

THE COMPETITION (AMENDMENT) BILL, 2016

A Bill for

AN ACT of Parliament to amend the Competition Act, 2010

ENACTED by Parliament of Kenya, as follows—

1. This Act may be cited as the Competition (Amendment) Act, 2016.

Short title.

2. The Competition Act, 2010, in this Act referred to “the principal Act” is amended in section 2-

Amendment of section 2 of No. 12 of 2010.

(a) by deleting the definition of the term “local authority”;

(b) by deleting the definition of the term “undertaking” and substituting therefor the following new definition—

“undertaking” means any business activity intended to be carried on for gain or reward by any individual, a body corporate, incorporated body of persons, trade association or a trust in the production, supply and distribution of goods or the provision of any services;

(c) by inserting the following new definition in proper alphabetical sequence –

“County government” means the county government established by Article 76(1) of the Constitution.

3. Section 5 of the principal Act is amended in subsection (5) by deleting the expression “local authority” wherever it appears and substituting therefor the expression “county government”.

Amendment of section 5 of No. 12 of 2010.

4. Section 18 of the principal Act is amended by inserting the following subsection immediately after subsection (5)—

Amendment of section 18 of No. 12 of 2010.

(6) Every person, undertaking, trade association or body shall be under an obligation to provide information requested by the Authority in fulfilment of its statutory mandate for conducting an inquiry or sectoral study regulated by this section.

5. Section 24 of the principal Act is amended—Amendment of
section 24 of No. 12
of 2010.

(a) in the marginal note by inserting the words “and buyer power” at the end thereof;

(b) by inserting the following new subsections immediately after subsection (2)—

(2A) Any conduct that amounts to abuse of buyer power in a market in Kenya, or a substantial part of Kenya, is prohibited.

(2B) In determining buyer power, the Authority shall take into consideration—

(a) the nature and determination of contract terms;

(b) the payment requested for access infrastructure; and

(c) the price paid to suppliers.

(2C) The Authority, in consultation with the Cabinet Secretary and other relevant government agencies and stakeholders, shall develop rules for the better carrying out of the provisions of this section.

(2D) For the purposes of this section, “buyer power” means the influence exerted by an undertaking or group of undertakings in the position of a purchaser of a product or service to obtain from a supplier more favourable terms, or to impose a long term opportunity cost including harm or withheld benefit which, if carried out, would be significantly disproportionate to any resulting long term cost to the undertaking or group of undertakings.

6. Section 34 of the principal Act is amended in subsection (1) by inserting the following paragraph immediately after paragraph (b)—Amendment of
section 34 of No. 12
of 2010.

(c) a prohibition or prohibitions under section C of this Part have been infringed.

7. Section 36 of the principal Act is amended—Amendment of
section 36 of No. 12
of 2010.

(a) In paragraph (a) by deleting the expression “or B” and substituting therefor the expression “B or C”;

- (b) in paragraph (d), by inserting the words “of up to ten percent of the immediately preceding year’s gross annual turnover in Kenya of the undertaking or undertakings in question” immediately after the word “penalty”.

8. Section 37 of the principal Act is amended in subsection (1) by deleting the words “section A of this Part or the prohibitions contained in section B of this Part” and substituting therefor the words “section A, B, or C of this Part”

Amendment of section 37 of No. 12 of 2010.

9. Section 41 of the principal Act is amended in subsection (3)(a) by inserting the words “or business or assets” immediately after the expression “share capital”.

Amendment of section 41 of No. 12 of 2010.

10. Section 42 of the principal Act is amended –

Amendment of section 42 of No. 12 of 2010.

- (a) in subsection (1), by deleting the words “declare any” immediately appearing after the word “*Gazette*” and substituting therefor the words “set a threshold for”;
- (b) in subsection (6) by deleting the words “In addition to the penalties described in subsection (5)”.

11. Section 47 of the principal Act is amended by inserting the following subsections immediately after subsection (2)—

Amendment of section 47 of No. 12 of 2010.

(3) Notwithstanding subsections (1) and (2), the Authority may impose a financial penalty of upto ten percent of the preceding year’s annual gross turnover.

(4) Any person who, being a party to a merger –

- (a) gives materially incorrect or misleading information; or
- (b) fails to comply with any condition attached to the approval for the merger;

leading to a revocation of the merger under this section, commits an offence and shall be liable on conviction to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding five years, or to both.

12. The principal Act is amended by inserting the following new section immediately after Section 70—

Insertion of a new section 70A.

- 70A** (1) Pursuant to the provisions of this Part, the Authority may on its own initiative or upon receipt of information or a complaint from any person, government agency, Ministry, or consumer body, initiate investigations into a consumer complaint.
- (2). The provisions of Sections 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40 of the Act shall apply *mutatis mutandis* to the investigation of consumer complaints under this section.

MEMORANDUM OF OBJECTS AND REASONS

Statement of the Objects and Reasons for the Bill

This Bill has been submitted by the Cabinet Secretary for the National Treasury in line with the proposals announced in the Budget for 2016/2017. The object of this Bill is to amend the Competition Act, 2010, to enhance consumer protection from unfair and misleading market conduct.

The Bill proposes to align the Act with Article 176 of the Constitution which recognises county governments and the principle of decentralisation of services. The Bill further proposes to amend the Act to impose an obligation on stakeholders to provide information required from them where the Authority conducts an enquiry either under the direction of the Cabinet Secretary or on its own motion.

The Bill further contains proposals to amend the Act to allow the Authority to exclude mergers which will have minimal impact on competition from the provisions of the Act, in line with regional and international best practices. This amendment is also meant to reduce the administrative burden of the Authority and facilitate investment.

The Bill proposes to amend the Act to empower the Authority to initiate investigations on its own motion for the expedient resolution of consumer complaints.

Statement of the delegation of legislative powers and the limitation of fundamental rights and freedoms.

The Bill does not delegate any legislative power nor limit any fundamental right or freedom.

Statement of how the Bill concerns county governments.

The Bill does not concern county governments in terms of Article 109(4) of the Constitution as it does not contain provisions that affect the functions and powers of the county governments as set out in the Fourth Schedule to the Constitution.

Statement as to whether the Bill is a money Bill within the meaning of Article 114 of the Constitution.

The Bill is a money Bill within the meaning of Article 114 of the Constitution.

Dated the 9th June, 2016.

ADEN DUALE,
Leader of the Majority Party, National Assembly.

The definition of “Local Authority” in section 2 of Act No. 12 of 2010 which it is intended to delete—

“local authority” has the meaning assigned in the Local Government Act (Cap. 265) and includes subsidiary undertakings controlled directly or indirectly by a local authority, whether incorporated or not

The definition of “undertaking” in section 2 of Act No. 12 of 2010 which it is intended to delete—

“undertaking” means any business activity intended to be carried on, or carried on, for gain or reward by a person, a partnership or a trust in the production, supply or distribution of goods or the provision of any service.

Section 5 of Act No. 12 of 2010 which it is intended to amend—

5. (5) For the purposes of this section, without affecting the meaning of “trade” in other respects—

- (a) the sale or acquisition of a business, part of a business or an asset of a business carried on by the Government, a state corporation or a local authority constitutes engaging in trade; and
- (b) the following do not constitute engaging in trade—
 - (i) the imposition or collection of taxes;
 - (ii) the grant or revocation of licences, permits and authorities;
 - (iii) the collection of fees for licences, permits and authorities;
 - (iv) internal transactions within the Government, a state corporation or a local authority.

Section 36 of Act No. 12 of 2010 which it is intended to amend—

36. After consideration of any written representations and of any matters raised at a conference, the Authority may take the following measures—

- (a) declare the conduct which is the subject matter of the Authority’s investigation, to constitute an infringement of the prohibitions contained in Section A or B of this Part;
- (d) impose a financial penalty

Section 41(3) of At No. 12 of 2010 which it is intended to amend—

41. (3) A person controls an undertaking if that person—

- (a) beneficially owns more than one half of the issued share capital of the undertaking;

- (b) is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;
- (c) is able to appoint, or to veto the appointment of, a majority of the directors of the undertaking;
- (d) is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act (Cap. 486);
- (e) in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
- (f) in the case of the undertaking being a nominee undertaking, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the nominee undertaking; or
- (g) has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

Section 42 of Act No. 12 of 2010 which it is intended to amend—

42. (1) The Authority may, by notice in the *Gazette*, declare any proposed merger to be excluded from the provisions of this Part.

- (6) In addition to the penalties described in subsection (5), the Authority may impose a financial penalty in an amount not exceeding ten percent of the preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question.