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SHOULD STARTUPS AND INNOVATORS BE CONCERNED ABOUT THE PROPOSED NATIONAL INFORMATION TECHNOLOGY DEVELOPMENT AGENCY ("NITDA") ACT 2021?

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INTRODUCTION

The National Information Technology Development Agency Bill 2021 (the "Bill) which suddenly came into circulation in the past week, has raised concerns amongst industry stakeholders. Although it is presumed that this Bill emanated from NITDA itself, we are not certain of this fact. World over, the exponential growth of the digital economy has stirred up debate about the need for emerging technologies to be captured for regulatory oversights. Old laws are fast becoming obsolete and inadequate, and regulators are racing against time to catch up with the tech revolution. However, overregulation or in indeed unnecessary or bad regulation can stifle and sometimes all together, kill innovation, resulting in minimal gains of technological advancement to government and the public. Regulatory oversight, although necessary, must therefore be done in a manner that supports digital innovation especially in an emerging digital economy such as Nigeria. In coming up with an up-to-date NITDA Act, it is advisable that the level of regulatory oversight should be commensurate with the activities being regulated and the level of risks such activities pose to the public. The majority of tech innovators in Nigeria are still small size startups compared to developed economies such as the United States, United Kingdom, Germany, China, etc. Heavy handed regulation will result in these startups being unfairly disadvantaged as a result of the high costs associated with regulatory compliance and slow the pace of foreign investment in that sector.

The Bill seeks to amend the 2007 Act and provide for the administration, implementation, regulation of information technology systems and practices as well as digital economy in Nigeria and for related matters. Since 2007 when the current Act was enacted, there has been wide deployment of artificial intelligence and digital technologies and a huge rise in internet access by the teeming population. The industry therefore recognizes the need for an up-to-date legislation in the tech space. However, it is not expected that such amendments to the NITDA Act would be a heavy handed interventionist regulatory model at this budding phase of Nigeria's technological growth, save for particular areas of concern such as the need to control market monopoly by tech giants and big data companies, consumer protection, protection of public interest, data privacy and perhaps in the area of revenue generation, capturing non-resident companies that fall within the "area of significant economic presence" for the purpose of taxation.

The Bill applies to the provision, deployment and use of information technology systems, practices, and digital services within Nigeria, or on a ship or aircraft registered in Nigeria.

This article seeks to examine some of the provisions of this Bill that may raise red flags for tech innovators and startups.

POWERS OF NITDA

The Bill introduced a new Section 6 titled "Powers of the Agency" which delineates the powers of the National Information Technology Development Agency ("NITDA" the "Agency"). The reach of the Agency by virtue of Section 6(3) is quite wide as it provides that the Agency is empowered to develop regulations, guidelines and directives on the use of information technology and digital services in every sector of the economy.

Licensing of Information Technology and Digital Services Providers

Of note is Section 6(5), (12) and (20) which mandate the Agency to fix licensing and authorization charges and collect fees and penalties in the exercise of its functions, and register, issue and renew, suspend and revoke licenses and authorisations for the provision of information technology and digital services in the

information technology and digital economy sector. ***Simply put, every startup in the tech space would be required to be registered and to apply for operating license from the Agency accompanied with the payment of prescribed fees.***

So why the need for licensing? Traditionally, issuing licences is one of the ways in which government monitor revenues generated by businesses in their domain for the purpose of taxation, prevent illegal or injurious activities., and generally monitor and regulate the activities of licensees. However, a lot of bureaucracy and delays have always accompanied this process as well as increase in startup costs which is not something the sector needs at the early stage of its growth. The World Bank has advised that prior to modifying regulatory frameworks for digital services, ***governments should undertake targeted, thorough, inclusive, and transparent review processes*** of the digital services in question to determine whether regulation is needed. This should include defining the scope of services under review, identifying whether there are issues to be addressed, assessing whether the existing regulatory framework is sufficient to address these issues, and considering the regulatory model that imposes the least burden on government and industry. [1]

The sweeping scope of the services captured by the licensing powers of the Agency and the resulting unavoidable multiplicity of regulators does not seem to have taken these factors into consideration. Already, there is an ongoing effort by stakeholders in the tech space to sponsor the Nigerian Startup Bill in a bid to advance the growth of the tech startup ecosystem in Nigeria by canvassing for co-created regulations that are well planned and geared towards creating an enabling environment for tech entrepreneurs. The NITDA Bill undermines this effort.

The question is, is NITDA willing to sacrifice the fostering of the budding innovative tech space in order to earn additional funds from licensing at this initial stage of growth of the industry, which invariably will be in addition to the licensing requirements of regulators of the sectors in which the service provider operates.

The traditional model for government oversight has always revolved around regulations. However, the world is changing and the tech revolution is dynamic, disruptive and fast paced and government agencies are learning to adapt and avoid stifling innovation through overbearing and uninformed regulations. The concept of "masterly inactivity"[2] has emerged as an offshoot of smart regulation, with countries like Singapore recognizing the need to adopt this model in supervising the use of crypto tokens. The applicability of new and untested technology for instance can be monitored through regulatory sandboxes[3] without shutting down disruptive innovations before they take off.

1 World Bank Digital Regulation Platform: https://digitalregulation.org/regulator-structure-and-mandate/

2 The crux of masterly inactivity is keeping up to date with the latest developments and trends, but not necessarily directly regulating the disruptive activity. https://www.imda.gov.sg/news-and-events/impact-news/2018/05/smart-regulations-for-technology-disruption

3 This is applied by providing a fixed timeframe within which such innovations are experimented without regulatory oversight and monitored by regula-

Power to Enter into Premises

Section 6(7) of the Bill gives NITDA the power to enter into premises, inspect, seize, seal, detain and impose administrative sanctions on erring persons and entities who contravene any provision of the Bill or other regulations and guidelines of the Agency. ***However, this power is subject to the order or a court of competent jurisdiction.*** From experience, it is not uncommon to see certain agencies of government being vested with the powers of entry and search in the process of carrying out their regulatory oversight functions. The problem only arises where the power is utilized arbitrarily. To guard against arbitrariness, the bill makes a proviso that such powers shall only be exercised upon the order of a court of competent jurisdiction. It is to be hoped that the courts would rise to the occasion and grant such orders with caution and on stringent grounds. The same goes for the power to enforce in collaboration with law enforcement agencies under Section 6(10). This, however, raises a higher degree of concern for practitioners knowing the tendency for abuse of power by our law enforcement agencies.

CONTRIBUTION TO THE NATIONAL INFORMATION TECHNOLOGY DEVELOPMENT FUND

The Bill imposes a levy of 1% of the profit before tax of companies and enterprises identified in the Third Schedule to the Bill with an annual turnover of NGN100,000,000 which is currently just above US$200,000. Such levy shall be tax deductible. The same provision exists under the current NITDA Act (although it is doubtful that compliance has been strictly enforced), but there is an expansion of entities captured by this provision. The scope of banks and other financial institutions has been expanded to include companies providing financial services using information technology tools e.g., FinTech companies. In addition, added to the pool are information technology and e-commerce companies, digital platform operators and providers[4] and other companies and enterprises as determined by the Agency from time to time. This seems to effectively capture all tech startups and innovators. This is another layer of taxation and startup expense that could stifle growth of the startup ecosystem. Startups are already struggling with the ability to attract funding in a hostile business environment with most funding opportunities coming from foreign Venture Capitalists and Angel Investors. The first few years of the startup's growth is very crucial and creating another layer of financial burden may kill off the potential proverbial goose that may lay the golden egg if this provision is strictly enforced. Fourteen years ago, when the NITDA Act was enacted, the value of NGN100,000,000 may have been such that the levy targeted only startups that have successfully scaled-up and could shoulder such financial burden. However, with the value of the Naira having depreciated so significantly, this levy would invariably capture budding startups and innovators who need every penny of their capital to operate and scale up.

OFFENCES AND PENALTIES FOR NON-COMPLIANCE

Failure to Contribute to the Fund

Section 16 of the Bill mandates the Federal Inland Revenue Service ("FIRS") to assess and collect the 1% levy which shall be due and payable within 60 days after the FIRS has served a notice of assessment on a company. Where the company fails to make the payment within the stipulated 60 days, the FIRS shall serve on the company a demand notice for the unpaid sum plus an additional sum of 2% of the unpaid levy. Section 22(1) makes non-payment of such demand notice within two months by a corporate body an offence punishable upon conviction by a fine of ***0.5% of the assessed sum for everyday of default.*** This is in addition to the payment of the original levy and the 2% penalty.

General Non-Compliance

Pursuant to Section 22(2), where a person or body corporate fails to comply with the regulations, standards, guidelines, frameworks, circulars, directives or any subsidiary legislation issued by the Agency in the discharge of its duties under the Bill, such person or body corporate commits an offence and is liable on

tors for subsequent informed regulation.

4 Including foreign digital platforms targeting the Nigerian market

conviction:

(a) in the case of an individual, to a fine of not less than NGN3,000,000.00 or imprisonment for a term of not less than 1 year or both; and

(b) in the case of a body corporate, to a fine of not less than NGN30,000,000.00 or imprisonment of the principal officers for a term of not less than 2 years or both.

Unless it can be proved that the act or omission constituting the offence took place without the knowledge, consent or connivance of such officers.

The same penalties generally run through the Bill for various offences. For individual offenders with subsequent convictions, the fine can run up to NGN5,000,000 or to imprisonment of up to 3 years.

No doubt this provision is alarming, although it also exists in the current NITDA Act, there is an increase in monetary fines and duration of imprisonment.

As a general rule, administrative fines and sanctions imposed by enforcement/regulatory agencies should adequately respond to the nature, gravity and consequences of the breach in question and should not only target deterrence but must be appropriate and proportionate to the contravention in respect of which they are imposed. It is difficult to justify the nature of the proposed fines and sanctions with the category and gravity of the possible contraventions/breaches. Instead of achieving deterrence which is presumed to be the intent of these harsh sanctions, an unwanted consequence might be the stifling of the growth of Nigeria's nascent technology ecosystem. Smart regulators look for innovative ways outside the field of enforcement such as collaboration and knowledge sharing with regulators from other jurisdictions to ensure deterrence.

OTHER RED FLAGS

In addition to the issues discussed above, other provisions in the Bill raises red flags. One of such is contained in Section 26 of the Bill that deals with rule making process.

The Rule Making Process

Section 26 (1) (a) provides that the Agency shall prior to issuance of any regulation, guideline, or framework under the Bill, conduct an enquiry on the subject in ***any manner it deems fit*** and take into consideration the findings of such enquiry in making the regulation. It is common for legislators to have rule making powers of a regulatory agency subject to public consultation with industry stakeholders to achieve a robust outcome that meets the needs of the industry in question. However, the fact that this Bill does not expressly mention consultation with industry stakeholders in its rule making process but rather, leaves it to the discretion of the Agency to determine the manner in which an enquiry is to be conducted allows for the making of draconian regulations with inadequate stakeholder input.

Establishment of a Digital Infrastructure and Service Provision Company

Section 27(1) of the Bill establishes a Digital Infrastructure and Service Provision Company under the supervision of the Federal Ministry of Communications and Digital Economy to be called Galaxy Backbone, or any other name the Ministry may determine. ***Amongst the members of the company is a representative of the***

Jigawa State Government.

The functions of the company include the following amongst others: [5]

(a) provide digital infrastructure services to the Ministries, Departments, Agencies, and public service institutions of the Government in a non-exclusive manner;

(b) conduct training for staff of the Ministries, Departments, Agencies and public service institutions of the Government to promote digital services,

(c) promote Nigerian content and digital services.

The Company shall be funded from (a) profits and earnings from its services and products; (b) subventions and budgetary allocations from Federal Government of Nigeria for targeted projects and services; and (c) grants-in-aid from national, bilateral and multi-lateral agencies. [6]

Considering the nature of some of the sensitive infrastructure services to be performed by this company (which is already in existence), as well as the sources of funding for its operations, and taking into consideration the federal character principle inherent in Nigeria's corporate existence, the Federal Government should either acquire Jigawa State's shareholding in the company or permit every state of the federation to also own shares in this company. Alternatively, the existence of this company should not be made the subject of a national legislation.

CONCLUSION

It is imperative that the innovative landscape of Nigeria's tech startup ecosystem is preserved through the fostering of a conducive and cohesive regulatory landscape. Nigeria's digital economy is still at its budding phase and should be allowed to thrive. NITDA as the regulatory Agency in charge of the development of the sector needs to be sensitive to its overarching role of developing and promoting investment in that sector, and not inadvertently become heavy handed and stifling in its regulatory oversight role. If the issue is supervision, save for major areas of concern identified in our introduction as requiring deliberate regulatory oversight and a few other areas identified in the Bill, the generality of the Nigerian tech ecosystem can benefit from self-regulation driven by competition and market forces and provision of basic operational guidelines and standards by the regulators. For the purpose of tracking industry players, mere registration for inclusion in the Agency's database without imposition of fees should suffice.

5 Section 27(5) of the Bill
6 Section 27(6) of the Bill

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Aderemi is a Partner in the firm's Energy and Natural Resources Practice Group. With two decades of experience in the legal profession, she is well versed in corporate and commercial transactions with particular expertise in energy law and policy. She has consistently advised both indigenous companies and multinationals, including various government MDAs on legal and regulatory issues and has been involved in the development of legal, regulatory and policy framework documents and transactional documents particularly in the oil and gas, power and mining sectors.

Aderemi has been recognized by leading ranking firms such as Chambers and Partners Global and IFLR 1000 for her expertise in the industry. She is a member of the NBA, member of AIPN, secretary to the Construction Projects and Infrastructure Committee of the NBA/SBL, member of the Policy and Advocacy Working Group of REAN, and was a member of one of the Working Groups that advised on the Ease of Doing Business in Nigeria initiative of the Federal Government.

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