TECH HIVE ADVISORY

# REVIEW OF THE KENYAN STARTUP BILL, NO. 163 (SENATE BILLS NO. 16) 2020

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In September 2020, the Kenyan government published the Startup Bill ("the Bill") in its National Gazette. The Bill, if successfully passed, would see Kenya joining two other nations, Senegal and Tunisia as the third African country to do so.

The Startup Bill, which was sponsored by Nairobi County Senator, Johnson Sakaja, has been published in the Kenya Gazette under the auspices of the Ministry of Education, Science and Technology, with the supervisory authority being the Kenya National Innovation Agency.

However, before the Bill can become law, it will need to pass through several steps including reading at the Senate and National Assembly.

Generally, the reception of the Bill has been positive; however, there are certain areas worth examining as well which we have done below.

## SCOPE

The Startup Bill defines[1] the goal of the Bill to be the provision of a framework to encourage growth and sustainable technological development and new entrepreneurship employment as well as creating a more favourable environment for innovation and attracting local talents and capital.

## REGULATORS

Under the Bill, the Kenya National Innovation Agency, which was established under the Science, Technology and Innovation Act, 2013[2], and county executive committee members responsible for matters relating to science, technology and innovation are mandated to establish incubation programmes and regulations on the relationship between incubators and startups.

## RELATIONSHIP WITH EXISTING LAWS

Certain aspects of the Bill refer to and amend existing laws in the country, such as the Kenyan Science, Technology and Innovation Act under which the Kenya National Innovation Agency was established. Important terms mentioned in the Bill such as "fund", "incubation" and "innovation", also retain the meaning given them under the Science, Technology and Innovation Act. The Bill also proposes to amend[3] Sections 29, 32, 33, 36 of the Science, Technology and Innovation Act to:

1. Include two specialists in the fields of innovation, technology and entrepreneurship and one to represent startups in the country nominated by an organisation representing startups; and

2. Mandate the Kenya National Innovation Agency and the National Research Fund to financially support technological innovations.

Similarly, the Bill makes reference to the Companies Act, the Partnership Act, the Limited Liability Partnership Act[4] and the Non-Governmental Organizations Co-ordination Act in specifying entities eligible to be registered as startups and admitted into an incubation programme.

[1] Section 2 of the Startup Bill, 2020.
[2] No. 28 of 2013.
[3] Section 32.
[4] No. 17 of 2015.

## NOVEL PROVISIONS

The Bill introduces a number of novel provisions to promote innovation in the country such as:

### ESTABLISHMENT OF INCUBATION PROGRAMMES

The Bill establishes startup incubation programmes for qualified startups in the country, defining incubators as companies, partnerships, non-governmental organizations or limited liability partnerships, with the primary goal of supporting the birth and development of start-ups, innovation, and related activities.

### CREDIT GUARANTEE SCHEME

The Bill grants the Cabinet Secretary the power to establish a credit guarantee scheme[5] to provide accessible financial assistance and management to startups[6].

### TRAINING AND CAPACITY BUILDING

The Bill also makes provision for training and capacity building of startups through the establishment of platforms at the national and county levels enabling them take advantage of the scheme[7].

### INTELLECTUAL PROPERTY

Under the Bill, startups can access and receive assistance to file patents locally and internationally. It also provides support for legal action in infringement cases[8].

### FISCAL INCENTIVES

The Bill provides fiscal incentives in the form of tax incentives among others for the development of startups in the country[9].

### IMPACT OF THE BILL ON BUSINESSES

Clearly intended to jolt and catalyse startups and research and development in the country, there have been several appreciative comments about one of the big four tech ecosystems on the continent – Nigeria, Kenya, Egypt and South Africa – finally getting on track by beginning the process for the enactment of pro-startup legislation.

The Bill contains several useful provisions for promoting startup growth, however, certain sections remain unclear as regards implementation and purpose.

[5] Section 24 (1).
[6] Section 24 (2).
[7] Section 25.
[8] Section 26
[9] Section 27

## COMMENTS

In spite of the merits of the Bill, there are certain points worth critiquing:

1. While the Bill went to great lengths to detail the eligibility requirement[10] for admission into an incubation programme as well as the procedure and requirements for the certification of incubators[11], the procedure[12] for withdrawal from the incubation programme is not explicitly spelled out.
In addition, Section 21(2) of the Bill requires the Agency and the county executive committee members to set up standards and guidelines to guide the withdrawal process which they are also required to abide by in removing defaulting incubators. This arrangement could potentially breach objectivity and neutrality in their activities.

2. Similarly, although Section 28 of the Bill states that startups will be encouraged to achieve growth objectives set out by the Cabinet Secretary, it is unclear how these growth objectives will be determined or how they would be enforced.

3. Section 13 (1) (d) provides that the Registrar or County Registrar may reject an application for the admission of an entity where its objects are likely to be pursued for an unlawful purpose or used for a purpose incompatible with public interest. However, the Bill neglects to specify what "a purpose incompatible with public interest" means. The lack of specificity here could engender interference with creative interests stifling them.

4. Although the Bill has been described to not be a Money Bill[13], it remains to be seen how it would carry out its stated goals of providing fiscal incentives to startups. It is questionable if the Bill is intended merely to guide policy makers in declaring these incentives raising questions about its effectiveness.

5. The registration and eligibility requirement for a Kenyan majority ownership appears to be in line with Kenya's move to increase local ownership of profitable tech startups in the country following a survey which revealed that at 37%, higher than any other country, Kenya had the largest presence of foreign co-founders. This has seen the country, in August 2020, pass the National Information Communications and Technology Bill that prescribes that foreign companies doing business in the country's ICT sector must cede no less than 30 percent shareholding to Kenyans.
While the motives are clear, there are reasonable concerns about how this could potentially impact the access of foreign funding coming into the country.

[10] Section 19.
[11] Section 20.
[12] Section 21(1)
[13] A Money Bill is a Bill that contains provisions dealing with taxes; the imposition of charges on a public fund or the variation or repeal of any of those charges; the appropriation, receipt, custody, investment or issue of public money; the raising or guaranteeing of any loan or its repayment. A Money Bill can only be introduced in the National Assembly.