THE DRAFT PRIVATIZATION BILL, 2023

We are writing to update you on the recent publication of the draft [Privatization Bill]() which was made available for public participation. The bill, if passed, will replace the current Privatization Act, 2005. The objective of the bill is to provide a revised regulatory framework for the privatization of public entities with a view to improving the efficiency and competitiveness of Kenya's productive resources.

The draft bill is currently open for public participation, which means that members of the public are invited to submit their views and comments on the bill before it is presented to Parliament for debate.

We encourage you to review the draft bill and provide your comments and suggestions within the public participation period which is open until 7th February 2023.

The draft bill proposes several key changes to the current privatization process, including:

a) Privatization Authority

The establishment of a new Privatization Authority ("Authority") to oversee the privatization process, replacing the current Privatization Commission ("Commission"). The Authority shall have a wider range of responsibilities and functions compared to the Commission.

The Authority shall be responsible for advising the government, facilitating the implementation of government policies, collaborating with other organizations and ensuring compliance with the Privatization Act, in addition to implementing the privatization programme.

b) Formulating the privatization programme

The bill proposes to change the entity responsible for formulating the privatization programme and identifying and determining the entities to be included in the privatization programme from the Commission to the Cabinet Secretary for the National Treasury ("Cabinet Secretary").

c) Identification of entities for the programme

The bill proposes a criteria that the Cabinet Secretary shall take into consideration to identify and determine the entities to be included in the privatization programme which includes: the relevant government policies, the need to avoid an unregulated monopoly, the expected benefits to be gained from the privatization and the sustainable development and protection of the economy.

d) Approval of privatization proposal

The bill proposes that the Authority shall prepare a privatization proposal which shall be approved by the Board of the Authority with the concurrence of the Cabinet Secretary. This process is different from the current law, which involves multiple steps and levels of approval, including specific proposals made by the Commission, presentation to the Cabinet and report submission to Parliament for consideration.

This proposed change, which deviates from the established process for privatization, has raised concerns among many and media reports have cited it as the most concerning change. The current process involves multiple steps of approval and public input and review, which ensures that privatization decisions are made in the best interest of the public.

The proposed change gives the Authority sole power to prepare and approve privatization proposals with the Cabinet Secretary's concurrence, potentially leading to decisions made without proper public input or oversight.

e) Contents of a privatization proposal

The bill maintains that where an entity has been identified for privatization, the Authority shall prepare a privatization proposal on the entity, which is consistent with the Commission's original mandate. A new requirement has been proposed for the privatization programme, placing a mandate for the inclusion of specific information not previously required in the privatization proposal about the entity to be privatized, including the purpose for the establishment or existence of the entity and the extent to which that purpose or operation has been met, including any inadequacies in meeting that purpose.

The proposal must also specify any rights or other entitlements and resources that have been provided to meet the purpose for the establishment or existence of the entity, as well as any recommendations for continuing to meet that purpose. Additionally, the proposal must include information about the financial position of the entity and a valuation of the privatization to be undertaken.

f) The methods of privatization

The bill introduces sale of shares by public tendering as a new method of privatization and maintains initial public offering of shares and sale resulting from the exercise of pre-emptive rights as privatization methods. The sale of assets including liquidation and any other method approved by the Cabinet in the approval of a specific privatization proposal are no longer methods of privatization but any method determined by the Authority with the approval of the Cabinet Secretary may be used for privatization.

The sale of shares by tendering will involve the shares of the company to be privatized being offered for sale to the public through a competitive bidding process. The procedure for the sale of shares by public tendering will include evaluation by a committee consisting of representatives from organizations such as the National Treasury, the

Authority and the Ministry responsible for the entity being privatized and the evaluation will be done in accordance with the criteria set out in the tender documents.

What the proposed bill means for you

The proposed bill shall potentially impact various stakeholders, including investors, the Kenyan public and the public entities that are planned to be privatized. Investors may be impacted by changes in the privatization process in the new law, which could affect their ability to participate in the process given that under the bill, the Cabinet Secretary can instruct the Authority to either limit privatization participation to Kenyans or to set a specified minimum level of participation by Kenyans in any privatization. Public entities may be impacted by the sale or transfer of ownership of their assets.

The bill seeks to shorten the time it takes for a company to complete the privatization process. This includes reducing the time it takes to get approval from relevant authorities and streamlining the approval processes involved, making it easier for companies to navigate the bureaucracy and reducing the potential for delays. By shortening these timelines, the bill hopes to make the process more efficient and straightforward as possible and attractive to investors, allowing more companies to privatize and contributing to the growth of the private sector.

While the aims of the bill are to lead to increased efficiency and economic growth, privatization can have a mixed effect on the economy with both positive and negative outcomes. Positive effects include increased efficiency and productivity in the privatized sector, lower prices for consumers, improved services, increased foreign investment and job creation. Negative effects include potential job losses for employees of the affected state-owned companies, increased market power for a few private companies, lack of government control and oversight, and potential for corruption and lack of accountability due to the revised privatization process lacking parliamentary approval.

The bill seeking to shorten approval time and levels of approval and introduce the sale of shares by tendering, may have some positive effects on the economy. It could potentially increase efficiency and competition, as well as provide an opportunity for the public to participate in the ownership of privatized companies. However, it is important to ensure that the tendering process is transparent and fair, to prevent any potential corruption or favoritism. Further by removing parliamentary approval, the bill has the potential to lead to negative consequences such as a lack of accountability and oversight, which can increase the risk of corruption and negatively impact the public's access to information and participation in the decision-making process.

Conclusion

Revising the law surrounding privatization in Kenya is crucial in ensuring that going forward, privatization leads to increased efficiency and economic growth. However, while the proposals in the bill may have some potential benefits, it is important for the potential impacts to be considered against the potential risks and appropriate safeguards put in place before the bill is enacted.

As the bill moves through the legislative process, it will be important to stay informed about its progress and any potential changes. In the meantime, it is prudent to consider the potential impact of these changes on your business and industry and to consider how you can adapt and take advantage of any new opportunities that may arise.

We will continue to monitor the progress of the draft bill and will keep you updated on any further developments. In the meantime, please do not hesitate to contact us if you have any questions or concerns.

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