

*CPI's Africa Column Presents:*

# Enforcing Competition Law and Consumer Protection During the COVID-19 Pandemic in Africa: The Competition Authority of Kenya

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## I. Introduction

This article discusses the measures and the actions that the [Competition Authority of Kenya](#) (“CAK”) has undertaken since COVID-19 was declared by the World Health Organization (“WHO”) as a global pandemic, in order to ensure that the markets continued to function effectively and consumers were not exploited by unscrupulous businesses taking advantage of the pandemic. I do not think many of the functioning competition agencies in Africa were prepared for pandemics, or had contemplated how they could regulate competition during crisis. COVID-19 therefore required unprecedented measures. Considering that most of the competition agencies in Africa are young, and have inadequate resources, the competition agencies responded differently depending on their capability and capacity.

It is important to note that since the CAK became operational under the 2010 Competition Act of Kenya, it is headed by the most vibrant Director General Francis Wang’ombe Kariuki who has spearheaded competition reforms not only at the national level, but also at the regional level. Also, in addition to South Africa and Gabon, Kenya has the oldest competition regime as it enacted its first comprehensive competition law in 1988. The CAK, therefore, is one of the most promising competition agencies in Africa and its responses towards COVID-19 are an important benchmark for young emerging competition agencies in the region.

## II. The Competition Authority of Kenya Continued Operations During The Pandemic, Leveraging Its Technological Base

The CAK should be applauded for taking measures at the onset, increasing its market surveillance and not halting its operations during the pandemic. When the COVID-19 pandemic struck, government agencies providing non-essential services were closed. Competition agencies were no exception. Closing competition agencies as governments in Africa restricted non-essential government businesses, called for social distances, put in place lockdowns and curfews, simply meant suspending market regulation and competition law enforcement. The repercussions would be catastrophic. In response, competition agencies were compelled to adopt novel measures to ensure continuous operations. Physical access to the office was restricted. For instance, the [Botswana Consumer and Protection Authority](#) closed its offices and suspended all its operations in respond to lockdown. On its website, the Botswana competition agency indicated to the public that, “since the country would be on lockdown, all CCA services would be suspended” and offices closed with effect from April 2, 2020.

In addition to restricted physical access to the competition agencies’ offices, filing of documents in paper format, and filing notification by hand was not possible. Those competition regimes in Africa like CAK that had automated their services had an advantage. Those that had not automated their services resorted to the use of emails and social media contact. The [Morocco Competition Council](#) although it does not have an electronic filing system, on March 24, 2020 asked the public to use its [email address](#) in filing documents and incase the agency needed hard copy documents, it would organize for the delivery.

The [Egyptian Competition Council](#) on March 26, 2020 [requested](#) the public to file documents in paper between 10am and 2pm. Documents submitted in electronic format were to be done via its email address or the paper data submitted in an electronic copy (CD or Flash memory). The use of email address invokes question as to whether the security and confidentiality of the documents could be guaranteed, as cyber security attacks have increased during the COVID-19 pandemic. This will unfold in time as African competition agencies share their experiences.

Unlike Botswana, Morocco and Egypt which opted to use email address for electronic filings, before the COVID-19 pandemic, CAK had [automated](#) most its services. CAK did leverage on its web-based applications. When the COVID-19 pandemic struck, CAK had deployed three systems, the Case Management System (“CMS”), Public Portal and the Enterprise Resource Planner (“ERP”). The CMS and the public portal have automated CAK’s key mandates including [filing of mergers](#), [exemption applications](#), [filing service complaint](#), and [consumer complaints](#). Therefore, during the pandemic, as physical access to the CAK offices became limited, CAK called upon the public to make use of its public portal.

The CAK public portal has simple and well elaborate user manuals on [mergers and acquisitions](#), [consumer complaint](#), [exemptions applications](#) and [restrictive trade practices complaints](#). This enabled the public to continue contacting CAK through its public portal. Moreover, CAK had prior carried out training to the public on how to use its public portal and this training is continuous. In its Biannual Newsletter Issue 4, [“COVID-19: Upholding Service Delivery During Pandemic a Pandemic”](#) CAK provides that automation eliminated the use of hard copy applications during the pandemic while securing the integrity of the documentation. The adoption of a web-based application does not always translate into usability and we are looking forward for data from CAK on the usability and effectiveness of its public portal, and the challenges CAK might have encountered as it moved its operations online during the COVID-19 pandemic.

The other reason why CAK did not also close its operations is because the majority of its staff could work remotely. Prior to the COVID-19 pandemic, CAK had purchased laptops for its staff to ensure they could work remotely. These laptops enabled every staff member to [“access the systems when away from their work stations as well as setting up a Disaster Recovery Site \(DRS\) to ensure that the system experiences minimal downtime, if any.”](#) So, when the government on March 15, 2020 recommended that employers adopt remote working, CAK sent [90 percent of its staff to work from home](#) ensuring that it continued to deliver its mandate. As noted by its Human Resource and Administration Manager, Faith Merete, CAK has continued [to provide support](#) to its staff ensuring that it mitigates the challenges that come with working from home such as distraction and unstable internet connection. [Eric Mwangi](#), Director of Corporate Services at CAK further notes that during the COVID-19 pandemic, “automation has facilitated members of staff to work remotely from the comfort of their homes, thereby ensuring continued and unfettered delivery of the Authority’s mandate while also protecting their health and, in the long-term, ensuring the sustainability of our human capital.”

CAK's investment in technology, its use and adoption has also made it invest in media coverage and makes use of social media channels such as [twitter](#), [Facebook](#), [LinkedIn](#), and [blog](#) to sensitize the public on the impact of COVID-19 on the market and consumer protection issues. CAK also has a well-functioning [website](#) that is interactive, informative and easy to navigate. This is important because not all competition agencies in Africa have websites, making it difficult to follow up on their implementation and enforcement measures during the COVID-19 pandemic. Yet, in the era of digitization, this inhibits effective competition law enforcement and advocacy of the agencies work. Only Botswana, Egypt, Eswatin, Kenya, Madagascar, Malawi, Mauritius, Namibia, Nigeria, Seychelles, South Africa, Tanzania, Gambia, Zambia, and Zimbabwe. Only Kenya and South Africa's websites go beyond just providing online information on its mandate and embed electronic filing systems in the public portal that were useful during the COVID-19 pandemic.

Additionally, as I noted on [AfronomicsLaw blog](#) during its symposium on "[Introduction to the COVID-19 Symposium on International Economic Law in the Global South](#)" in my article on "[COVID-19, Trade and Competition Law in Africa](#)," competition agencies in Africa that had automated their services were able to continue functioning even during the pandemic. Also, the public would alert the competition agencies through their public portal on any anti-competitive conduct and consumer issues arising during the pandemic. The use of media during the pandemic increased CAK's visibility. Further, CAK continued to use webinars and other technological platforms to sensitize the public on its mandate during the COVID-19 pandemic. CAK therefore offers lessons to competition agencies in Africa that have not adopted technologies to do so. As I have noted [earlier](#) and I will reiterate here, in Africa, "Covid-19 has also proved to us that competition agencies need to reinvent their enforcement including the adoption of digital technologies such as artificial intelligence and investing in the security and privacy concerns of the people. Integration of technology is no longer a choice. It is a must."

### III. CAK'S Enforcement Activities During the Pandemic

Having not halted its operations during the pandemic, it is important to explore how CAK continued to implement and enforce competition law. According to the 2010 [Competition Act](#) of Kenya, CAK's role is to promote and safeguard competition in the market, and to protect consumers from unfair and misleading market conduct. During the pandemic, CAK informed by the vulnerability of consumers during pandemics and distortion of markets by dominant undertakings who take advantage of the crisis to make unreasonable profits, focused more on consumer protection and ensuring that markets continued to be competitive and effective. Unlike other competition agencies that sought to relax competition laws during the pandemic to allow businesses to cooperate and collaborate to meet security of supplies, the CAK strictly enforced competition law, only allowing business to cooperate if authorized by CAK and through exemption applications.

## A. Consumer Protection

The impact of COVID-19 on markets has remained catastrophic, especially for developing countries. In the absence of curative vaccine, and as countries adopted more restrictive measures to contain the spread of the COVID-19 in the early days, essential commodities became scarce. The fear of countries adopting quarantines and lockdowns led to panic buying as consumers sought to stock as much essential commodities as possible. This panic buying in itself provided businesses with an opportunity to engage in restrictive trade practices to the detriment of the vulnerable consumer with low bargaining power.

Practices such as price increases of essential commodities, unconscionable conduct, misleading and deceptive conduct became prevalent not only in Africa, but also in developed countries. Competition agencies across the world were called upon to remain vigilant and ensure that markets continued to function effectively during the pandemic and after. Most of the African competition agencies issued precautionary notices against price hiking, deceptive practices and unconscionable conduct. The Namibian Competition Commission, issued [precautionary notice](#) on price hiking following a market analysis where it found that the prices of immune boosters, hand sanitisers and 3ply facemasks had increased during the lockdown. The South Africa Competition Commission enacted its “[Regulations and Directions: Consumer and Customer Protection During Coronavirus Covid-19 Lockdown](#)” to protect consumers during the COVID-19 pandemic. South Africa has also charged a [pharmaceutical company](#) for inflating prices of essential hygienic products during the COVID-19 crisis between February 2020 and March 2020.

In Kenya, aware of the impact of COVID-19 on markets and consumer protection, immediately the government of Kenya announced the first case of COVID-19, CAK on March 13, 2020 issued a [cautionary notice](#) on illegal price increases and hoarding. This was the first measure taken by CAK in respond to COVID-19 and it was informed by CAK’s knowledge that some manufacturers and retailers were contemplating collusive increases of prices. CAK encouraged the public to report any increase in prices of commodities during the pandemic.

This first response by CAK is a clear indication that CAK takes consumer protection seriously. Two days later, it would unfold that CAK’S fear that some business would increase prices following the government’s announcement of the first COVID-19 were justified. Through increased market surveillance and after carrying out its own investigation in accordance with Section 70A of the Competition Act, CAK found out that Cleanshelf Supermarket was unconscionably adjusting prices of Tropikal brand sanitizers in contravention of section 56(1) of the Competition Act. Cleanshelf supermarket which normally retailed the hand sanitizer at Ksh 800, on March 15, 2020 it was increasing the prices within hours. To remedy the consumers, on March 16, 2020 CAK issued a [remedial order](#) to Cleanshelf supermarket and “ordered Cleanshelf to [contact and refund ALL](#) the consumers who purchased the 960 pieces of the Tropikal brand hand sanitizers above the usual selling price and submit evidence to support the same by March 26, 2020.”

Since then, CAK has not publicly reported further consumer complaints and decisions on its website. However, in Malawi, the Malawi Competition and Fair-Trading Commission found out that independent schools were engaging in collusive practices and unconscionable conduct



on the level of school fees charged for online learning programs as schools shifted to online learning during the pandemic. The schools were asked to [cease and desist](#). It also carried out a joint market surveillance and price monitoring exercise with the Ministry of Transport and Public Works and found out that minibuses and buses in Malawi were taking advantage of the COVID-19 pandemic and [exploiting passengers](#) by charging excessive and unreasonable bus fares ranging from 40 to 200 percent despite substantial fuel prices reduction and in breach of Section 43 of the Competition and Fair Trading Act and Consumer Protection Act.

In West Africa, the newly established [Nigeria Federal Competition and Consumer Protection Commission](#) has heightened its market surveillance to protect consumers against [price gouging](#), unreasonable and [arbitrary increases in prices](#) of protective and hygiene products during the COVID-19 pandemic. Infact, Nigeria's competition agency is the first one in Africa to monitor digital markets during the pandemic. Following its warning, JUMIA an online market platform, had to [delist](#) 390 of its products belonging to 168 sellers of hand sanitizers and face masks from its platforms. These sellers had engaged in price gouging and arbitrary prices. To curb price hiking, the Botswana Competition Authority carried out a [price market survey](#) and the Egyptian Competition Authority was requested through the Prime Ministerial Decree No. 17/2020 to issued price caps. These few examples show that competition agencies in Africa have remained vibrant during the COVID-19 pandemic in enhancing consumer protection.

## **B. Restrictive Trade Practices**

According to the CAK's Director General Francis Kariuki, competition agencies have a critical role to "[play in ensuring that markets continue functioning competitively](#)" during the COVID-19 pandemic. CAK [increased its market surveillance](#), initiating investigations that sought to determine to what extent the business would engage in anti-competitive conduct during the COVID-19 pandemic. Kenya did not relax its competition law, but rather increased its market surveillance and applied the traditional restrictive approach that prohibits restrictive trade practices per se and only allows businesses to apply for exemptions which can only be authorized by CAK.

In this regard, on March 20, 2020, the CAK in its immediate release "Order on Exclusivity Agreements on Essential Commodities" warned distributors and retailers of essential commodities from engaging in exclusive conduct. Through its heightened surveillance the CAK found out that indeed [manufacturers and distributors](#) of essential commodities such as maize flour, wheat flour, edible oils, rice, sanitizers, and toilet papers were contemplating engaging in exclusive agreements. These exclusive agreements sought to "facilitate the allocation of distributorship territories, brand exclusivity, quantities supply, and deter manufactures of competing brands from accessing the same distributors to deliver their products outlets contrary to Section 21(1) of the Competition Act, No.12 of 2010."

CAK emphasized that these exclusive agreements during the pandemic "distort allocation of optimal prices for these commodities, ultimately denying consumers in some region of the country from accessing the commodities at competitive prices. This situation maybe exacerbated further by the COVID-19 pandemic". CAK demanded and ordered the distributors to expunge exclusivity clauses in their contracts with immediate effect and not later than 26<sup>th</sup>

March 2020. Second, to cease and desist from entering into exclusive agreements. Finally, distributors that operate their own retail outlets should avail those commodities to other retail outlets on non-discriminatory terms. These measures by CAK ensured that markets continued to function effectively during the COVID-19 pandemic and consumers would access these essential commodities.

At the time of writing this article, CAK had not provided any public information on any other enforcement activities it has taken resulting from the COVID-19 pandemic. Nevertheless, CAK did not relax its competition law to allow business to cooperate and collaborate if justified. Instead CAK advised business to apply for authorization first or seek advisory opinion. As CAK notes in its [newsletter](#) (page 5), “in instances where businesses seek to collaborate with the aim of increasing efficiency of the supply chain of essential goods and services that will reduce the impact of the Covid-19 pandemic, and they are uncertain about the compatibility of their actions with the Competition Act, they can seek an advisory opinion from the Authority. This informal guidance is offered free of charge” (p. 5). The second option is for the businesses to seek for exemptions, which CAK would give priority.

CAK’s strict approach to enforcing competition law during the COVID-19 pandemic can be explained by the fact that unlike United Kingdom that relaxed its competition law in the earlier days of the pandemic, the number of COVID-19 cases in Kenya have not been so high to warrant relaxation of competition law. In addition, generally CAK’s approach to enforcing competition law has always been one which reflects the Kenyan market realities and the government’s industrial policy. However, this does not mean that there is no African competition agency that relaxed its competition laws. Mauritius and Eswatin did.

The Mauritius Competition Commission on April 9, 2020 issued a formal guidance “to provide assurance that the competition law enforcement would not unduly constrain or impede necessary and critical cooperation, which are in consumers and public interest and which does not go further or last longer than what is necessary” (Emphasis added). On July 8, 2020, the competition agency initiated a [Guidance Program](#) the “guidance to business on proposed Covid19-related collaboration” to the business community on their proposed related collaborations. In this Guidance Program, the Executive Director will provide a non-binding guidance as to whether the “proposed collaboration (agreement) may be pursued or whether it is likely to be contrary to the prohibition on cartel.” This will offer the business with an opportunity to have their own collaborations reviewed by the competition agency before implementing them. The [main conditions](#) are that “the collaboration must be in response to the COVID-19 situation and secondly, the collaboration is only at the proposal stage and has not yet been implemented.”

The Eswatini Competition Commission recognized that the COVID-19 is not only a health crisis but also a crisis against the economy in its [press release](#) assured the business community that the “Commission has no intention of taking competition law action against cooperation between businesses that serves to ensure the continuity of supply and relevant interventions to the extend demonstrated as necessary to protect consumers and business continuity under the existing unprecedented circumstances.” However, it has warned that “at the same time,

the Commission will not tolerate unscrupulous business behavior that will exploit the current crisis as cover-up for unfair trading and collusion.”

South Africa resorted to issuing block exemptions to specific critical markets such as the [health industry](#), the [banking sector](#), and [retail property](#) instead of entirely relaxing its competition law. Egypt and Zimbabwe have resorted to providing informal guidance and not relaxing their competition laws. The Zimbabwe Competition and Tariff Commission [observed](#) that “the Commission therefore stands ready to guide companies on acceptable cooperation agreements during this coronavirus pandemic. In the interim, it would like to urge businesses to comply with the provisions of the Act, as non-compliance will lead to punitive penalties, once reported or comes to the attention of the Commission.”

#### IV. Conclusion

At the core of the measures adopted by CAK was consumer protection and ensuring competition within the market continued effectively. However, we do not know when the COVID-19 pandemic will end. As its impact on the economy and particularly markets continue to unfold and as the number of COVID-19 cases in Kenya increase with time, the CAK has an opportunity to borrow from the measures adopted by other competition agencies in Africa and across the globe as well, in order to strengthen its measures and provide clear guidance to the business community. I recommend the CAK to come up with a guidance initiative for the business community on how they should carry out their collaborations and the CAK’s expectations akin to the Mauritius Competition Commission’s.

African competition agencies and the existing regional competition agencies are encouraged to work together in ensuring that markets continue to work effectively during and post-COVID-19 pandemic. There is also need for the African competition agencies to reorganize their enforcement tools during and post-COVID-19 pandemic. As the CAK’s Director General, Francis Wang’ombe Kariuki [underscores](#), competition law and consumer protection regulators “should not strive to go back to the pre-Covid-19 dispensation, in terms of how we organize and manage our agencies, but instead let us embrace the new normal way of doing things that is far from normal.”

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