



Legal Alert | August 30, 2021

Business Registration Service Amendment Bills

Introduction

The Business Registration Service (“BRS”) published for public consultation several bills in an effort to address current legislative gaps and harmonise the business regulatory framework. The bills published were the Insolvency (Amendment) Bill, 2021; the Hire Purchase (Amendment) Bill, 2021; the Companies (Amendment) Bill, 2021; the Registration of Business Names (Amendment) Bill, 2021; the Limited Liability Partnership (Amendment) Bill, 2021; the Movable Property Security Rights (Amendment) Bill 2021; and the Business Registration Service (Amendment) Bill (“Bills” and each a “Bill”). We review all the Bills below except for the Insolvency (Amendment) Bill, 2021 which will be reviewed separately.

Companies (Amendment) Bill

The Companies (Amendment) Bill, 2021 seeks to amend the Companies Act (the “Companies Act”). The Bill proposes that an applicant provides a statement of the proposed company’s intended primary business activities at incorporation. This aligns with international best practices, where at registration, one must describe the company’s general activities. Further, the Bill requires disclosure of initial beneficial owners at incorporation.

Under the Companies Act, an unlimited company could convert into a company limited by guarantee. Companies limited by guarantee have always been tightly controlled, with vetting of the members and directors by the National Intelligence Service due to the possibility that such companies are used for money laundering. The Bill, in further effort to control companies limited by guarantee, proposes to bar such conversions of unlimited companies to companies limited by guarantee.

A company that has ceased to be a public company is required to keep a register noting interests in its shares for a period after it ceases being a public company. The Bill proposes to increase this period to

10 years from the current six years.

Loans or transactions that, by their nature, give benefits similar to loans to directors of public companies will require authorization by members through a special resolution, instead of an ordinary resolution as is currently required. This is meant to increase controls around public companies which typically will have a large number of members and may offer securities to the public. The Bill also proposes to amend the Companies Act to clarify that private companies with paid up capital of below KES 5,000,000.00 and companies limited by guarantee, may appoint a secretary.

Limited Liability Partnership (Amendment) Bill

The Limited Liability Partnership (Amendment) Bill, 2021 proposes to amend the Limited Liability Partnership Act, No. 42 of 2011 (the “LLP Act”). The amendments reflect the government’s recognition of the increased use of LLP as a business vehicle and their potential to enhance the ease of doing business.

The Bill proposes to require new LLPs to disclose their initial beneficial owners at registration. Existing LLPs must also disclose their beneficial owners, or risk a fine not exceeding KES 500,000.00. Access to accurate, basic and beneficial ownership information by competent authorities in a timely manner remains a key pillar in the ranking of a country’s compliance with international standards on Anti-Money Laundering and Counter Terrorism laws and compliance enhances the government’s efforts to position Nairobi as an International Finance Centre.

The LLP Act allows a partner to assign their partnership interest in respect of distributions they are entitled to from the partnership. Currently, an assignment automatically terminates the relevant partner’s membership in the LLP and entitles the recipient to participate in the management of the LLP

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The Bill proposes to allow assignment without these consequences, further entrenching the LLP as a corporate body where the partnership interest in an LLP is detachable from the partner, in the same way, shares in a company are and can be transferred. The Bill proposes to allow registration of foreign LLPs. Like foreign companies, a foreign LLP will also be required to appoint a local representative who may be a Kenyan Citizen or a foreigner who has a permanent residency permit.

For LLPs these changes remain a welcome addition as LLPs gains traction as an investment vehicle of choice, noting that, just recently, a corporate bond was issued through an LLP.

Hire Purchase (Amendment) Bill

The Hire Purchase (Amendment) Bill, 2021 introduces a new definition of a hire purchase agreement. The new definition clarifies in simpler terms that a hire purchase agreement involves hiring of goods, instalment payments of the hire purchase price, an option to buy at the end of the agreement and that the owner retains legal ownership of the goods during the hire purchase period. Under the proposed amendments, the Hire Purchase Act (the "HP Act") will now apply to all hire purchase agreements. The HP Act currently excludes agreements with a hire purchase price below KES 4,000,000.00. Under the current regime, all hire purchase agreements must be registered to be enforced. The Bill proposes to delete this requirement. To ensure transparency on the true cost of a hire purchase good, the Bill proposes to require that hire purchase agreements disclose key details including the applicable interest rate; total interest; processing fee; other applicable fees (e.g. insurance and freight charges); and default interest. The HP Act currently only requires limited disclosures being the cash price, hire purchase price, and the amount and due date for each instalment.

The Bill proposes to make the breach of warranties and conditions of a hire purchase agreement offences punishable by a fine not exceeding KES 3,000,000.00

or up to three-year jail term, on conviction. The Bill reviews the fines imposed under the HP Act to better reflect the current market values of hire purchase agreements. The Bill proposes to increase the fine for failing to notify the owner of the goods of a change of address from KES 2,000.00 to KES 100,000.00. The Bill also proposes to increase the fine for removal of goods out of the country without the owner's consent from KES 10,000.00 to KES 1,000,000.00. The Bill also proposes to clarify that application for hire purchase licenses will be made to the registrar of companies. Due to amendments in 2017 which deleted the definition of registrar without substitution, the HP Act currently lacks clarity on the entity to issue hire purchases licenses.

Registration of Business Names (Amendment) Bill

The Registration of Business Names (Amendment) Bill, 2021 is a long overdue amendment to the Registration of Business Names Act (the "RBN Act"), which commenced on September 29, 1951. The RBN Act provides for the registration of firms, individuals and corporations carrying on business under a business name. The Bill, similar to the other bills proposed by the BRS, aims to streamline and centralise services to business entities, while amending the law to be in line with current legislative developments.

The Bill proposes to enhance accountability of proprietors registering a business name by requiring at registration a concise description of the true nature of the business. Further, the registrar is given the power under the Bill to require any document to be lodged or issued electronically, either by the relevant person or their agent. This is geared towards streamlining and modernising the application process

The Bill also proposes to allow for the registration of a business name after commencement of business provided that the proprietor applies for registration within 30 days from the commencement of the business. The Bill increases the penalty for submitting

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false information to the registrar to KES 100,000.00 or a prison term not exceeding three years or both. This is an increment from the previous penalty of KES 2,000.00 or prison term not exceeding 12 months.

Business Registration Service (Amendment) Bill

The Business Registration Service (Amendment) Bill 2021 recommends the renaming of the Service established under the Business Registration Service Act, 2015 (in this section, the “Act”) to “Business Registration and Insolvency Service” (“BRIS”). BRIS will have powers to enter into contracts, lend money and charge fees for services. These are part of the amendments to the constitutive section of BRIS.

Movable Property Security Rights (Amendment) Bill

The Movable Property Security Rights (Amendment) Bill, 2021 proposes to introduce minimal amendments to the Movable Property Security Rights Act, 2017 (the “MPSR Act”). These amendments are aimed at streamlining the Act with the existing legislation. The MPSR Act is unclear on how fees collected by the registrar for applications under the MPSR Act should be treated. The Bill corrects this by providing that these fees will form part of the funds of BRIS.

Conclusion

The BRS Bills are a positive step taken towards sealing the existing gaps in the various Acts they propose to amend. The Bills, should they be passed, are likely to ensure a unified and simpler business regulatory framework. This will reduce the costs and time associated with different administrative bodies supervising same business operations. We will keep you updated on any significant developments regarding the Bills as they go through the legislative processes.

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