S&L ADVOCATES

Guidance Note

Analysis of the Competition Bill 2022 and state of competition regulation in Uganda

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Introduction

The government of Uganda tabled the Competition Bill 2022 before parliament in December 2022, marking what has been a long-awaited initiative by the state to finally translate years of both policy and political positioning on the regulation of competition into actual legislation.

From a policy viewpoint, the government has consistently maintained that Uganda's liberalised economy must be accompanied by a competition law regime – a study report by the Uganda Law Reform Commission, the Ministry of Trade's National Trade Policy 2007 and the National Competition and Consumer Protection Policy 2014 document the government's desire to formulate and implement competition legislation for the management of the country's liberal economy.

It is not entirely clear why the government made no attempt to enact a competition law over the past twenty years, but it would be rather simplistic to attribute this inaction to a lazy or inefficient legislative agenda. While competition law is essential for regulating competitive markets for goods and services, there are equally strong counter-arguments about the place of competition law in low-income countries with underdeveloped economic, administrative, operational and enforcement structures, and whether foreign competition law concepts properly reflect the true reality in developing markets.

Legally, the structural design of competition law in several developing countries has also been criticised for obsessive academic emphasis on form rather than economic effect, and it will be interesting to see how the Ugandan government frames its approach in the coming years.

Prior sector-specific regulation

While Uganda has never had a national competition law, the regulation of competition has been applied on a sector-specific basis. The key sectors here have been:

- **Telecommunications**: The Uganda Communications Commission has a statutory mandate to promote, monitor and enforce fair competition in the communications sector. The Uganda Communications (Competition) Regulations 2019 seek to ensure, among other objectives, that communication services are reasonably accessible and fairly priced and to promote and maintain fair and efficient market conduct. The commission is empowered to take action to prohibit what it considers to be anti-competitive agreements, abuse of dominant position and anti-competitive mergers, takeovers and consolidations.
- **Electricity**: The Electricity Regulatory Authority is required to promote competition in the sub-sector, and to investigate any market player who commits any act or omission in breach of fair competition. The authority may also decline to issue an additional licence to an already existing licence-holder in the interest of fair competition and mitigating concentration risk.
- **Insurance**: The Insurance Regulatory Authority has a general mandate to promote effective competition in the insurance sector in the interests of consumers, the growth and development of the insurance sector and the development of an inclusive insurance sector.
- **Upstream and midstream petroleum operations**: The Petroleum Authority of Uganda is required to monitor conditions of operators and their trade practices to ensure that competition and fair practice is maintained in the sector.
- **Downstream petroleum operations:** Anti-competitive behaviour by market players is prohibited, and the Department of Petroleum Supply in the Ministry of Energy is empowered to take action to correct anti-competitive behaviour and other forms of restrictive trade practices.
- **Banking:** Bank of Uganda has an overarching mandate to monitor market conduct in the financial institutions sector and take appropriate remedial action.

The approach of sector regulators has been fragmented and it is difficult to discern a harmonised approach towards the regulation of competition. Rather than assess pure competition law aspects, the focus of several regulators has leant more towards examining an applicant's technical and financial qualification for a new licensing grant or to assume responsibility for an existing grant from the current holder (through a share sale or asset sale).

In other cases, regulators have sought to manage concerns caused by "excessive competition" or market saturation by limiting the issue of new licences, or subjecting the issue of new licences to certain macro-level conditions. Bank of Uganda, the Electricity Regulatory Authority and the Lotteries and Gaming Regulatory Board have and continue to apply these specific methods.

For its part, the Uganda Communications Commission has demonstrated the most significant interventionist action. In 2019, the commission conditioned its approval of a merger between two licensees to the requirement that a significant indirect shareholder of one of the parties dispose of its shareholding interest. This condition was designed to avoid a structural monopoly that would have been created by the transaction as a result of mutual indirect shareholding and the ability to indirectly exercise significant control. In 2022, the commission declared certain clauses of a vertical agreement between two licensed players to be anti-competitive. The commission has also routinely extended its mandate to investigate alleged anti-competitive behaviour to agreements entered into between licence-holders and third parties who are not licensed or regulated by the commission.

A key consideration regarding the Competition Bill is the manner in which it proposes (if at all) to address the division of responsibility between autonomous sector regulators and the body responsible for enforcing the national competition law. This point is addressed further below.

Competition Bill 2022 – key highlights

Following on from the National Competition and Consumer Protection Policy, the Competition Bill deals with four main groups of behaviour:

- horizontal arrangements – mainly arrangements between firms to maintain and control prices;
- vertical arrangements – including exclusive dealing, resale price maintenance, geographical limitations on activities and tied dealing;
- misuse of market power by monopolies and large firms; and
- control of mergers and acquisitions to ensure that they do not impair overall competitive conditions in the market.

ISSUE	PROVISION
Regulatory body –Technical Committee in the Ministry of Trade	Competition matters shall be overseen by a technical committee in the Ministry of Trade (the "Technical Committee"). No independent statutory body is to be formed, and the import of this is examined further below. The key roles of the committee include monitoring and investigating anti-competitive and unfair practices and agreements, and approving mergers, acquisition and joint ventures which are adjudged to have no adverse competitive effect on the market.
Exclusions and exemptions	There shall be no competition review or inquiry in relation to matters which relate to the performance of an obligation which Uganda has assumed under a treaty or international agreement, and the performance of a sovereign function on behalf of the government. The government may also exempt activities from a competition review in the interests of national security, public interest or where the activity in question, though anti-competitive, leads to the improvement of production or distribution.
Prohibition of anti-competitive agreements and practices	Agreements, decisions or conduct in respect of the provision of good and services across the entire value chain and which cause or are likely to cause an adverse effect on competition in the market are prohibited. Agreements or activities which contravene this prohibition are deemed to be void. Establishing whether an agreement, decision or conduct has as its object or effect the prevention, restriction or distortion of competition is usually not straightforward, and the Competition Bill contains a non-exhaustive list of examples. These include price-fixing, territory-marking, bid-rigging or collusive tendering, tie-in arrangements, exclusive supply and distribution agreements and resale price maintenance. In assessing whether an agreement or conduct is anti-competitive, the Technical Committee shall consider whether the agreement or activity in question results in the creation of barriers to new entry, forces existing competitors out of the market, or results into consumer benefit or pro-competitive impact. Consistent with an internationally recognised exception, an agreement or conduct shall not be anti-competitive where it is shown to contribute to the improvement of production and distribution and promote technical and economic progress, while allowing consumers a fair share of the benefits.

ISSUE	PROVISION
Prohibition of abuse of dominant position	An organisation is deemed to be dominant if it possesses a substantial level of market power, and organisations with dominant position are prohibited from abusing that position. In assessing “dominant position”, the Technical Committee shall refer to a number of empirical and subjective factors. Market share is one of them, and the Competition Bill provides a threshold of 35%. The other factors are subjective guideposts as to whether an organisation enjoys significant market power. Only the abuse of dominant position results in an infringement of the prohibition and the non-exhaustive list of specific conduct which may constitute an abuse include: • directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; • limiting production, markets or technical development to the prejudice of consumers; • applying dissimilar conditions to equivalent transactions with other trading parties; • making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which have no connection with the subject of the contracts; and • conduct designed to exclude competitors (including predatory pricing, refusal to deal, refusal of access to essential facilities, among others).
Notification of mergers, acquisitions and joint ventures	All parties who propose to complete any merger, acquisition or joint venture where there is a change of control shall give notice to the Technical Committee after the commercial terms have been negotiated and agreed. “Control” is with reference to both objective and subjective criteria – the ability to exercise 49% or more of voting rights, to appoint more than half of the directors and the ability to control the affairs of the enterprise. The transaction in question shall then be inquired into by the Technical Committee to ensure that it does not cause or is not likely to cause any adverse effect on competition within the relevant market in Uganda. The procedure for inquiry will entail a public notification and representations from the public. The Technical Committee may approve the transaction conditionally or unconditionally, or decline to approve it entirely. The Bill provides an opportunity for the transaction parties to conduct post-decision review with the committee. So far, no value threshold in terms of assets or turnover has been provided.

ISSUE	PROVISION
Inquiries by the Technical Committee related to anti-competitive agreements and practices, and abuse of dominant position:	In relation to anti-competitive agreements and practices, and abuse of dominant position, the Technical Committee may institute an inquiry upon receiving a complaint or reference from any concerned third party, or on the basis of knowledge or information acquired by the Technical Committee from any source. Following an inquiry, the Technical Committee may make orders or directives that it considers appropriate. These include: • cessation orders; • rectification orders; • directing the division of an enterprise with dominant position; • a fine not exceeding 10% of the average turnover for the last three years; and • awarding compensation to any aggrieved party.

Competition Bill 2022 – key issues analysis

Our key issues analysis follows below:

ISSUE	COMMENT/ANALYSIS
Regulations yet to be developed	As a general comment, the Competition Bill lays out headline principles, but the real substance will lie in the regulations and guidelines to be passed by the Ministry of Trade in due course. Even after the Competition Bill is passed by Parliament, it is possible that it may remain practically unenforceable until enabling regulations are put in place. It is critical for the government to pass a detailed set of regulations swiftly to provide institutional and legislative structure and certainty, and to focus the enforcement regime.
No autonomous statutory authority	Uganda has gone against established international practice by opting not to establish a statutory authority to oversee, promote and enforce compliance with the competition law. Instead, this role is vested in the government itself, acting through the Technical Committee in the Ministry of Trade. In general, competition policymakers advocate for a model of an independent regulator which operates autonomously with no influence from government or private industry. In various engagements, the Competition Committee of the Organisation for Economic Co-operation and Development ("OECD") has concluded that there is a broad consensus that the independence of national competition authorities constitutes best-practice for all competition regimes. Uganda has taken a different approach, and this is most likely influenced by the government's ongoing program to merge and mainstream government agencies, commissions and authorities in a bid to rationalise public expenditure. There will be concerns going forward about the independence of the Technical Committee and its broad ability to apply competition regulation independently of political and private-sector influence. There will also be concerns about the committee's ability to attract (and remunerate) the technical skill and capacity necessary to oversee the competition regime.

ISSUE	COMMENT/ANALYSIS
Relationship with other sector regulators	There are bound to be concerns regarding the jurisdictional interaction between the Technical Committee and other autonomous sector regulators. As the OECD has observed, while the objectives pursued by national competition authorities and sector regulators are often academically aligned, differences in the substantive rules they apply and different perspective on the same matters may lead to diverging outcomes. Therefore, it is possible that an independent sector regulator or even a fellow government ministry may consider a particular transaction or agreement, although nominally anti-competitive, to be strategically and commercially justifiable, but the Technical Committee takes a different view (and vice-versa). The Competition Bill provides that the Technical Committee has a general mandate to monitor and enforce competition law in "the market". The Bill also provides that where a statutory authority or any other body is considering any matter (this would include licence applications, approval of transfer of licence requests and third-party complaints) and a party alleges that the decision taken or proposed to be taken is likely to affect competition in the market, the matter shall be referred to the Technical Committee. The committee shall then provide an opinion as to how the issue is to be addressed, and no decision is to be taken until the committee issues its opinion. This formulation is problematic. It interferes with the independence of sector regulators, who are usually better qualified to assess any competition law impact in their respective sectors. The proposed framework would also allow bad faith or frivolous complaints to be made to the committee and delay approval processes elsewhere. The Bill should define the jurisdiction of the committee in relation to sector regulators, or otherwise provide for a clear co-operation mechanism with sector regulators in the manner that Kenya does. Formal agreements defining jurisdictional limits and co-operation channels between competition authorities and sector regulators are common in many countries. This ensures that for every matter, the affected parties are dealing with a single-decision making body. This is critical for clarity, efficiency and predictability of regulation.
Clear exemptions in relation to anti-competitive agreements and practices	As has been indicated above, an agreement or conduct shall not be anti-competitive where it is shown to contribute to the improvement of production and distribution and promote technical and economic progress, while allowing consumers a fair share of the benefits. It would be critical for an objective criterion for measuring this particular aspect to be built into the Competition Bill, or addressed in regulations. For example, a key feature of the Ugandan market are vertical agreements which include agreements relating to exclusive distribution, selective distribution, franchising, exclusive purchasing and supply and agency. It is generally accepted by competition authorities that vertical agreements do not usually give rise to competition concerns unless one of the parties enjoys considerable market power, or an agreement forms part of a wide network of similar agreements. An appropriate qualification would therefore be essential to disqualify vertical agreements that are customary to the trade and essential to the business function of the goods of services being traded.

ISSUE	COMMENT/ANALYSIS
Absence of thresholds for mergers, acquisitions and joint ventures	So far, no value threshold in terms of assets or turnover has been provided for the notification of mergers, acquisitions and joint ventures. For example, in one notification category, Kenya's competition regime provides that transactions are subject to notification where undertakings have a minimum combined turnover or assets of approximately USD8 million, and the turnover or assets of the target undertaking is approximately USD4 million. Thresholds are customary in competition regimes and are important, if for no other reason, for regulating the workload of the Technical Committee. It is anticipated that regulations to be passed in due course will set out clear merger, acquisitions and joint venture notification thresholds.
Interplay with COMESA and EAC regimes	Uganda is a member of the Common Market for Eastern and Southern Africa (COMESA) and in 2017, Uganda passed the COMESA (Implementation) Act to give the establishment treaty and the regulations passed under it legal effect. Therefore, transactions in Uganda with a regional dimension which meet the notifiable thresholds under the COMESA competition regime are notifiable to the COMESA Competition Commission. The jurisdiction of the commission extends to both mergers and acquisitions, and agreement which may restrict competition within the common market. The COMESA Competition Commission considers itself to be an exclusive "one-stop-shop" for all competition law matters within the territory. However, this "one-stop shop" positioning has not been unanimously accepted by the member states, several of whom continue to run autonomous domestic competition regimes. The Competition Bill addresses this relationship issue in headline terms and provides that the Technical Committee shall "co-operate" with the COMESA regime to promote and regulate competition. No specific exclusionary or limiting language is used and until clear guidelines are issued which define jurisdictional limits, all transactions in Uganda with a regional dimension which meet the applicable notifiable thresholds are to be separately approved by both the Technical Committee and the COMESA Competition Commission. The same position applies to the East African Community (EAC) Competition Authority, which is established by the EAC Competition Act 2006 and the EAC Competition Regulations 2009 and recognised in Uganda.

ISSUE	COMMENT/ANALYSIS
Severity of penalties	The Competition Bill liberally imposes criminal sanctions (and possible imprisonment) for the violation of certain requirements such as the failure to give notice of a notifiable transaction, providing false statements or omitting to provide essential information and the failure to pay an assessed fine, among others. The Bill also provides a window for individuals to be held personally liable for offences committed by corporate bodies. While these provisions are a common feature of Ugandan statute, they can be conceptually flawed, harsh and oppressive. Legal provisions that provide for the personal liability of directors, managers or officers of corporate entities ignore the legal distinction between an individual and the company, the functional separation of the directors from the everyday operations of the company and also too readily disregard the complex rules which govern the attribution of criminal responsibility in relation to corporate entities. Criminal sanctions, and particularly, imprisonment, should be reserved for the outrageous cases of infringement such as hard-core cartels, which the OECD defines as anticompetitive agreements by competitors to fix prices, restrict output, submit collusive tenders, or divide or share markets.

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