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THE FAIR COMPETITION (AMENDMENT) ACT, 2024

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NOTICE

This Bill to be submitted to the National Assembly is published for general information to the public together with a statement of its objects and reasons.

Dodoma,
8th January, 2024

MOSES M. KUSILUKA
Secretary to the Cabinet

A BILL
for

An Act to amend the Fair Competition Act with a view of making better provisions for its effective implementation.

ENACTED by the Parliament of the United Republic of Tanzania.

- | | |
|-------------------------|---|
| Short title
Cap. 285 | 1. This Act may be cited as the Fair Competition (Amendment) Act, 2024 and shall be read as one with the Fair Competition Act, hereinafter referred to as “the principal Act”. |
| General amendments | 2. The principal Act is amended generally, by-
(a) deleting the words “court of competent jurisdiction” and “court” appearing in sections 25, 28, 33, 38, 39, 40, 41, 42, 43, 44, 47 and 59 and substituting for them the word “Commission”; and
(b) deleting the words “intentionally or negligently” appearing in sections 8, 9, 10 and 11. |
| Amendment of section 2 | 3. The principal Act is amended in section 2, by-
(a) deleting the definition of the term “consumer” and substituting for it the following: |

““consumer” means a person who purchases or offers to purchase goods or services or a person who uses such goods or services with the approval of the buyer but does not include a person who purchases goods or services for the purpose of resale or using them in the production or manufacture of any goods or articles for sale;” and

(b) adding in its appropriate alphabetical order, the following:

““essential facility” means an infrastructure or resource that cannot reasonably be duplicated, and without access to which, competitors cannot reasonably provide goods or services to their customers;

“cross subsidisation” means an internal transfer within an entity of profits resulting from one line of business to less profitable line of business;

“loyalty discount and rebate” means a discount offered on a condition that the customer engages in a loyal purchasing behavior by repeatedly purchasing goods or services from the same supplier and refraining to purchase from other suppliers;

“margin squeeze” means a pricing practice where the margin between the price at which a vertically integrated firm, which is dominant in an input market, sells a downstream product, and the price for which it sells the key input to competitors does not allow downstream competitors to compete effectively;

“re-sale price or condition maintenance” means an agreement between a

supplier and a re-seller whose object or effect or likely effect is, directly or indirectly, to fix a minimum selling price or condition to be used by the re-seller when re-selling goods or services to customers; and

“vertical agreement” means an agreement between persons each of which operates, for the purpose of the agreement, at a different level of the production or distribution chain and relates to the conditions under which the parties may purchase, sell or re-sell certain goods or services;”.

Amendment
of section 5

4. The principal Act is amended in section 5(6), by-
- (a) deleting the words “the person” appearing in paragraph (a) and substituting for them the words “or with another person”; and
 - (b) deleting paragraph (b) and substituting for it the following:
 - “(b) the person’s shares in the relevant market, severally or jointly, exceeds forty percent.”.

Amendment
of section 8

5. The principal Act is amended in section 8(3) by deleting figure “35” appearing in paragraph (a) and substituting for it the word “forty”.

Amendment
of section 9

6. The principal Act is amended in section 9-
- (a) in subsection (1), by-
 - (i) deleting the word “or” appearing in paragraph (b);
 - (ii) adding immediately after paragraph (a) the following:
 - “(b) output restrictions between competitors;
 - (c) allocation of market or customer;”;

- (iii) renaming paragraphs (b) and (c) as paragraphs (d) and (e) respectively;
- (b) in subsection (2), by-
 - (i) deleting a full stop appearing in paragraph (d)(ii) and replacing for it a semi colon and the word “and”; and
 - (ii) adding immediately after paragraph (d) the following:
 - “(e) “allocation of market or customer” means the allocation of a market or customer among competitors so as to limit the choice of doing business within a defined geographical territory, a defined product category or certain specified customers.”.

Addition of section 9A

7. The principal Act is amended by adding immediately after section 9 the following:

“Leniency programme

9A.-(1) The Commission may operate a leniency programme by reducing or exonerating a penalty applicable to a person who engages in agreements prohibited under section 9, where such person voluntarily discloses the existence of the agreement and co-operates with the Commission in the investigation of the prohibited practice.

(2) The leniency programme shall be as prescribed in the rules.”.

Amendment of section 10

8. The principal Act is amended in section 10 by adding immediately after subsection (4), the following-

“(5) Abuse of dominant position under this section includes-

- (a) directly or indirectly imposing unfair purchase or selling prices

- or other unfair trading conditions;
- (b) limiting or restricting production, market outlets or market access, innovation, investment, distribution, technical development or technological progress to the prejudice of consumers;
 - (c) predatory pricing;
 - (d) margin squeeze;
 - (e) cross subsidisation;
 - (f) refusal to deal;
 - (g) denial of access to an essential facility;
 - (h) tying and bundling;
 - (i) discrimination in price and trading conditions to the prejudice of suppliers or consumers;
 - (j) loyalty discount and rebates that harm competition;
 - (k) abuse of an intellectual property right; and
 - (l) making agreements subject to acceptance of supplementary conditions which by their nature have no connection with the subject matter.”.

Addition of
section 10A

9. The principal Act is amended by adding immediately after section 10 the following:

“Prohibition of
vertical
agreement

10A.-(1) A person shall not make or give effect to an agreement which involves-

- (a) re-sale prices or conditions maintenance;
- (b) foreclosing customers or competitors from access to

sources of supply or from access to outlets; or

(c) restricting movement of goods or services between different geographical areas.

(2) Notwithstanding subsection (1)(a), a person may recommend a minimum re-sale price to the reseller of goods or services if-

(a) the supplier or producer makes it clear to the reseller that the recommendation is not binding; and

(b) the product has a price stated on it and the words "recommended price" appear next to the stated price.

(3) A person who contravenes subsection (1) commits an offence."

Amendment of section 11

10. The principal Act is amended in section 11(1) by deleting the words "creates or strengthens a position of dominance" and substituting for them the words "substantially lessens competition".

Addition of section 11A

11. The principal Act is amended by adding immediately after section 11 the following:

"Merger resulting from substantial public benefits

11A.-(1) The Commission may approve a merger prohibited under section 11(1) upon satisfaction that the proposed merger is likely to result into substantial benefits to the public which would outweigh any detriment caused by the proposed merger on preventing, restraining or distorting competition.

(2) In determining the substantial public benefits under subsection (1), the Commission shall consider the following factors:

- (a) the extent to which the proposed merger shall contribute to the greater efficiency in the allocation of resources;
- (b) the extent to which the proposed merger would, or is likely to, promote technical or economic progress and the transfer of skills, or otherwise improve the production or distribution of goods or the provision of services in Mainland Tanzania;
- (c) the extent to which, the target firm faces actual or imminent financial failure and the proposed merger offers the least anti-competitive alternative use of the assets of the business;
- (d) the extent to which the proposed merger shall boost exports from Mainland Tanzania or employment in Mainland Tanzania;
- (e) the extent to which the proposed merger shall affect a particular industrial sector or region;
- (f) the extent to which the proposed merger may affect the ability of

national industries to compete in regional and international markets; and
 (g) the extent to which the proposed merger may affect the ability of small businesses to become competitive.”.

Amendment of section 13

12. The principal Act is amended in section 13(1)(a) by deleting the phrase “is likely to create or strengthens a position of dominance” and substituting for it, the phrase “substantially lessens competition”.

Repeal and replacement of section 17

13. The principal Act is amended by repealing section 17 and replacing for it the following:

“Price displayed and price paid as part of consideration

17.-(1) A person who sell goods or services shall indicate or display in a conspicuous manner the price of the goods or service.

(2) A person shall not charge a consumer more than the price indicated or displayed on goods or services.

(3) A person shall not, in connection with the supply or possible supply of goods or services or in connection with the promotion of supply or use of goods or services, make a representation with respect to an amount that, if paid, would constitute part of the consideration for the supply of the goods or services unless he specifies the price for the goods or services.

(4) A person who contravenes this section commits an offence and shall-

(a) in case of a body corporate, be liable to a

fine of not less than one million shillings and not exceeding ten million shillings; and

- (b) in case of a natural person, be liable to a fine of not less than three hundred thousand shillings and not exceeding one million shillings.”.

Amendment
of section 33

14. The principal Act is amended in section 33 by deleting the words “judgment”, “judgement”, “a judgement” and “the judgement” wherever they appear and substituting for the them the words “an order”.

Amendment
of section 58

15. The principal Act is amended in section 58, by-
- (a) deleting the words “(other than under Part VI or VII)” appearing in subsections (1) and (6);
 - (b) deleting the words “at any time within three years after the acquisition” appearing in the opening phrase of subsection (5);
 - (c) deleting the word “court” appearing in subsection (11) and substituting for it the words “judicial or *quasi*-judicial body”; and
 - (d) deleting subsection (12).

Amendment
of section 59

16. The principal Act is amended in section 59, by-
- (a) deleting the words “(other than under Part VI or VII)” appearing in subsection (1);
 - (b) deleting subsection (6); and
 - (c) renumbering subsection (7) as subsection (6).

Amendment
of section 60

17. The principal Act is amended in section 60, by-
- (a) deleting the words “(other than under Part VI, Part VII or section 58, 59 or 88)” appearing in subsection (1);
 - (b) adding immediately after subsection (1), the following:

“(2) Notwithstanding the provisions of sections 58 and 59, the Commission may impose the following fine against a person who commits an offence under Parts VI and VII:

- (a) in case of a body corporate, a fine of not less than thirty million shillings but not exceeding fifty million shillings or 3 percent of his annual turnover in the preceding year, whichever is greater; and
- (b) in case of a natural person, a fine of not less than ten million shillings but not exceeding thirty million shillings or 1.5 percent of his annual turnover in the preceding year, whichever is greater.”;
- (c) deleting subsections (5) and (8); and
- (d) renumbering subsections (2), (3), (4), (6) and (7) as subsections (3), (4), (5), (6) and (7) respectively.

Amendment
of section 61

18. The principal Act is amended in section 61 by deleting subsection (8) and substituting for it the following:

“(8) A person who is aggrieved by the decision of the Tribunal under this section may, within thirty days from the date of the decision, appeal to the High Court.

(9) For the purposes of hearing and determining an appeal under subsection (8), the High Court shall be composed of three Judges of the High Court.”.

Amendment
of section 78

19. The principal Act is amended in section 78(1) by inserting the words “the Tanzania Shipping Agencies Corporation” between the words “Aviation Authority” and “and such other” appearing in paragraph (c).

Amendment
of section 83

20. The principal Act is amended in section 83-
(a) by adding immediately after subsection (4) the following:

“(5) The Chairman and two members of the Tribunal shall hold office for a period of four years and other three members shall hold office for a period of three years.”;

(b) in subsection (5), by deleting the phrase “hold office for a period not exceeding three years as specified in the instrument of his appointment and shall”; and

(c) renumbering subsections (5) and (6) as subsections (6) and (7) respectively.

Amendment
of section 84

21. The principal Act is amended in section 84(1),
by-

(a) deleting subsection (1); and

(b) designating the contents of subsection (2) as section 84.

Amendment
of section 87

22. The principal Act is amended in section 87(1) by inserting the words “the Tanzania Shipping Agencies Corporation” between the words “Aviation Authority” and “and such other” appearing in paragraph (c).

Amendment
of section 91

23. The principal Act is amended in section 91 by deleting the phrase “the order shall, unless the Tribunal otherwise orders, be stayed” and substituting for them the phrase “the Tribunal may upon application, order for stay”.

Amendment
of sections 96

24. The principal Act is amended in section 96 by inserting the words “the Tanzania Shipping Agencies Act” between the words “Civil Aviation Authority” and “and sector” appearing in subsection (3).

OBJECT AND REASONS

This Bill intends to amend the Fair Competition Act, Cap. 285 in order to address some challenges which have been encountered during its implementation. The Bill seeks to enhance the main objective of the Act which is geared at promoting and protecting effective competition in trade and commerce and the protection of consumers against unfair practices.

The Act is proposed to be amended generally by deleting the words “court of competent jurisdiction” and “court” and substituting for them the words “Commission”. The aim of the proposed amendments is to vest the Commission with exclusive jurisdiction in dealing with consumer protection matters at the first instance. The Act is also generally amended by deleting the words “intentionally or negligently” wherever they appear in the Act. The objective of the amendment is to provide for strict liability of offences relating to competition and the enhancement of effective enforcement of the Act.

Section 2 is proposed to be amended in order to improve the definition of some terms used in the Act, and adding the definition of other terms in order to provide proper interpretation of the terms used in the Act.

Sections 5 and 8 are proposed to be amended by introducing the concept of “joint dominance” and increasing market dominance threshold from 35 percent to 40 percent. The objective of the proposed amendment is to recognise abuse of dominance practices by more than one person, and to align with economic changes and development taking place at national, regional and international level.

Section 9 is proposed to be amended by introducing the offence of “allocation of market or customer”. The objective of the proposed amendment is to prohibit competitors from allocating market or customers amongst themselves.

Section 9A is proposed to be added to make provisions for “leniency programme” which caters for leniency of offenders who volunteer to

provide information against prohibited practices. The objective of the proposed amendment is to assist the Commission to detect anti-competitive arrangements, ease investigation process and to promote corporation against combating of anticompetitive practices.

Section 10 is proposed to be amended by listing prohibited conducts by persons with dominant position in the relevant market. The aim of the proposed amendment is to ensure effective implementation of the Act by giving clarity of the offence of misuse of market power.

Section 10A is proposed to be added in order to make provisions for prohibited vertical agreements which are anti-competitive trade practices between persons of different levels in a market chain. The aim of the proposed amendment is to ensure that competitors compete fairly and consumers purchase goods or services at a competitive price.

Sections 11 and 13 are proposed to be amended to change the determinant factor of the prohibited merger to be whether the relevant merger has the effect of lessening competition. The purpose of the proposed amendment is to set the correct measure of prohibited mergers in order to match the reality of the competition environment at the national, regional and international spheres.

Section 11A is proposed to be added in order to allow the Commission to approve mergers which are of substantial public benefit, notwithstanding that a merger is a prohibited merger. Further, the proposed section provides for criteria constituting such benefit. The objective of the proposed amendment is to ensure that the country benefits from mergers which have wider public benefits.

Section 17 is proposed to be repealed and replaced so as to make provisions to condemn the sale of goods or services through part payment where such goods or services do not specify price. Also, the section makes provisions prohibiting sellers of goods or services from charging consumers the price more than that indicated or displayed on a product or service. The aim of the proposed amendment is to protect consumers from being overcharged and to ensure certainty of price of goods or services by consumers prior to purchase.

Section 33 is proposed to be amended to in order to align with other provisions of the Act. The objective of the amendment is to ensure clarity and uniformity of the provisions of the Act.

Sections 58 and 59 are proposed to be amended in order to align contents of those provisions with other similar provisions of the Act. Further, section 60 is proposed to be amended by specifying general penalties applicable to Part VI and VII of the Act. The aim of the proposed amendment is to ensure clarity and uniformity of the provisions of the Act.

Sections 61 and 84 are proposed to be amended in order to give opportunity to a person who is aggrieved by the decision of the Tribunal to appeal to three judges of the High Court. The aim of this amendment it to give opportunity an aggrieved person to seek remedy to a higher judicial organ.

Section 83 is proposed to be amended by providing tenure of members of the Tribunal on staggering basis. The objective of the amendment is to maintain institutional memory and ensure effective succession of members of the Tribunal during the discharge of functions.

Section 91 is proposed to be amended by removing automatic stay of the execution of orders of the Commission pending determination of an appeal to the Tribunal instead stay shall be on application. The aim of the proposed amendment is to discourage unscrupulous litigations and to expediate determination of appeals by Tribunal.

MADHUMUNI NA SABABU

Muswada huu unakusudia kurekebisha Sheria ya Ushindani, Sura ya 285 ili kutatua baadhi ya changamoto zilizojitokeza wakati wa utekelezaji wake. Muswada huu unalenga kuimarisha lengo kuu la Sheria ambalo linalenga kukuza na kulinda ushindani wenye ufanisi katika biashara na biashara na kuwalinda walaji dhidi ya vitendo hadaifu na kandamizi.

Sheria inapendekezwa kufanyiwa marekebisho kwa ujumla kwa kufuta maneno “court of competent jurisdiction” na “court” na badala yake kuweka maneno “Tume”. Madhumuni ya marekebisho yanayopendekezwa ni kuipa Tume mamlaka ya kipekee ya kushughulikia masuala ya ulinzi wa watumiaji mara ya kwanza. Aidha, Sheria inarekebishwa kwa ujumla kwa kufuta maneno “intentionally or negligently” popote yanapoonekana kwenye Sheria. Lengo la marekebisho hayo ni kuhakikisha kuwa watu wanaotenda makosa yanayohusu ushindani hawakwepi adhabu kwa kisingizio cha kuwa hakuwa na nia ovu wakati wanakiuka sheria.

Kifungu cha 2 kinapendekezwa kufanyiwa marekebisho ili kuboresha baadhi ya tafsiri za misamiati iliyotumika katika Sheria, na kuongeza baadhi ya fasili ili kutoa tafsiri sahihi ya misamiati iliyotumika katika Sheria hiyo.

Vifungu vya 5 na 8 vinapendekezwa kufanyiwa marekebisho kwa kuanzisha dhana ya "Hodhi ya Pamoja" na kuongeza kiwango cha hodhi ya soko kutoka "asilimia 35 hadi 40". Madhumuni ya marekebisho yanayopendekezwa ni kutambua vitendo vya matumizi mabaya ya hodhi ya soko vinavyohusisha mtu zaidi ya mmoja na pia kuendana na mabadiliko ya kiuchumi na maendeleo yanayofanyika katika ngazi ya kitaifa, kikanda na kimataifa.

Kifungu cha 9 kinapendekezwa kurekebishwa kwa kuanzisha kosa la "ugawanaji wa soko au wateja". Madhumuni ya marekebisho yanayopendekezwa ni kuwazuia washindani kugawana soko au wateja miongoni mwao.

Kifungu cha 9A kinapendekezwa kuongezwa ili kuweka masharti kwa ajili ya “Utaratibu wa Nafuu ya Adhabu” ambao unahusisha utoaji wa nafuu ya

adhabu watu waliohusika katika kupanga na kutekeleza mipango au vitendo vinavyolenga kufifisha ushindani, wanaojitolea kutoa taarifa juu ya utendekaji wa vitendo hivyo. Madhumuni ya marekebisho yanayopendekezwa ni kusaidia Tume kugundua mipango au vitendo vinavyolenga kufifisha ushindani, kurahisisha mchakato wa uchunguzi na kukuza ushirikiano katika kupambana na vitendo vinavyolenga kufifisha ushindani.

Kifungu cha 10 kinapendekezwa kurekebishwa kwa kuorodhesha mienendo isiyoruhusiwa kwa watu wenye hodhi ya soko husika. Madhumuni ya marekebisho yanayopendekezwa ni kuongeza uwazi wa makosa ya matumizi mabaya ya hodhi ya soko kwa ajili ya utekelezaji bora wa Sheria.

Kifungu cha 10A kinapendekezwa kuongezwa ili kuweka masharti yanayozuia makubaliano baina ya watu walio katika ngazi tofauti katika mnyororo wa uuzaji wa bidhaa yenye lengo la kufifisha ushindani katika biashara. Madhumuni ya marekebisho yanayopendekezwa ni kuhakikisha kuwa washindani wanashindana kwa haki na watumiaji wananunua bidhaa au huduma kwa bei shindani.

Kifungu cha 11 na 13 vinapendekezwa kurekebishwa ili kubadili kipimo cha muungano usioruhusiwa kuwa ni endapo muungano husika una athari za kufifisha ushindani. Madhumuni ya marekebisho haya ni kuweka kipimo sahihi cha muungano usioruhusiwa ili kuendana na uhalisia wa mazingira ya usimamizi na udhibiti wa ushindani katika nyanja za kitaifa, kikanda na kimataifa.

Kifungu cha 11A kinapendekezwa kuongezwa ili kuiruhusu Tume ya Ushindani kuidhinisha muungano wa kampuni wenye manufaa makubwa kwa umma, licha ya muungano huo kuzidi ukomo wa hodhi ya soko. Vilevile, sehemu inayopendekezwa inatoa vigezo vinavyounda manufaa hayo ya umma. Madhumuni ya marekebisho yanayopendekezwa ni kuhakikisha kuwa nchi inanufaika kutokana na muungano wa kampuni wa kampuni kwa maslahi mapana kwa umma.

Kifungu cha 17 kinapendekezwa kufutwa na kuandikwa upya kwa kuweka masharti yanayozuia uuzaji wa bidhaa au huduma kwa kupokea sehemu ya malipo ikiwa bei halisi ya bidhaa au huduma hizo haijabainishwa. Pia, kifungu hiki kinaweka masharti yanayowazuia wauzaji wa bidhaa au huduma kutoza wateja bei zaidi ya ile iliyobainishwa kuwa ndiyo bei halisi

ya bidhaa au huduma. Madhumuni ya marekebisho yanayopendekezwa ni kulinda walaji dhidi ya kutozwa zaidi na kuhakikisha uhakika wa bei ya bidhaa au huduma kwa walaji kabla ya kununua.

Kifungu cha 33 kinapendekezwa kufanyiwa marekebisho ili kuendana na masharti mengine ya Sheria. Lengo la marekebisho ni kuhakikisha uwiano wa masharti ya Sheria.

Vifungu vya 58 na 59 vinapendekezwa kurekebishwa ili kuoanisha maudhui yaliyomo katika vifungu hivyo na vifungu vingine vya Sheria. Vilevile, kifungu cha 60 kinapendekezwa kurekebishwa kwa kubainisha adhabu za jumla zitakazotumika katika Sehemu ya VI na VII ya Sheria. Lengo la marekebisho yanayopendekezwa ni kuhakikisha masharti katika vifungu vya Sheria yanaendana.

Vifungu vya 61 na 84 vinapendekezwa kurekebishwa ili mtu ambaye hajaridhika na maamuzi ya Baraza la Ushindani aweze kukata rufaa Mahakama Kuu ambayo itasikilizwa na majaji watatu. Lengo la marekebisho haya ni kutoa fursa kwa mtu ambaye hajaridhika na maamuzi ya Baraza kuweza kutafuta haki kwenye chombo cha juu zaidi cha utoaji haki.

Kifungu cha 83 kinapendekezwa kurekebishwa kwa kuainisha muda wa kuhudumu kwa wajumbe wa Baraza la Ushindani kwa kuzingatia msingi wa kupishana. Madhumuni ya marekebisho hayo ni kudumisha kumbukumbu ya kitaasisi na urithishanaji mzuri wa ujumbe kwa utekelezaji bora wa majukumu wa Baraza la Ushindani.

Kifungu cha 91 kinapendekezwa kurekebishwa kwa kuondoa usitishaji wa moja kwa moja wa utekelezaji wa amri za Tume wakati wa rufaa kwa Baraza na badala yake usitishaji wa utekelezaji utafanyika baada ya kufanyika maombi. Madhumuni ya marekebisho yanayopendekezwa ni kuzuia mashauri yanayolenga kuchelewesha utekelezaji wa amri za Tume na kuharakisha uamuzi wa rufaa katika Baraza.

Dodoma,
7th January, 2024

ASHATU K. KIJAJI,
Minister for Industries and Trade