



COMPETITION AUTHORITY PENALISES FIRMS FOR CARTEL CONDUCT

1. Summary

On Wednesday, 23 August 2023, the Competition Authority of Kenya (the **Authority**) announced its verdict, imposing sanctions and penalties on nine (9) steel manufacturers for engaging in the practice of price fixing and output restriction.

The penalty, amounting to **KES 338,849,427.89/=** is the largest ever imposed by the Authority.

2. Background: Investigative Mandate Bestowed on the Authority

The Competition Act of 2010 (the **Act**), empowers the Authority to initiate investigations into the actions of an entity, either independently or in response to a complaint. These investigations are aimed at

examining potential violations of prohibited practices outlined in the Act.

In this particular instance, the Authority, following the provisions of section 31 of the Act, launched the investigations into the activities of steel firms in the year 2020. The results of the investigations led the Authority to believe there was coordinated conduct by the steel manufacturers to fix prices and restrict output.

3. Prohibition of Restrictive Trade Practices

The Act prohibits agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their **object or effect** the prevention, distortion or lessening of competition in

trade in any goods or services in Kenya, or a part of Kenya (restrictive trade practices) unless they are exempt in accordance with the Act. These include any agreement, decision or concerted practice which:

- (a) directly or indirectly directly fixing the purchase or selling prices or any other trading conditions;
- (b) divides markets by allocating customers, suppliers, areas or specific types of goods or services;
- (c) involves collusive tendering;
- (d) limits or controls production, market outlets or access, technical development or investment;
- (e) otherwise prevents, distorts or restricts competition.

Notably, parties are considered to have participated in a restrictive trade practice when they enter into an agreement, make a decision, or partake in a coordinated effort **that results** in the prevention, distortion, or reduction of competition in the trade of goods or services within Kenya, even if such an outcome was not their explicit intention.

4. Investigative Process

The Competition Act grants the Authority the power to initiate investigations into alleged or potential violations of specific prohibitions related to competition practices including restrictive trade practices, abuse of dominance, and abuse of buyer power. If the Authority decides to proceed with an investigation, it can issue a written notice to individuals or entities involved. This notice can require them to provide relevant information in writing, produce specific documents or items, appear before the Authority to provide evidence, and share relevant records.

In line with the provisions of the Act, the Authority interviewed the steel firms and their legal representatives and issued a notice of proposed decision and invited the firms to make their oral and written submissions.

Subsequently, the Authority determined that the manufacturers were in breach of the prohibited

practices under the Act by engaging in cartel conduct including price fixing. The Authority's decision was reportedly supported by various evidence, including meeting minutes discussing the restriction of imports for specific steel products, coordinated price list releases based on ex-factory price analysis, monitoring of competitors' sales and stock levels, and a mutual understanding to abstain from importing raw materials.

5. Enforcement Measures

The Authority may take the following measures after consideration of the written representations of the parties:

- (a) declare the conduct to constitute an infringement of the prohibitions contained in the Act;
- (b) restrain the undertaking from engaging in that conduct;
- (c) direct any action to be taken by the undertaking concerned to remedy or reverse the infringement or the effects thereof;
- (d) impose a financial penalty of up to ten percent (10%) of the immediately preceding year's gross annual turnover in Kenya of the undertaking in question; or
- (e) grant any other appropriate relief.

In the present case, the Authority:

- (a) imposed an administrative penalty on the undertakings under investigation;
- (b) required the companies involved in the investigation to desist from engaging in any anti-competitive conduct in future; and
- (c) required the steel firms to roll out competition compliance programs in their operations.

In issuing its decision, the acting Director General, Dr. Adano Wario stated that the penalties in this case are **proportionate to the offence** due to the harm caused to the consumers over the high cost of steel products in the country. Further, he stated that the aim of the penalty is to **restore competition** in the sector and

deter companies from using anti-competitive conduct as part of their business strategies.

Additionally, the steel firms (with the exception of Accurate Steel Mills) were penalized for output restriction. The steel firms had allegedly collectively reached an agreement to restrict imports of specific steel components, leading to an artificially induced scarcity that consequently drove up market prices.

6. Settlement Negotiations

Notably, the Act permits businesses to seek resolution through settlement. This is particularly attractive to undertakings seeking to achieve a speedy and cost-effective resolution. At any stage of an investigation into a potential violation of regulations concerning restrictive trade practices, the Authority has the option to engage in settlement discussions with the involved undertaking(s). This agreement may encompass compensatory damages for the complainant and any potential monetary penalties. It's mandatory for the Authority to publicize details of such settlements by publishing a notice in the Kenya Gazette.

We understand that the Authority is currently engaging in settlement negotiations with five (5) other steel firms.

7. Conclusion

The Authority has recently taken a proactive stance by initiating investigations into instances of anti-competitive behavior, specifically those related to restrictive trade practices in the cement and manufacturing sector. In 2021, four paint manufacturers were penalized a total of KES. 66 million for cartel conduct and price fixing.

This decision, and such market-wide investigations in general underscore the significance of conducting routine compliance assessments and providing

training for businesses within the regulatory framework in Kenya.

Our team is ready to support you with any competition law inquiries. Do not hesitate to contact us for any questions or concerns you may have.



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