

COMPETITION AUTHORITY OF KENYA



CONSUMER PROTECTION GUIDELINES

UNDER PART VI OF THE COMPETITION ACT NO. 12 OF 2010

COMPETITION AUTHORITY OF KENYA

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PREFACE

These Guidelines has been developed to assist consumers, businesses, legal practitioners, enforcers and other stakeholders understand and comply with the Consumer Protection provisions under the Competition Act No. 12 of 2010 (the Act). The Guidelines seek to illustrate how the consumer protection provisions in Part VI of the Act may apply in practice. In this regard, the Guidelines explain the law in simple language but is not a substitute for the legislation. The Guidelines also provide general information and examples but not legal advice or a definitive list of situations where the law applies.

The Guidelines cover:

- Misleading or deceptive conduct.
- False or misleading representations and related offences.
- Unconscionable conduct.
- Product Safety and Information standards.
- Country of origin representations.

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1.0 INTRODUCTION

Article 46 of the Constitution protects the rights of consumers and promotes the provision of goods and services of reasonable quality; access to information necessary for customers to gain full benefit from goods and services; protection of consumer health, safety, and provides for the right to compensation for loss or injury arising from defects in goods or services. Consumer Protection Provisions under Part VI of the Act therefore capture the letter and spirit of the Constitution.

These Guidelines further elucidate the provisions of Part VI of Act and ensures predictability, transparency and accountability in application of the law.

1.1 Objectives

The objectives of these Guidelines are to ensure consumer welfare through;

- a) Consistency in application of consumer protection principles.
- b) Assisting in achieving, fostering and/or maintaining consumer protection;
- c) Assisting consumers make informed decisions/choices on the goods and services offered in the market;
- d) Encouraging high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers;
- e) Furthering cooperation with various sector and country wide agencies in the field of consumer protection; and
- f) Encouraging the development of market conditions which provide consumers with greatest product choices while ensuring product safety and quality.

2.0 DEFINITIONS

A misleading representation *occurs when a shared practice or representation misleads through the information it contains, or its deceptive presentation, and causes or is likely to cause the ordinary consumer to take a different decision.*

Unconscionably conduct *means conduct that is deliberate, harsh and oppressive, and that goes beyond what is reasonably required to protect commercial rights. Such conduct may be regarded as unconscionable.*

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.*

3.0 FALSE AND MISLEADING REPRESENTATIONS

3.1 Introduction

Under section 55 of the Act, an undertaking or business shall be deemed to have engaged in false and/or misleading representations if it falsely claims that:

- Goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;
- Services are of a particular standard, quality, value or grade;
- Goods are new;
- A particular person has agreed to acquire goods or services;
- Goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits;
- The person making the representation has a sponsorship, approval or affiliation;

False and misleading representation may also be in regard to:

- The price of goods or services;
- The availability of facilities for the repair of goods or of spare parts for goods;
- The place of origin of goods;
- The need for any goods or services;
- The existence, exclusion or effect of any condition, warranty, guarantee, right or remedy; or
- Any actual or implied requirement for a person to pay for a contractual right equivalent to a statutory consumer guarantee or any other statutory right or benefit that person may enjoy.

A representation can be made by any of the following means:

- Advertising, including infomercials, advertorials, testimonials and road shows
- In-store signage and displays
- Packaging and labels
- Documentation including descriptions and instructions
- Presentations, negotiations, contracts, leases, agreements among others.

3.2 Who does the prohibition on false and misleading representations apply to?

Section 55 applies to, companies or individuals, who make false and misleading representations in connection with the supply or possible supply of goods or services. All commercial supply is covered, not just supply to consumers. This may include:

- The end seller who directly supply customers, for example selling presentations, product descriptions, contractual terms, negotiations, advertising
- Manufacturers, importers and supply chain intermediaries that promote the goods, for example by providing manuals, guides, packaging and labeling and advertising
- Media companies that adopt, advise on, or endorse misleading representations, for example advertising design and content services

**Note that a media company that is merely the vehicle for another business' misrepresentation, for example by providing a simple advertising without knowledge of the truth or otherwise of the message content, may not be held liable for misrepresentations.*

3.3 How do you know if a representation is misleading?

The key issue to consider is what the overall impression created by the representation is. A representation can be misleading even if it is literally correct that is, the statement can be misleading where the 'general impression' that is false.

Thus, the "general impression" conveyed by a representation, as well as the literal meaning, are taken into account in determining whether a representation is false or misleading in a material respect. Whether you intended to mislead or not, is secondary to the effect of the misleading conduct.

For Example:

An advertisement promotes a bedspread for \$50, but the ad does not mention that it is a factory reject. This ad would be misleading because a consumer could be left to believe that the advertiser was selling first quality merchandise when it was second quality merchandise that was being advertised.

The audience of the false and misleading representation matters because some audiences are more informed. In addition, one audience may be misled by a representation while another may not. There will always be variations in knowledge and experience within an audience. This is particularly the case with mass advertising and general audiences. If a representation misleads only some of the audience, it is still misleading

It is therefore important to note that, the actual audience (those who are likely to act on your representation) may be wider than the audience that you are targeting.

For example:

While making a representation, you may expect that most of your customers will be traders, but it may be reasonably foreseeable that many housewives will respond to the same advertisement.

3.4 Types of false or misleading representations

a. Self-Evident Exaggeration/Puffery

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'

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 concern tangible claim and quantifiable information.

For Example:

If a prospective customer is told current performance characteristics of a product but the supplier knows that they have later been changed, the failure to inform the customer prior to delivery may constitute a misrepresentation.

d. Country or origin claims

Country 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.

e. Criteria for country or origin claims

This criterion applies to claims about the *country*, not *region of origin*.

For example:

These claims do not apply to 'made in Tasmania' or 'made in the Americas'

If a business is accused of making a false or misleading claim about country or origin, it must point to evidence that the claim meets the criteria set out herein:

a. 'Made in' claims

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

For a business to claim goods are 'produced in', 'produce of' or 'product of' a particular country:

- All or virtually all of the production or manufacturing processes must happen in that country, and
- All of the significant ingredients or components must come from that country.
- 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 Australia' label only if both juices are from Australia.

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 Australia'; the cranberry juice is 'significant', the preservative is not.

c. Claims of origin based on use of a prescribed logo

If a business labels a product with a prescribed logo the goods must:

- Pass the substantial transformation test, and
- Meet the prescribed percentage of production or manufacturing costs that apply for that logo.

d. 'Grown in' claims

A business can lawfully claim goods are 'grown in' a particular country when:

- At least 50 per cent of the total weight comprises ingredients or components grown and processed in that country
- Virtually all production or manufacturing processes happened in that country, and

- 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

The country of origin of a good may also be represented by use of a certification trademark, such as the 'Kenyan Made, Kenyan Grown' (KEBS) logo. The KEBS logo and other certification trademarks may only be used by businesses licensed by the owner of the mark.

f. Testimonials

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.

These can give 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.

Misleading representations can persuade customers to buy something to their detriment based on belief in the testimonial.

Examples of false and misleading representations through testimonials include:

- A supplier published a newspaper advertisement about a 'nasal delivery system' to treat impotence or erectile dysfunction. The advertisement quoted an interview with a celebrity that falsely claimed he had suffered from impotence and the nasal delivery system had assisted in dealing with this condition.
- An advertisement where an actor is portrayed as a real person and falsely claims to have reaped financial benefits from distributing health care products.

g. Consumer guarantees - guarantees, conditions and warranties

It is unlawful to make false or misleading representations about consumer guarantees. A trader/ undertaking 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. A trader guarantees that a consumer is buying goods;

- That have clear title, unless otherwise stated;
- That do not have undisclosed securities;
- That are fit for any disclosed purpose;
- With a right to undisturbed possession;
- That match sample or demonstration model;
- A trader guarantees that services are provided;
- With due care and skill;
- Which are fit for any specified purpose;
- Within a reasonable time (when no time is set); and
- Guarantees goods that have readily available spare parts.

h. Offering rebates, gifts, prizes and other free items

It is unlawful to promise rebates, gifts, prizes or other free items without intending to provide them, or not providing them as offered. The rebate, gift, prize or other free item must be provided within the specified time or, if no time was specified, within a reasonable time.

For example:

A stereo equipment retailer held a promotion. Customers went into a draw to win prizes when they bought stereo equipment. The retailer felt the promotion had not been a financial success, so the closing date was extended and fake names were added to the draw.

i. Misleading conduct as to the nature of goods and services

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

For example:

An importer sells motorcycle helmets with labels indicating the helmets met a mandatory safety standard, even though the helmets were not tested during manufacture.

j. Environmental claims

Many 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.

k. Health claims

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

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

l. Disclaimers and fine print

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

A disclaimer may be misleading if:

- It purports to significantly and unexpectedly negate the main representations in a contract.
- The disclaimer, or its existence, is not readily apparent when the main representation is seen, heard or read,
- 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.
- Contractual terms that purport to exclude any representations outside of the contract 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.

For example:

- The misrepresentation related to the effect of that contractual term
- The contractual term was unclear, hidden or not reasonably apparent to the consumer

m. Comparative advertising

Comparative advertising can be very relevant and informative for consumers. However, care must be taken to ensure that comparative claims are not misleading:

- Always compare like with like. For example consumer will be misled if price comparisons compare the prices of goods with significantly different characteristics
- Always ensure that comparisons are current unless there is a clear statement of the relevant time or date.

Comparative advertising explicitly or by implication makes reference to a competitor or competing goods or services. A comparative advertising campaign may involve printing a side-by-side comparison of the features of a company's products next to those of its competitor.

This type of advertising is only permitted when it is not misleading. It can be a legitimate means of informing consumers of what is in their interests. Therefore, in particular, the comparisons should:

- relate to goods or services which meet the same needs or are intended for the same purpose;
- relate to products with the same designation of origin;
- deal objectively with the material, relevant, verifiable and representative features of those goods or services, which may include price;
- avoid creating confusion between traders, and should not discredit, imitate or take advantage of the trade mark or trade names of a competitor.

Note: Always be aware that competitors may respond to unfavorable comparisons by changing their products/services or prices. Monitor the market and be prepared to withdraw or modify your representations.

3.5 How to avoid making misrepresentations

How you avoid misrepresentations may vary according to the media you use. For example complex explanations may be difficult or impossible to communicate during a 30 second TV ad. On the other hand it may be impractical to modify a billboard poster or withdraw a comparative advertisement for already circulating magazines should a competitor change the prices featured in the ad.

If it is not practical to include necessary qualifications in the form of advertisement being used, then the headline representation should not be used in that medium.

3.6 Offences and Penalties

Under section 55, there are a number of significant consequences to false and misleading representations:

- Administrative remedies by the Authority

The Authority can require the trader or undertaking to:

- Stop the advertisement;
- To repair, replace or revoke the defective product;
- To comply with any warranties and/or guarantees made to the consumer.
- Mediate amongst the parties to reach a settlement.

- Prosecution in Court

The Authority has the power to refer cases of false and misleading representations to the Director of Public Prosecutions (DPP) for prosecution in Court. The penalties can be significant: up to KSH 10 million or up to 5 years imprisonment.

Where you are not sure about the claim you are making

If you chose to make a claim then it is good practice to have a reasonable basis for making that claim. That may mean that you need to:

- Demand substantiation for your supplier; or
- Check with others who can provide you with authoritative answers. In some cases this may mean having the product test. In all cases it means using common sense and making reasonable enquiry.

If you have information that suggests that the proposed claim may not be true, or may be only partly true, don't make the claim.

If you are not very sure about truth or accuracy of a claim, either do not make the claim, or make it very clear that you are unsure.

In summary:

1. Identify your risks for making false and misleading representations. This is particularly important if you use any of the high risk advertising techniques.
2. Train your key personnel (including yourself) and all staff who prepare advertising and in-store displays or who deal directly with customers. They need to know what the law requires so that they can identify, avoid and report compliance risks.
3. Assign a person to take personal responsibility for compliance.
4. Implement a plan so that all advertising, in-store displays and sales rep routines are pre-checked and monitored to ensure that they are not misleading.
5. Media companies should refuse to accept advertising content, or remove existing content, that appears to be obviously misleading. If in doubt they should consider alerting the content owner to their legal obligations under s55.
6. Listen to you customers. If customers complain that they were misleading, they probably were. Review and appropriately modify you claims.
7. If you self -detect a false of misleading representation act decisively and quickly. Change or modify the representations, however made, to end the non-compliance. Then consider what other actions that may be appropriate to undo any harm already cause, such as notifying customers, refunds, credits, product substitutions etc.

Tips and tricks: how to manage your business' compliance

There are some simple steps every business should take to ensure that they comply with the requirements of the Competition Act. These are explained in more detail by our free downloadable 'Guide: managing you own *Competition Act* compliance' from cak.go.ke

4.0 UNCONSCIONABLE CONDUCT

4.1 'Unconscionable' business conduct

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, 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 preserve his conduct that it was fair and reasonable.

4.2 Unconscionable conduct in consumer transactions

Section 56(2) of the Act provides a list of factors that may be relevant in determining whether conduct is unconscionable. It is important to note that not all of these factors will be relevant in all circumstances and there may be circumstances where other, unlisted, factors are relevant and will be considered.

The factors listed are:

- (a) The relative strengths of the bargaining positions of the parties. Unconscionable conduct is less likely when the parties are more or less evenly matched.
- (b) Whether, as a result of conduct engaged in by the person, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the person;
- (c) Whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
- (d) Whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the person acting on behalf of the person in relation to the supply or possible supply of the goods or services; and
- (e) The amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from another supplier. This does not mean that suppliers have to price match or that

consumers do not have to worry about shopping around. However, the obligation to pay a price grossly in excess of the general market prices may be indicative to undue pressure or vulnerability.

4.3 Unconscionable conduct in business transactions

Section 57(2) provides a list of factors that may be relevant in determining whether conduct is unconscionable. Again it is important to note that not all of these factors will be relevant in all circumstances and there may be circumstances where other, unlisted, factors are relevant and will be considered.

The factors listed are:

- (a) The relative strengths of the bargaining positions of the supplier and the business consumer;
- (b) Whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions that are not reasonably necessary for the protection of the legitimate interests of the supplier;
- (c) Whether the business consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
- (d) Whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the business consumer or a person. Moreover unfair tactics or undue influence may be perpetrated by an individual acting on behalf of the business consumer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services;

Examples include:

- Using your friend or relative to pressure you into a deal
- Pressing you to agree to a deal when you are suffering from a serious illness or grief.
- Suggesting that you will displease police or government authorities if you do not agree to a deal

- (e) The amount for which, and the circumstances under which, the business consumer could have acquired identical or equivalent goods or services from a person other than the supplier;
- (f) The extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers;
- (g) The requirements of any applicable industry code; while most industry codes are not mandatory, many are likely to reflect good practice or at least current industry practice. Failure to observe such codes may be an indicator of undue influence or vulnerability
- (h) The requirements of any other industry code, if the business consumer acted on the reasonable belief that the supplier would comply with that code;
- (i) The extent to which the supplier unreasonably failed to disclose to the business consumer —
 - Any intended conduct of the supplier that might affect the interests of the business consumer; and
 - Any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer);

- (j) The extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer;

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

- (k) The extent to which the supplier and the business consumer acted in good faith. Lack of good faith would usually be a good indicator of whether firm conduct is unconscionable.

4.4 Protecting yourself from unconscionable conduct

Customers can protect themselves from the unconscionable conduct of firms by taking certain precautions. Below are some factors to consider in avoiding unconscionable conduct.

- Being sure about your contractual rights and obligations, to make sure that you not vulnerable to unconscionable conduct;
- Ensure that contracts are in writing, read the contract before you sign, and keep a copy for future reference; However documentary evidence such as receipts are also sufficient to prove existence of a contract
- Ask for plain language explanations of your rights and obligations;
- If you do not understand a term of the contract seek advice from an independent party such as a consumer organization, or from a lawyer
- Do not allow yourself to be talked into deals by high-pressure sales tactics. Be particularly on your guard when negotiating deals in your own home (for example door to door sales) or when the deal is subject to immediate agreement (with no change to reflect, compare or cool off) or unreasonable timetables.
- Shop around before you commit yourself to a deal. A business cannot take advantage of your ignorance if you have informed yourself about other

suppliers and deals, and how well the offered product or service actually meets your needs.

- Negotiate; you are more likely to be a victim if you passively accept whatever is offered to you.
- Be prepared to reject an offer and walk away, particularly if you have any concerns that the offer is not right for you.

4.5 Prohibition on unconscionable conduct applies to?

Section 56 of the Act outlines that unconscionable conduct in consumer transactions, applies to anyone, companies or individuals, in trade in connection with the supply or possible supply of goods or services to consumers.

Section 56 of the Act outlines that unconscionable conduct in business transactions, applies to anyone, companies or individuals, in trade in connection with:

- The supply or possible supply of goods or services, or
- The acquisition or possible acquisition of goods or services.

4.6 Offences and Penalties

Section 56 and 57 of the Act outlines the criminal offences applicable to unconscionable conduct. A person found liable for engaging in unconscionable conduct is liable to a fine of up to Kshs.10 million or to 5 years imprisonment or both.

5.0 CONSUMER PRODUCT SAFETY AND INFORMATION

5.1 Standards for product information

Under section 60, undertakings when dealing with products should clearly provide the following information:

- (a) The existence or nature of the product,
- (b) The main characteristics of the product
- (c) The extent of the trader's commitments
- (d) The motives for the commercial practice
- (e) The nature of the sales process
- (f) Any statement or symbol relating to direct or indirect sponsorship or approval of the trader or the product
- (g) The price or the manner in which the price is calculated
- (h) The existence of a specific price advantage
- (i) The need for a service, part, replacement or repair
- (j) The nature, attributes and rights of the trader or his agent
- (k) The consumer's rights or the risks he may face.

The 'main characteristics' to be disclosed include:

- (a) Availability of the product
- (b) Benefits of the product
- (c) Risks of the product
- (d) Execution of the product
- (e) Composition of the product
- (f) Accessories of the product
- (g) After-sale customer assistance concerning the product
- (h) The handling of complaints about the product
- (i) The method and date of manufacture of the product
- (j) The method and date of provision of the product
- (k) Delivery of the product
- (l) Fitness for purpose of the product
- (m) Usage of the product
- (n) Quantity of the product
- (o) Specification of the product
- (p) Geographical or commercial origin of the product
- (q) Results to be expected from use of the product
- (r) Results and material features of tests or checks carried out on the product.

Information standards for goods or services should:

- Require particular information to be provided, or not
- Set the form or manner of this information
- Give a certain meaning to information.

The Authority recognizes the consumer information standards prescribed by sector regulators and standardization bodies in Kenya.

5.2 Investigation procedures for product complaints

This section includes procedures on the generation of warning notices, on alerting public and notices issued as to whether particular consumer goods are unsafe

1. When a product safety problem is detected or reported, the Authority moves quickly to evaluate:
 - The nature of the harm: its severity and prevalence
 - The causation of the harm
 - Which immediate responses by the Authority and/or the relevant supplier(s) may be most effective in stopping further harm and reducing the severity of harms already caused
2. An investigation by the Authority may lead to the publication of a *Warning Notice*:
 - Alerting the public that particular goods are under investigation to determine whether they *will or may cause injury*.
 - Warning of the possible risks involved from the use of the goods under investigation.
3. The public notice will only be issued once the following thresholds are met:
 - The Authority establishes a prima facie case against the manufacture, business or supplier;
 - The Authority has communicated to the parties that may be affected by the said notice in writing of the proposed decision;

- The Authority afforded the parties reasonable time to make representations whether orally and/or in writing regarding the proposed actions;
 - The Authority under section 58 may waive this procedure in the event that it has obtained evidence that the products or goods would cause a greater harm to the public, which outweighs the harm that the businesses, manufacturers or suppliers might suffer.
4. The finalization of an investigation triggers the publication of notice in the Kenya Gazette and newspaper of local circulation announcing the results of the investigation and informing the public about any further action the Authority intends to take.
5. The Authority may require a supplier to:
- Recall the goods
 - Disclose to the public
 - The nature of the defects and/or safety Problems,
 - Procedures for disposing of the products
 - Inform the public of the supplier's undertakings to
 - Repair the goods
 - Replace the goods, or
 - Refund consumers

5.3 Prescription of consumer product safety standards

Consumer product safety standards are mandatory standards applied to specified products that have been identified as posing significant safety risks. Safety standards protect consumers by specifying minimum requirements that must be met before the goods can be supplied.

Safety standards may require the specified goods to comply with particular performance, composition, contents, and methods of manufacture or processing, design, construction, finish or packaging rules.

The *Kenya Bureau of Standards* (KEBS) kebs.org provides a wide range of standardization and conformity assessment services. The Authority consults and cooperates with KEBS in all matters relating to product safety and product information issues. Wherever practical and appropriate, product safety and product

information standards declared under the *Competition Act* will reference all or part of existing KEBS standards.

Importers and exporters should be aware that domestic product safety standards may have different requirements to safety standards in some international markets.

5.4 Procedure for recall

i. Initiation of recall

- a. Screening is done arising from customer complaints, internal findings
- b. The Authority will determine whether there are market complaints about the product's risk in liaison with the Kenya Bureau of Standards (KEBS) and the relevant sector regulator.
- c. The Authority will consult with KEBS and relevant sector regulators in the event that the manufacturers, wholesalers, retailers, hospital pharmacists, report likelihood or occurrence of a hazard in a product to carry out investigations.
- d. If the sample failed in analysis tested by the relevant body dealing with standards and/or information or by private testing laboratories and if the health publications shows the risk.
- e. Whether the product was suspended/cancelled in other jurisdictions for health, safety or other considerations
- f. Whether it is a banned product in other jurisdictions.

ii. Identification of a root cause of a potential product non-compliance issue

The Authority in furtherance of its mandate in section 63 and in consultation with the Kenya Bureau of Standards (KEBS) will require the affected parties to provide information explaining reasons for non-compliance of the product and provide any other supporting evidence.

iii. Preliminary recall assessment (Gathering and reviewing following document about the product):

The Authority shall analyze the following:

- Product information
- Labels' of the product
- Distribution pattern
- Product complaints
- Product specifications
- Operations manuals, brochures, flyers, or any other product related literature that will aid in determining the violation and evaluation of the product problem

- Formulation of the product
 - Analytical report and methods used to obtain the results of the product involved process, validation protocols and reports
- iv. The Authority shall then assess the seriousness of the defect, its potential for causing health hazard to the consumer.

v. Classifying the recall

The Authority shall thereafter determine the extent, urgency and duration of the recall.

vi. Decide whether to recall the product or not

- a. The Authority will decide whether to recall the product or not by providing a detailed report of its investigation report to the affected parties;
- b. Provide timelines to provide written or oral representations by the parties;
- c. The Authority will make its final finding based on its report and representations made.
- d. The decision will then be gazetted and published in one of the local daily newspaper's circulation.
- e. The Authority will thereafter determine whether the products of the consumers affected are to be repaired, refund and/or replaced.
- f. If recall is not required, the Authority will respond to customers accordingly.

5.5 Declarations that permanently ban particular consumer goods

When the use of a product poses are clear and imminent danger to consumers the Authority can declare a temporary ban. In such circumstances the temporary ban may be imposed without prior consultation with the supplier. However, consultations and if requested a conference, would be expected to follow as soon after the declaration.

The following procedure should be followed before a temporary ban is issued:

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

- The Authority under section 62 may waive this procedure in the event that it has obtained evidence that the products or goods would cause a greater harm to the public, which outweighs the harm that the businesses, manufacturers or suppliers might suffer.

A temporary ban will have effect for a maximum of 60 days, after which it expires. The Authority however reserves the power to extend the temporary ban for another 60 days to complete its investigations.

The declaration of a temporary ban provides a 'breathing period' during which there should be no further harms, for the Authority (and other relevant parties) to consider:

- The nature of the harm: its severity and prevalence
- The causation of the harm
- Which of the available responses by the Authority and/or the relevant supplier(s) may be most effective in stopping further harm and reducing the severity of harms already caused

The Authority will thereafter:

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

A permanent ban is most likely to be considered when:

- It is uneconomic or impractical to modify the product to remove the hazard, and
- Reliance on voluntary withdrawal of the product from the market is unlikely to be a viable long term solution

It is a criminal offence to supply a product that is subject to either a temporary or permanent ban.

6.0 REPORTING PROCEDURES

1. The Authority will obtain information from consumers.
2. The Authority will also obtain information from consumer organizations and businesses. Businesses who report product safety problems include manufacturers, importers and traders that:
 - Self-report their own products once they have become aware of safety problems. The Authority values and encourages self-reporting and works closely with those businesses to resolve problems quickly.
 - Manufacturers, importers and traders who report competitors' products once they have become aware of safety problems. The Authority understands that many such complainants will want to remain anonymous.
3. The Authority will coordinate with various state bodies and/or sector regulators dealing with standards.
4. The Authority will also carry out its own investigations.

7.0 ADMINISTRATIVE SETTLEMENTS OR PROSECUTION OF OFFENCES

The Authority may exercise appropriate discretion in respect of its response to consumer product safety concerns. In most circumstance the Authority will opt for one of the formal responses provided by the Act. However, in some circumstances it may consider resolving concerns by agreeing an administrative settlement with the supplier. Circumstances where an administrative settlement may be considered include:

- Where the supplier has self-reported and taken all reasonable steps to cease supply, recall goods already supplied, mitigate the harm and compensate consumers who have been harmed;
- Where only there is only one supplier of the product; and
- Where the harm is not serious and its incidence is confined.

The Authority will facilitate and/or encourage the resolution of complaints/disputes by parties through administrative settlement procedures.