

The Competition Act No. 12 of 2010.

The Act establishes the powers and functions of the Competition Authority and strengthens competition and consumer law enforcement in Kenya. The Act incorporates familiar elements that are found in the antitrust laws and concepts of many other jurisdictions. It articulates the right substantive standards applying to restrictive agreements, abuse of dominance and mergers; it also creates an Authority and in addition provides it with the legal and administrative tools.

The Act is a dynamic and modern regime of regulating competition. It fulfills the four important requirements of a modern law: transparency, predictability, accountability and consistency. These qualities are embedded in the scope, the investigative tools and enforcement processes of the Law.

Scope of the Law

The Act provides for the regulation of a wide range of generic competition issues which is consistent with the coverage of more developed jurisdictions.

Mergers: Unlike the earlier Law that covered only horizontal mergers, three types of mergers viz horizontal, vertical and conglomerate are considered separately as they may present different sets of harm to competition;

Abuse of Dominance: The definition and illustrative examples of dominance and how abuse is exercised are provided;

Consumer Welfare: provisions resonate with article 46 of the Constitution which seeks to protect consumers from misleading and unfair market conduct;

Exemption: these provisions relate to certain restrictive practices and not practices enjoying legislative privileges as was the case under the repealed Law. This provision has also been expanded to include exemptions in respect of persons exercising intellectual property rights (IPRs) and to rules of professional associations;

Cartel: the activities and investigations of such practices have been clearly spelt out; Other Restrictive trade practices e.g. discrimination, refusal to deal, unfair pricing and resale price maintenance are considered in greater and clearer detail;

Unwarranted concentrations of economic power: Provisions under these encompass decongesting inefficient and concentrated sectors and industries through divestiture.

Generally, under section 5 of the Act, the Authority is mandated to investigate all persons including

government, state corporations and local authorities insofar as they engage in trade.

Investigative tools and enforcement processes

To increase predictability and transparency, the Act provides the competition agency with adequate enforcement tools. It can conduct “dawn raids” (surprise visits to business offices to acquire documents) to curtail cartel activities and it can compel the production of documents, information and oral testimony (e.g. at hearing conferences). Despite the compulsion to provide data, there is the provision that allows parties to file confidentiality claims in respect of information that, in the Authority view, would constitute valuable information or trade secret. The Act provides for imposition of fines of up to Kshs.10 million. In addition there are financial penalties amounting to 10% of annual gross sales turnover and award for damages to deter parties from breaking the Law.

In terms of institutional design, the Law separates the three functions of the Authority: the policy (the Minister for Finance); the management (the Board); and the regulator (the Director General). This creates vertical accountability and also insulates the Director General from externalities. The Board appointees and the Director General shall be vetted by Parliament. This ensures that credible persons occupy these posts.

The Law and its application are clear, transparent and non-discriminatory. The Competition Authority will publish decisions and explanations on the approach used to enforce the laws in order to help parties understand and comply with its orders and decisions. This is premised on the fact that for competition laws and enforcement to be effective, businesses and other stakeholders need to understand the “rules of the game”. The Act creates transparency and its enforcement predictable. In other words, while each case may be different, the decisions will be consistent with one another under reasonably similar circumstances.

The public hearings engendered in the Act will contribute to legitimacy and effectiveness in legal enforcement. Decisions will be formed in a structured and transparent manner to permit input from all interested parties. The public appeals processes will increase procedural transparency by ensuring that decisions are subject to an open, prompt and impartial public review and appeals process. The Authority will evaluate the frequency and timeliness of information updates and whether such information is clear and succinct.

The Authority will handle exemption applications on a case by case basis deriving the criteria for approval from section 26(3). Whichever the exemption category, the exemption period will be specified and subjected to conditions such as regular reporting on agreed indicators. Extension of the exemption beyond the agreed period would be contingent on demonstrating that the claims made are realized. Exemptions will have to be clearly defined and will be given with caution- that is why the onus will rest on the applicant to justify the exemption scheme.

Trade-offs in competition law enforcement is necessary to address interests of special groups. To this end, there are exemption provisions in respect of intellectual property rights (IPR). This is to reward

investments in creative and innovative activities with exclusive rights, limiting direct competition for a period. In the absence of IPR, such investment would be smaller.

Advocacy

A healthy competition culture is the hallmark of a good competition regime and competition advocacy is a basic prerequisite for this. The Law outlines, under section 9, advocacy functions of the Authority. The new Act mandates the Authority to promote competition advocacy, create awareness and impart training on competition issues. Section 5(3) empowers the Authority in consultation with other public bodies which have a competition regulation mandate to identify and establish procedures for management of areas of concurrent jurisdiction, promote cooperation and exchange of information to ensure consistent application of the principles of the Act. While enforcement of competition law will be targeted towards commercial activities, advocacy will be targeted more towards the policy making powers of the government bodies. Therefore, law enforcement and competition advocacy will complement each other.

Sector inquiries

Sector inquiries are investigations that the Authority will carry out into sectors of the economy when a market does not seem to be working as well as it should. This might be suggested by evidence such as, lack of new entrants, the rigidity of innovation, upward trend of prices, or other circumstances which may suggest that competition is restricted or distorted. The information derived from the studies may be used to assess the need to open specific investigations. The results of sector inquiries may be published.

Consumer protection provisions

The dual role of the Authority to enforce competition and consumer laws arises from the fact that both laws complement and enhance each other therefore making it possible for the Authority to create synergies upon ensuring an effective coordination of the two. For example, the dual competence of the agency will give rise to centralized management, operational efficiencies, and the efficient use of available expertise.

Consumer protection laws are based on the fact that consumers often face imbalances in economic terms, educational levels, market information and bargaining power compared to the companies they deal with. Therefore, the provisions will correct or compensate for the weaker position. Competition law will promote a range of choices/options in services and goods available to the consumer through the protection of competition; whereas consumer protection law will give access and freedom to select among the available choices/options.

Both competition and consumer protection provisions deal with distortions in the marketplace, which is supposed to be driven by the interaction between supply and demand. Anticompetitive offenses, like price fixing or exclusionary practices, distort the supply side because they restrict supply and elevate prices. Consumer protection offenses, like deceptive advertising, distort the demand side because they create the impression that a product or service is worth more than it really is. In other words, both sets

of offenses can be analyzed in economic terms, and appreciation of this nexus will help to resolve some apparent tensions.

Consumer protection will enhance competition by making it easier for honest sellers to compete in the market. Also, consumer protection complements competition provisions by providing useful insights about how competition policy should be executed, and by improving the understanding of how markets operate. For example, information on advertising practices and consumer choice may affect competition. The empowered consumers are also expected to act as a countervailing power to businesses to ensure successful implementation of competition law.

The consumer is increasingly used as a source of information in competition policy and enforcement. The Authority will customarily consult with consumer associations with respect to proposed legislative changes, and under the modernized enforcement regime the Authority will be encouraged to take into account input from consumers. A strengthened consumer, particularly where the consumer is felt to have been harmed in specific industries, may shift competition's attention to those markets.

The consumer interest not only finds its way in competition enforcement in terms of procedure, but also in its substantive application. For example, a benefit to consumers may exempt a practice that would have otherwise been anticompetitive. The interest of the consumer is also central to the consideration of efficiencies in merger control.

Conclusion

To conclude, the Act has definitely revolutionized competition regulation and enforcement in Kenya. The expanded scope and adoption of international best practices in case management and institutional arrangement will enhance predictability, transparency and accountability in enforcement activities. Unequivocally, the Law captures the noble objectives of:

Guaranteeing consumers and producers considerable freedom of choice and action. Thus, competition is valued for its own sake, as the economic equivalent of political democracy;

Ensuring that producers adjust their use of production factors to changes in the demand. This switching of resources ensures that supply adapts to changes in demand and that the production factors of labor and capital are guided by these changes;

Accelerating economic growth and thus increasing the prosperity of Kenyans. These will result from increased research and development; and

Contributing to fair distribution of income by reducing non-performance-based income as soon as it occurred. For example, monopolists who do not produce at maximum efficiency (usually with surplus capacities) thereby wasting scarce production factors will not be favored because their actions lead to distribution of income not commensurate with performance.