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REPUBLIC OF KENYA

NATIONAL ASSEMBLY

ELEVENTH PARLIAMENT – FOURTH SESSION

THE DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING & TRADE

.....

REPORT ON THE COMPETITION (AMENDMENT) BILL, 2016

CLERKS CHAMBERS
DIRECTORATE OF COMMITTEE SERVICES
PARLIAMENT BUILDINGS
NAIROBI

OCTOBER, 2016

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ABBREVIATIONS

CAK: Competition Authority of Kenya

COMESA: Common Market for Eastern and Southern Africa

FMCG: Fast-Moving Consumer Goods

SMEs: Small and Medium Enterprises

CHAIRPERSON'S FOREWORD

This report contains the Committee's proceedings of the consideration of the Competition (Amendments) Bill, 2016 which was committed to the Committee on 20th July, 2016 pursuant to Standing Order 127.

The Bill proposes to align the Act with Article 176 of the Constitution which recognizes County governments and the principle of decentralization of services. The Bill also proposes to impose an obligation on stakeholders to provide information required by the Authority when conducting market inquiries either under direction of the Cabinet Secretary or on its own volition. Further, to strengthen remedial measures and penalties, the Bill proposes to amend the Act to enable the Authority impose administrative measures for abuse of dominance.

In line with regional and international best practices, the Bill proposes to amend the Act to allow the Authority to exclude mergers which have minimal impact on competition from the provision of the Act. Finally, the Bill proposes to amend the Act to empower the Authority to initiate investigations on its own motion for the expedient resolution of consumer complaints. Currently, the Competition Authority does not have powers to initiate its own investigations whenever the Authority discovers that there are defective goods being sold to consumers.

The Committee notes that the proposed amendments to various Sections of the Principal Act are important to seal some legislative gaps cited in the law and align them with the Constitution. In line with the Constitution of Kenya that creates two levels of government ie the National and County government, it is therefore necessary that all laws and regulations are aligned to this provision. For this reason, the Committee supports the bill as it will enhance consumer protection from unfair and misleading market conduct.

On behalf of the Departmental Committee on Finance, Planning & Trade 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 Competition (Amendments) Bill, 2016.

The Committee is grateful to the Offices of the Speaker and the Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings. The Committee wishes to thank the National Treasury for their participation in scrutinizing the Bill.

Finally, I wish to express my appreciation to the Honorable Members of the Committee who made useful contributions towards the preparation and production of this report.

HON. BENJAMIN LANGAT, MP

EXECUTIVE SUMMARY

The Competition (Amendment) Bill, 2016 was introduced in the National Assembly by the Leader of the majority Party, National Assembly on 19th July, 2016 and therefore committed to the Departmental Committee on Finance, Planning & Trade for consideration in line with the Standing Order 127. The Committee engaged Competition Authority of Kenya and the National Treasury whose views are contained in this report.

The Competition (Amendment) Bill, 2016 contains a total of 12 clauses which proposes to amend various Sections of the Principal Act in order to seal some legislative gaps cited in the law and align them with the Constitution. The amendment sets off by proposing to recognize County Government in the application of the Act, replacing the defunct"Local Authority".

The next amendment is to empower the Competition Authority to set threshold in order to create a possibility of excluding mergers with minimum impact from the provisions of this Act. The other major amendments include: obligating stakeholders to supply information when required to do so by the Authority when conducting any investigation, which it can initiate on its own motion or upon receipt of a complaint; address new emerging issues such as "the buyer powers"; and solving abuse of dominance administratively – proven to enhance problem solving.

MANDATE OF THE COMMITTEE

The Committee on Finance, planning & Trade is one of the Departmental Committees of the National Assembly established under Standing Order 216 and mandated to:-

(a) 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) Study the programme and policy objectives of ministries and departments and the effectiveness of the implementation.
(c) study and review all legislation referred to it;
(d) study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;
(e) 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;
(f) 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*); and
(g) Reports and makes recommendations to the House as often as possible, including recommendation of proposed legislation.

1.1.0 COMMITTEE MEMBERSHIP

Chairperson	The Hon. Benjamin Langat, MP
Vice Chairperson	The Hon. Nelson Gaichuhie, MP
Members	The Hon. Dr. Oburu Oginga, MP
	The Hon. Eng. Shadrack Manga, MP
	The Hon. Jimmy Nuru Angwenyi, MP
	The Hon. Ahmed Shakeel Shabbir Ahmed, MP
	The Hon. Sammy Mwaita, MP
	The Hon. Jones M. Mlolwa, MP
	The Hon. Anyanga, Andrew Toboso, MP
	The Hon. Joash Olum, MP
	The Hon. Patrick Makau King'ola, MP
	The Hon. Abdullswamad Sheriff, MP
	The Hon. Sumra Irshadali, MP
	The Hon. Ogendo Rose Nyamunga, MP
	The Hon. Iringo Cyprian Kubai, MP
	The Hon. Dennis Waweru, MP
	The Hon. Tiras N. Ngahu, MP
	The Hon. Sakaja Johnson, MP
	The Hon. Ronald Tonui, MP
	The Hon. Mary Emase, MP
	The Hon. Joseph Limo, MP
	The Hon. Lati Lelelit, MP
	The Hon. Kirwa Stephen Bitok, MP
	The Hon. Daniel E. Nanok, MP
	The Hon. Abdul Rahim Dawood, MP
	The Hon. Sakwa John Bunyasi, MP
	The Hon. Alfred W. Sambu, MP
	The Hon. Sammy Koech, MP
	The Hon. Abdikadir Ore Ahmed, MP

1.1.1 COMMITTEE SECRETARIAT

First Clerk Assistant	Evans Oanda
Third Clerk Assistant	Nicodemus Maluki
Third Clerk Assistant	Fredrick Otieno
Legal Counsel II	Emma Esendi
Research Officer III	Erick Ososi
Research Officer III	Sharon Rotino

1.1.2 CONSIDERATION OF THE BILL

The Competition (Amendments) Bill, 2016, was published on 24th June, 2016 and read a first time on 19th July, 2016 and thereafter committed to the Departmental Committee on Finance, Planning & Trade for consideration pursuant to Standing Order 127.

The Bill is necessitated by the need to enhance consumer protection from unfair and misleading market conduct. To achieve that, the bill proposes among other things, to strengthen remedial measures and penalties, to align the Act with Article 176 of the Constitution by recognizing County governments, to reduce the administrative burden on the Authority and facilitate investment through such merger requests, through setting a specific threshold for mergers which should be excluded from the provisions of the Competition Act.

Finally, the Bill proposes to amend the Act to empower the Authority to initiate investigations on its own volition for the expedient resolution of consumer complaints. This amendment will empower the Authority to initiate its own investigations in exercising its mandate in protecting consumers.

In processing the Bill, the Committee invited comments from the public by placing advertisements in the Daily Nation and Standard newspapers on Friday 22nd July, 2016 pursuant to Article 118 of the Constitution. The Committee received and consolidated submissions from Competition Authority of Kenya and met officers from the National Treasury whose views and comments are captured and contained in the body of the report.

1.0. BACKGROUND INFORMATION

The principal object of the competition (Amendments) Bill, 2016 is to enhance consumer protection from unfair and misleading market conduct. The Bill is necessitated by the challenges the Competition Authority has been experiencing when conducting market inquiries and when seeking for information from stakeholders. In order to address these challenges, the Bill proposes to impose an obligation on stakeholders to provide information required by the Authority when conducting market inquiries either under direction of the Cabinet Secretary or on its own motion. Further, to strengthen remedial measures and penalties, the Bill proposes to amend the Act to enable the Authority impose administrative measures for abuse of dominance.

The Bill proposes to align the Act with Article 176 of the Constitution which recognizes County governments and enhances the principle of decentralization of services. The Bill further proposes to amend the Act to allow the Authority to exclude mergers which have minimal impact on competition from the provision of the Act, in line with regional and international best practices. This amendment is meant to reduce the administrative burden on the Authority and facilitate investment through such merger requests, through setting a specific threshold for mergers which should be excluded from the provisions of the Competition Act.

Finally, the Bill proposes to amend the Act to empower the Authority to initiate investigations on its own motion for the expedient resolution of consumer complaints. Currently, the Competition Authority does not have powers to initiate its own investigations whenever the Authority discovers that there are defective goods being sold to consumers. This amendment will empower the Authority to initiate its own investigations in exercising its mandate in protecting consumers.

2.0. ANALYSIS OF THE CLAUSES OF THE COMPETITION (AMENDMENTS) BILL, 2016

The proposed amendments contained in the various clauses of the Bill are as hereunder presented.

(i).Clause 2 of proposes to amend Section 2 of the Act on interpretation: the amendment replaces "Local Authority" with "County Government" and also expands the definition of "undertaking".

Remark: the definition of "undertaking" is expanded to include corporate bodies, which is consistent with the objectives of the parent Act.

(ii).Clause 3 amends Section 5 of the Act on the application of the Act: the amendment replaces the phrase "local authority" with "County Government" in line with the Constitution of Kenya, 2010.

(iii).Clause 4 seeks to amend Section 18 of the Act which provides for the powers to hold inquiry: The amendment obligates stakeholders to provide information whenever required to do so.

(iv).Clause 5 proposes to amend Section 24 of the Act which provides for abuse of dominant position: the amendment introduces the issue of prohibition on abuse of buyer power which is essentially the exertion of influence by an undertaking as a purchaser in a bid to obtain favourable advantage from suppliers of products.

Remark: this amendment seeks to offer protection of consumers from unfair and misleading market conduct by some undertakings or groups of undertakings.

(v).Clause 6 amends Section 34 of the Act on the proposed decision of the Authority: the amendment seeks an inclusion of abuse of dominant position as one of the interventions of the Competition Authority once an infringement occurs.

Remark: this amendment seeks to offer protection of consumers from unfair and misleading market conduct by some undertakings or groups of undertakings.

(vi).Clause 7 amends Section 36 of the Act which provides for action following investigation: this amendment includes matters regarding to abuse of dominant position as among those that may be declared an infringement and therefore subject to investigation and subsequent recourse. Also, a penalty of 10% of annual gross turnover has been specified where an infringement has been determined.

(vii).Clause 8 amends Section 37 which provides for interim relief: the proposed amendment incorporates the issue of abuse of dominant position as among the three situations where the Authority can order stoppage of the practice pending investigation. The other two are restrictive agreements, practices and decisions; and restrictive trade practices applicable to trade associations.

(viii).Clause 9 amends Section 41 on mergers defined: the amendment enhances the provision of determining the control of an undertaking which is currently 50% of share capital to include the same on business or assets.

(ix).Clause 10 seeks to amend Section 42 on control of mergers: the proposed amendment changes from the current situation where the authority is mandated to declare exclusion of some mergers from the provision of the Act, to specify that the Authority will indeed set the threshold for exclusion of mergers.

Remark: This amendment intends to empower the Authority to set threshold for mergers in the Act, hence, implying that those whose impact is minimal may consequently be excluded from the provisions of the Act to ease the attendant administrative bottlenecks hindering investment.

(x).Clause 11 proposes to amend Section 47 which provides for revocation of approval of proposed merger: a penalty of 10% of the gross annual turnover has been proposed for falsifying information leading to violation of merger requirements. There is also a penalty of up to KSh. 10 million and 5 years jail term for any person party to the aborted merger in the event it is determined that s/he supplied materially incorrect or misleading information.

(xi).Clause 12 seeks to amend Section 70 which provides for offences and penalties: the amendment empowers the Authority to initiate investigations on its own motion or upon receipt of complaint. It further proposes that section E of part III of the Act which provides for investigations into prohibited practices shall be applied to the investigations concerning consumer complaints, albeit with necessary modifications and alterations.

Remark: the provision of dealing with consumer complaint is good, however, may occasion some administrative challenges given any consumer complaint will be required to be taken through entire process such as investigation; entry and search; Authority to take evidence; the Authority to make a decision; conducting of hearing conference for oral representation; Action; interim relief; settlement; publication of the Authority's decision and finally, appeals.

3.0. SUBMISSIONS FROM THE STAKEHOLDERS AND NATIONAL TREASURY COMMENTS

The submissions from the stakeholders and the subsequent views of the National Treasury on some of the clauses of the bill are as presented here below:

3.1 ANJARWALLA & KHANNA ADVOCATES

(i).Clause 2 proposes to amend Section 2 of the Act on interpretation

Proposal: Delete the definition of undertaking in the "Bill" and substitute with the following new definition "**undertaking**" means any business activity being carried on for gain or reward by any individual, a body corporate, incorporated body of persons, a trade association or a trust in respect of the production, supply and distribution of goods or the provision of any services".

Justification:

(a) The proposed amendment captures the future intention of an undertaking rather than what it is currently doing;
(b) The proposed amendment is therefore too far reaching and will result in transactions which do not require any merger assessment (because there is no "business" being undertaken at the time the transaction is effected) being notified;
(c) For instance, the new definition will capture the sale of "shelf companies" in the definition of undertaking;
(d) Shelf companies are usually created by persons such as company secretaries for sale to persons who may require a company. At the time of creation they do not undertake any activity for gain or reward and only start undertaking business for gain or reward after such sale;
(e) Therefore the sale of shelf companies has no effect on competition at all;
(f) If the proposed amendment of the definition of 'undertaking' is passed, a notification would need to be made to the Competition Authority every time a shelf company is sold (particularly as there are currently no automatic exclusions in relation to mergers) and therefore this method of obtaining a company will become impractical;
(g) Investors will therefore have to resort to incorporation of new companies which is currently a lengthy process and will unnecessarily slow down investment.

Treasury comment: *Appreciate the concern and propose that the definition of the word "undertaking" be re-worded to read as follows, 'undertaking means any business intended to be carried on, or carried on, for gain or reward by a person, a partnership or a trust in the production, supply or distribution of goods or provision of any service and includes a Trade Association.'*

(ii).Clause 4 seeks to amend Section 18 of the Act which provides for the powers to hold inquiry

Proposal: Delete the proposed subsection 18(6) and substitute therefor the following new subsection (6) –

"(6) Every person or undertaking shall be under an obligation to provide information requested by the Authority in fulfillment of its statutory mandate for conducting an inquiry or sectoral study regulated by this section, provided that no person or undertaking shall be bound to comply with an information request from the Authority, if the information request does not contain the following information:

(a) whether the person or undertaking is under investigation;
(b) the legal basis of the information request;
(c) the clear and specific purpose of the information request;
(d) a reasonable time period within which the information request should be complied with or within which a response should be provided as to why the information cannot be provided;
(e) penalties for non-compliance with the information request; and
(f) the person or undertaking's right to have the decision to request information from it reviewed by the Tribunal or a court of competent jurisdiction and provided further that no person or undertaking shall be under any obligation to provide any information to the Authority if the information provided could be used against such person or undertaking".

Justification:

(a) This provision is very broad and increases the Competition Authority's powers substantially;
(b) This proposed amendment also permits the Competition Authority to request information from professional advisors (such as lawyers who should be able to grant their clients legal privilege) or former employees;
(c) The clause should be drafted so that the information being requested should be very specific and relevant to the investigation being conducted.

Treasury comment: *The National Treasury does not support this amendment. The proposed amendment under the Bill is with reference to section 18 of the Act which provides for market inquiries and how the Authority is to conduct market inquiries. The amendment contained in the Bill will make it an obligation for the undertakings to provide information for market enquiries. The proposed amendment is on market enquiries and not investigations. Investigations fall under section 31 of the Act.*

(iii).Clause 10 seeks to amend Section 42 on control of mergers

Proposal: The power to set the threshold for a merger should remain within the powers of the Cabinet Secretary and it should be done in consultation with the Competition Authority as opposed to the proposal in the Bill to vest this power with the Competition Authority.

Justification:

(a) This will avoid the inherent conflict of interest and is also in line with international best practice;

(b) For example, under the South African Competition Act, the thresholds are set by the Minister of Trade and Industry in consultation with the Competition Commission. However, before making the determination of the thresholds, the Minister is required to publish in a gazette notice the proposed threshold and method of calculation and invite written submissions on the proposal.

Treasury comment: *The proposal has merit. The setting of merger thresholds should be done in consultation with the Cabinet Secretary for the National Treasury.*

(iv).Issue: The imposition of penalties and the conduct of an investigation should be separated.

New Proposal: The Act should be amended so that the power to determine the penalty is not given to the Competition Authority but is instead vested in the Tribunal.

Justification:

(a) Currently under the Competition Act, the Competition Authority is the investigator and decision maker in respect to the investigation and the financial penalties that should be imposed;
(b) By way of contrast the South African Competition Act (section59) provides that the Competition Tribunal may impose an administrative penalty following an investigation. The South African Competition Commission does not impose penalties on entities found to have contravened provisions on restrictive trade practices;
(c) This separation is necessary to avoid a scenario whereby the Authority is acting as the "police/investigator, prosecutor and judge".

Treasury comment: *The National Treasury does not support this amendment: The powers given to the Authority to levy penalties are meant to ensure compliance with the Act, while the mandate of the Tribunal is to arbitrate on appeals launched by parties from Authority's decisions. This is consistent with the powers given to other regulatory Authorities to levy penalties.*

(v).Issue: Section 21 (9) Penalties imposed for Restrictive Trade Practices offences

New Proposal: Amend section 21 of the Act in paragraph (9) by –

(a) deleting the words "to imprisonment for a term not exceeding five years" appearing immediately after the word "conviction"; and
(b) deleting the words "or both" appearing immediately after the word "shillings".

Justification:

(a) the best approach in controlling restrictive trade practices is imposition of financial penalties as opposed to imprisonment;
(b) restrictive trade practices are often committed by corporate entities for economic gain and therefore the effective way of achieving the objective is by imposing financial penalties since imprisonment is only applicable to natural persons;

(c) it would be prejudicial to hold employees of the entities liable for the conduct of entities which are separate legal entities.

Treasury comment: *The National Treasury does not support this amendment: A restrictive trade practice is one of the most serious forms of an anti-competitive conduct. Hence, criminal penalties imposed for Restrictive Trade Practices offences serves as a deterrent measure against would-be-offenders. Also the provision is in line with international best practices.*

(vi).Issue: Clarity on penalty applicable in failing to comply with the merger provisions to avoid double jeopardy

New Proposal: It should be made clear, that a person or undertaking can only be prosecuted under section 42(5) or 42(6) but not both as this would amount to a breach of the common law principle of double jeopardy.

Justification: Both subsections provide for the penalty applicable in failing to comply with the merger provisions under the Competition Act.

Treasury comment: *The National Treasury does not support this proposal and reiterates its position as proposed in the Bill.*

(vii).Issue: Section 42 Merger settlement process

New Proposal: Introduction of a merger settlement process in cases where parties have failed to notify the Competition Authority of a merger but there are mitigating factors and genuine reasons as to why the parties were unable to comply.

Justification: This may encourage more compliance from parties who were not aware of the merger regime in Kenya.

Treasury comment: *The National Treasury does not support this amendment as the concerns raised are already addressed in the proposed amendments under section 42.*

(viii).Issue: Section 47 Post-merger analysis

New Proposal: Post-merger analysis should be codified in the Competition Act and it should be made clear that only those matters related to the merger application or approval by the Competition Authority should be enquired into.

Justification:

(a) The Competition Authority has been requesting for information from parties that were part of a merger that was notified to and approved by the Competition Authority;
(b) Such post- merger analysis is not provided for under the Competition Act and it is of concern because the information that the Competition Authority is requesting does not seem to be related

to the merger analysis. For example, the Competition Authority has requested employee pay-roll information;

(c) It is best that there is a provision for this in the Act.

Treasury comment: *The National Treasury does not support this amendment. This proposal if accepted will hinder the Authority's ability to carry out post-merger compliance as provided for in section 47 of the Act.*

(ix).Issue: Dual or Triple merger notification requirements

New Proposal: A specific provision should be introduced in the Act to clarify that if a notification is made to a regional body the same does not need to be notified to the Competition Authority. In the case of notifications to the COMESA Competition Commission, the COMESA Treaty provides that the same merger does not have to be notified to the member state and any other member but this needs to be captured in the Kenyan Competition Act in order for this to apply in Kenya.

Justification:

(a) there is still no resolution on the applicability of the COMESA Competition Regulations and parties are still required to make dual notifications;

(b) in addition, with the looming operationalization of the East Africa Community Competition Act, there is no clarity on whether a triple notification will be required or not;

(c) this is making the completion of mergers very lengthy and time consuming and it seems unnecessary to have two or three agencies evaluating the competition effects of the same merger.

Treasury comment: *The National Treasury does not support this amendment. This proposal requires a regional consensus for any amendment to be made to the national laws.*

(x).Issue: Section 42 (5) De-criminalisation of Mergers

New Proposal: Section 42 (5) of the Act provides for criminal sanctions in respect of a failure to inform the Authority of a proposed merger. This failure should be a civil and not a criminal offence.

Justification: This does not conform with international best practice and should be amended accordingly.

Treasury comment: *The National Treasury does not support this proposal and reiterates its position as proposed in the Bill.*

(xi).Issue: Section 21 (1) Restrictive Trade Practices - Object and Effect

New Proposal: The application of section 21 of the Competition Act should be limited to agreements where there is implementation or the intention to implement a restrictive trade practice. The fines under this section can be quite significant and therefore companies that may qualify under the 'object' test but

have no intention to implement such a provision should not be found to be in breach of section 21 of the Competition Act.

Justification:

(a) The reference to "object" in section 21(1) means that agreements, decisions or concerted practices by undertakings will be prohibited despite there being no intention to implement them;
(b) For example, there was an investigation where a company was found in breach of the 'object' test despite having proved that such a provision was never enforced and was in fact contrary to the intention of the company;
(c) This is an onerous position and is not in line with international best practice.

Treasury comment: *The National Treasury does not support this proposal. International best practice provides that restrictive trade practices are to be determined on object or effect.*

(xii).Issue: Section (21) (3) (a) - (i), Vertical and Horizontal Restraints

New Proposal:

(a) a distinction should be made in relation to what practices under section 21(3) are prohibited in relation to vertical relationships and to horizontal relationships;
(b) With that clear distinction being made parties can be clear on their operational practices and penalties can be separated as vertical restrictions are generally less detrimental to competition than horizontal practices;
(a) a new subsection be added to the list in section 21(3) to make it clear that exclusive arrangements are considered a restrictive trade practice;
(b) Amend section 21 (8) (a) to read as follows: "a company and any subsidiary owned or controlled by it, or any subsidiary owned or controlled by that subsidiary company".

Justification:

(a) the Competition Authority has not issued any block exemptions in relation to restrictive trade practices;
(b) there is no distinction between vertical and horizontal practices, which is critical in the application of the restrictive trade practices provisions in the Competition Act;
(c) sections 21(3)(a) - 21(3)(c) are in the category of generally accepted horizontal restrictions and sections 21(3)(d) - 21(3)(i) are in the category of generally accepted vertical restrictions, however, in the Competition Act they are combined into one list;
(d) the Competition Authority is relying on the general provision in section 21(3) (i) which is in reference to any action that "otherwise prevents, distorts or restricts competition";
(e) it includes provisions that provide for making an application for exemption in respect of exclusivity arrangements but does not expressly make it clear that these types of arrangements are restricted;

(f) there are a number of small and medium sized businesses who operate using this type of model in order to make their businesses viable who may not be aware of the potential risks;
(g) section 21(8) of the Competition Act provides that restrictive trade practices undertaken between a company and its wholly owned subsidiary or a wholly owned subsidiary of that subsidiary are exempt; or undertakings other than companies, each of which is owned or controlled by the same person or persons;
(h) for companies in a group to be exempted under the above exemption, they have to be wholly owned by the parent company, whereas for other undertakings, they simply have to be controlled by the same person;
(i) this is an unequal exemption as it is quite common for group companies to have agreements between them some of which may amount to vertical agreements which should ordinarily be exempted.

Treasury comment: *The National Treasury does not support these proposals for amendment:*

If this proposal is accepted, it will be detrimental to SMEs because most markets structures are dominated by multinationals. In addition, vertical agreements those have no effect on competition can be handled through the provisions on exemptions in the current Act.

The proposal, if adopted, will hinder competition and bring about monopolistic and oligopolistic tendencies in hardship areas.

The proposed amendment contravenes the principle of single entity – investigation of a company and other companies under its control.

(xiii).Issue: Exclusive distributorship agreements to hardship areas
New Proposal: A block exemption to exclusive distributorship of Fast-Moving Consumer Goods (FMCG) in hardship or hard to reach areas.

Justification:

(a) Distribution requires commitment of substantial investment and in such areas the population is smaller and/or spread out;
(b) This makes it difficult and potentially more costly for distributors to make returns compared with other areas and therefore in many cases requires the incentive of a minimum geographical area or number of consumers to make the investment commercially viable;
(c) Additionally, FMCG products have a low profit margin for distributors and retailers and this is offset by selling large volumes;
(d) There is a net public benefit to having investment and FMCG products available in hardship areas which would outweigh any potential anti-competitive effects.

Treasury comment: *The National Treasury does not support this proposal.*

The proposal, if adopted, will hinder competition and bring about monopolistic and oligopolistic tendencies in hardship areas.

(xiv).Issue: Exclusive distributorship agreements in respect of Small and Medium Enterprises (SMEs) and New Market Entrants
New Proposal: Introduction of Exclusive distributorship agreements in respect of Small and Medium Enterprises (SMEs) and New Market Entrants
Justification:

(a) Geographical allocation of markets amongst distributors is not necessarily anti-competitive and can be useful in encouraging distributors to invest in distributing new products;
(b) In addition, for several smaller and medium sized businesses this is the regular way in which they conduct business and allows them to reduce their costs by getting better rates from their distributors;
(c) In most cases, these types of arrangements would be granted an exemption by the Competition Authority, however, the application process is onerous for small businesses and time consuming, and in addition there may now be fees payable for an exemption application;
(d) This means that these companies have to release the details of private business arrangements into the public domain and incur delays for a simple transaction;
(e) some de minimis provisions need to be introduced in the Competition Act.

Treasury comment: *The National Treasury does not support this proposal.*

The proposal, if adopted, will hinder competition and bring about monopolistic and oligopolistic tendencies in exclusive distributorship agreements involving SMEs. There is therefore need for the Authority to continue reviewing the transactions on a case by case basis as currently provided for by the Act.

(xv).Issue: Exclusive lease agreements in major developments (shopping centre)
New Proposal: Introduce an Exclusive lease agreements in major developments (shopping centre)
Justification:

(a) An exclusive lease prohibits a landlord from leasing space to another tenant in the same premises that deals with the same type of products or services;
(b) However, this is common in major developments and large shopping malls and in some instances necessary;
(c) For example, in order to secure an anchor tenant such as a supermarket in a shopping mall, the mall owner would usually have to commit to not leasing the space to another supermarket;
(d) In addition, the provision of infrastructure such as fiber cables, sewage, electricity also has to be limited to one provider;
(e) Without these exclusivity protections, such developments would not be commercially viable.

Treasury comment: *The National Treasury does not support this amendment. If the proposed amendment is adopted, it will hinder competition. Where landlords have allowed for more than one supermarket, it has had a positive effect on pricing for the benefit of the consumers.*

(xvi).Issue: De minimis provisions
New Proposal: Introduce De minimis provisions
Justification:

(a) Where agreements are regularly and justifiably exclusive, such as licensing of intellectual property arrangements, provision of infrastructure, certain distribution agreements such as for medicines where those types of contracts are in place to bring in technology, medicine and access to infrastructure having de minimis provisions in the Competition Act, in addition to block exemptions is recommended;
(b) These types of agreements usually have a clear public benefit and are often entered into by small and medium sized enterprises;
(c) They would ordinarily be given exemptions and such entities should not be required to bear the cost, delay and most importantly disclosure of their business secrets in order to continue to do their business in the manner in which it is usually undertaken.

Treasury comment: *The National Treasury does not support this amendment.*

The proposal is already taken care of under section D of part III and section 20 of the Act.

(xvii).Issue: Franchise Agreements
New Proposal: Franchise Agreements
Justification:

(a) Franchise agreements are a special form of exclusive arrangement where there is transfer of know-how and continued assistance from the franchisor in relation to the operation of the franchise;
(b) Franchise agreements should be distinguished from exclusive agreements and are generally exempted in competition law regimes;
(c) The draft Guidelines on the Application of Article 16 of the COMESA Competition Regulations (2004) to Restrictive Business Practices recognises that franchise agreements should be distinguished from ordinary exclusive agreements and Kenya should adopt this position.

Treasury comment: *The National Treasury does not support this amendment.*

The proposal is already taken care of by the subsidiary legislation of the Act.

(xviii).Issue: Section 25 (3) Gazette Notice

New Proposal: Amend section 25 (3) of the Act so that it is not mandatory for the Competition Authority to publish a Gazette Notice for every application for exemption and it should be at the Competition Authority's discretion.

Justification:

(a) Section 25(3) of the Competition Act requires a gazette notice to be published in respect of any application for exemption from a restrictive trade practice;
(b) Certain exclusive agreements, particularly those relating to intellectual property (such as those for medicine) and other import or technology agreements have a high net public benefit and the publication of the commercial details prior to the agreement being entered into between the parties will mean the release of sensitive confidential information which will alert competitors and affect that parties commercial interest which may then make the agreement uneconomical.

Treasury comment: *The National Treasury does not support this amendment.*

The requirement for Gazettement is important for transparency and disclosure of the exemption process which is granted pursuant to public interest considerations.

(xix).Issue: Section 48 Appeals to the Tribunal

New Proposal: Amend section 48 to allow a party to appeal once notified rather than waiting for the Gazette Notice given the delays experienced in waiting for the Notice.

Justification:

(a) Section 48 provides that "not later than thirty days after notice is given by the Competition Authority in the Gazette in terms of the determination made by the Competition Authority in relation to a proposed merger, a party to the merger may apply to the Tribunal, in the form determined by the Tribunal, for review of the Competition Authority's decision;
(b) once parties receive a written decision from the Authority, they should have the right to file an Appeal to the Tribunal. This is because there is often a significant time lag between the Authority issuing their written decision and the publication of the same in the Gazette.

Treasury comment: *The National Treasury supports this amendment since the process of Gazettement is lengthy.*

4.0. COMMITTEE OBSERVATIONS

The Committee held discussions with the National Treasury in Line with Article 114 for possible introduction into the Competition (amendments) Bill during the Committee Stage. The committee observed that, the bill proposes among other things, to strengthen remedial measures and penalties; to align the Act with Article 176 of the Constitution by recognizing County governments; to reduce the administrative burden on the Authority and facilitate investment through such merger requests, through setting a specific threshold for mergers which should be excluded from the provisions of the Competition Act; and finally, to empower the Authority to initiate investigations on its own motion for the expedient resolution of consumer complaints.

The Committee observed that the proposed amendments to various Sections of the Principal Act are important to seal some legislative gaps cited in the law and align them with the Constitution. The Constitution of Kenya creates two levels of government: the National and County government. It is therefore paramount that all laws and regulations are aligned to this provision. For this reason, the Committee supports the bill as it will enhance consumer protection from unfair and misleading market conduct.

5.0. COMMITTEE RECOMMENDATION

Having considered the proposed amendments by the stakeholders to the Competition (Amendment) Bill, 2016 the Committee adopted the amendments as follows:-

1. Clause 2
   That clause to be amended by deleting the definition of "undertaking" and substituting therefor the following definition: ***"undertaking" means any business intended to be carried on, or carried on, for gain or reward by a person, a partnership or a trust in the production, supply or distribution of goods or provision of any service and includes a Trade Association.'***

2. **Clause 10**
   That clause 10 be amended to provide a provide that the Cabinet Secretary shall set the threshold for a merger in consultation with the Competition Authority. The proposal in the Bill sought to vest the power to set the threshold for a merger with the Competition Authority.

3. New proposal to amend section 48
   Appeals to the Tribunal

   That section 48 be amended to make provision allowing a party to appeal upon receipt of a notification from the Tribunal rather than waiting for the Gazette Notice given the delays experienced in waiting for the Notice

   Section 48 provides that "not later than thirty days after notice is given by the Competition Authority in the Gazette in terms of the determination made by the Competition Authority in relation to a proposed merger, a party to the merger may apply to the Tribunal, in the form determined by the Tribunal, for review of the Competition Authority's decision;

   Once parties receive a written decision from the Authority, they should have the right to file an Appeal to the Tribunal. This is because there is often a significant time lag between the Authority issuing their written decision and the publication of the same in the Gazette.

SIGNED.....DATE.....4th Oct 2016.....

THE HON. NELSON GAICHUHIE, MP

VICE CHAIRPERSON

DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING AND TRADE

ANNEXES

ANNEX 1: MINUTES

MINUTES OF THE 77TH SITTING OF THE DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING & TRADE HELD ON SATURDAY 24TH SEPTEMBER, 2016 IN THE CONFERENCE ROOM, 3RD FLOOR, PINECONE HOTEL, KISUMU AT 10.00AM

PRESENT

1. Hon. Benjamin Langat, MP — **Chairperson**
2. Hon. Nelson Gaichuhie, MP — **Vice-Chairperson**
3. Hon. Jimmy Nuru Angwenyi, MP
4. Hon. Shakeel Shabbir, MP
5. Hon. Abdul Rahim Dawood ,MP
6. Hon. Anyanga Andrew Toboso, MP
7. Hon. Daniel Epuyo Nanok, MP
8. Hon. Iringo Cyprian Kubai, MP
9. Hon. Joash Olum, MP
10. Hon. Jones Mlolwa, MP
11. Hon. Joseph Limo, MP
12. Hon. Kirwa Stephen Bitok, MP
13. Hon. Lati Lelelit, MP
14. Hon. Mary Emase, MP
15. Hon. Ogendo Rose Nyamunga, MP
16. Hon. Ronald Tonui, MP

APOLOGIES

1. Hon. Dr. Oburu Oginga, MP
2. Hon. Eng. Shadrack Manga, MP
3. Hon. Sammy Koech, MP
4. Hon. Alfred Sambu, MP
5. Hon. Abdikadir Ore Mohammed, MP
6. Hon. Abdullswamad Shariff, MP
7. Hon. Dennis Waweru, MP
8. Hon. Patrick Makau King'ola, MP
9. Hon. Sakaja Johnson, MP
10. Hon. Sakwa John Bunyasi, MP
11. Hon. Sammy Mwaita, MP
12. Hon. Sumra Irshadali, MP
13. Hon. Tiras Ngahu, MP

COMMITTEE SECRETARIAT

1. Evans Oanda - Clerk Assisstant
2. Fredrick otieno - Clerk Assistant
3. Nicodemus Maluki - Clerk Assistant
4. Benson Nzofu - Clerk Assistant
5. Peter Mwaura - Legal Counsel

6. Adams Onyanyo - Sergent Art Arms
7. Sharon Cherono - Research Officer
8. Eric Ososi - Research Officer
9. Josephat Motonu - Fiscal Analyst
10. Robert Nyaga - Fiscal Analyst

THE NATIONAL TREASURY

1. Henry Rotich - Cabinet Scretary for the National Treasury
2. Donald Murgor - PA to the CS
3. Solomon Kitungu - CEO of the Privatization Commission
4. Stephen Wangombe - CEO, Competition Authority
5. Alexia Waweru - Legal Officer, Competition Authority
6. Jackline Muindi - Legal Officer, Privatization Commission
7. Sammy Mukobe - Commissioner, IRA
8. Elias Omondi - Insurance Regulatory Authority
9. Jemimah Mwaniki - Insurance Regulatory Authority
10. Ronoh Tuimising, PHD PPP Unit

MIN.NO. DCF/283 /2016: PRELIMINARIES

The ViceChairperson called the meeting to order at 10. 00am and prayed.

MIN.NO. DCF/284/2016: CONSIDERATION OF BILLS BEFORE THE COMMITTEEE

A. <u>The privatization (Amendment) Bill, 2016</u>

The Cabinet Secretary, with the help of the officers from the privatization Commission informed the Committee as follows regarding the Bill:

1. The proposed amendments are geared towards hastening the privatization process by introducing a tribunal that will be hearing cases on privatization, and also removing parliamentary approval of commissioners during appointment.
2. The CS proposed the following further amendments:

Section	Current provision	Amended provision	Rationale for amendment
	"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 state corporation;	**"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 state corporation but excludes sale of new shares to existing	To clarify that sale of new shares through a rights issue is not a privatization as defined under the Act. To clarify the position on rights issue in view of provisions under the

Section	Current provision	Amended provision	Rationale for amendment
		shareholders through a rights issue or any balance sheet reorganization which may lead to dilution of the percentage of shares held by a public entity	Companies Act and related laws with respect to which inclusion of rights issue under privatization would have no force. To clarify and encourage the use of rights issue as a source of financing for enterprises requiring urgent injection of financial resources.
Section 37	The Second Schedule shall apply with respect to objections and appeals relating to what has been determined, as published under section 36.	The Second Schedule shall apply with respect to objections and appeals relating to what has been determined and published under section 36 and any other objections and appeals relating to implementation of the privatization programme.	To broaden the mandate of the Privatization Appeals Tribunal to include other objections and appeals to preempt lengthy court processes.
Second Schedule	**Paragraph 2(1):** A person may file, with Commission, an objection to what has been determined, as published under section 36. **Paragraph 2 (2)** An objection may not be filed later than five working days after the publication under section 36.	**Paragraph 2(1):** A person may file, with Commission, an objection to what has been determined and published under section 36 or any other objection relating to implementation of the privatization programme. **Paragraph 2 (2)** An objection to what has been determined and published under section 36 may not be filed later than five working days after the publication. **Paragraph 2(3):**	To broaden the mandate of the Privatization Appeals Tribunal to include other objections and appeals to preempt lengthy court processes.

Section	Current provision	Amended provision	Rationale for amendment
	Paragraph 2(3): The Commission shall make a decision with the respect to the objection and give a copy of its decision to the objector within five working days after receiving the objection.	The Commission shall make a decision with the respect to the objection to what has been determined and published under section 36 or any other objection relating to implementation of the privatization programme and give a copy of its decision to the objector within five working days after receiving the objection.	
First Schedule	**Paragraph 3:** A member described in section 5(1) may designate a representative to attend a meeting of the Commission or of a committee of the Commission in the member's absence.	**Paragraph 3:** A member described in section 5(1) (b) and (c) may designate a representative to attend a meeting of the Commission or of a committee of the Commission in the member's absence.	To correct an earlier error in the Act. Allows the Attorney General and CS National Treasury to appoint alternate directors to represent them in the Commission's board.

The Committee agreed to all the proposed amendments. The Committee however noted that contrary to the assertion by the CS that parliament was responsible for delaying privatization process by not approving commissioners for appointment in time, the approval process is provided in law with clear timelines. Parliament has always adhered to the provided timelines.

B. <u>The Competition (Amendment) Bill, 2016</u>

After considering the proposed consolidated amendments to the Competition (Amendment) Bill, 2016 and their comments from the National Treasury, the following amendments were adopted:

1. Clause 2 be amended by deleting the definition of "undertaking and replacing therfor with the following definition: ***"undertaking" be re-worded to read as follows, 'undertaking means any business intended to be carried on, or carried on, for gain or reward by a person, a partnership or a trust in the production, supply or distribution of goods or provision of any service <u>and includes a Trade Association</u>.'***

2. ***Clause 10***

The power to set the threshold for a merger should remain within the powers of the Cabinet Secretary and it should be done in consultation with the Competition Authority as opposed to the proposal in the Bill to vest this power with the Competition Authority.

3. New proposal to amend section 48

Appeals to the Tribunal

Amend section 48 to allow a party to appeal once notified rather than waiting for the Gazette Notice given the delays experienced in waiting for the Notice

Section 48 provides that "not later than thirty days after notice is given by the Competition Authority in the Gazette in terms of the determination made by the Competition Authority in relation to a proposed merger, a party to the merger may apply to the Tribunal, in the form determined by the Tribunal, for review of the Competition Authority's decision;

once parties receive a written decision from the Authority, they should have the right to file an Appeal to the Tribunal. This is because there is often a significant time lag between the Authority issuing their written decision and the publication of the same in the Gazette

C. <u>The Insurance (Amendment) Bill, 2016</u>

After considering the proposed consolidated amendments to the Insurance (Amendment) Bill, 2016, the following amendments were adopted:

1. Clause 11 should be deleted.

Justification

It is good to retain ninety days. The proposed amendment does not take into account the practical issues which tend to arise when an insurer is handling a claim as some investigations involve many parties and take over thirty days to complete. If claims are settled hurriedly, it will encourage fraudulent claims and possible collapse of several underwriters, hence the need for caution to be exercised to ensure only genuine claims are settled.

The Committee held this clause in abeyance – for further discussion

2. The proposed section 19A be amended in subsection (1) by deleting the following words "**except where the person is exempted in accordance with this Act**".

<u>Justification</u>

Section 181 of the Insurance Act gives the Cabinet Secretary power to exempt any person from the provision of the Insurance Act. The exemption

contemplated under the proposed section is well taken care of under Section 181 and there may be no need for this repetition which may create an impression that the exemption is peculiar to *takaful*.
This is to give the correct meaning to the paragraph so as to allow the type of capital authorized for a new company as ordinary shares and preference shares which are irredeemable and non-cumulative in nature.

D. The Proceeds of Crime and Anti-Money Laundering (Amendment) Bill, 2015

After considering the proposed consolidated amendments to the Proceeds of Crime and Anti- Money Laundering (Amendment) Bill, 2016, the following amendments were adopted:

Clause 4

1. Clause 4 of the Bill is amended in the proposed section 24B –

(a) in subsection (1) –
  (i) by deleting the words "on conviction to a fine" and substituting therefor the words "to a monetary penalty" in the proposed paragraphs (a) and (b);
  (ii) by deleting the words "on conviction to an additional fine" and substituting therefor the words "to an additional monetary penalty in the proposed paragraph (c);

(b) in subsection (2) –
  (i) by deleting the word "fine" appearing immediately after the words "before imposing a" and substituting therefor the words "monetary penalty";
  (ii) by deleting the words "seven days" and replacing therefor with the words "forteen days"
  (iii) by deleting the word "fines" appearing immediately after the word "prescribed" and substituting therefor the words "monetary penalty";

(c) in subsection (3) –
  (i) by deleting the word "fine" in the opening statement where if first appears and substituting therefor the words "monetary penalty";
  (ii) by deleting the word "fine" in the opening statement where it second appears and substituting therefor the word "penalty";
  (iii)by deleting the word "ten" in paragraph (b);
  (iv)by deleting the word "fine" and substituting therefor the words "monetary penalty" in paragraph (c);

(d) in subsection (4) –
  (i) by deleting the word "fine" and substituting therefor the words "monetary penalty";
  (ii) by inserting the words "by proceedings in the name of the Centre" immediately after the word "jurisdiction".

Justification

This proposal emanated from the FRC. In the original submissions made by the FRC in December 2015, FRC had proposed the introduction of Civil Monetary Penalties into the Proceeds of Crime and Anti-Money Laundering Act 2009 (POCAMLA) as a means of further enhancing the FRC's powers to take action against persons found to be non-compliant with the provisions of POCAMLA. The ability by the Financial Intelligence Unit (in this case the FRC) to take proportionate and dissuasive sanctions against non-complaint institutions and persons is one of the requirements of the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation as set out by the Financial Action Task Force (FATF).

When the Proceeds of Crime and Anti-Money Laundering Bill, 2015 was however published, the sanctions were crafted as criminal sanctions requiring one to be first convicted. This was not the intention of the original proposal and the proposed amendments therefore seek to revert the amendments as contained in the Bill to civil monetary penalties as originally proposed.

The proposed penalties are serious and significant hence the need for extension of time from 7 days to 14 days in filing the notice to show cause response under clause 4(2).

2. Clause 4 of the Bill is amended in the proposed section 24C –

(a) inserting the word "or" immediately after the word "institution" in paragraph (a);
(b) inserting the words "instruction or" immediately before the word "direction in paragraph (b);
(c) inserting the words "or individuals" immediately after the word "individual|" in paragraph (c);
(d) deleting paragraph (d) and substituting therefor the following new paragraph –

"(d) issue an order to a competent supervisory authority requesting the suspension or revocation of a licence, registration, permit or authorization of a specified reporting institution whether entirely or in a specified capacity or of any director, principal, officer, agent or employee of the reporting institution

Justification

It seeks to enhance the FRC's ability to take administrative action against persons for non-compliance with the provisions of POCAMLA. This proposal is also in line with international best practices requiring FIUs to be able to take proportional and dissuasive sanctions for non-compliance. When the FRC recently began taking actions against reporting institutions for non-compliance with POCAMLA, it was noted that the Act did not vest on the FRC sufficient powers to take action against errant persons. There is therefore need to enhance the powers of the FRC to enable it to take civil and administrative action against non-compliant persons and institutions.

The FRC has benchmarked with other FIUs in the region and beyond and notes that these FIUs are clothed with these powers.

However, when the Amendment Bill was published, certain elements of the administrative sanctions were omitted. The proposed amendments therefore seek to revert the amendments in the Bill to the form as originally proposed by the FRC.

New proposal within clause 24C

"(2) Before taking administrative action imposing against any person or reporting institution under this section, the Centre shall give not less than fourteen days' notice in writing, requiring the person or reporting institution to show cause as to why the prescribed administrative action should not be taken.

Justification
Affords fair hearing to a reporting institution before issuing sanctions. The sanctions imposed are of a serious nature. However, there appears to be no provision for conducting a hearing with the reporting institution before imposing sanctions. This may be seen to be a breach of the right to natural justice and could result in administrative action against the FRC.

Clause 8

That clause 8 is amended by deleting paragraph (c) and substituting therefor with the following new paragraph:

" (c) taking all decisions of the Centre in the exercise, discharge and performance of the Centre's objectives, powers, functions and duties".

Justification

This clarifies that the Director-General is responsible for all decisions of the Centre. This is in line with the Financial Action Task Force (FATF) requirements and international best practice where the Centre is required to be operationally independent

Clause 11

That clause 11 be amended in 31(3) by inserting the words "specific act or" immediately before the word "function"

Justification

(a) The amendment seeks to remove the role of the State Corporations Act over the operations of the Centre as this has the potential to interfere with the operational independence of the centre which is a key requirement and best practice for financial intelligence units;

(b) The Cabinet Secretary, however, retains the role of approving the general terms and conditions of the Centre's staff.

E. <u>The Uwezo Fund Bill, 2015</u>

The Cabinet Sceretary informed the Committee that the Government has initiated of consolidating most of the Funds established to one Fund. This will reduce their admnistraton costs, avoid duplicity and ensure efficiency. Therefore the Uwezo Fund Bill should be pended. The Committee Concured.

F. <u>Public Private Partnership (Amendment) Bill, 2016</u>

The CS proposed the following further amendments to the Public Private Partnership (Amendment) 2016

Section in Act	Clause in Bill	Issue	Proposed Amendment
2	-	Definition of "transaction advisor" includes the term 'accession' which is not used anywhere in the Act. Its meaning is unclear in actual legal practice, and introduces uncertainty on what is intended. We believe this was a drafting error. It also provides a limited scope for the transaction advisor's services, which in any event is a substantive matter better left to the primary section – section 36 of the Act.	It is proposed that the word "accession" in the definition of the term 'transaction advisor' be deleted. It is also proposed that the words "including the preparation, accession and conclusion of a project agreement and the financial close" be deleted from the definition, so that the definition of the term "transaction advisor" would now read as follows: *"transaction advisor" means a person appointed in writing by a contracting authority who has the appropriate skill and experience to assist and advise the contracting authority or the unit on matters related to a public private partnership;*
36	-	There are a number of issues surrounding the transaction advisory services in a PPP project development – 1. First, the capacity of a contracting authority may be wanting in the entire	It is recommended that section 36(1) be amended by inclusion of the words 'preparation, procurement, contract negotiation and management so that the new sub-

Section in Act	Clause in Bill	Issue	Proposed Amendment
		PPP project value chain: preparation, development, procurement, contract negotiation, and even contract management. 2. Secondly, the scope of an advisor's engagement under this section needs to be expanded to include preparation (which is feasibility studies), procurement (which includes preparation of tender documents, support with bidder queries, support with tender evaluations, and support with contract negotiations post-procurement). This will ensure that any contracting authority that engages a transaction advisor will be properly guided on such an advisor's terms of reference. 3. Thirdly, contracting authorities need assistance in structuring a transaction advisory procurement framework and contract, and need the technical support and guidance of the Unit. In several instances where contracting authorities have done this on their own, they have experienced very poorly developed projects, that have all ended up in trouble during procurement, or are failing to close at negotiation. The solution is to create a role for the technical support of the Unit to be provided to contracting authorities in the recruitment and management of transaction advisors.	section now reads – *"36. (1) The unit shall assess the technical expertise of the contracting authority to procure the development, preparation, procurement, contract negotiation and management of a project under this Act."* To address the second problem, it is recommended that section 36(2) be amended by deletion of the words "procurement process" appearing at the end thereof, and substituting therefor the words "preparation, procurement, contract negotiations, and financial close phase of a project". To address the third problem, it is recommended that the following words by introduced, after the word 'appoint' appearing in the fourth line of section 36(2): "...with the guidance and approval of the unit,..." The new section 36(2) will now read as follows – *"36. (2) Where the unit finds that the contracting authority does not have the technical expertise to procure the project under this Act, the contracting authority shall appoint, with the guidance and approval of the unit, a transaction advisor to assist the authority in the preparation, procurement, contract negotiations, and financial close phase of a project."*

Section in Act	Clause in Bill	Issue	Proposed Amendment
56	-	Clause 11 of the PPP (Amendment) Bill, 2016 has removed Cabinet from the procurement process, by making the PPP Committee decision final – which is the correct position in practice. Section 56 retains reference to Cabinet decision under section 54(3) which has been deleted by clause 11. It is necessary to carry through the amendment philosophy from section 54 into sections 56 and 57, by deleting reference to the words "Cabinet" and "Parliament" and substituting therefor the word "Committee". It is also important to note that the import of section 55, which requires Parliament to ratify a natural resource PPP agreement, in practice is a post-contracting activity: in other words, until a contract is executed, it is not a contract capable of statutory ratification. This means that Parliament can only receive as competent an agreement under section 55 if it has been signed. What would usually happen is that one of the contract conditions would be that it would become effective only upon the ratification.	It is recommended that section 56(1), (2) and (3) be amended by substituting the word 'Committee' for the words "Cabinet and "Parliament" together with all words incidental to the two terms as used in these contexts, so that the new section 56 reads as follows – "56. (1) The Committee shall, within a period of thirty days from the date of its decision approving the project and financial risk assessment report, inform the contracting authority of the decision." (2) Where the Committee approves the undertaking of a project, the contracting authority shall finalise the project agreement for execution by the parties to the project. (3) The contracting authority shall communicate the decision of the Committee in writing, to all bidders who participated in the bidding of the project."
57	-	As a consequence of clause 11 of the PPP (Amendment) Bill, 2016, reference in section 57 to Cabinet and to Parliament is erroneous, and it is necessary to effect a consequential amendment to this section to make reference to the Committee. This is consistent with the amendment proposed for section 56 of the principal Act.	It is recommended that the words "where the Cabinet approves or Parliament ratifies the undertaking of a project as a public private partnership under this Act," be deleted, and the following words be substituted therefor – "..., following its finalization of the project agreement and after all parties to the agreement have perfected all conditions precedent to the execution of government

Section in Act	Clause in Bill	Issue	Proposed Amendment
			contracts,..." So that the new section 57 properly reads as follows: *"57. The contracting authority shall, following its finalization of the project agreement and after all parties to the agreement have perfected all conditions precedent to the execution of government contracts, execute the contract awarded to that bidder."*

G. <u>The County Industrial Development Bill, 2015 – Senate Bill</u>

After the presentation from the Parliamentary Budget Office that the County Industrial Development Bill, 2016 had been certified as money Bill by the Budget and Appropriations Committee and therefore ought not to have originated from the Senate, the Committee conccured with the Budget and Appropriations Committee in rejecting enactment of the law on the basis of its origin. Processing it when it has already been rejected by the Busget and Appropriations Committee would be engaging in an exercise in futillity.

MIN.NO. DCF/285 /2016: ADJOURNMENT

The Vice Chairperson adjourned the meeting at 12.05pm

Signed.....

Chairperson

Date.....