COMPETITION AUTHORITY OF KENYA

Consolidated Guidelines on Restrictive Trade Practices under the Competition Act

This publication is a guidance and contains general information intended for the convenient use and guide on how the provisions under Part III of the Competition Act, No 12 of 2010 (the Act) are applied. This publication can be made available in alternative formats upon request. Please contact the Competition Authority of Kenya using the contact information provided below. This publication may not be reproduced, in part or in whole by any means without the expressed permission of the Competition Authority of Kenya.

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Foreword by the Director General

The Competition Authority of Kenya ("the Authority") is established under Section 7 of the Act and is charged with, *inter alia,* promoting and enforcing compliance with the Competition Act. One of the objectives of the Act is to bring national competition law, policy and practice in line with international best practice and in furtherance of that objective and in accordance with the powers conferred on the Authority under the Act, the Authority hereby publishes these consolidated guidelines on restrictive trade practices which are intended to:

a) Equip undertakings and their legal representatives with information on how the Authority carries out its legal and economic analysis with the respect to restrictive trade practices and in particular provide explanations of the assessment standard the Authority will use in the assessment of (i) horizontal agreements, (ii) vertical agreements and (iii) abuse of dominance;

b) Explain the analytical construct that the Authority may use in determining whether an undertaking is dominant

c) Identify categories of restrictive trade practices that may be subject to exemptions.

d) To explain the procedure of grant of exemption

e) To explain the procedure for leniency

f) To explain the procedure of determining administrative financial penalties

These guidelines are not substitute to the provisions on restrictive trade practices under Part III of the Act or any Competition General Rules, 2019 made pursuant thereto. These guidelines should be read together with the Act and any Competition General Rules, 2019 made pursuant thereto and with any other applicable legal instruments of Kenya including binding or persuasive legal precedent from competition law cases. These guidelines do not constitute legal advice, do not have the force of law, and is not binding on the Competition Tribunal or any court of law

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Section 1 - Introduction

1. The primary law provisions on restrictive trade practices are set out under Part III of the Act" These guidelines provide explanation on the provisions under Part III of the Act.

2. These guidelines also provide direction and clarity regarding the analytical framework and the factual evidence the Authority considers in cases involving anticompetitive agreements including horizontal and vertical agreements as prohibited, under Section 21 and 22 of the Act.

3. These guidelines also explain the framework the Authority uses in assessing whether an undertaking is dominant and the type of evidence it may consider when establishing an abuse of dominance case.

4. No single methodology will be applied in all cases. Rather, the Authority will undertake a fact-finding process in each restrictive trade practice case and apply a range of tools to evaluate the conduct and/or agreement in question.

5. The principles contained herein will be applied and further developed and refined by the Authority in individual cases. The Authority may revise these guidelines from time to time in light of new developments to reflect changes in best practice and of evolving nature of law in Kenya.

6. In this document the Authority explains the following:

    i. **In Section 2 - The Ambit of the Authority's Jurisdiction with Respect to Undertakings Engaged in Trade:** this section explains the category of undertakings that are regulated by Part III of the Act.

    ii. **In Section 3 - The Assessment or Review Standard used in Assessing Anticompetitive Agreements**: this section explains the assessment criteria that will be applicable to horizontal and vertical agreements.

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iii. **In Section 4 - The Analytical Framework used in Abuse of Dominance Cases:** this section explains: (i)Determination of dominance (ii) the concept of abuse; and, (iii) how exclusionary and exploitative abuses will be assessed under the Act.

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iv. **In Section 5 – Assessment of exemption Applications and Categories of Exempted Conduct under the Act:** this section explains exemptions relating to Restrictive Trade Practices, Intellectual Property Rights, and Professional Association.

v. **Section 6- Leniency Programme under the Act: -** this section explains the procedure of reduction of administrative financial penalties that may be granted by the Authority in respect to horizontal restrictive agreements and conduct.

vi. **Section 7- Fining and Settlement.** This section will explain the Key principles in determining administrative financial penalties and settlement procedures.

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Section 2 -The Ambit of the Authority's Jurisdiction with Respect to Undertakings

7. The Authority will exercise its jurisdiction over conduct of undertakings pursuant to its powers under the Act. The Authority has the power to investigate, assess conduct and to implement remedies to address conduct by an undertaking(s) relating to restrictive trade practices regulated under Part III of the Act. An undertaking under the Competition Act means any business 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 provision of any service, and includes a trade association.

8. For purposes of these guidelines, anticompetitive conduct or restrictive agreement or conduct means agreements, decisions and concerted practices which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya; and the terms "anticompetitive agreements or conduct" and "restrictive agreement or conduct" will be used interchangeably.

9. As regards assessing the effect of conduct proscribed under Part III of the Act, the Authority will look at the effect of the conduct on the market in Kenya or any part of Kenya.

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Section 3 -The Assessment of Restrictive Agreements, Practices and Decisions

10. Section 21(1) of the Act prohibits all agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have the object or effect of preventing, distorting or lessening competition in trade in any goods and services in Kenya, or part of Kenya, unless they are granted exemption by the Authority.

11. Pursuant to the Competition Act "agreement" when used in relation to a restrictive trade practice, includes a contract, arrangement or understanding, whether legally enforceable or not. "Concerted practice" on the other hand means co-operative or coordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement.

12. A concerted practice, therefore, can include any type of coordinated activity between undertakings which substitute practical co-operation between them for the risks presented by effective competition, and includes any practice which involves direct or indirect contact or communication between undertakings, the object or effect of which is either to influence the conduct of undertakings on a market or to disclose the course of conduct which an undertaking has decided to adopt or is contemplating to adopt in circumstances where the disclosure would not have been made under normal conditions of competition.

13. Decisions by associations of undertakings include binding and non-binding decisions by trade associations and other established groups of undertakings. The Authority, therefore, considers that "decisions of associations" can include any form of cooperation or arrangement among competing undertakings in the setting of an industry association or private sector organization or any industry association setting.

14. With respect to the range of conduct that can constitute an agreement or concerted practice within the meaning of Section 21(1) of the Act, the Authority considers that a group of undertakings have engaged in prohibited conduct which has an anticompetitive object or effect in respect of the trade in goods or services in Kenya.

15. Therefore, the agreements or concerted practices as described under Sections 21(1), (2) and 22 of the Act may be:

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i. written down in a formal contract that memorializes the terms of the agreement among parties;
ii. via an oral agreement;
iii. express or implied conduct;
iv. inferred from and/ or imputed to an ongoing commercial relationship between the parties;
v. intended to be enforceable or not; or
vi. Any document that memorializes the collective object of the collaborating parties.

16. In a case before it, the Authority may consider a variety of factors, ranging from a formal sales agreement or the terms written into the fine print of a *pro forma* invoice to silent consensus, series of actions and any additional factors as evidenced by the surrounding circumstances when deciding whether an agreement has been reached between undertakings

17. In the context of this guidelines the term agreement includes concerted practices and decisions.

18. The prohibited Agreements can be between undertakings in horizontal or vertical relationship. The Authority considers that horizontal agreements are those between competitors operating at the same level of the supply chain, and vertical agreements to be those between market players operating at different levels of the supply chain to the extent that they distort or restrict competition are prohibited by law.

19. In determining whether an agreement, has effect in Kenya the Authority will consider, among others, the following: a) whether the business practice takes place within Kenya e.g. establishing direct sales of the relevant products to purchasers established in Kenya, irrespective of the location of the sources of supply and the production plant, and of where the agreement was formed; b) whether the business practice involved companies established within Kenya; or c) whether the business practice targeted, or intended to target, customers in Kenya.

20. Section 21(3) of the Act sets out a non-exhaustive list of examples of agreements, that may constitute an anticompetitive agreement. Section 22 of the Act sets out prohibitions of certain agreements among trade associations. These prohibited

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concerted practices can, however, be granted exemption by the Authority where the public interest as a result of the arrangement outweigh the detriment to competition. All other agreements not subject of an exemption and which prevent, distort or lessen competition are subject to enforcement proceedings.

21. In accordance with section 21 (8) of the Act, subsection (1) of section 21 does not apply in respect of an agreement entered into between, or a practice engaged in by—

i. a company and its wholly owned subsidiary or

ii. a wholly owned subsidiary of that subsidiary company; or

iii. undertakings other than companies, each of which is owned or controlled by the same person or persons

22. Companies that are under control of another undertaking form part of the same 'undertaking' are therefore not considered to be independent for the purposes of these guidelines. The same is true for sister companies over which control is exercised by the same parent company. Therefore, Section 21 only applies to agreements between independent undertakings. The Authority, therefore, considers that there must be a plurality of undertakings for there to be an agreement. Where two or more parties constitute a single economic entity, the prohibition under Section 21(1) does not apply.

23. Section 21(2) expressly extends the prohibition on restrictive agreements to horizontal and vertical agreements. There is a distinction to be drawn between horizontal agreements and vertical agreements and that the consequence of that distinction is that the Authority will apply separate assessment criteria for horizontal agreements and vertical agreements.

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24. In assessing whether an agreement restricts or distorts competition on a market the Authority will look at the effects of a conduct on the market. In this context the Authority is concerned with all types of effects the conduct can have on the market - that is, both vertical effects and horizontal effects.

25. Horizontal effects occur when the conduct of the undertaking in question stifles competition in the market in which the undertaking is active. This is for example the case if the undertaking and/or its competitors charge higher prices or reduce output.

26. Vertical effects occur when the conduct of the undertaking in question stifles competition in its upstream or downstream market. The Authority may not be overly concerned with vertical effects because the effects are usually procompetitive.

HORIZONTAL AGREEMENTS

27. A horizontal agreement is an agreement between undertakings which operate at the same level of the value chain. These type of agreements can be between actual and potential competitors. The Authority considers two companies as actual competitors if they are active in the same relevant market. A company is treated as a potential competitor of another company if, in the absence of the agreement, in case of a small but permanent increase in relative prices it is likely that the former, within a short period of time[1], would undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the latter is active. However, this assessment has to be based on realistic grounds, the mere theoretical possibility to enter a market is not sufficient (see the Authority' Guidelines on definition of the relevant market).

Hard-core Restrictions

28. Hardcore restrictive agreements are those that are by their very nature injurious to the proper functioning of competition and have no redeeming value whatsoever. Hardcore restrictions can be perpetrated through agreements by undertakings including trade associations.

[1] A short period of time is a period not exceeding one year and will be considered on a case to case basis

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29. The following non-exhaustive list gives examples of the types of agreements or practices that may constitute a form of a prohibited cartel conduct by object:

i. Contracts or agreements or decisions or concerted practices among competitors on prices charged to their customers;

ii. Contracts or agreements or decisions or concerted practices among competitors to limit their output;

iii. Contracts or agreements or decisions or concerted practices among competitors to allocate customers, territories, products or suppliers.

iv. Contracts or agreements or decisions or concerted practices among competitors to rig bids or tenders.

Price Fixing

30. The Authority considers price fixing to include:

i. fixing the price itself; or fixing an element of the price such as fixing a discount, setting percentage price increase; or

ii. setting the permitted range of prices between competitors;

iii. Setting the price of transport charges (such as fuel charges), credit interest rate terms etc.;

iv. An agreement or arrangement to indirectly restrict price competition in some way such as recommended pricing;

31. Agreeing to share price lists before prices are increased either directly or indirectly through an industry or trade association or to require competitors to consult each other before making a pricing decision.

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Collusive tendering (bid-rigging)

32. Collusive Tendering usually occurs between competitors or potential competitors who tender for the provision of goods or services. The Authority considers collusive tendering (otherewise referred to as bid-rigging,) to include:

i. Cover bidding. Cover (also called complementary, courtesy, token, or symbolic) bidding is the most frequent way in which bid-rigging schemes are implemented. It occurs when individuals or firms agree to submit bids that involve at least one of the following: (1) a competitor agrees to submit a bid that is higher than the bid of the designated winner, (2) a competitor submits a bid that is known to be too high to be accepted, or (3) a competitor submits a bid that contains special terms that are known to be unacceptable to the purchaser. Cover bidding is designed to give the appearance of genuine competition.

ii. Bid suppression. Bid-suppression schemes involve agreements among competitors in which one or more companies agree to refrain from bidding or to withdraw a previously submitted bid so that the designated winner"s bid will be accepted. In essence, bid suppression means that a company does not submit a bid for final consideration.

iii. Bid rotation. In bid-rotation schemes, conspiring firms continue to bid, but they agree to take turns being the winning (i.e., lowest qualifying) bidder. The way in which bid-rotation agreements are implemented can vary. For example, conspirators might choose to allocate approximately equal monetary values from a certain group of contracts to each firm or to allocate volumes that correspond to the size of each company.

iv. Market allocation. Competitors carve up the market and agree not to compete for certain customers or in certain geographic areas. Competing firms may, for example, allocate specific customers or types of customers to different firms, so that competitors will not bid (or will submit only a cover bid) on contracts offered by a certain class of potential customers which are allocated to a specific firm. In return, that competitor will not

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competitively bid to a designated group of customers allocated to other firms in the agreement.

Market division

33. **Market allocation or market division schemes** are agreements in which competitors divide markets among themselves. In such schemes, competing firms allocate specific suppliers, customers or types of customers, products and/or services, or territories among themselves. For example, one competitor will be allowed to sell to, or bid on contracts issued by, certain customers or types of customers. In return, he or she will not sell to, or bid on contracts issued by, customers allocated to the other competitors. In other schemes, competitors agree to sell only to customers in **certain geographic** areas and refuse to sell to, or quote intentionally high prices to, customers in geographic areas allocated to conspirator companies.

34. Coordination by way of market division will be easier if customers have simple characteristics that allow the coordinating undertakings to readily allocate them. Such characteristics may be based on;

i. geography,
ii. customer type, or
iii. the existence of customers who typically buy from one specific undertaking.

35. Coordination by way of market division may be relatively straightforward if it is easy to identify each customer's supplier and the coordination device is the allocation of existing customers to their incumbent supplier.

36. Coordinating undertakings may, however, find other ways to overcome problems stemming from complex economic environments short of market division. Publicly available key information, exchange of information through trade associations, or information received through cross-shareholdings or participation in joint ventures may also help undertakings reach terms of coordination. The more complex the market situation is, the more transparency or communication is likely to be needed to reach a common understanding on the terms of coordination.

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37. The Authority considers that market division may involve competitors agreeing to allocate customers between themselves or agreeing to stay out of each other's geographic territory or customer base.

38. Agreeing to buy only from certain suppliers could also be deemed to be anti- competitive. Competitors agreeing to specialize in certain products, ranges of products or in particular technologies could also be deemed to be anti-competitive. For ease of understanding consider the following example;

Output limitation/restriction

39. Output restriction occurs when competitors agree to prevent, reduce or restrict supply with the aim of creating scarcity. The purpose of the arrangement is to prop up or increase prices (or counter falling prices). This may be inferred where the arrangement directly or indirectly prevents, restricts or limits:
    i. the production, or likely production, of goods by any or all of the parties to the contract, arrangement or understanding; or
    ii. the capacity, or likely capacity, of any or all of the parties to the contract, arrangements or understanding to supply services; or
    iii. the supply, or likely supply, of goods or services to persons or classes of persons by any or all of the parties to the contract, arrangement or understanding.
40. Any undertaking may independently decide to reduce output to respond to market demand. What is prohibited is an agreement with competitors on the coordinated restriction of output.

Assessment of Hard-core Restrictions

41. The Authority considers that horizontal collusive agreements are subject to "object" assessment, that is, strict or per se scrutiny for which no defenses can be asserted. The Authority will only consider the content and nature of the agreement and not the effect of the agreement.

42. The Authority considers that horizontal collusive agreements (i.e., among competitors) are by their very nature injurious to the proper functioning of competition and can have no redeeming value whatsoever. These agreements include price-fixing cartels, bid-rigging, output restriction and market division agreements. Examples of other potential

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horizontal agreements include certain forms of information sharing between competitors, and certain trade association agreements.

VERTICAL AGREEMENTS

43. A vertical agreement is an agreement between undertakings each of which operates at a different level in value chain. Vertical restrictions can occur between any two levels of the supply chain such as at the production level between manufacturer and wholesaler or at the level of distribution between wholesaler and retailer.

44. Competition concerns may arise where one of the parties to the vertical agreement enjoys market power in its market. The Authority refers to an "upstream" effect where a vertical agreement stifles or harms competition in the market where the supplier operates. It refers to "downstream" effects where a vertical agreement stifles or harms competition in the market where the buyer participates.

45. Vertical restriction could be either on price or non-price. Examples of vertical agreements may include:

i. Resale Price Maintenance ("RPM"): this is a practice where the manufacturer or an upstream seller of a good sets a fixed or the minimum price at which his distributor or a downstream buyer can resell a good. Section 21(3)(d) prohibits the setting of a minimum resale price. This could involve any form of RPM including recommended retail pricing which serves as a focal point for downstream collusion and would also be deemed as anti-competitive. For example, a manufacturer sets the minimum price for which its products are sold at the retail level. The result is that all the manufacturer's re-sellers (e.g., retailers) do not compete on price with competing products.

ii. Tied Selling and Bundling: This occurs when the purchase of product A (the tying product) is conditional on the purchase of product B (the tied product) where A cannot be purchased alone, while B can. Pure bundling occurs when both products can only be purchased together. Mixed bundling occurs where the products can be purchased separately but it is cheaper to purchase them together. The Authority considers that this can be one typical way in which a dominant firm leverages market power in one market into a related

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market by tying or bundling products together. The Authority will scrutinize this type of conduct to assess whether the undertaking in question is a dominant firm as in this context the resultant effect on the market can be a reduction in competition in the related market principally because the conduct results in exclusion of rivals from the relevant market.

iii. Discount and Rebate Agreements: Conditional rebates are defined as rebates granted to customers to reward a specific purchasing behavior over a particular period of time. As far as conditional rebates are concerned, a further distinction could be made as follows:

a. Fidelity rebates and discounts are defined as discounts or rebates on units purchased of a single product, conditioned upon the level or share of purchases granted in return for an undertaking by the customer to obtain his stock exclusively or almost exclusively from an undertaking in a dominant position, independently of whether the quantities purchased were large or small. Fidelity rebates or loyalty discounts allow sellers to offer buyers a better price conditional on the buyer demonstrating loyalty in the purchases they make. In this respect, fidelity rebates are a form of price discrimination of a firm among its retailers and distributors.

b. **Bundled discounts**, whereby a customer receives a lower price when purchasing a combination of products compared to the price for purchasing the items individually.

c. **Quantity/Volume discounts**, where the unit price decreases as you purchase in larger quantities

d. **Aggregate rebates:** discounts given to a customer for purchasing most of its products from the same producer Incremental rebates whereby the conditional

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rebate is available only to incremental purchases above the threshold once it is e exceeded.

Intellectual Property Agreements Prohibited under Section 21(3)

46. Intellectual Property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce and the conferment of rights thereabout. The Authority regards Intellectual Property Rights to be vested in copyrights and related rights, trade marks, geographical indications, industrial design, and patents.

47. IIntellectual Property Rights provide the owner with exclusive control and exclusive ownership of the protected subject matter. This essentially means that an undertaking controls access and use of the protected subject matter. Hence this exclusive control may in some cases conflict with the competition law objective that seeks to avoid market barriers and benefits to consumers by ensuring multiplicity of suppliers of goods and services.

48. It is on this premise that; the Competition Act prohibits an intellectual property owner from using the intellectual property rights in a manner that would prevent or distort competition. Agreements on IPR's that directly or indirectly fix purchase or selling prices, allocate markets or indicate the manner in which IPRs are used by the concerned parties in a manner that goes beyond the limits of fair, reasonable and non-discriminatory use, are prohibited.

49. The Authority in the first instance, must satisfy itself on the legal owner of the Intellectual Property Right before proceeding with assessment of the complaint. Proof of ownership for each form of intellectual property shall be said to be established as shown below:

i. For copyrights, property or ownership is distinctive therefore it arises automatically. The intangible property must be embodied in a tangible manner for the owner to claim or prove intellectual property. Additionally the owner is said to have prima facie evidence if the same has been entered into the Register of the Kenya Copyright Board.[2]

[2] Section 22A, *Copyright Act,* No. 12 of 2001.

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ii. For trademarks, the trademark owner shall produce a valid Certificate of Registration that is duly signed and contains the seal of the Registrar.[3]

iii. For industrial design, the owner shall produce a valid certificate of registration issued by the Managing Director of Kenya Industrial Property Institute.[4]

iv. For patents, ownership shall be proved by production of a valid Certificate of Registration issued by the Managing Director of Kenya Industrial Property Institute[5]

50. The above ownership will be subject to confirmation from the Kenya Industrial Property Institute and the Kenya Copyright Board both statutory corporations which are mandated to administer intellectual property rights.

51. The Authority considers that the following is a non-exhaustive list of examples of intellectual property agreements prohibited under Section 21(3)(h) of the Act:

i. Exclusive licensing agreements: the Authority considers that these types of agreements can give rise to anti-competition concerns. Examples of such agreements include cross licensing by undertakings in oligopolistic market, grant backs and acquisitions of IPRs, including, patent-pooling agreements whereby firms in a manufacturing industry decide to pool their patents and agree not to grant licenses to third parties, at the same time fixing prices and supply quotas; and tie-in arrangements where a licensee may be required to acquire raw materials solely from the patent holder, thus foreclosing other producers on the market from accessing the license.

ii. Royalty Arrangements: where the licensee has to pay royalties for the patented product as well as unpatented information relating to the patent.

iii. Vertical Price-Fixing Agreements: the price at which the licensee can sell is set by the patent holder.

[3] Section 22 (2), *Trade Marks Act*, CAP. 506
[4] Section 87 (8), *Industrial Property Act*, No. 3 of 2001.
[5] Section 45 (2), *Industrial Property Act*, No. 3 of 2001.

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iv. Territorial Restrictions: where the licensee is restricted to certain geographic regions or groups of customers that are not covered by the patent.

v. Tying and Coercive Arrangements: where a licensee may be coerced by the licensor to take several licenses in intellectual property even though the former may not need all of them.

vi. Research and Development/Standard Setting Arrangements: where there is an agreement among undertakings to develop a new technology or set a standard for an industry and only just a few of the undertakings in the market can viably engage in this venture to the exclusion of other efficient competitors and to the detriment of consumers.

vii. Undue Influence over Quality Control: where there is an imposition of quality control on the licensed patented product beyond what is necessary for guaranteeing the effectiveness of the licensed patent.

viii. Application of Certain Conditions Applied to Trademark Use: the imposition of a trademark use restriction where the owner of a trademark imposes territorial restrictions on the licensee of a trademark, limiting the licensee to the manufacture and sale of the trademark to a specified geographic area or market or where the trademark owner grants licenses for the sale of a trademark product on the condition that the licensee also takes unwanted or broader bundle/package of products.

ix. Other Anticompetitive Licensee Restrictions: the imposition of other undue restrictions on the licensee, such as, limiting the maximum use the licensee may make of the patent, setting a specific or minimum price at which the patented product may be sold, imposing a territorial restriction on sale after the first authorized sale of the patented product has occurred or imposing a restriction on the licensee from using, selling or licensing a competitor's technology.

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52. The Authority considers that vertical restrictions are more likely to have anti-competitive effects where competition between products is weak, such anti-competitive effects may include:

i. Market foreclosure — blocking of access of rivals to consumers targeted in the relevant market or another market.

ii. Market exclusion — blocking of new entrants from entry to markets.

iii. Increased prices to consumers and limitation of quantities of goods.

Exploitative and Exclusionary Effects

53. Some effects impact rivals and some exploit consumers.

i. Exploitative effects- Business strategies that result in excessively high
ii. prices or scarcity of goods are considered to have exploitative effects.
iii. exclusionary effects- Business strategies that result in removal of
iv. competitors from markets or from accessing consumers or weakening of competition from rivals and erecting barriers to entry to exclude new rivals from the market are said to have exclusionary effects.

Burden of proof

54. For per se/ hardcore restrictions; the Authority bears the burden of proving the existence an agreement whose object is the prevention, distortion or lessening of competition.

55. For violations with restrictive effects on competition; the Authority has the burden of proving, the existence of the agreement and the anticompetitive effects in the relevant product and geographic markets.

56. The burden to adduce proof in defense of any conduct deemed to have restrictive effects on competition shifts to the respondent/undertaking who must adduce evidence to demonstrate otherwise after the Authority has invoked its powers under section 34 of the Act by issuing the Notice of Proposed Decision.

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Section 4 The Analytical Framework used in Abuse of Dominance Cases

57. A dominant position is defined under Sections 4 (3) and 23 of the Act. Section 24(1) prohibits any abuse of a dominant position by an undertaking in a market for goods or services in Kenya. For an infringement of 24 to arise, four conditions must be met:

i. the entity at issue must qualify as an "undertaking";
ii. the undertaking must hold a dominant position on a relevant market;
iii. the undertaking's conduct must qualify as an abuse; and
iv. the abusive conduct must be within a market in Kenya or substantial part of Kenya.

58. In determining whether an abuse of dominance practice is within Kenya the Authority will consider, among others, whether the business: a) takes place within Kenya e.g. establishing direct sales of the relevant products to purchasers established in Kenya, irrespective of the location of the sources of supply and the production plant, and of where the agreement was formed; b) involved companies established within Kenya; or c) targeted, or intended to target, customers in Kenya.

59. The following actions, as provided in Section 24(2) if done by a dominant undertaking can constitute abuse including;

i. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
ii. limiting or restricting production, market outlets or market access, investment, distribution, technical development or technological progress through predatory or other practices;
iii. applying dissimilar conditions to equivalent transactions with other trading parties;
iv. 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
v. abuse of an intellectual property right.

60. In determining whether there has been a contravention of Section 24(1) the Authority will assess whether the undertaking subject of the infringement

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proceeding is dominant. If the undertaking is dominant, the Authority will assess whether the undertaking is abusing its position of dominance.

61. In assessing abuse of dominance cases, the Authority will focus on the impact of the conduct on the market — that is whether the conduct is likely to restrict or harm competition on the market. The Authority therefore defines the relevant market to assess;

62. Whether an undertaking has market power and can harm competition and to ascertain who the market players are with a view to establishing the effect of the conduct on the competitive process as a whole. The starting point in analyzing any abuse of dominance case is therefore to define the relevant market. Consequently, any assessment of the effects of the abuse on the market will necessarily require a definition of the relevant market.

Dominance and market power test

63. As per Section 23 of the Act, an undertaking is deemed to be dominant if it has a

i. market share of fifty or more percent; or
ii. Controls at least forty percent but more than fifty percent of the market share unless it can show that it does not have market power; or
iii. Controls less than forty percent of the market but has market power.

64. Where an undertaking has a market share of below 50%, the Authority considers the following factors in establishing whether an undertaking has market power;

i. Barriers to entry,
i. Countervailing power,
ii. Imports
iii. Product differentiation,
iv. imports
v. The stability of market shares, and
vi. The ability of the undertaking to act independent of its customers and competitors.

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Market Power and Market Share

65. The Authority considers that market power gives an indication of; Whether an undertaking has the ability to act unconstrained by, or to an

i. appreciable extent, independently of its customers, competitors and suppliers,
ii. The ability of an undertaking to control prices, profitably sustain prices
iii. above competitive levels or restrict output or quality below competitive levels.

66. The Act presumes that a market shares of at least 50% is evidence that a firm is dominant. Where an undertaking has less than 50% market share, the Authority will consider whether the undertaking has market power or the ability to exercise market power. In this regard, the Authority may consider whether undertaking can set prices, outputs or trading terms without being effectively constrained by its customers, competitors or suppliers in the relevant market.

67. The Authority considers that market share levels assessed against the market concentration levels, possible likelihood of entry, any entry barriers, and countervailing buyer power may yield a better mapping of whether an undertaking has market power. An undertaking that can act unconstrained by customers, competitors and suppliers will be considered dominant and having market power.

68. The Authority, therefore, considers that a number of additional factors may factor into its assessment of whether an undertaking does not meet the market share dominance threshold but it has market power.

i. Actual Competition: the market shares of existing competitors on the market will be used by the Authority in its assessment of any constraints that are imposed on the undertaking subject of the infringement.

ii. Potential Competition and Barriers to Entry: the Authority will consider constraints that may be imposed by potential competitors. If a market is not easily entered, then the ability of a potential entrant to

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constrain a dominant firm may be too remote to consider. For example, an undertaking is likely to have market power in a market that has high barriers to entry than one in which entry and exit of competitors is easy. Where there is no threat of entry an undertaking that controls a substantial market share will exercise market power over a long and sustained period of time. Where entry is easy, new undertakings will enter the market and compete with the incumbent thereby reverting prices and services to competitive levels. Barriers to entry are generally put into two categories:

a) Structural barriers to entry- Structural barriers to entry include, but are
b) not limited to, regulatory barriers, sunk costs, economies of scale, access to key natural resources, network effects.
c) Behavioral barriers to entry- Behavioral barriers to entry include, but
d) are not limited to, predatory pricing, margin squeeze, an undertaking
e) holding on to a big proportion of industry's excess capacity, product differentiation and advertising, vertical relationships between incumbents, collusive behavior between incumbents.

iii. Product Differentiation: the Authority will consider the impact that product differentiation will have on a market. The Authority will assess whether product differentiation based on function or kinds of buyers can impact the undertaking's market power.

iv. Ability of the Undertaking to Sustain a Price Increase over Time: In addition to the factors listed above, the Authority will assess how sensitive the undertakings sales are to increases in prices. The Authority will seek evidence to demonstrate that the market is contestable and sustained price increase will not be profitable and sustainable.

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v. The Degree to which Countervailing Power Impacts the Undertaking's Ability to Exercise its Power in a Market: the Authority will consider if there are effective mechanisms that can be used by customers to counter the ability of the undertaking to exercise market power. The Authority will assess any credible tactics that would be applied by customers. For example, whether customers will sponsor entry or have in the past taken similar actions.

vi. The Degree to which Customer Perception, Innovation, and Import Competition Drives Competition in the Market: the Authority will seek evidence to demonstrate that customers are not brand loyal and would easily switch to alternative products or sources of supply. The Authority will also consider the prevalence and penetration of innovation on the ability of the undertaking to exercise market power over a sustained period of time. The Authority will also consider the role of imports in the market. The Authority will seek evidence to demonstrate whether there are no barriers to imports and if imports constrain the ability of the undertaking to exercise market power.

Evidence on market share

69. The Authority considers that market shares can, non-exhaustively, be assessed in terms of revenues (measured by monetary sales), demand units (unit sales), output, potential capacity (to produce or sell) or, in certain natural resource industries, reserves as evidenced in:

i. Data provided by undertakings in the relevant market including sales data and estimates of the market shares of their competitors;

ii. Documents produced by trade associations;

iii. Market research reports; and

iv. Independent and verifiable market reviews.

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iv. The parameter to be used to calculate market share will depend on the availability of data and the factors that may be relevant for effective competition in a market.

Abuse of dominance

70. In establishing this element of Section 24(1), the Authority considers that abuse of dominance may be manifested by the use of practices that allow an undertaking to preserve, entrench or enhance its market power. In its assessment of abuse, the Authority will consider the specific practice in question and the state of competition in the market with and without the presence of the alleged abuse.

71. The Authority will mainly assess whether the conduct results in foreclosure or exclusion of rivals or results in exploitation of consumers.

72. In some instances, the Authority may consider whether the conduct strengthens barriers to entry.

Categories of Abuse of Dominance

73. Abuse of dominance is generally put into two categories:

i. Exploitative Abuses: this involves those types of conduct by a dominant undertaking that exploit customers or suppliers (for example, excessive pricing) without necessarily affecting the competition process. In this context the Authority mainly considers the abusive conduct relative to consumers. The Authority may assess whether the conduct results in excessive profits owing to the setting of exploitative prices.

ii. Exclusionary Abuses: this involves those types of conduct by a dominant undertaking that will lead to the removal of an actual or potential competitor or the suppression or weakening of competition in a market. Exclusive abuse may

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a) include predatory pricing or certain discount schemes or raising the costs of entry which are intended to foreclose a market from competition. It may also include a refusal to deal that cannot be objectively and reasonably justified by the dominant undertaking. In this context the Authority mainly considers anticompetitive conduct relative to competitors and potential entrants. The Authority may assess whether the conduct prevents equally efficient competitors from competing.

74. The following practices may, depending on the facts of the case, be assessed for both their exploitative and their exclusionary effects.

Unfair purchase or selling prices or unfair trading conditions

75. Section 24 of the Act prohibits a dominant undertaking from directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions. However, the Act does not define the meaning of "unfair purchase or selling prices or other unfair trading condition". The Authority's assessment in this regard may include an assessment of whether prices are excessively high or excessively low.

76. The Authority considers that an excessive price is one where the price for a good or service bears no reasonable relation to the economic value of that good or service and is higher than the said economic value.

77. In its assessment, the Authority may consider whether a dominant undertaking has implemented an exploitative pricing strategy, that is, either an excessively low pricing strategy or an excessively high pricing strategy or both in order to weaken or eliminate competition in the short term so as to exploit customers or consumers at a later stage.

i. Excessively Low Prices: low prices in a market may indicate to the Authority that there is vigorous competition between competitors in a market and this benefits customers and consumers. However, a dominant undertaking may use a predatory pricing strategy by setting an excessively low price intended to eliminate competitors in order for it to be in a position to exploit customers at a later date. The Authority will seek to remedy this type of conduct where the pricing

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strategy is unprofitable in the short term. The Authority will seek to ascertain whether the dominant undertaking will be making losses as price is lower than average variable cost (as a proxy for marginal cost). The Authority will also consider whether the conduct has led to the elimination of a significant and/or an efficient competitor and whether the dominant player can recoup its losses after it would have eliminated or weaken its competitor(s) from the market.

ii. Excessively High Prices: a dominant undertaking may be in a position to charge excessively high prices if it is in control of a product or service (that has no readily available substitutes) that is essential to competitors, customers or suppliers. Excessive pricing may occur in the form of a margin squeeze, such as where a vertically integrated dominant undertaking charges more for an input sold to independent third parties than to its own downstream business.

iii. A vertically integrated undertaking with a dominant position in an upstream market prevents its non-vertically integrated downstream competitors from achieving an economically viable price-cost margin. This type of conduct may be assessed as excessive pricing or as price discrimination or as predatory pricing resulting in both exploitative and exclusionary conduct by a dominant undertaking. The Authority recognizes that this type of strategy can be implemented in various forms. For example this type of conduct may include:

iv. Discriminatory margin squeeze where a vertically integrated dominant undertaking charges its downstream competitors a higher upstream price than it charges its own downstream business.

v. A non-discriminatory margin squeeze where a vertically integrated undertaking raises the price of the upstream input to its downstream competitors and its own downstream business. This has the effect of raising the costs of all the downstream competitors. However, the vertically integrated dominant

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undertaking is able to absorb the raised cost of its own downstream business by cross-subsidizing it from its upstream or other operations.

vi. A predatory margin squeeze where a vertically integrated undertaking lowers its downstream price below the costs of production and adequate margin with the intention of eliminating an effective competitor and recouping short-term losses at a later period.

78. The Authority considers that in assessing unfair prices or trading conditions it may seek evidence on:

i. Analysis of prices charged to various customers and suppliers (including affiliated companies).

ii. Analysis of the structure of costs of production of goods or services

iii. Analysis of actual costs of production of goods or services.

iv. Analysis of prices and costs in a competitive market or comparable market.

v. Analysis of the profitability of the dominant undertaking.

Price Discrimination

79. This form of abuse by a dominant undertaking involves an assessment of whether as between equivalent transactions, there is discrimination between trading undertakings in the supply of goods or services. This form of abuse involves any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services. The conduct may apply to a vertically integrated undertaking as well as a non-vertically integrated one. This is the type of scenario contemplated in Section 24(2) (c).

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80. The Authority considers whether an undertaking has control over price, has the ability to, and is engaged in, segregating customers into different groups and there is detriment to consumers.

Tying and/or Bundling

81. Tying is a form of abuse in which a dominant undertaking requires customers that purchase one product or service ("tying good or service") to purchase another product or service ("tied product or service"). Bundling refers to the manner in which products or services are offered or priced for sale to customers or consumers. This is the type of scenario contemplated in Section 24(2) (d).

82. The Authority will assess whether a dominant undertaking can abuse its position in the market by tying or bundling products or services to the detriment of consumers. However, the Authority understands that in some cases tying and bundling strategies can provide customers with better product offerings.

83. To establish an abusive tying and/or bundling strategy, the Authority may seek to establish that the products or services that are subject to the tying/bundling are distinct. That is, the products or services are capable of being purchased separately and there are examples of the products or services being purchased or supplied separately. The Authority will seek to establish that the tying or bundling will negatively affect competition in either the tied market or tying market or both.

Abuse of an Intellectual Property Right

84. The Authority recognizes that protection of intellectual property plays an important role in stimulating new technology development, artistic expression and knowledge dissemination, all of which are vital to the knowledge based economy. In particular, IPRs reward creators and innovators and protect them from unscrupulous parties who may copy or free ride on their works, thereby discouraging innovation and dampening effective competition. The Authority recognizes the dynamic effects of intellectual property rights on innovation and competition and will factor them into its assessment.

85. Intellectual property rights may confer market power on the right holder (in respect of the provision of certain goods or services), which may give rise to the finding of a dominant position. Market power, however, is not to be presumed from the mere

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ownership of intellectual property rights. The legitimate exercise of IPR by a dominant undertaking is not an abuse in itself. In fact, Section 24(2)(e)_of the Act prohibits only abuse of intellectual property rights that can amount to the abuse of a dominant position in a market in Kenya, or a substantial part of Kenya. An abuse may, for example, arise in the manner in which a dominant undertaking exercises its IPR in relation to the granting of use, territorial limitation and payment of royalties.

86. For example, an abuse of dominance may occur if the dominant undertaking uses its IPR to prevent the development of a new product or market. A dominant undertaking may seek to impose any of the conditions listed under paragraph 50 above (non-exhaustive list of examples of intellectual property agreements prohibited).

Burden of proof

87. The Authority bears the burden of proving the abuse. Any arguments asserted by the undertaking to seek relief from infringement proceedings brought by the Authority pursuant to Section 24(1), must be proved by the undertaking. Undertakings are free to provide objective justification or defence of their conduct under section 35 of the Act.

88. The undertaking will be afforded the opportunity to assert its arguments justifying its conduct in response to the Authority's notice which will be issued in a timely manner during its enforcement proceeding.

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Section 5 -Types/Categories of Exemptions under the Act

89. Having regard to the object of the Act, as defined under Section 3(a), to promote and enforce compliance of the Act, the Authority provides the following explanations on the types of exemptions that an undertaking may seek before the Authority. The Authority considers that the Section 3(a) objective and others listed under Section 3 of the Act provides a basis for the Authority rules to explain the enforcement processes of the Authority, with a view to simplifying the legislative framework, providing legal security to the business community, thereby giving rise to higher levels of compliance.

90. Section 21 of the Act prohibits agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have their object or effect the prevention, distortion or lessening of competition. Section 22 prohibits restrictive trade practices relating to recommendations of prices and other terms and conditions by trade associations.

91. The Act, however, provides any undertaking or association of undertakings may apply to the Authority pursuant to Section 25 of the Act for an exemption from the provisions of Sections 21 and 22. In accordance with Section 25(1) of the Act, any undertaking or association of undertakings may apply to the Authority and be exempted in respect of any agreement or category of agreements, any decision or category of decisions and any concerted practice or category of concerted practices.

92. Further, PURSUANT to the provisions of section 30(2) of the Act, the Authority is empowered to exclude any category of decisions, practices or agreement by or between undertakings from the application of section 21 and 22 of the Act, as set out in the 'Block Exemption Guidelines'.

Grant of Exemption upon application by Parties

93. The Authority considers that the exemption process will apply to undertakings which are in the process of implementing a concluded agreement

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94. Section 26 of the Act provide that conduct/practices which is prohibited under Sections 21 and 22 of the Act may be exempted owing to exceptional and compelling reasons of public interest. In order to make this decision, the Authority will take into account whether the agreements, decisions or practices contribute to or result in:

i. Maintaining or promoting exports;
ii. Improving, or preventing decline in the production or distribution of goods or the provision of services;
iii. Promoting technical or economic progress or stability in any industry; and
iv. Obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or would be likely to result, from the agreement, decision or concerted practice or the category of agreements, decisions or concerted

95. The burden of submitting proof that a business practice satisfies the conditions lies with the undertakings claiming justifications. The Authority will have to satisfy itself that the submitted claims adequately justify the practice.

96. An exemption granted by the Authority can be revoked if the Authority has been supplied with misleading or false information, there is a material change in circumstances, or where there is non-compliance with an imposed condition.

Consideration of exemption applications on grounds of maintaining or promoting exports

97. The Authority considers that the following is a non-exhaustive list of agreements or arrangements that may be considered to maintain or promote export and may be subject to an exemption pursuant to Section 26(3)(a):

i. Agreements or arrangements that are directed exclusively at achieving a demonstrable export-related efficiency enhancing goal for the undertaking involved in the export arrangement such as the sharing of the fixed costs of transportation, distribution or marketing.
ii. Export association arrangements intended to aid small and medium-sized undertakings with certain aspects of the exporting

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process such as the high costs associated with export and which leads to the efficient provision of export trade services.

iii. Export-supply coordination arrangements intended to coordinate supply to overseas markets.

iv. Information exchange arrangements relating to product logistics such as transport, marketing, labelling or product development among exporters where the information exchanged is solely directed at enhancing the export process of products designated for export and the exporters involved in the arrangement are quarantined from activities on the domestic market.

v. Export arrangements which are likely to provide effective and essential support for small and medium sized undertakings to overcome barriers to entry to export markets.

98. In all the cases considered for exemption under this category, including the foregoing examples, the Authority considers whether the export arrangements have any anticompetitive effects on competition in the domestic market and the Authority will look at whether it is presented with evidence that competition in the domestic markets will not be significantly lessened.

99. The Authority will also consider whether the evidence presented by the exemption applicant demonstrates that without the agreement or cooperation among the undertakings their prospects of participating effectively in the overseas market are significantly reduced.

Consideration of improving or preventing the decline of production or promotion technical or economic progress in evaluation of exemption application

100. The Authority considers that the following is a non-exhaustive list of agreements or arrangements that may be subject to an exemption pursuant to Section 26(3)(b) or Section 26(3)(c), as may be applicable:

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i. A research and development agreement whereby each undertaking agrees to pool their research capabilities, where the agreement may lead to significant new capacity to the market in Kenya, thereby contributing to improvement in production or economic growth, and in circumstances where it can be demonstrated that the consumers are in a better position owing to the implementation of the agreement.

ii. An agreement which results in the production or supply of new and improved products or services where any benefits to be derived by consumers stemming from introduction or improvement of the product or service exceeds any harm from the maintenance or an increase in price caused by the restrictive agreement.

iii. Agreements for which there are significant identifiable technological benefits directly flowing from the agreement and in circumstances where the net effect to competition in Kenya is either benign or pro-competitive.

iv. An agreement for which evidence is adduced that a technical or design standard may lead to an improvement in production by reducing costs, improve quality, reduce waste and consumer search cost and in circumstances where it can be demonstrated that these benefits flow directly from the agreement.

v. An agreement that promotes the competitiveness of small undertakings.

vi. An agreement that is designed to maintain the stability or encourage growth of an industry in Kenya.

vii. An agreement that contributes to the maintenance or promotion of exports and in circumstances where evidence can be adduced to demonstrate that a significant benefit flows directly from the

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agreement and the agreement may lead to economic progress in Kenya.

Consideration of other public benefits

101. The Authority considers an agreement that improves the net balance of payments as an example of an arrangement that would be considered to have a net public benefit pursuant to Section 26(3) (d).

102. The Authority reinforces that it would give good consideration to any argument presented by an exemption applicant, in this context, where the applicant demonstrates that there is, ultimately, value to the Kenyan purchaser or consumer, such value having attendant elements of achieving economic development, elevated levels of consumer welfare or economic efficiency.

103. In all the foregoing examples and in all applications presented to the Authority in this context, the Authority will consider whether information supplied to it by the applicant demonstrates that there is a net benefit to the public that outweighs any possible detriment to competition that results or is likely to result from the agreement, arrangement or decision in question.

104. In considering whether an agreement, arrangement or decision in question can have restrictive effects on competition, the Authority looks at whether there is evidence of harm to consumers, purchasers or otherwise users of a good or service). Where the benefits to the public will outweigh the lessening of competition, the Authority may consider granting an exemption.

105. The Authority will therefore consider the market with and without the agreement or arrangement for which the exemption is claimed and make a determination, on balance, of whether there are public benefits that outweigh the effects on the public of a lessening of competition.

106. The evidence presented to the Authority to substantiate the cause for a grant of an exemption must be such that it enables the Authority to establish that there is a commercial likelihood that the exemption applicant will, upon the grant of the exemption, deliver or bring about the public benefit. The Authority must be satisfied

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107. that the benefit will, in a commercially-feasible manner, be a consequence of the agreement for which the exemption is claimed.

Exemptions for certain intellectual property arrangements

108. The use of an intellectual property right within the bounds of legal protection is not anti-competitive. Consequently, section 28 of the Competition Act provides that the Authority may, upon the application submitted by an undertaking or undertakings, grant an exemption in relation to any agreement or practice concerning the exercise of intellectual property rights. The Authority considers that the following is a non-exhaustive list of agreements or arrangements that may be subject to an exemption pursuant to Section 28(1):

109. Any agreement or practice undertaken whose only object is the exercise of any right or enjoyment of any interest derived under any intellectual property legislation in Kenya.

i. A technology transfer license agreement where the undertakings to the agreement are not competitors and where the relevant market shares of the undertakings party to the agreement or arrangement is insignificant.

ii. Where the owner of an intellectual property licenses, transfers or sells the intellectual property to an undertaking and there is no risk of the creating, enhancing or maintaining a position of dominance in the market.

iii. Where a refusal by the intellectual property owner to license, transfer or sell the intellectual property to a third party would prevent, restrict, or lessen competition, and such prevention, restriction or lessening of competition is not related to any aspect other than the refusal. The Authority will not intervene in such a case unless the competitive harm stems solely from the refusal and nothing more. Also, in this

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regard it is to be noted that the mere existence of an intellectual property right would not prevent the Authority from subjecting otherwise anticompetitive conduct to enforcement proceedings.

iv. The Authority considers these types of exemptions may involve efficiency considerations. There may be instances where the existence of an intellectual property right may foster dynamic efficiency and competition by facilitating technical or economic progress resulting in sustained period of increases in product selection, quality, output and productivity and therefore growth and economic progress in Kenya.

110. The Authority takes cognizance of the fact that in regard to section 21 on restrictive trade practices, the anti-competitive effect where an intellectual property is used beyond the limits of fair, reasonable and non-discriminatory use, is higher when a firm has market power and/or there no alternatives for consumers.

Exemptions for professional association agreements

111. The Authority considers that the following is a non-exhaustive list of agreements or arrangements that may be subject to an exemption pursuant to Section 29(1):

i. Agreements among undertakings in a professional association where the agreement relates to the setting of professional fees to be paid and where the fees are mandated by a statute;

ii. An agreement by the members of a professional association to publish guidelines on fees that may be applicable when procuring professional services and the fee guidelines are necessary to maintain professional standards or for the ordinary functioning of the profession;

iii. Decisions by the members of a professional association which are made to ensure industry health, safety or ethical standards and any restrictions in question do not;

a) Suppress a member's ability to practice his profession, seek employment, engage in commercial and economic activities related to his/her profession, advertising his products or services, where advertising is not prohibited under statute, restrict the ability of the professional member to form partnerships; or

b) Otherwise lead to conduct which is a contravention of the Act.

iv. Establishment of professional standards by a professional association that do not ordinarily prevent functioning of the professionals or curtail commercial practice or service in the industry concerned.

Block Exemption

112. Section 30 (2) of the Act provides that the Authority may, with the approval of the Cabinet Secretary, by notice in the Gazette, exclude any category of decisions, practices or agreements by or between undertakings from the application of the provisions of Part III of the Act. This gives the Authority the leeway to grant category exemptions otherwise referred to as 'block exemptions' in this Guidelines.

113. The Authority has therefore developed the Block Exemption Guidelines which cover agreements specifically regarding Franchise Agreements, Stadia and Sport Branding Rights, Content Development and Broadcasting Agreements, and One-off Sporting and promotional events.

114. The Block Exemptions Guidelines are aimed at meeting the following goals which ultimately are supposed to ease the cost of doing business in the country while enhancing the adoption of a competition culture in the Kenyan economy. The objects of the block exemptions guidelines therefore include achieving;

i. Transparency and Predictability in the market,

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ii. Consistency in analysis and application of the law,
iii. Reduction in transactional costs, and
iv. Saving on time especially for the time bound transaction

115. The Block Exemptions Guidelines provide guidance to the undertakings to self-assess as to whether the agreements, decisions or practices which they intend to enter into qualify for block exemption without the need to seek the Authority's intervention[6].

[6] Refer to the Block Exemption Guidelines.

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Section 6 –Leniency program under the Act

116. The Authority under Section 89A may operate a leniency program where an undertaking that voluntarily discloses the existence of an agreement or practice that is prohibited under the Act and co-operates with the Authority in the investigation of the agreement or practice, may not be subject to all or part of a fine that could otherwise be imposed under the Act.

What is the aim of Leniency Program?

117. The overall objective of the leniency programme is to improve the level of compliance with the Act. It enhances and facilitates investigations and enforcement actions within the economy by encouraging undertakings that have been engaging in wrong doing to provide direct evidence and proactively cooperate in bringing successful enforcement action in return of full or partial immunity

Who is eligible for the Leniency Programme?

118. An undertaking or a division of an undertaking would be eligible for leniency through the legal entity which it formed and which controls its decision-making process. A leniency agreement will cover the applicant's directors and employees as long as they respect the obligation to cooperate with the Authority. For more details on the scope of the program refer to the Authority's Leniency Guidelines.

Section 7 –Fining and Settlement procedure

119. The fining and Settlement procedure aims at achieving the following objectives;

i. Enhancing transparency, consistency and predictability in computation of the financial penalties; and

ii. Achieving proportionality on the remedies imposed against the degree of the contravention.

120. The procedure covers the financial penalties for prohibitions under Part III and IV of the Act and also considers the determination of pecuniary penalties in settlement agreements. For more details about the scope of the Fining and Settlement procedure, refer to the Authority's Fining and Settlement Guidelines.

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