

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

**INVESTIGATIVE POWER IN PRACTICE – Breakout session 3: Due Process in
Relation to Evidence Gathering**

Contribution from Kenya

- Session IV -

30 November 2018

This contribution is submitted by Kenya under Session IV of the Global Forum on Competition to be held on 29-30 November 2018.

More documentation related to this discussion can be found at: oe.cd/invpw.

Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

JT03438839

Investigative Powers in Practice

Breakout session 3 - Due process in relation to evidence gathering

- Contribution from Kenya –

1. Background

1. The Competition Authority of Kenya ('the Authority') is established by a statute, Competition Act No. 12 of 2010 (the Act).
2. The statute gives the Authority powers to carry out an investigation into any conduct or proposed conduct which is alleged to constitute or may constitute an infringement of;
 - Prohibitions relating to restrictive trade practices; or
 - Prohibitions relating to abuse of dominance.
3. Further, the law provides that evidence may be sourced through;
 - Furnishing the Authority with a written and signed statement;
 - The notice of investigation to produce to the Authority any document or article specified therein;
 - Leniency program;
 - Search and seizure; and
 - Appearing before the Authority at a time and place specified in the notice to give evidence.

2. Legal framework in the investigation process

4. To ensure that due process is followed in the evidence gathering the Authority is guided by:-
 - Constitution of Kenya, 2010;
 - Competition Act No. 12 of 2010; and
 - The Evidence Act, 2012 (Cap 80)
 - Fair Administrative Action Act No. 4 of 2015
 - Criminal Procedure Code, 2012
5. The Act empowers the Authority to take evidence in relation to an investigation. Specifically, the Authority may receive as evidence any statement, document, information or matter that may in its opinion assist to deal effectively with an investigation conducted

by it. However, a statement, document or information may not be received by the Authority unless it meets the requirement of admissibility in a Court of Law.

6. A person appearing before the Authority is entitled to the same immunities and privileges as a witness before the High Court. Thus, the evidence gathering process encompasses principles such as right to legal representation, right to be heard - where parties are given an opportunity to make written or oral representation before the Authority comes up with decision on a matter, respect for privilege.

7. To create transparency and predictability, the Authority has developed guidelines on the manner it handles privileged information it may come across in the course of evidence gathering. Further, the Authority issues a notice of legal and factual basis it relied upon in an investigation.

8. In light of the provisions of the statutory frameworks highlighted above, the section below is the Authority's application of the law in contribution towards its investigative powers on competition in practice.

9. The section also highlights an illustrative account of a specific-case outcome of the Authority's investigative powers in practice and the rights of the undertaking being investigated in due process of the law, and lessons from this particular case.

3. Due process in relation to evidence gathering

10. **Development of a theory of the case** - The Authority may on its own initiative or upon receipt of information/complaint from any person carryout an investigation into a conduct which may allegedly constitute an infringement such as a restrictive trade practice. If after a preliminary review of a complaint there is a finding that there may be an infringement of the competition law, the Authority then undertakes a full investigation.

11. **The investigation process is guided by an investigation work plan** which contains the case background or the nature of the complaint, the legal theory (what is being investigated and how might it violate the law), the theory of harm (what harm are competitors likely to suffer as a result of the conduct in question, evidence gathering logistics, timelines and resources required).

12. **Identification of the information sources and conducting interviews** - The investigation work plan indicates the evidence sought, the source of the evidence, the method of obtaining the information and the responsibility.

13. The law provides that the information can be sought using notices of investigations, requests for information, interviews and summons. It also gives powers to search and seize documents or equipment in the investigation process. The investigator has powers to take evidence on oath or affirmation from any person and in the form of a statement if need be.

14. **Organization and assessment of the evidence** - Upon gathering the evidence, the investigator will analyze it and prepare an investigation report that will give the background (complaint), the jurisdiction or legal theory and the theory of harm, the competition analysis of the matter that includes the relevant market and the findings, conclusion and recommendation.

15. The investigation process will involve organizing documentation into sub-files which include the initial report, work plan, evidence, expert reports, witness statements and

minutes of meetings, suspect statements, investigation diary and reports and correspondences.

16. **Determination of the violation of the law** - The determination of the violation of the law is done through the investigation report. The report provides the findings of the investigation and how the evidence gathered may or may not have proven a particular alleged offence.

17. **Hearing** - Once the investigation has been concluded, and the Authority proposes to make a decision based on the fact that restrictive trade practices have been occasioned, a written notification is given to the affected undertakings. This notice clearly explains the reasons behind this proposed decision, the recourse thereof, and offers an opportunity for the undertaking to respond to the proposed decision either in writing or an oral presentation within a specified period of time.

18. The conference date, time and place are determined by the Authority, and the undertaking and the complainant are invited for the same. The participants may be accompanied by any person, including an advocate if necessary. A record of the proceeding will be kept.

19. There is a vertical decision making process undertaken by the Authority;

- Upon consideration of the submissions a decision is taken by the Authority's **Board**. Parties are also at liberty to negotiate a settlement with the Authority to remedy a contravention subject to Board approval.
- The decision may be to either restrain the undertaking from further engaging in the prohibited behavior, impose a financial penalty of up to ten percent of the gross annual turnover of the previous year or advocate for change of behavior.
- The Authority's decisions are then published in the Gazette, and include the name of the undertakings, the nature of the conduct investigated and the settlement agreement.
- In case the parties to the decisions are aggrieved, they may appeal the Authority's decisions in writing to the **Competition Tribunal** within thirty (30) days.
- **The High Court** offers reprieve in case the decision of the Competition Tribunal is dissatisfactory. The High Court's decision is final.

4. Case Study: the Competition Authority of Kenya versus fertiliser suppliers in Kenya

20. The Authority, in exercise of its mandate under the Act, conducted an inquiry into the Fertilizer sector in Kenya. The objective of the study was to identify any anti-competitive conduct, competition constraints and consumer protection issues within the fertilizer market.

21. The study established that the fertilizer sector in Kenya exhibited characteristics that could catalyse coordinated practices by suppliers.

22. The study which among others, focused on assessment of costs of Diammonium phosphate (DAP) indicated that local prices increased by more than the international price movements and remained at relatively high despite subsequent decreases in international prices in 2012 and 2013. (an increase of some KSh500-750 per 50kg bag or close to \$200/ton).

23. Additionally, there was also a finding on significant price mark-ups being charged in the domestic market, well above competitive cost benchmarks over the same period. (Over KSh1000 for both DAP and Urea). The report attributed these scenarios of high prices and mark-ups to the major importers and suppliers and not to costs in the logistics and transport chain, nor by margins being made by agro-dealers.

24. Similar observations were made in the case of Urea fertilizer where the gap with international prices widened significantly from 2011, only returning to 2010/11 margins in late 2014.

25. Though there were new entrants into the sector, fertilizer importing and supply in Kenya remained concentrated, with a very small number of suppliers led by Yara East Africa Limited (Yara) and MEA Limited (MEA) dominating the commercial market for much of the period. (By 2013, it was estimated that the combined market share for MEA and Yara was 56%).

4.1. Investigations by the Authority

26. Considering that the inquiry gave a strong indication of a likelihood of restrictive trade practices, the Authority initiated investigations into the fertilizer sector in accordance with the Act to determine whether the players in the sector engage in concerted practices in the importation and distribution of fertilizer.

27. The Authority applied for, and obtained, a Search Warrant at the Magistrate's Court and conducted a dawn raid at the offices of the two major players, Yara and MEA.

28. Subsequently, MEA Limited instituted a suit against the Authority under a Certificate of Urgency in the High Court asserting that the documents and information were unlawfully obtained from them. They sought conservatory orders to;

- Stay the investigation(s) or any other proceedings;
- Stay all investigations and/or further proceedings arising from the allegation of having being involved in anti-competitive conduct; and
- Issue a temporary Injunction and/or Prohibition restraining the Authority from destroying, sharing, disclosing or distributing to any other person,

29. In order for MEA to be successful in the grant of a Conservatory Order, they had to satisfy the following:

- That there is a prima facie case with a likelihood of success on whether the applicant will prevail on the merits of the case at full trial;
- Threat of irreparable injury that cannot be compensated with damages; and
- The balance of rights and interests between the two parties.

30. The Application by the MEA failed to satisfy these 3 requirements and was hence dismissed. The Court also concluded that the Authority complied with Statutes guiding conduct of search and seizure in Kenya. Additionally, the Court commended the Authority for going out of its way to secure a Search Warrant despite not being mandated under the Act.

31. Consequently, MEA and the entire membership of the FAK expressed willingness to enter into Settlement Negotiations pursuant to the provision of the Act.

5. Conclusion

32. Lessons learned from this investigation include;
- Though there is no need for a warrant to conduct a search as per the Act as acknowledged by the court, it is prudent to obtain one.
 - It is necessary to follow due process; the Authority must create awareness on the Act in order to empower the stakeholders, while deepening the competition culture in the country.