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REPUBLIC OF KENYA

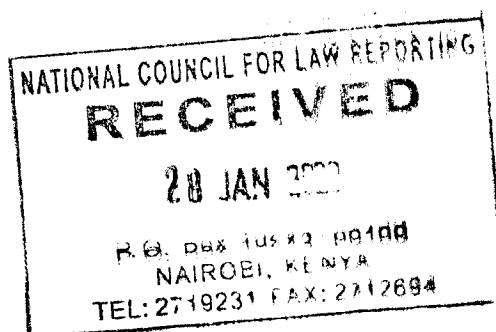
KENYA GAZETTE SUPPLEMENT

ACTS, 2019

NAIROBI, 17th December, 2019

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THE COMPETITION (AMENDMENT) ACT, 2019**No. 27 of 2019***Date of Assent: 13th December, 2019**Date of Commencement: 31st December, 2019***AN ACT of Parliament to amend the Competition Act****ENACTED** by the Parliament of Kenya, as follows—

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

Short title.

2. Section 2 of the Competition Act, hereinafter referred to as the “principal Act”, is amended by inserting the following new definition in the proper alphabetical sequence—

Amendment of s.2 of No. 12 of 2010

“buyer power” means the influence exerted by an undertaking or group of undertakings in the position of purchaser of a product or service to—

- (a) obtain from a supplier more favourable terms; or
- (b) impose a long term opportunity cost including harm or withheld benefit, which, if carried out, would be significantly disproportionate to any resulting long term cost to the undertaking or group of undertakings.

3. Section 18 of the principal Act, is amended in subsection (4) by inserting the words “abuse of buyer power” immediately after the word “competition”.

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

4. Section 24 of the principal Act is amended—

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

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

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

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

Insertion of new section in No. 12 of 2010.

Abuse of buyer power.

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

(2) Where the Authority establishes that a sector or an undertaking is

experiencing or is likely to experience incidences of abuse of buyer power, it may monitor the activities of the sector or undertaking and ensure compliance by imposing reporting and prudential requirements.

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

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

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

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

- (a) delays in payment of suppliers without justifiable reason in breach of agreed terms of payment;
- (b) unilateral termination or threats of termination of a commercial relationship without notice or on an unreasonably short notice period, and without an objectively justifiable reason;
- (c) refusal to receive or return any goods or part thereof without justifiable reason in breach of the agreed contractual terms;
- (d) transfer of costs or risks to suppliers of goods or services by imposing a requirement for the suppliers to fund the cost of a promotion of the goods or services;

- (e) transfer of commercial risks meant to be borne by the buyer to the suppliers;
- (f) demands for preferential terms unfavourable to the suppliers or demanding limitations on supplies to other buyers;
- (g) reducing prices by a small but significant amount where there is difficulty in substitutability of alternative buyers or reducing prices below competitive levels; or
- (h) bidding up prices of inputs by a buyer undertaking with the aim of excluding competitors from the market.

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

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

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

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

(9) Any person who contravenes the provisions of subsection (1) commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding ten million shillings or to both.

6. The principal Act is amended in section 29 by inserting the following new subsection immediately after subsection (7)—

Amendment of section 29 of No.12 of 2010.

(8) Any professional association—

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

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

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

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

- (c) prohibitions relating to abuse of buyer power.