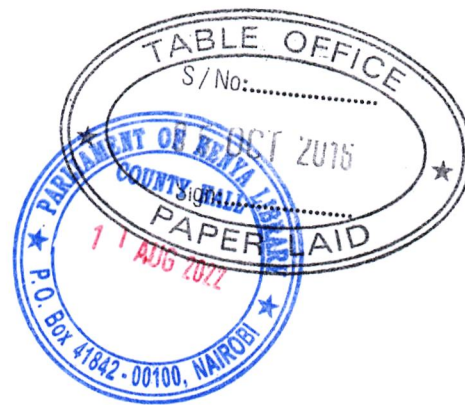


Approved for tabling *BW SNA*

5/10/16

REPUBLIC OF KENYA



NATIONAL ASSEMBLY

ELEVENTH PARLIAMENT – FOURTH SESSION

THE DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING & TRADE

REPORT ON THE INSURANCE (AMENDMENT) BILL, 2016

CLERKS CHAMBERS
DIRECTORATE OF COMMITTEE SERVICES
PARLIAMENT BUILDINGS
NAIROBI

OCTOBER, 2016

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ABBREVIATIONS

AKI: Association of Kenya Insurers

IRA: Insurance Regulatory Authority

CHAIRPERSON'S FOREWORD

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

The principal object of the Insurance (Amendments) Bill, 2016 is to amend the Insurance Act to enhance insurance business in Kenya. The Bill proposes to introduce *takaful* insurance an Islamic insurance that is Sharia compliant. The Bill proposes to provide for licensing and regulation of *takaful* insurance business in Kenya in order to encourage international investments in this sector, which is a target area for the Nairobi International Financial Centre.

The Bill proposes to introduce other forms of capital such as subordinated loans, share premiums, reserves and other forms of capital as may be determined by the Authority, to expand the scope of investment in the Insurance industry. This will encourage additional investments in the insurance sector without diluting the current stake of shareholders and ensure compliance with capital requirements under the Insurance Act. The Bill also proposes to harmonize the principle of capital adequacy as introduced by the Finance Act, 2015. Among those proposals is a requirement that an insurer should maintain a 100% capital adequacy ratio all the time.

The Bill further proposes to introduce the use of other valuation methods as may be prescribed by the Authority. This will enable the application of a market consistent approach of valuing liabilities of insurance companies as required under risk based capital model as well as enable valuation of general insurance business. Finally, the Bill proposes to reduce the period for payment of a claim, acceptance or denial of a liability from 90 days to 30 days. This will facilitate the expeditious payment of claims by the insurance companies and ensure customers to do not endure inordinate delays before receiving compensation.

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 honor to present to this House the Report of the Committee on its consideration of the Insurance (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 Honourable Members of the Committee who made useful contributions towards the preparation and production of this report.

HON. BENJAMIN LANGAT, MP

EXECUTIVE SUMMARY

The Insurance (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 Insurance Regulatory Authority (IRA) and the National Treasury whose views are contained in this report.

The Insurance (Amendment) Bill, 2016 contains a total of 12 clauses which propose to amend various Sections of the Principal Act, mainly to provide for the recognition, licensing and regulation of the Islamic insurance that is Sharia compliant (*takaful* insurance). The Bill proposes recognition of new insurance products of international nature.

The amendments provide for the departure from the asset and liability balance model of determining solvency to the risk based model. The amendment further provides for actuarial investigation and valuation of insurance business for both long term, as well as reduction of the period for settlement of insurance claims from the current 3 months to 1 month.

The amendments efforts are to make the supervisory agency take risk based supervisions more effectively, as the law still lags behind despite having seen a lot of amendments over the years. The Committee holds that there is still need to further engage the stakeholders and therefore the amendments have not been concluded.

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 Osoi |
| Research Officer III | Sharon Rotino |

1.1.2 CONSIDERATION OF THE BILL

The Insurance (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 proposes to amend various Sections of the Principal Act, mainly to provide for the recognition, licensing and regulation of the Islamic insurance that is Sharia complaint (*takaful* insurance). The amendments also provide for the departure from the asset and liability balance model of determining solvency to the risk based model; consistent with the international best practice where the focus is not on the assets and liability framework but on risk based solvency requirements. The amendments efforts are to make the supervisory agency take risk based supervisions more effectively, as the law still lags behind despite having seen a lot of amendments over the years.

The amendment further provides for actuarial investigation and valuation of insurance business for both long term, as well as reduction of the period for settlement of insurance claims from the current 3 months to 1 month.

In processing the Bill, the Committee invited comments from the public by placing advertisements in the Daily Nation and Standard newspapers on Friday 1st July, 2016 pursuant to Article 118 of the Constitution. The Committee received submissions from stakeholders and met officers from the National Treasury whose views and comments are captured and contained in the body of the report. The Committee holds that there is still need to further engage the stakeholders and therefore the amendments have not been concluded.

1.0. BACKGROUND INFORMATION

The principal object of the Insurance (Amendments) Bill, 2016 is to amend the Insurance Act to enhance insurance business in Kenya. The Bill proposes to introduce *takaful* insurance which is an insurance business based on group participation guaranteeing each of the members against defined loss or damage. This will enable the law to recognize *takaful* insurance business and facilitate financial inclusion to citizens who profess Islamic faith and at the same time allow any other citizen to benefit from such products irrespective of their faith. The Bill proposes to provide for licensing and regulation of *takaful* insurance business in Kenya in order to encourage international investments in this sector, which is a target area for the Nairobi International Financial Centre.

Currently, the scope of investment in the Insurance Act is only limited to ordinary shares. In order to expand the scope of investment, the Bill proposes to introduce other forms of capital such as subordinated loans, share premiums, reserves and other forms of capital as may be determined by the Authority. This will encourage additional investments in the insurance sector without diluting the current stake of shareholders and ensure compliance with capital requirements under the Insurance Act.

Under the current Insurance Act, the method for determination of solvency of the insurance companies is margin of solvency which compares the admitted assets and liabilities. The Bill proposes to harmonize the principle of capital adequacy as introduced by the Finance Act, 2015. Among those proposals is a requirement that an insurer should maintain a 100% capital adequacy ratio all the time.

The Bill further proposes to introduce the use of other valuation methods as may be prescribed by the Authority. This will enable the application of a market consistent approach of valuing liabilities of insurance companies as required under risk based capital model as well as enable valuation of general insurance business. The amendment will also provide for filing of financial condition report as may be prescribed by the Authority. Finally, the Bill proposes to reduce the period for payment of a claim, acceptance or denial of a liability from 90 days to 30 days. This will facilitate the expeditious payment of claims by the insurance companies and ensure customers to do not endure inordinate delays before receiving compensation.

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

The proposed amendments as enshrined in the various clauses of the bill and their respective repercussive effects are as below:

(i). Clause 2 proposes to amend Section 2 under interpretation: the amendment introduces *takaful* as part of the insurance business in Kenya.

Remark: this is the inclusion into the insurance industry, *takaful*, which is the Islamic insurance that is Sharia compliant.

(ii). Clause 3 amends Section 19 of the Act which provides for the registration of insurance: this amendment provides for the registration of *takaful* insurance and also provides for the Cabinet Secretary to consult the Authority (IRA) in making regulation for licensing and supervision.

(iii). Clause 4 amends Section 25 of the Act under requirements as to capital structure and voting rights: the amendment provides for a segregation of insurers' capital structure and voting rights by new companies and existing ones. For new companies, the consideration is on ordinary shares at single face value with voting rights and non-cumulative preference shares. For existing companies, the same applies but in addition, it may include subordinated loans, share premiums, reserves among others. The amendment further provides that this capital shall not rank in priority for the insured's interest in the event of liquidation.

(iv). Clause 5 amends Section 41 of the Act which provides for the margins of solvency: this proposed amendment seeks to shift the determination of solvency from assets and liability balance to capital adequacy ratio of 100%. It also segregates the capital adequacy ratio for long term and general insurance.

(v). Clause 6 amends Section 42 of the Act on admitted assets: this amendment proposes a departure from the assets and liability model to risk based solvency model. The other amendment is the introduction of capital charge to cater for depreciation and uncertainty in estimating adverse events

(vi). Clause 7 proposes to repeal Section 43 which provides for admitted liabilities: this proposed repeal is occasioned by the departure from assets and liability model to the risk based solvency model.

Remark: these three amendments in clause 5 to 7 are consistent with the international best practice where the focus is not on the assets and liability framework but on risk based solvency requirements.

(vii). Clause 8 amends Section 57 which provides for actuarial investigation: the proposed amendment provides for actuarial valuation of all insurance business annually as opposed to the current situation of only valuing long term insurance.

Also, the contents of financial report should include material risk and other matters impacting on the financial condition of the insurers.

Again, the Authority (IRA) is mandated to prescribe the value of assets and liability to be used in valuation and also the reporting formats of the Insurers.

Remark: the proposed amendment will streamline the financial operational issues of the insurance companies to ensure prudence.

(viii).Clause 9 amends Section 58 under actuarial valuation: it provides that actuarial valuation is for both long term and general insurance as opposed to the current case of only conducting valuation to long term insurance businesses.

The other amendment proposes to empower the Authority to prescribe the basis of technical reserves to be used in valuation.

Also, there is a proposal to change the valuation model from “minimum basis of statutory fund” to the “technical reserves” which will be determined by the Authority.

(ix).Clause 10 proposes to amend Section 115 on conditions for approval in relation to long term insurance business: the deletion of “minimum basis” is in line with the proposal to empower the Authority to prescribe the technical reserves.

Remark: this Section refers to long term insurance business and it therefore should be clarified whether it is supposed to change so as to apply for both long term and general insurance.

(x).Clause 11 amends Section 203 which provides for settlement of insurance claims: the period for settlement of the insurance claims has been reduced from the current three months to one month.

(xi).Clause 12 proposes to amend the Second Schedule on the minimum capital requirement: in determination of minimum capital requirement, the segment of bank deposits has been capped at a maximum of 10% in any one bank or group of banks, and not the minimum as set currently.

Remark: this measure is to ensure that insurers spread risks across the wider financial spectrum.

3.0. SUBMISSIONS FROM THE STAKEHOLDERS AND NATIONAL TREASURY COMMENTS

Following the advertisement inviting submissions from stakeholders' on the Bill, the submissions received and the Treasury's views on the submissions are as hereunder presented:

3.1 THE ASSOCIATION OF KENYA INSURERS

(i). **Clause 11** amends Section 203 which provides for settlement of insurance claims

Proposal: (a) Retain the ninety day period provided in the Act;

(b) Delete the words "the reporting of the claim" as provided in the Act and substitute therefor the words "of submission of all documents".

Justification: 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.

Treasury comment: *The Authority supports clause 11 as drafted in the Bill. The intention of amending the period for payment of claims to 30 days is due to the demand of the insurance consumers in Kenya and the aspirations of Vision 2030. Some of the reasons for delay in settlement of insurance claims include lack of innovation, slow adoption of technology as well as overreliance on the traditional claims settlement practices. The Authority is taking a disruptive approach to ensure that the industry innovates better mechanisms for settlement of claims within the shortest time possible and in line with the demands of the insurance consumers.*

(ii). **Clause 3** amends Section 19 of the Act which provides for the registration of insurance

New Proposal: 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".

Justification: 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*.

Treasury comment: *This is recommended. It is a clean-up.*

(iii). **Clause 4** amends Section 25 of the Act under requirements as to capital structure and voting rights

New Proposal: The proposed amendment to section 25(1) be amended in sub paragraph (a) (i) by deleting the words "shall be irredeemable, and non-cumulative preference shares" appearing after the

words “voting rights and” and replace it with the words “preference shares which are irredeemable and non-cumulative”.

Justification: 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.

Treasury comment: *This is recommended. It is a clean-up.*

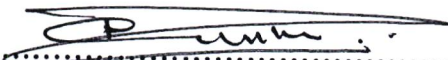
4.0. COMMITTEE OBSERVATIONS

The Committee held discussions with the National Treasury in Line with Article 114 for possible introduction into the Insurance (amendments) Bill during the Committee Stage. The committee observed that, the bill proposes to amend various Sections of the Principal Act, mainly to provide for the recognition, licensing and regulation of the Islamic insurance that is Sharia complaint (*takaful* insurance).

The Committee notes that the proposed amendments to various Sections of the Principal Act are important towards having an enhanced insurance business in Kenya. For this reason, the Committee supports the bill as it will make the supervisory agency take risk based supervisions more effectively. However, the Committee holds that there is need for further engagements with the stakeholders to clarify on pending issues including but not limited to:

1. Clause 7; proposes a valuation method; however it does not specify the method to be use.
2. Clause 10 proposes to amend Section 115 on conditions for approval in relation to long term insurance business, but does not clarify whether it is supposed to change so at to apply for both long term and general insurance.

Therefore the amendments have not been concluded.

SIGNED.  DATE. 4th Oct 2016

THE HON. NELSON GAICHUHIE, MP

VICE CHAIRPERSON

DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING AND TRADE

**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 - Sergeant Art Arms
- 7. Sharon Cheronu - Research Officer
- 8. Eric Ososi - Research Officer
- 9. Josephat Motonu - Fiscal Analyst
- 10. Robert Nyaga - Fiscal Analyst

THE NATIONAL TREASURY

- 1. Henry Rotich - Cabinet Secretary 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 COMMITTEE

A. The privatization (Amendment) Bill, 2016

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 | <p>Companies Act and related laws with respect to which inclusion of rights issue under privatization would have no force.</p> <p>To clarify and encourage the use of rights issue as a source of financing for enterprises requiring urgent injection of financial resources.</p> |
| 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 | <p>Paragraph 2(1):</p> <p>A person may file, with Commission, an objection to what has been determined, as published under section 36.</p> <p>Paragraph 2 (2)</p> <p>An objection may not be filed later than five working days after the publication under section 36.</p> | <p>Paragraph 2(1):</p> <p>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.</p> <p>Paragraph 2 (2)</p> <p>An objection to what has been determined and published under section 36 may not be filed later than five working days after the publication.</p> <p>Paragraph 2(3):</p> | 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 |
|-----------------------|---|---|---|
| | <p>Paragraph 2(3):</p> <p>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.</p> | <p>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.</p> | |
| First Schedule | <p>Paragraph 3:</p> <p>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.</p> | <p>Paragraph 3:</p> <p>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.</p> | <p>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.</p> |

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. The Competition (Amendment) Bill, 2016

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 and includes a Trade Association.*’
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. The Insurance (Amendment) Bill, 2016

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**".

Justification

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 “fourteen 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 it 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. The Uwezo Fund Bill, 2015

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

F. Public Private Partnership (Amendment) Bill, 2016

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

| Section in Act | Clause in Bill | Issue | Proposed Amendment |
|----------------|----------------|---|---|
| 2 | - | <p>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.</p> <p>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.</p> | <p>It is proposed that the word "accession" in the definition of the term 'transaction advisor' be deleted.</p> <p>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:</p> <p><i>"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;</i></p> |
| 36 | - | <p>There are a number of issues surrounding the transaction advisory services in a PPP project development –</p> <ol style="list-style-type: none"> 1. First, the capacity of a contracting authority may be wanting in the entire | <p>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-</p> |

| Section in Act | Clause in Bill | Issue | Proposed Amendment |
|----------------|----------------|---|--|
| | | <p>PPP project value chain: preparation, development, procurement, contract negotiation, and even contract management.</p> <p>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.</p> <p>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.</p> | <p>section now reads –</p> <p><i>“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.”</i></p> <p>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”.</p> <p>To address the third problem, it is recommended that the following words be introduced, after the word ‘appoint’ appearing in the fourth line of section 36(2): “...with the guidance and approval of the unit...”</p> <p>The new section 36(2) will now read as follows –</p> <p><i>“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.”</i></p> |

| Section in Act | Clause in Bill | Issue | Proposed Amendment |
|----------------|----------------|---|---|
| 56 | - | <p>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”.</p> <p>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.</p> | <p>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 –</p> <p>“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.”</p> <p>(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.</p> <p>(3) The contracting authority shall communicate the decision of the Committee in writing, to all bidders who participated in the bidding of the project.”</p> |
| 57 | - | <p>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.</p> | <p>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 –</p> <p>“..., following its finalization of the project agreement and after all parties to the agreement have perfected all conditions precedent to the execution of government</p> |

| Section in Act | Clause in Bill | Issue | Proposed Amendment |
|----------------|----------------|-------|---|
| | | | <p>contracts,..."</p> <p>So that the new section 57 properly reads as follows:</p> <p><i>"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."</i></p> |

G. The County Industrial Development Bill, 2015 – Senate Bill

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 concurred 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 Budget and Appropriations Committee would be engaging in an exercise in futility.

MIN.NO. DCF/285 /2016: ADJOURNMENT

The Vice Chairperson adjourned the meeting at 12.05pm

Signed.....

Chairperson

Date.....