

MEMORANDUM OF UNDERSTANDING

BETWEEN

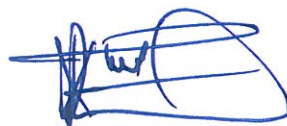


THE COMPETITION AUTHORITY OF KENYA

AND



THE ENERGY AND PETROLEUM REGULATORY AUTHORITY



MEMORANDUM OF UNDERSTANDING (MOU)

BETWEEN

THE COMPETITION AUTHORITY OF KENYA (CAK)

AND

THE ENERGY AND PETROLEUM REGULATORY AUTHORITY (EPRA)

1. PREAMBLE

This Memorandum of Understanding (MOU) is entered into in order to establish a framework for co-operation between the Competition Authority of Kenya ("CAK") and the Energy and Petroleum Regulatory Authority ("EPRA") concerning their statutory mandates to effectively address competition and consumer protection concerns in the Kenyan energy sector, including the Parties concurrent mandates for the investigation, evaluation and analysis of specified matters arising or incidental to both the Competition Act, 2010 and the Energy Act, 2019.

This MOU is entered into on the basis of mutual respect, in a spirit of goodwill and does not affect the independence of the two regulators to undertake their respective statutory mandates.

2. THE PARTIES

Competition Authority of Kenya ("CAK"), and the Energy and Petroleum Regulatory Authority ("EPRA"), individually referred to as "the Party", collectively referred to as "the Parties".



CAK is headquartered at:

Kenya Railways Headquarters, Block "D",

Ground Floor , Workshop Road off Haile

Selassie Avenue P.O. Box 36265-00200 Nairobi,

Kenya

EPRA is headquartered at:

Eagle Africa Centre, Longonot Road,

Upper Hill

P.O. Box 42681-00100

Nairobi, Kenya

3. ESTABLISHMENT AND RESPONSIBILITIES

3.1. The Competition Authority of Kenya

- a) The CAK is established in terms section 7 of the Competition Act, No. 12 of 2010 to, *inter alia*, promote and safeguard competition in the national economy, and to protect consumers from unfair and misleading market conduct.
- b) The CAK is mandated under section 5 (3) of the Competition Act to negotiate agreements with any regulatory body with which it has concurrent jurisdiction in respect of any conduct regulated under the Act in order to identify and establish procedures for management of concurrent Jurisdiction.

3.2. The Energy and Petroleum Regulatory Authority (EPRA)

- a) The Energy and Petroleum Regulatory Authority (EPRA) is established under section 9 of the Energy Act, 2019, to regulate the energy sector, regulate, monitor and



supervise upstream petroleum operations, to license, enforce compliance with the Act, investigate complaints and disputes in the energy sector.

- b) Pursuant to section 10 (m) of the Energy Act, 2019, EPRA is mandated to monitor in consultation with the Competition Authority of Kenya conditions of contractors' operations and their trade practices.

4. PURPOSE

This MOU shall:

- a) Facilitate effective and efficient co-operation between the Parties in the performance of their respective functions in so far as they relate to issues of competition and consumer protection in the energy sector;
- b) Reduce Parties costs by minimizing duplication of activity and sharing of knowledge;
- c) Facilitate expedient and efficient discharge of services by each Party to business undertakings in the energy sector;
- d) Establish a joint working committee to develop working procedures and processes to manage and facilitate cooperation and consultation between the Parties on matters relating to competition and consumer protection in the energy sector; and
- e) Ensure, as far as practicable, consistency between decisions made or other steps taken by the Parties that relate to determination of any issue of competition or consumer



protection in the energy sector.

5. SCOPE

This MOU shall apply to competition and consumer protection issues in the energy sector.

6. COMMON INTERESTS

The CAK and EPRA are both committed to conduct their regulatory responsibilities in the public interest. They recognize the importance of mutual consultation and cooperation across a wide range of issues relevant to competition and consumer protection in the energy sector. The CAK and EPRA agree that Kenya's energy sector should be competitive, efficient, and economically sustainable. In entering into this MOU, the CAK and EPRA give due recognition to the need to:

- a) Promote procedural co-operation and coordination between the CAK and EPRA when dealing with cases of anti-competitive behavior or consumer protection in the energy sector where they have overlapping powers;
- b) Facilitate the treatment of cases of anti-competitive behavior within the energy sector;
- c) Promote co-operation and coordination between the CAK and EPRA when dealing with merger notifications in the energy sector;
- d) Promote cooperation and coordination between the CAK and EPRA when dealing



with consumer protection issues in the energy sector;

- e) Work together to identify and address bottlenecks that restrict entry, investment and competition in the energy sector;
- f) Develop effective collaborative mechanisms to address novel and emerging competition and consumer protection issues in the sector;
- g) Coordinate their activities to eliminate forum shopping among operators in the energy sector;
- h) Collaborate in the preparation of legislative proposals and regulations that are likely to affect the level of competition in markets within the energy sector;
- i) Improve understanding of the respective roles of the CAK and EPRA by stakeholders in the energy sector;
- j) Collaborate to protect consumers of energy products and services;
- k) Share information relevant to the exercise of their functions;
- l) Facilitate the rolling out of the Regulatory Impact Assessment (RIA) framework for regulation pertaining to competition and consumer protection related issues in the energy sector;
- m) Ensure that a consistent and coordinated approach is taken by the Parties in dealing

with competition and consumer protection-related issues in the energy sector.

7. MANNER OF COOPERATION IN AREAS OF CONCURRENT JURISDICTION

7.1. Consultation

In any circumstance in which both Parties are considering an issue or issues of competition in the energy sector, which is or are identical to one another, each Party shall consult with the other before performing any function involving the determination of such issues.

7.2. Cases invoking concurrent jurisdiction

7.2.1. Where a notification, application or complaint is lodged about anti-competitive agreements, practices, or abuse of dominance in the energy sector; or where a Party initiates an investigation into allegations of the same; or where either party requires the other's expertise to facilitate an investigation and or determination of a matter, the following procedures shall apply:

- a) The Party that receives the notification/application/complaint or takes cognizance of the concern through other means shall notify the other Party of the notification/application/complaint or breach warranting investigation within 7 working days of receiving the notification;

b) Where the recipient Party does not intend to investigate, it shall notify the other party of its intention.

7.2.2. The Parties undertake to expedite consultation to avoid delays in resolution of any complaints and or conclusion of investigations in which both Parties have concurrent jurisdiction.

7.3. Forbearance to Act

7.3.1. Subject to Clause 12.2, where one Party is satisfied that the other Party is performing functions in relation to any particular matter, the first Party may agree to forbear to perform any of its functions in relation to that same matter.

7.3.2. Where a Party intends to forbear to perform its functions in the manner described in sub-section 7.3.1 of this Article, it shall first discuss the issue with the other Party, inform it of its intention to apply forbearance, and give the other Party an opportunity to respond.

7.3.3. Either Party may request the other to exercise forbearance in any particular case. The other Party may, subject to Clause 12.2, accede to such request where it is satisfied that the requesting Party is performing functions in relation to that matter.

7.3.4. Where one Party has agreed to forbear to perform its functions in any



particular matter, it may so inform any relevant third parties as it sees fit.

7.4 Participation

On matters of concurrent jurisdiction where a forbearance to act has not been expressed, a Party may:

- a) Make submissions/provide the other Party with comments or expert reports;
- b) Participate in the other Party's hearings related to competition or consumer protection in energy cases;
- c) Ask for or receive optional or mandatory referrals from the other party related to competition or consumer protection in the energy sector.

8. JOINT WORKING COMMITTEE

8.1. The Parties shall establish a Joint Working Committee ("the Committee") within six (6) months of signing this MOU. The Committee will be comprised of three (3) representatives each from CAK and EPRA as nominated by the Parties pursuant to this MOU and shall function on an on-going basis.

8.2. The functions of the Committee shall include developing mechanisms to realize and implement the areas outlined in section 6 of this MOU, and:



- a) Management and facilitation of cooperation and consultation (including a joint work plan) on matters relating to competition and consumer protection in the energy sector, including procedures and processes for:
- i. The manner of cooperation and consultation between the Parties in regard to restrictive trade practices and agreements in the sector;
 - ii. The manner of cooperation and consultation between the Parties in regard to mergers in the sector;
 - iii. The manner of cooperation and consultations between the Parties in regard to market studies in the sector; and
 - iv. The manner of cooperation and consultations between the Parties in regard to any issues relating to competition and consumer protection the energy sector.
- b) Serving as the anchors within both authorities for jointly addressing technical and substantive issues relating to competition and consumer protection in the energy sector;
- c) Jointly drafting legislation, regulations and guidelines on competition and consumer protection in the energy sector;



- d) Developing proposals, where necessary, for amendment or supplementation to this MOU; and,
- e) Advising the Management of CAK and EPRA on issues affecting competition and consumer protection in the Energy sector. Such advice shall include, but not be limited to, the following:
- i. Cooperation and collaboration in conducting joint market studies in the sector;
 - ii. Mutual consultation on matters involving competition and consumer protection in the sector, including drafting new legislation, regulations and guidelines;
 - iii. Amendments to the relevant or applicable legislation, regulations and guidelines that may be necessary from time to time;
 - iv. Sharing international approaches to addressing issues of competition and consumer protection in the sector;
 - v. Providing updates and sharing information on recent developments in the sector;
 - vi. Staff capacity building between Parties; and,
 - vii. Conducting joint training, workshops and capacity building activities in areas of concurrent jurisdiction or mutual benefit.



9. INFORMATION EXCHANGE

9.1. The CAK and EPRA shall exchange such information as may be necessary to actualize this MOU subject to the limitations imposed by legal and regulatory frameworks the Parties are subject to including the Competition Act and the Energy Act 2019.

9.2. The Parties recognize the intrinsic value of the information they each hold and the potential efficiencies that can be gained from sharing the said information with each other. The Parties therefore undertake to:

- a) Promote free access to and exchange of information in an efficient and expedient manner;
- b) Use the information exchanged under this MOU solely for the purpose for which the relevant information was sought and or disclosed;
- c) Keep strictly confidential all information and materials exchanged or obtained pursuant to this MOU. Neither party shall release any such information and/or materials to third parties without prior express written consent of the other party except as may be required by law.

9.3. Each party agrees that it will, upon written request, where it agrees that the request is reasonable and subject to any provisions of law (the responding party



hereinafter referred to as the "Respondent Party"), provide to the other Party (the "Requesting Party") any information in its possession of a kind specified in the request. The request shall state that the information is required by the Requesting Party for the purpose of the performance of its functions, and shall describe the particular functions for which the information is required.

9.4. Requests for information must be made in writing (for the avoidance of doubt, "writing" includes electronic mail).

9.5. In the case of information supplied pursuant to this MOU, the provisions of any enactment concerning the disclosure of information by the Respondent Party shall apply to the Requesting Party.

9.6. The Requesting Party may ask that the request itself be considered of a confidential nature.

9.7. The Parties hereby commit themselves to use the information solely for the purposes described in the request.

9.8. Should the Requesting Party wish to use the shared information for any purpose other than the purposes expressed in the request it must first obtain the written approval of the Respondent Party.



10. CONFIDENTIALITY

10.1. When exchanging information, each Party acknowledges the confidentiality provisions of the laws under which the Parties operate. Each party shall respect the confidentiality of information exchanged which has been obtained as a result of the other party's statutory powers or other legal obligations and relates to the affairs of any individual, business or undertaking.

10.2. Each party agrees not to disclose any information obtained pursuant to this MOU to a third party unless it has obtained prior consent of the party which has provided the information. Each party shall comply with any non-disclosure obligations that are binding on the other, in particular those set out in the Competition Act and the Energy Act 2019.

10.3. Each party agrees to take reasonable steps to ensure that access to the confidential information obtained pursuant to this MOU is limited internally to only those staff members who require the information.

10.4. In no event shall any party disclose any information which is protected as confidential under either the Competition Act or the Energy Act.



11. FOCAL CONTACTS

Each Party shall nominate a focal contact to liaise, communicate and respond to requests for information from the other Party for the purposes of this MOU.

12. STATUS OF THE PARTIES

12.1. Neither Party nor its personnel shall be considered as an official, agent, employee or representative of the other Party. Neither Party shall enter into any contract or commitment on behalf of the other Party.

12.2. Each Party shall carry out its own responsibilities and obligations under this MOU in accordance with the national and international laws, regulations and treaties applicable to it and unless separately agreed in writing, bear its own costs in relation to implementation of this MOU.

12.3. This MOU shall not create any binding legal obligations between or amongst the Parties.

12.4. This MOU does not amount to a delegation or limitation of any of the powers, duties or obligations of the Parties.

12.5. This MOU does not create, directly or indirectly, any rights, obligations or liabilities enforceable by the Parties or by any third party.



12.6. Nothing in this MOU restricts, enlarges, or otherwise modifies the respective jurisdictions of the Parties.

12.7. All intellectual property rights, title and interest associated with each Parties' supervisory and regulatory Know how, including without limitation, patent, trademark, copyright, trade secret rights, and moral rights shall remain in the respective party. Further, neither party will use, in any manner, including advertising or publicity or in any way related to this MOU or the subject matter hereof, the name of the other party or its affiliates or any of their directors, officers, managers, employees, consultants or agents or any trade name, trademark, service mark, logo, symbol or copyright, whether any of the above are registered or unregistered, of the other Authority or its affiliates, except with the express written consent of such other party.

13. DISPUTE SETTLEMENT

13.1. Parties shall adhere to the above procedures and shall continuously engage in consultations, exchange of information and review of processes of the mechanisms in order to avoid disputes. Parties undertake to use their best efforts to settle any disputes, controversy or claims arising out of this MOU or the breach, termination or invalidity thereof.



13.2. In the event that amicable settlement of the dispute, controversy or claim fails, the Director Generals of each Party shall endeavor to resolve the dispute informally.

13.3. In the event the Director Generals fail to reach an amicable settlement of a dispute, the dispute shall be settled in accordance with the Laws of Kenya.

14. INCONSISTENCIES OF LAWS

In the event of a conflict between this MOU and the laws applicable to any either Party, the law applicable shall prevail.

15. DURATION, AMENDMENT AND TERMINATION

This MOU may only be amended by mutual written agreement of the Parties. Either Party may only terminate the MOU upon issuance of a thirty day (30) notice in writing to the other Party. This MOU shall enter into force upon signature by both Parties and shall remain in force unless terminated.

16. EFFECTIVE DATE OF THE MOU

The MOU shall come into force on the date on which it is signed by persons authorized to act on behalf of the Parties.

17. PUBLIC DOCUMENT

This MOU shall be a public document.

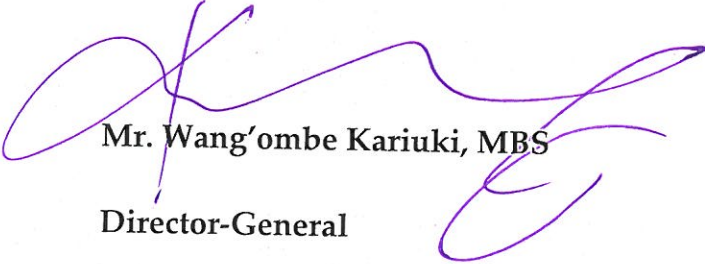


IN WITNESS WHEREOF, the duly authorized representatives of the parties affix their signatures below.


THIS MEMORANDUM OF UNDERSTANDING (MOU) is made on the..... day oftwo thousand and twenty.

The Competition Authority of Kenya

The Energy & Petroleum Regulatory Authority



Mr. Wang'ombe Kariuki, MBS
Director-General



Mr. Pavel R. Oimeke, EBS
Director-General

The Competition Authority of Kenya

Energy & Petroleum Regulatory Authority

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