

# **REVIEW OF TRADE AND INDUSTRIAL LICENSING LEGAL REGIME IN LESOTHO: PRELIMINARY OBSERVATIONS**

## **1. INTRODUCTION**

The current legal framework regulating both trade and industrial licensing regimes is the Trading Enterprises Order of 1993 together with the Trading Enterprises Regulations of 1999 and the Industrial Licensing Act of 1969 read together with the Pioneer Industries Encouragement Act of 1969. The Ministry of Trade, Industry, Cooperatives and Marketing (hereinafter Ministry of Trade and Industry) is responsible for the application and administration of the pieces of legislation specified above.

The Trading Enterprises Order was promulgated with the purpose of regulating trade licensing and to reserve certain business activities for Basotho entrepreneurs. It establishes the Trading Enterprises Board and the Local Licensing Board. The Board is entitled to delegate its functions and powers under the Order to the latter, but in practice the Local Licensing Board operates at the district level. The Order sets out the manner and period within which the meetings of these boards are to be held. It stipulates licence fees, conditions under which a licence may be suspended or cancelled, duration of licences, renewal of licences, penalties for failing to display trading licences and for violating the provisions of the Order generally and it also provides for the appeals procedure.

Section 34 of the Order empowers the Minister of Trade and Industry to make regulations regulating trading enterprises and reserving certain business activities for nationals of Lesotho. The Trading Enterprises Regulations of 1999 stipulate the procedure to be followed in meetings of the Local Licensing Board, namely that the chairman of the Board has a casting vote in addition to his deliberative vote and that the decision of the Board must be made by a simple majority of members present and voting. These regulations deal with the tenure of office of members of both boards together with their qualifications, expenses and allowances.

Section 8 of the regulations establishes the Pre-Selection Committee. Section 9 sets out the Committee's functions, which include amongst others, receiving applications for licences and making recommendations to the Board or the Local Licensing Board. Section 14 reserves certain business activities to local enterprises. The regulations stipulate various fees to be paid by applicants, trading hours, standards of morality and safety and penalties for those enterprises that violate their provisions. Finally, the regulations make provision for the appeals procedure to the minister against the decision of the Board or the Local Licensing Board.

The Industrial Licensing Act is another statute that regulates the licensing of manufacturing enterprises. The licensing authority in terms of this Act is the

Pioneer Industries Board, a board that is established in terms of section 3 of the Pioneer Industries Encouragement Act. In addition to granting manufacturing licences the Pioneer Industries Board is empowered to offer exclusive protection to qualifying manufacturing enterprises. The Board may require an applicant for protection to make representations and produce evidence before it pertaining to the applicant's suitability for purposes of an exclusive manufacturing licence. The Act regulates general manufacturing licences and licences giving exclusive protection including the transfer of one or both licences to a third party.

The system of exclusive protection was intended to apply to both existing and new manufacturing enterprises. Exclusive protection is granted only if it is in the economic interests or public interest of Lesotho. This licence applies to peculiar industries and in practice it means that the applications for this type of licence have to be rigorously scrutinised. Interested parties are given an opportunity to lodge their representations against the grant of exclusive protection within a period of 30 days. The Board may grant exclusive protection for a specified period either generally or in respect of any part of Lesotho. In other words, the Act was passed with the purpose of creating a monopoly for certain manufacturing enterprises that are able to prove that it is in the interests of the economy of Lesotho.

There is little doubt that the Industrial Licensing Act, apart from regulating and promoting industrial development and some revenue, is a valuable piece of

legislation when contextualised within the framework of the Pioneer Industries Encouragement Act. As the discussion will show hereunder in paragraph 3.4 it complements the already full baggage of incentives under the Pioneer Industries Encouragement Act by providing a monopoly to an appropriate manufacturer. It probably played an important role in attracting investment for Lesotho at the time it was promulgated, but its relevance is questionable in the context of contemporary global changes and economic challenges.

The current legal framework has been criticised on the grounds that it sets out licensing procedures that fail to meet their objectives and unnecessarily duplicates processes in certain respects. The report of FIAS (produced in 2004) titled “A Programme to Reform the Company Registry and the Licensing Regime” made a comprehensive analysis of the trade and industrial licensing regimes currently obtaining in Lesotho. The report consequently concluded by suggesting detailed recommendations for the transformation of the current legal framework to address the key concerns and weaknesses. The report recommends total elimination of some procedures because they are costly in monetary terms and in terms of time.

It is against this background that the government of the Kingdom of Lesotho seeks to revise the current trade and industrial licensing legal framework in line with the criticisms, concerns and recommendations. The fundamental aim is to establish a legal framework in the form of trade and industrial legislation to

facilitate private sector development by attracting both foreign and local entrepreneurs to invest in Lesotho because of the business-friendly trade and industrial licensing system.

The current review and proposals seek to actualise most of the recommendations by incorporating them in a regulatory legal instrument. The Government of Lesotho has, therefore, agreed to:

Convert the licence requirement into a reporting requirement, without the incidence of payment of fees and with a reduced requirement for information;

Streamline the industrial licensing procedures by eliminating the Pioneer Industries Board and Trading Enterprises Board or the Local Licensing Board;

Transfer the decision-making process to the Ministry of Trade and Industry's Commercial Officers;

Eliminate the requirement of an interview;

Reduce the amount of information and data an applicant for a licence has to supply;

Introduce an appeals procedure;

Computerise and process data supplied by applicants of licences.

## **INVESTOR ROADMAP THROUGH ENABLING LEGAL FRAMEWORK: A REVIEW OF SUGGESTIONS FOR REFORM**

## **Industrial Licensing**

### **2. Conversion of the licence regime into a Reporting System**

Foreign Investment Advisory Service (FIAS) Report titled “A Programme to Reform the Company Registry and the Licensing Regime” (Report) makes remarkable comments about the current industrial licensing regime in Lesotho. The Report makes findings to the effect that although the intention behind the Industrial Licensing Act of 1969 and the Pioneer Industries Encouragement Act of 1969 is to control entry of new manufacturing businesses and to offer protection to existing domestic manufacturers, this is not the case in practice. In fact the Report<sup>1</sup> indicates that despite the fact that the legal regulatory framework does not mention this, the licence requirement now functions largely as a “check point” or an “insurance policy” that any entity intent on operating as a manufacturer holds the necessary permits relating to health standards, safety requirements and general consumer protection.

The report also makes findings to the effect that the industrial licensing regime serves to enable the Ministry of Trade and Industry to collect and maintain data about the manufacturing sector in Lesotho. The Ministry also uses this licence for purposes of generating revenue for the government.

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<sup>1</sup> Page 33 Paragraph 133.

The Report identifies weaknesses inherent in the current industrial licensing system. First, the report concludes that “the industrial licensing procedure is a significant administrative barrier to doing business in Lesotho.”<sup>2</sup> The report criticises the procedure of completing the application form on the grounds that it takes considerable time to complete the prescribed forms given that they are long. Second, the report identifies the Pioneer Industries Board as the stumbling block because its involvement makes the industrial licensing procedure cumbersome, time-consuming and costly. The Board is expected to meet at least once each month and in practice it may be difficult to form a quorum even when the members manage to meet. Third, the report identifies the interview process as another factor that makes the current industrial licensing regime unsuitable and undesirable if the object is to attract investment in this sector. Fourth, the renewal requirement creates uncertainty on the part of the manufacturer because chances are that the license might not be renewed for whatever reasons.

The report identifies the function of collecting data as useless given that the quality of data collected leaves much to be desired. The reason being that in practice the prescribed forms are not completed in full resulting in inadequate information supplied by manufacturers. The consequence of this has been the non-recognition of the data collected by the Ministry of Trade and Industry by other ministries because they consider the data dated and “irrelevant”.<sup>3</sup> Finally, the report concludes by indicating that even if the data collection function was

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<sup>2</sup> Page 35 paragraph 139.

<sup>3</sup> Page 37 par 145.

done properly and quality information collected this would still duplicate efforts because there are other ministries that become involved in the same process.

It is against this background that the government of Lesotho decided to engage in an action plan intended to address these concerns and criticisms with the key objective of making the legal framework conducive to investor confidence. In this regard it agreed to adopt the measures set out clearly in paragraph 1.10 above.

The FIAS report does not tell what information should be contained in a report to the Ministry in order to facilitate the commercial officer to determine if the applicant has satisfied the requirements set out in other laws such as the Labour Code of 1992 (as amended) relating to safety standards. Would it be sufficient if the applicant were to submit the certificates from the different ministries certifying that the requirements set out under the laws governing those Ministries in terms of standards to be observed by those who seek to operate as manufacturers have been complied with? How is the Ministry of Trade and Industry going to ensure that these other Ministries become efficient in facilitating compliance with the applicable standards within a short space of time?

In our view these are critical issues because of the recommendation that there has to be legislation dealing with the issue of reporting. It also impinges on the issue of the licence fees. If the Government of Lesotho passes legislation

compelling potential manufacturers to report about their activities to the commercial officers will they be required to pay any “reporting fees” or something like that?

The other issue relates to the monitoring of compliance. If applicants for manufacturing activities are required to report to the Ministry of Trade and Industry should there be any penalties for non-compliance with the reporting requirements? This issue is important because it relates to the question of whether there will be anything issued by the Ministry of Trade and Industry to confirm that the applicant has complied with the reporting requirements such as, for instance, a “Certificate of Compliance”. Should the commercial officers be made to keep a list of entities that have complied with the reporting requirements? If so, how is the problem of duplication of processes and functions to be avoided? It is submitted that these are critical policy issues that require to be settled in order to enable the legal consultant to shape the proposed legislation. The consultant intends to meet the stakeholders in this regard particularly the Ministry of Trade and Industry officials with the objective of establishing their position as far as these issues are concerned.

### **3. Substitution of the Pioneer Industries Board with Commercial Officers**

The participation of the Pioneer Industries Board (Board) is criticised on the grounds that it makes the industrial licensing procedure cumbersome, time-consuming and costly.<sup>4</sup> The report suggests two options to deal with this issue. First, it suggests the total elimination of the Board and its replacement with the commercial officers. Second, if the first option does not seem suitable, the report suggests a less radical approach of redesigning the role of the Board in a manner that will make the industrial licensing procedure efficient and less costly. These suggestions are made against the background that the current practice of requiring applicants for licenses to come for interviews is regarded as a “nuisance” with regard to costs in the form of time, travel expenses and opportunity cost.<sup>5</sup>

As a result of these criticisms the recommendation is that commercial officers in the Ministry of Trade and Industry should be given powers to receive, consider and determine if each application has complied with all the requirements prescribed by all the line-ministries. It is assumed that this process will take a shorter period than it is currently the practice.

The replacement of the Board with commercial officers as decision-makers should be coupled with the abolition of a compulsory interview unless this is strictly necessary, for instance, in order to obtain explanation of certain information supplied. However, the report argues that the proposed legislation

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<sup>4</sup> P. 35 of Par 140 of the FIAS Report

<sup>5</sup> Page 41 paragraph 150

should spell out the criteria to be used by the commercial officers to justify calling an applicant for an interview.

The Board can fairly be described as composed of “public officers” representing the ministries of trade and industry, finance and economic planning and works. Its main responsibility under the Pioneer Industries Encouragement Act was to decide on issues of tax incentives for both existing and new manufacturers in Lesotho. In other words, the birth of this Board was prompted by the desire to grant substantial tax incentives to approved industries in excess of what would ordinarily be granted under the Income Tax Order of 1993 in order to encourage investment.

The Pioneer Industries Encouragement Act can be criticised on the grounds that the package of tax incentives appear to favour capital intensive rather labour intensive industries. For instance, citizen training and citizen wage allowances are available only to an approved manufacturer and may be available to an approved existing manufacturer. Business enterprises involved in hotel business, casino business and construction business are not entitled to them. The provisions of the Act do not have any explicit mechanism to encourage bias in favour of labour intensive industries. However, the words “economic development” and “public weal” could be interpreted and used to achieve this purpose. The most serious criticism that can be levelled against this statute is

that it lacks a specific provision set out to induce investment in sectors that will utilise Lesotho's local resources.

The FIAS report recommends the total abolition of the Board and the requirement of an interview. The reasons behind this suggestion are sound and convincing. However, it would probably be fair to retain the Board or some other institution of similar nature for the general industry policy in Lesotho. It is clear that the current practice relating to the Board's participation in the industrial licensing procedures leaves much to be desired as far as attracting investment is concerned. It is submitted that there is a need for an organ that will guide the government on issues of policy. This is because the proposed Foreign Direct Investment Bill of 2006 seeks to repeal the Pioneer Industries Encouragement Act of 1969 and the ramifications of this move are very clear, namely that the Pioneer Industries Board will be abolished once this Bill becomes an Act of Parliament.

In the premises it is submitted that the recommendation to abolish the Board to the extent that it deals with industrial licensing matters is compelling and requires to be implemented. In the same vein it is important to have an organ that will advise the government on issues related to industrial development and promotion. This body could be composed of public officers and stakeholders drawn from the private sector. A decision has, therefore, to be taken either to abolish the Pioneer Industries Board completely as the Foreign Direct Investment

Bill seeks to do or to replace it with some other organ which will advise the government on trade and industrial policy issues and this organ should never be involved in the licensing procedures in any way.

#### **4. Introduction of an Appeals Procedure**

The report advocates an appeals procedure if the decision-making process reposes on the commercial officers. The report recommends that if the applicant is not satisfied with the decision of the commercial officer s/he should be given an opportunity to lodge an appeal with a higher body such as a commissioner in charge of Industry. The applicant should be given a further opportunity to ventilate the complaint in the courts of law should this become necessary.

The rationale behind this recommendation is that if the Ministry has powers to review and set aside its decisions this will assure investors that the system is objective and not open to abuse by the Ministry's officials.

It is submitted that the appeal procedure should be set out in such a way that it does not stifle the proposed process of reporting by making that process long and cumbersome. One option would be to have the Minister responsible for trade and industry becoming the final arbiter. If an applicant is not satisfied with the decision of the minister she should have a right of review in the courts of law. In

our view the reporting mechanism should set out clearly the requirements to be satisfied for one to qualify to start operations as a manufacturer. This approach will alleviate disputes and make the appeals procedure redundant because an investor will know that if she has not satisfied the prescribed requirements the commercial officer is not going to give the required approval. In the final analysis the role of the commercial officer should simply be to determine if the applicant satisfies the criteria set out for the kind of business she seeks to conduct and if so, the approval should be granted.

#### **5. Reduction in Information to be furnished**

As it has been indicated above, the report makes findings to the effect that despite the fact that there are prescribed forms to be completed in full by all the applicants in practice this is not the case. The consequence of this is that the Ministry collects inadequate information and this in effect stifles its function of collecting data.

This is the reason why the report recommends that the Company Registry should act as the source of information to all the Ministries including the Ministry of Trade and Industry. The Registrar of Companies should advise a company after incorporation that there are further licensing requirements to be met and should specify the authorities in charge of those aspects. Alternatively, she should advise it to meet the officials of the Ministry of Trade and Industry for

directions regarding the steps to be followed for it to obtain the necessary certificates of compliance.

## **Trade Licensing**

### **6. Conversion of the Licence Regime into a Reporting Requirement**

Trading activities are regulated under the Trading Enterprises Order of 1993 (hereinafter the Order) and the Trading Enterprises Regulations of 1999. Each and every entity that seeks to operate a business enterprise in the country is obliged to apply for a trader's licence in terms of the provisions of the Order and Regulations. The Trading Enterprises Board (hereinafter the Board) is the licensing authority and is composed largely of public officers with the exception of a representative of the Lesotho Chamber of Commerce and Industry. In assessing the suitability of each applicant the Board relies on vague criteria stipulated under the provisions of section 5 of the Order. The Board is also entitled to delegate its functions to a Local Licensing Board, which is established in accordance with the provisions of the Order (section 11). The main purpose

behind the establishment of the Local Licensing Board is to facilitate the business of the main Board at the district level.

The Order regulates other matters such as renewal, suspension and cancellation of licences and the appeals procedure in case an applicant is aggrieved by the decision of the Board. The Order sets penalties for contravention of its provisions including trading without a licence. The discussion that will follow shows clearly that in light of the suggestions made for change the Order requires to be repealed with the objective of passing a new trade enterprises regulatory framework that ushers in and reflects modern international and regional best practices.

The FIAS report makes interesting findings about the current trade licensing system. First, the trade licensing system serves to regulate and control trading activities to protect consumers. Second, the purpose is to register trading businesses such as sole proprietors and partnerships, which do not have to register with the Registrar of Companies. Third, the system is used for collecting data. Fourth, it is used to provide basic training skills to licensed businesses. Fifth, it serves to generate revenue for the government. Finally, it protects the business activities reserved for locals.

The proposed legislation is expected to set out the reporting requirements in terms of which the applicant will indicate if he has complied with the health

standards, safety requirements and consumer protection requirements for the Department of Trade to register it. Views in this department are that the Ministry should act as the “focal point”. The Ministry should be the first to be approached by each intending investor and it should provide each applicant with brochures or guidelines identifying the line-ministries the applicant must approach in order to comply with the prescribed standards for the kind of business the applicant seeks to conduct. In other words the Ministry of Trade and Industry should be in a position to provide the applicant with information relating to the steps the applicant should take and follow in order to be registered in the business register.

The officials in the Department of Trade suggest that once the applicant has satisfied the requirements of the line ministries and provides proof to that effect the Ministry of Trade and Industry’s role should be limited to registering it in the business register. The applicant should thereafter be able to commence its business operations.

The majority of the officials in the Department of Trade hold the view that the Ministry should not charge the licence fees. The general view is that these fees are so insignificant in relation to the general budget to the extent that there is simply no justification for retaining them. The FIAS report recommends that the compulsory licence system linked to payment of fees should be abolished. Instead the report recommends the shifting of the compulsory licence fees from the Ministry of Trade and Industry to the ministries responsible for health and

safety standards, if the government strongly considers the fees strictly necessary for budgetary reasons. For instance, it is proposed that each business pay the amount of fees it would pay if the trade licence were to be compulsory as is currently the case.

In our view the recommendation of the FIAS report that sanctions and penalties should be meted out for business entities that fail to comply with the reporting requirements in terms of the law is the best option. This will ensure full compliance with the health standards and safety requirements. It means that the proposed routine inspections need to be effective if all business operators will comply with the requirements of the law. The proposal of routine inspections has to be weighed against the cost implications of the exercise. This is the reason why we consider the suggestion that the proposed law should oblige each business to file the necessary health standards and safety certificates annually to be the best option because it will reduce costs dramatically. Failure to comply with this requirement should be penalised by the law in order to encourage business enterprises to measure up to the prescribed standards. The assumption here is that most business enterprises will fulfil their obligations.

## **7. Abolition of the Local Licensing Board**

The recommendation contained in the FIAS report is that the Local Licensing Board should be abolished. The suggestion is that this board should be replaced with the commercial officers. One of the critical issues raised during the consultant's interaction with the Department of Trade officials is whether it is sufficient to leave the entire decision-making process to one commercial officer. Opinion is divergent in this regard. Some suggest that there should be somebody who should work with the commercial officer.

However, it was ultimately agreed that the Ministry of Trade and Industry as a whole should decide whether or not it intends to leave the entire decision-making process with regard to the registration of businesses to each commercial officer.

One other option is to introduce the appeals procedure. Here what should happen is that if the applicant is not satisfied with the decision of a commercial officer he should be able to approach a higher authority such as the Commissioner of Trade and thereafter the Minister responsible for trade and industry. Incidentally, this is the current practice which is sanctioned by section 27 of the Trading Enterprises Regulations of 1999. The difference is only that the appeals procedure under these regulations allows the aggrieved licence applicant to launch an appeal directly to the minister whereas the proposed appeals procedure is a two-staged process.

The abolition of the Trade Enterprises Board or the Local Licensing Board should inevitably make the reporting process relatively efficient. It is possible that the decision-making process on whether or not each individual applicant satisfies the requirements of the law is likely to be made in one day. The commercial officers should be given powers to interview applicants in exceptional circumstances and when this is strictly necessary to obtain an explanation of certain information furnished or for some other defined purpose to prevent the abuse of power and attendant costs on the part of the potential investor.

## **8. Training of Business Enterprises**

The current compulsory licensing regime is criticised on the ground that it is unusual by fostering training. It is said that there is no evidence that in practice businesses do attend the training sessions and there is no need to continue to make trade licences mandatory with the objective of compelling businesspersons to accept the training offered by the ministry. The suggestion is that training should be conducted on a voluntary basis and this work could be left to the professional bodies other than the state.

It is our view that the training of business operators should be a matter of individual choice. The market forces should dictate to each business if it requires any training for it to be competitive. If the ministry decides to be involved,

something which we do not recommend, its role should be limited to facilitating such trainings since there are so many organisations that have the capacity to handle this function better than the state. In the premises the recommendation is that the state should not involve itself in the training of business altogether.

## **9. Registration of Businesses and Data Collection**

The Ministry of Trade and Industry registers business enterprises that have been licensed to operate business activities. It is the policy of the ministry that registration should be linked to data collection in order to enable the government to know the number of business enterprises involved in trading activities and the kind of business operations they engage in. However, the findings of the FIAS report are that the trade licensing regime fails to capture data at all with the result that the data collection function is not working or at least no accurate data is collected because there is no functioning register. In the end the report recommends that this function should be linked to the business registration function.

It is important for the government to have statistics of the business enterprises operating in the country for fiscal policy reasons and other purposes. If the reporting system is the preferred model of regulating business enterprises in Lesotho, then there is need to formulate the proposed legislation in a manner

that identifies information that should be required from each applicant. But, this suggestion has to be considered against the background that there is a recommendation to the effect that the forms submitted to the ministry should streamline the amount of information required to be furnished by each applicant.

There is a recommendation that the Companies' Registry should keep the register of business enterprises operating in the country. The register should detail all the desired and required information that is spelled out in the proposed law. This will avoid the current criticised practice of business enterprises having to furnish all the line-ministries with the same information each time an applicant seeks to engage in trading activities in the country. Another reason is that it is expected that the annual return system as restructured under the proposed Companies Act should prove sufficient in terms of fulfilling the Ministry's function of data collection as far as companies are concerned.

## **10. Conclusion**

There is no doubt that the Pioneer Industries Encouragement Act, the Industrial Licensing Act, the Trading Enterprises Order of 1993 together with the regulations that have been promulgated under these statutes no longer reflect contemporary practices and there is a need to revise these statutes to reflect modern business practices. The Foreign Direct Investment Bill seeks to repeal the Pioneer Industries Encouragement Act and this step means that the Pioneer

Industries Board will automatically be phased out in the licensing system. Many criticisms have been levelled against the current licensing regulatory framework. Most of the criticisms are sound and convincing and should be implemented urgently in order to make Lesotho competitive in terms of attracting investment.

The abolition of the Trading Enterprises Board and its sibling, the Local Licensing Board, should be implemented as recommended and the necessary changes require to be made to the law. The decision-making process will have to be left to the commercial officers in the Ministry of Trade and Industry. The proposed law should make provision for safeguarding abuse of power by these officials. What this means is that a decision has to be taken by the ministry if it is satisfied to leave the entire decision-making process to these officials individually. The ministry may find this option adequate because it is coupled with the appeals procedure. It may also decide to subject the decision of each commercial officer to a system of balance and checks by providing that a junior commercial official should make a recommendation to a senior official regarding the approval of the application to commence business. This would not apply in the case of renewals. The current practice is that each commercial officer renews the licence if the business enterprise fulfils all the prescribed requirements.

It is suggested that the Pioneer Industries Board be replaced with some other institution that will advise the government on issues related to industrial development and promotion. This suggestion should only be considered if the

Ministry of Trade and industry believes that it is necessary to have an institution of that nature. The suggested entity should not be involved in licensing issues. Perhaps this proposed entity could also deal with trade policy issues.

The proposed reporting regime should carry sanctions that will make it effective and efficient in practice. In this regard the recommendation that penalties be meted out against those enterprises that fail to comply with their legal obligations under the proposed legislation should be implemented legislation. This is important because it will probably reduce the number of routine inspections that have to be made in order to investigate if each business enterprise satisfies the health standards and safety requirements.

The FIAS report recommends that information should be streamlined by using the Companies' Registry as the source of information for the line ministries. It means that the reporting system will have to clearly set out the kind of information that will be required for the Ministry of Trade and Industry to register each entity as a trading enterprise.