



## ***Legislative Teaser – TitBits You Should Know***

*At the twilight of his administration, Dr. Goodluck Ebele Jonathan (erstwhile President of the Federal Republic of Nigeria), signed certain Bills into law. The Bills, which have now become law, include the Cybercrimes (Prevention, Prohibition, etc.) Act, Nigerian Electricity Management Services Agency Act, Equipment and Leasing Act, AMCON (Amendment) Act and the Standards Organisation of Nigeria Act.*

*Whilst the Cybercrime (Prevention, Prohibition, etc.) Act was signed into law on May 15, 2015, the other four Acts, detailed hereunder were signed into law on May 27, 2015.*

*Key provisions of the recently enacted laws are as detailed hereunder.*

### **NIGERIAN ELECTRICITY MANAGEMENT SERVICES AGENCY ACT**

#### **NEMSA and NERC – One And The Same?**

The Nigerian Electricity Management Services Agency (the “**NEMSA**” or the “**Agency**”) Act 2015 (the ‘**Act**’) principally sets up the NEMSA with powers to enforce technical standards and regulations, carry out technical inspection, testing and certification of all categories of electrical installations, electricity meters and instruments used in the electricity space to generate and deliver safe, reliable and sustainable electricity power supply.

Whilst some industry players view the NEMSA as an attempt to duplicate the roles already assumed by the Nigerian Electricity Regulatory Commission<sup>1</sup> (the “**NERC**”), it is arguable from the review of the Act, that whilst the NERC would continue to prescribe regulations for the generation and distribution of electricity in Nigeria, the NEMSA on the other hand would primarily *regulate technical standards of power plants and the practice of electrical engineering in Nigeria*<sup>2</sup>. The NEMSA may however collaborate with the NERC, where necessary, in joint regulation of the electricity industry<sup>3</sup>.

#### **Legal Actions Against NEMSA:**

The Act prescribes a thirty (30) day pre-action notice in writing to the NEMSA before an aggrieved party can validly institute an action against the Agency in the relevant court of law. Such action must however be commenced against the NEMSA by such aggrieved party within a *period of one (1) year* from when the cause of action arose; otherwise such action would have become statute barred and incapable of legal pursuit through an adjudicatory process in Nigeria.

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<sup>1</sup> The Nigerian Electricity Regulatory Commission was established pursuant to the Electric Power Reform Act, 2015.

<sup>2</sup> Section 2 of the Act.

<sup>3</sup> Section 5(3) of the Act specifically provides that the NEMSA may submit its input to the NERC in the making of further technical regulations for the purpose of carrying out its functions under the Act.



### Certification and Limitation of Liability:

Under the Act, the Agency's certification of any electrical equipment, material or installation used in the distribution of electricity supply **shall not** be sufficient defence against negligence or damage suffered from the effect or application of the certified equipment, material or installation or power plant networks by the manufacturer, installer or user<sup>4</sup>.

### Alternative Dispute Resolution:

In line with the growing use of Alternative Dispute Resolution methods in resolving disputes between two or more parties (as opposed to going to court), it is interesting to note that the Act seeks to promote amicable settlement processes such as negotiation, mediation and conciliation in the resolution of such disputes. *It is only after attempts at amicable settlement have failed that a party can resort to going to court*<sup>5</sup>.

## ASSET MANAGEMENT CORPORATION OF NIGERIA (AMENDMENT) ACT

### Submission of quarterly reports to the National Assembly:

One of the key introductions of the Asset Management Corporation of Nigeria (Amendment) Act of 2015 (the "Act") to the previously existing Law<sup>6</sup> is the mandate placed on the Asset Management Corporation of Nigeria (the 'Corporation') to **submit quarterly reports of its operations to both chambers of the National Assembly**<sup>7</sup>. This mandatory obligation of the Corporation is expected to promote accountability.

### Banking Sector Resolution Cost Fund:

One of the truly remarkable additions to the Law is the creation of a fund known as the Banking Sector Resolution Cost Fund (the "**BSRC Fund**"), which is to be domiciled with the Central Bank of Nigeria ("**CBN**") and exempt from all applicable taxes<sup>8</sup>. The CBN is expected to appropriate (from the general reserves or its other funds) the sum of ₦50,000,000,000 or such higher sum as may be approved by the National Assembly to the BSRC Fund<sup>9</sup>. Also, an annual level levy equivalent to fifty (50) basis points or such higher basis points to be determined by the CBN in each financial year has been imposed on eligible financial institutions<sup>10</sup>. Further, the Act places primary responsibility on each eligible financial institution to carry out a self-assessment of the amount payable to the BSRC Fund.

The Board of Trustees ("**BOTs**") would conduct an independent assessment of levies that ought to have been paid and where any eligible financial institution fails to pay or understates the amount due, then such

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<sup>4</sup> See section 5(4) (1) *ibid*.

<sup>5</sup> See section 5(4)(5) *ibid*.

<sup>6</sup> Asset Management of Nigeria Corporation Act, 2010.

<sup>7</sup> Section 22 (2) of the Act.

<sup>8</sup> Section 61 of the Act.

<sup>9</sup> Section 62 of the Act.

<sup>10</sup> Section 63(1) of the Act.



figure calculated by the BOTs (except where manifestly erroneous) would be final and conclusive<sup>11</sup>. The CBN is then authorized to directly debit (for the benefit of BSRCF) the account of any defaulting eligible financial institution.

The BSRC Fund is to be utilized principally for meeting the obligations of the Corporation and the administration and management of the BSRC Fund itself. Also, the BOTs, CBN and the Corporation may, on an annual basis, make adjustments to the amount levied to meet deficiency or eliminate excess<sup>12</sup>.

Any eligible financial institution which fails to comply with any of the provisions of the Act shall, where found guilty be liable to pay the sum of ₦1,000,000,000 for *each act* of default or non-compliance<sup>13</sup>.

With the establishment of the BSRC Fund, a viable capital base has been created to support the Corporation in effectively discharging its mandate of managing assets of ailing financial institutions in Nigeria.

#### **Vesting of Bank Assets:**

The Act makes provision for the vesting of eligible bank assets and the assignment of every relevant contract relating to such eligible bank assets in the Corporation. Such vesting rights shall take effect and be effective notwithstanding any pending suit in respect of the eligible bank asset<sup>14</sup>. This is expected to promote a smooth assumption of eligible bank assets, prevent deterioration of the quality of those assets and avoid delays occasioned by protracted trials in the Nigerian courts.

#### **Continuation of Legal Suits:**

Under this Act, the Corporation is vested with powers to take over a subsisting action from an eligible financial institution, prior to acquisition of the assets, which form the subject matter of the suit, in its name<sup>15</sup>. This may be viewed as a remarkable addition to the Law, which is expected to aid quick dispensation of justice in each case since it obviates the need to commence fresh proceedings.

### **EQUIPMENT LEASING ACT**

The Equipment Leasing Act of 2015 (the “Act”) is the foremost legislation relating to equipment leasing business in Nigeria. Globally, equipment leasing is a well recognised alternative financing employed to meet the world’s equipment needs. It is hoped that the highly anticipated legislation would ignite the expansion of leasing activities in Nigeria.

#### **Registration and Consequences of non-Registration:**

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<sup>11</sup> Section 60(C)(5) of the Act.

<sup>12</sup> Section 60(F)(1) of the Act.

<sup>13</sup> Section 60(W)(1) of the Act.

<sup>14</sup> Section 34(2) (c) of the Act.

<sup>15</sup> Section 35 (6) of the Act.



Leases are classified under the Act as: (i) Finance Lease, (ii) Operating Lease; and (iii) variants of both Finance and Operating Leases. Variants of Finance and Operating Leases are specified in the Act as including: (i) Syndicated Lease; (ii) sale and lease back lease; (iii) cross board lease; (iv) leveraged lease; and (v) any equipment lease that may, from time to time, be approved by the Minister.

Pursuant to the Act, lease agreements are generally required to be registered within a fourteen (14) day period<sup>16</sup>, however **a period of three (3) Months** is allowed for registration of lease agreements entered into before the commencement of the Act<sup>17</sup>. In either case, a Certificate of Registration will be issued upon completion of the registration<sup>18</sup>.

***The Act makes any unregistered lease agreement invalid between the parties to the agreement but does not render same unenforceable by a third party acting in good faith, for value and without notice of the default***<sup>19</sup>. By implication, a party to a lease agreement desirous of acquiring legal rights in the subject matter of a lease must endeavour to register same or risk same being deemed null and void.

#### **Restriction on Operators of Equipment Leasing Businesses:**

Pursuant to the Act, participation in equipment leasing business is restricted to **registered** limited liability companies in Nigeria<sup>20</sup>. Such companies must have included the business of equipment leasing as part of its' Memorandum of Association<sup>21</sup>. *Consequently, private individuals as well as proprietors of Business Name are precluded from engaging in equipment leasing business.*

#### **Equipment Leasing Registration Authority:**

The Act establishes the Equipment Leasing Registration Authority (the "**Authority**"), which is charged, amongst others, with registering: (i) Equipment Lease Agreements<sup>22</sup>; (ii) companies carrying on and/or wishing to carry on business as equipment lessors<sup>23</sup>.

### **STANDARDS ORGANISATION OF NIGERIA ACT**

The Standard Organisation of Nigeria Act of 2015 (the "**Act**"), which repeals The Standard Organisation of Nigeria Act Cap. S9 Laws of the Federation of Nigeria, 2004, expands the regulatory functions and powers of the Standards Organisation of Nigeria ("**SON**" or the "**Council**").

#### **Additional Functions of the Council:**

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<sup>16</sup> Section 13 of the Act.

<sup>17</sup> Section 13 of the Act.

<sup>18</sup> Section 15 of the Act.

<sup>19</sup> Section 17 of the Act.

<sup>20</sup> Section 6(a) of the Act.

<sup>21</sup> Section 6(a) of the Act.

<sup>22</sup> Section 9(a) of the Act

<sup>23</sup> Section 9(b) of the Act



The Act expands the scope of duties of SON by vesting the Council with additional regulatory powers which include:

- (i) evaluation of quality assurance activities, including certification of systems, products and laboratories throughout Nigeria;
- (ii) compilation of an inventory of products in Nigeria requiring standardization;
- (iii) establishment of an import and export product surveillance;
- (iv) certification and conformity assessment scheme;
- (v) establishment of a mandatory conformity assessment programme for locally manufactured products in Nigeria;
- (vi) registration and regulation of standards, marks and certification; and
- (vii) setting up of industrial standards which shall be called the “*Nigerian Industrial Standards*” amongst others.

#### **Stringent Penalties for Non-Compliance:**

The Act empowers the Director General or any other employee or officer of the Council, authorised by him in writing, ***to stop and search any vehicle or access any premises at reasonable times where there are reasonable grounds for suspecting the warehousing or storage of items in contravention of the Act.***

Evasion of fees or levies payable or chargeable under the Act is an offence and on conviction, attracts a fine of not less than ₦1,000,000 and/or an imprisonment term of not less than nine (9) months<sup>24</sup>.

Generally, financial liability for most of the offences under the Act have been reviewed upwards to ₦1,000,000 and imprisonment term increased to between nine (9) months and one (1) year.

The foregoing appears to be a significant improvement from the previous legislation<sup>25</sup>, which prescribed a maximum penalty of ₦50,000 for apprehended peddlers of fake and counterfeit products. However, it is interesting to note that whilst the Act has extended the application of its provisions to offences by corporate bodies, it does not state the applicable fine(s) for such offences.

#### **Power of Recall:**

Under the Act, the Minister for Industries is now vested ***with the power to direct a supplier to recall a defective commodity on the recommendation of the Organisation.***

### **THE CYBERCRIMES (PROHIBITION, PREVENTION, ETC) ACT 2015**

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<sup>24</sup> Section 31(1) of the Act

<sup>25</sup> The Standard Organisation of Nigeria Act Cap. S9 Laws of the Federation of Nigeria, 2004.



The Cybercrimes (Prohibition, Prevention etc.) Act 2015 (the '**Act**') creates a legal, regulatory and institutional framework for the prohibition, prevention, detection, investigation and prosecution of cybercrimes and for other related matters. Particularly, the Act engenders a platform for cyber security and in turn ensures the protection of computer systems and networks, electronic communications, data and computer programs, intellectual property, privacy rights as well as preservation of critical national information.<sup>26</sup>

#### **Designation and Protection of Critical National Information Infrastructure:**

On the recommendation of the National Security Adviser, by an Order published in the Federal Gazette, certain computer systems, networks and/or information infrastructure which are considered vital to the security of Nigeria as well as her economic and social well being, may be designated as Critical National Information Infrastructure. The Presidential Order may require the office of the National Security adviser to audit and inspect any Critical National Information Infrastructure at any time to ensure compliance with the provisions of this Act.<sup>27</sup>

Any person who contravenes any provision of the Act pertaining to Critical National Information Infrastructure is liable on conviction to imprisonment for a term of not more than 10 years *without option of fine*<sup>28</sup>; Where the offence committed results in grievous bodily harm to any person, the person who commits the offence is liable on conviction to imprisonment for a term not more than 15 years *without option of fine*;<sup>29</sup> and where the offence results in the death, the person who commits the offence shall be liable on conviction **to life imprisonment**<sup>30</sup>.

Furthermore, any person who accesses without authorization, any computer system or network for fraudulent purposes and also obtains data which is vital to national security, is liable on conviction to a term of not more than 5 years or to a fine of not more than N5,000,000,000 or both; any Unlawful system interference for fraudulent purposes by deleting, transmitting, damaging or suppressing computer data which prevents the system from functioning, is liable on conviction to a fine of N5,000,000 or imprisonment for a term of not more than 2 years or both<sup>31</sup>.

#### **Regulation of Financial Institutions use of electronic transactions:**

The Act now imposes a duty of care on financial institutions to their customers to put in place effective check against cybercrimes. Section 37 (1) of the Act provides that a financial institution ***shall verify the identity of its customers carrying out electronic financial transactions by requiring the customers to present documents bearing their names, addresses and other relevant information before issuing ATM cards, credit cards, debit cards and other related electronic devices.*** An official or

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<sup>26</sup> See section 1 of The Cybercrimes (Prohibition, Prevention etc.) Act 2015

<sup>27</sup> See section 4 *ibid*.

<sup>28</sup> See section 5 (1) *ibid*

<sup>29</sup> See section 5 (2) *ibid*

<sup>30</sup> See section 5 (3) *ibid*

<sup>31</sup> See section 8 *ibid*



organization who fails to obtain proper identity of customers before executing customer electronic instructions in whatever way, commits an offence and is liable on conviction to a fine of N5, 000,000.<sup>32</sup>

Further, any financial institution that makes an unauthorized debit on a customer's account shall, upon written notification by the customer, provide clear legal authorization for such debit to the customer or reverse such debit within 72 and any financial institution that fails to reverse such debit within 72 hours, commits an offence and is liable on conviction to restitution of the debit and a fine of N 5,000,000.

The Act also provides that no financial institution shall give posting and authorizing access to any single employee,<sup>33</sup> and any person who is engaged in the services of any financial institution and, as a result of his special knowledge, commits identity theft of its employer, staff, etc. with the intent to defraud commits an offence and is liable on conviction to imprisonment for a term of 7 years or a fine of N5,000,000 or both.

#### *Retention of Records by service providers and disclosure/interception of electronic communication:*

The Act provides that a service provider shall keep all traffic data and subscriber information as may be prescribed by the relevant authority, for the time being, responsible for the regulation of communications services in Nigeria<sup>34</sup>, for a period of two years.<sup>35</sup> Additionally, having due regard to an individual's right to privacy under the Constitution of the Federal Republic of Nigeria Cap C23, Laws of the Federation of Nigeria, 2004<sup>36</sup>, service providers shall at the request of the relevant authority release any information required to be retained.

Further, where there are reasonable grounds to suspect that the content of any electronic communication is reasonably required for the purpose of a criminal investigation or proceeding, a Judge may, on the basis of information on oath - order a service provider, through the application of technical means to intercept, collect, record, permit or assist competent authorities with the collection or recording of content data or traffic data associated with specified communications transmitted by means of a computer system.<sup>37</sup>

#### *Establishment of the Cybercrime Advisory Council and the National Cyber Security Fund:*

The Act establishes the Cybercrime Advisory Council (the "Council"), which shall amongst other functions, provide recommendations on issues relating to the prevention and combating of cybercrimes and the promotion of cyber security in Nigeria.<sup>38</sup>

Additionally, the Act establishes the National Cyber Security Fund (the "**Fund**"), which shall be domiciled with the CBN and wherein shall be paid a levy of 0.005 of all electronic transactions by the businesses

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<sup>32</sup> See section 37 (2) *ibid*

<sup>33</sup> See section 19(1) *ibid*

<sup>34</sup> This is the Nigerian Communications Commission established by an Act.

<sup>35</sup> See section 38 (1) of the Act.

<sup>36</sup> See section 38(5) *ibid*.

<sup>37</sup> See section 39 *ibid*.

<sup>38</sup> See section 43 (1) *ibid*



specified in the Second Schedule of the Act<sup>39</sup>; grants-in-aid and assistance from donor, bilateral and multilateral agencies; all other sums accruing to the Fund by way of gifts, endowments, bequest or other voluntary contributions by persons and organizations (provided; such monies as may be appropriated for the Fund by the National Assembly; and all other monies or assets that may, from time to time, accrue to the Fund.<sup>40</sup> ***The monies accruing to the Fund is exempted from income tax while all contributions to the Fund is tax deductible.***<sup>41</sup>

### ***Banwo & Ighodalo***

*Banwo & Ighodalo ("B&I") is a full service commercial law firm known for providing innovative, competent, cost-effective and well-timed solutions. B&I is frequently ranked as one of the leading law practices in Nigeria and the Firm has advised, and continues to provide legal advisory support in its chosen areas of practice.*

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<sup>39</sup> Please note that no second schedule to the Act was sighted.

<sup>40</sup> See section 44 (1) and (2) *ibid*.

<sup>41</sup> See section 44 (3) *ibid*