

THE PRIVATISATION BILL, 2023

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A Bill for

AN ACT of Parliament to provide a regulatory framework for the privatisation of public entities including state corporations; to establish the Privatisation Authority; and for connected purposes.

ENACTED by Parliament of Kenya, as follows—

PART I—PRELIMINARY

Short title.

1. This Act may be cited as the Privatisation Act, 2023.

Interpretation.

2. (1) In this Act, unless the context otherwise requires—

“Authority” means the Privatisation Authority established under section 7;

“Board” means the Board of the Authority constituted under section 9;

“Cabinet Secretary” means the Cabinet Secretary for the National Treasury;

“Secretary” means the Corporation Secretary appointed in accordance with section 15;

“Managing Director” means the Managing Director of the Authority appointed under section 14;

“privatisation” means a transaction that result in a transfer, other than to a public entity, of the shareholding in a public entity;

“privatisation programme” means the privatisation programme provided for under section 17;

“privatisation proposal” means a proposal provided for under section 25;

“public entity” includes —

Cap. 446.

- (a) a government-linked entity;
- (b) a subsidiary of a national government entity;
- (c) a state corporation within the meaning of the State Corporations Act; or
- (d) any other entity declared as a public entity;

“Review Board” means the Privatisation Review Board established under section 38;

“secondary market” means financial market in which previously issued financial instruments such as bonds, options and futures are traded; and

“shares” means the shares in the share capital of a state corporation, and government-linked entity and includes share options.

Objects and purpose of the Act.

3. The objects of this Act are to—

- (a) provide for the establishment of the Privatisation Authority; and
- (b) streamline the regulatory and institutional framework for the implementation of a privatisation.

Limitation of application.

4. This Act shall not apply to—

- (a) sale of shares in the secondary market;
- (b) sale of shares by an entity that conducts investment and divestiture as part of its mandate;
- (c) sale of new shares to existing shareholders through a rights issue; and

- (d) any balance sheet reorganisation which may lead to dilution of the percentage of shares held by a public entity.

Guiding principles of the Act.

5. The implementation of this Act shall be guided by the following principles—

- (a) the national values and principles of governance set out in Article 10 of the Constitution;
- (b) transparency and accountability;
- (c) efficiency and sustainability; and
- (d) cost effectiveness and value for public resources;

PART II — COORDINATION AND OVERSIGHT OF PRIVATISATION MATTERS

Role of Cabinet Secretary.

6. The Cabinet Secretary shall have the following functions under this Act—

- (a) providing policy direction on matters related to privatisation;
- (b) co-ordinating the adherence to national, regional and international obligations relating to privatisation; and
- (c) development and formulation of the privatisation programme; and
- (d) oversee the administration of this Act.

Privatisation Authority.

7. (1) There is established an authority to be known as the Privatisation Authority.

(2) The Authority shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of—

- (a) suing and being sued;
- (b) taking, purchasing, charging and disposing of movable and immovable property;
- (c) entering into contracts; and
- (d) doing or performing all other things necessary for the proper discharge of its functions under this Act which may be lawfully done or performed by a body corporate.

Functions of the Authority.

8. The Authority shall—

- (a) advice the government on all aspects of privatisation of public entities;
- (b) facilitate the implementation of government policies on privatisation;
- (c) implement the privatisation programme;
- (d) implement specific privatisation proposals in accordance with the privatisation programme;
- (e) collaborate with other organisations, within or outside Kenya, as it may consider appropriate in furtherance of the objects of this Act;
- (f) take such measures as are necessary to ensure that the provisions of this Act are complied with; and
- (g) perform any other functions under this Act or any other legislation as may be conferred, from time to time, on the Authority.

Board of the
Authority.

9. (1) The Authority shall be managed by a Board which shall consist of—

- (a) a chairperson appointed by the President;
- (b) the Principal Secretary to the National Treasury or a designated representative;
- (c) the Principal Secretary in the Ministry for the time being responsible for matters relating to investment promotion or a designated representative;
- (d) the Attorney General or a designated representative;
- (e) four other persons, not being public officers, appointed by the Cabinet Secretary possessing relevant skills and competencies that may be required to achieve the objects of the Act; and
- (f) the Managing Director of the Authority.

(2) The chairperson and members of the Board appointed under subsection (1)(e) shall hold office for a term of three years and may be eligible for reappointment one further term of three years.

Functions of the
Board.

10. (1) The Board shall—

- (a) ensure the proper and effective performance of the functions of the Authority;
- (b) determine the mission, vision, purpose and core values of the Authority;
- (c) set and oversee the overall strategy and approve policies of the Authority; and
- (d) ensure availability of adequate resources for achievement of the Authority's objectives.

(2) In the performance of its functions under subsection (1), the Board shall have power to—

- (a) subject to the approval of the Cabinet Secretary, invest any of the Authority's funds that are not immediately required for the purposes of this Act;
- (b) monitor and evaluate the performance of the Authority;
- (c) open bank accounts for the funds of the Authority;
- (d) receive any grants, gifts, donations or endowments on behalf of the Authority; and
- (e) in consultation with the relevant agencies, determine and specify the terms and conditions for the appointment and emoluments of the staff of the Authority.

Vacancy in the Board.

11. (1) The office of the chairperson or a member of the Board shall become vacant if the holder—

- (a) dies;
- (b) resigns from office by notice in writing addressed to the appointing authority;
- (c) is removed from office on any of the following grounds—
 - (i) has been absent from three consecutive meetings of the Board without a reasonable explanation;
 - (ii) incapacitation due to prolonged physical or mental illness and is unable to discharge the duties of his or her office;

- (iii) failure to comply with the provisions of this Act relating to disclosure of interest;
- (iv) being adjudged bankrupt or entering into a composition scheme or arrangement with his or her creditors;
- (v) being convicted of a criminal offence; or
- (vi) being otherwise unable or unfit to discharge the functions of his office.

(2) Where a vacancy occurs in the membership of the Board, the appointing authority shall appoint a new member in accordance with the provisions of this Act.

Conduct of business and affairs of the Board.

12. The conduct of the business and affairs of the Board shall be as set out in the First Schedule.

Remuneration of the members.

13. The chairperson and members of the Board, other than the Managing Director, shall be paid out of the funds of the Authority such allowances or other remuneration as the Cabinet Secretary may determine.

Managing Director.

14. (1) There shall be a Managing Director of the Authority who shall be competitively recruited and appointed by the Board on such terms as may be specified in the instrument of appointment.

(2) The Managing Director shall, under the direction of the Board, be responsible for—

- (a) the day-to-day management of the affairs of the Authority;
- (b) the exercise and performance of the objectives, functions and duties of the Authority, and the general administration of the Authority; and

- (c) performance such other duties as may be determined by the Board.

(3) A person is qualified to be appointed as the Managing Director if that person possesses experience and expertise in either financial management, banking, economics, public policy or any other relevant skills and competencies that may be required to achieve the objects of the Authority.

(4) The Managing Director shall be appointed for a term of three years and may be eligible for reappointment for one further term not exceeding three years.

Corporation
Secretary.

15. (1) There shall be a Corporation Secretary who may be appointed by the Board on such terms as the Board may determine.

(2) The Secretary shall—

- (a) be the secretary to the Board;
- (b) record and keep minutes and other records of the Board;
- (c) ensure that members of the Board are aware of all relevant laws affecting the Authority; and
- (d) carry out such other functions as may be assigned from time to time by the Board or the Managing Director.

(3) The Secretary shall be responsible to the Managing Director.

Staff of the
Authority.

16. The Authority shall have such staff as it may require for the proper discharge of its functions under this Act, on such terms and conditions of service as the Board may determine.

PART III — PRIVATISATION PROGRAMME

Privatisation
programme.

17. (1) There shall be a programme to be known as the privatisation programme.

(2) The privatisation programme shall —

- (a) be formulated by the Cabinet Secretary in accordance with this Act and approved by the Cabinet;
- (b) specify the public entities identified and approved for privatisation; and
- (c) serve as the basis upon which a privatisation shall be undertaken.

(3) The privatisation programme shall be published in the *Kenya Gazette*.

Identification of
entities for the
programme.

18. (1) The Cabinet Secretary shall identify and determine the entities to be included in the privatisation programme.

(2) Without prejudice to the generality of subsection (1), the Cabinet Secretary shall, in the identification and determination of entities for privatisation, take into consideration—

- (a) the relevant government policies in respect of privatisation;
- (b) the need to avoid a privatisation that may result in an unregulated monopoly;
- (c) the expected benefits to be gained from a proposed privatisation; and
- (d) the sustainable development and protection of the economy.

Implementation of the programme.

19. The privatisation programme shall be implemented by the Authority in the prescribed manner.

Guiding principles of the programme.

20. The formulation and implementation of the privatisation programme shall be guided by the following principles—

- (a) the principles of public finance provided under Article 201 of the Constitution;
- (b) the maximization of value for money; and
- (c) the promotion of local participation, sustainable development and protection of the economy.

PART IV — PRE-REQUISITES FOR PRIVATISATION

Objectives of privatisation.

21. The objectives of a privatisation undertaken under this Act shall be to—

- (a) 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;
- (b) improve the infrastructure and the delivery of public services through the involvement of private capital and expertise;
- (c) reduce the demand for government resources;
- (d) generate additional revenue for the government through compensation for privatisations;
- (e) improve the regulation of the economy by reducing conflicts between the public sector's regulatory functions and commercial functions;

- (f) broaden the base of ownership in the Kenyan economy by encouraging private ownership of entities;
- (g) improve the efficiency of the Kenyan economy by making it more responsive to market forces; and
- (h) enhance and develop the capital markets in Kenya.

Methods of
privatisation.

22. The methods of privatisation shall include—

- (a) initial public offering of shares;
- (b) sale of shares by public tendering;
- (c) sale resulting from the exercise of pre-emptive rights; or
- (d) such other method as the Authority shall, with the approval of the Cabinet Secretary, determine.

Eligibility in a
privatisation.

23. (1) Subject to subsection (2), any person, whether Kenyan and non-Kenyan, is eligible to participate in a privatisation:

Provided that nothing in this section shall affect the application of any other law that may impose restrictions on participation by non-Kenyans.

(2) The Cabinet Secretary may direct the Authority to—

- (a) limit participation in any privatisation to Kenyans; or
- (b) ensure that there is a specified minimum level of participation by Kenyans in any privatisation.

(3) A government-owned entity shall not participate in a privatisation:

Provided that this subsection shall not apply to any government entity that conducts investment as part of its mandate.

(4) Subsection (3) 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.

Technical
advisory
committees.

24. (1) In the consideration of a proposed privatisation or the implementation of a privatisation, the Authority may constitute a technical advisory committee.

(2) A committee constituted under subsection (1) shall consist of representatives from the following institutions—

- (a) the National Treasury;
- (b) the Authority;
- (c) the Ministry responsible for the entity being privatised;
- (d) the entity to be privatised;
- (e) the Attorney General; and
- (f) any other relevant institution as may be determined by the Authority.

(3) A technical advisory committee shall operate on an *ad hoc* basis depending on the needs and technicalities of the proposed privatisation.

PART V — PRIVATISATION PROPOSAL

Privatisation
proposal.

25. (1) Where an entity has been identified for privatisation under this Act, the Authority shall prepare a privatisation proposal on the entity.

- (2) The privatisation proposal shall specify—
- (a) the purpose for the establishment or existence of the entity to be privatised and the extent to which that purpose or operation has been met including any inadequacies in meeting that purpose;
 - (b) 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 privatised;
 - (c) any recommendations for continuing to meet the purpose for establishment or existence of the entity to be privatised;
 - (d) the financial position of the entity to be privatised;
 - (e) the recommended method of privatisation;
 - (f) the estimated costs of implementing the proposed privatisation;
 - (g) any recommendations for dealing with the employees directly affected by the proposed privatisation including any benefits they are entitled to;
 - (h) the benefits to be gained from the proposed privatisation;
 - (i) a work plan for the proposed privatisation;
 - (j) any information relating to the repeal, amendment or enactment of any law for the proposed privatisation to be carried out;
 - (k) any proposals on how Kenyans can participate in the transaction;

- (l) a valuation of the privatisation to be undertaken; and
- (m) any other relevant information.

Approval of privatisation proposal. **26.** Upon preparation of a privatisation proposal under section 25, the proposal shall be approved by the Board with the concurrence of the Cabinet Secretary.

PART VI — IMPLEMENTATION OF A PRIVATISATION

Implementation of a finalised privatisation. **27.** Upon approval of a privatisation proposal under section 26, the determined and approved method of privatisation shall be effected in the manner specified in the Second Schedule.

No credit, etc., on sale of shares. **28.** Where the selected form of privatisation is sale of shares, the Government or the public entity that sells the shares shall not extend credit or provide financing for the purchase of the shares.

Obligation for record keeping. **29.** An entity undergoing privatisation shall—

- (a) keep up-to-date business records and books of accounts;
- (b) maintain an up-to-date register of all fixed assets; and
- (c) document all legal and other obligations of the entity.

PART VII— PRIVATISATION AGREEMENT

Privatisation agreement. **30.** Upon approval and implementation of a privatisation under Part VI, an agreement to give effect to a privatisation shall be executed in the prescribed manner.

Limits on when agreement may be signed.

31. (1) An agreement to give effect to a privatisation shall not be signed until the period for filing an objection has lapsed.

(2) An agreement to give effect to a privatisation shall not bind a public entity unless it is signed or countersigned by the Cabinet Secretary:

Provided that this section shall not apply to an agreement to sell an asset as part of a liquidation if the sale price of the asset is less than ten million shillings or such other amount as the Cabinet Secretary may prescribe.

(3) Where an objection or appeal has been lodged in accordance with section 36 or 37, the agreement to give effect to the privatisation shall not be executed until—

- (a) a determination with respect to the objection or appeal has been made;
- (b) the time for filing a notice of appeal has expired without such a notice being filed.

Regulation of monopolies.
No. 12 of 2010.

32. Where a proposed privatisation may result in an unregulated monopoly, the Authority shall, subject to the Competition Act, 2010—

- (a) ensure that the agreement to give effect to the privatisation provides for the regulation of the monopoly; and
- (b) seek the approval of the Cabinet Secretary on the agreement.

Publication of finalised privatisation.

33. (1) After an agreement to give effect to a privatisation becomes binding on the appropriate public entity, the Authority shall promptly publish a notice of the privatisation in the *Kenya Gazette*.

(2) The notice under subsection (1) shall specify—

- (a) a description of the entity being privatised;
- (b) a summarised description of the transaction used to give effect to the privatisation;
- (c) the names and addresses of the persons to whom the entity, operational control or operations are being transferred:

Provided that this paragraph shall not apply to a privatisation undertaken through initial public offering of shares; and

- (d) such other information as the Authority considers appropriate.

PART VIII — PROCEEDS OF PRIVATISATION

Proceed from sale of direct government equity holding.

34. Any proceeds from the sale of a direct Government equity holding shall be paid into the Consolidated Fund.

Proceeds from the sale of a state corporation's equity holding.

35. (1) Any proceeds from the sale of a state corporation's equity holding shall be deposited in a special interest-bearing account established for that state corporation in order to protect the erosion of the balance sheet of the state corporation.

(2) Subject to the approval of the Cabinet Secretary, the proceeds under subsection (1) may be used to —

- (a) liquidate the debts of the state corporation;
- (b) pay the costs of financial and organisational restructuring of the state corporation;
- (c) pay for capital investments by the state corporation;

- (d) defray the cost incurred by the Authority in the privatisation, which payment shall not exceed five percent of the proceeds of the privatisation or the actual cost incurred, whichever is lower; or
- (e) paid into the Consolidated Fund.

PART IX — OBJECTIONS, APPEALS AND REVIEW

Objections.

36. (1) Any person aggrieved by the determination of the Authority under this Act or implementation of the privatisation programme may lodge an objection.

(2) An objection under this section shall be lodged and determined in the manner specified by the Authority.

Appeals.

37. (1) Any person aggrieved by the determination of the Authority on an objection under section 36 may appeal to the Review Board.

(2) An appeal under this section shall be lodged and determined in the prescribed manner.

(3) On determination of a matter on appeal, the Review Board may—

- (a) annul anything done in the privatisation process, including annul the privatisation process in its entirety;
- (b) issue directions with respect to anything to be done or repeated in the privatisation process; or
- (c) order the payment of costs between the parties to the appeal.

(4) A person aggrieved by the decision of the Review Board in an appeal under this section may appeal to the High Court in the prescribed manner.

Establishment of the Privatisation Review Board.

38. There is established a board to be known as the Privatisation Review Board to determine disputes and appeals in accordance with this Act or any other written law.

Members of the Review Board.

39. (1) The Review Board shall consist of—

- (a) a chairperson who shall be an accredited arbitrator registered at the Chartered Institute of Arbitrators; and
- (b) two other persons, not being public officers or employees of the Authority, possessing relevant knowledge and experience in privatisation related matters.

(2) The chairperson and members of the Review Board shall hold office for a term of three years and may be eligible for re-appointment for one further term.

(3) A person shall be qualified for appointment under subsection (1) if that person—

- (a) is a citizen of Kenya;
- (b) holds a degree in a relevant field from a university recognised in Kenya;
- (c) is a member in good standing of the relevant professional association;
- (d) meets the requirements of leadership and integrity set out in Chapter Six of the Constitution.

Vacancy in the Review Board.

40. The office of the chairperson or a member of the Review Board shall become vacant—

- (a) at the expiration of the term of office of the chairperson or member;
- (b) where he or she dies or resigns from office;

- (c) if the member is otherwise unable or unfit to discharge the functions of his office;
- (d) if the member accepts any office the holding of which would make him or her ineligible for appointment to the office of member of the Review Board.

Secretary to the Review Board.

41. The Cabinet Secretary shall designate a public officer to be the secretary to the Review Board.

Conduct of proceedings.

42. Unless otherwise provided, the Review Board shall regulate its own procedures.

Remuneration of the Review Board.

43. The chairperson and members of the Review Board shall be paid such remuneration or allowances as the Cabinet Secretary may, in consultation with the Salaries and Remuneration Commission, determine.

Conflict of interest.

44. A member of the Review Board who has a direct or indirect interest in a matter before the Review Board shall declare the interest and shall not participate in any proceedings of the Review Board on the matter.

PART X — FINANCIAL PROVISIONS

Funds of the Authority.

45. The funds of the Authority shall comprise of—

- (a) monies allocated by Parliament for the purposes of the Authority;
- (b) monies accruing to or vesting in the Authority in the course of the exercise of its powers or the performance of its functions;
- (c) grants, donations, bequests or other gifts made to the Authority; and
- (d) monies from any other source provided for, donated or loaned to the Authority.

Financial year. **46.** The financial year of the Authority shall be the period of twelve months ending on the thirtieth June in each year.

Annual estimates. **47.** At least three months before the commencement of each financial year and in accordance with the Public Finance Management Act, 2012, the Board shall cause to be prepared estimates of revenue and expenditure of the Authority for the financial year.

No. 18 of 2012.

(2) The annual estimates shall provide for all the estimated expenditure of the Authority for the financial year, and in particular, the estimates shall provide for—

- (a) the payment of salaries, allowances and other charges in respect of the employees of the Authority;
- (b) the payment of pensions, gratuities and other charges in respect of the staff of the Authority;
- (c) the maintenance of buildings, other equipment and other property of the Authority; and
- (d) the acquisition, maintenance, repair and replacement of the equipment and other movable or immovable property of the Authority.

Accounts and audit. **48.** (1) The Authority shall keep proper books of accounts of the income, expenditure, assets and liabilities undertakings, activities, transactions and other business of the Authority.

No. 34 of 2015. (2) The accounts of the Authority shall be audited in accordance with the Public Audit Act, 2015.

Annual report. **49.** Within three months after the end of each financial year, the Authority shall prepare and submit to the Cabinet Secretary, an annual report on the operations of the Authority for the immediately preceding financial year.

PART XI — MISCELLANEOUS PROVISIONS

Report on the
privatisation
programme.

50. (1) The Authority shall prepare and submit to the Cabinet Secretary a report of activities undertaken under the privatisation programme in each financial year.

(2) The report submitted under subsection (1) shall form part of the annual report on privatisation which shall be tabled in Parliament by the Cabinet Secretary.

Records.

51. The Authority shall maintain updated records of each privatisation undertaken under this Act.

Protection from
personal liability.

52. No matter or action done by a member of the Board or by any officer, employee, or agent of the Authority shall, if the matter or action is done in good faith in the execution of the functions, powers or duties of the Authority under this Act, render the member, officer, employee or agent personally liable to any action, claim or demand.

(2) The provisions of subsection (1) shall not relieve the Authority of any liability to pay compensation or damages for any injury or damage caused by the exercise of any power under this Act or any other written law or by the failure, wholly or partially, of any works.

Information to the
Authority.

53. (1) In the implementation of this Act, a public entity to which this Act applies shall provide the Authority with such information as may be necessary to effectively implement the privatisation.

(2) The information given, furnished or maintained or required to be given, furnished or maintained under this Act shall be true, complete and accurate.

(3) Any information required under subsection (1) shall be submitted to the Authority within fourteen days of receipt of a request for information.

Confidential information.

54. (1) Any information issued to or sought by the Authority under this Act is confidential and shall not be disclosed unless with the written approval of the Authority.

(2) No person carrying out duties or responsibilities under this Act shall disclose any information or other data of a confidential nature obtained by virtue of their said authority, duties and responsibilities to any other person without the approval of the Authority.

Regulations.

55. The Cabinet Secretary may make Regulations generally for the better carrying out of the provisions of this Act.

PART XII — REPEALS, SAVINGS AND TRANSITIONAL PROVISIONS

Interpretation of Part.

56. (1) In this Part—

“Commission” means the Privatisation Commission established under the repealed Act;

“Tribunal” means the Privatisation Appeals Tribunal established under the repealed Act; and

No. 2 of 2005.

“repealed Act” mean the Privatisation Act, 2005.

(2) The Authority shall be the successor to the Commission existing immediately before the commencement of this Act.

Repeal of No. 2 of 2005.

57. The Privatization Act, 2005 is repealed.

Transitional provisions.

58. (1) Any rights and obligations of the Commission existing at the commencement of this Act shall, by virtue of this subsection, vest in the Authority.

(2) Any reference in any written law, document or instrument to the Commission shall be deemed to be a reference to the Authority;

(3) Any rights and obligations vested in or enforceable by or against the Commission shall, by virtue of this subsection, be vested in, or become enforceable by or against the Authority.

(4) Any asset and liabilities held or imposed on the Commission shall, by virtue of this subsection vest in the Authority.

Ongoing privatisations.

59. Any ongoing privatisation under the repealed Act shall be determined and finalised in accordance with this Act.

Members of the Commission.

60. Any person who was a member of the Commission immediately before the commencement of this Act shall be deemed to be a member of the Board of the Authority for the unexpired period of that person's tenure.

Staff of the Commission.

61. Any person who immediately before the commencement of this Act was an officer or employee of the Commission shall be deemed to be a member of staff of the Authority for the unexpired period of that person's tenure.

Members of the Tribunal.

62. Any person who was a member of the Tribunal immediately before the commencement of this Act shall be deemed to be a member of the Review Board for the unexpired period of that person's tenure.

DRAFT FOR PUBLIC COMMENTS

FIRST SCHEDULE

(s. 12)

CONDUCT OF BUSINESS AND AFFAIRS OF THE BOARD

1. Meetings

(1) The Board shall hold at least four meetings in every financial year.

(2) The notice for a meeting of the Board shall be in writing, and shall be for a period of at least seven days from the expected days of the meeting.

(3) The chairperson shall preside over all meetings and in the absence of the chairperson, by a person elected by the Board at the meeting for that purpose.

(4) The chairperson may, on the written request made by at least half of the members of the Board and within seven days of the request, convene an extraordinary meeting at such time and place and the chairperson may appoint.

(5) The Board may invite any person to attend any of its meetings and to participate in its deliberations, but such person shall not have a vote in any decision of the Board.

2. Conflict of interest and disclosure

(1) If a person is present at a meeting of the Board or any committee at which any matter is the subject of consideration and in which matter that person is directly or indirectly interested in a private capacity, that person shall as soon as is practicable after the commencement of the meeting, declare such interest.

(2) The person making the disclosure of interest under subsection (1) shall not, unless the Board or committee otherwise directs, take part in any consideration or, discussion of, or vote on any question touching on the matter.

(3) A disclosure of interest made under subparagraph (1) shall be recorded in the minutes of the meeting at which it is made.

(4) No member of the Board or officer, employee or agent of the Authority shall enter into a service contract or trade with the Authority.

3. Quorum

The quorum for the conduct of business at a meeting of the Board shall be two-thirds of the total number of members of a Board or the number nearest to but not less than two-thirds of all the members of the Board.

4. Resolution of the Board

A decision of the Board shall be by a majority of the members present and voting and, in the case of an equality of votes, the person presiding at the meeting shall have a casting vote.

5. Rules of procedure

Subject to this Act, the Board shall determine the procedure for the conduct of its business and cause to be kept records of minutes of its proceedings and decisions.

DRAFT FOR PUBLIC COMMENTS

SECOND SCHEDULE

(s. 27)

METHODS OF PRIVATISATION

1. Initial public offering of shares

Where the selected method of privatisation is through initial public offering of shares, the offering of shares shall be undertaken in accordance with the Capital Markets Act.

2. Sale of shares by public tendering

Where the selected method of privatisation is through sale of shares by public tendering, the following procedure shall apply—

Invitation to tender

- (a) the notice of invitation to tender on the sale of shares shall be published in the Government tenders' portals or on the Authority's website and in at least two newspapers of nationwide circulation and shall contain at a minimum—
- (i) necessary information on the scheduled date of bidding;
 - (ii) an invite to prospective bidders to obtain the sales prospectus;
 - (iii) information on the timelines for closure of bids;
 - (iv) details on any fees or charges to be paid in respect of the tender;
 - (v) any other relevant information;

Modifications of tender documents

- (b) the Authority may, on its own initiative or in response to an inquiry by a tenderer, amend the tender documents—
- (i) at any time before the closure of the tendering period;

- (ii) by issuing an addendum without materially altering the substance of the original tender;
- (c) The addendum issued under subparagraph (b) —
 - (i) shall be deemed to be part of the tender documents;
 - (ii) promptly provided to each person to whom the Authority provided copies of the tender documents;

Modification of bids

- (d) Before closure of the tendering process, a tenderer may, in writing, modify or withdraw a bid and in accordance with the procedures for submitting tenders.

Opening and evaluation of tenders

- (e) the successfully submitted tenders shall be evaluated by an *ad hoc* tender evaluation committee constituted by the accounting officer of the Authority consisting of representatives from —
 - (i) National Treasury;
 - (ii) the Authority;
 - (iii) the Ministry responsible for the entity being privatised;
 - (iv) any other relevant institution as may be determined by the Authority;
- (f) upon closure of the tendering period, the tender evaluation committee shall promptly and publicly open the submitted tenders reading out aloud the names of the tenderers and record the opened tenders in the tender opening register;
- (g) those submitting tenders or their representatives may attend the opening of tenders;
- (h) the evaluation of tenders shall be in accordance with the procedures and criteria set out in the tender documents and the provisions of this Act.

- (i) the evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders which report shall be approved by the Board with the concurrence of the Cabinet Secretary;

Notice of proposed Transfer

- (j) Upon determination and award of tender, the Authority shall publish a notice in the *Kenya Gazette* of the determination.

3. Sale resulting from the exercise of pre-emptive rights

(1) Where the selected method of privatisation is through sale resulting from the exercise of pre-emptive rights, the sale shall be undertaken in accordance procedure specified in the respective entity's charter documents.

(2) Where the charter documents of the entity do not provide a procedure for exercising and sale of a pre-emptive right, the provisions of the Companies Act, 2015 shall apply.

DRAFT FOR PUBLIC COMMENTS

MEMORANDUM OF OBJECTS AND REASONS

The principal object of this Bill is to provide a revised regulatory framework for the privatisation of public entities with a view to improving the efficiency and competitiveness of Kenya's productive resources.

The structure of the Bill is as follows:

Part I (Clauses 1-5) of the Bill provides for preliminary matters including the short title and interpretation of terms used in the Bill with a technical meaning. It further sets out the transactions to which the Act shall not apply

Part II (Clauses 6-16) of the Bill provides for the coordination and oversight of privatisation matters. It spells out the functions of the Cabinet Secretary; establishment, functions and administration of the Privatisation Authority; and the appointment and functions of the Managing Director, the Corporation Secretary and staff of the Authority.

Part III (Clauses 17-20) of the Bill deals with the privatisation programme. It makes provisions for the development and implementation of the programme and the guiding principles thereto.

Part IV (Clauses 21-24) of the Bill makes provision for the pre-requisites for privatisation. It provides for the objective and methods of privatisation; who is eligible to participate in a privatisation and empowers the Authority to establish technical advisory committees in the consideration or the implementation of a privatisation.

Part V (Clauses 25-26) of the Bill deals with a privatisation proposal. It provides for form of the proposal and its approval.

Part VI (Clauses 27-29) of the Bill provides for implementation of a privatisation.

Part VII (Clauses 30-33) of the Bill provides for privatisation agreement.

Part VIII (Clauses 34-35) of the Bill provides for the manner in which the proceeds of privatisation shall be handled.

Part IX (Clauses 36-44) of the Bill provides for objections, appeals and review. It provides the procedure for lodging and objection and appeal; establishment and conduct of the Privatisation Review Board.

Part X (Clauses 45-49) 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.

Part XI (Clauses 50-55) of the Bill provides the miscellaneous provisions. It provides for the report on the privatisation programme; protection from personal liability; submission of information to the Authority; and the power of the Cabinet Secretary to make Regulations.

Part XII (Clauses 56-62) of the Bill repeals, savings and transitional provisions. It provides for the effect of its enactment on existing legislation and for the repeal of the Privatization Act, 2005.

The Schedule to the Bill provides for the conduct of business and affairs of the Board and sets out provisions on the methods of privatisation.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

The Bill confers on the Cabinet Secretary the powers to make Regulations under the Act for the purposes of operationalizing the Act in order to implement the objectives. The Bill does not limit any fundamental rights or freedoms.

Statement on how the Bill concerns County Governments

The Bill does not concern County Governments as it does not affect the functions and powers of the County Governments as set out in the Fourth Schedule to the Constitution.

Statement of the Bill as a money Bill within the meaning of Article 114 of the Constitution

The Bill is not a Money Bill within Article 114 of the Constitution. However, the enactment may occasion additional expenditure to public funds.

Dated the 2023.

NJUNGUNA NDUNG’U
Cabinet Secretary to the National Treasury

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