

Detail

**THE NITDA BILL AND ITS POTENTIAL
IMPACT ON NIGERIA'S INFORMATION
TECHNOLOGY INDUSTRY AND
DIGITAL ECONOMY**

DETAIL COMMERCIAL SOLICITORS

Introduction

The National Information Technology Policy was approved in 2001 to guide the IT industry in Nigeria, and was followed by the enactment of the National Information Technology Development Agency Act 2007 (the “NITDA Act”) which became the legal platform for the creation of the National Information Technology Development Agency (the “Agency”). The NITDA Act empowers the Agency to create a framework for the planning, research, development, standardization, application, coordination, monitoring, evaluation and regulation of information technology practices, activities, and systems in Nigeria.



In August 2021, the National Information Technology Development Agency Bill (the “NITDA Bill”), which proposes to repeal and amend the extant NITDA Act, was released. A review of the NITDA Bill reveals that there are a number of proposed significant changes to be introduced by the NITDA Bill to the current regulatory landscape of the Information Technology Industry and the Digital Economy.

In this article, we examine the changes introduced by the NITDA Bill and how these changes may affect businesses, particularly those functioning within the Information Technology Industry and the Digital Economy.



Highlights of the NITDA Bill

(a) EXPANSION OF THE POWERS AND FUNCTIONS OF THE AGENCY

The NITDA Bill introduced some new functions for the Agency which include the following::

The coordination, monitoring and evaluation of the use and adoption of digital services, products and platforms to promote the digital economy.

The regulation of the use of data for business and security analytics and intelligence, subject to any other law on the subject.

The development, testing, and certification of information technology systems, services and practices to promote innovation and the use of emerging technologies to improve efficiency in service delivery including registration of devices and type approvals.

The regulation of the use, development, standardisation, research, and application of information technology, emerging technology and digital services practices, activities and systems in Nigeria.

The promotion of the adoption of the Nigeria Top Level Country Code internet domain (.ng), sound internet governance and giving effect to the Second Schedule of the NITDA Bill.

The implementation and execution of projects for the development of information technology and digital economy.

The regulation of the acquisition and use of digital systems and services in Government establishments. To create a framework for the auditing of Government information technology systems and digital services platforms.

Supporting the development and promotion of technical specifications and standards for the use of information technology and digital services in Nigeria, including emerging technologies such as robotics, blockchain, cloud computing, and artificial intelligence.

Coordinating and supervising the activities of any entity incorporated, owned or partly owned by the government to provide information technology infrastructure and digital services.

Promoting universal access for information technology, digital services and systems penetration in urban, rural, under-served and unserved areas.

Creating processes and keeping appropriate data to ensure effective monitoring of information technology and digital devices to support national security objectives.

Promoting the adoption of locally produced information technology goods and services offered by Nigerian entities to support national security, job creation and the well-being of citizens, having regard to international treaties and agreements on trade.

Protecting the interest and rights of consumers against unfair practices in collaboration with the consumer protection regulator.

Promoting digital skills, job creation, government digital services, cybersecurity, digital inclusion and local content development.

Representing Nigeria at international proceedings and meetings of international organisations relating to information technology and digital economy.

The NITDA Bill also deletes the section on powers of the Governing Board and replaces it with powers of the Agency which are²:

The implementation of all Government policies on information technology and digital economy.

The testing, and approval of the use of information technology infrastructure and services before adoption in Nigeria.

The development of regulations, guidelines and directives on the use of information technology and digital services in every sector of the economy to attain the purpose of the Agency.

The issuance of notices of contravention and non-compliance with the NITDA Bill, regulations, standards and guidelines made under the NITDA Bill.

LICENSE

The power to demand and monitor compliance with regulations, standards, guidelines, and directives issued under the NITDA Bill.

The testing, and approval of the use of information technology infrastructure and services before adoption in Nigeria.

Carrying out the other activities, which in the Agency's opinion are necessary to ensure the efficient performance of the purpose and functions of the Agency under the NITDA Bill, including implementation of the functions under the NITDA Bill.

(B) NEW LICENSING REGIME

The NITDA Bill seeks to introduce a licensing regime for operators in the Information Technology Industry and Digital Economy. The NITDA Bill empowers the Agency to issue regulations that provide for licensing and authorisation criteria including renewal, suspension, and revocation conditions to promote free market operation and competition, among other things within the sector³.

Under the proposed regime, the Agency will register operators in the Information Technology Industry and Digital Economy and will publish such register⁴.

3. Section 20 (1) of the NITDA Bill

4. Section 20 (2) of the NITDA Bill

Once passed into law, any operations by a person or body corporate of any information technology or digital economy service, product, or platform in a manner that is contrary to the provisions of the passed law shall be deemed to be an offence⁵. The penalty for such offence is as set out in the NITDA Bill.

The licenses and authorisations to be issued by the Agency shall fall under one of three (3) categories: Product License; Service Provider License; or Platform Provider License.

The NITDA Bill neither provides additional information nor explains the meaning, scope, or criteria for obtaining the different categories of licenses.

(C) THE NATIONAL INFORMATION TECHNOLOGY DEVELOPMENT FUND

The NITDA Act established the National Information Technology Development Fund (the “Fund”) into which certain companies (designated in the Act) with an annual turnover of One Hundred Million Naira (N100,000,000) are required to pay a levy of one percent (1%) of their profit before tax. The Fund is to be used for the advancement of the country’s digital economy objectives and related purposes.⁶

5. Section 20 (3) of the NITDA Bill

6. Section 12 (1) of the NITDA Act and Section 13 (1) of the NITDA Bill

The NITDA Bill now seeks to expand the pool of companies which are required to contribute to the Fund such that it will now include the following companies:⁷

- Information technology, e-commerce companies;
- Digital platform operators and providers;
- Foreign digital platforms targeting the Nigerian market;
- Banks, financial institutions, and companies providing financial services using information technology tools; and
- Such other companies and enterprises as determined by regulations from time to time by the Agency.

The Federal Inland Revenue Service (“FIRS”) is charged with the responsibility of assessing and collecting the levy.⁸ An assessment shall be made alongside the assessment for all applicable federal taxes.⁹ The levy shall be due and payable within sixty (60) days after the FIRS has served notice of assessment on a company.¹⁰ Where a levy due is not paid within the time specified, the FIRS shall serve the company with a demand note for the unpaid tax plus a sum which is equal to two percent (2%) of the levy.¹¹ Non-payment upon expiration of a demand notice of an assessed levy within two (2) months by a corporate body is an offence. The offending entity is liable on conviction to a fine of half of a percent (0.5%) of the assessed sum for everyday of default.¹²

7. Third Schedule to the NITDA Bill

8. Section 16 (1) of the NITDA Act and Section 16 (1) of the NITDA Bill

9. Section 16 (2) of the NITDA Act and Section 16 (2) of the NITDA Bill

10. Section 16 (3) of the NITDA Act and Section 16 (3) of the NITDA Bill

11. Section 16 (4) of the NITDA Act and Section 16 (4) of the NITDA Bill

12. Section 22 (1) of the NITDA Bill

(D) DIGITAL INFRASTRUCTURE AND SERVICE PROVISION COMPANY

The NITDA Bill establishes a Digital Infrastructure and Service Provision Company called “Galaxy Backbone”, or any other name determined by Federal Ministry of Communications and Digital Economy, which is the supervising ministry of the company (the “Company”).¹³ It should, however, be noted that Galaxy Backbone is currently the information technology and shared services provider of the Federal Government of Nigeria and has commenced operations since 2006.¹⁴

The Company will be empowered to perform the following functions:¹⁵

1. provide digital infrastructure services to the Ministries, Departments, Agencies, and public service institutions of the Government in a non-exclusive manner;
2. conduct training for staff of the Ministries, Departments, Agencies, and public service institutions of the Government to promote digital services;

¹³ Section 27 (1) of the NITDA Bill

¹⁴ This is as contained on the Company’s official website <https://galaxybackbone.com.ng/about-us/>

¹⁵ Section 27 (2) of the NITDA Bill



3. promote Nigerian content and digital services;
4. provide quality services at competitive pricing to ensure customer satisfaction;
5. explore and engage in international business opportunities on approval of the Board of the Company; and
6. perform any other function that may be assigned to the Company by the Agency.

The Company shall be funded from profits and earnings from its services and products, budgetary allocations from Federal Government of Nigeria and grants-in-aid from national, bilateral and multi-lateral agencies.¹⁶ The Company shall also produce annual reports to be received by 30th June of each year by the Director-General and forwarded to the Minister of Communications and Digital Economy.¹⁷

16. Section 27 (5) of the NITDA Bill

17. Section 27 (7) of the NITDA Bill



(E) DIGITAL INFRASTRUCTURE AND SERVICE PROVISION COMPANY

The NITDA Bill mandates the Agency to prescribe an administrative redress process to address issues that may arise from the regulatory activities of the Agency.¹⁸ The NITDA Bill also encourages the use of Online Dispute Resolution mechanisms in implementing the Agency's administrative redress functions and settling disputes¹⁹, and requires that a summary of the Agency's findings or conclusion in any administrative investigation or sanctions shall be published on its official website.²⁰

(F) OFFENCES AND PENALTIES

Generally, under the NITDA Act, first-time offenders are liable to at least one year imprisonment or a fine of Two Hundred Thousand Naira (~~₦~~200,000) or both, and subsequent offenders are liable to at least two years imprisonment, or a fine of Five Hundred Thousand Naira (~~₦~~500,000).²¹ The NITDA Bill proposed to increase the fines to Three Million Naira (N3,000,000) or imprisonment for a term of between one (1) and two (2) years (depending on the offence) or both fine and imprisonment for first offenders (individuals); a fine not exceeding Five Million Naira (N5,000,000) or imprisonment for a term not exceeding three (3) years or to both fine and imprisonment for subsequent convictions (individuals); and a fine of not less than Thirty Million Naira (N30,000,000) for body corporates.²²

18. Section 25 (1) of the NITDA Bill

19. Section 25 (2) of the NITDA Bill

20. Section 25 (3) of the NITDA Bill

21. Section 18 of the NITDA Act

22. Section 22 of the NITDA Bill

MATTERS ARISING

From our review of the provisions of the NITDA Bill, it is apparent that the NITDA Bill, if passed (as is), will introduce several new developments to Information Technology Industry and Digital Economy. There are, however, a few issues in the NITDA Bill that raise questions and concerns for stakeholders, such as:

(a) Duplicity of Licensing Regime

One of the developments in the NITDA Bill is the creation of a new licensing regime. This new licensing regime will most likely result in duplicity of licenses and authorisations to be obtained by companies in the Information Technology Industry and Digital Economy which may increase the difficulty of doing business within the sector.

(b) The National Information Technology Development Fund

The expansion of the pool of companies to contribute into the National Information Technology Development Fund also raises some concerns. Imposing new levies on information technology, e-commerce companies, digital platform operators and FinTech companies, most of which are likely to be start-ups with funding limitations, may stifle the ease of doing business in these sectors or even discourage investment. Thus, this may end up being inconsistent with the current policy measures adopted by policy makers to incentivize investments in the technology sector and the digital economy.



(c) The Composition of the Board

Another area of concern is the composition of the Governing Board of the Agency especially in the light of the widened powers of the Agency under the NITDA Bill. One of such concerns is the total absence of private sector representation on the Board. In addition, there is no requirement for expertise, knowledge, or experience in information technology for members of the Governing Board. The information technology sector is a fast paced and quickly evolving sector where regulation often plays catch up with innovation. Thus, to be effective, it is important that the decision-making body of the Agency has representation from players within the sector who have a firm and robust understanding of the intricacies and developments within the sector. The current composition of the Board in the NITDA Bill does not cater for these key considerations.

(d) Ambiguity of terms

Furthermore, the NITDA Bill fails to define several important terms as used in the bill, thus leaving room for ambiguity and varying interpretations of these terms. It is important that all key terms used are adequately defined or interpreted .



(e) Relationship with the Nigeria Startup Bill

The NITDA Bill is also coming at a time when preparations are in high gear for the unveiling of the Nigeria Startup Bill (“NSB”). The NSB is a joint initiative between Nigeria’s tech startup ecosystem and the Presidency. While the draft NSB is not yet publicly available, from the summary of the NSB,²³ the NITDA Bill and the NSB appear to overlap in certain areas particularly in relation to the registration and licensing regime set up by both bills. Furthermore, the Agency is also recognized as a key regulator under the NSB. It will be in the interest of all stakeholders and the economy for the legislative drafters to conduct extensive consultations with stakeholders and regulators alike to ensure uniformity of purpose, prevent overlap of powers and duplicity of compliance requirements.

(f) Bracing up for the Challenges

Looking forward, businesses within the Information Technology Industry and the Digital Economy should prepare for the disruptions that will be caused by the passing of the NITDA Bill. A key step in this regard will be to identify and take steps to comply with the new requirements being proposed, such as identifying and determining whether they fall into the pool of companies required to contribute to the National Information Technology Development Fund.

[23] NSB Summary <https://drive.google.com/file/d/1B2J8gnOLAUbL4SucD2KIfjCWnt_YPDgN/view>





CONCLUSION

With the increasing focus and regulatory zeal being shown by the government, businesses that are active participants in the Information Technology Industry and Digital Economy are advised to study the proposed laws and begin to take the necessary steps required to comply with the regulatory requirements under the NITDA Bill. Regulatory compliance is fast becoming one of the key factors that determines the success or failure of technology companies all over the globe.

On the other spectrum, it is imperative that the regulators and legislative drafters ensure that a balance is achieved between the objectives of protecting the consumers of information technology and incentivizing innovation and investment in the information technology sector and the digital economy. We expect to see more stakeholder engagement and harmonization of legislative efforts to avoid duplication of laws and licensing regimes. The role of stakeholders, industry participants and legal professionals cannot be overemphasized in the bid to regulate a fast paced industry such as this, as we anticipate the version of the NITDA Bill that will be passed into law.

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