

# COMPETITION AUTHORITY OF KENYA



## Search and Seizure Guidelines



## PREFACE

The Search and Seizure Guidelines shall provide guidance to stakeholders to ensure that Authority's searches are managed appropriately, effectively and in a manner consistent with the Constitution of Kenya ("the Constitution"), the Competition Act No.12 of 2010 (the Competition Act), the Criminal Procedure Code, Chapter 75 of the Laws of Kenya ("CPC") and the Evidence Act. The objectives of the Search and Seizure Guidelines include achieving transparency in the process of carrying out the searches, consistency in the application of the law, and reducing exposure to litigation costs that would otherwise arise if the searches were carried irregularly.

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## A. INTRODUCTION

1. The Competition Authority of Kenya (“the Authority”) 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. This is achieved through regulating the market structure and market conduct.
2. The Search and Seizure Guidelines are not a substitute for the Act and the Competition (General) Rules, 2018 made under the Act (“**Rules**”) made under the Act and must therefore, be read in conjunction with the Act and Rules. In applying these Guidelines, the facts and circumstances of each case will be considered. Other Terms used in these Guidelines, which are not defined herein, shall have the same meaning as defined in the Act.
3. Section 32 of the Act provides that where the Authority deems it necessary for its investigations, the person or persons authorized in writing by it may enter any premises in the occupation or under the control of a trader, manufacturer, producer, commission agent, clearing and forwarding agent, transporter or other person believed to be in possession of relevant information and documents and inspect the premises and any goods, documents and records situated thereon.
4. The Guidelines are applicable to all undertakings and association of undertakings as defined by the Act.
5. These Guidelines may be revised, supplemented, or replaced from time to time in order to keep at par with dynamics in the legal and market spheres.

## B. OVERVIEW OF THE LEGAL AND INSTITUTIONAL FRAMEWORK ON SEARCHES IN KENYA

6. Article 31 (a) of the Constitution specifically provides that every individual has the right not to have their person, home or property searched. The right can however be limited by law and to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account relevant factors as provided by Article 24 of the Constitution through a search warrant. Further the Authority is empowered to carry out a search without a warrant pursuant to Section 32 of the Act.

### Search with a Warrant

7. A search warrant is an order in writing, issued by a judge or judicial officer, commanding a law enforcement officer to search a specified person or premises which includes building, ship, aircraft, vehicle, box or receptacle for specified property and to bring it before the judicial authority named in the warrant.
8. A search warrant may be issued by a court of law pursuant to Section 118 of the (“CPC”).
9. A search warrant may be issued on any day (including Sunday), and may be executed on any day (including Sunday) between the hours of sunrise and sunset, but the court may in exceptional circumstances, by the warrant, authorize the police officer or other person to whom it is addressed to execute it at any hour as provided for in Section 119 of the CPC.
10. The Search warrant shall bear the following form, content and duration as provided by Section 102 of the CPC:
  - i. be under the hand of the judge or magistrate issuing it and shall bear the seal of the court;
  - ii. State the offence with which the person against whom it is issued is charged;



- iii. name or otherwise describe that person;
- iv. order the persons to whom it is directed to apprehend the person against whom it is issued and bring him before the court issuing the warrant, or before some other court having jurisdiction in the case, to answer to the charge therein mentioned and to be further dealt with according to law; and
- v. remain in force until it is executed or until it is cancelled by the court which issued it.

11. Once issued with a search warrant the executor can compel any owner or resident of a building to allow the Search Officer (SO) access to conduct the search. However, the SO must produce the search warrant to validate entry.

12. Section 120 of the CPC requires persons in charge of a closed place to allow ingress (entry) and egress (exit) during a search.

It provides that

*“(1) Whenever a building or other place liable to search is closed, a person residing in or being in charge of the building or place shall, on demand of the police officer or other person executing the search warrant and on production of the warrant, allow him free ingress thereto and egress therefrom and afford all reasonable facilities for a search therein.*

*(2) If ingress into or egress from the building or other place cannot be so obtained, the police officer or other person executing the search warrant may proceed in the manner prescribed by section 22 or section 23.*

*(3) Where a person in or about the building or place is reasonably suspected of concealing about his person an article for which search should be made, that person may be searched.”*

13. Further, Section 121 of the CPC provides for detention of property seized during a Search.

14. The Authority shall keep an inventory of all the items seized during the search which shall be counter signed by the undertakings' authorized representative or persons in charge and a copy of the same left with the undertaking.

The SO shall retain the property until the conclusion of the case and reasonable care shall be taken for the preservation of the property.

15. In the course of conducting a search, the Authority will be guided by the provisions of Section 134 of the Evidence Act with regard to handling privileged information which states;

*"S134(1) No advocate shall at any time be permitted unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:*

*Provided that nothing in this section shall protect from disclosure —*

*(a) Any communication made in furtherance of any illegal purpose;*

*(b) Any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client."*

#### Search without a warrant

16. If SO, or any other authorized person by the Authority or the court is satisfied upon information received that he has reasonable cause to believe that by reason of delay in obtaining a search warrant, the evidence would be adversely tampered with, removed, damaged or destroyed, the SO or any other authorized person may enter the premises and exercise all the powers under Section 32 of the Act in as full and ample manner as if he were authorized to do so by a warrant issued by a Court of Law.

17. Where a search is intended to be undertaken without a warrant, the Director General of the Authority shall issue a Search Order which may include:

- a) The date on which the search should take place;
- b) Name and description of the person, place or thing to be searched;
- c) The offence with which the person, place or thing being searched is related; and the circumstances that gave rise to the need to conduct the search.

#### Execution of Search and Seizure

18. If any SO or police officer with written authorization from the Authority to execute a search, has reason to believe that the person in or about the building or place is concealing about his person an article for which search should be made, that person may be searched.

19. If that person is a woman the search shall be made by another woman and if that person is a man the search shall be made by another man with strict regard to decency.

20. The SO or other person authorized by the Authority or the Court to conduct a search on behalf of the Authority, may stop, search and detain any aircraft, vessel or vehicle in or upon which there is reason to suspect has been used or employed in the commission or to facilitate commission of an offence under the Act.

21. No person shall be entitled to damages or compensation for loss or damage suffered by him in respect of the detention of his aircraft, vehicle or vessel. For purposes of these Guidelines, "aircraft", "vessel" and "vehicle", respectively, include everything contained in, being on or attached to an aircraft, vessel or vehicle, as the case may be, which, in the opinion of the Authority, forms part of the equipment of the aircraft, vessel or vehicle.

22. Where any representative or member of staff of the undertaking gives, pursuant to section 33(1) of the Act, statements on the spot-on facts or documents relating to the

subject matter of the search at the request of the Investigators, the explanations may be recorded in any form. A copy of any such recording will be made available to the undertaking concerned after the search.

### Search and Seizure process

23. Where the Authority deems it necessary for its investigations, the person or persons authorized in writing by it may enter any premises in the occupation or under the control of a trader, manufacturer, producer, commission agent, clearing and forwarding agent, transporter or other person believed to be in possession of relevant information and documents and inspect the premises and any goods, documents and records situated thereon.
24. The Authority may execute the search on any day (including Sunday) between the hours of sunrise and sunset, but the Authority may request court of law to authorize execution of the same at any hour.
25. The Search warrant shall remain in force until it expires.
26. Upon entering premises in pursuance of the powers conferred by the Competition Act, the person or persons authorized in writing shall, before proceeding to conduct an inspection of the premises, goods, documents and records situated thereon, serve the search warrant upon the person present who is or who reasonably appears to be for the time being in charge of the premises and inform of his intention to exercise his powers under this Act.
27. The Authorized persons to conduct the search (Search Officers- SO) shall have written Authorization from the Authority to execute the search and have proof of identity.
28. The role of the SO is, to carry out searches in the premises for items falling within the conditions of a search warrant. The SO is responsible for conducting his or her search in

a legal and professional manner and also for the correct completion of Item Location Records (ILR's) for items located during the course of such a search.

#### Access to Computerized Data

29. The investigators may search the Information Technology (IT)-devices, equipment and all storage media of the undertaking or Association of undertakings. This applies also to private devices and media that are used for professional reasons that are found on the premises. For this purpose, the SO may not only use any built-in (keyword) search tool but may also make use of their own forensic IT tools.
30. For the purpose of access, the SO shall be provided with the necessary password, encryption code, decryption code, software or hardware or any other means.
31. The undertaking shall be obligated to cooperate during the search and will provide IT staff during the execution of the search warrant to explain how the systems work and give administrator access including rights to:
  - a. search any data contained in or available in the IT system;
  - b. reproduce any record from that data;
  - c. seize any output from the IT system for examination and copying; and
  - d. attach and, if necessary, subject to the issuance of a receipt to that effect, remove from the premises for examination and safekeeping anything that has a bearing on the investigation.

The Authority **must** seal all copies of hard drives, **documents or any other evidence before they are removed from the Undertaking's premises. If the hard drives are to be inspected** at a later stage, it shall be done in the presence of the Undertaking's representative if so required, **and the seal to the hard drive will only be broken in the presence of the Undertaking's representative.**

32. The SO is empowered to examine the records, and any other documents related to the business, irrespective of the medium on which they are stored.
33. The SO may seal any business premises, books or records for the period and to the extent necessary for the execution of the warrant.
34. The SO may ask any representative or member of staff of the undertaking, or association of undertakings, for explanations on facts or documents relating to the subject matter of the inspection and to record the answers.
35. The SO may explain procedural matters, particularly with regard to confidentiality, and the possible consequences of a refusal to submit to the search process.
36. The undertaking or association of undertakings may consult an external legal counsel during the search. **The SO will allow a reasonable time for the Undertaking's legal counsel to arrive.** The SO is however empowered to enter the premises, serve the search warrant or the Authority's order and undertake the search without waiting for the undertaking to consult its legal counsel **reasonable time has elapsed.** The SO may, in any case, allow a reasonable time for the undertaking to obtain legal representation Personal data of individual staff members of undertakings (such as their names, telephone numbers, email addresses) that may, be contained in business documents / data related to such investigations and which may therefore be copied or obtained during a search. The undertakings may claim confidentiality in respect of the whole or any part of the material seized or disclosed during the search pursuant to Section 20 of the Act.
- Where request for confidentiality is made on-site during the search process, temporary confidentiality may be granted for a period of 14 days **within which period the undertaking must make a formal claim for confidentiality.**
37. While executing a search warrant, officers shall record a description of and the location from where items were seized. In addition to a written record, photographs may be used to show the location from which property was seized.

38. Where any record, book account, document, computerized data or other thing is seized, the SO making the seizure –

- a) shall prepare a list of the record, book, account, document, computerized data or other thing seized and shall sign the list;
- b) shall as soon as practicable, serve a copy of the list of record, book, account, document, computerized data or other thing seized to the representative of the undertaking which have been searched, or to his agent or servant at those premises. If the premises are unoccupied, the SO shall post a copy of the list of the record, book, account, document, computerized data or other thing seized conspicuously on the premises.
- c) After the completion of the search, the Authority may on request allow parties to make copies of documents seized, at their own cost.

39. Items seized by the Authority shall be detained until the conclusion of the case or the investigation, reasonable care being taken for their preservation. However, the Authority shall return items before conclusion of the investigations in the event that they are not relevant for the purpose of the investigation

40. In the course of a search, any material claimed as privileged information (privilege against self-incrimination and attorney client privilege) shall be evaluated separately and the parties shall agree the nature and extent of the privileged information. The parties that decline to produce information on grounds of privilege have the burden of establishing that the privilege applies. The Authority shall make a determination on the matter. The party aggrieved has a right of appeal to the Tribunal. and