

Cartel Regulation

Contributing editor
A Neil Campbell



2019

GETTING THE
DEAL THROUGH 

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Contributing editor
A Neil Campbell
McMillan LLP

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Preface

Cartel Regulation 2019

Nineteenth edition

Getting the Deal Through is delighted to publish the nineteenth edition of *Cartel Regulation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Belgium.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, A Neil Campbell of McMillan LLP, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
November 2018

Kenya

Anne Kiunuhe and Njeri Wagacha

Anjarwalla & Khanna

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Kenya

The relevant legislation in relation to cartels is:

- the Competition Act 2010 (CA) enacted by the Kenyan parliament;
- the East African Community Competition Act 2006, enacted by the East African Community (EAC); and
- the Common Market for Eastern and Southern Africa (COMESA), under the provisions of the COMESA Competition Commission (CCC) Regulations (the COMESA Regulations).

The EAC comprises six partner states including Kenya. COMESA comprises 19 member states including Kenya. The majority of EAC partner states are also members of COMESA.

COMESA

In mid-2016, the CCC issued Draft Guidelines on the Application of Article 16 of the COMESA Competition Regulations to Restrictive Business Practices (the Draft RBP Guidelines). In April 2016, the Competition Authority of Kenya (CAK) and the CCC signed a cooperation framework agreement, which specifies that, among other things, the CAK and CCC will share information in respect of investigations that concern the other regulator's jurisdiction.

The EAC

We understand that the EAC competition regime is in force and the EAC Competition Authority has commenced some nominal operations but has not started receiving or processing applications in respect of mergers, restrictive trade practices (RTPs) or cartels.

For the purposes of this chapter, we have focused only on the CA and, where relevant, the COMESA Regulations.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

Kenya

Cartel investigations are conducted by the CAK, which then takes on the role of prosecuting cases of alleged infringement and imposing pecuniary penalties and awards of damages in cases where the parties agree to settle.

Any person who is aggrieved by the CAK's decision following an investigation may appeal to the Competition Tribunal and thereafter may file a second appeal to the High Court. We understand that the Competition Tribunal has started receiving appeal applications.

Where cartel infringement is brought before a criminal court, the prosecution is conducted by the Office of the Director of Public Prosecutions whereby a public prosecutor handles the court process.

COMESA

For cartel investigations in the COMESA region (including Kenyan entities), the CCC has investigative powers (in addition, the CAK would have parallel jurisdiction). The CCC can also request the authorities

of member states to undertake investigations on its behalf. However, where an undertaking fails to comply with the CCC's decision, the CCC may request the assistance of the competition regulator in the member state where an undertaking is located to enforce its decision. In Kenya, therefore, the CCC would rely on the CAK to enforce its decision in relation to a cartel.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

Kenya

The CA was amended in December 2016 to, among other things, give the CAK greater information-gathering powers by providing that every person, undertaking, trade association or body is obliged to provide information requested by the CAK in relation to an investigation or possible investigation. The amended CA also allows the CAK to impose a financial penalty of up to 10 per cent of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question where any of the undertakings is found to be in breach of the provisions of the CA on restrictive trade practices. This is in addition to the then existing sanctions of a fine of 10 million Kenya shillings and/or imprisonment of up to five years.

In March 2018, the CAK published various draft rules and guidelines for stakeholder review and comments. The draft rules and guidelines which (if adopted) have an impact on cartels include:

- the Competition (General) Rules, 2018 (the Draft Competition Rules);
- the Block Exemption Guidelines; and
- the Search and Seizure Guidelines.

The Draft Competition Rules set out the process of conducting of investigations into RTP, the criteria for determination of exemptions, settlement in respect of RTPs and consumer infringements; and determination of penalties and remedies. The Draft Competition Rules also propose the introduction of forms for lodging complaints. The Block Exemption Guidelines propose the introduction of a block exemptions regime in Kenya allowing for the exemption from competition assessment of a category of agreements, decisions and practices by or between undertakings from application of prohibitions under section 21 and 22 of the CA. However, the Block Exemption Guidelines propose covering only certain franchise agreements, stadia branding rights, media content generation and one-off sporting and promotional events. The Search and Seizure Guidelines set out the procedure for conducting dawn raids for the purposes of ensuring they are conducted in a transparent and consistent manner.

As the draft rules and guidelines have not yet been passed and are subject to change, we have not considered them in this chapter.

COMESA

The CCC is still developing its regime on restrictive business practices. Detailed draft guidelines on restrictive trade practices have been proposed but not yet formally adopted.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Kenya

Section 21 of the CA and the Consolidated Guidelines on the Substantive Assessment of Restrictive Trade Practices under the CA (RTP Guidelines) contain the substantive law on cartels in Kenya. Section 21 prohibits RTPs, being agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings that 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.

RTPs can be among parties either in a horizontal or vertical relationship. Types of agreements listed in the CA that would apply to cartels include:

- directly or indirectly fixing purchase or selling prices or any other trading conditions;
- dividing markets by allocating customers, suppliers, areas or specific types of goods or services;
- collusive tendering; or
- otherwise preventing, distorting or restricting competition.

The RTP Guidelines expand on RTPs to include information-sharing between competitors (save where the information is for technical, safety or education purposes) to also constitute a horizontal restriction.

Certain practices by trade associations and their members constitute horizontal restrictions. These include the unjustifiable exclusion of a competitor, potential competitor from a trade association, or trade association, sharing pricing information or making pricing recommendations to its members. The members of trade associations are jointly liable for the decisions of the associations. However, the CAK may, in some circumstances, require evidence of actual knowledge of and participation in a prohibited activity before inferring that an individual member was in agreement with other members to engage in the prohibited activity.

The RTP Guidelines provide for a hard-core restriction on cartels and therefore these are per se illegal. Whereas in some instances RTPs may apply for exemption, no exemption and no analysis as to the object or effect of a cartel may be adduced and their mere existence is a breach of the CA.

COMESA

Article 16 of the COMESA Regulations prohibits any agreement between undertakings, decisions by associations of undertakings and concerted practices that may affect trade between member states and have as their object or effect the prevention, restriction or distortion of competition within COMESA. Specifically, article 19 makes it an offence for undertakings engaged in rival or potentially rival activities to engage in:

- agreements that fix prices, hinder or prevent the sale or supply or purchase of goods or services, limit or restrict the terms and conditions of sale or supply or purchase between persons, limit or restrict the terms and conditions of sale or supply or purchase between persons engaged in the sale of purchased goods or services;
- collusive tendering and bid rigging;
- market or customer allocation agreements;
- allocation by quota as to sales and production;
- collective action to enforce arrangements;
- concerted refusals to supply goods or services to a potential purchaser, or to purchase goods or services from a potential supplier; or
- collective denials of access to an arrangement or association which is crucial to competition.

The Draft RBP Guidelines provide that cartel conduct constitutes a restrictive business practice by object and is difficult to justify on the basis of efficiency. Therefore, cartel conduct is presumed by the CCC to have anticompetitive effects that outweigh any procompetitive effects.

The COMESA Regulations and the Draft RBP Guidelines are silent on the issue of knowledge and intention and their impact on a finding of liability.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

Kenya

There are no industry-specific infringements, defences or exemptions under the CA and no defence or exemption for government-sanctioned activity or regulated conduct.

In general, however, any person, undertaking or association may apply to the CAK for an exemption from the provisions dealing with RTPs and the CAK may, upon considering the application, grant an exemption to the agreement or practice. Trade associations and professional associations are also required to apply to the CAK for an exemption if their association rules have provisions that would prevent, distort or lessen competition.

The CAK may grant an exemption if it is satisfied that there are 'exceptional and compelling reasons of public policy', and in granting the exemption, the CA requires the CAK to take into account whether the practice would be likely to result in or contribute to:

- maintaining or promoting exports;
- improving or preventing decline in the production or distribution of goods or the provision of services;
- promoting technical or economic progress or stability in any industry; or
- obtaining a benefit for the public which outweighs or would outweigh the lessening competition that would result from the agreement, decision or concerted practices.

The RTP Guidelines in addition provide that the following categories of conduct may be entitled to an exemption:

- certain intellectual property arrangements; and
- certain professional or trade association agreements.

COMESA

There are no sector-specific offences, block exemptions or exemptions for government-sanctioned activity under the COMESA Regulations. However, any person, undertaking or association may apply to the CCC for an exemption from the provisions dealing with RTPs and the CCC may deem the restrictions to be inapplicable to such agreement if:

- the parties can prove that the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit and that does not:
 - impose restrictions that are not indispensable to the attainment of this objective; or
 - afford such undertakings the possibility of eliminating competition in respect of a substantial market for the goods or services in question; or
- the CCC determines that there are public benefits that outweigh the anticompetitive effect.

6 Application of the law

Does the law apply to individuals or corporations or both?

Kenya

The law applies to both individuals and corporations. Section 5 of the CA provides that the CA applies to all persons including the government, state corporations and local authorities insofar as they engage in trade. A person is defined to include a body corporate.

COMESA

Article 3 of the COMESA Regulations provides that the COMESA Regulations apply to all economic activities whether conducted by private or public persons within, or having an effect within, the common market. A person is defined under article 1 to include both a natural or legal person.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Kenya

Yes. The regime applies to conduct that takes place outside the jurisdiction if it has an effect in Kenya. Section 6 of the CA applies to conduct by either:

- a citizen or person resident in Kenya;
- a body incorporated or carrying out business in Kenya;
- any person in relation to the supply or acquisition of goods and services by that person in to or within Kenya; or
- any acquisition of shares or other assets outside Kenya resulting in a change of control of a business or an asset of a business in Kenya.

However, the above provisions need to be read in conjunction with section 21 of the CA, which states that the RTP must have the object or effect of distorting, lessening or preventing competition 'in Kenya'. Therefore, conduct taking place outside Kenya, for example, indirect sales into Kenya, may be captured by the CA's provisions on RTPs if the conduct is aimed at, or has the effect of distorting, lessening or preventing competition in the country.

COMESA

Yes, the regime applies to conduct that takes place outside the jurisdiction if it has an effect in the COMESA region. Article 3(2) of the COMESA Regulations provides that the regime is only applicable to conduct that has an appreciable effect on trade between member states and that restricts competition in the common market. Therefore, conduct whose effects are outside the common market is not within the jurisdiction of the CCC.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

Kenya

Yes, there will be a defence available if the conduct does not have as its object or effect the distorting, lessening or preventing of competition in Kenya. However, if the conduct taking place outside Kenya affects parties in Kenya, it will be regulated by the CAK.

COMESA

Yes, there will be a defence available if the conduct does not have an appreciable effect in the COMESA region. However, if the conduct affects trade within member states, it will be regulated by the CCC.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

Kenya

Investigation

Under section 31 of the CA, the CAK, can carry out an investigation either on its own initiative or upon receipt of information or a complaint. The CAK may request that the company or person under investigation produces records, documents and any other information that the CAK may request, or appears before the CAK to give evidence or produce a document. It may also enter and search premises and seize any data or anything that has a bearing on the investigation.

Proposed decision

The CAK will then write to the entity or person, advise it of its proposed decision and offer it the opportunity to make representations to the CAK either orally or in writing.

Final decision

After considering the representations made, the CAK will then make a final decision.

Settlement

The CAK may at any time during or after an investigation enter into an agreement of settlement with the entity or person concerned.

COMESA

Investigation

Under the COMESA Regulations, any person or consumer may request that the CCC conducts an investigation where there is activity that would restrict competition in COMESA.

Proposed decision

Where the CCC decides to investigate, it notifies the interested parties of the investigation and is required to complete the investigation within 180 days from the date of the request (this time period can be extended by notification to the parties). If the CCC decides that there has been a breach of regulations, it will notify the respondent party and will allow the party an opportunity to defend itself.

Final decision

Within 10 days of the hearing of the defence by the parties involved, the CCC is required to notify the interested parties of its determination. Based on this determination the CCC may decide that the party in breach should cease its conduct, pay a fine in an amount determined by it or take whatever act it deems necessary to diminish or remove the effect of the illegal conduct.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

General investigatory powers	Competition Act (CAK)		COMESA (CCC)	
	Civil/administrative	Criminal	Civil/administrative	Criminal
Order the production of specific documents or information	Yes	Yes*	Yes	No
Carry out compulsory interviews with individuals	Yes	Yes*	Yes	No
Carry out an unannounced search of business premises	Yes	Yes*	Yes	No
Carry out an unannounced search of residential premises	Yes	Yes*	Yes	No
Right to 'image' computer hard drives using forensic IT tools	Yes	Yes*	Yes	No
Right to retain original documents	Yes	Yes*	No**	No
Right to require an explanation of documents or information supplied	Yes	Yes*	Yes	No
Right to secure premises overnight (eg, by seal)	No	n/a	No	No

* In Kenya, in theory there is a criminal element attached to cartel behaviour under the CA. However, this is an untested area of competition law and any successful criminal sanctions would have to be enforced in line with the Evidence Act (Chapter 80 of the Laws of Kenya), the Penal Code (Chapter 63 of the Laws of Kenya), the Fair Administration of Actions Act and the Constitution of Kenya 2010.

** In COMESA, the CCC can request the authorities of member states to undertake investigations on its behalf.

The CAK does not require prior approval of the courts to conduct its investigative powers. The High Court of Kenya affirmed this in the case of *Mea Limited v Competition Authority of Kenya and another* [2016] eKLR.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Kenya

The CAK and the CCC, in April 2016, signed a cooperation framework agreement, which specifies that, among other things, the CAK and CCC will share information in respect of investigations that concern the other regulator's jurisdiction. The CAK has also signed a memorandum of understanding with the Competition Commission of South Africa in which both regulators have agreed to exchange information on competition issues.

COMESA

Rule 40 and 43 of the COMESA Competition Rules provide that the CCC may transmit to the competent authorities of the member states copies of the most important documents in relation to a restrictive business practice and request such authority to undertake an investigation. The officials of the CCC may assist the officials of such authority in carrying out their duties.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

Kenya's jurisdiction has interplay with COMESA and the EAC that arises from Kenya's membership of these two regional organisations.

The CAK and CCC have agreed to assist each other in their enforcement activities, to the extent compatible with their competition laws and within the reasonably available resources through:

- locating and securing evidence and voluntary compliance with requests for information from undertakings or natural persons within the respective jurisdiction;
- conducting investigations;
- assisting the requesting party with relevant information that may be in the possession of the other party; or
- assisting the other party with information that may come to the attention of the other party.

Either the CAK or the CCC may request the other to commence enforcement activities in relation to anticompetitive effects that have an impact on the territory of the other.

This cooperation between CAK and CCC is likely to create efficiency in the investigation and enforcement of the regime on cartels in both jurisdictions.

Risk could also be triggered as investigations may be carried out in other jurisdictions.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

Kenya

Following the steps outlined in question 9, the CA may do any of the following:

- declare the conduct to constitute an infringement of the prohibitions of the CA;
- restrain the undertaking from engaging in that conduct;
- direct any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof;
- impose a financial penalty of up to 10 per cent of the immediately preceding year's gross annual turnover in Kenya of the undertaking in question; or
- grant any other appropriate relief.

A party may also enter a settlement agreement with the CA any time after an investigation, which may include an award of damages to a complainant or the imposition of a pecuniary penalty.

COMESA

The COMESA Competition Rules provide that the initial determination of the CCC is made by an initial committee of three commissioners, after which parties may appeal to the full Board of Commissioners. The decisions that the initial committee may reach include ordering cessation of the prohibited conduct, imposing a fine or ordering any other action it deems necessary to remove or reduce the conduct.

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

Kenya

The CAK bears the burden of proving that undertakings have engaged in cartel conduct by entering an agreement whose object or effect is to distort or restrict competition.

The RTP Guidelines state that there is a hard-core restriction on cartels but do not set out the standard of proof that the CAK must meet before establishing that a cartel exists.

COMESA

The Draft RBP Guidelines provide that the burden of proof falls on the CCC or the person alleging that an agreement is restrictive to establish that the object of an agreement entered into between parties is to restrict competition. After discharging this burden, the onus is on the parties to the agreement to defend it and to establish that it has a positive effect on economic progress or it satisfies the conditions to warrant an exemption.

Where it is found that the object of the agreement is not to restrict competition, the burden of proving that the effect of the agreement is to restrict competition is on the person making this allegation.

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Kenya

Yes, the RTP Guidelines provide that the CAK may rely on circumstantial evidence when making a decision as to whether an agreement has been reached between the undertakings in question. There need not be a formal agreement in place between undertakings to warrant the CAK reaching this determination and that the provisions of the CA have been infringed.

COMESA

The COMESA regime is silent on the issue of circumstantial evidence.

16 Appeal process

What is the appeal process?

Kenya

The CA provides that a person aggrieved by a determination of the CAK may appeal in writing to the Competition Tribunal within 30 days of the decision. We understand the Competition Tribunal has started receiving appeal applications. The appeal process as detailed in the Competition Tribunal (Procedure) Rules, 2017 is summarised below:

Filing of pleadings

Appeal to the Competition Tribunal is by way of a Notice of Appeal and Memorandum of Appeal filed together with documents supporting the person's appeal.

Service and response

Upon filing the Memorandum of Appeal, the filing party is required to serve the respondent with a notice of appearance to allow the respondent to file a reply to the appeal.

Case management conference

Once the respondent's reply is filed, the Competition Tribunal sets a date for pretrial conference and directions during which the parties to the appeal deal with issues such as clarification of matters in dispute, appointment of experts and creation of a timetable for the hearing.

Hearing and determination

On the hearing date(s) the appellant has the right to begin the appeal. Either party may call witnesses and/or expert witnesses to make their appeal. The Competition Tribunal may issue summons to compel witnesses to attend proceedings. The Competition Tribunal may grant any interim or final orders as it deems fit.

Urgent appeals

Where a person wishes to get interim relief pending the hearing of an appeal, the person can file a Memorandum of Appeal together with a Notice of Motion under a certificate of urgency. In such circumstances, the Competition Tribunal is convened as soon as possible to give directions on the hearing of the appeal. Appeals from the Competition Tribunal lie in the High Court of Kenya.

COMESA

The COMESA Competition Rules provide that if the respondent party is dissatisfied with the initial determination (made by an initial committee of three commissioners), it can appeal to the full Board of Commissioners within 30 days from the date of receipt of notification of the initial committee's decision. The Board of Commissioners has powers to cancel, reduce or increase the fine imposed by the initial committee.

Sanctions**17 Criminal sanctions**

What, if any, criminal sanctions are there for cartel activity?

Kenya

The CA provides for imprisonment for a term not exceeding five years, a fine not exceeding 10 million Kenya shillings as the criminal penalties for engaging in cartel activity. Individuals or directors of undertakings involved in cartel conduct may be subject to an imprisonment term if found guilty of the offence. We are not aware of any instances where criminal sanctions have been imposed on any person or undertaking in respect of cartel conduct. As we are not aware of any criminal sanctions imposed by the CAK to date, we are not able to compare the CAK's previous decisions or sanctions.

COMESA

The COMESA Regulations only provide for civil and administrative sanctions.

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Kenya

Section 36 of the CA lists the actions that the CAK can take following an investigation. These are to:

- declare the conduct that is the subject matter of the CAK's investigation of an infringement;
- restrain the company or individual from engaging in that conduct;
- direct any action to be taken by the company or individual to remedy or reverse the infringement;
- impose a financial penalty up to 10 per cent of the immediately preceding year's gross annual turnover in Kenya of the undertaking in question; or
- grant any other appropriate relief.

In its annual report for 2015-2016, the CAK set out the fines imposed on companies found to have engaged in price fixing. These companies paid fines ranging from 100,000 to 5 million Kenya shillings. The imposition of fines is the most common form of sanction that has been imposed by the CAK to date.

COMESA

The CCC can require an undertaking to cease its conduct, pay a fine or take any other action it deems necessary to remove or reduce the conduct. The fines can be up to a maximum of 10 per cent of the COMESA turnover of the undertaking in breach. We are not aware of any penalties imposed by the CCC in relation to cartel conduct, so we are not able to comment on the frequency of fines or to make a comparison.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

Kenya

The RTP Guidelines are silent on the principles and formulas that may be used by the CAK to determine the amount of administrative fines payable after an investigation. The CA only sets the upper limit of the administrative fines payable as up to 10 per cent of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings found to have infringed the provisions of the CA. In practice, however, the CAK does take into account mitigating and aggravating factors in determining the penalties.

As for criminal sanctions, Kenya's Sentencing Policy Guidelines (the Sentencing Guidelines) are informative for judicial officers deciding any criminal case. The Sentencing Guidelines provide the principles that should guide the court when deciding whether to impose a custodial or non-custodial sentence, including the gravity of the offence, criminal history and character of the offender. When considering the appropriate term of imprisonment, the Sentencing Guidelines require the court to consider the mitigating or aggravating circumstances of the case.

COMESA

The COMESA Competition Rules require the CCC to consider the gravity and duration of infringement by the parties in question prior to imposing a fine. Parties are entitled to make oral submissions, including submissions in relation to the quantum of the fine.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Debarment from government procurement procedures is not listed as one of the sanctions available for cartel conduct in Kenya under the CA or in the COMESA Regulations.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Kenya

Parallel proceedings may be pursued in respect of the same cartel conduct. Criminal proceedings can only be undertaken by the Public Prosecutor while administrative sanctions are a preserve of the CAK. Persons affected by cartel conduct may pursue damages from civil courts.

COMESA

Since the COMESA Regulations do not contain criminal sanctions, there can be no parallel criminal and administrative proceedings. However, the COMESA Regulations do not prohibit individuals affected by cartel conduct to institute civil proceedings in their member states in order to obtain damages or any other redress.

Private rights of action**22 Private damage claims**

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Kenya

The CA is silent on private damage claims.

Direct and indirect affected parties may rely on the Constitution of Kenya (the Constitution) to institute claims where cartel conduct causes a denial of, a violation or infringement of, or a threat to rights in the Constitution, including consumer rights such as the protection of economic interests.

It is unclear whether courts would permit passing-on and double recovery in respect of such claims.

It is also unclear what level of damages would be awarded if these claims were successful, as the competition laws of Kenya are silent on this. As Kenya is a common law jurisdiction, decisions of courts in the Commonwealth countries are of persuasive value to Kenyan courts and therefore a decision in a common law jurisdiction such as in the United Kingdom would be persuasive in Kenya.

Courts have the discretion to determine whether to award costs and, if so, the quantum of costs in civil matters.

COMESA

The COMESA competition regime is silent on whether private damage claims are available for direct and indirect purchasers. In this respect we are not able to determine how passing-on and double recovery issues are dealt with and what level of damages (eg, single, double, treble) and cost awards can be recovered or how recent damages awards compare with previous cases.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Kenya

The Constitution permits class actions, but the CA is silent on this.

A person acting as a member of or in the interest of class of persons can institute a class action in the High Court of Kenya by way of a petition for the denial of, the violation or infringement of, or the threat to a right in the Bill of Rights of the Constitution.

A person would have to establish that cartel conduct caused the denial of, the violation or infringement of, or the threat to a right guaranteed in the Constitution.

COMESA

The COMESA competition regime is silent on whether class actions are permissible.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Kenya

Yes. In May 2017, the CAK published the Leniency Programme Guidelines (the Leniency Guidelines) that provide for a leniency programme (the Leniency Programme) and govern the processing and granting of leniency to parties that report cartel conduct.

According to the Leniency Guidelines, the CAK accepts applications for leniency in the following circumstances:

- when it has no knowledge of the contravention;
- when it has knowledge of a contravention but lacks sufficient information to proceed with investigation; or
- when it has commenced an investigation but requires additional evidence to penalise offenders.

Parties that report cartel conduct are offered a full or a partial reduction of the administrative financial penalty imposed by the CAK depending on when they report. It is envisaged that the incentive will encourage parties engaged in cartel conduct to provide evidence and, in effect, improve compliance with the CA.

The importance of being the first applicant for leniency or 'the first through the door', is that the applicant is granted 100 per cent reduction in the administrative financial penalty, which is also termed 'immunity'.

The full or partial leniency in the Leniency Programme does not absolve an applicant for leniency from criminal liability under the CA. The Director of Public Prosecutions may still prosecute the applicant for offences under the CA.

COMESA

COMESA does not currently have a leniency programme or the option of offering immunity.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Yes, the Leniency Programme extends to subsequent applicants for leniency.

Subsequent applicants for leniency may benefit from a partial reduction of the administrative financial penalty imposed by the CAK as follows:

- second through the door may be granted up to 50 per cent reduction in any penalty;
- third through the door may be granted up to 30 per cent reduction in any penalty; and
- any subsequent applicant that significantly contributes to an investigation may be granted up to 20 per cent reduction in any penalty.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

As set out in question 25, cooperating at an earlier stage affects the level of any administrative financial penalty imposed by the CAK.

The Leniency Guidelines do not provide for an 'immunity plus' or an 'amnesty plus' option.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

The Leniency Guidelines are silent on when an application for leniency should be initiated though, generally, the application would be expected to be made before or during an investigation into cartel conduct by the CAK and offer evidence that would be crucial in prosecuting offenders. Markers are available and they allow for an applicant to provide initial information on cartel conduct to the CAK while gathering further information in relation to a cartel and in the interim being offered a place in line for the leniency for a certain period.

The Leniency Guidelines set out the timelines below for the leniency application process.

Step*	Timeline
Submission of a marker application to the CAK	No timeline
Submission of the relevant documentation and information orally or in writing to the CAK	Within 28 days from the date the marker application is submitted
An applicant seeking the extension of its marker by the CAK due to unavoidable circumstances	After expiry of the 28 days
Initial meeting between the applicant and the CAK after the marker application has been finalised	No timeline
Decision on whether applicant's case qualifies for leniency	Within 14 days after date of initial meeting
Communication from the CAK to the applicant in writing on whether the applicant qualifies for leniency	Within 14 days of the decision being made
Further meeting with the CAK to discuss and grant conditional leniency to the applicant pending any further investigation and determination by the CAK	No timeline
Execution of the conditional leniency agreement between the CAK and the applicant which should also cover the directors and employees of the applicant	No timeline
The CAK engaging the Director of Public Prosecutions with regards to the criminal aspects of the cartel conduct	No timeline
Investigation, analysis and verification by the CAK with the applicant being obliged to co-operate as a serious breach of this obligation may lead to revocation of the conditional leniency agreement	No timeline

Update and trends

The CAK, in March 2018, published various draft rules and guidelines for stakeholder review and comments. The draft rules and guidelines which (if adopted) have an impact on cartels include:

- the Competition (General) Rules, 2018 (the Draft Competition Rules);
- the Block Exemption Guidelines; and
- the Search and Seizure Guidelines.

By way of summary, the Draft Competition Rules set out the process of conducting of investigations into RTPs, the criteria for determination of exemptions, settlement in respect of RTPs and consumer infringements; and determination of penalties and remedies. The Draft Competition Rules also propose the introduction of forms for lodging complaints. The Block Exemption Guidelines propose to introduce a block exemptions regime in Kenya allowing for the exemption from competition assessment of a category of agreements, decisions and practices by or, between undertakings from application of prohibitions under section 21 and 22 of the CA. However, the Block Exemption

Guidelines propose covering only certain franchise agreements, stadia branding rights, media content generation and one-off sporting and promotional events. The Search and Seizure Guidelines set out the procedure for conducting dawn raids for the purposes of ensuring they are conducted in a transparent and consistent manner.

In its 2016/2017 Annual Report, the CAK highlights its interactions with regional and international competition agencies in a bid to create partnerships, networks and deepening integration regionally and internationally. In particular, the CAK participated in the International Competition Network’s Cartel workshop Annual Conference, Chief/Senior Economist workshop during the 2016/2017 financial year and its own annual conference. The CAK notes that it has, based on its relationship with the International Competition Network, developed guidelines on fining and settlement of RTP cases, among others.

The CAK’s 2016/2017 Annual Report also notes that the CAK was engaged in initiatives in the financial year which enabled it to dismantle barriers to entry and abusive behaviour that restricted competition in purple tea exports.

Step*	Timeline
Subsequent meetings convened by the CAK	No timeline
Final meeting with the CAK to be given the leniency certificate or execute the leniency contract	After all conditions in the Leniency Guidelines have been met and the CAK has completed its investigation
* In the various steps, the applicant should always claim confidentiality for any confidential information or documentation provided to the CAK.	

- the disclosure is authorised by law or required by a court or a tribunal;
- the CAK is of the view that disclosure is not likely to cause detriment to the person providing the information or to the person to whom it relates; or
- the CAK is of the view that the public benefit from the disclosure outweighs the detriment occasioned.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

An applicant for leniency is expected to ensure total cooperation with the CAK throughout the investigation and until a determination by the CAK. The applicant should:

- provide full, timely and truthful information and documents in its possession or under to control;
- keep the application process confidential and not to reveal it to other members of the cartel; and
- immediately stop the cartel conduct.

These requirements also apply to subsequent applicants for leniency in respect of the same matter.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The Leniency Guidelines provide that the identity of an applicant remains confidential throughout the investigation and when a decision is made by the CAK. In addition, an applicant may pursuant to the CA claim confidentiality in respect of the whole or part of the materials disclosed to the CAK during an investigation.

The same level of confidentiality extends to subsequent applicants for leniency.

The Leniency Programme does not envisage any proceedings where confidential information may be disclosed to third parties.

Despite the CAK’s obligation not to disclose confidential information, the CA provides that it may disclose this information in the following circumstances, where:

- the disclosure is to a person performing an action under the CA;
- there is an obligation in law to disclose;
- the consent of the person who provided the information has been obtained;

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

The CAK may enter into a settlement with the party alleged to have engaged in a cartel activity in respect of the administrative financial penalty to be imposed or the quantum of damages to be awarded to the complainant.

Decisions of the CAK may be appealed to the Competition Tribunal or one may institute judicial review proceedings in respect of the decisions.

With regards to the criminal aspect of cartel conduct, the Director of Public Prosecutions may enter into a plea agreement with a person alleged to have engaged in a cartel activity after they have been charged in court. This will be in accordance with the Criminal Procedure Code, which applies to all criminal prosecutions, and is subject to the court’s approval.

Decisions of courts in criminal matter may be appealed to the superior courts.

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Full or partial leniency in respect of administrative financial penalties imposed by the CAK covers a corporate applicant, its directors and its employees. It is unclear whether it would cover its former employees.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

The Leniency Programme is new and untested, hence it is unclear whether there will be nuances to the practical steps set out with the Leniency Guidelines and also highlighted in question 27.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

We are not aware of any ongoing or anticipated assessment or review of the Leniency Guidelines.

Defending a case**34 Disclosure**

What information or evidence is disclosed to a defendant by the enforcement authorities?

The Kenyan competition regime is silent on this. However, it would be expected that the CAK would disclose to the alleged offender information and evidence sufficient to establish the existence of cartel conduct and also enable the alleged offender to defend itself while safeguarding the CAK's obligation to maintain confidentiality as per the CA and Leniency Guidelines.

In addition, it should be noted that the CAK's obligation to maintain confidentiality is subject to the exceptions set out in question 29, which may be used as a basis for the disclosure of confidential information.

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

The Kenyan competition regime is silent on these issues. If there is a likelihood of conflict of interest, it would be advisable for the corporation and its employees to each seek independent counsel.

It would also be advisable for present and past employees to seek independent legal advice during an investigation by the CAK where there is likelihood that the offenders may be prosecuted.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

The Kenyan competition regime is silent on this. If there is a likelihood of conflict of interest, it would be advisable for corporate defendants to each have their own independent counsel.

The decision on whether to be represented by the same counsel may depend on whether the corporate defendants are affiliated, in which case their interests are likely to be aligned.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

Yes. Kenyan laws do not preclude this.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

No. Fines or other penalties and private damage awards are not tax-deductible.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

The Kenyan competition regime is silent on this and, being a relatively new regime, it is unclear what approach the CAK or courts would take where penalties have been imposed in other jurisdictions.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The Leniency Guidelines only provide for the grant of full or partial leniency as a way in which the administrative financial penalties imposed by the CAK may be reduced, but is silent on any other ways in which they may be reduced. It is unclear whether a pre-existing compliance programme would reduce the administrative financial penalty.

The Kenyan competition regime is silent on the ways in which a fine imposed by a court, following a conviction for engaging in cartel conduct, may be reduced. The CAK has in the past considered mitigating factors such as cooperation with the CAK, past conduct of parties and duration of breach, among others, to reduce penalties imposed in relation to breaches in respect of merger notifications. Although the CA does not make specific reference to the application of mitigating factors in enforcement against cartels, there is a strong likelihood that the CAK would do so.

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