Legal Alert

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ANALYSIS OF THE NEW COMPETITION ACT, 2023

Introduction

In 2022, the Minister of Trade, Industry and Cooperatives (Minister) tabled before Parliament the Competition Bill, 2022 and after undergoing several revisions, it was assented to by the President on 2nd February 2024. In the past, there were only sector specific competition laws for example in the banking, telecommunications, and energy sectors therefore the Competition Act, 2023 (the Act) cures this by providing for Uganda's first ever national law on competition.

The Act seeks to among others promote and sustain fair competition and to prevent practices with an adverse effect on competition in markets in Uganda. The Act applies to anti-competitive practices, anti-competitive agreements, abuse of dominant position, mergers, acquisitions, and joint ventures with an adverse effect on competition. The Act does not have a commencement date and it will only come into force once gazetted.

This article highlights the salient aspects of the Act in the context of mergers, acquisitions, and joint venture transactions.

Administration:

The Ministry responsible for trade (Ministry) is the body entrusted with enforcing the Act and is to be assisted by a technical committee on competition and consumer protection, to be established within the Ministry (Technical Committee). The President rejected the proposal that an independent body, the Competition and Consumer Protection Commission, be responsible for enforcing the Act on the basis

that this would be contrary to government's policy on rationalization whereby government has frozen the establishment of new statutory bodies, to eliminate structural and functional duplication and overlaps.

There is concern that enforcement of the Act by the Ministry will create challenges, considering potential political influence and inefficiencies with the Technical Committee whose members may not be fully dedicated to competition matters owing to pre-existing full time jobs. An independent autonomous office on the other hand would likely instill more public confidence for example in private equity investors vis a vis the Ministry owing to perceived red tape in decision making at ministerial levels.

Anti-competitive behavior:

The Act prohibits (i) anti-competitive practices and agreements, (ii) abuse of dominant position by exploiting consumers and excluding competitors, and (iii) mergers, acquisitions, and joint ventures with an adverse effect on competition. This article briefly addresses each of the prohibited anti-competitive behaviors under the Act.

Anti-competitive practices and agreements:

The Act prohibits certain horizontal and vertical agreements if deemed anti-competitive. Horizontal agreements are agreements between persons, each operating at the same level of the market and would normally be actual or potential competitors in the market while vertical agreements are those between persons, each operating at different levels of the production and distribution chain and relate to the conditions under which the parties may purchase, sell or resale certain goods or services.

Some of the prohibited horizontal agreements include agreements that directly or indirectly fix purchase or selling prices, share markets or sources of production supply by territory type, customer size or any other way while the prohibited vertical agreements include among others exclusive supply and distribution agreements.

Abuse of dominant position:

An entity enjoys a dominant position if it has the power to behave independently of its competitors, customers, and can prevent other persons from competing in the relevant market. The Act lists instances the Ministry will consider when determining whether a person enjoys a dominant position which include among others:

- whether the person alone supplies or acquires 30% or more of particular goods or services or where three or more persons supply or acquire 60% or more of particular goods or services;
- the monopoly status or dominance acquired because of an Act of Parliament or by virtue of being a government undertaking, a government company of a public section undertaking.

A person abuses a dominant position if for instance it makes the conclusion of contracts subject to acceptance by other parties of supplementary obligations, which by their nature or according to commercial usage, have no connection with the subject of those contracts. The requirement to seek regulatory approvals under certain contracts would however not be caught by this provision.

The Act also prohibits persons holding a dominant position in the relevant market from engaging in any practice that excludes or is intended to exclude competitors from the market such as price squeezing, predatory pricing, cross-subsidization and unjustifiable discrimination among consumers or suppliers.

Mergers, acquisitions, and joint ventures with an adverse effect on competition:

The Act does not define what amounts to "adverse effect" however, it among others lists the following considerations for the Ministry to consider when determining if a merger, acquisition of control or joint venture would have an adverse effect on competition in a given market:

- the level of mergers, acquisitions or joint ventures in the market;
- the market share of the parties involved in the merger, acquisition or joint venture;
- the likelihood that the merger, acquisition or joint venture may result in the removal from the market of a vigorous and effective competitor;
- the possibility of a rise in failing businesses;
- the nature and extent of innovation in the market; and
- whether the benefits of the merger, acquisition or joint venture outweigh the adverse impact of the merger, acquisition or joint venture, if any.

In our view, the considerations are numerous and widely worded making it easy to fall within the ambit of the restriction against anti-competitive behavior, particularly where such investment triggers multiple considerations.

Investors proposing to enter mergers, acquisition of control or joint ventures are required to give notice thereof to the Ministry and obtain its approval ahead of the proposed merger, acquisition, and joint venture (as applicable). Failure to serve this notice will render such transaction void.

According to the Act, the thresholds for notifiable mergers and joint ventures will be prescribed by the Minister in a statutory instrument which is yet to be published. The Act does not have transitional arrangements to confirm approval requirements for ongoing mergers and joint ventures caught by these provisions ahead of completion. It is understood that guidelines offering guidance on these are also imminent.

In the case of an acquisition of control, a person is deemed to acquire control if (i) it has the ability to exercise 49% or more of the voting rights in another entity, (ii) can appoint more than half of the members of the board of directors or similar body in the other person; or (iii) where it can control the affairs of the other person. It is imperative to note that the 49% threshold is low compared to the 51% global practice threshold in equity investments.

The timeline for giving notice to the Ministry varies depending on the transaction at hand. For instance, the notice for a proposed merger or amalgamation is to be given after the board of directors or similar body of the respective parties have accepted the proposal to merge or amalgamate. For a proposed acquisition of control of another person, notice must be given after the conclusion of negotiations of the agreement of acquisition of control. Regarding joint ventures, notice must be given after the execution of the joint venture agreement by the relevant persons. These seem reasonable timelines and are indeed aligned with market practice for regulatory approvals being catered for as conditions precedent to the closing of a merger or joint venture transaction.

Once full notice of a merger, acquisition or joint venture is received from the party seeking approval, the Ministry is mandated to inquire into the merger, acquisition or joint venture within 120 days and also has power to direct the parties to publish details of the relevant transaction in a prescribed manner. If the Ministry fails, neglects or does not communicate its decision within the prescribed timeline, it will be taken to have approved the merger, acquisition, or joint venture. The approval process is straight forward, transparent, and

flexible and allows conditional approvals and party engagement with the Ministry.

Regulations:

The Minister is required to lay before Parliament regulations made under the Act within six months from the commencement date of the Act. These regulations are anticipated later this year and are meant to operationalize the Act by fleshing out details for instance on the process and documentation required under an approval.

Interface with COMESA:

The Act does not cater for interface with regional competition regimes such as the COMESA regime, thereby giving rise to dual notifications to both the Ministry and regional competition regulators like the COMESA Competition Commission (CCC). Based on regional practice, it is anticipated that the Ministry will cede jurisdiction to regional competition regulators like the CCC or the East African Community competition regime (once operationalized), where CCC thresholds are triggered to avoid over lapping and over regulation.

Conclusion

The Act is a sign of growth of the markets in Uganda and it is hoped that rather than stifle investment it will be a tool to further enhance and encourage investment. A more comprehensive analysis of the Act can be provided on request.


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