

Date: 11th June 2024

Ref: TBA

To:

**The Acting Director General
Competition Authority of Kenya
15th Floor, CBK Pension Towers, Harambee Avenue
P.O Box 36265-00200
Nairobi**

Dear Sir,

Re: Request for Comments on the Draft Competition (Amendment) Bill, 2024

We, a group of civil society organisations active in Kenya, welcome the opportunity to contribute to the public consultation on the draft Competition (Amendment) Bill, 2024 at the invitation of the Competition Authority of Kenya (hereinafter referred to as “the Authority”). We fully support the Authority’s stated and timely objective “to make the Act more robust to attend to emerging issues in the Kenyan market.”

We also appreciate the Authority’s resolve that the proposed amendments to the Competition Act be firmly rooted in and reflective of both the enforcement experience accrued by the Authority and international best practices. With respect to the latter, we also seize this opportunity to acknowledge the Authority’s significant international involvement, demonstrated among other things by its forward-thinking participation in the first-ever Technology Forum, convened in March 25th to 26th 2024 in Washington DC by competition and consumer protection authorities who are members of the International Competition Network and hosted by the US Federal Trade Commission.

In the remainder of this submission, we aim to highlight several specific points that, in our opinion, warrant further consideration by the Authority. We look forward to further dialogue with the Authority on these and other topics.

Digital activities

Digital services have emerged as a pervasive influence across various aspects of our lives, affecting everything from commerce and healthcare to how we communicate. There is a noticeable trend in digital markets where a few powerful corporations accumulate significant control, hampering market access and harming competition, which in turn hampers innovation.

Equally critically, this concentration of power may result in the exploitation of consumers and workers - that is, citizens. Competition law plays an essential role in protecting the economy, society and democracy.

The latest international best practices concerning digital services, from which the Authority expressly takes inspiration, have developed in response to the recognition that the traditional mechanisms at the disposal of antitrust authorities are insufficient to safeguard competitive processes in the digital age. This full awareness has led some jurisdictions to propose ex-ante regulation of digital services provided by extremely powerful companies that have assumed the role of so-called gatekeepers in the relevant digital markets. This trend was initiated by the European Union with the enactment of the Digital Markets Act (hereinafter referred to as “DMA”), with similar initiatives now being undertaken in other jurisdictions, such as Brazil and India.

The Authority is clearly aware of these developments, particularly as reflected in the proposed amendment that includes a new definition of digital activities. This definition broadly incorporates the concept of core platform services as proposed by the DMA, but it is transposed into the more traditional antitrust context and is intended merely as an illustrative example. Nevertheless, we believe it would still be beneficial to also include, in particular, the example of virtual assistants, as already incorporated in the DMA, given the increasing significance this digital service is set to gain in the rapidly approaching AI era.

Further amendments to the Competition Act also reflect the necessity to update the toolkit available to the Authority to preserve competitive processes in the digital era. Here, particular reference is made to the determination of a dominant position below the forty percent (40%) market share threshold. With regard to digital activities, the proposed amendment aims to identify factors that typically grant a significant market position below the forty percent market threshold. This is clarified in a new paragraph (c). The subsequent paragraphs from (d) to (h), however, are clearly sub-paragraphs of paragraph (c) and this should be specified to ensure clarity and readability of the provision. Regarding the specific content of those that are to be seen as sub-paragraphs of paragraph (c), they well reflect the current state of global reflection and enforcement in the digital domain.

Among other things of note that we wish to highlight is the appropriate focus on intermediary power (paragraph h), which is further emphasized in several proposed amendments to Section 23. Moreover, particularly useful is the reference to the economies of scale and scope that the

undertaking benefits from due to access to data for competition, which is poised to become an increasingly crucial element of assessment in the next digital phase characterized by an increasing deployment of advanced AI technologies globally.

Superior Bargaining Position

Equally commendable and useful, also regarding digital activities and the preservation of effective competition processes, is the introduction of the new provision of superior bargaining position, which replaces the more limited notion of buyer power. In addition to prohibiting abuses of superior bargaining position in a market in Kenya, or a substantial part of Kenya, the proposal is also significant in that it aims to eliminate and prevent instances of abuse of superior bargaining power, that is both when they have occurred and when it is likely that they will occur. Particularly important in this regard is the development of codes of practice, which are indicated to be developed in consultation with relevant stakeholders. It is essential to ensure the meaningful involvement of civil society organizations in the drafting of these codes. However, this significant new addition to the Authority's toolkit, to be effective in practice, must also be equipped with sufficient deterrent force. In this regard, it is noted that capping the fine at ten million shillings for abuse of superior bargaining position seems inappropriate. Instead, the fine should be substantially increased or, preferably, be commensurate with the undertaking's turnover.

Merger Control

We welcome this amendment which enables the authority to solicit information input from the public and we strongly recommend its extensive use. Building on the points previously made, it is expected to be particularly relevant for mergers involving corporations in the digital markets given the information asymmetry that disadvantages competition authorities, as has been observed globally.

Consumer bodies

Instead, the proposal to change the qualification of consumer bodies relevant to the Competition Act from being "recognized" by the Authority to "accredited" raises concerns among civil society organizations. This change may appear to hamper the activities of consumer bodies, which is something that must be firmly opposed. Given the complexity of competition law enforcement and the increased risk of consumer exploitation, also due to

anticompetitive practices by undertakings exercising digital activities, the potential involvement of consumer bodies should not be restricted but rather safeguarded and expanded.

Network of cooperation among relevant government agencies and regulatory authorities

We are pleased to note the Authority's proposed amendment aiming at the establishment of a network, or forum, of cooperation among relevant government agencies and regulatory authorities on matters relating to competition and consumer welfare. This network aims to facilitate coordination, share best practices, and promote pro-competition reforms.

This specific amendment proposed by the Authority once again duly reflects international best practices, and in particular one of the most interesting, recent institutional innovations in the field of competition policy as already emerged in other jurisdictions. While we support the establishment of such a network, we emphasize that it is crucial for it to be structured in a way that effectively serves to achieve its intended goals, while ensuring an adequate level of transparency in its operation.

Fair pricing for use of news content

In addition to addressing the superior bargaining position, it is crucial to consider the fair pricing of news content by big tech and Artificial Intelligence companies. As these technology giants increasingly aggregate and utilise news content generated by publishers, ensuring media sustainability becomes paramount

News publishers invest significant resources in generating high-quality content that informs and educates the public. However, big tech companies often reap substantial financial benefits from this content without providing fair compensation to the original creators. This dynamic not only undermines the financial viability of news organisations but also threatens the diversity and independence of the media landscape.

To address this imbalance, it is essential to develop and enforce mechanisms that ensure fair compensation for news publishers. This can be achieved through several approaches already tested in other jurisdictions:

1. **Regulatory Frameworks:** Establishing regulations that mandate compensation for the use of news content by tech companies. These regulations should outline clear guidelines for compensation rates and ensure transparency in their application.
2. **Negotiation Platforms:** Creating platforms where news publishers and tech companies can negotiate fair compensation agreements. These platforms should be supported by regulatory oversight to ensure equitable outcomes.
3. **Revenue Sharing Models:** Implementing revenue-sharing models where tech companies share a portion of the advertising and subscription revenue generated from news content with the original publishers. This approach aligns the financial interests of both parties and supports sustainable journalism.
4. **Collective Bargaining:** Allowing news publishers to engage in collective bargaining with tech companies. This strengthens the negotiating power of smaller publishers and ensures that compensation agreements reflect the true value of the content provided.

The Competition Authority should play a pivotal role in overseeing and enforcing these mechanisms. This includes:

- **Monitoring Compliance:** Ensuring that tech companies comply with fair compensation regulations and agreements.
- **Addressing Disputes:** Providing a framework for resolving disputes between news publishers and tech companies regarding compensation.
- **Imposing Penalties:** Enforcing penalties on tech companies that fail to adhere to compensation requirements, with fines proportional to their turnover to ensure deterrence.

Ensuring fair pricing of news content will contribute significantly to the sustainability of the media industry. It will enable news organisations to continue producing high-quality journalism, invest in investigative reporting, and innovate in response to changing media consumption patterns. Moreover, it will support the plurality and independence of the media, which are essential for a healthy democracy.

We remain fully available for any further clarifications and explanations that the Authority may find useful, and we are delighted at the prospect of continuing a fruitful discussion with the Authority on such important issues for our economy, society and democracy.

Signed by:

1. **ARTICLE 19 Eastern Africa**
2. **Kenya Human Rights Commission**
3. **KICTANet**
4. **Eastern Africa Editors Society (EAES)**
5. **B M Musau & Co., Advocates LLP**
6. **Young Women Growing Initiative**
7. **Paradigm Initiative**
8. **Amnesty International Kenya**

