activities.
- To propel the lending ideology in banks again.

Vision

- To be a key stabilizing and re-vitalizing tool in the Nigerian economy

Objectives of AMCON

Section 4 AMCON Act, 2010 provides the objectives of AMCON as follows;

- Assists eligible financial institutions to efficiently dispose of eligible bank assets in accordance with the provisions of the AMCON Act.
- Efficiently manage and dispose of eligible bank assets acquired by the corporation in accordance with the provisions of the Act.
- Obtain the best achievable financial returns on eligible bank assets or other assets acquired by it.

EBA & EFI's Explained

Eligible Financial Institutions {EFIs}: They are generally Financial Institutions regulated by CBN usually the Commercial Banks which their EBAs are purchased by AMCON according to the CBN Guidelines.

Section 24 AMCON Act, 2010 – Gives CBN power through its guideline to designate classes of Bank Assets as EBA.

Section 25 AMCON Act, 2010 – AMCON shall within 3months of such designation voluntarily purchase the EBA from the EFI that is desirous of disposing of such EBA at a value and price to be determined according to the provisions of Section 28 of the Act and CBN may extend the period specified in this section for a further period not exceeding 3years.

Section 28 AMCON Act, 2010 – The valuation and the purchase price of the EBA shall be determined in accordance with guidelines issued by CBN from time to time.

AMCON Special Powers

Section 48: Power to appoint and to act as a Receiver/Manager for debtor's company.

Section 49: Power to apply to Court to take possession of a Debtor's property.

Section 50: Power to apply to Court to attach and freeze debtors funds in any Bank.

Section 51: Power to apply to Court for bankruptcy of the debtor.

Section 52: Power to apply to Court for winding up of debtor company.

Section 53: Power for CJ of FHC to appoint designated Judges to hear AMCON debt recovery matters.



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Key Points of AMCON Special Powers Pre- 2019 Amendment

SECTION 48: RECEIVERSHIP

Under the 2010 Act, Section 48 (1) & (2) provided only for powers to appoint

Receiver and duties of a Receiver. The 2015 Amendment introduced Section 48 (3)-(8) which;

- Empowers Receiver to act over the entire undertaking of a debtor, notwithstanding that only one asset of a debtor is charged- Section 48 (3)
- Under the general law of Receivership, a Receiver can only be appointed over specifically charged assets.
- All assets need not be specifically charged under the Act for a receiver to be appointed-charge over even just one asset is sufficient.
- Power to appoint a receiver is however without prejudice to the right of secured creditors.
- Receiver can elect to act as a manager and upon election must notice of election in 2 newspapers- **Section 48 (4)**.
- Management of Receiver/Manager not just for benefit of AMCON but extends to the general body of creditors- **Section 48 (5)**.
- When Receiver elects to manage and publishes notice of election, there is

a standstill period of one year from the date of notice of election for the Receiver so appointed.

- No proceeding or enforcement action against the debtor company during the standstill period- **Section 48 (7)**.
- The receiver is required to publish a rehabilitation report within 30 days of notice of election- **Section 48 (8)**.
- If a receiver fails to publish, standstill provision will cease to apply.

SECTION 49 & 50 AMCON ACT

- Power to take custody of debtors company- **Section 49** provides for special debt recovery procedure by way of an application ex-parte for possession of the debtor's property.
- Attachment and freezing of debtors bank account- **Section 50** provides for the attachment and freezing of a debtor or a debtors company's bank account.
- Both **Sections 49 and 50** require debt recovery actions to be filed within 14 days of the order. However, it was held in JOSCO AG.

“that failure to file the substantive action within 14 days does not render it incompetent.”

- Provision of special powers to AMCON to obtain receiving orders against the debtors in bankruptcy proceedings but not attractive as it is needed after judgment has been obtained – **Section 51.**
- Provision of special powers to AMCON in winding up proceedings {simpler than the CAMA} – **Section 52.**
- Empowers the Chief Judge of the FHC to designate judges for special debt recovery and to issue practice direction {hampered by a shortage of Judges of the FHC} – **Section 53.**

AMCON 2019 Amendment

The amended AMCON Act was enacted on 29th July 2019 and it represents the 2nd Amendment of the AMCON Act. Comprising of 24 Sections, the amended sections include Sections 6,

10, 19, 31, 33, 34, 35, 39, 43, 45, 47, 48, 49, 50, 51, 52, 53, 55, 60 and 61 of the AMCON Act. Coupled with amended sections, new sections were introduced which include Sections 33A, 50A and 50B. The objective is to enhance AMCON debt recovery capabilities and improve supporting regimes for enforcement.

7 Key Pillars of the 2019 Amendment

1. Tracing and tracking debtors hidden funds.
2. Naming and shaming recalcitrant debtors and making contracting with government subject to good standing with AMCON.
3. Holding selling EFIs to their loan sale obligations and giving teeth to clawback rights.
4. Checkmating debtors legal gymnastics and exploitation of legal technicalities to frustrate recovery.
5. Fast tracking the hearing and determination of AMCON cases.
6. Enhancing AMCON's rights over collateral securing EBAs from securing interest to legal title.

7. Fine-tuning AMCON special powers.



Tracing and Tracking Debtors Hidden Funds

- Targets debtors that are able but unwilling to pay and who hide their funds, financial and commercial information away from AMCON to frustrate recovery.
- Comprehensive disapplication of banking secrecy laws and bankers confidentiality rules –Section 6(1) (ua) (iii) and new Section 50A(1).
- AMCON may additionally apply to court ex parte to compel compliance and the court except where it sees a good reason to the contrary is required to make order and award cost of a minimum of N5million- new Section 50A (4).

- Directors of defaulting EFI are criminally liable to 3 years imprisonment- new Section 50A (3).
- Surveillance and access to debtors banking, financial and commercial information and BVN from banks by Ex parte order of FHC- Section 6(1) (ua) (i) & (ii).
- Access to debtors computer systems for the purpose of locating debtors funds by ex-parte order of the FHC- new Section 6(1) (ua) (i) & (iii).
- Requiring any EFI by written notice for details of debtor's bank balances and investments by way of deposits and financial instruments- new Section 50A (1).
- Fine of 10m and additional N50k for each day of default- new Section 50A (2)

Naming and Shaming Recalcitrant Debtors and Making Their Access to Government Business Conditional Upon AMCON Good Standing

- Disapplication of rules or contractual obligations as to

confidentiality by empowering AMCON to publish a list of recalcitrant debtors in national daily/newspaper – Section 50B(1).

- AMCON to furnish the Federal Government and Federal MDAs with list of recalcitrant debtors and to furnish “procuring entities” with copy of published list- Section 50B(2).
- Imposing an obligation on FG and Federal MDAs to seek AMCON clearance before contracting with or making payments to recalcitrant debtors on list furnished – new Section 6(6) and new Section 50B (2)
- Prohibits procuring entities from awarding contracts to, or conducting business with, or making payments to debtors in the published list without AMCON’s prior written concurrence, and without satisfying themselves that any condition attached to AMCONs concurrence has been met- new Section 50B (3).

Holding Selling EFIs to their Loan Sale Obligations and

Giving Teeth to Claw Back Right

- The original Section 31 obligates selling EFIs to deliver to AMCON books, records and security document of collateral in respect of EBAs purchased by AMCON but does not provide penalties for default.
- Empowering AMCON to demand from selling EFI's, their directors or officers, delivery of information, books, accounts, records and documents in relation to acquired EBAs – new Section 31(2).
- Defaulting EFI's liable upon demand by AMCON, to make a full refund. It also mandatorily obligates the immediately debit the defaulting EFI the purchase price with interest – new Section 31(7).
- Criminalizes failure by directors or officers of EFIs to comply with the demand for delivery or furnishing of false or misleading information, books, accounts, records or documents {6months imprisonment} – new Section 31(6).

- Makes power to demand delivery applicable to EBA purchased before the enactment of the 2019 Amendment {Retrospective} – new Section 31 (3) TOYIN v PDP (2019) 9 NWLR (Pt. 1678).
- “Constitution empowers the National Assembly to make laws with retrospective effect and such laws are generally not unconstitutional”
- Imposes fine in favour of AMCON for failure to comply with the demand for delivery of necessary documents on acquisition of EBA {fine of N1million+ N50,000 for each day of default; EFI, Directors and officers are severally liable } – new Section 31(4)
- Delivery of false or misleading information {EFI to pay fine of N10million, Directors/Officers N2million} – new Section 31 (5)

Checkmating Debtors Legal Gymnastics and Exploitation of Legal Technicalities

- Grant of immunity to AMCON, its directors and officers against action or proceedings by “reason only” of

EBA acquisition and cessation and abatement of any such existing proceedings – new Section 33A.

- Imposition of condition for grant of stay of proceedings, stay of execution/injunction pending appeal and Leave to Appeal {all injunctive reliefs will be on condition of the deposit of claimed sum into an interest yielding account in the name of the registry of the relevant court} – new Section 53 (7).
- Limiting remedy to a debtor to monetary compensation – new Section 34 (6)
- Total disapplication of the statute of limitation in AMCON debt recovery and debt realization matters { as statute of limitation does not apply to EBAs purchased by AMCON- new Section 35 (5); MYEKO NIGERIA LTD v AMCON (2019) LPELR – 47643 CA
- Fast-Tracking Hearing and Determination of AMCON Cases
- Requiring the heads of courts, the president of Court of Appeal and the CJN to issue special practice directions exclusively for the expedited and accelerated hearing

of AMCON matters.- new Section 53 (1) and (3)

- Setting time limits for the determination of AMCON matters: {At the High Court, 6 months from filing fresh action while pending matters same 6months form enactment of 2019 Amendment}- new Section 53 (3); Court of Appeal & Supreme Court- 60days- new Section 53 (5)
- Mandatory requiring heads of courts to designate one or more special courts to exclusively hear and determine AMCON related matters - new Section 53(1).

Enhancing AMCONs Right Over Collateral Securing EBAs- From Security Interest to Legal Title

There were difficulties experienced in exercising the power of sale attending security interest acquired upon acquisition of the EBAs by AMCON. The amendment provided a departure from the regime of old Section 34 which focused on vesting of security interest hitherto held by EFI in AMCON and

there was unclear language of reference to vesting rights of EBA in AMCON.

The amended Act expressly provided for vesting legal title to acquired EBAs and in collateral securing such acquired EBA, and vesting power of sale, possession, management etc., in AMCON to exclusion of all other creditors notwithstanding that only equitable security exists in such collateral- Section 34 (1) (a) and (4).



Fine-Tuning AMCONs Special Powers

RECEIVERSHIP

- Omits the proviso to the old section 48 (3) which hitherto preserved the rights of secured creditors in security-rights of secured creditors

now preserved in new section 34 (1) (c)(i).

- Increases time within which a receiver/manager shall publish rehabilitation plan from 30 days to 90 days- new Section 48 (8) Provides for the extension of the protected standstill period of one year for a further period of 1 year by ex parte application to the court- new Section 48 (7).
- Prohibits other secured creditors or judgment creditors from enforcing security during the protected standstill period - new Section 48 (7) (b).
- Sets management objectives of a receiver/manager to be in the interest of all the debtors and to rescue the company as a going concern to get a better result for debtors creditors than likely winding up of the debtor company - new Section 48(11).
- Provides regime for a restructuring of the debtor company by way of hive down for the benefit of AMCON and secured creditors - new Section 48 (13), (14) & (15).

- **POSSESSION & FREEZING ORDER
(SEC 49 &50)**

The 2019 Amendment dispenses with the old stipulation that AMCON to commence action within 14days

BANKRUPTCY & WINDING UP PROCEEDINGS

For Bankruptcy, it is now triggered by a failure of a debtor to comply with written demand by AMCON to pay within 90days of demand - new Section 51 (1).

For winding up, it now only requires the failure of the debtor company to comply with written demand by AMCON to pay within 30days of demand - new Section 52 (1).

POWER TO APPOINT SPECIAL PROSECUTOR

Section 55 (2) makes provision for AMCON to appoint legal practitioners to prosecute offences under the AMCON Act though it is subject to the overriding constitutional powers of the Attorney General.

OTHER CHANGES IN THE 2019 AMENDMENT ACT

- Section 4 inserted new subsection (2) - (5) which indicates prior consent of the AGF to enforcement/execution of money judgment against AMCON and protection against interim or interlocutory attachment of AMCON's funds in any bank.
- Section 12 inserted a new subsection (2) for the introduction of Certificate of Judgment which constitutes Registrable instrument.
- Section 21 introduces a new subsection (1) where the FHC is vested with exclusive jurisdiction to try criminal offences under the AMCON Act.
- Please note that AMCON Act has primacy to any other law except the Constitution - Section 60z.

CONCLUSION

It is the general perception that the present amendment to the AMCON Act is draconian. However, the stringent

provisions of the Act is a welcomed idea as the increased rate of indebtedness and debt profile is a challenge to our dwindling economy. There is a need to revamp the culture of diligent liquidation of loan facilities granted as at when due to saving our economy from total collapse as spearheaded by this AMCON Amendment Act, 2019.

Definition of Terms/Acronyms

- Amendment: A minor change or addition designed to improve a text, piece of legislation, etc. “an **amendment to** existing bail laws”
- AMCON –Asset Management Corporation of Nigeria
- EBA – Eligible Bank Assets
- EFI – Eligible Financial Institution
- CBN – Central Bank of Nigeria