

The New Practice (TNP)

- An Andersen Collaborating Firm



Baba Alokolaro
Partner
E: baba@tnp.com.ng

Sophia Oboh
Associate
E: sophia@tnp.com.ng

The enactment of the Business Facilitation Act of 2023 ("the Act") marks a significant milestone in the efforts of the Presidential Enabling Business Environment Council (PEBEC) to enhance the ease of doing business and improve service delivery by Nigerian Ministries, Departments, and Agencies (MDAs). This legislation represents a crucial intervention aimed at streamlining processes, reducing bureaucratic obstacles, and fostering a more conducive environment for business growth. To achieve these objectives, the Act has introduced amendments to twenty-one (21) business-related laws in Nigeria, with the primary goal of promoting efficiency, transparency, and accountability to facilitate business operations in the country.

Under Section 1 of the Act, all MDAs providing products and services are obligated to disclose the requirements and timelines for obtaining approvals, permits, and licences on their websites.¹ Additionally, Section 4 establishes that if an application complies with the published requirements of the MDA and the MDA fails to issue its approval or rejection notice within the designated timeline, the application is deemed approved.² The applicant can then notify the MDA and request the issuance of a certificate as evidence of the deemed approval. Even if the MDA fails to issue the certificate, the notice itself is supposed to serve as evidence of the approval. Furthermore, if a responsible officer fails to act on an application within the specified timeframe, without valid justification, it will be considered misconduct, leading to appropriate disciplinary proceedings in accordance with relevant laws and regulations governing the civil or public service.

Put simply, the Act introduces the concept of "default approval of application," (the "Deeming Provision"). Accordingly, if any application for business registrations, certifications, waivers, licences, or permits is not finalised within the specified timeframe, it shall be deemed approved. However, it is crucial that any rejections are accompanied by clear and explicit reasons. This provision creates an obligation for MDAs to operate efficiently and adhere to prescribed timelines, aiming to eliminate unwarranted delays that could hinder businesses in Nigeria. However, it is important to note there are potential issues associated with these deeming provisions and their implementation may introduce various legal challenges and uncertainties.

The Nigerian Investment Promotion Commission (the "Commission") by virtue of Section 20 of the Nigerian Investment Promotion Act requires the Commission to register an enterprise within fourteen (14) working days from the receipt of completed registration forms, provided that all relevant documents for registration have been completed and submitted.

Assessing the Practicability of the Deeming Provisions of the Business Facilitation (Miscellaneous Provision) Act

The effect of the Deeming Provision is that, in a situation where the Commission fails to grant or deny the registration within the stipulated timeframe, the enterprise registration may be deemed approved. The enterprise can then notify the Commission and request the issuance of a certificate as evidence of the deemed approval. Even if the Commission fails to issue the certificate, the notice itself can serve as evidence of the approval. A significant challenge may however arise, with the legal uncertainty of the Deeming Provision. This is primarily due to the absence of explicit guidelines on its interpretation and implementation. The absence of clarity in interpreting the Deeming Provision can create confusion and disagreements between the applicant seeking registration and the Commission responsible for granting approval. As a result, there can be uncertainty regarding the legitimacy of the approval, which can further complicate the registration process. Even, third parties may find the implementation and interpretation of the Deeming Provision problematic. For example, let's consider a scenario where a third-party stakeholder intends to acquire a Nigerian enterprise ("the Target") with foreign participation. During the due diligence process, the stakeholder conducts an assessment and discovers the evidence of regulatory compliance for the Target is based on a notice of deemed approval. Uncertainty may arise regarding whether this notice of deemed approval will suffice as the enterprise's registration with the Commission. This can affect the stakeholders' decision to either proceed with the acquisition of the Target or not.

Whilst the Target may have interpreted the Deeming Provision as adequate approval, deeming its registration with the Commission as complete, the third-party stakeholder and the Commission may have different interpretations and applications of the provision, perceiving it as insufficient evidence of registration. This inconsistency in interpretation may give rise to legal challenges, with stakeholders seeking redress in court to clarify the interpretation of the default approval provision. As a result, disputes may arise concerning the validity, enforceability and legal status of the Target's registration with the Commission.

The Deeming Provision does not enable MDAs to use their discretion to consider individual circumstances or exceptional cases that may warrant additional scrutiny or tailored conditions. It fails to account for unique factors or specific concerns that should be taken into consideration for certain applications. The Deeming Provision can also undermine the quality and thoroughness of assessments conducted by the MDAs. To illustrate this point, let's consider a case where a company applies for a permit to establish a manufacturing plant in an environmentally sensitive area. By virtue of the deeming provision, if the MDA fails to approve or deny the application within a specified timeframe, the application can be deemed approved. However, the MDA may require additional time to thoroughly evaluate and scrutinize applications alongside the environmental regulations and requirements. Without a comprehensive review process, there is a risk of approving applications that do not meet necessary environmental standards or

pose potential risks to the surrounding ecosystem, public safety, or other regulatory concerns.

The Act incorporated a new Subsection 20(8) into the Nigerian Immigration Act. This stipulates that entry visas to Nigeria must be issued or rejected, along with providing reasons, within 48 hours of receiving a valid application. Therefore, if an individual submits an application for a Nigeria entry visa and the Comptroller General of Immigration either fails to approve or deny the visa application within 48-hours, the application can be deemed approved. Here, the Deeming Provision does not appear to contemplate exceptional circumstances that may require additional scrutiny during the visa evaluation process. These exceptional circumstances could include situations where the applicant's background raises concerns regarding security or where further assessment is necessary to ensure compliance with specific requirements. The failure to account for exceptional circumstances increases the risk of errors or oversight in the visa approval process. It may compromise the overall integrity and effectiveness of the visa system. Situations may also arise where visas are automatically approved, even if the applicant does not

meet the necessary requirements or poses potential security risks. This greatly undermines the purpose of conducting thorough evaluation and screening to maintain the integrity and security of the visa process.

To address the problems associated with the Deeming Provisions, there are several solutions that can be implemented. These include:

- Clear Guidelines and Criteria:** Establish clear guidelines and criteria for the interpretation and application of the Deeming Provision. This includes defining the specific circumstances under which default approval may be granted and the factors to be considered in the decision-making process. Clear guidelines will provide transparency and reduce the potential for disputes or inconsistencies;
- Periodic Review:** Conduct periodic reviews of the Deeming Provision's effectiveness and impact. Regular assessments will help identify any shortcomings, ambiguities, or unintended consequences and provide an opportunity to make necessary adjustments or clarifications to improve the provision's implementation;
- Mechanisms for Exceptional Cases:** Incorporate mechanisms to address exceptional cases that require additional scrutiny or tailored conditions. This will allow the consideration of unique circumstances that may not fit within the automatic approval framework. Such mechanisms may include provisions for discretionary decision-making, public consultations, or the involvement of expert panels to ensure a comprehensive evaluation.

The Nigerian Investment Promotion Commission (the "Commission") by virtue of Section 20 of the Nigerian Investment Promotion Act requires the Commission to register an enterprise within fourteen (14) working days from the receipt of completed registration forms, provided that all relevant documents for registration have been completed and submitted. The effect of the deeming Provision is that, in a situation where the Commission fails to grant or deny the registration within the stipulated timeframe, the enterprise registration may be deemed approved.

In conclusion, Deeming Provisions can offer a way to streamline the approval process and expedite decision-making. However, their implementation can give rise to legal challenges, uncertainties, and potential risks if not carefully managed. The lack of clarity in interpretation, application criteria, and timelines may also lead to disputes, inconsistencies, and inadequate assessments of applications. The absence of discretion to consider individual circumstances or exceptional cases may undermine fairness, transparency, and accountability. To address these concerns, it is crucial to strike a balance between efficiency and ensuring appropriate assessments. Clear guidelines, periodic reviews, mechanisms for exceptional cases, enhanced transparency and accountability measures are vital to mitigate risks and improve the default approval process. By incorporating these solutions, default approval provisions can be implemented in a manner that promotes efficiency, while safeguarding the environment, public safety, and regulatory concerns. It is essential to continually evaluate and refine these provisions to ensure they align with the evolving needs and challenges of decision-making processes. These notwithstanding, the Act is a step in the right direction, and we look forward to similar enactments aimed at easing the way business is done in Nigeria.

¹ Section 1 Business Facilitation (Miscellaneous) Act 2023
² Section 4 Business Facilitation (Miscellaneous) Act 2023

Disclaimer: This article is provided for general information and educational purposes only. It should not be construed as legal advice from TNP or the author. We advise that you seek legal and or other professional advice on issues raised in the article.

Setting the trend. Shaping the future.

