

SPECIAL ISSUE

Kenya Gazette Supplement No. 17 (National Assembly Bills No. 4)



REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

NATIONAL ASSEMBLY BILLS, 2026

NAIROBI, 19th February, 2026

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NATIONAL ASSEMBLY
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2 MAR 2008
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THE COMPETITION (AMENDMENT) BILL, 2026

A Bill for

AN ACT of Parliament to amend the Competition Act; and for connected purposes

ENACTED by the Parliament of Kenya, as follows—

1. This Act may be cited as the Competition (Amendment) Act, 2026.

Short title.

2. The Competition Act, in this Act referred to as the “principal Act”, is amended in section 2—

Amendment of section 2 of Cap. 504.

by deleting the definition of “person” and substituting therefor the following new definition—

- (a) “person” has the meaning assigned to it under Article 260 of the Constitution;
- (b) in the definition of “undertaking”, by inserting the words “or a natural person” immediately after the words “trade association”;
- (c) inserting the following new definitions in their proper alphabetical sequence—

“business consumer” includes a business or economic entity that purchases or offers to purchase goods or services otherwise than for the purpose of resale or conversion as an input in manufacturing or production of goods or articles for sale;

“counterparty” means the other party involved in a transaction or agreement;

“digital activity” means the provision of a service through the internet, or provision of digital content whether for consideration or otherwise and whether or not such activity is multisided and includes—

- (a) online intermediation services, including online marketplaces and application stores;
- (b) online search engines;
- (c) online social networking services;
- (d) video-sharing platform services;

- (e) independent interpersonal communication services;
- (f) operating systems;
- (g) cloud computing services; and
- (h) online advertising services;

“digital market” means a market where goods or services are primarily exchanged through digital platforms or online channels encompassing virtual marketplaces and the confluence of supply and demand for digital goods, services and rights to access;

“intermediate a transaction” means to facilitate the completion of a transaction between buyers and sellers in a digital market.

“multi-home” means users engaging with multiple competing digital platform services in parallel without significant switching costs and inconveniences;

“privatization” has the meaning assigned to it under section 2 of the Privatization Act;

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“product information standard” means a standard relating to information, safety and health developed by the relevant government agency for the purpose of consumer benefit;

“strategic market position” has the meaning assigned to it under section 4(4); and

“superior bargaining position” has the meaning assigned to it under section 4(6).

3. Section 4 of the principal Act is amended by inserting the following new subsections immediately after subsection (3)—

Amendment of
section 4 of Cap.
504.

(4) A person has a strategic market position in a market if the person influences market prices, quality, service, output or innovation to an appreciable extent independent of competitors, suppliers, users or consumers.

(5) In addition to other relevant matters, in assessing or determining whether an undertaking has a strategic market in a digital market, whether the digital activity is undertaken in one or multiple digital markets, the Authority shall, take into account—

- (a) the direct and indirect effects of the network and the entry barriers arising in connection with the network effects;
- (b) the economies of scale and scope enjoyed by the undertaking, including their access to data relevant for competition;
- (c) the costs of switching for users and the ability and propensity for users to multi-home;
- (d) the competitive pressure driven by innovation; and
- (e) the importance of the intermediary services provided by the undertaking for accessing supply and sales market, including the size of the undertaking and the number of business and individual users it has and the period over which that level of importance has been held.

(6) A person has a superior bargaining position in a market if the person creates an imbalance in the rights and obligations relating to its commercial relations with a counterparty and the counterparty cannot find a viable and satisfactory alternative in the market.

(7) In assessing or determining whether an undertaking has superior bargaining position in a market, it shall not be necessary to establish that the undertaking has a dominant market position or market power in the relevant market.

4. Section 9(1) of the principal Act is amended—

Amendment of section 9 of Cap. 504.

- (a) in paragraph (g), by inserting the word “evaluations” immediately after the word “inquiries”;
- (b) by deleting paragraph (n) and substituting therefor the following new paragraph —
 - (n) advice the Cabinet Secretary, other government agencies and stakeholders on any matter relating to competition and consumer welfare; and
- (c) by adding the following new paragraph immediately after paragraph (n)—

(o) in consultation with the Cabinet Secretary, foster strategic partnerships with national, regional and international bodies on matters related to competition and consumer welfare.

5. Section 18 of the principal Act is amended in subsection (4) by deleting the words “competition abuse of buyer power or consumer welfare” and substituting therefor the words “competition, consumer welfare, abuse of buyer power or abuse of superior bargaining position”.

Amendment of section 18 of Cap. 504.

6. Section 23 of the principal Act is amended—

Amendment of section 23 of Cap. 504.

(a) in subsection (1)(a), by inserting the words “intermediates a transaction” immediately after the word “distributes”;

(b) in subsection (2)—

(i) by deleting the words “though not dominant” appearing in paragraph (a);

(ii) by adding the following new paragraph immediately after paragraph (b)—

(c) in the case of a digital market, controls less than forty per cent of the market share but has market power including a significant market position.

7. The principal Act is amended by repealing section 24A.

Repeal of section 24A of Cap. 504.

8. Section 31 of the principal Act is amended in subsection (1) by inserting the following new paragraph immediately after paragraph (c) —

Amendment of section 31 of Cap. 504.

(d) prohibitions relating to abuse of superior bargaining position.

9. The principal Act is amended by inserting the following new Part immediately after section 40—

Insertion of a new Part in Cap. 504.

PART IIIA —UNFAIR MARKET CONDUCT

Abuse of buyer power.

40A. (1) A person shall not engage in any conduct that amounts to abuse of buyer power in a market in Kenya, or a substantial part of Kenya.

(2) Without prejudice to the generality of subsection (1), conduct amounting to abuse of buyer power includes—

- (a) delays in payment of suppliers without justifiable reason in breach of agreed terms of payment;
- (b) unilateral termination or threats of termination of a commercial relationship without notice or on an unreasonably short notice, and without an objectively justifiable reason;
- (c) refusal to receive or return any goods or part thereof without justifiable reason in breach of agreed contractual terms;
- (d) transfer of costs or risks to suppliers of goods or services by imposing a requirement for the suppliers to fund the cost of promotion of the goods or services;
- (e) transfer of commercial risks meant to be borne by the buyer to suppliers;
- (f) demands for preferential terms unfavourable to the suppliers or demanding limitations on supplies to other buyers;
- (g) reducing prices by a small but significant amount where there is difficulty in substitutability of alternative buyers or reducing prices below competitive levels; or
- (h) bidding up prices of inputs by a buyer undertaking with the aim of excluding competitors from the market.

(3) The Authority may require industries and sectors in which instances of abuse of buyer power are likely to occur, to develop a binding code of practice to regulate the terms and conduct between buyers and suppliers.

(4) The Authority shall publish the code of practice developed under subsection (3), which shall be developed after consultation with the relevant stakeholders and relevant government agencies.

(5) When investigating abuse of buyer power complaints, the Authority shall be guided by any existing agreement, whether written or not, between a buyer undertaking and supplier undertaking.

(6) In determining a complaint relating to abuse of buyer power, the Authority shall consider all relevant circumstances, including—

- (a) the nature and determination of contract terms between the concerned undertakings;
- (b) the payment requested for access to infrastructure;
- (c) the price paid to suppliers;
- (d) the conditions for termination and variation of the contract with reasonable notice; and
- (e) the mechanism for the resolution of disputes in respect of the contract.

(7) A person who contravenes the provisions of subsection (1) commits an offence and shall be liable, on conviction, to imprisonment for a term not exceeding five years or to a fine not exceeding ten million shillings, or to both.

Abuse of superior bargaining position.

40B. (1) A person shall not engage in any conduct that amounts to abuse of superior bargaining position in a market in Kenya, or a substantial part of Kenya.

(2) Without prejudice to the generality of subsection (1), conduct amounting to abuse of superior bargaining position includes imposing trading conditions that are more

unfavourable than would be expected in light of normal business practices including—

- (a) delays in the payment of suppliers without justifiable reason in breach of agreed terms of payment;
- (b) unilateral termination or threats of termination of a commercial relationship without notice or on an unreasonably short notice and without a justifiable reason;
- (c) failing to provide the counterparty with terms, conditions or other rules associated with the transaction or service prior to the transaction or provision of the service;
- (d) unilateral variation of contractual terms, conditions, or other rules associated with the transaction or service without prior notice to the counterparties;
- (e) transfer of costs to a counterparty;
- (f) transfer of commercial risks meant to be borne by a party to the counterparty;
- (g) demands for preferential terms unfavourable to the counterparty;
- (h) imposing purchase prices below competitive levels or service fees above competitive levels;
- (i) unreasonable collection or processing of data of the counterparty;
- (j) imposing unduly difficult conditions for the termination of service; and
- (k) obstruction of business activities or interference in the management of the business of a counterparty.

(3) Where the Authority determines that a sector or an undertaking is experiencing or is likely to experience incidences of abuse of superior bargaining position, the Authority may—

- (a) monitor the activities of the sector or undertaking;
- (b) impose reporting and prudential requirements and regulations to ensure compliance; and
- (c) in consultation with the relevant stakeholders, develop and publish a code of practice to regulate the terms and conduct between counterparties.

(4) In determining any complaint on the abuse of superior bargaining position, the Authority shall consider all relevant circumstances, including—

- (a) the degree of dependence by the affected undertaking or undertakings on transactions with the party under investigation;
- (b) the position of the undertaking in the market;
- (c) the possibility of the affected undertaking to change its business counterpart; and
- (d) whether the party under investigation is an unavoidable trading partner or a critical business partner in the relevant market.

(5) When investigating a complaint on the abuse of superior bargaining position, the Authority shall consider, among other factors, any existing agreement, whether written or not, between the counterparties.

(6) A person who contravenes the provisions of subsection (1) shall be liable, on conviction, to imprisonment of a term not

Investigation into complaints on the abuse of superior bargaining position.

exceeding five years or a fine not exceeding ten million shillings, or to both.

40C. (1) The Authority may, on its own initiative or upon receipt of information or a complaint from any person, government agency, Ministry, or consumer body, initiate investigations into the abuse of superior bargaining position.

(2) The provisions of sections 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40 of the Act shall apply *mutatis mutandis* to the investigation of complaints under this Part.

10. Section 41 of the principal Act is amended in subsection (2) by inserting the following new paragraph immediately after paragraph (h)—

Amendment of section 41 of Cap 504.

(i) privatization of Government agencies and state corporations that engage in trade as defined under section 5(5) of this Act.

11. Section 55 of the principal Act is amended—

Amendment of section 55 of Cap 504.

(a) in paragraph (a), by inserting the following new subparagraph immediately after subparagraph (vi) —

(vii) goods or services are in such other manner other than the manner specified;

(b) in paragraph (b), by inserting the following new subparagraph immediately after subparagraph (v) —

(vi) concerning any other relevant information in connection with the supply or promotion of goods or services to the consumer;

(c) by inserting the following new paragraph immediately after paragraph (b) —

(c) withholds material information on the quality and use of a good or service.

12. Section 70A of the principal Act is amended—

Amendment of section 70A of 504.

(a) in the marginal note, by deleting the word “complaints” and substituting therefor the words “consumer welfare matters”

(b) in subsection (1), by deleting the words “consumer complaint” appearing at the end of the sentence and

substituting therefore the words “consumer welfare matter”;

(c) in subsection (2), by deleting the word “complaints” and substituting therefor the words “consumer welfare matters”.

13. Section 89 of the principal Act is amended by inserting the words “and shall be liable on conviction to a fine of up to ten percent of the undertaking’s gross annual turnover of the preceding year” immediately after the word “offence”.

Amendment of
Section 89 of 504.

14. The principal Act is amended by inserting the following new section immediately after section 91—

Insertion of a new
section in Cap.
504.

Administrative
enforcement action.

91A. (1) Without prejudice to any other provision of this Act, the Authority may take such administrative enforcement action, against any person, for the breach of any provisions of this Act, the regulations, rules, guidelines, notices or directions made hereunder.

(2) The enforcement action under subsection (1) may include—

- (a) issuing a written warning to the undertaking for the cessation of the non-compliance and require the specific action to remedy or reverse the infringement or the effects thereof;
- (b) issuing a direction to the undertaking to take remedial action or to make specific arrangements to remedy the noncompliance within such timeframe as may be specified;
- (c) imposing an administrative penalty of up to ten percent of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question;
- (d) suspending, revoking or varying any right, benefit or privilege granted under this Act;

(e) taking any other administrative enforcement action determined by the Authority under this Act.

(3) The administrative penalty provided under subsection (1) (c) may be recovered summarily by the Authority as civil debt.

(4) The Authority shall ensure that there is fair administrative action, including a fair hearing, before imposing the administrative penalty.

MEMORANDUM OF OBJECTS AND REASONS

The principal object of this bill is to amend the Competition Act (*Cap. 504*) to broaden the mandate of the Competition Authority in addressing anti-competitive conduct in digital markets and unfair market conduct arising from the abuse of superior bargaining position.

Clause 1 of the Bill provides the short title of the Act.

Clause 2 of the Bill proposes the amendment of section 2 of the Competition Act to include new definitions of terms used in technical sense but not defined.

Clause 3 of the Bill proposes the amendment of section 4 of the Act to include parameters for assessing dominant position in the case of digital activities. Additionally, it includes a proposed interpretation of the expression strategic market position and superior bargaining position in a market.

Clause 4 of the Bill seeks to amend section 9 of the Act to provide additional functions of the Authority including fostering strategic partnerships with national, regional and international bodies.

Clause 5 of the Bill seeks to amend section 18 of the Act to empower the Authority to conduct inquiries into any matter affecting abuse of superior bargaining position.

Clause 6 of the Bill proposes the amendment of section 23 of the Act to provide for the regulation of intermediaries that are considered to be in a dominant position.

Clause 7 of the Bill proposes the repeal section 24A on abuse of buyer power due to improper logical placement in the Act. The abuse of buyer power is not a restrictive trade practice and as such the current position under Part III on Restrictive Trade Practices is considered an anomaly. Accordingly, the provision is reintroduced under **clause 9 of the Bill** which seeks to introduce a new Part in the Act on unfair market conduct; and particularly, the introduction of sections on the abuse of buyer power and abuse of superior bargaining position. The aforementioned conduct deals with where a party with greater influence over the outcome of negotiations uses that advantage to bring about excessive imbalances in the rights and obligations in the business engagement to the detriment of the other party.

Clause 8 of the Bill seeks to amend section 31 of the Act to empower the Authority to investigate any conduct constituting an abuse of superior bargaining position

Clause 10 of the Bill seeks to amend section 41 of the Act to broaden the definition of a merger to include privatization of Government agencies and state corporations that engage in trade.

Clause 11 of the Bill proposes to amend section 55 of the Act to include offences on providing false or misleading representations on goods or services by:

- (a) falsely representing that good or services are in such other manner other than the manner specified;
- (b) making false or misleading representation concerning any other relevant information in connection with the supply or promotion of goods or services to the consumer; or
- (c) withholding material information on the quality and use of a product.

Clause 12 of the Bill proposes to amend section 70A of the Act to replace the word complaints with consumer welfare issues in line with International Best Practices in the regulation of competition in Kenya.

Clause 13 of the Bill seeks to amend section 89 of the Act to enhance clarity by providing for the penalty for failure to comply with a lawful order of the Authority.

Clause 14 of the Bill seeks to insert a new provision in the Act empowering the Authority to enforce administrative sanctions against any person who violates the provisions of the Act.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

The Bill does not delegate legislative powers and it does not limit fundamental rights and freedoms.

Statement that the Bill concerns county governments

The Bill does not affect the functions of the county governments pursuant to the Fourth Schedule to the Constitution.

Statement that the Bill is not a money Bill within the meaning of Article 114 of the Constitution

The enactment of this Bill shall not occasion additional expenditure of public funds.

Dated the 30th January, 2026.

KIMANI ICHUNG'WAH,
Leader of Majority Party

Section 2 of the Competition Act which it is proposed to amend-**2. Interpretation**

In this Act, unless the context otherwise requires—

“agreement” when used in relation to a restricted practice, includes a contract, arrangement or understanding, whether legally enforceable or not;

“asset” includes any real or personal property, whether tangible or intangible, intellectual property, goodwill, chose in action, right, licence, cause of action or claim and any other asset having a commercial value;

“Authority” means the Competition Authority established by section 7;

“buyer power” means the influence exerted by an undertaking or group of

undertakings in the position of purchaser of a product 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.

“Cabinet Secretary” means the Cabinet Secretary for the time being responsible for finance;

“competition” and “competitor” have the respective meanings assigned in section 4;

“concerted practice” means co-operative or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement;

“consumer” includes any person who purchases or offers to purchase goods or services otherwise than for the purpose of resale, but does not include a person who purchases any goods or services for the purpose of using them in the production or manufacture of any goods or articles for sale;

“consumer body” includes residents’ associations and registered consumer groups by whatever name called;

“County government” means the county government established by Article 76(1) of the Constitution;

“customer” includes any person who purchases or offers to purchase goods or services;

“Director-General” means the Director-General appointed under section 12;

“dominant position in a market” has the meaning assigned in section 4 and “dominance” shall be construed accordingly;

“enterprise” means an undertaking;

“goods” includes—

(a) ships, aircraft and vehicles;

(b) animals, including fish;

(c) minerals, trees and crops, whether on, under, or attached to land or not; and

(d) gas, water and electricity;

“intermediate goods” means goods used as inputs in manufacturing;

“licence” means a licence, permit or authority that allows the licensee to supply or acquire goods or services or to carry on any other activity;

“local authority” deleted by Act No. 49 of 2016, s. 2;

“manufacture” includes any artificial process which transforms goods in order to add value to them for the purpose of resale and any operation of packing or repacking not linked to a form of transportation within a single enterprise;

“market” has the meaning provided for in section 4;

“market power” means the power of a firm to control prices, to exclude competition or to behave to an appreciable extent, independently of its competitors, customers or suppliers;

“member”, in connection with the Authority, means the Chairperson and any other member of the Authority;

“merger” means an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover;

“person” includes a body corporate;

“predatory practice” means the practice or strategy of seeking to drive competitors out of business or to deter market entry;

“recognized consumer body” means a consumer body recognized by the Authority for the purposes of this Act;

“sale” includes an agreement to sell or offer for sale, and an “offer for sale” shall be deemed to include the exposing of goods for sale, the furnishing of a quotation, whether verbally or in writing, and any other act or notification whatsoever by which willingness to enter into any transaction for sale is expressed;

“service” includes any rights (including interests in, and rights in relation to, real or personal property), benefits, privileges or facilities and, without limiting the generality of the foregoing, includes the rights, benefits, privileges or facilities provided, granted or conferred under any contract for or in relation to—

- (a) the performance of work, including work of a professional nature, whether with or without the supply of goods;
- (b) the provision of, or the use or enjoyment of facilities for, amusement, entertainment, transport, broadcasting, tourism, recreation, education or instruction;
- (c) insurance;
- (d) banking;
- (e) the lending of money;
- (f) consultancy;
- (g) private professional practice, and any right, benefit or privilege for which remuneration is payable in the form of a royalty, tribute, levy or similar charge, but does not include the performance of work or the supply of goods under a contract of employment;

“state corporation” has the meaning assigned to it in the State Corporations Act (Cap. 446);

“supply”—

- (a) in relation to goods, includes supply or re-supply by way of sale, exchange, lease, hire or hire purchase; and
- (b) in relation to services, includes provide, grant or confer, and “supplier” shall be construed accordingly;

“substantial part of Kenya” means a part of Kenya which constitutes a district, a town council, a municipal council or a city council;

“trade” includes commerce;

“trade association” means a body or person (whether incorporated or not) which is formed for the purposes of furthering the interests of its members or persons represented by its members;

“Tribunal” means the Competition Tribunal established by section 71;

“undertaking” means any business intended to be carried on, or carried on for gain or reward by a person, a partnership or a trust in the production, supply or distribution of goods or provision of any service, and includes a trade association; and

“unwarranted concentration of economic power” means the existence of cross directorship between two distinct undertakings or companies producing substantially similar goods or services and whose combined market share is more than forty per cent.

Section 4 of the Competition Act which it is proposed to amend-

4. Interpretation of expressions

(1) The following expressions referred to in the Act shall be interpreted in accordance with this section—

(a) “competition” means competition in a market in Kenya and refers to the process whereby two or more persons—

(i) supply or attempt to supply to; or

(ii) acquire or attempt to acquire from, the people in that market the same or substitutable goods or services;

(b) a person is a “competitor” of another person if they are in competition with each other or would, but for an agreement to which the two persons are parties, be likely to be in competition with each other;

(c) “market” means a market in Kenya or a substantial part of Kenya and refers to the range of reasonable possibilities for substitution in supply or demand between particular kinds of goods or services and between suppliers or acquirers, or potential suppliers or acquirers, of those goods or services.

(2) In assessing effects on competition or determining whether a person has a dominant position in a market, the following matters, in addition to other relevant matters, shall be taken into account—

(a) the importation of goods or the supply of services by persons not resident or carrying on business in Kenya; and

- (b) the economic circumstances of the relevant market including the market shares of persons supplying or acquiring goods or services in the market, the ability of those persons to expand their market shares and the potential for new entry into the market.
- (3) A person has a dominant position in a market if the person—
- (a) produces, supplies, distributes or otherwise controls not less than one-half of the total goods of any description that are produced, supplied or distributed in Kenya or any substantial part thereof; or
 - (b) provides or otherwise controls not less than one-half of the services that are rendered in Kenya or any substantial part thereof.

Section 9 of the Competition Act which it is proposed to amend-

9. Functions of the Authority

- (1) The functions of the Authority shall be to—
- (a) promote and enforce compliance with the Act;
 - (b) receive and investigate complaints from legal or natural persons and consumer bodies;
 - (c) promote public knowledge, awareness and understanding of the obligations, rights and remedies under the Act and the duties, functions and activities of the Authority;
 - (d) promote the creation of consumer bodies and the establishment of good and proper standards and rules to be followed by such bodies in protecting competition and consumer welfare;
 - (e) recognize consumer bodies duly registered under the appropriate national laws as the proper bodies, in their areas of operation, to represent consumers before the Authority;
 - (f) make available to consumers information and guidelines relating to the obligations of persons under the Act and the rights and remedies available to consumers under the Act;
 - (g) carry out inquiries, studies and research into matters relating to competition and the protection of the interests of consumers;
 - (h) study government policies, procedures and programmes, legislation and proposals for legislation so as to assess their effects on competition and consumer welfare and publicise the results of such studies;

- (i) investigate impediments to competition, including entry into and exit from markets, in the economy as a whole or in particular sectors and publicise the results of such investigations;
- (j) investigate policies, procedures and programmes of regulatory authorities so as to assess their effects on competition and consumer welfare and publicise the results of such studies;
- (k) participate in deliberations and proceedings of government, government commissions, regulatory authorities and other bodies in relation to competition and consumer welfare;
- (l) make representations to government, government commissions, regulatory authorities and other bodies on matters relating to competition and consumer welfare;
- (m) liaise with regulatory bodies and other public bodies in all matters relating to competition and consumer welfare;
- (n) advise the government on matters relating to competition and consumer welfare.

Section 18 of the Competition Act which it is proposed to amend-

18. Power to hold inquiries

(1) The Authority may conduct an inquiry or a sectoral study where—

- (a) it considers it necessary or desirable for the purpose of carrying out its functions;
- (b) upon a direction by the Cabinet Secretary in writing to the Authority, requiring it to conduct an inquiry or a sectoral study into a matter specified in the direction.

(2) A direction by the Cabinet Secretary under subsection (1)(b) shall specify a period within which the Authority shall submit its report to the Cabinet Secretary.

(3) In appropriate cases, after conclusion of an inquiry or a sectoral study, the Authority shall in its report to the Cabinet Secretary identify sectors where factors relating to unwarranted concentrations of economic power subsist and give advice regarding measures which may ameliorate such situations.

(4) At the request of a regulatory body, or at its own instance, the Authority may conduct an inquiry into any matter affecting competition

abuse of buyer power or consumer welfare and provide a report within a reasonable period.

(5) The Authority shall give notice of an intended inquiry or sectoral study by—

(a) publishing a notice in the Gazette and in at least one daily newspaper of national circulation specifying—

(i) the subject matter of the intended inquiry;

(ii) inviting submissions on the subject from members of the public within a specified period; and

(iii) in the case of an inquiry conducted at the direction of the Cabinet Secretary, the terms of reference issued by the Cabinet Secretary;

(b) sending written notice of the inquiry, including the information in paragraph (a) to—

(i) undertakings whose interests the Authority considers likely to be affected by the outcome of the inquiry;

(ii) industry and consumer organizations which the Authority considers may have an interest in the matter;

(iii) the Cabinet Secretary.

(6) Every person, undertaking, trade association or body shall be under an obligation to provide information requested by the Authority in fulfilment of its statutory mandate for conducting an inquiry or sectoral study regulated by this section.

Section 23 of the Competition Act which it is proposed to amend-

23. Criteria for determining dominant position

(1) For purposes of this section, “dominant undertaking” means an undertaking which—

(a) produces, supplies, distributes or otherwise controls not less than one-half of the total goods of any description which are produced, supplied or distributed in Kenya or any substantial part thereof; or

(b) provides or otherwise controls not less than one-half of the services which are rendered in Kenya or any substantial part thereof.

(2) Notwithstanding subsection (1), an undertaking shall also be deemed to be dominant for the purposes of this Act where the undertaking—

- (a) though not dominant, controls at least forty per cent but not more than fifty per cent of the market share unless it can show that it does not have market power; or
- (b) controls less than forty per cent of the market share but has market power.

Section 24A of the Competition Act which it is proposed to amend-

24A. Abuse of buyer power

(1) Any conduct that amounts to abuse of buyer power in a market in Kenya, or a substantial part of Kenya, is prohibited.

(2) Where the Authority establishes that a sector or an undertaking is experiencing or is likely to experience incidences of abuse of buyer power, it may monitor the activities of the sector or undertaking and ensure compliance by imposing reporting and prudential requirements.

(3) The Authority may require industries and sectors, in which instances of abuse of buyer power are likely to occur, to develop a binding code of practice.

(4) In determining any complaint in relation to abuse of buyer power, the Authority shall take into account all relevant circumstances, including—

- (a) the nature and determination of contract terms between the concerned undertakings;
- (b) the payment requested for access to infrastructure; and
- (c) the price paid to suppliers.

(5) Conduct amounting to abuse of buyer power includes—

- (a) delays in payment of suppliers without justifiable reason in breach of agreed terms of payment;
- (b) unilateral termination or threats of termination of a commercial relationship without notice or on an unreasonably short notice period, and without an objectively justifiable reason;
- (c) refusal to receive or return any goods or part thereof without justifiable reason in breach of the agreed contractual terms;
- (d) transfer of costs or risks to suppliers of goods or services by imposing a requirement for the suppliers to fund the cost of a promotion of the goods or services;
- (e) transfer of commercial risks meant to be borne by the buyer to the suppliers;

- (f) demands for preferential terms unfavourable to the suppliers or demanding limitations on supplies to other buyers;
 - (g) reducing prices by a small but significant amount where there is difficulty in substitutability of alternative buyers or reducing prices below competitive levels; or
 - (h) bidding up prices of inputs by a buyer undertaking with the aim of excluding competitors from the market.
- (6) When investigating abuse of buyer power complaints, the Authority shall be guided by any existing agreement, whether written or not, between a buyer undertaking and supplier undertaking.
- (7) An agreement between a buyer undertaking and a supplier undertaking shall include—
- (a) the terms of payment;
 - (b) the payment date;
 - (c) the interest rate payable on late payment;
 - (d) the conditions for termination and variation of the contract with reasonable notice; and
 - (e) the mechanism for the resolution of disputes.
- (8) The Authority shall publish the code of practice which shall be developed in consultation with the relevant stakeholders, relevant Government agencies and the Attorney-General.
- (9) Any person who contravenes the provisions of subsection (1) commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding ten million shillings or to both.

Section 31 of the Competition Act which it is proposed to amend-

31. Investigation by Authority

(1) The Authority may, on its own initiative or upon receipt of information or complaint from any person or Government agency or Ministry, carry out an investigation into any conduct or proposed conduct which is alleged to constitute or may constitute an infringement of—

- (a) prohibitions relating to restrictive trade practices;
- (b) prohibitions relating to abuse of dominance; or
- (c) prohibitions relating to abuse of buyer power.

(2) If the Authority, having received from any person a complaint or a request to investigate an alleged infringement referred to in subsection (1), decides not to conduct an investigation, the Authority shall inform that person in writing of the reasons for its decision.

(3) Deleted by L.N. 23/2011, Sch.

(4) If the Authority decides to conduct an investigation, the Authority may, by notice in writing served on any person in the prescribed manner, require that person—

- (a) to furnish to the Authority by writing signed by that person or, in the case of a body corporate, by a director or member or other competent officer, employee or agent of the body corporate, within the time and in the manner specified in the notice, any information pertaining to any matter specified in the notice which the Authority considers relevant to the investigation;
- (b) to produce to the Authority, or to a person specified in the notice to act on the Authority behalf, any document or article, specified in the notice which relates to any matter which the Authority considers relevant to the investigation;
- (c) to appear before the Authority at a time and place specified in the notice to give evidence or to produce any document or article specified in the notice; and
- (d) if he possesses any records considered relevant to the investigation, to give copies of those records to the Authority or alternatively to submit the record to the authority for copying within the time and in the manner specified in the notice.

Section 41 of the Competition Act which it is proposed to amend-

41. Merger defined

(1) For the purposes of this Part, a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.

(2) A merger contemplated in subsection (1) may be achieved in any manner, including—

- (a) the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question;
- (b) the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently whether or not the business in question is carried on by a company;

- (c) the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya;
 - (d) acquiring by whatever means the controlling interest in a foreign undertaking that has got a controlling interest in a subsidiary in Kenya;
 - (e) in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently;
 - (f) vertical integration;
 - (g) exchange of shares between or among undertakings which result in substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings; or
 - (h) amalgamation, takeover or any other combination with the other undertaking.
- (3) A person controls an undertaking if that person—
- (a) beneficially owns more than one half of the issued share capital or business or assets of the undertaking;
 - (b) is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;
 - (c) is able to appoint, or to veto the appointment of, a majority of the directors of the undertaking;
 - (d) is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act (Cap. 486);
 - (e) in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
 - (f) in the case of the undertaking being a nominee undertaking, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the nominee undertaking; or
 - (g) 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).

Section 55 of the Competition Act which it is proposed to amend-

55. False or misleading representations

A person commits an offence when, in trade in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, he—

- (a) falsely represents that—
 - (i) goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;
 - (ii) services are of a particular standard, quality, value or grade;
 - (iii) goods are new;
 - (iv) a particular person has agreed to acquire goods or services;
 - (iv) goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;
 - (vi) the product has a sponsorship, approval or affiliation it does not have;
- (b) makes a false or misleading representation—
 - (i) with respect to the price of goods or services;
 - (ii) concerning the availability of facilities for the repair of goods or of spare parts for goods;
 - (iii) concerning the place of origin of goods;
 - (iv) concerning the need for any goods or services; or
 - (v) concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

Section 70A of the Competition Act which it is proposed to amend-

70A. Authority to initiate investigation into complaint

(1) Pursuant to the provisions this Part, the Authority may on its own initiative or upon receipt of information or a complaint from any person, government agency, Ministry, or consumer body, initiate investigations into a consumer complaint.

(2) The provisions of sections 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40 of the Act shall apply mutatis mutandis to the investigation of consumer complaints under this section.

Section 89A of the Competition Act which it is proposed to amend-

89. Failure to comply with order

Any person who contravenes or fails to comply with a lawful order of the Authority given in terms of this Act commits an offence.

Section 91 of the Competition Act which it is proposed to amend-

91. General penalty

A person convicted of an offence under this Act, for which no penalty has been specified under this Act shall be liable to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or both.