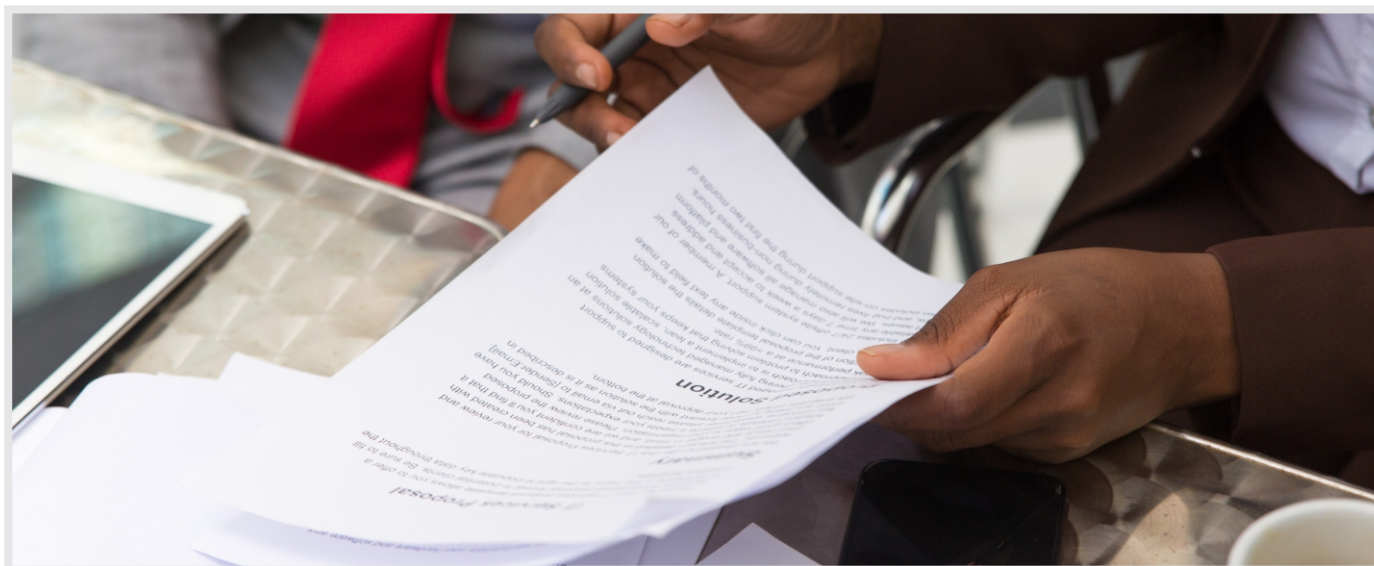




**An Examination of the Business Facilitation Act
and its Consequential Amendments**



Introduction

The President of the Federal Republic of Nigeria on 10 February 2023 signed into law the Business Facilitation (Miscellaneous Provisions) Bill, 2022 (also known as the “Omnibus Bill”) (the “Act”). Several business-related laws were amended by the Act, including the Companies and Allied Matters Act (CAMA), the Immigration Act, the Investment and Securities Act, the Trademark Act, amongst others.

The objective of the Act is to amend the relevant legislation, eliminate all bottlenecks and promote the ease of doing business in Nigeria. In this article, we have examined the provisions of the Act and its consequential amendments.

A. General Provisions

As part of its transparency requirements, the Act mandates all Ministries, Departments, and Agencies (MDAs) of the Federal Government which provide products and services¹ to publish a complete list of requirements to obtain the products and services. Similarly, failure of MDAs to communicate approval or rejection of an application within the stipulated time is now deemed implied approval.² Also, MDAs are now required to collaborate to process and deliver products and services to the public.³ Furthermore, there is now the requirement for an MDA to have a service level agreement which shall be binding on the MDA and which amongst others, shall provide for a list of products and services rendered and documentation and timelines required.⁴ In addition, the Act also makes several provisions guiding the operations of the Nigerian ports. Finally, the Registrar-General of the Corporate Affairs Commission (CAC), pursuant to the Act, has within 14 days of the commencement of the Act to ensure that all application processes at the CAC are fully automated from the start to completion.⁵ These provisions, if effectively enforced, will no doubt reduce corruption drastically in Nigeria.

B. Consequential Amendments under the Business Facilitation Act.

1. Amendments to the Companies and Allied Matters Act.

1.1. Foreign Participation.

The Act introduces a new Section 78 (3) (c) of the CAMA which exempts foreign companies seeking to do business in Nigeria and exempted under any extant act of the National Assembly⁶ in effect from the requirement of incorporation as a separate entity in Nigeria under sub-section (1). This amendment will expand the scope of foreign companies qualified to do business in Nigeria thus increasing foreign participation in the nation's economy.

¹Section 3(1) of the Act

²Section 4(1) of the Act

³Section 5(3) of the Act

⁴Section 6(1) of the Act

⁵Section 8 of the Act

⁶Part I, Para. 2 of the Schedule to the Act



1.2. Company Shares

Section 127(1) has been amended by the Act to allow a company limited by shares to increase its share capital not only by passing a resolution in a general meeting but also through a resolution by its board of directors, subject to conditions and directions that may be imposed in its articles of association or by the company in general meeting.⁷ In addition, with the amendment to Section 149, the express reference made to power to allot shares being vested in the company

By the amendment made by the Act to Section 142(1), only existing shareholders of a private company shall enjoy pre-emptive rights. Also, following the amendment to Section 142(2)(c), existing shareholders in a private company have 21 days to act on their pre-emptive rights under the CAMA, after which the offer made pursuant to the pre-emptive rights shall be deemed declined.⁸ This amendment is welcomed as it will allow for certainty in the deadline for the exercise of pre-emptive rights thus preventing unnecessary delays on the parts of the existing shareholders.

The amendment to Section 154 reduces the one-month requirement for returns on allotments of shares to the CAC to 15 days.⁹ This amendment makes sense considering the replacement of authorised share capital with issued share capital under CAMA which requires companies to allot all shares upon increase.

1.3. Charges

Section 207(4) has been amended to make the priority of a fixed charge over a floating charge and other debts, including preferential debts without prejudice to the provisions of Section 204.¹⁰ On another note, Section 222 (13) was amended by the inclusion of definitions of terms such as cash, financial collateral, financial instruments, and security interest.¹¹

1.4. Meetings and Notices

The amendment to Section 240(2) allows public companies to hold their general meetings electronically.¹² Considering the membership size of public companies and the realities of the current world being a global village, this addition is a welcome development. Prior to the amendment made to Section 244, notice through electronic mail¹³ could only be effective service if made in addition to personal service or service by post. However, with the amendment, companies may, as an alternative to other means, send notices to their members via electronic mail. Section 248 has been amended to include “electronic voting” as an alternative to “show of hands”.¹⁴

1.5. Board of Directors

The requirement in Section 275 for at least three independent directors in a public company has been changed to at least one-third of the company’s directors. Similarly, as opposed to the previous requirement of three directors, a person who nominates a majority of the candidates for the board of directors must now nominate at least one-third of them as independent directors.¹⁵ This addition promotes equity and fairness. The amendment to Section 307 clarifies the previous provision by stating that a person can only serve as a director of five public companies at the same time.¹⁶

1.6. Small Company

By the amendments in Section 394, the only requirement for a company to qualify as a small company in relation to a subsequent year is to meet the qualifying conditions in the year of application¹⁷ and the financial year preceding such application. This amendment is important as it provides for more clarity in that section.

⁷ Part, Para. 3 of the Schedule to the Act

⁸ Part 1, Para 4 of the Schedule to the Act

⁹ Part 1, Para 6 of the Schedule to the Act

¹⁰ Part 1, Para. 9 of the Schedule to the Act

¹¹ Part 1, Para. 10 of the Schedule to the Act

¹² Part 1, Para. 11 of the Schedule to the Act

¹³ Part 1, Para. 12 of the Schedule to the Act

¹⁴ Ibid.

¹⁵ Part 1, Para. 14 of the Schedule to the Act

¹⁶ Part 1, Para. 16 of the Schedule to the Act

¹⁷ Part 1, Para. 18 of the Schedule to the Act



1.7. Winding up by the Court

For the purpose of determining whether a company is unable to pay its debt, the amendment to Section 572 paragraph (a) has changed the threshold of debt to a creditor from N200,000.00 (Two Hundred Thousand Naira) to a sum to be determined by a regulation issued by the Commission.¹⁸ This amendment is commendable as it takes into consideration future economic realities.

1.8. Bankruptcy and Insolvency

The designation of lawyers and chartered accountants under the Institute of Chartered Accountants of Nigeria as "insolvency practitioners" by Section 868 of CAMA has been deleted without replacement.¹⁹ We therefore anticipate that the CAC will issue regulations or guidelines to clarify who can act as insolvency practitioners.



2. Amendments to the Nigerian Export Promotion Council Act

Section 2 of the Nigerian Export Promotion Council Act has been amended to include relevant stakeholders and industry players on the board of the Nigerian Export Promotion Council. It includes representatives from additional federal ministries, agencies, and associations such as mines and steel, agriculture, finance, industry, trade, and investment, the Bank of Industry, the Central Bank of Nigeria, and Manufacturers Association of Nigeria (Export Group). The provision that the appointment to be made by the Minister under Section 2(2)(d)²⁰ shall be on the recommendation of the appropriate association has been deleted and replaced with a new provision to the effect that the Chairman shall be a person with cognate experience in industry, commerce, finance, international trade, or export promotion.²¹ These changes are commendable as they allow for representation of more sectors in decision-making.

3. Amendments to the Export Prohibition Act

The erstwhile provision of Section 1 of the Export Prohibition Act (the "EPA") restricted the goods prohibited from being exported outside Nigeria.²² This made the list of prohibited goods immutable. However, with the amendment to the EPA, the Minister of Finance now has the power to vary the list of goods prohibited from being exported outside Nigeria. The power to vary given to the Minister of Finance is highly commendable as it allows for flexibility.

¹⁸ Part 1, Para. 19 of the Schedule to the Act

¹⁹ Part 1, Para. 21 of the Schedule to the Act

²⁰ Now Section 2(2)(e) by virtue of this amendment

²¹ Part II, Para. 23 of the Schedule to the Act

²² Part IV, Para. 30 of the Schedule to the Act



4. Amendments to the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act

The new amendment to the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act (the “FEA”) has expressly listed events which may lead to revocation by the Central Bank of Nigeria (CBN) of the appointment of a bank or non-banking corporate organisation as an Authorised Dealer or Authorised Buyer.²³ This amendment is commendable; however, we are of the opinion that a paragraph (m) should have been added to deal with “such other similar events” as may not be reasonably envisaged as at the time of the FEA. This is because the exhaustive nature of the list under this new amendment gives an Authorised Dealer or Authorised Buyer the right to challenge any revocation by the CBN that is not based on any of the grounds expressly listed under Section 34(1).

5. Amendments to the Immigration Act

By the new Section 20(8) and (9) of the Immigration Act, entry visas to Nigeria are now required to be issued or rejected with reasons within 48 hours of receipt of valid applications and a comprehensive and up to date list of requirements, conditions, and procedures for obtaining visa on arrival as well as all other entry visas, including estimated timeframe are now required to be published on all immigration-related websites, Embassies, and High Commissions, and all Nigerian ports of entry.²⁴ This is a welcome development which will result in better efficiency in the visa application process. The reference to “Minister” in Section 36(1)(b) has been changed to “Comptroller-General of Immigration”. This simply means that the consent required to be taken under that section must now be taken from the Comptroller-General of Immigration.

6. Amendments to the Investment and Securities Act

Section 67 of the Investment and Securities Act has been amended to allow private companies to issue shares to the public, subject to regulations by the Securities and Exchange Commission.²⁵ This new development is laudable due to its potential to offer private companies access to a larger pool of funds in the capital market

7. Amendments to the National Housing Fund Act

By the amendment to Section 4 of the National Housing Fund Act, a distinction has been made between workers in the public sector and workers in the private sector. Workers in the public sector earning the national wage and above are now mandatorily required to contribute 2.5% of their national income to the National Housing Fund, whereas their colleagues in the private sector are required but not mandated to make this contribution. The reason for this is the use of the word “may” and “shall” for workers in the private and public sectors, respectively. This requirement of contribution of monthly income also applies to self-employed persons earning the equivalent of the national minimum wage and above. In addition, the interest rate payable on the said contributions has been reduced from 4% to 2% (annually) or as may be determined by the Bank.²⁶

Similarly, the reference to “a basic salary of N3,000” in Section 9(1) has been changed to “the minimum wage”²⁷ to cater for the current economic realities.

8. Amendments to the National Office for Technology Acquisition and Promotion Act

Under the National Office for Technology Acquisition and Promotion Act (the “NOTAP Act”), it is compulsory to register contracts and agreements for the transfer of technology between a person in Nigeria and another person outside Nigeria. Companies that do not register but transfer technology are subject to penalties for non-compliance. However, pursuant to this new amendment, a company in its first two years of business operation will not be penalised for late registration if the contract or agreement is registered within the second year of its business operation.²⁸ Such companies can take advantage of this provision to conduct market acceptance tests before committing further to any agreement or contract.

²³ Part VI, Para. 34 of the Schedule to the Act

²⁴ Part VII, Para. 36 of the Schedule to the Act

²⁵ Part X, Para. 43 of the Schedule to the Act

²⁶ Part XI, Para. 45 of the Schedule to the Act

²⁷ Part XI, Para. 46 of the Schedule to the Act

²⁸ Part XII, Para. 48 of the Schedule to the Act



9. Amendments to the National Planning Commission Act

With the amendment to Section 3(2) of the National Planning Commission Act, the Director-General of the Infrastructure Concession Regulatory Commission is now a member of the National Planning Commission (the “Commission”).²⁹ The Commission, amongst other things, is responsible for determining and advising on policies that will best promote national unity and integration and sustain the Nigerian nation. Given that public-private partnership arrangements are amongst the most acceptable means of development in Nigeria at all levels of government, it is applauded that the Director-General of the Infrastructure Concession Regulatory Commission has been appointed to the Commission.

10. Amendments to the Patents and Designs Act

By Paragraph 13 of the First Schedule to the Patents and Designs Act, the Minister may provide for the grant of compulsory licences for patented products and processes declared to be of valid importance. A new Paragraph 13A has now been added to the effect that the Minister shall by regulation prescribe the procedure for the application, grant, use, and withdrawal of these compulsory licenses.³⁰ This new provision will no doubt bring more clarity to that paragraph.

11. Amendments to the Standard Organisation of Nigeria

Pursuant to the amendment to Section 5(1)(b), (e), and (l) of the Standard Organisation of Nigeria Act 2015 (SON Act), the duty of the Standard Organisation of Nigeria (the “Organisation”) to undertake investigations as to quality is now limited to facilities, materials, and products imported into Nigeria and will not include those manufactured in Nigeria. The Organisation will, in addition, no longer have this duty towards systems and services, and will now establish a quality assurance system including certification factories, products, and laboratories. Furthermore, the Organisation henceforth, will not just compile but will also publish an inventory of products (not just in Nigeria) requiring standardisation. Finally, the Organisation will now, as part of its functions, undertake the registration of all regulated products.

The Act has made some procedural changes to the SON Act. For instance, the Director-General of the Organisation must first of all obtain an ex parte order from the court before taking any step to issue sanction. In addition, the time within which a non-complying product may be seized and detained has now been reduced from 90 days to 30 days (with the option that the Organisation may make further ex parte application to the court for an order to detain such product for a further period not exceeding 30 days).³¹

These amendments to the SON Act are commendable. For instance, the introduction of the requirement of an ex-parte order before the Director-General can impose sanctions will help to curtail excesses in the use of such power and serve as a check on the exercise of such power.

12. Amendments to the Trademark Act

Section 67(1) of the Trademark Act 2004 has been amended by inserting the definition of “goods” to include “services”. ‘Trademark’ has also been defined to include the shape of goods, their packaging, and the combination of colours.³² By these amendments, service marks are now protected by the express provisions of the law.

13. Amendments to other Acts

The Act also makes amendments to the Customs and Excise Management Act, Financial Reporting Council Act, Industrial Inspectorate Act, Industrial Training Fund Act, Nigerian Customs Service Board Act, Nigerian Investment Promotion Commission Act, Nigerian Oil and Gas Industry Content Development Act, Nigerian Ports Authority Act, and Pension Reform Act to address sundry issues aim at providing for the ease of doing business in Nigeria.

²⁹ Part XIII, Para. 50 of the Schedule to the Act

³⁰ Part XVIII, Para. 62 of the Schedule to the Act

³¹ Part XX, Paras. 66 and 67 of the Schedule to the Act

³² Part XXI, Para. 69 of the Schedule to the Act



Conclusion

The Business Facilitation Act is no doubt a significant step towards improving the nation's business environment. The Act seeks to eliminate bureaucratic processes, reduce regulatory burdens, and promote transparency in government agencies. The consequential effect of this will be to attract local and foreign investments, create more job opportunities, and boost economic growth in the country.

The success of the Act will however depend on its effective implementation and enforcement by government agencies.

The Business Facilitation Act is a welcome development poised to making the nation's business environment more conducive for investment and growth. It is a step in the right direction towards positioning Nigeria as a competitive destination for businesses looking to invest in Africa.

Authors

Kehinde Adegoke

Associate
*Corporate, Commercial &
Business Advisory*

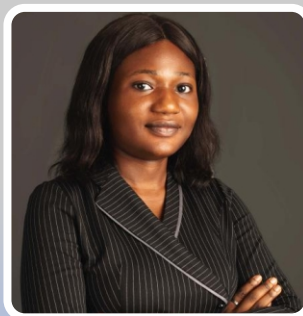
T: +234 1 700 257 0 Ext 125
E: kadegoke@alp.company



Chidinma Oko-Egwu

Associate
*Commercial Litigation &
Dispute Resolution
Regulatory and Compliance*

T: +234 1 700 257 0 Ext 151
E: koko-egwu@alp.company



Phillip Oke

Trainee Associate

T: 234 1 700 257 2 Ext 134
E: poke@alp.company

