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TEMPLARS ThoughtLab

The Business Facilitation (Miscellaneous Provisions) Act 2023 - A Boost for Economic Development

Introduction

In its bid to achieve economic growth and developmental pathways in the country, the Federal Government of Nigeria ('FGN' or 'The Government') continues to engender more efforts at ensuring the ease of doing business in Nigeria. The latest of these laudable efforts came to fruition in February 2023 when the Government signed the Business Facilitation (Miscellaneous Provisions) Bill 2022 (the Bill) into law. Having been passed into law by the National Assembly, the Bill received Presidential assent on the 8 of February 2023 and thus, became known as the Business Facilitation (Miscellaneous Provisions) Act, 2023.

The objective of the Act is to promote the ease of doing business in Nigeria, eliminate bottlenecks, amend relevant legislation to promote the ease of doing business in Nigeria and to institutionalize all the reforms to ease implementation. In this connection, the Act notably amended about 21 business-related laws, namely: the Companies Allied Matters Act ("CAMA"), Nigerian Export Promotion Council Act, Customs and Excise Management Act, Export Prohibition Act, Financial Reporting Council Act, Foreign Exchange (Monitoring and Miscellaneous Act), Immigration Act, Industrial Inspectorate Act, Industrial Training Fund Act, Investment and Securities Act, National Housing Fund Act, National Office for Technological Acquisition and Promotion Act, National Planning Commission Act, Nigerian Customs Service Board Act, Nigerian Investment Promotion Commission Act, Nigerian Oil and Gas Industry Content Development Act, Nigerian Ports Authority Act, Patents and Designs Act, Pension Reform Act, Standards Organisation of Nigeria Act, and Trademarks Act.

This article examines the key provisions and innovations introduced by the Act and the effect of its implementation on the ease of doing business in Nigeria.

Transparency Requirements and Default Approvals

The Act underscores the need for transparency in business engagements and activities in Nigeria, especially, engagements and activities that involve Ministries, Departments and Agencies (MDAs) of the Government, which provide products and services such as; waivers, tax related processes, filings, approvals, registration, certification, permits, licenses, etc. In this regard, the Act mandates MDAs to publish a complete list of requirements

to obtain such products and services in accordance with the functions of the MDA within 21 days from the commencement of the Act¹. By the implementation of this provision, persons dealing with MDAs for the procurement of products and services relevant to their functions, would have first-hand information of all requirements to be fulfilled in doing so. This not only eliminates the risk of acting on assumptions or relying on the discretion of the MDA for such information, but would also curb the prevalence of arbitrary requests and demands from MDA officials for providing such products and services.

Additionally, MDAs are now required to notify applicants of the acceptance or denial of their applications within the timeframe specified in their published list. The Act specifies that an application for a product will be deemed approved and granted if the approval or denial is not completed within the specified time frame. Consequently, should an application be denied within the deadline², the MDA is required to notify the applicant of the rejection and the reasons for same within the stipulated timeline, otherwise, the application is deemed approved. Whilst this appears to be a tall order given the antecedents of MDAs in relation to applications for approvals and grants, we opine that such transparency measures if successfully implemented, would in no small measure stem corruption and all forms of exploitation in that regard within the public sector.

Companies and Allied Matters Act (CAMA) 2020

Share Capital Increase - The Act allows for companies to increase their issued share capital by allotting new shares following passage of a resolution of the board of directors to that effect. Such resolution of the board must however be subject to such conditions or directions that may be imposed in the Articles or by the company in a general meeting³. This new provision and requirement of the Act is complementary to the existing provision which only allows a company to increase its share capital by members in general meeting. Thus, going forward, the board of directors are allowed to issue resolutions to increase the company's share capital without the requirement of a general meeting with its shareholders, provided the members in general meeting or the company's articles have so authorized. While this amendment brings about expediency to the process of share capital increase, companies must however exercise prudence in implementation by cautiously setting adequate boundaries in their articles for the exercise of such authority by the board.

Return on Allotment – The Act introduces a shorter period of 15 days within which to make returns on allotment of shares to the Corporate Affairs Commission (CAC) as against the one-month period that was earlier provided in the CAMA⁴. This would mean that new shares and details of the ownership of such shares will now be reflected promptly in the company's records at the CAC.

Electronic Share Certificates – There is now provision for issuance of share certificates through electronic means by the addition of a new subsection (7) to Section 171 of the CAMA 2020. By this addition, share certificates can be in physical or electronic form.⁵ This dematerialisation process is an excellent initiative because it eliminates the risk of loss of physical share certificates and facilitates paperless dealings on shares.

¹ Section 3 of the Act.

Limitation of Pre-emptive Rights - The BFA has limited the scope of pre-emptive rights to only private companies in alignment with Section 22 of CAMA⁶. The implication of this amendment is that only private companies are required to offer new shares to existing shareholders in proportion to their existing holdings as opposed to the previous requirement which covered both private and public companies.⁷ This amendment eliminates the challenges and controversies triggered by the extension of pre-emptive rights to public companies under CAMA 2020, thus availing public companies with a less burdensome way of generating capital, as shares can immediately be offered to the public.

Introduction of Virtual Meetings for Public Companies and Electronic Voting: The Act provides that public companies may hold general meetings virtually, provided that they are held in accordance with the relevant company's Articles of association⁸. Prior to this amendment, only private companies were allowed to hold general meetings virtually⁹.

Further, a resolution which is put to vote at any general meeting can now also be decided through electronic voting¹⁰. The adoption of these electronic alternatives to physical and manual processes are not only in conformity with global standards but shows the Federal Government's commitment towards making business operations easier for both private and public companies.

Insolvency Threshold - The insolvency threshold of N200,000 (Two Hundred Thousand Naira) under CAMA has been amended. Although, the Act does not specify a new monetary threshold, it instead permits the CAC to release a regulation establishing same¹¹. This amendment effectively transfers the power to determine insolvency thresholds from the legislature to the CAC, thereby allowing the CAC adjust the threshold as it deems fit. Although, the rationale is unclear, it perhaps may be connected to ensuring alignment of the law with commercial realities. That said, we should underscore the importance of prompt issuance of adequate regulations to this effect by the CAC in order to avoid creating uncertainties around the insolvency threshold in particular and Nigeria's insolvency regime in general.

Relatedly, the definition of an 'Insolvency Practitioner in CAMA has been removed¹². An Insolvency Practitioner was defined as a legal practitioner within the meaning of the Legal Practitioners Act or a member of the Institute of Chartered Accountants of Nigeria or such other professional bodies of accountants as are established by an Act of the National Assembly. While the rationale behind this deletion is uncertain, it is however anticipated that the CAC will publish guidelines outlining those who will subsequently be classified as Insolvency practitioners.

² Section 4, Business Facilitation (Miscellaneous Provisions) Act 2023

³ Section 3, Part I, Schedule of the Act.

⁴ Section 6, Part I, Schedule of the Act.

⁵ Section 7, Part I, Schedule of the Act.

⁶ Section 4, Part I, Schedule of the Act

⁷ See section 142(1) of CAMA.

⁸ Section 11, Part I, Schedule of the Act.

⁹ Section 240(2), Companies and Allied Matters Act 2020.

¹⁰ Section 13, Part I, Schedule of the Act.

¹¹ Section 19, Part I, Schedule of the Act.

¹² section 868 of CAMA

Investment and Securities Act (ISA) 2007

The ISA¹³ has been amended to the effect that private companies can allot shares to the public as regulated by the Securities and Exchange Commission. This means that private companies can now pool funds from a much larger source, which in turn portends lower rate of insolvencies.¹⁴

Foreign Exchange (Monitoring and Miscellaneous Provisions) Act (FOREX Act) 2004

The Act amended the FOREX Act¹⁵ by express inclusion of grounds for revocation of the appointment of an authorized dealer or buyer licensed to deal in foreign exchange¹⁶. The specified grounds for revocation includes where the authorized dealer or buyer:

- fails to utilize the license within 30 days;
- fails to commence its exchange business within 6 months from the date of the license;
- is found to be in malpractice or irregularity in the management of the business of dealing in foreign exchange;
- fails to comply with a directive under the FOREX Act;
- conducts or intends to administer its business in a manner that threatens the interest of customers or potential customers;
- has a bankruptcy order or judgment against him, etc.

This amendment effectively streamlines the otherwise ambiguous provisions of the FOREX Act which gave the central bank of Nigeria wide discretionary powers to revoke appointments of authorized dealers on the basis of 'national interest' without more. Further to this amendment, authorized dealers and buyers would henceforth be explicitly aware of actions and inactions that could endanger their licenses and take preventive steps to curb any excess.

National Housing Fund Act 1992

The National Housing Fund Act (NHF Act) which mandates every Nigerian in the public and private sector earning an equivalent of N3,000 (Three Thousand Naira) or above to contribute 2.5% of their monthly basic salary into the NHF managed and administered by the Federal Mortgage Bank of Nigeria has been amended. The amendment is to the effect that employees earning the national minimum wage or its equivalent and above in the public sector and those who are self-employed are to contribute 2.5% of their monthly income to the Fund.¹⁷

By the amendment, only employees earning the national minimum wage currently set at N30,000 (Thirty Thousand Naira)¹⁸ and above, employees in the public sector, and self-employed individuals are required to contribute 2.5% of their monthly income to the Fund. Consequently, private sector employees are now excluded from compulsory compliance with this obligation and may hence forth contribute the requisite 2.5% of their monthly income to the NHF voluntarily. This change provides more flexibility to employees in the private sector who simply have no interest in utilising the opportunity to obtain funds for housing under the Scheme.

¹³ Section 67 of the ISA

¹⁴ Section 43, Part X, Schedule of the Act.

¹⁵ Section 6 of the FOREX Act

¹⁶ Section 34, Part VI, Schedule of the Act.

¹⁷ Section 45, Part XI, Schedule of the Act.

¹⁸ Section 3 National Minimum Wage Act 2019

Pension Reform Act 2014

The BFA amended section 89 of the Pension Reform Act by providing that pension assets are eligible for securities lending as the Commission may approve¹⁹. According to this, retirees can have less worries about the constrictive nature of their pension assets as those assets can now be used as securities.

Immigration Act 2015

The BFA amends Section 20 of the Immigration Act and provides that entry visas to Nigeria should be issued or rejected with reason within 48 hours of receiving valid applications. Also, an updated comprehensive list of requirements, conditions and procedures for obtaining visa on arrival as well as all other entry visas should be published on all immigration-related websites, Embassies and High Commissions, and all Nigerian ports of entry²⁰. This is a positive improvement to the Immigration Act as the change would ease up the entire visa application process by making it more transparent and seamless especially for foreign investors who may be looking to enter the country for business/investment purposes.

Nigerian Oil & Gas Industry Content Development Act ('Local Content Act') 2010

The meaning of "Nigerian Independent Operators," which refers to a Nigerian Company, has been inserted into section 106 of the Local Content Act by the BFA. This addition reinforces the provisions of the Local Content Act²¹ which provides that first consideration in the award of oil blocks, oil field licences, oil lifting licences and in all projects for which contract is to be awarded in the Nigerian oil and gas industry shall be given to Nigerian independent operators subject to the fulfilment of such conditions as may be specified by the Minister. Considering that the term 'Nigerian Independent Operators' was not defined under the extant law, this definition would undoubtedly provide some much needed clarity in the sector and eliminate the lacuna in the current law.

National Office for Technology Acquisition and Promotion Act (NOTAP Act) 2004

Prior to the BFA, it was the case that contracts and agreements entered into by any person in Nigeria with a person outside Nigeria relating to the use of trademarks, patented inventions, supply of technical expertise, etc., are to be registered with NOTAP not later than 60 days of its execution. But the BFA has now amended the NOTAP Act to the effect that companies in their first two years of business operation shall not be liable to late registration penalties where such contracts are registered before the end of the second year of their business operation²². With this amendment, young businesses and start-ups involved in transactions relating to the use of trademarks and the likes now have some flexibility to commence and carry on with their business operations within the first two years of commencement without the concern of accruing penalties for late registration.

¹⁹ Section 64, Part XIX, Schedule of the Act.

²⁰ Section 36, Part VII of the Act.

²¹ Section 3, Nigerian Oil & Gas Content Development Act 2010

²² Section 48, Part XII, Schedule of the Act.

Industrial Training Fund Act (ITF Act) 2011

Any employer with 25 or more workers in his establishment who is not working within a free trade zone must contribute one percent (1 %) of his annual payroll to the Fund. The BFA has replaced the relevant provisions of the ITF Act²³ and relaxed the criteria for contribution of funds. Previously, it was 5 or more employees, thereby reducing the burden on employers with less than 25 employees.

Trademarks Act 2004

The definition of "goods" under the Trademarks Act²⁴ has been amended by the BFA to include services. The definition of trademark has also been amended to include the shape of goods, their packaging, and the combination of colours. This extends the coverage of protection for trademark beyond just physical goods to now services, and also from just the mark as obtainable prior to the new amendment to now include the shape, colour and packaging of the goods.

Nigerian Investment Promotion Commission Act (NIPC Act) 2004

The BFA modifies the NIPC Act²⁵ to permit any Nigerian registered company which after incorporation and commencement of business, acquires foreign participation, to register with the Commission within three months of such acquisition²⁶. Although, this creates an obligation for companies which hitherto had no obligation to register with the NIPC (because they had no foreign shareholders), to subsequently do so after they onboard foreign shareholders, it also creates an opportunity for such companies to align themselves with the requirements of the law which is mandatory registration for all foreign owned entities and have access to the benefits of registration including pioneer status, investment incentives, assistance with regulatory approvals etc.

Other Notable Amendments

The Industrial Inspectorate Act was amended by the Act to reflect an increase in the threshold of capital expenditure for new and existing undertakings from twenty thousand naira to five million naira.

The Nigerian Export Promotion Council Act (NEPCA) has now been amended by the Act, which now provides that the chairman of the governing board of the council shall be a person with cognate experience in industry, commerce, finance, international trade, or export promotion.

The Customs and Excise Management Act was amended to provide for a "single window" which is a platform that allows parties involved in trade and transport to lodge trade-import, export or transit-data required by government departments, authorities, or agencies through a single-entry point interface to fulfil all import, export, transit related and other regulatory requirements²⁷.

The Export Prohibition Act by its amendment by the BFA, now allows the Minister of Finance vary the goods that are prohibited from being exported outside Nigeria as opposed to the previous position which was an absolute prohibition.

The Nigerian Ports Authority Act was amended by directing the Authority to provide facilities for the use of information and communications technology for operations within the ports.

The Financial Reporting Council Act was amended to provide that general purpose financial statements prepared by companies and government organisations are to be

²³ Section 6 of the ITF Act

²⁴ Section 67 of the Trade Mark Act

²⁵ Section 20 of the NIPC Act

²⁶ Section 54, Part XV, Schedule of the Act.

²⁷ Section 26, Part III, Schedule of the Act.

prepared in accordance with the standards and regulations adopted by the Financial Reporting Council of Nigeria.²⁸

The amendment of **The National Planning Commission Act** by the BFA, now includes the Director-General of the Infrastructure Concession Regulatory Commission as a member of the Commission.

The Nigerian Customs Service Board Act was amended to ensure the board adopts modern means of operationalisation in carrying out their activities.

The Patents and Designs Act was amended to expressly empower the Minister of Trade and Tourism to regulate the process for application, grant, use and withdrawal of the compulsory licenses²⁹ and

The Standards Organisation of Nigeria Act was amended to ensure that the Organization carries out the function of investigating the quality of products imported into Nigeria, not just products already within Nigeria.³⁰

Conclusion

The changes introduced by the BFA are without a doubt, an advancement to our laws. Generally, laws need to be refined over time to reflect economic realities as well as changes in international standards and practices. By the provisions of the Act, it is clear that the Nigerian government's aim is to, reduce regulatory burdens, guarantee compliance with statutory requirements, encourage transparency across board among other things. Most of the provisions of the Act have the potential to improve Nigeria's ease of doing business ranking within Africa and the globe, thereby spurring the much required economic growth.

²⁸ Section 32, Part V, Schedule of the Act.

²⁹ Section 32, XVII, Schedule of the Act.

³⁰ Section 66, Part XX, Schedule of the Act.