



WWW.STRENANDBLANN.COM



A REVIEW

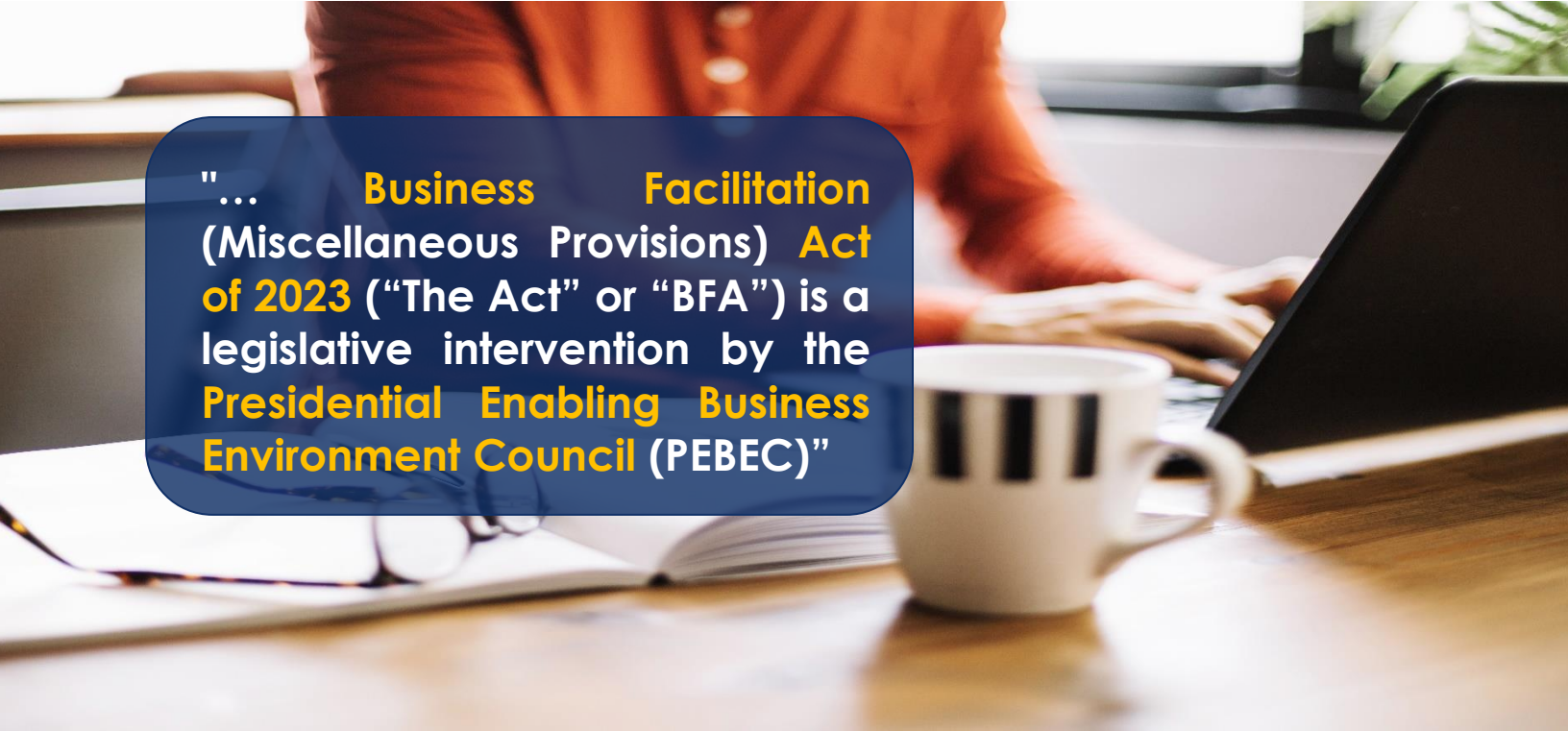
A REVIEW OF THE BUSINESS FACILITATION (MISCELLANEOUS PROVISIONS) ACT 2023

March 2023

TABLE OF CONTENTS

Introduction.....	3
Background and Scope.....	4
Key Highlights of the Act.....	5
Conclusion	13

INTRODUCTION



"... **Business Facilitation (Miscellaneous Provisions) Act of 2023** ("The Act" or "BFA") is a legislative intervention by the **Presidential Enabling Business Environment Council (PEBEC)**"

The Business Facilitation (Miscellaneous Provision) Bill 2022 (also known as the "Omnibus Bill") was signed into law on the 10th of February 2023, by the President of the Federal Republic of Nigeria, Muhammadu Buhari, GCFR (the "President").

The Business Facilitation (Miscellaneous Provisions) Act of 2023 ("**The Act**" or "**BFA**") is a legislative intervention by the Presidential Enabling Business Environment Council (PEBEC). It contains provisions aimed at promoting a more conducive business environment by streamlining business regulations, amending 21 existing laws (to reduce bureaucratic red tape) and creating a more conducive climate for investment and commerce.

The Act codifies the Executive Order 001(E01) on transparency and efficiency in public service delivery (the administration's first executive order) aimed at strengthening the ease of doing business across the country.

This article reviews the key provisions, as well as the amendments, made and introduced by the BFA and how it relates to the Companies and Allied Matters Act 2020 (the "**CAMA 2020**").

BACKGROUND AND SCOPE

The existence of the Act is a culmination of over four years work collaboration between public and private sector stakeholders, including the Attorney General of the Federation (and the Federal Ministry of Justice), the Nigerian Bar Association Section on Business Law (through the participation of over 40 Nigerian law firms and consulting firms), the Nigerian Economic Summit Group (NESG), and the National Assembly Business Environment Roundtable (NASSBER).

Nigerian context. the CAMA 2020; Customs and Excise Management Act; the Nigerian Export Promotion Council Act; the Export Prohibition Act; the Financial Reporting Council Act; The Foreign Exchange (Monitoring and Miscellaneous Provisions) Act; the Immigration Act; the Industrial Inspectorate Act; the Industrial Training Fund Act; the Investment and Securities Act; the National Housing Fund Act; the



The BFA adopts global best practices that are tailored to suit the Nigerian context. It guarantees efficiency and transparency in the operations of the Ministries, Agencies, and Departments ("MDAs") of the federal government, and it enhances the efficiency of the public service. As previously stated, the Act amends provisions in 21 existing laws, as follows: The BFA adopts global best practices that are tailored to suit the

National Office for Technology Acquisition and Promotion Act; The National Planning Commission Act; the Nigerian Customs Service Board Act; the Nigerian Investment Promotion Commission Act; the Nigerian Oil and Gas Industry Content Development Act; the Nigerian Ports Authority Act; Patents and Design Act; Pensions Reform Act; and Standards Organization of Nigeria; Trademarks Act.

KEY HIGHLIGHTS OF THE ACT

a. Codification of Presidential Executive Order 001 (E01)


The Act makes it mandatory for MDAs to publish a complete and up-to-date list of requirements to obtain its services. These services include permits, licenses, waivers, tax, related processes, filings, approvals, registrations, and certifications, in accordance with its function. In addition, it codifies default approvals. The Act further provides that where an MDA fails to communicate the outcome of an application within the stipulated timeframe provided, such application will be deemed approved.

As an extra measure, the Act mandates the automation of all application processes, from start to finish, at Corporate Affairs Commission (CAC).

Finally, MDAs are mandated to have and publish a Service Level Agreement (SLA) on their websites which must comply with within the stipulated timelines provided therein.

b. Key Amendments in the CAMA 2020

- Increase in Share Capital: By section 127 of the CAMA 2020, an increase in share capital can only be done by the company in a general meeting. However, the BFA has amended this provision to the effect that a resolution of the board of directors alone would suffice to increase the share capital of a company.
- Pre-emptive Rights of Shareholders: The BFA amends s.142 CAMA 2020 to restrict the enforcement of pre-emptive rights to private companies. Also, the BFA sets a specific timeline of a maximum of 21 days within which the offer of shares must be accepted by existing shareholders or deemed declined.
- Return on Allotment: Section 154 of CAMA 2020 has been amended to adjust the timeframe for the return on allotment from 1 month to 15 days.
- Electronic Share Certificates: Section 171 of CAMA 2020 has been amended to include subsection 7 which now



"... **Section 240** the **CAMA 2020** has been amended to allow all types of companies to conduct **virtual meetings**"

recognizes that a share certificate may be electronic.

- Virtual General Meetings: The provision of Section 240 the CAMA 2020 has been amended to allow all types of companies to conduct virtual meetings. The previous provision of the CAMA 2020 restricted the right to conduct virtual meetings to only private companies.
- Electronic Voting at Annual General Meetings: The provision of Section 248 of the CAMA 2020 was amended to include electronic voting as a

valid way of voting at general meetings. Previously, the only valid means of voting was by show-of hands or a poll.

- Minimum Number of Independent Directors for Public Companies: The BFA revised Section 275 of the CAMA 2020 to the effect that the minimum number of independent directors of a public company would no longer be three (3) but one-third of the Board. This implies that any person who nominates candidates for the Board should nominate at least one third of the number of persons

to be Independent directors as opposed to the previous requirement of three persons.

- Multiple Directorships: The BFA amended sub-section 3 of Section 307 of the CAMA (which provides for multiple Directorships) by introducing an entirely new sub-section 3 of Section 307, of the CAMA. To this end, the BFA emphasizes that a person can be a director in only five public companies – and any person who before the commencement of the Act was already a director in more than five public companies is required to resign as a director of all, but five, of the companies before the next annual general meeting of the companies, following two years from the commencement of the Act.
- Form and Content of individual financial statements: The BFA amended subsection 1 of Section 378 of the CAMA to provide that financial statements of a company should comply with the requirements of the accounting standards prescribed in the statements of accounting standards issued by the Financial Reporting Council of Nigeria.
- Qualification of a Small Company: Section 394 (2) of the CAMA provided conditions for a company to qualify as a small company. The BFA has now revised subsection (2) of Section 394 of the CAMA to reflect that a company qualifies as a small company (in relation to a subsequent financial year), if the conditions qualifying it as a small company are met in that year and the preceding financial year.
- Definition of Inability to Pay Debt: Section 572(a) of CAMA 2020 in defining a company that is unable to pay its debt, provides that such company must have a due debt to a person of a sum exceeding ₦200,000. However, the provision has been amended by the BFA to replace the ₦200,000 requirement with 'a sum to be determined by a regulation issued by the Commission'.
- Fraudulent Preference in Insolvency: Section 658 of CAMA 2020 does not provide a

specific timeframe, ending with the onset of the insolvency, in which to determine when preference has been given to a person connected to the company (otherwise than by reason of being its employee). This provision has now been amended by the BFA to reflect that in determining such preference, the relevant time would be a period of two years ending with the onset of insolvency.

- i. Inserting a Definition of “goods” within the Act (TMA)
- ii. Revising the definition of trade marks to include *service marks*

- **Inserting A Definition of Goods**

Pursuant to the amendment of the TMA by the BFA, Goods are now expressly defined within the TMA to **include services**.

“... **Section 240** the **CAMA 2020** has been amended to allow all types of companies to conduct **virtual meetings**”



c. **Key Amendments in the Trade Marks Act (Cap. T13 Laws of the Federation of Nigeria 2004) (“TMA”):**

- By virtue of the provisions of **Schedule 68 and 69 of Part XXI of the Schedule to Section 9** of the BFA, the provisions of the Trade Marks Act is amended thus:

Thus, wherever the term goods are used in the necessary context within the TMA, it shall be interpreted to include both goods and services, as the case may be.

The general implication of this is that all registration requirements for trade marks classified as goods under the

NICE Classification as applicable in the Trade Marks Registry, will henceforth statutorily apply to services listed within the NICE Classification as well.

In the same vein, all rights accruable to the registered proprietor of a trade mark shall apply to the proprietor of service marks in Nigeria.

Although the Registry allows for such registrations prior to this BFA, this amendment by the BFA has given this global best practice the required statutory backing in Nigeria.

- **Revising the Definition of Trade Marks**

By virtue of the new amendment, trade mark under the TMA is now defined as follows:

“Trade mark means-

- a) *A mark used or proposed to be **used in relation to goods or services** for the purpose of indicating a connection between the **goods or services** and a person having the right,*

*either as a proprietor or as a registered user, to use the mark, whether with or without any indication of the identity of that person, **and may include shape of goods, their packaging and combination of colours;** and*

- b) *In relation to a certification trade mark, a mark registered or deemed to have been registered under section 43 of this Act”*

The import of the above provisions is that it brings to determination, the long-subsisting legal debate as to the legality of registering service marks in Nigeria. The arguments on its illegality in Nigeria sprung from the dissenting opinions as to the powers of the Minister to give the 2007 Ministerial directive extending the Regulation to include service marks, in tandem with the 9th edition of the NICE Classification.

However, the above argument, including the decision of the court in **Ramhead Industrial & Commercial Co. Ltd v Ekulo International Ltd & 2 ors (Suit No. FHC/L/CS/256/2012 – unreported)** wherein Justice M. B Idris held that

the definition of trade mark under the Act does not include service marks, have all been nullified by the amended definition of trade mark in Nigeria, to now include service marks.

d. **Key Amendments in the Patents and Designs Act (Cap P2 Laws of the Federation of Nigeria, 2004)**

- **Section 61** and **62** of the BFA amends Part I of the First Schedule of the Patents and Designs Act (“**PADA**”) by introducing a new provision, **section 13A** as follows:

The Minister shall by regulation prescribe the procedure for the application, grant, use, and withdrawal of compulsory licenses under this paragraph.

This provision is particularly important as it seeks to bridge the procedural gap created by **section 13** of PADA. The law merely provides that in the interest of public health, the defence, and the economy of Nigeria, the Minister reserves the power to make an order, granting compulsory license over patented products and processes, before the expiration of the 3 or 4 years threshold. However, the procedure for the exercise of such power or to what extent it becomes exercisable so as to be at all times, be fair on the patentee was not provided for in PADA. Thus, the introduction of **section 13A** has now made the provisions of Section 13 more efficacious.

“... The **Minister** shall by regulation prescribe the procedure for the application, grant, use, and withdrawal of compulsory licenses under this paragraph”



e. Other Applicable Provisions

These are general provisions in the BFA as it concerns various Ministries, Departments and Agencies (MDA). In Nigeria, the Ministry of Industry, Trade and Investment is the umbrella ministry presiding over matters of Industrial Property. Within the ministry, matters relating to trade marks are handled by the Trade Marks Registry, while the Patents and Designs registry oversees matters relating to patents, industrial designs, utility models, etc. However, for ease of operation, services rendered by both registries are accessible using the same online platform <https://www.iponigeria.com/>. In view of this, we shall consider other relevant provisions of the Bill proscribing mechanisms for ease of doing business as may be applicable to the Trade Marks and Patent and Designs Registries. They are as follows:

a) **Section 3** requires the Trade Marks Registry and the Patents and Designs Registry as parts of the Commercial Law Department under the Ministry of Trade and Investments to publish a complete list of requirements to obtain relevant filings, approvals, registration,

certificates, and services as may be applicable. The published list of requirements must include ALL necessary processes, documents, fees and timelines required. This list is expected to be published on the Registry's website and the help desk of the Registry **within 21 days** from the commencement of the Act. This list is required to be verified and kept up-to-date by the Registrar of Trade marks and the Registrar of Patents and Designs at all times.

b) **Section 4** of the Bill is to the effect that where an acceptance or refusal of any filed application is not communicated to the applicant (by letter, email or website publication) within the stipulated timeline in the published list referred to above, such application shall be deemed approved and granted if not concluded within the specified timeline. Where an application is rejected within the timeline, the applicant must be informed of the grounds for the refusal. Where an application is deemed granted or accepted due to the failure of the

relevant registry to communicate acceptance or refusal within the stipulated time as published, the Applicant may notify the Registry at the expiration of the application timeline to issue the relevant certificate, approval or document. Upon notification, the Registry is mandated to issue such certificate or document within **14 days**.

It is also expected of the Registries to publish on its

- c) In determining timelines/deadlines, **Section 4(4)** allows an Applicant to tender as sufficient proof of service within timeline, a physical or electronic acknowledgment copy of the application.
- d) Pursuant to section 6, it is expected of every MDA to have a Service Level Agreement in accordance with the Act which shall be published on the website and will be binding on the MDA in the processing of applications.



"... the **Applicant** may notify the Registry at the **expiration of the application timeline** to issue the relevant certificate, approval or document"

website, at least two modes of communication and the preferred mode of communicating its official decisions (by letter, email or website publication)

The violation of these provisions are punishable as misconduct against the offending officer and would be subject to disciplinary proceedings in accordance with relevant laws or regulations applicable to the civil or public service.

CONCLUSION



"... the provisions of the **BFA** and its amendments to existing laws in Nigeria to aid the ease of doing business..."

The BFA is aimed to provide the ease of doing business, ensure transparency, efficiency and productivity in Nigeria; and for related matters.

As part of its objectives, the BFA seeks to promote the ease of doing business in Nigeria, eliminating bottlenecks and particularly to amend relevant legislation as a mechanism to facilitate and institutionalize strategic reforms towards implementing the ease of doing business goal in Nigeria. The provisions of the BFA and its amendments to existing laws in Nigeria to aid the ease of doing business is a commendable and welcomed development.

It is believed that the provisions as it relates to the operations of MDAs would create a more seamless and transparent business atmosphere in the Nigerian business market.

Although the directives to MDAs are yet to be entirely complied with and adopted since the commencement of the Act, the future of doing business with MDAs, especially the CAC and the Industrial Property Offices, appears promising and positively anticipated.



THE FIRM

Stren & Blan Partners is an innovative and dynamic law firm with a compelling blend of experienced lawyers and energetic talents. Our lawyers are available to provide you with guidance and innovative solutions on complex business and legal issues across a variety of sectors.

This is a publication of Stren and Blan Partners and it is for general information only. It should not be construed as legal advice under any circumstances. For more information about the firm and its practice areas, please visit www.strenandblan.com. You can also contact us via contact@strenandblan.com or call +234 (0) 7025580053.

AUTHORS



Christian Aniuoku
Managing Partner



Anne Uwaifo
Managing Associate



Chizitereihe Oti
Associate



Chidinma Anuforo
Associate



Radiance Onu
Associate

DISCLAIMER: This publication is not intended to provide legal advice but to provide information on the matter covered in the publication. No reader should act on the matters covered in this publication without first seeking specific legal advice.