

**COMPETITION
AUTHORITY
OF KENYA**

Creating efficient markets for consumers

11 YEARS OF COMPETITION LAW ENFORCEMENT IN KENYA



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© From the right: Albert Mwendu, Director General, Budget, Fiscal and Economic Affairs, National Treasury and Wang'ombe Kariuki, Director General, CAK

11 YEARS OF
**COMPETITION LAW
ENFORCEMENT IN KENYA**



➤ Wang'ombe Kariuki, Director General, CAK.

Table of Contents

Preface	iv
Foreword.....	vi
Acronyms.....	viii
Evolution of Competition Law and Policy in Kenya	1
A Model for Promoting Competition to Improve Efficiency and Alleviate Poverty	5
The Competition Authority of Kenya’s Approach to Penalties and Remedies for Anti-Competitive Conduct.....	9
Expanding Enforcement Frontiers	15
Balancing SME Growth and Competition Law Enforcement	19
Competition Law Enforcement and Investment in Kenya	23
The Competition Authority of Kenya: Trailblazers in the Enforcement of Buyer Power Regulations to Support MSMEs	25
The Role of Competition Policy in Enhancing Regional Integration	33
Stronger Together - The Competition Authority of Kenya and the International Competition Network	37
A Review of the Authority’s Procedures and Service Delivery	41
Efforts in Building Capacity on Competition Law and Policy	47

Preface



It is with immeasurable pleasure that I present this publication which seeks to, albeit non-exhaustively, provide a candid account of the Competition Authority of Kenya's scorecard over the last 11 years in its pursuit of creating efficient markets for consumers.

First, I wish to recognize my predecessor and first Chair of the Board, Mr. David Ong'olo, and the members who were instrumental in laying the foundation upon which the Authority now stands as a reputable regulatory agency, locally and internationally. The inaugural Board delivered immeasurably on the oversight role through ensuring that the right guiding instruments (procedures and manuals) were developed and commissioned, thereby setting a clear path and reference point for anyone working in the Authority, both incumbents and new recruits. The Board also ensured that the Authority is populated with the right personnel to undertake the Herculean task ahead of it and also facilitated financial resources to enable them deliver to the *Mwananchi*.

Secondly, I must recognize the unwavering support from the Management in actualizing the Authority's strategic goals. It is based upon their advice, and the countless man-hours put in by our tireless members of staff, that the Authority has made key interventions in various sectors of the economy, positively impacting the lives of Kenyans.

Obviously, special mention goes to the Director-General, Mr. Wang'ombe Kariuki. Under his guidance, the Authority has grown in leaps; in terms of its culture, technical expertise, professionalism, accountability, and steadfast commitment to our most important stakeholder – the Kenyan public, the taxpayers to whom we report. Mr. Kariuki's passion to better the lives of the majority poor through competition law and consumer welfare enforcement is exceptional and inimitable. Further, his approach of complementing advocacy and behavioral change with hard enforcement is commendable and serves as a learning point for upcoming agencies across the continent. This is the same aphorism that will continue guiding the Authority. We are here to ensure that infractions are fixed within the shortest time possible to reduce consumer harm.

Third, we wish to recognize and laud the support received from stakeholders from various sectors, without whom our work would be worthless. You are the reason we put in all the effort. You have been our best critics, yet our greatest supporters. We will continue partnering with you in delivering our mandate.

The Authority will continue to collaborate with other competition agencies and networks regionally and globally to share best practices, build capacity, transfer knowledge and skills and deepen the competition culture. These partners include but are not limited to including the International Competition Network (ICN), the African Competition Forum (ACF), the Competition Commission of South Africa (CCSA), the World Bank Group, the OECD, UNCTAD, and research institutions, such as CCRED, among others.

In conclusion, I would like to reiterate that the Board remains fully committed to providing guidance to the Management and ensuring adequate resources to implement its mandate. On behalf of the Board, I look forward to the continued cordial relations with the Management and Members of Staff as well as work towards meeting the expectations of Kenyans – to effectively interpret and implement the Competition Act in pursuit of positively impacting the growth and development of our national economy, by ensuring efficient markets and enhanced consumer welfare for shared prosperity.

Amb. Nelson Ndirangu, OGW

Board Chairperson

Foreword



Building a sound and effective competition system that supports open markets for the benefit of consumers and the long-term growth of an economy is challenging. Kenya has achieved this objective in a relatively short time frame, a little longer than 11 years. The adoption of the law in 2010 was just the first, and indeed necessary, step in providing Kenya with the legal tools to ensure that our markets are working efficiently for consumers. But building a competition culture requires more than just a legal framework.

Kenya has built a credible, in both domestic and international terms, enforcement agency and it has ensured that its mandate and its execution are predictable and transparent, and that the agency is accountable for its actions to Kenyan citizens. Through active enforcement and advocacy initiatives, the Competition Authority of Kenya has established itself as the most reputable institution in Kenya. Over the years it has expanded and strengthened its tools to support its enforcement agenda and has successfully married antitrust enforcement with consumer protection.

The Competition Authority of Kenya has made its independence a weapon to fight vested interests and to allow opportunities for new and small competitors to enter the market and thrive, as well as to build its own institutional culture based on transparency, accountability, and professionalism. Such values are also the foundations of the agency's efforts to reduce the inequality gap in society and alleviate poverty. These objectives remain high on the agenda of the agency.

By prioritizing scarce resources toward those cases and initiatives where it could have the greatest impact on the consumers and the economy, the Kenyan competition agency has been very effective in generating significant benefits for consumers in terms of prices and/or quality of products, and choice. In addition,

the CAK has supported the government in important reform processes in key sectors of the economy such as digital finance, banking, manufacturing, and professional services.

While being able to make a difference domestically, Kenya has become a leader in the competition arena in Africa and on the global stage, with ongoing recognition in international fora such as the International Competition Network (ICN), the OECD, and UNCTAD. Having put international co-operation on competition policy matters at the core of its agenda, Kenya has strengthened its relationship with neighboring countries and with more distant trading partners. This has facilitated regular exchanges of views on policy matters and case co-operation.

An enforcement agency must constantly strive to improve itself. As the Competition Authority of Kenya enters its next phase of existence, various objectives remain high on its agenda for improvement. These include building internal research capacity, engaging in market/industry studies to identify structural and behavioral competition concerns, investing in self-critical analysis through *ex post* evaluations, and ensuring the effectiveness of the leniency programme.

This publication not only testifies to the achievements of the Competition Authority of Kenya but also highlights the challenging path ahead that lies ahead. It is a must read! Drawing lessons from the last 10 years, it offers useful insights that can support other jurisdictions which are walking on the same path.

Antonio Capobianco

*Deputy Head of Division
OECD, Competition Division*

Acronyms

ACCC	Australian Competition & Consumer Commission
ACF	African Competition Network
AfCFTA	African Continental Free Trade Area
CAK	Competition Authority of Kenya
CCC	COMESA Competition Commission
COMESA	Common Market for Eastern and Southern Africa
CCRED	Centre for Competition, Regulation and Economic Development
CCSA	Competition Commission of South Africa
DG	Director General
FY	Financial Year
GDP	Gross Domestic Product
ICN	International Competition Network
MSME	Micro, Small and Medium Enterprises
SME	Small and Medium Enterprises
OECD	Organization for Economic Co-operation and Development
SACU	Southern African Customs Union
SADC	Southern African Development Community
TVETs	Technical and Vocational Education and Training
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UON	The University of Nairobi
USSD	Unstructured Supplementary Service Data
WBG	The World Bank Group
YP	Young Professional
YPP	Young Professional Programme

Evolution of Competition Law and Policy in Kenya

1

The Competition Authority of Kenya was born from an earlier institution namely, the Monopolies and Prices Commission, a Department within the Ministry of Finance back in 1988. The humble beginnings of competition law enforcement in Kenya, which I had the privilege to be a part of was within the framework of the Structural Adjustment Program to align economic policies and accelerate the growth of the Kenyan economy. One such policy was opening the market to competition and the removal of price controls, basically allowing the market to set the prices of goods and services based on demand and supply.

During that time, the economy was emerging from an import substitution strategy which created high levels of concentration and emergence of entrenched and protected multinational corporations which dominated the market from Kenya's independence in 1963. So, the Restrictive Business Practices, Monopolies and Price Control Act No. 504 of 1988 was enacted as a tool to regulate business behavior and to ensure that competition rivalry would start developing within the Kenyan market.



“ Kenya was one of the first countries to go through the UNCTAD Voluntary Peer Review Process in 2005: A bold step it was!

Elizabeth Gachuiri,
Economic Affairs Officer,
United Nations Conference
on Trade and Development
(UNCTAD).

The 2010 Competition Act of Kenya replaced the earlier Cap 504, establishing the CAK, as one of the recommendations of the UNCTAD Peer Review report of 2005. The Peer Review process was undertaken during the 5th UN Review Conference on Competition in Antalya, Turkey in 2005. Kenya and Jamaica were the pilot countries to participate in the UNCTAD Voluntary Peer review program.

With that background, I would like to interrogate the milestones that competition law and policy in Kenya has achieved since 2011 and my opinion on the CAK's position as a competition regulator and consumer watchdog. The first milestone that can be associated with the competition institutional framework is that the CAK was established as a state body with functional independence (autonomous), which sequentially accelerated the enforcement of the new Act.

Through the development of Strategic Plans, the CAK has managed to improve its enforcement efforts and influence, nationally, regionally, and globally. Legislative review has also led to amendments to the Competition Act to include key areas such as Abuse of Buyer Power which aims to protect small business when they are dealing with large buyers, a problem that has been identified not only in Kenya but other countries in Africa. Kenya has taken the lead in this area.

The sanctioning of anticompetitive business conduct has increased over the years and consumers have been protected. The CAK has not shied away from imposing financial penalties to offenders who engage in such conduct. Further, the CAK also led the way in evaluating COMESA Competition Commission's (CCC) enforcement of the regional competition regulations and rules, which resulted in a MoU defining how revenues and competencies are shared between CCC and national authorities.

Legislative review has also led to amendments of the 2010 Competition Act to include key areas such as Abuse of Buyer Power to protect small business in dealing with large buyers, a problem that has been identified not only in Kenya but other countries in Africa.

The CAK has made a mark in Kenya through its advocacy programs and building a competition culture, tackling competition cases that are impactful and relevant for sharing with other competition authorities in the region and worldwide. In addition, the CAK broke barriers between government regulators, through coordination of work and MoUs and bringing competition and consumer protection enforcement to the limelight among policies that matter for economic transformation.

The growth in staff establishment and the creation of relevant Departments that are well-resourced with financial and human resources have also shaped the institution.

In addition, the Competition Authority has made itself relevant at the regional level through its contribution to events organized by UNCTAD and other international organizations. The Authority has lived up to its vision of: *“A Kenyan economy with globally efficient markets and enhanced consumer welfare for shared prosperity”*. Well done CAK!!!

In terms of improvement, the Competition Authority can engage more with SME agencies and associations to leverage on the usefulness of the work of the CAK and its contribution to Kenyan markets. This can be instrumental in promoting competition to enable the growth and innovation of SMEs and compete beyond Kenyan borders.

Elizabeth Gachuiri,

Economic Affairs Officer,

United Nations Conference on Trade and Development (UNCTAD)



⦿ Awards presented to the CAK by the ICN and the World Bank Group in recognition of its advocacy initiatives.

A Model for Promoting Competition to Improve Efficiency and Alleviate Poverty

2

I have the pleasure and the honor of knowing Director-General Kariuki for at least a decade. In 2012 I was co-producing one of the first curriculum training modules for the International Competition Network (ICN). This module was devoted to developing countries, and we were making it at a time when a poisonous stereotype prevailed in the developed world (and it is not all gone): That developing countries' competition authorities were just trying to catch up to the West; that the developed world had nothing to learn from developing countries; and that the West might usefully do capacity building to train developing countries' officials and staffs in Western standards so that Western business could more easily and profitably contest their markets. Director-General Francis was one of the stars in our module (which is available on the ICN website, <https://www.internationalcompetitionnetwork.org/training/developing-countries-and-competition/>).

Francis and some of his similarly illustrious colleagues gave the lie to the stereotype. In fact, a strange thing has happened over the last few years.



“ The CAK tears down barriers, frees up markets, creates jobs and business opportunities, and makes available more goods and services at lower prices, especially for the poorer population. ”

Prof. Eleanor Fox,
New York University
School of Law.

As the West, with the whole world, has experienced crises in COVID-19, scarcity, spiraling inequalities, and existential threats to the planet, Western competition policy experts and policymakers – or at least a critical mass – have begun to consider a competition policy sensitive to inequality, sustainability, and interests of workers – concerns long embraced by developing countries. How to do it, and in a way that continues to serve consumers? The West has much to learn from Francis.

In this short essay, I reference several exemplary advocacy initiatives of the CAK led by Francis, all of which alleviated poverty and enhanced efficiency at the same time. Since I was requested to give advice for the future of the CAK, I attach as an appendix of suggestions I have made with my co-author Mor Bakhoun for sub-Saharan African competition authorities.

I have written elsewhere that the good head of a developing country competition authority must, among first steps, survey the landscape, identify what barriers are keeping the markets from working, keeping the people from entering and succeeding, and, reciprocally, keeping prices high and innovation low; and break those barriers, whether by enforcement or advocacy or both. This broad view of markets and obstructions is even more important for developing than developed countries, for developed countries typically have fewer impervious barriers and, to break the high ones, often can depend upon other sources of intervention, such as regulatory reformers. Scanning the horizon and pouncing where it will help the people the most is exactly what Francis does and has done.

In this short essay, I reference several exemplary advocacy initiatives of the CAK led by Francis, all of which alleviated poverty and enhanced efficiency at the same time. Since I was requested to give advice for the future of the CAK, I attach as an appendix suggestions I have made with my co-author Mor Bakhoun for sub-Saharan African competition authorities.

The subject of my first encounter with Francis was pyrethrum¹, and this was the subject of Francis' appearance on the ICN video. Kenya was the world class grower and supplier of pyrethrum, a flower that embodies an ecologically friendly organic insecticide. Tens of thousands of Kenyan small-scale farmers were growing pyrethrum. Then Kenya set up a state monopoly board to be the sole buyer of the flowers and the sole seller of the ingredient for fertilizer. Exports shrank. The farmers were squeezed and displaced, and many farm families lost their livelihood.

¹ <https://documents1.worldbank.org/curated/en/840201468046822619/pdf/CompetitionPolicy.pdf>

Working with the World Bank, Francis and his team broke the back of the monopoly. Tens of thousands of small farmers were again able to make a living for their families.

I love also the purple tea² story. Kenya is one of the world's leading producers of tea. The big producers of black tea controlled the market and in effect formed a government-authorized cartel; they procured a rule that gave them a veto over new licenses. Then innovative farmers developed a new variety of tea, purple tea, which has higher than usual health benefits, and an entrepreneurial investor applied for a license.

The incumbents opposed. The CAK with the World Bank came to the rescue. With data showing the benefits of purple tea farming to the country, including the additional income that would be earned by the purple-tea farmers, the regulator set aside the rule and granted the license. More than 2000 new jobs were created, farmers were enabled to produce this valuable new product, and exports increased exponentially. The CAK's successful intervention won an honorable mention in the annual advocacy contest of the World Bank and the ICN.

Other conduct fits into law violations, enabling settlements in the shadow of the law. Kenya has been in the forefront of innovative mobile telephone networks. Safaricom was a leader in bringing the technology to market. But when rivals began to compete with Safaricom, Safaricom prohibited its mobile money agents from doing business with competitors. The CAK intervened; it ordered the firm to drop the exclusivity clauses. The CAK's action led the way to a vibrant market of more than 300,000 agents serving more than 66 million users.

Where, however, competitors complain about competition itself, the CAK has the courage of its convictions to stand with the consumers. This was the story of Uber and Little Cab, where Little Cab (which was being supported by Safaricom) entered the ride-sharing market in Nairobi with low prices, triggering a slash of prices by Uber, of which Little Cab complained. The CAK stood up to principle. It found no price predation. This was competition.

The track record of the CAK is strong and principled. The CAK tears down barriers, frees up markets, creates jobs and business opportunities, and makes available more goods and services at lower prices, especially for the poorer population. A recognition of the CAK's commendable performance and the distinction of Director-General Kariuki is the selection of the Competition Authority of Kenya and thus Mr. Kariuki to join the Steering Group of the ICN in 2021.

**The West has much to
learn from Francis.**

*- Prof. Eleanor Fox,
New York University
School of Law.*

¹ <https://www.worldbank.org/en/news/feature/2017/08/29/creating-kenyas-purple-tea-market-markets-and-competition-policy-in-action>

Suggestions to Eastern and Southern African Competition Authorities

In our book on **Making Markets Work for Africa**³, Mor Bakhoum and I assessed the performance of a number of competition authorities in sub-Saharan Africa. We made some suggestions for the authorities. With the thought that some of our observations could be useful to the CAK or at least of interest, we include them in the appendix to this essay. When writing the last paragraph of that passage, we had in mind Director-General Kariuki:

“Through all of these challenges, a light shines. Some heads of the national competition systems follow their star to identify the most harmful market obstructions, to develop strategies to attack them, and to support the entrepreneurs who are trying to leap-frog over them. These dedicated leaders value inclusiveness and the need to develop sound substantive principles against harmful restraints. The agencies they lead are deepening their cooperative relations with one another, increasing coherence of their laws and policies, building community, and gaining a view from the top.”

Prof. Eleanor Fox,

New York University School of Law



⑤ *The Director General participating in an ICN Conference, Moderated by Prof. Eleanor Fox.*

³ Refer to the end note

The Competition Authority of Kenya's Approach to Penalties and Remedies for Anti-Competitive Conduct

3

Penalties for anti-competitive conduct are essential for deterrence as they change companies' incentives in support of competitive markets. Companies' incentive to collude is the higher profits that can be made compared with competing vigorously. The threat of substantial penalties is necessary to make companies think twice about engaging in anti-competitive conduct.

However, in the early stages of a competition regime, companies may have a poor awareness of the law. This means linking compliance and advocacy with building understanding and laying the platform for enforcement. The Kenyan experience provides important insights into the core challenges of a credible regime and the economic benefits of such a regime.



“ The Competition Authority of Kenya's first decade shows how an institution can build its credibility through a judicious combination of advocacy and enforcement. ”

Prof. Simon Roberts,
Professor, Centre for
Competition Regulation and
Economic Development,
University of Johannesburg.

Establishing Credibility and Deterrence

Cartel mark-ups are typically substantial with economic research finding them to be in the range of 15-25%, with some being much higher than this.⁴ It is normally only possible to establish the harm in any given cartel some years after it has ended. This has underpinned fining guidelines in many jurisdictions around the world which start from a base fine in the range of 10-30% of the firms' annual turnover of the affected goods or services, depending on indicators of the cartel's impact. This penalty is then multiplied by the duration the cartel has existed. The penalty may be adjusted for mitigating or aggravating factors, notably the extent of the firm's cooperation with the investigation and willingness to admit and settle the case. The fine may be subject to a maximum cap at 10% of the total turnover of the firm on purely pragmatic grounds.

The probable imposition of fines and thus their deterrent effect depends on detection. If there is a negligible chance that a cartel is uncovered, then the fine which may be imposed is irrelevant. In recognition of the secret nature of cartel arrangements, many countries have introduced corporate leniency policies to reward companies coming clean. For such a policy to be successful in inducing cartel members to break ranks and provide information on the cartel the first company and its managers must be guaranteed immunity from prosecution in exchange for complete cooperation. A leniency policy must be coupled with strong enforcement to increase the likelihood of detection and hence the threat of a penalty if leniency is not sought.

The Competition Authority of Kenya (CAK) has had notable successes in detecting cartels in a number of sectors. In a relatively short space of time, it has established its enforcement capabilities. Conduct has been addressed in industries from paint⁵ and cement⁶ to insurance. However, the leniency policy does not appear to have played a big role, likely due to the uncertainty related to whether complete leniency will be granted and the possibility of criminal prosecution being pursued even where firms cooperate.

Penalties and deterrence are also very much a work in progress. Penalties in nominal terms may appear high and it is unusual for a regulatory body in Kenya to impose a large financial penalty. The real question is whether these penalties provide sufficient deterrence.

⁴ See, for example, the cast concrete pipes cartel in South Africa where mark-ups as high as 50% were found in an ex post assessment (Khumalo, J., Mashiane, J., Roberts, S., 2014 'Harm and Overcharge in the South African Precast Concrete Products Cartel', *Journal of Competition Law and Economics*, 10(3): 621-646)

⁵ <https://www.businessdailyafrica.com/bd/economy/cak-faults-crown-paints-basco-3303118>

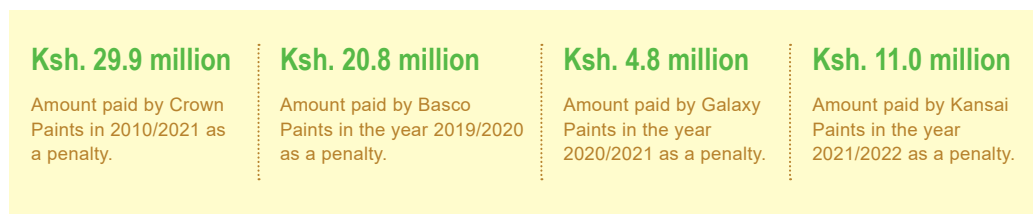
⁶ <https://www.businessdailyafrica.com/bd/corporate/industry/regulator-fights-tycoon-s-plan-cement-price-war-3586854>

The paint cartel uncovered in 2018 is a good example. Soon after the search and seizure exercise carried out by the CAK, one of the four colluding companies, Basco Products, settled and paid a penalty of Ksh. 20.8million. In the year 2020/21, two other companies, Crown Paints and Galaxy Paints and Coatings, agreed to the penalties imposed of Ksh. 29.9 million and Ksh. 4.8 million respectively and the fourth company (Kansai Plascon) was reported to be finalising settlement (CAK Annual Report Financial Year 2020/21).

The CAK’s preliminary finding was that the companies colluded on prices, discount structures, and transport charges, implying mark-ups over competitive prices. How do the fines match up to the likely effects of coordination? The East African paint market has been estimated at US\$350 million in 2018.⁷ If there had been just 10% higher prices due to collusive conduct then this would equate to US\$35 million per annum, or approximately Ksh. 3.5 billion each year. While we do not know the sales of the individual companies and the proportion of sales in Kenya (albeit the cartel likely operated across borders in the east Africa region), the fines imposed seem considerably less than the likely gain from the cartel conduct for just a single year.

Special Compliance Programme and Remedies for Anti-competitive Conduct

The prevalence of arrangements on the part of trade associations in agriculture and financial services which may have contravened the cartel prohibition led the CAK to launch a Special Compliance Programme (SCP) in 2015 under the market inquiry provisions (See Kariuki and Roberts, 2016).⁸ It appeared that the associations and their members simply had not internalized the implications of the Competition Act nor had they made the required changes to the business culture. The practices and rules of trade associations may also have been encouraged by past Government policies and have been undertaken in the spirit of the collective development of industries and sectors.



⁷ <https://theexchange.africa/industry-and-trade/manufacturing/kansai-paints-taps-into-east-africa/>

⁸ Kariuki, F.W. and S. Roberts (2016) ‘Competition and Development: Insights into Building Institutions from the Kenyan Experience’, in Fox, E.M., First, H., Charbit, N. & Ramundo, E. (eds) *Antitrust in Emerging and Developing Countries: Africa, Brazil, China, India, Mexico...*, Concurrences, New York.

By using the route of an inquiry, it meant that assessments would be produced of the markets in question. The SCP invited parties to identify, disclose and rectify rules, practices, and procedures that may raise competition concerns. If the inquiries concluded that the conduct had been disclosed and properly addressed, then no further action would be required. Alternatively, where conduct had not been addressed then an investigation could be launched (such as if a complaint was lodged) which could impose a significant penalty if there was a finding the act had been contravened.

The SCP therefore, enabled CAK to focus on widening understanding of the law and promoting compliance in important areas of the economy. It was an approach that was oriented toward remedying conduct rather than heavy enforcement. However, it also laid the basis for strong enforcement action in the future. More than eight associations in the financial and agricultural sectors implemented the requirements of the SCP and thereby rectified the contraventions identified and developed internal compliance programs.

The financial services and agricultural sectors were selected because the CAK had good cause to believe that there were competition issues associated with the rules, practices, and procedures of the trade associations in those sectors. If trade associations and their members did not cooperate in voluntarily making representations and, furthermore, did not respond fully to requests for information, then an adverse inference may be drawn about their activities.

The CAK has also focused on more timeous remedies for cases of possible unilateral conduct instead of the protracted litigation which would likely result from the imposition of substantial penalties. For example, an inquiry was conducted into the setting of the Unstructured Supplementary Service Data (USSD) charges by Safaricom instead of an abuse of dominance case (see Kariuki and Roberts, 2016). The inquiry resulted in a substantial reduction in the charges by agreement with Safaricom soon after the completion of the inquiry.

Complementarities between Advocacy and Enforcement

The use of inquiries by the CAK, with thirteen (13) in total over the first decade of the CAK, is consistent with the complementary role which advocacy can play alongside enforcement. The market inquiries resulted in various outcomes, including issuance of orders and commitment decisions.

Inquiries are able to consider the effects which government policies and regulations may be having in inadvertently undermining competition. They can also identify the policies required to open-up markets to greater competitive rivalry, reducing barriers to entry. In this way, inquiries can provide the basis for advocacy campaigns aimed at policymakers and the mobilising of stakeholders with evidence-based findings, as was the case with tea, pyrethrum, and sugar market inquiries. In addition, the Digital Credit Market Inquiry that recommended regulation of the unregulated Digital Lenders resulted in the amendment of the Central Bank of Kenya (CBK) Act, 2021, and the development of the Central Bank of Kenya (Digital Credit Providers) Regulations, 2022.

The CAK has effectively used inquiries across the economy to push for more effective competition, resulting in new regulatory frameworks. For example, the SME Leasing Market Inquiry has led to a policy that will put leasing on a better footing and increase access by SMEs in line with the Government's economic agenda. There have also been inquiries into banking, and digital credit which has supported improved regulation of these markets and protection of consumers with better information on the terms, charges and effective interest rates being applied.

In January 2017, the CAK launched an inquiry into the retail sector which examined various conduct and arrangements, including: the allocation of shelf space and the relative bargaining power between retailers and their suppliers; the nature of and the extent of exclusive agreements at one stop shop destinations and their effects on competition; the pricing strategies retailers employ especially in regard to responding to new entrants; whether there are any strategic barriers to entry created by incumbent firms to limit entry in the market; and the effect of the supermarkets branded products on competition.

The recommendations from this inquiry informed the Buyer Power provisions that were included in amendments to the law and are enforced by the CAK. In 2020 the CAK found that four top-tier retailers had delayed payments to suppliers by more than 90 days and were required to rectify this. Ongoing monitoring led to ensuring that Tuskys Supermarkets, one of the one-time leading retailers, paid a total of Ksh. 2.1 Billion to suppliers. These steps and the

In 2020 the CAK found that four top-tier retailers had delayed payments to suppliers by more than 90 days and were required to rectify this. Ongoing monitoring led to ensuring that Tuskys retailer paid a total of Ksh. 2.1 billion to suppliers.

inquiry led to the Retail Trade Code of Conduct being adopted in June 2021 which includes provisions on fair and prompt payment of suppliers. The Authority, as mandated by the Competition Act conducts regular surveillance of sectors likely to experience Abuse of Buyer Power to forestall such incidences.

Insights and Implications

The CAK's first decade shows how an institution can build its credibility through a judicious combination of advocacy and enforcement. In particular, through the use of inquiries, it has promoted compliance and has negotiated concrete remedies to apparently anti-competitive arrangements, avoiding protracted litigation. The inquiries have also proved an important means to obtain changes in policies and regulations for more open and competitive markets.

Having established awareness of competition law and a strong institutional foundation, the challenges in the next decade will include deterring hard-core cartels through substantial penalties and vigorous investigations where collusive conduct is suspected. This is also an important pre-requisite for corporate leniency to be an effective tool in uncovering collusion.

Prof. Simon Roberts,

Professor, Centre for Competition, Regulation and Economic Development (CCRED), University of Johannesburg



Expanding Enforcement Frontiers

4

When we first met in 2014, one of the first things DG Kariuki said to me was “I understand the argument, now show me the evidence.” In this case we were talking about the lack of transparency in pricing of mobile money services. Even in 2014 most Kenyan mobile money customers were not told the cost of a transaction before they executed it. But the request spoke to the DG’s relentless pursuit of fairness not by conjecture or opinion, but through his policy genius, innovative research, and constant engagement with the consumers CAK seeks to protect.

Working with CAK colleagues, we did provide the evidence through a survey on consumer price awareness in mobile money, and the CAK issued rules requiring pre-transaction price transparency in mobile money. This is just one example of how, during Kenya’s remarkable expansion of financial innovation over the past decade, the CAK has taken timely actions that promoted competition and consumer protection in Kenya. Some of the accomplishments include:



“CAK is the flattest organizational structure I have seen in a government agency, and that is because of DG’s style of leadership. He is aware and engaged with everything his team does, but he also gives them the freedom and power to lead.”

Rafe Mazer,
Director, Fair Finance
Consulting.

- ④ Prohibiting agent exclusivity of mobile money agents. This change was particularly important for rural Kenyans, where there may be only one *duka* in a small village, which is the natural location for most agent outlets.
- ④ The previously mentioned pricing transparency requirements for digital financial services.
- ④ The *USSD Channel Access Market Inquiry*⁹, which found pricing practices by the leading MNO towards banks and fintechs were both discriminatory and had excessive margins. This led to a price cap on USSD session costs charged to these firms that in some cases reduced the cost per session by 90% for small fintechs companies. This reform represented a major win for reducing the costs for innovative startups to enter and thrive in Kenya’s “Silicon Savannah.”
- ④ The *Digital Credit Market Inquiry*¹⁰, which utilized tens of millions of mobile loan records and a national consumer survey to document the key risks faced by digital credit users. The Inquiry proposed a range of reforms relating to pricing, transparency, and consumer information sharing. Already the CAK has used the inquiry findings to ensure more transparent fees and charges, and with the new The Central Bank of Kenya (Digital Credit Providers) Regulations, 2022, a new mandate has been established which should help consumers take control of their credit history and improve choice and competitive pricing.

Working with CAK, I have been impressed how its staff approach their work with creativity and personal commitment to the cause that is far beyond what I have observed in most partners. Through eight years of collaboration one of the most striking differences in how the CAK works versus many Government agencies is the responsibility and independence that its members of staff display. The CAK is the flattest organizational structure I have seen in a Government agency, and that is because of DG’s style of leadership. The DG is aware and engaged with everything his team does, but he also gives them the freedom and power to lead. I recently mentioned this to a CAK staff member, and they told me “Sometimes we forget we even work for a Government agency.” If other agencies followed DG’s empowering leadership style, I think Government would be far more innovative, and consumers and markets would benefit from the policy innovation and high-quality enforcement this inspires.

⁹ <https://cak.go.ke/sites/default/files/USSDServiceProvisionMarketInquiry.pdf>

¹⁰ https://cak.go.ke/sites/default/files/Digital_Credit_Market_Inquiry_Report_2021.pdf

The CAK's remarkable record of success in its first decade has not come easy. Another thing about DG Kariuki is he is tireless and hyper-disciplined in his work ethic. I remember when a fellow regulator in East Africa was considering a study into USSD pricing and channel access and was interested to learn from the CAK's experiences and successful reforms. These regulators were in Nairobi for a meeting, and I reached out to DG very last minute—the night before their visit—to see if we could meet. His day was of course full, but he suggested he could come to their hotel at 6:30 a.m. to have breakfast with them—he arrived early that morning of course! This was not a meeting that would influence Kenya's policy direction—the CAK's USSD inquiry had already been completed—but his commitment to the cause of fair and free digital markets extended beyond borders, and he was always willing to share the CAK's work to others facing similar challenges.

The journey the CAK began under DG Kariuki to safeguard Kenya's digital marketplace is not over, in fact it is barely begun in many ways. Kenya's mobile money sector remains the most concentrated in the world, and this has led to concentration in other sectors such as digital credit and digital overdraft loans. Kenya's costs for person-to-person payments remain higher than many other markets where regulators have taken a more forceful policy direction, such as India or Brazil. This erodes some of the value consumers derive from Kenya's remarkable expansion of digital financial services since 2008. As finance and e-commerce integrate, Kenya will face new competition risks from the dominance of platforms, and consumers will face new risks such as fraudulent goods and vendors, discriminatory pricing based on algorithms and market power, and control of their digital history. Even in issuance of credit we are seeing the emergence of products like buy-now-pay-later, which may pose similar risks that digital credit did over the past decade. The CAK needs to be ready to address these risks, and to stand strong with new policies in the face of risks of increased market dominance.

One of the ways I would like to see the CAK answer this challenge is through continued expansion of their quantitative research. In the Digital Credit Market Inquiry, the CAK and my team analyzed tens of millions of digital credit transactions to better understand

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the different outcomes borrowers faced. This level of analysis helped to distinguish between consumers who ran into challenges repaying their loans, and consumers who repaid their loans on time, even early in many cases. The policy prescriptions to help these consumers are varied. Some need policies that reduce the flow of loans to borrowers who are unlikely to pay, while others need policies that help them obtain lower cost loan offers from more providers after they have proven their capacity to repay. This type of policy nuance only comes from rigorous diagnostic research.

The increasing digitization of every aspect of our lives offers great opportunities for leveraging new digital data trails to better measure, monitor, and improve the digital economy to ensure it is safe, competitive, and supports Kenya's economic growth. I believe that the CAK's staff is capable to meet this challenge, and have seen their personal passion for research firsthand. Research efforts should be expanded, but within the confines of the Data Protection Act, 2019.

I want to close my note with a personal reflection on DG Kariuki. These past eight years have seen me evolve from a curious, young(ish) policy nerd, to a more confident, mature leader of a global initiative on consumer protection in digital financial services. I recently lost my closest personal mentor, Kate McKee, a true visionary in consumer protection and the most nurturing boss I have ever had. When I think about how Kate inspired me, and provided me the freedom to grow while still offering expert guidance along the way, I cannot help but reflect on how similar DG Kariuki's approach to leadership has been. In fact, the several times they met the two of them got along immediately, diving right into fascinating discussions on the frontiers of consumer protection policy.

DG Kariuki has been one of the most inspiring people I have worked with, and the collaborations with CAK have done more to make my career than any other work I have been a part of. More importantly, DG Kariuki has brought clear and unequivocal benefits to tens of millions of Kenyans across many industries. The Kenyan economy is more consumer-friendly because of CAK's leadership on consumer protection over the past decade. Kenyans, and non-Kenyans like me who lived in Kenya during his time at CAK, owe a debt of gratitude to DG Kariuki for his work. He may be the most unsung hero in Kenya's government, and while his humble nature makes me think he probably prefers it that way, I hope that mine and others' testimonials raise awareness of the legacy he leaves as the first ever Director General of the Competition Authority of Kenya, and inspire the new leadership to build on this legacy.

Rafe Mazer,

Director, Fair Finance Consulting

Balancing SME Growth and Competition Law Enforcement

5

UNCTAD is the guardian of the United Nations Set of Principles and Rules on Competition (1980)¹¹, the only internationally agreed instrument in this field, being mandated to support developing countries to adopt and use this policy to better integrate the world economy.

Kenya was one of the first member States which requested UNCTAD's assistance in this area, having volunteered for the UNCTAD Voluntary Peer Review in 2005 as this exercise was launched: this would be followed by the drafting of a new Competition law and the establishment of an autonomous Competition Authority in 2010, and led to a continuous active participation in the work of UNCTAD – either intervening in and reporting to the annual Intergovernmental Group of Experts' meetings, or answering UNCTAD call for cooperation in technical assistance and capacity building activities in Africa and beyond. The Authority later became very engaged also in the field of consumer protection.

¹¹ <https://unctad.org/system/files/official-document/t drbpconf10r2.en.pdf>



“ With Francis Kariuki the Competition Authority of Kenya asserted its experience in both areas and confirmed it to be an old, close and reliable partner of UNCTAD.

”
Teresa Moreira,
Head of the Competition and Consumer Policies Branch, United Nations Conference on Trade and Development (UNCTAD).

With Francis Kariuki the CAK asserted its experience in both areas and confirmed it to be an old, close and reliable partner of UNCTAD. We are grateful for the strong interest, the significant collaboration and the support delivered to other member States, especially during Francis Kariuki's tenure, and we are committed to continue supporting the Authority's next stage as the new management takes over.

We sincerely wish Francis a smooth transition and commend him for leaving the CAK solid and reputable in enforcing both Competition and Consumer protection policies.

Competition and Consumer Protection Authorities across the World were at the forefront of public authorities' response to the impact of the COVID-19 pandemic on markets, businesses and consumers as they adjusted to the new context, developing new tools, remaining vigilant, not hesitating to enforce the law to cease unfair and abusive practices. The CAK was extremely active during this period, going digital, adopting business guidance to improve predictability in times of uncertainty and effectively enforcing the law against rogue traders.

For instance, pre-COVID-19, the CAK used to accept complaints both physically and online, but because of the pandemic, it went fully online, facilitating the lodging of complaints by consumers. The Authority digitized all its records, which ensured that all cases are available at the click of a button. Additionally, the CAK developed a mobile application app to enable easier submission of complaints. Merger notifications were also available online, with no hard copies being accepted.

Another illustration was the cautionary notice¹² on illegal price increases and hoarding during the pandemic. The Authority has the mandate to promote and safeguard competition in the national economy and protect consumers from unfair and misleading market conduct. Using these powers, it cautioned manufacturers and retailers who were contemplating collusive increases of prices and/or hoarding with the intention of subsequently increasing prices of various consumer goods. Law enforcement actions on price hikes of essential products (such as Clean-shelf Supermarkets and Tropical hand sanitizers)¹³ were equally important to ensure that markets were functioning in a fair and balanced manner despite the disruptions caused by lockdowns.

¹² <https://cak.go.ke/sites/default/files/2020-03/CAKCautionaryNoticeonIllegalPriceIncreasesandHoarding.pdf>

¹³ <https://cak.go.ke/sites/default/files/2020-03/CAKRemedialOrdertoCleanshelfSupermarkets.pdf>

Overall, the CAK quickly reacted to the consumers' needs and to businesses practices, protecting consumer rights and leveling the playing field throughout challenging times. It confirmed the importance of effective Competition and Consumer policies and set strong standards for competition policy in times of crisis, which other Competition Authorities, namely younger and less equipped ones, can learn from.

UNCTAD shared the CAK's actions and initiatives to continue promoting the exchange of information and experiences which form part of the dissemination of best practices amongst UNCTADs member States were especially needed during such a period.

According to a 2020 UNCTAD Report¹⁴, "formal and informal micro, small and medium-sized enterprises (MSMEs) make up over 90% of all firms and account, on average, for 70% of total employment and 50% of gross domestic product (GDP)". MSMEs played a crucial role in the sustainable and inclusive recovery from the COVID-19 pandemic. Competition policy can further support MSMEs in terms of improving access to markets as well as in benefitting from the opportunities brought by digitalization, working together with SMEs to strengthen capacities and reflect on possible regulatory initiatives.

The recent technical cooperation project on the role of Competition law and policy in supporting MSMEs in facing and overcoming the COVID-19 pandemic economic impact¹⁵ showed that Competition Authorities could specifically address SMEs in their advocacy programmes, raising awareness and providing training jointly with relevant public bodies and business associations so that MSMEs would better understand the challenges they faced and prepare to overcome them.

Along these lines, the CAK should draft a specific guidance document on Competition law and policy and MSMEs' issues¹⁶. In addition, the CAK should consider further engagement with MSMEs, developing its relations with its peers and with the representatives of businesses for a more fruitful outcome. There are also opportunities to coordinate with other developing countries which dedicated special attention to MSMEs due to the fact that these were the business

¹⁴ See the UNCTAD report on The covid-19 pandemic impact on micro, small and medium sized enterprises - Market access challenges and competition policy (UNCTAD/DITC/CLP/20 and 21/3), 17 Feb 2022.

¹⁵ <https://unctad.org/project/strengthening-social-protection-pandemic-responses-identifying-vulnerable-aiding-recovery>.

¹⁶ See the example of the Singapore "Guidance Note on Collaborations between Competitors in Response to the COVID-19 Pandemic" at <https://www.ccs.gov.sg/media-and-consultation/newsroom/media-releases/business-collaboration-guidance-note-20-july-20>.

most seriously hit by the pandemic, such as South Africa, Thailand, and Brazil, whose national market studies complemented the global report on the challenges faced by these businesses during the pandemic¹⁷.

Teresa Moreira,

*Head of the Competition and Consumer Policies Branch,
United Nations Conference on Trade and Development (UNCTAD)*

¹⁷ Quoted, see note 2.

➤ *Trailblazing...*



Competition Law Enforcement and Investment in Kenya

6

Competition creates incentives for incumbent firms and entrants to invest in capacity, technology, and new products to win consumers. The Competition Authority of Kenya is playing an important role in safeguarding competition through both enforcement of rules to control mergers and discourage anticompetitive practices as well as through advocacy for government regulations that enable competition. The Competition Authority has taken a very proactive and investment-friendly approach boosting compliance with the law through mechanisms that reduce the regulatory burden.

For example, cutting regulatory costs of notifying mergers has mitigated undue effects on investment decisions and supported the creation of new companies and joint ventures to accelerate investments. The Consolidated Merger Guidelines¹⁸ issued in 2013 were the first step to avoid requiring all mergers to be notified independently of their size and the likelihood of potential impact on markets. This eliminated regulatory hurdles but also allowed the young agency to free up resources to focus efforts on investigations. The approach taken to set a tiered and fixed merger filing fees that did not depend on



“ *The carrot and stick approach adopted by the authority, together with open dialogue with the private sector, predictability and transparency of technical decisions are a good recipe for continuous success.* ”

*Tania Begazo,
Senior Economist,
Markets and Technology,
The World Bank Group.*

¹⁸ <https://cak.go.ke/sites/default/files/guidelines/ConsolidatedMergerGuidelines.pdf>

the revenue of the parties, was an additional testimony of the Authority's approach: boosting compliance rather than taxing enterprises that were considering merging.

To boost greater predictability, the law was afterward amended to allow for setting a merger notification threshold - in line with international practice. In Financial Year 2020/21, with the implementation of the subsequent Merger Regulations approved in 2019, various mergers – including foreign parties – were approved supporting investments across sectors. Some examples include the approval of a joint venture for affordable housing and a joint venture in manufacturing to expand local production of packaging material that is essential for food products and climate change mitigation. I have seen a positive evolution of the merger control framework and its implementation in the last 11 years.

The detection of anti-competitive practices and the settlement approach have allowed stopping practices that can harm the investments of small and medium players. Anticompetitive practices that restrict competition and put smaller players at disadvantage can discourage investments by those players. For example, the elimination of restrictive exclusive agreements with mobile money agents and adjustments to the fees for short codes used for mobile applications open the opportunity for additional investments by competitors to expand the network of agents and the variety of products offered to consumers. In other cases, settlements that stopped price coordination agreements by competitors in paints, insurance, and advertising allowed for lower prices of these inputs in other businesses, cutting operational costs and therefore freeing resources for investment.

Finally, the CAK has effectively implemented its mandate to advise market players and government entities on reforms to actions, regulations and procedures that limit competition. For example, in 2013 the Authority worked successfully with the Tea Board to eliminate entry restrictions to purple tea processing – a non-objection by existing factories. Besides important effects on the incomes to green leaf tea farmers and the opportunity to diversify into higher value purple leaf tea, this intervention permitted investments in new tea factories and the introduction of new technologies in the tea sector.

For the future, it would be important for the CAK to continue keeping the balance between being a watchdog and a facilitator of business activity. The carrot and stick approach adopted by the Authority, together with open dialogue with the private sector, predictability and transparency of technical decisions are a good recipe for continuous success. It has been a pleasure to work with the Authority throughout these last 10 years. We look forward to continued collaboration in the future to strengthen the investment climate while protecting consumers and small enterprises.

*Tania Begazo*¹⁹

Senior Economist, Markets and Technology, The World Bank Group

¹⁹ The views in this article are the Author's own and not those of the World Bank Group.

The Competition Authority of Kenya: Trailblazers in the Enforcement of Buyer Power Regulations to Support MSMEs²⁰

7

The Competition Authority of Kenya (CAK) paved the way for the enforcement of competition legislation to protect firms, particularly MSMEs, against the abuse of buyer power by large firms. Buyer power has been defined in different ways, including as the enhanced bargaining position of a buyer with respect to its supplier(s) of goods or services²¹; the ability for a buyer to capture a higher share of surplus when bargaining with a seller²² and the ability of downstream firms to affect the terms of trade with upstream suppliers.²³ The Kenyan Competition Act defines buyer power as “the influence exerted by an undertaking or group of undertakings in the position of purchaser of a product



“ The CAK had its finger on the pulse in terms of the unique challenges faced by MSMEs in Kenya.

Prof Reena das Nair,
Associate Professor, CCRED
– University of Johannesburg.

²⁰ I would like to thank Priscilla M. Njako, Manager in the Buyer Power Department at the Competition Authority of Kenya, for her valuable comments during the drafting of this article.

²¹ Anchustegui, I (n.d.), Buyer Power, Global Dictionary of Competition Law, Concurrences, Art. N° 12328

²² Carlton, D. W., & Israel, M. (2011). Proper Treatment of Buyer Power in Merger Review. *Review of Industrial Organization*, 39(1/2), 127–136

²³ OECD (2008). Monopsony and Buyer Power, OECD Policy Roundtables. DAF/COMP(2008)38

or service to— (a) obtain from a supplier more favourable terms; or (b) impose a long-term opportunity cost including harm or withheld benefit, which, if carried out, would be significantly disproportionate to any resulting long term cost to the undertaking or group of undertakings.”²⁴

Kenya was the first country in Africa and one of the first globally to explicitly introduce buyer power legislation in 2016 to its Competition Act of No. 12. This signaled the CAK’s firm intention to deal with conduct that hindered the participation and growth of firms due to weak bargaining positions relative to more powerful buyers in value chains. The firms most affected by such conduct are MSMEs. South Africa followed with amendments to the Competition Act in 2018 (effective 2020) prohibiting the abuse of buyer power²⁵ and price discrimination by dominant firms against SME businesses in selected industries. Both countries subsequently issued detailed guidelines that have been open for public comment and debate on what constitutes possible abuses of buyer power and how the authorities would evaluate the significance of buyers, the strength of alternatives available, supplier dependency etc. The CAK’s initial 2017 Guidelines were updated in 2022 following lessons from its experiences during enforcement and international best practice.²⁶

The premise of the buyer power provisions is the recognition that such conduct can lead to the exclusion of MSMEs and can entrench high concentration levels in markets where only large suppliers have countervailing power against powerful buyers. The provisions reflect the objectives of the Competition Act which go beyond just economic efficiency under a consumer welfare standard. Competition policy in developing economies like Kenya aim for performance-based competitive rivalry which stimulates investment in capabilities and learning while rewarding

effort and creativity. This is closely related to opening opportunities and leveling the playing field for new participants, particularly MSMEs. It is not simply overall growth in markets that matters - the nature of participation, ownership, and control also matters. The important

Kenya was the first country in Africa and one of the first globally to explicitly introduce buyer power legislation in 2016 to its Competition Act of No. 12.

²⁴ Section 2 of The Competition Act of No. 12 (amended in 2019); see also <https://www.cak.go.ke/buyer-power-for-a-full-definition>.

²⁵ The buyer power amendments in South Africa developed alongside, and complemented, an in-depth market inquiry into the grocery retail sector which was initiated in 2015.

²⁶ https://cak.go.ke/sites/default/files/Buyer_Power_Guidelines_2022.pdf

role that MSMEs play in developing economies in terms of contribution to GDP, employment, and innovation is valued and there is a recognition that they need to be protected.

Historically, there has been a reluctance to intervene in buyer power-related conduct as it has the potential, in the short-to-medium term, to result in lower prices if it countervails the market power of large suppliers and if associated cost savings are passed through to end consumers. Therefore, under a pure consumer welfare standard, the exertion of buyer power may be beneficial or, at the most, competitively neutral. But there is increasing recognition that the abuse of buyer power can also substantially distort and harm the *competitive process* in the long term if it leads to the exclusion of MSMEs. It can lead to their exclusion by reducing their ability to invest in capabilities and upgrade, which is not in the interest of consumers ultimately. There have indeed been growing calls for distributional considerations in competition policy stemming from a recognition that outcomes worldwide reflect increasing concentration levels and market power in key markets, widening inequality and a ‘sense of powerlessness’ of consumers (Stiglitz, 2017; 2)²⁷. This has devastating effects on the poor and most vulnerable, especially in developing countries. As Baker and Salop (2015:21)²⁸ note *“If growing concerns about inequality lead to the recognition that there are additional harms from market power, that recognition would justify reconsideration of the balance and the adoption of more interventionist antitrust rules”* (own emphasis). In other words, if the outcomes we see are not the outcomes we want, we need to re-think the rules of the game.

And the CAK did just that. The CAK had its finger on the pulse in terms of the unique challenges faced by MSMEs in Kenya. A pressing challenge at the time the Competition Act was amended to incorporate buyer power provisions was delayed payments and, in some instances, complete non-payment, to suppliers by some of the largest supermarket chains. Powerful and prominent supermarket chains like Nakumatt and Uchumi subsequently shut down, leading to significant disruptions in the grocery retail sector in Kenya. This put immense pressure on manufacturers and other suppliers of food and household consumable products to supermarket chains, not least with respect to cash flow. Many suppliers also went out of business.

²⁷ See Stiglitz (2017), Inequality, stagnation, and market power: The need for a new progressive era. Roosevelt Institute Working Paper. <https://www8.gsb.columbia.edu/faculty/jstiglitz/sites/jstiglitz/files/Roosevelt%20Inequality-Stagnation-and-Market-Power.pdf>

²⁸ Baker, Jonathan B. and Salop, Steven C., “Antitrust, Competition Policy, and Inequality” (2015). Georgetown Law Faculty Publications and Other Works. 1462. <https://scholarship.law.georgetown.edu/facpub/1462>

The CAK recognized that the Act did not adequately cater for conduct of this nature, and it was agile and flexible in initiating the process to amend the Act accordingly to change the rules of the game to suit the realities that Kenya was facing.²⁹

I recall a research trip I undertook to Nairobi during this period where I met with several representatives of manufacturing firms that were suppliers to the main Kenyan supermarket chains. I heard first-hand of the immense pressure these firms faced. The CAK was responsive to this, and to market dynamics in other sectors like insurance, where suppliers faced numerous challenges in their dealings with large buyers. The buyer power provisions that emanated from this, under Section 24 A of the Competition Act, aim to protect suppliers against unjustified late payments; unilateral de-listing or termination of commercial relationship without notice; onerous terms and conditions (e.g., certain listing fees, rebates; return fees; other charges for promotions etc.); depression of purchase prices; and the transfer of costs and risks onto suppliers among other impositions that extract rents from suppliers. This is especially problematic when powerful buyers are gatekeepers to end markets. In line with the thinking around protecting the competitive process rather than purely an economic efficiency standard, the Kenyan buyer power provisions do not require showing effects of the conduct on final consumers or that buyers have passed on the benefits of an unfairly low price achieved through the abuse of buyer power to consumers.³⁰ There is also no requirement to prove that the buyer is dominant.

To deal with the cases that the new provisions would bring, the CAK created a specialized Buyer Power Department which was mandated to investigate these cases. To assist key sectors affected by buyer power, such as retail and insurance, the CAK also provided model contracts for the supply of goods and services in these sectors.³¹ These highlight the basic minimum requirements that contracts should have, including payment terms; payment dates; interest rate payable on late payments; conditions for termination and variation of contracts with reasonable notice; and a mechanism for the resolution of disputes (see Njako, 2022³²).

²⁹ While the CAK was among the first to introduce and enact buyer power legislation which strongly (but not exclusively) affects food markets, other jurisdictions have intervened in grocery retail and food markets using other tools such as market inquiries, unfair trade practices legislation and retail charters, some even prior to 2016. For a discussion of such interventions in the UK, Australia, New Zealand, the European Union, Namibia, and South Africa, see das Nair and Shedi (2022). COP27 position paper 2: The 'supermarketisation' of African food systems: implications and responses. African Climate Foundation.

³⁰ https://cak.go.ke/sites/default/files/Buyer_Power_Guidelines_2022.pdf, accessed 31/10/22

³¹ <https://cak.go.ke/mandate/buyer-power/rules>, accessed 31/10/22

³² Njako, P (2022). *New thinking in competition regulation: Adjusting law and enforcement to address challenges of African markets*. Paper submitted to the Annual Competition and Economic Regulation (ACER) conference, 2022. Malawi.

In addition, under Section 24 A (3), the Competition Act allowed for the publication of binding codes of practice, developed in consultation with relevant stakeholders, government agencies and the Attorney-General. In 2021, the CAK gazetted the Retail Trade Code of Practice (RTCP), a voluntary undertaking encouraging self-regulation of signatories to ensure fair and ethical retailer-supplier trade relationships. The code incorporates a Prompt Payment Committee and a Retail Disputes Committee. The former sees to the administration of the code and reports unresolved issues to the latter. The committees are made up of relevant industry participants, such as the Retail Trade Association of Kenya, Kenya Association of Manufacturers, and Association of Kenya Suppliers (Wagacha and Muchiri, 2021).³³ The code provides a *first-tier dispute resolution mechanism*, after which unresolved cases would go to the CAK (Njako, 2022).

The formalisation of all these complementary structures to the buyer power legislation provided the CAK with a strong foundation to deal with cases as well as provided information and certainty around the new provisions. This strength is seen in the growing number of cases investigated and finalised, from nine cases investigated (four finalised) in 2018/2019 to 50 cases investigated (26 finalised) in 2020/2021. In 2018, cases were investigated in three sectors. This increased to cases in 11 sectors in 2020 and 2021 combined. While majority of the cases (67%) were in retail in 2018/2019, this has changed to majority of the cases being in insurance in 2020 (38%) and 2021 (44%). The buyer power provision is therefore gaining greater awareness including across different sectors in the economy, highlighting the CAK's growing credibility in this area of enforcement.

In terms of the types of conduct investigated, the vast majority continues to be around delayed payments. Other types of conduct investigated include unilateral termination of contracts or delisting,

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³³ Wagacha, N. and B. Muchiri (2021). Abuse of buyer power: Regulation of the retail sector in Kenya. Competition Law Alert, 21 July 2021. <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2021/Competition/Downloads/Competition-Law-Alert-21-July-2021.pdf>

unilateral variation of contract terms, unjust return of goods, transfer of costs and risks, preferential and unfavourable terms imposed.³⁴ Late payments put severe pressure on the cash flow of MSME suppliers, affecting their ability to maintain daily operations and to invest in future operations. Njako (2022) highlights that in 2021 the CAK recovered Ksh. 2.25 billion (around USD 18,814,281) owed to suppliers by a large supermarket chain and in 2022, it recovered Ksh. 38 million³⁵ (around USD 318,000) owed to suppliers in the insurance sector. These are significant amounts for MSMEs. Also highlighted by Njako (2022), the enforcement of the provisions led to jobs being saved in the motor repairs sector. In 2021, the Competition Tribunal upheld the CAK's findings in its first ever judgement of the buyer power provision in the *Majid Al Futtaim Hypermarkets Limited v Competition Authority of Kenya & another* [2021] eKLR.³⁶ The complaint against Majid Al Futtaim Hypermarkets Limited (t/a Carrefour) brought by food processor, Orchards Limited (2nd respondents) concerned a range of conduct including unilateral delisting and payment of numerous fees and rebates. The finding in favour of the CAK is yet another feather in its cap with regards to abuse of buyer power enforcement.

While an independent impact assessment or formal review of the Buyer Power Provisions has not been done yet to the best of my knowledge, the progress that the CAK has made in a short space of time in identifying and dealing systematically with abuses of buyer power as I have set out above has been highly impressive. The consistent interaction with industry stakeholders even prior to the promulgation of the buyer power provisions and the active involvement of industry players since, has created awareness and buy-in. Overall, the CAK has indeed been a trailblazer in this area of competition enforcement, and it has been very exciting for me to follow the progress in this critical area of the law.

I end by highlighting certain gaps that the CAK can address with regards to its abuse of buyer power enforcement. First, there might be uncertainty on how relevant purchasing markets are defined from a product and geographic

³⁴ 2018/2019 Annual Report: https://www.cak.go.ke/sites/default/files/annual-reports/FY_2018-2019_CAK_Annual_Report.pdf

2019/2020 Annual Report: https://www.cak.go.ke/sites/default/files/annual-reports/FY_2019-2020_CAK_Annual_Report.pdf

2020/2021 Annual: https://www.cak.go.ke/sites/default/files/annual-reports/CAK_Annual_Report_Financial_Year_2020_21.pdf

³⁵ See also Muchiri and Smith (2022)

³⁶ Available here <http://kenyalaw.org/caselaw/cases/view/211430/>

perspective in the specific context of abuse of buyer power cases. This was highlighted by Nyali and Karanja (2021)³⁷ as important ‘for the business community to align their conduct with the requirements of the law’. The 2022 guidelines note that the CAK will undertake a preliminary investigation under Section 31 of the Act to screen complaints and that this would include the identification and definition of the relevant market, however the guidelines do not go further to describe how relevant markets would be defined in buyer power cases. While perhaps it is obvious that the CAK will utilize general market definition principles and tools, it would provide more clarity if the guidelines were updated with more specific guidance and actual case examples on its approach to market definition (based on the now extensive experience that the CAK has on buyer power cases). The South African Competition Commission Buyer Power draft guidelines can also provide some insights on this.

Second, while the RTCP is commendable, the record internationally has shown that voluntary codes of conduct often do not achieve the desired results fast enough or as effectively as mandatory codes do. In 2018, the Australian Competition and Consumer Commission (ACCC) rejected a recommendation made in the independent review of their code to keep it voluntary. The ACCC emphasized that the code should in fact be made mandatory, with non-compliance attracting penalties. The ACCC was of the view that if left voluntary, there was always the risk that signatories would simply withdraw from the code when challenged. The UK’s Groceries Supply Code of Practice on the other hand is a mandatory code, overseen by the independent Grocery Code Adjudicator. More recently (July 2022), the New Zealand Commerce Commission also recommended a mandatory grocery retail code of conduct. Other voluntary initiatives, like the Namibian Retail Charter of 2016, would have arguably also seen greater progress if made mandatory (see das Nair and Shedi, 2022).

KSh. 2.25 billion

(Around USD 18,814,281) owed to suppliers by a large supermarket chain, recovered by CAK in 2021.

KSh. 38 million

(Around USD 318,000) owed to suppliers in the insurance sector, recovered by CAK in 2022.

³⁷ Nyali and Karanja (2021). KENYA: COMPETITION TRIBUNAL ISSUES FIRST DECISION ON ABUSE OF BUYER POWER – PART II. APRIL 26, 2021. Available at <https://www.bowmanslaw.com/insights/competition/kenya-competition-tribunal-issues-first-decision-on-abuse-of-buyer-power-part-ii/> accessed 31/10/2022

Lastly, the penalties for an abuse of buyer power in Kenya appear alarmingly low. The law allows the authority to pursue a criminal case which could lead to imprisonment for a term not exceeding 5 years, a maximum fine of KES 10 million, or both. The law also provides for an administrative penalty of up to 10% of the preceding year's turnover of the undertaking(s) in question and the ability to issue cease and desist orders and orders to remedy the damage caused by the infringement. In the *Majid Al Futtaim Hypermarkets Limited v Competition Authority of Kenya & another matter*, a financial penalty of 10% of Carrefour's gross annual turnover in Kenya from the sale of Orchard's probiotic yoghurt (the relevant product) amounted to a mere KES 124,768 (around USD 1,027).³⁸ This is hardly likely to be an effective deterrent for a multinational entity like Carrefour. Such low penalties may undo the CAK's hard work and credibility gained thus far in curtailing the conduct.

Prof. Reena das Nair,

Associate Professor - Centre for Competition, Regulation and Economic Development (CCRED), University of Johannesburg

³⁸ In addition to behavioural undertakings. Other financial payments to Orchard's included repayments of rebates and costs associated with the loss arising from unilateral termination of the supply agreement.

The Role of Competition Policy in Enhancing Regional Integration

8

I write this in the context of the impending end of the illustrious tenure of one of the most dynamic and transformational leaders we have had leading a competition agency on our continent. It is fitting to reflect on the opportunities for regional integration, focusing on the role of the Competition Authority of Kenya (the CAK) under the stewardship of Mr. Wang'ombe Kariuki, the founding Director-General. True to his character, Mr. Kariuki will not be one to want to take all the credit, yet he has led from the front, with consistency and strategic resolve.

Since the CAK opened its doors over a decade ago, the competition regulation landscape in Kenya took an upward trajectory, which undoubtedly spread within the East African Community. The focus of the CAK has been on high-impact enforcement and advocacy interventions, leading to numerous global awards, particularly in key markets affecting ordinary Kenyans. However, what made an even greater impact was the recognition by the CAK to look to adjacent markets to benchmark against certain market outcomes in Kenya, as product markets often transcend beyond national boundaries.



“ True to his character, Mr. Kariuki will not be one to want to take all the credit, yet he has led from the front, with consistency and strategic resolve.

Hardin Ratshisusu,
Deputy Commissioner,
Competition Commission of
South Africa.

It is this regional approach to competition regulation that heavily influenced the formation of the African Competition Forum (ACF) in 2011, in Nairobi, with Mr. Kariuki as the founding Chairperson. The ACF immediately embarked on cross-country studies in cement, poultry, sugar, and fertilizer covering several countries in the EAC, COMESA, SADC, and SACU. The outcomes of the studies led to various regulatory interventions across the participating countries, and finally to the documentation of these insights in a book in 2016 - *Competition in Africa: Insights from key industries*³⁹ edited by Prof. Simon Roberts. This excerpt from the said book is worth noting here:

“It is clear that competitive outcomes are more likely with effective regional integration as this means larger markets and greater rivalry. However, the regional integration project requires relatively balanced growth across countries. Support will quickly dissipate if the majority of the gains are in the larger economies and industrial centers, even if prices charged to consumers across countries are competitive ones. This has fundamental implications for the interface of development policies (for industries and agriculture) and competition law. Development policies need to work at the regional level to realize the potential for growth through supporting investment in capabilities and to counter the natural tendency towards agglomerations of economic activity in regions that are already more advanced.”

What is evident is that competition regulation in the context of the African continent, with countries at varied levels of development, should produce outcomes that not only promote competition but also achieve inclusive growth, development and, more importantly, unhindered participation of firms in markets, especially of micro, small and medium-sized enterprises.

In this vein, the CAK has not only been at the forefront in leading integration efforts through the ACF, but mainly a key contributor to the development of a competition policy protocol for the African Continental Free Trade Area (AfCFTA). When concluded, the competition policy protocol will provide an opportunity for Africa to tackle significant cross-border anti-competitive practices and mergers that current national and regional competition authorities are not able to effectively regulate. There are lessons in implementing a regional competition regime, particularly through the experience in COMESA that can shape the approach adopted at the continental level.

³⁹ https://www.researchgate.net/publication/350312928_Competition_in_Africa_Insights_from_key_industries

With the AfCFTA agreement, the role of competition policy has been elevated. Negotiations on the competition policy protocol for Africa are at an advanced stage, with a protocol envisaged to provide for a framework to address enforcement gaps. Competition agencies on the continent under the ACF are playing an active role in shaping the competition policy protocol. For the continued successes of competition policy in Africa, any structure to be adopted should build on the existing frameworks, enhance the capacities of national and regional competition agencies, and above all advance the continental integration agenda.

For the CAK and many national competition agencies, competition policy within the AfCFTA should present opportunities for enhanced cooperation and collaboration. For instance, the Council of Ministers of the AfCFTA recently established a structure of the Heads of Competition Authorities to fast-track collaboration between national and regional competition agencies, even before a competition policy protocol is finalized. The AfCFTA therefore, presents an opportune moment for competition agencies in Africa to rise and jointly tackle the pervasive anti-competitive practices such as cross-border cartels.

The CAK has been among leading competition agencies from developing countries that have championed for a competition policy approach that addresses broader societal challenges than just the sole pursuit of consumer welfare and efficiency in markets. Most pointed and impactful contributions of the CAK on this have been before the UNCTAD, the OECD as well as the International Competition Network. It is this pursuit of a purposeful competition policy that brings together competition agencies.

The South African Competition Commission has benefited immensely from the collaboration with the CAK, the relationship that was cemented through the conclusion of a memorandum of understanding (MoU) between the two agencies in 2016. Through experience sharing and other collaborative measures, the MoU allowed the agencies to cooperate more, particularly in identifying key competition concerns affecting the Kenyan and South African economies. Although informal cooperation is an option, competition agencies cooperate better and effectively within a formal cooperation framework.

The CAK has been among leading competition agencies from developing countries that have championed for a competition policy approach that addresses broader societal challenges than just the sole pursuit of consumer welfare and efficiency in markets.

In its pursuit, as outlined in the 2021 to 2025 Strategy⁴⁰, the focus of the CAK is on “expanding enforcement frontiers for increased consumer welfare and sustainable economy.” Sustainability, owing to an array of factors, is the focus of most competition agencies in developing and developed economies, but a challenging task. However, economies will achieve sustainability goals if there is enhanced cooperation and collaboration given the interdependencies through trade and linkages in value chains.

The CAK has, under the leadership of Mr. Kariuki ticked all the boxes of an effective competition agency. It is a feat achieved through a committed workforce, a strong executive team, a board with vision and, above all, an enabling political environment.

It is evident that the success of a competition agency requires more than just focus on domestic challenges but also learning and engaging with counterparts in the region as well as globally. That is the essence of a regional approach to competition regulation. In this regard, the path of the CAK has been informed by this foresight.

Hardin Ratshisusu,

Deputy Commissioner, Competition Commission of South Africa

⁴⁰ https://cak.go.ke/sites/default/files/CAK_STRATEGIC_PLAN.pdf

Stronger Together - The Competition Authority of Kenya and the International Competition Network

9

The Competition Authority of Kenya (CAK) is a strong international player. The CAK is firmly anchored in the international competition community with a high level of visibility and an excellent reputation. Francis W. Kariuki has been Director-General of the CAK since January 2013. How has he achieved this success?

The first and most important factor in increasing the presence in the international arena is a strong enforcement record. Successful enforcement goes hand-in-hand with a second element: international cooperation and networking. It not only allows agencies to share achievements, but also to receive input and learn and grow together, both from their successes as well as their failures. As Chair of the International Competition Network (ICN), a position I have held since 2013, and President of the Bundeskartellamt, I am convinced that international cooperation plays a crucial role in the successful work of competition agencies, and that competition agencies benefit greatly from the exchange in fora such as the ICN, the OECD and its Global Forum, as well as UNCTAD.



“...seized the opportunity with both hands by engaging the CAK at a higher level and has turned it into one of the leading competition authorities in the Network.”

Andreas Mundt,
President, Bundeskartellamt
and ICN SG Chair.

At the ICN Annual Conference in Singapore in April 2016⁴¹, the future of the ICN was discussed in a plenary session. The session was part of the 2nd Decade Follow-up Project, a network-wide consultation to examine the ICN's strengths and to identify opportunities for further improvements to the ICN's work and operations. Francis Kariuki was one of the panellists developing a roadmap for the ICN. He made sure that we learned of the benefits the Network provides to younger agencies as well as its worth to competition authorities from the African continent.

Because of its super-light structure and the lack of a formal secretariat or permanent employees, active participation by its members is key to the functioning of the ICN. The member agencies keep the system up and running. While this is a responsibility and a burden for agencies as they need to invest resources, it is at the same time an opportunity. Francis Kariuki has seized the opportunity with both hands by engaging the CAK at a higher level and has turned it into one of the leading competition authorities in the Network.

The project-orientated working groups are the engine room of the ICN, and it takes dedicated colleagues around the world to operate them. At present, the ICN has five Enforcement Working Groups: Advocacy, Agency Effectiveness, Cartel, Merger and Unilateral Conduct. Each working group is led by co-chairs from different jurisdictions; the CAK is currently a co-chair of the Advocacy Working Group. The working groups draft the ICN work plans, establish project teams and organise events. The co-chairs are the centre of all work streams, not necessarily in terms of project leads drafting work products, but in terms of being the contact agency responsible for communicating with members, other working groups and the Steering Group, and for all administrative matters. In preparation of the ICN Steering Group meetings, all working group co-chairs plus the Chair's Office, the Vice Chairs' teams, the Horizontal Coordinator and the ICN Secretariat come

As ICN Chair, I am thankful that Francis decided to go a step further and took the driver's seat. The ICN benefited greatly from his leadership and his perspective enriched the Network immensely.

together on a video call to provide updates on running projects, explore new avenues for cooperation and coordination among working groups, and provide input for the Steering Group meeting.

Being active in a working group offers competition agencies three key benefits: (i) discussions on topics about which agencies can gain new insights, (ii) the opportunity to

⁴¹ <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/MeldungenNewsKarussell/2016/04ICN-KonferenzSingapur.html>

provide input on how to shape international standards, and (iii) interaction with other agencies around the globe as a way to establish trust and cooperation on which joint case work is built. The CAK is active in all the working groups, both by actively participating in projects as well as by taking on leadership roles. The CAK's engagement follows a long-term strategy illustrated by the fact that the CAK has already expressed its willingness to host the ICN Advocacy Workshop in 2024. This will cast a spotlight on the CAK and Kenya and is a perfect fit given that Francis Kariuki and the CAK are well-known for their advocacy initiatives, in Kenya and around the world. We are looking forward to the Advocacy Workshop in Nairobi from 22-23 February 2024!

In 2021, the CAK made another big step and based on its longstanding commitment to the ICN became a member of its Steering Group. The ICN Steering Group consists of selected representatives of competition agencies and guides the ICN. It ensures that the ICN focuses on topics that are relevant to its members and takes the needs of its diverse membership into account.

In addition to the working groups, the Steering Group also leads projects, such as the Project on the Intersection of Competition, Consumer Protection & Privacy (initiated in 2019). Another task of the Steering Group is publishing statements, such as the Statement on Competition during and after the COVID-19 Pandemic (2020) and the Statement on the Role of Competition & Competition Policy in Times of Economic Crisis (2022). As a Steering Group member and given the strong position he holds in the African competition community as a former COMESA Competition Commission Board member and a founding member and first chairman of the African Competition Forum, Francis Kariuki is an ambassador for many African countries joining the ICN and a strong voice at Steering Group meetings.

The ICN opens doors and connects people. All members can make use of its growing encyclopaedia of written work available on the ICN website as well as the conferences and workshops as a platform for discussions and exchange. As ICN Chair I am thankful that Francis decided to go a step further and took the driver's seat. The ICN benefited greatly from his leadership and his perspective enriched the Network immensely. The example of the CAK shows that diving deeper into the Network, being actively engaged and investing time and energy is worth the while. I have travelled this road together with DG Francis Kariuki for many years. Together with his colleagues at the CAK, he has done exceptional work and has written a success story that put Kenya on the map within the field of competition law and policy.

Andreas Mundt,

President of the Bundeskartellamt and ICN Steering Group Chair.

⊙ *Sowing for the future...*



A Review of the Authority's Procedures and Service Delivery

10

Interaction with the CAK

In our view, the CAK ought to be commended for its professionalism in enforcing competition law and regulation in Kenya. Even when engaging with the CAK on adversarial matters (such as investigations into restrictive trade practices), our interaction have been largely amiable, respectful, and professional. This has proved extremely helpful in facilitating effective resolution of matters under the CAK's jurisdiction.

We recognize that the CAK case officers generally have a good grasp of the substantive relevant legal issues to be considered and are quite easy to engage with when it comes particularly to investigations, which are by their very nature adversarial.

It is notable that in the last few years, the CAK has built significant capacity in its enforcement capabilities including but not limited to restrictive trade practices, abuse of buyer power, and consumer protection. In addition, the CAK's investment in technology for use in data collection during dawn raids has increased its efficiency and speed in conducting investigations.



“The CAK's swift adoption of technology has continued to yield efficiency gains for its stakeholders.”

Joyce Karanja,
Partner, Bowmans
(Coulson Harney LLP).

Areas to Improve Efficiency

With respect to merger notifications specifically, it is our experience that case officers are promptly assigned onto matters, with open lines of communication being facilitated by the CAK. As a result, merger parties are able to address any queries or resolve issues arising in respect of a merger application in a timely manner. With the exception of a few cases which the CAK has addressed by making requests for additional information, the CAK has generally been very efficient in ensuring that it adheres to statutory timelines in determining merger applications that are before it. Notably, in straight-forward matters, the CAK has been able to deliver its determination within 45 days which is extremely commendable. This level of predictability is extremely important and helpful for facilitating an investment-friendly environment in Kenya as it greatly assists parties in planning their transaction timelines.

The importance of consistency, certainty and predictability in how the CAK interprets the Competition Act cannot be overstated. In this respect, we have in the recent past noted with some concern, some inconsistency in the CAK's interpretation of the acquisition of *de facto* control. Our recommendation would be for the CAK to consider clarifying (for example, by way of guidelines or rules) its interpretation of section 41(3)(g) of the Competition Act, which states that a person controls an undertaking if that person *"has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f)"* as well as its interpretation of what specifically amounts to *"strategic commercial policy"* for purposes of paragraph 21 of the Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act (the **Merger Guidelines**) – all whilst taking into account international best practice as well as the precedents and guidance it has previously provided in this respect. Specifically, a clear confirmation from the CAK that plain vanilla investor protection veto rights (e.g. veto rights on amendments to the articles of association, issuance of new shares, reclassification of shares, declaration of dividends etc.), which are customary rights aimed at protecting an investors position and that deal with the internal affairs of an undertaking do not amount to *de facto* control would be extremely helpful to cure the recent uncertainty.

We also acknowledge that the CAK has over the years worked to enter into various memoranda of understanding with other regulators, including the Central Bank of Kenya, the Communications Authority, and the Kenya Bureau of Standards. These collaborative efforts have ensured that enforcement practices falling under the concurrent jurisdiction of the CAK and these regulators have continued seamlessly. There have been occasions where such regulatory cooperation has not been effectively applied, leading to duplicated regulatory efforts and/or inconsistent decisions between regulators. We consider that there is scope for

improvement in the way in which the CAK addresses matters in which it has concurrent jurisdiction with other regulators in order to avoid offenders being punished twice for the same offence, whilst also ensuring that the CAK's valuable but scarce resources of time, effort and money are put to good use on areas where its enforcement effort will yield the best outcomes for consumers and the Kenyan economy at large.

Efficacy of the CAK's Guidelines, Forms and Templates

Since the enactment of the Competition Act, the CAK has issued a raft of new rules and guidelines. These have been very instrumental in creating certainty and predictability in the CAK's approach specifically in respect of its interpretation and enforcement of the Competition Act. In our experience, we have found that these largely align with international best practices and go a long way in enhancing the ease of doing business in Kenya. We would encourage the CAK to continue to take into account global best practices and applicable competition law principles whilst ensuring that these are adapted to our specific Kenyan circumstances and context (as opposed to undertaking a cut-and-paste exercise).

One of CAK's most recent significant steps has been the promulgation of the Competition (General) Rules, 2019 (the **Rules**), which *inter alia* recognized the COMESA Competition Commission as a "one-stop shop" for mergers that fall within its jurisdiction. This development was very welcome by the business community as it has now done away with the need for merger parties to make dual merger notifications to the COMESA Competition Commission and the CAK, which has greatly reduced the time and cost of merger transactions that have a regional dimension within COMESA.

The CAK has also issued a number of application forms/templates, such as the merger notification form and the application for exemption forms.

The CAK issued the Competition Administrative Penalties and Settlement Guidelines, 2020 (the **Settlement Guidelines**) which are helpful to provide clarity, consistency and transparency on the CAK's approach to calculating financial penalties in settlements of restrictive trade practices, abuse of buyer power and gun-

One of CAK's most recent significant steps has been the promulgation of the Competition (General) Rules, 2019 (the Rules), which *inter alia* recognized that the COMESA Competition Commission as a "one-stop shop" for mergers that fall within its jurisdiction.

jumping. However, the Settlement Guidelines appear rather rigid in that they restrain the CAK's flexibility in arriving at a suitable base amount for the varying contraventions of the Competition Act. For instance, it would be helpful to give the CAK flexibility to determine the applicable base penalty depending on the severity of the contravention. For example, the base penalty for horizontal cartels, which are deemed the most egregious by their nature and effect could be the maximum penalty of 10% whereas the base penalty for a gun-jumping infraction could begin at, for instance, 3%. This graduated matrix would give the CAK the ability to consider the impact of the contravention to the economy and consumers.

In terms of the CAK's Leniency Program Guidelines, although these are a welcome development in Kenyan competition law, we note that they are unlikely to achieve much success until the leniency process can provide participants with complete insulation from criminal prosecution.

The E-filing System

The CAK should be commended for the ease with which it has embraced technology – not least in its use of virtual meeting facilities (such as Zoom/Teams for video conferencing), which in particular contributed to ensuring that the CAK experienced limited disruptions during the COVID-19 pandemic when physical meetings were limited or prohibited altogether. The CAK's swift adoption of technology has continued to yield efficiency gains for its stakeholders such as ourselves (for example, a tremendous amount of travel time to and from meetings at the CAK's offices is saved).

The introduction of an online e-filing system is another notable achievement that has increased public and stakeholder access to the CAK. Importantly, filings can be uploaded onto the online e-filing portal at any time, which means that parties are not obligated to make filings within the 9am – 5pm traditional working hours.

Our interaction with the e-filing system has largely been in respect of submitting merger filings. In our view however, it would also be helpful if the system would be more user-friendly in particular to (i) display the names of the documents being uploaded prior to making the submission to enable parties to verify with ease that only correct documents have been attached; and (ii) allow for information to be presented in a tabulated form and to recognize punctuation marks. As it currently stands, once parties key in the requisite information into the online merger notification form, it regenerates that information in non-distinguishable sections with no appropriate punctuation. This not only skews the information provided but also makes reviewing the forms challenging. Finally, it would be helpful for the online e-filing system to generate and send out a confirmation of receipt of a complete merger filing to the registered email address of the parties submitting the merger filing (similar to the manner in which the system

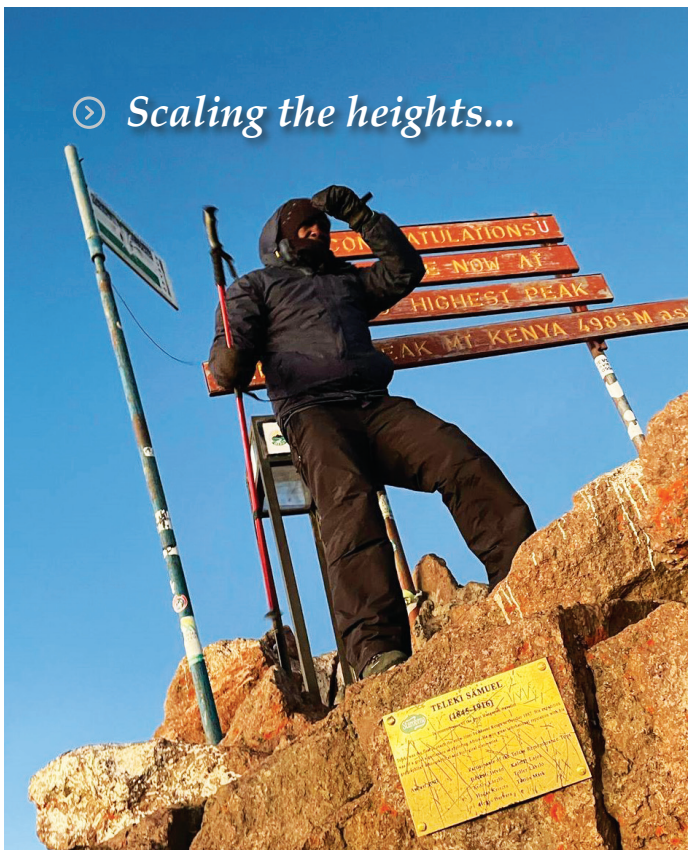
currently sends a notification upon initiation of a merger filing). These issues notwithstanding, the CAK is to be highly commended for its efforts in adopting technology for streamlining its application processes.

In terms of the ease of tracking merger applications, the CAK may wish to consider incorporating an automated tracking system for applications submitted to its various departments. With respect to mergers specifically, this could be provided on the CAK's website where parties are able to key in their matter reference numbers and receive a simple prompt as to what stage of review their merger is in. For instance, a matter that is under review by the technical team could indicate "under internal review" or where a matter has progressed beyond the internal team it could indicate "waiting for board approval". This will not only provide necessary transparency and real-time information to merging parties, but also reduce the burden on the CAK to provide regular updates to enquiring parties involved in various merger applications.

Joyce Karanja,

Partner, Bowmans (Coulson Harney LLP).

📍 *Scaling the heights...*





⦿ The Authority's CSR Committee led by the Director General participating in the 2019 Cerebral Palsy walk.

Efforts in Building Capacity on Competition Law and Policy

11

As a beneficiary of the Young Profession (YP) Programme in 2017, I would like to take this opportunity to thank the Competition Authority of Kenya (CAK) for granting me this chance, training me, and giving me hands-on experience in competition law and policy. At the CAK, I developed an interest and passion for competition policy. Although I had limited knowledge when I started the YP program, the intense training I received and the support from the staff, especially my immediate supervisors, changed my career path.

Generally, capacity building for any competition agency is critical to effectively enforce competition law and institutional building. Thus, it should be a priority for competition agencies. Yet, building capacity is difficult because of resource constraints, especially for competition agencies in developing countries. Moreover, competition policy is inherently political and complex, while also involving a myriad of economic concepts. Thus, creating awareness among the elites and the public is daunting.



“...my opinion about CAK’s capacity building is that it has been tactful and aggressive. The choice of capacity-building initiatives is well-informed.”

Vellah Kigwiru,
Doctoral Research Fellow at
the Technical University
of Munich.

For young competition agencies, building capacity is a gradual process. The CAK has increasingly trained its staff to enhance technical and behavioral competencies and learn best practices from various jurisdictions. However, the CAK realized that to increase its visibility and knowledge of competition law, it had to go beyond training its staff. This is because, for a young competition regime, the CAK had to build a pool to recruit staff. Building capacity beyond the CAK staff has happened in various ways.

The YP Program

The YP program aims to attract young Kenyans (below 30 years old) with a Master's Degree in Law and Economics to develop an interest in competition policy. The YP Program also exposes the youth to the working of the CAK. Job training is enriched by specific training sessions provided by competition and consumer protection professionals. The YPs are empowered by joining teams of dynamic members who assist and mentor them through identifying and executing case activities, regular reviews of targets through team discussions, and reporting.

The YP program is one of the successful initiatives CAK can boast about, with the CAK having been able to retain some staff following the end of the program. The recruitment of staff from the YP program has its benefits, including the hiring of mature employees with an appreciation of the organization's technical functionality. Moreover, some YPs have taken up jobs such as lecturers of competition law in Kenyan universities, while others work in the public and private sectors, driving the tenets of competition law. This has had the benefit of building capacity in terms of competition policy even beyond the CAK.

After my time on the YP program, I undertook a Ph.D. in Competition Law at the Technical University of Munich in Germany. I have written extensively on competition law in Africa, with continuous support from the CAK. Thus, we can say that the YPs, even when CAK does not absorb them as staff members, can become the champions of Kenya's competition law. It is perhaps timely that the CAK established a network of its former and current YPs.

Internship and Industrial Attachment

The CAK understands the potential of exposing the youth to competition law and policy principles. Thus, the CAK continues to engage fresh graduates in the internship program, which many youths have benefited. The CAK also supports continuing university students for industrial attachment. In addition, the CAK also engages undergraduate and postgraduate students in essay writing competitions to increase awareness and understanding of competition law and policy.

Media and Technology

When it comes to social media engagement, relative to other competition agencies in Africa, the CAK's presence on social media channels is an initiative that has involved the youth in understanding competition law. Indeed, the CAK's aggressive tactics in targeting the youth, especially through the media, have been fruitful. For instance, the CAK's Twitter account is very informative. CAK also has YouTube videos, which update the public on various competition law issues.

CAK has capitalized on the realization that the youth spend more time on social media. For instance, I have been tagged on CAK's Twitter or Facebook posts. Seeing the public mention or tag CAK on Facebook posts that raise consumer and protection issues is also fulfilling. For instance, during the COVID-19 pandemic, CAK was tagged and mentioned on Buyer Be Aware. A Facebook page where Kenyans complained about increased food products and sanitizers. Public awareness of the existence and role of CAK is happening because CAK has invested heavily in capacity building.

In my network of lawyers, I can say lawyers now understand what and why competition law is important. This builds not only CAK's reputation, but lawyers as intermediary actors pass this knowledge to their clients. Thus, I would like to applaud CAK for the annual symposium it holds. But also request CAK, in the future, to hold this symposium beyond Nairobi and invite some members of the public.

Research and Studies

Importantly, CAK staff often conducts public lectures and county sensitizations and invites speakers from other competition agencies or institutions in the competition policy fraternity, such as the Center for Competition and Economic Regulation (CCRED), to undertake the public lecture. CAK has also engaged in key research areas where the youth are most affected, such as the banking and finance sectors.

In conclusion, my opinion about CAK's capacity building is that it has been tactful and aggressive. The choice of capacity-building initiatives is well-informed. For instance, social media engagement, especially Twitter, is a good strategy for policymakers and youth. However, CAK needs to target the youth beyond the big cities in Kenya. This can be done by partnering with institutions such as TVETs.

CAK should continue to build its reputation through unbiased enforcement of competition law. The more CAK is seen as impartial, the more it will attract the attention of professionals. Indeed, CAK has focused on enforcement areas that reflect Kenyan market realities, such as agriculture, finance, communication, and banking. However, to invoke an interest in competition law and policy, there is

a need for CAK to prioritize evolving market issues that the public can easily relate. For instance, consumer protection issues in the digital lending market affect almost every Kenyan, especially the poor.

The role of lawyers is not only limited to advising clients. Professionals go beyond those employed by CAK. Thus, introducing courses on competition law in Kenyan universities increases the number of lawyers interested in lecturing or practicing competition law. In turn, when CAK builds its reputation, lawyers are likely to appreciate the work of CAK. Significantly, if CAK seeks to have well-trained professional staff, it has to push for the inclusion of competition law and policy in the Kenyan higher education system. This will widen the recruitment pool. Moreover, it will reduce the cost of training

The more scholarly work there is on CAK, the more awareness. There is a need for CAK to collaborate and support researchers who are willing to write about CAK. Indeed, it is time a book on Kenyan Competition Law analyzing CAK's enforcement activities is published. Collaboration with young researchers includes involving them in CAK's market studies or inquiries on a short-term basis.

There is a need for CAK to reintroduce the essay writing competition, especially at the undergraduate level. In reintroducing the essay writing competition, CAK should focus on novel and complex topics such as data and competition policy, digital markets, climate change, whether the labour exemption should be extended to the digital labour platform workers and artificial intelligence.

Competition law and policy should not be limited to the elites of society. There is a need to involve the public. For instance, during its annual symposium, CAK should go beyond Nairobi and invite at least some members of the public. In doing so, CAK can easily identify a topic the public relates to, such as online shopping, mobile banking, digital lending apps, and consumer protection-related issues. For example, CAK can invite an e-hailing app (Uber or Bolt) drivers and

have a topic on competition issues in the e-hailing sector discussed during the symposium.

CAK should continue to build its reputation through unbiased enforcement of competition law. The more CAK is seen as impartial, the more it will attract the attention of professionals.

Recognizing that competition law and policy are dynamic, just as markets are dynamic, competition law should be part of the higher education system. Most universities offer competition law as an elective course. Some Kenyan universities do not offer competition law as a

course. Moreover, some of the course modules are outdated, not reflecting novel competition issues such as digital markets, artificial intelligence, or climate change. While CAK has continued to push universities to introduce courses on competition law, CAK should take this as a very serious initiative that needs urgent attention.

This means CAK can organize workshops inviting lecturers and providing them with practical knowledge of enforcing competition law in Kenya. The African education system already faces the challenge of overreliance on books published in the US, UK, or EU. These books only reflect the enforcement of competition law in the said regions. If CAK collaborates with universities, then the lecturers are in a position to teach students about the peculiarities of competition policy as it applies in Africa and not reproducing the US, EU, or UK knowledge.

Vellah Kigwiru,

Doctoral Research Fellow at the Technical University of Munich

(Endnotes)

² Suggestions for competition authorities of Eastern and Southern Africa, from Eleanor Fox and Mor Bakhom, MAKING MARKETS WORK FOR AFRICA (2019) pp. 86-88, slightly edited:

1. *Priorities and proportionality.* The competition authorities are called on to do many things; too many things. They must ration their time and efforts. They must deal with mergers that are notified to them and complaints that are made to them, because their laws require it. These two tasks can easily overwhelm the authorities' workload and absorb their time and budget—and yet it is too bad if they do. More than 95 percent of the transactions and conduct are probably benign. It is so important for the authorities to set priorities and to apportion time to the most serious restraints and tasks, such as cartel enforcement, exclusionary monopoly tactics, and other restraints and barriers (including by mergers) that persistently keep outsiders out and raise prices. If authorities spend all of their scarce time on routine must-do matters—assessing a merger that is on its face unproblematic or a complaint that is a personal squabble—they are missing an opportunity. They are, in their country, the voice of defense of the market for the poorest and marginalized citizens. They are doing their job if they raise that voice loud and clear wherever it can do the most good for their people.
2. *State Owned Enterprises, trade associations, and government procurement.* These are three vital areas for enforcement, and several of the authorities are doing a commendable job in these areas. State-owned enterprises (SOEs) are a significant source of market distortions. While some nations exclude SOEs from their competition laws or tread lightly on them, others expressly include SOEs in their coverage, and increasingly the authorities are calling them to account when they can. Similarly, trade associations are a common source of restraints. A number of authorities have trade associations in their sights. The Namibia action against the lawyers' association is one good example. The Kenyan amnesty program targeted at financial services and agricultural trade associations, and focused on educating these stakeholders in early days of enforcement, is another. Government procurement represents a huge portion of the countries' budgets and affects the costs of vital necessities such as roads, schools, and children's meals. Procurement violations—bid rigging and complicit officials—lie at the intersection of antitrust and corruption. Botswana's observing and correcting deviations from the tender process is a good example of meaningful advocacy.
3. *Analysis: authorization of agreements.* When parties seek authorization of agreements, the agency usually grants the authorization, and more often than not, it does so on the basis of mixed economic and public interest grounds. Here is the problem: In the usual case, it is not clear from the agency's order if the agreement is anticompetitive and to what extent. It is not clear how and how much the agreement helps the public interest and whether the agreement is necessary to protect the public interest. Unbundling the issues would be an immense aid to clarity and predictability.
4. *Merger control.* Probably fewer than 3 percent of reported mergers are anticompetitive. Because review of mergers that meet the threshold is mandatory in most of the countries, merger review tends to take a disproportionate part of the agencies' time, as noted. Moreover, if the merger is large and is likely to create redundancy of workers, or is a value-chain merger and is likely to squeeze small suppliers, the agencies are likely to clear the merger with public interest conditions; no layoffs for two or more years has become boilerplate. The no-layoff condition can be expensive, pitting consumers' interests in lower prices against the interest of the redundant workers in holding on to their jobs a little longer. The trade-off might be worth it, particularly in economies with huge unemployment. But this is not necessarily so. Authorities should consider more market-friendly alternatives. Redundant employees might rather be creative than redundant. Instead of paying salaries for years to workers whose jobs have evaporated, merged firms might offer an option: a lump sum package for enterprising redundant workers to start their own small business.

Regarding megamerger control, the sub-Saharan national authorities are handicapped. Huge anticompetitive mergers are not uncommon. The world may be better off without them, but they are cleared by the Western authorities, who settle for spin-offs of assets to protect only their own jurisdictions. Often, the biggest harms from these megamerger fall on developing countries, which are pressed to devise second-best remedies. The remedies often consist of weak conditions to spur competition and to protect workers and SMEs. A regional or Continental voice is necessary to protect the interests of sub-Saharan Africa.

5. *Institutional arrangements may raise problems.* There are trade-offs between expediency and due process. The integrated agency design in which the same Board authorizes investigations and prosecutions and also decides cases raises a conflict of interest. Authorities should take note of conflict situations and to take steps to minimize the conflicts, so that all people called before the institutions go away believing that they have had a fair shot.

There are other institutional challenges. In general, the authorities are living under conditions of scarcity. Their budgets are too low. Their staffs are too small. Their expert talent pools are too small. Their investigative tools are too weak. The authorized penalties are too low, and conditions conspire against the imposition of penalties and enforcement. Everything cannot be cured at once; consciousness of the problems and the will to address them is the first step.

6. *Many restraints cross borders.* Many actors are multinational, and predictably they have cross-border strategies. Strategies at a supranational level, such as divvying up national markets, often are not visible to the naked nation-regarding eye. Only by deep collaboration of the national authorities with their neighbors, transborder market research, such as done by CCRED and the African Competition Forum, and eventually regional enforcement that combines the tools of trade and of competition, can the authorities identify and conquer some of the severest market obstructions.

Through all of these challenges, a light shines. Some heads of the national competition systems follow their star to identify the most harmful market obstructions, to develop strategies to attack them, and to support the entrepreneurs who are trying to leap-frog over them. These dedicated leaders value inclusiveness and the need to develop sound substantive principles against harmful restraints. The agencies they lead are deepening their cooperative relations with one another, increasing coherence of their laws and policies, building community, and gaining a view from the top.

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