

# BUSINESS LAW DIGEST

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## APPRAISAL OF THE BUSINESS FACILITATION (MISCELLANEOUS PROVISION) ACT 2023

### INTRODUCTION

Only time will tell if the newly passed Business Facilitation (Miscellaneous Provisions) Act 2023 ("the Act") will engender ease of doing business in Nigeria. The Act was enacted on the 14th of February 2023, as part of the initiative of the Federal Government to promote a supportive environment for micro, small and medium sized enterprises (MSMEs) in Nigeria.

The Act, also known as the Omnibus Act, is a codification of the Executive Order 001 on Transparency and Efficiency in Public Service Delivery of 2017 -, aimed at strengthening the Ease of Doing Business Reforms in Nigeria.

In examining the efficacy of the Act, it is pertinent to state quickly that Executive Order 001 has been in operation since 2017, and the Act became necessary because of the Consequential Amendments, which amend some extant Nigerian legislation insofar as they are deemed to enhance the ease of doing business in Nigeria.

This article examines some key amendments made to business-related legislation and proffers solutions that could enhance and institutionalize the Ease of Doing Business reform in Nigeria.

### KEY PROVISIONS

The Act is a nine-section legislation, with the bulk of the work in Section 9 on Consequential Amendments, which goes on to tinker with some extant Nigerian legislation that could in effect enhance ease of doing business, ensure transparency, efficiency, and productivity in Nigeria.

**Section 1 – Objectives** – these objectives include: **the promotion of ease of doing business** in Nigeria; **the elimination of bottlenecks in Nigerian public institutions;** **the amendment of extant Nigerian legislation** that could in effect enhance ease of doing business in Nigeria; and institutionalizing all the reforms on ease of doing business in Nigeria.

As lofty as these objectives are, the benefits must ultimately be for Nigeria and Nigerians, as the World Bank Ease of Doing Business Index Report, which precipitated the enactment of the Act, paradoxically, has been discontinued.



**Section 2 – Applicability** – the Act is applicable throughout the Federal Republic of Nigeria. In essence, apart from being applicable to all the Ministries, Departments, and Agencies (MDAs) of the Federal Government of Nigeria, sub-national entities like the Local Governments, States, and the Federal Capital Territory are expected to harmonise the Act in their respective entities by passing similar laws. This may be a tall order because there are quite a few other laws that are meant to have national applicability in Nigeria with only a handful of States ever enacting their own laws. In the unlikely event that these laws are enacted at the lower levels, one must contend with the stark reality that most people have scant awareness of their rights in these respects; suffice to state that the Act is elitist.

**Section 3 – Transparency Requirements** – this provision mandates MDAs to publish (on their websites and at their customer service help desks) a complete list of requirements necessary for obtaining their products and services, which includes permits, waivers, tax-related processes, filings, approvals, registrations, certifications, etc. More importantly, the list of requirements must include the processes, documents, fees, and timelines necessary for obtaining the products and services from each MDA. The Act specifically mandates the head of an MDA to personally verify and regularly update the list of requirements. Furthermore, each MDA is to maintain a register of all applications for products and services. These provisions are commendable, as they readily allow applicants to know the requirements for accessing the products and services of each MDA, which in turn will curb extortion and promote transparency.

**Section 4 - Default Provisions** - this provision mandates all MDAs to communicate the acceptance or rejection of an application on their respective websites within the stipulated time. The provision goes further to mandate the MDAs to state grounds for rejecting an application within the stipulated timeline. However, where the relevant MDA fails to communicate the result of the application within the stipulated timeline, the application shall be deemed approved or granted. Such applicant shall notify the affected MDA to issue a certificate or document in evidence of the grant and such MDA must respond within fourteen days, otherwise, the notification to the MDA shall be construed as the evidence of the grant of the certificate or document where the MDA fails to issue one.

**Section 4** – Furthermore, the appropriate officer, in an MDA, shall be personally liable for misconduct where an application is not treated within the stipulated timeline without a lawful reason. However, it should be conceded that the provisions on default approval are impractical. It is yet to be seen if a “certificate in evidence of grant” will be an acceptable substitute for a Nigerian passport, which the Immigration Service failed to issue within the stipulated timeline, when it comes to international travel.

**Section 5 – One Government Directive** – this provision mandates all MDAs to conduct verification and certification on applicants vis-à-vis pending applications from relevant MDAs, to engender “one government”, which is a collaboration between MDAs to process and deliver products and services to the public. Moreover, a copy of any document submitted to any MDA is proof of the content of the document to other MDAs in respect of any application. It shall be the responsibility of the originating MDA to seek verification or certification directly from the issuing MDA.

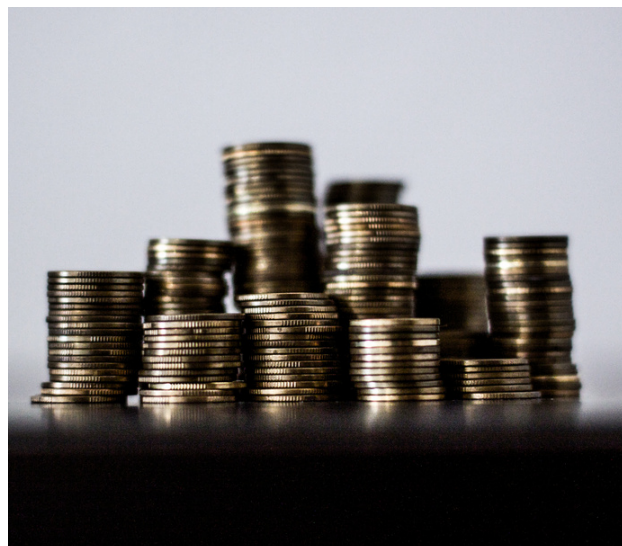
**Section 6 – Service Level Agreement** – the provision mandates MDAs to have Service Level Agreements (SLAs), which are to be published on their websites. The SLA shall contain a list of products and services the MDAs render, documentation requirements, timelines for processing applications, applicable fees, application procedures, etc. Section 6(4) of the Act makes the SLAs binding on the MDAs and imposes a penalty on defaulting officers where they fail to act within the timeline stated in the SLA without lawful reason. It is pertinent to note that defaulting officers are personally liable for misconduct, where there is a breach of the SLA, which will trigger a disciplinary proceeding, according to the relevant civil service rules.

**Section 7 - Port Operations** – this provision prohibits any form of touting at any Nigerian port, either by official or unofficial persons. It mandates on-duty officials to be properly identified by regulation-issued uniforms and identity cards.

**Section 7** – Off-duty officials are to stay away from the ports except with the express approval of the agency head. The Act prohibits Port officials from soliciting bribes from passengers or other port users, as culprits may be removed from their duty posts, be subjected to disciplinary proceedings, or brought to face criminal prosecution subject to relevant laws. Furthermore, all agencies physically present at the ports are mandated to fuse their operations into one single interface station sited in one location and implemented by a single joint task force. Nigerian ports are to assume 24-hour operations within 30 days of the enactment of the Act. All these lofty provisions are impressive – on paper. It may be too early to call out the jury on the new law, but the Executive Order had been in existence for more than six years and was only honoured in its breach.

**Section 8 – Registration of Business** – the Act mandates the Registrar-General of the Corporate Affairs Commission (CAC) to fully automate its application processes within 14 days of commencement of the Act. The aim of the provision is noble, as it strives to banish the cumbersome and tortuous processes that reigned at the CAC in the past. However, it is important to note that CAC improved its operations and application processes since the passing of the Executive Order of 2017, as it is currently fully automated (in terms of pre-incorporation processes only) and not unusual to incorporate a company in one day. In the recently published Presidential Enabling Business Environment Council (PEBEC) Report, CAC ranked fifth place as a top performing MDA in Nigeria and is currently part of the top 3 MDA on the [www.report.gov](http://www.report.gov) website.

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## CONSEQUENTIAL AMENDMENTS

### Section 9 – Consequential Amendments –

– In line with the objective of promoting ease of doing business in Nigeria, the Act consequentially amended twenty-one (21) business-related legislation, including:

- Companies and Allied Matters Act 2022 ("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,
- Investments 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.



The essence of the consequential amendment provisions of the Act is to create ratchet effect on business-related legislation in Nigeria, to the extent that future legislation must engender ease of doing business. The highlight of some of the amendments in the listed legislation thus:

#### **Companies and Allied Matters Act 2020 –**

- **S. 127 – Increase in Share Capital** – unlike before when a company could only increase its share capital at a general meeting, it is now possible for a company to increase its share capital by a resolution of the board of directors, subject to the conditions or directions that may be imposed by the articles of the company or in a general meeting. This no-frills approach to the increase of share capital by a company is a welcome development.
- **S. 142 (1) (c) – Preemptive Rights of Existing Shareholders** – prior to the enactment of the Act, a company could only allot newly issued shares to a third party after it had offered the shares by notice to the existing shareholders, who must accept the offer within reasonable time, or it will be deemed that the offer is declined. With the amendment, the existing shareholders must accept the offer of shares within twenty-one days, or the offer will be deemed declined.
- **S. 154 – Return on Allotment of Shares** – The Act reduces the time for submitting a return on share allotment to CAC from one (1) month to fifteen (15) days. As such, companies must ensure that all essential returns and filings are submitted to the CAC within the new period.
- **S. 244 – Electronic Notices and Voting** – Prior to the enactment of the Act, Section 244 of CAMA only allowed a company to give notice of its meetings either personally or by post. The Act amends Section 244 of CAMA to include “any electronic means” to give notice to its members. This new provision will ensure that members receive notice of meetings faster and eliminate any delay that accompanies posting. S. 248 also permits electronic voting at company meetings in addition to voting by show of hands, as previously obtained.

- **S. 275 – Independent Directors** – Prior to the enactment of the Act, Section 275 of CAMA required public companies to have a minimum of three (3) independent directors. This provision has now been amended to one third of the total number of directors on the board of a public company.

- **S. 283 – Disqualification for Directorship** – Previously, a person removed as a director under S.288 of CAMA is disqualified to become a director in any other company in Nigeria. However, the Act circumscribes the scope of the disqualification to persons removed for fraud, dishonesty or unethical conduct. This must be a welcome development, as it seeks to ameliorate the previous blanket disqualification for ever being removed as a director.

#### **Immigration Act:**

- **S. 20 – Visa Requirements and Conditions & Powers to Issue Visas** – the Act provides for new sub-sections (8) and (9), which in effect mandate the Immigration Service to issue or reject entry visas to Nigeria within forty-eight hours of application. Section 20 (9) further mandates the Immigration Service to publish a comprehensive and up-to-date list of requirements and procedures for obtaining visas on arrival, and other visas, on its website and all immigration-related websites such as Nigerian Embassies, High Commissions and all Nigerian ports. This is a rehash of Section 2 of the Act, which mandates MDAs to publish a list of requirements of their products and services on their websites, and it highlights the importance of the efficiency of visa applications to the ease of doing business in Nigeria reform.



# CONSEQUENTIAL AMENDMENTS

**Section 36 – Entry for Business Purposes**–the Act provides that no foreign person or entity shall establish a business in Nigeria without the consent of the Comptroller-General of the Immigration Service, as against the Minister, as was previously the case. The rationale behind this amendment is obvious, as obtaining the consent of the Minister involved more red tapes, which hampered the ease of doing business in Nigeria. There are now additional subsections 4,5,6 and 7, which in effect state that notice of change of particulars of business is to be given to the Comptroller-General. These new provisions generally mandate the Immigration Service to be innovative in establishing and employing modern technology in the discharge of its statutory duties. The amendment generally limits the responsibility of the Minister to policy making, while the Immigration Service is responsible for the granting of all relevant approvals in respect of entry for business purposes.

## National Office for Technology Acquisition and Promotion Act:

The Act varies Section 5 (2) of the NOTAP Act to the extent that there is now a proviso, which in effect extends the registration period from sixty (60) days to a maximum of two (2) years. Such companies shall not be liable to late penalties for registration where such contracts are registered before the end of the second year of business operation.

The amendment shifts the focus of liability for late registration from the date of execution of the agreement to the year of business operation of the applicant-company. It is hard to fathom the rationale for this change, especially where the amendment, by way of a proviso, is diametrically opposed to the strict liability for registration in the original provision. The amendment renders the original provision redundant; the proviso may as well be the main provision albeit such will lead to a footloose investment regime, where companies delay or altogether avoid registration.

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## National Housing Fund Act:

The Act amends Section 4 of the NHF Act to redefine contributor to the NHF. The Act mandates employees in the public sector earning above the minimum wage to pay 2.5% of their monthly income to the NHF.

However, it is optional for employees in the private sector earning above the minimum wage to contribute 2.5 % of their monthly income to the National Housing Fund. This is a deviation from the previous provision, which mandated both private and public sector workers to contribute 2.5% of their monthly income to the Fund.



## Industrial Training Fund Act:

The Act provides for a new Section 6 in the Industrial Training Fund Act where it increases the employee threshold of the application of the Industrial Training Fund Act to more than twenty-five (25) employees, as against five (5) employees, and excludes employers that operate in any free trade zone in Nigeria; the same rule applies to suppliers to MDAs with more than twenty-five (25) employees. Both are liable to pay one per cent (1%) of their annual payroll to the Industrial Training Fund (ITF). More importantly, the Minister, with the approval of the Federal Executive Council, now has the power to vary the rate of contribution to the Fund – a provision which, unfortunately, does not engender certainty in the implementation of the ITF Act and sounds the death knell of the somewhat anonymous legislation.

# CONSEQUENTIAL AMENDMENTS

## Pension Reform Act 2014:

The Act amends S.89(2) of the PRA to make pension assets eligible for securities lending notwithstanding the provisions of subsection (1) (c) prohibiting any Pension Fund Administrator from applying any pension fund asset under its management by way of loans, or credit or as collateral for loans by anyone holding a Retirement Savings Account (RSA) or any person whatsoever.

In short, an RSA holder can now apply to use a percentage of the RSA towards payment of equity on residential mortgage and equity lending – borrowing from the balance in the RSA to buy shares subject to the directives of PenCom.

## Closing Remarks

Undoubtedly, policies and regulations play a vital role in creating a thriving economy in any country. The legislators have scored fair points by codifying the provisions of the Executive Order 001 and taking a bold step further by amending some business-related laws in Nigeria, to engender ease of doing business in Nigeria, and ultimately encourage economic development in Nigeria.

In furtherance of the objective of ensuring that the Act does not end up being a dead letter law like many of its precursors, the Presidential Enabling Business Environment Council (PEBEC) established the Official Public Service Complaint website: [www.report.gov](http://www.report.gov) for complaints and feedback for the service of any MDAs of the government of the Federal Republic of Nigeria. This is a laudable step towards the achievement of one cardinal objective of the Act – institutionalising the gains of the Ease of Doing Business in Nigeria reform.

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## Trademarks Act 2004:

The Trademarks Act 2004 does not include a definition of "goods", and the Interpretation Act of 1990 makes no mention of such a definition either. However, the Act amends Section 67 of the Trademarks Act and defines "goods" to include "services". The Act modifies the definition of a trademark as follows:

"Trademark" refers to a mark that is being used or proposed to be used in connection with goods or services to signify a relationship between the goods or services and a person who has the legal right to use the mark, either as the owner or as a registered user, with or without any indication of that person's identity. This can include the shape of the goods, their packaging, and combinations of colours".

With this amendment, the definition of "goods" in the Trademark Act is better explained, and its application is expanded to cover services rendered by an individual.

A step can be taken further by grafting Servicom into the process, and possibly fuse the PEBEC and Servicom, so as not to reinvent the wheel.

Servicom was established in 2004, through another Presidential initiative, to promote efficiency in service delivery by MDAs to Nigerians. More significantly, Servicom operates via units established in all MDAs throughout the Federation and PEBEC would do well in grafting the Servicom structure to the gains of the Ease of Doing Business in Nigeria Reform.

To have an enduring Ease of Doing Business in Nigeria reform, it will be helpful to have a bottom-up approach, where the efforts are commenced from the Local Government level to the State level through to the Federal level.

However, since the effort started at the Federal level, it is imperative to extend it to the Local Government and States levels (where all businesses operate!) to such extent that the drive becomes a culture in Nigeria, lest the whole exercise ends up being yet another faddish elitist adventure.

The intention of the Act is commendable. However, the practicability of the consequential amendments is yet to be seen; will all the amended legislation be in turn amended individually or they are to be deemed amended?

Indeed, only time will tell if the Act brings about ease of doing business in Nigeria.

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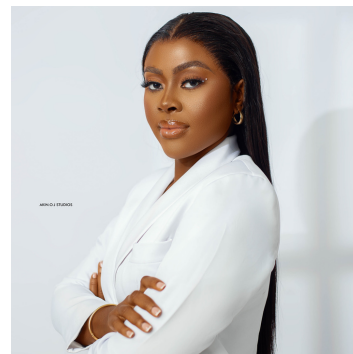


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