



ONG'ANYA OMBO  
ADVOCATES

# Newsletter

## Restrictive Trade Practice

Ong'anya Ombo Advocates © 2018

a Windsor House, 4<sup>th</sup> Floor,  
University Way/Muindi Mbingu Street  
w <https://onganyaombo.com>  
e [hello@onganyaombo.com](mailto:hello@onganyaombo.com)  
p +254 724 026 355 or +254711 185 636

**DISCLAIMER:** Take note that the information herein is not intended to serve as a legal opinion or advise, and should you need any clarity or understanding of what this information is about, you are advised to seek professional advice from your legal advisor, lawyer, or the professional person that you deem fit in reference to the questions that you have. In addition, you agree that, should you rely on this information, you shall not hold us liable, be it directly or indirectly.

## Competition Act No. 12 of 2010 of the Laws of Kenya

The Competition Act No. 12 of 2010 (the “Act”) promotes and safeguards various entities or individuals in the Republic of Kenya. Considering that, the operation of the Act, through its respective government body, is expected to protect consumers from unfair and misleading market conduct. In this newsletter, we are addressing **Restrictive Trade Practices** as projected by the Act.

Heading	The Section of the Law (paraphrased)	Comments
<p><b>21. Restrictive Trade Practices</b></p>	<p>(1) Any business arrangement between various business entities or associations that have the <b>objective</b> or <b>effect</b> of preventing, distorting or lessening competition in trading of goods or services in parts or the whole of Kenya is generally prohibited.</p>	<p>The prohibition is not absolute. In addition, the prohibition applies whether there was intent or lack of it.</p>
	<p>(2) The prohibition on Restrictive Trade Practices equally applies to horizontal relationship where the business is in competition, or vertical relationships where the business is with the suppliers, customers, or both.</p>	<p>Horizontal Relationship refers to businesses at the same level as Supermarkets-Supermarkets; manufacturing companies, among others.</p> <p>Vertical Relationship refers to businesses like a Supermarket and an entity that supplies it with certain products, and customers can be individual, or entity based.</p> <p>While the provision appears to prohibit Horizontal relationship between competitors whose arrangement might lead to prevention, distortion, or lessening of competition, the law is silent on horizontal relationship of businesses that are not competitors but that does not limit the scope of the law as under s 21 (1) to address such cases.</p>
	<p>(3) The general limitations of the prohibitions presented under the Restrictive Trade Practice are crystalized further towards arrangements that seem to (in)directly fix purchase, selling, or any trading conditions; divides the markets by allocating customers, suppliers, areas or certain goods or services; collusive tendering; minimum resale price maintenance; limitation or control of markets, production, access, investment or development; application of varied terms to similar transactions; preconditioned terms</p>	<p>The provision of the law provides the exact practices that apply to s 21 (1). It simply means that there are exceptions towards practices not falling within the mentioned categories.</p> <p>Of importance to note is how Restrictive Trade Practice applies towards Intellectual Property (IP). The law utilizes a conjunctive instead of disjunctive. Therefore, the Restrictive Trade Practice concerning IP has to entail – all – <b>limiting of fair,</b></p>

that have no connection to the subject of the contract; utilising intellectual property in a manner that is not fair, reasonable and non-discriminatory; or generally prevents, distorts or restricts competition. **reasonable and non-discriminatory use.**

(4) The law provides that though recommending resale price is prohibited, the same can be done but it should be made clear that such pricing is not binding. Simply, a producer of a certain product can suggest that the pricing of the product should be a certain figure but that will not be a binding suggestion/recommendation.

(5) the prohibited practice under s 21 (1) extends to factors such as shareholding or directorship. Prohibited practice maybe raised should there be a common director or shareholder. The definition of a Director is referred to the Companies Act CAP 486 (repealed) – see s 21 (7) of the Competition Act. However, the definition applied now is that of Companies Act No.17 of 2015 – see s 112 – 127, Part IX of the Companies Act No. 17 of 2015.

(6) One can bypass s 21 (5) if one establishes that the business was a normal commercial response to conditions prevailing in the market. This is quite important as it presents another exception towards s 21 (1) that entails “objective” or “effect”, which rendered it hard to bypass since it was a strict liability provision.

(7) Other than the Director’s as defined under the Companies Act No. 17 of 2015, it also refers to a Society; Trustee of a Trust; individual transaction or Partnership; or where the engagement is in favour of a certain management. The law makes the aspect of directors to be wide enough to capture various forms of entities both incorporated and unincorporated.

(8) The prohibition under s 21(1) does not affect companies that engage a wholly owned subsidiary; or where all the companies are owned by the same person. This is an exception that can equally apply to the issue of directors. For instance, where the director is the shareholder or shareholder acting as a nominee for both companies or one company as long as it is owned or controlled by the same person(s).

In the event one contravenes this section [s 21] the person, on conviction, will be imprisoned for five years or pay a fine of ten million, or both.

## 22. Restrictive Trade Practices Applicable to

(1) (a) Any practice by a trade association or on its behalf will be deemed restrictive trade practices when it unjustifiably excludes any person who, in good faith, intends to run a

**Trade Association**

trade that is similar to that of the trade association.

(1) (b) Where the trade association, (in)directly, makes a recommendation to its members on price to be charged, or the pricing will be based on a formula; or terms of sale – including discount, credit, delivery, and product and service guarantee terms – towards its member or class of members that directly affects prices, profit margins or pricing models used.

(2) Any practice by a trade association or on its behalf will be deemed restrictive trade practices under s (1) (b) whether the members comply to it or not.

A trade association is responsible whether the restrictive trade practice was effected or not.

(3) Any recommendation made in favour of a trade association that intends to defeat or evade the provisions of the law will be deemed to have been made by that trade association.

The association will assume responsibility of any action brought against it for evading or defeating the law. However, it is questionable why a trade association should be held liable if the “defeat” or “evasion” is not in contravention of the law that is in place.

(4) If a recommendation is made and it is meant to affect the trading conditions of the members, it will be presumed that the members came up with an agreement whereby members agreed with the association to effect such recommendations.

The purpose is to make sure that trade associations operate diligently.

(5) A member of the association who dissociates oneself from the arrangements of the association will not be held liable unless the contrary is proved.

Despite there being an arrangement made by the association, which will or likely to offend the law, a member can disassociate from such arrangement by writing a letter to the association stating that the member will not be part of that arrangement.

**23. Criteria for Determining Dominant Position**

(1) This is any entity that produces supplies, distributes or controls at least half of any goods or services in Kenya or any substantial part of Kenya.

To be dominant, an entity’s goods or services ought to be at least 50% of what is in that target market.

(2) Regardless of what s 23 (1) provides, an entity will be deemed as dominant if it controls at least 40% of the market share unless it can show it does not have market power.

The clause develops the concept of dominance can be based on market power regardless of not having 50% market share of a certain good or service.

In addition, an entity will be deemed as dominant if it has less than 40% market share but has market power.

It is important to note that the law shifts the liability of establishing whether or not an entity has market power to the entity, which is likely to be unconstitutional as it makes a presumption of “**guilty until proven innocent**”.

**24. Abuse of Dominant Position and Buyer Power.**

(1) Any activity that amounts to abuse of a dominant position in a market in Kenya or a substantial part of Kenya is prohibited.

It means that dominance is not unlawful unless the dominance is abused.

(2) Without prejudice to the generality of s 24 (1) abuse of dominant position includes (in)directly imposing unfair purchase or selling prices or other unfair trading conditions; limiting or restricting production, market outlets or access, investment, distribution, technical development or technological progress; applying dissimilar

**89A. Leniency Programme**

The Competition Authority may come up with a leniency programme that can be used in favour of entities that will come forward and disclose trade practices that are violating the provisions of the law.

Generally, in order to bring down any groups that are engaging in Restrictive Trade Practice, the law allows there being guidelines that can be used to allow entities to disclose such information to avoid being fined for their practices.

**LENIENCY PROGRAMME GUIDELINES**

**Immunity**

Refers to total or 100% reduction in administrative financial penalty, pursuant to section 89A of the Competition Act on an undertaking found to have committed an offence amounting to horizontal restrictive agreements prohibited under section 21 and 22 of the Act. In addition, the applicant will not be subject to prosecution for the criminal aspects of the offence, subject to the concurrence of the Director of Public Prosecution.

The guidelines, which form part of the law as per s 89A of the Competition Act provides that the Leniency Programme will only apply to **Horizontal Relationships**. That is despite the fact that a clear reading of the Competition Act provides that restrictive trade practices might occur in the following formats: Vertical; Horizontal; Vertical – Horizontal; Horizontal – Vertical R/ship.

In addition, the Horizontal entities intending to rely on the Leniency Programme will need to consider the fact that the entity may not be subjected to the financial penalty, if it meets the required test, it might be subjected to

criminal proceedings should the  
Director of Public Prosecution.

## THE TEAM

<b>J.B. Ong'anya (Mr.)</b>	<b>Managing Partner, Advocate</b>
<b>Sophia Khalid (Ms.)</b>	<b>Solicitor (the "U.K.") – Strategic Legal Consultant</b>
<b>Ombo Malumbe (Mr.)</b>	<b>Partner, Advocate</b>