

THE COMPETITION (AMENDMENT) BILL, 2024

A Bill for

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

ENACTED by the Parliament of Kenya, as follows—

Short title.

1. This Act may be cited as the Competition (Amendment) Act, 2024.

Amendment of section 2 in Cap. 504.

2. The Competition Act (hereinafter referred to as the “principal Act”) is amended in section 2 by —

(a) deleting the definition of “person” and substituting therefor the following definition—

“person” has the meaning assigned to it under Article 260 of the Constitution;

(b) deleting the definition of “recognized consumer body” and substituting therefor with the following new definition—

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

(c) inserting the words “or a natural person” immediately after the words “trade association” in the definition of “undertaking”

(d) inserting the following new definition in proper alphabetical sequence—

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

“digital activities” means the provision of a service by means of the internet, or provision of digital content, for the benefit of business consumers or other consumers (whether paid for or otherwise and whether or not such activity is multisided), and may include —

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- (a) online intermediation services, including online marketplaces and app stores;
- (b) online search engines;
- (c) online social networking services;
- (d) video-sharing platform services;
- (e) independent interpersonal communication services;
- (f) operating systems;
- (g) cloud computing services; and
- (h) online advertising services.

“product information standards” means Standards developed by any government agency in Kenya for the purpose of consumer benefit, relating to information, safety and health;

“strategic market position” has the meaning assigned in Section 4(2)(c)

“superior bargaining position” means the ability of an undertaking to control, direct, define or determine the conditions of business operations with counterparties which are favourable to itself without reference to the undertaking’s dominant market position or market power in the relevant market;

Amendment of section 4 in Cap. 504.

3. Section 4 of the principal Act is amended in subsection (2) by adding the following new paragraphs immediately after paragraph (b) —

- (c) in the context of digital activities, where dominance can be established even with market shares below forty percent, the Authority shall consider factors that typically grant significant market position, whether they arise from the digital activity being performed in one or multiple markets;
- (d) direct and indirect network effects and the entry barriers arising in connection with those network effects;

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- (e) economies of scale and scope enjoyed by the undertaking, including with regard to the undertaking's access to data relevant for competition;
- (f) switching costs for users and the ability and propensity for users to multihome; and
- (g) competitive pressure driven by innovation;
- (h) the importance of the intermediary services provided by the undertaking for accessing supply and sales market, including with reference to the size of the undertaking and the number of business and individual users it has and the period over which that level of importance has been held.

Amendment of
section 9 of
Cap. 504.

4. Section 9 of the principal Act is amended—

- (a) in subsection (1) (e) by deleting the word “recognize” and substituting therefor the word “accredit”;
- (b) in subsection (1) (g) by inserting the word “evaluations” immediately after the word “inquiries”;
- (c) by adding the following new paragraphs immediately after paragraph (n) —
 - (o) recommend policies to the Cabinet Secretary on competition management and consumer protection; and
 - (p) coordinate with relevant government agencies and regulatory authorities on matters relating to competition and consumer welfare through the establishment of a network of cooperation to facilitate coordination, share best practice, and promote procompetition reform.

Amendment of
section 18 of
Cap. 504.

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

Amendment of
section 23 of
Cap. 504.

6. Section 23 of the principal Act is amended—

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- (a) in subsection (1), by inserting the word “intermediates” immediately after the word “supplies” appearing in paragraph (a);
- (b) in subsection (2), by deleting the words “though not dominant” appearing in paragraph (a);
- (c) in subsection (2), by inserting the words “especially in the case of digital activities as per section 4 (2) (c)” immediately after the words “but has market power” appearing in paragraph (b).

Amendment of section 24A of Cap. 504.

7. The Principal Act is amended by deleting section 24A.

Amendment of section 31 of Cap. 504.

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

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

New

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

PART IIIA —SUPERIOR BARGAINING POSITION

Abuse of superior bargaining position.

40A. (1) A conduct that amounts to abuse of superior bargaining position in a market in Kenya, or a substantial part of Kenya, is prohibited.

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

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

- (a) monitor the activities of the sector or undertaking;
- (b) impose reporting and prudential requirements and regulations to ensure compliance; and

(c) develop a code of practice.

(4) The Authority shall publish the code of practice in subsection 3(c) which shall be developed in consultation with the relevant stakeholders.

(5) In determining the presence or absence of superior bargaining position, the Authority shall consider—

(a) the degree of dependence by the affected undertaking or undertakings on transactions with the party under investigation;

(b) the position of the undertaking in the market;

(c) the possibility of the affected undertaking to change its business counterpart;

(d) whether the party under investigation is an unavoidable trading partner or a critical business partner in the relevant market.

(6) The Authority will make this determination with reference to, among others, any existing agreement between the counterparties and any other factor that shows the affected undertaking needs to carry out transactions with the undertaking under investigation.

(7) For purposes of subsection (1), a conduct that amounts to superior bargaining position includes—

(a) delays in payment of suppliers without justifiable reason in breach of agreed terms of payment;

(b) unilateral termination or threats of termination of a commercial relationship without notice or on an unreasonably short notice period, and without a justifiable reason;

- (c) failing to provide the counterparty with terms, conditions or other rules associated with the transaction or service prior to the transaction or provision of the service;
- (d) unilateral variation of contractual terms, conditions, or other rules associated with the transaction or service without prior notification to the counterparties;
- (e) transfer of costs to a counterparty;
- (f) transfer of commercial risks meant to be borne by a party to the counterparty;
- (g) demands for preferential terms unfavourable to the counterparty;
- (h) imposing purchase prices below competitive levels or service fees above competitive levels;
- (i) unreasonable collection and/or processing of data of the counterparty;
- (j) imposing unduly difficult conditions for the termination of service; and
- (k) obstruction of business activities or interference in the counterpart's management of its business.

(8) In investigating an abuse of superior bargaining position complaint, the Authority shall be guided by any existing agreement, whether written or not, between the counter parties.

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

Amendment of
section 41 of
Cap 504.

10. Section 41 of the principal Act is amended in paragraph (h) by inserting the word “privatization” immediately after the word “takeover”.

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Amendment of
section 43 of
Cap 504.

11. The principal Act is amended in section 43 by inserting the following new subsection immediately after subsection (2) —

(3) The Authority may within fourteen days from the date of receipt of a notification of a proposed merger, invite the public to give information on the proposed merger.

Amendment of
section 55 of
Cap 504.

12. Section 55 of the principal Act is amended—

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

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

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

(vi) concerning any other information to the consumer.

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

(c) withholding material information on the quality and use of a product.

Amendment of
section 69 of
Cap 504.

13. Section 69 of the principal Act is amended in subsection (1) by deleting the word “Recognized” and substituting therefor the word “accredited”

Amendment of
section 70A of
504.

14. Section 70A of the principle Act is amended—

(a) in subsection (1), by deleting the word “complaint” and substituting therefor the word “consumer welfare issues”.

(b) in sub section (2), by deleting the word “complaints” and substituting therefor the word “consumer welfare issues”.

Amendment of
Section 89 of
504.

15. Section 89 of the principal Act is amended by—

(a) renumbering the existing provision as subsection (1);

(b) by adding the following new section

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(2) Any person who contravenes or fails to comply with a lawful order of the Authority given in terms of this Act will be liable to 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.

Repeal and replacement of section 92 of Cap. 504.

16. The principal Act is amended by repealing Section 92 and replacing therefor the following section—

Enforcement of orders.

92. (1) The Authority may issue a penalty notice to an undertaking to enforce an order of the Authority against the undertaking.

(2) If the specified date in a penalty notice has passed and —

(a) the period during which an appeal against the imposition, or amount, of the penalty may be made has expired without an appeal having been made, or

(b) such an appeal has been made and determined,

the Authority may make an *ex-parte* application to the Tribunal for an order to recover from a person, any amount payable under the penalty notice which remains outstanding.

(3) The Authority may enforce an order by—

(a) attachment and sale, or by sale without attachment, of any property;

(b) attachment of debts;

(c) appointing a receiver; or

(d) in such other manner as the nature of the relief granted may require:

MEMORANDUM OF OBJECTS AND REASONS

The principal object of the Bill is to amend the Competition Act, (Cap. 504).

Clause 2 of the Bill seeks to amend the Act to provide for the definition of terms used in technical sense but not defined.

Clause 3 of the Bill proposes to amend section 4 of the Act to include digital activities in the interpretation of expression and assessment of dominant position.

Clause 4 of the Bill further seeks to amend section 9 the Act to provide further functions of the Authority.

Clause 5 of the Bill seeks to amend the Act to align it with the proposed new part under section 40 on the abuse of a superior bargaining position.

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

Clause 7 of the Bill seeks to delete section 24A as the provision is moved to a proposed new Part on unfair market conduct.

Clause 8 of the Bill further proposes to amend to section 31 to add prohibitions on abuse of strategic market position and abuse of superior bargaining position

Clauses 9of the Bill seeks to amend section 40 to insert a new Part on abuse of superior bargaining power.

Clause 10 of the Bill seeks to amend section 41 to add mergers of institutions that have undergone privatization.

Clause 11 of the Bill further seeks to amend section 43 to provide for the role of the public mergers of undertakings.

Clause 12 of the Bill proposes to amend section 55 to streamline offences on false or misleading information and withholding of material information on products.

Clause 13 of the Bill proposes to amend section 69 to substitute the word recognize with the word accredited.

Clause 14 of the Bill proposes to amend section 70A to replace the word complaints with consumer welfare issues.

Clause 15 seeks to amend section 89 to provide for financial penalties.

Clause 16 of the Bill seeks to amend the Act by repealing section 92 and replacing with provisions on enforcement of decisions of the Authority.

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Section 2 of Cap. 504, which it is proposed to amend—

Interpretation

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

"person" includes a body corporate;

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

Section 9 of Cap. 504, which it is proposed to amend—

Functions of the Authority

(1) The functions of the Authority shall be to—

(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;

(g) carry out inquiries, studies and research into matters relating to competition and the protection of the interests of consumers;

Section 24A of Cap. 504, which it is proposed to amend—

23. Criteria for determining dominant position

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

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

(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

Section 24A of Cap. 504, which it is proposed to amend—

24A. Abuse of buyer power

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

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

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

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

(a) the nature and determination of contract terms between the concerned undertakings;

(b) the payment requested for access to infrastructure; and

(c) the price paid to suppliers.

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

(a) delays in payment of suppliers without justifiable reason in breach of agreed terms of payment;

- (b) unilateral termination or threats of termination of a commercial relationship without notice or on an unreasonably short notice period, and without an objectively justifiable reason;
 - (c) refusal to receive or return any goods or part thereof without justifiable reason in breach of the agreed contractual terms;
 - (d) transfer of costs or risks to suppliers of goods or services by imposing a requirement for the suppliers to fund the cost of a promotion of the goods or services;
 - (e) transfer of commercial risks meant to be borne by the buyer to the suppliers;
 - (f) demands for preferential terms unfavorable to the suppliers or demanding limitations on supplies to other buyers;
 - (g) reducing prices by a small but significant amount where there is difficulty in substitutability of alternative buyers or reducing prices below competitive levels; or
 - (h) bidding up prices of inputs by a buyer undertaking with the aim of excluding competitors from the market.
- (6) When investigating abuse of buyer power complaints, the Authority shall be guided by any existing agreement, whether written or not, between a buyer undertaking and supplier undertaking.
- (7) An agreement between a buyer undertaking and a supplier undertaking shall include—
- (a) the terms of payment;
 - (b) the payment date;
 - (c) the interest rate payable on late payment;
 - (d) the conditions for termination and variation of the contract with reasonable notice; and
 - (e) the mechanism for the resolution of disputes.
- (8) The Authority shall publish the code of practice which shall be developed in consultation with the relevant stakeholders, relevant Government agencies and the Attorney-General.
- (9) Any person who contravenes the provisions of subsection (1) commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding ten million shillings or to both.

Section 41 of Cap. 504, which it is proposed to amend—

Merger defined

- (2) A merger contemplated in subsection (1) may be achieved in any manner, including—
- (h) amalgamation, takeover or any other combination with the other undertaking.

Section 69 of Cap. 504, which it is proposed to amend—

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.

Section 70A of Cap. 504, which it is proposed to amend—

- (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.

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Section 89 of Cap. 504, which it is proposed to amend—

Failure to comply with order

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

Section 92 of Cap. 504, which it is proposed to amend—

Jurisdiction of magistrate's courts

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