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May 25, 2023

Via Email: stakeholder@cak.go.ke

SUBJECT: Joint Section Comments on the Competition Authority of Kenya's Draft Consolidated Administrative Remedies and Settlement Guidelines

Dear Sir/Madam:

On behalf of the American Bar Association Antitrust Law and International Law Sections, we respectfully submit these comments in response to the Competition Authority of Kenya's Draft Consolidated Administrative Remedies and Settlement Guidelines.

The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,

COMMENTS OF THE AMERICAN BAR ASSOCIATION'S ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTION ON THE COMPETITION AUTHORITY OF KENYA'S DRAFT CONSOLIDATED ADMINISTRATIVE REMEDIES AND SETTLEMENT GUIDELINES

May 25, 2023

The views expressed herein are presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The Antitrust Law Section and the International Law Section of the American Bar Association (the "**Sections**") recognize and applaud the Competition Authority of Kenya ("**CAK**") for its open and thoughtful review of the Consolidated Administrative Remedies and Settlement Guidelines ("**Guidelines**"),[1] and appreciate the opportunity to comment on the Guidelines published for comment. The Sections are grateful for the extension of the comment deadline, and respectfully submit these comments in the hope that they will aid the CAK in further refining the Guidelines to safeguard and promote competition in the Kenyan market.

These comments reflect the Sections' collective experience and expertise with respect to the application of antitrust law and economic analysis in the United States, the European Union, and other jurisdictions, as well as with international best practices. The Sections offer these comments to share our experience and provide suggestions to further enhance the relevancy, effectiveness, and efficiency of any updated competition law ultimately adopted in Kenya.

The Antitrust Law Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 9,000, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors and law students. The Antitrust Law Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the Antitrust Law Section have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.[2]

The International Law Section focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing and practical assistance related

[1] Available at https://cak.go.ke/sites/default/files/Consolidated%20Administrative%20Remedies%20and%20Settlement%20Guidelines.pdf.

[2] Past comments can be accessed on the Antitrust Law Section's website at: https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/

to cross-border activity. Its members total over 11,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The Section's more than 50 substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the Section has provided input to debates relating to international legal policy.[3] With respect to competition law and policy specifically, the Section has provided input for decades to authorities around the world.[4]

The Sections recognize that competition laws are a critical part of a healthy economy and critical to economic growth. In this respect, fines and sanctions play an important role in deterring violation of the competition laws and promoting compliance. At the same time, fines and sanctions must be effective and proportionate, as otherwise there is a risk that they could deter lawful vigorous competition and hinder economic growth. It is, therefore, important that the circumstances under which administrative penalties will be imposed are transparent and that the administrative penalties are honed to ensure proportional and effective sanctions for anticompetitive behavior. As will be touched on below, this is a delicate and difficult balance.[5]

The Sections focus these comments and make recommendations regarding select sections of the Guidelines and conclude with recommendations intended to further support the Guidelines' goals of enhancing transparency, efficiency, predictability, and consistency in determining the administrative remedial measures.[6]

I. Relevant Turnover

Paragraphs 19 and 23 of the Guidelines provide that the "relevant turnover" for purposes of calculating penalties is the undertaking's gross annual turnover from the preceding financial year. Evidently, the Guidelines do not premise the determination of administrative penalties on the turnover actually affected by a particular contravention. Rather, the Guidelines refer to the undertaking's total locally derived turnover.

The Sections note that this is a departure from the positions adopted by many international competition authorities that utilize the turnover or volume of the affected commerce in determining the base upon which a penalty is ultimately calculated ("**affected turnover**").[7] As noted by the International Competition Network ("**ICN**"), the premise for relying on affected turnover as a base amount for a penalty is that "*this concept provides a good proxy for assessing the gravity of the behaviour, both in terms of (presumed) damage to consumers and illicit gain.*

[3] American Bar Association, International Law Section Policy, https://www.americanbar.org/groups/international_law/policy/about/ .
[4] Past comments can be accessed on the International Law Section's website at: https://www.americanbar.org/groups/international_law/policy/blanket_authorities_initiatives/ .
[5] American Bar Association Section of Antitrust Law, *Cartel Sanctions Thought Paper* (July 2018).
[6] Guidelines at [10].
[7] ICN *Setting of fines for cartels in ICN jurisdictions* (2008), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_SettingFines.pdf .

Furthermore, such data is relatively easy to obtain."[8] In this respect, the Sections note the positions adopted in the following jurisdictions for purposes of calculating the base penalty:

- **South Africa:** "Affected turnover" means the "*annual turnover of the firm in the Republic and exports from the Republic based on the sales of products or services that can be said to have been affected by the contravention*"[9];

- **UK:** "Relevant turnover" means the "*turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year*"[10];

- **US:** The Sentencing Guidelines Manual states that: "*For purposes of this guideline, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation. When multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offense level*"[11];

- **Korea:** "Related turnover" means the "*the turnover incurred by an enterpriser which commits a violation from selling goods or services in specific transaction areas during the period of violation or the corresponding amount thereof*"[12]; and

- **Brazil:** CADE must consider the gross turnover of the entity's "economic group" in "*the field of the business activity in which the practice occurred in the year prior to the initiation of the Administrative Proceeding*".[13] CADE provides a list of "field of business activities" in Resolution n. 3/2012.

The Sections note that the purpose of imposing fines for anticompetitive conduct is two-fold. First, it can serve to recover ill-gotten gains and to restore any damages caused to customers and consumers and, second, it makes engaging in prohibited practices unprofitable for cartelists and firms that engage in such practices.[14] Despite this, where penalties are too high there is likely to be the concomitant result of discouraging procompetitive behavior, disproportionality, and lowering profitability and thereby harming innocent stakeholders.[15] By basing the relevant turnover solely on a percentage of the undertaking's prior year's turnover, the penalty risks being too low to serve as an effective deterrent (for example, if it takes several years to detect

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[8] *Id.*
[9] Guidelines for the Determination of Administrative Penalties for Prohibited Practices (2015) at page 4, https://www.compcom.co.za/wp-content/uploads/2018/11/Final-Guidelines-for-Determination-of-Admin-Penalties-MAY-2015.pdf
[10] OFT (CMA), OFT's guidance as to the appropriate amount of a penalty (2012), para 2.7.
[11] Federal Sentencing Guidelines Manual §2R1.1.(b)(2).
[12] Article 9(1) of the Decree of the Monopoly Regulation and Fair Trade Act.
[13] Brazilian Law n. 12.529/2011, Article 37, sub-paragraph I.
[14] Marie-Laure Allain, Marcel Boyer, Rachidi Kotchoni & Jean-Pierre Ponssard, *Are cartel fines optimal? Theory and evidence from the European Union*, 42 INT'L REV. OF LAW AND ECON. 38, 41 (2015); Robert Kneuper & James Langenfeld, *The Potential Role of Civil Antitrust Damage Analysis in Determining Financial Penalties in Criminal Antitrust Cases*, 18 GEO. MASON L. REV. 953 (2011).
[15] *Id.*

and bring the case, the profits over several years may well exceed annual turnover). Conversely, where the conduct in question relates to one or more products that constitute a small part of the undertaking's overall business, the penalty risks being vastly over-inclusive as well as disproportionate to the illicit gains attributable to the conduct.

In light of the above, the Sections respectfully submit that the Guidelines should ensure that penalties are adequately related to the damage caused by the underlying conduct and revert to using affected turnover as the relevant basis upon which the base amount is subsequently calculated.

The Sections further observe that the Guidelines employ the terms "affected" and "relevant" turnover interchangeably. Given that the Guidelines envisage that "relevant turnover" is an undertaking's gross annual turnover from the preceding financial year, the use of "affected turnover" may result in uncertainty as to what amount should be used for purposes of the calculation.

II. Nature of Contravention

Paragraph 34 of the Guidelines delineates different score percentages, as aggravating factors, for the different characterization of a particular contravention.[16] Similarly, paragraph 35 of the Guidelines delineates different score percentages, as aggravating factors, for the different characterizations of mergers implemented without CAK approval.[17]

The Sections note that while cartel conduct is viewed as the most egregious form of competition law violations, the severity of other types of infringements (e.g., horizontal agreement, merger implemented without prior approval, vertical agreement, unilateral conduct) can be more difficult to categorize. A majority of jurisdictions apply a percentage increase having regard to the gravity and nature of the infringement[18]. For example, in Korea aggravating percentage increases are delineated into three categories: highly significant infringement, significant infringement, and not very significant infringement and where the degree of severity of the infringement is determined based on a number of factors, including its qualitative effects such as increase of the market price, decrease of the market supply and anti-competitive effect.[19] Similarly in the UK, assessments to determine the base percentage rate are made on a case-by-case basis for all types of competition law infringements, giving consideration to all relevant facts.[20]

The Sections respectfully submit that due regard must be had to all relevant facts of the contravention as well as an assessment of the qualitative effects of the conduct on the market.

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[16] Horizontal agreements; Unilateral conduct; and Vertical agreements.
[17] Horizontal mergers with negative competition concerns; vertical mergers with negative competition concerns; and conglomerate mergers with negative competition concerns.
[18] LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM – Session I: Fining Methodologies for Competition Law Infringements at page 11, https://one.oecd.org/document/DAF/COMP/LACF(2019)5/en/pdf .
[19] *Supra* note 17 above, at page 13.
[20] OFT (CMA) Guidelines (2012), para. 2.6

III. Duration of the Conduct

In assessing "duration" as an aggravating factor, paragraph 38 of the Guidelines states that the "*duration of the conduct shall be the time between when the merger was implemented and the time the [CAK] makes a determination.*" This will likely aggravate fines associated with the prior implementation of a merger due to the general length of time it may take the CAK to issue its decision. Naturally, this can prejudice an undertaking when it has not been the cause of the CAK's delay.

The Sections submit that duration, in so far as it concerns the failure to notify a merger, should be calculated as the time between the date of implementation of the merger and the date on which the CAK was notified of the contravention.[21]

IV. Recidivism

Recidivists prove that they have not been effectively deterred from previous fines and have a higher tendency to commit further infringements and, thus, attract increased fines in many jurisdictions.[22] Indeed, in 2008, the ICN noted that 86% of ICN member countries had increased penalties for repeat offenders.[23]

The Sections note that, according to paragraph 41 of the Guidelines, a recidivist only attracts a nominal point towards the aggravation of a penalty. As discussed above, where one of the primary objectives of imposing administrative penalties is to achieve effective deterrence, the Sections respectfully submit that the aggravating points associated with an act of recidivism be significantly increased.

In this respect, the Section highlights that many jurisdictions utilize a percentage-increase approach.[24] Specifically, in Argentina, Brazil, Mexico, the United Kingdom and the EU, the fine increase for repeat offenders will be up to 100% of the base fine, while the maximum percentage increase is 80% in Korea and 50% in Japan.[25] In the United States, recidivism may increase the base fine by up to 16%.[26] The Sections also refer the CAK to the South African Competition Act which provides that an administrative penalty may not exceed 25% of an undertaking's annual turnover if the conduct substantially repeats conduct by the same firm previously found to be a prohibited practice.[27] The Sections further refer the CAK to European Union's *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003* which provide that the basic fine will be increased by up to 100% where

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[21] For clarity, this recommendation focuses on penalties for failures to file reportable mergers, and not on the separate question of how an anticompetitive merger that should have been brought to CAK's attention may be remedied.

[22] OECD *LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM – Session I: Fining Methodologies for Competition Law Infringements* DAF/COMP/LACF(2019)5 at 15, https://one.oecd.org/document/DAF/COMP/LACF(2019)5/en/pdf#:~:text=Several%20common%20steps%20are%20observed,iv)%20considerations%20of%20leniency%20programmes.

[23] *Supra*, note 5 above, at 23.

[24] *Supra*, 13 above, at 16.

[25] *Id.*

[26] *Id.*

[27] Competition Act, 89 of 1998, at section 59(2A).

an undertaking performs an act of recidivism.[28] The inclusion of a parental liability regime also allows finding recidivism based on repeat offenses by the parent company or the subsidiary, which promotes the ultimate objective of achieving deterrence.[29]

Further, the Sections submit that it is important to specify the time period over which such recidivism will warrant an increased fine. In this regard, the Sections recommend that the Guidelines provide for the higher maximum administrative penalty only for repeat offenders within a defined period of time. Most jurisdictions provide a limitation between the previous infringement and the current conduct that is being penalized.[30] In addition, the Sections submit that additional guidance regarding the pattern of conduct that would be considered "substantially a repeat" or as "substantially the same conduct" would provide additional clarity regarding compliance obligations (*e.g.*, must the conduct apply to the same products and customers, or will the same or similar conduct in respect of different products or customers qualify for the higher maximum penalty?).

V. Coverage

The Sections note that the Guidelines have specifically included the market share of the contravening undertaking as an aggravating factor for the purpose of assessing the coverage of conduct in the market.

Currently, the Sections are not aware of any other jurisdiction that accounts for a contravening party's market share in the determination of an administrative penalty. The Sections respectfully submit that such an approach may be disproportionate in that a firm may suffer an enhanced penalty due solely to its substantial share of the market (that is, aside from any culpable behavior). If the "coverage" aggravating factor is purely meant to punish the extent of the illegal conduct, the Sections submit that it would be a more equitable approach to base this consideration on the affected turnover within Kenya. This, in turn, may be coupled with the Section's first recommendation that for purposes of the Guidelines, "relevant turnover" should mean "affected turnover" and not the annual turnover of the previous financial year – in lieu of coverage as an aggravating factor.

VI. Definition of "Undertaking" and Parental Liability

The Sections note that the Guidelines are silent on the definition of an "undertaking," which may result in uncertainty in calculating potential penalties and determining which party shall be ultimately liable for penalization. In this regard, the Sections note that the principle of

[28] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 at [28], https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01) .
[29] *Id.*
[30] In France and the United Kingdom, the prior infringement must have taken place within the last 15 years. In Argentina, Japan, Mexico, Spain and the United States, recidivism covers a range of 10 years. In Germany and Korea, the difference between the infringements should be less than five years. See https://one.oecd.org/document/DAF/COMP/LACF(2019)5/en/pdf#:~:text=Several%20common%20steps%20are%20observed,iv)%20considerations%20of%20leniency%20programmes at page 15.

separate legal and corporate personality should be respected.[31] To the extent that the Guidelines introduce parental liability by imposing an administrative penalty based on the turnover of the parent company rather than the individual infringing subsidiary, this should be done on a proportionate basis considering the actual role of the parent company in the infringing conduct.[32]

South Africa has adopted a parental liability regime and clearly states the instances in which a holding / parent company will be held liable:

> *8.1 The Commission may impute liability for payment of the final administrative penalty on a holding company (parent company) where its subsidiary has been found to have contravened the Act. In determining the applicability of this section the Commission will consider whether:*
>
> *8.1.1. The parent or holding company wholly owned the subsidiary;*
>
> *8.1.2. The parent or holding company directly controlled the subsidiary or had decisive or material influence over the commercial policy of the subsidiary. Material influence in this instance is analogous to that considered under section 12(2)(g) of the Act which refers to, "the ability to materially influence policy of the firm in a manner;*
>
> *8.1.3. The parent or holding company had knowledge of the subsidiary's participation in the contravention; or*
>
> *8.1.4. The parent derived substantial benefit from the activities of the subsidiary.*

Further, in the EU an "undertaking" includes any entity engaged in economic activity, regardless of its legal status. Moreover, subsequent to the decision in *Akzo Nobel v Commission*,[33] the OECD stated that: "*All the Commission has to do is to prove that the parent company has the ability to exercise decisive influence over the conduct of the subsidiary, and such influence or control was actually exercised. Such decisive influence may be established (i) where there is evidence that the parent company gives instruction to the subsidiary, and (ii) on the basis of a rebuttable presumption where the parent company holds 100% of the capital of the subsidiary, which has committed the antitrust violation.*"[34]

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[31] Samuel Miller and Ryan Sandrock, "Parental Liability For A Subsidiary's Antitrust Violations Under U.S. Law", CPI Antitrust Chronicle, November 2009, at 2, available at https://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/SandrockN OV-09_1_.pdf

[32] LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM – Session I: Fining Methodologies for Competition Law Infringements at page 24-25, https://one.oecd.org/document/DAF/COMP/LACF(2019)5/en/pdf.

[33] CFI, 12.12.2007, Akzo Nobel NV et al./Commission, Case T-112/05, ECR 2007, II-5049, margin no. 58; the decision was confirmed by the ECJ on 10 Sept. 2009, Case C-97/08 P.

[34] *Supra*, note 20 above, at 26.

While some jurisdictions have proposed parental liability for a subsidiary's infringements, the Sections submit that the same policy grounds do not apply in reverse. Namely the Guidelines should clarify that a subsidiary cannot be held liable for its parent's conduct.

The Sections respectfully submit that the CAK should include a definition of "undertaking" that clearly delineates whether an undertaking includes the directly contravening party, or also includes parent companies that may not be directly involved in the infringing conduct. Further, if the CAK intends on imposing administrative penalties on the parent companies of the contravening undertaking, the Guidelines should provide clear and objective criteria which would result in the parent company being implicated. The Sections emphasize that any penalty imposed on a parent company should be proportionate to its involvement in relation to the particular conduct.

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The Sections appreciate this opportunity to provide their views on the Guidelines and are available to provide additional comments or assistance in any other way that the CAK may deem appropriate.