

ESTABLISHING AN EFFECTIVE LEGAL FRAMEWORK FOR THE GROWTH OF  
SMEs TOWARD THE AFRICAN CONTINENTAL FREE TRADE AREA.

By

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## **ABSTRACT**

Small to medium enterprises (SMEs), especially those recently termed “startups,” are growing the economies of different countries worldwide, especially in Africa. SMEs can play a vital role in what the intra-Africa trade growth of the African Continental Free Trade Area (AfCFTA) aims for. One of the greatest problems hindering SMEs’ growth is the absence of legal frameworks that adequately address their challenges. This study identified key challenges faced by SMEs and explored how to enhance the current SME legal frameworks to help SMEs tackle these challenges effectively. In answering the research question, “What would constitute an effective legal framework to assist the growth of SMEs towards the AfCFTA?” it explored the current SME legal landscape through a comparative desktop analysis of three countries: Kenya, Nigeria, and Tunisia. It examined the general laws governing SMEs and explored the specific Start-Up Law Acts that have surged in these African countries. It also examined the regional response from AfCFTA through its protocols, the AU Strategy for SME/I Development in Africa, and the implementation plan. In drawing lessons, the study compared the responses in Africa with the European Union's reaction to its own SME strategy for sustainable and digital Europe. Provisions on innovative financing, supporting a multistakeholder ecosystem, incentives that benefit the whole ecosystem, including investors, and action-oriented intellectual property protection and commercialisation measures are among the provisions identified as essential to constitute an effective SME legal framework. Furthermore, the study advocates that the intentionality and comprehensive benefits displayed in StartUp Acts should be incorporated into all SME legal frameworks to cater to conventional SMEs, especially considering that the environment enabling the full adoption of technology is not yet optimum. The research employed doctrinal research, which limited the information to the opinion and evidence of what other researchers had gathered. Empirical research would be valuable for future research to get a clearer perspective on what could constitute an effective SME legal framework.

## **LIST OF ABBREVIATIONS**

AFCFTA	African Continental Free Trade
AfDB	Africa Development Bank
AU	Africa Union
BFA	Business Facilitation Act
COMESA	Common Market for Eastern and Southern Africa
EU	European Union
GDP	Gross Domestic Product
ILO-	International Labour Organization
IP	Intellectual Property
KSH	Kenyan Shilling
MSEA	Micro and Small Enterprise Act
NITDA	National Council for Digital Innovation and Entrepreneurship
NSA	Nigerian Start-Up Act
OECD	Organisation for Economic Co-operation and Development
RECs	Regional Economic Communities
SMEs	Small and Medium Enterprises
STR	Simplified Trade Regime
UNECA	United Nations Economic Commission for Africa
UNCTAD -	United Nations Conference on Trade and Development
USD	United States Dollar
WAEMU	West African Economic and Monetary Union

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## **CHAPTER 1: INTRODUCTION**

### **1.1 Background of the study**

Small and Medium Enterprises (SMEs) are central to emerging economies, constituting 95% of registered businesses and 50% of the Gross Domestic Product (GDP) in most African countries.<sup>1</sup> Their growth can positively impact intra-African trade levels, which aligns with the core aims of the African Continental Free Trade Area (AfCFTA). Through trade facilitation across Africa, the AfCFTA brings together a population of 1.3 billion, combining a GDP of more than US\$3.4 trillion.<sup>2</sup> However, SMEs face hurdles hindering their growth. Among these hurdles is the lack of an enabling legal environment. SME legal frameworks exist but are inadequate to cover the SMEs' problems. Some small businesses with growth potential stay informal due to the excessive registration processes and capital requirements.<sup>3</sup> Alternatively, formal SMEs usually stagnate in growth due to a stifling economic, political, and regulatory environment.<sup>4</sup> Multiple laws governing big corporations often also govern SMEs.<sup>5</sup>

The AfCFTA promises to positively impact African SMEs by increasing their market and removing trade barriers, among other benefits. This possibility often ignores how most SMEs fail to make their business profitable in their countries; therefore, exporting might be an unrealisable dream. A study revealed that 75% of SMEs in South Africa do not become established businesses.<sup>6</sup> Chad, a country with a failure of 65%, was also named one of the most challenging countries to do business with due to unfavourable regulatory frameworks.<sup>7</sup>

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<sup>1</sup> World Economic Forum 'Why Africa's SMEs need more than money to ensure their growth' July 2014 *Centre for Financial and Monetary Systems*.

<sup>2</sup> Manboah-Rockson J 'Grabbing the 'Bull' by the 'Horns''': A Critical Analysis of the Establishment of AfCFTA' (2021) 11 *Open Journal of Political Science* 301-315.

<sup>3</sup> World Bank Report 'Doing Business 2020: Comparing Business Regulation in 190 Economies' (2020) *Washington, DC: World Bank* available at <http://hdl.handle.net/10986/32436> accessed on 11 October 2023.

<sup>4</sup> African Development Bank 'Annual Report 2015, Chapter 2' 2015 available at: [https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/AR2015/Annual\\_Report\\_2015\\_EN\\_-\\_Chapter\\_2.pdf](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/AR2015/Annual_Report_2015_EN_-_Chapter_2.pdf) accessed on 12 June 2024.

<sup>5</sup> Fafunwa Tunde & Fola Odufuwa. 'African Micro, Small, and Medium Enterprises Need to Digitally Transform to Benefit from the Africa Continental Free Trade Area (AfCFTA)' Chux Daniels, Benedikt Erforth, Chloe Teevan in *Africa-Europe Cooperation and Digital Transformation* 1 ed (2022)74-90.

<sup>6</sup> Moses Ahomka Yeboah. 'Determinants of SME growth: An empirical perspective of SMEs in the Cape Coast Metropolis, Ghana.' (2015) 14 *The Journal of Business in Developing Nations* 1-3.

<sup>7</sup> Samuel Muiruri Muriithi 'African small and medium enterprises (SMEs) contributions, challenges and solutions' (2017) 5(1) *European Journal of Research and Reflection in Management Sciences* 36-42.

Many individuals erroneously view SMEs as small (in size and capital) companies requiring minimal assistance to thrive, who will automatically participate in AfCFTA as soon as the domestic general business environment improves and ignore the SME-specific unique needs that must be addressed.<sup>8</sup> The Global Entrepreneurship Monitor has identified supportive government policy, efficient legal infrastructure, and good political governance as essential for effective entrepreneurship development in Africa.<sup>9</sup> These factors motivate potential entrepreneurs to tap into existing entrepreneurial opportunities.<sup>10</sup> Entrepreneurship development is indispensable to economic development and is the engine of growth in developing economies such as Africa.<sup>11</sup> It has always been regarded as an avenue for innovation, job creation, and poverty reduction in Africa.<sup>12</sup>

This study answers the question; what legal framework can be developed for SMEs to create an enabling environment for them to succeed? Using three country studies, namely Nigeria, Kenya and Tunisia, it identifies the problems SMEs face and examines how existing legal frameworks respond to them. In evaluating the legal landscape, it also explores the AfCFTA protocols and the African Union (AU) SME strategy and draws lessons from comparison with the European Union. Although the problems facing SMEs are multi-faceted, this thesis is limited in scope to create an enabling legal and regulatory environment. It argues that the current legal frameworks are inadequate and lays down essential provisions for an effective adoptive SME legal framework that will strengthen SMEs' participation in AfCFTA. SMEs need assistance throughout the continent, without which their participation in the AfCFTA will likely be feeble.<sup>13</sup>

## **1.2 Setting the parameters of an 'effective' SME Legal Framework**

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<sup>8</sup> Fafunwa & Odufuwa. op cite 5 at 75.

<sup>9</sup> Victor Atiase, Mahmood Samia, Wang Yong David Botchie 'Developing entrepreneurship in Africa: investigating critical resource challenges' (2017) 25(4) *Journal of Small Business and Enterprise Development* 644-666.

<sup>10</sup> Baughn. C.C, Neupert Kente 'Culture and national conditions facilitating entrepreneurial start-ups' (2003) 1(3) *Journal of International Entrepreneurship* 313-330.

<sup>11</sup> Naude Wim 'Entrepreneurship, developing countries, and development economics: new approaches and insights' (2010) 34(1) *Small Business Economics* 1-12.

<sup>12</sup> Sander Wennekers, Roy Thurik 'Linking entrepreneurship and economic growth' (1999) 13(1) *Small Business Economics* 27-55.

<sup>13</sup> Fafunwa & Odufuwa op cit note 5 at 77.

This thesis examines what constitutes an effective SME legal framework. Effectiveness is measured by analysing the gaps existing in the current SME legal frameworks and how they can be improved through restructuring, adding on, or completely removing certain laws. In establishing an effective SME legal framework, this thesis will examine and incorporate the strengths and weaknesses of existing legal frameworks governing African SMEs. These include Small Business Acts like the Micro and Small Enterprise Act of 2012, Start-Up laws like the Nigerian Startup Act, and general laws directly affecting SMEs' business operations. Components of SME legal frameworks across Africa, for example, Kenya, have some of the following offerings: seed grants and certain tax exemptions, attracting investment funding, reducing registration and operating license fees, and promoting local and female ownership of SMEs.<sup>14</sup> These will be explained in detail in the subsequent chapters.

A legal framework is a set of rules governing the rights and responsibilities of governments, companies, and citizens.<sup>15</sup> Favourable rules are necessary for SMEs to grow, trade, and be effective. In 2012, UNCTAD developed the Entrepreneurship Policy Framework to foster global SME growth. They set up six policy priority areas, the second is for governments to optimise a regulatory environment.<sup>16</sup> The legal and regulatory framework in which a business operates is crucial in determining its chances of survival and expansion.<sup>17</sup> This study will not process a uniform standard framework due to the challenges of harmonising diverse legal systems but highlight important provisions that remedy the challenges discussed. These provisions will serve as recommendations to the AfCFTA and the different governments to align in their systems rather than apply uniformly. Focusing on adaptable provisions

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<sup>14</sup> These components are fully discussed in Chapter 2 using various regulations that govern SMEs in Kenya.

<sup>15</sup> Natural Resource Governance Institute 'Navigating the Web of Laws and Contracts Governing Extractive Industries' March 2015 available at [https://resourcegovernance.org/sites/default/files/nrgi\\_Legal-Framework.pdf](https://resourcegovernance.org/sites/default/files/nrgi_Legal-Framework.pdf) accessed on 24 August 2023.

<sup>16</sup> United Nations Conference on Trade and Development (UNCTAD), 'Entrepreneurship Policy Framework and Implementation Guidance' (2012) available at [https://unctad.org/en/PublicationsLibrary/diae2012d1\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diae2012d1_en.pdf) accessed on 9 May 2023.

<sup>17</sup> Firdouse Rahman Khan 'Socioeconomic factors influencing entrepreneurship development: an empirical study of the small and medium enterprises of Chennai, the State of Tamil Nadu, India' (2014) 2(3) *International Journal of Students Research in Technology & Management* 89-94.

promotes coherence without imposing uniformity, enabling SMEs to thrive within their unique contexts while supporting regional integration.

It is important to note that an effective SME-friendly law is not the only factor halting the creation of a favourable environment for SMEs to grow. Nevertheless, the law is foundational in creating an enabling environment.<sup>18</sup> With the political will, funding, and private business enthusiasm that the AfCFTA has garnered since its establishment, developing a specific protocol for SMEs or incorporating the SME legal framework into one of the existing protocols will push governments to create an enabling environment for SME growth.<sup>19</sup> Rwanda's president, Paul Kagame, recently said, "Entrepreneurship is the surest way of development."<sup>20</sup>

Though this SME legal framework may not be perfect or achieve all possible results, Daniel J. Isenberg rightfully notes that, 'the alternatives—taking decades to devise a model set of guidelines, acting randomly, or doing nothing—are all unacceptable.'<sup>21</sup> AfCFTA needs businesses to work, for growth to occur under it. Most businesses in Africa are SMEs; hence, they need measures to capacitate them to trade.<sup>22</sup> Therefore, an effective SME legal framework leads to thriving SMEs, which means better trading, which is needed for the success of AfCFTA.

### **1.3 Elaborating the AfCFTA and the relevant objectives of this study**

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<sup>18</sup> Trubek, D.M., 'Law and Development in the Twenty-First Century' (2011) 1178 *Legal Studies Research Paper Series* 1-5.

<sup>19</sup> ACCORD, 'Arguing that a commitment to the principles of the AfCFTA will improve industrialisation in Africa' 2019 available at <https://www.accord.org.za/conflict-trends/the-african-continental-free-trade-area/#:~:text=Drawing%20data%20from%20the%20AfCFTA,indeed%20increases%20the%20prospect%20of> accessed on 18 April 2023; Katrin Kulmann and Akinyi Lisa Agutu 'The African Continental Free Trade Area (AfCFTA) Towards a new legal model for Trade and development' (2020) 51(4) *Georgetown Journal of International Law* 753-808.

<sup>20</sup> Isenberg, D., 'The Big Idea: How to Start an Entrepreneurial Revolution' June 20 *Harvard Business Review* Available at: <https://hbr.org/2010/06/the-big-idea-how-to-start-an-entrepreneurial-revolution> accessed 12 June 2024.

<sup>21</sup> Ibid

<sup>22</sup> Daniel Agyapong 'Micro, small and medium enterprises activities, income level and poverty reduction in Ghana – a synthesis of related literature' (2010) 5(12) *International Journal of Business and Management* 196-205.

The African Continental Free Trade Area (AfCFTA) is a mega-regional trade agreement among African countries.<sup>23</sup> It was proposed in 2015, the African Heads of State and Government agreed to operationalise it in 2019 but it only became fully operational in 2021 due to delays caused by the coronavirus pandemic.<sup>24</sup> It aims to achieve several objectives, the first of which is a single market for goods and services.<sup>25</sup> It aims to promote intra-African trade to boost the economy of African countries.<sup>26</sup> The removal of trade and non-trade barriers is essential to promoting intra-Africa trading.<sup>27</sup> The AfCFTA is expected to boost intra-African trade by 52.3% by 2025, increase Africa's income by up to \$450 billion by 2035, and lift 30 million Africans out of extreme poverty.<sup>28</sup> The promise to SMEs includes a wider market that cuts across borders, enhancing competitiveness and creating room for expansion.<sup>29</sup>

Intra-African trade is reported to account for only 15% of continental trade, compared to 61% in Asia and 67% in Europe.<sup>30</sup> An increase in intra-African trade becomes imperative, particularly as AfCFTA aims to establish a single market. This precise objective is central to the study of establishing an SME legal framework to facilitate their growth in trade across the African continent. SMEs need to engage in and increase intra-African trade effectively. By encouraging intra-African trade, the broader goals of AfCFTA can be achieved.

#### **1.4 The significance of SMEs to the growth of trade in AfCFTA**

This section explains why SMEs' growth is essential to the objective of intra-African trade within AfCFTA. It provides supporting evidence to establish a nexus between SMEs' growth

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<sup>23</sup> Akinkugbe.O 'A Critical Appraisal of the AfCFTA' (2021) in Franziska Sucker and Kholofelo Kugler(eds.) *International Economic Law (southern) African Perspectives and Priorities* last revised in 2024 JUTA Law 283-306.

<sup>24</sup> Manboah-Rockson J op cit note 2 at 301.

<sup>25</sup> African Union, 'Agreement Establishing the African Continental Free Trade Area' (2018) Article 3(a) Available at: <https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area> (accessed 12 June 2024).

<sup>26</sup> Akinkugbe.O op cit note 23 at 283

<sup>27</sup> Faizel Ismail '*The African Continental Free Trade Area (AfCFTA) and Developmental Regionalism- A handbook*' (2021) 3.

<sup>28</sup> AU NEPAD 'AfCFTA: Africa Controls Its Destiny' (2023) available at: <https://www.nepad.org/news/afcfta-africa-controls-its-destiny> accessed on 12 June 2024.

<sup>29</sup> African Union, Positioning SMEs in Africa to tap into and benefit from the AfCFTA available at <https://au.int/en/videos/20200201/positioning-smes-africa-tap-and-benefit-afcfta>.

<sup>30</sup> UNCTAD, 'Rules of Origin Key to Success of African Continental Free Trade Area' (2023) available at: <https://unctad.org/news/rules-origin-key-success-african-continental-free-trade-area> (accessed 12 June 2024).

and trade growth, also showing how increased commercial activity leads to increased trade levels.

As stated earlier, SMEs contribute significantly to Africa's GDP. For example, the National Development Plan of South Africa envisioned that by 2030, SMEs will contribute 60-80% to the GDP increase and generate 90% of their country's 11 million new jobs.<sup>31</sup> This is evidence of a nexus between SMEs' growth and trade growth. Small businesses are the driving force of growth in any society through providing jobs and solving specific problems.<sup>32</sup> According to the Statistical Service Report and the Ghana Bank Doing Business Report 2013, SMEs contributed 70% to the GDP and 49% to employment in Ghana.<sup>33</sup>

SMEs are also important to trade development as they introduce new technologies and products and create new industries.<sup>34</sup> Their usual small size allows them to navigate through decision-making faster, making them more flexible and responsive to frequently evolving country situations.<sup>35</sup> SMEs are described as a cradle of innovation, which could also generate added value in the economies.<sup>36</sup> In Serbia, 35% of Serbian SMEs introduced new products,

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<sup>31</sup> Government of South Africa, 'National Development Plan 2030: Our Future - Make it Work' available at: [https://www.gov.za/sites/default/files/gcis\\_document/201409/ndp-2030-our-future-make-it-workr.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf) (accessed 12 June 2024); Vuba.S 'The missed opportunity: SMMEs in the South African economy' *Mail and Guardian* 12 April 2019.

<sup>32</sup> OECD, 'Small and Medium-sized Enterprises: Local Strength, Global Reach' (2000), Available at: <https://www.oecd.org/cfe/smes/2090740.pdf> (accessed 12 June 2024); Hasan R, Md Asikur, Johora F.T, Ullah Md, Saju Md 'Driving Growth: The Intergral Role of Small Businesses in the US Economic Landscape' (2024) 14 (6) *American Journal of Industrial and Business Management*.

<sup>33</sup> Ramati Ussif, Kasim Salifu 'Contributions of Small & Medium Enterprises to Economic Developments in Sub-Saharan Africa' (2020)4(3) *International Journal of Academic Accounting, Finance & Management Research* 63-68.

<sup>34</sup> Pulka Buba, Muhammad Sani Gawuna 'Contributions of SMEs to Employment, Gross Domestic Product, Economic Growth and Development' (2022) 4 (1) *Jalingo Journal of Social and Management Sciences* 1-18.

<sup>35</sup> OECD 'Key Issues Paper: OECD SME and Entrepreneurship Ministerial Meeting 2023' (2023) available at: <https://www.oecd.org/cfe/smes/key-issues-paper-oecd-sme-and-entrepreneurship-ministerial-meeting-2023.pdf> 9 accessed 12 June 2024.

<sup>36</sup> Sabanidze Giorgi, Kivenko Aleksei, Benics Peter; Kalkan Gokce, Tick, Andrea 'The importance of SMEs in economic development of developing countries' (2021) *Management, Enterprise and Benchmarking in the 21st Century* 91-104.

while 28% introduced new processes.<sup>37</sup> New technologies, products, and industries are essential to keep trade agile under AfCFTA.

SMEs also enable better economic parity. UNCTAD confirmed that countries with a high rate of small industrial enterprises have succeeded in making income distribution more equitable.<sup>38</sup> This is because SMEs employ many people, especially the economically disadvantaged, and are key to achieving each Sustainable Development Goals.<sup>39</sup> Under its objectives, the AfCFTA also aims to attain sustainable and inclusive socio-economic and industrial development through diversification.<sup>40</sup> Hence, SMEs' development is towards achieving the single market objective and socio-economic and industrial development through economic parity.

Acknowledging the importance of SMEs, AfCFTA creates a business-friendly climate for current and prospective small and medium-sized enterprises through its protocols. The Protocol Trade in Services encourages governments to assist SMEs with export capacity building.<sup>41</sup> Assistance for SMEs is needed for AfCFTA to capitalise on all its potential.<sup>42</sup> Establishing a regulatory framework that specifically supports SMEs can significantly contribute to growth assistance. Tunisia is a case study where an SME-centred Start-Up Act was enacted in 2018, leading to increased company registration and a \$7 million USD increase in investment.<sup>43</sup>

## 1.5 Research Problem

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<sup>37</sup> Fernandez Viviana; Wellalagea Nirosha Hewa, 'Innovation and SME finance: Evidence from developing countries' (2019) 66 *International Review of Financial Analysis* 1-14.

<sup>38</sup> UNCTAD Secretariat "UNCTAD Annual Report 2001," United Nations, New York and Geneva 2002 at 20.

<sup>39</sup> Goumma.F 'The role of SMEs in national economies: overview and outlook' 2022 Conference: Economic and Social Development (Book of Proceedings) 82nd International Scientific Conference on Economic and Social Development – 'Post-Covid Economy in Africa and emerging countries' available at [https://www.researchgate.net/publication/360918005\\_THE\\_ROLE\\_OF\\_SMES\\_IN\\_NATIONAL\\_ECONOMIE\\_S\\_OVERVIEW\\_AND\\_OUTLOOK](https://www.researchgate.net/publication/360918005_THE_ROLE_OF_SMES_IN_NATIONAL_ECONOMIE_S_OVERVIEW_AND_OUTLOOK) 321 accessed on 16 June 2023.

<sup>40</sup> Agreement establishing the AfCFTA supra 3 Article 3(e) and (f).

<sup>41</sup> Protocol on Trade in Services section 27 available from AU AfCFTA and AfricanLII.

<sup>42</sup> Fafunwa and Odufuwa op cit note 5.

<sup>43</sup> Tunisia Start Up Act 2018 English translation by i4policy (24/5/18). This was retrieved directly from Smart Capital. A company implementing the Tunisia Start Up Act; Startup Tunisia, 'Startup Tunisia Annual Report 2020', Available at: <https://startup.gov.tn/sites/default/files/2021-11/Startup-Tunisia-Annual-Report-2020-en.pdf> (accessed 12 June 2024).

There is a reliance on SMEs if Africa is to build a single market of 1.3 billion people, with a combined GDP of \$3.4 trillion. Yet, an effective legal environment is absent for SMEs to grow and effectively benefit from AfCFTA.<sup>44</sup> Only a few countries in Africa have specific SME legal frameworks. Even in the countries where frameworks exist, they are inadequate to SMEs' challenges. Therefore, there is no comprehensive legal structure addressing the challenges of SMEs and creating an enabling environment for SMEs and relevant stakeholders to grow the African market as they should. There is an urgent need to establish a comprehensive, effective legal framework that offers guidance to countries to cater to SMEs' unique needs. This enables them to participate effectively in trade under the AfCFTA.

### **1.6 Research questions**

From the research problem being the lack of an effective SME legal framework, the broad research question is, 'What would constitute an effective legal framework to assist the growth of SMEs towards the AfCFTA? In answering this, some sub-questions are broken down as follows;

1. What are the legal challenges faced by SMEs?
2. What is the current legal landscape for SMEs at a country level and within the AfCFTA framework?
3. How have other regional economic areas dealt with SMEs' trade growth?
4. What provisions and elements should be included in a legal framework to address the unique needs of SMEs and ensure their growth and effective participation under AfCFTA?

By answering these research questions, the thesis facilitates an understanding of SMEs' legal challenges under the AfCFTA. The legal framework proposes practical solutions to foster SMEs' growth in the evolving trade landscape AfCFTA presents.

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<sup>44</sup> AU NEPAD op cit note 28.

## **1.7 Research Justification**

SMEs are significant contributors to Africa's GDP and have the potential to enhance intra-African trade under the AfCFTA substantially.<sup>45</sup> However, the legal frameworks governing them currently are inadequate for their unique problems and sustained growth. There is currently a lack of equity as the same commercial and company laws presently applied to big enterprises ('big' in terms of capital) are the same applied to SMEs. Furthermore, the legal frameworks existing present bureaucracy and multiplicity, making it difficult for SMEs to navigate. Yet law is foundational to the development of any business. For these reasons, a study into SMEs, in the manner this research proposes, is justified.

Furthermore, a specific dedicated SME legal framework with key provisions could enable the growth of SMEs. A case study in point is the introduction of the Tunisian StartUp Act, primarily dedicated to SMEs that qualify as Start-Ups. According to a report by Expertise France, 73% of labelled startups in Tunisia as of 2020 were founded after the enactment of the Act.<sup>46</sup> The Tunisian Startup Act incentivised the creation of new ventures, increased investment and created an ecosystem to lend to many starting a venture, allowing investors to put support where needed.<sup>47</sup>

## **1.8 Research Methodology**

The research methodology used for this thesis is desktop research relying on both primary and secondary sources of information. It critically analyses small businesses, SMEs, and Start-Up Acts, as well as their regulations and policies. Secondary sources include books, legal journals and papers, legal reviews, online databases, and newspaper articles.

A comparative law approach is used to explore the research of commonly used law for SMEs. The comparative study focuses on laws governing SMEs in Kenya, Nigeria, and Tunisia. The Start-Up Law Acts will focus on Tunisia and Nigeria, and the Kenya Start-Up

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<sup>45</sup> Agyapong op cit note 22 at 198.

<sup>46</sup> Africa Renaissance Initiative 'From Idea to Impact: The Evolution and Future of the Startup Act in Africa' 2023 available at <https://arinitiative.org/from-idea-to-impact-the-evolution-and-future-of-the-startup-act-in-africa/> accessed on 16 April 2024.

<sup>47</sup> Ibid.

Bill will also be explored, whilst general legal frameworks will focus on Kenya and Nigeria. It will examine what the AfCFTA has done to enable the full participation of SMEs in trade integration through protocols that specifically mention SMEs, such as the AU SME Strategy. This dissertation will identify the main factors affecting an effective SME legal framework, find strengths and gaps in the existing individual country statutes, and propose a way toward a standard framework. The SME legal Framework analysis process will also highlight other associated laws and regulations that resulted from it. The dissertation will analyse the relevant protocols and mechanisms of AfCFTA, highlighting how they offer growth to SMEs.

This thesis will critically analyse how these existing national frameworks can be adapted to leverage the opportunities presented by the AfCFTA, such as access to regional markets, simplified cross-border trade procedures, and enhanced IP protection.

### **1.9 Chapter Synopsis**

The first chapter introduces the thesis and provides a general overview and background of SMEs and their relevance to AfCFTA. It explores the research problem, presents the research question and introduces the parameters of this study.

The second chapter appraises the key concepts featured in the study. It reviews the literature, defines key terms and establishes their relevance to the study. It also examines the challenges SMEs face and highlights the relevance of a legal framework in addressing these challenges. Using a three-point rubric, it draws a landscape of the SME space in Africa by analysing the existing laws governing the SMEs of Nigeria and Kenya. These are mainly SME business Acts and general company and commercial laws. The rubrics used for comparison such as access to finance, regulatory compliance and intellectual property were selected based on challenges facing SMEs across several African countries. This makes the framework adaptable to other countries, allowing for broader regional comparisons

The third chapter centralises the emerging legal frameworks that govern startups, called Start-Up Acts. Similar to Chapter 2, it compares three Nigeria and Kenya, namely the Nigerian

Start-Up Act and the Kenya Start-Up Bill. It also highlights the Tunisia Start-Up Act as a pioneer of the Start-Up Acts in Africa while pointing out strengths and gaps. It uses a similar rubric set in Chapter 2, which examines the support ecosystem and incentives. It adds two extra rubrics essential to the subject matter of start-ups, that is, the definition and commercialisation of Intellectual Property.

The fourth chapter analyses the regional response to the SMEs' challenges by assessing the legal regulations that exist under the AfCFTA to support the growth of SMEs within its structures. Using the same rubrics in chapters 2 and 3, this chapter examines how these regulations could provide guidelines for an effective SME legal framework. It specifically explores the Agreement establishing the AfCFTA and related protocols, and the AU SME strategy compared with what other regional blocs, like the European Union, have done to support their SMEs.

The final chapter evaluates the strengths and weaknesses of different national and regional SME legal frameworks presented in Chapters 2 to 4. Based on the evaluation, it proposes provisions that constitute an effective legal framework for SME growth under AfCFTA and gives recommendations for further achieving SME growth. It also points out the study's limitations and recommends areas for further research.

## CHAPTER 2

### THE SME AFRICAN LEGAL LANDSCAPE

#### 2.1 Introduction

This chapter draws from academic literature in reviewing some of the key concepts essential to understanding the subject of this research, SMEs, including a category of SMEs termed ‘startups.’ If an effective SME legal framework is to be established, one must understand what SMEs are, what categories exist for them, what challenges they face, and the current landscape in which they operate. This chapter begins by appraising the critical concepts featured in this study. It defines and reviews the existing body of knowledge on terms like Start-Ups, SMEs, and informality and highlights their relevance to the discussion on trade growth and those made in other parts of this study. The chapter then examines the challenges SMEs face, which may be valuable for assessing the effectiveness of a legal framework. It then looks at the relevance of a legal framework to these challenges. Lastly, it examines the current legal landscape of SMEs in Africa using two countries in different regions of Africa.

#### 2.2 Start-up vs SME

This section highlights the key differences between an SME and a Startup. These terms are often confused and used interchangeably.<sup>48</sup> Since the study concerns establishing an SME legal framework that includes start-ups, this differentiation becomes essential.

While SMEs are quantitatively categorised by the number of employees, turnover, assets, cash or a combination, there is limited literature on defining a start-up.<sup>49</sup> People use the terms SME and Start-up interchangeably.<sup>50</sup> In its guide, the European Commission, for example, determines the criteria for defining enterprises: number of employees, annual

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<sup>48</sup> John Freeman, Glenn R Carroll, Michael T. Hannan ‘The liability of newness: age dependence in organisational death rates’ (1983) 48 (5) *American Sociological Review* 692-710.

<sup>49</sup> Zaeem-Al Ehsan ‘Defining a Startup - A Critical Analysis’ 2021 *SSRN Electronic Journal* at 1-8.

<sup>50</sup> Krishnan.S, N.Ganesh, L. S., & Rajendran, C. ‘Characterizing and Distinguishing ‘Innovative Start-ups’ Among Micro, Small and Medium Enterprises (MSME)’ (2020) 1(1-2) *Journal of New Business Ventures* 1-32.

turnover, and annual balance sheet.<sup>51</sup> Each country then chooses which quantification to use.<sup>52</sup> On the other hand, there is an inconsistency in defining “start-ups” as they are a reasonably new term, which weakens how to validate them.<sup>53</sup> There is confusion about whether they are early-stage new businesses or technology companies.<sup>54</sup> The Hungarian Spinoff and StartUp Association defines a startup as a knowledge-intensive firm that can grow quickly and with little labour and capital expenditure.<sup>55</sup> The European Private Equity and Venture Capital Association refers to a startup as the initial stage of a business before it hits the market.<sup>56</sup>

Startups are generally defined as companies in their first stage of operations with the ability to scale and grow rapidly.<sup>57</sup> They can be identified by different names: High-tech firms, university spinoffs, innovative startups, lean startups, Silicon Valley startups, and new technology-based firms.<sup>58</sup> All startups are SMEs, but not all SMEs are startups due to differences in set-up and vision.<sup>59</sup> A start-up is understood as ‘a human institution designed to create a new product or service under conditions of extreme uncertainty.’ This “temporary organisation is searching for a scalable, repeatable, profitable business model.”<sup>60</sup> The Tunisian Start-Up Act indicates that a business is only a start-up if it includes cutting-edge technology.<sup>61</sup> Section 47 of the Nigerian Start-Up Act defines a startup as a company that has existed for not more than ten years and whose objectives are the creation, innovation, production, development, or adoption of a unique digital technology, innovative product, service, or

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<sup>51</sup> European Commission, Commission Recommendation 'Recommendation of the Commission on the independence, integrity and accountability of the National and Community statistical authorities' (2005) 345 Available at: <https://ec.europa.eu/eurostat/documents/34693/344802/Commission-recommendation-COM-2005> (accessed 12 June 2024).

<sup>52</sup> Abor.J. & Quartey. P 'Defining Small and Medium Enterprises: A Critical Review' (2010) 5(4) *International Journal of Business and Social Science* 109.

<sup>53</sup> Zaeem.E cit note 51 pg 3

<sup>54</sup> Freeman.J, Carroll op cit note 48 at 692.

<sup>55</sup> Zsuzsanna Csorba 'Startup 'Hype Or Tendency?' (2020) 24 (3) *Corvinus University of Budapest Hungary*.

<sup>56</sup> *ibid*

<sup>57</sup> International Trade Centre, 'Startup Acts in Africa: The Impact on Entrepreneurial Ecosystems' 2023, Available at: [https://www.icr-facility.eu/wp-content/uploads/2023/08/icreport\\_startupacts.pdf](https://www.icr-facility.eu/wp-content/uploads/2023/08/icreport_startupacts.pdf) accessed on 12 June 2023.

<sup>58</sup> Krishnan.S, N.Ganesh, L. S., & Rajendran, C. op cite note 52 at 125

<sup>59</sup> European Economic and Social Committee 'Study of the Assessment of the Effectiveness of the EU SME Policies 2007-2015' (2017) available at <https://www.eesc.europa.eu/sites/default/files/resources/docs/qe-02-17-762-en-n.pdf> accessed on 10 May 2023.

<sup>60</sup> Steve Blank, Bob Dorf 'The Startup Owner's Manual: The Step-by-Step Guide for Building a Great Company' ed 2014 *Book Baby* xvii -5.

<sup>61</sup> Tunisia Start Up Act supra note 43.

process.<sup>62</sup> Generally, start-ups, especially for the established start-up Acts, seem to connote early-stage businesses with a technological and innovative aspect.

Examining the dynamic relationship between SMEs and startups reveals that SMEs have a clear legal and economic framework. Though they may not have a universally agreed-upon definition, SMEs can be identified by factors like turnover, employee count, and revenue. Innovation, rapid scaling, and technological use are not crucial for SMEs. SME legal frameworks aim at merely growing small businesses. In contrast, startup frameworks are comprehensive legislative and regulatory frameworks aimed at fostering entrepreneurship and enabling the development of new firms with high growth potential generally through the granting of targeted incentives.<sup>63</sup> The differentiation is significant because policymakers have been interested in the growth of start-ups and legislation for them in the past half-decade. Some scholars conclude that SMEs can be conceptually split into innovative start-ups and conventional SMEs.<sup>64</sup> This study will align with the idea that startups are early-stage companies. For this study, startups will be considered a group of SMEs with a particular analytical focus in Chapter 3.

### **2.3 The relationship between a Small and Medium Enterprises (SME) legal framework and the growth of SMEs**

This section explains why a legal framework is essential to the growth of SMEs. It draws from the theory of law and development and highlights modern-day examples of how better legal frameworks improve businesses. It also indicates that effective legal frameworks could improve the transition from informal to formal businesses. Lastly, it speaks to how a better legal framework could support the formalisation of more informal SMEs.

#### **a. Law and Development Theory**

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<sup>62</sup> Nigeria Start-Up Act 2022, ACT No. 32 available at <https://pwc-nigeria.typepad.com/files/nigeria-startup-act-2022-signed.pdf> accessed on 11 March 2023.

<sup>63</sup> International Trade Centre op cit note 59 at 12.

<sup>64</sup> Krishnan, S., N. Ganesh, L. S., & Rajendran, C. cite note 52 at 125.

To better understand how effective legal frameworks assist with the growth of SMEs, this study shall base it on the law and development theory. This theory suggests that legal engineering, through frameworks and norms, can bring social and economic change.<sup>65</sup> The imperfection of the law and the uncertainty in its application failed commerce.<sup>66</sup> The theory has driven different movements in world history, from adoption after the First World War, which sought to use the law to mould human behaviour but failed as certain social and economic conditions did not exist yet.<sup>67</sup> In his general theory of law and development, Yong-Shik Lee presents an advancement of the law and development theory, arguing that law reform projects to enhance development fail because they are carried out without understanding how laws affect development. He then suggests three categories of regulatory impact mechanisms to design better and implement regulations, making law reform projects more effective. These three categories are: 'regulatory design,' 'regulatory compliance,' and 'quality of implementation'<sup>68</sup>. The theory even forms a significant part of the sustainable development goals, which consider the rule of law.<sup>69</sup> Other scholars argue that a better legal system leads to better allocation of resources, increasing the aggregate total factor productivity.<sup>70</sup> Furthermore, it is believed that a nation's development is historically linked to its legal framework.<sup>71</sup> Legal systems contribute to the development by encouraging transparency, justice and the rule of law. This is because if businesses have confidence in a legal system, they are likely to invest more confidently and engage in long-term planning, which enables development. A recent study states that an environment unrestricted by 'red tape' and unnecessary regulations can grow businesses in

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<sup>65</sup> Seidman.R.B. 'Law and Development: A General Mode' (1972) 6(3) *Law & Society Review* at 311-342.

<sup>66</sup>Muna B. Ndulo' Law, Lawyers and Sustainable Development: Reflections of a Fellow Traveler; 5(6) *Southern African Journal of Policy and Development* 1-32.

<sup>67</sup> Trubek.D.M 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' (1972) 82(1, 6)YALE L.J); Trubek.D.M & Marc Galanter 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) 4 *Winscon Law Review* 1062-1102.

<sup>68</sup> Lee, Yong-Shik 'General Theory of Law and Development' (2017) 50 (3,2) *Cornell International Law Journal* 415 – 472.

<sup>69</sup> United Nations, 'Goal 16: Promote Just, Peaceful and Inclusive Societies', Sustainable Development Goals available at: <http://www.un.org/sustainabledevelopment/peace-justice/> accessed on 12 June 2024 accessed on 24 January 2024.

<sup>70</sup> Aldashev.G, 'Legal institutions, political economy, and development' (2009) 25 (2) *Oxford Review of Economic Policy* 257–270

<sup>71</sup> La Porta. R, Lopez-de-Silanes. F, Shleifer. A 'The Economic Consequences of Legal Origins' (2008) 46 (2) *Journal of Economic Literature* at 285.

Africa’<sup>72</sup> The Africa Development Bank also notes that uncertainty in regulations and delay in passing enabling laws severely inhibit sector growth across the continent.<sup>73</sup> This is because outdated systems lack the incentive to stimulate innovation and productivity and promote economic growth. This supports how efficient serving laws can accelerate SME growth, leading to economic development. The legal and regulatory framework in which a business operates is crucial in determining its chances of survival and expansion.<sup>74</sup>

**b. Modern-day examples of how effective legal frameworks support the growth of small and medium-sized enterprises (SMEs).**

Tunisia is a modern-day example of the legal and development theory relating to SMEs. The enactment of the Startup Act increased the incentives for young people to start ventures. It also enabled investors to invest in promising companies and other ecosystem actors to lend their support where needed.<sup>75</sup> Despite COVID-19 being a barrier to the growth of SMEs, Tunisia recorded growth not only in the number of startups but also in foreign funding for them, with \$18.5 million in funding raised.<sup>76</sup> Thus, provisions in an SME legal framework can encourage the whole stakeholder system, including investors. In comparison, Nigeria, without a Start-up Act catering to the needs of investors and startups, made uninformed decisions like banning bike-hailing. This significantly affected the operations of bike-hailing startups like ORide, Maxing, and Gokada, which had investments jointly worth several millions of dollars in the e-hailing sector.<sup>77</sup> These examples highlight how a dedicated SME legal framework promotes and incentivises growth. Its enactment process allows the necessary stakeholders to identify

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<sup>72</sup> Japan International Cooperation Agency, 'Africa Development Challenges towards 2050', 2015 Available at: [https://www.jica.go.jp/Resource/jica-ri/publication/booksandreports/jrft3q00000029i2-att/TICAD\\_Africa\\_2050\\_JICA-RI.pdf](https://www.jica.go.jp/Resource/jica-ri/publication/booksandreports/jrft3q00000029i2-att/TICAD_Africa_2050_JICA-RI.pdf) at 38 (accessed 12 June 2024).

<sup>73</sup> African Development Bank 'Annual Report 2015, Chapter 2' 2015, at 29 available at: [https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/AR2015/Annual\\_Report\\_2015\\_EN\\_-\\_Chapter\\_2.pdf](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/AR2015/Annual_Report_2015_EN_-_Chapter_2.pdf) accessed on 12 June 2024.

<sup>74</sup> Khan FR op cit note 17.

<sup>75</sup> Africa Renaissance Initiative op cit note.46.

<sup>76</sup> Gbemileke Babatunde 'African Countries are Embracing the Startup Act to Build Solid Ecosystems, Will Nigeria be Left Behind?' 2020 available at <https://technext24.com/2020/08/27/african-countries-are-embracing-the-startup-act-to-build-solid-ecosystems-will-nigeria-be-left-behind> accessed on 12 April 2024.

<sup>77</sup> Ibid.

the needs of growing startups and prevent any measures that could negatively impact them, like the case of Nigeria above.

### **c. How can legal frameworks address informal SMEs?**

Informality is a significant barrier to SME growth and trade. The formalisation of informal businesses can ensure more significant SME growth. Many businesses in Africa are informal, violating relevant laws and regulations—such as failing to register with the tax authorities or being registered as a legal entity.<sup>78</sup> The World Bank reports that 9 out of every 10 employees in Sub-Saharan Africa operate in the informal sector.<sup>79</sup> A favourable SME legal framework encourages informal businesses to become SMEs to obtain the incentives or reliefs that may accrue through the framework.

The informal sector dominates a significant part of business in Africa. Studies show that the percentage of informality stands at 30-40% for the poorer countries.<sup>80</sup> In Zambia, for example, nine out of ten operate in the informal sector.<sup>81</sup> The informal sector poses two possibilities to this thesis. The first is its unharnessed potential to improve national economies and intra-African trade. The second is that it poses a danger to existing formal trading businesses. A current case in point is OK Zimbabwe Private Limited, a leading retailer in Zimbabwe, which is being pushed to shut down due to unregulated tuckshops.<sup>82</sup> One of the reasons informality persists in Africa is because it is cheaper to operate a small business compared to the high transactional costs that come with compliance. An SME legal framework that caters to patient growth and offers incentives can encourage more companies to step out

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<sup>78</sup> Ulyssea.G 'Informality: Causes and Consequences for Development' (2020.) 12 *Annual Review of Economics* at 525-546.

<sup>79</sup> World Bank Group, 'Doing Business 2020: Republic of Congo' available at: <https://archive.doingbusiness.org/content/dam/doingBusiness/country/c/congo-rep/COG.pdf> accessed on 12 November 2024.

<sup>80</sup> La Porta.R, Shleifer.A 'Informality and Development' (2014) 28 (3) *Journal of Economic Perspectives* 109-126.

<sup>81</sup> Nuwagaba, A. 'Enterprises (SMEs) in Zambia' (2015) 4 *International Journal of Economics, Finance and Management* at 146-153.

<sup>82</sup> The Zimbabwe Mail 'OK Zimbabwe blames tuckshop economy as volumes decline by 7, 7%' 2023 available at <https://www.thezimbabwemail.com/business/ok-zimbabwe-blames-tuckshop-economy-as-volumes-decline-by-7-7/>.

of the informal sector.<sup>83</sup> This increases formal trade and the growth of countries' economies and the AfCFTA.

Favourable laws and regulations enable the transition from informal to formal. In their research, the USAID highlighted complex regulatory processes, bureaucracy, and tax issues as challenges to formalisation.<sup>84</sup> A provision for a reward structure in an institutional framework's provision significantly impacts an entrepreneur's decision to remain compliant with laws and regulations. This was the case in India, where the government provided an incentive package which, among other benefits, exempted newly registered businesses from excise duty exemption and a capital subsidy of 15%.<sup>85</sup> Registration of pre-existing informal firms increased significantly.<sup>86</sup> An effective SME legal framework should provide reward structures that incentivise entrepreneurs towards formalisation.

## **2.4 Challenges faced by SMEs**

### **a. Introduction**

An alarming five out of every seven SMEs in African nations close down in the first year, raising serious concerns about these businesses' high premature closure rate.<sup>87</sup> In Uganda, for example, 30% of newly founded companies fail within the first year of operation. In South Africa, the failure rate for new companies ranges from 50-95%, highlighting the significant challenges that SMEs must overcome in their early years.<sup>88</sup> Below are some critical reasons for the closure and how a legal framework could address these challenges.

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<sup>83</sup> Kibuuka.P, Tustin. D, 'The Key Triggers for the Transitioning of Informal SMMEs to Formal SMMEs' (2019) 9(1) *A Baseline Survey of the Gauteng Province—South Africa* 32-44.

<sup>84</sup> USAID (United States Agency International Development) 'Barriers to formalization. The case for reform and emerging best practice' (2005) Available on <http://www.oecd.org/development/povertyreduction/38452590.pdf> accessed on 04 June 2024.

<sup>85</sup> Abeberese. A.A, Chaurey.R 'Formal Sector Incentives and Informality' (2017) CDEP-CGEG Working Paper SERIES at 9 available at <https://cgeg.sipa.columbia.edu/sites/default/files/content/WP40Abeberese.pdf> accessed on 12 November 2024.

<sup>86</sup> Ibid at 13.

<sup>87</sup> Bushe, Bernard 'The causes and impact of business failure among small to micro and medium enterprises in South Africa' (2019) 7 (10) *Africa's Public Service Delivery and Performance Review* 2310-2195.

<sup>88</sup> Chana Boucher 'The number 1 reason most start-ups fail – and how to avoid it ' 5 March 2022 *News24*.

### **b. Regulatory restrictions**

SMEs face challenges in navigating regulatory frameworks, especially those regarding taxes. These include business establishment regulations, labour practices, tax, and foreign trade regulations.<sup>89</sup> The Africa Development Report highlights that Africa's legal and regulatory environment ranks amongst the least business-friendly in the world.<sup>90</sup> Over two-thirds of African businesses cite at least one regulatory issue as a critical source of concern. The report mentioned perceived corruption, trade and customs rules, tax administration and rates, labour regulations, the ease of obtaining operational permissions and licenses, or the court as the most often mentioned causes.<sup>91</sup> A study in Ghana highlighted how ineffective legal frameworks are linked to bureaucracy, unstable government policy, corruption, multiple taxation, and excessive customs trade and regulations.<sup>92</sup> This highlights how regulation is at the core of problems surrounding SMEs. It emphasised the need for a sound and conducive legal and regulatory framework. Establishing a well-defined legal framework with less ambiguity and providing mechanisms to enhance compliance could help with this challenge. This legal framework should also cater to oversight bodies to ensure fair and transparent regulation enforcement.<sup>93</sup>

### **c. Financing Constraints**

Access to finance is another big challenge for SMEs, negatively impacting their growth and survival. Continent-wide, the World Bank's Enterprise Surveys emphasises this by observing that limited access to and affordability of finance are the predominant constraints against the

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<sup>89</sup> Quartey.P 'Regulation, Competition and Small and Medium Enterprises in Developing Countries' (2001) (No. 30625) *University of Manchester, Institute for Development Policy and Management (IDPM)*.

<sup>90</sup> African Development Bank, 'Africa Development Report 2011- Private Sector Development as an Engine of Africa's Economic Development' 2011, at 36 available at [https://www.afdb.org/sites/default/files/documents/publications/african\\_development\\_report\\_2011.pdf](https://www.afdb.org/sites/default/files/documents/publications/african_development_report_2011.pdf) accessed on 12 June 2024.

<sup>91</sup> *Ibid* at 37.

<sup>92</sup> Kwame Nyarku, Stephen Odoru 'Effect of legal and regulatory framework on SMEs growth in the Accra Metropolis of Ghana' 19(3) *The International Journal of Entrepreneurship and Innovation* 207-217.

<sup>93</sup> OECD, 'The OECD-MENA Governance Programme: Promoting Good Governance for Development in Arab Countries' (2007) available at: <https://www.oecd.org/mena/governance/38403668.pdf> accessed on 12 June 2024.

growth of the SME sector in Africa.<sup>94</sup> More than 25% of SMEs are reported to consider finance costs the most critical obstacle to their growth.<sup>95</sup> Access to finance is critical and frameworks that increase access to finance through, for example, alternative financing options, collateralisation or credit reporting could aid this challenge. In an empirical study done in Zambia with 2793 SMEs registered with the Patent and Companies Registration Agency participants, 95% highlighted that SMEs failed to secure financing from banks due to a lack of assets for collateral and the size of their business (capital and market) being regarded as small.<sup>96</sup> Therefore, legal reforms should advocate for supportive regulatory frameworks for lending institutions.<sup>97</sup> In some cases SMEs are prone to the unfair ripping of available service providers and end up almost unfairly losing property to cover loan debt.<sup>98</sup> Disproportionate control over policies that include bankruptcy laws, exchange controls, control over inflation, credit ceiling lending policies or tight credit negatively affects SMEs' entry and development.<sup>99</sup>

#### **d. Burdensome Bureaucracy**

Beyond financing, simple processes like business registration are burdensome to African SMEs. A comparison between Australia and the Democratic Republic of Congo (DRC) substantiates this submission. In Australia, registering a business entails two steps that may be finished in two days and costs 0.7% of the nation's per capita GDP.<sup>100</sup> In stark contrast, the Democratic Republic of Congo entails ten procedures that take 49 days to complete and cost

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<sup>94</sup> German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE) 'Digitalisation in African Agriculture: How Digital Solutions Can Enable Risk Management in the Context of Climate Change' 2020 available at: [https://www.idos-research.de/uploads/media/DP\\_4.2020.pdf](https://www.idos-research.de/uploads/media/DP_4.2020.pdf) accessed on 12 June 2024.

<sup>95</sup> Pandula.G 'Bank Finance for Small and Medium-Sized Enterprises in Sri Lanka: Issues and Policy Reforms (2015) 10 *Studies in Business and Economics* 32-43.

<sup>96</sup> Chilembo.T 'A Study of the Factors Affecting Small and Medium Enterprises (SMEs) Access to Finance. A Case of Lusaka Based SMEs (2021) 11 *American Journal of Industrial and Business Management* 437-450.

<sup>97</sup> Djankov.S, McLiesh.C, & Shleifer. A 'Private credit in 129 countries' (2005) *SSRN Electronic Journal* 50-80.

<sup>98</sup> National Microfinance Bank vs Adam William Mwambo & 3 Others (Land Appeal No. 9341 of 2024) [2024] TZHC LandD 841 (7 October 2024) available on [2024] TZHC LandD 841zs accessed on 10 February 2025.

<sup>99</sup> Abor J, Biekpe.N 'SMEs' access to debt finance: a comparison of male-owned and female-owned businesses in Ghana' (2006) 7(2) *The International Journal of Entrepreneurship and Innovation* 105-112.

<sup>100</sup> World Bank Group, 'Doing Business 2020: Australia', Available at: <https://www.doingbusiness.org/content/dam/doingBusiness/country/a/australia/AUS.pdf> accessed on 12 June 2024.

the equivalent of 2.5% of the country's per capita income.<sup>101</sup> Similarly, a study in Ghana highlighted how bureaucratic factors such as the multiple numbers of institutions to report to, the prolonged time required to obtain licenses with numerous processes, and the high cost negatively impacted their business.<sup>102</sup> Generally, only two African economies ranked in the top 50 on the 2020 Ease of Doing Business rankings, while twelve of the bottom 20 economies in the global rankings were from the region.<sup>103</sup> Legal frameworks should assist in simple procedures and support more efficient ways like online registration.

#### **e. Supporting ecosystem**

In every country, entrepreneurship development requires a boost from Entrepreneurial Support Agencies (ESAs). SMEs cannot be profitable and sustainable without the support of support agencies and other stakeholders.<sup>104</sup> Hence, many governments have established these support agencies.<sup>105</sup> More effective institutional structures are needed to support and streamline entrepreneurs' risk-taking initiatives.<sup>106</sup> In Europe and the United States, the government supports their early stages and increases their chances of survival by setting up support structures like incubators.<sup>107</sup> Hence, the constitution and structure of the supporting ecosystem will be vital in examining the existing legal frameworks.

## **2.5 Importance of a Legal Framework**

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<sup>101</sup> World Bank Group, 'Doing Business 2020: Republic of Congo' available at: <https://archive.doingbusiness.org/content/dam/doingBusiness/country/c/congo-rep/COG.pdf> accessed on 12 November 2023.

<sup>102</sup> Nyarku & Odoru op cit note 92 at 6.

<sup>103</sup> World Bank Report op cit note 5.

<sup>104</sup> Abioye.L.A, Adeniyi. A.W, & Mustapha.W.B. 'The Status of Entrepreneurship Support Agencies (ESAs) in Lagos State, Nigeria. (2017) 10(4) Iranian' *Journal of Management Studies* 853-881.

<sup>105</sup> Ibid at 853.

<sup>106</sup> Opoku.M. A,Fobih.N. & Adom.Y.A 'Entrepreneurship Development and New Business Startups: Challenges and Prospects for Ghanaian Entrepreneurs' (2019) 13(3) *International Multi-Disciplinary Journal*- 27- 41.

<sup>107</sup> Gomez-Conde.J, Lopez-Valeiras.E, Malagueño.R & Gonzalez-Castro.R 'Management control systems and innovation strategies in business-incubated start-ups' (2023) 53(2) *Accounting and Business Research* 210–236.

This section will take an excerpt from the Doing Business report in Ghana, which ranked 135<sup>th</sup> at the time, emphasising the importance of a legal framework for business growth. The excerpt below concludes why a legal framework is needed;<sup>108</sup>

*‘...reduced the number of procedures required to start a business from the current eight to just four (other things remaining constant), its ranking would improve to 113<sup>th</sup>. If it reduced the days it takes to start a business from 33 to 15, its global ranking would improve to 119<sup>th</sup>. The most important factor is it removed the Legal and Regulatory Environment minimum capital requirement it would rank 91<sup>st</sup> on the ease of starting a business. ‘*

The above excerpt highlights how a simple legal adjustment could change SMEs' ease of doing business.

Meanwhile, a study of 85 countries comparing business entry regulations concluded that regulation costs burden entrepreneurs and reduce the number of start-ups and business growth rates.<sup>109</sup> Evidence also consistently suggests that legal systems play an essential role in moderating the effects of financial development on SME finance.<sup>110</sup> Whilst the literature on law and finance acknowledges the important role of legal systems in finance and economic growth<sup>111</sup>

There is a relationship between an SME specific Act and economic growth. The more you enable a conducive working environment for SMEs, the more they grow the economy.<sup>112</sup> However, SMEs do not exist in isolation. They coexist and depend on other actors. Hence, the

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<sup>108</sup> African Development Bank, 'African Development Report 2011, Chapter 2: The Legal and Regulatory Environment', 2011, Available at: <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/African%20Development%20Report%202011%20-%20Chapter%202-The%20Legal%20and%20Regulatory%20Environment.pdf> accessed on 12 June 2024) 48-49.

<sup>109</sup> Djankov S, La Porta R, Lopez-de-Silanes F and Shleifer, A 'The regulation of entry' (2002) 117 Quarterly Journal of Economics 1–37.

<sup>110</sup> Hongzhi.W, Xiang.X, Liang.H 'Financial development, legal systems and SME finance: Cross-country evidence' (2023) 88 *International Review of Economics & Finance* 993-1025.

<sup>111</sup> Porta, R. L., Lopez-De-Silanes, F., Shleifer, A., & Vishny, R. W. (1997). Legal Determinants of External Finance. *The Journal of Finance*, 52(3), 1131-1150.

<sup>112</sup> African Renaissance Initiative op cit note 30

stakeholders covered by an effective SME legal framework in this study will be diverse and will incorporate the different issues from different stakeholders that all play a role in the growth of SMEs.

Therefore, SME legal framework should focus on three areas: the creation of an enabling business environment, which includes business registration, tax, and compliance issues; the development of financial and non-financial services, which provide access to finance, loans, and other incentives; and finally, the establishment of a supportive institutional ecosystem, which includes relevant ministries, accelerators, and incubation. These thematic areas will form the basis of the analysis in the next section of the Small and Medium Enterprises(SME) legal landscape across different African countries.

## **2.6 Drawing a Legal landscape of the SMEs' space in Africa**

### **a. Overview**

This section examines the legal landscape in Africa. It starts by providing a bird' s-eye view of different legal frameworks in Africa and then highlights the historical development of SME legal frameworks. To give a detailed analysis of the legal landscape, it will compare two countries in different African regional economic zone communities: Nigeria and Kenya. The two countries' legal landscapes will be examined using three rubric headings: an overview of the region and country, financial and non-financial incentives, and the supporting ecosystem.

The legal landscape for SMEs in Africa is diverse and complex, with numerous challenges and opportunities. Depending on their jurisdictional area of operation, SMEs are governed by national, regional, or international laws. These laws cover many areas, including company registration and incorporation, taxation, labour relations, intellectual property rights, contract enforcement, and dispute resolution. In some African countries, the legal framework for SMEs is still in the early stages of development. This can lead to a lack of clarity and consistency in SMEs' legal requirements and procedures, challenging navigation and compliance with the laws and regulations.

The scenario exists threefold: there is no specialised legislation for SMEs, and they must rely on general company laws despite their relatively small capital, market, and revenue size. The second scenario is where specific small business legislation is set up.<sup>113</sup> The last and recent trend is the enactment of Start-up Acts to specialise in SMEs classified as Startups.

### **b. Historical development of SME legal frameworks**

Between the 1980s and the 1990s, the African continent saw the adoption of its first Small Business Acts, namely The South African National Small Business Act (1996), The Zambian Small Enterprises Development Act (1996), and The Ghanaian National Board for Small-scale Industries Act (1981).<sup>114</sup>

In 2012, countries started to move towards specialising the SME Act by establishing Start-up Law Acts. The first was by Tunisia, as mentioned earlier. In September 2022, DRC passed its Start-up Act after two years of co-creation. It enables a framework to foster innovation, entrepreneurship, and youth employment alongside international partners, the private sector, public stakeholders, and ecosystem partners.<sup>115</sup> SMEs must deeply understand the legal landscape in the African countries where they operate. Compliance with the applicable laws is essential for sustainable business growth and operations.<sup>116</sup>

However, SMEs operating in Africa continue to face significant challenges, several of them due to the historical legacy of earlier legal frameworks. For instance, while the *South African National Small Business Act (1996)* laid the groundwork for SME support it still does not fully address the regulatory complexities and compliance costs that disproportionately affect smaller enterprises<sup>117</sup> These historical shortcomings underscore the need for a more robust and adaptive

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<sup>113</sup> Oluseg.B 'Emerging Legislatures in Africa: Challenges and Opportunities' (2015) 5 (5) *International Sharing Knowledge Platform* 19-32.

<sup>114</sup> International Trade Centre op cit note 59.

<sup>115</sup> *ibid*

<sup>116</sup> Sohail Amjad 'The Role of Law in Promoting Sustainable Business Innovations' (2023)4 (1) *International Journal of Human Society* 35- 47.

<sup>117</sup> Nieuwenhuizen Cecile 'The effect of regulations and legislation on small, micro and medium enterprises in South Africa (2019) 36 (5) *Development Southern Africa* 666-677.

legal framework that aligns with the objectives of the AfCFTA, such as reducing trade barriers, enhancing cross-border collaboration, and fostering inclusive economic growth.

To fully harness the potential of the AfCFTA, SMEs must not only comply with existing legal requirements but also actively engage with the evolving legal landscape. This includes understanding the implications of regional trade agreements, leveraging digital tools for cross-border commerce, and advocating for policy reforms that address their unique challenges. The historical development of SME legal frameworks highlights the broader challenges of trade integration and competitiveness, this chapter highlights the critical role of adaptive and forward-looking legislation in enabling SMEs to thrive in the AfCFTA era.

### **c. Justification for selection of country examples**

The following sections will examine the different laws that apply to SMEs. Nigeria and Kenya, were selected for this study due to their geographic, economic, and legal representativeness of broader African trends. The selected countries and have high-performing SME industries.<sup>118</sup> Both also have their legal frameworks readily available online in English ensuring transparency and reliability. They are two of the few African countries that have worked or are working towards specific start-up laws, which makes the comparison in chapters 2 and 3 easier. Nigeria's large, diverse economy highlights scaling challenges and Kenya's innovative policies like the *Turnover Tax* offer regulatory solutions. Each covers a different African region and provides insight into challenges and solutions. As key players in the AfCFTA, their experiences provide insights into trade integration and regional collaboration. Together, they provide a clear picture of the challenges and opportunities for SMEs across Africa, making them ideal for a comparative analysis that informs effective legal frameworks for SME growth across the continent.

### **d. Country analysis of legal landscapes**

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<sup>118</sup> Muriithi.S.M op cite 7 at 38.

## **i. Nigeria**

### Definition and registration

Nigeria, a West African country, does not have a specific SME legal framework. Laws that govern all companies allow for differential treatment towards small businesses.<sup>119</sup> The legal framework governing the registration of SMEs is the Companies and Allied Matters Act, which regulates small companies, partnerships, and business names.<sup>120</sup> It governs their registration and operation. Section 19 dictates the registration of a partnership by highlighting eligibility, especially that members should not exceed 20. Section 394(3) defines a small company as a private company with a turnover not exceeding N120,000,000 (\$85,348 USD) or such amount as may be fixed by the Commission occasionally. Its net assets value should not exceed N60,000,000 (\$ 42,674 USD) or such amount as may be fixed by the Commission occasionally. None of its members should be an alien, government, government corporation, agency, or nominee. When a company has share capital, the directors hold at least 51% of its equity share capital. Many small businesses register as business names( a recognised legal structure under the Act) as it is procedurally easier, and no share capital or stamp duty is associated with it.<sup>121</sup> Personal tax suffices are viewed as one with the business, as the owner and proprietor are viewed as one.<sup>122</sup> Nigerian SMEs are often discouraged from registering as there are several stages and official procedures for establishing a business.<sup>123</sup> Hence, a more concise, tailor-made legal framework for SMEs might be better. Ufua presents a more inclusive suggestion that legal frameworks should also conclude street traders; otherwise, the SME legal frameworks are incomplete.<sup>124</sup>

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<sup>119</sup> Idem.U.J, Ikpeze.N.G, Anwana.E. O, Olipede. D. E, Ogundele. A. T ‘An overview of Legal and Regulatory Framework for Micro, Small and Medium Enterprises in Nigeria’ (2022) *International Conference on Sustainable Islamic Business and Finance* (SIBF) 252-258.

<sup>120</sup> The Companies and Allied Matters Act (CAMA) 2020 of Nigeria.

<sup>121</sup> Ufua.D. E, Olujobi.O.J, Ogbari.M. E, Dada.J.A, Edafe.O.D ‘Operations of small and medium enterprises and the legal system in Nigeria’ (2020) 7(1) *Humanities and Social Sciences Communications* at 3.

<sup>122</sup> *ibid.*

<sup>123</sup> Adelaja, A.O ‘The importance of Small and Medium Scale industries in a developing underdeveloped economy: Nigeria case study’ (2012) 4(1) *Journal of Business Administration and Education* 35.

<sup>124</sup> Ufua.D.E, Olujobi.O.J, Ogbari.M.E *op cit* note 119 at 2.

### Financial and non-financial incentives

This section examines the incentives provided to SMEs and their stakeholders under different legal frameworks. First, it looks at legal frameworks that give tax incentives to SMEs, followed by incentives that protect investors. Lastly, it looks at the incentives under the Business Facilitation Act.

Nigerian tax laws, such as the Companies Income Tax Act and the Personal Income Tax Act, impose tax obligations on SMEs. The income tax governs companies, and tax is self-assessed on a preceding-year basis.<sup>125</sup> Meanwhile, individuals and unincorporated companies are governed by the Personal Income Tax Act.<sup>126</sup> A study in Zaria, North-Central Nigeria, evaluating and ranking the factors that encourage non-compliance with SMEs' tax obligations highlighted that high tax rates and multiple taxing procedures are the most significant factors.<sup>127</sup> This is further supported by Ochine, who highlights that some factors responsible for the untimely closures of SMEs are tax-related issues, ranging from taxation to enormous tax burdens and a multiplicity of taxes.<sup>128</sup> The perception is that SMEs are minute establishments with minimal effect on the national economy. Yet research has shown that they make up about 95% of the entire economy, serving as a source of employment generation, innovation, and competition, leading to national growth.<sup>129</sup> The National Tax Policy aims to establish a tax system focusing on legislative amendments to reduce the tax burden on SMEs. However, a deliberate change to legislation has not been made regarding their proposal to lower corporate tax rates and introduce tax registration thresholds to encourage compliance and protect SMEs.<sup>130</sup> Hence, SMEs continue to struggle with tax implications as a barrier to growth that should be addressed.

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<sup>125</sup> Companies Income Tax (Amendment) Act No. 56 (2007).

<sup>126</sup> Personal Income Tax (Amendment) Act, NO 20, 2011.

<sup>127</sup> Ajibade.T.I, Ayodele.O, Adeniji.S.O 'Taxation and small business; challenges and prospects in Nigeria' (2020) 4(4) *Accounting and Taxation Review* 67-77.

<sup>128</sup> Ocheni.S 'Impact Analysis of Tax Policy and the Performance of Small and Medium Scale Enterprises in Nigerian Economy' (2015) 3(1) *Strategic Management Quarterly* 71-94.

<sup>129</sup> Ajibade.T.I, Ayodele.O. op cit note 125 at 67.

<sup>130</sup> *ibid.*

The Investment and Securities Act of 2007 creates a statutory body, the Securities and Exchange Commission, which regulates SMEs whose shares are listed on the Nigerian Capital Market. Sections 54–59 of the Act mandate the registration of securities and investments of SMEs registered as public companies. This protects investors' interests by regulating their investments, securities commodity exchanges, and the offer of securities by SMEs.<sup>131</sup> Such actions increase investor confidence and assist in widening funding for small businesses. Only 11% of SMEs have access to commercial bank loans; the limiting factor is the limited existence of credit facilities coupled with high interest rates.<sup>132</sup>

The Business Facilitation Act (BFA) was signed in 2023.<sup>133</sup> It is meant to ease business transactions by introducing transparency measures. It mandates that Ministries, Departments, and Agencies (MDAs) providing products and services such as waivers and tax-related processes publish a complete list of requirements to obtain such products and services following the functions of the MDA within 21 days of the commencement of the Act.<sup>134</sup> This ensures SMEs have full knowledge of the processes and avoids arbitrary requests for such services.<sup>135</sup> MDAs must also notify applicants of their acceptance or refusal within 21 days. Failure to notify within 21 days deems the application to have been successful. If an application is rejected within 21 days, reasons for rejection should be highlighted. Section 48 of the BFA Act exempts late registration penalties mandated by the National Office for Technology Acquisition and Promotion Act (NOTAP) for early-stage Nigerian companies that would have entered into contracts for intellectual property with foreign companies.<sup>136</sup> The usual requirement is that if such a contract is entered into, registration with NOTAP should be within 60 days. This amendment allows early-stage businesses to operate without the administrative burden of registering with NOTAP for the first two years. The BFA also expanded the

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<sup>131</sup> Ufua.D.E, Olujobi.O.J, Ogbari.M.E. op cite note 119.

<sup>132</sup> Nwosu, Chioma Peace, Ochu, Emeka Richar ‘Small and Medium Enterprise Financing in Nigeria: Benefits, Challenges and Way Forward.(2017) 8(17) *Journal of Economics and Sustainable Development* 178-189.

<sup>133</sup> Business Facilitation (Miscellaneous Provisions) Act 2022.

<sup>134</sup> Ibid at s 3.

<sup>135</sup> Cyriacus C, Oghomwen A, Odalumeh P ‘The Business Facilitation (Miscellaneous Provisions) Act 2023 - A Boost for Economic Development’ TEMPLARS Thought Lab June 2023 available at <https://www.templars-law.com/app/uploads/2023/06/SA-Version-The-Business-Facilitation-29-Clean.pdf> accessed on 15 April 2024.

<sup>136</sup> BFA supra 131 at s 48.

definition of trademarks under the Trademark Act to include the shape of goods, their packaging, and the combination of colours. The coverage also now extends to services.<sup>137</sup>

### Supporting ecosystem

The Small and Medium Scale Industries Development Agency Act establishes the Agency responsible for promoting and facilitating programs for SMEs, industry subsectors, and related purposes.<sup>138</sup> It is run by a Chairman and six other part-time Members appointed by the President from different geopolitical zones. It also has eleven ex-officio members, including Ministry heads and some association heads.<sup>139</sup> Section 8 lays out the agency's functions, namely: to initiate ideas for SME policy and be a focal point for industrialisation, poverty alleviation and eradication, technology acquisition and adaptation, job creation and sustainable livelihood, and promoting and facilitating development programmes, instruments, and support services to accelerate development. The excessive government constitution might explain stakeholders' apathy, and it is recommended that the Agency be independent without influence from politicians.<sup>140</sup>

Nigeria has also set up industry associations that help push forward entrepreneurs' needs in different industries.<sup>141</sup> These include the Manufacturers industry, the National Association of Small and Medium Enterprises, and a private sector membership offering networking, capacity building, political advocacy, and performance promotion.<sup>142</sup> The Nigerian Association of Small-Scale Industrialists supports SMEs by organising workshops, conferences, exhibitions, fairs, and study tours. It also provides consulting services and essential

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<sup>137</sup> Trademarks Act (Ch. 436), 1965, No. 29.

<sup>138</sup> Small and Medium Enterprises Development Agency of Nigeria, SMEDAN (2019) available at <https://smedan.gov.ng/about/> t/ Solomon, J accessed on 16 August 2023.

<sup>139</sup> *ibid* at s1.

<sup>140</sup> Ilori I.E, Uregu I, Allen-Ile C 'A Review of the Impact of the National Micro Small and Medium Enterprise Policy on Youth Employment and Enterprise Development: A Case of the Small Medium Enterprises Development Agency of Nigeria (2018) 7 *Journal of Reviews on Global Economics* 901-912.

<sup>141</sup> Raimi L, Basirat Olaide Raimi 'An Exploratory view of the Business Ecosystem in Nigeria' (2023) 2(2) *African Journal of Innovation and Entrepreneurship* 119-141.

<sup>142</sup> SMEAD *supra* 137 at s28.

information.<sup>143</sup> Nigeria also has public and private support agencies. These include private-sector microfinance banks and Non-bank Microfinance Institutions that fund small businesses, especially in rural areas.

Nigeria Investment Promotion Commission is the one-stop centre for investment guidelines, helping to simplify procedures. It further provides extensive information on Nigeria's economy, investment climate, and legal framework, issues licences and permits quickly, and offers follow-up services to investors.<sup>144</sup> Such synchronisation allows business to be processed more efficiently.

## **ii. Specific country study- Kenya**

### *Definition and registration*

The primary regulatory authority overseeing SME operations in Kenya is the Micro and Small Enterprises Authority, which operates under the Ministry of Industrialization, Trade, and Enterprise Development established by the Micro and Small Enterprise Act of 2012<sup>145</sup> (MSEA). Turnover, employees and assets define an SME. Hence, a micro-enterprise has an annual turnover of not more than 500 000 shillings (\$3 924 USD), employs less than 10 people, and its total assets and financial investment are determined by the Cabinet secretary.<sup>146</sup> A small enterprise is a firm, trade, service, or industry with an annual turnover between five hundred and five million shillings (\$39 238USD), ten to fifty employees, and assets and financial investment determined by the Cabinet Secretary.<sup>147</sup> The Act establishes an office of the Registrar of Micro and Small Enterprises, which is responsible for registering MSMEs.<sup>148</sup>

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<sup>143</sup> *ibid* at s35

<sup>144</sup> World Bank, 'Investment Policy and Regulatory Review – Nigeria' 2022 available at <https://documents1.worldbank.org/curated/en/099250201122328790/pdf/P17393802c4b840e50a637038b09da3478e.pdf> accessed on 12 July 2023 at 11.

<sup>145</sup> Micro and Small Enterprise Act No. 55 of 2012. (MSE Act)

<sup>146</sup> *ibid* at s 2.

<sup>147</sup> MSE Act *supra* note 143 at s 2.

<sup>148</sup> MSE Act *supra* note 143 at s 4.

MSEA's mandate includes promoting the growth and development of SMEs through policy advocacy, capacity building, and facilitating access to finance.

Moreover, for registration, the Companies Act 2015, which applies to all businesses in Kenya, significantly impacts SMEs by dictating their formation, operation, and dissolution processes.<sup>149</sup> The Act provides a streamlined process for registering companies, including provisions beneficial to small-scale businesses. It introduces the concept of small companies, which represents SMEs. To qualify as a small company, a company should have a turnover of not more than fifty million shillings, value its net assets at not more than twenty million shillings, and not have more than twenty-five employees.<sup>150</sup> It also outlines corporate governance practices, helping SMEs adopt structures that attract investment and partnerships. The Business Registration Services Act also governs the effective administration of laws and policies for registering companies, partnerships and firms.<sup>151</sup> This multiplicity of legislation may prove a challenge to SMEs.

### *Supporting infrastructure*

This section examines the structures and stakeholders supporting SMEs. It starts by discussing the role of the Micro Small Enterprise Authority, which governs the agency, the fund, and the associations. It then examines the development of different policies that empower institutions under the Sessional Papers. Lastly, it examines different government departments and institutions supporting the growth of SMEs.

The MSEs Act grants the Micro Small Enterprise Authority its mandate of promoting, developing, and regulating the MSE sector in Kenya.<sup>152</sup> This Act is divided into two parts. The first schedule establishes the Micro and Small Enterprises Authority, the country's small business development agency, and the Micro and Small Enterprises Development Fund. The second part sets up the business associations and supporting organisations. Kenya is unique in

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<sup>149</sup> The Companies Act No. 17 of 2015 s 11-19.

<sup>150</sup> *ibid* at s 624 (3).

<sup>151</sup> Business Registration Service Act No. 15 of 2015.

<sup>152</sup> MSEs Act *supra* note 143.

that it provides extensive regulation of business associations.<sup>153</sup> These regulations ensure effective coordination between government departments and entities, which is lacking in the Nigerian SME legal framework. The Act is then referred to as having a dual process of establishing the agency and also small business development, which is referred to as a hybrid focus.<sup>154</sup> Business associations are fundamental in that they can propose changes in four ways: administrative arrangements for how policy is implemented, the interpretation or change of existing regulations, and persuading governments to introduce or reform policy.<sup>155</sup> The associations are fairly successful, ensuring that concerns of small businesses that would otherwise be unheard of are recognised and acted upon. The Kenya Society of Physiotherapists suggested the creation of new legislation, leading to the enactment of the Physiotherapists Act of 2014. The Agricultural Industry Network led the movement to amend legislation, and the Agricultural Policy was revised by the government's constitution in 2013.<sup>156</sup> Hence, associations are a fundamental support structure for SMEs.

Policies have been continuously developed to help SMEs grow. The first sessional paper, Sessional Paper No. 10 of 1965, focused on acquiring the requisite skills, access to finance through established institutions, and access to markets.<sup>157</sup> The policy succeeded in establishing cooperatives nationwide and significant public funding investments in industries deemed priority areas for the economy.<sup>158</sup> The second sessional paper, Sessional Paper No. 1, formed a task force to review policies created since independence for SMEs<sup>159</sup> The Sessional Paper No. 2, built on the second sessional paper for 1992, mainly created linkages between MSMEs

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<sup>153</sup> Department of Small Business Development 'Comparative Analysis of SMME Legislation from eight countries to the National Small Business Act No 102 OF 1996 as amended in 2003 and 2004' available at <https://www.dsbd.gov.za/sites/default/files/reports/report-on-smme-legislation.pdf> accessed on 11 January 2024.

<sup>154</sup> *ibid.*

<sup>155</sup> David Irwin, Mary Githinji 'The influence of business associations on legislation: The case of Kenya' (2017)17(4) *Journal of Public Affairs* 1-10.

<sup>156</sup> *ibid.*

<sup>157</sup> Republic of Kenya. (1965). *Sessional Paper No. 10 of 1965 on African Socialism and Its Application to Planning in Kenya*. Nairobi: Kenya Gazette.

<sup>158</sup> National Assembly 'Report on the Sessional Paper No. 4 of 2020 on National Co-operative Policy' 10 August 2021 available at <http://www.parliament.go.ke/sites/default/files/2021-08/Report%20on%20the%20Sessional%20Paper%20No.%204%20of%202020%20on%20National%20Co-operative%20Policy> accessed on 12 July 2023 at 5.

<sup>159</sup> Republic of Kenya. (1986). *Sessional Paper No. 1 of 1986 on Economic Management for Renewed Growth*. Nairobi.

and large corporates and access to finance, development, acquisition, and technology transfer by small enterprises. It also led to the creation of the MSME Act of 2012, discussed above.<sup>160</sup> The latest sessional paper, Sessional paper no. 5 of 2020, creates a conducive and enabling environment for SMEs to grow, create decent jobs and increase their contribution to the overall social-economic development of Kenya.<sup>161</sup> It set ten objectives, which include skills and capacity building for SMEs, support to access domestic and international markets, access to a diversified affordable range of financial products and services, facilitation of start-ups, promotion of formalization, coordination and implementation of support programs, creation of a regulatory environment at national and county level and mitigation of business external risks. However, a report assessing the policy papers highlights that though the effort is commendable, less effort is put into implementation.<sup>162</sup>

Despite the obstacles to SMEs, Kenya has set up supporting institutions in the ecosystem. The Ministry of Education, Science, and Technology and the Ministry of Information and Communications Technology were created to promote innovation and capacity building.<sup>163</sup> These two ministries established the National Research Fund, Kenya National Innovation Agency, and the National Commission for Science, Technology, and Innovation. Existent is the Kenya Education Network, which also functions as the National Research Network, facilitating the sharing of research and educational resources through a government-subsidized countrywide broadband network.<sup>164</sup>

### *Financial and non-financial incentives*

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<sup>160</sup> Republic of Kenya. (2005). *Sessional Paper No. 2 of 2005 on Development of Micro and Small Enterprises for Wealth and Employment Creation for Poverty Reduction*. Nairobi: Kenya Gazette.

<sup>161</sup> Republic of Kenya. (2020). *Sessional paper no. 5 of 2020 on Kenya Micro and Small Enterprises Policy for Promoting Micro and Small Enterprises (MSEs) for Wealth and Employment Creation*. Nairobi: Kenya Gazette.

<sup>162</sup> Mary Mwami and Mercy Matwere, 'Assessment of Institutional Structures Governing the Informal Sector in Kenya' Discussion Paper No. 227 2019 *Kenya Institute for Public Policy Research and Analysis* 1-48 at 12.

<sup>163</sup> Hakizimana, S., Wairimu, M. C., & Muathe, S. (2023). Digital Banking Transformation and Performance : Where Do We Stand ? 13(01), 179– 196.

<sup>164</sup> *ibid.*

This section examines fiscal and non-fiscal incentives. It includes tax incentives, incentives that improve the accessibility of loans in banks, and cross-border trade and investment policies.

Specific incentives for SMEs exist, such as Government Procurement Opportunities and affirmative action funds targeting youth, women, and persons with disabilities.<sup>165</sup> It also provides MSEs platforms for trade exhibitions and trade fairs to promote market access to a broader scope. The government pushes awareness of the regional blocs like EAC and COMESA, AfCFTA and African Growth and Opportunity Act (AGOA)<sup>166</sup> These incentives ensure that the SMEs maintain a continental outlook in their business.

The Kenyan Revenue Authority imposes various tax obligations on businesses, including income tax, value-added tax, and turnover tax. The latter is explicitly targeted at SMEs with an annual turnover of KSh 500,000 to KSh 50 million.<sup>167</sup> In recent years, the Finance Act has seen adjustments in these rates and criteria to ease the tax burden on SMEs and stimulate business growth. The Kenya Revenue Authority (KRA), through the Finance Act 2006,<sup>168</sup> introduced a 'simpler' tax regime for Micro and small enterprises (MSMEs) dubbed Turnover Tax. Furthermore, the Companies Act of 2015 exempts small companies from audits, which eases their financial pressure.<sup>169</sup>

Additionally, the Banking Act and regulations issued by the Central Bank of Kenya are crucial in determining how SMEs access credit and other financial services. The Banking Amendment Act introduced interest rate limits on bank loans, a significant, controversial measure to make credit more affordable for SMEs.<sup>170</sup> The credit facility's upper limit was 4% above the central bank rate, and the lowest interest allowed on deposits held in interest was

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<sup>165</sup> Nganga, Tabitha Kiriti 'Kenya: assessment of access to government public procurement opportunities for women, youth and persons with disabilities' (2017).

<sup>166</sup> Elizabeth Mulae 'The Micro and Small Medium Enterprises Development in Kenya' *Tralac* 24 December 2022 available at <https://www.tralac.org/blog/article/15863-the-micro-and-small-medium-enterprises-development-in-kenya.html> accessed on 24 August 2023.

<sup>167</sup> USD \$3800-\$390 000as on 20 June 2024.

<sup>168</sup> The Finance Act, 2006. No. 10 of 2006.

<sup>169</sup> Companies Act supra note 147 at s 711.

<sup>170</sup> Kenya Gazette Supplement Acts, 2016.

70%.<sup>171</sup> Interest rate capping was intended to address the high interest rate in Kenya and ease the cost of borrowing.<sup>172</sup> The cap was eventually removed, as it reduced bank profitability and decreased bank loans.<sup>173</sup> Its introduction and subsequent lifting highlighted the dynamic nature of financial regulation's effect on SMEs' operations. More interventions that favour credit accessibility for SMEs but with proper stakeholder engagement could do more to boost their growth.

The Kenya investment policy creates supplier linkages between investors and SMEs. It advocates for a favourable legislative and regulatory framework with incentives for SMEs.<sup>174</sup> The Kenya National Trade Policy establishes Cross-Border Trade Committees to monitor and report counterfeits, smuggled items, and emerging Non-Tariff Barriers.<sup>175</sup> This is to enhance cross-border facilitation. The trade policy also spelt out policy measures to assist SMEs. These measures are the national Government working with County Governments and the Private Sector to develop an enabling and business-friendly legal and regulatory framework, providing business development skills training, establishing a trade finance facility and Simplified Trade Regime and Institutional Strengthening. These policies, though not law, highlight an effort towards supporting SMEs.

The National Trade Policy 2017 and Kenya Investment Policy 2019 were developed to provide guiding principles for the country's trade promotion strategy. The National Trade Policy is set to work alongside the Kenya Investment Policy, which aims to develop a regulatory framework promoting SME growth and inclusion into the global value chain.<sup>176</sup> They support the growth of MSMEs in the country by providing access to affordable funding,

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<sup>171</sup> *ibid.*

<sup>172</sup> Serah Wangari I Nganga *The Effect of Interest Rate Capping On Profitability of Tier one Commercial Banks* (Unpublished Thesis, University of Nairobi, 2019) 11.

<sup>173</sup> *ibid.*

<sup>174</sup> KenInvest 'Enhancing Investment in the Counties' County Investment Handbook 2019 available at <https://www.invest.go.ke/wp-content/uploads/2023/12/County-Handbook-final-PRINT-compressed.pdf> accessed on 13 May 2024 at 50.

<sup>175</sup> Government of Kenya, 'Kenya National Trade Policy (2016).

<sup>176</sup> *ibid* at 11.

relevant infrastructure and worksites, local and international markets, skills development for business owners, and access to information.<sup>177</sup>

Kenya takes a progressive approach to digitisation. The Data Protection Act, enacted in 2019, imposes new obligations on businesses regarding handling personal data, particularly relevant in e-commerce and digital services. Furthermore, the ongoing global and local discussions on sustainability and corporate social responsibility will likely result in new regulations affecting SME operations, particularly in industries with significant environmental impacts. Keeping up with these digital trends and the evolving legal environment is essential for SMEs to remain competitive and compliant.

### **iii. Lessons from SME legal frameworks**

From the above analysis, one notices that regulation attempts to assist in growing SMEs and creating an enabling business environment. Nigeria and Kenya do not have a specific SME legal framework, so they make a provision for SMEs in general company legislation. Hence, the Companies Act for Kenya recognises the small company regime, while the Nigerian CAMA recognises small companies. This then allows the SMEs to register with lower costs and compliance requirements and aligns with the AfCFTA's objective of reducing barriers to trade and promoting inclusive economic participation.

Both countries provide a wide range of incentives, especially tax breaks for SMEs. The country analysis shows that taxes greatly hinder SME growth due to high taxes, compliance, and multiplicity.<sup>178</sup> Kenya's dubbed Turnover tax, which simplifies taxation is a great initiative that other countries can implement. Nigeria could learn from Kenya and input more provisions promoting export to encourage SMEs to widen their market, enabling SMEs to expand their markets and take full advantage of the AfCFTA's trade liberalization agenda. However,

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<sup>177</sup> Jeremy Riro 'Evolution of the MSME policy in Kenya' April 2022 *Fie\_Labs Innovation Hub 2* available at [https://www.researchgate.net/publication/360216529\\_EVOLUTION\\_OF\\_THE\\_MSME\\_POLICY\\_IN\\_KENYA](https://www.researchgate.net/publication/360216529_EVOLUTION_OF_THE_MSME_POLICY_IN_KENYA) accessed on 12 May 2024.

<sup>178</sup> Ocheni Stephen op cit note 126.

incentives also need to focus on protecting investors to enable them to invest in SMEs, which is critical for scaling businesses and integrating them into regional value chains.

Both countries also involve different stakeholders in supporting SMEs and have governing Acts to ensure coordination. Kenya's MSEs Act focuses on small business development broadly and establishing a dedicated SMME agency, while Nigeria's focuses on establishing an agency. The private sector needs to be more involved as a partner in both countries for stronger public-private partnerships.<sup>179</sup> Such collaborations are essential for addressing the infrastructural and logistical challenges that SMEs face in accessing regional markets under the AfCFTA.

It is commendable that the Kenya National Trade policy includes cross-border traders, thereby incorporating a diverse SME demographic. SME legal frameworks must be inclusive and coherent with the realities of African structures within SMEs, aligning with the AfCFTA's goal of promoting equitable participation in trade.

The lack of a specific comprehensive SME legal framework is cumbersome for SMEs. From the analysis above, one had to search through numerous legal frameworks and policies to derive laws governing SMEs. Regulations pose as 'red tapes' and hurdles not only in starting, growing, and scaling an innovative business in Africa but especially when they become innumerable and require distinct cumbersome compliance and filing processes,<sup>180</sup> This hinders the growth and scalability of innovative businesses, particularly in the context of the AfCFTA, where SMEs must compete in a larger, more integrated market. Hence, a recommendation is to develop specific comprehensive legislation that SMEs can navigate. The legal system is crucial to SMEs and should thus be easy to navigate.<sup>181</sup> Such legislation should simplify

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<sup>179</sup> Gcume Andiswa, Willie Michael 'The Effectiveness of Public-Private Partnerships in Supporting SME Development: A Comparative Analysis of Different Partnership Models' May 2023 available at [https://www.researchgate.net/publication/370953418\\_The\\_Effectiveness\\_of\\_Public-Private\\_Partnerships\\_in\\_Supporting\\_SME\\_Development\\_A\\_Comparative\\_Analysis\\_of\\_Different\\_Partnership\\_Models](https://www.researchgate.net/publication/370953418_The_Effectiveness_of_Public-Private_Partnerships_in_Supporting_SME_Development_A_Comparative_Analysis_of_Different_Partnership_Models) accessed on 25 May 2024).

<sup>180</sup> Okolie. C.N, Akwiwu. I 'A review of the new Nigeria Startup Act 2022: benefits and challenges for the tech ecosystem in Nigeria' 2023) 13 (5) *International Journal of Social Science and Humanity* 13-45.

<sup>181</sup> Olujobi, Olusola & Ogbari, Mercy & Dada, Joseph & Edafe, Oluwatosin & Ufua, Daniel 'Operations of small and medium enterprises and the legal system in Nigeria' (2020) *Humanities and Social Sciences Communications* 7-15.

compliance processes, reduce administrative burdens, and provide clear guidelines for accessing AfCFTA-related opportunities.

## **2.7 Conclusion**

This chapter discussed key themes of the thesis and analysed the different problems SMEs face and the current legal status quo regarding these challenges. It strongly pointed that a streamlined and supportive legal system is not only crucial for SME development but also for realizing the full potential of the AfCFTA as a driver of continental integration and prosperity. The next chapter will delve more into a specialised SME environment, the start-up space. This will guide towards SME legal frameworks that will be comprehensive to cater to the general SME and the more specialised SME that is a Start-up.

## Chapter 3

### EXAMINING START-UP ACTS

#### 3.1 Introduction

The previous chapter spelt out the relationship between an SME and a startup, concluding that a start-up is a category of SME. Subsequently, it deals with the legal frameworks offered to SMEs under the general SME legal frameworks. This chapter now zones into the emerging legal frameworks that govern startups, called Start-Up Acts. Like Chapter 2, this exploration identifies strengths and weaknesses to answer what constitutes an effective legal framework. This chapter compares three countries in three African regions, namely Nigeria, Kenya and Tunisia, exploring what constitutes their StartUp Acts and pointing out strengths and gaps. Although Tunisia was not discussed in Chapter 2 due to its legislation being in Arabic, its *Start-up Act* (available in English) is a pioneering example in Africa, and is thus crucial to cover in this chapter. It uses a similar rubric in Chapter 2, which examines the support ecosystem and incentives. In addition to these rubrics, it then adds the ‘definition’ and ‘intellectual property commercialisation’ rubrics, which are emphasised in the Start-Up Acts and are important to examine along with the growth of the start-up category of SMEs. The significance of these rubrics is explained below in detail.

#### 3.2 Criteria to analyse Start-Up Acts

The four-point-way rubric used to analyse Start-Up Acts is as follows;

##### a. The definition.

Each Start-Up Act highlights a criterion for defining startups, looking at factors such as date of incorporation, legal structures, and revenue model. This rubric is fundamental as definitions give legal precision on who and what is covered. An SME must fit the definition to obtain the incentives accredited to a startup. Inclusivity is vital in determining the effectiveness of current existing SME legal frameworks. Lastly, considering the emergence of start-ups is relatively new, and the concept of how to define them could be more consistent even on a global level, as discussed in Chapter 2, looking at how different countries define them brings new literature.

### **b. IP commercialisation**

This section looks at provisions that facilitate the protection and commercialisation of IP, the relevant bodies engaged, if any, and the jurisdictions covered. Efficient intellectual property protection and commercialisation strategies encourage innovation which is the premise of promoting competition, leading to economic growth.<sup>182</sup> Intellectual property protection is the bedrock of development.<sup>183</sup> It also creates exclusivity of goods and services, leading to greater market demand.<sup>184</sup> Lastly, startups create innovative ideas, and when those ideas are left unprotected, they risk infringement and exploitation by larger entities.<sup>185</sup> If an SME legal framework is to be effective, it is essential to ensure legal frameworks adequately protect and commercialise intellectual property

### **c. Supporting ecosystem**

A supporting ecosystem examines other organisations and entities' actions to help startups grow. These can include, but are not limited to, accelerators, incubators, councils, and regulators. Chapter 2 highlighted how inadequate support is one of SMEs' most significant challenges. Startups do not grow alone, and there needs to be deliberate action to incorporate other parties to nurture them. Hence, examining this theme evaluates the gap or strength of the Acts and can guide the building of an effective SME legal framework.

### **d. Financial and non-financial incentives**

By nature, SMEs are small in size and need support. Incentives, especially financially related incentives, assist them in growing. This section looks at governments' efforts to give incentives to aid the growth of SMEs. Start-Up Acts offer a wide range of incentives to SMEs considered startups. This part of the analysis will explore these incentives and gauge their benefit to SMEs.

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<sup>182</sup> Pece, Andreea & Simona, Olivera & Salisteanu, Florina 'Innovation and Economic Growth: An Empirical Analysis for CEE Countries' (2015) 26 *Procedia Economics and Finance* 461-500.

<sup>183</sup> Chen H 'The impact of intellectual property protection on the development of digital economy and regional entrepreneurial activity: Evidence from small and medium enterprises' (2022) 13 *Frontiers in psychology*.

<sup>184</sup> Sukarmijan, Sati Salmah & Sapong, Olivia 'The Importance of Intellectual Property for SMEs; Challenges and Moving Forward' *UMK Procedia* 74-81.

<sup>185</sup> *ibid* at 75.

### 3.3 Country case studies of Start-Up Acts

#### a. Nigeria Start-Up Act

##### i. Overview

The Legal regime governing the Start-ups Act in Nigeria was passed in 2022 as the Nigeria Startup Act.<sup>186</sup> (also called NSA). The NSA applies to legally registered companies with a startup label, all incubating and supporting establishments and organisations, creating an ecosystem.<sup>187</sup> It is wide-ranging, as seen in section 2, which recognises that the NSA provides measures for the stakeholders in the startup ecosystem. It expands the scope of the Nigerian Start-Up Act's applicability to include businesses and organisations whose operations impact the development, support, and incubation of designated startups in Nigeria.<sup>188</sup> It ensures that Nigerian startups fully exploit the digital economy's opportunities.<sup>189</sup> It is reported that over 25 tech start-ups were consulted during drafting, highlighting that it was collaborative.<sup>190</sup>

##### ii. Definition of a start-up

Section 47 of the Nigerian Start-up Act (NSA) defines a startup as a company in existence for not more than 10 years, with its objectives being the creation, innovation, production, development or adoption of a unique digital technology innovative product, service or process. The process for a business to be labelled a startup is detailed in section 13. It must be a limited liability company registered under the Companies and Allied Matters Act (CAMA)<sup>191</sup>, not older than 10 years from the date of incorporation. Sole proprietorships or partnerships are

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<sup>186</sup> Nigeria Start-Up Act (NSA) supra note 64

<sup>187</sup> *ibid* at s2

<sup>188</sup> Olayide Oyeleke, Dr Emma Etimi 'From Idea to Impact: The Evolution and Future of the Startup Act in Africa' 15 February 2023 available at <https://initiative.org/from-idea-to-impact-the-evolution-and-future-of-the-startup-act-in-africa> accessed on 22 February 2024.

<sup>189</sup> Ogunnubi, A. V. 'The Nigeria Startup Act, 2022: 15 things to note.' (2022) available at <https://www.mondaq.com/nigeria/fund-finance/1307064/the-nigeriastartup-act-2022-15-things-to-note> accessed on 23 March 2024.

<sup>190</sup> Yunus Adelodun; Abdulrazaq Adelodun Daibu, 'The Nigeria Start-up Act 2022 as a Catalyst for Technological Development and Economic Growth in Nigeria' (2023) 7 *Strathmore Law Journal* 101 -150.

<sup>191</sup> CAMA supra note 118.

given six months leave to obtain a label while registering as a company under the CAMA.<sup>192</sup> This provides flexibility, allowing them time to transition.

However, there is a conflict of provisions on labelling, leading to the misinterpretation of the NSA. Section 13(2)(a) of the NSA requires a firm to be incorporated as a limited liability company under the CAMA and must have been operating for a maximum of ten years from the date of incorporation before it may be labelled start-up. If a company operates for five years before incorporation, it will only enjoy five years under the label. This contradicts Section 15(3) of the NSA, which asserts that a start-up label (certificate) is valid for ten years from the date of issuance.<sup>193</sup> This confusion creates uncertainty among the SMEs regarding qualifications and may lead to different, inconsistent implementations of labelling by governments and other stakeholders.

For a company to obtain a label, section 13 stipulates that it should own registered software that validates that the company greatly aligns with the innovation, development, and commercialisation of a digital product or a digital process. This limits upcoming SMEs without the technological skills and those without the financial means to register software. “Innovation”, in the definition section, is the implementation of technology-driven ideas that lead to the creation or development of a new product, process, or service to improve efficiency and effectiveness. A criticism of this is that it excludes non-technological companies that may be developing an enhanced business plan.<sup>194</sup> This means that non-technological small businesses will not benefit from all the incentives.<sup>195</sup> This excludes start-ups that do not follow the traditional way of building tech products, such as food and beverage, retail, healthcare, agriculture, fashion, and construction, but are prominent economy-growing industries in Nigeria.<sup>196</sup> Other stakeholders argue for the technology requirement, highlighting that the definition is justifiable since the highest capital startups in Nigeria before the Act were also all

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<sup>192</sup> *ibid* at s 13(2).

<sup>193</sup> Adelodun & Daibu op cite 188 at 125.

<sup>194</sup> Sunday Abayomi Adebisi & Olufemi Ebenezer Osob’ Evaluation of the Nigerian Startup Act 2022 in redefining SME growth in Nigeria: The Pros and Cons’ (2023) 6 (3) *Gusau International Journal of Management and Social Sciences* 111-133.

<sup>195</sup> *ibid*.

<sup>196</sup> Adelodun & Daibu op cite 188 at 125.

technology companies.<sup>197</sup> Furthermore, other supporters highlight that since technology-based companies top the startups globally, this requirement will encourage SMEs to transition and develop digital products like Netflix, a famous movie disruptor, did.<sup>198</sup> Regardless, this study would prefer an inclusive definition considering Africa's current digital and technological status. In 2023, less than 7% of African microenterprises used digital technologies (smartphones and computers) for their businesses.<sup>199</sup>

The issue of local ownership, still under section 13 (2)(d), is also quite pertinent. At least one Nigerian founder or co-founder should be involved. This ensures that the start-ups' benefits benefit indigenous people and Nigerian Nationals to some extent.

### **iii. Incentives**

This section highlights the different incentives given to companies labelled start-ups. The incentives discussed in this section include tax incentives to SMEs and investors, setting up government funds, deductions on research and development expenses, export incentives, access to loans and grants and international investment credits.

First, the Nigerian Sovereign Investment Authority manages the Start-Up seed fund. It funds labelled and early-stage startups and supports accelerators, incubators, hubs, and technology laboratories. It will be funded with a sum not less than N10,000,000,000 (\$6,636,304 US Dollars) annually.<sup>200</sup> This is an essential intervention as one of the most significant problems Nigerian startups faced before enacting the Nigerian StartUp Act was limited funding options; it was either venture funds or angel investors.<sup>201</sup> No public funding avenue was available to technology entrepreneurs before the enactment of the NSA. However, the maximum amount of funding is quite inadequate compared to what other countries like China and Tunisia put

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<sup>197</sup> Admin. (2022, January 14). 30+ Top Startups in Nigeria to watch out for in 2022. Startup HR Toolkit. Retrieved February 6, 2023, from <https://nigeria.startuphrtoolkit.com/top-startups-in-nigeria/>.

<sup>198</sup> Understanding the Provisions of the Nigerian Startup Act and its Impact on Businesses, Africa Law Practice, NG and Company.

<sup>199</sup> Atiyas Izak; Dutz Mark A 'Digital Technology Uses among Microenterprises: Why Is Productive Use So Low across Sub-Saharan Africa ?' 10280 *Policy Research working paper D.C.: World Bank Group*.

<sup>200</sup> NSA supra note 64 at s19(2); #10,000,000,000 (Ten Billion Naira) equals six million, six hundred thirty-six thousand, three hundred four US dollars. This conversion is as of 12 June 2024.

<sup>201</sup> Adelodun & Daibu op cite note 188 at 101.

towards their start-up development. This is especially true considering Nigeria has the largest number of start-ups in Africa, with 4,500 - 6,700 start-ups failing to scale due to funding availability.<sup>202</sup> Compared with Italy, investments of over 34 million euros (over 36 million US dollars) went into Italian startups between 2012 and 2015 following the enactment of their Start-up Act.<sup>203</sup> Tunisia set up its fund with €20 million (almost USD 25 million).<sup>204</sup> Hence, the ten billion naira fund is a great effort but might prove inadequate.

Secondly, according to section 25(2), a labelled startup may be eligible for an exemption on “ income tax or any other tax chargeable on its income or revenue for three years and an additional two years if still within the period of a labelled startup in accordance to the provisions of the Industrial Development (Income Tax Relief). This enables steady growth for the first years.

Thirdly, to encourage the continuous development of business models, any expenses spent by a labelled start-up on research and development that is wholly done in Nigeria shall also be deducted.<sup>205</sup> In addition, the tax incentives affect the whole ecosystem, as non-resident companies that offer different services to labelled start-ups are eligible for a 5% withholding tax.<sup>206</sup> These investor-targeted provisions are set to position the country as receptive to foreign collaborations.<sup>207</sup> Furthermore, in section 25(5), in-house training given to employees exempts startups from contributing to the Industrial Training Fund. This ensures continuous development of the skill force.

Fourthly, under sections 26 and 27, the secretariat shall ensure labelled startups benefit from export incentives and have access to any grants or loans meant for SMEs. This aligns with facilitating startup participation in regional trade. Furthermore, the Council shall assist startups

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<sup>202</sup> Adepetun A; Chibueze J, 'Start-ups Act: Experts lists gains, warn against pitfalls' *The Guardian*, 22 October 2022.

<sup>203</sup> Oturu D, and Dosunmu A, 'The Nigeria Start-up Act: What it is and why it matters' AELEX <https://www.aelix.com/the-nigeria-start-ups-act-what-it-is-and-why-it-matters/> on 8 July 2023.

<sup>204</sup> Startup Tunisia, 'Startup Tunisia Annual Report 2020' available at <https://startup.gov.tn/sites/default/files/2021-11/Startup-Tunisia-Annual-Report-2020-en.pdf> accessed on 12 June 2024.

<sup>205</sup> NSA supra 64 at s 25 (3).

<sup>206</sup> NSA supra 64 at s 24 (4).

<sup>207</sup> Okolie. C.N, Akwiwu. I op cit note 178.

that want to be listed on the stock exchange in terms of growth and development.<sup>208</sup> This displays how the Act does not limit funding avenues for startups, leveraging even the possibility of public funding through buying shares on the stock exchange. Furthermore, including a crowdfunding facility under section 32 provides a unique and innovative means of fundraising for startups, creating an alternative, more accessible avenue for accessing capital.

The creation of the start-up portal is a transformative factor in itself. It brings together Startups and their stakeholders to communicate and collaborate.<sup>209</sup> It provides information on incentives. A section will be dedicated to different programs and information on accelerators and incubators.<sup>210</sup> This portal can form part of the digital ecosystem, enabling digital cooperation necessary to promote inter-Africa trade.<sup>211</sup> However, the NSA lacks a compliance mechanism and a mechanism to flag inadequacy following failure to set up the start-up portal after one year of operation.<sup>212</sup> It has only finally launched in April 2024.<sup>213</sup>

Lastly, the Act recognises the critical role of the private sector in growing SMEs and encourages their participation through tax incentives.<sup>214</sup> It provides tax incentives for venture capitalists, individuals, impact investors, angel investors, companies, private equity investors, accelerators, and incubators by exempting them from paying taxes if they make equity investments in startups.<sup>215</sup> Section 29 (1) and (2) entitle these ecosystem stakeholders to investment tax credits equivalent to 30% of the investment in the labelled startup, provided that such credit shall be applied to any gains on investment subject to tax. Section 29(3) goes on to exempt capital gains tax that accrues on the disposal of an asset by any of these stakeholders concerning a labelled start-up so long as they have been in Nigeria for the past two years. This

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<sup>208</sup> NSA supra note 64 at s 26.

<sup>209</sup> NSA supra note 64 at s 10.

<sup>210</sup> Adelodun & Daibu op cite 191 at 116

<sup>211</sup>, Fafunwa and Odufuwa op cit note 5.

<sup>212</sup> Eze G, Ndunagu T ‘The Nigeria Startup Act 2022: prospect for Startups in Nigeria’ *Infusion Lawyers* (2023) available at <https://infusionlawyers.com/the-nigerian-startup-act-2022-prospects-for-startups-in-nigeria-and-potential-pitfalls/> accessed on 26 February 2024.

<sup>213</sup> Emeka Ekonkwo ‘Nigeria launches startup portal, sparking massive response’ 16 April 2024 available on <https://itweb.africa/content/KzQenqjyeQPMZd2r>; Nigeria launches Startup portal, Resilient digital Africa, 23 April 2024, available on <https://resilient.digital-africa.co/en/blog/2024/04/23/nigeria-launches-startup-portal/>

<sup>214</sup> Adelodun & Daibu op cite 191 at 118.

<sup>215</sup> Borg ‘On the journey to Nigeria Start-Up Act’ available at <https://www.borg.re/articles/ideasmemo/on-the-journey-to-nigerias-startup-act> accessed on 26 February 2024.

aligns with findings underscoring the importance of developmental financial institutions in promoting and nurturing entrepreneurial activities in developing economies.<sup>216</sup> By providing soft loans and making startup funds available to entrepreneurs through their lending policies and local content policies, as well as prioritising national industrial-development goals, they help grow startups, and specific incentives, especially around taxes, encourage them to help grow start-ups.<sup>217</sup> These enterprises, vital to economic development, faced barriers such as limited access to funding, cumbersome regulatory processes, and inadequate support for innovation and technology-driven initiatives.<sup>218</sup> The focus on supporting accelerators, incubators and hubs can create nurturing opportunities for SMEs to access mentorship and collaboration spaces.

The Start-Up Fund, tax, research and development expenses, and international investment credits can provide much-needed financial resources for SMEs to scale up and compete regionally. Extending the incentives to other ecosystem players like investors and accelerators encourages multi-stakeholder support for the growth of start-ups.

#### **iv. Intellectual Property Commercialization**

The NSA also establishes intellectual property protection and commercialisation mechanisms by partnering with relevant institutions such as the Nigerian Copyright Commission and the Trademarks, Patent and Design Registries. S31 (2) vaguely mentions the Secretariat helping with internalisation and commercialisation. It will designate part of the Startup portal, aid with a grant application or revocation, offer drafts, and facilitate registration and filing of trademarks and patents at the international level. This is to attract investors and enhance the competitiveness of startups in the global market.

However, a more explicit stance on what ‘assistance’ refers to would be appreciated in a practical SME legal framework, particularly one that states the government will offer financial

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<sup>216</sup> Gerard George, Ganesh Prabhu ‘Developmental financial institutions as technology policy instruments: implications for innovation and entrepreneurship in emerging economies’ (2003)32 (1) *Research Policy* 89-108

<sup>217</sup> Patrick Nnadozie, Udefuna, Emmanuel Ezenwa Uzodinma ‘Entrepreneurship Development in Nigeria: Issues for Policy and Legislative Attention’ (2017) 2(4) *Specialty Journal of Politics and Law* 33-44

<sup>218</sup> Adebisi and Osobu op cit note 196

support for IP registration, as is highlighted in the Tunisian StartUp Act.<sup>219</sup> Similarly the U.S. has a well-established IP regime under the *U.S. Patent and Trademark Office (USPTO)*, which offers fast-track patent processing and financial assistance programmes for small entities.<sup>220</sup> When creating incentives around IP, the goal is to ensure the discrepancy between the IP generated and utilised and the cost of its generation, including administration costs, is maximised in favour of the IP owner.<sup>221</sup> Hence, a commitment to assisting with the process and, more importantly, the cost is necessary.

#### **v. Supporting Ecosystem**

This section outlines the Act's governing structure, the council, and highlights the secretariat and its duties. It then looks at the other agencies and partnerships formed for startups, training and capacity building offered through the National Universities Commission and other tertiary institutions' regulatory bodies, and the interlinking among research institutions, private sectors, and the government for innovation development. The NSA underlines the importance of establishing an ecosystem that supports the growth of startups at different stages.

The National Council for Digital Innovation and Entrepreneurship is established in section 3. It includes government Ministers, the governor of the central bank, start-up consultative members (set up under section 12 from venture capitalists, labelled startups, incubators), and computer scientists. The National Information Technology Development Agency serves as its Secretariat.<sup>222</sup> Under section 7, this council has several roles, including ensuring the Secretariat operates well, making, regulating, monitoring and evaluating policy and laws, and supporting the advancement of technologies through grants. Government involvement, especially by highly positioned officials like the Vice President and President, may increase the possibility of bureaucracy, risking another bureaucratic drain on the Nigerian

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<sup>219</sup> Tunisia Start Up Act supra 43 Article 12

<sup>220</sup> U.S. Patent and Trademark Office Report, "Intellectual property and the U.S. economy: Third edition " 2019 available at <https://www.uspto.gov/sites/default/files/documents/uspto-ip-us-economy-third-edition.pdf> accessed on 15 February 2025.

<sup>221</sup> S. Besen, J. Raskind, 'An introduction to the law and economics of intellectual property' (1991) 5 (1). *Journal of Economic Perspectives* 3-27.

<sup>222</sup> NSA supra note 64 at s 9.

economy.<sup>223</sup> Adebisi even phrases the council as composed of highly burned political public office holders like the President and Vice president, multiple agencies and regulators.<sup>224</sup> Naturally, the President and Vice president have many tasks of national importance. It is important to have them as the chair and vice chair to lead the council and direct action where the Act is silent. Startups move quickly and prioritise speed in their operations and approval.<sup>225</sup> Government officials' involvement can pose a conflict of interest between their personal gains and legally imposed duties, especially as civil servants.<sup>226</sup> Adelodun and Daibu express concern that the executive arm's involvement in implementing the Start-up Act may undermine public confidence in decision-making processes and lead to the evasion of performing tasks impartially.<sup>227</sup> A tech-savvy entrepreneur as chair of the council would be preferable.<sup>228</sup> Otherwise, the Act could limit the input of the President, requiring them only in situations where such input is inevitable.<sup>229</sup>

On the other hand, Otoru argues that the council structure avoids the repetitive task of creating another government agency.<sup>230</sup> The government's involvement at this stage may avoid extended policy formulation and uptake procedures. Establishing the NITDA itself eliminates the need to set up a new agency as it already has the necessary frameworks as an implementing agency.<sup>231</sup> Furthermore, the collaboration with four members from the Startup consultative body, one member from Computer Professionals (Registration Council of Nigeria), one member from the Computer Society and the Director-General of the National Information Technology Development Agency ensures that laws and policies are influenced by industry and ecosystem players and not just by the government. It has an equal balance of seven

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<sup>223</sup> Eze G, Ndunagu T op cit note 210.

<sup>224</sup> Adebisi & Olufemi op cite 196.

<sup>225</sup> Okolie. C.N, Akwiwu. I op cit note 178 at 330.

<sup>226</sup> OECD 'Managing conflict of interest in the public sector -A toolkit' available at <https://www.oecd.org/gov/ethics/49107986.pdf> accessed on 23 September 2023

<sup>227</sup> Adelodun & Daibu op cite 191 at 129.

<sup>228</sup> *ibid* at 128.

<sup>229</sup> Okolie C N, and Akwiwu I op cit note 178.

<sup>230</sup> D.Otoru A. Dosunmu 'The Nigeria Start-up Act | What it is and Why It Matters' 20 October 2022, AELEX available on <https://www.aelix.com/the-nigeria-start-up-act-what-it-is-and-why-it-matters/> accessed on 24 February 2024.

<sup>231</sup> The National Information Technology Development Agency Charter 2007 available at <https://nitda.gov.ng/wp-content/uploads/2020/11/Charter.pdf> accessed on 24 February 2024.

government representatives, including the President, vice, and industry players. Regardless, a structure with less government involvement, especially those of higher ranking like the President, is needed as a precautionary measure for the success of the Start-up Act.

NITDA shall be the Council Secretariat.<sup>232</sup> It shall perform the day-to-day running duties of labelling startups, creating online platforms with information, and promoting collaboration with different stakeholders, including universities, venture capital funds, and incubation hubs. Most importantly, under section 10, it shall establish the Start-up support and engagement portal. The portal facilitates interaction among startups and other stakeholders like the government, angel investors, and accelerators; it creates beneficial challenges to participate in, fosters access to finance, information and the global market and provides tools and resources.<sup>233</sup> The portal shall be run by a coordinator appointed by the Secretariat with the council's approval. The appointment of the Council agent, according to section 8, sets up a monitoring and evaluation system for the Act through quarterly and annual reports. The engagement of venture capitalists, angel investors, incubators, accelerators, innovation hubs, and civil society organisations is through the creation of the Startup consultative forum in section 12. The forum shall provide information for startups to qualify for labelling, relevant incentives, local capabilities, nominations for council representatives, deliberations on memorandums and policy proposals for the startup ecosystem.

The Secretariat shall establish accelerators and incubators and develop a national accelerator and incubator policy for establishing and building startups. Each state should establish start-up innovation clusters, hubs, and physical and virtual innovation parks.<sup>234</sup> These initiatives create a collaborative environment and provide a well-structured and innovative framework.<sup>235</sup> Most startup firms lack measurable goals and objectives, a clear understanding of their business against the context, established processes and controls, and other essential

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<sup>232</sup> NSA supra note 64 at s 9.

<sup>233</sup> NSA supra note 64 at s 10(2)

<sup>234</sup> NSA supra note 64 at s 40(1).

<sup>235</sup> Adelodun & Daibu op cite 191 at 122

business management skills.<sup>236</sup> It is commendable that the NSA places great importance on education through research enabled by funding to stay current on trends in the technology industry worldwide.<sup>237</sup>

The Secretariat shall collaborate with the National Office for Technology Acquisition and Promotion to facilitate technology transfer at a discount, give technical assistance, and assist with registration. The limitation, however, according to the heading, is that this applies only to foreign technology transfer, leaving a question of domestic development.<sup>238</sup> There is also support for labelled startups to register with the central authority, and regulatory sandboxes are provided to ease business by minimising regulatory burdens and optimising corporate operations. Furthermore, section 23 divides the start-up portal to provide technology transfer and licensing of financial technology startups. This comprehensive support system exemplifies a deliberate attempt to promote innovation and accelerate development.

The Secretariat designs and implements training and capacity building. A separate fund, the Industrial Training Fund, and any organisation that can partner with the Secretariat facilitate this.<sup>239</sup> The National Universities Commission, the National Board for Technical Education, and other regulatory bodies of tertiary institutions play an essential role in supporting infrastructure. They collaborate with the Secretariat to develop modules and programs and hold workshops to impart the knowledge necessary for establishing and running a startup in Nigeria.<sup>240</sup> The secretariat is mandated to set up centres for the acquisition of digital technology in Nigeria's six geopolitical zones to support information systems, digital technology management capabilities, and the promotion of digital technology utilisation. This addresses

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<sup>236</sup> Öndas. V 'A Study on high-tech startup failure: Antecedents, outcome and context' (Master's thesis School of Business Master's Degree in Entrepreneurship and Business Competence. JAMK University of Applied Sciences) 2021.

<sup>237</sup> Okolie C N, and Akwivu I op cit note 178.

<sup>238</sup> NSA supra note 64 at s 33.

<sup>239</sup> NSA supra note 64 at s21(10 and (2))

<sup>240</sup> NSA supra note 64 at s 22

the long-advocated call for prioritising technology transfer.<sup>241</sup> They are giving SMEs access to technology and skills essential for regional competitiveness and to navigate the AfCFTA.

Establishing an interlink among research institutions, private sectors, and the government can foster collaboration on innovation initiatives relevant to AfCFTA. The Secretariat under section 9 (p) and section 23 shall support the development of academic research institutions by establishing connections between research institutions, private sectors, and the government, financing research systems, establishing research facilities, developing human resources, and funding research information sharing, including conferences and workshops. The nurturing of human capital within the academic entrepreneurial spheres can be achieved through the facilitation of partnerships and knowledge exchange promotion of cutting-edge facilities. Investing in research-sharing platforms, workshops, and events can encourage a dynamic, diverse environment conducive to sustainable growth and business competitiveness under the AfCFTA framework. Nigeria can position itself as a hub of innovation and entrepreneurship through all these efforts.

Sometimes, the Secretariat shall collaborate with the Corporate Affairs Commission to handle a specific part of the Start-Up Portal to facilitate registration (Section 30). This collaboration can facilitate registration and significantly reduce administrative burdens for start-ups.

## **b. Tunisia StartUp Act**

### **i. Overview**

The Tunisia StartUp Act (also called TSA) is the legal regime regulating startups in Tunisia.<sup>242</sup> TSA was created by the start-up task force, which comprises the government, civil society, and private sector and reports to the Minister of Technology.<sup>243</sup> One significant aspect is that it

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<sup>241</sup> Harry Deinibiteim 'Research, Technology Transfer and Socio-Economic Development in Nigeria: Some Lessons from the Asian Economies' (2013) 4 (8) *Mediterranean Journal of Social Sciences*. MCSER Publishing, Rome Italy.

<sup>242</sup> Tunisia Start-Up Act supra 43.

<sup>243</sup> Raymond Onuoha 'Nigeria's Startup Act 2022: A Benchmark Assessment, November 2023' Nigerian Economic Summit Group ESG available at [https://nesgroup.org/download\\_resource\\_documents/NRFP%20Policy%20Brief-%20Dr%20Raymond%20Onuoha\\_1701187276.pdf](https://nesgroup.org/download_resource_documents/NRFP%20Policy%20Brief-%20Dr%20Raymond%20Onuoha_1701187276.pdf) accessed on 12 March 2024.

involved the whole start-up ecosystem. Quoting Participedia, ‘It was a deliberative democracy mechanism.’<sup>244</sup> This is an essential method for examining the state of the entrepreneurship ecosystem, resulting in better laws and regulations that best serve the whole ecosystem.

The TSA aims to grow the startup ecosystem by mainly targeting key areas like simplifying administrative procedures, encouraging more startup registration, and widening funding structures. This is primarily through the fund of funds, which encompasses three different funds for startups at various stages and incorporates access to global markets for these startups.

## **ii. Definition**

Article 2 defines a startup first by highlighting it as a commercial company registered under laws and then satisfying the conditions of being labelled as a startup. Article 3 describes five key labelling requirements: The commercial company should have been registered for less than 8 years. Limitations imposed by government regulation on yearly turnover, balance sheet and personnel resources should not be exceeded. Two-thirds of capital held by an investment body, such as venture capital, seed money, and natural persons, should be permitted under the law. The business model should use innovation, exceptional technology, and potential for economic growth. The “cutting-edge technology” requirement excludes the TSA from non-technological businesses like Nigeria. However, unlike Nigeria or Kenya, there is no requirement for a particular component to be held by nationals; unlike other Acts, all it requires is to be a natural person, venture capital investment companies, or collective investment funds-investment, seed money and any other investment body. This may indicate that Tunisia values the industry's growth and not who grows it or who benefits. This could potentially encourage more regional growth.

## **iii. Incentives**

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<sup>244</sup> Participedia ‘The Tunisian Startup Act’ April 2 2018  
<https://participedia.net/case/12213#:~:text=The%20law%20aims%20to%20promote, the%20government%20of%20Habib%20Essid.>

This section details the incentives offered to businesses that qualify as start-ups. Key incentives for start-ups include tax holidays, start-up scholarships, and one-year leave and exemption leave for graduates. It then examines tax incentives and funding structures, particularly the fund-of-fund, guarantee fund, and crowdfunding. Lastly, it evaluates incentives offered to investors and other ecosystem players.

The first group of incentives relate to easing the pathway of starting a business through cushioning. First, the Tunisia Start-Up Act gives entrepreneurs the comfort of risking starting a business by allowing a fully paid year for three founders to launch a business before one returns to formal employment. This is called the Startup grant or scholarship.<sup>245</sup> Secondly, Articles 8 and 9 also give up to three shareholders or employees the right to a one-year leave, renewable once but only to be granted for up to three years. This means founders may take the risk of starting the business with job security to claim back if the start-up does not perform well. Thirdly, young graduates can start their companies without risking graduate programs as they remain eligible for three years. This gives young people the freedom to ideate and explore. Lastly, through these measures, the Tunisian Start-Up Act accepts that failure is normal. Furthermore, it allows amicable ways of winding up for start-ups that would have failed.<sup>246</sup>

A business can be pre-labelled for six months as it sorts out the legal entity structure registration. Like the Nigerian Act, this small business has time to regularise. Article 6 exempts the cutting technology requirement if the businesses have secured external funding. They are then deemed to have automatically satisfied this technology and potential for high economic growth requirements under Articles 3 (4) and (5). Though lenient to the technology requirement, this exemption is still a formidable challenge.

The second group of incentives relates to tax incentives for start-ups and potential investors. The TSA uniquely approaches the issue of tax incentives. Its features include tax exemptions for businesses no older than 8 years. It provides tax breaks for labelled startups,

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<sup>245</sup> Tunisia Start Up Act supra 43 at article 10.

<sup>246</sup> Tunisian Start-Up 'The Tunisian Startup Act: Genesis and Implementation' (2021) available at [https://assets.websitefiles.com/60e6bc58a4328775758e87d0/61e5721da63df498209669c2\\_THE%20TUNISIAN%20STARTUP%20ACT%20genesis%20Final%20.pdf](https://assets.websitefiles.com/60e6bc58a4328775758e87d0/61e5721da63df498209669c2_THE%20TUNISIAN%20STARTUP%20ACT%20genesis%20Final%20.pdf) accessed on 15 March 2023.

and the government pays for the social security taxes. The sale of securities is exempt from capital gains tax under Article 14.

To encourage funding for start-ups other than from the government, venture capital companies' investments of at least 65% of their income or profits in start-ups are tax deductible.<sup>247</sup> This establishes a holistic funding structure that ensures the government is not burdened with sustaining the growth of start-ups, as other private players are encouraged to take on the risk of funding start-ups through tax incentives. Any investment in startups warrants one, deductible tax. Hence, businesses will receive tax benefits as they expand their investment portfolio. Any profit or income reinvested into startups is tax deductible, encouraging startup financing. The tax exemptions allow startups to reinvest earnings into their business instead of covering high initial taxes. This investment in funding highlights an essential factor of a effective SME legal framework: it should go beyond just tax incentives and have a facility for loans and grants.

One of the unique features of this Act is the creation of a foreign currency account to allow acquiring assets, setting up subsidiaries, purchasing raw materials, and investing in foreign corporations. This is provided for under Article 17 and shows the commitment to startups as international entities rather than just operating in Tunisia, thus fostering global competitiveness.

A significant export trade incentive is that startups are regarded as Authorized Economic Operators.<sup>248</sup> This means that when moving goods internationally, they have been approved by national customs as compliant with World Customs Organizations or standards. This ensures that border post authorities trust the startups, making the process of moving goods faster.<sup>249</sup> This is a significant benefit to urge the issues of non-trade barriers constantly hindering trade in Africa.

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<sup>247</sup> Tunisia Start Up Act supra 43 at article 13.

<sup>248</sup> Tunisia Start Up Act supra 43 at article 20.

<sup>249</sup> Tunisia Start Up Act supra 43 at article 55.

Lastly, although not mentioned in the Act itself, through Smart Capital, Tunisia has established a €200 million fund consisting of more than ten funds to support start-ups in their different stages of growth.<sup>250</sup> The Startup Guarantee fund guarantees any investment funds in start-ups. It is managed by the Tunisian Guarantee company, which was agreed upon by the Ministry for Digital Economy and the Ministry of Finance.<sup>251</sup>

The TSA could benefit from creating a Tunisian legal framework for crowdfunding. Existing crowdfunding platforms like Cofundly and Afrikwity in Tunisia are subject to French regulations.<sup>252</sup> A recommendation from a paper that examined crowdfunding in Africa highlighted the need for local crowdfunding regulation to increase confidence in this form of funding.<sup>253</sup>

#### **iv. Intellectual Property Commercialization**

According to Article 12, IP development is also enhanced through the fast-track processing of patents nationally and even internationally. The Ministry in charge of the digital economy will cover direct and indirect costs. Tunisia aims to see its startups become nationally and globally dominant. This action of bearing the direct and indirect expenses highlights the government's intentionality towards registering intellectual property. It is a different, more committed approach than the Nigerian Start-up Act.

#### **v. Supporting ecosystem**

This section outlines the different parties and structures supporting the implementation of the TSA. It looks at Smart Capital, the private company implementing the Act. It points out that the Tunisia Start-Up Act is one of the three pillars of a strategy to grow startups, and it is called

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<sup>250</sup> StartUp Tunisia 'Fund of funds, Raise Capital for startups in Tunisia'  
[https://startup.gov.tn/en/startup\\_act/discover](https://startup.gov.tn/en/startup_act/discover); El Aynaoui, K., Jaïdi, L., and Zaoui, A., 'Digitalise to Industrialise: Egypt, Morocco, Tunisia, and the Africa–Europe Partnership' in *Africa–Europe Cooperation and Digital Transformation* (2022) 100-115.

<sup>251</sup> Tunisia Start Up Act supra 43 at article 18.

<sup>252</sup> Ismaila, Bouba 'The state of crowdfunding in Africa and its potential impact: a literature review' (2023) 12(5) *International Journal of Research in Business and Social Science* 258–268..

<sup>253</sup> Tekfi, S 'Caractéristiques et fonctionnement du Crowdfunding au Maghreb.' (2018) 10(2), *Revue Marocaine de Recherche En Management et Marketing* 189–206.

Start-Up Tunisia. Hence, the supporting ecosystem, though not explicitly mentioned in the Tunisia Start-Up Act, exists strongly as a third pillar with incubators and accelerators.

The implementation of the TSA is currently being coordinated by a specialised management company called Smart Capital. This is provided under Article 5, which gives the minister the power to confer all powers and responsibilities to a technical expert. This is an innovative public-private partnership, in keeping with the spirit of the legislative process: a public company in shareholding, public-private in governance, and private in self-imposed operational efficiency standards. The Financial Markets Council governs it in an agreement with the Ministry of Communication Technologies and Digital Economy, the Ministry of Finance, and the CDC (a public investor).<sup>254</sup> Smart Capital establishes a "Fund of Funds" consisting of more than ten funds for start-ups at various stages (seed funds, early-stage funds, late-stage funds), thereby creating a solid financing framework for start-ups. This non-government interference approach has been attributed to being one of the key reasons for TSA's success.<sup>255</sup>

An important point is that the TSA is just one pillar of the startup-building strategy called Start-Up Tunisia.<sup>256</sup> The second pillar is termed start-up capital and involves a VC framework, the fund of funds,<sup>257</sup> a GP incubator that works to grow the next VCs and the guarantee program. The third pillar is strengthening the start-up ecosystem through a start-up and hubs framework, networking events, and grants.<sup>258</sup> These highlight how a start-up legal framework needs help to grow SMEs.

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<sup>254</sup> The Tunisian Start-Up Act, Creating a legal framework from below, 2018 available [https://assets.website-files.com/60e6bc58a4328775758e87d0/61e5721da63df498209669c2\\_THE%20TUNISIAN%20STARTUP%20ACT%20genesis%20Final%20.pdf](https://assets.website-files.com/60e6bc58a4328775758e87d0/61e5721da63df498209669c2_THE%20TUNISIAN%20STARTUP%20ACT%20genesis%20Final%20.pdf) accessed on 20 February 2024.

<sup>255</sup> South Africa Start Up Act Progress Report 2022- 2023, South Africa Start Up Act 1-47.

<sup>256</sup> El Aynaoui, K., Jaïdi, L. and Zaoui, A. op cit note 254 at 107.

<sup>257</sup> Government of Tunisia 'Fund of Funds' available at: [https://startup.gov.tn/en/startup\\_invest/the\\_fund\\_of\\_funds](https://startup.gov.tn/en/startup_invest/the_fund_of_funds) accessed 12 June 2024).

<sup>258</sup> W. El Mekki 'Introduction of Tunisia's initiatives to support Startups and SMEs' 2020 WIPO available at [https://www.wipo.int/edocs/mdocs/mdocs/en/wipo\\_ip\\_tyo\\_20/wipo\\_ip\\_tyo\\_20\\_t\\_7-related1.pdf](https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_tyo_20/wipo_ip_tyo_20_t_7-related1.pdf) accessed on 25 February 2024; Simone Hinrichsen , 'Exploring the rising Tunisian Start-ups ecosystem' GSMA, 20 November 2020 GSMA available at <https://www.gsma.com/solutions-and-impact/connectivity-for-good/mobile-for-development/blog/exploring-the-rising-tunisian-start-up-ecosystem/> accessed on 28 February 2024.

Results from the StartUp Act enacted in 2018 have started showing with the Global Entrepreneurship Development Institute publishing its index, which ranked Tunisia second in Africa based on 14 values measuring the ecosystem's health. According to *Entrepreneurs of Tunisia*, a leading paper on tech news in Africa, as of 2020, Tunisia had increased its co-working spaces from 38 in 2018 to 62, a 61.2% growth.<sup>259</sup> Start-up founders had increased significantly, as did investor investment due to the business-friendly provisions of the StartUp Act.<sup>260</sup>

In just over a year, Tunisia has recorded a disruptive growth in investment and recorded start-ups.<sup>261</sup> It climbed the VC funding table for Africa to number 11 in 2019, where it could not be found on top venture investment destinations just the year before.<sup>262</sup> In 2023, despite the downturn in VC funding globally, it raised 33 million in equity funding and ranks number 9 on the funding table.<sup>263</sup>

### **c. Kenya StartUp Bill**

#### **i. Overview**

The legal regime proposed for regulating Startups in Kenya is the Kenya Start-Up Bill 2022 (also referred to as the bill).<sup>264</sup> At the time of writing this thesis, the Kenya Start-Up Bill has not been assented to by the President. It has gone through all the processes and waiting for the president's signature since 2023.<sup>265</sup> The analysis, therefore, is merely meant to examine the

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<sup>259</sup> Gbemileke Babatunde op cit note 76.

<sup>260</sup> *ibid.*

<sup>261</sup> Okolie C N, and Akwiwu I op cit note 178.

<sup>262</sup> Gbemileke Babatunde op cit note 76.

<sup>263</sup> Partech 'Presenting The 2023 Partech Africa Report: A Rough Year For The Ecosystem' January 2024 available at <https://partechpartners.com/news/presenting-the-2023-partech-africa-report-a-rough-year-for-the-ecosystem> accessed on 28 February 2024.

<sup>264</sup> Kenya Start Up Bill 2022, Nairobi December 2022 available at <http://www.parliament.go.ke/sites/default/files/2023-02/The%20Startup%20Bill%2C%202022.pdf>

<sup>265</sup> Nixon Kanali ' Kenya will enact a startup bill' 30 Nov 2023 *IT Web Africa* available at <https://itweb.africa/content/mQwkoM6YNGe73r9A>; Abuya.K, President Ruto to sign bill that will give tax break to Kenyan startups, *Techcabal*, November 2023 available at <https://techcabal.com/2023/11/28/startup-bill-2022>

legislature's response to addressing the problems of start-ups and their growth in Kenya. From this, the study can evaluate strengths and gaps that will be guidelines for constituting an effective SME legal framework. There is limited academic literature analysing the bill; hence, this section will rely on more articles.

A Start-Up Act in Kenya is necessary, as highlighted by an investigation into the Kenyan start-up ecosystem.<sup>266</sup> This investigation noted that a concentrated system of laws during economic downturns will help start-ups reduce their risk net.<sup>267</sup> The bill's preamble highlights its purpose as a framework to encourage growth and sustainable technological development, new entrepreneurship employment, a more favourable environment for innovation, attracting Kenyan talents and capital, and related purposes.<sup>268</sup>

## **ii Definition**

Under its definition, section 2, a start-up is a technology-based innovative entity recognised by Kenyan laws with strong growth potential and a disruptive economic model. This is quite similar to the Nigerian Start-Up Act analysed above.

According to section 8 of the bill, the legal structure of qualifying business entities is quite broad. They can be limited companies, partnerships, or non-governmental organisations. Most definitions lean towards a Western perspective and do not recognise the diversity in African businesses, making them inapplicable.<sup>269</sup> Thus, the expansive definition in the Bill increases the flexibility of those who can explore the start-up journey, including social entrepreneurs and accommodates the different business structures in Africa.

However, the requirement that an entity register before registration has been criticised as double registration. These critics argue that registering as a company or any legal entity and

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<sup>266</sup> Nakalembe I, Dushime, J, Makuei, Y, Kwitonda A, Hakizimana S, & Muathe, S 'Financing Start-ups, the Need, Relevance, Facets and Constraints in Kenya Start-ups Ecosystem. (2023) 13 (1) *International Journal of Academic Research in Business and Social Sciences* 843-857.

<sup>267</sup> *ibid*

<sup>268</sup> Kenya Start Up Bill supra note 261.

<sup>269</sup> Karitu Beatrice 'A theoretical route towards conceptualization of start-ups in emerging markets' (2022) *International Journal of Research in Business and Social Science* 448-457.

then as a start-up makes registration onerous.<sup>270</sup> From the analysis done in this study, it can be noted that prior registration is required in all analysed Start-Up Acts, namely Nigeria and Tunisia. Prior registration is an international practice that helps governments determine the “newness” of a business, which is essential in establishing whether an entity is a start-up.<sup>271</sup> One can even argue that it is a justified prerequisite as it allows streamlining and integration into broader international economic systems, which is essential for AfCFTA growth.

To be registered, the legal entity must have existed for not more than three and five years, as in the case of biotechnology companies.<sup>272</sup> This is much shorter than the other Acts like Nigeria, which states no more than ten years of existence, or Tunisia, which states eight years. This will result in only very early-age businesses being taken up as start-ups, yet it has been proven that most businesses can struggle for as long as ten years. Hence, after three years, they will still need the support a Start-up Act provides. This shorter period of existence then is restrictive and lacks inclusion. According to section 8 (1) (c), a start-up must have innovation, development, and commercialisation at its core or have a scalable business model. One-third of its ownership has to be Kenyans, and 15% of its expenses are attributed to research and development. The requirement for pre-existing patents or trademarks in the section may exclude several Startups as the condition is expensive.<sup>273</sup> Other Acts, like those in Nigeria and Tunisia, require the government to assist newly registered start-ups in acquiring some IP protection. Hence, Kenya may need to re-examine this requirement.

### **iii. Incentives**

A series of incentives are given to qualifying start-ups in Kenya. The incentives discussed in this section include non-fiscal ones like capacity building and support in research and development. Furthermore, fiscal ones like subsidising costs of formalisation, tax incentives to start-ups, and even ones extended to investors, such as credit guarantee assurance, are extended

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<sup>270</sup> Bonyo. L ‘ Why proposed start-ups law is bad for entrepreneurship’ October 06, 2020 Business daily available at [https://www.businessdailyafrica.com/bd/opinion-analysis/ideas-debate/why-proposed-start-ups-law-is-bad-for-entrepreneurship-2459040#google\\_vign](https://www.businessdailyafrica.com/bd/opinion-analysis/ideas-debate/why-proposed-start-ups-law-is-bad-for-entrepreneurship-2459040#google_vign) accessed on 3 March 2024.

<sup>271</sup> Luger M I, Koo J ‘Defining and Tracking Business Start-Ups. Small Business Economics’ (2005) 24(1) Small Business Economics 17–28.

<sup>272</sup> Kenya Start Up Bill supra note 261 at s 8(b).

<sup>273</sup> Kenya Start Up Bill supra note 261 at 8 (1) (i).

to startups. The analysis in this section juxtaposes the incentives given by Kenya with those of other countries like Tanzania. It also importantly discusses the intentionality of the Kenyan in their wording of provisions to that of Tunisia and Nigeria.

Section 27 of the Bill lists some incentives the government will offer startups. The incentives by the Kenyan government present a lack of commitment compared to Nigeria and Tunisia, as discussed previously. These incentives include subsidising the formalisation of start-ups,<sup>274</sup> facilitating the protection of IP,<sup>275</sup> fiscal and non-fiscal for those admitted under incubation<sup>276</sup>, provide support in the form of research and development.<sup>277</sup> The last statement under section 27(e), the incentives paragraph, increases the vagueness as it states, “provide such other support for the development and growth of startups.” It is questionable how far stretched or narrowed the latitude to which the phrase ‘such other’ can be interpreted.

Section 25 gives a credit guarantee assurance for investors investing in start-ups. It also informs startups on credit, financial issues, risk, and financial management, ensuring they have better financial management skills. Section 31 highlights how the government, in consultation with the Cabinet responsible for finance, shall implement measures granting fiscal incentives, including tax incentives necessary for developing startups. Additional tax levies are rampant as Kenya’s devolved governance system(county governments) sometimes adds additional tax levies.<sup>278</sup> Startups need these incentives. However, a more intentional approach may have been more lucrative, like what Tanzania did with the Silicon Zanzibar project.<sup>279</sup> Silicon Zanzibar offers tax breaks and 10 years of work and business visas. A local Kenyan company, Wasoko, is one of the many that has gone to Zanzibar due to the better taxation position.<sup>280</sup> Kenya’s Finance Act 2022 targeted tech establishments. It has doubled the digital service tax from 1.5%

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<sup>274</sup> Kenya Start Up Bill supra note 261 at s27 (a).

<sup>275</sup> Ibid at s 27 (b).

<sup>276</sup> ibid at s27 (c).

<sup>277</sup> ibid at s 27 (d).

<sup>278</sup> Issau, K., Acquah, I.S.K., Gnankob, R.I., and Hamidu, Z ‘Innovation orientation and performance of small and medium-sized enterprises (SMEs) in Ghana: evidence from the manufacturing sector’ (2021) 19 (4) *Innovation & Management Review* 290-305.

<sup>279</sup> Faustine Ngila ‘Why Wasoko is setting up a tech hub in Zanzibar’ *Quartz*, August 30, 2022 available at [https://www.yahoo.com/tech/heavy-taxation-forced-wasoko-relocate-124000925.html?guccounter=1&guce\\_referrer=aHR0caccessed on 5 March 2024](https://www.yahoo.com/tech/heavy-taxation-forced-wasoko-relocate-124000925.html?guccounter=1&guce_referrer=aHR0caccessed on 5 March 2024).

<sup>280</sup> Faustine Ngila, Why Wasoko is setting up a tech hub in Zanzibar, *Quartz*, August 30, 2022.

in January to 3% on the gross value of online transactions, making Nairobi less attractive to tech-based startups.<sup>281</sup> Hence, the SME legal framework could reintroduce lucrative tax incentives but be more explicit and intentional.

Section 29 provides for training and capacity building, which is crucial for the growth of start-ups. Kenyan startups fail due to a lack of skills that training could assist with, such as inadequate soft and managerial skills, deficiencies in financing, track records, and team structure.<sup>282</sup> The provision of training and capacity-building programs is essential in legal frameworks.

#### **iv. Commercialisation of Intellectual Property**

In terms of IP support, Section 4 (2) (i) and Section 27(b) describe how the Agency and county executive members shall implement facilitative measures for IP protection at both the national and international levels. Section 30 then highlights that an agency will facilitate the grant and revocation of IP and the filing and registration of IP internationally. The term facilitation is not defined. One of the most significant reasons why Kenyan start-ups fail early is because they give off a large percentage of their share capital in exchange for funding too early, and the bigger companies go on to develop the innovations.<sup>283</sup> The IP regime and policy should be designed to protect these small or sole inventors and innovators by having their works legally owned and protected.<sup>284</sup>

#### **v. Supporting ecosystem**

Section 3 (c) of the Bill sets the ecosystem's foundation. It aims to develop a framework for startup registration, linking startups to financial institutions, private sector research institutions, and other institutions at the National and county levels of government. Furthermore, section 3

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<sup>281</sup> *ibid.*

<sup>282</sup> Luger M I , Koo op cit note 275.

<sup>283</sup> McGuirk H, Leniham H, Hart, M 'Measuring the impact of innovative human capital on small firms' prosperity to innovate' (2015) 44 (4) Elsevier Research Policy 965-976.

<sup>284</sup> Ndicu Simon 'Intellectual Property Rights, Innovation And Firm Performance in Developing Countries: Firm-Level Evidence From Kenya' Conference: Proceedings of 2nd Annual Innovation Research Symposium March 6 th 2018, University of Nairobi.

(e) introduces incubation facilities at the national and county levels as part of rolling out supporting infrastructure.

Section 4 (e) mandates that the counties create linkages between universities, research institutions, and the business community. Bridging the gap between academia, research, and industry is fundamental. Section 29 highlights how the government will create a platform with information for incubators, mentors, training programs, etc. Under Section 5, establishing incubation programs is a national and county obligation, making it a shared responsibility. Section 4(2) highlights the support process, which includes, among other things, setting up a national and county incubation framework and partnering with local and international incubation organisations.

There has always been an appeal for the Kenyan government to alter existing national legislation and enhance coordination among the numerous players in the start-up ecosystem.<sup>285</sup> The above provisions on linkages of different players in the ecosystem are a step in the right direction.

### **3.4 Lessons from the Start-Up Acts**

In analysing these three countries, it is important to note that each country develops a unique approach to its economic priorities and contexts. However, some critical essential considerations should be addressed across all borders. The following section summarises what needs to be addressed to establish an effective SME legal framework. It is also important to note that since these legal regimes are relatively new, assessing their success is not yet possible as most countries have not published reports of any results since adopting them.

The definitions of all three countries showed that technology is an important qualifying factor. One argues that an effective start-up law framework should accommodate technological and non-technological ventures to maximise SME participation.<sup>286</sup> This restriction means the

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<sup>285</sup> Muathe Stephen and Otien Victor 'Startups Incubation and Accelerators in Africa: Are Start-Ups Scaling up in Kenya?' (2022) 11 American International Journal of Social Science Research 23-28.

<sup>286</sup> Adebisi & Olufemi op cite 196.

other SMEs will not benefit from the Act's benefits. Less than 7% of African microenterprises use digital technologies for their businesses.<sup>287</sup> The environment enabling the full adoption of technology is not yet there, with only 40% of Africa's population having internet access.<sup>288</sup> Over 640 million Africans have no energy access, corresponding to an electricity access rate of just over 40% for African countries.<sup>289</sup> This emphasises that there needs to be education on technology and the creation of an enabling environment before restricting whether a company is technological or not. A suggestion is that there can be a leeway, for example, pre-labelling in the technological sense, if it has been noted that technology is essential to the success of start-ups. This would mean SMEs can still qualify as start-ups and enjoy incentives for a limited time as they grasp some technology in their products or services and also aligns with AfCFTA's objective on inclusion.

The entry points for startups should be re-evaluated in some legislation to be inclusive and incorporate especially resource-constrained SMEs. The registered software or IP requirements under the Kenyan Bill have already cut off many SMEs with great ideas and growth potential but no financial means to acquire specific requirements. IP protection should be a process the government is firmly willing to assist with, as is the case in Tunisia. The Tunisia Start-Up Act explicitly highlights how the government pays for direct and indirect costs. It is this explicit intentionality in wording that effective SME legal frameworks should have and not ambiguous use of words like just stating "assistance," as highlighted by the Nigerian Start-Up Act. By assisting SMEs with IP registration and commercialisation costs, countries can empower SMEs to protect their innovations, enter new markets, and compete globally. This not only strengthens the competitiveness of State Parties but also contributes to the AfCFTA's broader goal of transforming Africa into a dynamic player in the global economy.

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<sup>287</sup> Atiyas Izak op cit note 201.

<sup>288</sup> Ganiu Oloruntade 'Technology is improving the performance of African SMEs but less than 7% of them use it' April 7 2023 available at <https://technext24.com/2023/04/07/7-percent-african-smes-use-tech/> accessed on 24 March 2024.

<sup>289</sup> Light Up and Power Africa – A New Deal on Energy for Africa, Africa Development Bank, 05 Jul 2019 <https://www.afdb.org/en/the-high-5/light-up-and-power-africa-%E2%80%93-a-new-deal-on-energy-for-africa>

An effective legal framework should encourage foreign investment and collaboration while guaranteeing local benefit. The premise of AfCFTA is premised on member states' growth and economic regional integration. Hence, provisions in the Kenya Start-Up Bill and Nigeria Start-Up Act that mandate that a certain percentage of start-up founders are local are encouraged. An omission of this requirement, as in the Tunisian Start-Up Act, raises local beneficiation concerns.

All three countries are commendable for providing incentives to start-ups and potential investors. Incentives come in different forms, like tax breaks, tax credits, and assistance with essential services like capacity building and training. They all embody the right factors to encourage growth in SMEs by reducing their expenses and widening funding channels by encouraging investors.

Innovative financing is quite essential. Traditional financing methods like bank loans have long proved difficult for SMEs.<sup>290</sup> Hence, approaches such as setting up government funds with specific stipulated funds by the Nigerian and Tunisian governments are welcome. Furthermore, non-innovative financing methods like crowdfunding should be implored, and regulations to govern them should be implemented, as was suggested for Tunisia. The Kenya Bill should also be encouraged to set up a government fund, as the government ought to be one of the first investors in its SMEs.<sup>291</sup> Innovative financing facilitates the movement of capital across borders and can support cross-border investments and initiatives, enabling State Parties to build competitive and resilient economies.

The supporting structures chosen to implement the legislation are essential to the provisions' success. Tunisia 's private-public partnership seems to be an excellent approach, as it has recorded tremendous success. The number of existing start-ups increased from 515 in

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<sup>290</sup> Aryeetey E ' From Informal Finance to Formal Finance in Sub-Saharan Africa: Lessons from Linkage Efforts.' Paper Presented at the high-Level Seminar on African Finance for the 21st Century IMF Institute and the Joint Africa Institute Tunis, Tunisia, March 4 – 5, 2008.

<sup>291</sup> Gai L, Arcuri MC, Lelasi F 'How does government-backed finance affect SMEs' crisis predictors?' 2023 (61) 3 *Small Bus Economies* 1-25.

2016 to 5,943 after the enactment of the Tunisian Start-Up Act.<sup>292</sup> The Nigerian Start-Up Act, which has been widely criticised for including government officials in the council, could adopt the privatisation of an implementing body, avoiding bureaucracy.

Lastly, the three legislative frameworks discussed in this chapter should implore more effective monitoring and evaluation mechanisms. There should be a compliance mechanism and a mechanism to flag inadequacy. After two years, only six out of 36 states had domesticated the Nigerian Start-Up Act. Referring to the innovation diffusion theory, which states that innovation can spread rapidly through a social setting or system, the Act needs high acceptability for it to work fully. When such a necessary uptake is absent, actions should be taken to rectify it. Furthermore, one interviewee in a survey in Tunisia commented that enacting the law is a start and that the law needs to be promoted so investors can be encouraged.<sup>293</sup> A monitoring and evaluation mechanism diligently followed is a great way to instil confidence in different stakeholders.

### **3.5 Conclusion**

This chapter examined the specific SME category called startups and the emerging legal frameworks that govern them called StartUp Acts. It mainly looked at the StartUp Acts of Nigeria and Tunisia and the Kenyan Start-Up Bill, which is waiting to be assented to and signed by the President. Examining the Acts focused on four key areas: the definition, supporting ecosystem, incentives, and IP commercialisation, three of which have already been used to analyse other SME legal frameworks in Chapter 2. It highlighted each of the strengths and weaknesses. The analysis took a comparative approach, sometimes juxtaposing a provision of one country with another. The last section highlighted the gaps that can be relooked at to establish an effective SME legal framework for trade growth in AfCFTA. Having looked at the general existing SME legal landscapes and the specific start-up Acts in the past two chapters;

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<sup>292</sup> Ludovica C, 'The contribution of the Italian Start-up Act to the country's economic growth and job creation: The anatomy of a successful implementation' (2016) LUISS Guido Carli, 2016.

<sup>293</sup> Labiadh Aicha, Elleuch Fadoi, Boudabbous, Sami 'Start-ups in times of crises: The case of Tunisia' February 12, 2024 available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4723200](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4723200) accessed on 23 February 2024.

the next chapter will look at how the AfCFTA caters to the unique needs of SMEs towards their growth. It will also compare with what other continents are doing to promote the development of SMEs.

## CHAPTER 4

### SME LEGAL FRAMEWORKS UNDER AfCFTA

#### 4.1 Introduction

The previous chapters have examined the problems that SMEs face and the different interventions given by specific countries through existing regulations, including SME Business Acts and Start-Up Acts. Using the same rubrics in chapters 2 and 3, this chapter appraises what legal regulations exist under the AfCFTA to support the growth of SMEs within its structures and how these could constitute part of an effective legal framework. The regional responses could provide guidelines for an effective SME legal framework. It then compares it with what the EU, a more advanced regional bloc, does for its SMEs.

It first explores the response of the AfCFTA through the agreement establishing the AfCFTA.<sup>294</sup> (hereinafter referred to as the Agreement) and related protocols. It will then investigate what the African Union is doing for SMEs and compare what other regional blocs, like the European Union, have done for their SMEs. This chapter examines these different regional responses, identifying strengths and weaknesses to propose how these elements can be adopted into an effective legal framework.

#### 4.2 The Agreement and relevant protocols

##### a. Overview

The AfCFTA has adopted different implementation protocols. Although no specific one is centred on SMEs, this section shall highlight the ones explicitly mentioning SMEs in their provisions. In particular, it shall examine the Agreement, the Protocol on Competition Policy,<sup>295</sup> the Protocol on Intellectual Property<sup>296</sup>, The Protocol on Trade in Services,<sup>297</sup> and the Protocol on Investment.<sup>298</sup>

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<sup>294</sup> Agreement establishing the AfCFTA supra note 23.

<sup>295</sup> Protocol on Competition Policy 2023.

<sup>296</sup> Protocol on Intellectual Property Rights 2023.

<sup>297</sup> Protocol on Trade in Services supra 39 section 27.

<sup>298</sup> Protocol on Investment 2023.

## **b. Financial and non-financial incentives**

This section looks at financial and non-financial incentives. These include capacity building for exporting, especially for informal traders, protection of SMEs' benefits from local financial institutions, consideration during mergers and acquisitions and protection from differentiation in pricing.

The AfCFTA emphasises capacity building for exporting. The Trade in Services protocol focuses on capacity building, technical assistance, and cooperation for SMEs within the AfCFTA.<sup>299</sup> The Protocol on Trade in Goods provides technical assistance and capacity building to improve the export capacity of formal and informal service suppliers, especially micro, small, and medium-sized women and youth service suppliers.<sup>300</sup> It urges governments to mobilise resources in collaboration with development partners to ensure domestic efforts like capacity building are made. Furthermore, Section 27 (2) (d) of the Protocol on Trade in Services acknowledges the importance of capacity building to the informal trade. It provides technical assistance and capacity building to informal businesses. Informal employment in Africa accounts for 85.8% of all jobs.<sup>301</sup> Through this provision, AfCFTA helps them transition from informal to formal or improve efficiency. A study identifies potential mediating factors, including innovation, business, and market-essential strategies, that could be game-changers for export performance.<sup>302</sup> Hence, such skills should be taught to SMEs to actively participate in the 1.3 billion market that AfCFTA is to open. Governments are then responsible for ensuring that this technical teaching and capacity building is undertaken.<sup>303</sup> The emphasis on capacity building and technical assistance for SMEs is vital, as SMEs face challenges in understanding export regulations, marketing internationally, and cross-border logistics, among other things.<sup>304</sup> Building export capacity allows SMEs to access new markets within the

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<sup>299</sup> Protocol on Trade in Services supra note 39.

<sup>300</sup> Protocol on Trade in Goods s 29.

<sup>301</sup> International Labour Organization(ILO) 'Women and men in the informal economy: a statistical picture' 3ed (2018) *Geneva: International Labour Organization* 24.

<sup>302</sup>Michael E Porter 'Competitive strategy' (1997) 1(2) *Measuring Business Excellence* 12-17.

<sup>303</sup> Safari Arsalan, Saleh Ali Salman, Balicevac Al Ismail, Vanesa 'Enhancing the export activities of small and medium-sized enterprises in emerging markets' (2022) 37 ( 5) *The journal of business & industrial marketing* 1150-1166.

<sup>304</sup> *ibid* at 1158.

AfCFTA region, leading to more business opportunities and economic growth. Thus, it is an essential part of an effective SME legal framework.

The Protocol on Investment, in its preamble, recognises the importance of promoting investment opportunities that assist small and medium-sized businesses. Article 3(4) indicates that the Protocol will not apply to any advantages awarded to SMEs by finance institutions in the host countries. By outlining this exception, this Protocol aims to balance regulatory control and the adaptability financial institutions require to support SMEs' needed expansion and development within their jurisdictions.

AfCFTA ensures unfair barriers are not created for SMEs during mergers and acquisitions. It is important to point out that as AfCFTA opens the market for SMEs, the smaller markets SMEs operate in will also be open to large transnational African corporations. Therefore, competition policy and law are particularly important in guaranteeing against monopolistic tendencies.<sup>305</sup> According to Article 10 (8) (c) of the Protocol on Competition Policy, one public factor in approving a merger or consolidation is whether a merger will substantially distort or lessen competition for SMEs to become competitive.<sup>306</sup> Hence, the protocol safeguards them from anti-competitive practices in a liberalised market.

Article 11 section (4) (e) on the Protocol of Competition Policy establishes crucial protection for SMEs by prohibiting businesses designated as gatekeepers from differentiation in prices for SMEs. This ensures they cannot discriminate in price, which could disadvantage smaller competitors. It protects them from unfair pricing practices from more powerful companies and safeguards smaller competitors from potential disadvantages. Pricing greatly affects profitability and cost-effectiveness in the short term, impacting market share, product image and quality signals.<sup>307</sup> Ultimately, by outlawing discriminatory price practices, the AfCFTA promotes fair competition for SMEs and creates an environment where they can

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<sup>305</sup> Vellah Kedogo Kigwiru, 'The Cooperation on Competition Policy under the African Continental Free Trade Area' (2020) 17(1) *Manchester Journal of International Economic Law* 1-3.

<sup>306</sup> Protocol on Competition Policy supra note 292.

<sup>307</sup> Kienzler Mario & Christian Kowalkowski 'Pricing strategy: A review of 22 years of marketing research' (2017)78 *Journal of Business Research* 101–110.

prosper and contribute to regional economic growth. The changing marketing and operating environments make it challenging for SMEs to compete effectively.<sup>308</sup> Hence, provisions that ensure assistance in competition and fair competition are essential to promote growth.

### **c. Supporting ecosystem**

AfCFTA uses the regional economic communities (RECs) already in existence to push forward the capacity building of SMEs. According to Article 5(2) of the Agreement, these existing RECs are building blocks for the economic integration the AfCFTA aims for. Furthermore, according to Article 19(2) of the Agreement, RECs that progressed better towards economic integration before the AfCFTA's entry into force will continue with their current operations. A prime example is how the Common Market for Eastern and Southern Africa (COMESA) has adopted a simplified trade regime (STR) and standards for the treatment of small-scale cross-border traders to facilitate quicker clearance of goods, reduce costs and improve data capture. This helps to address some of the challenges informal cross-border traders face and bring them into the formal channels.<sup>309</sup> STR streamlines trade by using a common list of products, consignment value threshold (USD 2000 in COMESA and EAC), simplified certificate of origin provided by Trade Information Desk Officers, and Simplified Customs Document for declaring products included in the common list without duty.<sup>310</sup> Under the AfCFTA, plans are underway to develop a continental STR to facilitate small-scale trade and ensure the benefits of the AfCFTA extend to small-scale traders.<sup>311</sup> Successful REC models like COMESA's STR can help AfCFTA create better supportive environments for SMEs throughout the continent. Similar models at a continental level have the potential to promote SME growth, reduce informality and result in better economic integration.

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<sup>308</sup> Olannye A D, & Edward Eromafuru. 'The dimension of entrepreneurial marketing on the performance of fast-food restaurants in Asaba, Delta State, Nigeria' (2016) *Journal of Emerging Trends in Economics and Management Sciences* 137-146.

<sup>309</sup> William Osemu 'MS ponder how to keep the simplified regime running amid the pandemic' 25 June 2020, COMESA available at <https://www.comesa.int/comesa-ms-ponder-how-to-keep-the-simplified-trade-regime-running-amid-the-pandemic/> accessed on 16 October 2023.

<sup>310</sup> *ibid*

<sup>311</sup> Faith Mbakhwa 'Leveraging the AfCFTA trade facilitation regime to advance formalisation strategies for Informal Cross-Border Traders (ICBTs) in Africa' Dec 2022 *Tralac* available at <https://www.tralac.org/blog/article/15857-leveraging-the-afcfta-trade-facilitation-regime-to-advance-formalisation-strategies-for-informal-cross-border-traders-icbts-in-africa> accessed on 16 February 2024.

#### **d. Intellectual Property protection and commercialisation**

Article 26 (2) of the Protocol on Intellectual Property states the importance of building the capacity for the organisational responsibilities of state parties in the IP organisation's protocol to represent rights holders with limited capacity to enforce their rights. These rights holders include small and medium-sized enterprises, farmers, and traditional communities. This capacity-building of governments and organisations aligns with international standards, as even the United Arab Emirates advocates for a similar measure in its IP growth plan for SMEs.<sup>312</sup> However, the lack of specificity on what should constitute the capacity could be a weakness. This ambiguity could result in inconsistent support for SMEs, with some state parties providing strong programs while others do not. Without clarity in guidelines, the legal and technical resources essential for IP protection for SMEs will continue to be inaccessible. Further, Prof Ncube also notes that it is important to expressly state the scope of this cooperation and the specific measures of any capacity building.<sup>313</sup>

Overall, the AfCFTA provisions for SMEs appear elementary rather than revolutionary. For instance, the Protocol on Trade in Services seeks to channel the potential and capacities of SMEs to participate in regional and global value chains, yet the strategies detailing how this would be done are unclear. Article 27 (2d) of the Protocol in Services directly mandates countries to give specific attention to formal and informal SME service suppliers, especially those owned by women and youth. However, the national or regional mechanisms to implement this policy are not specified and still need to be worked out. It is thus not clear how SMEs could participate in the AfCFTA without clear strategies accompanying the protocols.<sup>314</sup>

### **4.3 AU SME Development Strategy and Action Plan 2020<sup>315</sup>**

#### **a. Overview**

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<sup>312</sup> Rami Olwan 'Intellectual property management for small and medium-sized enterprises in the United Arab Emirates' (2021) 16(3), March 2021, *Journal of Intellectual Property Law & Practice* 278–288

<sup>313</sup> Ncube Caroline .B 'Intellectual property and the African continental free trade area: lessons and recommendations for the IP protocol' (2022) 21 (2) *Journal of International Trade Law and Policy* 105-121.

<sup>314</sup> Fafunwa & Olungwe op cite 6 at 102

<sup>315</sup> The African Union (AU) SME Development Strategy and Action Plan (2020) (referred to as AU SME strategy)

The African Union (AU) SME Development Strategy and Action Plan (also called the AU SME strategy) outlines AU's vision towards creating dynamic, competitive and sustainable in Africa driven by SMEs. The SME strategy is centred along seven pillars to grow better SMEs. These pillars range from enabling the business environment to inclusive entrepreneurship and livelihood development. They will be discussed in detail. It will be discussed along with the implementation plan set in place by the AU, which is called the implementation of the AU SME Strategy.<sup>316</sup>

The AfCFTA is the AU's flagship project towards the developmental framework of Agenda 2063. The AU, as the overarching organisation that created it, influences it. The AU's policy and regulations regarding SME growth will also be attributed to the AfCFTA's efforts. This section highlights how the AU promotes inclusive growth by identifying and sharing best practices for entrepreneurship training in educational institutions.

#### **b. Detailed examination of the AU SME Strategy**

This section will analyse the strategy pillars and then examine the implementation plan, which outlines the roles and responsibilities of AU, RECs, and member states. At the time of writing, there is limited literature critiquing this strategy from the desktop research. Hence, the study compares key points to relevant literature rather than the strategy itself. Lastly, it will also explore some potential limitations and areas for further consideration within the AfCFTA's approach to SME development.

##### **i. Administrative burdens**

The AU Strategy echoes the need to reduce or eliminate burdensome registration procedures, including costs and days. For business registration, the strategy encourages member states to reduce or eliminate burdening procedures which prolong and cost businesses to register

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<sup>316</sup> Integrated Programme Delivery Module Implementation of the AU SME Strategy (referred to as The Implementation plan)

formally.<sup>317</sup> It highlights that although Sub-Saharan Africa has made significant progress, more needs to be done.<sup>318</sup>

AU recognises that an enabling environment must be created for SMEs to grow. Hence, under its first pillar, it aims to improve the environment by developing and promoting a continental model charter for enhancing SMEs' development.<sup>319</sup> It will advocate for RECs to combine regional SME charters to serve as the basis for developing an African SME charter. This continental charter will include the definition of an SME. With such a charter, the AU hopes to define objectives and targets of policy frameworks, mobilise resources for implementation, and facilitate the integration of entrepreneurship and industrialisation. Charters can be very beneficial as they target specific needs and build confidence with different stakeholders, for example, the West African Economic and Monetary Union (WAEMU) charter.<sup>320</sup>

The SME strategy suggests a differentiated policy that formalises start-ups and growth-oriented informal enterprises.<sup>321</sup> It encourages member states to incorporate incentives to formalise informal businesses. Member states like Tunisia, for example, have gone on to create separate Start-Up Acts to cater to start-ups.<sup>322</sup>

The strategy introduces how developing infrastructure and access to energy is crucial for fostering a favourable business environment. Inadequate infrastructure prevents SMEs from growing.<sup>323</sup> It is worth noting that none of the SME legal frameworks analysed in the prior chapters tackle this issue. This recognises a significant, overlooked challenge—SMEs need the physical infrastructure to operate effectively. The AU intends to create a collaborative platform between the African Union Commission's Department of Trade and Industry and the

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<sup>317</sup> AU SME strategy op cit note 312 at 32.

<sup>318</sup> *ibid* at 23.

<sup>319</sup> The Implementation plan op cit note 313 at 23.

<sup>320</sup> Making Finance Work for Africa 'WAEMU adopts charter to support SMEs' Dec 2015 available at <https://www.mfw4a.org/news/waemu-adopts-charter-support-smes> accessed on 13 March 2024.

<sup>321</sup> AU SME strategy op cit note 312 at 24.

<sup>322</sup> Tunisia Start-Up Act *supra* note 41.

<sup>323</sup> Andrew Enaifoghe, Trish a Ramsu 'Examining the Function and Contribution of Entrepreneurship through Small and Medium Enterprises as Drivers of Local Economic Growth in South Africa' (2024) 5(1) *African Journal of Inter/Multidisciplinary Studies* 1-11.

Programme for Infrastructure Development in Africa's Governance Institution to enhance access to infrastructure for SMEs and domestic enterprises.

## **ii. Financial and non-financial incentives**

This section examines the different methods AU has implemented to assist SMEs. These include mobile financing, marketplace lending like crowdfunding, and partnership funding methods like the G20 financing strategy. It also examines tax incentives and lastly explores the idea of blended finance. It examines non-finance incentives, including business development services, market access, and export competitiveness.

The AU SME strategy highlights that access to finance is one of the three constraints to MSME growth.<sup>324</sup> It aims to tackle it through innovative finance, establishing new funding mechanisms, and institutional development. This supports the theory brought forward by the UNCTAD report that current financing models have failed and that financial technology and alternative financing need to be explored.<sup>325</sup> The AU looks to increase and create innovative financing for Africa's SMEs. This includes encouraging states and RECs to develop policies that support mobile operators in providing digital financing in Africa and cross-border digital financing services. Mobile financing is robust in Sub-Saharan Africa as mobile networks have expanded rapidly, even in the poorest countries.<sup>326</sup> Hence, it is quite pertinent to ensure that regulation incorporates it.

Innovative financing also includes venture capital funding, marketplace lending platforms like crowdfunding, and peer-to-peer platforms that match borrowers to loans like Kiva. Innovative financing, especially centred on financial technology, can expand financial inclusion and promote SME access and productivity.<sup>327</sup> An example is the WAEMU where,

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<sup>324</sup> AU SME Strategy op cit note 312 at 16.

<sup>325</sup> UNCTAD report 'Rethinking the Foundations of Export Diversification in Africa' 2022 available at [https://unctad.org/system/files/official-document/aldcafrica2022\\_en.pdf](https://unctad.org/system/files/official-document/aldcafrica2022_en.pdf) accessed on 30 March 2024.

<sup>326</sup> GSMA 'The mobile-economy sub-Saharan Africa ' 2022 available at <https://www.gsma.com/solutions-and-impact/connectivity-for-good/mobile-economy/wp-content/uploads/2022/10/The-Mobile-Economy-Sub-Saharan-Africa-2022.pdf> accessed on 24 March 2024.

<sup>327</sup> Babilla, Thierry U. Kame 'Digital innovation and financial access for small and medium-sized enterprises in a currency union.' (2023) 120 *Economic Modelling*.

due to financial technology, millions of underserved and unbanked economic agents have access to various financial services.<sup>328</sup>

It further explores the necessity of developing and expanding new funding methods using public and private resources to mobilise them. The strategy explores some of the following: challenge funds capitalised by multilateral funds, such as the G-20 challenge developed for SMEs that are too small for banks but too big for microfinance products. It also looks at impact investment and funding businesses that make a social impact.

The strategy highlights how the AU can advocate adopting policies to provide tax incentives and simplify tax regimes and social protections for informal enterprises. This is tailored towards encouraging them to formalise their activities through business registration, thus enabling them to grow. It even strives to create a tax scheme to promote SME development.<sup>329</sup> The strategy also highlights that the AU can encourage Member States to adopt regulatory measures, such as tax rebates, subsidies, and exemptions, to promote investment in industrial clusters.<sup>330</sup>

The last aspect of innovative financing is blended finance, which uses public or charitable proposals in either grants or non-grant financing from private and public sources. The last step is supporting institutional development, which involves pre-existing financing structures. Instead of the usual collateral, they use different methods, such as psychometric tests for potential debtors and ensuring loan access. This multi-faceted approach underscores the AU's commitment to assist SMEs' growth by accessing finance.

The AU aims to promote business development services (BDS) that can effectively support SME growth, especially in marginalised communities.<sup>331</sup> This strategy focuses on developing RECs' capacities to establish and strengthen networks. The AU highlights successful existing models like UNIDO, which provides in-demand services to rural areas.<sup>332</sup>

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<sup>328</sup> Acemoglu Daron, Akcigit Ufuk., Alp Harun., Bloom Nicholas., Kerr William 'Innovation, reallocation, and growth' 2018 108 (11) *American Economic Review* 3450-91.

<sup>329</sup> The Implementation plan supra 313 at 23.

<sup>330</sup> AU SME strategy op cit note 312 at 41.

<sup>331</sup> AU SME strategy op cit note 312 at 58.

<sup>332</sup> AU SME strategy op cit note 312 at 60.

By replicating and scaling up such initiatives, the AU aims to create a more robust BDS ecosystem that effectively supports SMEs across Africa. Furthermore, a feasibility study will be conducted to explore the creation of a continental information portal for business development services. This portal could serve as a one-stop shop for SMEs, offering information on available BDS programs, best practices, and resources across the continent. This aligns with what has been implemented in Nigeria with part of the Start-Up portal that provides information.<sup>333</sup>

The AU recognises that market access and export competitiveness are fundamental for SME success. The AU will work through enhanced integration into the regional and global value chains to promote SMEs' access to markets and export competitiveness.<sup>334</sup> This includes organising train-the-trainer workshops and trade facilitation training on regional value chains.<sup>335</sup> Exploiting regional value chains in Africa is essential to industrialisation.<sup>336</sup> Additionally, a policy brief study on pro-SME measures and linkages with industrial park development will be conducted to enable decision-makers to take necessary policy action. Studies will also establish trade facilitation portals that provide up-to-date trade information and facilitation requirements for SMEs' increased engagement in export. It will also investigate strengthening the capacity of trade services providers in border countries to enable SMEs to have current market information and assistance with cross-border trade requirements.<sup>337</sup> The AU's incentives approach does not simply eliminate tariffs; it equips SMEs with the knowledge, resources, and streamlined procedures essential to the trade. Since SMEs often lack sufficient financial and human resources to cope with border complexities and bureaucracy, trade facilitation measures are imperative to assist African SMEs in participating in global value chains.<sup>338</sup>

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<sup>333</sup> NSA supra note 64 at section 2 (e).

<sup>334</sup> AU SME strategy op cit note 312 at 54.

<sup>335</sup> Implementation plan op cit note 313 at 26.

<sup>336</sup> Avom Desire, Tiako Irene. and Nguenkeng Bernard 'Regional Value Chains and Industrialization of Sub-Saharan Africa' (2011) 11 (6) *Theoretical Economics Letters* 1312-1327.

<sup>337</sup> AU SME Strategy op cit note 312 at 55; The Implementation plan op cit note 313 at 19,

<sup>338</sup> OECD, WTO, UNCTAD, Implications of Global Value Chains for trade, investment, development and jobs 6 August 2013 prepared for the G-20 Leaders' Summit Saint Petersburg available at [https://unctad.org/system/files/official-document/unctad\\_oecd\\_wto\\_2013d1\\_en.pdf](https://unctad.org/system/files/official-document/unctad_oecd_wto_2013d1_en.pdf) accessed on 17 March 2024

The SMEs' legal framework should incorporate innovative financing ideas to ensure access to finance becomes less of a problem for SMEs and emphasise training that centres on business development, export, and market readiness.

### **iii. Supporting ecosystem**

This section explores the structures and partners involved in the growth of SMEs under the strategy. These include partnerships among government, academia, and corporations and establishing SME envoys and training institutions to assist RECs.

The strategy emphasises the partnerships of government, academia and corporations in promoting research and development.<sup>339</sup> AU acknowledges the importance of innovation and technology in enabling SME growth. It does this by promoting research and development and technology transfer, building and strengthening institutional frameworks, promoting access to increased ICT applications, and supporting digital infrastructure development.<sup>340</sup> Furthermore, it promotes knowledge-based sectors and growth-oriented enterprises through periodic continental fairs, exhibitions, business competitions, and continental awards.<sup>341</sup> Additionally, a policy study on growth-oriented enterprises will be undertaken. Hence, the AU recognises the critical importance of infrastructure, access to energy and technological innovation in creating an environment that fosters SME growth and competitiveness within the continental free trade area.

To promote learning practices and ensure knowledge management, the AU encourages member states to establish SME envoys in their respective jurisdictions, mirroring the European Union's example.<sup>342</sup> These envoys would champion SMEs within their respective governments, advocating for policies and programs that foster SME growth. Therefore, the AU actively promotes collaboration, analysis, and dedicated advocacy efforts to create a more supportive environment for SME development across Africa. This method has been effective

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<sup>339</sup> AU SME strategy op cit note 312 at 41.

<sup>340</sup> *ibid* at 56.

<sup>341</sup> *ibid* at 32; Implementation plan op cit note 313 at 24.

<sup>342</sup> AU SME Strategy op cit note 322 at 63; Implementation plan op cit note 313 at 28.

in Europe and would be a significant component of a supporting ecosystem institution for any SME legal frameworks to assist with monitoring implementation.<sup>343</sup>

The seventh pillar recognises the importance of promoting inclusive entrepreneurship and livelihood development.<sup>344</sup> A key initiative is conducting regional case studies and producing a policy brief on best practices for entrepreneurship training in educational institutions to assist RECs in promoting such practices across regions. This will serve as a guideline for RECs as they encourage future generations of entrepreneurs. In conclusion, the AU's approach to inclusive entrepreneurship extends beyond simply encouraging business creation. It hammers on identifying and sharing best practices to ensure that all Africans have the skills and knowledge they need to succeed in the entrepreneurial landscape.

#### **iv. Monitoring and Evaluation mechanism**

From the implementation plan, each part of the AU, REC, and member states have a role to play. Even more member states are encouraged to have dedicated Ministries dedicated to SMEs, following the example of Ethiopia and Algeria.<sup>345</sup>

The AU and RECs will organise continental and regional annual reviews as necessary to monitor the progress and results of implementing the Strategy. They are establishing the SME Development Partnership Platform, which will serve as an important body for facilitating and executing the review. The outcomes from such participatory review forums will feed into the following evaluations. Additionally, there will be mid-term and end-of-term reviews.

### **4.4 Comparison between African Union and European Union Strategies**

#### **a. SME strategy for sustainable and digital Europe<sup>346</sup>**

##### **i. Overview**

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<sup>343</sup> European Commission, 'SME Envoys Finance 'SME access to finance situation in EU Member States Final Report' 2019 available at <https://ec.europa.eu/docsroom/documents/39645/attachments/1/translations/en/renditions/native> accessed on 24 March 2024.

<sup>344</sup> The Implementation plan op cit note 313 at 40; AU SME Strategy op cit note 312 at 64.

<sup>345</sup> Implementation plan op cit note 313 at 14.

<sup>346</sup> An SME strategy for a sustainable and digital Europe COM(2020) 103 Brussels.

The European Union (EU) defines SMEs as enterprises with fewer than 250 employees, €50m in turnover, or €43m in balance sheet.<sup>347</sup> The European Charter for Small Enterprises, released in 1992, was the first comprehensive EU strategy.<sup>348</sup> Acknowledging the significant role of SMEs in the European economy, it called for several measures to nurture their development, including access to finance, reduced administrative burdens, and enhanced entrepreneurial skills.<sup>349</sup> In the following years, the EU continued to refine and expand the SME support framework, the 2008 ‘Small Business Act for Europe’ being the most significant milestone.<sup>350</sup> The Small Business Act, like AfCFTA with the African single market, strongly advocates a European single market and provides a comprehensive policy agenda to improve the business environment for SMEs.<sup>351</sup>

The EU SME strategy of 2020, under analysis for this section, focuses on three main pillars: capacity-building and support for the transition to sustainability and digitalisation, reducing regulatory burden and improving market access; and improving access to financing. It is important to note that European SMEs are more advanced, as many are well-equipped, high-tech, and innovative.<sup>352</sup> Their problems are different from the ones in Africa. Criticism has come with the costs of additional regulation and administrative burdens and the lack of implementation of the initial Think Small First principle adopted through the Small Business

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<sup>347</sup> European Commission, Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises(2003) 1422 at 36 available at <https://www.eusmecentre.org.cn/wp-content/uploads/2022/12/SME-Definition.pdf> accessed on 15 March 2024.

<sup>348</sup> Henriksen Lone ‘Small firms and economic development: research, policy and practice’ (1999) 6 (5) *Journal of Small Business and Enterprise Development* 215-218.

<sup>349</sup> *ibid* at 216.

<sup>350</sup> Marco Lopriore ‘Supporting Enterprise Development and SME in Europe’ 2009 (2) *EIPA Scope* 31-36.

<sup>351</sup> European Commission ‘Think Small First A Small Business Act for Europe’ COM (2008) 394.

<sup>352</sup> Abisuga-Oyekunle, Oluwayemisi Adebola, Swapan Kumar Patra, and Mammo Muchie. ‘SMEs in sustainable development: Their role in poverty reduction and employment generation in sub-Saharan Africa.’ 2020 12 (4) *African Journal of Science, Technology, Innovation and Development* 405-419.

Act<sup>353</sup> for Europe 2009.<sup>354</sup> Regardless of the criticism, this strategy has introduced many proactive initiatives that can be a learning point for Africa's effective SME legal framework.<sup>355</sup>

## **b. Detailed examination of EU SME strategy**

### **i. Financial and Non-Financial Incentives**

This section examines financial and non-financial incentives. These include green, sustainable incentives like the European Resource Efficiency Knowledge Centre, technology adaptation incentives, and streamlining regulations. Financial ones include the late payments directive, innovative financing methods like IP credit, and specifically targeted ones like InvestEU, which is focused on women.

The EU strategy is intensely focused on green energy. The European Resource Efficiency Knowledge Centre will continue to help SMEs save energy, material and water costs.<sup>356</sup> Furthermore, the European Innovation Council, through the Commission, will allocate at least EUR 300 million in 2020 alone to high-potential start-ups and SMEs so that they can deliver breakthrough Green Deal innovation.<sup>357</sup> This focus on green energy is essential as transitioning towards climate neutrality requires clear, cost-efficient and facilitating policies and initiatives.<sup>358</sup> Critics have also encouraged the EU to create solutions that assist SMEs in transitioning into green, sustainable businesses.<sup>359</sup> This should also be a significant focus area for AfCFTA's SME growth as it is the centre of the UNCTAD 2023 Science and Technology

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<sup>353</sup> European Commission. "Think Small First" A "Small Business Act" for Europe 25.6.2008 COM(2008) 394 final available at <https://eur-lex.europa.eu/EN/legal-content/summary/a-small-business-act-for-european-smes.html> accessed on 10 Mach 2024.

<sup>354</sup> European Parliament. (2020). SME focus - Long-term strategy for the European industrial future available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648776/IPOL\\_STU\(2020\)648776\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648776/IPOL_STU(2020)648776_EN.pdf) 9.

<sup>355</sup> Ibid.

<sup>356</sup> EU SME strategy op cit note 343 at 3.

<sup>357</sup> EU SME strategy op cit note 343.

<sup>358</sup> Business Europe. 'The new EU SME strategy: 50 actions to make it work' 2020 available on [https://www.bussinesseurope.eu/sites/buseur/files/media/position\\_papers/smes/the\\_new\\_eu\\_sme\\_strategy\\_-\\_50\\_actions\\_to\\_make\\_it\\_work.pdf](https://www.bussinesseurope.eu/sites/buseur/files/media/position_papers/smes/the_new_eu_sme_strategy_-_50_actions_to_make_it_work.pdf) accessed on 24 March 2024.

<sup>359</sup> *ibid.*

report.<sup>360</sup> This focus is contextualised by the fact that the earlier version of the UNCTAD report was one of the primary focus documents used to draft the AU SME strategy.<sup>361</sup>

Recognising the importance of the environment and technology adaptation, the EU prioritises equipping SMEs with the tools and resources necessary for sustainable and digitalised operations. The Enterprise Europe Network has been set up to provide services to SMEs as part of capacity building to provide sustainability services.<sup>362</sup> It has positively impacted Western Balkan SMEs, where 67% of supported firms increased their turnover and 62% increased their market share.<sup>363</sup>

Furthermore, the EU makes public procurement more accessible by encouraging innovative procurement, such as member states breaking down larger contracts into smaller lots. The EU's intentionality is exemplified by its European Enterprise Promotion award for the city, which employs SME-supporting initiatives.<sup>364</sup> This could be an encouraging initiative for member states under AfCFTA.

The Commission will support the Member States in enforcing the Late Payment Directive by setting up monitoring and better enforcement tools and exploring the feasibility of alternative resolution/mediation mechanisms for SMEs.<sup>365</sup> This will ensure that SMEs do not go bankrupt, as they supply bigger companies and are subject to delayed payments. Research shows that SMEs that regularly face late payments are 7% more likely to face access to finance problems.<sup>366</sup> Delays in payments render SMEs unable to take on new projects due

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<sup>360</sup> United Nations Conference on Trade and Development (UNCTAD). (2023). *Technology and Innovation Report 2023*. <https://unctad.org/publication/technology-and-innovation-report-2023> accessed on 24 March 2022.

<sup>361</sup> *ibid*

<sup>362</sup> EU SME strategy op cit note 343 at 3.

<sup>363</sup> Ćudić, B, Klemenčić M 'The Role of Enterprise Europe Network in Export Activities of the Western Balkan SMEs' (2022) 24 (2) *Economic and Business Review* 84-100.

<sup>364</sup> Opinion of the European Committee of the Regions – SME Strategy (2020) Official Journal of the European Union available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020IR1373> accessed on 20 March 2024.

<sup>365</sup> EU SME strategy op cit note 343 at 10.

<sup>366</sup> Kaya Orcun 'Late Payments to SMEs - a Factor that Affects Their Access to Finance' available at SSRN: <https://ssrn.com/abstract=4606894> or <http://dx.doi.org/10.2139/ssrn.4606894> accessed on 24 March 2024.

to limited cash flow.<sup>367</sup> It is an issue that even African SMEs face. In South Africa, a clause in the Small Business Act states payments should be timely.<sup>368</sup>

The EU looks at streamlining regulations and fostering a more friendly SME single market. The regulatory Fitness and Performance Programme screens current legislation and simplifies it to reduce burdens and simplify legislation. The EU SME Envoy will provide the SME perspective in the Fit for Future Platform.<sup>369</sup> This platform is a forum for dialogue between policymakers, businesses, and other stakeholders on regulatory reform and guaranteeing a future-proof single-market regulatory structure. The EU's approach to analysing the SME space could be a learning point for AfCFTA. Further, the AU could learn how to implement the SME envoys it proposes in the AU strategy from the EU, which even produces yearly SME envoy reports.<sup>370</sup>

The EU seeks to provide equity financing whilst facilitating access to finance along all development stages, from start-up to scale-up and IPO, through a single integrated guarantee facility and targeting SMEs that fall within the EU's areas of interest, like sustainability and digitalisation.<sup>371</sup> In addition, through partnerships with Member States and initiatives like the Digital Innovation and Scaleup initiative, the EU aims to address geographical imbalances in investments and ensure broad access to finance for SMEs across Europe. The Capital Markets Union seeks to diversify funding sources. It explores innovative financing like fintech and blockchain technology. Innovative financing methods must also ensure that implementing

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<sup>367</sup> Heindri A. Bailey 'The challenge of late payment of SMMEs with a focus on South Africa' (2019) 7 Proceedings Paper, in: Bode, Jürgen & Freitag, Christine (ed.), *Universities, Entrepreneurship and Enterprise Development in Africa - Conference Proceedings 2018* Universities Entrepreneurship and Enterprise Development in Africa International Conference 19-36.

<sup>368</sup> National Small Business Act (No 102 of 1996).

<sup>369</sup> EU SME strategy op cit note 343 at 7.

<sup>370</sup> EU Monitor, Network of SME Envoys, May 2023 available at <https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vk66hvceh9z1> accessed on 30 March 2024.

<sup>371</sup> EU SME strategy op cit note 343 at 16.

partners know how to access them. An example is that although IP is being recognised as an asset, most banks fail to understand how to assess the risk that comes with it.<sup>372</sup>

## **ii. Supporting Ecosystem**

This section explores the structures and partners involved in SMEs' growth under the strategy. These include the Digital Innovation Hubs, SME entrepreneurship courses, private partnerships like the one with the European Innovation Council, and Strategic entrepreneurship ambassadors that support SME envoys.

A network of up to 240 Digital Innovation Hubs has been set up to support digital assistance in each European region.<sup>373</sup> This is underpinned by investment from the Digital Europe Programme and Structural Funds.<sup>374</sup> Scholars have also added that these hubs should cater for a wide range of SMEs, especially entry-level ones, and structural barriers like access to data should be addressed.<sup>375</sup> The AfCFTA strategy currently lacks comprehensive digitalisation support for SMEs. While it has partnered with AfroChampions to launch the Hub platform, it primarily focuses on information sharing. The African Union(AU) Digital Education Strategy and Implementation Plan includes the enterprise and innovation attributes that push the increase of support to EdTech enterprises and the development of the 4th Industrial Revolution strategies in some countries that encourage EdTech.<sup>376</sup> The AU Digital strategy also highlights partnerships between National Research and Education Networks and other global research and education networks. It extends to the Kenyan government and companies like Huawei and Telkom Kenya for the Digischool project.<sup>377</sup> Regardless, as the EU exemplifies, an effective SME legal framework is a comprehensive document that consolidates all digital efforts to avoid navigating multiple documents. The AU could replicate the

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<sup>372</sup> IPO, Brassell, Martin, King, Kelvin 'Banking on IP? The Role of Intellectual Property and Intangible Assets in Facilitating Business Finance' (November 06, 2013) *Intellectual Property Office Research Paper No. 2013/34*, Available at SSRN: <https://ssrn.com/abstract=4094073> or <http://dx.doi.org/10.2139/ssrn.4094073>

<sup>373</sup> EU SME strategy op cit note 343 at 4.

<sup>374</sup> EU SME strategy op cit note 343 at 4.

<sup>375</sup> European Parliament (2020). SME focus op cite 359.

<sup>376</sup> Africa Union, The Digital Transformation Strategy For Africa (2020-2030) at 31.

<sup>377</sup> Ibid at 46.

partnership model of working with technology companies, universities and development agencies to establish digital innovation hubs, as the EU also leverages public-private partnerships.

Regarding governance, the Commission will appoint a high-level dedicated EU SME Envoy and Strategic Entrepreneurship Ambassadors, a new advisory group of entrepreneurs from across Europe who will be a sounding board. Furthermore, the SME Performance Review will be published, which will monitor, among other things, the national start-up policies, digitalisation of SMEs, and engagement of sustainable practices. The Enforcement Action Plan outlines initiatives such as the Single Market Task Force, assisted by contributions from the EU SME envoy and national Envoys' network. These specialised bodies assist in exploring detailed research and solutions for SMEs, as the EU SME envoy has managed to do on issues for access to finance.<sup>378</sup> Such monitoring measures should also accompany the AU SME envoys.

Unlike the AU SME Strategy, the EU SME strategy employs affirmative language. Statements like, 'The Commission will monitor and work with Member States and will not hesitate to take decisive enforcement action where necessary to ensure that the single market benefits SMEs' show a proactive standing. This underscores the EU's commitment to supporting SMEs and ensuring their participation in a single market. It raises concerns about AU's commitment to meet the SMEs' needs within AfCFTA as the AU strategy lacks assertiveness and clarity.

The EU recognises the critical role that innovative startups play in driving economic growth and job creation. The EU will implement the EU Start-Up Nations Standard in collaboration with member states and stakeholders, such as the European Innovation Council forum.<sup>379</sup> This political effort boosts scale-ups by encouraging member states to implement

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<sup>378</sup> European Union 'SME Envoys Finance SME access to finance situation in EU Member States Final Report 2019' available at <https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vl3ditzo1rzm> accessed on 24 March 2024.

<sup>379</sup> EU SME strategy op cit note 343 at 3.

best practices for startups at local, regional and national levels. Although the European Committee of the Regions welcomes the initiative, it promotes all levels of government involvement.<sup>380</sup> Practices include streamlining regulations for attracting and retaining talent, simplifying cross-border expansion and promoting access to finance for scaling business. One author encourages the European Innovation Council, highlighting that the innovation space should have multi-stakeholders, especially industries of any size or quality. This ensures there are research and innovation partners with whom to collaborate.<sup>381</sup> The European Committee's opinion encourages the strategy to focus on more than start-ups, scale-ups, and high-tech SMEs. Regardless of this group's importance for growth and innovation, traditional and firms should also be a priority.<sup>382</sup> This is a learning point for African governments as they embrace start-ups.

### **iii. Intellectual Property Protection and Commercialization**

The EU's Intellectual Property Action Plan proposes measures to make the IP system more accessible and beneficial for SMEs.<sup>383</sup> Like the AfCFTA, it proposes simplifying IP registration procedures but is more specific in stating them. An example of the named procedures is reforming the EU legislation on industrial designs and improving access to strategic IP advice by making it standard in all EU-level research and development funding. The EU further seeks ways of facilitating the use of IP as a lever to gain access to finance by using IP as collateral when securing loans or attracting investment.<sup>384</sup> This is an innovative financing method AfCFTA can encourage. For example, SMEs are leading the transition to an

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<sup>380</sup> European Union 'Opinion of the European Economic and Social Committee on 'SMEs, the backbone of the EU economy: to modernize the policy on SMEs' (2020/C 364/07). No 24 available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022IE1049&from=EN> accessed on 24 March 2024

<sup>381</sup> European Parliament (2020). SME focus op cite 359 at 11.

<sup>382</sup> Opinion of the European Committee of the Regions op cit note 364 at 61.

<sup>383</sup> EU SME strategy op cit note 343 at 5.

<sup>384</sup> EU SME strategy op cit note 343 at 4.

information-based economy in Kenya.<sup>385</sup> Access to finance using IP only seems ideal for growth.<sup>386</sup>

#### **iv. Monitoring and Evaluation mechanism**

The EU conducts an active monitoring and evaluation system by conducting regional case studies and producing a policy brief on best practices for entrepreneurship education. These best practices are at educational institutions to assist RECs in spreading these practices throughout their regions and support referrals towards employment. Entrepreneurship education can be through entrepreneurial programs and cross-border exchange programs. Hence, the AfCFTA, on top of accelerating its work through RECs as stated under Article 5 (2), can also pick up best practices to impart to RECs and member states.

#### **4.5 Lessons from the Regional SME legal frameworks**

To tackle the need for capital, the AU SME strategy enhances access to finance through innovative financing methods and partnerships with financial institutions. The AU SME strategy proposes entry into regional and international markets, highlighting key initiatives. A strong theme in the AU SME strategy is collaboration between SMEs, large enterprises, academia, and government institutions. The Trade in Services protocol aims to remove trade border barriers. The Competition Protocol aims to ensure fair competition to assist SMEs in competing on level ground, ensuring that trade liberalisation does not result in suppression. The IP protocol looks to simplify IP processes whilst the Agreement leans into the power of RECs to push through reforms. All these key points should be hammered in an SME legal framework.

The EU SME strategy focuses on similar themes but emphasises innovative financing, especially IP as collateral. It also emphasises sustainability through green transition. Digital

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<sup>385</sup> Frank C ‘Innovation Of SMEs In The Knowledge-Based Economy’ (2001) 15 (4) *Journal of small business and entrepreneurship* 2-31.

<sup>386</sup> Beck, Thorsten, Demirguc-Kunt, Asli ‘Small and Medium-size Enterprises: Access to Finance as a Growth Constraint’ (2006) 30 *Journal of Banking & Finance*.

transformation is intentional, establishing 240 innovation hubs across different European areas. The legal framework for African SMEs could also explore these themes, particularly propositions that can be supported with measurable actions, as the EU has exemplified by stating the number of innovation hubs it wants to build.

Furthermore, although the AU SME strategy is a visionary document introducing comprehensive suggestions for growing SMEs, it could be more intentional. The document's phrases throughout the strategy, like 'the AU can' or 'suggests encouraging member states to 'raise questions about the proposed concrete action.'<sup>387</sup> The document is supposed to constitute a concrete AU strategy for SMEs like the EU SME strategy. However, this wording might give the impression that the AU lacks a definitive commitment to a solid strategy for SMEs, raising questions about the AU's intentions regarding formalising and supporting SMEs. Furthermore, using this conditional language in the document creates ambiguity about the AU's role and responsibility in promoting targeted, actionable policies for SME development.

#### **4.6 Conclusion**

The different frameworks analysed highlight the efforts AfCFTA targets for SMEs' growth, which are great guidelines towards an effective SME legal framework. The success of SMEs lies in a comprehensive approach to implementation, regional adaptation, and monitoring and evaluation. Chapter 4 has explored the different SME support documents at the regional level. It has also contrasted the efforts of AfCFTA with the EU SME strategy to identify areas of complementing and learning in the pursuit of constructing an effective legal framework. Chapter 5 will summarise all the submissions from Chapter 2 until Chapter 4, comparing them and recommending provisions for an effective SME legal framework.

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<sup>387</sup> AU SME Strategy op cit note 312 at 29.

## **CHAPTER 5: CONCLUSION**

### **5.1 Overview**

This thesis set out to answer what provisions constitute an effective SME legal framework that promotes SME growth towards AfCFTA. It commenced by showing the importance of SMEs in Africa's trade growth and identified the problems hindering their growth. It examined how the legal landscape in different African regions attempts to address these problems by examining and analysing general laws governing all companies, SME Business Acts and Start-Up Acts. It also examined the regional responses, comparing them with other regional zones. In analysing the strengths and weaknesses of the different legal frameworks, it picked out what constitutes an effective SME legal framework.

This chapter now synchronises the findings from Chapters 2 to 4 and presents key provisions that constitute an effective legal framework for SME growth under AfCFTA. In addition, it proffers recommendations for further achieving SME growth to both governments and the AfCFTA. It begins by proposing the essential provisions that constitute an effective. Secondly, it gives recommendations for governments to enhance their existing SME legal frameworks, for AfCFTA to consider an SME legal framework, and for extension of benefits in Start-Up Acts to all SMEs. Lastly, it exposes the study's limitations and discusses recommendations for further studies.

### **5.2 A Summary of Provisions that should constitute an effective SME Legal Framework**

This section discusses eight essential provisions that need to constitute an effective SME legal framework. They are drawn from the analysis of existing SME Business Acts, Start Up Acts, AfCFTA protocols, AU strategy and lessons from the European SME strategy. A detailed analysis was done in Chapters 2 to 4. The following essential provisions should be included and carefully crafted to address the existing gaps in the SME legal framework. These provisions address the unique challenges facing SMEs. The list is not exhaustive, but from the analysis

done in Chapters 2 to 4, it constitutes key provisions that should form the basis of any effective SME legal framework:

**a. Inputting inclusive legislative definitions for a wider reach of SMEs**

An effective SME legal framework ensures the definition section is inclusive to a wide base of SMEs that need support to grow. SME definitions cannot be the same throughout the continent, as highlighted in Chapter 2, as different countries experience different challenges.<sup>388</sup> However, the definitions need to be inclusive to the different businesses operating in their diverse structures and processes. As stated in Chapter 3, definitions are crucial in outlining, with legal precision, who and what is covered by benefits, incentives and support. When defining the parameters of who qualifies, one must look at the unique realities of the continent and its SME's standing. The definitions of start-ups in Start-up Acts, though promoting technology and innovation, must be more inclusive and not restricted to technological companies. This study acknowledges the motivation to emulate top start-up companies worldwide by adopting the same technological advancement criteria.<sup>389</sup> However, establishing an effective SME legal framework fit for Africa requires moulding the definition of start-ups to the modern realities of the industry and the advancement of Africa.<sup>390</sup> This is especially important as Start-up Acts offer more incentives than SMEs, such as dedicated funds like the Tunisian Start-Up Fund<sup>391</sup> and registration portals like the start-up portal in Nigeria, among other incentives. An effective SME legal framework ensures that more, if not most, SMEs in need of support qualify for and access the support through an inclusive definition. A pre-label process like the one in the Tunisian Start-Up Act should be copied so that SMEs can be technologically advanced while the necessary capacity building around technology is being concurrently undertaken.

**b. Incentives**

Secondly, effective SME legal frameworks should infuse incentives to assist SMEs in establishing their business. SMEs need intensive support as they grow, and specific incentives

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<sup>388</sup> Freeman.J op cite note 48; Hatten TS op cit note 47; Gibson T op cit note 48 .

<sup>389</sup> NG & Company op cit note 204

<sup>390</sup> Adelodun & Daibu op cite 191.

<sup>391</sup> Government of Tunisia 'Fund of Funds' op cit note 254.

are necessary to support this growth. The common incentives provided in the different legal frameworks analysed are related to tax. The Start-Up Acts analysed in Chapter 3 highlight how a big part of incentives in these Acts is based on tax reductions for SMEs just starting a term called “tax holidays”. An example is how Tunisia gives tax breaks to labelled startups, and the government pays social security taxes.<sup>392</sup> These tax incentives should not only be construed to SMEs identifying as start-ups. Countries should emulate Egypt, which introduced a simplified taxation system for establishments with an annual turnover not exceeding EGP 10 million<sup>393</sup> and tax incentives for the first year of formalisation to encourage formalisation.<sup>394</sup> The Turnover Tax, introduced by Kenya,<sup>395</sup> presents a simpler tax system designed especially for SMEs, which is an example to copy for other countries. Tax policies should also be designed to promote their growth directly.<sup>396</sup>

The tax incentives need to be extended to potential investors to encourage the possibility of funding SMEs can access. It was highlighted how the Start-up Acts offer these incentives to investors to promote multi-stakeholder involvement, especially towards funding startups. These tax incentives make it attractive to invest in SMEs, enabling vital and urgent funding required for SMEs’ growth. Nigeria offers a 5% withholding tax to non-resident companies that provide different services to labelled startups.<sup>397</sup> Thus, tax incentives for SMEs and potential investors appear to be a very effective way to help SMEs soar, especially in their first years.

Effective SME legal frameworks need to widen financial incentives beyond tax exemptions. Tunisia offers a foreign currency account to acquire assets, set up subsidiaries, purchase raw materials, and invest in foreign corporations for its startups.<sup>398</sup> This allows them to expand easily outside the national borders. Nigeria offers deductions on research and

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<sup>392</sup> Tunisian Start-Up Act supra 41.

<sup>393</sup> Two hundred nine thousand, nine hundred thirty-nine dollars and fifty cents.

<sup>394</sup> (Law No. 30 of 2023) to the Egyptian Income Tax Law (No. 91 of 2005)

<sup>395</sup> Kenya Revenue Authority op cit note 169.

<sup>396</sup> Ojochogwu.W. A, Ojek.S. op cit note 123 at 130.

<sup>397</sup> Nigerian Startup Act supra 185 at 25(2).

<sup>398</sup> Tunisian Start-Up Act Supra 41.

development expenses and export incentives, and the Council shall assist startups that want to list on the stock exchange in growing and developing.

Incentives should target the informal sector. This study highlighted the importance of the informal sector not only because it dominates business in Africa but also because it threatens the operations of established businesses. The study also made the vital point that incentives need to cover not only the initial registration cost but also the continued cost of operation.<sup>399</sup>

Non-financial incentives like capacity building and training are essential to the continuous growth of SMEs. Nigeria partners with the National Universities Commission, while the Kenyan government has set up a Ministry with one of its key mandates being capacity building.<sup>400</sup> On a regional level, the AfCFTA, through its protocols, encourages export capacity building of formal and informal services. Capacity building is so important that it forms one of the three pillars of the EU SME strategy. It is important to have specific African objectives for capacity building. Faizel notes that one of the weaknesses in African policymaking is always how multiple capacity-building programs are aimed towards donor agencies' priorities.<sup>401</sup> Of concern to the writer is how incentives seem to be limited, other than in Start-Up Acts, and this needs to be improved across all SME legal frameworks.

### **c. Access to finance**

One of the biggest problems for SMEs identified across all jurisdictions in this study is the lack of funding. In the analysed chapters, access to finance for SMEs is a recurring theme addressed in different SME legal frameworks using various methods. Effective SME legal frameworks should facilitate access to various funding sources. The first is to set up government funds like the Fund of Funds for Tunisia and the Start-Up Seed Fund in Nigeria. These funds should be adequately resourced to meet the demands fully. Hence, models like Nigeria, which has set

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<sup>399</sup> Abeberese. A.A, Chaurey.R op cit note 85.

<sup>400</sup> Hakizimana, S. op cite note 160.

<sup>401</sup> Faizel Ismail op cit note at 3.

only a small fund with one of the largest number of start-ups compared to Tunisia, China, and Italy, should be revised.<sup>402</sup>

Innovative financing methods should also be adopted. The previous chapters cite examples like incentivising financial institutions to offer loans and products, especially for SMEs, as the AU envisions that the G20 Finance for SMEs program should be employed.<sup>403</sup> This also includes developing alternative financing mechanisms such as angel investing, venture funding, and crowdfunding, examples of which are pointed out greatly in the Start-Up Acts. Nigeria, through its Start-Up Act, even leverages the possibility of public funding by assisting SMEs in buying shares on the stock exchange.<sup>404</sup> Tunisia has set up the Startup Guarantee fund, which guarantees start-up investment funds.<sup>405</sup> This decreases the risk for investors seeking to fund start-ups, thus increasing the possibility of funding.

To address gaps in financing for informal businesses, creative solutions are needed. For example, mobile-based microfinancing platforms could provide small, accessible loans to informal SMEs, leveraging Africa's high mobile penetration.<sup>406</sup> Peer-to-peer lending networks and community-based savings groups could also bridge the financing gap in underserved regions. Furthermore, capacity-building programs should be integrated into financing initiatives to improve financial literacy and business management skills among informal entrepreneurs, ensuring they can effectively utilise available funds.

#### **d. Streamlining Regulations and Compliance:**

A key initiative to tackle the informal sector issue is simplifying the registration process. Processes should be synchronised and automated to comply with regulations governing SMEs. Several legal frameworks and institutions govern SMEs, especially the “conventional” ones

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<sup>402</sup> Adepetun A, and Chibueze J op ci note 206.

<sup>403</sup> AU SME Strategy op cite note 312 at 20.

<sup>404</sup> Nigerian Startup Act supra 185 at s26

<sup>405</sup> Tunisia Start Up Act supra 43 at s11

<sup>406</sup> L. Grzybowski, V. Lindlacher and O. Mothobi 'Mobile money and financial inclusion in Sub-Saharan Africa' (2023) 65 *information Economics and Policy* 101064

discussed in Chapter 2.<sup>407</sup> Nigeria, for example, has its SMEs guided by multiple Acts.<sup>408</sup> A key step is digitalising the whole process, utilising online platforms for registration, compliance filing and government services. All 20 top-ranking economies in the Ease of Doing Business report have online business incorporation processes. The Start-Up Acts have led great examples, with Nigeria establishing the Startup portal with both Nigeria and Tunisia with the Start-Up Tunisia online portal. This ensures registration is faster. These online platforms should also facilitate compliance communication and ensure regulators can communicate with each other to avoid repetitive processes.

**e. Building a Supportive Ecosystem:**

SME legal frameworks need to take a multistakeholder approach to support SMEs. General SME legislation, like in Kenya, merely create specific committees or Ministries for SME support.<sup>409</sup> The Start-Up Acts then offer a holistic approach involving innovation hubs, accelerators, and private sector players. This multistakeholder approach provides essential services, from business development assistance to networking opportunities, helping SMEs scale up and grow towards wider markets. The AU SME strategy also supports building partnerships of government, academia and corporations in promoting research and development.

There should be a separation of power in enacting and implementing the SME legal frameworks. The Tunisian structure highlights an even more effective and power-separating mechanism of adopting a multi-stakeholder ecosystem. The enacted law is implemented by a separate private entity with expertise, Smart Capital. Results recorded so far from their growth in the industry highlight the success of this method.<sup>410</sup> The EU incorporates SME envoys, the European Innovation Council, and Strategic entrepreneurship ambassadors to drive the implementation of the SME strategy.

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<sup>407</sup> Krishnan.S, N.Ganesh, L. S., & Rajendran, C. cite note 52 at 125.

<sup>408</sup> Fafunwa & Olungwe op cite 6 at 331.

<sup>409</sup> MSEs Act supra note 143.

<sup>410</sup> Presenting The 2023 Partech Africa Report op cit note 260.

Lastly, SME envoys or similar structures, advised in the AU SME strategy and implemented by the EU, should be adopted. These envoys can champion SMEs within their governments, advocating for policies and programs that foster SME growth. They have been adopted successfully in Europe.<sup>411</sup>

#### **f. Intellectual Property Commercialization**

IP remains a key structure for growing SMEs. Firm support, like Tunisia's support of fast-track patent processing nationally and internationally and commitment to pay indirect and direct costs, is encouraged. Countries should not be ambiguous about the support in the Nigerian Start-Up Act, which promises "assistance" without defining what assistance constitutes. On a regional scale, the AfCFTA seems only to regard SMEs partially under the Protocol on IP; lessons can be drawn from the EU that not only specifically states a strategy of IP protection but also uses IP as a form of collateral.<sup>412</sup>

#### **g. Fostering Innovation and Entrepreneurship:**

Effective SMEs should foster innovation and entrepreneurship through tax breaks and incentives encouraging research and development, as stated in the Tunisia Start-Up Act. Incubation should be provided through the set-up of innovation hubs and support of the hubs through various incentives throughout the continent, as the EU has done with the 240 innovation hubs across Europe.<sup>413</sup> This element of incubation appears to be lacking in general SME legislation. An effective legal framework will have measures to ensure the business keeps innovating to remain competitive.

#### **h. Enhancing Regional and Continental Integration**

SME legislation must strive towards regional and continental integration. COMESA's STR system creates an enabling environment for informal traders by facilitating quicker clearance of goods, reducing costs and improving data capture. This emphasises adopting a regional approach to the business of SMEs instead of restricting it to national borders. SME legal frameworks must also adopt the AfCFTA objectives, include a liberalised market, and promote

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<sup>411</sup> AU SME Strategy op cite 320 at 32, AU implementation plan op cit note 322 at 24.

<sup>412</sup>EU SME strategy op cit note 343.

<sup>413</sup> EU SME strategy op cite note 343.

an inclusive economy that considers gender equality. In an effort toward continental integration, the Protocol of Trade in Services underlines the importance of capacity building to encourage knowledge of export regulations, international marketing, and cross-border logistics.<sup>414</sup> These are the basics that SMEs need to know to grow their trade. Tunisia is a great example of this, and it has incorporated this in its StartUp Act through the Authorized Economic Operators.<sup>415</sup> This ensures SMEs have been approved by national customs as compliant with World Customs organisations or standards while moving goods internationally.

Incentives in legal frameworks should favour supporting SMEs in exporting. In Nigeria, for example, under its NSA sections 26 and 27, the Secretariat shall ensure that labelled startups benefit from export incentives.<sup>416</sup> Kenya's National Trade Policy establishes cross-border Trade Committees to monitor and report counterfeits, smuggled items, and emerging Non-Tariff Barriers.<sup>417</sup>

A full digital platform should also be established to enable regional integration. Digitalisation has been proven to transform industries, value chains, and economic segments, including the MSME sector.<sup>418</sup> Portals can go beyond merely being for registration and infuse regionalism.

### **5.3 Recommendations**

#### **a. To governments**

Most governments have shown commitment by enacting specific legal frameworks for SMEs, but there are gaps and weaknesses. There should be a comprehensive SME legal framework with the above-stated provisions. These provisions should not only exist in Start-Up Acts, as seen in Tunisia and Kenya, as 40% of African SMEs are yet to catch up with technologies. Efforts must be made to ensure that non-technological businesses also have room to grow.

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<sup>414</sup> Protocol on Trade in Services supra 39 section 27(2).

<sup>415</sup> Tunisia Start-Up Act supra 43 at s1 3.

<sup>416</sup> Nigerian Startup Act supra 185 at s 26.

<sup>417</sup> Kenya National Trade Policy op cit note 173

<sup>418</sup> Sabrina Disse Christoph Sommer 'Digitalisation and its Impact on SME Finance in Sub-Saharan Africa: Reviewing the Hype and Actual Developments' Bonn 2020.

Moreover, efforts must be emphasised to ensure that informal businesses register and formalise.

Taking a participatory approach when enacting or refining the SME legal frameworks is important. This follows what Tunisia did in its Act, which has made it inclusive.<sup>419</sup> Lessons should also be taken from Yong-Shik Lee’s general theory of law and development of strongly observing “regulatory design,” “regulatory compliance,” and “quality of implementation” when enacting and implementing these SME legal frameworks.<sup>420</sup>

These governments should also integrate regional growth objectives as stated in the AU SME strategy and AfCFTA protocols. AfCFTA provides guidelines and recommendations through specific protocols, structures, and the AU strategy. As governments enact laws, it is essential to keep the goal of regional trade growth in mind. Therefore, aligning with regional objectives to enhance regional market access is necessary. Although national SME laws, such as Nigeria’s Start-Up Act and Kenya’s Micro and Small Enterprises Act, focus on fostering innovation and entrepreneurship. They often lack provisions for integrating SMEs into regional value chains, which are critical for industrialisation. Utilising the AfCFTA’s Protocol on Trade in Goods and Protocol on Trade in Services can bridge this gap by encouraging cross-border collaboration and specialisation, enabling SMEs to participate in regional industrial value chains.

Governments should establish an effective implementation, monitoring, and evaluation system. They should periodically assess the effectiveness of SME legal frameworks, including re-evaluation, to ensure appropriate incentives are enhanced for SME growth. The OECD encourages governments to create genuine opportunities for regulators and inspection authorities to feed their knowledge into reviewing and designing policies and regulations.<sup>421</sup> It is not adequate to make an SME legal framework; implementation also ensures effectiveness. Hence, monitoring and evaluation mechanisms should be incorporated into these legal

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<sup>419</sup> Participedia op cit note 241.

<sup>420</sup> Lee, Yong-Shik op cit note 68.

<sup>421</sup> OECD Regulatory Policy Outlook ‘Improving the governance of regulators and regulatory enforcement’ 2018 available at <https://www.oecd-ilibrary.org/sites/9789264303072-8-en/index.html?itemId=/content/component/9789264303072-8-en> accessed on 10 May 2024.

frameworks. To develop, the private sector requires a legal and regulatory environment that fosters business and is backed by strong institutions with effective monitoring and enforcement powers.<sup>422</sup>

#### **b. A specific SME protocol under AfCFTA**

This study strongly recommends that the AfCFTA adopt a protocol specifically for SMEs. It has been noted that there is no protocol for SMEs under AfCFTA. Chapter 4 had to infer clauses from certain protocols that indirectly speak to SMEs. A dedicated protocol for SMEs would provide a focused, comprehensive and coherent strategy to assist the growth of SMEs. Institutional coverage that is specifically targeted to SMEs is required. The needs of SMEs need to be directly acknowledged as regional and national strategies for implementing trade growth are developed.<sup>423</sup> Considering SMEs' contribution to the GDPs of all African countries as continuously stated throughout this study.<sup>424</sup> Therefore, it is concerning that one needs to make extensive efforts to identify where their needs are being addressed, and some protocols entirely omit SMEs. Additionally, protocols identify merely general actions and fail to get into detail or provide comprehensive support strategies. One example stated how the Protocol on Trade in Services under section 27 facilitates SMEs' participation in regional and trade value chains by harnessing their potential and capabilities. However, the specific details of the strategy for achieving this are unclear.<sup>425</sup>

#### **c. Extending the attention and benefits given to Start-up Acts to all SMEs legal frameworks**

From an analysis of the laws governing SMEs and the SME Business Act compared to the Start-Up Acts, one notices that effort has been put into ensuring comprehensive solutions for the growth of startups. The limiting factor, however, is how StartUp Acts, due to their definition, apply merely to technological companies as referred to in the Nigerian Act or those with some registered software. This means all the benefits are restricted to a small number of

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<sup>422</sup> African Development Report 2011 op cite note 107.

<sup>423</sup> Okolie. C.N, Akwiwu. I op cit note 178.

<sup>424</sup> Agyapong op cit note 22 at 200.

<sup>425</sup> Protocol on Trade in Service supra 39 section 27(2).

SMEs that can fit this definition. Without such structures, the AfCFTA's potential to benefit MSMEs will be significantly reduced.<sup>426</sup>

#### **5.4 Limitations and suggestions for future research**

The research employed doctrinal research, which limited the information to only what had been gathered by other researchers and their opinions. In some cases, the challenge was limited access to academic literature, such as fairly new acts like the Nigerian Start-Up Act, enacted less than two years ago.<sup>427</sup> Future research can consider employing empirical research methods to obtain an unfiltered and clear perspective from the SME ecosystem participants on what constitutes an effective SME legal framework.

Furthermore, the study could not incorporate the Tunisia SME legal frameworks governing conventional SMEs as all material was in Arabic and access to English versions failed. Future studies can obtain such legislation and give a detailed comparison between the StartUp Act and the laws governing SMEs that do not qualify as startups.

The Start-Up Acts and the AU SME strategy had just been implemented when this study was conducted. Hence, there is limited material on monitoring and evaluating these legal frameworks. Future research can evaluate the success of these frameworks after years of implementation to adequately measure effectiveness. Only Tunisia has published a monitoring and evaluation report.

Future studies should also explore the challenges of implementing the suggested provisions for example economic disparities among member states and political and institutional challenges. They can also give suggestions on implementation of the provisions which include adopting a minimum standards approach. They can also explore why reform efforts to SME legal frameworks such as the Kenyan and Nigerian SME legal frameworks have not been fully implemented despite recognition of the common problems facing SMEs. Lastly

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<sup>426</sup> Ibid at 76.

<sup>427</sup> Adebisi, & Osobu, O. E op cit note 228.

more global perspectives part from the EU can be explored to compare how other continents or emerging markets address the SME issues.

### **5.5 Conclusion**

The findings of the study indicate that although SMEs are currently anchors of economies and have the potential to help make the AfCFTA a success, the current national and regional frameworks are inadequate. With this background, it compared three countries' diverse legal frameworks and the AfCFTA 's legal frameworks. It identified the strengths and weaknesses, enabling lessons on what constitutes an effective SME legal framework. It then presented eight key provisions which constitute an effective SME legal framework. These provisions, though not exhaustive, are essential. By implementing these provisions along with the recommendations and continually refining their legal frameworks, African policymakers can empower SMEs to become the engines of economic growth and innovation on the continent. A robust legal framework, coupled with a supportive ecosystem, will unlock the full potential of African SMEs, allowing them to not only compete domestically but thrive within the vast opportunities presented by the AfCFTA. This, in turn, will pave the way for a more prosperous and integrated Africa.

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