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INTERACTIONS BETWEEN COMPETITION AUTHORITIES AND SECTOR REGULATORS – Contribution from Kenya

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

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Interactions between Competition Authorities and Sector Regulators

– Contribution from Kenya –

1. Introduction

1. The Competition Act of 2010 ('**the Act**') empowers the Competition Authority of Kenya ('**the Authority**') to safeguard and promote competition in all sectors of the economy and protect consumers from unfair and misleading conduct. Specifically, Section 10 of the Act sets out the composition of the Authority. It consists of: a non-executive chairperson; the Permanent Secretaries responsible for finance and trade; the Government's chief legal advisor; and the Director-General of the Authority.

2. In addition to the above public sector members, the Act provides for appointment of five other independent members from among persons with experience in competition and consumer welfare matters. The members go through vetting and approval by the relevant Committee of Parliament. The fact that the members are not in board positions of sector regulators, avoids the likelihood of conflict in decision-making on matters competition in areas of concurrent jurisdiction.

3. Pursuant to Section 5 of the Act, the Authority has the primary jurisdiction to deal with all matters concerning competition and consumer protection in the national economy. This section further obliges sector regulators with concurrent jurisdiction on competition regulation matters to establish a Working Framework with the Authority. Such joint framework is expected to: identify and establish procedures for the management of areas of concurrent jurisdiction; promote co-operation; provide for the exchange of information and protection of confidential information; and ensure consistent application of the principles of the competition Act.

4. Cognizant of the benefits inherent in joint working relationship, the Authority endeavors to develop formal co-operation mechanisms with sector regulators with concurrent jurisdiction over market competition and consumer protection concerns. The Authority has since its inception in August 2011 signed six memoranda of understanding with regulators in the following sectors; the banking; telecommunications; insurance; energy; agriculture, and transport.

5. The co-operation between the Authority and the sector regulators is voluntary based on the desire to realize each other's mandate and for the shared good of the stakeholders. However, in some instances, the primary Statutes and sectoral regulations require the sector regulator to cooperate or establish a co-operation mechanism with the Authority on competition matters. For example, Section 4 (2) of the Kenya Information and Communication Act, Fair Competition and Equality of Treatment Regulations 2010 states; "*In so far as such matters fall concurrently under the jurisdiction of another statutory agency responsible for competition matters, the telecommunications sector regulator shall cooperate with the said agency in matters related to fair competition*". By the dint of this Section, the Communications Authority of Kenya (CA) is required to cooperate with the Authority on matters competition within the telecommunications sector. In contrast, the Central Bank of Kenya (CBK) Act is silent on whether the financial sector regulator is required to develop a co-operation mechanism with the Authority.

6. The co-operation agreements between the Authority and the sector regulators have provisions that address specific issues. Some pertinent issues addressed in the MoUs, among others, include; the manner of co-operation and consultation in carrying out investigations, conducting merger analysis (in the case of telecoms sector) and information collection, conducting market studies, drafting and informing new legislations and regulations, staff exchange programmes, conducting joint capacity building in areas of concurrent jurisdiction, or mutual benefit.

7. The existing MoUs are implemented jointly by the two institutions by creating a joint team with the representations of the parties, and each two co-chair persons who report to the institutions on matters discussed and agreed upon by the joint committee. The committee develops annual work plans on joint activities, which is informed by their institutional work plans. The work plans are reviewed annually and signed by the two institutions prior to implementation.

8. In the next sections, we discuss how these co-operation frameworks have enabled the Authority effectively achieve its mandate. We shall further illustrate, with examples, enforcement cases in banking and telecoms sectors that required a co-operative approach and resulted in areas of successful co-operation, as well as offered key lessons for furthering co-operation mechanisms.

2. The financial sector

9. The Central Bank of Kenya, established by the Central Bank of Kenya Act of 1966, is the primary regulator of the financial sector. The Central Bank of Kenya (CBK) has mandate to foster the liquidity, solvency and proper functioning of a stable market-based financial system which includes, but is not limited to, ensuring competition in the sector. The CBK Act does not expressly or indirectly require the Bank to cooperate with the Authority in promoting and safeguarding competition in the banking sector. In spite of that and in recognition of the role, functions and mandate of the regulators in the national economy, the Authority found it necessary to enter into a co-operation agreement with the CBK in order to facilitate collaboration in dealing with matters of concurrent jurisdiction.

10. In February 2020, the Authority launched an inquiry into the digital credit market in Kenya with an aim of identifying and addressing the competition and consumer protection issues in the digital credit market. The inquiry targeted the digital credit market in Kenya which was mostly unregulated and thus the Authority, through a gazette notice, informed all the stakeholders in the sector about the inquiry. Given the inquiry was in the financial sector, it was necessary consequence the Authority collaborates with the CBK during the inquiry, both in development of the data collection instruments and data analysis. The Authority and CBK jointly developed the recommendations that operationalized the Central Bank of Kenya (Amendment) Act, 2021. The Bill which eventually became law in 2021, consequently brought all digital lenders and borrowers under the regulatory ambit of the Central Bank of Kenya.

11. As part of the collaborative effort, the Authority also contributed to the drafting of the Central Bank of Kenya (Digital Credit Providers) Regulations, 2022[1]. The Regulations were published in official gazette and provide for the licensing, governance and credit operations of Digital Credit Providers in the country. It further provides for consumer protection, credit information sharing, and explicates on the Anti-Money Laundering and

1 https://www.centralbank.go.ke/2022/03/21/central-bank-of-kenya-digital-credit-providers-regulations-2022/

Combating the Financing of Terrorism obligations of Digital Credit Providers. In spirit of the MoU with CBK, the Authority gave its written submissions on the proposed regulation on non-bank digital credit service providers.

Box 1. Digital Credit Market Inquiry

The Authority conducted a market inquiry into the Digital Credit market in Kenya[1]. The main objective of this study was to identify and address potential consumer protection concerns in the regulated and unregulated digital credit markets. The specific objectives of the study were to;

- Provide evidence regarding the size and nature of the digital credit market;
- Identify potential consumer protection risks and consumer outcomes within Kenya's digital credit sector;
- Increase transparency and comprehensiveness of product information and terms and conditions;
- Address probable fraud in digital financial services;
- Improve consumer redress for digital credit products;
- Increase consumer control over personal information to expand choice and competition; and
- Inform the development of policies to ensure adequate consumer protection across regulated and unregulated lenders and equal protection of all Kenya consumers.

The study was conducted using two-pronged approach: a demand-side survey conducted through a phone survey of seven hundred and ninety-three (793) users of digital financial services from across Kenya, and a supply-side survey that audited and analyzed transaction and account-level data of regulated and unregulated digital credit providers.

In line with the MoU with CBK, the Authority recommended the following from the Digital Credit market inquiry, as an input into the operationalization of the CBK (Amendment) Bill, 2020, which included;

- Developing policies that will contribute to a more competitive digital credit ecosystem through standardizing channel access, product placement and revenue-sharing for digital credit services on mobile money menus. This advice will go a long way to ensure fair competition and consumer awareness of a diverse set of product options. In particular for those consumers/borrowers without the ability to download apps due to device or network limitations, expanding sharing of consumer information for bank and non-bank digital lenders, through both credit information systems and other information-sharing schemes;
- Developing standards on structure and timing of fees in digital credit to ensure comprehension for consumers across bank and non-bank products. Improving presentation of information and consumer education that could help reduce complexity and improve consumers' usage of digital loans, reducing late repayment;

- Developing pricing rules which ensure that consumers exhibiting positive repayment behavior receive improved terms of credit over time**.** Some credit providers already reduced interest and other charges for early repayment, and reduce interest rates on subsequent loans. These practices should be standardized across the industry by refunding a portion of finance charges for early payment and reducing the proportion of fees to loan value charged to repeat borrowers who consistently repaid prior loans; and
- Requiring digital lenders to provide periodic reports on the actual total charges paid by borrowers. Early repayment, late payment, and loan roll-overs can shift actual costs of loan far from advertised costs. Loan repayment varied significantly. To better monitor pricing trends in the market, data on actual amounts charged and duration of loan cycles should be reported quarterly to assess the effective costs incurred by borrowers and monitor trends in pricing over time to the Central Bank of Kenya.

The Authority recommended the following policy options through the parent ministry - the National Treasury - based on the findings of the study.

- To offer support for consideration and incorporation of the study recommendations in the CBK (amendment) Bill, 2021 with a view to bring digital credit services on mobile into regulated market and unlock the potential of digital service providers, and enable MSMEs access competitive credit services and choice; and
- To constitute an inter-agency team consisting of representatives from the National Treasury, the Authority and CBK, among others, to develop policy and rules to guide the implementation of the recommendations.

Following the sharing of the findings and recommendations of the market study, the CBK mandate was expanded to include regulation of non-bank digital credit lenders, which were previously unregulated. The Authority through the recommendations of the digital credit market, and subsequent adoption of its inputs into the CBK (Digital Credit Providers) Regulations, 2022, made a significant contribution to the sector reforms.

3. The telecommunications sector

12. The Kenya Information and Communications Act (KICA), 1998 established the Communications Authority of Kenya (CA), regulates the telecommunications sector in Kenya. The Authority and the CA have areas of concurrent jurisdiction in regulating the market structure and conduct of the telecommunication sector. More specifically, the KICA requires the CA to cooperate with the Authority on matters relating to competition. In actualizing the provisions of the Competition Act and the KICA, the Authority and CA entered into an MoU in May 2015. The two institutions have since cooperated in the assessment of merger decisions and market conduct of players in the telecommunication sector where they have overlapping powers.

13. Although the formal co-operation has worked fairly well in various collaboration efforts, the Authority and the CA in some instances have had varied outcomes in the assessment of a similar issue. For instance in the case of assessment of dominant position, the two institutions have a different approach to regulating market conduct of dominant players, as demonstrated below.

Box 2. Investigation by Parliament on Telecom player's Dominant Position

The Kenyan parliament launched an investigation on the dominant position of one player in the telecommunications sector and sought actions taken by the Authority and the CA - the telecoms sector regulator.

PART VIC of the Kenya Information and Communications Act (KICA) empowers the Communications Authority (CA) to regulate competition in the sectors that fall within its mandate. The KICA, like the Competition Act, prohibits operators from engaging in concerted practices and Abuse of Dominant position. The remedies provided under the CA's Act include: order the licensee to stop the unfair competition; and require the licensee to pay a fine not exceeding the equivalent of 10% of the annual turnover of the licensee for each financial year that the breach lasted up to a maximum of three years.

Further, KICA has ex-ante jurisdiction as provided under sections 84Q, 84R, 84S and 84T of the Act. The CA also has ex-ante jurisdiction in determining which licensees are dominant in a relevant market as provided under section 84W of the Act. Similarly, in the assessment of Abuse of Dominant cases, the Authority (CAK) is also guided by sections 4 and 23 of the Competition Act, which require that existence of Market Power has to be proved.

Notably, the sector regulation worldwide is on ex-ante and ex-post basis. Whereas the ex-ante entails to sector specific interventions for example price setting, network access obligation, among others, the ex-post relates to regulation of market conduct of players through application of competition law. The Competition law, as an ex-post intervention, predominantly aims at preventing creation and exercise of market power that would undermine effective competition. This involves Abuse of Dominant (AoD) position by an undertaking or anti-competitive agreements between firms.

The ex-ante regulation is usually deployed in non-contestable market/s. Prior to this kind of intervention, the Regulator is often required to apply the Three-Criteria-Test and satisfy the following criteria:

- The relevant market must demonstrate high and non-transitory barriers to entry;
- Market structures which do not tend towards effective competition in a relevant time horizon; and
- Application of competition law alone is insufficient to adequately address the market failure(s).

The three criteria have no hierarchy, but they have to be adopted together and cumulatively. In other words, if any criteria cannot be met ex-ante regulation is generally not warranted. In addition to the Three-Criteria-Test, ex-ante regulation can only be visited on one or more operators if they possess Significant Market Power (SMP) on the respective market.

The Kenyan Competition Act, and any other modern competition regulation regime in the World practices that constitute AoD position are broadly categorized into exclusionary (anti-competitive) and exploitative. The specific conduct by dominant firms which are prohibited in the Competition Act include; unfair pricing, limiting or restricting production, market outlets or market access, investment, distribution, technical development or technological progress. When analyzing AoD cases, the

Authority is also guided by sections 4 and 23 of the Competition Act which require that existence of market power has to be proved.

It is important to highlight that dominance is not an illegality. What is an illegality is the AoD position. However, given the varied outlook of application of the competition provisions by the CA and the Authority (i.e. ex ante and ex-post market interventions), the two institutions had divergent advisories to the relevant committee of parliament. This was owing to the fact that the Authority intervenes in the market when there is abusive conduct by a market player, whilst the CA legislation requires regulatory intervention for as long as a player is dominant. In practice, the CA is required to publish guidelines on this provisions on dominant position, which it is yet to do. Even so, the difference in treatment of abuse of dominance between the Authority and CA is clearly embedded in their respective laws, leading to divergent outcomes in the assessment of a similar market conduct.

4. Conclusion

14. As explained above, formal co-operation mechanisms have yielded different outcomes in enforcement and advisory cases to the government in the telecommunications sector. This can be seen in the advisories that the sector regulators and the Authority have made to Parliament as provided for in section 9(l) of the Act, particularly on market intervention in cases of dominant players. This outcome clearly calls for reflection on new methods of cooperating even in the presence of mutually beneficial agreements (MoUs), but where substantive legislations may have slightly divergent approaches on the same matters and may lead to different outcomes. Additionally, the practical lessons drawn from the co-operation in enforcement cases between the Authority and the sector regulators have a wider implication for competition regulation beyond the national level.