



TANZANIA STARTUP
ASSOCIATION



POLICY BRIEF No: 2/2022

REVIEW OF THE TANZANIA FAIR COMPETITION Act No. 8 of 2003

Competition policy and laws if appropriately designed and effectively implemented is healthy to the economy. In today's world, fair competition is a cornerstone in business, bolsters productivity and plays an imperative role in promoting economic growth hence unlocking the business potential for Startups and SMEs to grow, compete, and internationalize. In an improved and supportive business environment, startups can significantly contribute to Tanzania's industrialization and Development Vision 2025 by accelerating growth and development.

1. Introduction

The private sector is an important ally in the economic development of any economy and therefore, creating and maintaining a conducive business environment is a prerequisite for economic growth and poverty reduction. Evidence shows, in Tanzania, there are about 4.5 million SMEs, contributing about 35 percent of the GDP and employing more than eight (8) million people (MIT Budget Speech 2021/2022).

In most cases, sector-specific rules and regulations frequently limit market entry or reinforce the dominance of a few firms. Notwithstanding many countries have enacted competition laws, anticompetitive practices continue, especially in developing countries, where regulatory frameworks often cannot ensure that more efficient market players can compete on a level playing field. In Tanzania's context, despite progress being made towards an improved business environment, competition still faces challenges sourced from the policies, legal and regulatory framework. As a result, this affects many businesses hence creating an outcry for Startups and SMEs ecosystem, which forms a big part of the Private sector today.

Evidence reveals that startups and SMEs are highly affected by the existing Fair Competition Act, of 2003 in different ways. For instance, the threshold for notification of a merger currently is TZS 3.5 billion under the Fair Competition (Threshold for Notification of a Merger) (Amendment) Order, 2017. This prescribed amount creates a position for many SMEs and startups to merge hence creating a position for dominance. Over and above, the merging fee is high currently ranging from TZS 25,000,000 to 100,000,000 which poses difficulty for SMEs and startups to afford. Again, the timeframe for a merger takes 90 days period for examination and can be extended up to 180 days which in fact does not attract investors to Tanzanian Startups.

2. TSA and Breakthrough Attorneys role

Tanzania Startup Association (TSA) being the voice of the startups in the country, focusing on driving, advocating, and lobbying for the frameworks that create a conducive business environment for startups, in collaboration with the Breakthrough Attorneys have prepared this Policy Brief complementing government efforts after thoroughly reviewing the Fair Competition Act of 2003. This policy brief has identified gaps and provided policy and non-policy recommendations envisaging the need for favorable measures to be incorporated in the revised law towards creating a fair competition environment in Tanzania favorable for startups and SMEs considering their role to the economy.

An improved business environment promotes fair competition and significantly impacts the economy. The evidence shows in 2021, the Startups brought investment worth \$96million to Tanzania. Also, according to TSA study on mapping and digitalizing the startup ecosystem in Tanzania established that, on average one (1) startup creates about 133.3 jobs. Therefore, Startups and SMEs sector like other businesses have significant potential to contribute to Tanzania's industrialization drive and Development Vision 2025 by accelerating growth and development in a supportive environment.

3. Competition regime

Historically, the Tanzania Fair Trade Practices Act of 1994 was replaced by the Fair Competition Act (FCA) no 8 of 2003. The object of this Act is "to enhance the welfare of the people of Tanzania as a whole by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Tanzania in order to: (a) increase efficiency in the production, distribution, and supply of goods and services; (b) promote innovation; (c) maximize the efficient allocation of resources, and (d) protect consumers. The FCA of 2003 established autonomous and independent agencies to oversee competition and Consumer Protection, including the Fair Competition Commission (FCC), Fair Competition Tribunal (FCT) and the National Consumers Advocacy Council (NCAC) established under FCA section 62, 83 and 92 respectively.

Specifically, the Fair Competition Commission (FCC) is a Public Institution established by virtue of section 62(1) of the Fair Competition Act, No.8 of 2003 (FCA) to promote and protect effective competition in trade and commerce and to protect the consumer from unfair and misleading market conduct. The ultimate goal is to increase efficiency in the production, distribution, and supply of goods and services. The establishment of the FCC is a significant step in Tanzania's effort to establish a market economy. Technically, FCC makes necessary interventions to ensure that competition is allowed to regulate the competitive market. It also intervenes to prevent significant market dominance, price fixing and extortion of monopoly rent to the detriment of the consumer, market instability. Further, FCC deals with all issues of anticompetitive conduct, abuse of dominance and has provision for curtailing mergers and acquisitions if the outcome is likely to create dominance in the market or lead to uncompetitive behaviour.

Moreover, in Tanzania the competition law co-exists with the sector-specific regulatory framework. The regulatory framework is literally governed by the following Acts;

- i. The Energy and Water Utilities Regulatory Authority Act, 2001 (EWURA Act);
- ii. The Surface and Marine Transport Regulatory Act, 2001 (SUMATRA Act);
- iii. Tanzania Civil Aviation Regulatory Authority Act, 2003 (TCAA Act);
- iv. The Tanzania Communications Regulatory Authority Act, 2003 (TCRA Act).

4. Policy Recommendations

For almost 19 years now, despite progress being made, competition in Tanzania still faces challenges that negatively impact Startups and SMEs businesses. After comprehensively review of the FCA No. 8 of 2003, the TSA and Breakthrough Attorneys recommend the following:-

1. Raising the threshold for notification to FCC for mergers from 1.5 Million USD\$ to 10 Million USD\$. This will enhance startups' advancement in the sense that startups and SMEs will be able to join forces and accumulate more resources from one another for expansion. This cannot be achieved at the moment as mergers of a few startups could easily reach the threshold for notification which is set at TZS 3.5 billion as provided under Fair Competition (Threshold for Notification of a Merger) (Amendment) Order, 2017. The current threshold subjects almost any potential fundraising by Startups to the notification requirement since it is low compared to other neighbouring countries for example Kenya and members of the Common Market for Eastern and Southern Africa (COMESA). In Kenya, the threshold for notification is not standard for all merger transactions, it is different based on the nature of each merger whereas for a merger to be notifiable, the turnover of combined assets of the merging entities should not be less than USD 10 million, and the assets of a targeted undertaking in Kenya must not be below USD 5 million. This difference in notification threshold also explains the reason for the difference between funds raised by Startups in Tanzania (USD 96 million) compared to Kenya (USD 411 million) in the year 2021.

2.Exemption of fees to be paid once the startup has reached the notification threshold. Currently, companies intending to merge are required to pay fees ranging from 25,000,000 to 100,000,000. This is a very high fee for startups considering startups could be mobilizing resources and skills at the time. Thus, imposing such fees makes it impossible for startups and SMEs to grow or merge. For instance, Mali has recognized startups and granted the same eight years tax break. Kenya is another excellent example whereby startups are exempted from registration fees in mergers with assets or transactions whose value is between USD 5 million to USD 10 million which is way above the Tanzanian notification threshold. FCC could also adopt these initiatives by granting exemptions for startups and waiving the fees to be paid to the commission during notification.

3.Reducing the time for examination of a merger after notification. The law should reduce the current timeframe of 90 days period for examination. Startups depend on funding from private investors who are usually looking to invest in a friendly environment without complicated procedures. In other countries, Kenya for example the period for examination of a merger is only 60 days and can be extended to 120 days while in Tanzania, it usually takes up to 180 days.In Nigeria, the review period is between 30 to 120 days depending on the size of a merger.Reduction of the timeframe to at least 21 to 60 days maximum will attract investors to Tanzanian Startups.

E. ANNEX-MATRIX OF RECOMMENDATIONS FOR THE AMENDMENT OF TANZANIA FAIR COMPETITION Act, (Act No. 8 of 2003).

Section	Current Position	Shortcomings	Recommendations	Rationale
Section 3	The provision provides for the objects of the Acts, which are: to enhance the welfare of the people of Tanzania as a whole by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Tanzania.	The objective of the Act which intend to promote and protect effective competition in markets does not seem to include promotion and support of startups and SME's. Besides the fact Section 3 (b) includes the promotion of innovation, the said provision is silent on all issues of SMEs and Startups.	It is recommended that the said provision be amended and in Section 3 subsection (b) to add the following words after the promotion of innovation "and support SMEs and startup sector".	The Act should promote startups and SMEs as they are exponentially growing and their contribution to the economy will be maximized in the near future. As these startups penetrated the competition trade grounds, it is crucial for the FCC to acknowledge and support the same.
Section 7	The Act provided that it shall apply in conducts outside Mainland Tanzania in relation to the acquisition of shares or other assets outside Tanzania resulting in the change of control of a business or asset in Tanzania.	The specifics in the applicability of the Act aims at using this law to protect companies incorporated and caring out business in Tanzania. However, the same does not specifically consider reciprocity of laws in case the law in that particular country does not consider a conduct as anti competitive.	The same provision should be amended and added under S. 7 (d) by adding a Proviso that; Provided that the Act shall not apply in case conduct is done outside Mainland Tanzania and it is not Anti-Competitive in that other country or it is a conduct that supports SMEs and the Startup sector.	This will be instrumental in ensuring the Startups or SMEs search for funds outside Tanzania or expansion of their existence outwards. For the sake of SMEs and Startups, the Act should ensure that if in a country where a deal is made the same is not anti competitive, our law should be flexible and in harmony with what is required in the Startups/ SMEs sector.
Section 9	A person shall not make or give effect to an agreement if the object, effect or likely effect of the agreement is: (a) price fixing between	The term agreement under section 2 is limited to only express agreements leaving out implied agreements. This allows competitors to fix prices between them	The provision (section 2) should add the following words as item (c); A conduct which by implication amounts to an agreement	This is to protect new entrants into the market from price fixing arrangements entered in the name of market regulated prices which restricts Startups and SMEs

	competitors; (b) a collective boycott by competitors; or (c)collusive bidding or tendering.	without having an actual express agreement.		from penetrating due to by making it hard for one to have different prices.
Section 11	<p>The provision (S.11(3)) provides that if, within 14 days after receipt of a notification of a merger under subsection (2), the Commission determines that the proposed merger should be examined,</p> <p>the merger shall be prohibited for a period of 90 days thereafter or such further period as the Commission determines under subsection (4), unless the Commission earlier determines the merger should not be prohibited.</p>	The provision provides for a 90 days period after notification for examination of a merger within which the merger will be prohibited.	The provision should have an exception to fast-track examination for the Startup ecosystem. The new subsection should read; Notwithstanding the operation of subsection (3), if a party to a merger is a Startup or SME, the Commission shall examine the merger within 21 days	Most Startups especially in the innovative and Technology industry depend on funding from private investors who search for potential companies to invest in. Thus having a 90 to 180 days period of waiting for an examination is not friendly to them. Therefore a fast-tracking mechanism for mergers that involve Startups is necessary for the Startup sector.
Section 12	The Commission may, upon the application of a party to an agreement, grant an exemption for that agreement as sees fit if the same is likely to have effect of appreciably preventing, restraining or distorting competition or likely to result into benefits to the public	The law provides for exemption for prohibited agreements provided under section 9 and sets several criteria for an agreement to be exempted. The criteria, however, do not cover Startups /SMEs sector as one of the condition for exemption.	It should be added under Section 12 b a new subsection (vii) which shall provide; (vii) supports and promotes SMEs and startups sector.	The Act should support and promote startups by creating favourable environment and exemptions tailored to support the SMEs/ Startups business.

<p>Section 13</p>	<p>Upon application of a party to merger, the Commission may grant an exemption for that merger subject to conditions or without conditions as may deem fit to Commission If the merger is likely to strengthen a position of dominance in a market, the merger is likely to result in benefits to the public or the merger offer the least anticompetitive alternative use of assets of the business.</p>	<p>The law provides for an exemption for prohibited merger and sets several criteria for a merger to be exempted. The criteria, however, do not cover the Startups /SMEs sector as one of the condition for exemption.</p>	<p>It should be added under Section 13 (b) a new subsection (vii) which shall provide; 13 (b) (vii) by supporting and promoting SMEs and startups. (viii) fosters or nurtures innovation in new industries</p>	<p>The Act should support and promote startups by creating favourable environment and exemptions in assisting startups/SMEs growth This recommendation responds to section 11(1) which restricts mergers which creates dominant position in the market.</p> <p>However, in innovative sectors it is always expected to have a dominant position. Thus, the law should be flexible and allow mergers in such cases.</p>
<p>Section 58 (5), together with 58 (3)</p>	<p>The provision limits the acquisition of shares which may create a dominant position in the market, whereas the Commission may make a compliance order requiring disposition/ the disposal of shares or declaring the acquisition as void</p>	<p>It limits the growth of innovative Startups which if they get funds from wealthy sources, they may obviously create a dominant position due to the novelty of their solutions and low-level competition</p>	<p>To extend the application of section 58(8) and allow the Commission to enter into a compliance agreement that allows such acquisition for innovative companies and companies with less than 5 years in operation. Limiting the application of this provision to businesses with more than 5 years of operations and with dominance.</p>	<p>This will allow the growth of innovative startups and SMEs in less competitive sectors and attract funding for such businesses as most investors will be sure there won't be a breach by such acquisition.</p>
<p>Section 62 (6)</p>	<p>The Fair Competition Commission is constituted of five members.</p>	<p>No representation from Startups and SMEs</p>	<p>One of the five members be appointed from the startup and SMEs associations</p>	<p>Having a representative from startups, and SMEs will be instrumental in making sure agendas, and issues of startups and SMEs are well addressed.</p>

Section 83(3)	A member of the Fair Competition Tribunal be appointed by virtue of his knowledge of or experience in the industry, commerce, economics, law, or public administration.	It does not include business knowledge as one of the qualifications.	To include a person who has the knowledge of business or experience in business operations (small and medium enterprises) and startups	Having a representative from startups and SMEs will be instrumental in making sure issues of startups and SMEs are well considered.
Section 92(5)	Considerations by the Minister in appointing persons to the National Consumer Advisory Council. It provides that the Minister shall have regard to the desirability of the Council as a group having knowledge and understanding of interests of consumers, including low income, rural and disadvantaged persons; industrial and business users; Government and community organisation.	The considerations are limited to the groups listed. The Startups and SMEs are not recognized.	To include the Startups and small and medium enterprises.	Having a representative from startups and SMEs will be instrumental in making sure agendas, and issues of startups and SMEs are well addressed.

5. Other Recommendations

1. Deliberate initiative to be implemented by the relevant authorities (FCC inclusive) to incorporate compliance exemptions to startups. Priority areas should be established for startups and SMEs to be exempted from compliance in specific priority areas to be identified. This will be a catalyst in the booming of the priority areas and exponential growth of startups and SMEs as the same will operate as promotion and support to startups and SMEs. Priority should be given to areas with an impact on the public i.e startups that enhance financial inclusion (Fintech), insurance and micro insurance, innovative solutions to agriculture and agribusiness, digital health solutions, and educational technology (EdTech), legal tech, etc.

2. Representation of startups and SMEs in different authorities within FCC by appointing a representative from the Tanzania Startup Association (or any designated Startup Association) at least one member to represent Startups in each of the following institutions: The National Consumer Advisory Council, Fair Competition Commission, and Fair Competition Tribunal. Representation of startups in these authorities will be instrumental in bringing to light all evolving issues and challenges of the startups and SMEs.

3. Limitation for the appeals against the decisions of the commission: The FCA currently declares that the decisions as provide in section 61 (8) of the FCA, 2003, made by Fair Competition Tribunal (FCT) are final and thus leaves no room for a person who is dissatisfied with his decisions to appeal to the Court of Appeal. Best practice from kenya shows, a person who is dissatisfied with the decision of the Tribunal may appeal to the High Court against that decision within thirty days after the date on which a notice of that decision has been served on him and the decision of the High Court shall be final.

4. The Act's objective, which intends to promote and protect effective market competition, should also target the promotion and support of startups and SMEs. By carrying that as one of the objectives, FCC laws will be instrumental to all the key players in different areas to align and devise mechanisms for pushing forward and supporting startups and SMEs. For FCC to support Startups and SMEs business, promoting and nurturing of Startups should be added in their functions to ensure Startups compete in the market while guaranteeing consumers get the best of standard services from them. Part of the support could be the adoption of a regulatory sandbox to shield startups operating in a restricted environment.

5. Establishing an enabling environment to expedite the FCT decision-making processes, with and without the chairman. Subsection 83(3), provide that, *“No person shall be appointed as a member of the Tribunal other than the Chairman”*. Therefore, under that situation, TSA and Breakthrough recommend for introducing the new subsection for the position of Vice Chairman which the hearing of the proceedings will not be affected with and without the chairman.

6. FCC laws should set specific criteria for identifying startups that fall within areas of priority for the FCC. The aforesaid criteria will be instrumental in identifying and exempting startups in different matters within the FCC operations.

7. FCC should be able to regulate or intervene in some industries which tend to fix prices by industry practice (market regulated prices). This allows competitors to fix prices without even having express agreements among them. However, this practice restricts competition by making it hard for new entrants (Startups and SMEs) to penetrate and have competitive prices over the existing ones.

6. Conclusion

In an endeavour to champion the interests of the Startups, TSA and Breakthrough Attorneys commend the government's efforts towards an improved business environment through the ongoing reforms in policies, laws, and regulations that govern business. Considerably, private sector growth, in particular, Startups and SMEs role is widely acknowledged to be an essential component in the alleviation of poverty as a means of providing more and different economic opportunities. To this end, the government should clearly take into consideration the private sector's views toward amending the Fair Competition Act 2003.

7. References

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