Legal Alert

PRIVATE EQUITY INVESTMENT IN UGANDA AND THE PROPOSED COMPETITION BILL

Introduction

Uganda has historically had no national law on competition but rather sector specific competition laws for example in the banking, telecommunications, and energy sectors. In 2022, however, the Minister of Trade, Industry and Cooperatives (**Minister**) tabled before Parliament the Competition Bill, 2022, (the **Bill**), which bill seeks to promote and sustain fair competition across the various markets in Uganda, control anti-competitive behavior, enhance access for new investors and safeguard consumer interests. After undergoing several revisions, Parliament passed the Bill on 26 May 2023, but on 24 July 2023, the President requested for it to be sent back for further consideration. Whereas Parliament sat to reconsider the Bill on 31 August 2023, there have been no further updates on its passing.

Private equity investments on the other hand continue to grow in Uganda, with various business sectors looking lucrative and attracting more and more sophisticated investors, more recently in the financial services sector, data technology and traditional FMCG. In 2022 alone, Uganda's private equity deal value stood at USD 70 million according to Digest Africa. There are also efforts to enhance the regulatory regime applicable to the structuring of private equity funds in Uganda spearheaded by the East African Venture Capital Association and funded by the European Union, IFAD (International Fund for Agricultural Development), and other stakeholders including industry regulators.

This article attempts to analyze salient aspects of the Bill and their potential impact on private equity investments in Uganda.

Analysis of the Bill

Administration:

The Bill proposes that an independent body, the Competition and Consumer Protection Commission (**Commission**), be responsible for enforcing the Competition Act, meeting once every quarter with provision for special meetings at the request of three members to cater for any

backlog resulting from only the quarterly meetings. This is contrasted against an earlier position in the same Bill that gave the oversight and enforcement function to the Ministry responsible for trade (**Ministry**), assisted by a technical committee to be established within the Ministry (**Technical Committee**).

Without doubt enforcement of the Competition Act by the Ministry would create challenges, considering potential political influence and inefficiencies with the Technical Committee whose members would not be fully dedicated to competition matters owing to pre-existing full time jobs. The independent autonomous office would likely instill more confidence in private equity investors vis a vis the Ministry, if one considers typical time lags in decision making at ministerial levels.

Anti-competitive behavior:

To achieve its objectives, the Bill 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. While each of these restrictions is addressed in great detail by the Bill, this article focuses on item (iii) immediately above, being most pertinent to private equity investments.

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

The Bill does not define what amounts to "adverse effect". However, it among others lists the following considerations for the Commission 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 for an equity investment to fall within the ambit of the restriction against anti-competitive behavior, particularly where such investment triggers multiple considerations. How these considerations will be applied remains to be seen. It is nonetheless hoped they will not be applied in a way that would suffocate the budding private equity sector.

Merger, Acquisition and JV Notifications:

Private equity investors proposing to enter into mergers, acquisition of control or joint ventures will be required to give notice thereof to the Commission and also obtain its approval of the proposed merger, acquisition, and joint venture (as applicable). Failure to serve this notice would render such transaction void.

At this stage, the thresholds for notifiable mergers and joint ventures aren't prescribed but are awaited under regulations to be passed pursuant to the passing of the Bill into law. It is anticipated that the Bill will have transitional arrangements to cater for the applicability of approval requirements for the mergers and joint ventures caught midway completion.

In the case of acquisitions of control transactions, a private equity investor will be 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. It is hoped that the 49% will be reconsidered, so less transactions are caught by the approval requirement.

Notification Timelines:

The timeline for giving notice to the Commission under the Bill varies depending on the transaction at hand. For instance, the notice for a proposed merger or amalgamation is proposed 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 an equity investment under private equity.

Approval process:

According to the Bill, once full notice of a merger, acquisition or joint venture is received from the party seeking approval, the Commission will be mandated to inquire into the merger, acquisition or joint venture within 120 days and will have power to direct the parties to the merger, acquisition, or joint venture to publish details of the relevant transaction in a prescribed manner. The Commission may also invite persons affected or likely to be affected by the merger, acquisition or joint venture to file their written comments or objections and shall thereafter proceed to consider the request to approve the merger, acquisition or joint venture.

If the Commission is of the opinion that a merger, acquisition or joint venture has no adverse effect on competition in the market, it shall approve the proposed transaction and where it holds a contrary opinion, it shall communicate the conditions subject to which it proposes to approve the merger, acquisition or joint venture. If the concerned parties agree to the Commission's conditions, they will be required to indicate their acceptance within 14 days and if they do not, they will apply to the Commission for further modification of the conditions.

Where the Commission agrees with the modifications to the conditions proposed by the parties, it will be required to approve the merger, acquisition or joint venture subject to the modifications and if it does not accept the proposed modifications, it will give the parties a further period of time within which to indicate their consent to the merger, acquisition or joint venture as proposed to be approved, subject to the conditions given earlier. If the parties fail to indicate their consent at the end of the prescribed time, then the merger, acquisition or joint venture will be taken to have been disapproved by the Commission.

The proposed approval process appears fairly straight forward, transparent and flexible to allow for conditional approvals and party engagement with the Commission. It is hoped that this will instill sufficient confidence in the private equity investors and encourage further investment in Uganda. It is also hoped that the proposed 120 days within which the Commission is obliged to respond can be reduced to 90 days to make the process more expeditious.

Interface with COMESA:

The Bill does not cater for interface with regional competition regimes such as the COMESA regime, thereby giving rise to dual notifications to both the Commission and regional competition regulators like the COMESA Competition Commission (**CCC**). Based on regional practice, it is recommended that at the point of setting the thresholds for notifiable mergers, acquisitions and joint ventures, consideration is also given to the COMESA thresholds, such that the Commission in Uganda would 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 regulation. For thresholds not caught by the CCC, the Uganda Commission would have jurisdiction and only be informed of notifications to the regional regulators to avoid duplicity of applications and facilitate private equity deal flow in Uganda and the region.

The current version of the Bill provides for no exemptions to the notifications and approval requirements flagged above. This means that without exception private equity investments that trigger the restrictions and /or notification requirements, including those proposing to operate in priority sectors and/or sectors with specific competition provisions, will have to comply with the Competition Act. This is bound to raise red tape and questions around which regime takes priority over the other, whether the applications for approval under separate laws are made simultaneously. It is hoped that this will be resolved ahead of the passing of the Bill into law.

Conclusion

The Competition Bill is a generally welcome development in the private equity and mergers and acquisitions industry. It 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.

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