

REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY

THIRTEENTH PARLIAMENT – SECOND SESSION – 2023

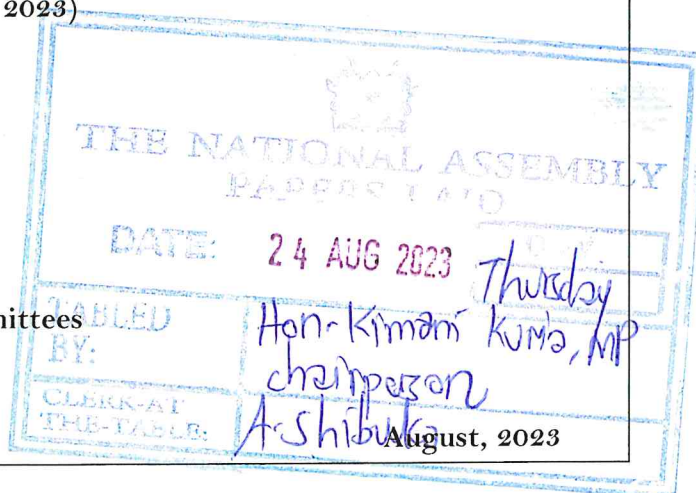
THE DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING

REPORT ON-

THE PRIVATISATION BILL, 2023 (NATIONAL ASSEMBLY BILLS NO. 22 OF 2023)

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CHAIRPERSON'S FOREWORD

This report contains the proceedings of the Departmental Committee on Finance and National Planning on its consideration of the Privatisation Bill (*National Assembly Bills No. 22 of 2023*) which was published on 24th May 2023 and read for the First time on 6th June 2023. The Bill was committed to the Departmental Committee on Finance and National Planning for consideration and reporting to the House in line with the Standing Order 127(1).

The principal object of the Bill is to provide a revised regulatory framework for the privatisation of public entities to improve the efficiency and competitiveness of Kenya's productive resources. The Bill further seeks to repeal the Privatisation Act (No. 2 of 2015).

In compliance with Article 118(b) of the Constitution and Standing Order 127(3), the Committee placed an advertisement in the print media on 12th June 2023 inviting the public to submit memoranda on the Bill by way of written statements. In addition, the Committee vide letter **REF: NA/DDC/F&NP/2023/088 dated 15th August 2023** invited key stakeholders to submit views on the Bill and attend a public participation forum on Tuesday 23rd August 2023.

Arising from the public participation exercise, the Committee received six memoranda from the following six institutions: the National Treasury, the Privatization Commission, PricewaterhouseCoopers Limited, the Institute of Certified Public Secretaries, the Public Procurement Regulatory Authority; and the Nairobi Securities Exchange

The majority of the Stakeholders stressed the need for provisions to improve governance in the privatization processes and speedy procedures. PricewaterhouseCoopers Limited proposed the need for the Bill to include provisions that shall provide regulatory processes for privatization undertaken by the county governments. However, the Committee held the view that separate legislation to guide the privatization process was needed to cure the legal gap.

I take this opportunity to thank and commend Committee Members for their devotion and commitment to duty, the Speaker and the Clerk of the National Assembly for providing leadership and direction and finally the Committee Secretariat for exemplary performance in the provision of technical and logistical support.

On behalf of the Departmental Committee on Finance and National Planning and pursuant to provisions of Standing Order 199 (6), it is my pleasant privilege and honour to present to this House the Report of the Committee on its consideration of the Privatisation Bill, 2023 (*National Assembly Bill No. 22 of 2023*)

Hon. CPA Kuria Kimani, MP

Chairperson, Departmental Committee on Finance and National Planning

PART I

1.0 PREFACE

1.1 MANDATE OF THE COMMITTEE

1. The Departmental Committee on Finance and National Planning is one of the twenty Departmental Committees of the National Assembly established under ***Standing Order 216*** whose mandates pursuant to the ***Standing Order 216 (5)*** are as follows:
 - (a) *To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;*
 - (b) *To study the programme and policy objectives of ministries and departments and the effectiveness of the implementation;*
 - (c) *on a quarterly basis, monitor and report on the implementation of the national budget in respect of its mandate;*
 - (d) *To study and review all legislation referred to it;*
 - (e) *To study, assess and analyze the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;*
 - (f) *To investigate and inquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;*
 - (g) *To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments);*
 - (h) *To examine treaties, agreements and conventions;*
 - (i) *To make reports and recommendations to the House as often as possible, including the recommendation of proposed legislation;*
 - (j) *To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and*
 - (k) *To examine any questions raised by Members on a matter within its mandate.*
2. In accordance with the Second Schedule of the Standing Orders, the Committee is mandated to consider, public finance, public audit policies, monetary policies, financial institutions (excluding those in securities exchange), economy, investment policies, competition, banking, insurance, national statistics, population, revenue policies including taxation, national planning and development, digital finance, including digital currency.
3. The Committee oversees the Ministry of National Treasury and Planning, Commission on Revenue Allocation and Office of the Controller of Budget.

1.2 MEMBERSHIP OF THE COMMITTEE

4. The Committee comprises the following Members

Chairperson

Hon. CPA. Kuria Kimani, MP
Molo Constituency

UDA Party

Vice-Chairperson

Hon. Amb. Benjamin Langat, CBS, MP
Ainamoi Constituency

UDA Party

Hon. Adan Keynan, MP
Eldas Constituency
Jubilee Party

Hon. Andrew Okuome, MP
Karachuonyo Constituency
ODM Party

Hon. David Mboni, MP
Kitui Rural Constituency
Wiper Party

Hon. Joseph Oyula, MP
Butula Constituency
ODM Party

Hon. Joseph Kipkoros Makilap, MP
Baringo North Constituency
UDA Party

Hon. Umul Ker Kassim, MP
Mandera County
UDM Party

Hon. CPA Julius Rutto, MP
Kesses Constituency
UDA Party

Hon. Shadrack Ithinji, MP
South Imenti Constituency
Jubilee Party

Hon. Paul Biego, MP
Chesumei Constituency
UDA Party

Hon. Joseph Munyoro, MP
Kigumo Constituency
UDA Party

Hon. Dr. John Ariko, MP
Turkana South Constituency
ODM Party

Hon. Mohamed Machele, MP
Mvita Constituency
ODM Party

Hon. George Sunkuya, MP
Kajiado West Constituency
UDA Party

1.3 COMMITTEE SECRETARIAT

5. The Committee is facilitated by the following staff

Mr. Benjamin Magut
Senior Clerk Assistant /Head of Secretariat

Ms. Jennifer Ndeto
Deputy Director, Legal Services

Mr. Salem Lorot
Legal Counsel I

Mr. Nebert Ekai
Clerk Assistant II

Mr. Benson Kamande
Clerk Assistant III

Mr. George Ndenjeshe
Fiscal Analyst III

Mr. James Macharia
Committee Intern

Mr. Andrew Jumanne Shangarai
Principal Serjeant-At-Arms

Mr. Simon O. Ouko
Assistant Serjeant-At-Arms

Ms. Shamsa A. Abdi
Research Officer III

Ms. Nelly W. N Ondieki
Research Officer III

Ms. Joyce Wachera
Hansard Officer III

Ms. Benson Muchiri
Audio Officer III

Ms. Ivy Mumbi
Committee Intern

Mr. Alfas Mulunda
Committee Intern

Mr. Ian Kinuthia
Committee Intern

PART II

2.0 OVERVIEW OF THE PRIVATISATION BILL, 2023 (NATIONAL ASSEMBLY BILLS NO. 22 OF 2023)

6. The Privatization Bill (*National Assembly Bills No. 22 of 2023*) was published on 24th May 2023 and for the First time on 6th June 2023. Pursuant to Standing Order 127(1), the Bill was committed to the Departmental Committee on Finance and National Planning for consideration and reporting to the House.
7. The principal object of the Bill is to provide a revised regulatory framework for the privatization of public entities to improve the efficiency and competitiveness of Kenya's productive resources. The Bill seeks to repeal the Privatization Act (No. 2 of 2015).
8. Part I (Clauses 1-6) of the Bill provides for preliminary matters including the short title and interpretation of terms used in the Bill. It further sets out the transactions to which the Act shall not apply, the guiding principles of the Act and the purpose of undertaking privatization.
9. Clause 3 of the Bill provides for the objects and purpose of the Act to provide for the establishment of the Privatization Authority and to streamline the regulatory and institutional framework for the implementation of privatization.
10. Clause 4 of the Bill provides for the limitations of the Act. It provides that the Act shall not apply to
 - i. sale of shares in the secondary market
 - ii. sale of shares by a social security fund, compensation fund, superannuation fund, insurance fund or endowment fund under public control for the benefit of its contributors
 - iii. sale of new shares to existing shareholders through a rights issue
 - iv. any balance sheet reorganization which may lead to dilution of the percentage of shares held by a public entity
 - v. sale or transfer of shares by a county government
11. Further, the clause provides that the National Treasury may, on its own or through the Authority, provide technical support and assistance to county governments with regard to privatization by county governments.
12. Clause 6 of the Bill provides for a privatization as to—
 - i. encourage more participation of the private sector in the economy by shifting the production and delivery of products and services from the public sector to the private sector
 - ii. improve the infrastructure and the delivery of public services through the involvement of private capital and expertise

- iii. reduce the demand for government resources
- iv. generate additional revenue for the government through compensation for privatizations
- v. improve the regulation of the economy by reducing conflicts between the public sector's regulatory functions and commercial functions
- vi. broaden the base of ownership in the Kenyan economy by encouraging private ownership of entities
- vii. improve the efficiency of the Kenyan economy by making it more responsive to market forces
- viii. enhance and develop the capital markets in Kenya.

13. Part II (Clauses 7-17) of the Bill provides for the coordination and oversight of privatization matters. It outlines the functions of the Cabinet Secretary; provides for the establishment, functions and administration of the Privatization Authority and the appointment and functions of the Managing Director, the Corporation Secretary and the staff of the Authority.

14. Clause 7 of the Bill provides for the functions of the Cabinet Secretary under the Act as follows—

- i. providing policy direction on matters related to privatization
- ii. co-ordinating the adherence to national, regional and international obligations relating to privatization
- iii. developing and formulating the privatization programme
- iv. overseeing the administration of the Act

15. Clause 8 of the Bill provides for the establishment of the Privatization Authority as a corporate entity.

16. Clause 9 of the Bill provides for the functions of the Privatization Authority as follows—

- i. to advise the government on all aspects of the privatization of public entities
- ii. to facilitate the implementation of government policies on privatization
- iii. to implement the privatization programme
- iv. to implement specific privatization proposals in accordance with the privatization programme
- v. to collaborate with other organisations, within or outside Kenya, as it may consider appropriate in furtherance of the objects of the Act
- vi. to take such measures as are necessary to ensure that the provisions of this Act are complied with
- vii. to perform any other functions under the Act or any other legislation as may be conferred, from time to time, on the Authority

17. Clause 10 of the Bill provides for the Board of the Privatization Authority, consisting of 8 persons. These are:

- i. a chairperson appointed by the President

- ii. the Principal Secretary to the National Treasury or a representative designated in writing
- iii. the Principal Secretary in the Ministry responsible for matters relating to investment promotion or a representative designated in writing
- iv. the Attorney General or a representative designated in writing
- v. four other persons, not being public officers, competitively recruited and appointed by the Cabinet Secretary possessing relevant skills and competencies that may be required to achieve the objectives of the Act

18. Part III (Clauses 18-24) of the Bill deals with the privatizations programme. It makes provisions for the formulation of the programme which includes identification of entities to be included in the programme in line with the considerations, public consultations during development and ratification by Parliament before implementation of the programme.

19. It further specifies the validity period of the programme as not exceeding five years from the date of gazettment and such validity may be extended for a period not exceeding twelve months.

20. Clause 18 of the Bill provides that the privatizations programme shall be formulated by the Cabinet Secretary in accordance with the Act and approved by the Cabinet; specify the public entities identified and approved for privatizations; and serve as the basis upon which privatizations shall be undertaken.

21. Clause 20 of the Bill provides that the Cabinet Secretary shall, in the identification and determination of entities for privatization, take into consideration-

- i. The relevant government policies in respect of privatizations
- ii. The strategic priorities and policy goals to be achieved by the privatisation
- iii. The strategic nature of the public entity to be privatised
- iv. The need to avoid privatizations that may result in an unregulated monopoly
- v. The need to avoid privatizations that may accord the new owners special protection or access to credit on concessionary terms as a result of the National Government's sovereign status
- vi. The extent of regulatory adjustments required
- vii. The need to reduce the budget drain on government resources
- viii. The expected benefits to be gained from a proposed privatization
- ix. Any other relevant consideration

22. Clause 21 of the Bill provides that upon approval of the privatization programme by the Cabinet, the Cabinet Secretary shall submit the approved privatization programme to Parliament for ratification before implementation of the programme. Parliament has been given 60 days to consider the privatizations programme and either ratify it or refuse to ratify it.

23. Clause 22 of the Bill provides that the privatizations programme ratified under section 21 shall be published in the Kenya *Gazette*.
24. Clause 23 of the Bill provides that a privatizations programme shall be valid for 5 years from the date of gazettment. Further, the Cabinet Secretary may extend the validity of the privatizations programme for a period not exceeding twelve months.
25. Clause 24 of the Bill provides that the Cabinet Secretary may amend the privatizations programme and the provisions of Part III of the Bill relating to formulation and approvals shall apply with respect to any such amendments.
26. Part IV (Clauses 25-38) of the Bill makes provision for the implementation of the programme. It mandates the Privatization Authority to implement the programme and empowers the Authority to constitute technical advisory committees in the implementation of privatizations.
27. It further provides for who is eligible to participate in a privatization; the methods of privatization; the development of a privatization proposal which shall include stakeholder engagement on the individual privatizations and the approval of the privatization proposal by the Board of the Authority and the Cabinet Secretary before implementation.
28. Additionally, the Part provides for restrictions and obligations on entities scheduled for privatization.
29. Clause 25 of the Bill provides that the privatization programme shall be implemented by the Authority in accordance with the Act.
30. Clause 26 of the Bill provides that any person, whether Kenyan or non-Kenyan, is eligible to participate in a privatization. Further, it provides that the Cabinet Secretary may direct the Authority to limit participation in any privatization to Kenyans; or ensure that there is a specified minimum level of participation by Kenyans in any privatization. The clause also provides that a national government-owned entity is not eligible to participate in a privatization but this shall not prevent a social security fund, compensation fund, superannuation fund, insurance fund or endowment fund under government control from purchasing shares for the benefit of its contributors.
31. Clause 27 of the Bill provides that in the implementation of privatizations, the Managing Director may constitute a technical advisory committee, operating on an *ad hoc* basis, consisting of representatives from the following institutions:
- i. the National Treasury
 - ii. the Authority
 - iii. The ministry responsible for the entity being privatized
 - iv. The entity to be privatized
 - v. the Attorney General

- vi. a representative of any other relevant institution as may be determined by the Managing Director.

32. Clause 28 of the Bill provides for methods of privatizations which shall include:

- i. Initial public offer of shares
- ii. sale of shares by public tender
- iii. sale resulting from the exercise of pre-emptive rights
- iv. such other method as the Board shall, with the approval of the Cabinet Secretary, determine

33. Clause 29 of the Bill provides for the contents to be included in the privatizations proposal. It provides that where an entity has been identified for privatizations under the Act, the Authority shall prepare a privatizations proposal on the entity. The privatizations proposal shall specify—

- i. the purpose for the establishment or existence of the entity to be privatized and the extent to which that purpose or operation has been met including any inadequacies in meeting that purpose
- ii. any rights or other entitlements and resources that have been provided to meet the purpose for the establishment or existence of the entity to be privatized
- iii. any recommendations for continuing to meet the purpose for the establishment or existence of the entity to be privatized
- iv. the financial position of the entity to be privatized
- v. the recommended method of privatizations
- vi. the estimated costs of implementing the proposed privatization
- vii. any recommendations for dealing with the employees directly affected by the proposed privatizations including any benefits they are entitled to
- viii. where applicable, a recommendation on how to undertake socio-economic investments to the host community
- ix. the benefits to be gained from the proposed privatizations
- x. a work plan for the proposed privatization
- xi. any information relating to the repeal, amendment or enactment of any law for the proposed privatization to be carried out
- xii. an evaluation of the entity to be privatized
- xiii. any proposals on how Kenyans can participate in the transaction
- xiv. any other relevant information.

34. Clause 30 of the Bill provides that during the preparation of a privatization proposal, the Authority shall undertake consultations on the privatizations to be implemented under the privatization programme.

35. Clause 31 of the Bill provides that upon preparation of a privatization proposal under section 30, the proposal shall be approved by the Board and submitted to the Cabinet Secretary for approval.

36. Clause 32 of the Bill provides that upon approval of a privatization proposal under section 31, the determined and approved method of privatization shall be effected in the manner specified in the Second Schedule.
37. Clause 33 of the Bill provides that the Privatization Authority shall undertake a valuation for each privatizations to assist in the implementation of the privatizations proposal. The valuation shall be performed by a qualified person appointed by the Authority.
38. Clause 35 of the Bill provides for general restrictions. It provides that a state corporation to which the section applies shall not—
- i. allow the assets of the public entity to be dissipated
 - ii. incur any liabilities, other than in the ordinary course of business, without the prior written approval of the Cabinet Secretary
 - iii. disclose information, other than publicly, if there is a reasonable risk that the disclosure would give an advantage to a person who might compete in the privatizations
39. Clause 36 of the Bill provides that a state corporation undergoing privatizations shall not undertake any new capital investment or disposal unless approved by the Cabinet Secretary.
40. Clause 37 of the Bill provides that the National Government or the public entity undergoing privatizations shall not extend credit or provide financing for the purchase of the shares.
41. Clause 38 of the Bill provides that a public entity undergoing privatizations shall—
- i. keep up-to-date business records and books of accounts
 - ii. maintain an up-to-date register of all fixed assets
 - iii. document all legal and other obligations of the entity
42. Part V (Clauses 39- 42) of the Bill provides for privatizations agreement specifying who and when an agreement can be executed. It further provides for the publication of finalized privatizations.
43. Part VI (Clauses 43-44) of the Bill provides for how the proceeds of privatizations shall be handled.
44. Part VII (Clauses 45-53) of the Bill provides for objections and appeals. It provides the procedure for lodging an objection and appeal; establishment and conduct of the Privatization Review Board.
45. Part VIII (Clauses 54-57) of the Bill provides the financial provisions in respect of the Authority including the sources of funds, the financial year of the Authority, annual estimates, accounts and audit of the financial affairs of the Authority.

46. Part IX (Clauses 58-64) of the Bill provides the miscellaneous provisions. It provides for the annual report on the privatization programme; protection from personal liability; submission of information to the Authority; offences under the Act and the power of the Cabinet Secretary to make Regulations.
47. Part X (Clauses 65-71) of the Bill contains repeals, savings and transitional provisions. It provides for the effect of its enactment on existing legislation and the repeal of the Privatization Act, 2005.
48. The First Schedule to the Bill provides for the conduct of business and affairs of the Board.
49. The Second Schedule to the Bill sets out provisions on the methods of privatisation.
50. The Third Schedule to the Bill sets out the Administrative Procedures for the administration of objections and appeals under the Act.

PART III

3.0 PUBLIC PARTICIPATION AND STAKEHOLDER ENGAGEMENT ON THE BILL

3.1 LEGAL FRAMEWORK ON PUBLIC PARTICIPATION

51. Article 118 (1) (b) of the Constitution provides that:

“Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees.”

52. The National Assembly Standing Order 127 (3) and (3A) stipulates that:

*“(3) The Departmental Committee to which a Bill is committed shall **facilitate public participation on the Bill** through an appropriate mechanism including-*

(a) inviting submission of memoranda;

(b) holding public hearings;

(c) consulting relevant stakeholders in a sector; and

(d) consulting experts on technical subjects.

(3A) The Departmental Committee shall take into account the views and recommendations of the public under paragraph (3) in its report to the House.”

3.2 MEMORANDA RECEIVED ON THE BILL

3.2.1 THE NATIONAL TREASURY

53. The Director General Public Investment and Portfolio Management for the National Treasury appeared before the Committee on 22nd August 2023 and submitted as follows:

54. The National Treasury supported the Privatisation Bill, 2023 as it will cure the shortcomings and challenges associated with the current law (The Privatization Act, 2005). Prior to the Privatization Act, 2005, Privatisation transactions were guided by the Policy Paper on Public Enterprises Reforms and Privatisation of 1998, with the then Permanent Secretary to the Treasury (Incorporation) Act as the legal framework.

55. Privatisation Act, 2005 has not been as facilitative for privatisation transactions as was otherwise contemplated. In particular, the lengthy privatisation processes requiring approval decisions at various stages have proved to be inefficient and less suitable for achieving quick turnaround times that are often necessary to secure market values for transactions, among other benefits. In addition, some aspects of the Act are out of tune with the Constitution of Kenya 2010, and other laws that have since been enacted.

56. The requirement of the Privatisation Act, of 2005, to involve the National Assembly in the process of recruitment and appointment of Privatisation Commission members is inconsistent with the Constitution of Kenya, 2010, since the involvement of the National Assembly is envisaged for Independent Commissions established under the Constitution.

57. The Bill aims to enhance transparency, accountability, efficiency, and value for public resources in the privatisation processes. In addressing the gaps and weaknesses under the

current legal framework, the following areas among others, are notable in the Privatisation Bill, of 2023:

- i. The role of the National Assembly, The National Treasury and the Board of the Privatisation Authority is distinct and separate in ways that remove ambiguities and possible contradictions;
 - ii. Recognizing that the role of the National Assembly is legislation and oversight by the Constitution, it is not involved in approving Privatisation proposals for each entity;
 - iii. The National Assembly is not involved in the process of recruitment and appointment of members of the Privatisation Authority, since the involvement of the National Assembly is envisaged for Independent Constitutional Commissions and not state corporations such as the Privatisation Authority; and,
 - iv. A Privatisation Review Board is established to provide a mechanism for determining disputes and appeals under the proposed law or any other written law.
58. The National Treasury conducted public participation together with the Privatization Commission countrywide on the Privatisation Bill, 2023, through a process that involved receiving comments, inputs and memoranda from members of the public in person and also by post and electronic mail. Public participation in person which aimed at reaching all the forty-seven (47) counties was undertaken in Nairobi, Mombasa, Kisumu, Eldoret, Nyeri, Garissa and Machakos on various dates between 31st January 2023 and 7th February 2023.
59. The comments and inputs received were considered in the Privatisation Bill itself, as indicated in the correspondence between the National Treasury and the Office of the Attorney General. The Cabinet approved the Privatisation Bill, 2023, and the repeal of the Privatization Act, 2005.
60. Additionally, The National Treasury has proposed amendments to four sections of the Bill, which it felt, if left uncorrected, may work against the purpose and objectives for which the proposed law is intended to serve. The four sections are:

Clause 27 on the Technical Advisory Committee

61. Delete Clause 27 and retain the steering Committee as per the current Act (Privatization Act, 2005) and replace '*permanent Secretary*' with '*Principal Secretary*' to Clause 27 of the proposed Bill to read as follows:

27(1) For each privatisation, there shall be a Steering Committee to implement the privatisation on behalf of the Commission subject to any directions of the Commission.

- (2) The Steering Committee shall comprise the following members-*
(a) the members of the Commission described in paragraphs (b) and (c) of section 5(1);
(b) the Principal Secretary of the Ministry with responsibility over the asset or service being privatized; and
(c) such members of the commission as the commission specifies.

Justification

Implementation of privatisation transactions, once approved, ought to be an internal matter of the Privatisation Authority for which the Authority is solely accountable. The Authority may however procure the services of external service providers on a need basis.

Committee Observation

The Committee agreed with the proposed amendment.

Clause 30

62. Expunge Clause 30 in its entirety.

Justification

Engagement with relevant stakeholders is a common feature throughout the entire Privatisation process. To require stakeholder engagement specifically at the stage of proposal preparation which essentially is a technical output stage informed by the commercial circumstances of the individual entity is not necessary, and would only cause unnecessary delays in the process.

Committee Observation

The Committee agreed with the proposed amendment.

Clause 31

63. The current section 31 proposal be re-drafted as follows:

- 31 (1) Upon preparation of a Privatisation proposal under section 30, the proposal shall be approved by the Board and submitted to the Cabinet Secretary.*
(2) The Cabinet Secretary shall present the Privatisation proposal specified in subsection (1) to the Cabinet for approval.

Justification

This is to avoid the risks associated with concentrating the decision-making on such a weighty and politically sensitive office (Cabinet Secretary).

Committee Observation

The Committee agreed with the proposed amendment.

Clause 68

64. Amend the Clause by re-drafting and deleting '*that may be completed within twelve months from the date of commencement of this Act,*' to read as follows:

68(1) Upon commencement of this Act, the Privatisation of entities published under Gazette Notice No. 8739 of the 14th August 2009 shall lapse.

(2) Notwithstanding subsection (1) any ongoing Privatisation under the repealed Act shall be determined and finalized in accordance with this Act.

Justification

It is not advisable to prescribe timelines on the transition of ongoing Privatisation as there may arise exogenous factors, such as; litigations, that could delay the completion of a transaction in good time as may otherwise, planned

Committee Observation

The Committee agreed with the proposed amendment.

3.2.2 PRIVATIZATION COMMISSION

65. The Privatization Commission appeared before the Committee on 22nd August 2023 and submitted as follows:

Clause 2(1)

66. Amend the definition of Privatization to read as follows:-

"Privatization" means a transaction or transactions that result in a transfer, other than to a public entity, of the assets of a public entity including the shares in a public entity."

Justification

Transfer of shares/shareholding cannot be done in isolation of the assets.

Committee Observation

The Committee was of a different view that the definition provided in the Bill was adequate within the purposes of the Bill.

New Clause 24A

67. Insert a new clause 24A immediately after clause 24 of the Bill to provide as follows, "*A Privatization that entails the transfer of a public interest in a public entity shall not be implemented unless it is included in the Privatization Programme.*"

Justification

This will ensure that all privatizations are undertaken in line with the Privatization Act. Section 22(2) of the Privatization Act, 2005, has a similar provision.

Committee Observation

The Committee agreed to the proposed amendment.

Clause 27

68. Delete the Clause and retain the steering Committee as per the Privatization Act, 2005. Replace the words “*Permanent Secretary* with *Principal Secretary*” and “*Commission* with *Board*” to read as follows;

“27 (1) For each Privatization, there shall be a Steering Committee to implement the Privatization on behalf of the Authority subject to any directions of the Board.

(2) A steering Committee shall comprise the following members-

(a) the members of the Board described in paragraphs (b) and (d) of section 10(1);

(b) the Principal Secretary of the Ministry with responsibility over the asset or service being Privatized; and

(c) Such members of the Board as the Board shall specify.”

Justification

Implementation of Privatization transactions, once approved ought to be an internal matter of the Privatization Authority for which the Authority is solely accountable. The Authority may, however, procure the services of external service providers on a need basis.

Committee Observation

The Committee agreed to the proposed amendment.

Clause 28(d)

69. Amend by replacing the word “*Cabinet Secretary*” with “*Cabinet:*” to read as follows;

“Any other method approved by the Cabinet in the approval of specific privatization proposals”.

Committee Observation

The Committee agreed with the proposed amendment.

Clause 29 (2) (l)

70. Delete Clause 29 (2) (l)

Justification

The items listed in clause 29(2) which form the contents of the Privatization proposal are the outcome of an evaluation. The clause is therefore redundant.

The Committee agreed to the proposed amendment.

3.2.3 PUBLIC PROCUREMENT REGULATORY AUTHORITY (PPRA)

77. The Public Procurement Regulatory Authority appeared before the Committee on 22nd August 2023 and submitted proposed amendments to the Second Schedule to the Bill as follows:

Paragraph 2 (3)

78. Amend by adding advertisements in free-to-air television stations and two radio stations of national reach. Advertisements on the Authority's website should not be optional. The advertisement should be for a minimum of twenty-one (21) days.

Justification

This shall enable a wider reach of public participation in the tendering process in cognizance of Article 227 of the Constitution of Kenya, 2010 and the Public Procurement and Asset Disposal Act, 2015. The twenty-one (21) days shall give ample time for potential tenderers to participate and give a timeframe for conducting this activity.

Committee Observations

The Committee was of the view that paragraph 2(3) of the Schedule was adequate since it provides for the advertisement of notice inviting expressions of interest in the Government tenders' portal, or on the Privatization Authority's website and in at least two newspapers of nationwide circulation.

Paragraph (2) 5

79. Amend Paragraph 2 (5) to ensure the conduct of the evaluation process should be within 30 days of the opening of applications. There is a need to specify who opens the applications upon closing. There is a need for a separate team/ Committee appointed by the Managing Director other than the evaluation Committee to open the applications. The opening Committee should maintain records relating to the opening of the applications.

Justification

This shall be in line with PPADA, 2015, and give a timeframe for this activity. This will ensure the segregation of responsibilities.

Committee Observation

The Committee was of the view that the provisions of the Public Procurement and Asset Disposal Act are applicable and that its provisions need not be restated in the Schedule

Paragraph 6

80. Amend Paragraph 6 to ensure the submission of the evaluation report by the accounting officer to the Board for approval within 7 days after the evaluation.

Justification

This shall enable timely submission of the evaluation report to the accounting officer before submitting the report to the Board.

Committee Observation

The Committee agreed to the proposed amendment

Paragraph 2(7)

81. Amend paragraph 2 (7) to ensure;
- a) Notification should be done within 5 days.
 - b) The candidates/shortlisted persons shall be given 14 days to fill in their Request for Proposal and submit.

Justification

This shall be in line with PPADA, 2015, and also assign the timeframe to the activity.

Committee Observation

The Committee agreed to the proposed amendment.

82. Amend paragraph 2 (7) by inserting a new sub-paragraph to read:

“(2) The request for proposal document shall at minimum set out the following—

- a) Instructions for the preparation and submission of the proposal*
- b) any requirement that evidence be provided of the qualifications of the person submitting the proposal*
- c) an explanation of where and when proposals shall be submitted,*
- d) a statement of the period during which proposals must remain valid;*
- e) the procedures and criteria to be used to evaluate and compare the proposals;”*

Justification

It will enhance the quality of proposals received and ensure fairness and objectivity in the evaluation of proposals.

Committee Observation

The Committee agreed to the proposed amendment.

Paragraphs 2(4) and 2(8)

83. Amend sub-paragraphs 4 and 8 of paragraph 2 by inserting the words “*technical*” before the word “*committee*”.

Committee Observations.

The Committee rejected the proposed insertion of a new definition of “divestiture”. Further, it was of a different view on the proposal to amend the definition “privatization” since as it is currently worded, it fits within the purposes of the Bill.

Clause 3.

93. Amend Clause 3 by adding the following objects:

- i. Prohibit restrictive or unfair trade practices in the Privatization process.
- ii. Promote openness and public participation in Privatization programmes in Kenya.

Justification.

For the comprehensiveness of the Authority’s regulatory role since the objects stipulated are limiting

Committee Observations

The Committee was of a different view and noted that the objects and purposes of the Bill as provided were proper and that they were not limiting.

Clause 5

94. Amend Clause 5 by including the following in the guiding principles of the Act:

- a) *Enhancing Economic Efficiency*
- b) *Lessening Fiscal burden*
- c) *Expanded or Increased Ownership to private investors for effective governance.*
- d) *Boost growth of Capital Markets*

Justification

For comprehensiveness of the Authority’s regulatory role since principles, as stipulated, are limiting and not comprehensive.

Committee Observation

The Committee was of a different view that the guiding principles provided for in clause 5 were adequate and not limiting

Clause 9

95. Amend clause 9 to include the following additional functions:

- a) *Seek potential investors in public enterprises.*
- b) *to prepare the long-term divestiture sequence plan*

- c) *Maintain records, safeguard information, and establish such administrative procedures as shall ensure the confidentiality of information.*
- d) *Maintain close liaison with all relevant institutions in the process of Privatization.*
- e) *Publicize activities of the Privatisation programme.*
- f) *Monitor and evaluate the implementation of Privatization programs in Kenya.*

Justification

Important functions such as record management, liaison, publicity or monitoring and evaluation have been left out. These need to be explicitly stated.

Committee observation

The Committee agreed to the proposed additional function under paragraph (b & f).

Clause 10(1) (e)

- 96. Amend clause 10 (1) (e) to increase the number of Board Members not being public servants from four to six to ensure the independence of such members in the deliberations and resolutions of Board matters.

Justification

The number of independent Board members is limited.

Committee Observation

The Committee noted the proposed amendment by the stakeholders but observed that it would unduly expand the number of Board Members. However, the Committee recommended an increase in the membership under clause 10 (1) (e) from four to five to make the total number nine (9) instead of eight (8) which is an even number.

Clause 15 (3)

- 97. Amend Clause 15(3) of the Bill by deleting and substituting with the following:

15 (3) A person is qualified to be appointed as the Managing Director if that person—

- (a) holds a degree in either economics, accounting, finance, or any other relevant degree from a recognized institution.*
- (b) has 10 years of work experience of which 5 years shall be at senior management level in a relevant field; and*
- (c) meets the requirement of Chapter Six of the Constitution.*

Justification

The Bill needs to be clear on the qualifications of the Managing Director by specifying the number of years of working experience.

Committee Observation

The Committee agreed to the proposed amendment.

Clause 19

98. Amend Clause 19 by inserting new sub-clauses to read as follows;

3) Stakeholders shall provide input and representations on a draft Privatisation Programme for consideration before implementation within 14 days of formulation of the Programme.

(4) The Cabinet Secretary shall provide feedback on incorporation of stakeholder comments within 7 days at the end of the stakeholder engagement exercise.

(5) Where it is deemed or established by a relevant National Assembly Committee that there was no stakeholder engagement or input, the Programme shall be suspended.

Justification

Whilst it's laudable that the Bill has provided avenues for consultations, it fails to provide timelines and guarantees on feedback given by stakeholders before a Privatization programme is implemented.

Committee Observation

The Committee was of a different view that clause 19 of the Bill was adequate and that since public participation is a constitutional requirement, the whole gamut of its processes may not be spelt out in the Bill.

Clause 27(1)

99. Amend clause 27 (1) by deleting the words “*Managing Director*” and substituting therefor the word “*Board*”.

Justification

Appointment to the Membership to the Technical Advisory Committee should be through the Board and not the Managing Director.

Committee Observation

The Committee recommended the retention of the Steering Committee as provided for under section 27 of the existing Privatization Act, 2005.

Clause 27(2)

Justification

To speed up the process.

Committee Observation

The Committee agreed to the proposed amendment.

Paragraph 2 (13)

88. Amend by inserting that notifications to be done immediately after approval by the Cabinet Secretary within 7 days.

Justification

This shall be in line with the Constitution, 2010 and PPADA, 2015 by providing information to the candidates.

Committee Observation

The Committee agreed to the proposed amendment

3.2.4 INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

89. ICPAK appeared before the Committee on 22nd August 2023 and submitted as follows:

Arrangement of clauses

90. Amend the arrangement of clauses by correcting the typographical error under section 28.

Justification

For clarity

Committee Observation.

The Committee agreed to the proposed amendment.

Clause 2.

91. Amend the definition of “Privatisation” under clause 2 by deleting “*A transaction that results in a transfer, other than to a public entity, of a national government shareholding in a public entity*” and substituting therefor with “*A transaction that results in a transfer to the private sector of part or the whole of the equity or other interest held by the National Government, directly or indirectly, in a public enterprise or entity.*”
92. Amend clause 2 of the bill by introducing a new definition of “divestiture” to mean “*Disposing of whole or part of the assets and or shares of a public enterprise*”.

Justification.

For clarity of interpretation and flexibility of government interest

Committee Observations.

The Committee rejected the proposed insertion of a new definition of “divestiture”. Further, it was of a different view on the proposal to amend the definition “privatization” since as it is currently worded, it fits within the purposes of the Bill.

Clause 3.

93. Amend Clause 3 by adding the following objects:

- i. Prohibit restrictive or unfair trade practices in the Privatization process.
- ii. Promote openness and public participation in Privatization programmes in Kenya.

Justification.

For the comprehensiveness of the Authority’s regulatory role since the objects stipulated are limiting

Committee Observations

The Committee was of a different view and noted that the objects and purposes of the Bill as provided were proper and that they were not limiting.

Clause 5

94. Amend Clause 5 by including the following in the guiding principles of the Act:

- a) *Enhancing Economic Efficiency*
- b) *Lessening Fiscal burden*
- c) *Expanded or Increased Ownership to private investors for effective governance.*
- d) *Boost growth of Capital Markets*

Justification

For comprehensiveness of the Authority’s regulatory role since principles, as stipulated, are limiting and not comprehensive.

Committee Observation

The Committee was of a different view that the guiding principles provided for in clause 5 were adequate and not limiting

Clause 9

95. Amend clause 9 to include the following additional functions:

- a) *Seek potential investors in public enterprises.*
- b) *to prepare the long-term divestiture sequence plan*

- c) Maintain records, safeguard information, and establish such administrative procedures as shall ensure the confidentiality of information.*
- d) Maintain close liaison with all relevant institutions in the process of Privatization.*
- e) Publicize activities of the Privatisation programme.*
- f) Monitor and evaluate the implementation of Privatization programs in Kenya.*

Justification

Important functions such as record management, liaison, publicity or monitoring and evaluation have been left out. These need to be explicitly stated.

Committee observation

The Committee agreed to the proposed additional function under paragraph (b & f).

Clause 10(1) (e)

96. Amend clause 10 (1) (e) to increase the number of Board Members not being public servants from four to six to ensure the independence of such members in the deliberations and resolutions of Board matters.

Justification

The number of independent Board members is limited.

Committee Observation

The Committee noted the proposed amendment by the stakeholders but observed that it would unduly expand the number of Board Members. However, the Committee recommended an increase in the membership under clause 10 (1) (e) from four to five to make the total number nine (9) instead of eight (8) which is an even number.

Clause 15 (3)

97. Amend Clause 15(3) of the Bill by deleting and substituting with the following:

15 (3) A person is qualified to be appointed as the Managing Director if that person—

- (a) holds a degree in either economics, accounting, finance, or any other relevant degree from a recognized institution.*
- (b) has 10 years of work experience of which 5 years shall be at senior management level in a relevant field; and*
- (c) meets the requirement of Chapter Six of the Constitution.*

Justification

The Bill needs to be clear on the qualifications of the Managing Director by specifying the number of years of working experience.

Committee Observation

The Committee agreed to the proposed amendment.

Clause 19

98. Amend Clause 19 by inserting new sub-clauses to read as follows;

3) Stakeholders shall provide input and representations on a draft Privatisation Programme for consideration before implementation within 14 days of formulation of the Programme.

(4) The Cabinet Secretary shall provide feedback on incorporation of stakeholder comments within 7 days at the end of the stakeholder engagement exercise.

(5) Where it is deemed or established by a relevant National Assembly Committee that there was no stakeholder engagement or input, the Programme shall be suspended.

Justification

Whilst it's laudable that the Bill has provided avenues for consultations, it fails to provide timelines and guarantees on feedback given by stakeholders before a Privatization programme is implemented.

Committee Observation

The Committee was of a different view that clause 19 of the Bill was adequate and that since public participation is a constitutional requirement, the whole gamut of its processes may not be spelt out in the Bill.

Clause 27(1)

99. Amend clause 27 (1) by deleting the words “*Managing Director*” and substituting therefor the word “*Board*”.

Justification

Appointment to the Membership to the Technical Advisory Committee should be through the Board and not the Managing Director.

Committee Observation

The Committee recommended the retention of the Steering Committee as provided for under section 27 of the existing Privatization Act, 2005.

Clause 27(2)

100. Amend clause 27 (2) by inserting a new paragraph (g) and (h) immediately after (f) as follows:

(g) A representative of the statutory body mandated with the regulation of accountancy profession in Kenya

(h) A technical representative from the relevant Private Sector.

Justification

The formation of technical committees is not comprehensive and skewed to the public sector to the disadvantage of the private sector and professional bodies, yet their input is critical in the process.

Committee Observation

The Committee recommended the retention of the Steering Committee as provided for under section 27 of the existing Privatization Act, 2005. It further noted that section 27 (2) (c) provides for “such members of the Commission as the Commission specifies” which is adequate as opposed to what is proposed by the stakeholder which could be questioned for locking out other professions or institutions.

Clause 33(2)

101. Amend Clause 33 (2) by deleting and substituting therefor with the following;

(1) The Authority shall appoint such a number of reputable valuers comprising the relevant experts in the sector in which the entity is domiciled to carry out the valuation of the public entity identified for Privatisation.

(2) The independent valuers envisaged under subsection (1) may include financial experts, Management consultants, legal experts, Tax experts, Actuarial firms, Property valuers, Plant & machinery valuers' plant & equipment valuers who properly value the fixed assets, Technical experts or Environmental auditors

(3) The valuers shall prepare a comprehensive report containing-

- (a) historical financial performance as well as future earnings potential and strategic value of the public entity;*
- (b) any unique assets and liabilities, contractual obligations, or litigation risks should be identified and factored into the valuation;*
- (c) recommended fair market valuation range as well as the underlying methodology, analyses, assumptions and limitations;*
- (d) the reserve price or minimum price for the sale of the enterprise assets or shares.*

(4) The Authority may recommend restating the valuation exercise if market conditions change materially post-valuation.

(5) Any changes to valuation scope or assumptions must be approved by the Authority before revising the valuation conclusions.

(6) The details of the valuation process shall be prescribed in the Regulations.

Justification

The omnibus provision that valuation be done by a qualified person appointed by the Authority negates professionalism and may be subject to abuse.

Committee Observation

The Committee noted that clause 33(2) of the Bill provides for a “qualified person” whereas the stakeholder recommends “reputable valuers comprising the relevant experts in the sector in which the entity is domiciled to carry out the valuation of the public entity identified for privatization”. The Committee observed “a qualified person” as provided carried with it safeguards and that in case of abuse, recourse is available in law. The Committee further noted that the additional proposals might be limiting particularly on the contents of the report and may be subject to amendments.

Clause 13B

102. Amend by inserting 13B to read,

The Board may, by a resolution either generally or in a particular case, delegate to a subcommittee of the Board or to a member, officer, employee or agent of the Authority, the exercise of any of the powers or performance of any of the functions of the Board.

Justification

Provision of powers to delegate.

Committee Observation

The Committee agreed to the proposed amendment.

New proposals

103. Amend by inserting Clause 13C to read;

“The Board may, by a resolution either generally or in a particular case, co-opt an additional member with relevant expertise for purposes of performance of any of the functions of the Board.”

Justification

Absence of powers to co-opt by the Board.

Committee Observation

The Committee agreed to the proposed amendment.

Insertion of New Clause 45A

104. Amend by inserting New Clause 45A to read as follows:

- (1) The Authority shall monitor and oversee the performance of privatized public- entities for a specified number of years' post-transaction.*
- (2) The privatized entities shall be required to submit periodic financial statements, operating statistics, compliance reports to the Authority to facilitate monitoring.*
- (3) The Authority may conduct field visits, inspections and audits of privatized entities to verify compliance and performance levels.*
- (4) Any breach of the contractual obligations which may include investment commitments, service standards, staff retention shall be an offence under the Act.*
- (5) The Authority may recommend cancellation of contracts, change of management or divestment or dilution of ownership in circumstances where there is continued breach of terms of the contract.*
- (6) The Authority may receive and consider any complaints during the post-privatisation period.*
- (7) The Authority shall annually publish consolidated monitoring reports on privatized entities and table them before Parliament.*
- (8) Suitable amendments should be made in relevant regulations to require privatized entities to provide information required by the commission for monitoring.*
- (9) The commission may hire industry experts/consultants to assist with monitoring privatized entities in infrastructure and public service sectors.*
- (10) The Authority may enforce through imposing penalties, cancellation of Privatisation or re-nationalization as per the provisions in the contract for any non-compliance.*

Justification

This is to make it more comprehensive for ease of reference and interpretation.

Committee Observation

The Committee was of a different view that the proposed new clause will unduly expand the mandate of the Privatization Authority.

3.2.5 PRICEWATERHOUSECOOPERS LIMITED (PWC)

105. PWC appeared before the Committee on 22nd August 2023 and submitted as follows:

Clause 2

106. Amend Clause 2(1) (a) by deleting and substituting therefor the definition of the term “public entity” to read

“(a) a national or county government-linked entity”

Justification

This will give a clear demarcation as to the organizations being referred to. The national and county government-linked entities will be covered under the scope of the Bill. Failure to give this accurate demarcation will lead to confusion and uncertainty.

107. Amend Clause 2(1) (b) by deleting and substituting therefor the definition of the term “Public entity” to mean *“a subsidiary of a National or a County Government entity”*

Justification

This will give a clear demarcation as to the organizations being referred to. The national and county government-linked entities will be covered under the scope of the Bill. Failure to give this accurate demarcation will lead to confusion and uncertainty.

Committee observations

The Committee observed that the definition of “public entity” in clause 2 of the Bill and the long title give the scope of the Bill and that it does not extend to county governments.

108. Amend Clause 2 by inserting the definition of the term *“county government-linked corporation”* as follows-

“County government-linked corporation” means a corporation in which the county government or a county government entity is a shareholder with less than fifty per cent of the share capital of the corporation;

Justification

With the devolved system of government, it is important to clarify the definition of county government-linked entities, in their role of advancing Privatization.

Committee Observation

The Committee observed that the definition of “public entity” in clause 2 of the Bill and the long title give the scope of the Bill and that it does not extend to county governments.

109. Amend clause 2 by inserting the definition of the term *“secondary markets”* to read:

“Secondary market” means financial market in which previously issued financial instruments such as shares, and other marketable securities are traded, either locally and/or internationally.”

Justification

This clause of the Bill needs to provide clarity on the various financial instruments that are issued in the financial market.

Committee Observation

The Committee noted that clause 2 of the Bill already provides for the definition of “secondary market”.

110. Amend clause 2 by deleting and substituting therefor the definition of the term ‘privatization’ to include transactions that result in the material sale or transfer, other than to a public entity, of the business, assets, and liabilities of a public entity.

Justification

One method of privatization that should be considered for addition is privatization through the sale or material transfer, other than to a public entity, of the business, assets, and liabilities of a public entity.

Committee Observation

The Committee was of a different view that the definition of “privatization” was adequate and it was within the purposes of the Bill.

Clause 4

111. Amend clause 4 of the bill by inserting a new sub-clause (f) to read as follows;
(f) *“material sales of assets or transfer of business of a public entity”*

Justification

One method of Privatization that should be considered for addition is Privatization through the sale or material transfer, other than to a public entity, of the business, assets, and liabilities of a public entity.

Committee observation

The Committee noted that the proposed amendment would not be in tandem with the intention of clause 4 of the Bill which is on the limitation of the application of the Act.

Clause 7

112. Amend clause 7 by inserting the following new sub-clause to read as follows—

“(e) providing technical support and assistance to county governments with regard to Privatisation by county governments.”

Justification

Clause 7 should encompass all the responsibilities that the Bill delegates to the Cabinet Secretary. Leaving this as it is, may lead to a lack of clarity by stakeholders.

Committee Observation

The Committee observed that the definition of “public entity” in clause 2 of the Bill and the long title give the scope of the Bill and that it does not extend to county governments.

Clause 9

113. Amend clause 9 by inserting the following new sub-clause to read as follows

“(h) monitor and evaluate the implementation of the privatization programme.”

Justification

Monitoring and evaluation is a crucial component of programme management. The Authority should be charged with the responsibility of monitoring and evaluating the implementation of the Privatization program. This will also tie into the Authority’s mandate to annually report the status of the Privatization program.

Committee observation

The Committee observed that the definition of “public entity” in clause 2 of the Bill and the long title clearly give the scope of the Bill and that it does not extend to county governments.

Clause 10(1)

114. Amend clause 10 (1) by inserting the following new sub-clause to read as follows:

“(g) The Chief Executive Officer / Secretary to the State Corporations Advisory Committee or a representative designated in writing.”

Justification

Adding the Chief Executive Officer / Secretary to the State Corporations Advisory Committee is a function created under section 26(3) of the State Corporations Act. They shall be important personnel bringing on board the requisite skills and experience to advise and make recommendations on the review and investigation of the affairs of the state as well as advise the Authority on matters pertaining to the need to privatize, reorganize or dissolve state corporations.

Committee Observation

The Committee agreed to the proposed amendment.

Clause 12 (1) (v)

115. Amend Clause 12 (1) (v) to read as follows;

The office of the chairperson or a member of the Board shall become vacant if the holder-

“(v) being convicted of a criminal offence and sentenced to imprisonment for a term exceeding six months or to a fine exceedingshillings”. -

Justification

The nature of how penal provisions of our laws as well as the pronouncements by the Judiciary, often prescribe financial penalties instead of and/or in addition to imprisonment. Therefore, it is important for a financial penalty to be prescribed that would mandate a Board member to vacate their office. This will address the gap identified.

Committee observation

The Committee was of a different view. The rationale behind clause 12(1) (c) (v) is that if a chairperson or a member of the Board is imprisoned for more than six months, the Board would have been deprived of the presence of that chairperson or member of the Board thus impeding the Board’s functions.

Clause 18(2)

116. Amend clause 18(2) by inserting the following new paragraph to read as follows;

“(d) Annually be audited and reported to monitor and evaluate the suitability and adequacy of the entities under the privatisation programme. Where candidates are deemed unsuitable for privatisation, the Authority shall recommend restructuring or other options for the entity to ensure its sustainability.”

Justification

This amendment will ensure the privatization programme remains current and relevant and also provide a way forward for entities deemed not suitable for privatization.

Committee observation

The Committee agreed to the first part of the proposed amendment but rejected the second part because it goes beyond the scope of the privatization programme.

Clause 27(1)

117. Amend clause 27 (1) and clause 27 (2) (f) by deleting the word “*Managing Director*” and substituting thereof with the word “*Authority*”.

Justification

The concentration of power to one individual may prove detrimental to the tenets of corporate governance. The reversion of such powers of appointment should be reverted to the Authority, to ensure oversight of any appointments.

Committee observation

The Committee recommended the deletion of the provision and its substitution with the provisions of section 27 of the Privatization Act, 2005, with amendments.

Clause 28

118. Amend clause 28 by inserting a new sub-clause (e) to read as follows:

“(e) privately initiated proposals”

119. Further, if the proposal is accepted, further amendments need to be made by adding a definition to the definition section under section 2 of the Bill as well as the Second Schedule to reflect this additional method of Privatization.

Justification

One method of privatization that should be considered for addition is privatization through privately initiated proposals. This allows the private sector to identify potential privatization candidates that the government may not have considered. The process, however, needs to be above Board.

Committee observations

The Committee noted that clause 28 (d) of the Bill provides for “such other method as the Board shall, with the approval of the Cabinet Secretary, determine” which is adequate and could include the proposal by the stakeholder.

Clause 33(1)

120. Amend clause 33(1) by deleting and substituting therefor with the following -

“(1) The Authority shall undertake a business and assets valuation for each Privatization, to assist in the implementation of the Privatization proposal.

Justification

The use of “*valuation*” in a standalone form may create ambiguity. The specification of business and assets valuation brings more clarity on the nature of valuation required to help facilitate privatization.

Committee observation

The Committee agreed to the proposed amendment.

Clauses 35, 36 and 37

121. Amend Clause 35, 36 and 37 by deleting the words “*state corporation*” and “*National Government*” and substituting therefor with the word “*public entity*” whenever they appear.

Justification

The use of various terminologies may lead to confusion and ambiguity

Committee observation

The Committee agreed to the proposed amendment.

Clause 35(b)

122. Amend clause 35 (b) by deleting and substituting therefor the following:

(b) “incur any liabilities and /or procure any assets, other than in the ordinary course of business, without prior written approval of the Cabinet Secretary; or”

Justification.

This amendment recognizes that in the ordinary course of business, an entity will accumulate both assets and liabilities, which could both be material to its business.

Committee observation.

The Committee agreed to the proposed amendment.

Clause 36

123. Amend clause 36 by deleting and substituting therefor with the following:

“A state corporation undergoing privatization shall not undertake any new capital investment or disposal, other than those under ordinary course, had been approved prior to the entry into the privatization programme, or are critical to business continuity, unless approved by the Cabinet Secretary.

Justification.

This amendment helps to ensure the business continuity and preservation of value of the entity even as it enters the privatization programme and prevents the risk of erosion of value through under-investment in the anticipation of a privatization.

Committee Observation.

The Committee agreed to the proposed amendment.

Clause 38

124. Amend clause 38 by inserting a new sub-clause (d) to read as follows;

“(d) Continue to operate in its ordinary course of business without prejudice to the Government of Kenya or potential purchaser.”

Justification

This ensures that the entities envisioned in the Bill continue to operate normally regardless of the proposed privatization to ensure that revenues are not affected.

Committee Observation

The Committee agreed to the proposed amendment.

Clause 43

125. Amend clause 43 by inserting a new subclause (2) to guide on where the proceeds of the direct sale of county government shareholding shall be paid to.

Justification

There is a lack of a clear direction as to where the proceeds of the direct sale of county government shareholding shall be paid.

Committee observation

The Committee observed that the definition of “public entity” in clause 2 of the Bill and the long title clearly give the scope of the Bill and that it does not extend to county governments.

Clause 44 (1)

126. Amend clause 44 (1) to provide where the proceeds of the direct sale of county government shareholding shall be paid to.

Justification

There is ambiguity to stakeholders and the public as to where the proceeds of the direct sale of County Government shareholding shall be paid.

Committee observation

The Committee observed that the definition of “public entity” in clause 2 of the Bill and the long title clearly give the scope of the Bill and that it does not extend to county governments.

Clause 44(2).

127. Amend clause 44 by deleting subclause (2)

Justification

This clause may not be practically implementable without a re-investment in the State Corporation or public entity, which may then reverse the privatization.

Committee Observation

The Committee agreed to the proposed amendment.

Clause 56(2)

128. Amend clause 56 (2) by inserting a new sub-clause (e) to read as follows:

“(e) the payment of the salaries, allowances and other charges in respect to external technical consultants.”

Justification

One of the expenses of the Authority shall be external technical consultants. This should be factored in when preparing the annual estimated expenditure of the Authority.

Committee Observation

The Committee rejected the proposed amendment and noted that the provision could be abused.

New Proposal

129. Amend the bill to create a Privatization Facilitation Fund.

Justification

Some privatizations may be affected by a lack of funds to pay up the strategy formulators, transaction advisors and valuation firms and so on. Right expertise is needed to ensure process

in effective, efficient, and timely. Need for the establishment of a Privatization Facilitation Fund sourced from:

- (i) Amounts appropriated by Parliament.
- (ii) Grants and donations.
- (iii) Success fees.
- (iv) Levies or tariffs imposed on the enterprise.

Committee Observation

The Committee noted that the proposed amendment falls within the ambit of Article 114 of the Constitution and therefore rejected the proposal.

3.2.6 NAIROBI SECURITIES EXCHANGE

130. The Nairobi Securities Exchange sent their written submissions on 23rd August 2023 and submitted as follows:

131. The Nairobi Securities Exchange supported the Privatisation Bill, 2023 in its entirety with the following new proposals:-

Part IX – Miscellaneous provision

132. Inserting the following paragraph

“the corporate rate of tax shall be in the case of a company newly listed on any securities exchange approved under the Capital Markets Act which has at least 10% of its issued share capital listed, 20% for five years commencing immediately after the year of income following the date of such listing”

Justification

This is to reduce corporate tax rates for newly privatized/listed entities from 30% to 20%. This is to allow newly listed entities sufficient time to restructure.

Committee observation

The Committee noted that the proposed amendment ought to be dealt with in a Finance Bill.

133. Inserting the following paragraph

“Notwithstanding any other provision of this Act, the commissioner shall refrain from assessing or recovering taxes, penalties or interest from a company that lists on the growth segment of the securities exchange in Kenya, in respect of any year of income prior to the date of listing”.

Justification

This clause provides tax reprieve for companies once they privatize/ list on a licensed stock exchange. This shall provide investor confidence to prospective investors that may doubt the viability of the company.


Committee Observation

The Committee noted that the proposed amendment ought to be dealt with in a Finance Bill.

PART IV

4.0 COMMITTEE RECOMMENDATION

134. The Committee, having considered the Bill and the submissions from members of the public and stakeholders, **recommends that the House approves the Bill with amendments.**

Signed.......... Date: 24th August 2023

**HON. CPA KURIA KIMANI, MP
(CHAIRPERSON)**

DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING

