

TECH START-UP COMPANIES







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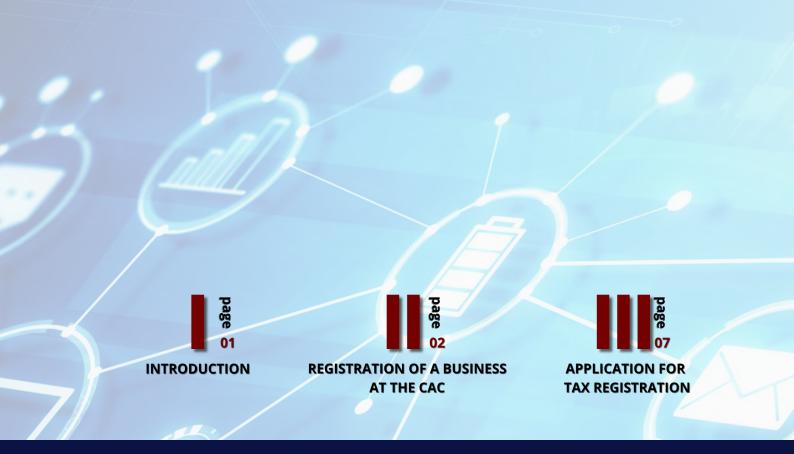


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section one INTRODUCTION

Are you running a start-up or contemplating starting that business and you are uncertain on how to proceed? Do not fret as this start-up tool kit[1] will guide you on setting up your business. We will set out the steps for incorporating a company, obtaining a tax clearance certificate, intellectual property registration and filing annual returns.

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[1] Prepared by AELEX TMT group We detail below our unique experience and proposal to support this project

section two REGISTERING YOUR BUSINESS WITH CAC



REGISTERING YOUR BUSINESS WITH CAC

One of the essential steps to take in setting up a business in Nigeria is registration of the business.

The body saddled with the responsibility of overseeing the registration and overall running of business affairs in Nigeria is the Corporate Affairs Commission ("CAC"). The laws guiding the CAC is the Companies and Allied Matters Act, 2020 ("CAMA").

To register a business with the CAC in Nigeria, business owners may adopt any of the following business structures:

- Sole proprietorship;
- Partnership (this may be either general partnership, limited partnership or limited liability partnership);
- Company (this may be either a public or private company).

SOLE-PROPRIETORSHIP

This business structure is an enterprise that is run by an individual. The individual is the sole ownerinvesting the capital, bearing all the risks, enjoying all the profits and may or may not employ staff in running the affairs of the business.

Incidence of registration:

The registration of a business run by a sole proprietor does not confer legal personality on the business. The sole proprietor is seen to have registered a **"business name"**[2]. This is because the law does not recognize a business name as a separate entity from the owner(s).

Compulsory registration

A startup who uses a name different from its propietors surname, first name or initials or adds a new word is of necessity required to register with the CAC[3].

Requirements for registration

The following documents must be submitted for registration:

A statement in writing, in the form prescribed by CAMA, signed, together with accompanying documents, containing the following[4]:

- The proposed business name(s);
- The general nature of the business;
- The full postal address of the principal place of business;
- The full postal address of every other place of business;
- The present first name and surname, any former first name and surname and nationality.

It is to be noted that an inspector on behalf of the CAC, may call for papers, documents or examine individuals on oath in a bid to confirm the information submitted in relation to the registration.

• Copies of the passport photograph of the individual

The registration must be done within 28 days of commencement of business by the sole proprietor, as prescribed by the law.

PARTNERSHIP

Partnership is registered as a business name as it falls under Part B of CAMA. The particulars of all the partners would be submitted during the business registration. There are different types of partnerships:

General Partnership

In a general partnership (which is your typical partnership), the liability, risks, profits, capital contribution and losses are borne equally by the partners, except where there is a written agreement (**"partnership agreement"**) stating the percentage of liability, profit, loss and other risks to be shared between the partners.

Limited Partnership[5]

A limited partnership is a variant of the typical partnership (general partnership), except that while a general partnership must have at least two general partners (GPs), a limited partnership must have at least one GP and at least one limited partner. Limited partnerships are distinct from limited liability partnerships, in which all partners have limited liability.

Limited Liability Partnership

This is a business structure that combines aspects of a partnership and incorporated company in one. A limited liability partnership ("LLP") is a body corporate, incorporated as a legal entity separate from the partners and the change in partners does not affect the existence, rights and liabilities of the LLP.[6]

Registration of an LLP

It is important to note that an LLP must be registered with a minimum of 2 partners.[7]

Companies

Essentially, a company may be incorporated as either private or public in any of the following forms: a. Company limited by Shares, which is a company having the liability of its members limited to the amount, if any, unpaid on the shares held by them;

b. Company limited by Guarantee, which is a not-for-profit entity having the liability of its members limited to the amount that they have undertaken to contribute to the assets of the company in the event of its being wound up; and

c. Unlimited Company, which is a company not having any limit on the liability of its members.

It should be noted that the maximum number of members a private company can have is fifty (50). This number does not include members who are or were employees of the company.

Every company is required to have a registered office address in Nigeria (not a P.O. Box).

Procedure, Documents, Requirements and Time for Setup

The first step to incorporating a company is to conduct an availability search at Nigeria's companies' registry – the CAC in order to ensure that the proposed name of the company is available for registration.

Upon the approval of the proposed name, the Memorandum and Articles of Association as well as other incorporation documents will be prepared, stamped and submitted for registration with the CAC. This process may take up to 5-10 working days (excluding the time for obtaining signatures), after which the CAC will issue a Certificate of Incorporation.

Documents Required for Incorporation:

i. <u>Signed and stamped/sealed copies of the Memorandum and Articles of Association</u>

Please note that the stamp or seal of each company subscribing to shares in the new entity is to be affixed to the Memorandum and Articles of Association before submission.

ii. Completed CAC Form

A CAC Form 1.1 (Application for the Registration of a Company).

iii. <u>Original resolutions of the Board of directors of the companies incorporating the Company (applicable</u> where a company subscribes to the Memorandum and Articles of Association)-

where the shareholders of the new company are corporate entities, the company must submit original resolutions from their Boards of directors:

- authorising them to subscribe for shares in the new company; and
- appointing a named person to execute all documents relating to the incorporation of the company;

In addition, notarised or apostilled copies of the companies' certificates of incorporation/registration shall be required where the local entity of a foreign company is to be incorporated.

iv. Means of identification -

a copy of the information page of the passport of each director, shareholder and in the case of a corporate shareholder, the representative of such shareholder shall be required.

Please note that all documents submitted are required to be in English language. Where the original document is not in English language, a legalized/notarized translated version of the document will be required.

Also note that the Corporate Affairs Commission ("CAC"), in exercise of its powers under CAMA may issue further guidelines and regulations in relation to the documentation and registration procedure.

Requirements for shareholders

In line with the provisions of CAMA, a Nigerian company having a share capital is allowed to have one (1) shareholder. Although there is no restriction on the nationality of the shareholders and directors, kindly note that directors/persons not resident in Nigeria may not be accepted as signatories to the company's Nigerian bank account.

Requirements for directors

Every Nigerian company must have at least two directors. Although there is no restriction to the nationality of the shareholders and directors, kindly note that directors/persons not resident in Nigeria may not be accepted as signatories to the company's Nigerian bank account. It should be noted that a public company must have at least, three (3) independent directors.

Authorised Share Capital

The minimum authorised share capital requirement for a private company is N100, 000.00 (One hundred thousand Naira), while that of a public company is N2,000,000.00 (Two million Naira). The minimum authorised share capital requirement for companies with foreign shareholding is N10, 000,000.00 (ten million Naira).

No proportion of the share capital is required to be paid up at incorporation. However, at least 25% of the share capital must be allotted to at least two shareholders at incorporation.

Appointment of Company Secretary

Every Nigerian company is required to appoint a company secretary at incorporation. Please note that the CAC will not permit a company to file its statutory returns or any other document at the registry if it does not appoint a company secretary and notify it of such appointment.

It is worthy of note that CAMA excludes small companies from this requirement. A company qualifies as a small company if:

a. it is a private company;

b. its turnover is not more than N120,000,000 or such amount as may be fixed by the Commission from time to time;

c. its net assets value is not more than N60,000,000 or such amount as may be fixed by the Commission from time to time;

d. none of its members is an alien;

e. none of its members is a government, government corporation or agency or its nominee; and

f. in the case of a company having share capital, the directors between themselves hold at least 51% of its equity share capital.

section three APPLICATION FOR TAX REGISTRATION: VAT AND CORPORATE TAX

All companies are expected to register with the Federal Inland Revenue Services (FIRS) for Companies Income Tax (CIT) and Value Added Tax (VAT) purposes within six months of incorporation.

The Taxpayer Identification Number (TIN) is a unique number that identifies a specific individual (or business) for the purpose of tax payment. This number must be inserted on all the company's invoices.

In July 2020, the CAC announced that upon successful registration of companies under Part A i.e. limited liability companies, TIN would be automatically assigned to the company. However, the notification does not cover other business organizations. Business names will still have to register with the FIRS directly.



section four APPLICATION FOR TAX CLEARANCE CERTIFICATE

APPLICATION FOR TAX CLEARANCE CERTIFICATE

A tax clearance certificate (TCC) is a confirmation from the relevant tax authority that the tax payer is up-todate in the payment of its taxes at the date of issue of the Certificate.

TCC is required of both individual persons and corporate entities for various transactions in Nigeria.

How to obtain your TCC

Step One: Register to Obtain Tax Identification Number This would have been automatically generated and received during incorporation.

Step Two: Apply to Register For VAT

- 1. Complete Application for VAT Registration Form (Form 001)
- 2. Certificate of Incorporation, Memorandum of Association, CTC of Form CAC2 & CAC7

Step Three: Apply to Tax Clearance Certificate

- 1. Application for Tax Clearance form (In Triplicate)
- 2. Taxpayer registration input form (TRIF/2006/001 COYS);
- 3.Completed FIRS questionnaire for new taxpayers on the Company's Letter Head addressed to the Tax Controller
- 4. Copy of memorandum and articles of association
- 5. Copy of the certificate of incorporation
- 6. Letter of appointment of tax adviser and a letter of acceptance

The application forms must be in triplicate and the original certificate of incorporation must be presented for 'sighting' by the controller. Upon receipt of the completed taxpayer registration input form and all documents, a tax reference number is allocated. An application must be filed for the tax clearance certificate. Its issuance is not automatic.

The fees for the tax clearance issuance are as follows:

- for newly registered companies within 6 months of incorporation no fee;
- for companies that are yet to commence business and show up for registration after 6 months of incorporation, if they request for tax clearance certificate a pre-operation levy of NGN 25,000 is payable for the first time and NGN 20,000 is payable for subsequent years until it files a notice of commencement of business.

section five INTELLECTUAL PROPERTY REGISTRATION

INTELLECTUAL PROPERTY REGISTRATION

1. REGISTRATION OF TRADEMARK IN NIGERIA

Trademarks and its registration in Nigeria is governed by the provisions of the Trademarks Act Chapter T13 Laws of the Federation of Nigeria, 2004 ("the Act") and the Trademarks Regulations 1990.

The Act provides that no person shall be entitled to institute or commence any proceeding to prevent or recover damages for the infringement of an unregistered trademark. Simply put, in order to lay claim to a particular trademark, such a trademark must have been registered.

However, the Act protects actions for passing off by providing that nothing under the Act shall prevent an action against any person for passing off goods as goods of another person or the remedies in respect of such action[8].

The Act also provides that registration must be made with respect to certain categories of goods or class of goods and any question with respect to the class within which any goods fall, shall be determined by the Registrar of Trademarks (Registrar) whose decision shall be final.

Under the Act, the registration of a person in respect of any goods shall (if such registration is valid) give or be deemed to have given that person the exclusive right of usage of that trademark that has been successfully registered in relation to those goods.

The registration of any trademark in Nigeria must be carried out at the Trademark, Patents and Designs Registry of the Commercial Law Department, Federal Ministry of Industry, Trade and Investment[9].

Also, an application for the registration of a trademark may be made by the proprietor/owner of the trademark or by an agent, however, where the proprietor is a foreigner, then he or she must make use of a local agent.

Requirement for registration

In order to register a trademark, it must contain or consist of at least, one of the following[10]:

(a) the name of a company, individual, or firm, represented in a special or particular manner;

(b) the signature of the applicant for registration or some predecessor in his business;

(c) an invented word or invented words;

(d) a word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname;

(e) any other distinctive mark.

Registration process

Conduct search- though this step is not provided for under the Act, it is however prudent for a search to be conducted first, to determine whether such trademark sought to be registered, has been previously registered.

Traditionally, the actual search is done manually at the Trademarks, Patents and Designs Registry in Abuja. Trademark search is essential before registration because it ensures that the proposed trademark does not conflict with an existing trademark. Where there are no conflicting names, the applicant can proceed with the application for registration of the trademark to the registrar. **Application**- The application for the registration of trademarks must be made to the Registrar. Upon receipt of the Application, the Registrar will issue an *acknowledgement form* confirming and verifying the receipt of the application by the Registrar and a temporary number will be allocated to the trademark, pending full registration and allocation of a permanent registration number. The Registrar may accept, reject or conditionally accept the trademark sought to be registered[11].

Examination by the Registrar- The Registrar will conduct a proper and detailed examination of the trademark in the Trademarks Register to ensure that there is no existing registered trademark which may conflict with the trademark sought to be registered. Such registration will extend to whether the mark is distinctive, scandalous, deceptive or in any way prohibited or disallowed because it contains names of prohibited words, single chemical substance, arms of Nigeria or state, national flag, the words "President" or "Governor", arms of a city, town, place, society, names of living persons or persons recently dead (except the permission of such persons is obtained).

Issuance of Acceptance form or Refusal Form- Sequel to the examination conducted by the Registrar, if the Registrar is satisfied that the trademark may be registered, an *acceptance form* will be issued to the applicant within a period of three (3) weeks after the issuance of the *acknowledgment form*. However, if the Registrar rejects the application, then a refusal form will be issued and Registrar shall if required by the applicant, state in writing the grounds for such refusal and the materials used by him in arriving at the decision to reject or refuse such application[12].

Publication of Notice of Application – After the application has been accepted by the Registrar (whether absolutely or subject to any conditions or limitations), the Registrar is required by the Act, to as soon as possible, compel the publication of the trademark in the Trademark Journal and the Notice shall contain all conditions and limitations subject to which the application has been accepted. This publication is usually done within 12 to 18 months after the issuance of the Letter of Acceptance.

Objection/ Opposition- By virtue of section 20 of the Act, any person may file an objection or opposition to the registration of the mark. Such objection must be made within a period of two months from the date of the registration. The objection notice must be in writing and it must also contain the grounds for such an objection. The Registrar is required to send a copy of the notice of objection to the applicant and the applicant is required by the Act, to send to the Registrar, a counterstatement in the (prescribed manner) stating the grounds on which he relies for his application. However, failure to send a counterstatement within the prescribed time to the Registrar, the applicant is deemed to have "abandoned his application". Upon sending the counterstatement, the Registrar will furnish the person giving notice of opposition with the counter-statement of the applicant. After hearing the parties, determine (whilst considering the evidence presented before him) whether the mark should be registered or registered with certain limitations or conditions. However, the decision of the Registrar is subject to an appeal to the Federal High Court.

Registration- Where there is no objection or opposition to the registration of a mark within the time stipulated by the Act or where the opposition or objection is settled in favour of the applicant, the Registrar is required to issue the applicant with a Certificate of Registration. However, it is imperative to note that such registration takes effect retrospectively from the date the application/filing is made. It is also important to note that upon registration, the right to a trademark subsists for a period of seven years and it is renewable from time to time, for another period of fourteen years.

Transmission/Assignment- Section 26 of the Act provides for the transmission of registered trademarks. Such transmission, according to the Act may be in respect of part of the goods or all the goods that were registered and such assignment or transmission is required to be registered in the Trademark registry. The transmission may also be in tandem with business goodwill.

In addition to the above registration process, it is prudent for a trademark owner to understand that his or her trademark can also be removed from the register and revoked. The Act stipulates the following grounds for revocation:

- 1. non-use of a trademark for a continuous period of (at least) five years after it was registered;
- 2. non-compliance to the registrar's statutory notice to renew by the registered proprietor;
- 3. if the entry has been made in the register without sufficient cause.

By virtue of section 31 of the Act, such revocation will be made upon an application made by any person concerned to the court or, at the option of the applicant. The effect of such revocation is that the trademark owner ceases to have any rights pertaining to such a trademark.

2. REGISTERING PATENT IN NIGERIA

An application for the grant of patent is made to the registrar of Patent and Industrial designs which is under the Federal Ministry of Commerce, Abuja. The application consists of:

- A petition or request for a patent with the applicant's full name and address (form 1A);
- A signed power of attorney authorization of agent if the application is made by an agent (form 2);
- A specification including a claim or claims in duplicate (form 3);
- Plans and drawings if any in duplicate;
- A declaration by the true inventor where applicable;
- An address for service in Nigeria if your address is outside Nigeria;
- If an applicant wants to leverage on a foreign priority in respect of an earlier application made in a country outside Nigeria, the application would have to accompany a written declaration showing the following
 - the date and number of the earlier application,
 - the country in which the earlier application was made,
 - the applicant's name as indicated in the earlier application

Not more than 3 months after filing the application, the applicant must furnish the Registrar with a copy of the earlier application, certified copy by the appropriate industrial property office of the foreign convention country.

Upon filing the application, an official Letter of Acknowledgment bearing the official application number and local filing date of the application is generated immediately from the Patent and Trademark Office (PTO) online portal, where it is an online application; where it is a manual application, it takes about 2-3 weeks for the TM Registry to issue the same.

Any outstanding document not filed along with the application would need to be lodged at the PTO or uploaded on the PTO's online portal. There is a period of three (3) months within which to comply, as inability to lodge all documents within timeframe may lead to refusal of the application.

The patent application is then examined by the Registrar merely to ascertain formal compliance. Where the Registrar is satisfied that there has been compliance as to form of application, a notification of acceptance is issued by the registrar.

Once the application satisfies the statutory requirements as to the completion of form, payment of appropriate fees, it dates to only one invention, the Registrar is likely to grant the patent without enquiries to its novelty, inventiveness, and industrial applicability or whether the specification sufficiently discloses the invention. Patents are granted at the risk of the patentee and without guarantee as to their validity.

The Registrar grants a patent by issuing to the patentee a ceremonial document with the Sealed Letters Patent, containing the following:

- number of the patent in the order of grant;
- name and address of the patentee;
- the dates of the patent application and the grant;
- if foreign priority is claimed, an indication of the fact
- number and date of the application on which the claim is based and the name of the country where it was made;
- the description of the invention (with any relevant plans and drawings) and the claims; and
- where appropriate, the name and address of the true inventor.

A Patent expires after 20 years from the date of the filing of the relevant patent application.

At the expiration of a patent where the patent holder fails to pay the prescribed annual fees after a grace of 6 (six) months following the year from which such fees are due.

3. REGISTRATION OF COPYRIGHT

A copyright is a legal right given to the originator of creative work to reproduce the work for a limited period. Copyright protects the work of authors, artists, songwriters, music publishers and composers, photographers and other creatives. The primary copyright law in Nigeria is the **Copyright Act Cap C28 LFN 2004 (the Act).**

Under the Act, Section 1 provides that the works that are eligible for copyright protection are as follows:

Literary works
Musical works
Artistic works
Cinematograph works
Sound recording

Section 11 provides that the owner of a copyright has the following rights:

- 1. To claim authorship of his work
- 2. To object and seek relief in connection with any distortion, mutilation or any other modification of his work.

Please note that the law also recognizes an "author" to include a person's heir and successors in title. Where work with subsisting copyright is published, printed, produced or manufactured, there should be kept a register showing the name of the author, the title, the year of production and the quantity of work produced.

A copyright is infringed by any person who without the license or authorization of the owner of the copyright uses or causes the copyrighted work to be used. A copyright holder whose right has been infringed is entitled to damages or injunctions.

The copyright law in Nigeria provides for has several categories and the duration of rights. The First Schedule of the Copyright Act provides that:

In the case of literary, musical or artistic works (photographs are not included), copyright will be given for a period of 70 years after the end of the year in which the author dies. Where the work is created by a body corporate then the copyright will last for 70 years after the end of the year in which the work was first published.

In the case of cinematography, films, and photographs, the copyright will last for a period of 50 years after the end of the year in which the work was first published.

In the case of sound recordings, the copyright is given for a period of 50 years after the end of the year in which the recording was first made.

Where it is a broadcast, the copyright will last 50 years after the end of the year in which the broadcast first took place.

COPYRIGHT REGISTRATION

Although, the maker is automatically deemed to be the owner of a copyright, with or without registration. However, registration provides protection in respect of a copyright works and it is a prima facie evidence of title, where there are conflicting rights in respect of any copyright.

The advantages of copyright registration include the followings:

- Independent source of verifying data relating to a work or its author to the general public
- The acknowledgement certificate issued to the author who notifies the Commission of his work provide prima facie evidence of the facts shown on it;
- The Commission provides a depository for preserving original copies of works notified;
- The information and data contained offers reliable rights management information to members of the public and prospective licensees to the work.

section six PROCEDURE FOR FILING OF ANNUAL RETURNS UNDER THE COMPANIES AND ALLED MATTERS ACT

PROCEDURE FOR FILING OF ANNUAL RETURNS UNDER THE COMPANIES AND ALLIED MATTERS ACT.

In Nigeria, the filing of Annual returns by a company is regulated by the provisions of the Companies and Allied Matters Act, 2020 ("CAMA") and the Corporate Affairs Commission ("CAC"). CAMA provides that every company, incorporated trustee and Business name (enterprise) shall once at least in every year, make or deliver to CAC Annual returns in the prescribed form. The purpose of filing an annual return is to confirm that such company, business name, or incorporated trustee is a going concern and for such entity to regularly update its records with the CAC. Accordingly, under section 417, every company whether limited by shares or guarantee shall once at least in every year make and deliver to CAC an annual return in the form, and containing the matters specified in section 417, 418, 419, 420of CAMA (as may be applicable). However, the same section also provides that a company need not file an annual return in the year of its incorporation if it is not required under CAMA to hold an annual general meeting during the following year.

Generally, organisations are required to file their annual returns not earlier than 30th June or later than 31st December every year except the year the organisation was incorporated (as earlier stated). Hence, newly registered organisations are required to commence the filing of their annual returns not later than 18 months after their incorporation with the CAC, while existing companies are required to file their annual returns (according to Section 421 of CAMA) not later than 42 days after their Annual General Meeting.

CAMA also provides for the penalties of breach of not filing the annual returns ranging from fines, liability on the part of the directors and the striking off the name of the company by CAC.

CONCLUSION

As a start-up company, the laws of Nigeria are not all engraved in stone in a particular location. However, the gap in legal knowledge of owning a business should not stop you from executing the ideas. Start that business and consult a legal practitioner today!

Please stay tuned for AELEX start-up toolkit 2 where we will discuss licensing technology and raising funds with private equity investors.

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