

Competition Authority of Kenya flexes its muscles

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In its Strategic Plan for the period from 2013/14 to 2016/17, the Competition Authority of Kenya (Authority) indicated that its focus would be on enforcement of competition and protection of consumers, which included merger control, control of unwarranted concentration of economic power, regulating restrictive trade practices and enhancing enforcement of competition and consumer welfare, among other issues.

The Authority has historically been focused on merger control, and this continues to be the case, but more recently it has become more active in the enforcement of restrictive trade practices including the abuse of dominance and unwarranted concentrations of economic power. The last couple of years or so have seen the Authority build capacity to enforce the restrictive trade practice provisions of the Competition Act, No 12 of 2010 (the Act).

With effect from October 2014, the Authority was empowered to operate a leniency programme. Under the leniency programme, any firm which voluntarily discloses the existence of any agreement or practice which is prohibited by the Act and co-operates with the Authority in its investigations may be granted leniency by the Authority and spared from all or part of any fines that would otherwise apply to it under the Act. The Authority has recently indicated that it intends to issue guidelines setting out how it will administer and apply this leniency programme.

Related to this, the Authority recently published the terms of two voluntary disclosure programmes applicable to trade associations in the financial, agriculture and agro-processing sectors, allowing for contraventions to be reported in exchange for immunity from prosecution. The deadline for submissions to be made to the Authority was mid-April 2016. The amnesty did not, however, extend to conduct which was already the subject of an ongoing investigation - so the amnesty did not apply to the cement sector since the cement industry inquiry was already underway.

The Act specifically prohibits certain horizontal restrictive practices (unlawful conduct between competitors) as well as certain vertical restrictive practices (unlawful conduct between an undertaking and its supplier or customer, or both). The Act also prohibits direct or indirect price fixing, dividing markets by allocating customers, suppliers, areas or specific types of goods or services, distorting, restricting or preventing competition and collusive tendering.

Parties to any agreement may apply to the Authority for an exemption from the application of the provisions of the Act which prohibit restrictive trade practices. The Authority has recently indicated that it intends to issue guidelines on vertical agreements in accordance with international best practice, in terms of which vertical restraints are not regarded as raising competition concerns in and of themselves recognizing that such

arrangements are often pro-competitive in nature. The scope of these guidelines remains to be seen.

The Authority is empowered to investigate restrictive and prohibited trade practices, which includes cartel conduct, either on its own initiative, or on receipt of information from any person, government agency or ministry.

In conducting its investigations, the Authority may, by notice in writing to the person being investigated: require the person (or director or other competent officer in the case of a body corporate) to provide information relating to the investigation within the time and in the manner specified in the notice; require the person to appear before the Authority to give evidence or produce any documents; require the person to produce certain documents to the Authority or to a person specified in the notice to act on the Authority's behalf; and request the person in possession of certain records to give copies of the records to the Authority.

The Act also empowers the Authority to investigate anti-competitive practices such as cartels and we are aware that it is making strides towards investing more resources in expanding its focus on enforcement against anti-competitive behaviour. Under the Act, the Authority is empowered to regulate cartel conduct, including any agreements or concerted practices which have the object or effect of preventing, distorting or lessening competition in any goods or services in Kenya.

The Authority also has search and seizure powers under the Act, the enforcement of which can be carried out with the assistance of police officers and other law enforcement agencies.

In March this year, the Authority conducted its first dawn raid at the offices of fertiliser producers Mea Limited and Yara East Africa, both of which are members of the Fertiliser Association of Kenya (FAK). The Authority reportedly suspected price collusion between the fertiliser companies and was seeking board reports, presentations, pricing data and circulars to detect other contraventions of the Act. The Authority is demanding full disclosure of directives issued by the FAK to its members in relation to the pricing of products and services.

Any person who contravenes the provisions of the Act relating to restrictive trade practices is liable on conviction to imprisonment for a period not exceeding five years or a fine not exceeding KES 10 million, or both.

The Authority in Kenya is clearing flexing its muscles with regards to restrictive trade practices and anti-competitive practices.