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**The Role of Competition Law and Policy in Supporting
Microenterprises and Small and Medium-Sized Enterprises
During the Economic Recovery in the Post-Pandemic Period**

Competition Authority

Kenya

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COUNTRY STATEMENT

THE ROLE OF COMPETITION LAW AND POLICY IN SUPPORTING MICROENTERPRISES AND SMALL AND MEDIUM-SIZED ENTERPRISES DURING ECONOMIC RECOVERY IN THE POST-PANDEMIC PERIOD

A CASE OF KENYA

Presented to the Intergovernmental Group of Experts on Competition Law and Policy

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A. BACKGROUND

1. Micro, Small and Medium Enterprises¹ (MSMEs) play a vital role in the Kenyan economy in supporting livelihoods through creation of employment. MSMEs employ about 15 Million persons² and contribute about 40% to the GDP. However, the sector remains highly informal as only 20% of the 7.4 million MSMEs operate as licensed entities³. Further, MSMEs are majorly sole proprietorship operating from their households making access to finance a challenge. From available sources, it takes about 3 months to access loans for 80% of MSMEs⁴. This has resulted in reliance on digital credit in addition to other informal credit sources such as *chamas* (i.e. an informal association), family and friends. The inadequate access to credit has been a leading factor in explaining the low survival rate of their businesses and the sluggish growth of micro and small enterprises to middle enterprise level⁵. Premised on the role of the credit market on SME growth, it is essential to promote competition principles as a means of enhancing access by MSMEs.
2. Market access related challenges affect majority of MSMEs and remains one of the main growth constraints. Since 2013, the Kenyan government has been enforcing the Access to Government Opportunities (AGPO) initiative in public procurement. Despite such efforts, low participation by MSMEs in public procurement, as most of them sell their goods and services to friends and family, only 3% participation has been noted. In line with the development goals of the country, competition policy is a tool for promoting fair play in public procurement, while promoting access to special interest groups typically on account of public interest considerations.
3. The Corona Virus Disease (COVID-19) has had adverse effects on the Kenyan economy due to the consequent domestic and international containment measures that were adopted. This resulted in a contraction of the real Gross Domestic Product (GDP) by an estimate of 0.3% in

¹ Kenya categorises Micro enterprises as those that employ less than 10 employees, Small enterprises have between 10 and 49 employees and Medium enterprises have between 50 and 99.

² KNBS, MSME Survey 2016

³ *ibid*

⁴ <https://www.kba.co.ke/downloads/MSMEs-Survey-Report.pdf>

⁵ MSME Policy, Sessional Paper No. 05 of 2020





2020 in comparison to the growth of 5% that was registered in 2019. This has had adverse effect on SME survival coupled with the already existing challenges that grapple the MSMEs.

B. THE COMPETITION AUTHORITY OF KENYA'S INTERVENTIONS

4. The Authority's interventions aimed at supporting MSMEs can be categorized into market conduct and market structure related.

B.1. Market Structure Initiatives

5. The Authority in its review of competition assessment tools and guidelines, established the merger notification thresholds were resulting in increased compliance and regulatory burden on MSMEs and resolved to review its merger notification threshold and merger notification requirements.
6. The merger notification thresholds⁶ were reviewed to exempt businesses with combined value of assets/turnover less than Ksh. 500 million (US\$ 4,262.57⁷) turnover from notifying the Authority. Further, on cross border mergers, Kenya engaged COMESA Competition Commission (CCC) on the COMESA merger filing fees regime. Ultimately, the COMESA Council of Ministers amended the COMESA Competition Regulations, introducing new thresholds and reducing the filing fees. The zero thresholds regime was also repealed. The new thresholds for notifiable mergers apply when;
 - i. The combined annual turnover of the parties in the COMESA Member States exceeds US\$50 million; and,
 - ii. At least two parties to the merger each have an annual turnover or valued assets in the COMESA States of US\$10 million.
7. Filing fees were scaled down to 0.1% of the parties' combined turnover or assets - whichever is higher - in the COMESA region, up to a maximum of US\$200,000. These interventions have generated tremendous benefits to businesses, especially Small Medium Enterprises (SMEs), some of which are;

⁶ <https://cak.go.ke/sites/default/files/guidelines/Consolidated%20Merger%20Guidelines.pdf>

⁷ USD1 = Ksh. 117.30





- i. SMEs that are now excluded from mandatory notifications to COMESA have been able to consolidate more easily and become effective competitors in the region.
- ii. Reduction in transaction costs leading to enhanced profitability.
- iii. Improved investment climate due to enhanced ease of doing business.
- iv. Creation of more employment opportunities.

B.2. Market Conduct Interventions

8. Abuse of Buyer Power⁸ can arise through conduct by a buyer, motivated by the hope of gaining a competitive advantage that is likely to lessen suppliers' incentives to invest in new capacity, products and production processes. During financial year 2020/2021, up to 35% of abuse of buyer power cases handled by the Authority emanated from the retail sector. The corresponding conducts relate to delays in payment comprising 80% of the cases, 18% unilateral termination and 2% unilateral change of contract terms⁹.
9. The Authority's intervention resulted in recovery of US\$ 21.3 million (Ksh. 2.5 Billion) owed to SMEs by buyers, by the end of 2020. This enforcement promoted innovation, creation of employment opportunities and increased efficiency for SMEs, as well as promoted understanding of the obligations of market players. It also enhanced the knowledge of the mandate of the Authority, particularly regarding the abuse of buyer power provisions.
10. In order to streamline commercial relationships and promote self-regulation and mitigate against case of Abuse of buyer power the Authority published the retail sector code of practice. The code provides for principles of fair and ethical dealing, variation of supply agreements/joint business plans and terms of supply; duties of retailers and suppliers including on delays in payment, contribution to marketing costs, payment for shrinkage and for damages, promotions, duties in relation to de-listing etc. and establishment of a Retail Trade Dispute Settlement Committee and a Prompt Payment Committee.
11. Further, the Authority developed model contracts for the retail and insurance sectors aimed

⁸ In this context, buyer Power is the ability of a buyer to obtain from a supplier more favourable terms or impose a long term opportunity cost unfair to the supplier.

⁹ https://cak.go.ke/sites/default/files/annual-reports/CAK_Annual_Report_Financial_Year_2020_21.pdf





at minimizing conflicts currently experienced between contracting parties in the retail and insurance industries. This was necessitated by the realisation that 85% of the Buyer Power complaints investigated by the Authority in FY 2019/2020, parties did not have written contracts. Therefore, the parties are at liberty to modify and vary terms of their individual contracts to reflect their intent and fit their respective circumstances, subject to the basic minimum requirements pursuant to Section 24A (7) of the Act.

C. THE AUTHORITY'S POLICY DIRECTION

12. The shift from the brick and motor markets to use of online platforms has presented challenges for competition enforcement, especially in the retail sector, which accounts for majority of the MSMEs. The Authority received a number of cases whereby there were substantial disparity in bargaining power between MSMEs in the online retail platforms and the buyers of their goods and services for resale in the market. Online platforms are fuelled by big data, which is essential to target and retain customers, streamline operations, optimize supply chain, improve business decisions, and ultimately save money. It also has a potential of misuse resulting in Abuse of Buyer Power concerns. The risk of online platforms engaging in practices such as mining supplier's and consumer's data, which can in turn be used to the advantage of the retailer and a disadvantage for the suppliers, is a potential abuse of Buyer Power.
13. Notably, these online platforms act as conduits to the buyer supplier relationship and therefore, despite harmful conducts relating to the bargaining power of these platforms to the detriment of MSMEs, the Competition Act has provisions on buyer supplier relationship and not parties that are involved in the trading process. This has reduced the ability of the Authority to conclude some cases where there are abuses as a result of a bargaining position of a buyer and MSMEs in online platform transactions.
14. To remedy this, the Authority is;
 - i. Reviewing the appropriate regulations in order to effectively cover cases related to abuse of bargaining power. This is aimed at inclusion of Buyer Power provisions into the Competition Act by the legislature that will preserve the sustainability of SMEs and deepen the Authority's ability to intervene against practices that exclude them from





- meaningful participation in markets; and,
- ii. Undertaking inquiry into online platforms aimed at unearthing any market conduct related competition challenges with a view of remedying them with the act and reviewing the existing competition assessment tools.
15. In the review of market structure, the Authority is currently focusing on undertaking technology aided mergers analysis, through enhanced research, use of business intelligence and data analysis tools. This is aimed at promoting competitive markets that stimulate investment and growth of SMEs, reduce cost of filing by businesses, improve completeness in filing, reduced timelines in merger analysis, and contribute to sound decision-making.

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