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COMPETITION ACT

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COMPETITION ACT

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PROVISIONS AS TO THE AUTHORITY

NO. 12 OF 2010
COMPETITION ACT

[Date of assent: 30th December, 2010.]

[Date of commencement: 1st August, 2011.]

An Act of Parliament to promote and safeguard competition in the national economy; to protect consumers from unfair and misleading market conduct; to provide for the establishment, powers and functions of the Competition Authority and the Competition Tribunal, and for connected purposes

[Act No. 12 of 2010, L.N. 73/2011, L.N. 23/2011, Act No. 16 of 2014,
Act No. 25 of 2015, Act No. 49 of 2016, Act No. 11 of 2017.]

PART I – PRELIMINARY

1. Short title

This Act may be cited as the Competition Act, 2010.

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;

“**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 Chairman 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;

“Minister” means the Minister for the time being responsible for finance;

“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; and

“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;

“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.

[Act No. 16 of 2014, s. 31, Act No. 49 of 2016, s. 2.]

3. Objects of the Act

The object of this Act is to enhance the welfare of the people of Kenya by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Kenya, in order to?

- (a) increase efficiency in the production, distribution and supply of goods and services;
- (b) promote innovation;
- (c) maximize the efficient allocation of resources;
- (d) protect consumers;
- (e) create an environment conducive for investment, both foreign and local;

- (f) capture national obligations in competition matters with respect to regional integration initiatives;
- (g) bring national competition law, policy and practice in line with best international practices; and
- (h) promote the competitiveness of national undertakings in world markets.

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.

[Act No. 16 of 2014, s. 32.]

5. Application

(1) This Act shall apply to all persons including the Government, state corporations and local authorities in so far as they engage in trade.

(2) Where there is a conflict between the provisions of this Act and the provisions of any other written law with regard to matters concerning competition, consumer welfare and the powers or functions of the Authority under this Act, the provisions of this Act shall prevail.

(3) If a body charged with public regulation has jurisdiction in respect of any conduct regulated in terms of this Act within a particular sector, the Authority and that body shall—

- (a) identify and establish procedures for management of areas of concurrent jurisdiction;
- (b) promote co-operation;
- (c) provide for the exchange of information and protection of confidential information; and
- (d) ensure consistent application of the principles of this Act:

Provided that in all matters concerning competition and consumer welfare, if there is any conflict, disharmony or inconsistency, the determinations, directives, regulations, rules, orders and decisions of the Authority shall prevail.

(4) Notwithstanding the provisions of subsection (1), the Government shall not be liable to any fine or penalty under this Act or be liable to be prosecuted for an offence against this Act.

(5) For the purposes of this section, without affecting the meaning of “**trade**” in other respects—

- (a) the sale or acquisition of a business, part of a business or an asset of a business carried on by the Government, a state corporation or a county government constitutes engaging in trade; and
- (b) the following do not constitute engaging in trade—
 - (i) the imposition or collection of taxes;
 - (ii) the grant or revocation of licences, permits and authorities;
 - (iii) the collection of fees for licences, permits and authorities;
 - (iv) internal transactions within the Government, a state corporation or a county government.

[Act No. 49 of 2016, s. 3.]

6. Extra-territorial operation

This Act shall apply to conduct outside Kenya by—

- (a) a citizen of Kenya or a person ordinarily resident in Kenya;
- (b) a body corporate incorporated in Kenya or carrying on business within Kenya;
- (c) any person in relation to the supply or acquisition of goods or services by that person into or within Kenya; or
- (d) any person in relation to the acquisition of shares or other assets outside Kenya resulting in the change of control of a business, part of a business or an asset of a business, in Kenya.

PART II – ESTABLISHMENT, POWERS AND FUNCTIONS OF THE AUTHORITY

7. Establishment of the Authority

(1) There is hereby established an Authority to be known as the Competition Authority.

(2) The Authority shall be independent and shall perform its functions and exercise its powers independently and impartially without fear or favour.

(3) The Authority shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of—

- (a) suing and being sued;
- (b) purchasing or otherwise acquiring, holding, charging and disposing of movable and immovable property;
- (c) borrowing money; and
- (d) doing or performing all other things or acts necessary for the proper performance of its functions under this Act, which may lawfully be done or performed by a body corporate.

8. Conduct of business and affairs of the Authority

(1) The conduct and regulation of the business and affairs of the Authority shall be as provided in the Schedule.

(2) Except as provided in the Schedule, the Authority may regulate its own procedure.

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.

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

10. Members of the Authority

(1) The Authority shall consist of the following members—

- (a) a non-executive Chairman, appointed by the Minister;
- (b) the Permanent Secretary in the Ministry for the time being responsible for finance or his representative;
- (c) the Permanent Secretary in the Ministry for the time being responsible for trade or his representative;
- (d) the Attorney-General or his representative;
- (e) the Director-General appointed under section 12; and
- (f) five other members appointed by the Minister from among persons experienced in competition and consumer welfare matters, one of whom shall be experienced in consumer welfare matters.

(2) The persons proposed to be members of the Authority under subsection (1)(f) shall, before their appointment to the Authority, be vetted and approved by Parliament through the relevant Committee of Parliament.

11. Remuneration of members of the Authority

The members of the Authority shall be paid such remuneration, fees, allowances and disbursements for expenses as may be approved by the Minister.

12. Director-General

(1) There shall be a Director-General of the Authority who shall be appointed by the Authority with the approval of Parliament from persons having knowledge and experience in competition matters.

(2) The Director-General shall hold office on such terms and conditions of employment as the Authority may determine in the instrument of appointment or otherwise in writing from time to time:

Provided that the Director-General shall hold office for a renewable term of five years, subject to a maximum of two terms.

(3) The Director-General shall be an *ex officio* member of the Authority but shall have no right to vote at any meeting of the Authority.

(4) The Director-General shall be the chief executive officer of the Authority and shall, subject to the direction of the Authority, be responsible for the day to day management of the Authority.

13. Staff

(1) The Authority shall employ such staff as it considers appropriate to enable it to perform its functions and exercise its powers.

(2) The Authority may engage consultants and experts, as it considers appropriate, to assist it to perform its functions and exercise its powers.

(3) The Authority shall establish a competitive selection procedure for the appointment of all employees, consultants and experts.

(4) The terms and conditions on which the Authority employs staff and engages consultants and experts shall be as determined by the Authority but shall include the following—

- (a) an employee, consultant or expert shall, without delay, notify the Authority in writing of any conflict of interest as soon as it arises and failure to comply with this requirement, whether wilfully or inadvertently, will be a ground for immediate dismissal;
- (b) where the Authority becomes aware of a conflict of interest, whether as a result of a notification under paragraph (a) or by any other means, the Authority may direct the person not to participate in the consideration of any matter in relation to which the person has the conflict of interest and, in that case, the person shall comply with the direction.

(5) Before employing or engaging any person, the Authority shall obtain from the person a written declaration of any existing conflict of interest.

(6) Persons employed by the Authority as full-time employees shall not undertake any other paid employment.

(7) The Authority may enter into agreements with government departments and other government authorities and agencies to share the services of particular employees, as it may consider appropriate.

(8) The Authority shall include in its Annual Report a statement of its competitive selection procedure and its employment practices.

14. Common seal

(1) The common seal of the Authority shall be kept in the custody of the Director-General or of such other person as the Authority may direct, and shall not be used except upon the order of the Authority.

(2) The common seal of the Authority, when affixed to a document and duly authenticated, shall be judicially and officially noticed, and unless and until the contrary is proved, any necessary order or authorization by the Authority under this section shall be presumed to have been duly given.

(3) The affixing of the common seal of the Authority shall be authenticated by the signature of the Chairman of the Authority and the Director-General:

Provided that the Authority shall, in the absence of either the Chairman or the Director-General, in any particular matter, nominate one member of the Authority to authenticate the seal of the Authority on behalf of either the Chairman or the Director-General.

15. Delegation by the Authority

(1) The Authority may delegate to any of its members, either generally or otherwise as provided by the instrument of delegation, any of its powers other than—

- (a) duties to make decision under the Act;
- (b) power of delegation itself; and
- (c) the powers to revoke or vary delegation.

(2) A delegated power shall be exercised in accordance with the instrument of delegation.

(3) A delegation may, at any time, be revoked or varied by the Authority.

16. Protection from personal liability

(1) No matter or thing done by a member of the Authority or by any officer, member of staff or agent of the Authority shall, if the matter or thing is done *bona fide* for executing the functions, powers or duties of the Authority, render the member, officer, employee or agent or any person acting on his directions personally liable to any action, claim or demand whatsoever.

(2) No compensation shall be payable to any person for any loss, damage or harm directly or indirectly caused by anything done or intended to be done in good faith by the Authority or any person authorized by the Authority under this Act.

(3) Any expenses incurred by any person in any suit or prosecution brought against him in any court in respect of any act which is done or purported to be done by him under the direction of the Authority shall, if the court holds that such act was done in good faith, be paid out of the general funds of the Authority, unless such expenses are recovered by him in such suit or prosecution.

17. Liability of the Authority for damages

The provisions of section 16 shall not relieve the Authority of the liability to pay compensation or damages to any person for any injury to him, his property or any of his interests caused by the exercise of any power conferred by this Act or by any other written law or by the failure, whether wholly or partially, of any works.

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 Minister 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 Minister under subsection (1)(b) shall specify a period within which the Authority shall submit its report to the Minister.

(3) In appropriate cases, after conclusion of an inquiry or a sectoral study, the Authority shall in its report to the Minister 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 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 Minister, the terms of reference issued by the Minister;
- (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 Minister.

(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.

[Act No. 49 of 2016, s. 4.]

19. Establishment of divisions of the Authority

(1) The Authority may establish one or more divisions as it may deem appropriate for the proper performance of its functions under this Act.

(2) The Authority shall appoint an employee or employees of the Authority as Directors of the divisions.

(3) Responsibility for running the day to day activities of the Authority and the supervision and allocation of duties to its employees shall vest in the Director-General.

20. Confidentiality

(1) For the purpose of this section, “**material**” includes any information, document or evidence relating to any matter to which this Act applies.

(2) Any person who gives or discloses any material to the Authority, whether under compulsion of law or otherwise, may claim confidentiality in respect of the whole or any part of the material.

(3) The provision of this section shall not be deemed to be breached where material is disclosed to persons outside the Authority any time before a claim for confidentiality is made.

(4) In the case of oral evidence, the claim may be made orally at the time of giving the evidence and in all other cases it shall be in writing, signed by the person making the claim specifying the material and stating the reason for the claim.

(5) If the Authority is satisfied that material is of a confidential nature and—

- (a) its disclosure could adversely affect the competitive position of any person; or
- (b) is commercially sensitive for some other reason,

the Authority shall grant confidentiality for the material.

(6) The Authority shall give notice in writing to a person making a claim for confidentiality of the Authority’s decision to grant or not grant confidentiality and, if it has not granted confidentiality, the Authority shall treat the material as confidential for a period of fourteen days after giving such notification.

(7) If a claim for confidentiality—

- (a) is made in relation to material supplied to the Authority voluntarily; and
- (b) the Authority decides not to grant confidentiality in whole or in part for the material,

the person who supplied the material may, within the fourteen days period provided under subsection (6), withdraw the material from the Authority together with other material supplied with it.

(8) Notwithstanding that the Authority has granted a claim for confidentiality under subsection (5), the Authority may disclose the material—

- (a) at any time without notice to any other person if—
 - (i) the disclosure is made to another person who is also performing a function under this Act;
 - (ii) the disclosure is made with the consent of the person who gave the material;
 - (iii) the disclosure is authorised or required under any other law; or
 - (iv) the disclosure is authorised or required by a court or a tribunal constituted by law; or
- (b) if the Authority is of the opinion that?
 - (i) disclosure of the material would not cause detriment to the person supplying it or the person to whom it relates; or

- (ii) although the disclosure of the material would cause detriment to the person supplying it or the person to whom it relates, the public benefit in disclosing it outweighs the detriment,

and the Authority has given fourteen days prior written notice to that person of its intention to disclose the material pursuant to this provision.

(9) Any person who is aggrieved by a decision of the Authority under this section not to grant a claim for confidentiality for material or to disclose confidential material may, at any time while the Authority is obliged by this section to keep the material confidential, appeal to the Tribunal against the decision and the Authority shall continue to treat the material as confidential pending determination of the appeal.

(10) Any person who discloses confidential information otherwise than as authorised by this section, commits an offence.

PART III – RESTRICTIVE TRADE PRACTICES

A – Restrictive Agreements, Practices and Decisions

21. Restrictive trade practices

(1) Agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya, are prohibited, unless they are exempt in accordance with the provisions of Section D of this Part.

(2) Agreements, decisions and concerted practices contemplated in subsection (1), include agreements concluded between—

- (a) parties in a horizontal relationship, being undertakings trading in competition; or
- (b) parties in a vertical relationship, being an undertaking and its suppliers or customers or both.

(3) Without prejudice to the generality of the provisions of subsection (1), that subsection applies in particular to any agreement, decision or concerted practice which—

- (a) directly or indirectly fixes purchase or selling prices or any other trading conditions;
- (b) divides markets by allocating customers, suppliers, areas or specific types of goods or services;
- (c) involves collusive tendering;
- (d) involves a practice of minimum resale price maintenance;
- (e) limits or controls production, market outlets or access, technical development or investment;
- (f) applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (g) makes the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject of the contracts;

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- (h) amounts to the use of an intellectual property right in a manner that goes beyond the limits of fair, reasonable and non-discriminatory use;
- (i) otherwise prevents, distorts or restricts competition.

(4) Subsection (3)(d) shall not prevent a supplier or producer of goods or services from recommending a resale price to a reseller of the goods or a provider of the service, provided—

- (a) it is expressly stipulated by the supplier or producer to the reseller or provider that the recommended price is not binding; and
- (b) if any product, or any document or thing relating to any product or service, bears a price affixed or applied by the supplier or producer, and the words “recommended price” appear next to the price so affixed or applied.

(5) An agreement or a concerted practice of the nature prohibited by subsection (1) shall be deemed to exist between two or more undertakings if—

- (a) any one of the undertakings owns a significant interest in the other or has at least one director or one substantial shareholder in common; and
- (b) any combination of the undertakings engages in any of the practices mentioned in subsection (3).

(6) The presumption under subsection (5) may be rebutted if an undertaking or a director or shareholder concerned establishes that a reasonable basis exists to conclude that any practice in which any of the undertakings engaged was a normal commercial response to conditions prevailing in the market.

(7) For the purposes of subsection (5), “**director**” includes—

- (a) a director of a company as defined in the Companies Act (Cap. 486);
- (b) in relation to an undertaking conducted by a society, a person responsible jointly with others for its management;
- (c) a trustee of a trust; or
- (d) in relation to an undertaking conducted by an individual or a partnership, the owner of the undertaking or a partner of the partnership;
- (e) in relation to any other undertaking, a person responsible either individually or jointly with others for its management.

(8) Subsection (1) does not apply in respect of an agreement entered into between, or a practice engaged in by—

- (a) a company and its wholly owned subsidiary or a wholly owned subsidiary of that subsidiary company; or
- (b) undertakings other than companies, each of which is owned or controlled by the same person or persons.

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

[Act No. 16 of 2014, s. 33.]

*B – Restrictive Trade Practices Applicable to Trade Associations***22. Application to practices of trade associations**

(1) The following practices conducted by or on behalf of a trade association are declared to be restrictive trade practices—

- (a) the unjustifiable exclusion from a trade association of any person carrying on or intending to carry on in good faith the trade in relation to which the association is formed, and in determining whether an exclusion from such an association is unjustifiable, the Authority may examine, in addition to any other matters which it considers relevant, the application of any rules of that association and the reasonableness of those rules;
- (b) the making, directly or indirectly, of a recommendation by a trade association to its members or to any class of its members which relates to—
 - (i) the prices charged or to be charged by such members or any such class of members or to the margins included in the prices or to the pricing formula used in the calculation of those prices; or
 - (ii) the terms of sale (including discount, credit, delivery, and product and service guarantee terms) of such members or any such class of members and which directly affects prices, profit margins included in the prices, or the pricing formula used in the calculation of prices.

(2) A recommendation by a trade association as described in subsection (1)(b) shall be deemed to be a restrictive trade practice notwithstanding that any statement in the recommendation may or may not be complied with as the members or class of members to whom the recommendation is made think fit.

(3) A recommendation made by any person for the purpose of or having the effect, directly or indirectly, of enabling any trade association to defeat or evade the provisions of this Act shall be deemed to have been made by that trade association.

(4) Where a specific recommendation whether express or implied is made by or on behalf of a trade association to its members or to any class of its members, concerning the action to be taken or not to be taken by them in relation to any matter affecting the trading conditions of those members, the provisions of this Act shall apply as if membership of the association constituted an agreement under which the members agreed with the association and with each other to comply with the recommendations, notwithstanding anything to the contrary in the constitution or rules of the association.

(5) A member of a trade association who expressly notifies the association in writing that he disassociates himself entirely from an agreement made by that association or, as the case may be, that he will not take action or will refrain from action of a kind referred to in an express or implied recommendation made by that association shall not, in the absence of proof to the contrary, be deemed to be a party to that agreement or, as the case may be, a member of the association who has agreed to comply with the recommendation.

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

C – Abuse of Dominant Position

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.

[Act No. 16 of 2014, s. 34.]

24. Abuse of dominant position and buyer power

(1) Any conduct which amounts to the abuse of a dominant position in a market in Kenya, or a substantial part of Kenya, is prohibited.

(2) Without prejudice to the generality of subsection (1), abuse of a dominant position includes—

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting or restricting production, market outlets or market access, investment, distribution, technical development or technological progress through predatory or other practices;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties;
- (d) making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject-matter of the contracts; and
- (e) abuse of an intellectual property right.

(2A) Any conduct that amounts to abuse of buyer power in a market in Kenya, or a substantial part of Kenya, is prohibited.

(2B) In determining buyer power, the Authority shall take into consideration—

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

(2C) The Authority, in consultation with the Cabinet Secretary and other relevant government agencies and stakeholders, shall develop rules for the better carrying out of the provisions of this section.

(2D) For the purposes of this section, "buyer power" means the influence exerted by an undertaking or group of undertakings in the position of a purchaser of a product or service to obtain from a supplier more favourable terms, or to 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.

(3) Any person who contravenes the provisions of this section commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding ten million shillings or to both.

[Act No. 49 of 2016, s. 5.]

D – Exemption of Certain Restrictive Practices

25. Grant of exemption for certain restrictive practices

(1) Any undertaking or association of undertakings may apply to the Authority to be exempted from the provisions of Section A or B of this Part in respect of—

- (a) any agreement or category of agreements;
- (b) any decision or category of decisions;
- (c) any concerted practice or category of concerted practices.

(2) An application for an exemption in terms of subsection (1) shall be—

- (a) made in the prescribed form and manner;
- (b) accompanied by such information as may be prescribed or as the Authority may reasonably require.

(3) The Authority shall give notice by publishing a notice in the *Gazette* of an application received in terms of subsection (1)—

- (a) indicating the nature of the exemption sought by the applicant; and
- (b) calling upon interested persons to submit to the Authority, within thirty days of the publication of the notice, any written representations which they may wish to make in regard to the application.

26. Determination of application for exemption

(1) After consideration of an application for exemption and any representations submitted by interested persons, the Authority shall make a determination in respect of the application, and may—

- (a) grant the exemption;
- (b) refuse to grant the exemption, and notify the applicant accordingly with a statement of the reasons for the refusal; or
- (c) issue a certificate of clearance stating that in its opinion, on the basis of the facts in its possession, the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices does not constitute an infringement of the prohibitions contained in Section A or B of this Part.

(2) The Authority may grant an exemption if it is satisfied that there are exceptional and compelling reasons of public policy as to why the agreement, decision, concerted practice or category of the same, ought to be excluded from the prohibitions contained in Section A or B of this Part.

(3) In making a decision under subsection (2), the Authority shall take into account the extent to which the agreement, decision or concerted practice, or the category thereof contributes to, or results in, or is likely to contribute to or result in—

- (a) maintaining or promoting exports;
- (b) improving, or preventing decline in the production or distribution of goods or the provision of services;
- (c) promoting technical or economic progress or stability in any industry;
- (d) obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or would be likely to result, from the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices.

(4) The Authority may grant an exemption subject to such conditions and for such period as the Authority may think fit.

27. Revocation or amendment of exemption

(1) If the Authority, at any time after it has granted an exemption or issued a certificate of clearance under section 26, is satisfied that—

- (a) the exemption was granted or the certificate of clearance was issued on materially incorrect or misleading information;
- (b) there has been a material change of circumstances since the exemption was granted or the certificate was issued;
- (c) a condition upon which an exemption was granted has not been complied with,

the Authority may revoke or amend the exemption or revoke the certificate of clearance, as the case may be.

(2) If the Authority proposes to revoke or amend an exemption or to revoke a certificate of clearance under subsection (1), it shall—

- (a) give notice in writing of the proposed action to the person to whom the exemption was granted or the certificate of clearance was issued, and to any other person who in the opinion of the Authority is likely to have an interest in the matter; and
- (b) call upon such persons to submit to the Authority, within thirty days of the receipt of the notice, any representations which they may wish to make in regard to the proposed action.

(3) In the event of non-compliance with a condition of an exemption, and irrespective of whether the Authority revokes or amends the exemption on account of the non-compliance, the Authority may make application to the Tribunal for the imposition of a pecuniary penalty in respect of that non-compliance, either with or without any other order.

(4) Any person who does not comply with a condition of exemption commits an offence.

28. Exemption in respect of intellectual property rights

(1) The Authority may, upon application, and on such conditions as the Authority may determine, grant an exemption in relation to any agreement or practice relating to the exercise of any right or interest acquired or protected in terms of any law relating to copyright, patents, designs, trade marks, plant varieties or any other intellectual property rights.

(2) Sections 25, 26 and 27 shall apply, *mutatis mutandis*, to an exemption under this section.

29. Exemption in respect of professional rules

(1) A professional association whose rules contain a restriction that has the effect of preventing, distorting or lessening competition in a market shall apply in writing or in the prescribed manner to the Authority for an exemption in terms of subsection (2).

(2) The Authority may exempt all or part of the rules of a professional association from the provisions of Section A of this Part for a specified period if, having regard to internationally applied norms, any restriction contained in those rules that has the effect of preventing or substantially lessening competition in a market is reasonably required to maintain—

- (a) professional standards; or
- (b) the ordinary function of the profession.

(3) Upon receiving an application in terms of subsection (1), the Authority shall—

- (a) publish a notice of the application in the *Gazette*;
- (b) allow interested parties thirty days from the date of that notice to make representations concerning the application; and
- (c) consult the Government agency or Ministry responsible for the administration of any law governing the profession concerning the application.

(4) After considering the application and any submission or other information received in relation to the application, the Authority shall—

- (a) either grant an exemption or reject the application by issuing a notice in writing to the applicant;
- (b) give written reasons for its decision if it rejects the application; and
- (c) publish a notice of that decision in the *Gazette*.

(5) If the Authority considers that any rules, either wholly or any part thereof, should no longer be exempt under this section, the Authority may revoke the exemption in respect of such rules or the relevant part of the rules, at any time after it has—

- (a) given notice in the *Gazette* of the proposed revocation;
- (b) allowed interested parties thirty days from the date of that notice to make representations concerning the exemption; and
- (c) consulted the responsible Minister referred to in subsection (3)(c).

(6) The exemption of a rule or the revocation of an exemption shall take effect from such date as may be specified by the Authority.

(7) For the purposes of this section, “**professional association**” means the controlling body established or registered under any law in respect of recognized professions, but does not include trade associations and industry lobby institutions or bodies whether incorporated or not.

[Act No. 16 of 2014, s. 35.]

30. Notification of grant, revocation or amendment of exemption

(1) The Authority shall, as soon as is practicable, cause to be published in the *Gazette* notice of every exemption granted, and of every exemption revoked together with the reasons thereof, under any provision of this Part.

(2) The Authority may, with the approval of the Cabinet Secretary, by notice in the *Gazette*, exclude any category of decisions, practices or agreements by or between undertakings from the application of the provisions this Part.

[Act No. 16 of 2014, s. 36.]

E – Investigation into Prohibited Practices

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; or
- (b) prohibitions relating to abuse of dominance.

(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.

[L.N. 23/2011, Sch.]

32. Entry and search

(1) Where the Authority deems it necessary for its investigations under this Part, the person or persons authorized in writing by it may enter any premises in the occupation or under the control of a trader, manufacturer, producer, commission agent, clearing and forwarding agent, transporter or other person believed to be in possession of relevant information and documents and inspect the premises and any goods, documents and records situated thereon.

(2) Upon entering premises in pursuance of the powers conferred by subsection (1), the person or persons authorized in writing shall, before proceeding to conduct an inspection of the premises, goods, documents and records situated thereon, inform the person present who is or who reasonably appears to be for the time being in charge of the premises of his intention to exercise his powers under this Act.

(3) The authorized persons may use any computer system on the premises, or require assistance of any person on the premises to use that computer system, to—

- (a) search any data contained in or available to that computer system;
- (b) reproduce any record from that data;
- (c) seize any output from that computer for examination and copying;
- (d) attach and, if necessary, subject to the issuance of a receipt to that effect, remove from the premises for examination and safekeeping anything that has a bearing on the investigation.

(4) The Authority may seek the assistance of police officers and other law enforcement agencies in its execution of the mandate conferred upon it by this section.

33. Power of Authority to take evidence

(1) The Authority may receive in evidence any statement, document, information or matter that may in its opinion assist to deal effectively with an investigation conducted by it, but a statement, document, information or matter shall not be received in evidence unless it meets the requirements for admissibility in a Court of law.

(2) The Authority may take evidence on oath or affirmation from any person attending before it, and for that purpose any member of the Authority may administer an oath or affirmation.

(3) The Authority may permit any person appearing as a witness before it to give evidence by tendering and, if the Authority thinks fit, verifying by oath or affirmation, a written statement.

(4) A person attending before the Authority is entitled to the same immunities and privileges as a witness before the High Court.

34. Proposed decision of Authority

(1) If, upon conclusion of an investigation, the Authority proposes to make a decision that—

- (a) a prohibition or prohibitions under Section A of this Part have been infringed; or
- (b) a prohibition or prohibitions under Section B of this Part have been infringed.
- (c) a prohibition or prohibitions under section C of this Part have been infringed,

it shall give written notice of its proposed decision to each undertaking which may be affected by that decision.

(2) The notice referred to in subsection (1) shall—

- (a) state the reasons for the Authority's proposed decision;
- (b) set out details of any relief that the Authority may consider to impose;
- (c) inform each undertaking that it may, in relation to the Authority's proposed decision or any of the matters contemplated in paragraph (b), within the period specified in the notice—
 - (i) submit written representations to the Authority; and
 - (ii) indicate whether it requires an opportunity to make oral representations to the Authority.

[Act No. 49 of 2016, s. 6.]

35. Hearing conference to be convened for oral representation

(1) If an undertaking indicates that it requires an opportunity to make oral representations to the Authority, the Authority shall—

- (a) convene a conference to be held at a date, time and place determined by the Authority; and
- (b) give written notice of the date, time and place to?
 - (i) the undertaking or undertakings concerned;
 - (ii) any person who had lodged a complaint with the Authority concerning the conduct which was the subject matter of the Authority's investigation; and
 - (iii) any other person whose presence at the conference is considered by the Authority to be desirable.

(2) A person to whom notice has been given of a conference in terms of subsection (1) may be accompanied by any person, including an advocate, whose assistance he may require at the conference.

(3) The proceedings at a conference shall be carried out in as informal a manner as the subject matter may permit.

(4) The Authority shall cause such record of the conference to be kept as is sufficient to set out the matters raised by the persons participating in the conference.

(5) The Authority may terminate the conference if it is satisfied that a reasonable opportunity has been given for the expression of the views of persons participating in the conference.

36. Action following investigation

After consideration of any written representations and of any matters raised at a conference, the Authority may take the following measures—

- (a) declare the conduct which is the subject matter of the Authority's investigation, to constitute an infringement of the prohibitions contained in Section A, B or C of this Part;
- (b) restrain the undertaking or undertakings from engaging in that conduct;
- (c) direct any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof;
- (d) impose a financial penalty of up to ten percent of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question; or
- (e) grant any other appropriate relief.

[Act No. 49 of 2016, s. 7.]

37. Interim relief

(1) If the Authority believes, on reasonable grounds, that an undertaking has engaged, is engaging, or is proposing to engage, in conduct that constitutes or may constitute an infringement of the prohibitions contained in section A, B, or C of this Part, and that it is necessary for the Authority to act as a matter of urgency for the purpose of—

- (a) preventing serious, irreparable damage to any person or category of persons; or
- (b) protecting the public interest,

the Authority may, by order in writing, direct the undertaking or undertakings to stop and desist from engaging in such conduct until the ongoing investigation is concluded.

[Act No. 49 of 2016, s. 8.]

38. Settlement

(1) The Authority may at any time, during or after an investigation into an alleged infringement of the prohibitions contained in this Part, enter into an agreement of settlement with the undertaking or undertakings concerned.

(2) An agreement referred to in subsection (1) may include—

- (a) an award of damages to the complainant;
- (b) any amount proposed to be imposed as a pecuniary penalty.

39. Publication of decision of Authority

(1) The Authority shall cause notice to be given in the *Gazette* of any action taken under section 37 and of any agreement referred to in section 38.

(2) The notice referred to in subsection (1) shall include—

- (a) the name of every undertaking involved; and
- (b) the nature of the conduct that is the subject of the action or the settlement agreement.

40. Appeals to the Tribunal

(1) A person aggrieved by a determination of the Authority made under this Part shall appeal in writing to the Tribunal within thirty days of receiving the Authority's decision.

(2) A party to an appeal under subsection (1) who is dissatisfied with the decision of the Tribunal may appeal to the High Court against that decision within thirty days after the date on which a notice of that decision has been served on him and the decision of the High Court shall be final.

[Act No. 16 of 2014, s. 37.]

PART IV – MERGERS**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).

[Act No. 49 of 2016, s. 9.]

42. Control of mergers

(1) The Authority may, in consultation with the Cabinet Secretary and by notice in the Gazette, set the threshold for any merger excluded from the provisions of this Part.

(2) No person, either individually or jointly or in concert with any other person, may implement a proposed merger to which this part applies, unless the proposed merger is—

- (a) approved by the Authority; and
- (b) implemented in accordance with any conditions attached to the approval.

(3) No merger as described in section 41 carried out in the absence of an authorizing order by the Authority, shall have any legal effect, and no obligation imposed on the participating parties by any agreement in respect of the merger shall be enforceable in legal proceedings.

(4) Payment of the full purchase price by the acquiring undertaking shall be deemed to be implementation of the merger in question for the purposes of this section, and payment of a maximum down payment not exceeding twenty percent of the agreed purchase price shall not constitute implementation.

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

(6) The Authority may impose a financial penalty in an amount not exceeding ten percent of the preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question.

[Act No. 49 of 2016, s. 10.]

43. Notice to be given to Authority of proposed merger

(1) Where a merger is proposed, each of the undertakings involved shall notify the Authority of the proposal in writing or in the prescribed manner.

(2) The Authority may, within thirty days of the date of receipt of the notification under subsection (1), request such further information in writing from any one or more of the undertakings concerned.

44. Period for making determination in relation to proposed merger

(1) Subject to subsection (2), the Authority shall consider and make a determination in relation to a proposed merger of which it has received notification in terms of section 43—

- (a) within sixty days after the date on which the Authority receives that notification; or
- (b) if the Authority requests further information under section 43(2), within sixty days after the date of receipt by the Authority of such information; or
- (c) if a hearing conference is convened in accordance with section 45, within thirty days after the date of conclusion of the conference.

(2) Where the Authority is of the opinion that the period referred to in paragraph (a), (b) or (c) of subsection (1) should be extended due to the complexity of the issues involved, it may, before the expiry of that period, by notice in writing to the undertakings involved extend the relevant period for a further period, not exceeding sixty days, specified in the notice.

45. Hearing conference in relation to proposed merger

(1) If the Authority considers it appropriate, it may determine that a conference be held in relation to a proposed merger.

(2) If the Authority determines that a conference is necessary, it shall, before expiry of the period referred to in paragraph (a) or (b) of subsection (1) of section 44 or subsection (2) of that section, as the case may be, give reasonable notice to the undertakings involved in writing—

- (a) convening the conference;
- (b) specifying the date, time and venue; and
- (c) stipulating the matters to be considered at the conference.

46. Determination of proposed merger

(1) In making a determination in relation to a proposed merger, the Authority may either—

- (a) give approval for the implementation of the merger;
- (b) decline to give approval for the implementation of the merger; or
- (c) give approval for the implementation of the merger with conditions.

(2) The Authority may base its determination in relation to a proposed merger on any criteria which it considers relevant to the circumstances involved in the proposed merger, including—

- (a) the extent to which the proposed merger would be likely to prevent or lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services;
- (b) the extent to which the proposed merger would be likely to result in any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;

- (c) the extent to which the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment which would be likely to result from any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;
- (d) the extent to which the proposed merger would be likely to affect a particular industrial sector or region;
- (e) the extent to which the proposed merger would be likely to affect employment;
- (f) the extent to which the proposed merger would be likely to affect the ability of small undertakings to gain access to or to be competitive in any market;
- (g) the extent to which the proposed merger would be likely to affect the ability of national industries to compete in international markets; and
- (h) any benefits likely to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets.

(3) For the purpose of considering a proposed merger, the Authority may refer the particulars of the proposed merger to an investigator, who may include an employee of the Authority or any other suitable person, for investigation and a report in relation to the criteria referred to in subsection (2), and shall inform the undertakings involved of such referral.

(4) As soon as practicable after a referral in terms of subsection (3), the investigator concerned shall—

- (a) investigate the proposal so referred; and
- (b) before the date specified by the Authority, furnish the Authority with a report of the investigation.

(5) Any person, including a person not involved as a party in the proposed merger, may voluntarily submit to an investigator or the Authority any document, affidavit, statement or other relevant information in respect of a proposed merger.

(6) The Authority shall—

- (a) give notice of the determination made by the Authority in relation to a proposed merger—
 - (i) to the parties involved in the proposed merger, in writing; and
 - (ii) by notice in the *Gazette*; and
- (b) issue written reasons for its determination—
 - (i) if it prohibits or conditionally approves a proposed merger; or
 - (ii) if it is requested to do so by any party to the merger.

47. Revocation of approval of proposed merger

(1) The Authority may at any time, after consideration of any representations made to it in terms of subsection (2), revoke a decision approving the implementation of a proposed merger if—

- (a) the decision was based on materially incorrect or misleading information for which a party to the merger is responsible; or

- (b) any condition attached to the approval of the merger that is material to the implementation is not complied with.

(2) If the Authority proposes to revoke its decision under subsection (1), it shall give notice in writing of the proposed action to every undertaking involved in the merger, and to any other person who in the opinion of the Authority is likely to have an interest in the matter; and call upon such persons to submit to the Authority, within thirty days of the receipt of the notice, any representations which they may wish to make in regard to the proposed action.

(3) Notwithstanding subsections (1) and (2), the Authority may impose a financial penalty of upto ten percent of the preceding year's annual gross turnover.

(4) Any person who, being a party to a merger—

- (a) gives materially incorrect or misleading information; or
(b) fails to comply with any condition attached to the approval for the merger,

leading to a revocation of the merger under this section, commits an offence and shall be liable on conviction to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding five years, or to both.

[Act No. 49 of 2016, s. 11.]

48. Review of decisions of Authority by Tribunal

(1) Not later than thirty days after notice is given by the Authority in the *Gazette* in terms of section 46(6) of the determination made by the Authority in relation to a proposed merger, a party to the merger may apply to the Tribunal, in the form determined by the Tribunal, for review of the Authority's decision.

(1A) Upon receipt of a written decision from the Authority as contemplated under section 46(6), a party may file an appeal to that decision to the Tribunal.

(2) Within thirty days after receiving an application under subsection (1), the Tribunal shall by notice in the *Gazette* give notice of the application for a review, and invite interested parties to make submissions to the Tribunal in regard to any matter to be reviewed within the time and manner stipulated in the notice.

(3) Within four months after the date of the making of an application for a review was made, the Tribunal shall make a determination either—

- (a) overturning the decision of the Authority;
(b) amending the decision of the Authority by ordering restrictions or including conditions;
(c) confirming the decision of the Authority; or
(d) referring the matter back to the Authority for reconsideration on specified terms.

(4) The Tribunal shall—

- (a) give notice of the determination it has made in relation to the review?
(i) to the Authority and to the parties involved in the proposed merger, in writing; and
(ii) by notice in the *Gazette*; and
(b) issue written reasons for that determination to the Authority and the parties involved.

(2) The Tribunal may determine the procedure for a review in terms of this section.

[Act No. 49 of 2016, s. 12.]

49. Compliance with other laws and appeals

(1) Approval of a proposed merger granted by the Authority, or by the Tribunal upon a review, under this Part shall not relieve an undertaking from complying with any other applicable laws.

(2) A party to an appeal under this Part who is dissatisfied with the decision of the Tribunal may appeal to the High Court against that decision within thirty days after the date on which a notice of that decision has been served on him and the decision of the High Court shall be final.

PART V – CONTROL OF UNWARRANTED CONCENTRATION OF ECONOMIC POWER

50. Identifying unwarranted concentration of economic power

(1) The Authority shall keep the structure of production and distribution of goods and services in Kenya under review to determine where concentrations of economic power exist whose detrimental impact on the economy out-weighs the efficiency advantages, if any, of integration in production or distribution.

(2) The Authority shall investigate any economic sector which it has reason to believe may feature one or more factors relating to unwarranted concentrations of economic power, and for that purpose, the Authority may require any participant in that sector to grant it or any person authorized in writing by it access to records relating to patterns of ownership, market structure and percentages of sales.

(3) The Authority may require any person possessing the records referred to in subsection (2) to provide it with copies of the records.

(4) For the purpose of this Part, an unwarranted concentration of economic power shall be deemed to be prejudicial to the public interest if, having regard to the economic conditions prevailing in the country and to all other factors which are relevant in the particular circumstances, the effect thereof is or would be to—

- (a) unreasonably increase the cost relating to the production, supply, or distribution of goods or the provision of any service; or
- (b) unreasonably increase—
 - (i) the price at which goods are sold; or
 - (ii) the profits derived from the production, supply or distribution of goods or from the performance of any service; or
- (c) lessen, distort, prevent or limit competition in the production, supply or distribution of any goods (including their sale or purchase) or the provision of any service;
- (d) result in a deterioration in the quality of any goods or in the performance of any service; or
- (e) result in an inadequacy in the production, supply or distribution of any goods or services.

51. Hearing conference

(1) If any undertaking in the economic sector under investigation so requests, or the Authority considers it appropriate, it may determine that a hearing be held in relation to a proposed determination regarding unwarranted concentration of economic power.

(2) If the Authority determines that a hearing should be held, it shall give reasonable notice in writing to the undertaking or undertakings involved—

- (a) convening the hearing;
- (b) specifying the date, time and place for the holding thereof; and
- (c) stipulating the matters to be considered thereat.

(3) Where a hearing is contemplated or held, the Authority's determination as to whether or not an unwarranted concentration of economic power exists shall be kept in abeyance pending conclusion of the hearing.

(4) A hearing shall not be deemed inconclusive due to the mere fact of non-cooperation by concerned undertakings.

52. Orders to dispose of interests

(1) After completion of its investigation, the Authority may make an order directing any person whom it deems to hold an unwarranted concentration of economic power in any sector to dispose of such portion of his interests in production, distribution or the supply of services as it deems necessary to remove the unwarranted concentration.

(2) In addition to subsection (1), the Authority may order, separately or together with the order to dispose of interests made under that subsection, the person in question to observe such other conditions as may be deemed necessary to remove the unwarranted concentration.

(3) A disposal of interest pursuant to an order made under subsection (1) may be accompanied by sale of all or part of a person's beneficial interest in an enterprise, or by the sale of one or more units in a group or chain of manufacturers or distributors or suppliers of services controlled by the person.

(4) No order shall be issued under this section which would have the effect of subdividing a manufacturing facility whose degree of physical integration is such that the introduction of independent management units controlling different components reduces its efficiency and substantially raises production costs per unit of output.

(5) An order made under this section shall allow sufficient time, to be determined by the Authority, for orderly disposal of interests or to comply with any conditions imposed by the Authority so as not to cause undue loss of value to the person to whom the order is addressed.

53. Appeals from the Authority's order

(1) A person aggrieved by an order of the Authority made under this Part may appeal to the Tribunal in the prescribed form.

(2) A party to an appeal under subsection (1) who is dissatisfied with the decision of the Tribunal may appeal to the High Court against that decision within thirty days after the date on which a notice of that decision is served on him and the decision of the High Court shall be final.

54. Offences and penalties

(1) Every person who, whether as principal or agent and whether by himself or his agent—

- (a) having lodged no appeal within the time allocated for appeals against an order of the Authority made under the provisions of this Part, contravenes or fails to comply with such order;
- (b) after the Tribunal has pronounced its decision on the appeal, contravenes or fails to comply with any portion of an order of the Authority made under this Part which is confirmed by the Tribunal or as modified by the Tribunal,

commits an offence.

(2) A party to an appeal under this Part who is dissatisfied with the decision of the Tribunal may appeal to the High Court against that decision within thirty days after the date of service of the decision on him, and the decision of the High Court shall be final.

(3) Any person who is convicted of an offence under this Part shall be liable to imprisonment for a term not exceeding five years, or to a fine not exceeding ten million shillings, or both.

PART VI – CONSUMER WELFARE**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;
 - (v) 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.

56. Unconscionable conduct

(1) It shall be an offence for a person, in trade in connection with the supply or possible supply of goods or services to another person, to engage in conduct that is, in all the circumstances, unconscionable.

(2) Without limiting the matters to which the Authority may have regard for the purpose of determining whether a person has contravened subsection (1) in connection with the supply or possible supply of goods or services to another person (in this subsection referred to as “the consumer”), the Authority may have regard to—

- (a) the relative strengths of the bargaining positions of the person and the consumer;
- (b) whether, as a result of conduct engaged in by the person, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the person;
- (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the person acting on behalf of the person in relation to the supply or possible supply of the goods or services; and
- (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from another supplier.

(3) A person shall not, in the provision of banking, micro-finance and insurance and other services, impose unilateral charges and fees, by whatever name called or described, if the charges and the fees in question had not been brought to the attention of the consumer prior to their imposition or prior to the provision of the service.

(4) A consumer shall be entitled to be informed by a service provider of all charges and fees, by whatever name called or described, intended to be imposed for the provision of a service.

(5) A person shall not be deemed to engage in unconscionable conduct under this section in connection with the supply or possible supply of goods or services to a person by reason only that the person institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim in relation to that supply or possible supply to arbitration.

(6) For the purpose of determining whether a person has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person—

- (a) the Authority shall not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
- (b) the Authority may have regard to conduct engaged in, or circumstances existing, before the commencement of this Act.

(7) A reference in this section to goods or services is a reference to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.

(8) A reference in this section to the supply or possible supply of goods does not include a reference to the supply or possible supply of goods for the purpose of re-supply or for the purpose of using them up or transforming them in trade.

57. Unconscionable conduct in business transactions

(1) It shall be an offence for a person in trade in connection with—

- (a) the supply or possible supply of goods or services to another person; or
- (b) the acquisition or possible acquisition of goods or services from another person,

to engage in conduct that is, in all the circumstances, unconscionable.

(2) Without limiting the matters to which the Authority may have regard for the purpose of determining whether a person, being a supplier, has contravened subsection (1) in connection with the supply or possible supply of goods or services to a business consumer, the Authority may have regard to—

- (a) the relative strengths of the bargaining positions of the supplier and the business consumer;
- (b) whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions which were not reasonably necessary for the protection of the legitimate interests of the supplier;
- (c) whether the business consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the business consumer or a person acting on behalf of the business consumer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services;
- (e) the amount for which, and the circumstances under which, the business consumer could have acquired identical or equivalent goods or services from a person other than the supplier;

- (f) the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers;
- (g) the requirements of any applicable industry code;
- (h) the requirements of any other industry code, if the business consumer acted on the reasonable belief that the supplier would comply with that code;
- (i) the extent to which the supplier unreasonably failed to disclose to the business consumer—
 - (i) any intended conduct of the supplier that might affect the interests of the business consumer; and
 - (ii) any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen that would not be apparent to the business consumer);
- (j) the extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer; and
- (k) the extent to which the supplier and the business consumer acted in good faith.

58. Warning notice to public

(1) The Authority shall publish a notice containing one or both of the following—

- (a) a statement that goods of a kind specified in the notice are under investigation to determine whether the goods will or may cause injury to any person;
- (b) a warning of possible risks involved in the use of goods of a kind specified in the notice.

(2) Where an investigation referred to in subsection (1) has been completed, the Authority shall, as soon as practicable, by notice in writing published in at least one national daily newspaper, announce the results of the investigation, indicating whether, and if so, what action is proposed to be taken in relation to the goods under this Act.

(3) The Authority may delegate to the relevant specialized agencies of the Government its functions as envisaged by this section.

59. Product safety standards and unsafe goods

(1) It shall be an offence for a person, in trade, to supply goods that are intended to be used, or are of a kind likely to be used, by a consumer if the goods are of a kind—

- (a) in respect of which there is a prescribed consumer product safety standard and which do not comply with that standard;
- (b) in respect of which there is in force a notice under this section declaring the goods to be unsafe goods; or
- (c) in respect of which there is in force a notice under this section imposing a permanent ban on the goods.

(2) Where—

- (a) the supply of goods by a person constitutes a contravention of this section by reason that the goods do not comply with a prescribed consumer product safety standard;
- (b) a person suffers loss or damage by reason of a defect in, or a dangerous characteristic of, the goods or by reason of not having particular information in relation to the goods; and
- (c) the person would not have suffered the loss or damage if the goods had complied with that standard,

the person shall be deemed for the purposes of this Act to have suffered the loss or damage by the supplying of the goods.

(3) Where—

- (a) the supply of goods by a person constitutes a contravention of this section by reason that there is in force a notice under this section declaring the goods to be unsafe goods or imposing a permanent ban on the goods; and
- (b) a person suffers loss or damage by reason of a defect in, or a dangerous characteristic of, the goods or by reason of not having particular information as to a characteristic of the goods,

the person shall be deemed for the purposes of this Act to have suffered the loss or damage by the supplying of the goods.

60. Product information standards

(1) It shall be an offence, in trade, for a person to supply goods that are intended to be used, or are of a kind likely to be used, by a consumer, being goods of a kind in respect of which a consumer product information standard has been prescribed, unless the person has complied with that standard in relation to those goods.

(2) The Authority may, by regulations in respect of goods of a particular kind, prescribe a consumer product information standard consisting of such requirements as to—

- (a) the disclosure of information relating to the performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of the goods; and
- (b) the form and manner in which that information is to be disclosed on or with the goods,

as are reasonably necessary to give persons using the goods information as to the quantity, quality, nature or value of the goods.

(3) Subsection (1) shall not apply to goods that are intended to be used outside Kenya.

(4) If there is applied to goods—

- (a) a statement that the goods are for export only; or
- (b) a statement indicating by the use of words authorised by the regulations to be used for the purposes of this section that the goods are intended to be used outside Kenya,

it shall be presumed for the purposes of this section, unless the contrary is established, that the goods are intended to be so used.

(5) For the purposes of subsection (4), a statement shall be deemed to be applied to goods if—

- (a) the statement is woven in, impressed on, worked into or annexed or affixed to the goods; or
- (b) the statement is applied to a covering, label, reel or thing in or with which the goods are supplied.

(6) A reference in subsection (5) to a covering includes a reference to a stopper, glass, bottle, vessel, box, capsule, case, frame or wrapper and a reference in that paragraph to a label includes a reference to a band or ticket.

(7) A person shall be deemed, for the purposes of this Act, to have suffered the loss or damage by the supplying of the goods where—

- (a) the supplying of goods by a person constitutes a contravention of this section by reason that the person has not complied with a prescribed consumer product information standard in relation to the goods;
- (b) a person suffers loss or damage by reason of not having particular information in relation to the goods; and
- (c) the person would not have suffered the loss or damage if the person had complied with that standard in relation to the goods.

61. Notice to consumers

(1) Where a person (in this section referred to as the “**supplier**”), in trade, supplies, on or after the commencement date of this Act, goods that are intended to be used, or are of a kind likely to be used, by a consumer, and—

- (a) it appears to the Authority that the goods are goods of a kind which will or may cause injury to any person;
- (b) the goods are goods of a kind in respect of which there is a prescribed consumer product safety standard and the goods do not comply with that standard; or
- (c) the goods are goods of a kind in relation to which there is in force a notice under section 58;
- (d) it appears to the Authority that the supplier has not taken satisfactory action to prevent the goods causing injury to any person,

the Authority shall, by appropriate notice, require the supplier to take action in accordance with subsection (2).

(2) The Authority shall, in the circumstances set out in subsection (1), require the supplier to—

- (a) recall the goods within a period specified in the notice;
- (b) disclose to the public, or to a class of persons specified in the notice, in the matter and within the period specified in the notice, one or more of the following—
 - (i) the nature of a defect in, or a dangerous characteristic of, the goods identified in the notice;

- (ii) the circumstances, being circumstances identified in the notice, in which the use of the goods is dangerous; or
- (iii) procedures for disposing of the goods specified in the notice;
- (c) inform the public, or a class of persons specified in the notice, in the manner and within the period specified in the notice, that the supplier undertakes to—
 - (i) repair the goods, except where the notice identifies a dangerous characteristic of the goods, repair the goods;
 - (ii) replace the goods; or
 - (iii) refund to a person to whom the goods were supplied (whether by the supplier or by another person) the price of the goods,

within the period specified in the notice.

(3) Prior to the publication by the Authority of the notice mentioned in subsection (1)(c), the Authority shall notify the affected party accordingly and give him an opportunity to be heard as to why such notice should not be published.

(4) The Authority shall consider representations made under subsection (3) and communicate its decision as to publication within a period of twenty-one days.

(5) A person aggrieved by the decision of the Authority under subsection (4) may appeal to the Tribunal.

62. Authority to declare product safety or information standards

(1) The Authority shall notify the public that, in respect of goods of a kind specified in the notice, a particular standard, or a particular part of a standard, prepared or approved by a prescribed association or body, or such a standard or part of a standard with additions or variations specified in the notice, is a consumer product safety standard for the purposes of this Act.

(2) Where a notice has been given, the standard, or the part of the standard, referred to in the notice, or the standard or part of a standard so referred to with additions or variations specified in the notice, as the case may be, shall be deemed to be a prescribed consumer product safety standard for the purposes of this Act.

63. Liability in respect of unsuitable goods

(1) Where—

- (a) an undertaking, in trade, supplies goods manufactured by the undertaking to another person who acquires the goods for re-supply;
- (b) a person (whether or not the person who acquired the goods from the undertaking) supplies the goods, otherwise than by way of sale by auction, to a consumer;
- (c) the goods are acquired by the consumer for a particular purpose that was, expressly or by implication, made known to the corporation, either directly, or through the person from whom the consumer acquired the goods or a person by whom any prior negotiations in connection with the acquisition of the goods were conducted;

- (d) the goods are not reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied; and
- (e) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the goods are not reasonably fit for that purpose;

the undertaking shall be liable to compensate the consumer or that other person for the loss or damage and the consumer or that person may recover the amount of the compensation by action against the undertaking in a court of competent jurisdiction.

(2) Subsection (1) shall not apply—

- (a) if the goods are not reasonably fit for the purpose referred to in subsection (1) by reason of—
 - (i) an act or default of any person (not being the undertaking or a servant or agent of the undertaking); or
 - (ii) a cause independent of human control; occurring after the goods have left the control of the undertaking; or
- (b) where the circumstances show that the consumer did not rely, or that it was unreasonable for the consumer to rely, on the skill or judgement of the undertaking.

64. Liability for defective goods

(1) Where a person, in trade supplies goods manufactured by it, and such goods are found to have a defect as a result of which an individual suffers loss or injury, such person is liable to compensate the individual for the loss or injury suffered.

(2) An individual who suffers loss or damage may recover compensation through court action.

65. Unidentified manufacturer

(1) Where a person who wishes to institute an action for compensation does not know who manufactured the goods which are the subject matter of the action, such person may serve on a supplier, or each supplier, of such goods, who is known to him, a written request to give the person particulars identifying—

- (a) the person who manufactured the goods; or
- (b) the supplier of the goods to the supplier requested.

(2) If, thirty days after the person has made the request or requests under subsection (1), the person still does not know who manufactured the goods, the subject of an action, then the person, or each person, that is a supplier—

- (a) to whom a request was made; and
- (b) who did not comply with the request,

is taken, for the purposes of the action, to have manufactured the action goods.

66. Defence

- (1) In an action under section 64, it shall be a defence to establish that—
- (a) the defect in the action goods which is alleged to have caused the loss did not exist at the time of supply of the goods;
 - (b) they had that defect only because there was compliance with a mandatory standard for them;
 - (c) the state of scientific or technical knowledge at the time when they were supplied by their actual manufacturer was not such as to enable that defect to be discovered; or
 - (d) if they were comprised in other finished goods, that defect is attributable only to—
 - (i) the design of the finished goods; or
 - (ii) the markings on or accompanying the finished goods; or
 - (iii) the instructions or warnings given by the manufacturer of the finished goods.

67. Consultations with the Kenya Bureau of Standards

The Authority shall consult with the Kenya Bureau of Standards in all matters involving definition and specification of goods and the grading of goods by quality for the purposes of this Act.

68. Referral of complaints to Government agencies

In appropriate circumstances the Authority shall have powers to refer consumer complaints to specialized agencies of the Government, which agencies shall make apposite determinations and inform the Authority and the complainants accordingly.

69. Notification by Consumer bodies

(1) Recognized consumer bodies shall be entitled to notify the Authority of any alleged infringement of the provisions of this Part.

(2) Upon receipt of a notification by a consumer body, the Authority shall undertake necessary investigations.

(3) A consumer body which gives notification to the Authority shall be required to cooperate with the Authority in its investigation of the alleged infraction of the provisions of this Part.

70. Offences and penalty

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

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.

[Act No. 49 of 2016, s. 13.]

PART VII – ESTABLISHMENT AND POWERS
OF THE COMPETITION TRIBUNAL

71. Establishment of the Competition Tribunal

(1) There is hereby established a Tribunal to be known as the Competition Tribunal which shall exercise the functions conferred upon it by this Act.

(2) The Tribunal shall consist of—

- (a) a chairman, who shall be an advocate of not less than seven years standing; and
- (b) not less than two and not more than four other members,

appointed by the Minister.

(3) A member of the Tribunal shall hold office for the period, not exceeding five years, specified in the instrument of his appointment unless, prior to the expiration of that period—

- (a) he resigns his office by written notification under his hand addressed to the Minister; or
- (b) the Minister, being satisfied that the member is unfit by reason of mental or physical infirmity to perform the duties of his office, or that the member has failed to attend at least three consecutive meetings of the Tribunal, revokes his appointment.

(4) The quorum for a meeting of the Tribunal shall be the chairman and two other members.

(5) The members of the Tribunal shall be entitled to receive such fees and allowances as the Minister may determine.

(6) The Minister may, in consultation with the Tribunal, make rules—

- (a) prescribing the manner in which an appeal shall be made to the Tribunal and the fees to be paid in respect of all appeals;
- (b) prescribing the procedure to be adopted by the Tribunal in hearing an appeal and the records to be kept by the Tribunal;
- (c) prescribing the manner in which the Tribunal shall be convened and places where and the time at which the sittings shall be held;
- (d) generally for the better carrying out of the provisions of this Act relating to the Tribunal and appeals thereto.

72. Procedure on appeals to the Tribunal

In an appeal under this Act—

- (a) the appellant shall appear before the Tribunal either in person or by an advocate on the day and at the time fixed for the hearing of the appeal, but if it is proved to the satisfaction of the Tribunal that, owing to absence of the appellant from Kenya, sickness, or other reasonable cause, he is prevented from attending at the hearing of the appeal on the day and at the time fixed for that purpose, the Tribunal may postpone the hearing of the appeal for such reasonable time as it deems necessary; and
- (b) the costs of the appeal shall be at the discretion of the Tribunal.

73. Persons entitled to appeal to the Tribunal

The following persons may exercise the right of appeal to the Tribunal conferred under this Act—

- (a) any person who, by a determination made by the Authority under this Act—
 - (i) is directed to discontinue or not to repeat any trade practice;
 - (ii) is issued with a stop and desist order or any other interim order;
 - (iii) is permitted to continue or repeat a trade practice subject to conditions prescribed by the order;
 - (iv) is directed to take certain steps to assist existing or potential suppliers or customers adversely affected by any prohibited trade practices;
 - (v) is ordered to pay a pecuniary penalty or fine; or
 - (vi) is aggrieved by a stop and desist order or any other interim order of the Authority;
- (b) where any order referred to in paragraph (a) is directed to a class of persons, any person belonging to or representing that class; or
- (c) any person who by an order made under section 46 is—
 - (i) enjoined from proceeding with a proposed merger; or
 - (ii) authorized to proceed with a proposed merger subject to conditions prescribed by the order.

74. Hearing and determination of appeal

(1) The Tribunal may, in any case, if it considers it in the interest of the parties or of any of them and is not contrary to the interest of other persons concerned or the public interest, order that the hearing or any part of it shall be held *in camera*.

(2) The Tribunal may make an order prohibiting the publication of any report or description of the proceedings or of any part of the proceedings in any appeal before it (whether heard in public or in private), but no such order shall be made prohibiting the publication of the names and descriptions of the parties to the appeal, or of any decision of the Tribunal.

(3) In its determination of any appeal, the Tribunal may confirm, modify, or reverse the order appealed against, or any part of that order.

75. Tribunal to refer appeals back for reconsideration

(1) Notwithstanding anything contained in section 73, the Tribunal may, in any case, instead of determining any appeal under that section, direct the Authority to reconsider, either generally or in respect of any specified matters, the whole or any specified part of the matter to which the appeal relates.

(2) In giving any direction under this section, the Tribunal shall—

- (a) advise the Authority of its reasons for so doing; and
- (b) give to the Authority such directions as it thinks just concerning the rehearing or reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.

(3) In reconsidering the matter referred back under subsection (2), the Authority shall have regard to the Tribunal's reasons for giving a direction under subsection (1) and to the Tribunal's directions under subsection (2).

76. Provisions pending determination of appeal

(1) Where an appeal is brought against a determination by the Authority regarding restrictive trade practices, consumer welfare matters or abuse of dominant positions, the stop and desist order or any other interim order or conditions issued by the Authority shall be observed, unless the Tribunal otherwise orders, pending the determination of the appeal.

(2) Where an appeal is against a determination of the Authority regarding mergers, the merger to which the appeal relates may not be finalised pending the determination of the appeal.

77. Authority's right of appeal

The Authority shall have a right to appeal to the High Court against any decision of the Tribunal.

PART VIII – FINANCIAL PROVISIONS**78. Funds of the Authority**

(1) The funds of the Authority shall consist of—

- (a) any grants, donations, bequests or other contributions made to the Authority;
- (b) funds allocated to the Authority by Parliament;
- (c) fees and penalties collected by the Authority;
- (d) litigation costs refundable to the Authority;
- (e) all other payments due to the Authority in respect of any matter incidental to its functions.

(2) The Authority shall disclose details of the sources of its funds in the annual report.

(3) The Authority may make rules prescribing filing fees and other fees to be paid by persons in connection with the procedures of the Authority.

79. Financial year

The financial year of the Authority shall be the period of twelve months ending on the thirtieth of June in each year.

80. Annual estimates

(1) At least three months before the commencement of each financial year, the Authority shall cause to be prepared estimates of the revenue and expenditure of the Authority for that financial year.

(2) The annual estimates shall make provision for all estimated expenditure of the Authority for the financial year and in particular, shall provide for—

- (a) the payment of salaries, allowances and other charges in respect of the officers, agents or members of staff of the Authority;
- (b) the payment of pensions, gratuities and other charges in respect of retirement benefits payable to the members of staff of the Authority;
- (c) the maintenance of the buildings and grounds of the Authority;

- (d) the maintenance, repair and replacement of the equipment and other property of the Authority; and
- (e) the creation of such reserve funds to meet future or contingent liabilities in respect of retirement benefits, insurance, replacement of buildings or equipment, or in respect of such other matters as the Authority may deem appropriate.

(3) The annual estimates shall be approved by the Authority before the commencement of the financial year to which they relate and, once approved, the sum provided in the estimates shall be submitted to the Minister for approval.

(4) No expenditure shall be incurred for the purposes of the Authority except in accordance with the annual estimates approved under subsection (3), or in pursuance of an authorisation of the Authority given with prior written approval of the Minister, and the Permanent Secretary to the Treasury.

81. Accounts and audit

(1) The Authority shall cause to be kept proper books and records of accounts of the income, expenditure, assets and liabilities of the Authority.

(2) Within a period of three months after the end of each financial year, the Authority shall submit to the Controller and Auditor-General the accounts of the Authority in respect of that year together with—

- (a) a statement of the income and expenditure of the Authority during that financial year; and
- (b) a statement of the assets and liabilities of the Authority on the last day of that financial year.

(3) The accounts of the Authority shall be audited and reported upon by the Controller and Auditor-General in accordance with the provisions of the Public Audit Act, 2003 (No. 12 of 2003).

82. Investment of funds

(1) The Authority may invest any of the funds of the Authority in securities in which it may by law invest trust funds, or in any other securities which the Minister for the time being responsible for finance may, from time to time, approve.

(2) The Authority may, subject to the approval of the Minister for the time being responsible for finance, place on deposit with such bank or banks as it may determine, any moneys not immediately required for the purposes of the Authority.

PART IX – MISCELLANEOUS

83. Annual reports

(1) Before thirtieth September each year, the Authority shall prepare an annual report in respect of the year up to the immediately preceding thirtieth June and submit it to the Minister before 30th November in that year.

(2) The annual report shall provide information regarding the activities and plans of the Authority during the year to which it relates sufficient to impart an accurate understanding of the nature and scope of its activities and its plans and priorities and, without limitation, shall include—

- (a) details of the performance of the Authority against its key performance indicators, including the number and nature of

complaints and applications the Authority has decided or are under consideration, the number and nature of investigations completed and continuing, significant studies and reports completed, undertaken or planned, and the number and nature of inquiries completed, undertaken or planned;

- (b) such information and other material as the Authority may be required by this Act or regulations made thereunder to include in the annual report; and
- (c) such additional information or other material as the Minister may request in writing.

(3) The Minister shall, within two months after receiving the annual report, transmit it to the National Assembly.

84. Prohibition on disclosure of information

(1) A member of the Authority or of a committee, the Director-General, any other employee of the Authority, and any other person required or permitted to be present at any meeting of the Authority or of a committee or at any investigation in terms of this Act, may not publish or communicate or in any other way disclose any information relating to the affairs of any person or undertaking that has come to such person's knowledge—

- (a) in the exercise of any power or performance of any duty or function under this Act; or
- (b) as a result of such person's attendance at such meeting or investigation.

(2) Subsection (1) shall not apply to information disclosed?

- (a) for the purpose of the proper administration or enforcement of this Act;
- (b) for the proper administration of justice; or
- (c) at the request of an investigator, the chairman or any other member entitled to receive the information.

85. Disclosure of private interest by staff

(1) The Director-General, an investigator or any other person employed by the Authority who has a financial or other personal interest in any matter which is the subject of an investigation by the Authority—

- (a) shall disclose that interest to the chairman; and
- (b) unless the Authority otherwise directs, may not participate or assist in the investigation of that matter.

(2) The Director-General, an investigator or any other person employed by the Authority may not use any confidential information obtained in the performance of their functions to obtain, directly or indirectly, a financial or other advantage for himself or herself or any other person.

86. Time within which investigation may be initiated

An investigation into an alleged infringement of the provisions of this Act may not be initiated after three years from the date the infringement has ceased.

87. Hindering administration of Act

A person commits an offence who hinders, opposes, obstructs or unduly influences any person who is exercising a power or performing a duty conferred or imposed on that person by this Act.

88. Failure to comply with summons

Any person who—

- (a) having been duly summoned to attend before the Authority, without reasonable excuse fails to do so; or
- (b) being in attendance as required?
 - (i) refuses to take an oath or affirmation as lawfully required by the Authority;
 - (ii) refuses, after having taken the oath or affirmation, to answer any question to which the Authority may lawfully require an answer or gives evidence which the person knows is false; or
 - (iii) fails to produce any document or thing in his or her possession or under his or her control lawfully required by the Authority to be produced to it,

commits an offence.

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.

89A. Leniency programme

(1) The Authority may operate a leniency programme where an undertaking that voluntarily discloses the existence of an agreement or practice that is prohibited under this Act and co-operates with the Authority in the investigation of the agreement or practice, may not be subject to all or part of a fine that could otherwise be imposed under this Act.

(2) The details of the leniency programme under subsection (1) shall be set out in the guidelines of the Authority.

[Act No. 16 of 2014, s. 38.]

90. Other offences

Any person who—

- (a) does anything calculated to improperly influence the Authority or any member concerning any matter connected with the exercise of any power or the performance of any function of the Authority;
- (b) anticipates any decision of the Authority concerning an investigation in a way that is calculated to influence the proceedings or decision;
- (c) does anything in connection with an investigation that would constitute contempt of court had the proceedings occurred in a court of law; and
- (d) knowingly provides false information to the Authority,

commits an offence.

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.

92. Jurisdiction of magistrate's courts

Notwithstanding any other law, a magistrate's court has jurisdiction to impose any penalty provided for in this Act.

93. Rules

(1) The Minister may, in consultation with the Authority, make rules generally for the better carrying into effect the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), rules made under this section shall prescribe for anything required to be prescribed under this Act.

[Act No. 25 of 2015, Sch.]

PART X – REPEAL, SAVINGS AND TRANSITIONAL PROVISIONS**94. Definition**

In this Part—

“**appointed day**” means the day on which the Act shall come into force; and

“**Department**” means the Monopolies and Prices Department of the Treasury existing immediately before the appointed day.

95. Assets and other property

(1) On the appointed day, all the assets and other property, movable and immovable, which immediately before that day, were held for and on behalf of the Department in the name of the Permanent Secretary to the Treasury shall, by virtue of this section and without further assurance, vest in the Authority.

(2) Every public officer having the power or duty to effect or amend any entry in a register relating to property or to issue or amend any certificate or other document effecting or evidencing title to property, shall, without payment of a fee or other charge and upon request made by or on behalf of the Authority, do all such things as are by law necessary to give final effect to the transfer of the property mentioned in subsection (1).

96. Rights, powers, liabilities, etc.

On the appointed day, all rights, powers, liabilities and duties, whether arising under any written law or otherwise, which immediately before the appointed day were vested in, imposed on or enforceable by or against the Government for and on behalf of the Department shall, by virtue of this section, be transferred to, vested in, imposed on or become enforceable by or against the Authority.

97. Legal proceedings

On and after the appointed day, all actions, suits or legal proceedings pending by or against the Government for and on behalf of the Department shall be carried on or prosecuted by or against the Authority.

98. Secondment to Authority

(1) Subject to subsection (2), the Commissioner, officers and servants of the Department in office on the appointed day shall be deemed to be officers and servants on secondment to the Authority.

(2) Notwithstanding the provisions of subsection (1), within twelve months after the appointed day, the Authority shall review the qualifications of all persons deemed to be on secondment to the Authority under that subsection, and may retain those found suitably qualified for employment by the Authority subject to—

- (a) such persons opting to remain in the service of the Authority; and
- (b) such terms and conditions of service (not being to the disadvantage of such persons) as may be agreed with the Authority.

(3) Any employee not retained by the Authority under subsection (2) may exercise his option to either—

- (a) retire from the service of the Government; or
- (b) in cases where the employee has not reached retirement age, be redeployed within the public service.

(4) Where an employee enters into an agreement with the Authority under subsection (2), his service with the Government shall be deemed to be terminated without the right to severance pay but without prejudice to all other remuneration and benefits payable upon the termination of his appointment with the Government.

(5) The annual estimates for the Department for the financial year in which the appointed day occurs shall be deemed to be the annual estimates of the Authority for the remainder of that financial year:

Provided that such estimates may be varied by the Authority in such manner as the Minister may approve.

99. Repeal of Cap. 504

The Restrictive Trade Practices, Monopolies and Price Control Act (No. 14 of 1988), is hereby repealed.

100. Savings

Notwithstanding the repeal of the Restrictive Trade Practices, Monopolies and Price Control Act (No. 14 of 1988), any applications for mergers or takeovers, any investigations relating to restrictive trade practices and any investigations relating to unwarranted concentrations of economic power ongoing immediately before the commencement of this Act shall be taken over by the Authority.

SCHEDULE

[Section 8, Act No. 11 of 2017, Sch.]

PROVISIONS AS TO THE AUTHORITY

1. Tenure of office

Any member of the Board, other than an *ex officio* member shall, subject to the provisions of this Schedule, hold office for a period of three years, on such terms and conditions as may be specified in the instrument of appointment, but shall be eligible for re-appointment, subject to a maximum of two terms of office.

2. Vacation of office

(1) A member of the Board, other than an *ex officio* member, may—

- (a) at any time resign from office by notice in writing to the Minister;
- (b) be removed from office by the Minister if the member—
 - (i) is declared bankrupt, takes the benefit of any law for the relief of insolvent debtors or assigns the member's remuneration for the benefit of creditors;
 - (ii) is convicted of a criminal offence;
 - (iii) is required by paragraph 4(7) to resign;
 - (iv) is incapable of carrying out his duties because of ill health or physical or mental impairment;
 - (v) fails to attend at least two thirds of all meetings of the Authority, without the Authority's permission, in any period of twelve consecutive months; or
 - (vi) has committed a material breach of a code of conduct to which the Authority is subject under the provisions of this Act.

(2) Before removing a member from office, the Minister shall inform a member in writing stating the grounds for removal.

3. Meetings of the Authority

(1) The Authority shall meet not less than four times in every financial year and not more than four months shall elapse between the date of one meeting and the date of the next meeting.

(2) The Authority shall convene its meetings as directed by the Chairman or if requested in writing by at least half of the non-*ex officio* members.

(3) Subject to the provisions of sub-paragraphs (1) and (2), the Chairman may convene meetings of the Authority, after consultation with the members, at such times and places as he sees fit.

(4) The chairman shall preside at all meetings of the Authority at which he is present, and in his absence the members present may appoint one from among their number to preside at the meeting.

(5) A quorum will be four members including the Chairman.

(6) All questions shall be decided by a majority of votes of the members present and voting and, in the event of an equality of votes, the presiding member shall have a deliberative and a casting vote.

(7) The Chairman may decide that particular meetings of the Authority should be held by telephone, closed circuit television or other method of communication as the Chairman thinks fit.

(8) A minute of a resolution signed by all members of the Authority shall constitute a valid resolution of the Authority as if it were duly passed at a validly constituted meeting of the Authority.

[Act No. 11 of 2017, Sch.]

4. Conflicts of interest

(1) A member or employee of the Authority shall be considered to have a conflict of interest for the purposes of this Act if he acquires any pecuniary or other interest that could conflict with the proper performance of his duties as a member or employee of the Authority.

(2) If at any time a member of the Authority has a conflict of interest in relation to—

- (a) any matter before the Authority for consideration or determination; or
- (b) any matter the Authority could reasonably expect might come before it for consideration or determination.

(3) The member shall immediately disclose the conflict of interest to the other members of the Authority and refrain from taking part, or any further part, in the consideration or determination of the matter.

(4) Where the Authority becomes aware that a member has a conflict of interest in relation to any matter before the Authority, the Authority shall direct the member to refrain from taking part, or taking any further part, in the consideration or determination of the matter.

(5) If the Chairman has a conflict of interest he shall, in addition to complying with the other provisions of this section, disclose the conflict that exists to the Minister in writing.

(6) Upon the Authority becoming aware of any conflict of interest, it shall make a determination as to whether in future the conflict is likely to interfere significantly with the proper and effective performance of the functions and duties of the member or the Authority and the member with the conflict of interest shall not vote on this determination.

(7) Where the Authority determines that the conflict is likely to interfere significantly with the member's proper and effective performance as provided for in sub-paragraph (6), the member shall resign unless the member has eliminated the conflict to the satisfaction of the Authority within thirty days.

(8) The Authority shall report to the Minister any determination by the Authority that a conflict is likely to interfere significantly with performance as above and whether or not the conflict has been eliminated to the satisfaction of the Authority.

(9) The Annual Report of the Authority shall disclose details of all conflicts of interest and determinations arising during the period covered by the Report.

5. Code of conduct

(1) Within twelve months of the commencement of this Act, the Authority shall adopt a code of conduct prescribing standards of behaviour to be observed by the members and staff of the Authority in the performance of their duties.

(2) Subject to sub-paragraph (1), before adopting any code of conduct or making any substantial amendments to an existing code of conduct, the Authority shall publish the proposed code or amendments in the *Gazette* and in a newspaper circulating nationally, inviting public comment.

(3) The Authority shall include in its Annual Report a report on compliance with the code during the period covered by the Annual Report.

(4) The Code of conduct adopted or prescribed under this section shall be binding on the Authority and its employees.

6. Execution of instruments

Any contract or instrument which, if entered into or executed by a person not being a body corporate, would not require to be under seal, may be entered into or executed on behalf of the Authority by any person generally or specially authorized by the Authority for that purpose.

7. Minutes

The Authority shall cause minutes of all resolutions and proceedings of meetings of the Authority to be entered in books kept for that purpose.
