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NATIONAL ASSEMBLY BILLS, 2019

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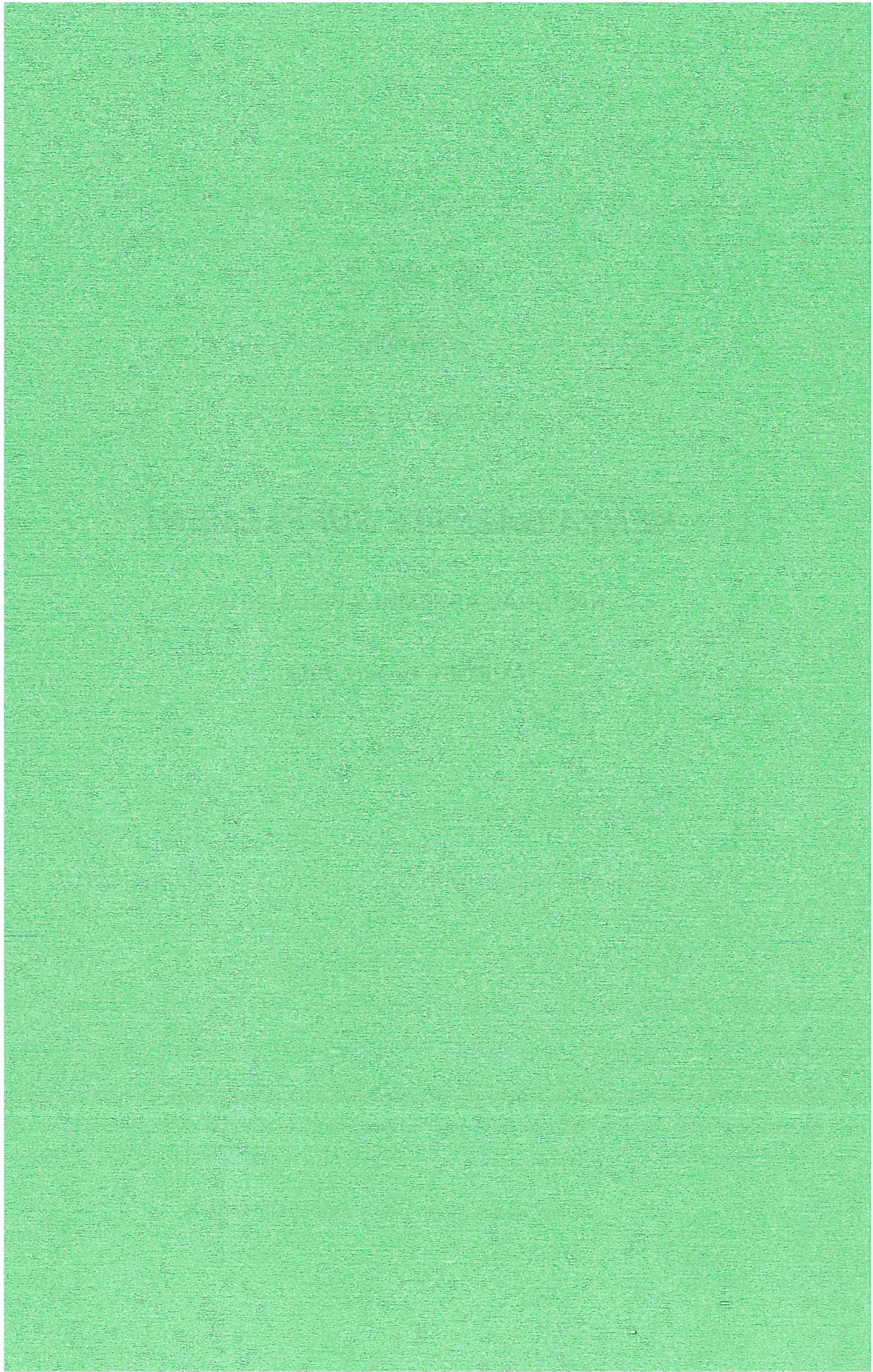
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THE COMPETITION (AMENDMENT) BILL, 2019

A Bill for

AN ACT of Parliament to amend the Competition Act

ENACTED by the Parliament of Kenya, as follows—

1. This Act may be cited as the Competition (Amendment) Act, 2019.

Short title.

2. Section 18 of the Competition Act, 2010, hereinafter referred to as the “principal Act”, is amended in subsection (4) by inserting the words “,abuse of buyer power” immediately after the word “competition”.

Amendment
of s. 18 of No.
12 of 2010.

3. Section 24 of the principal Act is amended—

Amendment
of s. 24 of No.
12 of 2010.

(a) in the marginal note by deleting the words “and buyer power”; and

(b) by deleting subsections (2A), (2B), (2C) and (2D).

4. The principal Act is amended by inserting the following new section immediately after section 24—

Insertion of
new section in
No. 12 of
2010.

Abuse of buyer
power.

24A. (1) Any conduct that amounts to abuse of buyer power in a market in Kenya, or a substantial part of Kenya, is prohibited.

(2) For the purposes of this section, “buyer power” means the influence exerted by an undertaking or group of undertakings in the position of purchaser of a product or service—

(a) to obtain from a supplier more favourable terms, or

(b) 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.

(3) Where the Authority establishes that a sector or an undertaking is experiencing or is likely to experience incidences of abuse of buyer power, it may monitor the activities of the sector or undertaking and ensure compliance by imposing reporting and prudential requirements.

(4) The Authority may require industries and sectors, in which instances of abuse of buyer power are likely to occur, to develop a binding code of practice.

(5) In determining any complaint in relation to abuse of buyer power, the Authority shall take into account all relevant circumstances, including—

- (a) the nature and determination of contract terms between the concerned undertakings;
- (b) the payment requested for access to infrastructure; and
- (c) the price paid to suppliers.

(6) Conduct amounting to abuse of buyer power includes—

- (a) delays in payment of suppliers without justifiable reason in breach of agreed terms of payment;

- (b) unilateral termination or threats of termination of a commercial relationship without notice or on an unreasonably short notice period, and without an objectively justifiable reason;
- (c) refusal to receive or return any goods or part thereof without justifiable reason in breach of the agreed contractual terms;
- (d) transfer of costs or risks to suppliers of goods or services by imposing a requirement for the suppliers to fund the cost of a promotion of the goods or services;
- (e) transfer of commercial risks meant to be borne by the buyer to the suppliers;
- (f) demands for preferential terms unfavourable to the suppliers or demanding limitations on supplies to other buyers;
- (g) reducing prices by a small but significant amount where there is difficulty in substitutability of alternative buyers or reducing prices below competitive levels; or
- (h) bidding up prices of inputs by a buyer undertaking with the aim of excluding competitors from the market.

(7) When investigating abuse of buyer power complaints, the Authority shall be guided by any existing agreement, whether written or not, between a buyer undertaking and supplier undertaking.

(8) An agreement between a buyer undertaking and a supplier undertaking shall include—

- (a) the terms of payment;
- (b) the payment date;
- (c) the interest rate payable on late payment;
- (d) the conditions for termination and variation of the contract with reasonable notice; and
- (e) the mechanism for the resolution of disputes

(9) The Authority shall publish the code of practice which shall be developed in consultation with the relevant stakeholders, relevant Government agencies and the Attorney-General.

(10) Any person who contravenes the provisions of this section commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding ten million shillings or to both.

5. The principal Act is amended by inserting the following new section immediately after section 29—

Insertion of
new section
in No. 12 of
2010.

Professional
associations.

29A. Any professional
association—

- (a) whose rules contain a restriction that has the effect of preventing, distorting or lessening competition in a market in Kenya and which fails to apply for an exemption as required by section 29 (1) and (2); or
- (b) which having applied for exemption under section 29 (1) fails to comply with the Authority's decision rejecting its application,

commits an offence, and any official thereof or any person who issues guidelines or rules in contravention of that provision shall be liable, upon conviction, to imprisonment for a term not exceeding five years or to a fine not exceeding ten million shillings, or both.

6. Section 31 of the principal Act is amended in subsection (1) by inserting the following new paragraph immediately after paragraph (b)—

Amendment
of s. 31 of No.
12 of 2010.

(c) prohibitions relating to abuse of buyer power.

7. Section 70A of the principal Act is amended—

Amendment
of s. 70A of
No. 12 of
2010.

- (a) by deleting the marginal note and substituting therefor the words “Authority to initiate investigations”;
- (b) in subsection (1), by deleting the words “into a consumer complaint” and substituting therefor the words “into any conduct or proposed conduct which is alleged to constitute an infringement of Part VI of the Act”; and

- (c) in subsection (2), by deleting the words “of consumer complaints” and substituting therefor the words “into any conduct or proposed conduct which is alleged to constitute an infringement of Part VI of the Act”.

MEMORANDUM OF OBJECTS AND REASONS

The Bill seeks to amend the Act to facilitate investigations with a view of mitigating abuse of bargaining or buyer power which adversely affects the economy, and empowers the Competition Authority to investigate and take action against such conduct.

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

The Bill does not limit fundamental rights and freedoms.

Statement that the Bill concerns county governments

The Bill does not concern County Governments in terms of Article 110 (1) (a) of the Constitution.

Statement that the Bill is a money Bill within the meaning of Article 114 of the Constitution

The enactment of this Bill shall not occasion additional expenditure of public funds.

Dated the 27th June, 2019.

ADEN DUALE,
Leader of Majority.

Subsection (4) of section 18 of No. 12 of 2010 which is intended to amend—

18. (1) The Authority may conduct an inquiry or a sectoral study where—

- (a) it considers it necessary or desirable for the purpose of carrying out its functions;
- (b) upon a direction by the Minister in writing to the Authority, requiring it to conduct an inquiry or a sectoral study into a matter specified in the direction.

(2) A direction by the Minister under subsection (1)(b) shall specify a period within which the Authority shall submit its report to the Minister.

(3) In appropriate cases, after conclusion of an inquiry or a sectoral study, the Authority shall in its report to the Minister identify sectors where factors relating to unwarranted concentrations of economic power subsist and give advice regarding measures which may ameliorate such situations.

(4) At the request of a regulatory body, or at its own instance, the Authority may conduct an inquiry into any matter affecting competition or consumer welfare and provide a report within a reasonable period.

(5) The Authority shall give notice of an intended inquiry or sectoral study by—

- (a) publishing a notice in the *Gazette* and in at least one daily newspaper of national circulation specifying—
 - (i) the subject matter of the intended inquiry;
 - (ii) inviting submissions on the subject from members of the public within a specified period; and
 - (iii) in the case of an inquiry conducted at the direction of the Minister, the terms of reference issued by the Minister;
- (b) sending written notice of the inquiry, including the information in paragraph (a) to—
 - (i) undertakings whose interests the Authority considers likely to be affected by the outcome of the inquiry;
 - (ii) industry and consumer organizations which the Authority considers may have an interest in the matter;
 - (iii) the Minister.

(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.

Section 24 of No. 12 of 2010 which is intended to amend—

24. (1) Any conduct which amounts to the abuse of a dominant position in a market in Kenya, or a substantial part of Kenya, is prohibited.

(2) Without prejudice to the generality of subsection (1), abuse of a dominant position includes—

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting or restricting production, market outlets or market access, investment, distribution, technical development or technological progress through predatory or other practices;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties;
- (d) making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject-matter of the contracts; and
- (e) abuse of an intellectual property right.

(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.

(3) Any person who contravenes the provisions of this section commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding ten million shillings or to both.

Subsection (1) of section 31 of No. 12 of 2010 which is intended to amend—

(1) The Authority may, on its own initiative or upon receipt of information or complaint from any person or Government agency or Ministry, carry out an investigation into any conduct or proposed conduct which is alleged to constitute or may constitute an infringement of—

- (a) prohibitions relating to restrictive trade practices; or
- (b) prohibitions relating to abuse of dominance.

(2) If the Authority, having received from any person a complaint or a request to investigate an alleged infringement referred to in subsection (1), decides not to conduct an investigation, the Authority shall inform that person in writing of the reasons for its decision.

(3) *Deleted by L.N. 23/2011, Sch.*

(4) If the Authority decides to conduct an investigation, the Authority may, by notice in writing served on any person in the prescribed manner, require that person—

- (a) to furnish to the Authority by writing signed by that person or, in the case of a body corporate, by a director or member or other competent officer, employee or agent of the body corporate, within the time and in the manner specified in the notice, any information pertaining to any matter specified in the notice which the Authority considers relevant to the investigation;
- (b) to produce to the Authority, or to a person specified in the notice to act on the Authority behalf, any document or article, specified in the notice which relates to any matter which the Authority considers relevant to the investigation;
- (c) to appear before the Authority at a time and place specified in the notice to give evidence or to produce any document or article specified in the notice; and
- (d) if he possesses any records considered relevant to the investigation, to give copies of those records to the Authority or

alternatively to submit the record to the authority for copying within the time and in the manner specified in the notice.

Section 70A of No. 12 of 2010 which is intended to amend—

(1) Pursuant to the provisions 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.

