



COMPETITION AUTHORITY OF KENYA **NEWSLETTER**

Creating efficient market for consumers

EDITORIAL NOTE

Dear Esteemed Reader,

The Authority's editorial team is glad to welcome you to the second edition of its quarterly newsletter. This is a follow up of our maiden Issue that was released in October 2016. The advent and subsequent production of the Authority's newsletter is a landmark step not only for disseminating news to our stakeholders but also as a means of forging the desired synergies with them and create public awareness on our mandate, mission and vision.

The newsletter delves into local and international competition practices with up-to-date competition news. Through this medium of communication, we get an opportunity of sharing with you some of the Authority's interventions. This Issue is being published in the wake of the recent signing of the Competition Amendment Bill (2016) into law on 23rd December 2016 by H.E. President Uhuru Kenyatta. This development enhances the enforcement mandate of the Authority.

We hope you will enjoy reading the articles we have prepared for you in this Issue. Once more, on behalf of the Director General Mr. Wang'ombe Kariuki and the CAK management committee, we wish to thank you for your continued partnership with the Authority in our Endeavor to make Kenya an economy with globally efficient markets and enhanced consumer welfare.

We look forward to receiving your feedback.

Editorial Team

Editorial Team

1. Evans Nyangena
2. Mercelline Anduro
3. Edith Masereti
4. Terence Minishi
5. Sylvester Mwazama
6. Rosebela Oiro
7. Benard Ayieko

Contact us

Kenya Railways Staff Retirement
Benefit Scheme Block 'D'
1st floor, Haile Selassie Avenue
P.o Box 36265-00200 Nairobi, Kenya.
Phone: 020-2628233
Pilot line: 020-2779000
E-mail: editorial@cak.go.ke



COMPETITION AMENDMENT ACT 2016 EMPOWERS THE AUTHORITY'S
STATUTORY ENFORCEMENT CAPACITY



H.E. President Uhuru Kenyatta

His Excellency, President Uhuru Kenyatta assented to the Competition Amendment Act 2016 on 23rd December 2016 thus enhancing the statutory mandate of the Authority. The amendments are aimed at aligning the Competition Act with international best practice, increasing the enforcement capacity as well as emboldening the ability of the Authority to address dynamic changes in the competition terrain such as those posed by abuse of buyer power. The amendments have also significantly bolstered the Authority's enforcement capacity with regard to its consumer protection mandate. Further, the amendments empower the Authority to impose administrative penalties for Abuse of Dominance cases in addition to issuance of interim order for such cases. With this new development, a financial threshold has been introduced for undertakings found to have engaged in restrictive trade practices, abused buyer power or their dominant position in the market by allowing the Authority to impose a penalty of up to 10% of the undertakings preceding year's turnover. Owing to the numerous complaints by

Small and Medium Enterprises (SMEs) on abuse of credit terms by their customers, the Act has been amended to empower the Authority to handle Abuse of Buyer power. The Authority is currently developing draft abuse of buyer power guidelines which shall involve our various stakeholders. In a bid to address instances of undertakings either concealing information or submitting false and misleading information while seeking for Merger approvals, the Act has been amended to empower the Authority to penalize administratively such undertakings in addition to prosecution. The Authority also recognizes that the Merger notification regime if not managed diligently has a potential to become bureaucratic bottleneck to investments and in this regard the amendments have allowed the Authority to Gazette a threshold of Mergers that are excluded from notification in

consultation with the Cabinet Secretary, National Treasury. It was noted that despite receiving a number of consumer complaints in all sectors of the economy the Authority's enforcement capacity was limited since the Act only provided for investigation of complaints. The amendments to Part VI of the Act now empowers the Authority to not only commence investigations of the consumer complaints *suo moto* (on its own motion) but also enable the Authority to impose administrative penalties.

TOTAL-GAPCO MERGER APPROVED WITH CONDITIONS

The Authority approved the merger between Total and Gulf Africa Petroleum Corporation (GAPCO) with hospitality and employment conditions. The related markets considered in this merger included the importation through Open Tender System (OTS), storage and downstream retail market of petroleum products. The Authority undertook analysis of the potential effects of the merger and found that the transaction was unlikely to lessen or prevent competition in the importation and downstream retail market of petroleum products. However, the transaction raised competition concerns in the market for the Storage of Petroleum Products. Analysis of this

transaction showed that, the main players in the market for the storage of petroleum products were: Hashi Energy, KenolKobil Limited, Vivo Energy Kenya Limited, Total Kenya Limited, Gulf Energy Limited, GAPCO Kenya limited, Mbaraki Bulk Terminal limited, Vitol Tank Terminals International (VTTI) Kenya Limited, Trojan International Limited, Petrocity Energy (K) Limited, Tecaflex Limited, Kenya Petroleum Refineries Limited (KPRL), Kenya Pipeline Corporation (KPC) and Libya Oil Kenya Limited. Government facilities account for 52.99% of the total storage capacity, with KPRL 22.21%, and KPC utilizing 30.78%. GAPCO had the largest storage capacity among private players.

Thus, the Authority approved the transaction on condition that the merging parties shall respect all hospitality agreements that GAPCO has entered into with third parties on or before 21st July, 2016 and the applicable Kenyan laws and regulations on all health, safety and environmental ("HSE") standards in relation to Mombasa Terminal 2.

In regard to public interest, the merging parties were directed not to terminate any of the current short-term and long-term employment contracts of GAPCO employees before the end of 12 months and 24 months respectively from the completion date.

THE AUTHORITY PRIORITISES COUNTIES' POLICIES

In line with its mandate of offering advisory opinion to government pursuant to provisions of Section 9 of the Competition Act, the Authority is currently prioritizing issuing advisories to County governments as they develop policies and laws, affecting markets in their respective counties. Part of the Authority's plan is to deepen its capacity through trainings and sharing experiences where the National-County government model has worked across the world. These experiences will then be

customized to the development needs of our country. In this regard, the Authority recently organized a training in Nairobi with resource persons drawn from Mexico and Australia. The staff were exposed on the success factors of national competition policy in Australia and calculation of the impact analysis in Mexico. Such workshops are timely to the Authority's operations especially during this time that the County governments in Kenya are formulating policies to govern their operations.



CAK staff listening to presentations during a capacity building training

SERVICE PROVIDERS REQUIRED TO IMPLEMENT PRICE TRANSPARENCY ON MOBILE RELATED SERVICES

Price awareness is an important aspect of consumer protection. Article 46 of the Constitution of Kenya provides that consumers have the right “to the information necessary for them to gain full benefit from goods and services”. Pursuant to this, the Competition Act, under Section 56(4), provides that ‘A consumer shall be entitled to be informed by a Service provider of all charges and fees, by whatever name called or described, intended to be imposed for the provision of a service’. To ensure compliance with the aforementioned provisions, the Authority carried out an audit of the practices in the country, specifically in services availed through mobile phone technology. It was noted that there is widespread lack of price disclosure in the Telecommunication and Banking industries.

The mobile transparency audit established that there were contraventions of the Act whereby consumers who access loans via Subscriber Identity Module (SIM) card, Unstructured Supplementary Service Data (USSD) codes or mobile applications are not informed of the applicable transaction fees and charges. Furthermore, consumers who make payments using mobile phone platforms are not informed of the charges or fees prior to making such payments and entering into binding contracts.



A customer using mobile phone services

To ensure the consumer is protected from the said behavior, the Authority directed mobile phone Service Providers and banking industry players to fully disclose to their customers all applicable charges for the services offered prior to the completion of the transaction.

Some of the requirements that the service providers have been advised to implement include: all Short Message Service (SMS) receipts for payments should contain both the principal value and any additional fee debited; a provision that inflight charging information be made available to the customer where an account is debited real-time; and that all debits from a mobile-enabled account without the customer initiation should have an electronic receipt issued at the point of debit/payment.

In addition, institutions are required to ensure that prior to any new tariffs are actualised, they should be updated with the aggregator; samples of disclosure messages to be first presented to the Authority before implementation of any new technology and finally, the disclosure changes should be made on Sim Toolkit, USSD and App channels.

The Authority has already held meetings with twenty one (21) providers, where it emphasized on these mandatory requirements and jointly reviewed sample message formats that the providers are expected to implement. The Authority is set to follow up on the implementation process of this disclosure of charges.

INFORMATION EXCHANGE UNDER THE COMPETITION ACT

It has been noted that information exchange between companies is quite prevalent. However, companies must exercise caution when exchanging information available as sharing commercially sensitive information such as current data on price discrimination, sales volumes, and production capacities among others could breach competition law and they could therefore be held liable for contravening the law and attract fines and criminal sanctions.

The Authority has encountered numerous cases of competitors exchanging information that is likely to distort or lessen competition in the market. Section 21(1) of the Act prohibits agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya, unless they are exempt in accordance with the provisions of the Act.

Section 22(b) (ii) further prohibits exchange of information by members through trade Associations relating to prices and margins included in the prices or to the pricing formula used in the calculation of those prices; or the terms of sale. Information exchange among competitors may breach the Act under three different scenarios which include: (i) exchange of sensitive information to facilitate price fixing or market sharing

agreement; (ii) in the context of enhancing efficiency cooperation agreements such as joint venture, standardization or



Research and Development agreements; (iii) exchange of information as the only cooperation among competitors.

The main competition law concern for the Authority arises when the nature of the information exchanged between competitors makes it easier for them to predict each other's behaviour and subsequently adjust their own accordingly. The risk of information sharing is greatest when information passes between current or potential competitors because it may in serious cases ultimately enable competitors to fix prices or allocate markets or customers. This is akin to participating in a cartel. The Authority examines information exchange under the "rule of reason," to distinguish between legitimate and illegitimate information exchange. The three main factors considered in determining

whether the exchange is illegal or not is whether the information is in the public domain, the extent of data aggregation and the age of the data being shared. To deal with the risks associated with anti-competitive information exchange, the Authority will not only make use of its enforcement powers, but also engage in activities aimed at providing companies with guidance as to the legality of various information exchange schemes.

In summary, information exchange that is historical in nature may not have restrictive effect on competition though it has to be assessed in relation to relevant market and its characteristics. Additionally, the risk of information exchange can be addressed through competition compliance programs initiated by firms and supported by the Authority sensitization programs.

Parties that exchange anti-competitive information are therefore in breach of the competition Act and are liable upon conviction to imprisonment for a term not exceeding five years or a fine not exceeding ten million shillings or both pursuant to Section 21(a) or 22(6).

MERGING PARTIES MUST SEEK THE AUTHORITY'S APPROVAL



The Competition Act in Section 2 defines a merger as acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover. Mergers are substantively provided for under Part IV of the Act which in Section 41 further elucidates situations where a merger may be achieved.

The Act makes it a mandatory obligation for undertakings or persons contemplating a merger to seek the Authority's approval prior to implementing the merger. Section 42(2) of the Act provides that: *"No person, either individually or jointly or in concert with any other person, may implement a proposed merger to which this part applies, unless the proposed merger is approved by the Authority"*

It is imperative to note that under Section 42(1) as read with paragraph 38 of the Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act (Guidelines), the Authority may consider excluding some mergers from Notification. However, this does not remove the mandatory obligation to seek the Authority's approval before implementing a merger under the Act.

In the event there is an implementation of a merger without approval, the Authority may propose criminal sanctions as prescribed under Section 42(5) of the Act whereby *"Any person who contravenes the provisions of this section commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding ten million shillings or both"*. In light of the recent amendments to the Act, the Authority may also settle the matter administratively under Section 42(6) through imposition of a financial penalty. In the recent past, the Authority has noted a rise in the number of merger cases that have been consummated without approval.

COMPLAINTS HANDLING

The Authority takes seriously its service delivery to the Kenyan citizen. Visit our website at www.cak.go.ke to understand our commitment and resolve of giving quality service as outlined in the Citizenry Service Delivery Charter, Complaints Handling Policy and the Complaints Handling Procedures.

You can also contact us email; complain@cak.go.ke, telephone – 0202779123 or 020 2628233, or drop your complaint in our complaints handling box located at the reception of our offices.



THE AUTHORITY INTENSIFIES CONSUMER AWARENESS



Consumer Protection manager Mr. Boniface Kamiti engaging a member of the public during a Consumer Blitz Campaign in one of the shopping malls in Nairobi County.



Ms. Nancy Otori of the Consumer Protection department talks to a member of the public during a Consumer Blitz Campaign.

In achieving its mandate of consumer protection as outlined in the Competition Act No.12 of 2010 (the Act), Part VI Section 55-70, the Authority has intensified its campaigns in the shopping malls across the country dubbed “Consumer Blitz Campaign (CBC)”.

The CBC’s main focus was on shopping malls at the County level, with the target of reaching as many consumers as possible.

The forum provided a platform for the consumers to interact with the Authority on matters of consumer welfare. Besides getting real time feedback to their inquiries and complaints, they were also informed on how to lodge complaints with the Authority.

The Authority was able to achieve its goal of consumer education and awareness amongst consumers with a view of enabling them to make informed decisions. Through the campaigns, the Authority realized tremendous progress in promoting public knowledge of its mandate on consumer protection, consumer rights and responsibilities under the Act.

Following the recent Amendment to the Competition Act on 23rd December 2016, the Authority’s consumer protection function has been empowered to initiate *Suo Moto* investigations of consumer complaints and impose administrative penalties for consumer cases.

THE AUTHORITY SIGNS MoU WITH COMPETITION COMMISSION OF SOUTH AFRICA (CCSA) TO FACILITATE CROSS-BORDER MERGERS

The Authority has signed a Memorandum of Understanding (MoU) with the Competition Commission of South Africa (CCSA). The MoU that was signed on 6th October, 2016 during the 10th South Africa's Annual Competition Law Economics & Policy Conference in Cape Town enables the two agencies to share information and conduct joint investigations and enforcement activities, subject to their respective national laws and regulations.

The MoU further facilitates cooperation among the two countries especially on cross-border mergers. This memorandum is deemed to increase the efficiency of the respective investigations and increase the overall transparency of the merger review process. Further, the MoU provides for an exchange program involving experts as well as an exchange of non-confidential information and document thereby deepening the ties and formalising avenues of cooperation between the two agencies.



Director General Mr. Wang'ombe Kariuki with his South African counterpart during the signing ceremony.

WORLD COMPETITION DAY 2016 FOCUSES ON UNIVERSITIES

On the 5th December of every year, Competition Agencies world over commemorate the World Competition Day. The day is observed to create awareness regarding the role of Competition in achieving an enabling business environment and protection of consumers.

For the last three years, the Authority has been marking this Day as a one day event in Nairobi. In a departure from the previous years, the Authority organized a week-long County advocacy effort dubbed "The Competition Week" under the theme "Building Capacity in Competition Law and Policy" from 5th to 9th December 2016. Given the Authority's focus at the County level, the staff visited 16 universities across the country with an aim of creating visibility and explaining the benefits of competition to its stakeholders. The Authority underscored the importance of a competitive environment in addition to promoting a competition culture in institutions of higher learning countrywide.

The Authority succeeded in eliciting interest from the University staff and Students on competition and consumer protection matters. It was elucidated that there is need for the Authority to continually visit and educate stakeholders in the country at large on competition and consumer protection related issues.



Enforcement and Compliance Manager Mr. Gideon Mokaya addressing students during the World Competition Week at Kirinyaga University.

AFRICAN COMPETITION FORUM APPOINTS NEW STEERING COMMITTEE



Delegates who attended the African Competition Forum in Mauritius. During this meeting, the new Steering Committee was appointed.

The African Competition Forum (ACF) is a network of national and multinational competition authorities in Africa which was launched in March 2011 in Nairobi. As a Pan-African competition authority, its main objective is to promote the adoption of competition principles in the implementation of national and regional economic policies of African countries.

Since being established six years ago, ACF's membership has grown to 34 countries including 30 national competition agencies and four regional agencies. The network has a new Steering Committee elected during the ACF biennial meeting on 12th13th2016 in Mauritius. The Steering Committee selected South Africa, Mauritius, Morocco and Botswana to be the Chairman, Vice Chairman, Secretary and the fund raising team chairman respectively.

Kenya and Tanzania were selected to represent East Africa region. Other member countries elected to represent regional bloc interests include South Africa and Mauritius to represent Southern Africa, Gambia and Senegal to represent the West Africa and Morocco and Egypt to represent Northern Africa.

The meeting was preceded by a half-day capacity building workshop which brought together experts from competition agencies to discuss issues affecting their day-to-day enforcement activities and how to improve their efficiency. Kenya shared its experience in implementing the Case Management System (CMS) geared to improve efficiency. The next ACF meeting will be held in Morocco in 2018.

COMPETITION LAW AND POLICY
JOURNALISTS AWARD

The Competition Authority of Kenya (the Authority) is mandated to promote and safeguard competition in the national economy; to protect consumers from unfair and misleading market conduct.

The Authority recognizes the critical role the media plays in facilitating its mandate of regulating markets in the Kenyan economy and ensuring consumers are protected from misleading market conduct.

The Authority will therefore be recognizing journalists who write on competition and consumer protection issues affecting the Kenyan economy through the **Competition Law and Policy Journalists Award**.

The contestants will be required to submit stories that focus on the Core Mandate of the Authority as stated in the Competition Act No. 12 of 2010 (the Act). **The deadline for submission of the stories is Friday, 12th May 2017.**

For more details on the key requirements and entry criteria, kindly visit the website:-
<http://www.cak.go.ke>

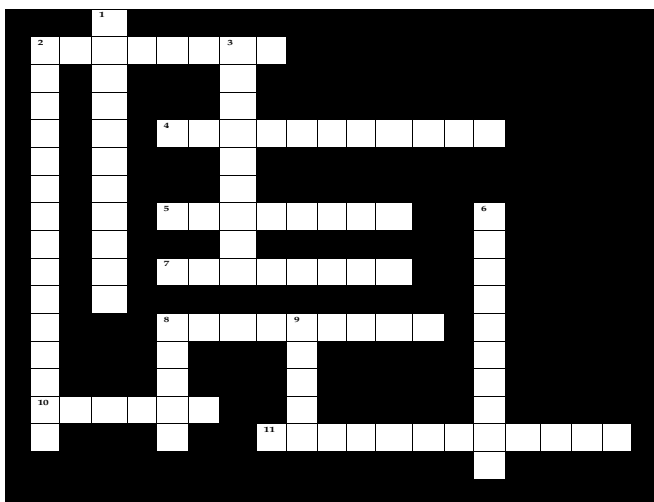
CROSSWORD PUZZLE

Across

2. Includes any person who purchases or offers to purchase goods or services otherwise than for the purpose of resale.
4. Refers to the process where two or more persons supply or attempt to supply or acquire or attempt to acquire from the people in that market the same or substitutable goods or services.
5. An appellant shall appear before the _____ either in person or by an advocate on the day and time fixed for the hearing of the appeal.
7. The Authority may operate a _____ programme where an undertaking that voluntarily discloses the existence of an agreement or practice that is prohibited under the Act and corporates with the Authority.
8. _____ practice means any practice or strategy of seeking to drive competitors out of business to deter market entry.
10. _____ is used to refer to the firm or undertaking being acquired.
11. After consideration of an application for exemption and any other representations submitted by interested persons, the Authority shall make a _____ in respect of the application.

Down

1. _____ means any business activity intended to be carried on or carried on for gain or reward by a person, a partnership or a trust in the production, supply or distribution of goods or the provision of a service.
2. Any person who gives or discloses any material to the Authority whether under compulsion of law or otherwise, may claim _____ in respect to the whole or any part of the material.
3. Any undertaking or association of undertakings may apply to the Authority for an _____ from the provisions of part III of the Act.
6. The Authority may at any time, during or after the an investigation into an alleged infringement of the prohibitions contained in contained in part III of the Act enter into an agreement of _____ with the undertaking or undertakings concerned.
8. Market _____ refers to the ability of a firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers and suppliers.
9. Applying dissimilar conditions to equivalent transactions amounts to _____ of dominance.



Answers for the previous crossword puzzle

ACROSS

1. Acquirer
2. Concert
4. Fine
7. Oligopoly
14. Monopoly
15. Divestiture
16. Revoke
18. Undertaking
19. Control
20. JV

DOWN

1. Appeal
3. Remedy
5. Dominance
6. HHI
8. Conglomerate
9. Penalty
11. Market power
12. Legal
17. Veto
21. Vertical
22. Merger

FIVE COMMISSIONERS FROM THE EAC COMPETITION AUTHORITY SWORN IN EAC



The five newly sworn in Commissioners of the EAC Competition Authority (L-R), Innocent Habarugira (Burundi), Mr. Sam Watasa (Uganda), Dr. Frederick Ringo (Tanzania), Dr. Didas Kayihura (Rwanda) and Francis Kariuki (Kenya), at the Commission's inaugural meeting held at the EAC Headquarters.

The five (5) newly appointed Commissioners of the East African Community Competition Authority (EACCA) have been sworn in at the EAC Headquarters in Arusha, Tanzania. The five Commissioners of the Authority are; Mr. Francis W. Kariuki (Kenya), Dr. Frederick Ringo (Tanzania), Dr. Didas M. Kayihura (Rwanda) and Mr. Sam K. Watasa (Uganda), Mr. Innocent Habarugira (Burundi).

Presiding over the function on behalf of the EAC Secretary General, the Registrar of the East African Court of Justice His Worship Yufnalis Okubo, welcomed and congratulated the commissioners upon their appointment as the first Commissioners to serve the EAC Competition Authority.

"The onset of the EAC Common Market, coupled with our engagement in the globalized world implies that a higher percentage of competition cases have a significant regional and international ramification. The foregoing calls for the establishment of the EAC Competition Authority to regulate regional competition matters," said the Registrar.

He urged Partner States to benchmark on international best practices in the enforcement of the EAC Competition Act 2006. The EAC Competition Act, 2006, among other things, seeks to allow consumers to take class action against goods or services providers.

It also seeks to seal loopholes that enable trade associations and firms operating across the region to engage in exclusive agreements, or form cartels, forcing consumers to pay higher prices for goods and services. The Authority is an independent organ of EAC but subject to judicial review by the EACJ (as provided for in Sections 44 and 46 of the EAC Competition Act, 2006. It is mandated to develop appropriate procedures for public sensitization, consultation and participation.

Continued on the next page

Competition advocacy will entail providing information to citizens and businesses on competition whereas consultation will involve asking stakeholders for comments and advice regarding the Authority's enforcement practice and on matters it intends to regulate. In relation to participation, the Authority is expected to provide Partner States' governments with comments and advice relating to the compatibility of Partner States' regulatory activities with requirements of the Act.

The Authority is also obligated to publish an Annual Report as well as occasional reports. The enforcement of the EAC Competition Act, 2006 will trigger obligations for enterprises operating in various sectors as well as for Partner States. In particular, it is necessary for the Authority to evaluate what mechanisms will be used to implement the EAC Competition Act in a context where only two Partner States have operational

national competition authorities, two Partner States are at advanced stages of establishing national competition authorities and one Partner State is in the process of enacting a competition law.

Given the confidential and sensitive nature of the matters to be handled by the Ad Hoc competition Authority, the Commissioners took an Oath of Secrecy and an Oath of Allegiance before they embarked on discharging their services to the Community. The Commissioners pledged their commitment to the Community by signing the Oaths of Allegiance and Secrecy, a formality and requirement

delivered and witnessed by the EACJ Registrar; His Lordship Yufnalis Okubo, assisted by the Counsel to the Community; Dr. Anthony Kafumbe, Principal Human Resource Officer, Ms. Ruth Simba, among other staff from the EAC Secretariat.

During their three-day inaugural meeting, the Commissioners considered the Authority's draft internal rules of procedure which spell out how it will conduct its business, developed a work plan and EAC merger review issues.

UPCOMING EVENTS

Event: World Consumer Rights Day

Date: Wednesday, 15th March, 2017

Time: 9am-5pm

Venue: Westside Mall, Kenyatta Avenue, Nakuru County.

The Authority cordially invites you to this event.



Competition of Kenya staff member in one of the presentations on competition issues in devolved governance system held in Nairobi by experts from Australia and Mexico



Staff from Counties and Authority during the pro-competition market regulations sensitization seminar held in Naivasha. The Authority is implementing programmes to foster competition practices within the Counties



**COMPETITION
AUTHORITY
OF KENYA**

Creating efficient markets for consumers

Kenya Railways Staff Retirement
Benefit Scheme Block 'D'
1st floor, Haile Selassie Avenue
P.O. Box 36265-00200 Nairobi, Kenya
Telephone: +254 20 2628233/ 254 20 2779000
E-mail: info@cak.go.ke
Twitter: @CAK_Kenya
Facebook: Competition Authority of Kenya
Website: www.cak.go.ke