



# Competition Law

**ALERT**

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CLIFFE DEKKER HOFMEYR

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## IN THIS ISSUE

### KENYA

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On 23 August 2023, the Competition Authority of Kenya (CAK) made a landmark announcement, revealing its imposition of a record penalty on nine (9) steel manufacturers totalling KES 338,848,427.89, the highest fine the CAK has meted out to date for engaging in price fixing and output restriction. In addition to the financial penalties, the CAK has mandated these companies to cease any participation in anti-competitive activities going forward. It has also required them to establish robust competition compliance programs to ensure adherence to fair market practices.



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KENYA

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The steel manufacturers in this regard include Nail and Steel Products Limited, Brollo Kenya Limited, Blue Nile Wire Products Limited, Tononoka Rolling Mills Limited, Devki Steel Mills, Doshi & Hardware Limited, Corrugated Steel Limited, Jumbo Steel Mills, and Accurate Steel Mills Limited.

This historic penalty underscores the CAK's commitment to deterring anti-competitive practices as a strategic business approach. The penalties are regarded by the CAK as commensurate with the offences committed i.e. targeted practices such as price fixing and output restriction which the CAK believes, led to artificial price inflation and hindered healthy market competition.

### Background

In August 2020, the CAK initiated an investigation into the practices of the steel manufacturers suspected of engaging in anti-competitive behaviour that led to inflated steel product costs.

In December 2021, CAK, in collaboration with law enforcement agencies, executed search warrants at the premises of the aforementioned companies. This operation yielded compelling evidence, including meeting minutes that demonstrated agreements to curtail the importation of 0.99mm coils and plates. Further investigations uncovered a coordinated strategy involving the simultaneous release of price lists based on ex-factory analyses, vigilant monitoring of rivals' stock levels, and meticulous scrutiny of sales volumes.

### Offences and penalties

Section 21 of the Competition Act (Act") addresses restrictive trade practices that undermine competition in the trade of goods and services. It explicitly prohibits agreements, decisions, and concerted practices among undertakings that have the object or effect of preventing, distorting, or lessening competition in any goods or services in Kenya, or a part of Kenya. Such practices are unlawful unless exempted by the CAK in accordance with the Act.



KENYA

## The competition authority of Kenya imposes the highest penalty in history for anti-competitive behaviour

CONTINUED

This restriction extends to both horizontal and vertical relationships. Horizontal relationships involve agreements among competing undertakings, while vertical relationships encompass agreements between undertakings and their suppliers or customers. Some of the prohibited actions include, price fixing, market division or allocation, collusive tendering, minimum resale price maintenance and limits or controls on production, market outlets or access, technical development or investment.

The CAK published the Consolidated Guidelines on Restrictive Trade Practices under the Competition Act (Guidelines), which set out information on how the CAK carries out its legal and economic analysis with the respect to restrictive trade practices and in particular, provide explanations on the standard the CAK will use in the assessing potential anti-competitive risks in horizontal agreements and vertical agreements.

Under the Guidelines, price fixing and output restriction are considered as 'hardcore restrictions' which are very injurious to the proper functioning of competition and have no redeeming value whatsoever.

Price fixing, as defined in the Guidelines, includes actions like setting the price itself, fixing elements of the price (such as discounts or percentage increases), establishing a range of prices among competitors, setting transport or credit-related terms, and indirectly restricting price competition through suggested pricing. The CAK observed that the steel companies agreed to collectively set prices and timelines for adjusting prices, which falls under the definition of price fixing in the Guidelines.

Similarly, output restriction, as defined in the Guidelines, includes arrangements that directly or indirectly prevent, restrict, or limit production, capacity to supply services, or the supply of goods/services to specific groups.

The CAK noted that the steel companies collectively limited the import of certain steel components, leading to artificial scarcity and increased steel prices. These actions fall within the definition of output restriction as outlined in the Guidelines.

### Enforcement and compliance measures

Section 36 of the Act empowers the CAK to impose financial penalties of up to ten percent (10%) of the previous year's gross annual turnover within Kenya of the implicated undertaking. This provision ensures that penalties are proportionate to the severity of the violation and the economic impact it has on the market.

Beyond financial penalties, the CAK's approach to ensuring fair competition involves requiring penalised companies to discontinue engaging in anti-competitive activities. In addition, the CAK mandates the



KENYA

## The competition authority of Kenya imposes the highest penalty in history for anti-competitive behaviour

CONTINUED

implementation of robust competition compliance programs by these entities. This preventive measure promotes a culture of fair competition and responsible business practices, aligning with the broader objectives of the Act.

Notwithstanding the foregoing, the Act also allows the CAK to enter into settlement agreements with undertakings that have breached the provisions of the Act at any time, during or after an investigation into an alleged infringement. Such agreements would typically include either an award of damages to a complainant or any amount to be proposed to be imposed as a pecuniary penalty. On this basis, the CAK indicated that, as part of its investigation into the steel manufacturers, it was engaging five other steel firms in settlement negotiations, which engagement is aimed at achieving a speedy and

cost-effective resolution and a return of effective competition in the sector. The settlement outcome is to be published in the Kenya Gazette at a later date.

### Conclusion

It is incumbent upon businesses to ensure their operations align with the restrictions in the Act to avert significant financial penalties. Familiarity with practices considered anti-competitive is essential. It is advisable for businesses to conduct a legal audit to ensure the absence of any restrictive practices within their agreements. In the event that such restrictions are identified, the recommended course of action is to engage with the CAK for the purpose of reaching a settlement. Moreover, when entering into new agreements, businesses should proactively seek exemptions from the CAK before entry into the said agreement. Section 25 of the Act

allows businesses can potentially seek exemptions from the application of restrictive practices outlined in the Act. This exemption route is applicable to undertakings or associations of undertakings, specific agreements or categories thereof, decisions or categories of decisions, and concerted practices or their categories.

Seeking exemption requires the submission of a prescribed application form accompanied by the necessary information. This proactive approach can potentially shield businesses from inadvertently engaging in anti-competitive practices. As your legal advisors, we stand ready to provide guidance on compliance strategies, ensuring your business operates in alignment with the Act.

For any queries or further assistance, please feel free to reach out to our dedicated competition law team.

**Njeri Wagacha, Martha Mbugua and Brian Muchiri**



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