



International  
Competition  
Network

ANTI-CARTEL ENFORCEMENT  
TEMPLATE

CARTELS WORKING GROUP  
Subgroup 2: Enforcement Techniques

Competition Authority of Kenya  
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## ICN ANTI-CARTEL ENFORCEMENT TEMPLATE

### IMPORTANT NOTES:

This template is intended to provide information for the ICN member competition agencies about each other's legislation concerning anti-competitive practices, particularly hardcore cartels. At the same time the template supplies information for businesses participating in cartel activities about the rules applicable to them; moreover, it enables businesses and individuals which suffer from cartel activity to get information about the possibilities of enforcement of their rights in private law in one or more jurisdictions.

Reading the template is not a substitute for consulting the referenced statutes and regulations. This template should be a starting point only.

[Please include, where applicable, any references to relevant statutory provisions, regulations or policies as well as references to publicly accessible sources, if any.]<sup>1</sup>

### 1. Information on the law relating to cartels

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| <b>A. Law(s) covering cartels:</b><br>[availability (homepage address) and indication of the languages in which these materials are available] | Competition Act No. 12 of 2010<br><a href="https://cak.go.ke/sites/default/files/Competition-Act-No-1-%20of%202010-Amended-as-at-2019.pdf">https://cak.go.ke/sites/default/files/Competition-Act-No-1-%20of%202010-Amended-as-at-2019.pdf</a><br><br>language: English                        |
| <b>B. Implementing regulation(s) (if any):</b><br>[name and reference number, availability (homepage address) and                              | Competition (General) Regulations, 2019<br><a href="https://cak.go.ke/sites/default/files/2020-03/The%20Competition%20%28General%29%20Rules%2C%202019.pdf">https://cak.go.ke/sites/default/files/2020-03/The%20Competition%20%28General%29%20Rules%2C%202019.pdf</a><br><br>language: English |

<sup>1</sup> Editor's note: all the comments in [square brackets] are intended to assist the agency when answering this template, but will be removed once the completed template is made public.

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| <p>indication of the languages in which these materials are available]</p>   |  |
| <p><b>C. Interpretative guideline(s) (if any): [name and reference number, availability (homepage address) and indication of the languages in which these materials are available]</b></p> | <p>Consolidated Guidelines on Restrictive Trade Practices<br/> <a href="https://cak.go.ke/sites/default/files/Consolidated%20Guidelines%20on%20Restrictive%20Trade%20Practices%20.pdf">https://cak.go.ke/sites/default/files/Consolidated%20Guidelines%20on%20Restrictive%20Trade%20Practices%20.pdf</a><br/> Language: English</p> <p>Competition Administrative Penalties and Settlement Guidelines<br/> <a href="https://cak.go.ke/sites/default/files/Competition%20Administrative%20Penalties%20and%20Settlement%20Guidelines.pdf">https://cak.go.ke/sites/default/files/Competition%20Administrative%20Penalties%20and%20Settlement%20Guidelines.pdf</a><br/> Language: English</p> <p>Leniency Programme Guidelines<br/> <a href="https://cak.go.ke/sites/default/files/guidelines/enforcement-compliance/Leniency%20Programme%20Guidelines.pdf">https://cak.go.ke/sites/default/files/guidelines/enforcement-compliance/Leniency%20Programme%20Guidelines.pdf</a><br/> Language: English</p> |
| <p><b>D. Other relevant materials (if any): [availability (homepage address) and indication of the languages in which these materials are available]</b></p>                               | <p>External Guidelines on Informant Reward Scheme Policy<br/> <a href="https://cak.go.ke/sites/default/files/External%20Guidelines%20on%20the%20Informant%20Reward%20Scheme%20Policy%20(2).pdf">https://cak.go.ke/sites/default/files/External%20Guidelines%20on%20the%20Informant%20Reward%20Scheme%20Policy%20(2).pdf</a><br/> <br/> Language : English</p>  |

## 2. Scope and nature of prohibition on cartels

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| <p><b>A. Does your law or case law define the term “cartel”?</b><br/> <b>[Please quote.]</b></p> <p><b>If not, please indicate the term you use instead. [Please quote.]</b></p> | <p>A. No</p> <p>Parties in a horizontal relationship, being undertakings trading in competition</p>  |
| <p><b>B. Does your legislation or case law distinguish between very serious cartel behaviour (“hardcore cartels” – e.g.: price fixing, market sharing,</b></p>                   | <p>The Consolidated Guidelines on Restrictive Trade Practices has made a distinction of the hardcore cartels. It explains them as agreements that are by their very nature injurious to the proper functioning of competition and have no redeeming value whatsoever. Hardcore restrictions can be perpetrated through</p> |

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| <p><b>bid rigging or production or sales quotas<sup>2</sup>) and other types of “cartels”? [Please describe how this differentiation is made and identify the most egregious types of conduct.]</b></p>                                  | <p>agreements by undertakings including trade associations.</p> <p><u>Assessment of Hard-core Restrictions</u></p> <p>i) The Authority considers that horizontal collusive agreements are subject to “object” assessment, that is, strict or per se scrutiny for which no defences can be asserted.</p> <p>ii) The Authority will only consider the content and nature of the agreement and not the effect of the agreement.</p> <p>iii) The Authority considers that horizontal collusive agreements (i.e., among competitors) are by their very nature injurious to the proper functioning of competition and can have no redeeming value whatsoever.</p> <p>iv) These agreements include price-fixing cartels, bid-rigging, output restriction and market division agreements.</p> |
| <p><b>C. Scope of the prohibition of hardcore cartels: [including any exceptions, exclusions and defences e.g. for particular industries or sectors. Please also describe any other limitations to the ban on hardcore cartels.]</b></p> | <p>The Authority considers that horizontal collusive agreements are subject to “object” assessment, that is, strict or per se scrutiny for which no defences can be asserted.</p>   |
| <p><b>D. Is participation in a hardcore cartel illegal <i>per se</i><sup>3</sup>? [If the situation differs for civil, administrative and criminal liability, please clarify this.]</b></p>  | <p>Participation in a hardcore cartel is illegal <i>per se</i>.</p>   |
| <p><b>E. Is participation in a hardcore cartel a civil or administrative or criminal offence, or a combination of these?</b></p>   | <p>The Competition Act, 2010 provides for participation in a hardcore cartel as both a criminal and administrative offence.</p>   |

### 3. Investigating institution(s)

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| <p><b>A. Name of the agency, which investigates cartels: [if there is more than one agency, please describe the allocation of responsibilities]</b></p> | <p>Competition Authority of Kenya –investigates undertakings involved in cartel conduct which may include price fixing, allocation of markets, output restrictions and bid rigging schemes.</p> <p>Public procurement Regulatory Authority investigates cartels involved in public procurements (tenders)</p> |
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<sup>2</sup> In some jurisdictions these types of cartels – and possibly some others – are regarded as particularly serious violations. These types of cartels are generally referred to as “hardcore cartels”. Hereinafter this terminology is used.

<sup>3</sup> For the purposes of this template the notion of ‘per se’ covers both ‘per se’ and ‘by object’, as these terms are synonyms used in different jurisdictions.

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| <b>B. Contact details of the agency: [address, telephone and fax including the country code, email, website address and languages available on the website]</b> | Competition Authority of Kenya<br>P.O Box 36265-00200, Kenya<br>Tel: +254-20-277900/ +254-20-2628233<br>Website:- <a href="http://www.cak.go.ke">www.cak.go.ke</a><br>Language: English   |
| <b>C. Information point for potential complainants:</b>   | <a href="mailto:info@cak.go.ke">info@cak.go.ke</a><br><a href="mailto:complaints@cak.go.ke">complaints@cak.go.ke</a>  |
| <b>D. Contact point where complaints can be lodged:</b>   | Director General, Competition Authority of Kenya  |
| <b>E. Are there other authorities which may assist the investigating agency? If yes, please name the authorities and the type of assistance they provide.</b>   | Directorate of Criminal Investigations (DCI) where the Authority pursues criminal investigations - assist in certain aspects of investigations.<br>Office of the Director of Public Prosecutions – assist in making search and seizure applications |

#### 4. Decision-making institution(s)<sup>4</sup> [to be filled in only if this is different from the investigating agency]

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| <b>A. Name of the agency making decisions in cartel cases: [if there is more than one agency, please describe the allocation of responsibilities.]</b>          |  |
| <b>B. Contact details of the agency: [address, telephone and fax including the country code, email, website address and languages available on the website]</b> |  |
| <b>C. Contact point for questions and consultations:</b>  |  |
| <b>D. Describe the role of the investigating agency in the process leading to the sanctioning of the cartel conduct.</b>  |  |
| <b>E. What is the role of the</b>   |  |

<sup>4</sup> Meaning: institution taking a decision on the merits of the case (e.g. prohibition decision, imposition of fine, etc.)

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| investigating agency if cartel cases belong under criminal proceedings? |  |
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## 5. Handling complaints and initiation of proceedings

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| <b>A. Basis for initiating investigations in cartel cases: [complaint, ex officio, leniency application, notification, etc.]</b>  | Complaints, suo moto investigations, leniency application, orders from the courts.   |
| <b>B. Are complaints required to be made in a specific form (e.g. by phone, in writing, on a form, etc.)? [If there is a requirement to complete a specific form, please, indicate its location (website address).]</b> | Yes, the complaints form<br><a href="https://cak.go.ke/sites/default/files/RTP%20Complaints%20Form.pdf">https://cak.go.ke/sites/default/files/RTP%20Complaints%20Form.pdf</a>  |
| <b>C. Legal requirements for lodging a complaint against a cartel: [e.g. is legitimate interest required, or is standing to make a complaint limited to certain categories of complainant?]</b>                         | None   |
| <b>D. Is the investigating agency obliged to take action on each complaint that it receives or does it have discretion in this respect? [Please elaborate.]</b>   | No. The investigating agency is obliged to review the complaint and either take action based on findings that there is a probable cartel case or close the matter if there was no such findings or refer the matter to another agency if the complaint does not fall within its mandate. |
| <b>E. If the agency intends not to pursue a complaint, is it required to adopt a decision addressed to the complainant explaining its reasons?</b>  | yes  |
| <b>F. Is there a time limit counted from the date of receipt of a complaint by the competition agency for taking the decision on whether to investigate or</b>  | The Competition Authority of Kenya's service charter provides for review of complaints and finalization of matters within 180 days upon receipt of all requested information and cooperation of the parties involved.  |

reject it?

## 6. Leniency policy<sup>5</sup>

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| <b>A. What is the official name of your leniency policy (if any)? [Please indicate its public availability.]</b>  | Leniency Programme Guidelines<br><a href="https://cak.go.ke/sites/default/files/guidelines/enforcement-compliance/Leniency%20Programme%20Guidelines.pdf">https://cak.go.ke/sites/default/files/guidelines/enforcement-compliance/Leniency%20Programme%20Guidelines.pdf</a>   |
| <b>B. Does your jurisdiction offer full leniency as well as partial leniency (i.e. reduction in the sanction / fine), depending on the case?</b>  | Yes it has both full leniency and partial leniency   |
| <b>C. Who is eligible for full leniency [only for the first one to come forward or for more participants in the cartel]?</b>  | The first party to come forward with relevant and credible information.  |
| <b>D. Is eligibility for leniency dependent on the enforcing agency having either no knowledge of the cartel or insufficient knowledge of the cartel to initiate an investigation?</b><br><br><b>In this context, is the date (the moment) at which participants in the cartel come forward with information (before or after the opening of an investigation) of any relevance for the outcome of leniency applications?</b> | In both scenarios (no knowledge or insufficient knowledge) participants in the cartel will be eligible for leniency<br><br>Yes, the order of applications will be relevant to the extent that the first applicant takes precedence provided that the information submitted is relevant to the investigation.                 |
| <b>E. Who can be a beneficiary of the leniency program (individual / businesses)?</b>   | Companies, Partnerships, Trust and members of a Trade Association  |
| <b>F. What are the conditions of availability of full leniency: [e.g. provide decisive evidence, maintain cooperation throughout, not to be the ringleader, cease the infringement, restitution,</b>  | <ol style="list-style-type: none"><li>1. provide full, timely, relevant and credible information</li><li>2. be cooperative throughout the investigation and conclusion of the case</li><li>3. Keep the application process confidential</li><li>4. cease or continue with participation as guided by the Authority</li></ol> |

<sup>5</sup> For the purposes of this template the notion of ‘leniency’ covers both full leniency and a reduction in the sanction or fines. Moreover, for the purposes of this template terms like ‘leniency’ ‘amnesty’ and ‘immunity’ are considered as synonyms.

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| etc.]   |  |
| <b>G. What are the conditions of availability of partial leniency (such as reduction of sanction / fine / imprisonment): [e.g.: valuable, potential, decisive evidence by witnesses or on basis of written documents, etc.? Must the information be sufficient to lead to an initiation of investigations?]</b> | <p>The conditions of availability of partial leniency are the same as those for full leniency as detailed in part F above.</p>   |
| <b>H. Obligations for the beneficiary after the leniency application has been accepted: [e.g. ongoing, full cooperation with the investigating agency during the proceedings, etc.]</b>   | <p>Full cooperation with the Competition Authority of Kenya throughout the investigations until determination of the matter.</p>   |
| <b>I. Are there formal requirements to make a leniency application? [e.g. must applications take a particular form or include particular information/data, must they be in writing or can they be made orally, etc.]</b>  | <p>The applicant must fill in a leniency application form for review and consideration by the Authority. The application even if oral must be followed with the application.</p>   |
| <b>J. Are there distinct procedural steps within the leniency program? [e.g.: provisional guarantee of leniency ("PGL") and further steps leading to a final leniency agreement / decision)?]</b>   | <p>First contact with the Competition Authority of Kenya; where a firm is unsure whether or not the LPG would apply to a particular conduct, it may approach the Authority to seek clarity.</p> <p>This may be done through telephone or in writing. A firm may choose to remain anonymous if it wishes to. Once a firm it is satisfied that it can apply for leniency, it can go ahead and apply for a marker.</p> <p>For the purposes of Marker and Leniency application, applicants should contact the Manager Enforcement and Compliance in person or via a designated email (leniency@cak.go.ke) or phone (+254 202628233 between 8.00 am and 5.00 pm Monday to Friday).</p> <p>Marker Application; The application must contain information substantial enough to enable the Authority to identify the conduct and its participants in order to determine whether or not an application for leniency has been made in respect of the same conduct. The applicant is given an initial period of 28 days to submit relevant documentation information either orally or inwriting.</p> <p>Marker extension; An applicant may seek an extension of its marker after the expiry of the 28 days if due to unavoidable circumstances, that will be reviewed on a case by case basis, it is unable to perfect its application.</p> <p>Initial meeting with the Authority after the marker has been</p> |



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|   | <p>perfected; The applicant should bring any information or evidence it deems relevant and answer the questions posed by the Authority in relation to the conduct being reported or matters relating thereto. The Authority may only have sight of and peruse all the documents brought by the applicant but will not make copies.</p> <p>Communication for qualification for Leniency; The Authority must within fourteen (14) days , after the date of the first meeting make a decision on whether or not the applicant's case qualifies for leniency and inform the applicant accordingly in writing within fourteen (14) days.</p> <p>Meeting with the Authority after the applicant has qualified for leniency; The aim of this meeting is to discuss and grant conditional leniency to the applicant pending finalization of any further investigations and determination by the Authority in the matter. At this stage, the Authority would be able to make copies of all documents provided.</p> <p>Grant of Conditional Leniency; A written agreement between the applicant and the Authority, otherwise known as the conditional leniency agreement, which will be granted subject to the conditions and requirements under the LPG. The conditional leniency agreement shall explicitly cover also directors and employees of the applicant undertaking.</p> <p>Final meeting with the Authority; The purpose of this meeting between the Authority and the applicant is to give the applicant a Leniency Certificate or sign the Leniency Contract. This only happens when the applicant has met all the conditions set out in this LPG and when the Authority has completed its investigation.</p> |
| <p><b>K. At which time during the application process is the applicant given certainty with respect to its eligibility for leniency, and how is this done?</b></p>  | <p>See J</p>   |
| <p><b>L. What is the legal basis for the power to agree to grant leniency? Is leniency granted on the basis of an agreement or is it laid down in a (formal) decision? Who within the agency decides about leniency applications?</b></p> | <p>The legal basis for the power to grant leniency is section 89A of the Competition Act.</p> <p>Leniency is granted on the basis of full compliance to the procedural requirements as outlined in the LPG. A leniency certificate is issued or a Leniency Contract is signed.</p> <p>The Director General decides on leniency applications.</p>   |
| <p><b>M. Do you have a marker<sup>6</sup> system? If yes, please describe it.</b></p>   | <p>Yes. Marker Application; The application must contain information substantial enough to enable the Authority to identify the conduct and its participants in order to determine whether or not an application for leniency has been made in respect of the same conduct. The applicant is given an</p>  |

<sup>6</sup> A marker protects an applicant's place in the queue for a given period of time and allows it to gather the necessary information and evidence in order to meet the relevant evidential threshold for immunity.

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|  | initial period of 28 days to submit relevant documentation information either orally or in writing.   |
| <b>N. Does the system provide for any extra credit<sup>7</sup> for disclosing additional violations? [e.g. a hardcore cartel in another market]</b>  | No  |
| <b>O. Is the agency required to keep the identity of the beneficiary confidential? If yes, please elaborate.</b>   | Yes. The identity of the leniency applicant will be kept confidential throughout all stages of the procedure (during the investigation or once a decision has been taken).  |
| <b>P. Is there a possibility of appealing an agency's decision rejecting a leniency application?</b>   | No. However, an applicant may request for a re-consideration of their application upon submitting additional relevant information   |
| <b>Q. Contact point where a leniency application can be lodged [telephone and fax including the country code, plus out of hours contacts (if any)]:</b>  | (leniency@cak.go.ke) or phone (+254 202628233 between 8.00 am and 5.00 pm Monday to Friday).  |
| <b>R. Does the policy address the possibility of leniency being revoked? If yes, describe the circumstances where revocation would occur. Can an appeal be made against a decision to revoke leniency?</b> | <p>Yes, the policy addresses the possibility of the leniency being revoked.</p> <p>Only a serious breach of the cooperation obligation might result in revocation of the conditional leniency by the Authority. Before the Authority makes a decision to revoke the conditional leniency, it will inform the applicant in writing and provide an opportunity to meet with the Authority and make good the breach. While the Authority is considering revoking the conditional leniency, it will suspend the obligation of the applicant to cooperate. The Authority will revoke a conditional leniency in writing.</p> <p>No, it is not possible to make an appeal against a decision to revoke the leniency. However, an applicant may request for a re-consideration of their application upon submitting additional relevant information</p> |
| <b>S. Does your policy allow for "affirmative leniency", that is the possibility of the agency approaching potential leniency applicants?</b>  | The policy does not have written affirmative leniency but its encouraged on a case by case basis  |
| <b>T. Does your authority have rules to protect leniency material from disclosure? If yes, please elaborate which parts are protected and what</b>   | <p>Yes, the protection of the leniency material is pursuant to the provisions of section 20 of the Competition Act and the Competition (General) Regulations.</p> <p>Confidentiality may be in respect of the whole or any part of the</p>  |

<sup>7</sup> Also known as: "leniency plus", "amnesty plus" or "immunity plus". This category covers situations where a leniency applicant, in order to get as lenient treatment as possible in a particular case, offers to reveal information about participation in another cartel distinct from the one which is the subject of its first leniency application.

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| does protection actually mean. | material disclosed and the protection granted is against disclosure of the information to third parties unless such disclosure is exempted under the Competition Act. |
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| 7. Settlement   |   |
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| <p><b>A. Does your competition regime allow settlement ?</b></p> <p>If yes, please indicate its public availability (link to the relevant rules, guidelines, etc.).</p> | <p>Yes it does</p> <p><a href="https://cak.go.ke/sites/default/files/Competition%20Administrative%20Penalties%20and%20Settlement%20Guidelines.pdf">https://cak.go.ke/sites/default/files/Competition%20Administrative%20Penalties%20and%20Settlement%20Guidelines.pdf</a></p> |
| <p><b>B. Which types of restrictive agreements are eligible for settlement [e.g. hardcore cartels, other types of cartels, vertical agreements only ...]?</b></p>       | <p>All types of restrictive agreements where the findings are adverse</p>   |
| <p><b>C. What is the reward of the settlement for the parties?</b></p>  | <p>The Settlements Guidelines provide for mitigating factors which may be considered so as to Reduce the penalties that could otherwise be paid by the parties.</p>   |
| <p><b>D. May a reduction for settling be cumulated with a</b></p>   | <p>No</p>   |

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| <p><b>leniency reward?</b></p>  |   |
| <p><b>E. List the criteria (if there is any) determining the cases which are suitable for settlement .</b></p>  | <p>All cases which are in the determination making process or have already been investigated and have an adverse decision qualify to be settled.</p>  |
| <p><b>F. Describe briefly the system [who can initiate settlement – your authority or the parties, whether your authority is obliged to settle if the parties initiate, in which stage of the investigation settlement may be initiated, etc.].</b></p> | <p>The parties are supposed to initiate the settlement process by writing to the Authority willingness to engage in the process. The Authority considers the request and informs the parties whether it is amenable to the request for settlement. The settlement process may be initiated at any stage of the investigation process.</p> |
| <p><b>F. Describe the procedural efficiencies of your settlement system [e.g. shorter decision, etc.].</b></p>  | <p>The settlement system provides an opportunity to resolve matters expeditiously</p>   |
| <p><b>G. Does a settlement necessitate that the parties acknowledge</b></p>   | <p>Yes</p>  |

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| <p>ge their liability for the violation?</p>   |  |
| <p>H. Is there a possibility for settled parties to appeal a settlement decision at court?</p> | <p>No. Since the settlement process results in a settlement agreement signed by the party and the Authority which is a mutual agreement on completion of the case.</p> |

| <b>8. Commitment</b>  |   |
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| <p><b>A. Does your competition regime allow the possibility of commitment?</b></p> <p>If yes, please indicate its public availability [link to the relevant rules, guidelines, etc.].</p>   | <p>The Competition regime allows for commitments by the parties in a settlement process or as a way of concluding the matter. However there are no written rules on this rather commitments will be arrived at on a case by case basis.</p>   |
| <p><b>B. Which types of restrictive agreements are eligible for commitment [e.g. hardcore cartels, other types of cartels, vertical agreements only ...]?</b></p> <p>Are there violations which are excluded from the commitment possibility?</p> | <p>Commitments can apply to both cartel and abuse of dominance cases.</p> <p>There are no violations that are excluded from the commitment possibility.</p>   |
| <p><b>C. List the criteria (if there are any) determining the cases which are suitable for commitment.</b></p>  | <ol style="list-style-type: none"> <li>1. Has the case been concluded with an adverse finding?</li> <li>2. Do the adverse findings point out to a violation of the competition act.</li> <li>3. Does the violation of the conduct require a behavioural adjustment by the accused parties.</li> <li>4. Do the accused parties have the capacity or resources to undertake the commitment action.</li> </ol> |
| <p><b>D. Describe, which types of commitments are available under your competition law.[e.g.: behavioural / structural]</b></p>   | <ol style="list-style-type: none"> <li>1. Behavioural</li> <li>2. Structural</li> </ol>   |
| <p><b>E. Describe briefly the system [who can initiate commitment – your authority or the parties, in which stage of the investigation commitment]</b></p>  | <p>The parties are supposed to initiate a commitment process.</p>   |

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| may be initiated, etc.]   |   |
| I. Does a commitment decision necessitate that the parties acknowledge their liability for the violation? | No  |
| J. Describe how your authority monitors the parties' compliance to the commitments.                       | Periodical review after three to six months.  |
| K. Is there a possibility for parties to appeal a commitment decision at court?                           | The commitment can be reviewed by the Authority and the parties if it is impractical or unworkable. |

## 9. Investigative powers of the enforcing institution(s)<sup>8</sup>

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| A. Briefly describe the investigative measures available to the enforcing agency such as requests for information, searches/raids <sup>9</sup> , electronic or computer searches, expert opinion, etc. and indicate whether such measures requires a court warrant. | <ol style="list-style-type: none"> <li>1. Notice of investigations requesting for information</li> <li>2. Summons for information, evidence or documentation</li> <li>3. Powers of search and seizure</li> <li>4. Expert opinion from other agencies</li> </ol> <p>The powers to search and seize are provided for in the Competition Act but as a precautionary measure, the Authority seeks the court orders to insulate the Authority from allegations of infringement of privacy.</p> |
| B. Can private locations, such as residences, automobiles, briefcases and persons be searched, raided or inspected? Does this require authorisation by a court?   | <p>Private residences and persons can be searched so long as there is reasonable belief that relevant information will be found in such a search.</p> <p>Yes such searches will require warrants.</p>   |
| C. Can servers located outside the territory (abroad or in a cloud) be inspected? Are there special rules for this investigative power? Please explain!   | <p>Servers with information that may be useful to an investigation that relates to an object or effect on competition in our jurisdiction may be inspected.</p> <p>No special rules</p>   |
| D. May evidence not falling under the scope of the authorisation allowing the inspection be seized / used as evidence in another case? If yes, under which circumstances (e.g. is a post-search court warrant needed)?  | <p>No, such evidence amounts to illegally obtained evidence and such evidence would be struck out for want of admissibility</p>   |

<sup>8</sup> “Enforcing institutions” may mean either the investigating or the decision-making institution or both.

<sup>9</sup> “Searches/raids” means all types of search, raid or inspection measures.

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| <p><b>E. Have there been significant legal challenges to your use of investigative measures authorized by the courts? If yes, please briefly describe them.</b></p> | <p>One challenge that has been there is the question of whether the Authority can undertake a search without a warrant. The High Court however ruled that the Authority does not need a warrant.</p> <p>Obtaining the search warrants is also a difficult process with some courts refusing to grant it while some granting the same noting that the warrants are applied for in the different courts located that have jurisdiction where the business are located.</p> |
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## 10. Procedural rights of businesses / individuals

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| <p><b>A. Key rights of defence in cartel cases: [e.g.: right of access to documents in the possession of the enforcing authority, right to a written statement of the case against the defendant, right to respond to that case in writing, right to respond orally, right to confront companies or individuals that make allegations against the defendant, right to legal representation before the enforcing authorities, right not to self-incriminate, etc.] Please indicate the relevant legal provisions.</b></p> | <p>Section 4(a) - (g) of the Fair Administrative Action Act, 2015</p> <p>a) prior and adequate notice of the nature and reasons for the proposed administrative action;</p> <p>(b) an opportunity to be heard and to make representations in that regard;</p> <p>(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;</p> <p>(d) a statement of reasons;</p> <p>(e) notice of the right to legal representation, where applicable;</p> <p>(f) notice of the right to cross-examine or where applicable; or</p> <p>(g) right to information, materials and evidence to be relied upon in making the decision or taking the administrative action</p> |
| <p><b>B. Protection awarded to business secrets (competitively sensitive information): is there a difference depending on whether the information is provided under a compulsory legal order or provided under informal co-operation? Please indicate the relevant legal provisions.</b></p>   | <p>Section 20(2) of the Competition Act, 2010</p> <p>No, it does not matter whether a person discloses any material to the Authority under compulsion of law or otherwise, they may claim confidentiality in respect of the whole or any part of the material.</p>  |

## 11. Limitation periods and deadlines

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| <p><b>A. What is the limitation period (if any) from the date of the termination of the infringement by which the investigation / proceedings</b></p> | <p>An investigation into an alleged infringement of the provisions of the Competition Act may not be initiated after 3 years from the date the infringement has ceased.</p> |
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| <p><b>must begin or a decision on the merits of the case must be made? Please describe potential suspension or interruption opportunities of this limitation period and the requirements for such rules to apply!</b></p>   | <p>If during an investigation it is found that there was intermittent infringement that occurred in the period 3 years prior to the current investigation and extending beyond the 3 year limitation period</p>  |
| <p><b>B. What is the deadline, statutory or otherwise (if any) for the completion of an investigation or to make a decision on the merits? Please describe potential suspension or interruption opportunities of this limitation period and the requirements for such rules to apply!</b></p> | <p>The Authority's service charter provides for review of complaints and finalization of matters within 180 days upon receipt of all requested information and cooperation of the parties involved.</p>  |
| <p><b>C. What are the deadlines, statutory or otherwise (if any) to challenge the commencement or completion of an investigation or a decision regarding sanctions? (see also 15A)</b></p>  | <p>There are no deadlines for challenging the commencement or completion of an investigation. However, the deadline for challenging a decision, to the Competition Tribunal, regarding sanctions is 30 days of receiving the Competition Authority of Kenya's decision.</p> <p>The Competition Act further provides that a party that is dissatisfied with the decision of the Competition Tribunal can appeal to the High Court within 30 days after the date on which a notice of that decision has been served on them.</p> |

## 12. Types of decisions

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| <p><b>A. List which types of decisions on the merits of the case can be made in cartel cases under the laws listed under Section 1. [E.g.: finding of an infringement, ordering to bring the infringement to an end, imposition of fines, etc.]</b></p> | <p>Administrative sanctions (section 36):</p> <ul style="list-style-type: none"> <li>a) declaration that the conduct which is the subject matter of the Authority's investigation, constitutes an infringement of the prohibitions;</li> <li>(b) restrain the undertaking or undertakings from engaging in that conduct;</li> <li>(c) direct any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof;</li> <li>(d) impose a financial penalty of up to ten percent of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question; or</li> <li>(e) grant any other appropriate relief</li> </ul> <p>Criminal sanctions (section 21(6):</p> <p>A person who contravenes the provisions on restrictive trade practices commits an offence and 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.</p> |
| <p><b>B. List any other types of decisions on the merits of the case relevant particularly in</b></p>   | <p>The decisions are the same</p>  |



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| <b>hardcore cartel cases under the laws listed under Section 1 (if different from those listed under 12/A).</b>  |  |
| <b>C. Can interim measures<sup>10</sup> be ordered during the proceedings in cartel cases? (if different measures for hardcore cartels please describe both<sup>11</sup>.) Which institution (the investigatory / the decision-making one) is authorised to take such decisions? What are the conditions for taking such a decision?</b> | Yes, the Competition Authority of Kenya can take interim measures directing an undertaking to cease and desist from engaging in such conduct until the ongoing investigation is concluded to prevent serious, irreparable damage to any person or category of persons or to protect the public interest. |

### 13. Sanctions for procedural breaches (non-compliance with procedural obligations) in the course of investigations

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| <b>A. Grounds for the imposition of procedural sanctions / fines [e.g. late provision of requested information, false or incomplete provision of information, lack of notice, lack of disclosure, obstruction of justice, destruction of evidence, challenging the validity of documents authorizing investigative measures, etc.]:</b> | <p>Section 88, 89 and 90 of the Competition Act, 2010 provide for sanctions for various procedural breaches as follows:</p> <p>Section 88. Failure to comply with summons</p> <p>Any person who—</p> <p>(a) having been duly summoned to attend before the Authority, without reasonable excuse fails to do so; or</p> <p>(b) being in attendance as required—</p> <p>(i) refuses to take an oath or affirmation as lawfully required by the Authority;</p> <p>(ii) refuses, after having taken the oath or affirmation, to answer any question to which the Authority may lawfully require an answer or gives evidence which the person knows is false; or</p> <p>(iii) fails to produce any document or thing in his or her possession or under his or her control lawfully required by the Authority to be produced to it, commits an offence.</p> <p>Section 89. Failure to comply with order</p> <p>Any person who contravenes or fails to comply with a lawful order of the Authority given in terms of this Act commits an offence.</p> <p>Section 90 Any person who -</p> |
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<sup>10</sup> In some jurisdictions, in cases of urgency due to the risk of serious and irreparable damage to competition, either the investigator or the decision-making agency may order interim measures prior to taking a decision on the merits of the case [e.g.: by ordering the immediate termination of the infringement].

<sup>11</sup> Only for agencies which answered “yes” to question 2.B. above

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|  | <p>(a) does anything calculated to improperly influence the Authority or any member concerning any matter connected with the exercise of any power or the performance of any function of the Authority;</p> <p>(b) anticipates any decision of the Authority concerning an investigation in a way that is calculated to influence the proceedings or decision;</p> <p>(c) does anything in connection with an investigation that would constitute contempt of court had the proceedings occurred in a court of law; and</p> <p>(d) knowingly provides false information to the Authority, commits an offence.</p> |
| <b>B. Type and nature of the sanction (civil, administrative, criminal, combined; pecuniary or other):</b> | Criminal - fine not exceeding five hundred thousand shillings, or imprisonment for a term not exceeding three years, or both.   |
| <b>C. On whom can procedural sanctions be imposed?</b>   | Any party who violates the procedures   |
| <b>D. Criteria for determining the sanction / fine:</b>  | This is prescribed under section 91 of the Competition Act, 2010.   |
| <b>E. Are there maximum and / or minimum sanctions / fines?</b>  | Yes. The fine cannot exceed five hundred thousand shillings, and imprisonment cannot exceed three years.  |

#### 14. Sanctions on the merits of the case

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| <p><b>A. Type and nature of sanctions in cartel cases (civil, administrative, criminal, combined):</b></p> <p><b>On whom can sanctions be imposed?</b><br/> [E.g.: representatives of businesses, (imprisonment for individuals), businesses, in the case of associations of companies the associations or the individual</p> | <p>The sanctions are both administrative and criminal.</p> <p>- For the administrative sanctions, they are imposed on the individual Companies, Partnership Association while the criminal remedies are imposed on individuals (directors of a company)</p> |
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| <b>companies?]</b>  |   |
| <b>B. Criteria for determining the sanction / fine: [e.g.: gravity, duration of the violation, benefit gained from the violation]</b>   | nature of the contravention,<br>gravity<br>duration of the conduct<br>spread of conduct<br>repetitive conduct   |
| <b>C. Are there maximum and / or minimum sanctions / fines?</b>   | yes   |
| <b>D. Guideline(s) on calculation of fines: [name and reference number, availability (homepage address) and indication of the languages in which these materials are available]</b>                 | <a href="https://cak.go.ke/sites/default/files/Competition%20Administrative%20Penalties%20and%20Set">https://cak.go.ke/sites/default/files/Competition%20Administrative%20Penalties%20and%20Set</a>   |
| <b>E. Does a challenge to a decision imposing a sanction / fine have an automatic suspensory effect on that sanction / fine? If it is necessary to apply for suspension, what are the criteria?</b> | No, where an appeal is brought against a determination by the Authority the stop and desist order or conditions issued by the Competition Authority of Kenya shall be observed, unless the otherwise orders, pending the determination of the appeal.<br><br>It is necessary to apply for suspension of the Competition Authority of Kenya's sanction but the determine the criteria for suspension of such a sanction on a case to case basis. |

## 15. Possibilities of appeal

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| <b>A. Does your law provide for an appeal against a decision that there has been a violation of a prohibition of cartels? If</b> | Yes, the law provides for an appeal against a decision that there has been a violation of a prohibition of cartels.<br><br>The grounds of appeal could be on both matters of law and on |
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| <p><b>yes, what are the grounds of appeal, such as questions of law or fact or breaches of procedural requirements?</b></p>    | <p>matters of fact.<br/>Breach of procedural requirements could also be a ground for appeal.</p>                |
| <p><b>B. Before which court or agency should such a challenge be made? [if the answer to question 15/A is affirmative]</b></p> | <p>The Competition Tribunal for the first appeal and the second and final appeal to the High Court of Kenya</p> |

## 16. Private enforcement

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| <p><b>A. Are private enforcement of competition law and private damage claims possible in your jurisdiction? If there is no legal provision for private enforcement and damage claims, what are the reasons for it?</b></p>                | <p>Private enforcement of competition law is not possible since the mandate of enforcing compliance with the Competition Act, 2010 is vested in the Competition Authority of Kenya.<br/><br/>The reason for lack of private enforcement of competition law is because it is a public interest matter and therefore the state is the rightful body to oversee its implementation.<br/><br/>It is however possible for a victim of violation of provisions of the Competition Act, 2010 to institute a private damage claim in a judicial court.</p> |
| <p><b>B. Laws regulating private enforcement of competition law in your jurisdiction [indication of the provisions and languages in which these materials are available; availability (homepage address)]</b></p>                          | <p>N/A</p>   |
| <p><b>C. Implementing regulation(s) on private enforcement (if any): [name and reference number, availability (homepage address) and indication of the languages in which these materials are available]</b></p>                           | <p>N/A</p>   |
| <p><b>D. On what grounds can a private antitrust cause of action arise? / In what types of antitrust matters are private actions available?</b></p>  | <p>N/A</p>   |
| <p><b>E. What pleading standards must the plaintiff meet to file a stand-alone or follow-on claim?</b></p> <ul style="list-style-type: none"> <li>• is a finding of infringement by a competition agency required to initiate a</li> </ul> | <p>N/A</p>   |

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| <p><b>private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition agency on national courts/tribunals?</b></p> <ul style="list-style-type: none"> <li>• if a finding of infringement by competition authority is required, is it also required that decision to be judicially finalised?</li> </ul> |     |
| <p><b>F. Are private actions available where there has been a criminal conviction in respect of the same matter?</b></p>  | N/A |
| <p><b>G. Do immunity or leniency applicants in competition investigations receive any beneficial treatment in follow-on private damages cases?</b></p>  | N/A |
| <p><b>H. Name and address of specialised court (if any) where private enforcement claims may be submitted to</b></p>  | N/A |
| <p><b>I. Information about class action opportunities</b></p>   | N/A |
| <p><b>J. Role of your competition agency in private enforcement actions (if at all)</b></p>   | N/A |
| <p><b>K. What is the evidentiary burden on plaintiff to quantify the damages? What evidence is admissible?</b></p> <ul style="list-style-type: none"> <li>• Role of your competition agency in the damage calculation (if at all)</li> </ul>  | N/A |
| <p><b>L. Discovery / disclosure issues:</b></p> <ul style="list-style-type: none"> <li>• can plaintiff obtain access to competition authority or prosecutors' files or documents collected during investigations?</li> <li>• is your competition agency obliged to disclose to the court the file of the case (in follow-</li> </ul>                    | N/A |

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| <p>on cases)?</p> <ul style="list-style-type: none"> <li>• <b>summary of the rules regulating the disclosure of confidential information by the competition agency to the court</b></li> <li>• <b>summary of the rules regulating the disclosure of leniency-based information by the competition agency to the court</b></li> </ul> |  |
| <p><b>M. Passing-on issues:</b></p> <ul style="list-style-type: none"> <li>• <b>how is passing-on regulated / treated in your jurisdiction?</b></li> <li>• <b>is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?</b></li> </ul>  | <p>Passing-on is not regulated in our jurisdiction</p> |