FIRST
PUBLIC
CONSULTATION
PAPER

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1. COMPANY LAW AND ONLINE REGISTRY REFORM: STARTING THE PROCESS

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NEW ZEALAND COMPANIES OFFICE

The Government of New Zealand, through the New Zealand Companies Office, is assisting with these reforms.

Contents

Executive Summary

The Ministry of Commerce, Industry and Trade (the ministry) administers the *Eswatini Companies Act 2009* and serves as the Registrar of Companies. The ministry has determined that the 2009 Act does not serve the business community as well as it should and is undertaking reform efforts to modernize the law. The reform project will consist of (i) seeking public input on a variety of policy issues to inform the drafting of a new law, (ii) preparing a draft bill and circulating for comments and, once the comment period concludes, (iii) finalizing and delivering the bill to Parliament. On a parallel track of the project, the ministry will work to develop and implement a new company registry that allows businesses to complete all their filings completely online. Together these reforms will make it substantially easier for businesses to create companies and fulfill their legal obligations.

Why is the ministry undertaking this project now? The *Eswatini Companies Act 2009* is based on South African law, which in turn is based on an older version of British law. While the 2009 Act represents an improvement over prior law, it does not fully embrace the trends instituted by countries that have successfully modernized their approach to business law and governance. One such trend in modern laws has been to embrace advances in technology and place the company registries online. An online registry allows the business community to conduct all their business with the registry without having to visit the registry office or trust the mail system. It also allows searchers to obtain real-time information about registered companies, which leads to significant gains in efficiency in areas such as contract formation, opening bank accounts, and obtaining credit. The coronavirus disease (COVID-19) pandemic has taught the world how important it is to be able to conduct business online and the ministry believes this is the perfect time to move forward in this regard. However, the 2009 Act has insufficient authority to properly support an online registry.

Another matter not addressed in the 2009 Act, but that has grown significantly in importance in recent years, is international anti-money laundering efforts. There are global standards that must be followed to avoid penalties and the 2009 Act is largely silent on these issues. Provisions need to be included in the new bill to ensure Eswatini avoids any negative consequences.

Further changes to the law will also benefit the private sector. For example, many countries have eliminated the need to file numerous ancillary documents—now viewed as unnecessary formalities in the creation of companies—such as the Memorandum, Articles, and Declaration of Compliance. Instead, a single Application to Incorporate is filed which collects basic biographical details about the company and its directors and shareholders. This change reduces costs to entrepreneurs and facilitates online registration of new businesses.

The ministry is being aided in this effort by the Government of New Zealand and its Company Registry Office.[1] New Zealand consistently ranks in the top three countries in the World Bank's 'Doing Business'

1 The New Zealand Ministry of Business, Innovation and Employment administers the company registry.

rankings and is almost always first in the category of 'starting a business.' This has not happened by accident. Nearly 30 years ago New Zealand recognized that its British-based 1955 Companies Act was antiquated, bad for business, and needed a major overhaul. The result of this examination was a thoroughly reimagined Companies Act 1993. This 1993 Act accomplished many goals: it removed old corporate structures that were no longer in use, updated business start-up requirements to streamline entry into the formal economy, formalized director duties and shareholder rights, recognized new ways of raising capital, and made it possible to make company data transparent and available to the public via online technology. The results for New Zealand are indisputable: significant increases in company formation and top international rankings for ease of starting a business.

While it makes good sense for Eswatini to look to New Zealand as a model for legislation, the New Zealand Act should not simply be copied. The consultation process that the ministry will oversee will define the proper policies for Eswatini. Specific matters for discussion include:

- The requirement that the new law recognize the validity of electronic records and electronic submissions to the registry to allow for online filing and searching of company records.
- Whether Eswatini should follow the modern trend and eliminate the need to create and submit multiple secondary documents, such as the Memorandum and Declaration, in favour of a simple form that collects all required information?
- Ensuring that director duties are set out in easy-to-read language that brings clarity to this sensitive area. This affords more certainty for persons serving as company directors and more protections for the public at large from fraudulent actors. As part of this, the process should consider whether especially bad actions by directors should result in criminal liability?
- The expansion of shareholder rights, such as granting specific rights to inspect company records, the right to question management at shareholder meetings, and other various minority shareholder rights.
- Whether Eswatini would benefit from relaxing the rules around how SMEs can raise capital by allowing private sales of shares without the need for a prospectus.
- Would voluntary administration—a process by which a distressed company is given a chance to try to rehabilitate its business by stopping creditor enforcement action for a short time—be beneficial for Eswatini especially considering the ongoing troubles associated with the COVID-19 pandemic?
- Including a reformulated "solvency test" in the new law to provide both flexibility and guidance on when a company may engage in extraordinary activities to protect not only shareholders but also creditors.

The Government of New Zealand has experience in assisting other countries in reforming their company law regimes. This includes both Botswana and Lesotho, where the New Zealand Companies Act influenced their new laws, and their online registries follow the New Zealand approach. The New Zealand Companies Act has also been adopted (with appropriate customisation for each country) as the core Companies Act in several

Pacific jurisdictions[2] including Papua New Guinea, a country of nearly 9 million citizens with about 300,000 registered entities and a per capita GDP of approximately US$2,900.

1.0 Reform Project Process

The ministry is mindful that undertaking a law reform during the time of COVID-19 presents challenges. However, the ministry also believes that the disruptions caused by the pandemic underscore how important it is to make changes to benefit the private sector, including being able to conduct all business online. For these reasons, the ministry will do all it can to accelerate the reform to assist the private sector as soon as possible. Still, it is critically important that the public have the opportunity to provide feedback on proposed policy changes. To manage this process during the pandemic, the ministry will publish a series of papers on different topics and seek written comments from the public. Once all comments have been collected the ministry will prepare a draft bill and circulate it for further comment. Only at the conclusion of this consultation process will the bill be ready for introduction into the formal legislative process.

To assist in this process a task force has been formed to oversee the project. The task force consists of various stakeholder representatives and is chaired by the Ministry of Commerce. The task force will make sure that various viewpoints are heard and oversee the drafting process.

The public is invited to submit comments to this and all future consultation papers at this following email address: [insert email address]. The following is a proposed list of topics for each of the four planned consultation papers:

A. First paper: Starting a company

- What company types are right for Eswatini?
- Can Eswatini do away with secondary documents like the Memorandum?
    - Would Eswatini benefit from having Model Rules set out in the Regulations that can be accepted by simply ticking a box on the application to incorporate?
- Should the concepts of stated capital and par value be eliminated?
- The new law must address anti-money laundering (AML) issues
    - Include provisions regarding *beneficial owners*
    - Should there be a residency requirement for at least one director of a local company?
        - Current law has a citizenship test for determination of whether a

2 Samoa, Solomon Islands, Tonga, and Vanuatu are other countries that have closely followed the New Zealand Act and have successfully implemented online registries in projects assisted by the Asian Development Bank.

company is 'local', which is similar but different from a director residency requirement.

    - The new law should address shadow directors, which are people that act like directors without having their names on the official records.
    - Bearer shares should be specifically banned.

- The registration of overseas companies should be rethought to ensure that Eswatini receives all pertinent information regarding these entities while not discouraging foreign investment.

B. Second paper: Operating a company

- Director duties will be clarified.
    - Is some behaviour so bad that it should be criminalized?
- Would a new formulation for a solvency test work for Eswatini?
- Shareholder protections could be strengthened, including protections against 'oppressive' majority shareholder acts.
- All details around each company (addresses, directors, etc.) will be required to be updated in the online registry within a very short period after any changes are made.
- Annual returns will be subjected to an automated compliance routine so that if companies do not file, they will be automatically removed from the register.
    - While new registry software will make automatic removal for failure to file an annual return easy, the law will also make it easy to reinstate a company to the active registry by both shareholders and creditors.

C. Third paper: Raising capital

- Raising capital and obtaining credit are absolutely essential to growing small- to medium-sized enterprises (SMEs) and the new law should take account of this.
- Should Eswatini relax rules to allow SMEs to offer shares to the public without going through the prospectus process?
- Company charges will continue, but in the future should Eswatini consider implementing a secured transactions regime that makes it easier to pledge movable property as collateral for a loan?

D. Fourth paper: Closing down a company

- The new law will follow the same basic approach as exists in the current law.

- The new law will provide for voluntary dissolution in an orderly manner that includes notice to known creditors and a way to deal with unknown creditors
- Is voluntary administration right for Eswatini?

Once the legal reform is well underway, the ministry will begin investigating the best approach to implement an online registry. The draft bill will inform the drafting of registry specifications that can then be used to develop or otherwise obtain the appropriate software. The task force will closely monitor this process.

2.0 Transitioning to the new law and online registry

There are always two topics commonly asked about at the start of a company law reform. The first is about the online registry and the second about how the country will transition the new law and registry. These topics will be discussed here to provide proper background information for future public comment.

2.1 Online registry system

The ministry believes that an online registry will bring meaningful benefits to the economy, including making entry into the formal sector significantly easier and less expensive. An electronic, online registry system will provide the following core business functions for Eswatini:

- allow online filing for all required filings;
- maintain up-to-date company information;
- publish public information to the web for online searchers (including entity name and addresses, director and shareholder names, etc.);
- allow compliance monitoring to make sure that annual returns and other time-sensitive filing are properly submitted;
- provide the ability to produce statistical reports regarding corporate activity; and
- maintain registry information as electronic media that can be properly backed up.

To access the online system, a person must first establish a client account with the registry. Account registration is free, and it provides a means by which to identify the person submitting filings on behalf of a company. The client is then able to manage its own business through a dashboard that will appear each time the client logs into the system. The client will have access to every single filing they have ever made and, if they are responsible for multiple companies, they can access all those records from a single login. The client account will also have an accounting module that will allow for the processing of online payments for filings. The specific methods of online payments will be explored during the next few months so as to make it as easy as possible for businesses.

With the creation of an electronic registry comes new opportunities for the Registrar to administer the registry more efficiently. These include the authority to rectify the register in the event of minor errors, such as typos, and the recognition of the validity of email notices sent from the Registrar when the company has provided an email address pursuant to undertaking online filings.

2.2 Transitioning to a new law and online registry

When implementing a new law and online registry, many countries call for a transition period during which all companies must re-register under the new law. Until re-registered, the company is governed by the old law, and then once re-registered, the new law will apply. Often this re-registration period is set at one year and takes the place of the regular annual return that would be due that first year, so that the company is not overly burdened with two filings. The re-registration will also allow the new registry to collect all data that the new law requires so that each active company will start afresh in compliance with the new law. Companies that fail to re-register will be struck off the registry. Thus, after the transition period the online registry will be completely up to date, with all active entities having proper information for public searchers.

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