

Legal Alert | October 18, 2023

The 2023 Privatization Act – Towards Streamlining Privatization

On Monday, 09 October 2023, the President assented to the 2023 Privatization Act. The Act will overhaul the regulatory framework for privatizing public entities established by the 2005 Privatization Act. It represents a notable and hopeful advancement in privatization regulation.

It is expected to enhance privatization by simplifying the privatization process and timelines. It is also aimed at encouraging wider participation, fair evaluation, and quicker funding to have a positive impact on privatization. We highlight the changes introduced below.

Aspect	Repealed 2005 Act	2023 Act
Institutional changes	The Privatization Commission (the Commission) oversaw privatizations with limited powers and responsibilities.	The Privatization Authority (the Authority) will oversee privatizations, with a wider range of powers and responsibilities.
Privatization Program	The commission formulated the program identifying suitable entities for privatization. The program would then be approved by cabinet and gazetted.	The cabinet secretary for treasury to formulate program, in consultation with experts, affected groups, and the public. Program to be approved by cabinet and ratified by the national assembly.
Privatization Proposal	The commission makes proposal on how privatization will be done to the cabinet secretary. Cabinet secretary presents proposals to cabinet for approval. Cabinet secretary thereafter submits proposal to parliament for approval before implementation.	The authority prepares proposal, in consultation with technical experts, employees affected by privatization, host community, and other relevant stakeholders. Proposals to be approved by the authority's board and then the cabinet secretary before implementation.
Ratification and Approval	Parliament ratifies privatization proposals but no timeframe is specified for this.	Privatization program approved by Cabinet to be presented to Parliament for ratification prior to implementation. Parliament required to decide within 60-days, which if it fails to do within 90-days the program is deemed ratified.
Privatization Methods	Public offering of shares, negotiated exercises of pre-emptive rights, asset sales (including liquidation), and any other method approved by Cabinet.	Sale of shares by public tender introduced, and asset sale removed. However, Authority may with the Cabinet Secretary's approval determine to use any other method.

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Aspect	Repealed 2005 Act	2023 Act
Exclusions	None.	<p>The Act does not apply to:</p> <ul style="list-style-type: none"> • sale of shares in secondary markets; • sale of shares by public controlled funds (compensation, insurance, endowment, social security, or superannuation) for benefit of their contributors; • rights issues; • balance sheet reorganizations; or • sale or transfer of shares by county governments.
Privatization Proceeds	<p>Proceeds from direct government equity holding were deposited into consolidated fund.</p> <p>Proceeds from state corporations' equity holdings deposited into special interest earning account. A state corporation could use these funds to pay its debts, restructuring costs, and capital investments. Surpluses would be paid into the consolidated fund.</p>	<p>Proceeds from direct national government shareholding to be paid into consolidated fund.</p> <p>State corporations may in addition use up to 5% of proceeds towards privatization costs.</p>
Objections and Appeal	<p>Right to object to Commission decision within 5 working days, and receive decision on objection within similar period.</p> <p>Right of appeal to Privatization Appeals Tribunal (PAT) within 7 working days. PAT required to determine appeals within 30 working days. Further right of appeal to the High Court within 10 working days of receiving PAT decision.</p>	<p>Privatization Appeals Tribunal replaced with Privatization Review Board (PRB).</p> <p>Timelines amended as follows: objection to be filed within 15-days of Authority determination. Authority to decide on objection within 15-days of receiving complete objection. Appeal to PRB to be filed within 15-days of Authority decision, and to be determined within 45-days. Further right of appeal to High Court within 15-days of receiving PAT decision.</p>

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