

GPKLegal considers the implications of THE NATIONAL INVESTMENT BOARD BILL

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Introduction

The National Investment Board Bill (“the Bill”) proposes to establish a National Investment Board (NIB) which (through its Secretariat) would, amongst other functions, promote, encourage, attract, facilitate, monitor, and evaluate all forms of investment and business activity in Sierra Leone (section 12(2)). If enacted, the Act would cover both domestic and foreign investment.

The Board will include: the President (chairman of the Board); the Vice-President; the Chief Minister; the Minister responsible for foreign affairs and international development; the Minister responsible for finance; the Minister responsible for mines; the Attorney-General and Minister of Justice; the Minister responsible for trade and industry; the Minister responsible for planning and Economic development; the Minister responsible for Lands; and the Governor of the Central Bank.

The Secretariat would be headed by an Executive Director. The main function of the Secretariat is to implement the Board’s decisions and to carry out the objectives for which the Board is created.

The term “investor” is defined as an individual or legal entity engaged in the business of value adding, manufacturing and other business activities. “Investment” is defined as the creation or acquisition of business, assets, and services with a view to generate higher value and includes, restructuring or rehabilitation of an existing business enterprise. The Act will therefore have ramifications for all existing as well as future businesses in Sierra Leone.

Sections 50, 51 and 52 of the Bill effectively abolish the Corporate Affairs Commission, the Public Private Partnership Unit and the Sierra Leone investment and Promotion Agency (SLIEPA) as we know them, with the Board absorbing their current mandates.

Increased Government scrutiny and involvement

- The Bill mandates the Board to monitor all business activities in Sierra Leone, including public sector initiatives, private businesses, and public-private partnerships. Section 34 (e) specifically mandates that an investor (i.e. anyone running a business) shall respond to any query from the Board in connection with the operations of the business entity, while section 34 (h) allows the Board or its employees or agents access to monitor the operations of the business. This will increase government involvement in the private sector in a way that many private companies will find undesirable and an unwarranted interference with their operations. Furthermore, it is noteworthy that the “query” referred to in the said section has not been defined leaving it open to misinterpretation.

- The Bill allows for greater government involvement and intervention in the private business sector, something which may be inimical to free market economic growth. The certainty which provides assurance to investors that long term contracts and financial commitments will be secure and free from political interference is likely to be undermined by these provisions.

Make-up and Structure of the Board

- The statutory members of the Board may not necessarily possess the requisite experience and expertise in trade and investment. This is clearly disadvantageous to the promotion of investment and trade. By comparison, the current Board of SLIEPA consists of persons with experience in industry, business, exporting, export promotion, investment, as well as representatives of the Sierra Leone Chamber of Commerce, Industry and Agriculture, and the Sierra Leone Association of Manufacturers (section 3 of the SLIEPA Act). It is noted that while sections 13 (2) and 16 of the Bill provide that the Executive Director and Deputy Executive Director respectively shall have proven abilities in matters relating to international trade, foreign direct investment, economics or public policy, section 6(3) prohibits the Executive Director, as secretary, from voting in any deliberations of the Board. The Deputy Executive Director is not included as a member of the Board.
- All members of the Board would be members of cabinet of the government of the day and apart from the President and Vice-President, would have been directly appointed by the President. There may potentially be little diversity of thought or opinion among members of the Board, which may lead to a one-dimensional and discriminatory approach to issues.
- It is arguable that the composition of the Board is overly politicized and that it is in effect a sub-committee of the cabinet. There is no provision for private sector representation; or indeed civil society representation given growing interest in the intersection between investment and climate, environmental, labour, inclusion, and gender policy issues.
- A secretariat is envisaged for carrying out the direction of the Board. One of the proposed units within the secretariat will be responsible for investment and export promotion. This is contrary to current best practice which separates these two activities as they are very different in scope and function.
- There is no provision in the secretariat for a unit on post-investment care, monitoring, evaluation, and performance review – again contrary to best practice.

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Potential for unconstitutionality, partisanship, and conflict

- Section 35 (2) of the Bill enlarges the scope of compulsory acquisitions provided for in section 21 of the Constitution of Sierra Leone 1991 with the addition of the word “undertakings”. It is debatable whether section 21 of the Constitution envisaged the compulsory acquisition of private businesses. Therefore the constitutionality of this provision is questionable. Undertakings are not defined and so presumably include intellectual and other commercial rights.
- As noted above, all members of the Board would be members of cabinet of the government of the day. This potentially increases the risk of decisions (for e.g. whether to allow a certain company to be incorporated) being made on a partisan basis, or for the benefit of the governing political party. Section 10 does however provide that any member of the Board with an interest, direct or indirect, in any matter being considered by the Board is to disclose the nature of his/her interest to the Board and shall not take part in the deliberations or decision-making processes relating to that matter. There is however no provision for a register of members' interests.
- Given the sweeping functions of the Board, there is the potential for conflict between the activities of the Board and other Ministries, Departments and Agencies (MDAs), such as the National Minerals Agency and the National Tourist Board. It is unclear what strategies have been or will be implemented to deal with such conflicts if they arise. Section 28(1) of the Bill provides simply that MDAs performing functions relating to investment in Sierra Leone shall cooperate with the Board.

Investor Confidence and Obligations

- The provisions on the rights and obligations of the state and investor are not clear and do not reflect best practice. Indeed, no distinction is made between the two.
- Section 34 stipulates inter alia that investors must: respond within the period prescribed by a written notice to any query from the Board in connection with operations of the investment enterprise; and must permit the Board or its employees or agents access to monitor the operation of the business enterprise.
- Section 47 provides inter alia that a person who knowingly or recklessly gives false or misleading information to the Board or who refuses or neglects to provide information or a service which the Board reasonably requires for the purpose of the enforcement of the Act commits an offence punishable by a term of imprisonment of up to two years and or a fine of up to two hundred million Leones. If the offence is committed by a corporate

body every director or officer of the body will be deemed to have committed an offence. In the case of a partnership, every partner or officer of the partnership will be deemed to have committed an offence.

- Those advising potential investors (i.e. anyone running a business in Sierra Leone) will be duty bound to highlight the risk of innocent mistakes made in providing information or a service to the Board resulting in imprisonment or a fine or both if the Board deems the failure to be willful or reckless.

Dispute Resolution

- Many developing countries no longer utilise bilateral investment treaties (BITs) as they are perceived to favour the investor and home country rather than the host country. As a result, it has become common for some developing countries to circumscribe the matters on which an investor may take action against the state as a way of downgrading disputes to matters for adjudication under commercial law in local courts. Nevertheless, the proposed dispute settlement provisions do not reflect best practice and lack clarity.

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- Section 37 (2) provides that, in relation to the settlement of disputes, where the investor and the Board are unable to reach an amicable settlement, the parties shall proceed to the courts of Sierra Leone for adjudication.
- If the adjudication fails, the dispute may be submitted to arbitration in one of three ways. Although in theory the mode of arbitration is to be mutually agreed between the Board and the investor this is subject to a proviso which allows the Board to specify the mode of arbitration in any investment approval granted to the investor.
- Foreign investors are often wary of domestic courts and insist on the comfort of a neutral dispute mechanism in a neutral seat. This provision is therefore likely to deter potential foreign investment. This is particularly so as the composition of the Board is scheduled to change with each successive Government.

Centralization, efficiency, and economic advantages

- As a “one-stop shop centre” (section 20), the NIB will serve to facilitate the registration, licensing and setting up of businesses, potentially making it easier for investors to set up businesses and commence trading. There is merit in being able to obtain the relevant licenses and other documentation from one centralized agency, rather than having to interface with multiple MDAs.

- Section 28(4) provides that MDAs will sign agreements with the Board defining service commitments and maximum delivery timelines for services offered to investors. This may improve timelines with respect to the establishment of businesses and the obtaining of relevant licensing and other documentation.
- Sections 30 to 33 deal with the provision of incentives to investors who qualify for such incentives under the provisions of section 31(2). Such incentives do have the potential to increase investment inflows into the country.

Conclusion

During a three-day consultative meeting held in Freetown in December 2020 with various MDAs in attendance, the main objective given for the creation of the NIB was to integrate a modern investment promotional facilitation service through improved networking, collaboration, and coordination of MDAs. The proposed bill represents a divergence from that objective as the Bill essentially replaces the relevant MDAs in charge of investment, registration, and regulation of businesses with the Board rather than seeking to collaborate with them.

Sierra Leone has traditionally operated a capitalist economic model with a free market where people are free to operate businesses as they wish and not to be subjected to unnecessary government interference. This Bill is at odds with such an economic model, and considering the greater government involvement and control, is arguably more suited to a command economic model.

The Act as currently drafted has no provision for alignment with the ECOWAS Common Investment Code (see here: [ECOWAS-COMMON-INVESTMENT-CODEENGLISH.pdf](#)) or the Pan-African Investment Code which is a non-binding AU instrument (see here: [32844-doc-draft panafrican investment code december 2016 en.pdf \(au.int\)](#)). Significantly the draft does not anticipate the AfCFTA Investment protocol which is expected to be negotiated next year or the WTO Investment Facilitation Agreement which is currently being discussed in Geneva.

The focus of the Act appears to be the creation of an institutional framework for investment regulation without being clear about what is to be regulated. There is, for instance no clear definition of what an 'investment' is or on the overall investment policy framework. As a result, the draft is silent on the priority areas for investment and how this relates to the country's development. The agricultural sector is mentioned but this is clearly too narrow. A proper and considered definition of "investment" is fundamental to the operation and interpretation of any resulting legislation.

While some aspects of the Bill have the potential to incentivize investment and improve the ease of setting up and operating businesses, in its present form it represents a backward step and is likely to impact adversely on investor confidence and make regulatory compliance obligations

more onerous. There is also an obvious risk of abuse which may ultimately prove detrimental to investment inflow and economic growth.

The Bill potentially restores barriers to investment and makes it more onerous to conduct business in Sierra Leone. It also creates new offences and penalties that are far reaching.