



COMMENCING BUSINESS IN THE TECHNOLOGY SPACE IN NIGERIA: LEGAL GUIDE

INTRODUCTION

Digital revolution remains one of the key features of the 21st century with technology startups daily developing software and other solutions which companies and organisations are leveraging on to transform and improve service delivery and other socio-economic challenges. Businesses in different sectors, financial, energy, agricultural, transportation sectors and so on have all benefitted immensely from the successes and advancements in technology. Nigeria is not left behind in this revolution with the steady rise of technology entrepreneurs and startups. These tech startups are often at the inception lacking in funds to procure the necessary legal and financial expertise to help navigate the risks associated with their venture. Recently, in recognition of its importance and contributions to national development, the Nigerian Vice President, Professor Yemi Osinbajo and some other Nigerian technology experts and investors paid a visit to the Silicon Valley in the United States to explore the possibility of further cooperation with global tech giants. We have addressed a few legal issues startups may need to consider for their venture in Nigeria:

TYPES OF VEHICLE

One of the first considerations for a venture is the form the business should take whether it should be a business name, partnership or limited liability company. There are various benefits and drawbacks to each. The various business forms are considered below.

- A. Business Name:** This is a name or style under which a business can trade or carry on business. The various forms of business names that can be operated are as follows:
- i. Sole proprietorship:** This is a form of business owned and run by an individual whereby there is no legal distinction between the owner of the business and the business.
 - ii. Partnership:** This arrangement comprises two or more individuals who have agreed to own a business and be personally responsible for the debts and other obligations of the business. It can accommodate a maximum of up to 20 partners.
 - iii. Limited Liability Partnership ("LLP"):** A Limited Liability Partnership is a form of partnership where the partners enjoy limited liability similar to that of an incorporated limited liability company. Only Lagos State has a law permitting the operation of an LLP through the Lagos State Partnership (Amendment) Law, 2008. However, with the recent passing of the amendment to the Companies

and Allied Matters Act¹, which if signed by the President, will apply to the entire Federation of Nigeria, a Limited Liability Partnership will now be legally permissible throughout the country. This provides another available option for small and medium scale entrepreneurs who may want some legal structure created around their businesses.

B. Company: This is a legal entity made up of an association of people, be they natural, legal, or a mixture of both, for the carrying on of a business. A company can be either limited or unlimited by liability. For a technology the limited liability company is the appropriate vehicle. A company is created as a distinct legal personality so that the company itself can be held legally liable for the actions or omissions arising from its operations.

Prior to any company carrying on business in Nigeria, the subscribers must first comply with all the incorporation requirements. Besides the incorporation requirements, there are certain requisite permits and licenses that the company must acquire for its operations some of which are dependent on the sector in which the startup intends to operate (these may include the National Office for Technology Acquisition and Promotion (NOTAP) and National Information Technology Development Agency (NITDA) approvals); and also the procurement of expatriate quota for foreign personnel if the promoters intend to engage, collaborate or have as shareholders foreign entities or individuals.

Incorporation requirements

The principal statute governing operation of businesses in Nigeria is the Companies and Allied Matters Act (CAMA)². To incorporate, it is a pre-requisite that a company must have a minimum of two (2) subscribers and at least two (2) Directors at all times. With the recent passing of the Amendment Bill to CAMA however, it is our hope that a company of only one person especially by someone who intends to set up a technology company will be possible upon Presidential assent. The proposed amendments as passed by the National Assembly also exempts company promoters from certain statutory/regulatory compliances viz a viz the requirements for a company secretary, annual general meeting and so on. These amendments are pursuant to the Federal Government's policy on ease of doing business in Nigeria. In addition and for incorporation purposes, a name search is conducted, Memorandum and Articles of Association are drafted and executed, first directors appointed, shares allotted and other requirements fulfilled.

Registration and Protection of Intellectual Property Rights

Since technology startups are focused on innovations, inventions, and transformation of ideas to reality, usually it is also characterized by the use of distinct name, logo, slogan, domain name, shape, colour or sound, all of which are registrable with the Commercial Law department, Ministry of Trade and Investment in Nigeria. Given this uniqueness, it is critical that their outputs and marks are legally protected by registering their trademarks, patents, and or designs. Registration of these rights is achieved in three extensive stages, commencing with availability search in order to determine whether there are existing rights similar to that being proposed by the startup, followed by an application for the registration of the ideas or marks at which stage, a letter of acceptance is issued to the startup to serve as an approval in principle. The last stage involves the application for Certificate of registration to enable the startup becomes the original author/owner of the invention or mark respectively and enjoys its benefits.

¹ Cap C20 Laws of the Federation of Nigeria, 2004

² ibid

Registration of intellectual property rights provides legal protection against thefts and other infringements. Where there are infringements, in addition to other remedies available to the owner of the rights, an action may be commenced at the Federal High Court for damages and an injunction restraining the person from continuing the infringement.

Taxation and Tax Exemptions

It is important for tax purposes that the company upon incorporation obtains a Tax Identification Number and register for Value Added Tax at the Federal Inland Revenue Service – TIN and VAT Registration. The TIN number is applicable for the payment of corporate tax and all other taxes. The incorporated company is also expected to act as an agent of the tax authorities by collecting VAT on any services. To this end, the company is expected to file monthly VAT returns to the tax authorities. The applicable tax rate for the company is 30% under the Companies' Income Tax Act, it is important to also note that the employees of the company will be subject to personal income tax including the expatriate staff, if any. Companies Income Tax Act is payable in arrears and it is deductible on the income of a company based on the preceding year's profit.

However, fiscal incentives in form of duty waivers, tax exemptions, tax holidays, rebate, accelerated capital allowances and many more may be available to a company in the technology sector, for instance companies in business of installation of scientific instruments and communications equipment, manufacture of telecommunications cables, production of ICT equipment, electronic commerce services and software development and publishing are qualified for pioneer status tax incentive for between three to five years.

NOTAP Registration

National Office for Technology Acquisition and Promotion regulates the transfer of foreign technology or technical expertise to Nigeria, and the business of technology in Nigeria for now is substantially reliant on the can importation of both. Depending on the type of startups however, there may be need for registration with NOTAP, of the transfer of technology contract with the transferring entity or technical expertise to be provided to the startup. Such Agreements must be registered with NOTAP as a pre-condition for obtaining approval to repatriate in foreign currency any dividends or fees that may be due to the foreign partner. Fees payable under the agreement (such as royalties, management fees, software licenses etc.) must be proportionate to the quality and use of the technology or services that is being transferred and the agreement must also clearly specify the features of same. The effect of non-registration prevents repatriation of fees, profits, royalties etc. arising from the unregistered contract through the Central Bank of Nigeria or an authorized dealer.

The Role of National Information Technology Development Agency (NITDA)

NITDA's role in the technology space is quite diverse, its major responsibility however includes regulation, monitoring, evaluation, and verification of the progress made in the technology sector under the supervision and coordination of the Ministry of Communications. Its duties include but not limited to the following:

- i. To operate and implement the National IT policy and to give effect to provisions of the National Information Technology Development Agency Act (NITDA Act) of 2007;
- ii. To enter into strategic alliance with the private sector as well as international organizations for the actualization of the IT vision;
- iii. To develop and regulate the Information Technology Sector in Nigeria;

- iv. To ensure that Information Technology resources are readily available to promote Nigerian development; and
- v. To empower Nigerians to participate in software and IT system development.

Flowing from the above, it is important to note that every technology company in Nigeria has to be registered with NITDA.

Contractual Arrangements

In ensuring a viable technology business, the following agreements are required both pre and post incorporation as the case may be:

- **Shareholders/Founders Agreement**

A Shareholders/Founders Agreement governs the relationship among the founders/ initial shareholders, and the subsequent shareholders and the company. It contains clauses relating to the decision making powers of the founders, privileges and rights, shareholding structure, disposal or transfer of shares such as pre-emptive rights, rights of first refusal, tag along and drag along rights, redemption of shares upon death or disability amongst others. It also includes other clauses such as issues requiring shareholder approval, declaration of dividends and assignment of IP and invention rights to the company. This agreement is important because it provides for the entire rights and obligations of the founders of the business enterprise and their relationship with the company that is being established.

- **Non-Disclosure Agreement (NDA)**

All startups are built on ideas and the execution of these ideas usually involves collaborations and sharing of these ideas with others. An NDA is a contract entered into to protect the confidentiality of information shared between parties. It restricts third party access to the information shared and is enforceable when breached. An NDA could be mutual (for circumstances when information is to be exchanged by both parties) or one-sided when only one party is to disclose information. The NDA should contain a non-circumvention clause to prohibiting parties from profiting from confidential information other than as agreed between them.

- **Intellectual Property (IP) Assignment Agreement**

This is an agreement by which a party assigns intellectual property rights to another and in this case the incorporated entity. Startups are built on intangibles, inclusive of skills, ideas, expertise and know-how, especially when it relates to technology. In coming together to form a business, the primary contributions of parties to the business may entail these intangible properties, and may need to be assigned to the startup. The means of doing this is through an IP Assignment Agreement and forms part of the initial arrangement between the founders. There is a need to assign all the IP rights created or owned by the promoters or founders which forms the main and probably only assets of the startup to the company.

- **Invention Assignment Agreement**

Whilst the IP Assignment Agreement usually addresses the assignment of pre-incorporation IP rights to the startup, an Invention Assignment Agreement assigns the rights that may arise during the lifetime of the startup. It is usually drafted in a “futuristic” manner such that it assigns to the company, all intellectual rights that may arise or be developed whilst executing tasks in the ordinary course of the startup’s business. Parties to an Invention Assignment Agreement would usually include employees, founders and/or consultants. However, it is possible to have the IP & Invention Assignment Agreements subsumed under one document.

- **Vesting Agreement**

A vesting agreement (or clause) is an arrangement that provides benefits, privileges, authority, rights, or interest in an asset or property (which includes a startup) to accrue to a party and at what time. Vesting agreements ensure that at the commencement of the enterprise, founders get their full allotment of shares or equity to avoid double taxation, nevertheless, the company reserves the right to acquire a percentage of a founder's equity in case he or she disengages from the project before the agreed period. It is to guarantee the continuous involvement of the original shareholders for a specified period of time. In effect where one of the founders or shareholders decides not to continue participating in the project before the specified period, by the vesting agreement, he or she is only entitled to the shares that have vested as at the time of walking away from the venture.

Conclusion

The pervasive nature of technology has made it a critical element in driving the 21st century economy. This has encouraged a vast number of technology experts and young entrepreneurs to participate in the startup space hence the need to have appropriate legal vehicles to achieve their entrepreneurial dreams. Whilst the vehicle to conduct the business is important there is also need for contractual documentation between owners and service providers. The contractual documentation must properly assess and allocate risks to the party most appropriate to bear such risk. In addition to contractual documentation, there is need to navigate the regulatory maze in Nigeria to ensure that the business is regulatory compliant.

Key Contact



Lateef Bamidele
Associate

lateef.bamidele@advocaat-law.com