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IAJ

0-28

Tabled by Chair (Brkich)

Date April 25, 2017

## **LAW ON PRIVATIZATION**

Prepared by the Legal Reform and Private Sector Development Unit

Legal Department

The World Bank

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## **LAW No. ....**

### **of .....**

**providing for: the privatization of State owned enterprises; the establishment of the [name of country] Privatization Agency and the definition of its functions; and matters connected with or incidental to the foregoing.**

The Legislative Assembly of [name of country]

having taken note of:

the Constitution and, in particular, Articles ..., ... and ... thereof;

Law No. ... of ..... regarding public enterprises;

Law No. ... of ..... being the Company Law;

Law No. ... of ..... regarding competition;

Law No. ... of ..... regarding .....

hereby enacts as follows:

### **PART I**

#### **PRELIMINARY**

##### Article 1

This law provides the general rules applicable to the total or partial privatization of enterprises of which the State and legal entities governed by public law own, directly or indirectly, [all or part][not less than a majority] of the capital.

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## Article 2

In this law, unless the context otherwise requires -

"Agency" means the [name of country] Privatization Agency established under Article three;

"associate" means in relation to any person:

- (a) a body corporate of which that person beneficially owns or controls, directly or indirectly, shares or securities currently convertible into shares carrying more than five per cent of the voting rights under all circumstances or by reason of the occurrence of an event that has occurred and is continuing, or a currently exercisable option or right to purchase such shares or such convertible securities;
- (b) a partner of that person acting on behalf of the partnership of which they are partners;
- (c) an entity in which that person has a[n] [substantial] interest or in respect of which he or she serves as agent or in a similar capacity;
- (d) a spouse of that person;
- (e) a brother, sister, ascendent or descendent of that person or any spouse thereof;  
and
- (f) any other relative of that person or of his or her spouse if that relative has the same residence as that person;

"consultant" means any person or firm, or employee of such person or firm, engaged by the Agency to provide advisory services connected with the privatization program;

"golden share" means a share in the capital of a company formed by conversion of a State owned enterprise pursuant to this law carrying such special rights as are set out in the charter or articles of association of the company to enable the Government to protect the national interest;

"person" means an individual, partnership, association, body corporate, or agent other than a State owned enterprise;

"privatization" means a transaction or transactions utilizing one or more of the methods referred to in Article 18 hereof and resulting in either the sale to private parties of a[n]

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[controlling] interest in the share capital of a State owned enterprise or of a substantial part of its assets, or the transfer to private parties of operational control of a State owned enterprise or a substantial part of its assets;

"State owned company" means a State owned enterprise that is a company or is converted into a company in accordance with Article 15 hereof;

"State owned enterprise" means a corporation, board, company, parastatal or body that is owned or controlled by [name of country] or by a State owned enterprise or that is otherwise an agency or instrumentality of the Government, but does not include a Government department.

## **PART II**

### **THE PRIVATIZATION AGENCY**

#### Article 3

(1) There is hereby established the [name of country] Privatization Agency which shall have [insert number not less than 6] members. The members of the Agency shall be appointed by the [President][other appropriate authority] having regard to their expertise in such matters as will ensure that the Agency achieves its objectives. The Minister of [ ] shall be the Chairman of the Agency.

(2) The Agency shall be an autonomous legal entity.

#### Article 4

(1) The office of a member shall become vacant -

- (a) upon his death or resignation;
- (b) if he is absent without reasonable excuse from three consecutive meetings of the Agency of which he has had prior notice; or
- (c) if he is removed from office by the [President][other appropriate authority].



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#### Article 5

A member of the Agency shall be paid such remuneration and allowances as specifically provided for in the Annual Budget.

#### Article 6

(1) It shall be the function of the Agency to plan, manage, implement and control the privatization of State owned enterprises.

(2) Notwithstanding the generality of paragraph (1), the functions of the Agency shall be to -

- (a) recommend privatization policy guidelines to the [appropriate authority];
- (b) submit for approval by the [appropriate authority] not less than annually a program of privatization for the relevant ensuing period which program shall include a list of State owned enterprises eligible for privatization;
- (c) implement each privatization program according to the policy guidelines issued by the [appropriate authority];
- (d) carry out or cause to be carried out a valuation of a State owned enterprise or its assets to be privatized;
- (e) maintain records, safeguard information and establish administrative procedures to ensure confidentiality of information;
- (f) maintain close liaison with all relevant institutions in the process of privatization; and
- (g) publicize the activities of each privatization program.

#### Article 7

Subject to this law, the Agency may regulate its own administrative internal procedures.

#### Article 8

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- (1) Meetings of the Agency shall be held at such times and places as the Agency or the Chairman from time to time appoints.
- (2) A majority of the members then in office shall form a quorum at any meeting of the Agency.
- (3) There shall preside at any meeting of the Agency -
  - (a) The Chairman;
  - (b) in the absence of the Chairman, such member as the members present may elect for the purpose of that meeting.
- (4) A decision of the Agency on any question shall be by a majority of the members present and voting at the meeting and, in the event of an equality of votes, the person presiding at the meeting shall have the casting vote in addition to his deliberative vote.
- (5) The Agency may invite any person, whose presence is in its opinion desirable, to attend and to participate in the deliberations of the meeting of the Agency but such person shall have no vote.
- (6) The validity of any proceedings or decision of the Agency shall not be affected by any vacancy in the membership of the Agency or by any defect in the appointment of any member.
- (7) The Agency shall cause minutes to be kept of the proceedings of every meeting of the Agency and of every meeting of any committee established by the Agency.

#### Article 9

- (1) The Agency may for the purpose of performing its functions under this Act establish committees and delegate to any such committee such of its functions as it considers necessary.
- (2) The Agency may appoint as members of a committee established under paragraph (1) persons who are or are not members of the Agency and such persons shall hold office for such period as the Agency may determine.
- (3) Subject to any specific or general direction of the Agency any committee established under paragraph (1) may regulate its own procedure.

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#### Article 10

If any person is present at a meeting of the Agency or any committee of the Agency at which any matter is the subject of consideration and in which matter that person or his immediate family or his professional and business partners, is directly or indirectly interested in a private or professional capacity, he shall as soon as is practicable after the commencement of the meeting disclose such interest and shall not, unless the Agency or the committee otherwise directs, take part in any consideration or discussion of or vote on, any question touching on such matter.

### **PART III**

#### **ADMINISTRATION**

#### Article 11

(1) The Agency shall appoint, on such terms and conditions as it may determine, a Director who shall be the chief executive officer of the Agency and who shall be responsible for the conduct of the day-to-day affairs of the Agency.

(2) The Agency may appoint, on such terms and conditions as it may determine, a Deputy Director to assist the Director.

(3) The Director, or in his absence the Deputy Director, shall attend meetings of the Agency and may address such meetings, but shall not vote on any matter.

Provided that the person presiding at any meeting of the Agency, may for good cause, require the Director or Deputy Director to withdraw from such meeting.

(4) Article 10 shall apply, with the necessary modifications, to the Director and the Deputy Director.

#### Article 12

(1) There shall be a Secretary to the Agency who shall be appointed by the Agency on such terms and conditions as the Agency may determine.

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(2) The Director may appoint, on such terms and conditions as he may determine, such other staff as he considers necessary for the performance of the functions of the Agency.

#### Article 13

(1) An employee of the Agency, or a consultant, who is, or whose spouse is, directly or indirectly interested in a private or professional capacity, in any matter relating to any privatization program shall be required to disclose such interests.

(2) A disclosure of interest made under this Article shall be made to the Director who shall take such decision as he considers appropriate in each case.

#### Article 14

(1) No person shall, without consent in writing given by, or on behalf of, the Agency, publish or disclose to any person, otherwise than in the course of his duties, the contents of any documents, communication or information, which relates to, and which has come to his knowledge in the course of his duties under this Act.

(2) Any person who knowingly contravenes the provisions of paragraph (1) shall be guilty of an offense and shall be liable upon conviction to a fine not exceeding [ ] or to a term of imprisonment not exceeding [ ], or to both.

(3) If any person having information which to his knowledge has been published or disclosed in contravention of paragraph (1) unlawfully publishes or communicates any such information to any person he shall be guilty of an offense and shall be liable upon conviction to a fine not exceeding [ ] or to a term of imprisonment not exceeding [ ], or to both.



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## **PART IV**

### **PRIVATIZATION**

#### Article 15

- (1) The [appropriate authority] may, by decree: (a) convert a State owned enterprise eligible for privatization, which is not a public company, into a public company in accordance with the provisions of the Companies Act; and (b) retain a share in the capital of a State owned company and convert such share into a golden share.
- (2) The [appropriate authority] shall by notice in writing to a State owned company appoint from time to time the board of directors of the company. The board shall be accountable to the [appropriate authority] for the operation of the company.
- (3) The shares in a State owned company shall be allotted to the State represented by the [appropriate authority].
- (4) The decree referred to in paragraph (1) shall vest in or impose on the State owned company any asset or liability, or any class of such asset or liability, specified in such decree.
- (5) Any asset or liability of the State may be vested in or imposed on a State owned company whether or not any Act or agreement relating to the asset or liability permits such vesting or imposition or requires any consent.
- (6) Where a transfer of the kind described in paragraph (4) takes place -
  - (a) the transfer shall not entitle any person to terminate, alter, or in any way affect the rights or liabilities of the Government or the State owned company under any Act or agreement;
  - (b) the Government shall remain liable to any third party as if the asset or liability had not been transferred; and
  - (c) any contract relating to the activities carried on by the State owned company shall, from the publication date of the notice described in paragraph (1) of this Article, be deemed to be a contract entered into by the State owned company.

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#### Article 16

The [appropriate authority] may, by decree, initiate the liquidation of a State owned enterprise, or a State owned company in accordance with the provisions of the Companies Act. The Director of the Agency shall be appointed as the liquidator of the enterprise or company.

#### Article 17

A State owned enterprise eligible for privatization shall -

- (a) carry out any directions given by the Agency in writing to prepare the enterprise [or its assets] for privatization or to implement the privatization;
- (b) keep up-to-date business records and books of account;
- (c) prepare a rolling two year investment and financing plan and a manpower development plan;
- (d) prepare annual financial statements and cause them to be audited not later than four months after each financial year;
- (e) maintain a fixed asset register which shall be reconciled with the financial statements;
- (f) not perform any action or actions that would result in the assets of the enterprise being dissipated;
- (g) not undertake any new capital investment program, unless a project appraisal document is prepared demonstrating to the satisfaction of the Agency that -
  - (i) routine plant, equipment or vehicle renewal is required; or
  - (ii) the investment has a pay-back period of less than two years; or
  - (iii) the investment will within a period of two years, or such lesser period as the Agency shall specify, result in a reduction of the liabilities of the enterprise in excess of the amount of the investment; or

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- (iv) the investment will within a period of two years, or such lesser period as the Agency shall specify, result in a reduction of the operating costs of the enterprise during that period in excess of the amount of the investment;
- (h) not incur any liabilities other than in the ordinary course of business without the prior written approval of the Agency;
- (i) not give any person information other than in the ordinary course of business which might confer any advantage on that person or any potential investor;
- (j) when directed by the Agency, pay any costs incidental to the privatization of the enterprise relating to -
  - (i) valuation fees;
  - (ii) legal costs;
  - (iii) advertising charges;
  - (iv) marketing expenses; and
  - (v) any other expense;
- (k) when directed by the Agency, disclose to the Agency or to the general public or to such other persons as the Agency shall direct such information about the enterprise as the Agency shall specify; and
- (l) refrain from taking any action or actions which may cause industrial unrest.

#### Article 18

The Agency may employ the following modes of privatization:

- (a) public offering of shares;
- (b) sale of shares through negotiated or competitive bids;
- (c) sale of the assets and business of a State owned enterprise;

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- (d) management or employee buyouts by management or employees of a State owned enterprise;
- (e) lease, management or concession contracts; or
- (f) any other method the Agency may consider appropriate.

#### Article 19

The Agency shall for each proposed privatization publish in at least [two] newspapers with a national circulation on at least [two] occasions not less than seven days apart, details of the method of privatization, the bidding terms and conditions (if appropriate) and the bid closing date.

#### Article 20

- (1) The valuation of a State owned enterprise or its assets shall be performed by independent valuers who shall issue a certificate of valuation to the Agency.
- (2) The valuation of a State owned enterprise or its assets shall be done as follows:
  - (a) the valuation shall be based on the current value of the State owned enterprise or its assets as a going concern;
  - (b) where the enterprise or the assets are not a going concern, the valuation shall be based on net asset value; or
  - (c) any other prudent valuation method approved by the Agency.
- (3) Net asset value shall be based on -
  - (a) the market value of real property as assessed by a real estate valuer;
  - (b) the depreciated replacement value of tangible assets other than real property; and
  - (c) the fair value of other assets.

#### Article 21



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Subject to the provisions of this law or any statutory or regulatory instrument made under it, any person, whether or not such person is a citizen of [name of country] or is formed under the laws of [name of country], shall be eligible to participate in a privatization.

#### Article 22

No member of the Agency or member of a committee of the Agency or any employee of the Agency or consultant or an associate of any such person shall participate, directly or indirectly, in a privatization except through a public offer of shares.

#### Article 23

- (1) The Agency shall appoint a negotiating team for each privatization other than a public offering of shares.
- (2) Each member of the negotiating team shall -
  - (a) have proper professional qualifications, experience and good business standing;
  - (b) sign a confidentiality and secrecy agreement as prescribed by the Agency; and
  - (c) disclose to the Agency any personal or professional interest in the transaction before accepting the appointment.

#### Article 24

The Agency shall publish by notice in the Gazette promptly following the completion of each privatization transaction:

- (a) the name of the State owned enterprise and a summary description of the transaction;
- (b) the consultants advising the Agency on the transaction;
- (c) the name and address of the successful bidder; and

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(d) any other matters deemed appropriate.

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## **PART VI**

### **FINANCIAL AND OTHER PROVISIONS**

#### Article 25

- (1) Any proceeds from privatizations shall be paid net of the costs of the transaction into a Privatization Revenue Account established by the Minister responsible for finance.
- (2) The Minister responsible for finance may apply the proceeds of privatization for -
  - (a) settling all or part of the liabilities of any State owned enterprise, including any such liabilities retained by the Government for the purposes of preparing such enterprise for privatization; or
  - (b) supporting redundancy payment schemes in consultation with the Minister responsible for labor; or
  - (c) repaying official internal or external debt of [name of country].

#### Article 26

- (1) The funds of the Agency shall consist of such moneys as may -
  - (a) be appropriated in accordance with the annual Budget Law for the purposes of the Agency; or
  - (b) be paid to the Agency by way of grants or donations.
- (2) There shall be paid from the funds of the Agency -
  - (a) the salaries and allowances of the staff of the Agency;
  - (b) such travelling, transport and other allowances for the members of the Agency or a committee of the Agency when engaged on the business of the Agency at such rates as are determined in annual Budget Law; and
  - (c) any other expenses incurred by the Agency in the performance of its functions.

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#### Article 27

The financial year of the Agency shall be the period of twelve months ending [31st December], in each year.

#### Article 28

- (1) The Agency shall cause to be kept proper books of account and other records relating to its financial affairs.
- (2) The accounts of the Agency shall be audited annually by independent auditors appointed by the Agency.

#### Article 29

- (1) As soon as practicable, but not later than six months after the expiration of each financial year, the Agency shall submit to the [appropriate authority] a report concerning its activities during the financial year.
- (2) The report referred to in paragraph (1) shall include information on the financial affairs of the Agency and there shall be appended to the report -
  - (a) an audited balance sheet;
  - (b) an audited statement of income and expenditure; and
  - (c) such other information as the Agency may consider appropriate.
- (3) The report shall promptly be published and made available for sale to the public.

#### Article 30

The [appropriate authority] shall:

- (a) issue privatization policy guidelines;



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- (b) approve each privatization program; and
- (c) approve the method of privatization for each State owned enterprise or its assets falling within such parameters as are fixed by the [appropriate authority] by [decree].

#### Article 31

The [appropriate authority], on the advice of the Agency, may by [resolution][statutory instrument][decree] prescribe -

- (a) tender procedures;
- (b) public flotation procedures;
- (c) pre-qualification and registration of bidders procedures;
- (d) public announcement requirements;
- (e) any forms for the purpose of this law;
- (f) any fees payable in respect of any service provided by the Agency; and
- (g) such other matters as are necessary or conducive to the carrying out of the purposes of this law.

