Competition Law and Policy Reviews

OECD Peer Reviews of Competition Law and Policy: Kenya

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Foreword

Peer Reviews are founded upon the willingness of a country to submit its laws and policies to substantive review by other members of the competition international community. This process provides valuable insights to the country under study and promotes transparency and mutual understanding for the benefit of all. There is an emerging international consensus on best practices in competition-law enforcement and the importance of pro-competitive reform. Peer Reviews are an essential part of this process, as well as an important tool in strengthening competition institutions. Strong and effective competition institutions can promote and protect competition throughout the economy, which increases productivity and overall economic performance.

A peer review is a two-stage process: first, a report is produced by the OECD Secretariat on the current state of the country's competition framework and its enforcement practice; and second, a peer review based on the report is performed either in the Competition Committee or the OECD Global Forum on Competition.

This OECD report served as basis for the Peer Review in the presence of lead examiners that took place at the OECD Global Forum on Competition on 2 December 2025. The lead examiners were Gustavo Augusto Freitas de Lima (President, Brazilian Administrative Council for Economic Defense – CADE), Linsey McCallum (Acting Director-General, European Commission Directorate-General for Competition – DG COMP) and Doris Tshepe (Commissioner, Competition Commission of South Africa Competition Commission of South Africa). The delegation representing Kenya during the Peer Review session was led by: David Kemei (Director General, Competition Authority of Kenya).

The precise recommendations were developed by the lead examiners, discussed at the OECD Global Forum on Competition on 2 December 2025 and approved by written procedure on 16 February 2026. They have been included as a separate chapter in this report.

This report was prepared by Marcelo Guimarães, Connor Hogg and Saïd Kechida (from the OECD Competition Division), with support by Tominaga Yuichi (on secondment to the OECD from the Japan Fair Trade Commission) and Zeynep Akbas. Ori Schwartz, Antonio Capobianco and Aura García Pabón provided valuable inputs. The report was prepared for publication by Erica Agostinho.

The Peer Review process was extensively supported by the management and staff of the Competition Authority of Kenya, co-ordinated by Adano Roba and Ninette Mwarania.

This report reflects information provided in:

- The responses to the OECD Secretariat's questionnaire as well as follow up clarifications.
- Information collected in the OECD Secretariat's May 2025 fact-finding mission, where the Secretariat met with the following stakeholders:
  - The Board, Director-General and staff of the Competition Authority of Kenya
  - Competition Tribunal of Kenya
  - National Treasury of Kenya

- Central Bank of Kenya
- Communications Authority of Kenya
- Insurance Regulatory Authority
- Public Procurement Regulatory Authority
- The World Bank Group
- East Africa Community Competition Authority (EACCA)
- The Common Market for Eastern and Southern Africa (COMESA) Competition and Consumer Commission
- Competition Commission of South Africa (CCSA)
- Faith Odhiambo: President of the Law Society of Kenya, Partner at Ombok & Owuor Advocates LLP
- Francis Wang'ombe Kariuki: Senior Consultant in Competition and Trade Policy at Bowmans, former Director-General of the Competition Authority of Kenya
- Stephen Kiptiness: Managing Partner at KO Associations, former board member of the Competition Authority of Kenya
- Professor Simon Roberts: Professor of Economics at the University of Johannesburg and the Centre for Competition, Regulation and Economic Development
- Professor Reena das Nair: Associate Professor at the University of Johannesburg and Executive Director of the Centre for Competition, Regulation and Economic Development
- Dr Vellah Kigwiru: Friedrich Schiedel Fellow of the TUM Think Tank at the Technical University of Munich
- Joyce Karanja: Partner and Head of Competition Practice at Bowmans
- Anne Kiunuhe: Partner and Co-head of Competition Law Practice at ALN Kenya
- Professor Migai Akech: Professor at the University of Nairobi School of Law
- Tamara Cook: CEO of Financial Sector Deepening Kenya
- Elias Sang: Chairperson of the Association of Insurance Consumers of Kenya
- Ishmail Bett: CEO of the Association of Kenyan Suppliers
- Alice Kemunto: Executive Director of Consumer Grassroots Association

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Abbreviations and acronyms

ACF	African Competition Forum
AfCFTA	African Continental Free Trade Area
CAK	Competition Authority of Kenya
CCCC	COMESA Competition and Consumer Commission
CCSA	Competition Commission of South Africa
CMA	Capital Markets Authority
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
EACCA	East African Community Competition Authority
HHI	Herfindahl-Hirschman Index
ICN	International Competition Network
IMF	International Monetary Fund
MEA	Middle East and Africa
MSME	Micro, small and medium enterprises
ODPP	Office of the Director of Public Prosecutions
PMR	Product Market Regulation
PPRA	Public Procurement Regulatory Authority
SLC	Substantial lessening of competition
SSNIP	Small but significant and non-transitory increase in price
UNCTAD	United Nations Trade and Development
USSD	Unstructured Supplementary Service Data

Executive summary

By submitting its competition law and policy to this OECD review, Kenya takes an important step and demonstrates its dedication to implementing a modern and effective competition law and policy framework. This report describes and analyses the current competition law and policy framework in Kenya, as implemented by the Competition Authority of Kenya (CAK). The report concludes with recommendations developed by the OECD Secretariat and lead examiners, to be discussed at the Peer Review examination, which will take place during the 2025 OECD Global Forum on Competition.

Kenya has made significant progress in establishing a modern competition regime. Kenya was among the first countries in Africa to adopt a competition law in 1989 which was repealed in 2010 by the Competition Act, Cap 504 Laws of Kenya. The current Act provides the CAK (established in 2011) with a comprehensive mandate covering enforcement against anticompetitive agreements, abuse of dominance, merger control, market studies and advocacy. The CAK also serves as the national consumer protection authority.

Kenya's competition law applies across all sectors of the economy, including state-owned enterprises, and is complemented by concurrent jurisdiction with sector regulators in areas such as banking, energy, insurance, and telecommunications. The country's integration into regional and continental competition frameworks (COMESA, the East African Community, and the African Continental Free Trade Area) has introduced additional layers of enforcement, raising both opportunities for co-operation and risks of duplication and legal uncertainty.

While the institutional design of the CAK reflects a commitment to independence and accountability, with a Board of Directors and a Director-General overseeing its operations. However, the review identifies several areas for improvement. The CAK's budget and staffing levels remain low by international and regional standards, potentially limiting its effectiveness. Furthermore, the absence of clear eligibility criteria for appointing Board members and the Director-General as well as the lack of clear dismissal rules raise concerns about potential political influence and continuity.

Enforcement activity by the CAK has been low in the last five years. While the legal framework for sanctions and investigative powers is robust, actual enforcement has been limited. The CAK has relied heavily on settlements, often with low financial penalties and without admissions of wrongdoing, which may undermine deterrence and the development of case law. The leniency and whistleblower programmes have not yet yielded results, reflecting limited awareness and perceived risks among potential applicants. Transparency is also a concern, as only summaries of decisions are published, restricting public understanding of how competition law is interpreted and applied.

Merger control is well established, with clear notification thresholds and procedures. However, the substantive analysis of mergers tends to prioritise public interest considerations over competition effects, and remedies are more often behavioural than structural. The CAK has not prohibited any mergers to date, and the number of cases subject to remedies remains low. The review notes that the CAK's co-operation with sector regulators in merger review is generally effective.

Advocacy and market studies are central to the CAK's activities, and the authority has been successful in raising awareness of competition issues among public sector stakeholders. Nevertheless, the impact of

market studies is constrained by challenges in information gathering and the selection of topics. The review highlights the need for the CAK to focus its limited resources on high-impact markets and to strengthen enforcement as a complement to advocacy.

Judicial review of CAK decisions is available through the Competition Tribunal and the High Court, but the lack of competition law expertise among adjudicators and the prevalence of settlements have limited the development of jurisprudence. Private enforcement is non-existent, reflecting broader challenges in developing a competition culture and the risks and costs associated with litigation.

The report concludes with a series of recommendations aimed at strengthening the CAK's resources, independence, enforcement capacity, and co-operation with domestic and international counterparts. They suggest possible ways forward for consideration by Kenya, with the aim of improving the country's competition law and policy.

Key recommendations

Improving enforcement practices

- Ensure that fines serve as a deterrent by being proportionate to both the gravity of the infringement and the turnover of the fined undertakings. The Consolidated Administrative Remedies and Settlement Guidelines ("fining guidelines") should be adjusted to ensure that the fine calculations better reflect aggravating factors.
- Ensure that funding provided to the CAK by the Government of Kenya is ringfenced and cannot be adjusted according to any fines or fee revenue raised by the CAK.
- Establish clear rules for the settlement procedure, as well as the payment of a financial penalty. In addition, clarify settlement discounts, for instance by setting maximum reduction percentages and other guiding criteria. Avoid granting excessive discounts.
- Increase the use of dawn raids, leveraging the recently established forensics laboratory
- Empower the CAK to impose sanctions for non-compliance with requests for information, as well as failure to pay fines. The CAK should not be reliant on the Office of Director of Public Prosecutions to bring injunctive action.

Institutional framework

- Implement a transparent process for selecting all members of the Board of Directors and the Director-General, introducing clear eligibility criteria to guarantee they have competition law or economics expertise to the extent possible.
- Introduce rules on staggered appointments of Board members, ensuring partial renewals of the Board of Directors.

Improving transparency and CAK performance

- Ensure the CAK has adequate resources (both financial and staffing) for its core competition enforcement functions. CAK resources should at least be at the level of comparable jurisdictions.
- Ensure that there are dedicated resources and operational structures for competition enforcement, separate from its consumer protection functions.
- Publish, including on the CAK's official website, public versions of full decisions, subject to the protection of confidential information. Decisions should be well reasoned and subject to sound economic analysis. This includes all decisions relating to anticompetitive conduct, market studies and merger reviews.

Co-operation

Significantly increase the amount of co-operation between the CAK and PPRA. The authorities should develop a work plan to significantly enhance co-operation on referring alleged bid rigging to each other and identify opportunities to collaborate on enhanced detection techniques (such as screening tools or audits of past tender procedures to identify high-risk markets). <!!Best practice on key box (unnumbered): Essential information - such as key messages, recommendations, findings, calls for action - highlighting the main text. Ideally, no more than one page long.!!>

1 Context and legal framework

This chapter provides an overview of the institutional and legal framework of competition law in Kenya. After describing the main features of the country, it analyses the origin of the Competition Act and its scope of application.

1.1. General legal context

The Republic of Kenya (Kenya) is located on the East Coast of Africa bordering the Indian Ocean to the East, South Sudan and Ethiopia to the North, Somalia to the Northeast, Uganda to the West, and Tanzania to the South. It has a population of 53.3 million people and covers a total of 580 367 square kilometres.[1] The official languages of Kenya are Swahili and English.[2]

Kenya is a presidential republic and adopts the tripartite system of government (legislature, executive and judiciary).[3] Kenya's legal system predominantly operates on a common law model, governed by a constitution and acts of parliament. Kenya has two levels of government, at the national and county level. Each of the 47 counties has an executive and legislative branch with devolved powers and responsibilities.[4] Kenya has a bicameral parliament, with a National Assembly and a Senate (although the Senate only has the power to consider, debate and approve legislation when it concerns county governments).[5] The President of Kenya is elected by direct popular vote and serves as head of state and government.[6] The judicial system in Kenya consists of three superior and other subordinate courts.[7]

There are no constitutional provisions relating to competition law. However, there is a constitutional requirement that all public procurement contracts take place in a competitive system (as well as being fair, equitable, transparent and cost-effective), with sanctions for breaches of procurement laws and policies.[8] There is also constitutional guarantees related to consumer rights.[9]

As of April 2025, Kenya's Gross Domestic Product (GDP) stood at approximately USD 132 billion, with a growth rate of 4.8% in 2024. This is equivalent to a GDP per capita of USD 2 470 in current prices, or USD 7 530 when adjusted for Purchasing Power Parity (International Monetary Fund, 2025[1]). Kenya has the third largest economy in Sub-Saharan Africa, behind Nigeria and South Africa (International Monetary Fund, 2025[1]). Real GDP grew at a solid annual average rate of 5% over the 2010-2019 period lifting the country into the lower middle-income country category in 2014.

Considered as the commercial, financial and transport hub of East Africa, Kenya has a diversified economy with a rapidly growing services sector contributing to 54% of value added and 45% of jobs mainly in the finance, information and communications, transport and tourism segments (World Bank, 2023[2]). Agriculture remains a large contributor to the economy accounting for approximately 24.4% of value added with about 40% of the total population (and more than 70% of Kenya's rural population) earning at least part of their income from the sector which largely contributes rural livelihoods and exports of cash-crop and agro-industrial raw materials.

At independence in 1963, Kenya pursued import substitution policies through public investment, encouragement of smallholder agricultural production, and incentives for foreign private industrial investments. Following a balance of payments crisis in the early 1970s and subsequent economic difficulties, Kenya engaged in structural adjustment programmes with the World Bank and the IMF in the 1980s, adopting more liberal trade and promoting market mechanisms and free competition. The adoption of the "Restrictive Trade Practices Monopolies and Price Control Act" in 1989, the country's first competition act was an important outcome of this regulatory revamp.

Kenya has made important progress in its economic transformation agenda in the last decade. However, the Kenyan economy is still characterised by a restrictive regulatory environment and a strong state presence. Commercial state companies' revenue were equivalent to at least 4.2% of the country's GDP in 2023 (World Bank, 2025[3]). According to the World Bank's Business of State database, there are currently 209 State Owned Enterprises (SOEs) in Kenya most of which operate in competitive sectors raising concerns about market distortions and potentially crowding out private operators (World Bank, 2025[3]). The OECD and World Bank Product Market Regulation (PMR) indicators from 2025 show that Kenya's overall score (2.92 on a scale of 0-6 with 0 being the least restrictive and 6 being the most restrictive) is well above the average for other middle-income countries suggesting that product market regulations are

more restrictive to competition, especially in terms of direct state participation in markets, and barriers to entry with very little improvement over the past 10 years (World Bank, 2025[3]).

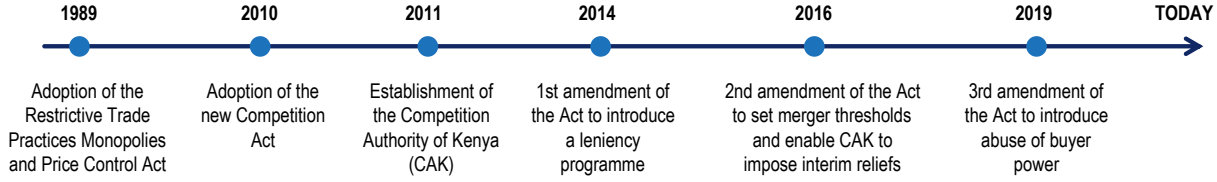
Adopting pro-competitive reforms could yield significant benefits for Kenya in terms of growth and jobs outcomes. Recent estimations suggest that reducing barriers to competition in foundational services sectors (such as electricity and professional services) would boost GDP growth by 0.55 percentage points (p.p.) in a year while addressing barriers to trade and investment could boost formal jobs by 2.6% and real GDP growth by 4.9% by 2035 (World Bank, 2025[4]).

1.2. Development of competition law

Prior to 2010, competition matters in Kenya were regulated by the 1989 Restrictive Trade Practices Monopolies and Price Control Act ("1989 Act"). The 1989 Act provided for a commissioner and a department within the government's treasury ministry to be vested with powers to institute price control measures. Additionally, the commissioner could investigate restrictive trade practices, collusive tendering, monopolies and mergers. In practice, very little competition-related activity was undertaken during this period.

Figure 1.1 below outlines the major milestones relating to the development of the competition law in Kenya.

Figure 1.1. Major milestones of the competition law and policy development in Kenya



Source: Created by the OECD, based on information provided by the CAK.

By 2009, Kenya's parliament sought to modernise the legislative framework, including the creation of an independent competition authority, add prohibitions on abuse of dominance, and introduce a consumer protection regime to the law. Parliament thus repealed the 1989 Act and passed the 2010 Competition Act ("Competition Act").[10]

Pursuant to the Competition Act, the Competition Authority of Kenya ("CAK") was established in 2011.[11]

The Competition Act has been amended thrice. In 2014, a leniency programme was introduced. In 2016, it expanded the CAK's power to issue guidelines, grant block exemptions and (in consultation with the government minister) set merger thresholds. Most recently, in 2019 the law was amended to strengthen the provisions relating to abuse of buyer power and the conduct of professional associations.

Kenya's Parliament is currently considering amendments to the Competition Act which would grant the CAK additional ex ante powers relating to the regulation of digital markets. The proposed amendments would also revise the Competition Act to provide stronger protections for smaller parties against unfair contract terms in commercial negotiations.[12]

1.3. Competition framework

1.3.1. Object and application of the law

The object of the Competition Act is to enhance the welfare of the Kenyan people "by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Kenya".[13] The Competition Act is intended to:[14]

> *(a) increase efficiency in the production, distribution and supply of goods and services;*
>
> *(b) promote innovation;*
>
> *(c) maximize the efficient allocation of resources;*
>
> *(d) protect consumers;*
>
> *(e) create an environment conducive for investment, both foreign and local;*
>
> *(f) capture national obligations in competition matters with respect to regional integration initiatives;*
>
> *(g) bring national competition law, policy and practice in line with best international practices; and*
>
> *(h) promote the competitiveness of national undertakings in world markets.*

The Competition Act applies to all persons in Kenya. The government, state corporations and local authorities are subject to the Competition Act so far as they "engage in trade".[15] While non-exhaustive, the Competition Act specifies that:[16]

- The sale of a business or asset by the government or state entity constitutes trade.
- The imposition and collection of taxes does not constitute trade.
- The granting, revoking or collection of fees relating to licences, permits and authorisations does not constitute trade.
- Internal transactions within the government or other state entities does not constitute trade.

The Competition Act has application when conduct:[17]

- a Kenyan citizen or resident,
- a Kenyan firm or firms carrying on business in Kenya,
- any person supplying or acquiring goods or services in Kenya or within Kenya,
- any person outside Kenya that is acquiring shares or assets resulting in the change of control of a business, part of a business or an asset of a business, in Kenya.

The Competition Act covers all typical areas of enforcement and advocacy powers, namely, prohibited agreements (horizontal, vertical and bid rigging), abuse of dominance, merger control, market studies and advocacy opinions.

Contraventions of the Competition Act can be enforced through a civil law administrative decision of the CAK. However, all contraventions of the law also constitute a criminal offence and carry criminal penalties of up to five years imprisonment and/or a fine of up to KES 10 million (around EUR 66 000). In practice, no criminal enforcement of the Competition Act has ever taken place. This is discussed in Chapter 3 when discussing the sanction regime in Kenya.

Part VI of the Competition Act includes provisions on consumer protection. The CAK also serves as the consumer protection authority.

Additionally, the Competition Act contains a prohibition on the abuse of buyer power. This provision relates to conduct such as unfair contract terms, unjustified delays in payments, unjustified unilateral termination of commercial relationships, and demands for preferential terms unfavourable to the supplier.[18] Abuse of buyer power is not considered to be competition enforcement for the purposes of this Peer Review. The CAK's practice relating to abuse of buyer power is only discussed in Chapter 2 as it relates to its enforcement prioritisation.

1.3.2. Exemptions

There are no general exemptions to the Competition Act. The Competition Act provides for exemptions from the provisions of the law covering agreements or abuse of dominance if there are compelling public policy reasons. The four criteria for the determination of exemption applications are the extent to which the conduct is likely to contribute or result in:[19]

> *(a) maintaining or promoting exports;*
>
> *(b) improving, or preventing decline in the production or distribution of goods or the provision of services;*
>
> *(c) promoting technical or economic progress or stability in any industry;*
>
> *(d) obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or would be likely to result, from the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices.*

Applications for exemptions must be filed with the CAK. The CAK then publishes the proposed exemption in the government Gazette and calls on interested parties to submit written views to the CAK.[20] The CAK then issues a decision on the exemption (including rejections), which must include reasons.[21] Exemptions may include the imposition of conditions.

Exemptions may be revoked if there has been a material change of facts, the grant of an exemption was based on incorrect or misleading information, or if the conditions of the exemption are breached. Revocations of exemptions must also be published in the Gazette with a call for third party input.[22] A breach of any conditions imposed on the exemption is also an offence under the Competition Act.[23] The maximum sanction for breaching the Competition Act is a fine not exceeding KES 500 000 (EUR ~3 300), or imprisonment for a term not exceeding three years, or both.[24]

Parties may also seek exemptions for conduct in relation to any right or interest acquired or protected by intellectual property laws.[25] Anticompetitive restrictions in the rules governing professional associations or trade bodies may also be exempted by application if they are reasonably required to maintain professional standards or the ordinary functions of the profession.[26]

There is no *de minimis* exemption to the ambit of the Competition Act.

Table 1.1 below sets out the number of exemptions granted in the past five years.

Table 1.1. Exemptions granted by the CAK

Year	Applications filed	Exemptions granted*	Sectors/industries of exemptions
2020	2	0	Energy; agriculture
2021	3	1	Agriculture; manufacturing; energy
2022	0	2	Energy; agriculture
2023	3	2	Aviation; retail
2024	1	2	Aviation; agriculture

Note: *Applications may not be granted in the same year as they were filed.
Source: CAK.

The CAK notes that while they do conduct compliance checks on exemptions granted, they do not periodically assess exemptions to determine whether they are necessary and do not go beyond achieving their objective.

An application by the Energy Dealers Association in 2019 is discussed in greater detail in Chapter 4 as the exemption application uncovered long-term cartel conduct in the gas cylinder exchange market which had not been authorised.

1.3.3. Creation of appellate body

The Competition Act also creates the Competition Tribunal to hear appeals of decisions of the CAK. Under the legislation, decisions of the Competition Tribunal are then appealable to the High Court of Kenya as the second and final level of appeal.[27]

Chapter 8 of this Peer Review provides a detailed assessment of the practices and procedures related to appeals and judicial review under the Competition Act.

1.3.4. Regulated sectors

The Competition Act applies across all economic sectors and the CAK is the only authority with powers to enforce the legislation. Nonetheless, authorities in some regulated sectors do have some limited legal powers relating to competition law and policy in Kenya.

The Communications Authority has the power to investigate anticompetitive conduct under their legislation.[28] However, in practice, this has not taken place. In addition, the Energy and Petroleum Regulatory Authority has a specific mandate under its legislation to work with the CAK on monitoring "the conditions of contractors' operations and their trade practices", and "to ensure and facilitate competition, access and utilisation of facilities by third parties".[29]

Moreover, in the banking, energy, insurance and telecommunications sectors, both the CAK and the relevant sector regulator have concurrent jurisdiction to review mergers. In these cases, authorisation from both authorities is required before a transaction can be implemented. Each authority conducts its own assessment and issues an independent decision, with the power to impose remedies or prohibit the transaction. When assessing such mergers, the sector regulator mainly focusses on regulatory and technical aspects (such as licence conditions and compliance with regulatory requirements), while the CAK evaluates their impact on competition, although this distinction is not always easy to draw in practice.

In addition, the Capital Markets Authority has the power to review mergers involving publicly listed companies.

Chapter 10 of this Peer Review on co-operation provides greater detail on the practice and memoranda of understanding that exist between the CAK and sector regulators regarding competition functions.

1.3.5. Supranational competition frameworks

Kenya is a member of three supranational trading blocs relevant to its competition framework. These are:

- The Common Market for Eastern and Southern Africa (COMESA) – which has an active supranational competition enforcement framework and a regional competition authority. The COMESA framework includes the ability to investigate and enforce competition matters in Kenya that have regional effects and obligations on the CAK to support.
- The East African Community (EAC) – which has a supranational competition enforcement framework and a regional competition authority due to commence merger control functions in

November 2025. The EAC framework includes the ability to investigate and enforce competition matters in Kenya that have regional effects and obligations on the CAK to support.

- The African Continental Free Trade Area (AfCFTA) – which is in the process of designing a supranational competition enforcement framework, including a continental competition authority. At the time of drafting this Peer Review, the specific operations of the AfCFTA competition framework were still under negotiation.

The CAK's practice relating to supranational competition enforcement is discussed in Chapter 5 on mergers, as merger control is the main aspect of supranational enforcement currently taking place in the region.

A broader discussion on the CAK's international co-operation practice, including supranational competition enforcement is included in Chapter 10 of this Peer Review.

1.4. Analysis

The basic pillars of competition law are present in the legislation and are in line with good practice internationally. In general, stakeholders did not raise major concerns regarding the underlying competition law framework in Kenya.

Four specific concerns regarding the legislative framework were highlighted during the OECD fact-finding mission.

The first relates to the previous amendments of the Competition Act, namely that changes have been added in a piecemeal manner without sufficient consideration of what is already in the legislation. Stakeholders expressed confusion that the overlap between the law on abuse of dominance and abuse of buyer power had become confusing to interpret, as had the provisions relating to professional and trade associations.

The second is forward-looking, regarding the potential reforms to the Competition Act to add provisions on ex ante digital platform regulation. Stakeholders expressed concerns that the significant legislative amendments being proposed do not connect with the findings of relevant market study activities, nor has there been any enforcement action in this area to date to prove that the existing legislation is not adequate to address harm.

Thirdly, is the introduction of additional supranational competition authorities with jurisdiction in Kenya. In the long-term, there may be four overlapping competition frameworks in Kenya, an unprecedented number compared to other competition authorities globally. This creates risk of unnecessary confusion and duplication for stakeholders in Kenya (including the CAK). A wide range of external stakeholders noted that they were concerned about costs and resource burdens placed on parties, noting it could disincentivise investment. More detail on the supranational frameworks is included in Chapter 5 on mergers and Chapter 10 on co-operation.

Finally, evidence gathered by the OECD indicates that the CAK does not engage in periodic assessment of exemptions it has granted, only conducting compliance checks once the exemption period has lapsed. This does not align with the OECD Recommendations that relate to exemptions. These are the:

- Recommendation of the Council concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452], which calls on adherents to "make their exemptions transparent and periodically assess their exemptions to determine whether they are necessary and limited to achieving their objective".
- The Recommendation of the Council on Competition Assessment [OECD/LEGAL/0455], which calls on adherents to ensure that an "exception should be defined for a limited period of time,

typically by including a sunset date, so that no exception would persist when it is no longer necessary to achieve the identified policy objective".

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World Bank (2025), *Beyond the Budget : Fiscal Policy for Growth and Jobs - A Public Finance Review for Kenya*, World Bank Group, Washington DC. [3]

World Bank (2025), *From Barriers to Bridges: Procompetitive Reforms for Productivity and Jobs in Kenya*, https://documents.worldbank.org/en/publication/documents-reports/documentdetail/099112125052016953. [4]

World Bank (2023), *Kenya Country Economic Memorandum 2023 : Seizing Kenya's Services Momentum*, World Bank Group, Washington DC, http://documents.worldbank.org/curated/en/099072623125529056 (accessed on 12 November 2025). [2]

Notes

[1] Kenya National Bureau of Statistics, "Population", https://www.knbs.or.ke/.

[2] Constitution of Kenya, art 7(2).

[3] Constitution of Kenya, art 1(3).

[4] Constitution of Kenya, art 6; Constitution of Kenya, schedule 4.

[5] Constitution of Kenya, ch 8.

[6] Constitution of Kenya, ch 9.

[7] See Constitution of Kenya, ch 10. The three superior courts are the Supreme Court, Court of Appeal and the High Court. The Employment and Labor Relations Court, the Environment and Land Court are considered to have the same status as the High Court. The subordinate courts consist of the Magistrates Courts, Small Claims Courts, Kadhi Courts, Tribunals and the Courts Martial.

[8] Constitution of Kenya, s 227.

[9] Constitution of Kenya, s 46.

[10] An Act of Parliament to promote and safeguard competition in the national economy; to protect consumers from unfair and misleading market conduct; to provide for the establishment, powers and

functions of the Competition Authority and the Competition Tribunal, and for connected purposes (Competition Act), CAP 504 (2010).

[11] Competition Act, s 8.

[12] Competition (Amendment) Bill 2024.

[13] Competition Act, s 3.

[14] Competition Act, s 3.

[15] Competition Act, s 5.

[16] Competition Act, s 5(5).

[17] Competition Act, s 6.

[18] Competition Act, s 24A.

[19] Competition Act, s 26(3).

[20] Competition Act, s 25.

[21] Competition Act, s 26(1).

[22] Competition Act, s 27(1)-(2).

[23] Competition Act, s 27(3)-(4).

[24] Competition Act, s 91.

[25] Competition Act, s 28.

[26] Competition Act, s 29.

[27] Competition Act, p.p. VII.

[28] Kenya Information and Communications Act (2012), p.p. VIC.

[29] Energy Act (2019), ss 10(m), 10(bb).

2 Institutional design

This chapter covers the mandate, structure and resources of the Competition Authority of Kenya.

2.1. Law and practice

The Competition Authority of Kenya is the competition authority in Kenya, as well as the consumer protection regulator. It was created in 2011, replacing the former Monopolies and Prices Department of the Treasury, which was responsible for enforcing the 1989 Act. The CAK was established as an independent statutory body, with its own budget and organisational autonomy.[1] The CAK reports to the National Treasury and is accountable to the Office of the Auditor-General, which audits the CAK's accounts annually,[2] and to the National Assembly, through the submission of annual reports.[3]

These reports must contain information on the CAK's annual activities and plans, including details of its performance against key performance indicators, such as the number and nature of complaints decided or under consideration, investigations completed or ongoing, and significant market studies and inquiries conducted or planned.[4]

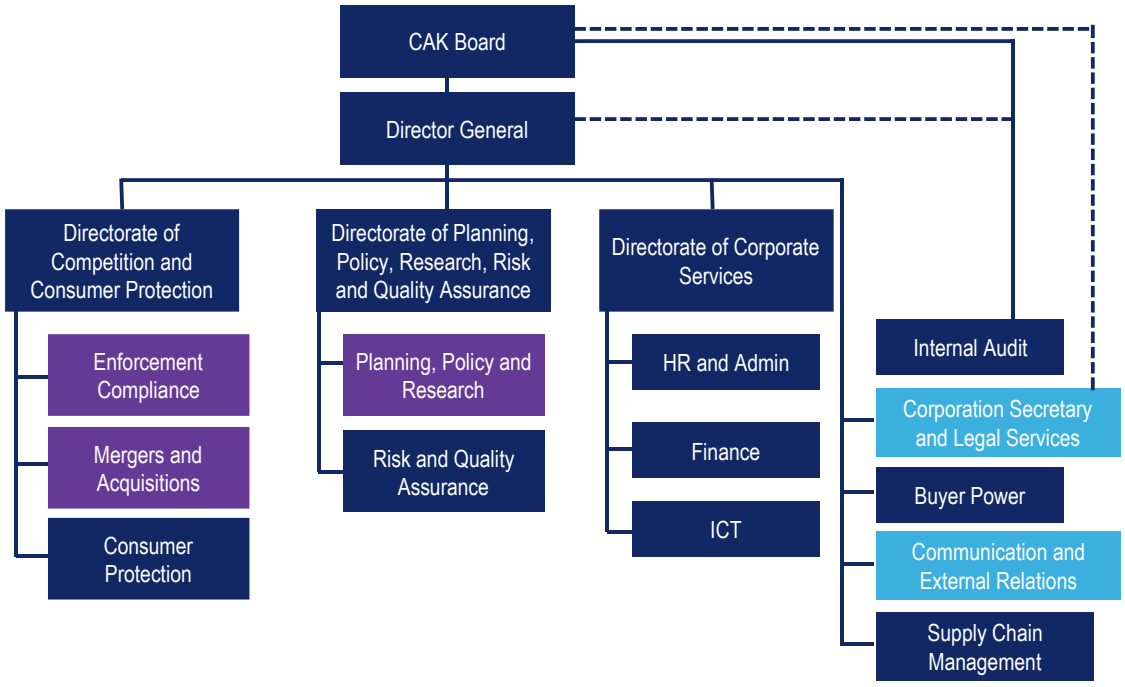
The CAK is empowered to enforce competition law (i.e. to review and authorise mergers, as well as investigate and sanction anti-competitive agreements, abuse of dominance and violations of merger review rules), carry out market studies and conduct competition advocacy activities. In addition, the CAK is mandated to enforce consumer protection and abuse of buyer power provisions, which fall outside the scope of this Peer Review.

As will be further discussed in Chapters 3, 4 and 5 of this Peer Review, enforcement of competition is still developing in Kenya, according to the information obtained by the OECD. During the OECD fact-finding exercise, the CAK provided several different sets of statistics regarding its enforcement practices. While the CAK contends this is largely driven by the need to convert from the CAK's financial year reporting (July to June) to calendar year reporting, the figures are nonetheless inconsistent with those previously reported by the CAK to the OECD's annual Competition Trends project, which utilises calendar years. In combination with the fact that the CAK does not publish all of its enforcement decisions (as further discussed below), it was not possible to report with certainty on the enforcement figures in Kenya and to assess in detail how competition law has been interpreted and applied in practice.

2.1.1. CAK internal structure

The CAK is composed of a Board of Directors ("the Board") and a Director-General, supported by various units, as described below.

Figure 2.1. CAK's organigram



Note: The units marked with a purple square are involved exclusively in competition-related activities, while those marked with a light blue square are partially involved in competition-related activities. The other units are either dedicated to administrative tasks or to other substantive activities (consumer protection or abuse of buyer power).
Source: OECD, based on CAK (2024[1]), Strategic Plan (2023-2027) – Promoting and Sustaining Enforcement for Enhanced Consumer Welfare, https://cak.go.ke/sites/default/files/downloads/2025-06/COMPETITION-AUTHORITY-STRATEGIC-PLAN-2023-2027.pdf.

The Board consists of nine members: (i) the Chairperson; (ii) the Principal Secretary for the National Treasury or their representative; (iii) the Principal Secretary for the Ministry of Investment, Trade and Industry or their representative; (iv) the Attorney-General or their representative; and (v) five independent, non-executive members. In addition, the Director-General is an *ex officio* member of the Board of Directors but does not have voting rights.[5]

The Board serves as the CAK's main decision making body, including the imposition of administrative sanctions in cases of anti-competitive practices, abuse of buyer power and consumer protection violations, as well as merger control. The Board provides overall strategic direction to the agency.

The Board has four committees, each composed of two to four Board members. Before the Board takes a decision, the matter must be first assessed and approved by the relevant committee:

1. Technical and Strategy Committee, mandated to advise on strategic planning and the implementation of the Competition Act, including enforcement decisions
2. Finance Committee, responsible for recommending financial policies, goals and budgets to support the operation of the authority
3. Human Resources Committee, in charge of implementing human resource policies and
4. Audit Committee, tasked with ensuring ethics and integrity

The Board of Directors is supported by the Corporation Secretary and Legal Services Department, which advises the Board, organises its meetings, drafts its decisions and communicates them once adopted. This department also provides legal advice to the various CAK operational units and represents the agency before the courts.

The Director-General is the CAK's chief executive officer and is responsible for managing the agency's day-to-day activities, including both administrative and substantive tasks (e.g. investigations into anti-competitive practices, abuse of buyer power and consumer protection infringements, as well as merger review).[6] The Director-General has the power to assign tasks to the various CAK's units, take procedural decisions during investigations and approve final investigation reports before submitting them with a proposed decision for consideration by the Board of Directors.

The departments responsible for competition-related activities are: the Enforcement and Compliance Department and the Mergers and Acquisitions Department (both under the Directorate of Competition and Consumer Protection), which are in charge of investigating anti-competitive practices and reviewing mergers, respectively; and the Planning, Policy and Research Department (under the Directorate of Planning, Policy, Research, Risk and Quality Assurance), which conducts market studies and competition advocacy efforts (the latter in collaboration with the Communication and External Relations Department). Additionally, as noted above, the Corporation Secretary and Legal Services Department – formally reporting to the Board of Directors – is also directly involved in competition-related activities (alongside the other substantive areas).

The CAK has neither a dedicated Chief Economist position nor a separate economics unit to provide economic analysis in support of its enforcement and advocacy teams.

2.1.2. Leadership, appointments and dismissals

As reported above, the CAK Board of Directors is composed of nine members.[7] They are appointed for a three-year term, which may be renewed once.[8]

The Chair of the Board of Directors is appointed by the President of the Republic and is not subject to parliamentary vetting. The government representatives (i.e. from the National Treasury; the Ministry of Investments, Trade and Industry; and the Attorney-General) are also not vetted by Parliament.[9] The Competition Act does not specify any eligibility criteria for their selection.

The five independent, non-executive members are appointed by the Cabinet Secretary for the National Treasury and are vetted by Parliament. They must be "experienced in competition and consumer welfare matters", and at least one must "be experienced in consumer welfare matters".[10]

Neither the Competition Act nor secondary regulations provide for rules on the selection process, such as timeframes, procedures or eligibility conditions. There are also no provisions regarding staggered appointments of Board members.

The Board of Directors operates as an independent body, and its members can only be removed from office under the conditions set out in the Competition Act, namely if they: (i) resign during their term; (ii) are declared bankrupt or insolvent; (iii) are convicted of a criminal offence; (iv) have a conflict of interest likely to significantly interfere with the proper and effective performance of their functions; (v) are incapacitated (mentally or physically) and unable to perform their duties; (vi) fail to attend at least two-thirds of Board meetings without the Board's permission within any period of 12 consecutive months; (vii) commit a material breach of the CAK code of conduct.[11] The Cabinet Secretary for the National Treasury has the power to make any removal and must inform the relevant member in writing in advance, stating the grounds for removal.[12]

All Board members (except the Director-General) are part-time and receive an allowance based on the number of meetings they attend. The Board of Directors must meet at least four times each financial year, with each meeting held no later than four months after the previous one.[13] Each year, the National Treasury approves the number of meetings to be held, and any changes (e.g. if there is a need for additional meetings) must receive its prior approval. The Board held 15 meetings in the 2023-2024 financial year and 12 meetings in the 2022-2023 financial year.[14]

The Board's quorum is four members, and decisions are taken by majority vote. In the event of a tie in the votes, the presiding member (either the Chairperson, when present, or another member designated by the Board in the Chairperson's absence) has a deliberative and casting vote.[15]

At the time of writing, only four Board members were in office: the Chairperson and the representatives from the National Treasury, the Ministry of Investments, Trade and Industry and the Attorney-General (in addition to the Director-General). No non-executive Board members were in office.

The Director-General is appointed by the Board of Directors and approved by Parliament for a five-year term, which may be renewed once. The Director-General must have knowledge and experience in competition matters.[16] Neither the Competition Act nor secondary regulations provide additional eligibility criteria or rules on the selection process. There are also no specific provisions for dismissal of the Director-General, and the Competition Act explicitly establishes that the rules on Board members dismissals do not apply to the Director-General.[17]

The technical personnel at second and third management levels are appointed through a competitive process by the Board of Directors. All other staff members are competitively selected through a panel appointed by the Director General, through delegated authority by the Board.[18] Staff may be dismissed in case of gross misconduct, including desertion, insubordination, poor performance and intoxication during working hours.[19]

Board members, the Director-General and CAK staff are subject to rules on conflicts of interest. In particular, they are required to use their best efforts to avoid any situation that could create a conflict of interest. If this is not possible, the conflicted person must disclose the conflict as soon as it arises and refrain from participating in any related matter. Conflicts of interest include any financial or other personal interests that could interfere with the proper performance of official duties.[20] Board members, the Director-General and CAK staff are also subject to professional secrecy obligations, as further discussed in Chapter 3.

2.1.3. Resources

Budget

The CAK's budget has two main sources:[21] approximately 70% comes from the state budget (through exchequer transfers), while the remaining 30% derives from the fees and fines the agency collects, including imposed fines and merger filing fees (both local and from the COMESA regime). This means that the CAK retains the funds it collects from fees and fines and uses them to finance its own activities.

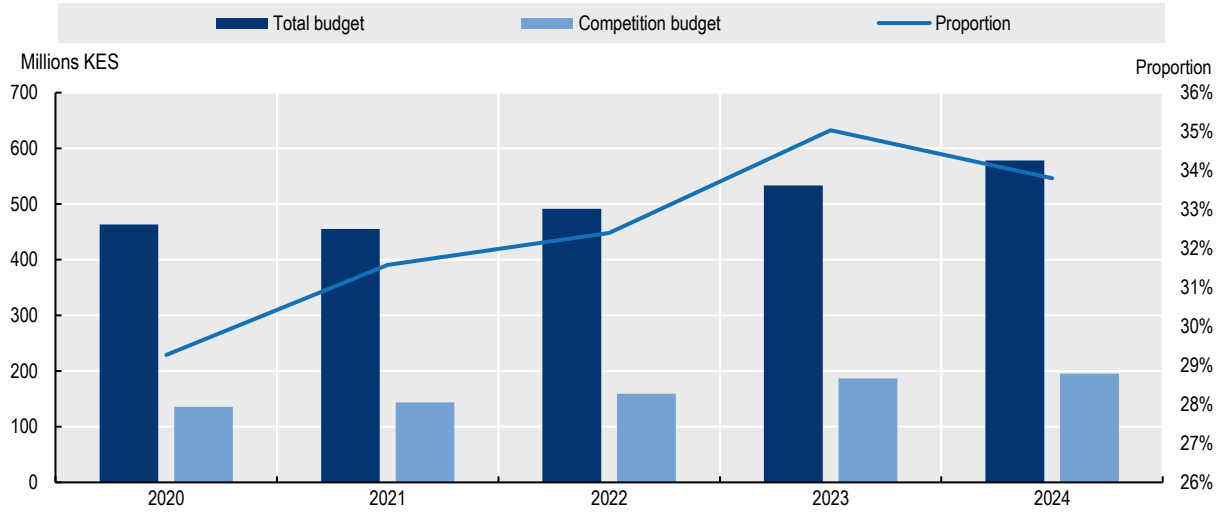
The CAK's budget is co-ordinated by the Finance Department, under the Directorate of Corporate Services. Every financial year, with inputs from the different CAK units, the Finance Department drafts the budget – including both sources of funding – which is then approved by management and the Board of Directors. The draft budget is subsequently submitted to the National Treasury, which integrates it into the state budget for parliamentary approval.[22] Both the National Treasury and Parliament may adjust the draft budget in line with overall available resources and the national policy prioritisation process that guides allocation across government entities.

The share of budget financed by CAK's fees and fines is estimated on the basis of past trends in fine collection as well as merger activity in the region. If changes occur during the financial year, particularly with respect to the realisation of projected fines and fees, the budget must be revised, subject to approvals by the Board of Directors, the National Treasury and Parliament. This is the case also if the resources collected by the CAK exceed the initial projections.

In addition to the annual budget, the CAK prepares a three-year budget plan to enhance predictability and support longer-term planning of its activities. However, this plan is not binding on the government.

In 2024, the CAK's budget was KES 578 181 004 (equivalent to EUR 3.8 million), of which KES 195 439 032 (equivalent to EUR 707 000) was allocated to competition activities (the "competition budget"), according to data provided by the CAK. Figure 2.2 presents the CAK's total and competition budgets between 2020 and 2024.

Figure 2.2. CAK's total and competition budget, 2020-2024



Source: Nominal data provided by the CAK.

It shows that both the total budget and the share dedicated to competition activities have increased over the years, the peak competition budget accounted for around one-third of the total budget in 2024.

According to the CAK, the recent budget increases reflect the agency's success in convincing the National Treasury and Parliament of the importance of its mandate, as well as the conclusion of several high-profile cases.

Once approved by Parliament and allocated to the CAK, the budget is managed and spent under the authority of the Director-General.[23] Expenses with human resources generally account for more than 50% of the budget. Other expenditures include office space, goods and services, training and travel, as well as costs to the agency's substantive activities.

Human resources

In 2025, the CAK had 84 staff members, of whom 35 (41.7%) worked – at least partially – on competition-related activities (i.e. competition enforcement and advocacy). Table 2.1 below shows the evolution of total and competition staff between 2020 and 2025.

Table 2.1. Number of total and competition staff at the CAK, 2020-2024

Year	Total staff	Competition staff
2020	85	29
2021	84	30
2022	84	30
2023	84	30
2024	84	29

Note: Competition staff includes members from: the Directorate of Competition and Consumer Protection (which includes the Enforcement and Compliance Department and the Mergers and Acquisition Department); the Directorate of Planning, Policy, Research, Risk and Quality Assurance (namely the Planning, Policy and Research Department); the Corporation Secretary and Legal Services Department; and the Communication and External Relations Department.
Source: Data provided by the CAK.

Of the roughly 30 staff currently working on competition-related activities, there are 10 lawyers and 16 economists.

The CAK conducts staff selection and promotion through a competitive process,[24] without the involvement of other government departments. However, the creation of new positions requires approval from the National Treasury. Salary structures and staff benefits are set by the Public Service Commission, which is responsible for setting pay scales, allowances and other entitlements for public employees across the government.

According to the CAK, salaries are competitive compared to other government agencies. Nevertheless, the private sector and regional economic communities (especially COMESA and the EAC) often provide more attractive opportunities. While staff turnover is not high (e.g. five departures in 2024 and four in 2023), it imposes additional costs on the agency to recruit and train replacements. Recruiting new staff is particularly challenging given the highly technical and specialised nature of competition law and economics. In practice, new recruits require intensive training once hired.

To improve retention, the CAK has developed a programme that includes training opportunities (including postgraduate studies), recognition of outstanding performance, prioritisation of internal promotion over external recruitment, and the provision of mortgages and car loans at concessionary rates.

2.2. Analysis

2.2.1. CAK internal structure

All decisions of the Board of Directors must first be reviewed and approved by one of the four Board committees. This introduces an additional layer that may slow down the decision making process, which might be unnecessary especially given the current number of Board members.

As mentioned above, the CAK lacks a dedicated Chief Economist and/or a separate economics unit to support its enforcement and advocacy teams with economic analysis. This could help the CAK improve the use of economic analysis in investigations and decisions, particularly in abuse of dominance and merger cases.

Today, economic analysis plays a crucial role in competition enforcement (OECD, 2021[2]; 2021[3]). For instance, 90% of OECD competition authorities have created the position of a Chief Economist and/or have established a separate economics unit (OECD, 2023[4]).

2.2.2. Leadership, appointments and dismissals

Three out of nine Board members are direct representatives of the government. Although conflict-of-interest rules exist, this governance structure may expose the CAK's decision making to political influence. Additionally, potential conflict of interests is not considered as an eligibility criterion prior to appointing Board members, but rather as a basis for their removal.[25] This risk is heightened by the absence of eligibility requirements ensuring that these four Board members have expertise and experience in competition matters.

While the Competition Act stipulates that independent, non-executive members must have experience in competition and consumer protection matters, this requirement is too general and may not guarantee sufficient expertise in competition law.

More broadly, there are no clear rules governing the selection process for Board members, thereby leaving room for political influence in their appointment.

Several stakeholders interviewed by the OECD raised serious concerns about the selection process of Board members, including the non-executive ones. They noted that although many qualified professionals exist in Kenya, in practice appointments are not necessarily made on the basis of merit or technical expertise. According to them, past boards included more qualified members, who played a more active role in decision making. Stakeholders also criticised the overall lack of transparency in the selection process.

This departs from the OECD Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement [OECD/LEGAL/0465], which calls for jurisdictions to:

> *ensure that competition law enforcement is independent, impartial and professional, by (…) guaranteeing that competition law enforcement is conducted by accountable public bodies that enjoy independence, i.e. are free from political interference or pressure, and that interpret, apply and enforce competition law on the basis of relevant legal and economic arguments grounded in sound competition policy principles.*

Furthermore, the absence of rules on staggered appointments of Board members hinders partial renewals and continuity of the Board, creating a risk of lack of quorum that could paralyse the CAK. In practice, the appointment of non-executive Board members often takes too long, which is likely to further undermine the agency's independence, as the Board can continue to operate even without any of the non-executive members. In fact, at the time of writing, all non-executive positions were vacant. The short terms of Board members (i.e. three years) exacerbate these challenges and create additional cost related to training, since most appointees do not have extensive competition expertise.

Similar concerns regarding transparency, political influence and eligibility criteria were also raised in relation to the selection of the Director-General, which may undermine the agency's effective functioning and independence. Moreover, the absence of timelines for the appointment process can result in prolonged periods under acting Director-Generals, which significantly affects the authority's operations.

In addition, the lack of clear rules ensuring that the Director-General may only be dismissed under clearly defined and specific conditions may also weaken the independence of his/her functions. Indeed, the possibility of arbitrary dismissals may undermine the ability of top-level officials to act independently.

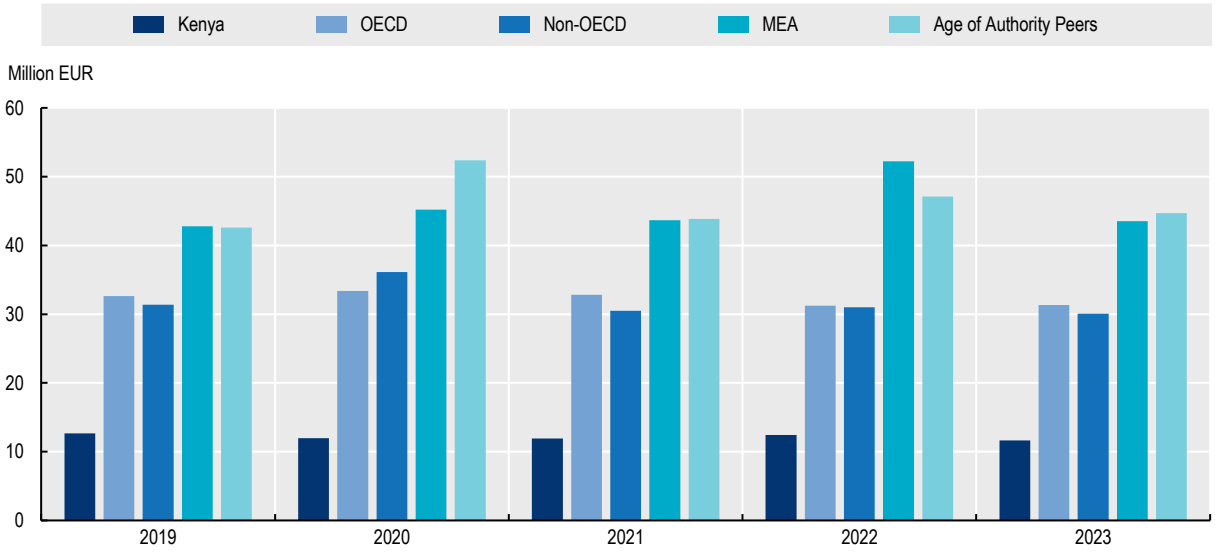
2.2.3. Resources

Budget

Despite the progressive increases in recent years, the CAK's budget remains considerably low for international and regional standards. Figure 2.3 below compares the average competition budget with certain groups of jurisdictions that provided data to the OECD CompStats Database,[26] in particular with

(i) OECD jurisdictions; (ii) non-OECD jurisdictions; (iii) jurisdictions in the Middle East and Africa (MEA) region; (iv) jurisdictions that also have had a competition authority for a similar length of time (10-20 years). The CAK's budget appears well below when compared to any of the indicated groups.

Figure 2.3. Budget (in 2015 EUR) per GDP 1 million, 2019-2023



Note: GDP is expressed in PPP (Purchasing Power Parity). Given the current make up of jurisdictions that provide data for the OECD CompStats database, comparing Kenya to its GDP or population peers is not a useful comparison given the different World Bank Group income classifications that the peer jurisdictions belong to. The CompStats database lacks data from enough jurisdictions with sufficiently similar GDP per capita for this to be useful comparison. As such, comparing Kenya to jurisdictions that have had similar lengths of time to develop their competition authorities was assessed as being the best feasible comparison given the limitations in the data. The peer group of jurisdictions with a competition authority that has been active for 10-20 years and consists of: COMESA, Dominican Republic, Ecuador, El Salvador, Hong Kong (China), Mauritius, Spain, Panama and Paraguay.
Source: OECD CompStats, World Bank and CAK.

During the OECD fact-finding mission, stakeholders raised concerns about the low level of the CAK's budget, which could limit the agency's effectiveness. Moreover, some questioned whether the current allocation of resources is the most efficient, suggesting that improvements could be made, particularly by prioritising core enforcement activities over training or certain administrative expenses.

Concerns were also expressed about the lack of predictability in the CAK's budget, which hampers longer-term planning of its activities. First, the budget is approved annually, and abrupt cuts are possible, although in recent years the agency has successfully managed to secure progressive increases, as noted above. Second, the share of the budget financed through merger filing fees and fines is difficult to forecast and remain uncertain in practice. Deviations from projected figures – which are only noticeable during the course of the financial year – can significantly affect the agency's operations.

Stakeholders interviewed by the OECD highlighted that the government's broader policy trend is toward making independent agencies increasingly self-funded, with progressively reduced reliance on state resources. The (OECD, 2016[5]) has previously noted self-funding can create risks to a competition authority's legitimacy, as reliance on fines can create perverse incentives for an authority to unduly impose more fines or only focus on cases with better prospects of high fines, and reliance on merger fees can create shortfalls during periods of where the country's economic performance is weaker.

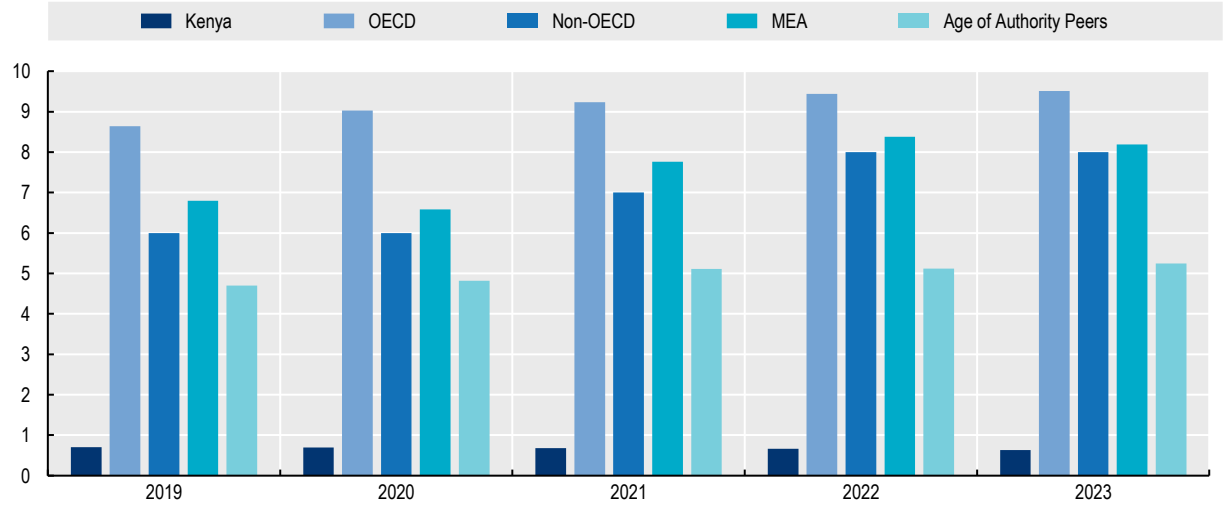
However, as discussed in Chapters 3 and 4 of this report, the current trend in Kenya is that the number of CAK decisions is low and that the size of fines is low, suggesting a need to increase the agency's focus

on enforcement activities and a need to increase the size of fines. Given these conflicting concerns, it is preferable for the CAK to maintain a consistent level of funding from the government whilst the CAK works to enhance its enforcement practices.

Human resources

The number of staff allocated to competition-related activities at the CAK is significantly lower than in other comparable jurisdictions. Figure 2.4 below compares the number of competition staff per million inhabitants in Kenya with (i) OECD jurisdictions; (ii) non-OECD jurisdictions; (iii) jurisdictions in the Middle East and Africa (MEA) region; and (iv) jurisdictions that also have had a competition authority for a similar length of time (10-20 years).

Figure 2.4. Competition staff per 1 million inhabitants



Note: Age of authority peer group refer to the same group as in Figure 2.3.
Source: OECD CompStats and CAK.

Although the CAK's budget has progressively increased in recent years, staff levels have remained stable. This reinforces the view that the additional resources have not been allocated efficiently, suggesting room for improvements in this regard, as discussed above.

During the OECD fact-finding mission, CAK staff reported being generally satisfied with their working conditions, including material conditions, and highlighted the agency's good reputation. This positive perception was also confirmed in an anonymous online survey conducted by the OECD among CAK staff.[27] The main concern identified relates to career prospects and opportunities for advancement at the CAK. In fact, many officials feel stuck at certain stages of their careers, as promotions are limited. The CAK is currently reviewing its HR regulations with the aim of addressing this issue.

Private stakeholders interviewed by the OECD raised concerns about staff turnover, particularly at senior management level. They noted that several highly qualified staff have left in recent years and were not necessarily replaced by professionals with equivalent expertise. According to those stakeholders, this has negatively affected the CAK's operations, especially in relation to competition enforcement.

References

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OECD (2021), "Economic Analysis and Evidence in Abuse Cases", *OECD Roundtables on Competition Policy Papers*, No. 269, OECD Publishing, Paris, https://doi.org/10.1787/63e6d5f0-en. [3]

OECD (2021), "Economic Analysis in Merger Investigations", *OECD Roundtables on Competition Policy Papers*, No. 261, OECD Publishing, Paris, https://doi.org/10.1787/f9cc5dc4-en. [2]

OECD (2016), "Independence of Competition Authorities - From Design to Practice", *OECD Roundtables on Competition Policy Papers*, No. 195, OECD Publishing, Paris, https://doi.org/10.1787/ea9749e1-en. [5]

Notes

[1] Competition Act, s 7.

[2] Competition Act, s 81.

[3] Competition Act, s 83.

[4] Competition Act, s 83(2). The past annual reports are available at https://cak.go.ke/planning/annual-reports.

[5] Competition Act, s 12(3).

[6] Competition Act, ss 12, 19.

[7] In addition, the Director-General is also an *ex officio* member of the Board of Directors.

[8] Competition Act, Schedule Provisions as to the Authority, s 1.

[9] Competition Act, s 10(1).

[10] Competition Act, s 10(1)(f), (2).

[11] Competition Act, Schedule Provisions as to the Authority, s 2(1).

[12] Competition Act, Schedule Provisions as to the Authority, s 2(2).

[13] Competition Act, Schedule Provisions as to the Authority, s 3(1). For instance, the Board of Directors held 15 meetings in the 2023/24 financial year. See CAK (2024), "Strategic Plan (2023-2027) - Promoting and Sustaining Enforcement for Enhanced Consumer Welfare".

[14] CAK (2024), Annual Report & Financial Statements – FY 2023/24; CAK (2023), Annual Report & Financial Statements – FY 2022/23, https://cak.go.ke/planning/annual-reports.

[15] Competition Act, Schedule Provisions as to the Authority, s 3(4), (5), (6).

[16] Competition Act, s 12(1), (2).

[17] Competition Act, Schedule Provisions as to the Authority, s 2(1).

[18] Competition Act, ss 13(3), 19.

[19] Employment Act, 2007, ss 41 ff.

[20] Competition Act, ss 13(4), 85(1), Competition Act, Schedule Provisions as to the Authority, s 4, and Public Officer Ethics Act, rev. 2016, s 12.

[21] Competition Act, s 78.

[22] Competition Act, s 80.

[23] Competition Act, s 80(4).

[24] Competition Act, s 13(3).

[25] Competition Act, Schedule Provisions as to the Authority, s 2(1)(b)(iii).

[26] The OECD CompStats Database compiles general statistics related to 69 OECD and non-OECD jurisdictions. Information of CompStats Database is compiled in the publication OECD Competition Trends (OECD, 2024[6]).

[27] To complement the information gathered through the Peer Review questionnaire and the interviews held during the fact-finding mission, the OECD carried out an online survey among CAK staff between March and April 2025. The survey aimed at collecting information on working conditions, including career plans, training, team specialisation, interaction with other government bodies and public perception of the CAK's work. It consisted of eight questions, with satisfaction levels rated on a scale from 1 to 5. A total of 80 CAK staff members responded.

3 Competition enforcement process

This chapter covers the enforcement powers and procedures of the competition law in Kenya. This includes the competition authority's powers to prioritise and open cases, conduct investigations, make enforcement decisions and issue sanctions.

3.1. Law and practice

3.1.1. Case prioritisation

Every five years, the CAK develops a Strategic Plan that sets out the authority's directions and priorities. It is prepared in consultation with external stakeholders, including the business community, lawyers and other government institutions. Once approved by the Board of Directors, the Strategic Plan is published on the CAK's webpage. The current Strategic Plan, launched in December 2024, will guide the CAK in fulfilling its mandate until June 2028 (CAK, 2024[1]).

The current Strategic Plan outlines four strategic goals that support the CAK's mission: (i) strengthened and sustained enforcement of competition and consumer protection law; (ii) evidence-based decisions and policy advocacy; (iii) informed and engaged citizenry on competition law and consumer welfare; and (iv) strengthened institutional capacity and sustainability. For each strategic objective, the Strategic Plan identify key result areas, expected outcomes, outcome indicators and annual targets. The CAK regularly monitors the implementation of the Strategic Plan to track progress, assess the achievement of its objectives, evaluate programme outcomes and ascertain the desired impact.

In developing the Strategic Plan, the CAK takes into account the priorities of the current government, identifying areas and sectors where it can most effectively contribute to its mandate. The current Strategic Plan highlights five priority areas: agricultural transformation; micro, small and medium enterprises (MSME); housing and settlement; healthcare; digital superhighway and creative industry. These priorities guide the CAK's *ex officio* actions. Nevertheless, the authority is required to investigate all complaints it receives, at least at a preliminary level, and cannot dismiss them solely on the basis of strategic priorities.

3.1.2. Case opening

The CAK may open investigations into anti-competitive practices on its own initiative, via complaints, or leniency applications.[1]

Proactive detection

The Competition Act explicitly indicates that the CAK may open an investigation on its own initiative,[2] for instance through cartel screenings or industry monitoring (e.g. press and internet), as well as market studies. According to the CAK, the authority currently aims at enhancing its *ex officio* investigations and the use of proactive detection methods. For instance, the CAK has recently implemented a forensics laboratory, equipped with specialised software and digital tools, which can be used to proactively detect anti-competitive behaviours (Capital Business, 2025[2]).

Complaints

The Competition Act provides that any person, government agency or ministry may submit a complaint to the CAK.[3] Complaints can be lodged by submitting written information or by filling a form developed by the CAK.[4] Anonymous complaints are accepted.

When complaints are submitted using the CAK's official form, they must include the following elements: (i) the name and contact details of the complainant (unless complaint is anonymous); (ii) the name of the alleged infringers and the sector in which they operate; (iii) the facts and any evidence supporting the alleged infringement; (iv) an indication of whether the conduct has ceased, and, if not, whether the complainant requests interim measures; and (v) the name of other government bodies and organisations that were also contacted regarding the alleged infringement.[5]

Upon receipt, complaints are assigned to the investigation officers, who must conduct a preliminary assessment to verify whether the CAK has jurisdiction and whether there are reasonable indications of an infringement.[6] Within 14 days of receiving the complaint,[7] the investigation officers must submit a report to the Director-General, proposing the opening of a formal investigation; rejecting the complaint; referring the case to the competent authority (if the CAK lacks jurisdiction); requesting further clarification or documents from the complainant; or requesting information from third parties. If the Director-General decides not to initiate a formal investigation, the complainant must be informed in writing of the reasons for this decision.[8]

Leniency programme for cartels

In 2014, the Competition Act was amended to include Section 89A, which establishes that the CAK may operate a leniency programme, providing for only very general elements thereof. In particular, the provision indicates that a leniency programme is the one through which (i) an undertaking voluntary discloses the existence of an agreement or practice that is prohibited under the Competition Act and (ii) co-operates with the CAK in the investigation, being in exchange, (iii) exempted from all or part of a fine that could otherwise be imposed under the Competition Act. Section 89A (2) of the Competition Act also states that the CAK should detail the leniency programme through guidelines.

In 2017, the CAK published the "Leniency Programme Guidelines" (hereafter "Leniency Guidelines"), providing the detailed rules of leniency (CAK, 2017[3]). The Leniency Guidelines spell out that the leniency programme aims at encouraging wrongdoers to provide the CAK with evidence of horizontal agreements and proactively co-operate in bringing successful cartel enforcement action in return of full of partial immunity.

Applications must be submitted by an undertaking but will cover its directors and employees as long as they comply with the obligation to co-operate with the CAK.[9] Undertakings that have coerced others or instigated others to operationalise the cartel are not eligible for leniency.

According to the Leniency Guidelines, there are four types of leniency applications:[10]

- First through the door applicant, which is granted 100% reduction in penalties (immunity),
- Second through the door applicant, which may be granted up to 50% reduction in penalties,
- Third through the door applicant, which may be granted up to 30% reduction in penalties,
- Any subsequent applicant, which may be granted up to 20% reduction in penalties.

Applications must be submitted before the CAK concludes the investigation and are accepted when (i) the CAK has no knowledge of the infringement; (ii) the CAK has knowledge of the infringement but lacks sufficient information to start an investigation; or (iii) the CAK has opened an investigation but requires additional evidence to penalise the offenders, in which case the applicant must provide new evidence.[11]

The conditions to qualify for immunity or for a reduction in the sanction require the applicant to:[12]

- Provide the CAK with full, timely and truthful information about the infringement,
- Full and expeditious co-operation with the CAK,
- Keep the application process confidential,
- Immediately terminate its participation in the cartel, unless otherwise directed by the CAK.

The Leniency Guidelines provides that the identity of the applicant must be kept confidential throughout all stages of the investigation and even after a final decision is made.[13] The Leniency Guidelines also detail the procedure to be followed during a leniency application, including initial contact, the marker request, the submission of the application, the process for the CAK to evaluate applications and grant of conditional leniency, as well as the final decision.[14] Conditional leniency may be revoked in the event of a serious breach of the co-operation obligation.[15] In such cases, the CAK may decide to pursue the investigation against the undertaking in question, although it may still be eligible for a settlement process.[16]

According to the Leniency Guidelines, once the conditional leniency is granted, the CAK must engage with the Office of the Director of Public Prosecutions (ODPP) to forgo prosecution of the criminal aspects of the infringement.[17] There is no provision regarding the effects of leniency applications on civil liability for damages.

Whistleblowing programme

In 2021, the CAK introduced a whistleblowing programme, called the Informant Reward Scheme policy (CAK, 2021[4]). It empowers the CAK to grant monetary compensation to anyone who provides information on the existence and operation of cartels.

According to the "External Guidelines on the Informant Reward Scheme Policy" (hereafter "Informant Guidelines"), the programme applies to informants who possess inside information but were not directly involved in the cartel's decision making process (and are therefore not eligible for leniency).[18] For instance, this may be the case of an employee who, under instruction from superiors, attended a meeting without any decision making powers (e.g. secretaries).[19]

The Informant Guidelines outline the conditions an informant must meet to be eligible for financial compensation. These include: consistently providing truthful information; submitting information that is indispensable, materially valuable, useful, reliable and relevant to the investigation; complying with instructions from the investigation officer; and, if required, testifying as a witness in court.[20] The Informant Guidelines also detail procedural aspects of the programme, such as the type of information that must be submitted.[21]

Monetary compensation is granted at the conclusion of the investigation, once administrative fines have been collected by the CAK, provided that the authority is satisfied that the informant has co-operated, and that the information provided was credible, relevant and authentic. The exact amount is determined by the CAK based on the material value of the information provided and must be up to 1% of the administrative penalty and below KES 1 million (approximately EUR 6 500).[22]

According to the Informant Guidelines, the CAK must guarantee the confidentiality of the informant's identity during and after the investigation. A few safeguards are in place to protect confidentiality, including storing information in locked file cabinets or safes, limiting staff access to such information and assigning a pseudonym for all communications.[23]

3.1.3. Case investigation

When a formal investigation is opened, following the decision of the Director-General, the Head of the Enforcement and Compliance Department (guided by the Director of the Competition and Consumer Protection) assigns it to a team, generally led by a senior investigation officer, who works with an investigation officer and in some cases a junior investigation officer or an intern. The investigation team has various powers to collect evidence, such as conducting dawn raids, requesting information and taking oral statements, as described below. During the investigation, the team provides regular updates to the Director-General, the Director of Competition and Consumer Protection and the Head of the Enforcement and Compliance Department. The Corporation Secretary and Legal Services Department is also consulted throughout the process.

There is no fixed statutory deadline for concluding investigations. Nevertheless, the CAK's Service Charter states that full investigations should be finalised within 180 days upon receipt of all requested information and co-operation of the parties involved.[24]

Upon the conclusion of an investigation, if the issuance of an infringement decision is proposed to the Board of Directors, each investigated party that may be affected by the decision must be formally notified in writing. The notification must include: (i) the reasons for the proposed decision; (ii) details of any relief

the CAK may consider to impose; and (iii) a statement that the party may, within the period specified in the notice, submit written representations to the CAK and indicate whether it requires to make oral representations.[25] Investigated parties are granted due process rights, including access to evidence relied on by the CAK.[26]

After assessing investigated parties' defence arguments (including, when applicable, oral statements), a report is submitted to the Director-General with a proposed decision for consideration by the Board of Directors. If the Director-General agrees with the proposal, it is forwarded to the Board of Directors for adjudication.

The Competition Act provides for the protection of confidential information, setting out procedural rules for the granting of confidentiality where the CAK determines that disclosure could adversely affect the competitive position of any person or is otherwise commercially sensitive. Interested parties may appeal to the Competition Tribunal against a CAK decision to deny a confidentiality request.[27] The disclosure of confidential information obtained during investigations constitutes a criminal offence, subject to a fine of up to KES 500 000 (approximately EUR 3 300) and/or imprisonment for up to three years.[28]

Dawn raids

If deemed necessary for its investigations (whether related to anti-competitive agreements or abuse of dominance), the CAK has the power to conduct searches (dawn raids) at any premises occupied or controlled by an undertaking or other person believed to be in possession of relevant information and documents.[29] In general, a prior judicial order (search warrant) must be obtained by the CAK to conduct dawn raids.[30] However, a judicial order is not required in urgent cases, where obtaining a warrant would risk tampering, removal, damage or destruction of evidence. In these cases, the Director-General must authorise the search.[31] In both situations, the Criminal Procedure Code must be followed.[32]

During dawn raids, the CAK may access any type of information needed to prove an anti-competitive behaviour. This includes IT equipment and all forms of data storage, including private devices and media used for professional purposes that are found on the premises.[33] In this context, the recently implemented forensics laboratory enables the authority to extract and analyse data from computers, phones, servers and cloud storage used by investigated firms (Capital Business, 2025[2]).

The Search and Seizure Guidelines contain procedural rules, including the obligations and rights of the parties being raided in light of due process. The CAK must keep an inventory of all the items seized during the search, which must be signed by the raided parties or their legal representatives.[34]

Failure to co-operate with the CAK during a dawn raid or any action obstructing the process constitutes a criminal offence, subject to a fine of up to KES 500 000 (approximately EUR 3 300) and/or imprisonment for up to three years.[35]

Between 2020 and 2024, the CAK conducted two dawn raids in cartel investigations, both with prior judicial authorisation. The CAK has not requested search warrants in other cases.

Requests for information

The Competition Act empowers the CAK to request individuals and legal persons, including investigated undertakings, third parties (e.g. complainants, competitors, suppliers and providers) and government authorities, to provide information, documents or any other evidence during investigations.[36] Requests for information must indicate their legal basis, purpose and the consequences of non-compliance.[37]

Failure to provide the requested information, delays in doing so or the provision of false information constitutes a criminal offence, subject to a fine of up to KES 500 000 (approximately EUR 3 300) and/or imprisonment for up to three years.[38]

According to CAK staff interviewed during the OECD fact-finding mission, stakeholders do not always comply with requests for information, particularly those unfamiliar with the CAK's work. Nevertheless, the CAK has never imposed sanctions in this regard.

Oral statements

The CAK can request defendants and third parties to provide oral statements during investigations.[39]

Failure to provide the oral statements, delays in doing so or the provision of false information constitutes a criminal offence, subject to a fine of up to KES 500 000 (approximately EUR 3 300) and/or imprisonment for up to three years.[40]

As with request for information, stakeholders do not always comply with requests to provide oral statements. Similarly, the CAK has never imposed sanctions in such cases.

3.1.4. Decision making process

Upon receiving the report prepared by the investigation team and approved by the Director-General, the Board of Directors must take a decision, having full adjudicative powers, including to make findings and impose sanctions.[41]

In practice, before being submitted to the full Board, each case is first discussed by the Technical Committee, which is composed of four Board members. The Director-General presents the case and the recommendations to the Technical Committee. When the Technical Committee approves the proposed course of action, the Corporation Secretary and Legal Services Department drafts the decision for submission to the full Board, which then approves the final decision. At both the Technical Committee and full Board stages, discussions may be held, and adjustments can be made. Once the final decision is reached, the Corporation Secretary and Legal Services Department communicates it both internally and externally, through the publication a notice in the gazette (see below).[42]

Administrative and criminal enforcement frameworks

As mentioned in Chapter 1, all competition infringements defined by the Competition Act can be enforced either administratively (through decisions by the CAK's Board of Directors) or criminally (through court rulings following prosecution by the ODPP). Criminal and administrative sanctions are substitutes rather than complements, due to double jeopardy protections, meaning that the CAK must choose one enforcement path in each case. If the CAK decides to proceed with criminal prosecution, once the Board of Directors approves the conclusions of the investigation, the case is handled over to the ODPP to file a criminal lawsuit. In such cases, the courts have the adjudicative power to determine whether an infringement has occurred and to impose sanctions.[43]

Interim measures

The CAK can issue interim measures prior to the adoption of a final decision. The general criteria for granting interim measures are: (i) the CAK has reason to believe that an undertaking has engaged, is engaging, or is proposing to engage in anti-competitive behaviour; and (ii) urgent action is necessary to prevent serious, irreparable damage or to protect the public interest.[44] Interim measures can be lifted if the investigated party demonstrates sufficient cause or upon conclusion of the case.[45]

Neither the Competition Act nor CAK's internal regulations specify who can request interim measures (e.g. *ex officio* or upon request by complainants or third parties), when such measures can be requested (i.e. at which stage of the investigation) or who within the CAK has the authority to issue them (e.g. the Director-General or the Board of Directors). In practice, the Director-General issues the interim measures on behalf of the Board.

Decisions imposing interim measures can be appealed to the Competition Tribunal and subsequently to the High Court.[46]

At the time of writing, the CAK had issued interim measures in two competition cases (one involving concerted practices and another involving abuse of dominance). These decisions were not appealed to the Competition Tribunal, but both cases remained ongoing.

Transparency of decisions

According to the Competition Act, following CAK final decisions, the authority must publish a notice in the gazette, including the name of all undertakings involved and the nature of the conduct subject of the action or the settlement agreement.[47]

The transparency requirement relies on the Constitution of Kenya, which provides for a general right for citizens to access public information held by the state.[48] In this vein, the Access to Information Act of 2016 establishes a duty to disclose and that non-disclosure shall be permitted only in specific circumstances, such as when it undermines the national security of Kenya, impedes the due process of law, substantially prejudices the commercial interests of anyone and infringes professional confidentiality.[49]

However, in practice only short summaries of CAK decisions are made public, both in the gazette and in the CAK's website.

3.1.5. Sanctions

As mentioned above, competition infringements (i.e. anti-competitive agreements and abuse of dominance) are subject to either criminal or administrative sanctions,[50] as follows:

- Criminal sanctions (applicable to both undertakings and individuals): imprisonment for up to five years and/or a fine of up to KES 10 000 000 (approximately EUR 66 000)[51]
- Administrative sanctions (applicable only to undertakings): fine of up to 10% of the undertaking's gross annual turnover in Kenya for the immediately preceding year and/or any appropriate non-financial remedies.[52]

In addition, procedural infringements are subject to criminal sanctions: imprisonment for up to three years and/or a fine of up to KES 500 000 (approximately EUR 3 300).[53]

Only legal entities and individuals engaging in trade can be subject to administrative sanctions in Kenya, meaning that there are no individual sanctions for natural persons acting on behalf of undertakings (e.g. directors or managers).

The CAK has adopted fining guidelines, providing a methodology for calculating administrative fines (CAK, 2023[5]), based on the guidance set out in the Competition (General) Rules.[54] The guidelines outline the following steps for determining fines:

- First, the CAK must determine the base percentage, which is 10% of the undertaking's or association of undertakings' gross annual turnover in Kenya for the preceding year.[55]
- Next, the base percentage may be increased in light of aggravating factors, including the impact of the contravention, the duration of the conduct, market coverage, recidivism and public interest concerns (e.g. effects on a specific industrial sector or region, employment, MSMEs and the ability of national industries to compete in international markets).[56]
- Subsequently, the amount may be reduced considering mitigating factors, including co-operation with the CAK, status as a first-time offender, public interest and justifications on efficiency and consumer benefits (e.g. rescue of a failing firm, prevention of job losses, enhancement of

international or regional competitiveness, attraction of foreign direct investment and employment creation).[57]

- After evaluating the relevant aggravating and mitigating factors, the CAK establishes the final penalty amount, which must not exceed 10% of the undertaking's or association of undertakings' gross annual turnover for the preceding year.[58] This means that the starting point for fines and the end point of the maximum penalty is the same figure. In practice, there have never been cases where the CAK has found there to be more aggravating factors than mitigating factors, necessitating the CAK from dropping from a higher percentage back to the 10% of turnover figure.

Furthermore, in exceptional cases, the CAK may allow undertakings to pay penalties in instalments, provided the firm demonstrates that payment in a single instalment would irretrievably jeopardise its economic viability and its ability to continue operating.[59]

If undertakings fail to pay imposed fines, the CAK cannot directly enforce the penalties by filing an execution suit before the courts. In such cases, the CAK must refer the matter to the ODPP for further action.

The CAK may also impose non-financial remedies, including orders directing undertakings to take specific actions or any other appropriate relief.[60]

Despite provisions criminalising both substantive and procedural breaches of the Competition Act, no criminal enforcement of the law has ever taken place. The CAK identified a number of factors that underpinned their decision to not undertake any criminal enforcement of the Competition Act, namely:

- The CAK remains hesitant to issue heavy monetary sanctions, let alone imprisonment, believing awareness of competition in Kenya remains low and that education and advocacy remain effective.
- That the Office for the Director of Public Prosecutions, the body responsible for criminal enforcement in the Competition Act, lacks the resources for such cases and does not prioritise enforcement of statutes where administrative sanctions are also available. However, the CAK did not confirm they had explicitly received this guidance from the public prosecutor.
- That the courts and juries in Kenya would be unfamiliar with competition law generally and would be ill-equipped to adjudicate on cases.

Settlements

The Competition Act allows the CAK to settle any case at any stage, whether during or after an investigation into anti-competitive behaviour. Settlements may include a reduced pecuniary penalty, which is determined taking into account the same elements considered when setting fines, as described above.[61] Settlements may also include corrective actions to address the identified competition concerns. Parties are not necessarily required to admit a violation to settle a case.

In line with the Constitution of Kenya, the CAK must facilitate settlements to resolve matters expeditiously.[62]

If a settlement is reached before the CAK Board of Directors issues a final decision, the Board is responsible for approving it, based on a proposal submitted by the Director-General. If the case is already before the courts – either the Competition Tribunal or the High Court – the settlement (referred to as a consent order) is still negotiated with the CAK, without the court's direct involvement. In such cases, once both parties agree on the terms of the settlement (including with the Board of Directors' approval), the court must be notified and ratify the agreement.

The Competition (General) Rules and the Consolidated Administrative Remedies and Settlement Guidelines outline the process to be followed when negotiating settlements.[63] Notably, if settlement negotiations collapse, the CAK must not use any information provided by the parties during the

negotiations.[64] In such cases, the CAK will resume the investigation or the courts will proceed with the appeal process (if the case is already before them).

3.2. Analysis

3.2.1. Case prioritisation

The CAK does not have the power to reject complaints based on priority grounds. During the OECD fact-finding mission, internal CAK stakeholders mentioned that they are not currently overwhelmed with complaints. Nevertheless, a high volume of complaints can create a heavy workload, consuming substantial time and resources, thereby preventing the CAK from focussing on the most serious breaches of the competition law.

In many jurisdictions, competition authorities can decide which cases will be investigated and which cases can be dropped based on pre-established priorities. The level of discretion enjoyed by competition authorities in setting priorities varies from one jurisdiction to another. Similarly, the criteria used by competition authorities to set priorities diverge and may include the nature of the case, its geographic impact, the relevance of the evidence, the importance of the sector affected by the infringement and the size of the market. Competition authorities often involve third parties (e.g. business and consumer groups, as well as other government agencies) when setting their priorities and make them public (OECD, 2015[6]).

3.2.2. Case opening

The CAK relies primarily on complaints to initiate cases. For instance, from 69 investigations into horizontal agreements opened between 2020 and 2023, 37 were launched following a complaint. Likewise, 56 out of 80 investigations into abuse of dominance were opened after a complaint.

The use of proactive detection tools by the CAK is still very incipient in Kenya. This seems to be attributable, at least partially, to limited resources, both material (e.g. technological devices) and human. For instance, the authority lacks a tool to monitor bids in public procurement procedures to help identify potential bid rigging in public procurement.

The OECD Recommendation concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452] recognises the importance of *ex officio* investigations, stating that jurisdictions should use "pro-active cartel detection tools such as analysis of public procurement data, to trigger and support cartel investigations". Indeed, there has been a rise in the interest of competition authorities to use screens to detect cartels worldwide, considering the increasing availability of large amounts of digital data on prices and quantities, as well as the emergence of new technologies to extract and analyse data in an increasingly automated manner (OECD, 2022[7]).

Regarding the leniency programme in Kenya, the legal framework is in line with international practices, in particular the OECD Recommendation concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452].

However, the CAK has not received any leniency applications to date. For a leniency programme to function effectively, competition authorities should ensure a high risk of detection and the imposition of significant sanctions. Indeed, such programmes generally work well when the relevant competition authority has built up a strong enforcement record and cartel members perceive a genuine risk of detection, even in the absence of a leniency application. Additionally, the programme's success depends on whether the sanctions for those cartel members that do not qualify for leniency are severe (OECD, 2023[8]). In this context, the limited enforcement track record and low penalties may explain why Kenya's leniency programme has yet to produce results.

Furthermore, although the Leniency Guidelines state that the applicant will not be subject to criminal prosecution – this would require the CAK to request criminal immunity from the ODPP on behalf of the applicant. Given the lack of utilisation of the leniency programme and no criminal enforcement of the Competition Act, it remains unclear whether this would occur in practice. CAK stakeholders informed that leniency applications do not guarantee immunity from criminal sanctions. The lack of effective co-operation between the CAK and the ODPP may also contribute to legal uncertainty. This ambiguity could be an additional reason for the ineffectiveness of the leniency programme in Kenya, even though in practice there has been no criminal prosecution of competition infringements to date. Other reasons raised by stakeholders interviewed by the OECD include the lack of awareness of the leniency programme among the business community and the fear of undertakings facing retaliation from other cartel members.

While the OECD Recommendation concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452] calls on adherents to exclude cartel coercers from leniency programmes, it does not recommend excluding cartel instigators, as the current Kenyan leniency programme does. As the (OECD, 2016[9]) has previously observed, preventing instigators from applying can undermine leniency programmes as:

> *(i) It discourages leniency applications relating to cartels that have existed for many years and in which the conspirators have taken turns as ringleader, and from enterprises that were initially the instigator but are now under new managers who have terminated involvement in the conspiracy and would prefer to seek leniency from the [authority].*
>
> *(ii) It reduces uncertainty among the conspirators about which enterprise might apply for leniency.*
>
> *(iii) It is difficult for the [authority] to administer because, among other reasons, it creates disputes among leniency applicants seeking to improve their place on the application roster by asserting that an earlier applicant is an ineligible instigator.*

Finally, the Leniency Guidelines indicate that only a serious breach of the co-operation obligation can justify the revocation of leniency benefits. However, they do not clarify what constitutes a serious breach, nor whether this also covers the other conditions that applicants must meet, such as providing full, timely and truthful information, maintaining confidentiality of the application and ceasing involvement in the illegal conduct. This lack of clarity may create legal uncertainty, which could discourage potential applications. On the other hand, since applicants remain eligible to settle in case of revocation, this may undermine the credibility of the leniency programme and incentivise wrongdoers to misuse this tool to their advantage.

As for the whistleblowing programme, it also aligns with the OECD Recommendation concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452], which recommends “facilitating the reporting of information on cartels by whistle-blowers who are not leniency applicants, providing appropriate safeguards protecting the anonymity of the informants”.

The CAK has never received a whistleblower application. During the OECD fact-finding mission, stakeholders indicated several possible reasons. First, there is limited awareness of the tool. Second, concerns were raised regarding whether the confidentiality of the informant’s identity can be effectively guaranteed in practice, which may discourage individuals from coming forward due to fears of job losses or professional reputational damages. Third, although the scheme provides financial incentives, the rewards are perceived as too low relative to the burden and risks involved (e.g. dismissal, blacklisting, reallocation or demotion), particularly in light of the confidentiality concerns.

In this context, additional measures could be considered to strengthen confidentiality, notably the introduction of digital whistleblowing tools, such as secure platforms for encrypted submissions, as implemented in other jurisdictions (OECD, 2023[8]). Furthermore, while financial rewards have proven effective in encouraging whistleblowers in some jurisdictions, this is typically the case when the rewards are sufficiently significant (OECD, 2023[8]). The current cap in Kenya (around EUR 6 500) appears

relatively low. For example, in Peru, the reward programme offers a maximum payment of approximately EUR 100 000 (Indecopi, 2019[10]).

3.2.3. Case investigation

In Kenya, investigative and decision making functions are formally separated within the authority. However, in practice, the Corporation Secretary and Legal Services Department – who advises the Board of Directors and drafts its decisions – is deeply involved in the investigation process. As a result, the Board of Directors typically follows the proposals made by the Director-General, as further discussed below.

Although there are no statutory deadlines for concluding investigations, the CAK has established in its Service Charter a 180-day target for completing full investigations. Nevertheless, according to the CAK, investigations generally last between 6 and 12 months, depending on the complexity of the case and the volume of evidence and information required. The OECD team also identified some investigations lasting up to two years, suggesting an inconsistency with the CAK Service Charter.

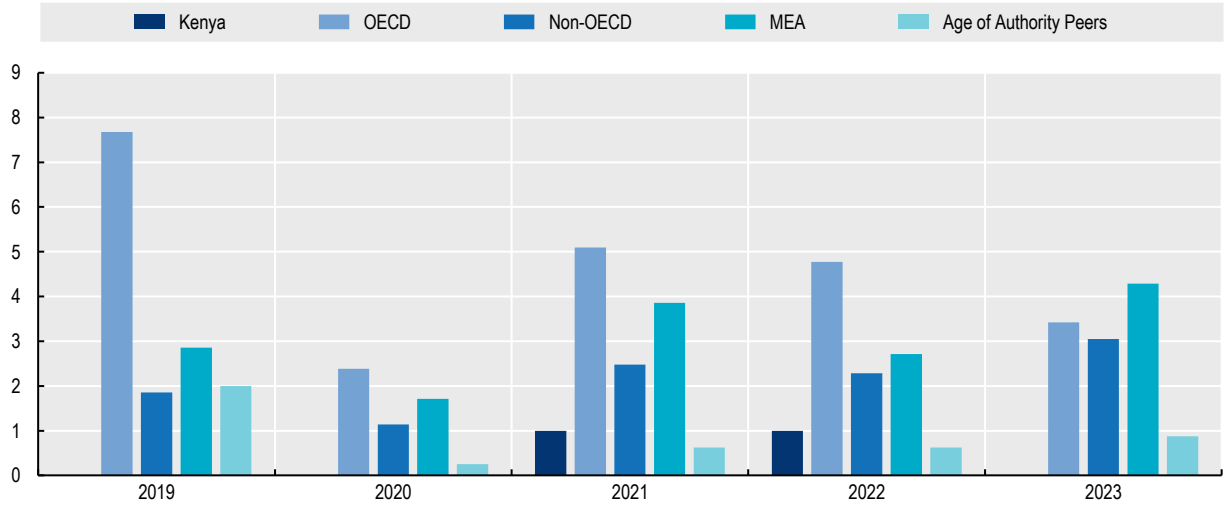
Regarding the notification of investigated parties of the charges against them and their right to present a defence, the legislation aligns with international standards, particularly the OECD Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement [OECD/LEGAL/0465].[65]

Nonetheless, stakeholders interviewed by the OECD expressed concerns about whether the CAK consistently shares all relevant documents and provides access to the case file, potentially limiting the ability of investigated parties to fully exercise their rights of defence. According to them, in some past cases, the list of documents shared with the parties was limited, which could suggest that part of the evidence was not made accessible. However, some stakeholders noted that this could also be explained by the fact that the CAK's conclusions were insufficiently substantiated, with decisions that do not provide sufficient details of the evidence relied upon to come to the decision. The OECD Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement [OECD/LEGAL/0465] underscores the importance of "informing parties of all allegations against them and granting them access to the relevant evidence collected by or submitted to the competition authority or court, subject to the protection of confidential and privileged information".

The rules on the protection of confidential information appear to be in line with the OECD Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement [OECD/LEGAL/0465], according to which jurisdictions should have "rules, policies or guidance regarding the identification and treatment of confidential information". The Recommendation also calls on adherents to "protect confidential and privileged information (…) by: a) ensuring that competition authorities appropriately protect against unlawful disclosure of confidential information in their possession (…)". However, stakeholders interviewed during the OECD fact-finding mission raised concerns about the CAK's ability to effectively protect confidential information. They also mentioned that when the CAK denies a request for confidentiality, the concerned parties often withdraw the information from the investigation.

The number of dawn raids carried out by the CAK (all within cartel investigations) is considerably low for international and regional standards (see Figure 3.1 below).

Figure 3.1. Average number of cartel cases in which a dawn raid was carried out, 2019-2023



Note: Age of authority peer group refer to the same group as in Figure 2.3.
Source: OECD CompStats and the CAK.

During the OECD fact-finding mission, CAK stakeholders explained that dawn raids are only conducted when strictly necessary, given that they entail a limitation of the constitutional right to privacy. They also noted that in most cases the evidence required for investigations can be obtained through other means. Moreover, conducting dawn raids is substantially costly, especially in light of the CAK's limited material and human resources. Nevertheless, with the recent implementation of a forensics laboratory, the CAK aims at increasing its use of dawn raids in the future.

Dawn raids are considered vital in cartel investigations worldwide, being one the most powerful tools in the fight against cartels, especially when an element of surprise is key to securing evidence and where alternative investigative methods could result in evidence being concealed, removed or destroyed (ICN, 2025[11]). According to the OECD Recommendation concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452], competition authorities should have the powers to "conduct unannounced inspections ('dawn raids') at business and private premises, and access and obtain all documents and information necessary to prove cartel conduct".

Non-compliance with requests for information undermines the CAK's investigative powers. In such cases, it is important to impose appropriate sanctions in order to enhance both specific deterrence (aimed at the individual offender) and general deterrence (aimed at the general public). The Competition Act classifies this conduct as a criminal infringement, meaning that the CAK must refer the case to the ODPP, which has the authority to initiate criminal prosecution. However, the CAK has never referred a case to the ODPP, as it is overwhelmed and prioritises other matters. In practice, the CAK has relied on issuing reminders and encouraging voluntary compliance with requests for information. Stakeholders interviewed during the OECD fact-finding mission indicated that enforcement would be more effective if such conduct were classified as an administrative infringement, which the CAK could enforce directly.

The OECD Recommendation concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452] highlights the importance of this investigation tool, recommending that competition authorities have effective powers to "request and obtain information from investigated and third parties, including other government entities" and to "impose sanctions for non-compliance with mandatory requests and obstruction of investigations".

Likewise, the same considerations apply to offences related to non-compliance with requests to provide oral statements. According to the OECD Recommendation concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452], competition authorities should have effective powers to "obtain oral testimony from individual witnesses" and to "impose sanctions for non-compliance with mandatory requests and obstruction of investigations".

3.2.4. Decision making process

Although the Board of Directors is formally independent in its decision making process, in most cases it follows the recommendations submitted by the Director-General. One potential reason for this could be that the Corporation Secretary and Legal Services Department serves both as the secretariat to the Board and as legal counsel to the CAK, including during investigations. In practice, the Department participates in investigations and comments on the final report prepared by the investigation team but also advises the Board and drafts its decisions.

As mentioned above, CAK decisions (both relating to anticompetitive conduct and merger reviews) are not fully published; only summaries are made available, including the name of the companies involved, the nature of the conduct and the case outcome, in line with the requirement of Section 39 of the Competition Act. During the OECD fact-finding mission, CAK staff explained that full decisions are not disclosed because they contain some confidential information. However, they acknowledged that public versions of full decisions could be made available, with all confidential information redacted. In contrast, decisions of the Competition Tribunal are published in full, suggesting that the limited disclosure of CAK decisions is not due to legal constraints in Kenya.

The Communications and External Relations Department is responsible for preparing decision summaries based on the final decisions of the Board of Directors. The summaries must be approved by the Corporation Secretary and Legal Services Department, the Director of Competition and Consumer Protection and the Director-General before publication. These summaries appear to be aimed more at serving as press releases than at informing the public about how competition law is interpreted and enforced in Kenya.

Stakeholders interviewed by the OECD during the fact-finding mission noted that there is no established timeline for the publication of summaries. According to them, in some cases several months passed before a summary was eventually made public.

The lack of transparency hinders the development of competition policy in Kenya. For instance, it prevents businesses and society from better understanding how competition law is interpreted and applied by the CAK.

The practice in Kenya does not align with the OECD Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement [OECD/LEGAL/0465], which recommends that jurisdictions should "ensure that competition law enforcement is transparent and predictable, by (…) publishing the facts, legal basis and sanctions relating to decisions, including decisions to settle cases, subject to the protection of confidential information". The Recommendation defines confidential information as "business secrets and other sensitive information, as well as any other information treated as confidential under applicable law".[66]

Most jurisdictions publish their decisions while safeguarding business secrets and other confidential information. Generally, a public version of the entire decision is made available to the public.[67]

Further, stakeholders interviewed by the OECD indicated that while investigated parties receive a more detailed version of decisions than the summaries published on the CAK's website, stakeholders were sceptical as to whether these are in fact full decisions. The decisions provided to parties were criticised as being very brief, with limited reasoning and economic analysis. The OECD fact-finding team was unable

to verify these assertions. Although it requested a sample of decisions for analysis, it received only decision summaries slightly longer than those published on the CAK's website (typically three to four pages). These summaries did not show any indication of detailed reasoning or economic analysis.

In practice, the CAK has pursued only administrative enforcement, with no plans to initiate criminal prosecution, which the agency considers more complex and less efficient. As noted above, the ODPP – the body in charge of criminal prosecution – is overwhelmed and has other priorities. In addition, there are concerns that the courts lack sufficient expertise in handling competition cases. Stakeholders consulted by the OECD emphasised that more enforcement against anti-competitive conduct is necessary, but no concerns were raised regarding the absence of criminal enforcement.

The conditions required for issuing an interim measure are generally in line with international practices, i.e. the likelihood of success on the merits of the case and the urgency to prevent harm (OECD, 2022[12]). However, the lack of detailed procedural rules regarding interim measures (such as who can request them, when they can be requested and who has the authority to impose them) may increase legal uncertainty. According to the CAK, interim measures can be requested by the complainant or adopted *ex officio.* The CAK also indicated that the Board of Directors is responsible for deciding on the imposition of interim measures, except when this power is delegated to the Director-General due to urgency. Nevertheless, the allocation of powers remains unclear, particularly given that urgency is itself one of the conditions for imposing such measures.

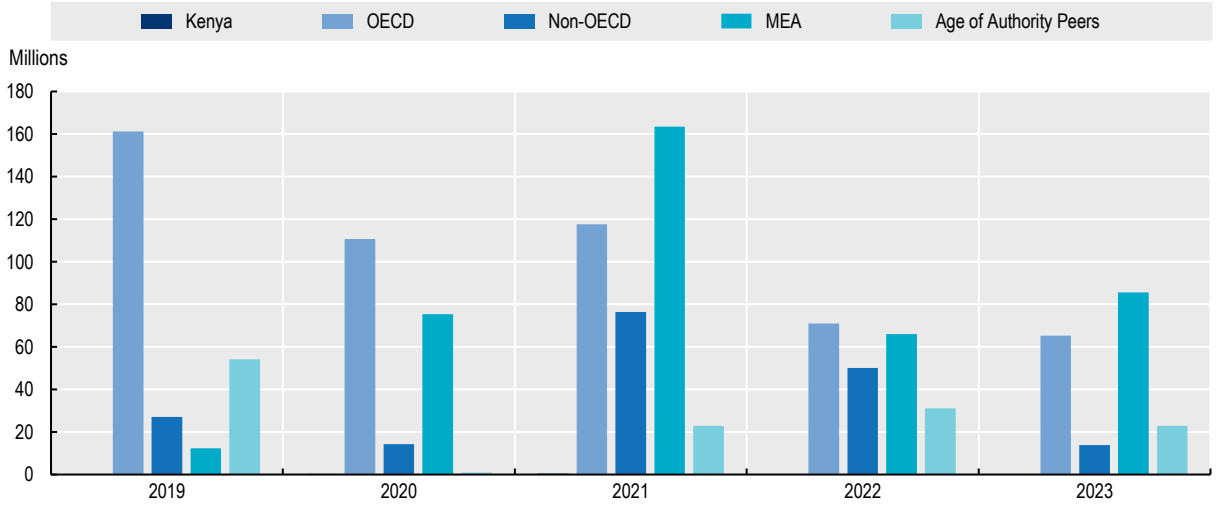
3.2.5. Sanctions

The legal framework governing administrative sanctions is generally in line with international practices, particularly the OECD Recommendation concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452] and the OECD Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement [OECD/LEGAL/0465]. Notably, the methodology for setting fines is indeed similar to that used in most jurisdictions (OECD, 2016[13]).

Nevertheless, in practice, the application of these rules does not appear to be effective. As noted above, the OECD was unable to verify CAK's decision numbers. Regarding sanctions in particular, only the final penalty amounts are disclosed, which prevented the OECD from assessing how fines are set in practice (for instance, the base percentage used and how aggravating and mitigating factors are considered).

In any case, based on the most recent figures provided by the CAK, the total amount of fines imposed in cartel enforcement cases (including those resulting from settlements) is significantly lower than both international, regional and peer averages, as shown in Figure 3.2 below.

Figure 3.2. Total fines imposed per jurisdiction in cartels by region, in EUR, 2019-2023



Note: Age of authority peers refers to the same group as in Figure 2.3.
Source: OECD CompStats and the CAK.

These findings are consistent with the inputs received from various stakeholders interviewed by the OECD, who indicated that the fines imposed by the CAK are very low, often based on a percentage well below the maximum available (i.e. 10% of the undertaking's gross annual turnover in Kenya for the immediately preceding year). Some stakeholders noted that most cases apply a percentage of 1% or less when setting fines. Concerns were also raised about how the guidelines are used in practice, particularly regarding the consistency of their application.

CAK staff acknowledged that sanctions were lower in the early times of enforcement, as awareness of the Competition Act was still limited, and therefore sanctions were intended to be pedagogical. According to them, the CAK has gradually increased the level of fines over time, although they recognise that there is room for improvement. They also emphasised that the primarily goal of competition enforcement is not to bankrupt companies, but rather to deter anti-competitive behaviour. Concerns were also voiced about whether imposing high fines might discourage investment.

According to the OECD Recommendation concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452], jurisdictions should "provide for effective sanctions of a kind and at a level adequate to deter firms and individuals from participating in hard core cartels". In addition, the OECD Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement [OECD/LEGAL/0465] calls for jurisdictions to "ensure that competition law enforcement in non-discriminatory, proportionate and consistent across similar cases". Proportionate fines are indeed critical to deterring companies from breaching the law, which should not be perceived as a profitable activity. Ideally, fines should outweigh the expected gains from infringements divided by the probability of detection (Ginsburg and Wright, 2010[14]; Connor and Lande, 2012[15]). If the expected profits from infringement exceed the expected fines, rational companies may not abstain from engaging in anti-competitive conduct (OECD, 2016[13]).

Most competition authorities pursue one or more objectives through their fining policies, such as deterrence, punishment, disgorgement or compensation. While the emphasis on each goal may vary, these objectives are not mutually exclusive. A common argument faced by competition authorities is that high fines could drive companies out of the market. However, such concerns should influence fine levels only in exceptional cases. Provisions setting maximum fines as a percentage of turnover (as is the case in Kenya) already serve as a means of accounting for ability to pay. Additionally, while many jurisdictions can

consider inability to pay when setting fines, to safeguard the legitimacy and credibility of competition authorities, such reductions must be granted based on specific, objective and transparent criteria. There are also alternative ways to preserve deterrence without increasing the risk of bankruptcy, such as offering extended payment deadlines or payment in instalments instead of reducing the fine amount (OECD, 2016[13]; ICN, 2008[16]) – an option that is also available under the Kenyan regime. In conclusion, the potential impact of fines on companies should not serve as a general justification for failing to impose sanctions that are sufficiently deterrent.

In cases of non-compliance with fines imposed, by the CAK, the Authority lacks direct enforcement powers, which may in practice weaken the effectiveness of its decisions. However, the OECD was unable to obtain statistics on the actual level of non-compliance and therefore could not assess whether this poses a real challenge. In any event, strengthening the CAK's powers to enforce its own decisions would be a welcome development.

Although the legislation provides for the adoption of non-financial sanctions, CAK stakeholders indicated that these are not possible in practice. Measures such as director disqualification and bidder exclusion have been implemented in many jurisdictions and have proven to be a powerful deterrent mechanism (OECD, 2022[17]). Furthermore, administrative sanctions against individuals (e.g. directors or managers) are not available under the current Kenyan framework. Since competition infringements have not been criminally prosecuted in Kenya and individuals are not sanctioned in practice, stakeholders interviewed by the OECD noted this may reduce the overall deterrent effect of competition enforcement. As stated in the OECD Recommendation concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452], jurisdictions should "introduce a combination of sanctions (civil, administrative and/ or criminal, monetary and non-monetary) for an adequate deterrent effect in their jurisdiction" and should also "consider introducing sanctions against individuals having participated in cartels".

Finally, as mentioned above, no sanctions have been imposed for procedural infringements, despite such offences having occurred. These are criminal offences and must be prosecuted by the ODPP. Nonetheless, the CAK has never referred cases of procedural infringements to the ODPP. This practice goes against the OECD Recommendation concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452], which recommends that jurisdictions "impose sanctions for non-compliance with mandatory requests and obstruction of investigations".

Settlements

Settlements in Kenya share characteristics with what is referred to in most jurisdictions as commitments and in practice are a hybrid of both early termination tools. In many countries, settlements apply more often to cartels and involve situations where the competition authority and the investigated parties agree on certain substantive findings (often including an admission of liability) and procedural matters, in exchange for a quicker resolution of the case and reduced fines. By contrast, commitments are more commonly applicable for abuse of dominance and vertical anti-competitive agreements cases, where authorities accept remedies proposed by the investigated parties to address the authority's initial concerns in an antitrust proceeding. If accepted, commitments become binding on the proposing party, but no competition infringement is formally established (OECD, 2016[18]).

In Kenya, settlements are applicable for all types of competition infringements and do not necessarily require the investigated parties to admit liability. According to the CAK, parties that do admit guilt benefit from higher fine discounts. According to the OECD Recommendation concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452], jurisdictions should "enable and incentivise early case resolution tools such as plea negotiation and settlements, which often require an admission of guilt and/or the admission of facts and/or a waiver of the right to appeal".

The legislation states that settlements may include a financial penalty, suggesting that such a penalty is not mandatory, although in practice it is always applied in cartel cases. Moreover, settlements may involve corrective measures, but there is no clear guidance on when and how these measures should be implemented. The CAK mentioned that in a few cases, settlements included obligations for companies to introduce competition compliance programmes.

Neither the Competition (General) Rules nor the Consolidated Administrative Remedies and Settlement Guidelines provide clear rules on settlement discounts, referring only to the general methodology for setting fines. Since full CAK decisions are not published, the OECD was unable to assess how settlement discounts (or other settlement terms) are applied in practice. According to the CAK, the discounts primarily reflect the degree of co-operation by the parties. However, stakeholders interviewed by the OECD expressed concerns about the potential for excessive discretion by the CAK when negotiating and setting the financial penalty, particularly given the lack of transparency. Many jurisdictions establish maximum reduction percentages for settlements, with clear criteria for their application, thereby ensuring proportionality across cases. Jurisdictions also typically avoid granting sanction discounts that are too generous, which could undermine incentives to apply for leniency and limit the deterrent effect of fines (OECD, 2008[19]).

Moreover, although the Competition Act requires the publication of a notice in the gazette regarding settlement agreements, including the name of all undertakings involved and the nature of the conduct in question,[68] stakeholders interviewed by the OECD mentioned that in practice firms may even negotiate as part of settlements to avoid being mentioned in press announcements or the published cases.

In practice, the CAK settles most cases. According to the CAK, settlements are a desired outcome, as they expedite case resolution without litigation, saving time and resources for both the CAK and the investigated parties, while ensuring compliance with competition law. The CAK also considers this approach consistent with the Constitution of Kenya. Investigated parties agree that settlements offer a quick and predictable resolution and thus represent the best way to conclude investigations. Indeed, parties have strong incentives to settle cases, especially considering that there is no formal requirement to admit the infringement and the financial penalties involved tend to be relatively low.

The CAK's tendency to close nearly all cases with settlements, some of which do not require recognition of any violation, hinders the development of an enforcement decision record and the establishment of case law through judicial review. In the long run, this may undermine transparency and overall compliance. In addition, the fact that settlements can be negotiated at all levels (including before courts), coupled with the substantial reductions in financial penalties offered, encourages parties to rely heavily on this tool, which may weaken the deterrent effect of the CAK's enforcement actions and undermine its credibility.

In cases where settlements are reached after the CAK has issued a final decision, judicial approval is required (either by the Competition Tribunal or the High Court). Nevertheless, these settlements are negotiated by the CAK and, in practice, once approved by the CAK's Board of Directors, they are typically homologated by the Judiciary (see Chapter 8).

There are no specific rules governing non-compliance with settlements. In such an instance, the CAK expects it would conduct an investigation internally and impose remedies as provided by the Competition Act, rather than refer the matter to the ODPP. To date, the CAK reports that there have been no incidents of non-compliance with settlements.

Criminal sanctions

The OECD Recommendation concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452] recommends providing for "effective sanctions of a kind and at a level adequate to deter firms and individuals from participating in hard core cartels and incentivise cartel members to defect from the cartel

and co-operate with the competition agency", including "a combination of sanctions (civil, administrative and/ or criminal, monetary and non-monetary) for an adequate deterrent effect".

The criminalisation of competition infringements in most jurisdictions is typically limited to hard core cartels, which are considered the most egregious violations of competition law, as recognised in the OECD Recommendation [OECD/LEGAL/0452]. In some jurisdictions, criminalisation is further restricted to bid rigging conduct. Abuse of dominance is generally not criminalised. Compared to civil enforcement, criminal enforcement across the globe is far less frequent and takes place in far fewer jurisdictions (OECD, 2020[20]).

In contrast to the typically narrow ambit of criminalised competition prohibitions, all anticompetitive conduct in break of the Competition Act constitutes a criminal offence, as do procedural infringements of the law. Legislation that criminalises conduct is only effective law if it is capable of being enforced. This suggests the Competition Act currently contains a superfluous criminal enforcement regime disconnected from the reality of competition enforcement in Kenya. The (OECD, 2020[20]) has previously observed that.

> *Introducing statutory criminal penalties without following up with actual criminal enforcement might convey a message of weakness of the competition authority and hence decrease (rather than increase) deterrence, insofar as it might even affect the credibility of administrative fines.*

Chapter 10 of this Peer Review on co-operation explores the specific challenges relating to enforcing procedural infringements of the Competition Act.

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Notes

[1] Competition Act, ss 31, 89A and Competition (General) Rules, 2019, s 34.

[2] Competition Act, s 31(1).

[3] Competition Act, s 31(1).

[4] Competition Act, s 34 and Competition (General) Rules, Second Schedule, Form I.

[5] Competition (General) Rules, Second Schedule, Form I.

[6] Competition (General) Rules, s 34(3).

[7] CAK Citizen’s Service Delivery Charter, https://cak.go.ke/sites/default/files/CAKCitizensServiceDeliveryCharter.pdf.

[8] Competition Act, s 31(2).

[9] Leniency Programme Guidelines, s 5. The Guidelines also set out rules governing applications by subsidiary and parent undertakings, as well as legal entities involved in a joint venture (Leniency Programme Guidelines, ss 7-10).

[10] Leniency Programme Guidelines, s 13.

[11] Leniency Programme Guidelines, ss 11, 13(iv).

[12] Leniency Programme Guidelines, s 12.

[13] Leniency Programme Guidelines, s 14.

[14] Leniency Programme Guidelines, ss 18-31.

[15] Leniency Programme Guidelines, s 30.

[16] Leniency Programme Guidelines, s 31.

[17] Leniency Programme Guidelines, s 25.

[18] External Guidelines on the Informant Reward Scheme Policy, s 5.

[19] External Guidelines on the Informant Reward Scheme Policy, s 6.

[20] External Guidelines on the Informant Reward Scheme Policy, s 7.

[21] External Guidelines on the Informant Reward Scheme Policy, s 9.

[22] External Guidelines on the Informant Reward Scheme Policy, ss 10-12.

[23] External Guidelines on the Informant Reward Scheme Policy, s 8.

[24] CAK Citizen's Service Delivery Charter.

[25] Competition Act, s 34 and Competition (General) Rules, s 38(a).

[26] Competition (General) Rules, s 38(b).

[27] Competition Act, s 20 and Competition (General) Rules, s 47.

[28] Competition Act, ss 20(10), 91.

[29] Competition Act, s 32 and Competition (General) Rules, s 37.

[30] Search and Seizure Guidelines, s 7.

[31] Search and Seizure Guidelines, ss 16, 17.

[32] Competition (General) Rules, s 37.

[33] Search and Seizure Guidelines, s 29.

[34] Search and Seizure Guidelines, s 14.

[35] Competition Act, ss 89, 91.

[36] Competition Act, s 31(4) and Competition (General) Rules, s 36(1).

[37] Competition (General) Rules, s 36(2).

[38] Competition Act, ss 88, 91.

[39] Competition Act, ss 33, 35 and Competition (General) Rules, s 39.

[40] Competition Act, ss 88, 91.

[41] Competition Act, s 36.

[42] Competition Act, s 39.

[43] Competition Act, s 92.

[44] Competition Act, s 37 and Competition (General) Rules, s 35(1).

[45] Competition (General) Rules, s 35(2).

[46] Competition Act, s 40.

[47] Competition Act, s 39.

[48] Constitution of Kenya, 2010, s 35.

[49] Access to Information Act, 2016, ss 4, 6.

[50] Although Kenya's legal system operates on a common law model, in practice the CAK has the powers to impose administrative sanctions.

[51] Competition Act, ss 21(9), 22(6), 24(3).

[52] Competition Act, s 36.

[53] Competition Act, ss 20(10), 88, 89, 90, 91.

[54] According to sections 42 and 45 of the Competition (General) Rules, the CAK must consider the following elements when determining administrative fines: the nature of contravention; co-operation by the undertaking with the CAK; whether the undertaking is a first-time offender; whether the conduct has ceased; the effect and duration of the misconduct; the amount of commerce affected by the conduct; the profits made as a result of the conduct; pre-meditation; and any other relevant factors.

[55] Consolidated Administrative Remedies and Settlement Guidelines, 2023, s. 8.1.2.

[56] Consolidated Administrative Remedies and Settlement Guidelines, 2023, s 8.1.3.

[57] Consolidated Administrative Remedies and Settlement Guidelines, 2023, s 8.1.4.

[58] Consolidated Administrative Remedies and Settlement Guidelines, 2023, s 8.4.

[59] Consolidated Administrative Remedies and Settlement Guidelines, 2023, s 10.

[60] Competition Act, s 36.

[61] Competition (General) Rules, s 45(1) and Consolidated Administrative Remedies and Settlement Guidelines, s 107.

[62] Consolidated Administrative Remedies and Settlement Guidelines, s 99.

[63] Competition (General) Rules, s 41 and Consolidated Administrative Remedies and Settlement Guidelines, ss 100-108.

[64] Competition (General) Rules, s 41(5).

[65] According to the OECD Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement [OECD/LEGAL/0465], jurisdictions should "inform parties and offer them opportunities to engage meaningfully in the competition law enforcement process, with due regard to the effectiveness of the investigation, by: a) ensuring that parties are notified in writing as soon as feasible and legally permissible that an investigation has been opened and of its legal basis and subject matter, to the extent

that this does not undermine the effectiveness of the investigation; b) explaining to the parties, as soon as reasonably possible and appropriate during the competition law enforcement process, the factual and legal basis, competition concerns, and the status of the investigation; (…) e) providing parties with meaningful opportunities at key stages to discuss with the competition authority the investigation's facts, progress, and procedural steps, as well as relevant legal and economic reasoning; f) offering parties the opportunity to present an adequate defence before a final decision is made. This should include: i. informing parties of all allegations against them and granting them access to the relevant evidence collected by or submitted to the competition authority or court, subject to the protection of confidential and privileged information; and ii. providing parties a meaningful opportunity to present a full response to the allegations and submit evidence in support of their arguments before the key decision makers".

[66] While the definition of confidential information varies across jurisdictions, it typically includes business secrets and other commercially sensitive information, sensitive personal information (e.g. telephone numbers and addresses, medical or employment records), national security information and information which cannot be disclosed due to international law obligations (OECD, 2019[21]).

[67] For instance, this is the practice of the European Commission. See (European Commission, 2024[22]).

[68] Competition Act, s 39.

4 Enforcement against anticompetitive conduct

This chapter covers Kenya's law and practice relating to enforcement against anti-competitive agreements and abuse of dominance.

4.1. Horizontal agreements

4.1.1. Legal framework – horizontal agreements

The Competition Act prohibits all agreements, decisions and concerted practices between undertakings or associations of undertakings "which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya".[1]

In addition to the general prohibition, the Competition Act also includes a non-exhaustive list of specific conduct that is likely to fall foul of the law.[2] These are:

1. directly or indirectly fixing purchase or selling prices,
2. dividing markets by allocation,
3. collusive tendering,
4. limits or controls on production, access, technical development or investment.

Conduct by companies within a single economic unit is exempted from the cartel law.[3]

There is also an additional section of the Competition Act relating to horizontal agreements formed under the auspices of trade associations.[4] This section prohibits:

- unjustifiable exclusion from trade associations,
- the association directly or indirectly recommending prices, the profit margin to include in a price, or a pricing formula,
- the association directly or indirectly recommending terms of sale (including discount, credit, delivery and product and service guarantee terms) that impact pricing.

As noted in Chapter 1, parties may seek an exemption from the CAK in relation to the general prohibition on horizontal agreements and the provision specifically covering trade associations provision.

Under the CAK's guidelines, the authority considers that all horizontal agreements involving hard core cartel conduct are *by object* a breach of the Competition Act.[5] There are no *de minimis* rules in the Competition Act or relevant CAK guidelines (see Chapter 1).

There is both an administrative and criminal enforcement regime relating to cartels. Under the civil framework, the CAK may:[6]

- Declare that the conduct has infringed the Competition Act,
- Order the parties to stop engaging in the conduct,
- Direct the parties to reverse or otherwise remedy the effects of the conduct,
- Impose a financial penalty "of up to ten percent of the immediately preceding year's gross annual turnover in Kenya".

As discussed in Chapter 3, parties may also enter into settlement agreements with the CAK, which may include a pecuniary penalty paid to the CAK, and/or an award of damages to the complainant. Settlements do not require the party to admit wrongdoing.[7]

Under the criminal framework, a person in contravention of the horizontal agreement prohibitions "shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding ten million shillings, or both".[8]

The CAK does not have the power to prosecute criminal cases. It must instead refer these cases to the Office of the Director of Public Prosecutions (ODPP) which directs criminal investigations and institutes criminal proceedings. Parallel proceedings under both criminal and civil frameworks are not possible in Kenya.

4.1.2. Legal framework – bid rigging

There is no specific definition of bid rigging in the Competition Act. The non-exhaustive list of conduct likely amounting to a cartel does note that collusive tendering amounts to a breach of the law.[9] In their guidelines, the CAK explains that it views four activities as collusive tendering for the purposes of the Competition Act: cover bidding, bid suppression, bid rotation and market allocation.[10] The CAK also reports relying on the (OECD, 2009[1]) Bid Rigging Guidelines as part of their analysis of potential cases.[11]

The same sanctions regime for horizontal agreements also applies to bid rigging.

4.1.3. Enforcement practice

The Enforcement and Compliance Department is in charge of carrying out the CAK investigations into horizontal and vertical agreements (in addition to abuse of dominance investigations). As of April 2025, it had 9 staff members.

During the course of the OECD fact-finding exercise, the CAK provided several different sets of statistics regarding its enforcement practices, all of which included conflicting figures. In combination with the fact that the CAK does not publish its enforcement decisions (and may also agree to non-publication of a summary of a case as a condition for settling with a party), this means that it is not possible to report with certainty on the enforcement figures in Kenya.

In terms of investigations opened, the five most recent years of data provided show that the CAK opened an average of 6.6 investigations into cartel agreements per year. Roughly 54% of investigations were opened after a complaint, with 46% opened *ex officio* by the CAK.

According to the five-year averages collated in the latest OECD CompStats data, the average number of cartel investigations opened is 11.8 for OECD jurisdictions, 5.9 in non-OECD jurisdictions, 8 in MEA jurisdictions and 3.6 in age of authority peers.

For bid rigging, the CAK opened 2.6 investigation per year on average over the last five years. Ten investigations were opened following a complaint, and three were opened *ex officio* by the CAK.

The CAK has not received any leniency applications or whistleblower reports, so no investigations were started using these tools for any horizontal agreement conduct.

Table 4.1 summarises the best available statistics on cartels and bid rigging in Kenya.

Table 4.1. Horizontal agreements (cartels and bid rigging) enforcement in Kenya

	2020	2021	2022	2023	2024
Total final decisions issued	15	7	5	7	2
Final decisions finding infringement and imposing a fine (including settlements)	2	0	1	1	0
Final decisions closing an investigation after accepting commitments	0	0	0	0	0
Final decisions closing an investigation without finding infringement	13	7	4	6	2

Source: CAK.

Box 4.1 surveys the cases available to the OECD, noting again that these are only redacted summaries of the cases, with no original version of the decision available.

Box 4.1. Prominent cartel and bid rigging decision in Kenya

2020 – Energy Dealers Association and its members – CAK/EC/05/182/A

The investigation covered whether there was an agreement by the Energy Dealers Association and its members to engage in market allocation, agreement on terms of trade and sharing of commercially sensitive information. The CAK became aware of the conduct after the association sought an exemption for a mutual gas cylinder exchange agreement among its members.

The CAK found the association's rules created a pricing formula for members. Although the CAK did not find evidence that the rules were implemented by members in practice, the object of the conduct was nonetheless to fix prices. The CAK made no findings of infringement in relation to any of the other grounds for investigation.

The trade association was required to pay a penalty of KES 408 000 (~EUR 2 700) which amounted to roughly 5% of the association's turnover and establish a compliance programme to raise awareness of competition law among its members.

2020-2021 – Bid rigging in supply of electricity poles – CAK/EC/05/188/A

The CAK investigated a number of complaints relating to bid rigging in the supply of electrical poles. The investigations found widespread collusion including common directorships of firms allegedly competing for tenders, firms submitting bids on behalf of themselves and their competitors, and communications from the chair of the industry association setting prices via WhatsApp.

The industry association and the majority of accused firms received no penalties and were required to undergo compliance training.

In a separate decision, four firms were issued fines after settling their cases. The highest penalty was KES 410 000 (~EUR 2 750), being 3.5% of the tender value. The other three firms fined were not named in the case summary, nor was the quantum of penalty reported.

2020-2021 – Paint manufacturing sector cartel – CAK/EC/05/166/A

Through their informally established trade association, four paint manufacturers shared strategic information, agreed to common price increases and fixed a common price for delivery.

The highest penalty was issued against the largest firm in the market, Crown Paints, who were issued a KES 29.92 million (~EUR 200 000) fine. All four firms were required to give undertakings to refrain from the conduct and to put compliance programmes in place.

2021 – Steel manufacturing cartel – CAK/EC/05/200/A

The CAK investigated 14 firms in the steel manufacturing sector. Evidence gathered showed that the firms discussed and exchanged sensitive information on competitor capacity and future investment plans. The CAK also found that the firms discussed pricing, discounts, limiting importation of inputs, limiting production of outputs and standardising product specifications.

Five firms entered into early settlements. The fines across the 14 firms totalled KES 338.85 million (~EUR 2.27 million).

Source: CAK.

Under the Competition Act, there is no set time period for conducting an investigation. The CAK's service charter commits to investigating complex complaints such as cartel cases within 180 working days. Of the four total enforcement cases that the CAK figures on investigative timeframes for, the range was from 268 business days (around 13 months) to 753 business days (around three years), with an average of 491 business days (just under two years).

There is a Memoranda of Understanding ("MoU") between the CAK and the Public Procurement Regulatory Authority that allows procurement data to be requested in bid rigging investigations. This does not happen in practice and there has been no co-operation between the two authorities in bid rigging investigations. This is discussed in detail in Chapter 10 on co-operation.

4.2. Vertical agreements

4.2.1. Legal framework

The Competition Act confirms that the prohibition of anti-competitive agreements applies to agreements between "parties in a vertical relationship, being an undertaking and its suppliers or customers or both".[12] Similar to horizontal agreements, there is also a non-exhaustive list in the Competition Act of conduct which may amount to a prohibited vertical agreement. These include:

- Resale price maintenance,[13] unless it is expressly stipulated that the recommended price is not binding and that any label with a price affixed also bears the words "recommended price" next to the price.[14]
- Tied selling and bundling.[15]
- Conditional discount and rebate agreements.
- Conduct involving an intellectual property right in a manner that goes beyond the limits of fair, reasonable and non-discriminatory use.[16] The CAK guidelines note this could include behaviour such as exclusive licensing, territorial restrictions, undue influence over quality control and fixing prices for licensed products.[17]

Vertical agreements are assessed by the rule of reason, requiring the CAK to prove the existence and anticompetitive effects of the conduct.[18] The CAK must also prove the undertakings engaging in the conduct are dominant in the relevant market.

4.2.2. Enforcement in practice

In the five-year review period, the CAK opened a total of 22 cases relating to vertical agreements, 21 based on complaints and 1 opened *ex officio*.

Table 4.2 provides an overview of the CAK's decision practice on vertical agreements over the last five years.

Table 4.2. Vertical agreements enforcement in Kenya

	2020	2021	2022	2023	2024
Investigations opened	4	3	5	7	3
Final decisions	0	0	5	7	2
Decisions to close a case without finding infringement	0	0	5	7	2
Decisions to close a case with commitments	0	0	0	0	0
Decisions imposing sanctions or orders (including where settlements were reached)	0	0	0	0	0

Source: CAK.

The only enforcement decision from the CAK that has ever related to vertical agreements is the *Airtel v Safaricom* case from 2014.[19] However, this case was brought under the Competition Act's abuse of dominance provisions and did not directly consider the prohibition on vertical agreements, as discussed in section 4.4.

4.3. Analysis of agreements enforcement

4.3.1. Low enforcement levels

Over the last five years, the CAK has sanctioned an average of 0.8 horizontal cartels per year and 0 relating to vertical agreements. The decline in recent years in Kenya is stark.

Low levels of enforcement can undermine the deterrent effect of competition law, as deterrence requires a sufficient perceived probability of being detected and sanctioned. External stakeholders were broadly critical of the CAK's approach to prohibited agreements enforcement. As mentioned in Chapter 2, concerns were repeatedly raised that the CAK has not placed sufficient strategic focus on investigating cartel cases, with the CAK's resources too focussed on trainings and workshops for staff, or advocacy activities. While stakeholders recognised the need for advocacy and skilled staff, they were of the strong view that bringing enforcement cases, particularly in cartels, is the most effective form of training for staff and the most useful advocacy tool available to the CAK.

The OECD Recommendation concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452] calls on adherent jurisdictions to "enable and incentivise early case resolution tools such as plea negotiation and settlements, which often require an admission of guilt and/or the admission of facts and/or a waiver of the right to appeal". However, this requires striking a balance between utilising early case resolution to ensure effective and efficient use of competition authority resources, against the potential weakening specific and general deterrence the sanctions are too low.

4.3.2. Sanctions and deterrence

The Recommendation on Fighting Bid Rigging in Public Procurement [OECD/LEGAL/0396] recommends providing for sufficiently deterrent sanctions for bid rigging. These can include criminal liability and imprisonment for individuals.

Within the CAK, the culture among staff and leadership is that the authority's approach to sanctioning cartels is a work in progress. Since beginning operations in 2011, the CAK has moved from issuing warnings, to nominal fines and now larger fines as they build awareness of the competition law in the country. Internal stakeholders remain acutely concerned with potential negative external criticism about being overly punitive that may lead to job losses from firm closures, or by deterring foreign investment. For the CAK, the focus remains less on punishing but on converting sanctioned firms into ambassadors for increased compliance. The CAK does not require firms to admit wrongdoing. Indeed, firms may even negotiate as part of settlements to avoid being mentioned in press announcements or the published cases (noting again that the formal CAK decisions are not publicly available).

As a result, concluding cases through settlement is the default approach the CAK takes. Despite the maximum civil penalty for cartel conduct being 10% of turnover, the CAK has never issued a sanction close to this amount and reported no intention of seeking such a sanction in the short to medium term. Estimates provided by stakeholders was that settlement sanctions typically amount to less than 1% of total turnover. In the more recent cases where information is available on the quantum of sanctions in settlements, figures include:

- 5% of turnover of the industry association in the Energy Dealers Association cartel.[20]
- 3.5% of the tender value (rather than total firm turnover) in the electricity poles cartel.[21]

The CAK explained that the low fines through settlements are also driven in part by a concern that overly onerous sanctions may deter investment into Kenya, or that they may put sanctioned firms out of business (also impacting employment). Concerns about decreasing competition in a market if a firm exits due to large sanctions, must be balanced against the potential upsides of increasing competition in markets across Kenya through general deterrence of cartel conduct (Buccirossi et al., 2009[2]). Additionally, overly generous discounts on the basis of potential firm failure risks "generating distorted incentives for compliance for wrongdoers differing only in their financial situation, and of inducing firms to issue more debt to reduce their (apparent) ability to pay and, thereby, the level of the expected fines" (Buccirossi et al., 2009[2]).

Several external stakeholders noted that while the CAK's generous approach to settling cases may have been appropriate in its earlier years of operations, after 14 years it was now time to issue substantive sanctions when appropriate. No party has ever sought leniency in Kenya, with external stakeholders explaining there was no incentive given the low risk of being investigated at all, and the generosity of settling meaning firms can pay a small sum if they are caught.

Early case resolution through settlements must be balanced against the need to adequately deter cartels and to encourage firms to apply for leniency (OECD, 2019[3]). This is particularly relevant for the Kenyan context where the CAK emphasises the need to continue raising awareness of the competition law, and where there have been no leniency applications or whistleblower disclosures. For the CAK, increasing enforcement in cartels and increasing the penalties issued should be a priority.

4.3.3. Preventing bid rigging

The Recommendation on Fighting Bid Rigging in Public Procurement [OECD/LEGAL/0396] recognises that bid rigging is among the most egregious violations of competition law that injures the public purchaser by raising prices, reducing quality, establishing output restrictions or quotas, or sharing or dividing markets (OECD, 2021[4]).

Public procurement accounts for 60% of the Kenyan Government's annual budget, typically amounting to 10-13% of GDP (National Treasury of Kenya, 2025[5]; Kenyan Public Procurement Regulatory Authority, 2023[6]). The Kenyan Constitution includes an article that requires the procurement system to be "fair, equitable, transparent, competitive and cost-effective".[22] Article 227 also requires the parliament to create a legislative framework that, among other factors, sanctions those that breach procurement procedures or have engaged in corrupt practices.[23]

An MoU exists between the CAK and the Public Procurement Regulatory Authority ("PPRA"). However, in practice there is no co-operation to date that has resulted in any bid rigging enforcement. The minimal co-operation to date has focussed on capacity building and trainings for procurers, and the agencies do not regularly communicate.

Despite being mandatory, only roughly 800 of the 34 000 procuring authorities in Kenya utilise the country's eProcurement portal. Neither the CAK nor the PPRA have any capacity to conduct screening and are entirely dependent on complaints to identify bid rigging conduct.

The PPRA has never issued a sanction for any breach of the public procurement law, let alone corrupt practices such as bid rigging. The bid rigging conduct the CAK investigated and sanctioned relating to electricity pole tenders was discovered by a complaint and through monitoring news media reports.

4.4. Abuse of dominance

Sections 23 and 24 of the Competition Act provides the legal framework on abuse of dominant position in Kenya. Section 24 of the Competition Act prohibits any abuse of a dominant position by an undertaking in a market in Kenya, including through the following practices:

- Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions,
- Limiting or restricting production, market outlets or market access, investment, distribution, technical development or technological progress through predatory or other practices,
- Applying dissimilar conditions to equivalent transactions with other trading parties,
- Making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject-matter of the contracts,
- Abusing of an intellectual property (IP) right.

The list of abusive practices mentioned in the Competition Act contemplates both exploitative and exclusionary abuses. It is a non-exhaustive list of potential abusive behaviour, meaning that other practices can also constitute an abuse of dominance.[24]

To assess whether an undertaking has abused its dominant position, the CAK needs to first define the relevant market, then establish whether the undertaking holds a dominant position and finally determine whether it has abused that position.[25]

In Kenya, abuse of dominance constitutes either a criminal or an administrative infringement. Criminal sanctions include imprisonment for up to five years and/or a fine of up to KES 10 000 000 (approximately EUR 66 000).[26] Administrative sanctions include a fine of up to 10% of the undertaking's gross annual turnover in Kenya for the immediately preceding year.[27]

4.4.1. Market definition

Based on Section 4(1)(b) of the Competition Act, the CAK developed the Guidelines on Relevant Market Definition to guide how it applies the concept of relevant markets (CAK, 2019[7]). The Guidelines apply to vertical agreements, abuse of dominance and merger review cases.

The Guidelines clarify that while market definition is not an end in itself, it constitutes the first step in a full competition analysis, helping the CAK establish the boundaries within which competition takes place and assess the effects on competition of a conduct or transaction by calculating market shares and identifying actual or potential competitors of the undertakings involved.[28]

To determine relevant markets, the CAK focusses on both demand and supply substitutability. It defines relevant markets along two main dimensions: the product market (i.e. all products or services regarded as reasonably interchangeable or substitutable by consumer preferences, product characteristics, intended use, production methodologies, raw materials used and route to market) and the geographic market (i.e. the area in which the undertakings concerned are involved in the supply and demand of products or services, where competition conditions are sufficiently homogeneous).[29]

According to the Guidelines, the main test used by the CAK to define relevant markets is the hypothetical monopolist test (SSNIP test).[30]

The Guidelines also provide examples of types of evidence and information the CAK may use in the market definition process. These include, among others: product characteristics and intended use, substitution in the recent past, views of customers and competitors, consumer preferences, barriers to substitution, patterns in price changes, imports and transportation costs.[31]

The Guidelines also include some considerations for market definition in multi-sided markets, non-price markets, digital markets and secondary (or after) markets.[32]

4.4.2. Dominant position

According to the Competition Act, an undertaking is considered to hold a dominant position when:[33]

- It has a market share of over 50% in a relevant market,
- It has a market share of between 40% and 50% in a relevant market unless it proves that it does not have market power,
- It has a market share below 40% in a relevant market but has market power.

Depending on the availability of data and the characteristics of the market, the CAK can assess different factors to determine market shares, such as revenues (monetary sales), demand units (unit sales), output or potential capacity (to produce or sell).[34]

The legislation establishes a presumption of dominance for firms holding more than 50% market share. For undertakings with less than 50% market share, the CAK needs to assess whether they have market power or the ability to exercise market power.[35] According to the CAK, market power is considered to exist when an undertaking has: (i) the ability to act unconstrained by, or to an appreciable extent, independently of its customers, competitors and suppliers; and/or (ii) the ability to control prices, profitably sustain prices above competitive levels or restrict output or quality below competitive levels (i.e. whether they can act unconstrained by customers, competitors and suppliers).[36]

Several factors are considered in this regard, including barriers to entry, countervailing power, imports, product differentiation, the stability of market shares and the ability of the undertaking to sustain price increase over time.[37]

4.4.3. Abusive behaviour

Abuse of dominance is assessed under the rule of reason, meaning that a behaviour will only be considered illegal if its anti-competitive effects outweigh its pro-competitive effects.

Indeed, when assessing unilateral conduct, the CAK takes into account the specific practice in question and the level of competition in the market with and without the presence of the investigated practice. In general, the CAK focusses on whether the behaviour leads to foreclosure or exclusion of rivals or results in exploitation of consumers. It can also consider whether the practice strengthens barriers to entry.[38] The CAK has the burden of proving the anti-competitive effects of the unilateral conduct, while the investigated parties are entitled to provide an objective justification or efficiency defence for their conduct.[39]

The CAK guidelines provide more specific guidance on the assessment of different types of abuse, in particular the ones falling under the practices mentioned in the non-exhaustive list provided for in Section 24(2) of the Competition Act. For example, regarding unfair prices or trading conditions, the CAK assesses: prices charged to various customers and suppliers, the structure of costs of production of goods or services, actual costs of production of goods or services, prices and costs in a competitive or comparable market and the profitability of the dominant undertaking.[40] Regarding price discrimination, the CAK considers: whether the dominant undertaking has control over prices, has the ability to and is engaged in segregating customers into different groups, and whether there is detriment to customers.[41] As for tying and bundling, the CAK assesses whether the products or services in question are distinct and whether the tying or bundling is negatively affecting competition in either the tied market or tying market or both.[42] Finally, while owning an IP right does not automatically confer market power, it is provided that IP owners can abuse their dominant position, for instance if they use their IP rights to prevent the development of a new product or market.[43]

4.4.4. Enforcement practice

The Enforcement and Compliance Department is in charge of carrying out the CAK investigations into abuse of dominance. As at April 2025, it had nine staff members.

According to CAK data, between 2020 and 2023, the CAK issued 82 decisions on abuse of dominance. All of them closed the investigations without finding an infringement (see Table 4.3 below). The duration of cases varies significantly, from 268 days to 753 days. The most notable abuse of dominance case dates back to 2014, when a settlement was reached with the investigated party (as discussed in the box below).

Between 2020 and 2023, the CAK started 80 investigations, 56 of them after receiving a complaint.

Table 4.3. Abuse of dominance enforcement in Kenya

	2020	2021	2022	2023	2024
Total final decisions issued	17	20	27	18	
Final decisions finding infringement and imposing a fine (including settlements)	0	0	0	0	
Final decisions closing an investigation after accepting commitments	0	0	0	0	
Final decisions closing an investigation without finding infringement	17	20	27	18	

Source: CAK.

Box 4.2. Airtel Kenya Limited v Safaricom Limited (2014)

In 2014, the CAK received a complaint from Airtel Kenya Limited against Safaricom Limited ("Safaricom"), alleging that Safaricom had abused its dominant position through exclusive dealing arrangements in the mobile money transfer service market. In particular, it was alleged that Safaricom had entered into agreements with its mobile money transfer service agents ("M-PESA") requiring them not to offer mobile money transfer services for competing mobile money transfer service providers and therefore abused its dominant position.

In response, the CAK conducted a two-phase investigation: first, to determine whether Safaricom was a dominant undertaking, and second, whether Safaricom had abused its dominant position.

Firstly, the CAK found that Safaricom was the dominant undertaking in the mobile money transfer service market with a market share of over 75%. Subsequently, the CAK determined that the M-PESA agent agreements included exclusivity clauses that barred agents from promoting or selling competing services, though banks and large supermarkets were exempt. This discouraged agents from investing in competing services due to fear of retaliation, despite Safaricom making minimal retail-level investments that did not justify exclusivity. As a result, competition in the mobile money transfer market was restricted, resources of the dealers of the agents were used inefficiently and socio-economic growth was hindered, resulting in the abuse of a dominant position by limiting output.

The case was settled on the conditions that: (i) Safaricom must promptly revise M-PESA agent contracts to remove exclusivity, allowing agents to do business with other money transfer service providers; (ii) its oversight over agents must be limited to its own services; and (iii) each mobile money transfer service provider must ensure compliance with Central Bank of Kenya Regulations.

Source: CAK's decision no. CAK/EC/05/34/A of 18 July 2014.

4.5. Analysis on abuse of dominance enforcement

4.5.1. Market definition

While the methodology set out in the Guidelines on Relevant Market Definition is generally in line with international best practices, the OECD was unable to assess in detail how these provisions are applied by the CAK, and therefore how relevant markets are defined in practice. This is because full decisions are not publicly available and were not shared with the team. Indeed, public decisions only present the conclusions on market definition, without further explaining the underlying reasoning.

During the OECD fact-finding mission, stakeholders expressed concerns regarding how the CAK defines relevant markets. They noted that market definition is often not very detailed, relying more qualitative than quantitative analysis. According to stakeholders, although the Guidelines on Relevant Market Definition identify the SNIPP test as the main tool for defining relevant markets, in practice it has been applied only on a few occasions.

CAK staff acknowledged the challenges of obtaining the information necessary to determine relevant markets. The limited effectiveness of the CAK's powers to request information, as discussed above, contributes to these difficulties. They also noted that the challenge is particularly acute in sectors where informality is widespread, as experienced in past cases.

4.5.2. Dominant position and abusive behaviour

In general, the Kenyan legal framework on abuse of dominance aligns with international best practices. Indeed, holding a dominant position is not in itself a violation of competition law in Kenya, and in order to establish an abuse the CAK must determine that the undertaking at stake is dominant and that it has abused that position. Moreover, the list of potential unilateral conducts set out in the Competition Act is non-exhaustive, suggesting that the CAK focusses on the anti-competitive effects of the conduct rather than its form. Abuse of dominance is assessed under the rule of reason, that is, the CAK must first demonstrate the anti-competitive effects of the conduct (especially in terms of its ability to exclude competitors or affect the competitive process) and then evaluate whether there are legitimate justifications of efficiencies.

However, there appears to be a lack of clarity regarding the definition of dominance and market power. On the one hand, undertakings with a market share exceeding 50% in a relevant market are presumed to be dominant. On the other hand, undertakings with less than 50% market share "shall also be deemed dominant" if: (i) they have between 40% and 50% market share, unless they can demonstrate they do not have market power; or (ii) they have less than 40% market share but nonetheless have market power. According to these provisions, the notion of dominance refers to structural elements based on a market share threshold, while market power relates to other market conditions and dynamics, such as barriers to entry, countervailing power etc.

In practice, according to the CAK, to establish an abuse of dominance case, the agency must demonstrate dominance, which rests in the ability to exercise market power. For undertakings with more than 50% market share, dominance is presumed, meaning that it is sufficient to prove that the market share threshold is met. For undertakings below the 50% threshold, the CAK must assess whether the firm has market power, which requires an analysis of market conditions and dynamics to determine whether the firm can set prices, output, or trading terms without being effectively constrained by its customers, competitors or suppliers.

The text of the Competition Act seems to introduce an irrebuttable presumption of dominance for undertakings with over 50% market share, as neither the Act nor the CAK guidelines refer to the possibility of rebutting this presumption by demonstrating a lack of market power. By contrast, for undertakings with

market share between 40% and 50%, the Act also provides for a presumption of dominance, but expressly allows them to prove they do not hold market power. Nevertheless, during the OECD fact-finding mission, CAK stakeholders indicated that both presumptions of dominance are, in practice, rebuttable, meaning that undertakings may present evidence showing they lack sufficient market power to behave independently of competitive constraints.

Therefore, while the legal framework seems to depart from international best practices regarding the definition of dominance, in practice the CAK's assessment is generally consistent with such standards. However, the lack of clarity in the legal framework can still give rise to legal uncertainty, including due to the risk of new interpretations of existing provisions. In many jurisdictions, a market share threshold is set below which dominance is considered unlikely and above which dominance is considered likely. Market shares are typically used just as a first step to determine a dominant position (i.e. a rebuttable presumption), being complemented by a case-by-case assessment of other market conditions and dynamics, such as the potential entry of newcomers and the growth of existing competitors, countervailing purchasing power, alternative sources of supply and entry barriers (OECD, 2021[8]).

Regarding enforcement records on abuse of dominance, although various investigations have been conducted, no infringement decisions have been issued to date. Only one can be highlighted as a landmark case, where the CAK settled with the investigated party in 2014, as mentioned above.

According to the OECD CompStats, between 2019 and 2023, the average of abuse infringement decisions was 1.5 in OECD jurisdictions, 2 in non-OECD jurisdictions, 3 in MEA jurisdictions and 0.8 in age of authority peer jurisdictions.

The OECD was unable to access full decisions of abuse of dominance cases (including non-infringement decisions), which limited the team's ability to further assess the underlying reasons for the lack of successful enforcement. During the OECD fact-finding mission, CAK stakeholders suggested that the limited number of complaints may at least partially explain the low level of enforcement related to unilateral conduct, though they also indicated that the authority is making efforts to strengthen its *ex officio* actions to spot potential abuse of dominance cases. Moreover, they highlighted that proving dominance is very challenging, particularly due to difficulties in obtaining up-to-date data to establish market shares. In practice, the CAK relies on disaggregated data from the Kenya Bureau of National Statistics (with whom it has an MoU), supplemented by information from sector regulators, desk research and market participants. More efforts are necessary to compel market participants to provide data, including the use of the CAK's powers to enforce compliance with compulsory requests for information.

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OECD (2009), *Guidelines for Fighting Bid Rigging in Public Procurement*, OECD Publishing, Paris, https://doi.org/10.1787/8cfeafbb-en. [1]

Notes

[1] Competition Act s 21.

[2] Competition Act s 21(3).

[3] Competition Act s 21(8).

[4] Competition Act s 22.

[5] Consolidated Guidelines on Restrictive Trade Practices under the Competition Act, paras 41-42.

[6] Competition Act s 36.

[7] Competition Act s 38.

[8] Competition Act ss 21(9), 22(6).

[9] Competition Act s 21(3)(c).

[10] CAK, "Consolidated Guidelines on Restrictive Trade Practices under the Competition Act", https://cak.go.ke/arch/sites/default/files/Consolidated%20Guidelines%20on%20Restrictive%20Trade%20Practices%20.pdf.

[11] Note that an updated version of the OECD Bid Rigging Guidelines were released in 2025, https://doi.org/10.1787/cbe05a56-en.

[12] Competition Act s 21(2).

[13] Competition Act s 21(3)(d).

[14] Competition Act s 21(5).

[15] Competition Act s 21(3)(g).

[16] Competition Act s 21(3)(h).

[17] Consolidated Guidelines on Restrictive Trade Practices under the Competition Act, paras 41-42.

[18] Consolidated Guidelines on Restrictive Trade Practices under the Competition Act, para 55.

[19] Airtel Kenya Limited v Safaricom Limited CAK/EC/05/34/A.

[20] Decision CAK/EC/05/182/A.

[21] Decision CAK/EC/05/188/A.

[22] Constitution of Kenya, Article 227(1).

[23] Constitution of Kenya, Article 227(2)(c)-(d).

[24] Competition Act, s 24(2).

[25] CAK Consolidated Guidelines on Restrictive Trade Practices under the Competition Act, ss 60-62.

[26] Competition Act, s 24(3).

[27] Competition Act, s 36.

[28] Competition Authority of Kenya Revised Guidelines on Relevant Market Definition, ss 3, 4.

[29] Competition Authority of Kenya Revised Guidelines on Relevant Market Definition, ss 10-12.

[30] Competition Authority of Kenya Revised Guidelines on Relevant Market Definition, s 13.

[31] Competition Authority of Kenya Revised Guidelines on Relevant Market Definition, ss 19-53.

[32] Competition Authority of Kenya Revised Guidelines on Relevant Market Definition, ss 58-73.

[33] Competition Act, ss 4(3), 23.

[34] CAK Consolidated Guidelines on Restrictive Trade Practices under the Competition Act, s 69.

[35] CAK Consolidated Guidelines on Restrictive Trade Practices under the Competition Act, s 66.

[36] CAK Consolidated Guidelines on Restrictive Trade Practices under the Competition Act, s 65.

[37] CAK Consolidated Guidelines on Restrictive Trade Practices under the Competition Act, ss 64, 66-68.

[38] CAK Consolidated Guidelines on Restrictive Trade Practices under the Competition Act, ss 70-72.

[39] CAK Consolidated Guidelines on Restrictive Trade Practices under the Competition Act, s 87.

[40] CAK Consolidated Guidelines on Restrictive Trade Practices under the Competition Act, s 78.

[41] CAK Consolidated Guidelines on Restrictive Trade Practices under the Competition Act, s 80.

[42] CAK Consolidated Guidelines on Restrictive Trade Practices under the Competition Act, s 83.

[43] CAK Consolidated Guidelines on Restrictive Trade Practices under the Competition Act, ss 85-86.

5 Mergers

This chapter covers the merger control framework in Kenya, at both the national and supranational level.

5.1. Law and practice

Part IV of the Competition Act establishes an *ex-ante* and mandatory merger control regime in Kenya. The notification of a merger has suspensory effects until the decision by the CAK or the period for review expires.[1] The CAK can unconditionally authorise the transaction, authorise the transaction subject to remedies or reject the transaction.[2]

The CAK has issued a few guidelines related to merger control. In addition to the Merger Threshold Guidelines (attached to the Competition (General) Rules), the CAK has developed the Guidelines for Market Definition (CAK, 2019[1]), the Consolidated Merger Guidelines (CAK, 2024[2]) and the Joint Venture Guidelines (CAK, 2024[3]).

The definition of a merger is provided in Section 41(1) of the Competition Act and encompasses transactions where "one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking". Section 41 of the Competition Act, Section 6 of the Competition (General) Rules, as well as the Consolidated Merger Guidelines and the Joint Venture Guidelines, provide further details on the definition of mergers for the purpose of merger review in Kenya.

The Mergers and Acquisitions Department under the Directorate of Competition and Consumer Protection is in charge of reviewing mergers. As of April 2025, it had 7 staff members. The decisions are made by the Board of Directors, based on a final report approved by the Director-General.

5.1.1. Notification system

According to the Competition Act, the CAK may, in consultation with the Cabinet Secretary and by notice in the gazette, set merger thresholds.[3] In practice, thresholds were set in the Competition (General) Rules, which provide for alternative turnover- and asset-based thresholds for mandatory notifications (so-called "full notifications"):[4]

- Mergers where the undertakings have a minimum combined local turnover or assets (whichever is higher) of KES 1 billion (around EUR 6.6 million) and the turnover or assets (whichever is higher) of the target undertaking is above KES 500 million (around EUR 3.3 million);
- Mergers where the acquirer's turnover or assets (whichever is higher) is above KES 10 billion (around EUR 66 million), the merging parties are in the same market or can be vertically integrated and the transaction does not meet the COMESA merger notification thresholds;
- Mergers where the undertakings operate in the COMESA region, if the undertakings have a minimum combined local turnover or assets of KES 500 million (around EUR 3.3 million) and two-thirds or more of their turnover or assets (whichever is higher) is generated or located in Kenya; or
- Mergers between undertakings in the carbon-based mineral sector, if the value of the reserves, the rights and the associated exploration assets to be held as a result of the merger exceeds KES 10 billion (around EUR 66 million).

Based on the general provisions of the Competition Act,[5] the Competition (General) Rules also establish that transactions meeting the following criteria may be excluded from notification:[6]

- Mergers where the combined turnover or assets (whichever is higher) of the merging parties is between KES 500 million (around EUR 3.3 million) and KES 1 billion (around EUR 6.6 million) and
- Mergers between undertakings in the carbon-based mineral sector, if they are engaged in prospecting, irrespective of asset value.

These mergers must also be notified to the CAK (albeit through a simplified form). The CAK will then conduct an assessment within 14 days and decide whether the transaction can be excluded from having to submit a full notification and review. This decision rests with the Director-General who has been given delegated authority by the Board. If the CAK concludes that the transaction is likely to substantially prevent or lessen competition, restrict trade or raise public interest concerns, the exclusion will not be granted and a full notification will be required. The CAK has only excluded one transaction from being able to rely on the simplified form, which occurred in 2015.

Transactions meeting the following thresholds are automatically excluded from notification and can be implemented without notifying the CAK:[7]

- Mergers where the combined turnover or assets (whichever is higher) of the merging parties does not exceed KES 500 million (around EUR 3.3 million); or
- Mergers that meet the COMESA Competition Commission (CCC) merger notification threshold and at least two-third of the turnover or assets (whichever is higher) are not generated or located in Kenya. In such cases, the CAK must be informed in writing about the notification to the CCC.[8]

The CAK has call-in powers and may require parties of excluded transactions to seek approval where it is likely that the merger will substantially prevent or lessen competition, restrict trade or raise public interest concerns.[9] To date, the CAK has exercised this power once, in 2015.

The Competition (General) Rules and the Merger Threshold Guidelines provide clarifications on how to determine the relevant turnover and assets, specifying that these should be calculated based on annual turnover or the value of assets in Kenya.[10] In addition, there are specific provisions applicable to credit institutions and other financial entities, joint ventures, and investment funds.[11]

The notification thresholds were set in 2019 and have not been reviewed since then. This also included changes to avoid overlapping jurisdiction between Kenya and COMESA, as discussed below, which led to a significant reduction in the number of notifications to the CAK. Any changes to the thresholds must be decided by the Cabinet Secretary for the National Treasury and Planning, in consultation with the CAK.

Table 5.1 below presents the number of merger notifications received by the CAK in recent years:

Table 5.1. Number of merger notifications to the CAK, 2020-2024

Year	Full notification	Notification seeking exclusion from full notification	Total
2020	40	77	117
2021	21	29	50
2022	25	27	52
2023	21	25	46
2024	17	18	41

Note: Full notifications refer to transactions meeting the thresholds for mandatory notifications, while transactions excluded from notification refer to mergers that may be excluded from notification.
Source: Data provided by the CAK.

5.1.2. Review process and timelines

Pre-notification

Section 14 of the Competition (General) Rules allows for pre-notification consultations with the CAK regarding the need to notify a transaction. Such consultations can also cover other aspects, including

guidance on process (for instance, documents and information to be submitted) and timing.[12] These consultations are indicative, meaning that CAK's advisory opinions are non-binding.

The CAK estimates they conduct 5 to 10 pre-notification consultations per year.

Notification

The requirements for notification are established in the Competition (General) Rules, notably the submission of the notification form with detailed information on what should be provided. This includes, for instance, the identity of the merging parties, the nature and terms of the transaction, and details of the relevant markets in which they operate. Notifications seeking exclusion from full notification require more succinct information.[13]

Notifying parties must pay a filing fee, which varies according to the combined turnover or value of assets:

- Between KES 1 billion (around EUR 6.6 million) and KES 10 billion (around EUR 66 million): KES 1 million (around EUR 6 600),
- Between KES 10 billion (around EUR 66 million) and KES 50 billion (around EUR 330 million): KES 2 million (around EUR 13 200),
- Above KES 50 billion (around EUR 330 million): KES 4 million (around EUR 26 400).

Merger filing fees were set in 2019 and have remained unchanged since. Any revision must be decided by the Cabinet Secretary for the National Treasury and Planning, in consultation with the CAK. As noted in section 2.1.3, merger fees form part of the CAK's operating budget.

Notifications seeking exclusion from full notification are not subject to any filing fees.

Timeline and procedure

As mentioned above, the Competition (General) Rules allow transactions meeting specific thresholds to apply for an exclusion from full notification. In such cases, the CAK has 14 days after receiving the simplified notification to assess the transaction and determine whether it qualifies for exclusion. If the authority concludes that the transaction raises competition or public interest concerns, it may require the parties to submit a full notification.[14] According to the CAK, currently, around 50% of notified mergers qualify for the simplified procedure.

For full notifications, once a notification is received, the CAK has 30 days to analyse it and, if necessary, request further information. If this is the case, the CAK must issue a decision within 60 days of receiving the requested information. If no further information is requested, the CAK must decide within 60 days of the date on which the notification was received. Before the expiry of these time limits, the CAK may decide to conduct a hearing, in which case it must issue a decision within 30 days after the conclusion of the hearing. Depending on the complexity of the case, these deadlines may be extended by up to 60 days based on a reasoned decision by the CAK.[15] According to the CAK, this extension has been used only on one occasion to date.

The CAK is not required to publicise the receipt of a merger notification or the start of a review, for instance by disclosing the name of the parties involved and their economic activities. During the merger review process, the CAK may take statements and request information from third parties (including both private and public entities).[16] Third parties may submit documents or other information relevant to the transaction.[17] Merging parties are given the opportunity to engage with the CAK during the investigation, including by providing oral or written submissions and meeting with the authority.[18]

Merger decisions must be reasoned, particularly in case of prohibition or authorisation subject to remedies.[19] The CAK must notify the merging parties in writing and publish the decision in the Gazette.[20] Within 30 days of publication, the merging parties may appeal to the Competition Tribunal, which must

issue a decision within four months.[21] Decisions of the Competition Tribunal may be appealed to the High Court within 30 days of the notification of the Competition Tribunal's decision.[22]

As discussed in Chapter 3, mergers decisions are not fully published. Only short summaries are made public, both in the Gazette and on the CAK's website. Private stakeholders interviewed by the OECD expressed concerns about whether merging parties themselves have access to full decisions, even when remedies are imposed. They also noted the absence of a standard timeline for the online publication of summaries.

Merger review in Kenya is not structured in two phases. In other words, all cases of full notification are assessed in a single phase, regardless of their complexity, and are subject to the same time limits, although in practice more complex cases take longer. According to the CAK, the average review period for full notifications over the past five years was 45 days.

5.1.3. Substantive analysis

The competition analysis begins with the definition of the relevant market (see Chapter 4), followed by the competitive assessment and the public interest assessment. Pursuant to Section 46(2) of the Competition Act, the CAK analysis must consider whether mergers:

- Prevent or lessen competition, restrict trade or the provision of services, or endanger the continuity of supplies or services
- Lead to the acquisition or strengthening of a dominant position
- Generate public benefits that outweigh anti-competitive effects
- Affect a particular industrial sector or region
- Impact employment
- Influence the ability of small undertakings to gain access to or to remain competitive in the market
- Affect the ability of national industries to compete in international markets and
- Bring benefits related to research and development, technical efficiency, increased production, efficient distribution of goods or services and access to markets

Competitive assessment

Pursuant to the Guidelines on the Substantive Assessment of Mergers, the substantive test applied by the CAK encompasses both the dominance test and the substantial lessening of competition (SLC) test.[23] According to the CAK, both tests are complementary, as prevention or lessening of competition results only from mergers that are likely to create, maintain or enhance the ability of the merged undertaking, unilaterally or in co-ordination with other market players, to exercise market power.[24] The main objective of the competition assessment is to ensure that there will be strong rivalry between undertakings in the post-merger market.[25]

After defining the relevant market(s), the CAK first calculates the market shares and market concentration levels, including through concentration ratios (CR4) and the Herfindahl and Hirschmann Index (HHI), in order to assess its changes before and after the transaction.[26] Then, the authority looks at the competitive effects of the transaction, including the ability of merging firms to exert market power, barriers to entry, potential competition and countervailing powers.[27] The CAK evaluates horizontal (unilateral and co-ordinated) and non-horizontal (including both vertical and conglomerate) effects, considering the impact of the transaction on prices, resellers, end consumers, quantity, quality and innovation.[28]

If the CAK identifies anti-competitive effects, the merging parties may claim efficiencies arising from the merger. In order to be accepted, efficiencies must be demonstrated by the parties, verifiable by the

authority, merger-specific, passed on to consumers and sufficient to outweigh the anti-competitive effects.[29] To date, efficiencies have not played a role in CAK's decisional practice.

Parties may also raise the failing firm defence. They have the burden to prove it and demonstrate the following conditions: (i) the allegedly failing undertaking would inevitably exit the market in the near future as a result of its financial difficulties if not taken over by another undertaking; (ii) there is no less anti-competitive alternative purchase than the proposed merger; and (iii) absent the merger, the assets of the failing undertaking would inevitable exit the market.[30] According to the CAK, the failing firm defence has been accepted on a few occasions.[31] However, these transactions did not raise competition concerns, which means that in practice the failing firm argument was instead considered as a positive factor in the public interest assessment.

Public interest assessment

As mentioned above, the Competition Act requires the CAK to conduct a public interest test when reviewing merger. This analysis is carried out regardless of the outcome of the competition assessment.[32] In other words, the CAK may find that a merger does not raise any competition concerns but does raise public interest concerns, or vice-versa.[33]

The public interest assessment considers the effects of a transaction on employment; the ability of SMEs to access or remain competitive in any market; the ability of national industries to compete in international markets; and the impact on a specific industrial sector.[34] The Guidelines on the Substantive Assessment of Mergers provide further detail on how each fact is assessed and the type of evidence considered during the public interest assessment.[35]

The Guidelines recognise that in some cases a merger may raise multiple public interest factors with conflicting or contradictory outcomes. In such situations, the CAK must evaluate whether the various issues can be reconciled and, if not, apply a balancing approach to reach a net conclusion.[36]

If the CAK finds that a transaction may have negative effects on the public interest, the merging parties may present justifications, demonstrating that the positive outcomes of the transaction outweigh those effects.[37]

Remedies and prohibitions

If competition and/or public interest concerns are identified by the CAK, it may approve the merger subject to remedies that address these concerns or prohibit the transaction if there are no effective measures to remedy the concerns raised by the merger.[38] This means that the CAK may impose remedies or block the transaction on public interest grounds, even where no competition concerns are identified.

Where competition and/or public interests concerns arise during its assessment, the CAK must inform the merging parties and provide them with the opportunity to submit arguments and/or propose remedies. The CAK may also consult with other stakeholders (public and private) to gather their views on the assessment and market-test the proposed remedies.[39]

The Guidelines on the Substantive Assessment of Mergers set out the elements that the CAK must consider when examining remedies:[40]

- Comprehensive impact: remedies must address all identified concerns resulting from the merger;
- Acceptable risk: the risk of remedies failing to adequately address concerns must be low;
- Practicality: remedies must be capable of practical implementation, monitoring and enforcement;
- Appropriate duration and timing: remedies must be capable of addressing concerns over a specified period of time.

Remedies may be structural, behavioural, or a combination of both, and are determined on a case-by-case basis, with no preference given to any particular type of remedy.[41]

Remedies targeting public interest concerns may include: establishing a fund to ensure that a particular industry or local sector continue to be competitive; ensuring supply of a key input or technology over a defined period of time; imposing a moratorium on job losses for a defined period of time; redeploying staff; re-skilling and training staff for alternative employment; maintaining contracts with suppliers for a prescribed period; or placing limits on imports.[42]

In recent years, the CAK has imposed remedies on a few occasions, as summarised in Table 5.2 below. Most of these remedies were aimed at addressing public interest considerations rather than competition concerns. In addition, the majority of remedies were behavioural, although structural remedies were imposed in at least one case (see the Box below). To date, no merger has been prohibited.

Table 5.2. Merger decisions by the CAK, 2020-2024

Year	Number of merger notifications	Number of mergers excluded from full notification	Number of mergers authorised	Number of mergers authorised with remedies	Number of mergers prohibited
2020	117	77	29	11	0
2021	50	29	18	3	0
2022	52	27	21	4	0
2023	46	25	25	1	0
2024	41	18	18	5	0

Note: The number of merger notifications include both full notifications and transactions qualifying for exclusion.
Source: Data provided by the CAK.

Box 5.1. Remedies in merger cases

Eastern Chemicals/Shreeji (2022)

In 2022, the CAK approved the proposed acquisition of 100% of the issued shares of Eastern Chemicals Industries Limited ("Eastern Chemicals") by Shreeji enterprises (K) Limited ("Shreeji"), subject to conditions.

In terms of relevant market analysis, the CAK identified that Shreeji primarily provided transportation, warehousing and logistics services, as well as IT services, whereas Eastern Chemicals manufactured sodium silicate in various grades, in both solid and liquid forms.

Although there was no direct overlap between the parties' activities, a cross-directorship existed between Shreeji and Shreeji Chemicals Limited ("Shreeji Chemicals"), a competing manufacturer of Eastern Chemicals in the Kenyan sodium silicate market. Specifically, a director of Shreeji also served as a director of Shreeji Chemicals.

The CAK therefore identified competition concerns related to potential strategic information sharing and co-ordinated conduct in the event of the merger. In light of these concerns, the CAK approved the transaction subject to the condition that no cross-directorship exists at any time between Shreeji Chemicals and Eastern Chemical. The parties agreed to comply with this remedy.

The CAK also evaluated any potential public interest impacts of the proposed transaction and concluded that there were no negative outcomes in this regard.

VIVO Energy/ENGEN International (2018)

In 2018, the CAK approved the proposed acquisition by VIVO Energy Holding B.V. ("VIVO Energy") of 100% of the shareholding in ENGEN International Holdings (Mauritius) Limited ("ENGEN International").

According to the CAK, VIVO Energy was a Shell licensee in 16 African countries, distributing and marketing Shell-branded fuels and lubricants, as well as dealing in liquefied petroleum gas ("LPG"). ENGEN International was wholly owned by ENGEN holdings (Pty) ("ENGEN") and served as a holding company for ENGEN's subsidiaries operating in petroleum product importation, storage, marketing and retail across Africa.

The CAK established that the acquiring and target companies had horizontal overlaps in the relevant product markets. The competitive assessment revealed that certain local markets in the downstream retail of petroleum products raised anti-competitive concerns, particularly in markets with few competitors where the merging parties had a significant presence and where the scarcity or high cost of land made it prohibitive to set up new retail stations. The proposed transaction also raised public interest concerns related to SME competitiveness.

The CAK approved the transaction subject to the following conditions, considered sufficient to address the identified concerns: (i) divestiture of ENGEN petrol stations in the specific local markets that raised competition concerns to players not operating in those locations at the time; (ii) honouring ongoing contracts with ENGEN's third-party operators relating to outsourced functions; and (iii) absorption of all permanent ENGEN employees into the post-transaction entity.

Source: CAK decisions.

When a merger is approved subject to remedies, the CAK must monitor their implementation by the parties. For this purpose, it may require compliance reports at specified intervals.[43] Non-compliance with remedies may result in revocation of the approval[44] and constitutes either an administrative or criminal infringement, as discussed below.

In the banking, energy, insurance and telecommunications sectors, both the CAK and the relevant sector regulator have concurrent jurisdiction to review mergers.[45] In these cases, authorisation from both authorities is required before a transaction can be implemented. Each authority conducts its own assessment and issues an independent decision, with the power to impose remedies or prohibit the transaction.[46]

When assessing such mergers, the sector regulator mainly focusses on regulatory and technical aspects (such as licence conditions and compliance with regulatory requirements), while the CAK evaluates their impact on competition, although this distinction is not always easy to draw in practice.

In addition, mergers involving publicly listed companies must also be cleared by the Capital Markets Authority (CMA).[47] Co-operation is discussed in more detail in Chapter 10.

5.1.4. Sanctions

The CAK can impose an administrative fine of up to 10% of the preceding year's annual gross turnover of the undertaking(s) in question for failure to notify transactions fulfilling mandatory notification thresholds; for implementation of a merger before the approval by the CAK or after a prohibition decision; for providing materially incorrect or misleading information during the merger review; for non-compliance with the remedies imposed by the CAK when the transaction had been approved subject to conditions.[48] The

determination of such fines must follow the Consolidated Administrative Remedies and Settlement Guidelines, applying the same methodology described in Chapter 3.

These practices also characterise criminal offences, subject to a fine not exceeding KES 10 million (approximately EUR 66 000) and/or imprisonment for up to 5 years.[49] Like anti-competitive behaviour, prosecution can be on either an administrative or criminal basis, although in practice no criminal prosecution has been conducted.

At the time of writing, the CAK had issued six sanctions in the past five years where a notifiable transaction had been consummated without CAK's approval. The Box below summarises an illustrative case.

Box 5.2. Sika AG/Skyscraper Holdco gun-jumping case

In October 2023, Sika International AG ("Sika AG") and LSF11 Skyscraper Holdco S.a.r.l ("Skyscraper Holdco") self-reported the implementation of a merger in Kenya (namely, Sika AG's acquisition of indirect control of Master Builders Solutions Kenya Ltd, which was controlled by Skyscraper Holdco), following the close of the global deal in May 2023. The parties acknowledged that the transaction had not been cleared by the CAK and expressed their willingness to regularise the transaction.

The CAK confirmed that the transaction met the threshold for mandatory notification and therefore constituted a violation of Section 42 of the Competition Act. Considering mitigating factors – particularly the parties' co-operation and self-reporting, as well as the fact that the transaction did not negatively impact competition – the CAK imposed a reduced fine of KES 17 492 795.

Subsequently, the parties formally notified the merger before the CAK, requesting exclusion from full notification and in-depth analysis, given that the Kenyan target's turnover was below KES 500 million. In 2024, after taking into account factors such as job retention, increased consumer choice, foreign direct investment and payment of the fine, the merger was regularised and formally approved by the authority without the need for a detailed competitive review.

Source: CAK decision.

5.1.5. COMESA, EAC and AfCFTA merger control

As mentioned in Chapter 1, Kenya is a member of the Common Market for Eastern and Southern Africa and the East African Community, both having regional competition law regimes, including merger control. Moreover, Kenya is a member of the African Continental Free Trade Area, which is also introducing a continental competition law regime. As mentioned in Chapter 1, merger control is the main aspect of supranational enforcement currently taking place in the region.

COMESA

The Common Market for Eastern and Southern Africa (COMESA) is a regional economic community comprising 21 Member States,[50] established in 1994 to promote regional integration through trade liberalisation and co-ordinated economic policies. COMESA has adopted a regional competition regime, including a mandatory and non-suspensory merger control system, governed by the COMESA Competition Regulations of 2004 and enforced by the COMESA Competition and Consumer Commission (CCCC). The COMESA merger control regime has been operational since 2013. The joint competence model between the CCCC and the national competition authorities is intended to foster greater convergence and co-operation across jurisdictions.

Transactions must be notified to the CCCC if they meet the following criteria:[51]

- Both the acquiring firm and the target firm or either the acquiring firm or target firm operate in two or more Member States;
- The combined annual turnover or combined value of assets (whichever is higher) in COMESA of all merging parties equals or exceeds USD 50 million; and
- The annual turnover or value of assets (whichever is higher) in COMESA of each of at least two merging parties equals or exceeds USD 10 million, unless each of the merging parties achieves at least two-thirds of its aggregate turnover or assets in COMESA within the same Member State.

Merging parties must notify notifiable mergers using the prescribed form within 30 days of their decision to merge,[52] but transactions may be implemented before notification or approval by the CCCC is granted.[53] Merging parties must also pay a filing fee of 0.1% of their combined annual turnover or value of assets (whichever is higher) in COMESA, subject to a cap of USD 200 000.[54] The CCCC retains 50% of the filing fees, while the remaining 50% is distributed among the relevant national competition authorities, proportionate to the value of the turnover or assets of the merging parties in each Member State relative to their total value of their turnover or assets in COMESA.[55]

The CCCC applies the substantial lessening of competition (SLC) test when reviewing mergers, while also taking into account any merger-specific efficiencies and public interest considerations.[56] The CCCC must notify the Member States in which any of the merging parties operate, calling upon their views on the transaction.[57] It may also request assistance from the relevant national competition authorities in cases that may affect their respective jurisdictions. Such assistance may include providing information, locating and securing evidence, and facilitating voluntary compliance with requests for information from undertakings or individuals within their territory. Staff from national competition authorities may also be required to assist CCCC officials in carrying out their duties.[58]

The CCCC may refer the assessment of a notified transaction to a Member State's competition authority upon request, where the Member State claims that the transaction is likely to disproportionately reduce competition to a material extent in its territory or part thereof. The CCCC must decide within 21 days whether to retain jurisdiction over the case or to refer it – either in whole or in part – to the requesting Member State. If referred, the merger (or its relevant part) will be reviewed under that Member State's national competition law.[59] When deciding on a referral, the CCCC must take into account whether the national competition authority is the most appropriate body to handle the case.[60] The referral mechanism has already been used in the past, with the CCCC handing over the assessment of mergers to Member States' competition authorities (including the CAK) on a few occasions. Referral up from a domestic competition authority to the CCCC is not possible under the current framework.

EAC

The East African Community (EAC) is a regional economic community comprising eight member states,[61] established in 2000 to widen and deepen co-operation in political, economic and social dimensions. The EAC Competition Act, 2006, introduced a regional competition regime, including the creation of a regional competition authority (EAC Competition Authority – EACCA) in 2018 and an *ex-ante* and mandatory regional merger control regime. While the EAC Competition Act is in force since 2014, the merger control regime will only start operating on 1 November 2025.[62]

Mergers falling under the following thresholds shall notify the EACCA of the merger:[63]

- The merging parties operate in at least two EAC Partner States;
- The combined turnover or assets in EAC of the merging undertakings (whichever is higher) equals to or exceeds USD 35 million; and

- At least two merging parties have a combined turnover or assets of USD 20 million in EAC, unless each of the parties achieves at least two-thirds of its aggregate turnover or assets in EAC within one and the same Partner State.

Merging parties must notify transactions using the prescribed form and pay a filing fee, which shall be shared between the EACCA and the relevant national competition authorities.[64] Filing fees vary according to the aggregate value of assets or turnover (whichever is higher):[65]

- Between USD 35 million and USD 50 million: USD 45 000
- Between USD 50 million and USD 100 million: USD 70 000
- Above USD 100 million: USD 100 000

Transactions meeting EAC merger notification thresholds and notified to the EACCA do not need to be notified to the EAC national competition authorities.[66]

The substantive test to be applied by the EACCA when reviewing mergers is the substantial lessening of competition (SLC test), although public interests considerations must also be taken into account.[67] When assessing transactions, the EACCA may consult with Partner State's competition authorities, sector regulators or any other body.[68] The EACCA may also request a Partner State's competition authority to conduct an assessment of a merger in respect of specific aspects of the transaction or the relevant market, or where the EACCA considers that the merger may have greater impact in a specific Partner State.[69]

AfCFTA

The African Continental Free Trade Area (AfCFTA) was launched in 2019 to create a single continental market for goods and services, facilitating free movement of capital and natural persons across the 55 countries of the African Union and 8 regional economic communities (RECs). According to Article 7(1)(c) of the AfCFTA Agreement, member states are required to enter into negotiations on competition policy.

In this regard, the AfCFTA Protocol on Competition Policy was adopted in February 2023 to regulate competition in the continental market; however, although it has not yet entered into force, and no official date for its implementation has been established. It aims at creating an integrated and unified African competition regime, including the creation of an AfCFTA Competition Authority and an *ex-ante* and mandatory merger control regime. According to the Competition Protocol, the following transactions with continental dimension must be notified and approved by the AfCFTA Competition Authority:[70]

- The merger has significant effect on competition in a market of at least two State Parties that do not share the same jurisdiction of the existing regional economic communities;
- Both the acquiring undertaking and target undertaking or either the acquiring undertakings or target undertakings operate, directly or indirectly, in the AfCFTA market or a substantial part thereof; and
- The combined annual turnover or assets of the undertakings concerned equals to or exceeds the thresholds to be determined by a Regulation.

The competitive test is based on the substantial lessening of competition (SLC test), although public interest factors must also be taken into account.

5.2. Analysis

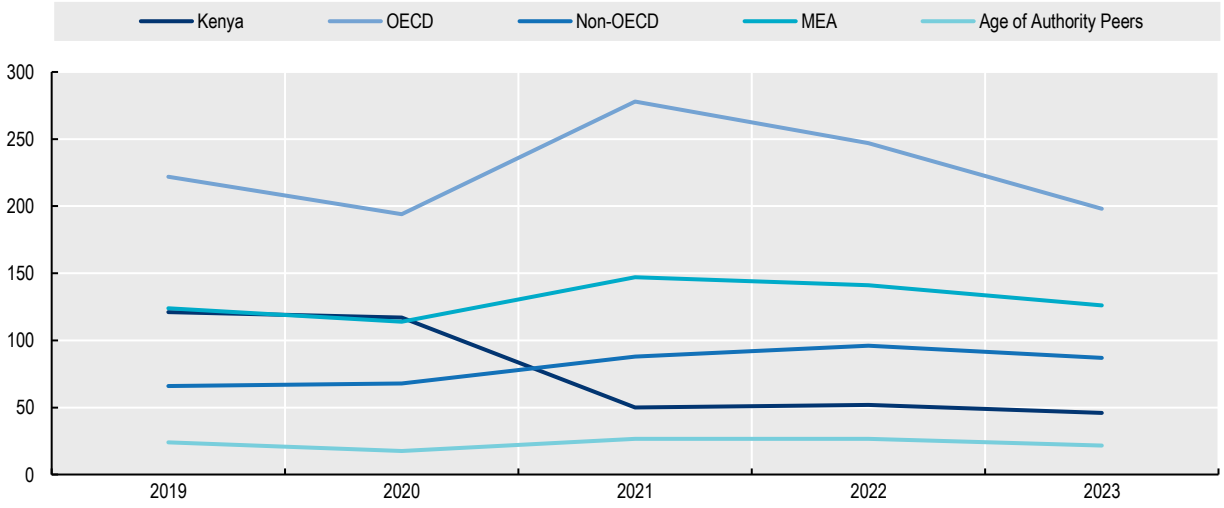
5.2.1. Notification system

The turnover and assets-based notification thresholds are quantifiable and transparent. This was confirmed by stakeholders interviewed by the OECD, who noted that while there had previously been

uncertainty regarding the respective jurisdictions of the CAK and the CCC, this has since been resolved and there is no longer overlapping jurisdiction. Moreover, basing thresholds on turnover or asset value in Kenya ensures an appropriate local nexus, in line with the OECD Recommendation on Merger Review [OECD/LEGAL/0333].

Although there has been a gradual decrease over the years (particularly due to the threshold changes aimed at avoiding overlapping jurisdiction with COMESA), the number of merger notifications in Kenya is generally higher than the average among age of authority peers, but lower than the average among OECD and MEA peers. The notification thresholds have not been reviewed for over six years. Any changes must be approved by the National Treasury. During the OECD fact-finding mission, CAK staff indicated that a revision of thresholds is being considered in the next strategic plan. Such a revision would be welcome and aligns to the OECD Recommendation on Merger Review [OECD/LEGAL/0333], which calls for jurisdictions to "consider reviewing periodically the merger notification thresholds in mandatory merger regimes".

Figure 5.1. Average number of merger notifications per jurisdiction, 2019-2023



Note: Age of authority peers refer to the same group as in Figure 2.3.
Source: OECD CompStats and the CAK.

The provision allowing the CAK to exclude from mandatory notification transactions meeting certain thresholds is uncommon. In most countries, clear and objective criteria define whether and when a merger must be notified, and transactions deemed not to raise competition concerns are subject to expedited review. In practice transactions meeting Kenya's potential exclusion thresholds must still be notified and are assessed by the CAK under a fast-track procedure (up to 14 days). This resembles a simplified procedure for reviewing mergers unlikely to raise competition concerns, which is a common practice in many jurisdictions and consistent with the OECD Recommendation on Merger Review [OECD/LEGAL/0333]. Nevertheless, most jurisdictions define transactions eligible for simplified procedures based on structural elements – such as absence of horizontal overlaps or vertical relationships between the merging parties, combined market shares and the Herfindahl-Hirschman Index (HHI) (OECD, 2021[4]) – rather than turnover or asset values, as in Kenya.

The fact that the CAK has call-in powers to require notification of transactions below the merger thresholds is in line with the OECD Recommendation on Merger Review [OECD/LEGAL/0333] and allows the CAK to intervene in non-notifiable mergers that could harm competition. However, in most jurisdictions the use of

such powers is typically subject to conditions, such as being exercised within a given timeframe (OECD, 2022[5]).

Merger filing fees have not been adjusted in over six years. Any changes must be approved by the National Treasury. The legal framework does not allow for flexibility for future adjustments, for instance through the use of inflation indices. According to stakeholders interviewed by the OECD, previously, there was discussion about the payment of two filing fees (to both the CAK and CCC), but clarifications on the jurisdiction of each authority have resolved this issue, and currently merging parties pay only one filing fee (either to the CAK or CCC).

5.2.2. Review process and timelines

During the OECD fact-finding mission, private stakeholders indicated that the CAK is generally accessible for pre-notification consultations, although the advice provided is often generic and may depend on additional information to be more conclusive. Pre-notification consultations are common in many jurisdictions and align with the OECD Recommendation on Merger Review [OECD/LEGAL/0333].

The CAK has the power to request information not only from the merging parties but also from other stakeholders, which is in line with the OECD Recommendation on Merger Review [OECD/LEGAL/0333]. However, only requests for information directed to merging parties – if made within 30 days of receipt of the merger notification – impact the review timeline. In practice, this may hinder the effective assessment of transactions, especially given the lack of enforcement of procedural infringements, such as failure to provide requested information, delays in doing so or the provision of false information, as discussed in Chapter 3.

Although third parties may participate in the merger review process, the CAK is not required to publicise the receipt of a merger notification or the start of a review (for instance by disclosing the name of the parties involved and their economic activities), which may prevent third parties from becoming aware that a transaction is taking place in the first place. According to the CAK, in practice the authority is better placed to determine which stakeholders are relevant to consult. By contract, most jurisdictions, in line with the OECD Recommendation on Merger Review [OECD/LEGAL/0333], allow broader participation of third parties with legitimate interest in the merger under review, which may bring additional data and views during the investigation, helping competition authorities take more informed decisions.

CAK stakeholders interviewed by the OECD considered the current timeframe for merger assessment to be reasonable. For instance, the current average of 45 days represents an improvement compared to previous years. Private stakeholders generally agree that the 60-day statutory timeframe for merger review is adequate. Moreover, although Kenya does not apply a two-phase system, the existence of a simplified procedure ensures that transactions less likely to raise competition concerns are cleared more rapidly, in line with the OECD Recommendation on Merger Review [OECD/LEGAL/0333].

5.2.3. Substantive analyses

The CAK has made efforts to improve its merger review. In particular, the Guidelines on the Substantive Assessment of Mergers provide useful guidance, especially on competitive assessment, and are generally aligned with international best practices. These guidelines have been praised not only by CAK officials, but also by private stakeholders interviewed by the OECD, who noted that they enhanced predictability.

However, the way the substantive assessment is conducted in practice has been subject to criticism. Although the OECD was not able to assess in detail how the analysis is carried out, many stakeholders indicated that the CAK's substantive analysis is not extensive. Public versions of decisions, as well as more detailed decisions shared with the OECD team, confirm that the economic analysis, especially the use of quantitative techniques, remains very limited. This contrasts with the OECD Recommendation on

Merger Review [OECD/LEGAL/0333], which stresses that economic analysis should be a key part of merger review.

This may help explain the low number of mergers approved subject to competition-related remedies and the absence of merger prohibitions, as described in Table 5.2 above. In recent years, these figures have been below the average of most peer groups. For instance, according to the OECD CompStats, in 2023 the CAK approved one merger subject to remedies, matching the average of age of authority peers but lower than all other peer groups (3.4 in OECD jurisdictions, 9.7 in non-OECD jurisdictions and 32.1 in MEA jurisdictions). In 2022, the CAK approved 3 transactions subject to remedies, which was higher than age of authority peer jurisdictions (2.74), but lower than the averages of OECD jurisdictions (4.1), non-OECD jurisdictions (6.2) and MEA jurisdictions (21)The gap is particularly pronounced when only remedies targeting competition concerns are considered, since most remedies imposed by the CAK aim instead at addressing public interest considerations, as explained below.

Likewise, the CAK has never blocked a transaction, unlike many other jurisdictions. In the five years between 2019 and 2023, the averages of merger prohibitions were 0.6 in OECD jurisdictions, 0.2 in non-OECD jurisdictions, 0.6 in MEA jurisdictions and 0.1 in age of authority peer jurisdictions.

The lack of in-depth economic analysis in the CAK's merger review process may be attributable – at least partially – to limited human resources. In particular, the Mergers and Acquisitions Department has only seven staff members, including three economists. Moreover, the CAK lacks a specialised economics unit. As noted above, the CAK also faces challenges regarding its information-gathering powers and third-party participation is limited, which may further contribute to the limited depth of its analysis.

The public interest assessment appears to be central to merger review in Kenya and even more prominent than the competitive test. This is evidenced by the fact that most remedies imposed by the CAK are justified on public interest grounds (most frequently to preserve employment or maintain supplier and distributor contract terms for a given period) rather than on competition grounds. Stakeholders interviewed by the OECD also raised this concern, noting an expansion of the role of public interest considerations in the CAK's assessment in recent years.

Best practices from OECD Members suggests that competition authority interventions in mergers on non-competition grounds should be exceptional and limited to specific sectors and markets only (OECD, 2016[6]; 2016[7]). This is why it is often argued that non-efficiency public interests are better addressed through sector regulators or government departments, rather than via the competition system. This is because these bodies have the relevant policy expertise or are empowered to weigh up competing political and/or policy interests (OECD, 2016[6]; 2016[7]). However, it should be acknowledged that there is not total consensus on the role of public interest considerations in merger review. This perspective builds on recent discussions on the objectives of competition enforcement and institutional design have considered whether the aims of competition policy should be extended to encompass a broader range of socio-economic, political, and environmental goals in competition enforcement. (CCSA, 2024[8]; OECD, 2023[9]).

The CAK's adoption of the Guidelines on the Substantive Assessment of Mergers aims to more clarity regarding the public interest test, including how it should be reconciled with the competitive test. Nevertheless, although the guidelines are a welcome development, they remain too general, leaving wide room for discretion and, as a result, making the CAK's assessment uncertain and unpredictable. Several stakeholders interviewed by the OECD raised this concern. For instance, it remains unclear how in practice the CAK addresses cases of conflict between the competitive and the public interest tests, or between different interest factors.

For instance, South Africa, which has a similar legal framework, has recently reviewed its public interest guidelines, setting out a more detailed approach that the Competition Commission may adopt in relation to each public interest factor and the type of information it may require when evaluating such factors (CCSA, 2024[8]).

5.2.4. Sanctions

The CAK's work in detecting and sanctioning violations of merger review rules remains limited, at least in part due to constraints in human resources, as mentioned above. During the OECD fact-finding mission, CAK staff noted that they are seeking to be proactive in identifying such infringements, particularly by monitoring publicly available information (e.g. media reports).

Sanctions for breaches of merger review rules are an essential feature of an effective merger control regime. Indeed, if these infringements are not duly sanctioned, the overall credibility of the merger control regime is undermined.

5.2.5. COMESA, EAC and AfCFTA merger control

In addition to the domestic merger control regime, transactions involving companies operating in Kenya may also fall within regional and/or continental merger control regimes. At the time of writing, COMESA was the only regional economic community of which Kenya is a member that enforced merger control, although the EAC merger review system was about to enter into force, and the AfCFTA also foresees the introduction of a merger control regime.

Over the years, Kenya and COMESA have streamlined their merger control systems (particularly through amendments to Kenya's merger thresholds), so as to ensure the exclusive jurisdiction of each authority once its respective thresholds are met. In other words, transactions that meet COMESA's thresholds are not required to be notified to the CAK. Stakeholders interviewed by the OECD have praised this initiative, noting that the CCCC's and the CAK's jurisdictions are now clear and no longer overlap in merger review.

The CCCC and the CAK have also co-operated relatively well – at least from a formal standpoint – in merger control, relying on an MoU.[71] For instance, the CAK provides its views on transactions notified to the CCCC with respect to their effects on the Kenyan market. These opinions are then incorporated into the CCCC's analysis, alongside the views of other Member States and private stakeholders. The CAK also assists the CCCC by gathering information domestically and allowing its staff to support CCC officials when needed.

Nevertheless, several stakeholders have suggested that co-operation between the CCCC and the CAK could be strengthened. While COMESA Member States receive a share of the merger filing fees, questions remain as to whether they have sufficient incentives to engage actively in COMESA merger review. This limited involvement and lack of access to information – coupled with the CCCC's reliance on Member States' inputs – may constrain the CCCC's ability to fully identify competition concerns in the transactions under review. Indeed, in practice, few transactions have been prohibited or authorised subject to remedies by the CCCC. COMESA's assessments could therefore benefit from greater detail and depth, supported by more active and collaborative engagement from national competition authorities.

At the time of writing, the EAC merger control regime was not yet in force but was expected to commence in November 2025. While the EAC regulations specify that mergers meeting their thresholds do not need to be notified to national competition authorities, this clarification has not yet been incorporated into Kenya's legal framework (as was done for transactions falling under COMESA's thresholds). This may create legal uncertainty as to which jurisdictions must be notified. Moreover, six of the eight EAC Partner States are also members of COMESA, resulting in an overlap between the two regimes and requiring dual notification where both the CCCC's and the EACCA's thresholds are met.

Stakeholders interviewed by the OECD expressed serious concerns about these potential overlaps (both between the EAC and COMESA systems, and between the EAC and CAK regimes) and the resulting legal uncertainty and costs. In fact, parties currently lack clarity on whether dual notifications are required (e.g. to the CAK and the EACCA, or to the EACCA and the CCCC). Such duplication would not only increase

financial and administrative burdens for both merging parties and authorities but also create a risk of divergent decisions.

During the OECD fact-finding mission, staff from both the CCCC and the EACCA acknowledged these challenges and indicated they were working together to address them. For example, the CCCC and the EACCA signed an MoU in June 2025,[72] but its terms are too general and do not resolve jurisdictional overlaps (for instance by establishing exclusive jurisdiction for each authority or at least including a referral mechanism). CCCC staff also mentioned that COMESA is reviewing its competition regulations in light of the forthcoming EAC merger control regime. On the other hand, CAK stakeholders suggested that these issues were being handled primarily at the regional level, and that the CAK was not directly involved. The MoU signed between the EACCA and the CAK in May 2023 similarly does not provide additional clarity regarding their respective jurisdiction over merger cases.[73]

The potential introduction of a continental merger control regime under the AfCFTA would further exacerbate these challenges. To date, AfCFTA merger notification thresholds have not yet been established, but they could overlap with the thresholds of the CAK, CCCC and/or EACCA, potentially resulting in a triple notification requirement and parallel merger review.

References

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OECD (2016), "Public Interest Considerations in Merger Control", *OECD Roundtables on Competition Policy Papers*, No. 187, OECD Publishing, Paris, https://doi.org/10.1787/21950340-en. [7]

Notes

[1] Competition Act, s 42(2).

[2] Competition Act, s 46(1).

[3] Competition Act, s 42(1).

[4] Competition (General) Rules, First Schedule, Merger Threshold Guidelines, s 4.

[5] Competition Act, s 42(1).

[6] Competition (General) Rules, First Schedule, Merger Threshold Guidelines, s 5.

[7] Competition (General) Rules, First Schedule, Merger Threshold Guidelines, s 6.

[8] Competition (General) Rules, s 8.

[9] Competition (General) Rules, s 13.

[10] Competition (General) Rules, s 12.

[11] Competition (General) Rules, First Schedule, Merger Threshold Guidelines, s 8.

[12] Competition (General) Rules, First Schedule, Merger Threshold Guidelines, s 11 and Competition (General) Rules, Second Schedule, Form III, s 8.

[13] Competition (General) Rules, s 15 and Competition (General) Rules, Second Schedule, Form III.

[14] Competition (General) Rules, First Schedule, Merger Threshold Guidelines, s 5(2).

[15] Competition Act, ss 44, 45.

[16] Competition (General) Rules, s 18.

[17] Competition Act, s 46(5).

[18] Competition (General) Rules, s 18(d), f).

[19] Competition Act, s 46(6)(b)(i).

[20] Competition Act, s 46(6)(a).

[21] Competition Act, s 48.

[22] Competition Act, s 49.

[23] Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act, s 5.

[24] Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act, s 42.

[25] Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act, s 43.

[26] Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act, ss 58, 59.

[27] Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act, s 46.

[28] Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act, ss 44, 45.

[29] Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act, ss 187-201.

[30] Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act, ss 202-204.

[31] For instance, Mobius Motors Kenya Limited/Silver Box – FZCO (2024), Style Industries Limited/Hair Manufacturing Kenya Limited (2024), Maua Agritech PLC/Kokatnur Amogasidda Murgeppa (2024) and CFAO Motors Kenya Limited/Vehicle Manufacturers Limited (2024).

[32] Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act, s 217.

[33] Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act, s 218.

[34] Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act, s 216.

[35] Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act, ss 221-225.

[36] Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act, s 219.

[37] Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act, s 220.

[38] Competition Act, s 42(2) and Competition (General) Rules, s 19.

[39] Competition (General) Rules, s 19(b) and Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act, ss 229-230.

[40] Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act, s 231.

[41] Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act, s 246.

[42] Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act, s 245.

[43] Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act, s 19(2).

[44] Competition Act, s 47(1)(b).

[45] Banking Act, rev. 2024, s 9; Energy Act, rev. 2022, s 124; Insurance Act, rev. 2022, ss 22 ff., 113 ff; Kenya Information and Communications Act, rev. 2022; Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, 2010.

[46] This has been clarified by the Competition Tribunal in a case involving the telecommunications sector (Telcom Kenya Limited & another v Competition Authority of Kenya, Case No. CT/005/2020, decision of 24 April 2020).

[47] Capital Markets Act, rev. 2023; Capital Markets (Take-Overs and Mergers) Regulations, 2002.

[48] Competition Act, ss 42(6), 47(3).

[49] Competition Act, ss 42(5), 47(4).

[50] Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Kingdom of Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia and Zimbabwe.

[51] COMESA Competition Regulations, art 23(3)(4)(5) and Rules on the Determination of Merger Notification Thresholds and Method of Calculation, r 4.

[52] COMESA Competition Regulations, art 24.

[53] COMESA Merger Assessment Guidelines, para. 5.32.

[54] COMESA Competition Rules, s 55(5).

[55] Rules on COMESA Revenue Sharing of Merger Filing Fees, r 8.

[56] COMESA Competition Regulations, art 26 and COMESA Merger Assessment Guidelines, s 7.

[57] COMESA Competition Regulations, art 26(6).

[58] Co-operation Framework Agreement between the COMESA Competition Commission and the Competition Authority of Kenya regarding Co-operation in the Application and Enforcement of their Competition and Consumer Protection Laws, 2022, art 3-6.

[59] COMESA Competition Regulations, art 24(8)(9).

[60] COMESA Merger Assessment Guidelines, para. 5.27.

[61] Burundi, Democratic Republic of the Congo, Kenya, Rwanda, Somalia, South Sudan, Uganda and the United Republic of Tanzania.

[62] Notice of Commencement of Receipt of Notification of Mergers and Acquisitions with Cross-Border Effect by the East African Community Competition Authority, of 1 July 2025.

[63] EAC Competition Act, art 4(1), 11(1), EAC Competition (Mergers and Acquisitions) Regulations, 2025, art 3(1), 4 and EAC Competition (Thresholds for Notification of Mergers and Acquisitions to the East African Competition Authority) Notice, 2024, art 2.

[64] The EACCA shall retain 50% of the notification fee, while the remaining 50% shall be distributed among the relevant national competition authorities in proportion to the value of the turnover or assets of the undertakings in each Partner State relative to the total value of the turnover or assets in the EAC market (Competition (Sharing of Merger and Acquisition Notification Fees) Regulation, 2025).

[65] EAC Competition (Merger and Acquisition Notification Fees) Regulations, 2024.

[66] Notice of Commencement of Receipt of Notification of Mergers and Acquisitions with Cross-Border Effect by the East African Community Competition Authority, of 1 July 2025.

[67] EAC Competition Act and Article 9 of the EAC Competition (Mergers and Acquisitions) Regulations, 2025, art 12.

[68] EAC Competition (Mergers and Acquisitions) Regulations, 2025, art 10(e).

[69] EAC Competition (Mergers and Acquisitions) Regulations, 2025, art 13.

[70] AfCFTA Protocol on Competition Policy, art 10.

[71] Co-operation Framework Agreement between the COMESA Competition Commission and the Competition Authority of Kenya regarding Co-operation in the Application and Enforcement of their Competition and Consumer Protection Laws, 2022.

[72] Memorandum of Understanding between the Common Market for Easter and Southern Africa (COMESA) Competition Commission and the East African Community (EAC) Competition Authority, June 2025.

[73] Memorandum of Understanding between the East African Community Competition Authority and the Competition Authority of Kenya, May 2023.

6 Advocacy

This chapter examines the Competition Authority of Kenya's activities to promote competition. This includes the authority's participation in regulatory and legislative activities, the outreach events and training run by the authority, and the publications and guidance produced by the authority.

6.1. Law and practice

The Competition Act grants a range of advocacy competences to the CAK, including issuing advocacy opinions, proposing the revocation or amendment of acts that have led or may lead to distorting or preventing competition and organising actions to raise awareness on competition law.

The CAK's market study competence is discussed separately as Chapter 7 of this Peer Review.

6.1.1. Participation in legislative and regulatory policymaking, including competition assessment

Under the Competition Act, the CAK has a broad set of powers relating to advocacy in relation to legislation and policy. These include powers to:

- "Study government policies, procedures and programmes, legislation and proposals for legislation so as to assess their effects on competition and consumer welfare and publicise the results of such studies".[1]
- "Investigate impediments to competition… and publicise the results of such investigations".[2]
- "Investigate policies, procedures and programmes of regulatory authorities so as to assess their effects on competition and consumer welfare and publicise the results of such studies".[3]
- "Participate in deliberations and proceedings of government, government commissions, regulatory authorities and other bodies".[4]
- "Make representations to government, government commissions, regulatory authorities and other bodies on matters relating to competition and consumer welfare".[5]
- "Advise the government on matters relating to competition and consumer welfare".[6]

These interventions can be undertaken at the request of the government, Parliament, a regulatory agency, or on the CAK's own initiative.

The CAK reports that it monitors media and the Kenyan Parliament's legislation tracking tool to identify issues that may warrant an advocacy intervention by the CAK. As mentioned in Chapter 3, the CAK relies on its priorities (set in line with the broad Kenyan Government national priorities) to focus its advocacy efforts. Currently, this includes legislation and policy in the areas of food security and nutrition, healthcare, the digital economy, housing and support for SMEs.

Table 6.1 below notes the number and focus areas of the CAK's formal advocacy opinions in the last five years.

Table 6.1. CAK's advocacy opinions

Year	Number of formal advocacy opinions	Sectors
2020	26	Retail, manufacturing, Banking, Telecommunications, Health, Financial
2021	30	Retail, Banking, Insurance, Manufacturing, Telecommunications, Legal services,
2022	33	Retail, Banking, Insurance, Manufacturing, Telecommunications, Legal Services, Accounting/Financial Services
2023	26	Retail, Banking, Insurance, Manufacturing, Telecommunications, Legal services
2024	27	Retail, Banking, Manufacturing, Insurance, Telecommunications, Legal services

Note: List of sectors defined by the CAK.
Source: CAK questionnaire.

The CAK estimates that 90% of their opinions relate to assessing the competitive impact of laws and policies, with 10% covering issues related to competitive neutrality.

In the context of public procurement, the CAK reported that it provided an opinion on designing the tender template during the reform of Kenya's public procurement law. The CAK also provided advice on the competitive merits of leasing vehicles for government use compared to out-right purchasing, an approach which has now been adopted in the country.

Advocacy opinions of the CAK are not published. The CAK reports that it follows up on its advocacy opinion to gauge whether their opinion has been adopted.

6.1.2. Campaigns, events and training

The Competition Act gives the CAK the mandate to promote, train and liaise with other public bodies.[7]

There are several key campaigns, events and trainings in the CAK calendar. For over a decade, the largest event is an annual capacity building workshop for public and private sector stakeholders. This event is paired with the CAK annual Symposium on Competition Law and Policy. Previous sessions of the workshops and symposia have covered topics including:

- The procedural framework for competition law enforcement
- Assessment of vertical agreements
- Complementarity or conflict: interaction between competition and industrial policies

Other activities for public bodies have included trainings for the regional County Governments, with a particular focus of promoting pro-competitive County policies and regulations.

The CAK has also provided trainings for industry associations such as the Kenya Association of Manufacturers, Retail Traders Association of Kenya and Kenya Private Sector Alliance. Under the Competition Act, the CAK is also required to promote the creation of and build relationships with duly registered consumer rights organisations.[8]

Within the CAK, building public awareness of the competition law and the competition authority is viewed as a key focus for the CAK. In addition to its website,[9] the CAK operates on a number of digital platforms to spread its message:

- A Facebook page with ~8 300 followers[10]
- An X (formerly Twitter) account with ~7 700 followers[11]
- A LinkedIn page with ~5 000 followers[12]
- A YouTube channel[13]
- A biannual email newsletter[14]

Given their limited resources, the CAK sees digital channels as their key method for outreach and public awareness. The CAK hopes to expand its offering to include a podcast, and a more frequent newsletter for interested stakeholders of the CAK's activities each week.

The public facing events the CAK organises include activities for World Competition Day and World Consumer Rights Day.

The CAK estimates that roughly 30% of their public advocacy relates to competition, with the remaining 70% focussed on consumer protection.

Table 6.2 below tallies the total number of competition advocacy events ran by the CAK in the last five years.

Table 6.2. Advocacy events organised by the CAK

Year	Total number of advocacy events organised
2020	21
2021	21
2022	25
2023	26
2024	28

Source: CAK questionnaire.

6.1.3. Publications and guidance issued by the CAK

Competition authorities use guidelines as a soft law tool to clarify and increase transparency on their activities and procedures. The CAK is able to make information and guidelines available relating to the application and enforcement of the Competition Act.[15] The CAK has adopted guidelines on:

- Restrictive Trade Practices under the Competition Act
- Informant Reward Scheme Policy
- Leniency Programme
- Search and Seizure
- Market Definition
- Mergers
- Joint Ventures
- Assessment of Regulatory Impact on Competition (for Policy Makers)
- Competition Compliance for Trade Associations (as part of a 2016 special compliance programme looking into conduct among trade associations)

Other publications from the CAK include its annual report and its five-year strategic plan, as mentioned in Chapters 2 and 3. The CAK has also developed a Law Digest, which highlights summaries of major CAK decisions issued between the CAK's establishment in 2011 through to June 2022.[16]

6.2. Analysis

The OECD Recommendation on Competition Assessment [OECD/LEGAL/0455] encourages countries to identify existing or proposed public policies that unduly restrict competition and consider adopting more pro-competitive alternatives. The Recommendation calls on jurisdictions to integrate competition assessment in the policymaking process in the most efficient and effective manner consistent with institutional and resource constraints.

Internally, the CAK explained that they believe increased co-operation with other government bodies and more requests for advisory opinions is a strong indicator that the CAK has improved awareness of the authority and the importance of competition in the economy. Domestic co-operation is discussed in detail in Chapter 10.

External stakeholders were broadly complementary of the CAK's efforts to make advocacy and awareness a cornerstone of their work. Many noted that they had participated in CAK advocacy activities and observed that the CAK in comparison to its peer competition authorities had done a good job at raising awareness.

When engaging in legislative and regulatory policymaking, the CAK could also assess whether the government intervention in question, for instance through regulation or state support, does not tilt the level

playing field in favour of certain market participants (e.g. SOEs or incumbents), in line with the OECD Recommendation on Competitive Neutrality [OECD/LEGAL/0462]. The OECD Competitive Neutrality Toolkit, developed to support the implementation of competitive neutrality principles, could be particularly useful in this regard (OECD, 2024[1]). The CAK has also participated in a World Bank review of the Kenyan procurement system in 2018/19 and is now part of the World Bank and Kenyan National Treasury programme on Development Policy Objectives.

The CAK's current practice of not publishing its advocacy opinions may somewhat limit their effectiveness. By making advocacy opinions publicly available, the CAK may enable more stakeholders to understand the impacts a policy or law may have or be having on competition and build more support for any pro-competitive reforms the CAK is advocating for. Of course, advocacy opinions should only be published when appropriate, respecting Kenyan norms on the sensitivity and confidentiality of the policymaking and legislative process.

However, one aspect of advocacy raised by a number of stakeholders echoes the concerns discussed in Chapter 4 this review regarding low levels of enforcement. Stakeholders repeatedly noted that there is need for a culture shift in the CAK. After 14 years of operations, stakeholders observed it was time for the CAK to focus on bringing more enforcement cases, not advocacy work. High profile enforcement cases also create opportunities for high impact advocacy. For example, bid rigging cases can be used to highlight the opportunity cost of public money being misused and not available for schools, hospitals and roads etc.

While research into best practices by bodies such as the OECD and International Competition Network (ICN) have recognised there may be benefits to prioritising advocacy for newly founded competition authorities in low and middle-income countries, this cannot act as a substitute for enforcement in the longer term. At a certain point, competition advocacy is "usually more convincing when expressed by someone with a stick in his hand" (International Competition Network, 2002[2]), requiring authorities to show that there are consequences for wrongdoing. External stakeholders argued that the CAK working to publicise the major enforcement decisions and imposing sanctions would be the most powerful form of advocacy available to it.

References

International Competition Network (2002), *Advocacy and Competition Policy – Report prepared by the ICN Advocacy Working Group*, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_AdvocacyReport2002.pdf (accessed on 12 November 2025). [2]

OECD (2024), *Competitive Neutrality Toolkit: Promoting a Level Playing Field*, OECD Publishing, Paris, https://doi.org/10.1787/3247ba44-en. [1]

Notes

[1] Competition Act s 9(1)(h).

[2] Competition Act s 9(1)(i).

[3] Competition Act s 9(1)(j).

[4] Competition Act s 9(1)(k).

[5] Competition Act s 9(1)(l).

[6] Competition Act s 9(1)(m).

[7] Competition Act s 9(1).

[8] Competition Act s 9(1)(d)-(e).

[9] See https://cak.go.ke/.

[10] See https://www.facebook.com/CompetitionAuthorityOfKenya.

[11] See https://x.com/cak_kenya.

[12] See https://www.linkedin.com/company/competition-authority-of-kenya.

[13] See https://www.youtube.com/@competitionauthorityofkeny2933.

[14] See https://cak.go.ke/node/345.

[15] Competition Act s 9(1).

[16] CAK (2024), "Competition and Consumer Protection Law Digest", https://cak.go.ke/sites/default/files/2024-02/CAK_COMPETITION_AND_CONSUMER_PROTECTION_LAW_DIGEST.pdf.

7 Market Studies

This chapter covers the Competition Authority of Kenya's market study function. It includes a description and analysis of the authority's legal powers, the process the authority follows, and the outcomes of past market studies.

7.1. Law and practice

7.1.1. Legislative powers to conduct market studies

The Competition Act enables the CAK to "carry out inquiries, studies and research into matters relating to competition and the protection of the interests of consumers".[1] The legislation does not explain the difference between inquiries, studies and research. The CAK understands and uses the law to enable three activities:

- Research: informal desktop research on a market or sector involving no information gathering powers.
- Inquiry: a preliminary research activity where there may currently be limited available information, an emerging sector of the economy, or where there is interest from other government agencies who want to know more about the sector.
- Study: a formal market study process for an entire sector, including use of evidence gathering powers, engagement with external stakeholders and concluding with formal recommendations made.

Inquiries or market studies can be carried out by the CAK *ex officio*, or upon direction of the Cabinet Secretary for the National Treasury and Economic Planning.[2] The Cabinet Secretary's direction to commence an inquiry or market study may set a timeframe and may request advice on potential policy or legislative reforms.[3]

Notices of commencing an inquiry or market study must be published in the Kenyan Gazette and a national newspaper, with the notice covering the subject, inviting submissions from the public, and any terms of reference if the Cabinet Secretary has directed the CAK.[4] The CAK must also send written notice to undertakings likely to be affected by the outcome of the study, all relevant industry and consumer organisations, and the Cabinet Secretary.[5]

When conducting an inquiry or market study, the CAK has compulsory information gathering powers.[6] Failure to comply with an information is an offence under the Competition Act.[7] However, as noted in Chapter 3, this is not enforced in practice.

7.1.2. The CAK market study process

Since the CAK's founding, the authority has viewed market studies as a vital tool to address sectors with entrenched competition concerns, large incumbent firms and often government policies that facilitated the conduct. Particularly in its earlier years of operation, the CAK's corporate strategy was to prioritise market studies as a way of addressing long-standing market structures and anticompetitive conduct.

During OECD fact-finding, the CAK reported that almost all their market studies and inquiries have been commenced *ex officio*. Sectors are selected on the basis of the CAK's internal prioritisation guidelines and on complaints received by the CAK's enforcement teams.

Prioritisation is also guided by sectors of interest based on the Kenyan Government's current national priorities. The CAK noted their latest inquiry on animal feed was an example of this alignment with the national priorities, as food security and nutrition are a key aspect of the government's agricultural transformation and inclusive growth priorities.

Inquiries and market studies are conducted by the CAK's Planning, Policy and Research Department. The department is made up of 8 staff, including a manager, 4 analysts (3 trained as economists and 1 with a government procurement background), and 3 other staff. In addition to market study activities, the same department is also responsible for advocacy opinions, event organisation, international co-operation activities, knowledge management for the CAK, and producing annual reports.

The CAK noted they may also retain external consultants to assist in conducting inquiries and studies, such as those with greater relevant industry expertise.

The CAK estimates its inquiries and market studies run for an average of 18 months. Figure 7.1 below outlines the CAK's internal process for conducting a study.

Figure 7.1. CAK market study process diagram

Source: OECD, based on material from the CAK questionnaire.

Over the past five years, the CAK has undertaken six market studies. Table 7.1 below surveys the markets in focus. This represents an average of 1.2 market studies per year, lower than the average of three market studies carried out yearly by OECD jurisdictions in the latest Competition Trends report (OECD, 2024[1]).

Table 7.1. CAK's market studies

Year	Number of market studies	Sectors
2020	2	Commercial leasing sector; Aviation sector (as part of African Competition Forum cross-country study)
2021	1	Digital Credit Market
2022	1	Telecommunications and international roaming charges (as part of African Competition Forum cross-country study)
2023	1	Online Food and Grocery Delivery Platforms
2024	1	Animal Feed

Source: CAK.

A highlight from earlier in the CAK's operations was the market study into Unstructured Supplementary Service Data (USSD), highlighted below in Box 7.1. In this case the CAK found that Safaricom the major telecommunications firm and market leader in mobile money services was imposing high and discriminatory fees on USSD.

Box 7.1. CAK market study into Unstructured Supplementary Service Data (USSD) service provision

USSD is one of the key technologies that underpins mobile money services, which are widely used in Kenya. The CAK launched the market study to examine whether the pricing and access conditions were restricting competition.

The CAK found that Safaricom, the dominant telecommunications firm in Kenya charged high and discriminatory USSD fees, imposing a margin squeeze and creating barriers for competitors to Safaricom's preferred mobile money service. The market was also found to include network effects such as interoperability challenges, as well as opaque pricing information and a lack of consumer awareness of USSD charges.

Through the market study recommendations, the CAK was able to negotiate a commitment with Safaricom to cut USSD fees by 90% on competitors (in lieu of an investigation), and impose a consistent price for all market players. Firms also committed to publishing the standard prices for USSD services, and informing customers of any prices charged for processing mobile money transfers.

More broadly, there were helpful regulatory spillover effects, as the market study recommendations included greater collaboration between the CAK, the Central Bank of Kenya and the Communications Authority. This longer-term collaboration informed broader policy reforms, including digital credit regulations and advocacy for fair pricing in telecommunication services.

Source: CAK decision CAK/PR/03/10/A.

The CAK report that their ongoing efforts to improve co-operation and engage in advocacy activities have been helpful in getting better engagement from public sector stakeholders during market study processes.

However, private sector stakeholders remain a challenge, with the CAK reporting a general perception that firms are unwilling to engage with the CAK out of concern they will incriminate themselves and come under scrutiny of the CAK's enforcement activity. There is no specific requirement in the Competition Act for information gathered in a market study not to be used for other enforcement purposes.

The CAK report that the potential outcomes for market studies they consider are as follows:

- Referral to CAK enforcement staff for investigation.
- Seeking administrative settlements with sector stakeholders suspected of violating the Competition Act.
- Advocacy targeting relevant stakeholders, including creating consumer awareness and collaborating with sector regulators.
- Recommendations to develop policy or legislation if there is no current framework for the sector.
- Recommendations to amend relevant legislation and regulations.

In terms of recommendations for reforms coming out of a market study, the CAK estimates that approximately 50% of their recommendations have led to successful changes in law or policy. The CAK noted that they made recommendations in 2016 about bringing digital lenders into the regulatory remit of the Central Bank of Kenya, which were then followed five years later in 2021.

Market studies are made available to the public on the CAK website.

7.2. Analysis

Broadly, stakeholders were complimentary that the CAK's long-term project to build awareness of the authority and its mandate meant that it had generally good buy from the public sector when conducting market studies.

Nonetheless, challenges remain in relation to private sector stakeholders in the context of market studies. As discussed in Chapter 3 in greater detail, the CAK's lack of enforcement in relation to compulsory information gathering powers means that market studies often cannot adequately measure factors such as market concentration and must rely on general sector data gathered by the government. Enhancing information gathering is vital to conduct robust competition analysis. External stakeholders noted this lack of detailed evidence from the sectors under review meant that there was insufficient analysis to justify any policy recommendations made.

Another concern raised was about the selection of topics for market studies. OECD good practices suggest that defining market selection criteria allows competition authorities to identify markets with potential competition problems or regulatory inefficiencies, or that have a greater importance for the economy (OECD, 2018[2]). The 2024 market study into online food and grocery delivery was criticised by stakeholders as the CAK focussing on a relatively niche topic that impacts only wealthy consumers in the capital of Nairobi. Additionally, evidence from the African Competition Forum's Digital Platforms Landscape Study shows that there has been low adoption of online delivery services in Kenya, in both absolute terms and relative to other African countries in the landscape study (African Competition Forum, 2024[3]).[8]

The evidence provided by the CAK to the African Competition Forum was that they had only received a single complaint in the online delivery services sector, related to excessive pricing and alleged collusion on commission prices charged by the apps (African Competition Forum, 2024[3]). In the circumstances, an initial investigation for potential enforcement action may have been more appropriate rather than launching a market study. Given the CAK's limited resources and current challenges relating to information gathering powers, the authority should always focus its market study work on high profile markets with immediate impact on large parts of the economy, not those perceived as being *in vogue* for competition authorities globally.

References

African Competition Forum (2024), *ACF Digital Platforms Landscape Study*, http://compcom.co.za/wp-content/uploads/2025/06/ACF-Digital-Platform-Study.pdf (accessed on 12 November 2025). [3]

OECD (2024), *OECD Competition Trends 2024*, OECD Publishing, Paris, https://doi.org/10.1787/e69018f9-en. [1]

OECD (2018), *Market Studies Guide for Competition Authorities*, OECD Publishing, Paris, https://doi.org/10.1787/7381b582-en. [2]

Notes

[1] Competition Act s 9(1)(g).

[2] Competition Act s 18(1).

[3] Competition Act s 18(2)-(3).

[4] Competition Act s 18(5)(a).

[5] Competition Act s 18(5)(b).

[6] Competition Act s 18(6).

[7] Competition Act s 89.

[8] The study found that Kenya has a low adoption of online food delivery services. Only three African Competition Forum jurisdictions were noted to have medium adoption (The Gambia, Namibia and Zambia), with only South Africa having high adoption. See (African Competition Forum, 2024[3]).

8 Judicial review

This chapter covers the law, procedures and practice for appeals of decisions of the Competition Authority of Kenya. This includes appeals to both the Competition Tribunal and the High Court of Kenya.

8.1. Law and practice

This chapter addresses only the judicial review process of CAK administrative decisions that are of relevance to competition law and policy in Kenya as noted in Chapters 1 and 3 above, the Competition Act does contain a framework for criminal enforcement of anticompetitive conduct in Kenya. However, the CAK has never and does not intend to use the criminal enforcement framework.

8.1.1. Overview of the judicial system

There are two bodies in the Kenyan judicial system that are empowered to hear appeals of CAK decisions. At first instance, appeals are made to the Competition Tribunal of Kenya (the "Tribunal"), with a second and final level of appeal to the High Court of Kenya.

The Tribunal is established in 2016 under the Competition Act to hear appeals of CAK decisions.[1] The Tribunal is composed of a chairperson and must have between two and four ordinary members.[2] The chairperson and members serve for a period not exceeding five years, unless they resign or are relieved of duties (due to health or lack of attendance at Tribunal meetings).[3] In recent practice, Tribunal members are appointed by the government for a three-year term, and then re-appointed for another three-year term (exceeding the five year mandate period).

Quorum for a decision requires the chairperson and at least two members.[4] Positions on the Tribunal are not full time, with the chairperson and members receiving fees and allowances for their work.[5]

The Competition Act grants the Tribunal powers to convene hearings, for parties to appear before the Tribunal and to award costs at the Tribunal's discretion.

The operations of the Tribunal are governed by a Cabinet Secretary. The Cabinet Secretary and a staff of around seven others are seconded from the Kenyan National Treasury and the Ministry of Justice to provide administrative support. In consultation with the Tribunal, the Cabinet Secretary is empowered under the law to make rules regarding:[6]

- the legal form for appeals to the Tribunal and any fees charged
- the procedural rules for appeals and record keeping
- arranging the schedule for hearings and meetings of the Tribunals
- setting the fees and allowances that are to be paid to Tribunal members.

Kenya's court system is structured as set out in the Kenyan Constitution.[7] The High Court of Kenya is third highest court in the hierarchy as set out in the Constitution. Among its roles, the High Court has supervisory jurisdiction over bodies exercising a judicial or quasi-judicial function, such as the Tribunal.[8] The Competition Act establishes that parties have a right to appeal Tribunal decisions to the High Court.[9] The term of a High Court judge runs from their appointment until their compulsory retirement age of 70, unless they choose to resign earlier, take early retirement after the age of 65, or are removed pursuant to the grounds in the Constitution (such as gross misconduct or becoming bankrupt).[10]

The High Court is the final avenue of appeal for CAK decisions. There is no scope to appeal High Court decisions to the Court of Appeal or the Supreme Court of Kenya.

Appeals at the High Court are typically heard by a single judge. Any matter certified by the court as raising a substantial question of law can be assigned by the Chief Justice to a panel of judges (at least three and the number of judges must be uneven).[11] CAK appeals are heard by judges that are assigned to the Commercial Division of the High Court (judges are rotated across the various Divisions of the Court and do not specialise).

Decisions of the High Court are binding on subordinate courts and tribunals under the doctrine of stare decisis.

8.1.2. Standing to appeal

The Competition Act states that any "person aggrieved by a determination" of the CAK has standing to appeal.[12]

Additionally, the Competition Tribunal (Procedure) Rules set out which persons may also be parties to an appeal of a CAK decision. These are:[13]

- In the context of an appeal of a merger decision, an interested party to the transaction.[14]
- A party joined to the appeal by the Tribunal.
- Any other persons affected by a decision of the CAK that have applied to be enjoined to the appeal.

8.1.3. Decisions subject to appeal

All final decisions of the CAK can be appealed to the Tribunal at first instance and finally to the High Court of Kenya at second instance.[15]

In addition to these final decisions relating to anticompetitive conduct or mergers, the Competition Act also allows parties to appeal decisions relating to interim measures and decisions relating to claims for confidentiality or non-disclosure of information.[16]

8.1.4. Appeal process

For CAK decisions that relate to anticompetitive practices, parties must lodge an appeal to the Tribunal within 30 days of receiving the CAK's decision. There is also a 30-day timeframe for appealing Tribunal decisions to the High Court.[17]

For merger decisions, parties have 30 days after the merger decision is issued by the CAK to appeal to the Tribunal. The Tribunal is bound under the Competition Law to issue its decision within four months of the appeal being lodged.[18] Merger-related decisions of the Tribunal may then be appealed to the High Court within 30 days of the Tribunal's decision, though the legislation does not set any obligations on the speed of the High Court's decision.[19]

During the course of the litigation, the CAK and the party appealing a decision may arrive at a settlement and seek permission of the Tribunal or High Court to close the legal proceedings. As noted in 8.1.6 below, this has been the typical outcome of proceedings in the past five years, with 5 of the 6 concluded Tribunal appeals ending in a settlement.

8.1.5. Standard of review

Appeals can be in relation to the procedural legality or merits of CAK decisions. In practice, the CAK report that roughly 80% of the appeals are challenging the legality of CAK decisions. Common grounds of appeal are claims the CAK has failed to follow fair administrative processes, failed to instigate an investigation within the three-year limitation period, that the CAK lacks jurisdiction, or that the CAK has breached the rules of evidence.

In an appeal, the Tribunal and High Court have the power to conduct a hearing *de novo*, and to confirm, modify or reverse the decision subject to the appeal.

In its determination of any appeal, the Tribunal may confirm, modify, or reverse the order appealed against, or any part of the CAK's decision.[20] The Tribunal may also refer the matter back to the CAK with directions on how to reconsider the matter.[21]

The standard of proof is the balance of probabilities. The burden of proof is on the party seeking the appeal.

8.1.6. Decisional practice

There are very few decisions of either the Tribunal or High Court. In practice, very few decisions of the CAK are appealed. Of the few that are appealed, almost all are settled by the parties before the Tribunal or High Court has issued its decision.

The table below sets out the decisional practice of the Tribunal and High Court over the last five years, as reported to the OECD by the CAK.

Table 8.1. Decisions of the Tribunal and High Court relating to competition enforcement

Year	Tribunal appeals of CAK decisions from that year*	Tribunal outcomes	Subject of decision	High Court appeals of CAK decisions from that year*	High Court outcomes
2020	3 (separate parties in same case)	3 settled before appeal decision issued	Horizontal agreements	0	N/A
2021	1	1 CAK upheld	Merger	0	N/A
2022	0	N/A	N/A	0	N/A
2023	8 (separate parties in same case)	2 settled before appeal decision issued			
6 still ongoing	Horizontal agreements	0	N/A		

Note: Decisions of Tribunal or High Court were not necessarily issued in the same year that the CAK issued the decision.
Source: CAK questionnaire.

This means that the Tribunal has issued one decision about mergers and none on antitrust enforcement over the past five years, with the High Court issuing no decisions at all.

The Tribunal has also heard three cases covering the related conduct of misuse of buyer power (one of which was also unsuccessfully appealed by a party to the High Court). However, as noted in Chapter 1 above, abuse of buyer power is not interchangeable with abuse of dominance and is outside of the scope of this Peer Review exercise.

8.1.7. Judicial expertise

For the Tribunal, the Competition Act requires that the chairperson be a lawyer of at least seven years standing.[22] There is no requirement for the chairperson to have any particular experience or expertise in competition or consumer protection law.

There are no skill or expertise requirements at all for the other members of the Tribunal.

No competition law training has been provided to the Tribunal in at least the last five years. The Competition Act does not empower the Tribunal to call or remunerate independent experts to assist the Tribunal in appeal proceedings.

The criteria for appointing High Court judges are set out in the Kenyan Constitution. Appointees must have at least ten years of relevant experience as a judge, magistrate, lawyer or academic.[23] Judges of the High Court do not specialise and after three years are rotated across the High Court's Divisions, including the Commercial Division which hears CAK related appeals.

The OECD team was unable to meet with the High Court during the fact-finding mission. However, no evidence gathered from the questionnaire or other stakeholders suggests that any training has been provided to the High Court in relation to competition law.

8.2. Analysis

The Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement [OECD/LEGAL/0465] calls on adherents to "ensure access to an impartial review by an adjudicative body that is independent and separate from the competition authority", adding that the appeal body should be able to examine "facts and evidence, and the merits of competition law enforcement decisions".

While the Competition Act envisages the Tribunal as a specialised body to hear appeals, there are significant challenges impeding its ability to do so. However, the Tribunal has no competition law expertise and has no resources to develop expertise. This critically undermines the Tribunal's capacity to act as an effective check on the CAK's decisions.

Further, the only eligibility criterion is that the chairperson of the Tribunal is a lawyer of seven years standing and that there are no criteria at all for ordinary members of the Tribunal. This creates a situation where appeals to the specialised tribunal body are in practice being heard by people with no underlying knowledge or experience in the competition field.

Historically, Tribunal members were not remunerated, meaning that in the past Tribunal members had included workers such as schoolteachers due to the lack of candidates willing to take on the role. The Tribunal is now able to remunerate its members on a part time basis when they are required to hear and decide cases. The Tribunal is now made up of private legal practitioners, though none practice competition law. The reliance on private practitioners as Tribunal members may raise additional concerns about potential conflicts of interest when these lawyers or the firms they work in may have business before the Tribunal.

With the exception of the Tribunal's Secretary, none of the Tribunal's other administrative staff have any expertise in competition law or economics, being on secondment from government ministries. This means there is no capacity for the Tribunal to seek research assistance in conducting its cases, nor the ability for the Tribunal to seek external experts or advice to assist in appeals.

During OECD fact-finding, there was no evidence to suggest that the Tribunal has had access to any training on competition law or economics. There is no co-operation between the CAK and Tribunal on training.

Stakeholders were of the view that these factors cumulatively meant that the Tribunal is not capable of acting as an effective appellate body, as it is too deferential to the CAK's decisions. Private practitioners reported being hesitant to appeal cases to the Tribunal as they knew their prospects for success are very low. Stakeholders see this as creating a cycle which reduces the opportunities for the Tribunal to hear cases and further limiting the amount of meaningful oversight of CAK decisions.

Given there have been no appeals of competition cases to the High Court in at least the last five years and no participation from the High Court in relevant training, stakeholders held similar concerns regarding the prospects of effective judicial review at second instance.

Notes

[1] Competition Act, p.p. VII.

[2] Competition Act, s 71(2).

[3] Competition Act, s 71(3).

[4] Competition Act, s 71(4).

[5] Competition Act, s 71(5).

[6] Competition Act, s 71(6).

[7] Constitution of Kenya (2010), s 165.

[8] Constitution of Kenya (2010), s 165(6).

[9] Competition Act, s 77.

[10] Constitution of Kenya (2010), ss 167-168.

[11] Constitution of Kenya (2010), s 165(4).

[12] Competition Act, ss 40, 73.

[13] Competition Tribunal (Procedure) Rules (2017), r 11.

[14] See Competition Act, s 48(2).

[15] Competition Act, ss 40, 48, 73.

[16] Competition Act, s 20(9).

[17] Competition Act, s 40.

[18] Competition Act, s 48.

[19] Competition Act, s 49.

[20] Competition Act, s 74(3).

[21] Competition Act, s 75.

[22] Competition Act, s 71(2)(a).

[23] Constitution of Kenya, s 166(5).

9 Private enforcement

This chapter covers the law relating to private rights of action under the Competition Act.

9.1. Law and practice

While Kenya's civil law framework enables parties to bring private actions for follow-on damages, there is nothing in the Competition Act or related guidelines related to private enforcement. In practice there is no private enforcement in Kenya.

9.1.1. Standing for private claims

The Competition Act does not specifically establish any right or process to pursue private enforcement of competition harms. The CAK noted in their questionnaire response that as there is no specific provision preventing a party from filing a private claim, parties can theoretically bring them.

There are no guidelines or regulations that set out the specific process for private claims. The CAK notes they interpret the law to only cover follow-on private enforcement as only the CAK has the power to declare what is an infringement of the Competition Act. This means private enforcement can only be brought after the CAK has issued a decision finding an infringement.

The Competition Act does not grant the CAK any powers to intervene in private proceedings.

9.1.2. Time limits

Under section 86 of the Competition Act, "an investigation into an alleged infringement of the provisions of this Act may not be initiated after three years from the date the infringement has ceased".

The Competition Act does not specify a limitation period for private rights of action. Kenya's Limitation of Actions Act also sets a three-year time limit for tort actions.[1]

9.1.3. Collective redress (class actions)

The CAK notes that there is nothing preventing private parties from seeking follow-on damages through a class action.

The Kenyan Civil Procedure Rules set out the requirements of forming a plaintiff group for class actions.[2]

9.1.4. Access to competition authority information

The Competition Act does not set out rules on private claimants seeking evidence or information gathered by the CAK as part of its investigations. CAK decisions are not published as well, limiting the availability of publicly available information that can be relied upon for private claimants.

Under its leniency guidelines, the CAK commits to protecting the identity of and material provided by successful leniency applicants, including after the end of proceedings. However, in practice, the CAK has never received a leniency application, meaning the CAK has not had to consider what information should be publicly available in a CAK decision.

9.1.5. Private enforcement practice

The CAK reports there has never been a single instance of private enforcement in Kenya. Nor has the CAK engaged in any advocacy activities relating to private enforcement.

During the OECD fact-finding mission, private practitioners did not express any interest in recommending that their clients pursue private claims relating to competition law.

9.2. Analysis

The Recommendation concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452] recommends that anyone who has suffered harm caused by a hard core cartel should have the right to obtain redress or claim compensation for that harm from the persons or entities that caused it.

Evidence from the (OECD, 2015[1]) suggests that the lack of private enforcement is not unique to Kenya. This is typically driven by a range of factors, including:

- **Developing a competition culture:** potential claimants are less likely to be aware of their private rights of action in jurisdictions that have more recently introduced competition laws or created competition authorities. Collective redress schemes / class actions may not be familiar concepts, creating a further barrier for bringing claims.
- **Insularity and/or informality of the economy:** this may act as a disincentive from bringing action against a firm one may continue dealing with in the long term.
- **Cultural norms:** parties may be hesitant to publicly accuse one another of wrongdoing and seek damages in relation to conduct that would be enforced by a public body.
- **Risks and cost of litigating:** the lack of competition law expertise among judges may create a risk of poor outcomes for plaintiffs. Further, the lack of established process or precedent for private claims means it is unlikely that private practitioners would recommend clients spend time and money on a novel form of litigation. Lawyers are more likely to recommend parties refer the alleged conduct to the CAK in the hopes of obtaining a more reliable outcome.

There is no relevant framework for private enforcement in the Competition Act, nor is there any private enforcement taking place in practice in Kenya.

Private enforcement could be expected to develop if public enforcement increases, as infringement decisions allow claimants to rely on the CAK's findings to prove their harm. Private enforcement can, in its turn, reinforce public enforcement by strengthening deterrence.

Given the general lack of private enforcement of competition law around the world, Kenya is not a significant outlier compared to Members and non-Members of the OECD Competition Committee (OECD, 2023[2]).

References

OECD (2023), "The Future of Effective Leniency Programmes: Advancing Detection and Deterrence of Cartels", *OECD Roundtables on Competition Policy Papers*, No. 299, OECD Publishing, Paris, https://doi.org/10.1787/9bc9dd57-en. [2]

OECD (2015), "Relationship Between Public and Private Antitrust Enforcement", *OECD Roundtables on Competition Policy Papers*, No. 174, OECD Publishing, Paris, https://doi.org/10.1787/8c535258-en. [1]

Notes

[1] Limitations of Action Act (as amended 2012), p.p. ii, s 4(2).

[2] Civil Procedure Rules (CAP. 21), order 1, rule 8.

10 Co-operation

This chapter examines the Competition Authority of Kenya's institutional co-operation with other domestic entities and competition authorities in other jurisdictions.

10.1. Domestic co-operation

10.1.1. Law and practice

Consumer protection

In addition to its functions as a competition authority, the CAK is the consumer protection authority for Kenya. This includes enforcement, advocacy and public awareness activities in relation to the consumer protection and product safety provisions with the Competition Act, advocacy and public awareness campaigns.

As detailed in Chapter 2, the consumer protection functions of the CAK sits within the same directorate as competition enforcement.

Other areas of the CAK are similarly responsible for overseeing the dual mandate of the authority, such as the Policy and Planning Department. Given the broader public awareness and interest in consumer protection matters, the Communications and External Relations Department estimates that around 70% of their time is occupied with communications related to consumer protection.

Sector regulators

As noted in Chapter 1, sector regulators have some limited legal powers relating to competition law and policy in Kenya in the telecommunications and energy sector. The Communications Authority is the only sector regulator with the power to investigate anticompetitive conduct under their legislation, although this has not taken place in practice.[1] The Energy and Petroleum Authority's legislation has a mandate to co-operate with the CAK regarding trade practices and facilitating competition in regulated energy markets.[2]

In mergers involving banking, energy, insurance, telecommunications, or publicly traded firms, both the CAK and the relevant sector regulator have concurrent jurisdiction to review the transaction. Only the CAK conducts a competition assessment as part of its merger review process.

Historically, the extent to which these legislative frameworks overlapped was ambiguous, with uncertain regulatory mandates. This was particularly in relation to mergers, where both CAK and sector regulator approval was necessary to clear a transaction.

As such, the CAK has worked to develop MoUs with a number of domestic sector regulators:

- Central Bank of Kenya (April 2015)
- Communications Authority of Kenya (May 2015)
- Insurance Regulatory Authority (April 2016)
- Kenya Civil Aviation Authority (August 2018)
- Energy and Petroleum Regulatory Authority (February 2020)
- Public Procurement Regulatory Authority (June 2018)

These MoUs aim to facilitate the exchange of information, collaborate on merger reviews, report anticompetitive conduct and ensure the consistent application of competition law.

Additionally, the Capital Markets Authority is involved in merger transactions involving publicly listed companies in Kenya.

In practice, there is very little co-operation between the CAK and sector regulators in relation to enforcement against anticompetitive conduct. The only co-operation in this regard is occasionally relying on sector regulators to informally encourage firms in their sector to comply with CAK requests for information.

The vast majority of domestic co-operation relates to merger control activities. While the reviews conducted by the CAK and the relevant sector regulators are independent, there is co-operation through providing opinions to one another, or through establishing a joint committee to discuss relevant elements of a transaction. Such co-operation aims at ensuring a convergent and complementary analysis (including in design of remedies), without implying that the agencies are abdicating their statutory mandates.[3]

The CAK has also co-operated with sector regulators in relation to advocacy activities. For example, in 2020, the CAK launched an inquiry into the digital credit market in Kenya to identify and address competition and consumer protection issues in the market. Although not a market regulated by the Central Bank at the time, the CAK involved the Central Bank during the inquiry through developing the data collection requests and when conducting the data analysis. The CAK and Central Bank jointly developed the recommendations. This ultimately resulted in the passage of legislation to bring digital lenders under the regulatory remit of the Central Bank.[4]

By contrast, the CAK also notes that the lack of consistency in legal frameworks between the competition authority and sector regulators has led to inconsistent advocacy opinions. In their responses to a parliamentary inquiry into the telecommunications sector, the CAK and Communications Authority arrived at different conclusions about a firm's dominant position based on their different regulatory frameworks.[5]

Public procurement

As noted in Chapter 1, Kenya's Constitution has a requirement that all public procurement contracts take place in a system that is competitive (as well as being fair, equitable, transparent and cost-effective), with sanctions for breaches of procurement laws and policies.[6]

Chapter 4 provides a comprehensive overview of the CAK's bid rigging enforcement framework and practices. In addition to the cartel conduct prohibition in the Competition Act (which includes bid rigging), the Public Procurement Regulatory Authority ("PPRA") has a mandate to investigate allegations of bid rigging.

The CAK and the PPRA signed an MoU in March 2019 which includes mutual training and information sharing as part of investigations. To date, there has been limited co-operation between the two authorities. Co-operation has focussed on capacity building and training for procurers, and providing input on the current standard tender form used in Kenya. The two authorities do not regularly meet.

There has been no co-operation on enforcement activities, with no referrals of conduct that may amount to bid rigging. The PPRA has never imposed a sanction for a breach of Kenyan public procurement law, including no enforcement activity relating to bid rigging.

The CAK can request data from the PPRA as part of investigations. However, this has not taken place in practice. Neither the PPRA or CAK have the capacity to conduct any proactive screening of procurement processes and are solely reliant on complaints or random auditing. Further, there is limited visibility over procurement processes, as the centralised electronic procurement portal is used by just over 2% of procuring bodies in Kenya.

Public Prosecutor

In Kenya, the Office of Director of Public Prosecutions ("Public Prosecutor") is the authority responsible for:

- Bringing criminal prosecutions under the Competition Act.[7]
- Enforcing the provisions relating to failure to comply with a request from the CAK (such as a request for information or a request to attend an interview), or hindering a CAK investigation.[8]
- Bringing an action against a party for failing to comply with a CAK order or decision (such as non-payment of a fine).[9]

As discussed in Chapter 3, to bring these actions, the CAK must refer the case to the Public Prosecutor, providing the relevant evidence. There is no co-operation between the CAK and the Public Prosecutor and there has been no enforcement of the Competition Act by the Public Prosecutor.

10.1.2. Analysis of domestic co-operation

It is widely accepted that effective co-operation between competition authorities and sector regulators or other national bodies with mandates that are relevant to competition is a critical component of effective competition policy and enforcement. Such other bodies can promote competition and provide intelligence and insights on potentially problematic conduct or transactions, and therefore contribute to competition advocacy and enforcement (OECD, 2022[1]).

As detailed in the subsections below, while the CAK has made admirable efforts in the past to establish MoUs with relevant domestic counterparts, implementation and substantive co-operation remains more limited. Past OECD work has recognised that MoUs are just one aspect of effective domestic co-operation. Without meaningful bottom-up co-operation between agencies, focussed on notification and consultation, sharing expertise among working groups at the staff level and developing a culture of engaging in ad hoc co-operation where beneficial, what is outlined in MoUs is less likely to take place (OECD, 2022[1]).

Sector regulators

The CAK's relationship with sector regulators in the context of mergers appears to be successful in minimising duplication and inconsistent processes when assessing transactions.

Similarly, the CAK and most sector regulators appear to have built working relationships that enable them to seek guidance when developing policy or seeking to understand market dynamics.

In the medium to long term, the CAK and sector regulators should consider enhancing their co-operation in the field of enforcement, particularly mutual notification of potential anticompetitive conduct (OECD, 2022[1]).

Public procurement

The Kenyan Government reports that public procurement accounts for 60% of the government's annual budget, typically amounting to 10-13% of GDP (National Treasury of Kenya, 2025[2]; Kenyan Public Procurement Regulatory Authority, 2023[3]). As noted by OECD Recommendation of the Council on Fighting Bid Rigging in Public Procurement [OECD/LEGAL/0396], competition in public procurement promotes efficiency, helping to ensure that goods and services offered to public entities more closely match their needs and preferences, producing benefits such as lower prices, improved quality, increased innovation, higher productivity and, more generally, "value for money" to the benefit of users of public goods and services, and taxpayers.

The lack of co-operation between the CAK and the PPRA suggests there is a lack of alignment with the OECD Recommendation of the Council on Fighting Bid Rigging in Public Procurement [OECD/LEGAL/0396]. Among the activities suggested in the Recommendation that are currently not being undertaken includes:

- Establishing a working relationship between the competition and public procurement authorities to report suspected collusion, with the confidence that the authorities will help investigate and prosecute wrongdoing.
- Reviewing the level of competition in past tenders to inform tender planning.
- Using electronic procurement systems for all stages of the procurement process to the extent possible.
- Keeping reliable and comprehensive procurement databases.

- Developing digital filters or using screening tools to detect bidding cartels.
- Considering the use of debarment as a sanction for firms and individuals that have engaged in bid rigging in the past.

A number of stakeholders expressed the view that the widespread concerns about corruption in public procurement in Kenya meant that there should be greater efforts to enhance co-operation between the CAK and the PPRA.[10] Competition and integrity in public procurement reinforce each other, and the formal and informal co-operation of public sector authorities with relevant policy and law enforcement powers is essential.

Public Prosecutor

The current level of co-operation between the CAK and the Public Prosecutor inhibits the competition authority's capacity to effectively enforce the Competition Act. Currently there is no mechanism to legally enforce obligations to comply with CAK requests, not obstruct CAK activities, or comply with CAK decisions and orders. The ability to impose sanctions for this behaviour is considered as best practices, such as under the OECD Recommendation of the Council concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452].

As the CAK is currently hesitant to issue the maximum civil sanction for cartel conduct (i.e. 10% of turnover), there is little likelihood that the competition authority will explore the use of the criminal sanctions regime that exists under the Competition Act. In the longer-term the CAK and Public Prosecutor should explore whether the use of criminal enforcement may be an effective way of adequately deterring hard core cartel and bid rigging conduct in Kenya, as suggested in the OECD Recommendation of the Council concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452].

Consumer protection

During OECD fact-finding, no stakeholders raised specific concerns relating to the co-operation between the overlapping competition and consumer protection functions of the CAK. Indeed, external stakeholders that mentioned consumer protection were generally complimentary of the CAK in this regard. They highlighted that the CAK was generally willing to engage with advocacy and interest groups, and that the CAK was more responsive to complaints than when consumers attempted to engage with relevant sector regulators. As noted in Chapter 2, the broader challenge the CAK faces in relation to its competition and consumer protection functions is balancing allocation of resources between these two mandates and concerns raised by stakeholders that this is contributing to the low level of competition enforcement activities by the CAK.

10.2. International co-operation

10.2.1. Law and practice

Co-operation with supranational competition authorities

This Peer Review report was drafted from June to September 2025, a time of major change for the supranational competition policy and enforcement landscape in Africa.

Kenya is a member of three trade blocs that have established or are working to establish supranational competition frameworks. These are the:

- Common Market for Eastern and Southern Africa (COMESA), which has established the COMESA Competition Commission (CCC). The CCC has been active since 2013.

- East African Community (EAC), which is currently in the process of establishing an operational EAC Competition Authority (EACCA). The first area of enforcement for the EACCA (merger control) is scheduled to commence in November 2025.
- African Continental Free Trade Area (AfCFTA), which includes a plan to establish the AfCFTA Competition Authority in the future.

The CAK has entered into MoUs with the CCC (signed in March 2022) and the EACCA (signed in May 2023).

Chapter 5 of this Peer Review provides a detailed description and analysis of the CAK's international co-operation in merger control. This is the one of enforcement co-operation area where the CAK is active (currently only with the CCC as the EACCA framework is not yet operational). Chapter 5 also highlights the longer-term challenges Kenya and the CAK face with potentially three overlapping supranational frameworks as well as its domestic framework.

In addition to mergers, the CAK has also co-operated with the CCC in other activities, including:

- The CAK conducted the Kenyan data collection, providing technical expertise, and disseminating findings domestically in a CCC market study into the fertiliser and vegetable oil sectors.
- The CCC facilitated the CAK's fact finding across COMESA member states as part of the CAK's market inquiry into the regional shipping, trucking and haulage sector.
- The CAK conducted a compliance check on behalf of the CCC as part of an investigation into anticompetitive practices in the alcoholic beverages sector.
- The CAK facilitated requests for information that were issued to Kenyan healthcare firms as part of a CCC market study.
- The CAK provided technical expertise when the CCC was reviewing an exemption application in the aviation sector.
- The CAK conducted a compliance check in Kenya with the CCC related to a merger in the drinks market, visiting bottling plants to ensure compliance with the conditions of the merger.

As one of the more experienced competition authorities in Africa, the CAK has also hosted delegations of staff from the COMESA region to assist in capacity building efforts in the region.

The CAK expects to begin formal co-operation on merger clearance with the EACCA once this supranational authority commences operations in November 2025.

Co-operation beyond supranational frameworks

To date, the CAK has not directly engaged in international enforcement co-operation beyond its supranational framework with the CCC.

However, the CAK entered into an MoU with the Competition Commission of South Africa in October 2016. Since then, the CAK and South African authority have co-operated on capacity building and best practices dissemination activities.

The CAK also signed an MoU with the Japan Fair Trade Commission in June 2016 which includes provisions on the exchange of information and facilitating training programmes. Since then there has some been capacity building activities for CAK technical staff.

Co-operation through participation in international fora

Kenya has been an invitee of the OECD Competition Committee since 2014 and has consistently attended the OECD Global Forum on Competition for the past five years. The CAK has submitted eight contributions to Global Forum on Competition sessions in that time. In the June 2025 Competition Committee session

on Mobile Payment Services, the CAK gave an extended presentation to delegates about Kenya's experiences in this sector.

Kenya is also a founding member and sits on the steering committee of the African Competition Forum (ACF). Founded in 2011, the ACF is an informal network of African national and multinational competition authorities. Its principal objective is to promote the adoption of competition principles in the implementation of national and regional economic policies of African countries.

Staff within the CAK have acted as contributors to a number of the ACF's cross-country research studies into sectors. To date, these have covered:

- Airlines (African Competition Forum, 2021[4])
- International roaming charges (African Competition Forum, 2023[5])
- Generic pharmaceuticals (African Competition Forum, 2023[6])
- Agriculture and agro-processing (African Competition Forum, 2024[7])
- Construction markets (African Competition Forum, 2020[8])

Kenya is also a member of the International Competition Network and participates in its various working groups. The CAK currently co-chairs the ICN Advocacy Working Group and is a member of the steering group for the ICN special project on Food and Agriculture Markets. In February 2024, the CAK hosted an ICN Advocacy workshop, with over 200 participants from 46 jurisdictions attending.

Kenya also participates in the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy. The CAK has attended all three sessions in the past five years and submitted a total of 10 contributions.

10.2.2. Analysis on international co-operation

International co-operation with foreign competition authorities is also important as businesses and supply chains cross increasingly national borders. The significant benefits of international co-operation are detailed in the Recommendation Concerning International Co-operation on Competition Investigations and Proceedings [OECD/LEGAL/0408].

Chapter 5 of this Peer Review provides specific observations about the CAK's merger control practices. This includes strengthening co-operation in certain aspects of cross-border merger control that involves one of the supranational competition authorities and ensuring that the addition of new supranational frameworks does not create legal uncertainty and cost burdens on stakeholders.

More broadly, stakeholders were complimentary of the CAK's international co-operation practices. They were viewed as diligent and willing to assist where they can, particularly for newer and smaller competition authorities in the region.

Despite the concerns raised by stakeholders about the CAK that are detailed throughout this Peer Review on a wide range of aspects, many of the international stakeholders consulted during OECD fact-finding insisted that the CAK must be assessed against the counterfactual. The CAK remains one of the more experienced, most staffed and highest funded competition authorities on the continent. Accordingly, while there may be many challenges the CAK faces and there are many things it could improve, for the region it still is seen as a regional leader that other authorities seek to learn from.

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Notes

[1] Kenya Information and Communications Act (2012), p.p. VIC.

[2] Energy Act (2019), ss 10(m), 10(bb).

[3] As underlined by the Competition Tribunal in Telcom Kenya Limited & another v Competition Authority of Kenya, Case No. CT/005/2020, decision of 24 April 2020.

[4] Central Bank of Kenya (Amendment) Act (2021).

[5] OECD Global Forum 2022, Interactions Between Competition Authorities and Sector Regulators – Contribution from Kenya, https://one.oecd.org/document/DAF/COMP/GF/WD(2022)17/en/pdf.

[6] Constitution of Kenya, s 22.

[7] Competition Act, ss 21(9), 22(6), 24(3).

[8] Competition Act, ss 87, 88.

[9] Competition Act, ss 54, 89.

[10] See for example (Transparency International, 2024[9]) and (Kenyan Ethics and Anti-Corruption Commission, 2015[10]).

11 Recommendations

This section sets forth recommendations for Kenya, prepared in collaboration between the OECD Secretariat, the three Lead Examiners, and delegates of the OECD Global Forum on Competition. The recommendations reflect the discussion during the peer review examination that took place on 2 December 2025.

11.1. Priority recommendations

11.1.1. Improving enforcement practices

- Ensure that fines serve as a deterrent by being proportionate to both the gravity of the infringement and the turnover of the fined undertakings. The Consolidated Administrative Remedies and Settlement Guidelines ("fining guidelines") should be adjusted to ensure that the fine calculations better reflect aggravating factors.
- Ensure that funding provided to the CAK by the Government of Kenya is ringfenced and cannot be adjusted according to any fines or fee revenue raised by the CAK.
- Establish clear rules for the settlement procedure, as well as the payment of a financial penalty. In addition, clarify settlement discounts, for instance by setting maximum reduction percentages and other guiding criteria. Require that liability be admitted in most enforcement cases. Avoid granting excessive discounts.
- Increase the use of dawn raids, leveraging the recently established forensics laboratory.
- Empower the CAK to impose sanctions for non-compliance with requests for information, as well as failure to pay fines. The CAK should not be reliant on the Office of the Director of Public Prosecutions to bring injunctive action.

11.1.2. Institutional framework

- Implement a transparent process for selecting all members of the Board of Directors and the Director-General, introducing clear eligibility criteria to guarantee they have competition law or economics expertise to the extent possible.
- Introduce rules on staggered appointments of Board members, ensuring partial renewals of the Board of Directors.

11.1.3. Improving transparency and CAK performance

- Ensure the CAK has adequate resources (both financial and staffing) for its core competition enforcement functions. CAK resources should at least be at the level of comparable jurisdictions.
- Ensure that there are dedicated resources and operational structures for competition enforcement, separate from its consumer protection functions.
- Publish, including on the CAK's official website, public versions of full decisions in a timely manner, subject to the protection of confidential information. Decisions should be well-reasoned and subject to sound economic analysis. This includes all decisions relating to anticompetitive conduct, market studies and merger reviews.

11.1.4. Co-operation

- Significantly increase the amount of co-operation between the CAK and the PPRA. The authorities should develop a work plan to significantly enhance co-operation on referring alleged bid rigging to each other and identify opportunities to collaborate on enhanced detection techniques (such as screening tools or audits of past tender procedures to identify high-risk markets).

11.2. Recommendations for further improvement

11.2.1. Improving enforcement practices

- Implement effective proactive cartel detection tools, such as economic filters and industry monitoring.
- Enable the CAK to prioritise enforcement actions based on transparent criteria, including the discretion not to pursue certain cases or to close complaints and investigations based on its priorities and/or available resources.
- Ensure that any reforms to the Competition Act to address conduct by digital platforms are limited to enhancing the CAK's abuse of dominance enforcement activities. Adding an additional *ex ante* regulatory mandate without additional resourcing poses a risk to improving competition enforcement in the country. Any broadening of CAK's mandate should be accompanied by a corresponding expansion of its staff and other resources.
- Assess whether the CAK is the right body to perform reviewing mergers on public interest grounds and consider separating this responsibility from the competition review. This could be done by conducting an *ex-post* analysis of remedies from a competition perspective. If the CAK remains responsible for considering public interest factors, public interest should be considered narrowly, and the CAK should provide clear and detailed guidelines on how it interprets public interest.
- Prioritise structural remedies over behavioural ones.
- Strengthen confidentiality of whistleblower applications, including through secure platforms for encrypted submissions, and increase financial rewards to encourage applications.
- Review merger notification thresholds and filing fees periodically.
- Publicise the receipt of merger notifications to allow third parties with a legitimate interest in the transaction under review to have an opportunity to express their views during the review process.
- Monitor the market to detect potential violations of merger review rules and impose deterrent fines where appropriate.
- Promote private enforcement as part of advocacy activities with private sector stakeholders (namely legal practitioners and industry associations).

11.2.2. Institutional framework

- Develop a strategy for enhancing the economic analysis in CAK investigations and decisions. This could include the creation of a dedicated Chief Economist role and/or an economic unit to support enforcement and advocacy teams across the CAK.
- Consider further streamlining and clarifying merger notification requirements across all of Kenya's regional agreements to promote consistency and prevent regulatory overlap or confusion.
- Amend the Competition Act to improve the Tribunal's capacity to meaningfully review CAK decisions. This could be done by reducing the requisite number of Tribunal members but requiring those appointed to have relevant expertise in competition law or economics.
- Appoint Tribunal members and the chairperson for a full five-year period as they are eligible to sit under the Competition Act, to enable them to develop greater experience adjudicating appeal decisions.
- Provide adequate funding and opportunities for training members of the Tribunal and judges of the High Court Commercial Division. This could include through the COMESA judges training programme.

- Provide adequate funding and staffing resources to ensure that the secretariat of the Tribunal is able to provide research assistance in relation to competition law and economics.
- Consider developing a structured career framework for competition officials, with transparent progression criteria grounded in merit, accomplishments, and professional experience
- Amend the legal framework for interim measures to specify who is empowered to issue them and the procedures for applying them.
- Consider introducing a two-phase merger review regime.

11.2.3. Co-operation

- Ensure the development and implementation of supranational competition frameworks avoid duplication of functions and do not unnecessarily increase the burden on domestic authorities and merging parties.
- Ensure continued co-operation between the CAK and sector regulators, particularly the Communications Authority of Kenya, in merger review and develop a protocol for cross-referrals for reporting alleged anticompetitive conduct.
- Strengthen co-operation with the COMESA Competition and Consumer Commission, particularly in relation to the competitive assessment in merger review.

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