

Template pursuant to Section 3 (a) of the  
ICN Framework on Competition Agency Procedures

[COMPETITION AUTHORITY OF KENYA, KENYA]

The following template is submitted by **[the Competition Authority of Kenya, Kenya]** pursuant to Section 3(a) of the ICN Framework on Competition Agency Procedures ("CAP").

**I. Introduction**

*Please add brief presentation/link to agency website.*

The website of the Competition Authority of Kenya is: <http://www.cak.go.ke>

The Competition Authority of Kenya (CAK) is Kenya's sole competition and consumer regulating Authority. The Authority is established under section 7 of the Competition Act, No. 12 of 2010 ("the Act") and its functions are provided for under section 9 of this Act. Its mandate is to enforce the Act with the objective of enhancing the welfare of the people of Kenya by promoting and protecting effective competition in markets and preventing misleading market conduct throughout Kenya.

The CAK does this through:

- Conducting of market inquiries to assess whether there exist impediments to competition or consumer welfare.
- Investigating restrictive trade practices, abuse of dominance and abuse of buyer power cases, evaluation of exemption applications and ensuring compliance with the Orders issued under the Act.
- Analysis of Merger applications and assessing whether the proposed mergers have anti-competitive effects in order to make an informed decision on whether to allow or reject the Merger unconditionally or with conditions.
- Investigating Consumer Complaints relating to false or misleading representations, unconscionable conduct, supply of unsafe, defective and unsuitable goods; and ensuring compliance with product information standards.
- The Authority also imposes pecuniary penalties against market players found to be in contravention of the Act.
- The Authority is also empowered to advise the Government on matters related to competition and consumer protection.

**II. Laws, Regulations, and Policies relevant for the implementation of the CAP**

*For each CAP Principle below, please explain how your competition law investigation and enforcement procedures meet the Principle. Please highlight important features relevant for the implementation of the CAP and explain limitations, if applicable. Feel free to include links or other references to related materials such as relevant legislation, implementing rules and regulations, and guidelines where helpful and appropriate.*

*Please update your Template reflecting significant changes as they relate to the CAP, as needed.*

**The CAK is guided by the following key laws and regulations, the:**

- Constitution of Kenya, 2010;**
- Competition Act, No 12 of 2010;**
- The Competition (General) Rules, 2019; and**
- Fair Administrative Action Act, 2015.**

**i) The Constitution of Kenya, 2010**

**The Constitution of Kenya, 2010 is the Supreme Law of Kenya. In Article 2(5) and (6) it provides for the domestication of general rules of international law and treaties and conventions ratified by Kenya. It also contains the Bill of Rights in Chapter Four (Articles 19 to 51) by incorporating international human rights and freedoms including socio-economic rights.**

**The Constitution also provides the right to Fair Hearing under Article 50, where every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before an appropriate independent and impartial tribunal or body.**

**The CAK being a State Corporation is bound by Article 10 (national values and principles of governance) and article 232 (values and principles of public service) of the Constitution which essentially provide that when the Authority in applying any law or making a decision, it is to do so in a manner that upholds; rule of law, human dignity, equity, social justice, equality, non-discrimination, good governance among others.**

**ii) The Competition Act No. 12 of 2010**

**The Act contains elaborate provisions on the procedures for investigation, fair trial and appeal mechanisms. In particular, the Act provides for:**

- Powers of investigation including the power to conduct a search and seizure, to summon for information or documentation and to collect evidence;**
- The requirement to issue a Notice of investigation to relevant persons including the accused. Further, upon conclusion of investigations, to communicate the preliminary findings and to invite the accused to defend themselves through written or oral submissions.**
- The requirement to communicate the preliminary findings through a Notice of Proposed Decision laying out the facts and evidence resulting from the investigation.**

-Parties are given an opportunity to make submissions through legal representatives or in person and such submissions are taken into consideration before a final decision is made.

-parties who wish to enter into a Settlement with the CAK are provided with an opportunity and if the negotiations are successful, upon approval of the Board of the Authority an agreement is signed.

-If a decision is made there is a right of appeal to the Competition Tribunal with a further right of appeal to the High Court.

The relevant sections of the Act providing for the above are outlined in sections 31 to 40.

There are guidelines which the CAK has developed to support some of the above processes;

-For elaborating on offences relating to restrictive trade practice and, abuse of dominance; the Consolidated Guidelines on Restrictive Trade Practices (\*These are currently under review\*).

-For elaborating on offences relating to buyer power; The Buyer Power Guidelines.

-For conducting searches; the Search and Seizure Guidelines.

-For determining penalties; The Fining and Settlement Guidelines.

-For consumer infringements; The Consumer Protection Guidelines.

### **iii) The Competition (General) Rules, 2019**

This is a document which provides for the administrative processes relating to the mandate of the CAK under the Act. It contains the investigation procedures, the factors relating to fining and settlement among others.

### **iv) The Fair Administrative Action Act, 2015**

Article 47 of the Constitution of Kenya, 2010 provides that every person has a right to administrative action that is expeditious, lawful, reasonable and procedurally fair. This article of the Constitution gave birth to the Fair Administrative Action Act, 2015.

This Act provides for need for written reasons where a right or fundamental freedom is likely to be adversely affected by administrative action. It also provides for review of an administrative action by an independent and impartial Tribunal.

Hence any investigations to be conducted by the CAK would observe the requirements of the Constitution of Kenya 2010, the Competition Act No 12 of 2010 and the Fair Administrative Action Act.

**Links:**

**-Constitution of Kenya, 2010**

<http://kenyalaw.org/kl/>

**-Competition Act, No. 12 of 2010 (as amended in 2019)**

<http://www.cak.go.ke/sites/default/files/Competition Act No. 12 2010Amended as at 2019.pdf>

**-Fair Administrative Action Act, 2015**

<http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/FairAdministrativeActionAct2015.pdf>

**-Competition (General) Rules, 2019**

[http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2019/LN176\\_2019.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2019/LN176_2019.pdf)

**-Consolidated Guidelines on restrictive trade practices**

<http://www.cak.go.ke/mandate/enforcement-and-compliance/forms>

**-Search and Seizure Guidelines**

<http://www.cak.go.ke/mandate/enforcement-and-compliance/forms>

**-Fining and Settlement Guidelines**

<http://www.cak.go.ke/mandate/enforcement-and-compliance/forms>

**-Buyer Power Guidelines**

<http://www.cak.go.ke/mandate/buyer-power/rules>

**-Consumer Protection Guidelines**

<http://www.cak.go.ke/mandate/Consumer-Protection/Forms-Guidelines>

**b) Non-Discrimination**

*Each Participant will ensure that its investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.*

**i) The Constitution of Kenya, 2010**

**In Article 27 it provides for the right to Equality and freedom from Discrimination which essentially means that every person is equal before the law and has the right to equal protection and equal benefit of the law.**

**The CAK being a State Corporation is bound by Article 10 (national values and principles of governance) and 232 of the Constitution which essentially provide that when the Authority in applying any law or making a decision, it is to do so in a manner**

that upholds; rule of law, human dignity, equity, social justice, equality, non-discrimination, good governance among others.

**ii) The Competition Act No. 12 of 2010**

As elaborated in (II) above, the Competition Act contains elaborate provisions on the procedures for investigation, fair trial and appeal mechanisms. The Final decision does not discriminate on State origin nor any other ground, the decision is as a result of the legal facts and effects of the alleged conduct on the Competition.

**iii) The Fair Administrative Action Act, 2015**

As elaborated in (II) above, that every person has a right to administrative action that is expeditious, lawful, reasonable and procedurally fair.

**c) Transparency and Predictability**

- i. Each Participant will ensure that Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- ii. Each Participant with the authority to adopt Procedural Rules will have in place such rules applicable to Investigations and Enforcement Proceedings in its jurisdiction.*
- iii. Each Participant will ensure that Procedural Rules that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- iv. Each Participant will follow applicable Procedural Rules in conducting Investigations and in participating in Enforcement Proceedings in its jurisdiction.*
- v. Each Participant is encouraged to have publicly available guidance or other statements, clarifying or explaining its Investigations and Enforcement Proceedings, as appropriate.*

**The CAK undertakes its mandate in a transparent and predictable manner as the procedures relating to its mandate are expressly provided for in the Act and the Rules developed under the Act. The various Guidelines the Authority has developed also ensure that it undertakes its mandate in a manner that is predictable, consistent, accountable and transparent**

**The CAK indeed has its Law and Guidelines publicized on its website. The CAK also has availed all its annual reports on its website.**

**Furthermore, the Authority holds roadshows, seminars and training of different stakeholders within the various markets to inform them of the role of the Authority, its mandate. During these forums the Authority provides brochures and physical materials detailing its Enforcement mandate**

**The Authority has equally provided all information on its official website in relation to its mandate: <http://www.cak.go.ke>**

#### **d) Investigative Process**

- i. Participants will inform any Person that is the subject of an Investigation as soon as practical and legally permissible of that Investigation, according to the status and specific needs (e.g., forensic considerations) of the Investigation. This information will include the legal basis for the Investigation and the conduct or action under Investigation.*
- ii. Participants will provide any Person that has been informed that it is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.*
- iii. Participants will focus investigative requests on information that they deem may be relevant to the competition issues under review as part of the Investigation. Participants will provide reasonable time for Persons to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.*

**The Authority is guided by the Competition Act which provides for the process of investigation under section 31.**

**If the CAK, upon receiving a complaint or on its own motion (suo moto), decides to conduct an investigation, the Authority will issue a Notice of Investigation to the accused informing the undertaking that they are the subject of an investigation and the contents of the complaint or violation.**

**The CAK also gives the accused undertaking an opportunity to respond to its Notices of Investigation and Proposed Decision and to submit relevant documentation within reasonable time. If extensions are sought by parties to respond, the CAK usually grants the extension to respond within a further reasonable period.**

**The Authority, can also convene oral hearings if the same is requested for by an accused party.**

**The above are statutory requirements which ensure that the Authority complies with the rules of natural justice when undertaking its mandate.**

#### **e) Timing of Investigations and Enforcement Proceedings**

*Each Participant will endeavor to conclude its Investigations and aspects of Enforcement Proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case.*

**The Act does not provide for specific timelines with regards to duration of investigations or enforcement proceedings. However, it is bound by the Constitution to execute its mandate efficiently. The CAK's internal procedures provide for timelines within which it is to dispense its duties in an efficient and effective manner.**

**Through the ISO procedures, the Authority has performance timelines for investigation, response to undertakings under investigations and the enforcement proceedings.**

**f) Confidentiality**

- i. Each Participant will have publicly available rules, policies, or guidance regarding the identification and treatment of confidential information.*
- ii. Each Participant will protect from unlawful disclosure all confidential information obtained or used by the Participant during Investigations and Enforcement Proceedings.*
- iii. Each Participant will take into consideration both the interests of the Persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an Enforcement Proceeding.*

**Confidentiality is a key principle within the Authority.**

**Internally, the staff of the CAK are required to adhere to a Code of Conduct so as to protect sensitive information of the matters the organization handles.**

**The Competition Act, No. 12 of 2010 under section 20 provides that a party subject to proceedings has a right to seek confidentiality, in regards to the material supplied to the CAK and for the CAK to communicate its decision on whether it has approved the request.**

**It is important to note that the CAK grants confidentiality to material information which it deems commercially sensitive and if disclosed would have adverse effects against the party in question.**

**g) Conflicts of Interest**

*Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.*

**The CAK has a Code of Conduct to ensure that its officers and decision-makers are objective and impartial and do not have material personal, financial or political conflicts of interest. Where individuals do have such conflicts of interest, they must be disclosed in the first instance through an internal Conflict of Interest Register. The Audit Department of the CAK monitors this register and reports to another public entity in Kenya vested with the mandate of overseeing compliance in such matters (The Ethics and Anti-Corruption Commission).**

**In addition, the CAK is bound by the Constitution, the Competition Act and relevant laws in Kenya which provide for adherence of good governance and the staff of the Authority as public officers have an obligation to ensure they declare their conflict of interest. The Authority additionally falls under the supervisory purview of the Commission on Administrative Justice (Ombudsman) which is a Constitutional body charged with reviewing cases of maladministration by Public entities.**

#### **h) Notice and Opportunity to Defend**

- i. Each Participant will provide Persons subject to an Enforcement Proceeding timely notice of the alleged violations or claims against them, if not otherwise notified by another governmental entity. To allow for the preparation of an adequate defense, parties should be informed of facts and relevant legal and economic reasoning relied upon by the Participant to support such allegations or claims.*
- ii. Each Participant will provide Persons subject to a contested Enforcement Proceeding with reasonable and timely access to the information related to the matter in the Participant's possession that is necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions.*
- iii. Each Participant will provide Persons subject to an Administrative Proceeding with reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence.*

**The CAK is guided by section 34 and 35 of Competition Act No 12 of 2010 which allows an accused to defend itself through written representations with an additional right to make oral representations.**

**The CAK is bound by the Constitution of Kenya, 2010 which also provides for the right to Fair Hearing under Article 50, where every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before an appropriate independent and impartial tribunal or body.**

**The Fair Administrative Action Act, 2015 of Kenya, by which the CAK is bound, provides for the right to administrative action that is expeditious, lawful, reasonable and procedurally fair. This article of the Constitution gave birth to the Fair Administrative Action Act, 2015.**

**This Act provides for need for written reasons where a right or fundamental freedom is likely to be adversely affected by administrative action. It also provides for review of an administrative action by an independent and impartial Tribunal.**

#### **i) Representation by Counsel and Privilege**

- i. No Participant will deny, without due cause, the request of a Person to be represented by qualified legal counsel of its choosing.*
- ii. Each Participant will provide a Person a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law. Notwithstanding the foregoing, Persons may be required to provide direct evidence.*
- iii. Each Participant will recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or*



rendering of legal advice. Each Participant is encouraged to have rules, policies, or guidelines on the treatment of privileged information.

#### **Constitution 2010**

The Constitution of Kenya under Article 50 on Fair Hearing, provides that Fair Hearing includes the right to choose, and be represented by, an advocate, and to be informed of this right promptly. Therefore, an accused undertaking is guaranteed of its right to legal representation by an advocate of its choosing.

#### **Competition Act**

The Act under section 35 of the Ac provides that an accused may request for the presence of an advocate during an oral hearing.

### **j) Decisions in Writing**

- i. *Each Participant in charge of issuing decisions or orders will issue in writing its final decisions or orders in which it finds a violation of, or imposes a prohibition, remedy, or sanction under applicable Competition Laws. Such final decisions or orders will set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions. Each Participant will ensure that all final decisions are publicly available, subject to confidentiality rules and applicable legal exceptions.*
- ii. *Each Participant will ensure that all commitments it accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, each Participant will (i) make public the commitments it accepts, and (1) describe the basis for the competition concerns or (2) reference public materials in which those concerns are expressed, or (ii) provide a summary explanation of the commitments and the reasons for them.*

#### **Interim Orders**

In accordance to section 37 of the Competition Act, if the CAK believes on reasonable ground that an undertaking is engaging in prohibited conduct, and that it is necessary for the CAK to act as a matter of urgency for the purpose of (a) preventing serious, irreparable damage or (b) protecting the public interest, the CAK may, by order in writing, direct the undertaking to stop and desist from engaging in such conduct until the ongoing investigation is concluded.

#### **Final Decision**

In accordance to section 36 of the Act, upon completion of investigation and consideration of submissions the CAK Authority makes a decision in writing and communicated the same to the accused.

The Fair Administrative Action Act, 2015 of Kenya, by which the CAK is bound, provides for need for written reasons where a right or fundamental freedom is likely to be adversely affected by administrative action. It also provides for review of an administrative action by an independent and impartial Tribunal.

#### **k) Independent Review**

*No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).*

##### **Appeal to the Competition Tribunal**

**Under the Competition Act no 12 of 2010, an undertaking that is aggrieved by the decision of the Authority can make an appeal in writing to the Tribunal. This appeal can only be made within thirty (30) days upon receiving the decision/judgement from the Authority.**

##### **Appeal to the High Court**

**If an undertaking is yet still aggrieved by the decision of the Competition Tribunal, then such undertaking can make a final appeal to the High Court within 30 days upon receiving the decision of the Tribunal.**