



REPUBLIC OF KENYA

EXPLAINER OF THE PROPOSED BUSINESS LAWS (AMENDMENT) BILL, 2024

PURSUANT to Article 174 and article 232 of the Constitution, the Ministry of Trade, Investments and Industry via public notice issued on 13th September, 2024 and in-person consultative workshops held from 23rd to 27th September 2024, invited the public to submit their views and proposals on:

1. Measures to attract, incentivize and de-risk private investments (both foreign and local) in all sectors of the economy;
2. Rationalization of incentives to boost manufacturing;
3. Measures to improve consumer protection and fair trade;
4. Measures to improve the performance of the export sector, foster structured commodity trade, and ease costs associated with domestic trade;
5. Harmonization of taxes within the manufacturing sector to eliminate distortions and provide a stable and predictable taxation structure; and
6. Putting in place measures to consistently assure the quality of manufactured products, ensure consumer protection, and fight counterfeits.

NOW THEREFORE, the Ministry of Investments, Trade and Industry gives notice of its intention to submit the Business Laws (Amendment) Bill, 2024 to achieve the above objectives. The Ministry of Investments, Trade and Industry has submitted the Bill listed below to the National Assembly for publication and consideration:

The Business Laws (Amendment) Bill, 2024

The Business Laws (Amendment) Bill, 2024 consolidates proposals to amend the following laws;

Proposal to amend the Investment Promotion Act

Registration of foreign direct investments and accreditation of facilitators of foreign investors

The Bill proposes to amend section 2 of the Investment Promotion Act by renaming the heading of Part II of the Act to be in line with the new provisions for Registration of Foreign Direct Investments and Accreditation of facilitators for foreign investors.

Accreditation of investment facilities

The Bill seeks to amend section 3 of the Investment Promotion Act to provide for the accreditation of persons who facilitate foreign direct investors by the Kenya Investment Authority. This will provide for setting standards for investment promotion and facilitation, provide traceability for protection of investors to avoid conning of foreign investors.

Registration of foreign direct investments

The Bill also seeks to amend section 6 of the Investment Promotion Act to provide for the registration of foreign investments by the Kenya Investment Authority and issuing of investment certificate that guarantees them with various benefits in terms of the permits issued and fast tracking of incentives and exemptions. Registration will also assist in collection of data to guide promotional efforts and offer aftercare services for the growth and sustainability of the investments.

Issue of investment certificate

The Bill seeks to amend section 8 the Investment Promotion Act in order to prohibit the transfer of an investment certificate to avoid misuse of the benefits and registration for speculation purposes.

Maintenance of Register

The Bill seeks to amend the Investment Promotion Act by introducing new sections 11A that gives the Kenya Investment Authority the mandate to maintain a register of manufacturers for facilitating evidence based targeted investor promotion, policy decision making, monitoring and evaluation.

Provision of government services at a centralized facility

The Bill seeks to introduce a new section 11B to provide for a centralized facility, one-start-one-go-centre through collaboration between the Kenya Investment Authority and other Public Institutions for ease of doing business.

Collaboration with other public institutions

The Bill seeks to introduce a new section 15A to provide for collaboration with different ministries, departments, agencies and counties to guide investors on the investor entry point, strengthen the investor journey to enhance positive investor facilitation and experience.

Proposal to amend the Standards Act

Registration of Industries

The Bill seeks to amend section 5 of the Standards Act by providing for the registration of manufacturers by the Kenya Bureau of Standards. This will address the lack of reliable data and unfair trade practices. Further it will support evidence-based policy interventions, monitoring and evaluation of industrial development by industry, sector, and value-added computation; and provide a competitive business environment that promotes growth in the manufacturing sector.

Disbursement powers of Director

The Bill seeks to add a new section 10C of the Standards Act to change the reference from Standards Levy Fund instead of the Bureau account.

Standards for manufacturers

The Bill seeks to insert a new section 10D in the Standards Act to provide for obligations of manufacturers which will encourage self-regulation to enhance product compliance and protect the consumers. It

will enhance regulation of manufacturers by requiring them to put in place measures that will promote compliance to the Kenya Standards; remove substandard goods from the market; and protect the consumer and the environment.

Samples and information

The Bill seeks to amend section 12 of the Standards Act address inadequate traceability (chain of custody) for products in the market; and enhance compliance to the Kenya Standards in terms of safety and quality of products. The proposed amendment will enhance consumer protection and guidance in quality assurance of Kenyan products; and improve traceability of products in the market for regulatory compliance.

Establishment of laboratories

The Bill seeks to insert new sections in section 12 of the Standards Act to provide for the establishment and designation of laboratories and establishment of calibration facilities by the Kenya Bureau of Standards. This will assist to the Bureau to keep pace with the ever-growing industrial development and technology to establish laboratories that will enhance the testing scope in the Country; provide for reference laboratories, test methods and reference materials; and increase testing capabilities.

Appointment of an inspection body

The Bill seeks to amend the Standards Act to provide for the appointment of inspection bodies based at the country of origin of goods to undertake verification of conformity to Kenyan Standards and to require the inspection bodies to have a tax presence in Kenya. There is increased congestion at the ports of entry due to growth in the number of imports, leading to delayed clearance. The proposed amendment will facilitate fast clearance of cargo on arrival, avoid storage costs, enhance efficiency of clearance of goods in compliance with the Port Charter. Further the establishment of a tax residence for PVoC contracted companies in Kenya will enable them to meet their tax obligations to the Kenyan Government.

Proposal to amend Kenya Accreditation Service Act

Accreditation of foreign conformity assessment bodies

The Bill seeks to amend section 10 of the Kenya Accreditation Service Act to provide for the Accreditation of foreign Conformity Assessment Bodies (CABs) operating in Kenya. This will ensure that the CABs align with the national regulatory framework and ensure that they set up a local office in Kenya. This will also harmonize accreditation services to national and international standards for consumer protection while at the same time ensuring they pay requisite taxes to support expansion and growth of accreditation services.

Accreditation Levy

The Bill seeks to insert a new section 12A in the Kenya Accreditation Service Act to provide for the imposition of the accreditation levy from CABs. The Levy will be at the rate of three per cent of the value of any accredited conformity assessment undertaken by a body.

Proposal to amend The Scrap Metal Act

Composition of Scrap Metal Council

The Bill seeks to amend section 4 of the Scrap Metal Act to amend the composition of the Scrap Metal Council. This will help rationalize the representation of non-State Actors thereby enhancing the leadership and governance structure to grow the scrap metal industry while at the same time protecting road furniture for destruction. Currently metal items are being stolen from homesteads or within the roads and being sold to smelters.

Proposal to amend the Anti-Counterfeit Act

Definitions

The Bill proposes to amend section 2 of the Anti-Counterfeit Act to provide for the amendment of some definitions and introduction of new definitions to be in line with the emerging counterfeit measures. Local industry has raised concerns

Composition of Board

The Bill proposes to amend section 6 of the Anti-Counterfeit Act to allow for review of the board composition, rationalize representation to ensure representation of key stakeholders in the board to enhance service delivery.

Powers of Inspectors

The Bill seeks to amend section 7 of the Anti-Counterfeit Act to provide for expeditious handling of counterfeit goods to eliminate the menace.

Register

The Bill seeks to amend section 23 of the Anti-Counterfeit Act to provide for the power of inspectors to dispose of counterfeit goods.

Seizure and disposal of counterfeit goods

The Bill seeks to amend section 27 of the Anti-Counterfeit Act to provide for the disposal of counterfeit goods by the court.

The Bill seeks to amend section 28 of the Anti-Counterfeit Act to provide for the disposal of seized goods.

Recordation of Intellectual Property Rights

The Bill seeks to amend section 34B of the Anti-Counterfeit Act to provide for the recordation of intellectual property rights.

Penalties

The Bill seeks to amend section 35 of the Anti-Counterfeit Act to provide for the penalty for the offences under section 32(h) to section 32(n).

The Bill seeks to amend the schedule to the Anti-Counterfeit Act to provide for a fixed term of office for board members of the Authority and to provide for quorum for meetings.

Proposals to amend Special Economic Zones Act

Interpretation

The Bill seeks to amend section 2 of the Special Economic Zones Act to provide for a new definition of business process outsourcing.

Removal of goods from Special Economic Zones

The Bill is amended to insert a new subsection (5) in section 8 of the Special Economic Zones Act to provide that sold Goods that remains within a customs-controlled area of a special economic zone are entitled to the benefits conferred under the Act.

Functions of the Authority

The Bill amends section 11 of the Special Economic Zones Act to give the Special Economic Zones Authority (SEZs) structures for the setting of the minimum acreage of land and the Minimum Investment Amount to be invested for a land to be considered for declaration as a Special Economic Zone by the Cabinet Secretary for Economic Zones on the recommendation of the Special Economic Zones. This will provide for licensing and development of SEZs that will provide the greatest impact to the economy.

Qualification of SEZ Developer and operator

The Bill seeks to amend section 28 of the Special Economic Zones Act to enable public entities to qualify as special economic zone developers and operators. This will enhance value addition and exports of products across the country.

Register of licenses

The Bill seeks to insert a new Section 30A of the Special Economic Zones Act to provide for the issuance of Special Economic Zone Business Service Permit.

Rights and obligations of SEZ developer and operator

The Bill seeks to amend section 33 of the Special Economic Zones Act to provide for the lease, sub-lease or sale of land or buildings to special economic zone service permit holders.

Benefits accruing for SEZ Developer and operators

The Bill seeks to amend section 35 of the Special Economic Zones Act to address visibility of benefits to be enjoyed by the investors within the Special Economic Zones, predictability of the benefits that will continue to be enjoyed by the investors once on board into the Special Economic Zones for a given period of time given under the Act has ten years provision.

Proposals to amend Kenya Industrial Research and Development Institute Act

Functions of the Institute

The Bill seeks to amend section 6 of the Kenya Industrial Research and Development Institute Act to provide for further functions to include buying, selling or taking patent rights in inventions and undertaking marketing research, technological and innovative products. This will enhance business incubation and spur industrialization in the country; curb rural urban migration by creating employment opportunities in the rural areas for adding value to locally available resources; and will support startups in the manufacturing sector by facilitating technology transfer and development of innovative products among others.

Proposals to amend First Schedule to the Excise Duty Act

First Schedule

The Bill seeks to amend the First Schedule of the Excise Duty Act to provide for the reduction of excise duty charged on packaging and non-virgin test liners to avoid double taxation. This is in response to concerns by the stakeholders that package excise duty to be reduced on both packaging/input and final product to avoid double taxation for the product. Therefore, there is need to eliminate this double taxation through explicitly allowing for the offset of packaging and related material. This reduction of duty on packaging material will result in increased sales of the products. Similarly exempt of excise duty on re-used packaging material will address the climate change challenges and help sectors, such as the flower Industry get carbon credits from the re-used packaging materials.

Proposals to amend First Schedule to the Miscellaneous Fees and Levies Act

Third Schedule

The Bill seeks to amend the Third Schedule to Miscellaneous Fees and Levies Act by deleting the Third Schedule and substituting with a new Third Schedule to provide for a new list of goods subject to the Export and Import Promotion Levy and prescribing the respective rates of the Levy. This will help in achieving of the policy objective of supporting the local manufacturing and create a more level playing field for local manufacturers who have struggled to compete with cheap imports. It will also reduce the country's reliance on foreign goods and services, incentivize investment by the local Micro, Small and Medium Industries (MSMIs) and contribute towards reduction of the balance of payment deficit and deter dumping of substandard and counterfeit foreign goods.

Proposals to amend the Employment Act

Definitions

The Bill seeks to amend section 2 of the Employment Act to redefine the terms 'employee', 'employer' and 'business process outsourcing' in order to provide for the provision of information technology enabled services and align with international trends.

Obligation of BPO companies and providers

Further the Bill seeks to amend section 5 of the Employment Act to provide for the obligations of BPO companies and providers of information technology enabled services to their employees. This is to recognize the employer-contractor relationship for the BPO sector whose working environment includes digital work spaces and remote working. Firms looking to establish call center or business process outsourcing (BPO) operations in Kenya have expressed concerns about the country's unclear laws regarding employer-contractor relationships.

The proposal to amend Occupational Safety and Health Act

Definitions

The Bill seeks to amend the Occupational Safety and Health (OSHA) Act to provide for the recognition of remote locations as workplaces. The OSHA does not recognize the employer-contractor relationship for the BPO sector whose working environment includes digital work spaces and remote working. This has led to several cases affecting the BPO sector resulting into some firms delaying or reconsidering their entry into the Kenyan market.

The proposal to amend the Affordable Housing Act

Definitions

The Bill seeks to amend the definitions in section 2 of the Affordable Housing Act to include the social, physical and urban infrastructure for ease of implementation of the Act.

The proposal to amend the Lands Act

Remedies of a chargee

The Bill seeks to amend section 90 of the Land Act to reduce the timelines within which a chargee may enforce remedies in case of default by a chargor. The banks have raised reservations for funding customers under the affordable housing scheme as it takes a long time, to enforce remedies for defaulters hence reducing uptake of the houses.

Chargee's power of sale

The Bill further seeks to amend section 96 of the Land Act to reduce the time within which a charge may exercise the power of sale from forty days to twenty days. This is meant to give the banking institutions confidence on the timely payment of charges with regard to the affordable housing scheme which will in turn ensure easy access to loans by the citizens thus achieving the BETA pillar of affordable housing for all.

The proposal to amend the National Electronic Single Window System Act

Fees

The Bill seeks to amend section 11 of the National Electronic Single Window System Act by granting the Cabinet Secretary the power to exempt certain category of users from the payment of fees prescribed under the Act. Further, the amendment is to facilitate the collection of dues as agreed upon by relevant government Ministries, Departments or Agencies that will lead to reduction in costs and enhance product competitiveness for priority sector.

The proposal to amend the Public Procurement and Asset Disposal Act

Participation of candidates in preference and reservations

The Bill seeks to amend section 157 of the Public Procurement and Asset Disposal Act to provide for the mandatory public procurement of forty percent of goods and services from local manufacturers or local service providers to spur local manufacturing, increase utilization and value addition of local resources thereby enhancing income and job creation.

Proposals to amend the Banking Act

Compliance with prudential guidelines

The Bill seeks to amend the Banking Act to provide for stiffer penalties against banking institutions and credit reference bureaus that do not comply with prudential guidelines issued by the Central Bank. The Bill proposes to introduce a penalty of three million for body corporates and one million for natural persons.

Core capital

Additionally, the Bill proposes to amend the Banking Act to provide for a progressive increase in banks' core capital culminating at ten billion (10B) in four years or by the year 2027.

Proposals to amend the Central Bank of Kenya Act

Regulation of non-deposit taking credit business

The Bill seeks to amend the Central Bank of Kenya Act to provide for regulation of non-deposit taking credit businesses by the Central Bank of Kenya. The Bill defines terms such as buy now pay later, "credit provider", "non-deposit taking credit business" "peer to peer lending" and "specified credit guarantee business" with regards to consumer credit.

Additionally, the Bill seeks to amend the Central Bank Act to expand regulation not just to digital lenders but to all non-deposit taking credit providers. This will ensure that all non-deposit taking credit providers which were previously unregulated, are regulated by the Central Bank. The Bill seeks to provide for licensing, approval of channels of credit, parameters of credit etc. It also seeks provide for sharing of credit information.

Similarly, the Bill seeks to provide for the Central Bank to regulate all credit guarantee businesses, including registration and licensing. It will also set out the powers of the Central Bank regarding regulation of credit guarantee businesses.

Proposal to amend the Microfinance Act

Exemption of non-deposit taking microfinance.

The Bill seeks to amend the Microfinance Act to remove non-deposit taking microfinance business from the ambit of the Act. This is because of the amendments made to the Central Bank of Kenya Act, to provide for regulation of such businesses by the Central Bank. The Bill also seeks to include provisions on the qualifications for carrying out of non-deposit taking microfinance business.

Additionally, it sets out consumer protection provisions for non-deposit taking microfinance business. These include: the requirement that they should furnish the borrower with accurate information; inform the borrower of costs associated with the credit; inform the borrower of the rights and obligations.

Finally, the Bill proposes to set out a six-month transitional period for the non-deposit taking microfinance institutions to comply with the new provisions.

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