

COMPETITION  
AUTHORITY  
OF KENYA

Creating efficient markets for consumers

# Ushindani

*Ushindani* (Swahili for 'Competition') is a biannual Newsletter of the Competition Authority of Kenya | **ISSUE 6** | July – December 2020

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## ANTI-CARTEL ENFORCEMENT THROUGH INFORMANTS



# Director-General's FOREWORD

The Competition Act No.12 of 2010 prohibits practices which limit or diminish competition, and sets out the applicable penalties, both administrative and financial, for parties who infringe the law.

In order to enhance the efficiency and effectiveness of the Authority's enforcement activities, we have, effective January 1, 2021, operationalized an Informant Reward Scheme.

This programme provides a mechanism and a framework for informants to receive financial incentives in exchange for actionable information in the course of the Authority's investigations.

The Scheme is targeted at persons with credible intelligence regarding restrictive trade practices and was conceptualized with the understanding that cartel-like conduct, which occasion significant harm on consumers, flourish under a veil of secrecy.



Such conduct includes agreements between undertakings to fix purchase and selling prices, maintenance of minimum resale prices, controlling production levels and market allocation, and collusive tendering.

The scope of the programme also extends to misrepresentation and safety of products, abuse of dominance, abuse of buyer power, mergers and acquisitions implemented without approval, and unconscionable conduct.

The main objective of the Scheme is to enhance our intelligence-gathering capacity with regard to anti-competitive practices in the economy.

By operationalizing this Scheme, the Authority joins the likes of competition agencies in the United Kingdom, Hungary and the Slovak Republic who have in place similar programmes to augment their enforcement against cartels.

Further, in this edition we highlight some of the Authority's key focus areas in terms of advocacy and enforcement in 2021, including playing our role in supporting ongoing economic recovery by the Government. ◀

*Wang'ombe Kariuki, MBS*

## Editorial Note

The Editorial Committee is pleased to welcome you to read yet another issue of the *Ushindani* Newsletter, a biannual publication through which the Authority highlights its activities and recent developments in competition law and policy enforcement.

In *Issue 6*, we are focusing on the Authority's Informant Reward Scheme which lays out a framework to reward parties who provide information enables us conclude investigations through penalization of businesses and companies who infringe the Competition Act.

We unpack what the Scheme entails, its scope of application, and the applicable rewards, among other aspects. Further, we elucidate how the Authority aims to safeguarding the interests of whistle-blowers.

Additionally in this edition, we provide key highlights of activities we have undertaken in the six months to December, including hosting 7<sup>th</sup> Annual Symposium and Workshop as well as commemorating the World Competition Day.

As always, readers who attempted to fill the Crossword in *Ushindani* Issue 6 can access the answers. And yes, we have another scintillating puzzle to test your knowledge on matters competition law and policy.

Your feedback is welcome:  
[editorial@cak.go.ke](mailto:editorial@cak.go.ke)

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# CAK LAUNCHES INFORMANT REWARD SCHEME TO ENHANCE ITS ENFORCEMENT AGAINST CARTELS

The Authority's Informant Reward Scheme became effective on January 1, 2021. **Mr. Boniface Makongo, Director, Competition and Consumer Protection**, discusses the salient features of the programme, including its objective and measures taken by the Authority to safeguard the interests of whistle-blowers.

» **The Authority's Informant Reward Scheme Guidelines came into force on January 1, 2021. Kindly give us an overview of what they entail and their main objectives.**

The objective of the Guidelines is to enhance the efficiency and effectiveness of the Authority's enforcement activities, mainly against restrictive trade practices. Such conduct includes agreements between undertakings to fix purchase and selling prices, maintenance of minimum resale prices, controlling production levels and market allocation, and collusive tendering. Their scope extends to misrepresentation and safety of products, abuse of dominance, abuse of buyer power, mergers implemented without approval and unconscionable conduct.

Specifically, the Guidelines sets out the collection of principles and conditions governing, among others, the processing and granting of rewards to informants, including the role of informants, the expected nature of cooperation, reward payment criteria, and eligible entities.

» **Is there a legal basis upon which the Scheme rests?**

Section 9 of the Competition Act No. 12 of 2010 (the Act) grants the Authority scope to issue Guidelines which provide clarity about various aspects of implementation of the law.

Further, section 33 of the Act also empowers the Authority to collect evidence in any admissible form for purposes of an investigation. It is against this backdrop that the Guidelines have been developed.

» **Who is deemed as a confidential informant?**

A confidential informant is a person, either natural or juristic, who provides relevant, actionable information to the Authority regarding violations of the Act for the purposes of an investigation. This role targets neutral third parties or those playing a peripheral role in the anti-competitive conduct. A confidential informant can be, for example, an employee who was directed by their superiors

to attend a meeting between competing firms where price fixing was discussed, but did not actively participate in the decision-making.

» **Briefly describe the process through which the Authority determines the eligibility and suitability of the confidential informant to participate in the Scheme.**

A confidential informant must be privy to intimate insider information. To determine their suitability, potential informants shall be subjected to an assessment to analyse their reliability, nature and relationship with the subject or target of an existing or potential investigation, criminal history, among others.

*Continued on Pg. 4*

**The objective of the Guidelines is to enhance the efficiency and effectiveness of the Authority's enforcement activities, mainly against restrictive trade practices. Such conduct includes agreements between undertakings to fix purchase and selling prices, maintenance of minimum resale prices, controlling production levels and market allocation, and collusive tendering.**

*Boniface Makongo,  
Director, Competition  
and Consumer  
Protection.*



» **What are the obligations of a confidential informant once they are registered on the Scheme?**

Informant reward schemes are anchored on trust and cooperation. Therefore, confidential informants, by volunteering to collaborate with the Authority, undertake to always provide truthful and accurate information. Further, they will be expected to abide by the case officer's instructions. An informant may also be required to testify in a court of law should the need arise. When an informant becomes uncooperative or ceases to provide credible intelligence, the Authority may deactivate them from the programme.

» **What measures has the Authority put in place to ensure that confidential informants are protected and that they are not culpable as a result of their cooperation?**

The Authority has established a controlled mode of communication to ensure that the informant's identity and intelligence is, from the first point of contact, restricted to a single focal point in the Authority. In addition, it is important to note that all employees of the Authority are prohibited by the Act from disclosing information that comes into their custody while undertaking their duties. Further, a secure E-mail address, [informant@cak.go.ke](mailto:informant@cak.go.ke), has been set aside. Lastly, the Authority shall collaborate with other government agencies to ensure that the confidentiality and safety of our informants is guaranteed.

» **The entire basis of an informant reward scheme is monetary compensation. Kindly explain the salient provisions of compensation as provided for in the Scheme.**

An informant who provides credible intelligence leading to closure of an investigation through penalization is entitled to up to 1% of the administrative penalty imposed by the Authority, but shall not exceed Ksh.1 Million. However, the Authority may decline to make a payment upon obtaining new material evidence that the informant was party to the anti-competitive conduct.

» **The Authority has been operating a leniency programme since 2016. Kindly highlight the salient differences between the Informant Reward Scheme and the Leniency Programme.**

The difference between the two programmes is that with the Leniency Programme (LP), the concerned party is a participant in the anti-competitive conduct whereas informants are not. Under the LP, parties found to have participated in anti-competitive conduct apply for graduated reliefs on the amount of penalty imposed. As for informant reward scheme, the Authority shall procure actionable information in exchange for money.



» **Based on your response, if a businessperson has been involved in anti-competitive conduct, such as participating in a cartel-like conduct such as price fixing or market allocation, they are not eligible to apply to become an informant but can apply to be granted leniency. Is that factual?**

Yes, this is the position. Leniency applies to undertakings who have been actively involved in the violation of the Act i.e. involved in the decision-making process. The informant reward scheme, on the other hand, is targeted at those in the periphery, neutral third parties who are not directly involved in contravening the Act.

» **What are some of the challenges you foresee in the implementation of this new enforcement tool?**

Given that it is a new programme, it is expected that some interested parties may be cautious or apprehensive to apply due to worrying about their safety and their identity being disclosed. We shall however sensitize the public about the programme, including clearly elaborating the provisions. <<

**1 Million**  
Maximum entitlement to an informant who provides credible information leading to closure of an investigation through penalization.



Scan the QR Code to access the Informant Reward Scheme Guidelines.







# CAK 2021 KEY FOCUS AREAS

**R**obust engagement with stakeholders during the 7<sup>th</sup> Annual Competition Symposium on Competition Law and Economic Regulation resulted in the Authority pronouncing its key focus areas in the coming year.

Firstly, a Retail Sector Code of Practice aimed at addressing abuse of buyer power concerns highlighted in the sector shall be developed.

The Code of Practice will facilitate self-regulation between specific-sector suppliers and buyers. Contentious matters among players shall be escalated to the Authority which serving as an arbiter.

Further, and in order to protect SMEs from being disenfranchised by buyers through inculcating the culture of documenting agreements, the Authority is developing template contracts. The template contracts will, for instance, and at a bare minimum, spell out the duration of contracts as well as termination and variation clauses, payment terms, applicable interest rates for late honouring of invoices, among others.

The Authority will continue to leverage on social media to create a competition culture. This will go hand in hand with collaborating with sector regulators and other government agencies in enforcement and capacity building of staff while also engaging

universities and research bodies to collaborate in programmes in areas of mutual benefit.

The Authority will also deepen its cooperation with regional and international partners in order to share experiences and knowledge, more so regarding exchange of best practices and partner in emerging areas of competition enforcement.

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## +360

**Participants from the private sector, non-governmental organizations, government ministries and agencies, consumer organizations and academia.**

The Symposium was arranged in three (3) panel discussions themed; **the necessity of buyer power regulation; responsible manufacturing and adaptive consumer complaints mechanisms, and competition law enforcement in the next decade.**

The Director-General, Mr. Wang'ombe Kariuki, who also participated in discussion on competition law enforcement in the next decade, noted that the pandemic has tested the effectiveness and relevance of competition law.

He reiterated that competition agencies must necessarily and urgently move to interpret and implement their laws purposely to respond to emergencies, such as the Covid-19 pandemic.

Additionally, Mr. Kariuki acknowledged that competition agencies are in an enforcement and operation quagmire as a result of the pandemic. He however noted that agencies which are well prepared, in terms of the scope and adequacy of their legal frameworks, automation of the systems, and market intelligence, will "come out of such emergencies with their heads held high."

*Continued on Pg. 7*



**Ms. Teresa Moreira, the Head Competition & Consumer Policies Branch at UNCTAD, gives the keynote address during the 7<sup>th</sup> Annual Competition Symposium.**

# SPURRING ECONOMIC GROWTH THROUGH BLOCK EXEMPTION GUIDELINES

The COVID-19 pandemic severely impacted markets by occasioning an imbalance in demand and supply of essential goods and services as well as logistical and transport bottlenecks.

The pandemic has affected negatively the capacity of businesses to penetrate and expand into new markets and, to some extent, depriving them the capacity to adequately serve all the geographical markets in Kenya.

In the tourism and aviation sectors, they have been unable to sustain their businesses due to lockdown effects.

In a bid to mitigate against the disruptive effect of the Covid-19 pandemic and spur growth in line with the ongoing economic recovery initiatives by the Government, the Authority has developed the Draft *Block Exemption Guidelines*.

The proposed Guidelines provide a framework for businesses to collaborate for a definite period of time with the sole objective of ensuring availability of goods and services to Kenyan consumers.

The sectors covered by the proposed Guidelines are: manufacturing, private healthcare, healthcare research services; horticulture farming and export, as well as aviation, travel and tourism industry.

The proposed Guidelines are therefore meant to allow joint and collaborative markets penetration and sustenance initiatives by business that would otherwise be a contravention of the Act," said Mr. Wang'ombe Kariuki, the Authority's Director-General.



The Competition Act prohibits restrictive trade practices (RTPs), including sharing of strategic market information; joint distributorship and supply agreements including marketing/sales strategies and also research into new markets.

The proposed Guidelines are therefore "a window in which businesses are expected to present exemption applications" to be, for a set period of time, be exempted from Section 21 and 22 of the Competition Act which prohibits RTPs.

The key considerations when making a determination shall include public (stakeholders) participation and to what the extent

the envisaged cooperation will ensure availability and accessibility of goods and services available to the public, especially the vulnerable members of our society.

Further, the Authority will consider if the presented collaboration is indispensable in achieving the said efficiency gains.

Mr. Wang'ombe Kariuki emphasized that the draft Guidelines are targeted at small players in the outlined sectors. With respect to the manufacturing industry for instance, businesses that apply for block exemptions must collectively control not more than 15% of the market.

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## The sectors covered by the proposed Guidelines:



Manufacturing



Private Healthcare, & Healthcare Research Services



Horticulture Farming & Export



Aviation, Travel, and Tourism Industry

## The Authority to roll out block exemption guidelines to spur economic growth

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Further, in the aviation industry, the Authority may favourably consider coordination meant to enhance transportation or shipping of procurement of various consumables, masks hands sanitizers, water sanitation, disinfectants and anti-viral products.

Collaboration between medical research firms meant to facilitate licensing and efficient distribution of Covid-19 vaccines will also be considered, with the local companies being granted priority.

# 15%

**Businesses that apply for block exemptions in the manufacturing industry must collectively control not more than 15% of the market.**

The Authority will continue to strengthen its advocacy initiatives, with the realization that soft enforcement, just like hard enforcement, is an important tool in achieving behavioural change and inculcating a competition culture in the country.

In this regard, the Authority will continue to offer its advisory services to with Government Ministries, Departments and Agencies (MDAs), regional governments, as well as businesses on matters to do with competition law enforcement.

Lastly, the Authority will scale up its proactive engagement with consumer groups as well as business associations in order to build a relationship that fosters effective and collaborative competition law enforcement in the country. <<

## CAK 2021 Key Focus Areas

Continued from Pg. 5

“The Annual Symposium accords us a unique opportunity to interact with our stakeholders from diverse sectors of the economy and gather ideas that will shape our regulatory path,” he added, while stating that this is the last such event in the first decade of the Authority’s existence.

“Too much pressure has been, understandably, placed on our shoulders. Demand for our services is at its peak, particularly attending to consumer welfare matters as well as abuse of buyer power. Service delivery must go even in time of crisis and more efficiently so.”

The Symposium’s keynote speaker, Ms. Teresa Moreira, the Head Competition & Consumer Policies Branch at UNCTAD, urged competition agencies to boost their advocacy efforts and advise Governments to design pro-competitive policies.

Ms. Moreira, who also moderated panel session on **competition law enforcement in the next decade**, submitted that agencies should adapt to the changing business environment through issuing temporary exemptions, especially for agreements between suppliers of essential goods and services that can facilitate the economy recover in post COVID-19 period.

“Those competition enforcers who the pandemic may result in their reduced funding should, in response, heighten their cooperation by implementing joint initiatives and policies”, she advised.

In her keynote address, Ms. Moreira further emphasized that the global outbreak of COVID-19 pandemic has underlined how countries are interdependent and how globalization has made us

**We, need to improve working together for mutual benefits and collectively rethink how markets can operate to deliver better services to society path”**

*Ms. Teresa Moreira | Head Competition & Consumer Policies Branch , UNCTAD*

vulnerable to each other’s problems. “We, therefore, need to improve working together for mutual benefits and collectively rethink how markets can operate to deliver better services to society,” she said.

The Symposium attracted more than 360 participants from the private sector, non-governmental organizations, government ministries and agencies, consumer organizations and academia. The participants were from at least a dozen countries.

The panellists were drawn from the Kenya Association of Suppliers, Retail Trade Association of Kenya, Competition Commission of South Africa and Coulson Harney Advocates. The Consumer Unity and Trust Society (CUTS), Kenya Bureau of Standards (KEBS), Consumer Grassroots Association (CGA), University of Johannesburg and the Kenya Association of Manufacturers (KAM).

The Symposium was preceded by a capacity building workshop covering a course in competition law and policy for economic regulation. The three-day Workshop focused on fundamental principles of competition law enforcement and emerging issues in light of the dynamic economic and regulatory environment brought about by the COVID-19 economic and health crisis. <<



# ENHANCED CONSUMER WELFARE THROUGH IMPLEMENTATION OF UN GUIDELINES

**By leveraging the United Nations Guidelines for Consumer Protection (UNGCP) in the execution of its mandate, the Authority has noted enhanced consumer welfare as well as improved awareness among the public about their consumer rights and responsibilities.**

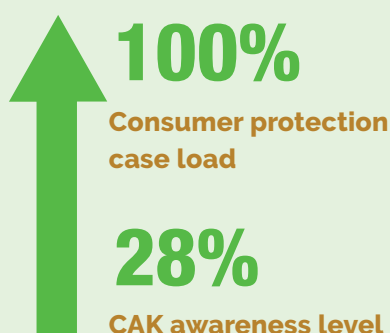
The UNGCP are “a set of principles setting out the main characteristics of effective consumer protection legislation, enforcement institutions and redress systems and for assisting interested Member States in formulating and enforcing domestic and regional laws, rules and regulations.”

The main objective of the Principles is assisting member countries achieve and maintain adequate protection of consumers, encourage good business practices, and facilitate development of consumer bodies..

The specific principles, which were under discussion during the Conference, were principles for good business practices, consumers’ education and information program, e-commerce,

financial services and measures related to specific areas (water and energy).

These are some of the benefits highlighted by the Authority at the 8<sup>th</sup> UN Review Conference on Competition and Consumer Protection which took place between October 19 and October 24, 2020. Mr. Wang’ombe Kariuki, the Authority’s Director-General, was part of a high-level roundtable that deliberated agencies’ success stories implementing the UNGCP principles, while detailing what more needs to be done to enhance consumer welfare.



Mr. Kariuki noted that the Kenya’s Competition Act empowers the Authority to; enforce against consumer harm by businesses; advise Government on consumer-related policies; and support consumer lobby groups to enhance consumer welfare.

Further, he said the Authority’s efforts to create awareness about its mandate has raised levels of awareness among consumers, giving them the impetus to lodge complaints with the Authority when their rights are infringed upon.

“The Authority’s consumer protection case load has in the past year increased by 100% whereas consumer awareness levels have improved by 28% since 2018. We have prioritized the digital economy when implementing the UN Guidelines for Consumer Protection” said Mr. Kariuki.

Mr. Kariuki informed the Conference that the Authority recently conducted an Internet sweep of over 20 e-commerce platforms which was aimed at identifying and addressing consumer protection concerns in their business practices. The key findings of the investigation were unavailability of terms and conditions (T&Cs), lack of refund/return policies, as well as misrepresentation. Eight (8) firms were directed to review their T&Cs, which were found to be unconscionable.

Additionally, Mr. Kariuki informed the Conference that the Authority is investigating the terms and conditions pertaining to Mortgage Contracts in the banking sector with the aim of identifying and addressing consumer protection issues.

“In order to enhance the welfare and awareness of consumers in the electricity sector, there is need for better coordination and collaboration between regulators in order to improve how the bills, among others,

*Continued on Pg. 9*

## OBJECTIVES OF THE UN GUIDELINES FOR CONSUMER PROTECTION

- ① To assist countries in achieving or maintaining adequate protection for consumers
- ② To facilitate production and distribution patterns responsive to the needs and desires of consumers
- ③ To encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers
- ④ To assist countries in curbing abusive business practices by all enterprises which adversely affect consumers
- ⑤ To facilitate development of independent consumer groups
- ⑥ To further international cooperation in the field of consumer protection
- ⑦ To encourage the development of market conditions which provide consumers with greater choice at lower prices
- ⑧ To promote sustainable consumption.



## CAK sees enhanced consumer welfare through implementation of UN Guidelines

are presented to consumers' Mr. Kariuki pointed out.

"Going forward, there is also need for enhanced international coordination and collaboration

in terms of regulating digital services providers as well as enforcing against data manipulation to the detriment of consumers," he said. <<

# CAK ENGAGES STAKEHOLDERS THROUGH SENSITIZATION SESSIONS

**In a bid to entrench a competition culture among businesses and consumers through awareness creation, the Authority has stepped up its stakeholder sensitization sessions with over ten (10) activities planned for the current financial year.**

The sensitization sessions revolve around the Authority's core mandate areas and activities, but will more specifically focus on sanctioning of abuse of buyer power (ABP) as well as consumer protection.

Stakeholders who attend these ABP workshops gain from elucidation of the ABP-specific provisions under the Act, practices constituting abuse of buyer power, the rights and obligation of market players, including sanctions for breaching the law.

The Authority also highlights the various modes of lodging complaint on ABP, the investigations, a right to a fair trial, responsibility of complainants and accused, remedies under the Act, among others.

One of the beneficiaries of the ABP sensitization are the Uasin Gishu and West Pokot chapters of the Kenya National Chamber of Commerce and Industry (KNCCI). The Authority sensitized eighty (80) of its members in September 2020.

The KNCCI is a membership-based trade support institution working to protect the commercial and industrial interests of the Kenyan business community. Its membership constitutes small and micro enterprises (MSEs) as well as medium and large enterprises drawn from various sectors.

"Unfortunately, West Pokot is often forgotten when it comes to awareness creation by various bodies. Our members were therefore honoured to have the Authority take time to visit and engage us," said Isoka Matemba, the Chief Executive of KNCCI's West Pokot Chapter.

"The session was an eye-opener with regard to the policies and laws applicable to our members who operate various businesses, especially with regard to contract negotiation between suppliers and buyers. Where necessary, we shall seek advice from the Authority."

In October 2020, the Authority sensitized fifty (50) members of the Association of Kenya Insurers (AKI) on ABP.

The attendees were apprised of the fact that, since the formation of the Authority's Buyer Power Dept in Nov 2018, over 40 cases have been processed, with a majority of them arising from the insurance sector (39%) and retail sector (28%).

Delayed payments & contract termination/threat of termination are the leading offences.

The insurers were also sensitized on the rights and obligations of market players & consumers; the impact of abuse of buyer on the value chain, as well as the ABP concerns that the Authority has noted to be prevalent in the insurance sector and how they can be addressed.

Mr. Tom Gichuhi, the AKI Chief Executive Officer, noted that the sensitization session was timely since insurers are suppliers & buyers of goods/services. Further, he posited that the knowledge of the law, through the Workshop, would result in improved compliance levels among AKI members as well as enhanced consumer welfare.

This, he said, would buttress ongoing efforts to raise insurance penetration which currently stands at below 5% of the country's Gross Domestic Product, according to statistics from the Insurance Regulatory Authority. <<

**Number of stakeholders sensitized**



**80 KNCCI (Uasin Gishu and West Pokot Chapters)**

**50 Association of Kenya Insurers (AKI)**

# CAK COMMEMORATES WORLD COMPETITION DAY 2020

**The Authority held a virtual conference on 5<sup>th</sup> December to mark the World Competition Day (WCD) 2020 under the theme *The Role of Competition Law and Policy in Enhancing Access to Healthcare*.**

The WCD commemorates the General Assembly's adoption of the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices on 5<sup>th</sup> December 1980.

The day is set aside to facilitate enhanced and targeted discussion, among businesses and consumers, regarding the benefits of effective competition. These include better priced goods and services of enhanced choice and variety. Effective competition also encourages companies to innovate.

Given the pandemic that is currently facing the Globe, the choice of the 2020 WCD was timely since it was meant to highlight the centrality of competition law enforcement in ensuring the physical accessibility and affordability of medication and medical technologies.

To spur debate around this issue, the Authority hosted a webinar on 5<sup>th</sup> December during which

stakeholders from the health sector were sensitized about the CAK's mandate and ongoing efforts to promote competition and consumer protection in the healthcare sector. Further, the participants were informed about the actions the Authority is taking to enforce against abuse of buyer power in the sector, particularly in the insurance industry.

The Webinar participants were from the Association of Kenya Insurers (AKI), the Christian Health Association of Kenya (CHAK), the Kenya Medical Association (KAM), and the Kenya Healthcare Federation (KHF). The Kenya Association of Private Hospitals (KAPH) as well as the Kenya Association of Pharmaceutical Industry (KAPI) were also represented.

The Authority also hosted the Ethics and Anti-Corruption Commission to give insights about how corruption contributes to increasing the inaccessibility of healthcare products and technologies to Kenyans and ongoing initiatives to remedy the situation.

Mr. Mwaniki Gachoka, an EACC Commissioner and a panelist, stated that the Commission has conducted corruption risk assessment of key

organizations in order to facilitate them strengthen their systems with a view to mitigate potential corruption loopholes.


He stated that cooperation between various State agencies, especially in deterring corrupt practices, will promote competition and increase consumer protection in the health sector.

Mr. Simon Kibias, the Head of Division on Emergency and Disaster Management at the Ministry of Health, and who represented the Chief Administrative Secretary, highlighted the Government's interventions aimed at enhancing availability and affordability of healthcare to Kenyans, including policy interventions.



Mr. Kibias MoH appreciated the Authority's interventions to address anti-competitive practices in the health sector and reiterated the need for increased collaboration to increase innovativeness, efficiency and client satisfaction.

Mr. Makongo, the Director of Competition and Consumer Protection at the Authority, reiterated that the competition enforcers have a crucial role to play to lower or extinguish barriers to access to healthcare.



He also pointed out that the Authority is part of an inter-agency task force under the Ministry of Health that was formed to enhance access and affordability of healthcare, while promoting competition and innovation in the health sector. <<



*The Constitution of Kenya, 2010 recognizes health as a fundamental human right; which provides that every person has the right to the highest attainable standard of health.*



*400 million people in the World lack access to essential health services & 6% of persons living in low- and middle-income countries slip into poverty due to healthcare costs - World Bank and WHO*



Scan the QR code to access the Authority's YouTube page





# ENHANCING ACCESS TO HEALTHCARE THROUGH COMPETITION ENFORCEMENT

By *Boniface Makongo, Director, Competition and Consumer Protection.*

**The Constitution of Kenya, 2010 recognizes health as a fundamental human right, indicating that every person has the right to the highest attainable standard of health, including the right to healthcare services.**

Indeed, the health of a population is inextricably linked to a country's productivity and economic development.

Whereas the Government has implemented measures to enhance availability and affordability of health products and technologies, out-of-pocket expenditure as a proportion of total health expenditure still remains high at 26.1%. Half of this cost is attributable to the high cost of medication which, unfortunately, leads to financial hardship.

Studies have shown that in the private sector, the retail cost of healthcare products is over 30 times more expensive when compared to regional and international indexes.

It is against this backdrop that the Competition Authority of Kenya joined the World in commemorating the World Competition Day on December 5, under the theme *Competition Policy and Access to Healthcare*.

This year's commemoration took place under unique circumstances with the World facing an existential threat in the form of COVID-19 pandemic.

The timely theme choice recognizes the fact that competition enforcers have a crucial role to play to lower or extinguish barriers to access of healthcare. However, regulators must remain cognizant of the fact that the healthcare marketplace is a unique one to interrogate and enforce.

For starters, novel medication are patent protected, typically for about 20 years. This is meant to enable innovator firms recoup their costs. Additionally, these pharmaceutical firms may take advantage of their patent-granted monopoly power to impose stringent distributorship conditions downstream that further restrict competition.

The pricing and availability of such medication is therefore not solely signaled by the forces of supply and demand. Therefore, regulators should balance between being pro-innovation with hard enforcement to ensure that these firms do not abuse their unique status.

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## 26.1%

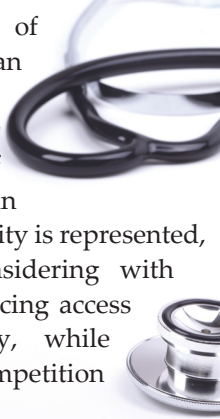
**Out-of-pocket expenditure as a proportion of total health expenditure, despite the Government implementing measures to enhance availability and affordability of health products and technologies.**

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**Half of this cost is attributable to the high cost of medication which, unfortunately, leads to financial hardship**

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The high cost of medical technology and medication in Kenya has also been determined to be as a result of, among others, high costs of local production, consumer information asymmetry, exorbitant mark-ups, and regulation gaps in terms of registration of medication.



These are some of the issues that an inter-agency taskforce under the Ministry of Health, and in which the Authority is represented, is currently considering with the aim of enhancing access and affordability, while promoting competition and innovation.

Some of the interventions that have been successful in other jurisdictions include enhancing price transparency for bulk and individual customers, supporting local production, introducing tax incentives as well as policy interventions promoting generics use, among others.

However, countries should not resort to price setting to address the existing competition concerns. Indeed, price control regimes are counterproductive since they end up incentivizing black market trade while also depressing the investment climate.

Another contributory factor to high cost of healthcare products and technologies is flawed procurement. Data from the Pharmacy and Poisons Board (PPB) shows that pharmaceutical imports in 2018 were worth \$728 million, with a bulk of these purchases ultimately being made by the Government.

*Continued on Pg. 13*

## \$728 Million

**Worth of pharmaceutical imports in to Kenya in 2018, according to Pharmacy and Poisons Board.**

# CAK DG APPOINTED TO WORLD BANK ADVISORY PANEL



**M**r. Wang’ombe Kariuki, the Competition Authority of Kenya’s Director-General, has been appointed to the World Bank’s Advisory Panel. The key deliverable is advising on the World Development Report (WDR) 2021.

The Director-General will be part of distinguished thought leaders from across the globe contributing to the seminal annual publication which will be themed *Data for Better Lives*.

The WDR, which has been produced since 1978, provides in-depth analysis and policy recommendations on important aspects of development and serves as a reference point for, among others, policy makers, governments, civil societies, scholars, and multilateral organizations.

The upcoming report will among others, focus on opportunities and challenges of data to improve the lives of poor people in low- and middle-income countries, while trying to find a balance between data’s potential to improve lives and the risk of misuse.



**CAK Director-General, Wang’ombe Kariuki, at a past function.**

Further, the WDR 2021 will seek to establish cases where data collection by private entities has been used for the good of society and also propose data governance and policy reforms needed for less developed countries to benefit from the data economy.

The Report shall also reflect on the data value chain, including data creation and collection, processing, sharing, securing access, archiving, and destruction, and harnessing it to facilitate more people participate in the digital economy and enjoy the benefits of a data-driven society.

**The Director-General will be part of distinguished thought leaders from across the globe contributing to the seminal annual publication which will be themed *Data for Better Lives*.**

“The appointment takes cognizance of the fact that competition law enforcement has a role to play in poverty alleviation and that data is a highly prized asset among companies which can be leveraged for development or socio-economic harm, said Mr. Kariuki.

“Private firms may use data to deter entry of upcoming firms, thereby limiting or preventing competition to the detriment of consumers, specifically eroding their purchasing power and choice.”

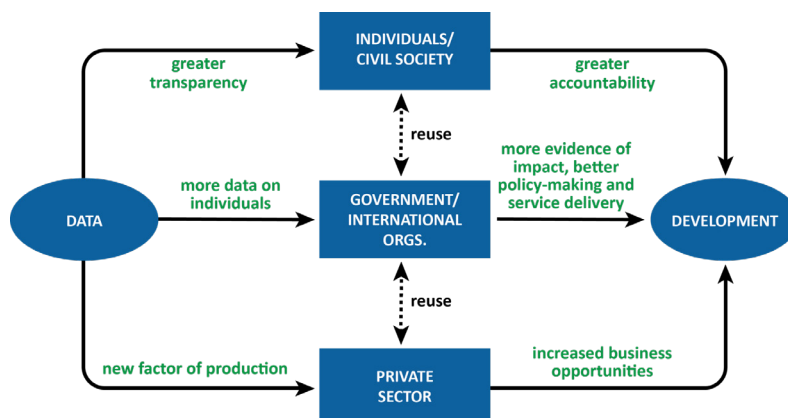
Past reports covered topics such as poverty, agriculture, gender, the role of state, transition economies, governance, infrastructure, health, and trade.

Mr. Kariuki has an MSc in Competition and Economic Regulation from City University, London. He has served on the COMESA Competition Commission Board and is a founder member and first chairman of the African Competition Forum (ACF).

He has also served as a commissioner in the East African Community Competition Authority.

His main interests are in competition regulation and economics of institutions and development, currently focusing on the digital economy and platforms business. He is a distinguished authority in the competition enforcement world for his advocacy efforts and other initiatives geared towards developing and modernizing various competition regimes. ◀◀

## Enabling data to *positively* affect development



Source: WDR2021, *Data for Better Lives: Enablers and Safeguards* (World Bank)



### Enhancing access to healthcare through competition enforcement

To facilitate the purchase of goods that are value for money, and whose quality is guaranteed, the Authority and the Public Procurement Regulatory Authority (PPRA) have this year developed standard tender documents which will guide public procurement across all sectors.

It is expected that this intervention will translate into tangible benefits in terms of choice, quality and pricing of goods and services, including in the healthcare sector.

Another intervention by the Authority, which is meant to ensure unfettered supply of essential medication, vaccines and personal protective equipment during the pandemic, is the development of Block Exemption Guidelines.

These instruments will allow firms to, for a set period of time, collaborate and share material information with the sole aim of ensuring availability of goods being utilized in the fight against COVID-19.

These Guidelines are supplementary to the countrywide enforcement action we undertook when the first COVID-19 patient was announced locally in March 2020, consequently stabilizing the prices of these key commodities which had experienced a spike due to price gouging.

Kenya loses revenues of over Sh10 billion annually as patients seek treatment and expertise, which is available locally, abroad. Effective competition in the healthcare sector can facilitate the physical and financial affordability of these services within the country and for all citizens as envisioned in the Constitution. <<

# THE AUTHORITY FETES OUTSTANDING EMPLOYEES FOR SERVICE EXCELLENCE



1. Mr. Hesbon Mushukhani  
2. Ms. Hakima Mohammed  
3. Ms. Sarah Chege

4. Mr. Sylvester Mwazama  
5. Mr. Enock Oyondi  
6. Mr. Linus Melly

**Six (6) of the Authority's employees were recognized for their exemplary performance in 2020 and their contribution to ensuring enhanced service delivery to internal and external stakeholders.**

The members of staff were recognized at the Annual end-of-year-team building whose objective is to strengthen team cohesion and conduct a self-assessment of the Authority's performance in the past year.

At the event, the Authority's Director-General, Mr. Wang'ombe Kariuki, also commended all staff for their individual and collective roles in ensuring that service delivery to the public was uninterrupted despite the pandemic.

"For the better part of the year, over 90% of our staff have been working remotely. This has been facilitated by a robust ICT infrastructure as well as enhanced performance monitoring,"

Mr. Kariuki noted during the event held on December 19<sup>th</sup> 2020.

"Whereas, we had the necessary policies and tools in place, our success was majorly attributable to our positive culture of service delivery. I wish to thank everybody for playing their role in weathering this year's storm and delivering on our mandate.

Mr. Hesbon Mushukhani, a Senior Records Management Assistant, was voted by members of staff as the Employee of the Year in recognition of his admirable dedication to his work which he conducts with utmost professionalism in service of both internal and external stakeholders.

Ms. Sarah Chege, Records Management Assistant, was also recognized for her diligent service in 2020 while Mr. Linus Melly, a Senior Analyst in the Mergers & Acquisitions Department, was

Continued on Pg. 14

### The Authority fetes outstanding employees for service excellence

feted for professionalism and job excellence.

Ms. Hakima Mohammed, a Senior Finance Officer, received an award for professionalism, reliability and ethical practices while Mr. Sylvester Mwazama, a Senior Investigations Officer in the consumer protection department, was recognized for exemplary customer service.

ICT Officer, Mr. Enock Oyondi, was feted for professionalism, impartiality and reliability. «



## OCCUPATIONAL SAFETY AND HEALTH FOR A PRODUCTIVE WORKFORCE

**In order to safeguard the safety as well as the physical, mental, and social wellbeing of its employees, the Authority has in a place an Occupational Safety and Health (OSH) Committee.**

The key mandate of the Committee is to guide, advice and sensitise the Authority’s members of staff on all matters relating to prevention of hazards and accidents at the workplace and leading a wholesome life.

The Committee also conducts safety and health inspections of the Authority’s premises once every six months during which identified potential hazards are identified and escalated to the Management for remedial measures to be undertaken.

They are also tasked with compiling statistics on workplace-related accidents or incidences as well as establishing an effective communication channel on matters health and safety between the Management and staff.

The Committee executes the above mandate through safety programmes like carrying out work safety inspection, fire evacuation drills, regular fire safety inspection, maintenance and servicing of fire equipment.

Further, the Committee coordinates the equipping and inspection of



**Ms. Margaret Njorge, an Administrative Assistant at CAK, checks her temperature before accessing the Authority’s office.**

first aid boxes and providing safety information to occupants of the building.

In the wake of the COVID-19 pandemic, the Committee played a critical role within the Authority, advising Management on specific measures that could be rolled out to curb the spread of the disease within the workplace.

In March 2020, the Authority directed its members of staff to work from home, a deployment which was made possible by the fact that the Authority has automated its technical processes and support functions therefore service delivery was no affected.

However, some employees providing essential services were still required to come to work during this period. The Authority

ensured that this cohort is adequately facilitated including providing them with sanitizers and the necessary personal protective gear.

In order to prevent the spread and infection of the virus, the workplace was fumigated, cleaned and disinfected more frequently, with extra attention given to cleaning high- touch areas including door handles and electric switches.

Further, and in compliance with the Ministry of Health protocols on social distancing, the Authority designated the maximum number of persons allowable in public spaces such as boardrooms, conference halls as well as the staff common area.

To augment these efforts, the Committee regularly disseminated communiques through WhatsApp channels and on their official emails sensitizing members of staff about the novel virus as well as how to protect themselves and their families.

The Committee also coordinated the production and dissemination of posters which have been placed in various locations within the Authority in order to sensitize staff and stakeholders who visit our officers about the requisite measures to undertake to prevent spread of the virus. «



# CAK'S ROLE IN HIV/AIDS MAINSTREAMING



According to official data, Kenya had 1.5 Million people living with the Human Immunodeficiency Virus (HIV) in 2019, with 42,000 being new patients. The country recorded 21,000 Acquired Immunodeficiency Syndrome (AIDS)-related deaths in the same year.

However, following concerted public and private efforts to raise awareness regarding the virus and how to manage it, approximately 75% of adults and 63% children living with the disease are reportedly on antiretroviral treatment.

In order to augment these efforts, the Authority set up the HIV/AIDS Mainstreaming Committee whose mandate is to sensitize internal and external stakeholders about prevention and management of HIV/AIDS.

The Committee sensitizes the public through distributing condoms to the Public across the country and educating them about the benefits of safe sex.

In the FY 2019/2020, the Authority distributed over 2,000 condoms to over 500 residents in 17 counties including Makueni, Nyeri, Taita Taveta, Tana River, Tharaka-Nithi, Bomet, Homa Bay, Kisii, and Kisumu.

Further, the Committee also distributes free condoms within the washrooms allocated to members of staff and stakeholders who visit the Authority. In the year under review, over 500 condoms were distributed through this channel.

The Committee also lays emphasis on sensitizing members of staff, with information being shared regularly through various communication platforms such as WhatsApp's and on email. In October 2020, the staff were uniquely sensitized through messages on their pay slips. The message read: "Prevention is the best cure against HIV/AIDS".

Further, the Committee also conducts sensitization to new staff joining the Authority, including new interns, attachés and young professionals, during the induction program carried within in the first month of reporting to work.

In order to enhance the management of the disease, the Government has, through the National AIDS Control Council (NACC), implemented preventive measures within Ministries, Departments and Agencies through their annual Performance Contract (PC). These Committee's annual activities are guided by the NACC's guidelines.

At the end of every Financial Year NACC provides performance scores to the various MDAs. In Financial Year 2019/2020, the Authority scored 87% which is an improvement from the previous year's 56.6%. The Authority is committed to improving this score to 100% this year and maintaining it.



**1.5 Million**

Number of people in Kenya living with the Human Immunodeficiency Virus (HIV) as of 2019.



**+2,000**

Number of condoms distributed by the Authority the FY 2019/2020.



**+500**

Number of residents who received the condoms.



**17**

Number of counties that benefited, including Makueni, Nyeri, Taita Taveta, Tana River, Tharaka-Nithi, Bomet, Homa Bay, Kisii, and Kisumu.

Lastly, the committee would like to leave you with the following messages:

- ① Practice abstinence
- ① Be faithful to your partner
- ① Practice safer sex
- ① Know your HIV status
- ① Stop HIV Stigma
- ① Love and support those living with HIV. <<



Mr. Anthony Mutula (R), CAK's Principal Accountant, and HIV/AIDS Committee Chair, distributes condoms to stakeholders in Kisumu.

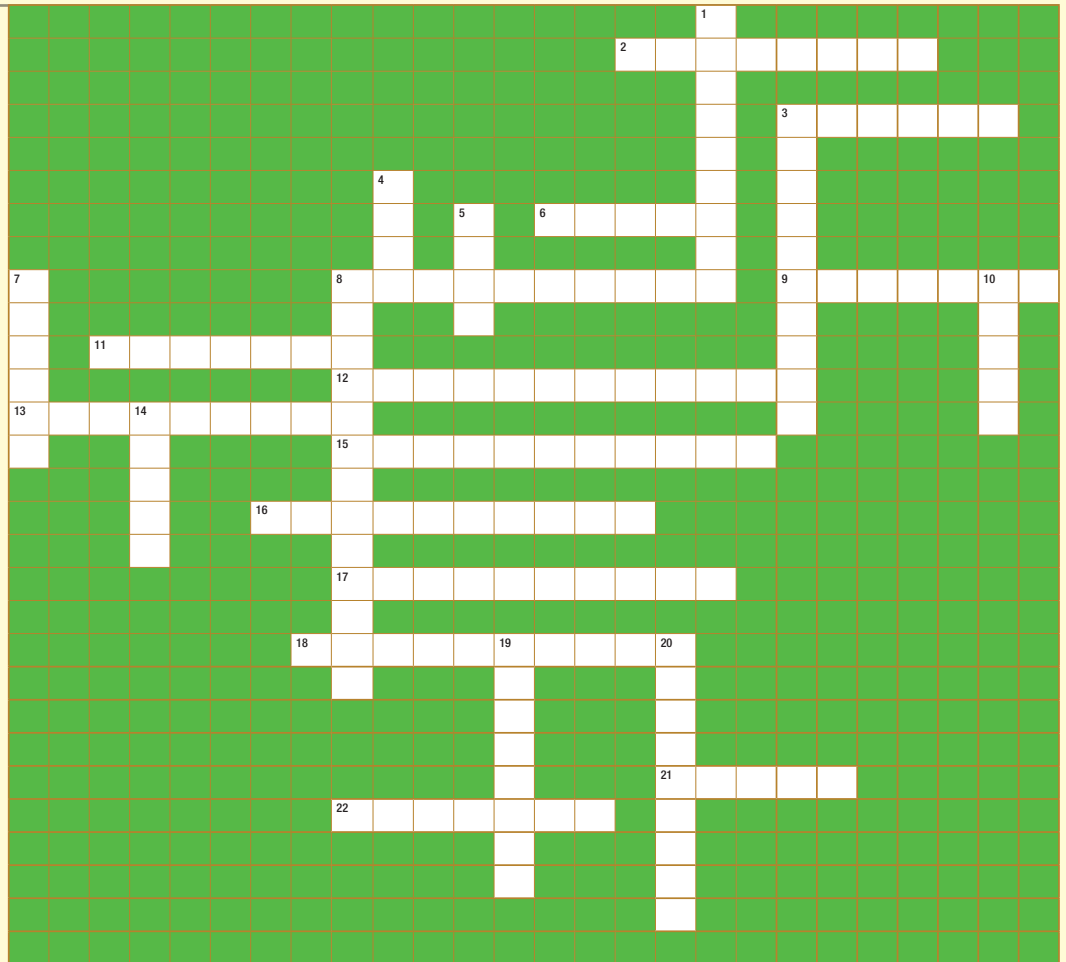
## COMPETITION CROSSWORD

### Across

2. A generally accepted principle in Competition Law
3. Action to alleviate against
6. Issuance of a cease and desist...
8. Combine
9. Take up
11. In the meanwhile
12. Violation, engaging in a contravention
13. A merger involving target's turnover/assets of below KES 500M
15. Intermixing a segregation
16. Lessening intensity of harm to competition
17. Protect from likely negative effect
18. Adherence to the Competition Act. No. 12 of 2010
21. Measure of substitutability for rational consumers
22. Having value attached to it.

### Down

1. Involving Amazon, Jumia, OLX, Jiji, among others, including online payments.
3. Restricts from acting contrary



4. Negative effect
5. Change of control from 50/50 to 100%
7. A set of goods/services identified through the Hypothetical Monopolist Test
8. Person/institution in charge of a liquidation process
10. A set of regulations published by the Authority toward the end of 2019
14. Position
19. Protection
20. A transaction that leads to change in control but may not require notification before implementation.



Scan to access CAK's  
Citizens' Service  
Delivery Charter



## Answers to Ushindani Issue 5 Crossword Puzzle

### Across

- |              |                |
|--------------|----------------|
| 2. Refund    | 12. Fee        |
| 4. Ban       | 13. Adjustment |
| 7. Notify    | 17. Aggravate  |
| 8. Consumer  | 18. Exemption  |
| 9. Mitigate  | 20. Penalty    |
| 11. Turnover |                |

### Down

- |              |                |
|--------------|----------------|
| 1. Decision  | 14. Settlement |
| 3. Gazette   | 15. Form       |
| 5. Agreement | 16. Warning    |
| 6. Violation | 19. Price      |
| 10. Supplier |                |

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