



**PRIVATE SECTOR POSITION PAPER ON THE COMPETITION BILL 2022**

**SUBMITTED TO**

**THE PARLIAMENT COMMITTEE OF TRADE, TOURSİM AND INDUSTRY**

**BY**

**PRIVATE SECTOR FOUNDATION UGANDA**

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## **1.0 INTRODUCTION**

The Private Sector Foundation Uganda (PSFU) wishes to extend its appreciation to the Parliament of Uganda through the Committee on Trade, Tourism, and Industry for facilitating the private sector investments through enacting relevant laws and regulations. The Competition Bill is yet another critical Bill that the committee has prioritized to support the development and promote investments in the economy.

The PSFU is the apex body of the private sector in Uganda with a membership of over 311 business associations, corporate bodies, and Government agencies. The PSFU membership is structured into 12 sectors including Agriculture, Agribusiness and Forestry; Construction; Tourism and Hospitality; Information Communication Technology; Manufacturing and Conversion Industries; Trade and Commerce; Human Resources (skills, education, and health); Culture and Creative Arts; Professional Services; Financial Services; Logistics and Transport; and Minerals, Oil and Gas and Extractives. Competition is a key component in trade and investment and is such a cross-cutting issue across all the 12 sectors and hence the interest in this Bill.

This paper has been developed through consultation and harmonization with diverse stakeholders including the sectors in Trade and Commerce, Professional Services, Information, Communication and Technology, Transport and Logistics, Financial Services, Agriculture, Agribusiness and Forestry, Culture and Creative Arts, Tourism and Hospitality, Manufacturing, and Construction and Real Estates.

## **2.0 Background**

Despite being developed in 1998, the first Bill was never made a law. In the absence of such legislation, sector regulators such as the Uganda Communications Commission, Bank of Uganda, and Electricity Regulatory Authority have attempted to control unfair trading practices and general consumer protection in the respective sectors by establishing regulations for the purpose. The banking and energy sectors for instance have sector-specific regulations. These have, however, been insufficient and grossly inadequate for competition regulation.

Today, there are various threats to Uganda's free market economy that can only be adequately addressed by effective trade sector regulation. These threats include abuse of monopoly and market dominance, mergers, cartels, bid rigging, predatory pricing, and other behaviors. These actions undermine competitive pricing and drive out small businesses since they are unable to compete.

Government has in some instances legalized and formalized monopolies, including setting prices for services that otherwise would be open to regulated competition, e.g. Motor Vehicle Inspection by SGS, and the recent Electronic Vehicle Number Plate contract. Uganda also has statutory monopolies whose pricing structure is not subject to any regulatory market investigation.

### 3.0 GENERAL COMMENTS ON THE BILL

- i. Generally, the Bill is timely considering the current legal, sustainability, managerial, economic, environmental, and social challenges.
- ii. **Fair regulation of the banks** by the central bank. The central bank has set minimum capital thresholds that undermine free entry into the banking sector which leaves the market to a limited number of larger banks. This has implications for pricing of services and could lead to hard-core cartels in interest rate fixing. The BOU is therefore not able to conduct objective market investigations because its complicit in driving in contributing to the current market structure.
- iii. **Implementation of the Law by the MTIC as its mandate** will lead to unintended policy consequences. Consideration, investigation and decisions on mergers, acquisitions and investigation of conduct of firms in the market requires expeditious processes. Government MDA depend on quarterly releases for their operations and this structure of financing is not consistent with the need for expeditious implementation of competition law. It is therefore important that this is considered and addressed by setting up an independent commission.

- iv. **The decisions rationalising Authorities was based on mistakes of the past.** The Competition Law is going to address matters of trade sector regulation for the future and specifically, private sector development. Determining implementation of the law through the impact of past mistakes is the wrong thing to do. Competition Agencies in the medium to long term operate on self-generated revenue through merger and acquisition filing fees, penalties, and other related income.
- v. Implementation of the law through government bureaucracies will inadvertently undermine private sector efficiencies. It is important to benchmark other jurisdictions on the modalities for implementation of competition laws.
- vi. **Funding of the Implementing Agency:** Financing of the preliminary activities of the competition regulation should be got from the consolidated. It is important to note that Uganda is also a beneficiary of revenues generated by the COMESA Competition Commission.; such revenue should be dedicated to capacity building and operations of the Competition Regulator in Uganda.
- vii. **Penalties:** Specific penalties for breach of the Completion law should be embedded in the Bill; the Bill should provide for regulation o set turn over thresh holds that qualify for completion regulation and penalties for non-compliance. This needs to be expanded and reviewed, implying subsidiary regulations to provide for this. The higher the offence the higher the penalty.
- viii. **The tariff indexes for the Monopolies** e.g. NWSC, Electricity Generation and distribution pass through tariffs are not systematically evaluated from the monopoly position perspective. These are supervised by the sector Ministries. It is not ideal that The Minister for Trade is given the mandate to implement the law because of underlying conflict of interest.
- ix. **The Proposed Technical Committee** is not recommended for the various reasons given. Should it be done, it should be in consultation with the private sector. The Bill should rather provide for a stepwise implementation by setting up an independent agency, provide for its growth, staffing and training of technical manpower.

- x. The presence of a **Board** is very critical; however, the terms of the Board Members should not be a repeat of past mistakes in terms of remuneration which is what has led to the current rationalizations that will affect efficiency.
- xi. Competition Law confers quasi-judicial powers on the implementing agency and therefore there is a need for a clause that provides for a competition tribunal. This will reduce the need for resorting to courts of law to appeal decision of the Agency. This also introduce further justification for an independent agency because appealing a decision by a Minister is a nuanced process.
- xii. **Power of the Ministers;** This need to be revised by consideration of 10 above.
- xiii. **Interpretation of words used; words** should be defined to bring clarity while interpreting the bill.
- xiv. **Provision of exemptions for certain restrictive practices;** the bill provides for restrictive practices but its silent about exemptions and for law to be a good law its must be flexible.
- xv. **Publication of a decision made by the authority** in case any business has been found guilty in the breach of the provisions of the law, in the gazette for public awareness and this will act as a lesson for the would-be business that will breach the law hence easy regulation of the sector.
- xvi. **The Bill should make provision for regulations to specify a period for determination of proposed mergers, acquisitions, and joint ventures.**
- xvii. **Provision for revocation of approved mergers, acquisitions, and joint venture in case of misleading information or non-compliance with merger and acquisition conditions** will help to regulate and promote a competitive environment.
- xviii. **The bill should also provide for the provision of consumer welfare.** This will enable supply of good and standard commodities for people's consumption which it's to the best interest of the public.
- xix. **The bill should provide for the financing of the Agency.** This will specify the source of the funds to be used by the authority and for accountability purposes.



**4.0 PROPOSALS BY PRIVATE SECTOR FOUNDATION UGANDA (PSFU) ON THE DRAFT COMPETITION BILL SUBMITTED TO THE PARLIAMENT OF UGANDA.**

No	Section	Proposal	Justification
1.	Section 1 - Application	<p>Add a Clause to the effect that.</p> <p>“In case of a conflict between the provisions of this Act and provisions of any other written law with regard to any competition matters, the provisions of this Act shall prevail”</p>	<p>This is to avoid any potential conflicts between the different laws considering some sector regulators have already established competition - related regulations and for any other regulators intending to pass sector-related provisions relating to competition.</p>
2.	Section 2 - Interpretation	<p>Amend the Clause to provide for definition and/or interpretation of words used such as “Sovereign function” under S.1 (2) (b), “Concerted action or practice” under S.8, and many other words used in the Act.</p>	<p>This will help in easing of the interpretations of the provision of the Act.</p>
3.	Part II – Administration S.3 – Administration,	<p>Amend Part II in its entirety to vest the</p>	<p>Whereas it is the correct position that the parent Ministry should maintain oversight and exercise such powers as</p>

No	Section	Proposal	Justification
	<p>S. 4 – Functions of the Ministry</p> <p>S.5 – Reference of matters to the Ministry</p> <p>S.6 - Establishment of the Technical Committee &amp;</p> <p>S.7 – Power of Ministry.</p>	<p>administration/implementation of the Act in an established independent Authority (Agency, Independent Commission or Authority)</p> <p>The subsequent sections should provide for establishment of Authority, its functions, Membership, Remuneration of the Members, Delegation by the Authority, Liability and protection from personal liability and Powers of the Authority (such as entry &amp; search, investigations).</p>	<p>delegated legislative power over competition law matters, appointments into different offices etc., actual implementation/administration of the law is best executed through an independent institution.</p> <p>There is need to establish either a Competition Authority, Agency, or Independent Commission for several reasons including accountability, timeliness in handling matters as well as ensuring proper structures and resolution channels especially when it comes to resolution of disputes and making sure that there are proper appeal channels.</p> <p>Such an institution can be established without any concerns on budget constraints since after establishment and operationalization, the institution can run on self-generated finances through fees, fines, penalties, and related payments.</p>
4.		Amend Section 8(3) insert subsection 3(e)	Ensuring fairness in the marketplace for the consumers' benefit.



No	Section	Proposal	Justification
	Section 8 – Prohibition of anti-competitive practices and agreements	(e) prevents, distorts, lessens, or restricts competition	<p>Including of exceptions to this provision in regard to matters of public policy, public health and security exceptions and for a law to be a good law its must be flexible. reference can be made in line with Section 25 of the Kenyan Competition Act of No. 12 of 2010.</p> <p>The Act should grant exceptions for such prohibited practices for example.</p> <p>(1) Any undertaking may apply to the Authority To be exempted from the provisions of Section 12(2) in respect of—</p> <p>(a) made in the prescribed form and manner. (b) accompanied by such information as may be prescribed or as the Authority may reasonably require.</p> <p>(2) The Authority shall give notice by publishing a notice in the Gazette of an application received in terms of subsection (1)—</p> <p>(a) indicating the nature of the exemption sought by the applicant; and (b) calling upon interested persons to submit to the</p>

No	Section	Proposal	Justification
			<p>Authority, within thirty days of the publication of the notice, any written representations which they may wish to make regarding the application.</p>
		<p>Insert a provision right after Section 8(4)</p> <p>Subsection 4(e) shall not prevent a supplier or producer of goods or services from recommending a resale price to a reseller of the goods or a provider of the service, provided –</p> <p>i) it is expressly stipulated by the supplier or producer to the reseller or provider that the recommended price is not binding; and</p>	<p>Consumer protection.</p>

No	Section	Proposal	Justification
		<p>ii) if any product, or any document or thing relating to any product or service, bears a price affixed or applied by the supplier or producer, and the words “recommended price” appear next to the price so affixed or applied.</p>	
5.	<p>Section 9 – inquiry into anti-competitive practices and agreements</p> <p>S.20 of the bill does not grant publication to the public (gazette) by the Authority when it makes orders in accordance with the Act</p>	Delete the section	<p>Already covered under Part VI of the Act.</p> <p>Including of the provision of publication to the gazette when it makes an order in accordance with the Act in case any business has been found guilty in the breach of the provisions of the law, in the gazette for public awareness and this will act as a lesson for the would-be business that will breach the law hence easy regulation of the sector. reference can be made in line with Section 39 of the Kenyan Competition Act Of No. 12 of 2010 Publication of decision of Authority.</p>

No	Section	Proposal	Justification
			<p>(1) The Authority shall cause notice to be given in the Gazette of any action taken under section 37 and of any agreement referred to in section 38.</p> <p>(2) The notice referred to in subsection (1) shall include—</p> <p>(a) the name of every undertaking involved; and</p> <p>(b) the nature of the conduct that is the subject of the action or the Settlement agreement.</p>
6.	Part II – Prohibition of Anti-Competitive Practices and Agreements	Amend the Part to include a section providing for the exemption of certain restrictive practices. Reference of Part III (E) – Exemption of certain Restrictive Practices.	<p>It is necessary to have a provision for circumstances where such practices arise owing to the nature of a particular market segment/dynamics.</p> <p>The same should also pave way for the enactment of a statutory instrument (Regulations or Guidelines) specifically addressing the handling of different types of such practices that cannot be exhaustively covered through an Act of Parliament.</p>
7.	Section 13 – Inquiry into abuse of dominant position	Delete section	Already covered under Part VI of the Act.

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8.	Part V – Mergers, Acquisitions and Joint Venture	<p>Amend the provision to include a section that widens the definition of Merger to highlight manners in which acquisition may be achieved. Reference to Sec 41 (2) Competition Act Kenya.</p> <p>Part v of the bill provides for the merger, acquisitions and joint venture however the bill is silent in relation to the revocation of approval of proposed merger, acquisitions and joint venture in case one gives misleading information.</p>	<p>Alignment to best practice and EAC, COMESA competition laws.</p> <p>The provision of the law in line with the revocation of approval of the proposed merger, acquisitions and joint venture should be incorporated in case one gives misleading information and the effect to this is that it will cause the business to avail the right information to the authority which will ease the regulation the sector and promote a good competitive environment. reference can be made in line with Section 47 of the Kenyan Competition Act of No. 12 of 2010 Revocation of approval of proposed merger.</p> <p>(1) The Authority may at any time, after consideration of any representations.</p> <p>made to it in terms of subsection (2), revoke a decision approving the implementation of a proposed merger if—</p> <p>(a) the decision was based on materially incorrect or misleading information for which a party to the merger is responsible; or</p> <p>(b) any condition attached to the approval of the merger that is material to the implementation is not complied with.</p>

No	Section	Proposal	Justification
			<p>(2) If the Authority proposes to revoke its decision under subsection (1), it shall give notice in writing of the proposed action to every undertaking involved in the merger, and to any other person who in the opinion of the Authority is likely to have an interest in the matter; and call upon such persons to submit to the Authority, within thirty days of the receipt of the notice, any representations which they may wish to make in regard to the proposed action.</p> <p>(3) Notwithstanding subsections (1) and (2), the Authority may impose a financial penalty of up to ten percent of the preceding year's annual gross turnover.</p> <p>(4) Any person who, being a party to a merger—</p> <p>(a) gives materially incorrect or misleading information; or</p> <p>(b) fails to comply with any condition attached to the approval for the merger, leading to a revocation of the merger under this section, commits an offence and shall be liable on conviction to a fine not exceeding ten million shillings or to Imprisonment for a term not exceeding five years, or to both.</p>

No	Section	Proposal	Justification
9.	Section 27 - Appeals	Amend Section to the effect that appeals from the Authority's decisions shall be made the Competition Tribunal.	See justification below
<b>PROPOSED ADDITIONS (NEW CLAUSES)</b>			
10.	Consumer Protection and consumer welfare	Include a Chapter/Part on Consumer protection and avenues for consumers to raise concerns around anti-competitive practices in the marketplace.	Alignment to best practice and the overall objective of competition law being the protection of consumers. Consumer welfare should be incorporated. This will enable supply of good and standard commodities for people's consumption which it's to the best interest of the public. Reference can be made in line with part vi of the Kenyan Competition Act of No. 12 of 2010.
11.	Establishment of a Tribunal	Include a provision for establishment of a tribunal that has the mandate to hear and determine appeals from the Authority's decision.	With the establishment of a Competition Authority/Agency as proposed above, it is necessary to establish a Competition Tribunal as an additional layer of oversight over the activities and decisions of the Competition Authority.  Considering the lengthy trial processes associated with courts, establishment of a tribunal will enable expeditious

No	Section	Proposal	Justification
		<p>Provide for Membership, appointments, term of office, quorum, powers of the Tribunal.</p> <p>Include provisions to the effect that appeals from decisions of the tribunal shall lie with the High Court.</p>	<p>handling of any appeals from the decision of the implementing authority.</p> <p>The provision of the law in line with the establishment of the tribunal should be incorporated this will help in appeals, reviewing and revision of the discussions of the authority hence promoting of justice in case of any matter brought to the authority for a decision and if the parties are not satisfied with the outcome and also over look the other works of the authority. reference can be made in line with Section 48 of the Kenyan Competition Act Of No. 12 of 2010 Review of decisions of Authority by Tribunal</p> <p>(1) Not later than thirty days after notice is given by the Authority in the Gazette in terms of section 46(6) of the determination made by the 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 Authority's decision.</p> <p>(1A) Upon receipt of a written decision from the Authority as contemplated under section 46(6), a party may file an appeal to that decision to the Tribunal.</p>



No	Section	Proposal	Justification
			<p>(2) Within thirty days after receiving an application under subsection (1), the Tribunal shall by notice in the Gazette give notice of the application for a review and invite interested parties to make submissions to the Tribunal in regard to any matter to be reviewed within the time and manner stipulated in the notice.</p> <p>(3) Within four months after the date of the making of an application for a review was made, the Tribunal shall decide either—</p> <p>(a) overturning the decision of the Authority;</p> <p>(b) amending the decision of the Authority by ordering restrictions or including conditions.</p> <p>(c) confirming the decision of the Authority; or</p> <p>(d) referring the matter back to the Authority for reconsideration on specified terms.</p> <p>(4) The Tribunal shall—</p> <p>(a) give notice of the determination it has made in relation to the review.</p>

No	Section	Proposal	Justification
			<p>(i) to the Authority and to the parties involved in the proposed merger, in writing; and</p> <p>(ii) by notice in the Gazette; and</p> <p>(b) issue written reasons for that determination to the Authority and the parties involved.</p> <p>(2) The Tribunal may determine the procedure for a review in terms of this Act</p>
12.	Control of unwarranted concentration of economic Power	Include provisions under Part V of the Bill to cover controls around the unwarranted concentration of economic power.	Control of abuse of dominant position as an anti-competitive practice. The provision of the law in line with the control of the unwanted concentration of economic power should be incorporated. This will deal away with monopoly and also lessen the economic gap between the people leading to improved standards of living among Ugandans. Reference can be made in line with part v of the Kenyan Competition Act of No. 12 of 2010.
13.	Financial provisions	<p>Include a Section/Part on Financials to cover:</p> <ul style="list-style-type: none"> <li>• Sources of Funds for the Competition</li> </ul>	<p>Ensure sound financial accountability in the running of the Institution's affairs.</p> <p>The provision of the law in line with the financial provisions should be incorporated. This will state clearly the source of the funds to be used by the authority and for accountability</p>

No	Section	Proposal	Justification
		<p>Authority/Agency/Commission</p> <ul style="list-style-type: none"> <li>• Financial estimates (annual)</li> <li>• Financial Year of the institution</li> <li>• Accounts and Audit</li> <li>• Investments of funds</li> <li>• Any other relevant financial matters</li> </ul>	<p>purposes. Reference can be made in line with part viii of the Kenyan Competition Act Of No. 12 of 2010.</p>
14.	General	<p>Review the Bill alongside COMESA and EAC competition laws to ensure absence of legislative gaps as well as alignment to regional best practice</p>	<p>Uganda is a Member of both COMESA and EAC trade bloc and there is need for alignment and uniformity for ease of implementation of the law in regional trade.</p>

## 5.0 PROPOSALS ON INSTITUTIONAL ARRANGEMENTS FOR COMPETITION POLICY AND LAW IMPLEMENTATION

It is established practice that no matter how well-crafted and drafted a competition policy and law is the effectiveness of the policy and law is largely compromised if the institutional framework for their implementation and enforcement is not in place or is inadequate. In other words, even a good competition policy and law would not be effective unless efficient institutional arrangements are in place to implement the policy and law.

The primary responsibility of implementing country's competition policy and enforcing the law lies with a Competition Authority, which is the centerpiece of the institutional framework for effective competition. The following are the three basic elements of an effective competition authority:

1. **Independence:** An independent competition authority, free from political interference or any other interest group influences, is best positioned to get the necessary respect and cooperation from the business community, which constitutes its main client base.
2. **Transparency:** The decisions of a competition authority should be known to the public in the interest of transparency. This not only builds public confidence in the competition regime, but also safeguards the independence of the competition authority. Transparency in the operations of the competition authority is also an important tool in advocating competition in public policy formulation and promoting private sector compliance with competition law.
3. **Accountability:** While independence of a competition authority is desirable and important element, competition authorities should be accountable for their actions to guard against possible abuse of their immense quasi-judicial powers and influence over practices and conduct of enterprises, and to ensure that they implement competition policy in cohesion with the country's other socio-economic policies. Accountability of competition authorities is through all the government's three branches (i.e., Executive, Legislature and Judiciary).

The Executive is an important player in enforcement of competition law and policy because provides direction for social and economic development priorities. Government therefore gives competition authorities directions aimed at advancing other public economic and social policies

e.g., those related to consumer protection, price surveillance or control, small and medium enterprises promotion, etc.

The judiciary plays an important role in enforcement of competition law as review and appeal bodies of competition decisions. In this regard law courts assess evidence presented by competition authorities and undertakings or their representatives to determine whether there is a breach of the competition law. The rights to appeal to a higher court or tribunal against decisions of competition authorities are provided for almost all laws in different jurisdictions.

Sector regulators are also an indispensable part of the competition institutional framework. Regulation of key economic sectors, particularly those served by monopolies, has been generally accepted in both developing and developed economies. The main reason being that competition in such sectors is usually inadequate or even non-existent, for the purposes of encouraging and promoting efficiency and protecting consumer welfare.

**Progression of Institutional Development and Capacity Building;** Competition Agencies take on average five to ten years to mature and effectively enforce competition law and policy. In Uganda, the decision to rationalize agencies notwithstanding, considering the critical importance of competition law and policy implementation, a middle ground can be sought. The law may establish a Competition Agency with a secretariat at the Ministry of Trade, Industry and Cooperatives. Staff assigned to the Agency should be excluded from other routine duties of typical civil service nature and concentrate on foundational aspects of institutional development, development of regulations to underpin effective implementation, public awareness, and human resource development.

The Secretariat should have full-time staff to handle the administrative affairs of the agency and undertake investigations into competition complaints; it is therefore the investigative arm of the Agency. It is therefore impractical that the set-up of the traditional civil service structure, bureaucracy can effectively implement the law.

Starting a competition agency requires no more than six full-time staff to focus on inception activities of institutional development nature, which should not be a financial burden, especially because when the agency matures, it generates its own income.

The Agency set up should have an ad hoc, a non-executive board that will provide governance support and planning with a view to transiting into an independent Agency within five years. This will reduce the unnecessary cost of running an Agency with many staff but without the requisite competence to implement the law.

The quasi-judicial nature of the work of competition agencies exposes them to litigation and other legal challenges from enterprises aggrieved by their decisions, and even by their procedures. There is therefore need for members and staff of competition agencies to have immunity against any suit, prosecution, or other legal proceedings for anything done under the competition law or in good faith.

## **6.0 CONCLUSION**

The above-mentioned comments and proposals if considered will foster a conducive environment that supports the business community to yield more export earnings, create jobs and generate more tax revenue for Government to enable service delivery. Therefore, the PSFU plea is that the above proposals are considered while making decisions.