

THE PRIVATIZATION ACT

2025 ANALYSIS

INTRODUCTION

Assented to on 15 th October 2025, the Privatization Act, 2025 (the Act) repeals the previous legislation that had been declared unconstitutional by the High Court. The new Act establishes a revised framework aimed at enhancing efficiency, competitiveness and economic growth.

KEY HIGHLIGHTS

Privatization Authority

The Act establishes a Privatization Authority (the Authority) to oversee and implement the privatization programme/process. The Authority is mandated to advise the government, facilitate policy implementation, coordinate with relevant institutions and ensure compliance with the provisions of the Act.

Expanded Scope of Limitations

The Act excludes sales in secondary markets, rights issues, balance sheet reorganizations, county government share transfer and sale of government shares in a government linked corporation. This prevents overreach and potential overlaps with other existing frameworks.

Methods of Privatization

The Act provides for sale of shares through public tendering, initial public offerings and sales arising from the exercise of pre-emptive rights. Under this approach, shares of a public entity slated for privatization will be offered for sale through a competitive bidding process. The evaluation of bids will be conducted based on the criteria outlined in the tender documents.

Leadership and Formulation of the Privatization Process

The Act vests the Cabinet Secretary for the National Treasury(the CS) with overall policy and oversight responsibility for privatization. The CS shall have the power to identify and determine the entities to be included in the privatization programme as well as develop and structure the privatization policy and strategy. The Act expands consultation requirements to include experts, affected organizations, and the public, with consideration of government policies and the strategic nature of entities.

Identification of Entities for Privatization

The Act sets out criteria for the CS to consider when identifying entities for inclusion in the privatization programme. These include alignment with government policy, prevention of unregulated monopolies, anticipated economic and social benefits and promotion of sustainable development and economic stability (the Considerations).

Approval of Privatization

The Act requires that the privatization programme formulated by the CS be approved by the National Assembly. Parliament now has ninety (90) days to consider the programme based on the Considerations set out in the Act. The approved programme shall be published in the Kenya Gazette. This change departs from the previous privatization process, drawing significant public and media concern. The previous framework involved several layers of approval and public participation, designed to ensure that privatization decisions serve the broader public interest. Following approval of a privatization, a privatization agreement will be prepared and become binding once executed by the registered owner of the

shares and countersigned by the CS. If privatization may create a monopoly, the Authority must include safeguards and obtain the CS's approval.

Duration and Amendment of the Programme

The Act states that each privatization programme shall remain valid for a maximum of four(4) years from the date of gazetttement. Where implementation is incomplete upon expiry, the CS may carry forward the affected entities into a newly formulated and approved programme. The CS retains the power to amend the privatization programmes in accordance with the Act.

Implications

The Act shall affect investor participation, as the CS can limit sales to Kenyan nationals or require a minimum level of local participation. It also streamlines approvals and reduces delays, aiming to enhance efficiency , and accelerate privatization. Economic impacts are mixed with potential benefits including higher productivity, better services, lower prices, increased investment, and job creation, while risks include job losses, market concentration, reduced oversight, and corruption if safeguards are not enforced.

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