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TO

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19th March 2019

RE: Memorandum on Nairobi City County Trade licensing Bill, 2018

About the Institute for Social Accountability (TISA)

TISA is a civil society initiative committed towards the achievement of sound policy and good governance in local development in Kenya, to uplift livelihoods of, especially, the poor and marginalized. TISA has established itself as a leading player in decentralized governance and has engaged with relevant state and non-state actors in the quest to promote effective local governance in Kenya.

TISA wishes to make the following comments on the proposed Nairobi City County Trade and Licensing Bill, 2018 in addition to submissions shared on 12th March 2019 at Charter Hall during the public hearings on the proposed Trade and Licensing Bill, 2018.

No	Topic/Clause	Proposed Amendment	Justification
New Clause: Guiding principles	<p>The county should introduce a section on principles to guide the Act as follows;</p> <ul style="list-style-type: none"> • To provide an enabling regulatory framework which provides and promotes growth and development in the sector, promotes self-regulation by trading associations, ensures accountability and answerability; • To give effect to Article 232 on the values and principles of public service which include responsive, prompt, effective, impartial and equitable provision of services; involvement of the people in the process of policy making, accountability for administrative acts and transparency; affording adequate and equal opportunities for all and provision to the public of timely, accurate information • To give effect to Article 10 to promote public participation, inclusiveness, equality, human rights, non -discrimination and 	<p>The Constitution¹ of Kenya sets a legislative standard of codifying values and principles to guide the interpretation and implementation of the supreme law. To ensure compliance to the statutory requirements and to promote right to trade for all, the bill should conform to the guiding principles provided</p>	

¹ Chapter Four of the constitution of Kenya 2010 provides for the Bill of rights and points out that the bill of rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. Article 27 (3) provides that women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres. Article 28 provides that every person has inherent dignity and the right to have that dignity respected and protected. Article 29 states that Every person has the right to freedom and security of the person, which includes the right not to be subjected to any form of violence from either public or private sources and subjected to torture in any manner whether physical or psychological. The above in essence affects the proposed Bill and requires that right of all traders are protected by the Bill.

		<p>protection of the marginalised that include in this case the vulnerable trading populations</p> <ul style="list-style-type: none"> • To give effect to article 35 and provide for open governance based on proactive disclosure of information; The government should adopt a proactive information disclosure to enhance transparency in preferential procurement facilities. • To give effect to Article 27 (3) which provides that women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres. Thus, the Act should be aimed at facilitating access to trading spaces for marginalized groups especially women and youth; 	
	<p>Part 1 Preliminary provisions: Interpretations²</p> <p>“Business” includes a profession, occupation clear definition of operating times or trade, include the businesses that are exempted</p> <p>“Trade” means any business in the course of which any goods, wares, merchandise or provisions are sold and for which a license under this Act is required, in any trading premises, whether by retail or wholesale.</p>	<p>Revision: “Business” includes <i>commercial activities conducted for the purpose of facilitating such buying and selling of goods and services with clear definition of operating times or trade</i>, including the businesses that are exempted</p> <p>Revision “Trade” or “Trading” “means any business in the course of which any goods, wares, merchandise or provisions are sold and for which a license under this Act is required,</p>	<p>Through licensing, registration of informal sector will be enabled subsequently allowing traders to get onto county database which would allow them to gain access to government support programmes; Licensing of all traders will ensure greater security to operate a business</p>

² Under Cap 500; Business is interpreted as **“business”** means *any trade or occupation, other than a profession, carried on with a view to profit*

	<p>in any trading premises, whether by retail or wholesale.</p> <p>Recommendations on other interpretations relevant to the Bill:</p> <ol style="list-style-type: none"> 1. “General trade area” means an area declared under section 3 to be a general trade area for the purposes of this Act; this will allow section 3 (1) provide in detail general trade area under the act 2. “Street trading” the selling or offering for sale of any article in the street 3. “Hawker” means a person who, whether on his or her own account or as the servant of another person, sells goods by retail other than in trading premises or in a market established by the county and /or authorities related to the county 4. “specified goods” means any goods, or goods of any particular class, declared as such under section for the purposes of this Act. 	
<p>Clause 3: This Act shall apply to all persons who trade or have businesses in Nairobi</p>	<p>Revision Clause 3: This Act shall apply to all persons who trade or have businesses in Nairobi cutting across all business classifications specified under subsection</p> <p>3(1) General trade areas- this part should set out the general trade areas under the act-</p>	

	<p>basically it will provide how the trade areas will be designated</p> <p>Introduce subsection on business classification</p> <p>Micro enterprises</p> <ul style="list-style-type: none"> ❖ sector including hawkers, street vendors and small traders and service providers operating on the street verandahs or temporary buildings³ <p>Small enterprises</p> <ul style="list-style-type: none"> ❖ Shop and retail services ❖ Communication Transport, storage and ❖ Accommodation and catering <p>Medium enterprises</p> <ul style="list-style-type: none"> ❖ Agriculture, forestry and natural resources extraction activities ❖ Technical Financial, and Professional services ❖ Entertainment, Health and Education 	<p>Part II-Administration of Trade Licenses</p> <p>4(1) There is established a Directorate of Trade Licensing within the County Sector responsible for matters relating to trade</p>	<p>To promote compliance to statutory regulations, transparency and accountability</p>
	<p>Revision 4(3): the directorate of trade shall be guided by the principles including</p> <p>(a) The regulation of licensable activities which shall aim to set minimum standards relating to such activities and to ensure</p>		

³ community, social and personal services trade sub sector: Jua Kali Artisans; motorcycle taxi; Car wash; Tomato vendors; Food vendors; Salons and barber shops; Fishmongers; Small slaughter house; Juice parlor; Second hand clothes; Outdoor food and drinks; Mobile cookers and Barbeque; Catering type trucks; Mobile food kiosks; Posho mill etc.

		<p>i. national security;</p> <p>ii. public safety and hygiene; and environmental protection;</p> <p>iii. Inclusion of marginalized trading populations, including hawkers and street vendors</p> <p>v. Promotion of transparency and public participation</p> <p>(b) Licences shall be issued on the basis of clearly defined and transparent criteria;</p>	
	<p>Clause 7.(1) A person who intends to operate any business or trade within the county shall obtain a license</p> <p>Clause 7(2) A person who operates a trade or business without a trade license commits an offence and shall be liable upon conviction (b) in the case of an individual to a fine not exceeding Kenya Shillings Fifty Thousand</p>	<p>Revision 7.(1) A person who intends to operate any business or trade within the county and fall within the brackets of traders under subsection (3) shall obtain a license</p> <p>Revision7(2) A person who operates a trade or business listed under subsection (3) without a trade license commits an offence and shall be liable upon conviction (b) in the case of an individual to a fine not exceeding Kenya Shillings Fifty Thousand or a 6 months' imprisonment or both</p> <p>Include: on Declaration of General trading areas and trading centres.</p> <p>The County Executive Committee Member through the directorate of trade, may from time to time, by statutory order, declare any area of county that meets set standards to be a general trading area for the purposes of this Act;</p>	<p>This enhances transparency and effective management of trade in the county</p>
	<p>New Clause: Declaration of general trading areas and trading centres</p>	<p>Include: Declaration of specified goods.</p>	<p>Compliance on constitution provision on right to trade by all</p>
	<p>New clause: Declaration of specified goods</p>		

		<p>The County Executive Committee Member for the sector, through the directorate of trade may, from time to time, by statutory order, declare any particular goods or goods of any particular class to be specified goods for the purposes of this Act.</p>	
	<p>New clause: Hawkers and street vendors licensing</p>	<p>Include: Grant of hawker's licence. No person shall act as a hawker unless he or she is in possession of a valid hawker's licence granted to him or her for that purpose by the Directorate of trade unless they operate business exempted from licensing and stated under the regulations</p> <p>The directorate of trade may, on application made to it in the prescribed manner and on payment of the appropriate fee specified in the Finance Act, grant to the applicant a hawkers licence.</p> <p>A hawker's licence shall be in such form as may be prescribed and shall be granted subject to such conditions as to—</p> <ol style="list-style-type: none"> 1. the kind of goods which may be hawked; 2. the area within which the hawking shall be restricted; 3. the hours during which the goods may be hawked, and such other conditions as the licensing authority may think fit to impose. 	<p>Enhance inclusivity</p>

Where any person employs one to hawk goods on his or her behalf, he or she shall take out, in his or her own name, a licence to be carried by the employee; and where it is desired that more employees than one shall be so employed, an additional licence shall be taken out in respect of each additional employee.

No hawkers licence shall be required in respect of any person who acts as a hawker of goods and services declared by the directorate of trade and stated in the regulations of this Act to be hawked without a license

The directorate of trade may refuse to grant a hawker's licence under this section and may revoke any hawkers licence granted under this section if it is satisfied that any of the terms and conditions upon which the hawkers licence was granted has been contravened.

Duration of hawker's licence: Unless earlier revoked, a hawker's licence granted under this Act in respect of any year shall expire 12 months after the date of issue.

Hawkers licence not transferable: A hawker's licence granted under this Act shall be personal to the holder of the licence and shall not be transferable.

		<p>Production of hawkers licence on demand: Every person who holds a hawkers licence granted to him or her under this Act shall carry his or her licence with him or her at all times while he or she is acting as a hawker, and shall produce the license for inspection on the demand of any enforcement officer, police officer or any person authorised in writing by the the directorate of trade</p>	
	<p>New clause: licensing charges</p>	<p>Include: a) The directorate of trade shall ensure that the license charges remain reasonable and proportionate through establishing regular and robust review process annually</p>	
	<p>Clause 12(1)A person who is aggrieved by the decision of the Directorate of Trade licensing may make a written appeal to the county Executive Committee Member within fourteen days in a prescribed form</p>	<p>Revision Clause 12(2) A person who is aggrieved by <i>any</i> decision of the Directorate of Trade licensing may make a written appeal to the appeals board within fourteen days in a prescribed form</p>	<p>To promote transparency and accountability</p>

Include clause on Appeal

Appeals Board

1. There shall be an Appeals Board to hear and determine appeals against the decisions of the directorate of trade.
2. The Appeals Board shall consist of the following members appointed by the County Executive Committee Member —
 - a. a chairperson;
 - b. a representative of the Attorney General;
 - c. a representative of the Fair-Trading unions;
 - d. a representative of a non-governmental organisation that represents the interests of the public.
3. A person appointed as a member of the Appeals Board shall have experience in legal, administrative, economic or financial matters.
4. A member of the Appeals Board shall be appointed on such terms and conditions as the County Executive Committee Member may determine.
5. The Chairperson and other members of the Appeals Board shall hold office for five years and shall not be eligible for reappointment.
6. The County Executive Committee Member shall at any time terminate the appointment of a member who has been found guilty of

		<p>a. any misconduct, default or breach of trust in the discharge of that member's duties; or</p> <p>b. an offence of such nature as renders it desirable that the member's appointment be terminated.</p> <p>The Appeals Board may regulate its own proceedings.</p> <p>Appeal Verdicts</p> <p>7. The Appeal Board may, where it entertains a notice of appeal, decide the appeal by —</p> <ol style="list-style-type: none"> a. confirming the decision of the the Directorate of Trade licensing; b. varying the decision; c. quashing the decision; d. ordering the Directorate of Trade licensing to reconsider the Directorate's decision as directed by the Appeals Board. 	
	<p>Memorandum of Objects and Reasons (pg 11):</p> <p>This bill is intended to provide for regulation of trade in the County of Nairobi. It is intended to give a legal framework for application and issuance of trade licenses</p>	<p>This bill is intended to provide for regulation of trade in the County of Nairobi. It is intended to give simple, facilitative framework for the licensing application procedures by providing set norms and standards and promoting competent governance and support for businesses.</p>	

General Gaps in the proposed Nairobi City County Trade Licensing Bill, 2018

Informal Sector in Nairobi City County

Liberalisation and globalization has pushed most employment into the MSME trade. MSME comprises small scale units providing distributing and retailing goods and services. The sector is largely unregulated and therefore leads to some undesirable social and environmental impacts such as environmental degradation, nonobservance of health standards and infringement of copyright laws, heavily relying on self-supporting and “informal” institutional arrangements.

The informal sector emerges as a result of limited formal job opportunities, slow economic growth, and high population growth. Although, these sectors present less business entry challenges, they present survival challenges.

Sessional Paper No.2 of 1992 on Small Enterprise and Jua Kali Development in Kenya, emphasized the need to create an enabling environment through appropriate legal and regulatory framework and measures to promote the growth of the sector. The paper was informed by the successes of the newly industrialized Asian nations and identified four principal challenges facing informal trade, namely, lack of access to; credit, land and infrastructure, training and technical support, technology and market information. Under its proposals the EPZs and national industrialization promotion council were launched. Its failure has been attributed to macro level economic policy that was preoccupied with privatization and foreign investment than with local initiatives and investments. Mauulu attributes the failure of the policy to a preoccupation with the SAPs and the short-term focus of government.

Informal enterprises have a slight advantage when compared to formal enterprises, given the relative ease of entry and lower cost of compliance. This creates an uneven playing field for formalized competitors. The Kenya 2013 Enterprise Survey identifies practices of the informal sector as the top business environment constraint experienced by the formal enterprises sampled. Nonetheless the informal trade sub-sector continues to face barriers to its growth and graduation to formal trade status.

TO this end, TISA recommends that the proposed Trade licensing Act should be designed in such a manner to:

- **Define informal trade as:** Any business that includes the selling of goods and services in public spaces and informal trader” to mean any person that carries on a business as a street vendor, hawker and include an employee of such person.
- Provide a comprehensive coordinated multiagency approach aimed at promoting formality in business; enhancing social employment and investor protection; and ensuring compliance or conformity to statutory and regulatory requirements;
- Support implementation of the national legal and regulatory framework for the informal sector;
- Provide a comprehensive license that is readily accessible, and the process is fast and efficient;
- Promote a licensing regime which integrates the informal sector into mainstream trade development and regulation;

References

The proposed Nairobi City County Trade and Licensing Bill has been reviewed in reference to the following

- Constitution of Kenya 2010 -right to trade and inclusion of disadvantage groups in development matters
- The National Trade Policy 2016,
- National Land Policy 2009, and the following reports:
- Kiama and others, A Cry for Justice: torture and ill treatment of Hawkers and Small-Scale Traders in Nairobi City County, IMLU 2012.
- The Institute for Social Accountability, Exploring Vulnerability among Small Scale Traders in the Informal Sector in Nairobi, Kenya, (Draft) 2018
- Underscore the overall objective pf the motion mover and the county assembly committee of Committee of trade, tourism and cooperatives in the development of the
- World Bank survey: Informal enterprises in Kenya , 2016
- Related legislations in other jurisdictions and counties with similar scenarios: south Africa , Seychelles, Muranga and Laikipia Counties