



# CONSUMER PROTECTION GUIDELINES

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THE COMPETITION AUTHORITY OF KENYA

Revised December 2017

## Preface

The Competition Authority of Kenya is established under section 7 of the Competition Act No. 12 of 2010 (Act) and is charged with, inter alia, promoting and enforcing compliance with the Act. One of the objectives of the Act is to protect consumers from unfair and misleading market conduct. In order to effectively deliver on this mandate, the Act was amended in 2016, to include section 70 (A) which gives the Authority the power to not only initiate investigations into consumer violations on its own motion, but to also impose administrative remedies.

These Guidelines take into consideration emerging issues and international best practice and principles articulated in the United Nations Guidelines on Consumer Protection. Therefore, in furtherance of the aforementioned objective and in accordance with the powers conferred on the Authority under section 9(f) of the Act, the Authority hereby publishes these guidelines.

The Guidelines are intended to help suppliers or undertakings to comply with the Act. They will also be of use to legal representatives of undertakings, consumer bodies and consumers in understanding what commercial conduct is prohibited and the available rights and remedies under the Act. The Guidelines therefore sets out how the Act may apply in practice. They also provide clarity regarding investigations and redress of consumer violations as well as the enforcement of section 70(A) of the Act.

These Guidelines are not intended to be a substitute for the provisions on Consumer Welfare of the Competition Act or any subsidiary rules made thereto. The Guidelines do not have the force of law.

This set of Guidelines may from time to time be amended, as and when it is considered necessary.

# TABLE OF CONTENTS

PREFACE ..... 2

TABLE OF CONTENTS ..... 3

1.0 INTRODUCTION ..... 4

2.0 DEFINITIONS OF TERMS..... **Error! Bookmark not defined.**

3.0 FALSE AND MISLEADING REPRESENTATIONS ..... 6

4.0 UNCONSCIONABLE CONDUCT ..... 24

5.0 CONSUMER PRODUCT SAFETY STANDARDS, UNSAFE GOODS PRODUCT INFORMATION STANDARDS AND PRODUCT LIABILITY ..... 25

6.0 CONSUMER COMPLAINTS AND INFORMATION ..... **Error! Bookmark not defined.**

7.0 INVESTIGATION BY THE AUTHORITY..... **Error! Bookmark not defined.**

8.0 AVAILABLE REMEDIES AND RELIEF ..... **Error! Bookmark not defined.**

9.0 CHANGES TO THE GUIDELINES..... **Error! Bookmark not defined.**



## DEFINITIONS OF TERMS

*Act* refers to the Competition Act No.12 of 2010;

*Authority* means the Competition Authority of Kenya;

*Business* refers to retailers, sellers, distributors, suppliers or manufacturers engaged in commerce with consumers;

*Defect* refers to any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied, or as is claimed by the trader in any manner whatsoever in relation to any goods;

*Undue influence* means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision.

## A. INTRODUCTION

1. These Guidelines shall be known as the *Consumer Protection Guidelines*.
2. Article 46 of the Constitution of Kenya provides for the following Consumer rights:
  - i. Goods and services of reasonable quality;
  - ii. Information necessary to enable consumers gain full benefit from goods and services;
  - iii. Protection of consumer health, safety and economic interests; and
  - iv. Compensation for loss or injury arising from defects in goods or services.
3. Part VI of the Act, specifically, Sections 55 to 57, prohibits false or misleading representations, and unconscionable conduct by undertakings while Sections 58-64 of the Act ensures that consumers are compensated in case they suffer loss and injury as a result of: lack of information regarding particular goods; and supply of unsafe, unsuitable or defective goods.
4. Annexed to the Consumer Protection Guidelines is the Administrative Remedies Guidelines for Consumer Protection.
5. This Guideline covers false and misleading representations, unconscionable conduct, product safety standards and unsafe goods product information standards, and liability in respect of unsuitable goods and defective goods.

### Objectives of the Guidelines

6. The objectives of these Guidelines are to ensure promotion of consumer welfare through:
  - i. Providing for consistency, predictability, transparency and accountability in application of consumer protection principles;
  - ii. Encouraging the development a market environment which provides consumers with the greatest product choices while ensuring product safety and quality; and
  - iii. Promotion and protection of consumers' health, safety and economic interests.

### Scope

7. Generally, the Guidelines elucidate Part VI of the Act. It is notable that the Act applies to market conduct by suppliers or undertakings that affect consumers.
8. The Act applies to market conduct that occurs before, during and after a transaction, if any.

## B. CONSUMER INFRINGEMENTS UNDER THE ACT

9. In summary the Act applies to transactions which involve:-

- i. The marketing and promotion of goods and services;
- ii. The supply of goods;
- iii. The performance of services; and
- iv. Any other transaction (such as e-commerce transactions) or agreement entered into with a consumer for the supply of goods or performance of services.

10. Section 70A of the Act empowers the Authority to initiate investigations on its own motion or upon receipt of a complaint. provides that:

11. Further, section 70A provides that 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.

12. Part VI of the Act provides for the following:

- i. False or misleading representations;
- ii. Unconscionable conduct against consumers and business transactions;
- iii. Product safety standards and unsafe goods,;
- iv. Product information standards;
- v. Liability in respect of unsuitable goods and defective goods.

### False and Misleading Representations

13. A representation is a statement of account, assertion of facts, declaration, depiction, explanation, illustration, indication, narration, narrative, portraiture, portrayal, presentation, report, setting forth. It should be noted that a statement may be express or implied.

14. According to section 55 of the Act, it is unlawful to make false or misleading representations about products and services when supplying, offering to supply or promoting those products or services. For instance, a business must not make false or misleading representations about:

- i. the standard, quality, value or grade of products or services
- ii. the composition style, model or history of products
- iii. whether the products are new
- iv. a particular person agreeing to acquire products or services
- v. testimonials by any person relating to products or services

- vi. the sponsorship, approval, performance characteristics, accessories, benefits and uses of products or services
  - vii. the price of products or services
  - viii. the availability of repair facilities or spare parts
  - ix. the place of origin of a product - for example, where it was made or assembled
  - x. a buyer's need for the products or services
  - xi. any exclusion, guarantee, warranty or condition on the products or services.
15. Any statement representing a supplier's products or services should be true, accurate and able to be substantiated. It is a violation of the Act for a supplier to make statements that are incorrect or likely to create a false impression, whether intentional or not. This includes advertisements or statements in any media (print, radio, television, social media and online) or on product packaging, and any statement made by a person representing a supplier's business.
16. Whether a representation is considered false or misleading will depend on the circumstances of each case, and what misleads one group of consumers may not necessarily mislead others. It should be noted that a representation can be misleading even if it is partly true.
17. Business practices that have been found to be misleading include false oral or written representations, misleading price claims, sales of hazardous or systematically defective products or services without adequate disclosures, failure to disclose information regarding pyramid sales, use of bait and switch techniques, subscription traps, failure to perform promised services, and failure to meet warranty obligations.

## **Forms of false or misleading Representations**

### **Direct or express representations or statements**

18. These involve written or oral misrepresentations of material information. They may also occur in other forms of conduct associated with a sales transaction. The entire advertisement, transaction or course of dealing will be considered.

### **Conduct of the Business or Supplier**

19. Conduct that affects the consumer's impression of a good or service. Conduct in this regard includes actions and statements, such as: advertisements, promotions, quotations and any other representation made by a person.

20. When deciding if conduct is misleading or deceptive, or likely to mislead or deceive, the Authority will look at whether the overall impression created by the conduct is false or inaccurate.
21. Additionally, whether the conduct is false or misleading will depend on the particular circumstances of the case. This means that all relevant circumstances will be taken into consideration, such as the entire advertisement, the medium in which the advertisement appeared (for example TV, radio, and internet), product packaging, and any statements (or silence) made by a sales representative relating to the product. Fine print, contradictory statements and images that obscure or alter written statements are also taken into account.
22. Further, whether or not conduct is misleading or deceptive will be considered within the context of the class of consumers who are likely to be affected by the conduct. For example, people concerned about their body image may be more vulnerable to products claiming to enhance beauty. Whether a representation about a beauty product was misleading would depend on whether it might mislead a reasonable person within this group.

### **Implied representations**

23. A false or misleading representation may be express or implied. The implied representation may be by conduct for example;
  - i. paying by cheque is a representation that the bank will honour the cheque; and
  - ii. display of a product with a price mounted on a tag is a representation that the product is on sale.

### **Silence where a business fails to disclose certain relevant information**

24. Businesses or suppliers must not keep silent about important facts regarding their goods or services. They must give consumers enough information to make an informed choice. Silence can be false or misleading when:
  - i. one person fails to alert another to facts known only to them, and the facts are relevant to the decision;
  - ii. important details a person should know are not conveyed to them; or
  - iii. a change in circumstance meant information already provided was incorrect. Whether silence is misleading or deceptive will depend on the circumstances of each case.

**For Example:**

- A transport company gives the impression that it takes freight by air, but it actually sends it by road.
- A mobile phone seller offers free weekend calls, but does not indicate that the offer excludes calls to other networks.
- A business places a job advertisement in the newspaper, but does not specify that the job is commission-based.
- A store advertises a sale as '25% discount on everything', but still excludes certain items from the sale.

**Omission of relevant information**

25. Failing to disclose relevant information. In most cases, businesses cannot rely on small print and disclaimers as an excuse for misleading or deceptive conduct. A limited exception applies to businesses (mostly media outlets) who make representations in certain circumstances in the course of carrying on a business of providing information.

**For example**

- Failing to disclose or indicate the expiry date on a product.
- Failing to indicate the list of ingredients in a product.
- Failing to disclose fees and charges for financial services conducted through bricks and mortar methods (e.g. at branch level) or through digital means (e.g. through mobile phone)
- Unfair terms and conditions (to be analyzed on a case to case basis)

## **False or misleading conduct in relation to specific aspects of a product or service**

### **False or misleading relating to quality of products**

26. Suppliers must not engage in conduct likely to mislead the public about the nature, manufacturing process, product composition, characteristics, and suitability for purpose or the quantity of any goods or services.

**For example:**

- An importer sells motorcycle helmets that do not meet a mandatory safety standard but have with labels indicating that they meet the safety standard.
- A manufacturer sold socks, which were not pure cotton, but were labelled as 'pure cotton'
- A claim that bread is made from wholemeal grain while it is not.
- Bread indicated as 500g but upon measurement the actual weight is 400g

27. False and misleading representations on quality may also be considered in relation alteration of odometer or mileage in case of motor vehicle purchases. Tampering with or knowingly misrepresenting the mileage, and when done with an intent to defraud, is a violation of section 55 of the Act. Forms of misrepresentation regarding odometer or mileage include:

- i. Disconnecting, resetting or replacing the odometer with intent to change the mileage reading.
- ii. Selling a vehicle with a nonfunctional odometer with intent to defraud.
- iii. Advertising, selling, using or installing a device that causes an odometer to register incorrectly.
- iv. Knowingly falsifying an odometer mileage disclosure on the inspection certificate.
- v. Failing to attach a written notice of odometer replacement to the left door frame of the vehicle, or removing or altering such a notice.

### **False or misleading representations relating to price of Products**

28. A supplier should not make false or misleading representations on the price of goods. Price information must be unambiguous, legible and identifiable.

29. When presenting prices of their products to consumers, suppliers/businesses must state or disclose the total price of the good or service as a single figure. This should include any tax, duty, fee, levy or other additional charges. However, the suppliers/businesses do not need to

include optional charges or extras or delivery charges, unless they are aware of a minimum delivery charge that must be paid, in which case the suppliers/businesses can choose whether to include it in the total price or as a separate component.

### **Price display**

30. Prices displayed by a business must be clear, accurate and not misleading to consumers. This enables the consumer to make an informed decision and compare prices. Businesses should always display the total price of a good or service and in some specific cases such as in grocery retailers, also display unit pricing on their shelf labels.
31. If the business is promoting a price that is only part of the total price, the total price must also be displayed at least as prominently as the part price. This means that consumers should be able to identify the total price in the advertisement relating to the good/service being sold and the price of other components that are necessary to enable the consumer to make an informed choice.

### **Price indication on the product**

32. Price indication promotes consumer information and facilitates price comparison. Suppliers should therefore ensure that they indicate prices on their products or services. Suppliers/businesses should indicate the selling price in terms of price per unit on products they offer to consumers other than those sold in bulk. For example in case a business sells diapers in units, it must indicate the price for each unit and also the price in bulk.

### **Price comparisons**

33. Suppliers often make comparisons between product prices being charged and the company's previous pricing (including 'was/now' pricing or by specifying a particular Shillings amount or percentage saving).
  - i. Statements such as 'Was KShs. '100'/Now Kshs. '90' or 'Kshs. '100' Now Kshs. 90' are likely to be misleading if products have not been sold at the specified 'before' prices (i.e. Kshs 100) in a reasonable period immediately before the sale commences. For example a retailer placed a label on garments showing a sale price (e.g Kshs 150) and a higher, crossed-out price ( Kshs 200~~Kshs 2,000~~). However, the garments had never been sold for the higher price ( Kshs. 200). This conduct is intended to mislead consumers that there was an actual discount, but there was none.
  - ii. Similar considerations apply to the specification of shilling amount or percentage savings such as 60% discount.

34. Other price comparisons include the Recommended Retail Price (RRP). Depending on individual circumstances, businesses using statements such as 'savings' or 'discounts' when comparing a sale price to the recommended retail price (RRP) may be misrepresenting potential savings if the product has never been sold at the RRP or the RRP does not reflect a current market price.
35. Price comparison statements are also likely to be misleading if only a limited proportion of a product's sales were at the higher price in the period immediately before the sale commences. The volume or proportion of sales that may result in such statements being misleading will depend on the circumstances of each case. The length of the period will depend on factors such as: the type of product or market involved and the usual frequency of price changes.
36. If a business has a policy or practice of discounting goods when not on sale and uses two-price advertising in relation to sale periods, there is a significant risk that the use of two-price advertising will involve conduct that is misleading. The business would be representing to consumers that they will make a particular saving if they purchase the item during the sale period, when this is not necessarily the case. For example, designer jeans price indicating 'ksh 500' during ordinary sales but during the sale period indicating the price as 'special price at only Kshs 1000 but with a 50% discount'.
37. In view of the foregoing, businesses that use price comparison statements must ensure that consumers are not misled about the savings that may be achieved.

### **False or misleading representations relating to place of origin**

38. Place of origin claims or markings on a product affects consumers' evaluation of product and ultimately affects the purchasing decision. Place of origin claims are popular with suppliers because there is often an expectation that consumers will pay more for the quality associated with local products or products from certain countries. Generally consumers will understand that any origin claims will relate to the main product and not to ancillary items or packaging, unless a contrary intention is clear.
39. Place of origin claims include:
  - a) **'Made in' claims**
40. For a business to claim goods are 'made in' a particular country the goods must be *substantially transformed* in that country, To substantially transform a product means the product undergoes a fundamental change in the country represented.

**b) 'Product of' claims**

41. For a business to claim goods are 'produced in', 'produce of' or 'product of' a particular country:
- i. All or virtually all of the production or manufacturing processes must happen in that country, and
  - ii. All of the significant ingredients or components must come from that country.
42. An ingredient or component does not have to be a certain percentage to be 'significant'.

**For example:**

An apple and cranberry juice bottle can carry a 'produce of Kenya' label only if both juices are from Kenya. Even though the cranberry juice is about five per cent of the total volume, it is 'significant' to the product and the label would be misleading if the cranberry juice was imported. The final product may contain an imported preservative and still be 'produce of Kenya'; the cranberry juice is 'significant', the preservative is not.

**c) Claims of origin based on use of a prescribed logo**

43. If a business labels a product with a prescribed logo the goods must:
- a. Pass the substantial transformation test; and
  - b. Meets the prescribed percentage of production or manufacturing costs that apply for that logo.

**d) 'Grown in' claims**

44. A business can lawfully claim goods are 'grown in' a particular country when:
- a. At least 50 per cent of the total weight comprises ingredients or components grown and processed in that country;
  - b. Virtually all production or manufacturing processes was carried out in that country; and
  - c. Each significant ingredient or significant component was grown and processed only in that country. An ingredient or component does not have to be a certain percentage to be 'significant'.

**e) Certification trade marks**

45. The country of origin of a good may also be represented by use of a certification trademark, such as; the KEBS logo relating to the 'Kenyan Made, Kenyan Grown'. The KEBS logo and

other certification trademarks may only be used by businesses licensed by the owner of the mark.

### **False or misleading representations relating to exclusions, effect of any conditions, guarantees and warranties**

46. It is unlawful to make false or misleading representations about the existence, exclusion or effect of any condition, warranty, guarantee right or remedy, including consumer guarantees.

**For example:**

An individual, business or supplier operating an online electronics store makes false or misleading representations to consumers about the availability of refunds and the extent of its liability for faulty goods.

The representations may include that consumers are not entitled to a refund, repair, or replacement for goods in various circumstances, such as where the goods are no longer under an express warranty, where the goods are used or are not in their original packaging, or unless a claim is made within a specified time period

47. A Business dealing with goods generally guarantee that goods are of acceptable quality and match a specific description. They also guarantee that any express warranties will be honored.

48. A business guarantees that a consumer is buying goods;

- a. That have clear title, unless otherwise stated; sanctity of title
- b. That do not have undisclosed securities;
- c. That are fit for any disclosed purpose;
- d. With a right to peaceful possession;
- e. That match sample or demonstration model;

49. A business guarantees that services are provided;

- a. With due care and skill;
- b. Which are fit for the specified purpose;
- c. Within a reasonable time (when no time is set); and
- d. Guarantees goods that have readily available spare parts.

## **Wrongly accepting payment for goods or services**

50. Businesses or suppliers must not accept payment for goods or services:

- if they do not intend to supply them
- if they intend to supply materially different goods or services
- if they knew, or should have known, they would not be able to supply the goods or services in a timely manner

## **False or misleading representations relating to Promotional competition including prize giveaways, promotions or sponsorships**

51. Promotional competition is any competition, game, scheme, arrangement or scheme for distributing prizes either by lot or chance regardless of any skill, conducted in the course of a business to promote its services and goods.

52. Where a business engages in promotional competitions, it is required to provide information on; the prize to be won, how to participate in the competition, how the winners will be chosen and how they will be informed of the results of the competition, the closing date how the prize can be redeemed if won, the dispute resolution mechanism for any dispute arising from the competition.

53. If a supplier gives away free items or prizes as a promotional activity, it must not mislead its audience about the items on offer or the chances of receiving these items. If there is a catch (for example, if people must meet certain conditions to claim a prize), it must disclose from the outset of the promotion.

54. Promotional offers includes any offer of a prize, reward, gift, free good or services, price reduction or discount, upgrade in quantity or quality of goods and services. It is unlawful to offer promotional offers without intending to provide them or not providing them as offered.

55. If a business offers a promotion it must include the minimum requirements relating to:

- i. What the offer entails;
- ii. The goods and services to which it relates;
- iii. Steps required by a consumer to accept the offer or to receive the benefit of the offer;
- iv. The person from whom and the place where the consumer can receive the benefit of the offer; and
- v. dispute resolution mechanisms in case of any dispute arising from the promotion.

## Misleading advertising

56. Misleading advertisement is a published claim that gives a consumer false representation of the product or service. Misleading advertising is advertising that which in any way, including in its representations is capable of:

- i. Deceiving the persons to whom it is addressed;
- ii. Distorting their economic behavior; or
- iii. As a consequence, harming the interests of the consumers.

### For example

- A business advertises on an online platform that a hand bag or shoes are made of 100% leather, which is false, and a consumer buys the handbag or shoes in the belief that it is made of 100% leather because of the advertisement.
- Misleading labels on products such as edible oils, beauty products etc. stating that they contain certain ingredients such as minerals, which upon testing is found not to be true

## Comparative advertising

57. Comparative advertising is used by businesses to differentiate between similar products in the market to grant them a competitive edge over rivals.

58. Businesses are allowed to compare goods and services in other markets on price, quality etc. as long as those comparisons are not false or misleading and appropriately compare the products.

However, when making a comparative advertising, businesses must:

- i. relate to goods or services which meet the same needs or are intended for the same purpose;
  - ii. relate to products with the same designation of origin;
  - iii. deal objectively with the material, relevant, verifiable and representative features of those goods or services, which may include price;
  - iv. avoid creating confusion between traders, and should not discredit, imitate or take advantage of the trade mark or trade names of a competitor.
59. Comparative advertising may involve generalized superiority claims, performance test and demonstrations. When making generalized superiority claims, such a claim should be accurate and if any conditions exist, they must be provided. When making comparative

advertisement using demonstrations, the relative effectiveness of the competing products should be shown under equivalent conditions.

**For example:**

A claim that a certain washing detergent is better than another must be demonstrated under the same conditions for example using the same stains on same quality or type of material.

### **Bait advertising**

60. Bait advertising occurs when a business advertises a certain good or services to consumers but the business does not have sufficient stock to last until the end of the sale. The business then lures the consumer to buy or access a more expensive good or service. It is an unethical technique which lures or deceives the consumer, and once lured the business changes the scheme by providing a different or more expensive product instead.

**For example:**

- A business advertises low price products to attract the attention of the consumers into their stores, but once in they are induced to buy the same goods at a higher price on the pretext that the advertised goods are sold out.
- A business offers a free accessory to sell a popular product to attract consumers in the store also known as 'while supplies last'. However when the majority of the consumers get into the stores, the supplies are limited and gone. In this scenario, the business offers to sell the accessory to the consumer instead.

61. In order to avoid bait advertising consumers must read the fine print of the advertisement. For example a business may advertise that if you buy a certain car you will win yourself a TV without disclosing which type of TV. A consumer believing that the TV is of a certain make may be misled to enter into the agreement.

### **Self-Evident Exaggeration/Puffery**

62. Most audiences have some experience with sales presentations and advertising. They know that some of what they hear, read or see is designed to convince them to buy a product or service. They know that some of those representations are exaggerations or meaningless generalities and in this case they are not actionable under the Act.

**For example:**

‘The most beautiful luscious hair’ or ‘tastiest food this side of Nairobi’, because what is the most beautiful or tastiest is clearly ‘in the mind of the beholder’

63. However, some self-evident exaggerations are actionable.

**For example:**

‘The widest mobile coverage in Kenya’ or ‘the cheapest petrol price in Nairobi’ are not self-evident exaggeration because they concern tangible claim and quantifiable information.

### **Testimonials, endorsement and referrals**

64. It is unlawful to make false or misleading testimonials. Testimonials are statements from previous and/or current customers about their experience with a product or service.

65. These can give or increase consumers’ confidence in a product or service on the basis that another person, particularly a celebrity or famous person, is satisfied with the goods or services. Genuine customer reviews and testimonials also provide valuable independent information about a product or service. However, false testimonials may persuade consumers to make the wrong choices.

66. Any information that is likely to affect purchasing decision of a product or service must be disclosed. Misleading representations can persuade customers to buy something to their detriment based on belief in the testimonial.

67. Testimonials may appear, among others:

- i. on a business’ website
- ii. on independent review websites or forums
- iii. commercials
- iv. in marketing emails
- v. in newspapers.

68. Examples of Businesses which commonly rely on testimonials include: alternative health care businesses, restaurants, weight loss service providers, hotels and estate agents.

## Disclaimers and fine print

69. Disclaimers and fine print must be used with great caution because their inappropriate use can be misleading. Any disclaimers must:

- i. be prominent and visible
- ii. be readily apparent when the main representation is seen, heard or read
- iii. not be obscured by images, graphics or text
- iv. not undermine or contradict the main offer.

70. Businesses are required to give all the important facts about goods or services and should not hide them in the fine print. It should be noted that a person or corporation cannot simply rely on a disclaimer or exclusion clause to avoid liability for a false or misleading conduct claim. However, in some circumstances, an express disclaimer that is prominently displayed such that it forms part of the overall message may operate to render accurate a statement or conduct which would otherwise be misleading or deceptive.

71. A disclaimer may be misleading if:

- i. It purports to significantly and unexpectedly negate the main representations in a contract;
- ii. The disclaimer, or its existence, is not readily apparent when the main representation is seen, heard or read;
- iii. A disclaimer is simply part of the overall impression created. Therefore, it can only be considered if it is an express disclaimer that is prominently displayed such that it forms part of the overall message.
- iv. The inappropriate use of fine print can be misleading if significant qualifications to the main representation are in fine print. This may not modify the impression created by the unqualified representation. Like disclaimers generally, fine print should not be used to negate or undo the main representation. What constitutes fine print will depend upon its placement and readability by the actual audience;
- v. Contractual terms that purport to exclude any representations outside of the contract may be ineffectual in correcting previously made misrepresentations if the overall effect is still misleading. The misrepresentation related to the effect of that contractual term; and the contractual term was unclear, hidden or not reasonably apparent to the consumer.

## Other claims that may mislead consumers

### “Free from” Claims

72. A “free-from” claim is an absolute claim unless a regulatory threshold has been set and should only be used following a rigorous assessment of the ingredients, process and environment.

#### Examples of ‘free from claim’:

- Free from Sulphur dioxide and Sulphites
- Free from Lactose
- Free from cholesterol
- Free from Gluten

73. A “free-from” claim stating the absence of a specific food allergen in any food, including prepacked and non-prepacked food (e.g. food sold loose or a menu item), must be relevant and based on a comprehensive risk assessment accompanied by rigorous controls (which may include analytical testing) to ensure that the claim is valid and not misleading. It is important that good manufacturing and/or handling practices are observed at all times with regard to the production and serving of these specialised foods.

74. A “free-from” means a complete absence of the specified allergen in the product. However, in practice it is the scientific demonstration on an ongoing basis that the specified allergen in the food product is at a level that ensures safety and takes into account the analytical limit of detection for a recognised and accepted laboratory test method. The focus is on limits for precautionary allergen labelling, rather than “free from”.

75. To make a “free-from” claim the following principles should be followed:

- i) The product recipe does not use any ingredients or compound ingredients (including additives and processing aids) containing the specified “free-from” allergen;
- ii) The product is made in an environment (e.g. a factory or catering facility) strictly following Good Manufacturing Practices and allergen management practices;
- iii) A robust sampling and testing programme (using a fully validated analytical method) suitable for the specified allergen must be in place; and
- iv) The communication of a “free-from” claim to consumers, including labelling, of the product must comply with the relevant legal requirements such as Standards developed by Kenya Bureau of Standards. For catering in particular, since foods will



be provided in a non-prepacked format, effective communication practices (between consumer and the supplier) are imperative.

### **Environmental claims**

76. Purchasers are influenced by environmental claims, for example use of the terms 'green' or 'environment friendly'. Because many of these terms do not have exact meanings and are difficult for consumers to check, suppliers must exercise caution when using such terms.

### **Health and nutritional claims**

77. Suppliers need to be very careful when making representations about the health and nutritional benefits of their products or services because many consumers are influenced by such claims. Extra care needs to be taken in respect of:

- i. Claims with regard to the treatment or cure of serious or chronic diseases such as cancer, HIV, arthritis, sexual dysfunction or hair loss.
- ii. Vulnerable audiences such as those suffering from serious or chronic diseases or injuries, the elderly or uneducated.
- iii. Products that have not been registered as therapeutic products with appropriate government agencies, including traditional or herbal products.

### **Exceptions for Information providers**

78. Information providers are exempt from liability for false or misleading representations. Information providers' include media organizations such as: radio stations, television stations and publishers of newspapers or magazines (including online). However, this exemption does not apply to:

- i. conduct or representations about employment matters
- ii. supply of products or services by the information provider
- iii. Publication of advertisements.

### **Publishing and advertising**

79. Information providers and other businesses may not be responsible for publishing a false or misleading advertisement if they can prove that they:

- i. are in the business of publishing or arranging for the publication of advertisements
- ii. received the advertisement for publication in the ordinary course of this business, and

- iii. did not know, and had no reason to suspect, that the advertisement was false or misleading.

### **Assessment of False or Misleading Conduct**

80. Whether a conduct is false and misleading or not, is a question of fact to be determined by the Authority. In determining whether a representation is false or misleading, the Authority shall take into consideration the existence of compelling evidence that the undertaking knowingly and carelessly made the false or misleading representation to the public.
81. In determining whether a representation is false or misleading, the Authority shall look at the general impression it conveys to a consumer including its literal meaning. A representation can be misleading even if it is literally correct, that is, the statement can be misleading where the 'general impression' is false.

#### **For Example:**

An advertisement promotes a blanket for Kshs 350, but the advert does not mention that it is a factory reject. This advert would be misleading because a consumer could be left to believe that the advertiser was selling good quality merchandise when it was low quality merchandise that was being advertised

82. The Authority will adopt an objective test to decide whether conduct or representations are false or misleading (. The test is whether, when viewed objectively and in the context of all of the circumstances, the conduct in question has misled or deceived or is likely to mislead or deceive reasonable members of the class of consumers to whom the conduct is directed. In this regard, the Authority will consider the following elements:
  - i. there must be a representation, omission or practice that is likely to mislead the consumer. The issue is whether the act or practice is likely to mislead, rather than whether it causes actual deception. Further, the Authority will assess whether the overall impression created by the statement or quotation creates a false impression to the consumer. If it does, then the conduct is likely to be a breach the Act.
  - ii. the Authority shall examine the practice from the perspective of a consumer acting reasonably in the circumstances. If the representation or practice affects or is directed primarily to a particular group, the Authority will examine reasonableness from the perspective of that group.
  - iii. the representation, omission, or practice must be a "material" one. The basic question is whether the act or practice is likely to affect the consumer's conduct or

decision with regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently if there was no misrepresentation. In many instances, materiality, and hence injury, can be presumed from the nature of the practice. In other instances, evidence of materiality may be necessary.

83. In regard to allergens, when evaluating ‘free-from’ claims or statement, to determine whether they may be false or misleading to consumers, the Authority will consider the following:

- i) Does the product contain the specified allergen as a deliberate ingredient or as part of a compound ingredient? If yes, then a free from claim would be false and misleading;
- ii) Can the business or its suppliers substantiate the “free-from” status of their raw materials, ingredients (including additives and processing aids) and finished products? If no, then the manufacturer should not use a free from claim as it would be misleading;
- iii) Is the specified allergen used in the manufacturing/catering environment (e.g. elsewhere in a factory, or handling areas within a kitchen)? If yes, the manufacturer should not use the free from claim;
- iv) Is the risk of cross-contamination of the specified allergen strictly controlled? If no, the manufacturer cannot use a free from claim. Use of such claim would be misleading to the consumers or class of consumers;
- v) Whether the manufacturer has considered the role of a robust sampling & testing programme as part of verifying their allergen controls? And especially where there is a risk of contamination or the specified allergen is used in the manufacturing/catering environment. If no, the manufacturer cannot use a free-from claim as it would be misleading; and
- vi) Where testing has been carried out, the question is whether the specified allergen is undetectable? If the test indicates that the level of allergen is above any limit prescribed in a mandatory Standard For instance, if the allergen is gluten the prescribed limit is 20ppm as specified by the KEBs Standard for use of Gluten-free claim.

## C. UNCONSCIONABLE CONDUCT

84. Unconscionable conduct is generally understood to mean a statement or an act which is particularly unreasonable, that it goes against good conscience.
85. In accordance with section 56 and 57 of the Act, businesses must not engage in unconscionable conduct, when dealing with consumers, or another business respectively.

### **For example:**

The relationship or dealings between a creditor and a debtor is one that could assume characteristics of unconscionable conduct. This is because the collector is often in a position of bargaining strength and can exert pressure or unfair tactics over a debtor.

86. Transactions or dealings therefore, may be termed to be unconscionable when they are deliberate, involve serious misconduct or involve conduct which is clearly unfair and unreasonable.
87. Further, pursuant to section 56(2) and 57 (2) of the Act, there are a number of factors the Authority will consider when assessing whether conduct in relation to the selling or supplying of goods and services to a customer, or to the supplying or acquiring of goods or services to or from a business, is unconscionable.

### **For Example- Bancassurance**

A consumer applies for a loan at a bank to purchase a motor vehicle and is told that she/he qualifies for the loan. The Bank also indicates to the customer that one of the conditions is that they must insure the vehicle with the Bank's inhouse or affiliated insurance agency. However, the premium at the Bank's agency may be higher than what is offered by other insurance agencies. The customer is left without choice, but to abide with the Bank's condition.

88. Additionally, business should be transparent in terms of levying or imposition of charges and fees to consumers during business transactions. In accordance with section 56 (3) of the Act, a business involved in the provision of banking, micro-finance and insurance and other services is prohibited from imposing unilateral charges and fees of whatever nature or name without first exposing them to the consumer before the provision of the service or levying of such fees and charges.
89. In view of the above, other services include; medical, transport, maintenance, repair, cleaning, internet, transmission and any other kind of service of the manner offered to consumers, in this case a natural person or business consumer.
90. While businesses are not obliged to negotiate or to agree to terms that they do not want, unconscionable conduct is less likely where contracts are the result of genuine negotiation. Unconscionable conduct is more likely where consumers or small businesses are presented with standard form contracts and no real opportunity to negotiate, at least some terms, is allowed;
91. Where a claim is made that certain firm conduct is unconscionable, it must be shown with success that there was inequality in the position of the parties due to ignorance, need or distress of the weaker party which would have him in the power of the stronger party, coupled with proof of substantial unfairness in the bargain. When it has been shown, a presumption of fraud is raised and the stronger party must show the inverse in order to prove his conduct was fair and reasonable.

#### **D. PRODUCT SAFETY STANDARDS, UNSAFE GOODS AND PRODUCT LIABILITY**

92. Consumers have a right to the protection of their health and safety. In this regard a supplier has primary responsibility for the supply of safe consumer products in Kenya. There will often be more than one supplier responsible for a particular product. Each entity in the supply chain is responsible for assessing and (if necessary) rectifying potential safety hazards presented by the consumer products that they supply.
93. All suppliers in the supply chain should also be able to demonstrate due diligence in the procurement and supply of those consumer goods. The responsibility to ensure consumer goods are safe and fit for purpose may not be discharged to other parties in the supply chain, whether they be domestic or overseas manufacturers, suppliers or distributors.

94. Under Section 59 of the Act, it is unlawful for a business or supplier to sell banned goods and goods that do not comply with consumer product safety standards before they are offered for sale. Additionally, suppliers are prohibited from selling goods which have been declared unsafe by a Notice publicized by the Authority in accordance with section 58 of the Act.
95. Further, the Authority deems it an offense where a supplier or business supplies goods that do not comply with a prescribed consumer safety standard or goods that have been declared unsafe or banned via a Notice, and the consumer suffers loss or damage by reason of the defect or dangerous characteristic of the goods or by not having particular information regarding the characteristic of the good.
96. An unsafe product may result from a manufacturing or production error—that is, where the manufacturer of the product deviated from its design or material specifications during production. An unsafe product may also result from a design defect - that is, a product may be unsafe even if the product is manufactured exactly in accordance with its design specifications. A design defect may also be implicated if the risk of injury results from the operation of the product, the reasonably foreseeable misuse of the product, or the failure of the product to operate as intended.
97. The range of goods covered under the Act (and to which the product safety requirements apply) is broad and covers any product that is put to personal, domestic or household use. Goods that are monitored by other specialist Government Agencies or Sector regulators such as Kenya Bureau of Standards (KEBS) also fall within the jurisdiction of the Authority.
98. However, as a matter of administration and in recognition of the mandate and specialist expertise of those agencies, goods regulated by specialist Government agencies or Sector regulators are not normally subject to direct action under the Authority. The Authority in this regard collaborates with the specific specialized agency in accordance with sections 67 and 68 of the Act.
99. Further, in certain circumstances, the Authority becomes involved in specialist matters when a regulator’s powers are insufficient to satisfactorily address safety issues. In addition, the breadth of the definition of consumer goods under the Act allows the Authority to act as a ‘safety net’ and ensure that there are no gaps in the regulatory coverage.

## **Detection of unsafe products**

100. A safety-related hazard relating to goods may be identified by a number of different means, including:

- i. detection by the supplier undertaking a recall or by another supplier within the supply chain
- ii. a complaint from a consumer
- iii. detection by an industry body or consumer organisation
- iv. detection by the Authority, another specialist government agency or sector regulator.

101. Where the Authority detects or becomes aware of unsafe goods or a safety-related hazard, it will attempt to identify the supplier at the highest level in the supply chain in order to assist in ensuring that all relevant stakeholders, including overseas entities, are identified and advised of the safety hazard relating to the product.

102. In order to protect consumers from harm or injury arising from unsafe products or products that do not comply with prescribed product safety standards, the Act mandates the Authority to issue safety warning notices, banning products on a temporary or permanent basis, imposing mandatory safety standards or issuing a compulsory recall notice to suppliers

## **Warning Notice**

103. If the Authority has reasonable grounds to believe that a product or products may or will cause injury to the consumer, and initiates or intends to initiate investigations in this regard, it may issue a safety warning notice to the public in accordance to section 58 of the Act, warning them on the possible risks involved in use of the product.

## **Notice on Findings**

104. In accordance with section 58(2) of the Act, after conclusion of the investigations relating to unsafe goods, the Authority shall publish a Notice in at least one daily newspaper, announcing the results of the investigations, and the proposed action if any, to be taken in relation to the goods.

## **Unsafe Goods Notice**

105. As stipulated under section 59 (1) (b) of the Act, the Authority by a Notice may declare goods to be unsafe goods. However, before making such a declaration, on the grounds of reasonably foreseeable use, the Authority shall take all circumstances into account including:



- i. how likely it will be that a person is injured
- ii. how serious any resulting injury is likely to be
- iii. how often injury is likely to happen
- iv. what steps a manufacturer or supplier has taken to minimize the risk of injury
- v. whether making a declaration is in the public interest

106. Unsafe Goods Notices may last for a period until it is determined that the supplier has undertaken the necessary steps to rectify the situation and to prevent future misconduct on the same. In making an Unsafe Goods Notice permanent the Authority shall consult with those people who will be substantially affected and consider their feedback.

### **Bans**

107. If any products are subject to a ban, business(es) must not sell them. A ban on a product-related service makes it unlawful for anyone, in trade or commerce, to supply or offer to supply that service.

108. Bans can be placed on products and product-related services if there is a risk that they may cause serious injury, illness or death. There are various kinds of bans that may be imposed on products. These include: interim and permanent bans.

### **Interim bans**

109. The Authority can impose an interim ban on products or product-related services if they consider:

- i. the product will or may injure someone
- ii. as a result of the service being supplied, the product will or may injure someone
- iii. using or misusing the product, or the product to which the service related, in a 'reasonably foreseeable' way will or may injure someone
- iv. another government agency or sector regulators has imposed an interim ban on the product or service, which is still in force.

110. Interim bans imposed by the Authority apply nationally. In this regard, suppliers are to be notified and given an opportunity to be heard in accordance with section 61(3) of the Act before the ban is imposed, unless the Authority determines that there is impending danger to the public.

**For example**

Where people are dying of food poisoning from consumption of contaminated bottled water or juice. In this case, suppliers will be notified and have an opportunity to be heard at the time, or shortly after the ban is imposed

111. The Authority shall act in accordance with the following procedure before a temporary ban is issued:

- i. The Authority establishes a prima facie case against the manufacturer, business or supplier;
- ii. The Authority has communicated to the parties that may be affected by the said notice in writing of the proposed decision; and
- iii. The Authority afforded the parties reasonable time to make representations whether orally and/or in writing regarding the proposed actions.

112. Interim bans are notified to the public via a Notice by the Authority in accordance with section 58 of the Act and may last for 90 days unless extended and may be extended for up to another 90 days if reasonably necessary, especially to allow for conclusion of investigations.

113. The declaration of a temporary ban provides a 'breathing period' during which there should be no further harm, allowing the Authority (and other relevant parties) to finalize on investigations. Depending on the outcome of the investigation, the Authority may:

- i. Revoke the temporary ban that had been issued or
- ii. Declare a permanent ban on the product.

**Permanent bans**

114. Pursuant to section 59 of the Act, the Authority has the power to declare a permanent ban on a product or product-related service. The Authority may also delegate this function to specialized agencies of the government, as envisaged in sections 58, 67 and 68 of the Act.

115. If the Authority proposes to impose a permanent ban, it shall invite affected suppliers to request an opportunity to make written or oral representations or both. If there is an imminent risk of death or injury from the unsafe product, a ban can be imposed immediately and suppliers given a fair opportunity to be heard.

116. A permanent ban is most likely to be considered when:

- i. It is uneconomical or impractical to modify the product to remove the hazard, and

- ii. Reliance on voluntary withdrawal of the product from the market is unlikely to be a viable long term solution
117. It is a criminal offence to supply a product that is subject to either a temporary or permanent ban.

### **Complying with bans**

118. If a product or product related service has been banned, it is against the law for anyone to:

- i. supply
- ii. offer to supply
- iii. manufacture
- iv. possess
- v. have control of this product

119. Special rules apply to consumer products supplied for export only. Businesses that supply consumer products for export only should seek legal advice if any of those items are subject to a ban. It should be noted that suppliers are responsible for staying informed about their legal obligations.

120. A ban on a particular product applies to anyone in the business of supplying that product, including:

- i. manufacturers
- ii. importers
- iii. distributors
- iv. retailers
- v. hirers.

### **Remedial measures by suppliers**

121. Upon conclusion of investigations on unsafe goods the Authority by a Notice, may require the supplier to take remedial measures in accordance with section 61(2)(b) of the Act and may include recall of the goods with a view to repair, replace, or refund of the purchase price of the goods.

122. The Supplier may also be required to inform the public or a class of consumers identified in the Notice on the following:

- i. The nature of the defect in, or dangerous characteristic of, the goods;



- ii. The circumstances in which the use of the goods is dangerous and;
- iii. Procedures for disposing the said goods

123. Additionally and in accordance to section 61 (2) (c) of the Act, the supplier must inform the public or a class of consumers identified in the Notice that the supplier undertakes to:

- i. Repair the goods
- ii. Replace the goods; or
- iii. Refund the consumer to whom the goods were supplied the price of the goods

124. It should be noted that repair of the goods cannot be undertaken where the Notice identifies a dangerous characteristics of the goods or where the dangerous characteristic is inherent in the good itself.

## Recall

125. A product safety recall is initiated when a consumer good is identified as presenting a safety risk to consumers. Recalls may also be initiated solely by suppliers when they become aware of safety issues presented by their products. Product recalls may also be negotiated by the Authority or other regulators when suppliers are identified as having sold consumer products that are unsafe. As a last resort, the Authority may initiate a compulsory recall in order to protect the public from an unsafe good in accordance with section 61(2) of the Act. In this event, the Authority will direct the manner in which the recall is to occur and will enforce compliance.

126. A supplier may be required by the Authority in accordance with section 61(2) of the Act to recall unsafe, or goods that may cause injury to consumers. In this regard, the supplier has prime responsibility for implementing a recall. A recall should be implemented in accordance with the Authority's directives and after consultation with the Supplier.

127. Further, prior to publishing a Recall Notice, the Authority shall notify the suppliers or businesses affected by the recall and give them an opportunity to, make written or oral representations or both, in accordance with section 62 (3) of the Act. The Authority shall consider the representations made and communicate its decision regarding the publication of the Notice within twenty one (21 days) as per section 62(4) of the Act. However, if the supplier is dissatisfied with the Authority's decision, they may appeal to the Competition Tribunal in accordance with section 61(5) of the Act.

## Voluntary recall

128. While recalls may be ordered by the Authority, a supplier may voluntarily initiate a recall of his goods upon detection of a safety related hazard related to his/her goods or upon receipt of complaints by consumers, consumer bodies or other persons regarding any dangerous characteristic of the good or injury result from the use of the said goods.
129. A voluntary recall therefore occurs when the supplier of a consumer product initiates the recall and voluntarily takes action to remove the goods from distribution, sale, and/or consumption. A voluntary recall may also be negotiated with a supplier following enforcement or compliance action by the Authority. The word 'voluntary' is not intended to infer that a supplier may choose not to remove the product from sale. When a recall occurs, all of the goods subject to the recall must be removed from the market place.
130. If a product or service presents a safety risk or is non-compliant with a mandatory standard or ban, it may need to be recalled. Businesses therefore, have an obligation to notify the Authority when they initiate a recall. The Authority receives the notification and oversees the recall to ensure that businesses effectively remove unsafe products from the marketplace and retrieve them from consumers.
131. In order for the Authority to be assured that the recall will meet its objectives, businesses should undertake the following actions:
- i. notify the Authority of the recall, which includes providing details of other entities within the supply chain that have been notified
  - ii. prepare a recall strategy for submission to the Authority
  - iii. retrieve the affected product from consumers and from within the supply chain
  - iv. submit regular progress reports to the Authority
132. The businesses should notify the Authority within a reasonable period depending with the circumstances. Depending on the consumer product that is being recalled, businesses are obligated to notify other specialist government agencies or sector regulators when they initiate a recall.
133. In addition, if specific goods, which are sold in Kenya, are banned or recalled in one or more countries for safety hazard related reasons, the supplier of the said goods in Kenya should inform the Authority and must initiate their recall immediately.

## Recall Notification

134. Although there are various means by which a supplier can convey a recall notification to consumers, there are some minimum requirements for written communication. A written Recall Notice should include:

- i. **Product description**—a clear description of the product, including the name, make and model and any distinguishing numbers, such as batch or serial numbers. Dates the product was available for sale should also be included.
- ii. **Picture of the product**—a photograph or drawing of the product will provide the consumer with a convenient and effective means of identification.
- iii. **Description of the defect**—a clear description of what the defect is. The defect should be described in simple terms so that the average consumer can understand what the problem is. Suppliers should refrain from using overly technical terminology wherever possible.
- iv. **A statement of the hazard**—a description of the maximum potential hazard and associated risk. Where available, an appropriate hazard symbol should be included.
- v. **A section titled “What to do”**, which explains the immediate action the consumer should take. For example, “Cease use immediately and return the product to the place of purchase for a full refund”. It should be clear that the consumer should return the product and not dispose of it. Suppliers should ensure they minimize the inconvenience to consumers in order to encourage consumer compliance with the recall notice.
- vi. **A section titled, “Contact details”**, which explains who consumers should contact in order to receive a refund or have the product repaired or replaced. Business and after-hours telephone numbers should also be included (preferably toll free), as well as suitable email and website addresses. The recall notice should not include the words ‘voluntary recall’.

## Supplier Recall Responsibilities

135. A supplier has the following general responsibilities in relation to ensuring that a recall's main objectives are achieved:

- i. conduct a comprehensive risk analysis of the safety-related hazard
- ii. stop distribution of a product that has been identified for recall
- iii. cease production or modify the manufacturing process
- iv. remove the unsafe product from the marketplace
- v. notify the relevant regulator/s
- vi. notify the public
- vii. notify international product recipients

- viii. notify others in the domestic supply chain
- ix. facilitate the return of recalled products from consumers
- x. store and dispose of recalled products safely
- xi. draw up a written recall strategy/plan
- xii. maintain records and establish procedures that will facilitate a recall (records should be in a form that can be quickly retrieved)
- xiii. provide progress reports on the conduct of the recall to relevant regulators

136. In some cases, the risk analysis may indicate that it is not necessary to retrieve products from consumers. However, in order to mitigate the safety risk, some other action by the supplier may be required. These other actions may include initiating a trade level recall or issuing a safety alert. Where a supplier initiates a trade level recall (if appropriate), the same general responsibilities would apply, except that the supplier would not be required to notify the general public of the recall. Likewise, when issuing a safety alert, a supplier would have the same general responsibilities, but would not be required to remove the unsafe product from the marketplace.

### **Retrieval of the affected product**

137. The ultimate goal of a recall is to retrieve as many unsafe products from consumers as possible and prevent any further distribution of the affected product in the market place. Products that are the subject of a recall may be recovered from different entities in the supply chain or directly from consumers.

138. A supplier is required to make arrangements for the retrieval of the product. These arrangements should include:

- i. establishing collection points across the distribution network
- ii. notifying the relevant parties, including other entities within the supply chain and consumers, of the intended method of retrieval of the recalled product
- iii. arrangements for disposing of the returned product—this may involve arranging for the returned product to be quarantined until it can be rectified or safely destroyed.

### **Reporting on the recall**

139. In order for the Authority to be able to monitor the progress of a recall and assess its effectiveness, a supplier should provide progress reports at regular intervals.

140. The Authority will develop a reporting schedule with a supplier at the beginning of a recall that appropriately reflects the product risk being addressed.
141. The information that the Authority requires will depend on the specifics of the recall and will therefore be negotiated on a case-by-case basis. Examples of the types of information that may be required include:
- i. the number of products returned from within the supply chain and from consumers
  - ii. the number of complaints and inquiries that have been received regarding the affected product and the nature of these complaints
  - iii. the number of inquiries that have been received from consumers regarding the recall and the nature of these inquiries
  - iv. whether the supplier deviated from the original plan as described in the agreed communication strategy and if so, the reasons why.

## **Final report**

142. When a supplier has taken all reasonable steps to effectively mitigate the risk posed by the unsafe product, the recall can be closed. Closure of a recall does not affect the statutory rights of consumers and the public may continue to access information about the recall through the suppliers or Authority's website at [www.cak.go.ke](http://www.cak.go.ke). However, when a recall is closed, the supplier no longer needs to actively promote the recall. While the Authority's regulatory oversight might reduce, the Authority will nonetheless undertake a compliance checks.
143. The supplier should submit a final report before a recall can be closed. A supplier's final report should include:
- i. confirmation of the total number of items supplied and the final number of units recovered from consumers and from within the supply chain
  - ii. evidence to demonstrate that all entities from within the domestic supply chain were notified of the recall
  - iii. information about the communication strategy, including copies of any data relating to its effectiveness (for example, the number of 'visitors' accessing the relevant webpage)
  - iv. action taken by the supplier to identify and correct the cause of the safety hazard presented by the product, including the outcome of any root cause

analysis, whether the defect was caused by a design, testing, manufacturing, packaging, shipping, or other fault, and the steps the supplier has taken to remedy the defect.

- v. information about any known injuries or incidents associated with the product
- vi. the final number of complaints or inquiries that have been received regarding the recall and/or the product
- vii. information about the means by which the recalled product has been destroyed or rectified, including evidence of the destruction or rectification of the unsafe product.

### **Declaration of Product Safety or Information Standards**

144. Pursuant to Section 62 of the Act, the Authority is mandated to impose or declare product safety standards or information standard. In this regard, the Authority will collaborate with prescribed associations or body in terms of preparation or approval of a particular safety standard or part of it.

145. Further, by a Notice, the Authority shall inform the public that a particular standard or part of it, or additions or variations to the particular standard specified in the Notice, is a consumer product safety standard for the purposes of the Act. Such product safety standard or part of it will have been prepared or approved by a prescribed association or body.

146. The product safety standards may cover:

- i. the nature of the product and its performance - for example, composition, contents, manufacture, processing, design, construction, finish or packaging
- ii. tests the product should go through during or after manufacture
- iii. the form and content of any markings, warnings or instructions on the product.

147. It should be noted that it is a breach for a supplier to fail to comply with the requirements of any consumer product safety standard.

### **Product Information Standard**

148. Consumer Product Information Standards (CPIS) regulate the type and amount of information provided to consumers about goods and services. A CPIS for goods or services can:

- i. require particular information to be provided, or not
- ii. set the form or manner of this information
- iii. give a certain meaning to information.

149. Information that may be required to be disclosed in relation to goods under a prescribed CPIS may include: the kind, ingredients, grade, quantity, origin or supply of goods. A CPIS can also specify:
- i. how this information must be obtained or verified before it is disclosed, and
  - ii. the way in which that information is disclosed.
150. Any person who supplies, or offers to supply, goods that a CPIS applies to must comply with that standard, otherwise he would be in violation of section 60 (1) of the Act. If there are two or more CPIS in relation to those products or services, then they must comply with at least one of those Standards.
151. However, these requirements don't apply to goods that are intended for use outside Kenya pursuant to Section 60 (4)
152. The Authority, pursuant to section 60(2) of the Act, may prescribe a CPIS. It can achieve this by developing regulations in respect of goods of a particular kind.
153. Before introducing a CPIS the Authority will:
- i. consult with all parties that the Authority believes will be substantially affected by the CPIS; and
  - ii. consider those parties' comments
154. The Authority recognizes the CPIS prescribed by sector regulators and standardization bodies in Kenya. Section 67 of the Act allows the Authority to collaborate with the Kenya Bureau of Standards (KEBS) in all matters involving definition and specification of goods and grading of goods by quality. It is notable that KEBS provides a wide range of standardization and conformity assessment services.

### **Product liability**

155. Product liability refers to a manufacturer or seller being held liable for placing a defective product into the hands of a consumer. In general, the Act requires that a product meet the ordinary expectations of the consumer. When a product has an unforeseeable defect or danger to a consumer, the product cannot be said to meet the ordinary expectations of the consumer.

156. Pursuant to sections 63 and 64, a supplier shall be liable to a consumer where they supply unsuitable and/ or defective goods and the consumer suffers loss or injury as a result of the unsuitable goods or the defect.
157. There are three types of defects that might cause injury and give rise to manufacturer or supplier liability:
- i. Manufacturing defect;
  - ii. Design defect; and
  - iii. Marketing defect (also known as a failure to warn defects).

### **Manufacturing defects**

158. Manufacturing defects are those that occur in the manufacturing process and usually involve use of poor-quality materials or shoddy workmanship. A manufacturing defect exists if the product “departs from its intended design even though all possible care was exercised in the preparation and marketing of the product. Common examples of manufacturing defects are products that are physically flawed, damaged, incorrectly assembled or do not comply with the manufacturer’s design specifications.

### **Design defects**

159. Design defects occur where the product design is inherently dangerous or useless (and hence defective) no matter how carefully manufactured; this may be demonstrated either by showing that the product fails to satisfy ordinary consumer expectations as to what constitutes a safe product, or that the risks of the product outweigh its benefits.

### **Marketing defects or failure to warn defects**

160. Marketing defects arise in products that carry inherent non obvious dangers which could be mitigated through adequate warnings to the user, and these *dangers are present* regardless of how well the product is manufactured and designed for its intended purpose. They result from flaws in the way a product is marketed, such as improper labeling, insufficient instructions, or inadequate safety warnings.
161. It is considered that there is a defect if foreseeable risks of harm posed by the product “could have been reduced or avoided by reasonable instructions or warnings” on the product and this omission makes the product not reasonably safe.

## Strict liability

162. Under strict liability, the focus is on the product, not on the conduct of the manufacturer. In this regard, the manufacturer is liable if the product is defective, even if the manufacturer was not negligent in making that product defective. The consumer therefore, need not prove that the manufacturer was negligent, just that the product was defective. Strict liability on defective products can be summarized in some of Justice Traynor words (*Escola case 1944*,<sup>1</sup>) :...*If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market.*
163. It should be noted that for a strict liability to apply, the sale of the product must be made in the regular course of the supplier's business.

## Supplier responsibility

164. Responsibility for a product defect that causes injury lies with all sellers of the product who are in the distribution chain. It should therefore be noted that the liability for a product defect could rest with any party in the product's chain of distribution, such as:
- i. The product manufacturer;
  - ii. A manufacturer of component parts;
  - iii. A party that assembles or installs the product;
  - iv. The wholesaler; and
  - v. The retail store that sold the product to the consumer

165. Pursuant to section 65 of the Act, if the manufacturer of a defective good is not known or unidentified, the supplier who supplied or sold the goods shall be deemed to be the manufacturer for the purpose of the compensation of the consumer who have suffered a loss or injury.

## Instances where a supplier's may not be liable in regard to defective goods

166. Under the theory of liability, a consumer in a product liability case must prove that the product that caused injury was defective, and that the defect made the product unreasonably dangerous.

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<sup>1</sup> *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 462 (1944) (Traynor, J., concurring).

167. a supplier of goods may be relieved of liability for injury caused by a defective good to the user or consumer only if they can prove any of the defences set out under section 66 of the Act as follows:

- i) The defect did not exist at the time of supply of the goods
- ii) Where a good is modified or altered after it left the manufacturer's control

168. In case the product was modified or altered after it was supplied by the manufacturer and the injury or damage from a defective good was caused by a modification or alteration to the product and not by an inherent defect in the product.

169. Manufacturers and/or other entities in a chain of product distribution are not liable for damages caused by modifications or alterations to products that are not reasonably foreseeable to the product manufacturer.

### **Where a good has been misused by the consumer**

170. A manufacturer may be relieved of liability by the fact that the consumer may have misused the product in an unforeseeable way, and that his/her misuse of the product caused the injuries alleged.

### **The goods had a defect only because of compliance with a mandatory standard**

171. This is where the cause of the defect is from adherence by the manufacturer to a prescribed standard, which is mandatory, and such adherence made the product unsafe or to have a dangerous characteristics

### **The state of scientific or technical knowledge at the time the goods were supplied by the original manufacturer could not be able to detect the defect**

172. In cases of design defects, supplier may be able to escape liability on the basis of the "state of the art" defense, which asserts that the supplier has used the best available technology and design at the time to make the product as safe as possible. If there is no safer known design, a manufacturer might not be liable for design defects.

173. In addition to the defences set out under section 66 of the Act, the Authority will also consider the following factors:

- i. If a person knowingly and unreasonably assumes the risk of a known danger, the manufacturer cannot be liable for the injuries that result. Thus, a person who intentionally electrocutes himself by inserting a fork into an electrical outlet will not be able to recover injuries from the outlet maker.



- ii. If a product has an obvious risk of injury, then the buyer cannot recover for those injuries from the manufacturer. For example, a consumer buys a car with a defective odometer which defect they were informed of at the time of sale but the consumer still proceeded to purchase the car having been made aware of the defect.
- iii. Some products, such as experimental drugs, may be dangerous, but not unreasonably so. If the dangers are known to the public, and the seller clearly warns of the dangers, and properly packages and labels the product, the seller will not be strictly liable for making available a product that is inherently dangerous, but not unreasonably so for its intended purpose. For example testing of new pharmaceutical drug.

## **E. CONSUMER COMPLAINTS AND INFORMATION**

174. If a consumer is aware of an alleged consumer infringement the consumer is at liberty to make a complaint to or inform the Authority and provide required information.

### **Who can file a complaint or provide information to the Authority?**

175. A consumer, government agency or Ministry or consumer body.

### **When to make a complaint**

176. A complaint can be made to the Authority when there is an alleged infringement of Part VI of the Act.

### **Submitting a complaint**

177. Before lodging the complaint with the Authority:

- i. the consumer may endeavor to contact and address the issue with the retailer first within a reasonable time taking into account the set terms and conditions on claims.
- ii. the consumer is encouraged to keep record of all the communication with the seller such as; the receipts, invoices, warranties, contracts, the business representatives to whom the consumer lodged the complaint with, the actions taken by the concerned party.

178. If the consumer feels that the matter was not handled adequately they are at liberty to lodge the complaint with the Authority.

### **What information is required?**

179. When lodging a consumer complaint, the consumer is encouraged to provide supporting documentation to the Authority in accordance with the information indicated in the Consumer Complaint form prescribed in the Competition (General) Regulations.

### **How to submit information or complaints to the Authority**

180. Any information or complaint concerning an alleged consumer infringement shall be submitted through the following ways, by:

- i) Submitting the prescribed Consumer Complaint form as per the Competition (General) Regulations;
- ii) visiting the Authority's office at Kenya Railways Staff Retirement Benefit Scheme Block 'D', 1<sup>st</sup> Floor, Haile Selassie Avenue, Workshop Road;
- iii) emailing to the Authority; at [info@cak.go.ke](mailto:info@cak.go.ke) or [complain@cak.go.ke](mailto:complain@cak.go.ke);
- iv) Calling the Authority using direct line +254202628233 or hot line +254202779122/3
- v) Posting to; P.O Box 36265-00200, Nairobi.

### **Seeking an advisory opinion on a consumer complaint**

181. When it is not clear to a consumer the type of complaint, is at liberty to seek an advisory opinion.