

Strengthen Competition Law Enforcement Against Abuse (Dominance and Buyer Power) – Developing Legal Frameworks and Investigative Tools

Sixth Arab Competition Forum

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Baghdad, Iraq

May 28-29, 2025

Enforcement depends:

- Investigative tools

The Legal Regime

- The Constitution
- The Competition Law – Regulations, Guidelines, International Best Practices
- The Evidence Act
- Fair Administrative laws

Resources

- Ability to Compel (Voluntary or non-voluntary) for Information
- Capacity to procure information – out of site or on-site
- Skills to evaluate the relevant information on timely manner and pinpoint the Competitive impact of the conduct under investigation; prohibit or remedy the mis-conduct and to defend the findings.
- Ability to ensure impactful compliance including appropriate sanctions for non-compliance

Application of the Investigate Tools

Appropriate Limitations...

- i. Internal Agency Reviews;
- ii. External Review By Courts;
- iii. Evidence gathering subject to applicable legal privileges
- iv. Confidentiality protections
- v. Due consideration of relevance and proportionality

Transparency – Agency policies and Standards

- i. Substantive legal standards, guidelines for analysis, framework for judicial review, sanctions and remedies
- ii. Transparency should be to the extent it does not affect the investigations process

Evidence Gathering Due Process

- Development of a theory of the Case
- Detailing an Investigation Work Plan
- Identification of the information sources and mode of engagement
- Organization and assesment of evidence
- Determination of Dominance and its Abuse
- Hearing

Determining Abuse - Dominance

- **Predatory pricing (selling below a profitable price)** – the criteria; the duration; capacity to re-coup (market power)
- **Excessive Pricing** – [CAK USSD Market Inquiry](#) – Challenge – what's the market price? might be the 'economic value'?
- **Exclusive agreements** – foreclosure effect – [CAK vs. Safaricom PLC](#) -Mpesa agents Case; [CAK vs Kenya Breweries](#)
- **Margin Squeezing** – [CAK USSD market Inquiry](#) - Mobile banking and **Preferential treatment**;
- **Refusal to deal** or supplying under **dissimilar conditions**

Determining Abuse – Buyer Power

Relation between buyer and supplier (*fairness*): -

- Nature and determination of contract terms
- Payment requested for access infrastructure
- Retention period for Suppliers payments
- Price paid to suppliers – margins

Transparency during an Investigation

- Only **high-level transparency** – significant information investigation, competition concerns identified
- **Presentation of legal and economic arguments and defenses** are necessary to ensure efficient and effective enforcement
- **Basic facts and nature of evidence** gathered to be availed
- **Access to the evidence relied** upon as the basis for the Agency's allegations and an effective opportunity to respond.

Engagement during an investigation

- Agency and the Parties under investigations– to share significant factual, legal, economic and procedural issues
- Parties should be provided with opportunities and platform to present arguments/defenses
- Engagement with third parties (competitors, other regulators) ensures optimal decisions
- 3rd Parties may be offered opportunities to submit/discuss their views

Internal Agency Safeguards

- Vertical and horizontal separation of investigations
- Create mechanisms for sound and effective decisions – brainstorming
- Ensure consistency and impartiality – respect of precedence
- Conflict of interest to be extinguished
- Avoidance of unnecessary delays in enforcement
- Periodic review of internal rules and procedures to ensure continual improvement

The Investigation Report

- Thorough **Interrogation of findings and recommendations** before implementation
- Internal safeguards/moot courts/**peer reviews to support credible and optimal** decision making hence effective outcomes
- **Application of appropriate legal and economic analysis** to the facts and evidence gathered
- **Avoid other considerations** – personal biases, political interference

Cont'd...

- Seek the investigated parties opinion of evidence finding and agency concerns
- Formal hearing on alleged violations should be before a panel not involved in/independent of investigations
- The final written enforcement decisions on violations should include – explanation of findings of fact, conclusions of law, evidence relied upon, party arguments and sanctions.
- Settlements or commitment decisions should highlight the legal basis, relevant facts and evidence including explaining sanctions or commitments.

Confidentiality protections and legal privileges

- Commercial interests of information submitters should be taken into account
- Issue guidelines on threshold of confidentiality criteria
- Clear policies on handling of confidential information including a [confidentiality policy](#)
- Excessive and unwarranted confidentiality claims should be rejected
- Disclosure of already granted confidential information to another party should be communicated to the submitter

Remedies

- Clear rules/Guidelines
- Transparency and Predictable process – ensures accountability
- Should be proportional – to punish or to rectify the markets?
- Determination/decisions should be drafted very clearly and unambiguously
- Compliance process and timelines should be clear

