

COMPETITION AUTHORITY OF KENYA

Guidelines on the Control of Unwarranted Concentration of Economic Power



This publication is not a legal document. It contains general information intended for the convenient use and guide on how the provisions under Part V of the Competition Act, No. 12 of 2010 are applied. This publication can be made available in alternative formats upon request. Please contact the Competition Authority of Kenya using the contact information provided below. This publication may not be reproduced, in part or in whole by any means without the expressed permission of the Competition Authority of Kenya.

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Foreword by the Director General

It gives me great pleasure to present these consolidated guidelines on unwarranted concentration of economic power analysis. These guidelines are meant to improve the business regulatory framework.

The Competition Authority of Kenya (“Authority”) is established under Section 7 of the Competition Act and is charged with, *inter alia*, promoting and enforcing compliance with the Competition Act. One of the objectives of the Competition Act number 12 of 2010(the Act) is to bring national competition law, policy and practice in line with international best practice and in furtherance of that objective and in accordance with the powers conferred on the Authority under Section 93 of the Competition Act, the Authority hereby publishes these consolidated guidelines on unwarranted concentrations of economic power which is intended to:

- Equip businesses and their legal representatives with an understanding of the object of the provisions under Part V of the Act;
- Explain which factors may be deemed to be prejudicial to the public interest
- Explain the process that is applied and the type of evidence that may be assessed in an investigation under Part V of the Act.

These guidelines are not intended to be a substitute for the provisions on control of unwarranted concentration of economic power under Part V of the Competition Act or any subsidiary rules made pursuant thereto. They should be read together with the Competition Act and any subsidiary rules made pursuant thereto and with any other applicable legal instruments of Kenya including binding or persuasive legal precedent from competition law cases. These guidelines do not constitute legal advice and do not have the force of law and is not binding on the Competition Tribunal or any court of law.

INTRODUCTION

1. The primary law provisions on control of unwarranted concentration of economic power are set out under Part V of the Competition Act (“the Act”).
2. This document will explain the object of the provisions under Part V and the competition and economic test used in assessing conduct falling under the ambit of Part V.
3. An investigation into unwarranted concentration of economic power is a fact-finding process through which the Authority applies a range of legal and economic tools to evaluate each case before the Authority.
4. The principles contained here will be applied and further developed and refined by the Authority in individual cases. The Authority may revise these Guidelines from time to time in the light of new developments to reflect changes in best practice and of evolving insight.

THE OBJECT OF THE PROVISIONS UNDER PART V OF THE ACT

5. The object of the Act has been established as, *inter alia*, to enhance the welfare of the people of Kenya and to protect effective competition in markets. The provisions under Part V of the Act are part of a broad range of enforcement tools used under the Act to keep competition in markets in Kenya in furtherance of the fulfilment of the stated object of the Act.
6. The object of the inclusion of the provisions under Part V are to ensure that unwarranted concentrations of economic power are subject to the Authority’s power to curb anti-competitive practices not captured by other sections of the Act.
7. The provisions under Part V will be used in part to determine whether any feature of the market detrimentally impacts price, quantity, quality or choice and to effect appropriate remedies to address this concern.
8. In its review under Section 50(1) (“Identifying Unwarranted Concentration of Economic Power”), the Authority will cast a wide net, with a view to studying the market as a whole, investigating the market or sectors, even where the market or sector may comprise of only one single/dominant firm.

DEFINITION OF UNWARRANTED CONCENTRATION OF ECONOMIC POWER

9. The Authority considers an unwarranted concentration of economic power to mean the existence of cross-directorship between two distinct undertakings or companies producing substantially similar goods or services and whose combined market share is more than forty per cent.

10. In this context the Authority will look at a situation in which a director sits on multiple boards and firms share a director (“direct interlock”), or where an executive or senior employee of one firm may be the director of another firm (“direct interlock”) or where firms have different directors but a third firm may share one or both directors (“indirect interlock”). These are common situations of cross-directorship - sometimes interlocks are direct or indirect. The result is that even without firms having merged, board decisions can be taken that can lead to collusion among firms. For example, where two directors share directorship on the boards of competing firms, for example, a decision to fix prices on the market or divide markets among their firms is easy to engender; and even without a merger of the firms having occurred the resulting anticompetitive impact on the market will be the same as though they are one merged entity. For this reason, cross-directorships or interlocking directorships also require competition regulation and are controlled within the context of Part V of the Act.

FACTORS PREJUDICIAL TO THE PUBLIC INTEREST

11. Section 50(4) states that an unwarranted concentration of economic power shall be deemed to be “prejudicial to the public interest” if, having regard to the economic conditions prevailing in the country and to all other factors which are relevant in the particular circumstances, the effect thereof is or would be to unreasonably increase price, lessen competition, result in a deterioration in quality or result in inadequate supplies. The following are considered by the Authority to include examples of factors that may be considered of “public interest” within the meaning of Section 50(4):

- The extent to which the unwarranted concentration of economic power would be likely to affect a particular industrial sector;
- The extent to which the unwarranted concentration of economic power would be likely to affect employment;
- The extent to which the unwarranted concentration of economic power would be likely to affect the ability of small undertakings to gain access or to be competitive in any market; and
- The extent to which the unwarranted concentration of economic power would be likely to affect the ability of national industries to compete in international markets.

12. The Authority considers that these factors may change from time to time as the decisions on public policy are subject to change as technology, trade and economic progress changes.

THE INVESTIGATIVE PROCESS

13. The review of an unwarranted concentration of economic power will be conducted similar to investigations conducted under Part III of the Act. The following summarily describes the more important features of the investigative process:
- The Authority may initiate a review under Section 50(1) of the Act on its own initiative or after having received complaints that include among others price, supply quantities, lack of choice or the quality of products supplied in a market, that have effect of competition.
 - The Authority may also receive complaints and launch full inquiries into unwarranted concentrations of economic power upon the direction of the Director General.
 - The Authority may summon or otherwise request information, including the conduct of searches and seizures of documents at business and private premises.
 - Upon the conclusion of its investigation, study of the evidence and review of information submitted or seized, the Authority will publish written, reasoned objections to any unwarranted concentrations of economic power, documenting the factors that are deemed prejudicial to the public interest and any resultant increases in cost, prices, distortion, prevention or lessening of competition as well as any deterioration in the quality of goods and/or inadequacy in production levels in an Enforcement Report.
 - The Authority will afford due process to respondents including the right to access evidence relied on by the Authority and to mount a defence in writing in response to the Authority's Enforcement Report.
 - The Authority will hold meetings, conferences or conduct formal hearings where requested by interested parties at which sector or market players and interested consumer groups may supply evidence that can assist the Authority in identifying unwarranted concentration of economic power pursuant to Section 50(1) of the Act.
 - Where there are serious competition issues and where it is clear that the unwarranted concentration of economic power held in a sector is leading to anticompetitive effects in a sector the Authority will seek to make an order to dispose of interest in accordance with the provisions set out under Section 52 of the Act. Such a disposal order is intended to prevent sharing of confidential and sensitive business information and to eliminate any influence over the ability of undertakings to make independent decisions. The Authority may therefore order disposal of total interests or disposal to a minimum share ownership such that ownership interests can no longer guarantee any rights of

directorship. Additionally, such disposal orders may also require that undertakings not have the same people sitting on the boards of competing undertakings.

- Undertakings in the sector may make proposals, which fit with the provisions under Section 52 of the Act, to effectively address the concerns of the Authority and the Authority reserves its powers as conferred under the Act, on whether to adopt the proposals.

TYPE OF EVIDENCE THE AUTHORITY WILL CONSIDER

14. The Authority understands that concentration of economic power may manifest itself in one of two ways:

- (i) Market concentration - where one or more undertakings become so big that they are in a position to affect the market outcomes in a manner that will result to the effects set out in Section 50(4) of the Act; and/or
- (ii) Ownership concentration - where one or more undertakings control a substantial ownership interest in businesses or the productive inputs of a particular industry in the economy to affect the market outcomes in a manner that will result to the effects set out in Section 50(4) of the Act.

15. The Authority will investigate, among other factors:

- the level and prevalence of cross ownership and of interests in undertakings;
- the level and prevalence of cross directorships in undertakings;
- whether the ownership interests of undertakings in Kenya are concentrated in the hands of a few individuals or undertakings;
- whether the undertakings are competitors in the same market;
- whether the combined market share of the undertaking is more than 40%;
- how the undertakings use/would likely use their ownership interests to affect the market outcomes set out in Section 50(4) of the Act;
- how the undertakings with economic power behave in the markets in which they operate;
- what relationships exist between undertakings with economic power and their customers and competitors;

- what restraints, if any, are imposed by undertakings with economic power that prevent or distort competition;
- whether undertakings with economic power are engaging in mergers and acquisitions activities to strengthen and consolidate their market position;
- whether undertakings with economic power are engaging in mergers and acquisitions activities to increase or consolidate their control of a particular sector;
- whether prices, profits, product variety, quantity and quality are reflective of market conditions;
- Whether there are significant barriers to enter the sector of the economy in which undertakings have economic power;
