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Examining the efficacy of Kenya's corporate leniency programme in the context of competition law

Felyn N. Shikuku
Strathmore Law School (SLS)
Strathmore University

Examining the Efficacy of Kenya's Corporate Leniency Programme in the Context of Competition Law

Felyn Nekesa Shikuku

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DECLARATION

I declare that this work has not been previously submitted and approved for the award of a degree by this or any other University. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

Felyn Nekesa Shikuku

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Approval

The thesis of **Felyn Nekesa Shikuku** was reviewed and approved by the following:

Dr. Williams Chima Iheme,
Senior Lecturer, Strathmore Law School,
Strathmore University

Dr. Peter Kwenjera,
Dean, Strathmore Law School,
Strathmore University

Dr. Bernard Shibwabo,
Director, Office of Graduate Studies,
Strathmore University

ABSTRACT

The Corporate Leniency Programme is a fairly new concept in Kenya. It was introduced in 2017 under section 89A of the Competition Act of Kenya. Cartel activities are becoming very dominant and the Competition Authority of Kenya needed to come up with other methods of curtailing cartel activities. In the leniency programme, once an entity comes to the Authority on a first-come-first-serve basis to confess its involvement in cartel activities, it is either pardoned partially or in full. This allows the Authority to conduct its investigations and punish the other entities involved. The corporate leniency programme concept was borrowed from other jurisdictions such as the UK, USA and South Africa. They have always had this system of granting leniency to entities that are the first to approach and confess their involvement in cartel activities.

The study seeks to look at whether the implementation of the leniency programme has been effective since its introduction in 2017. The study also examines the challenges that Kenya faces and might face in the implementation of the programme. From my research (although the programme is still fairly new in Kenya) it is still not yet effective given that amongst other challenges, not many people are aware of its existence yet or the steps to take to apply for leniency. Due to this, implementation of the programme will be a challenge. In Kenya so far there are no reported cases regarding entities that have approached the Competition Authority and have been granted leniency.

Kenya should first introduce an awareness programme that would enable all entities and authorities to be on the same page. It will enable everyone to be aware of the programme and put it to good use. This is because the knowledge of the existence of the programme may help reduce cartel activities as entities may suspect that other entities will approach the Competition Authority and come clean on their cartel activities.

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LIST OF ABBREVIATIONS

CAK	-Competition Authority of Kenya
COMESA	-Common Market for Eastern and Southern Africa
EAC	-East African Community
ERC	-Energy Regulation Commission
OMC	-Oil Marketing Company
WPGE	-Working Party on Government Expenditures

LIST OF CASES

KENYA

Governor of Kericho County v Kenya Tea Development Agency & 30 others Ex-Parte Ktda Management Services Limited (2016) eKLR

SOUTH AFRICA

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LIST OF STATUTES AND REGULATIONS

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Trade Licensing Act, Cap 497 Laws of Kenya

SOUTH AFRICA

Competition Act No. 89 of 1998

Constitution of the Republic of South Africa, 1996

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CHAPTER 1

1. Introduction to the study

1.1 Background to the problem

Looking at the state of the economy in the world before competition law came about, it was a pure market economy.[1] According to Adam Smiths' theory of the Invisible Hands, the market was free since it was governed by forces of demand and supply of the people in the economy. It depended entirely on the willingness of people to pay a certain price for a particular good. When the demand of particular goods in a market goes up; the prices also go up making it more attractive for producers to continue producing. The entry of new producers increases supply therefore reducing the prices.[2] The rise of cartels is motivated by the desire to keep supply low and increased profit from the resulting higher demand and price. For this profitable status quo to be assured, the dominant entities make it difficult for new companies to gain entry into the market, thereby increasing supply and lowering demand and price. In this case therefore cartels remain a quick solution.[3] In a market economy, every individual seeks to provide capital to support the domestic industry in order for it to produce the greatest value.[4] Such an individual has no intention of promoting the public interest and he is not aware of the public interest he is promoting. He seeks to promote himself but, in the process, ends up promoting the society.[5]

However, if the society's market is controlled purely by the invisible hand, the merchants in the market would take advantage of the lack of regulation and take part in trade practices that may lead to introduction of monopolies. In such a situation of a free market, vital goods and services could be hijacked and their prices manipulated and controlled by a few producers. This could therefore bring about the rise of cartels.[6]

Due to the rise of cartels monopolizing the economy, consumers suffer in the process as they do not benefit from healthy competition from good prices to good products. According to the Black's Law Dictionary, a cartel takes place when producers combine their products and then

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[1] Smith A and Seligman E, *An Inquiry into the Nature and Causes of the Wealth of Nations*, JM Dent & Sons Limited, London, 1910,400-401, 400.
[2] *Smith A and Seligman E, An Inquiry into the Nature and Causes of the Wealth of Nations, 400.*
[3] Pearson Education, Canada, 'Perfect Competition', 275 -http://www.sfu.ca/~friesen/park_7e_sm_ch12.pdf.
[4] *Smith A and Seligman E, An Inquiry into the Nature and Causes of the Wealth of Nations, 400.*
[5] *Smith A and Seligman E, An Inquiry into the Nature and Causes of the Wealth of Nations, 400.*
[6] *Smith A and Seligman E, An Inquiry into the Nature and Causes of the Wealth of Nations, 401.*

control how they are produced, how they are sold and they further control their prices. The producers thereafter obtain a monopoly in a particular industry or products.[7]

Cartel activities led to the introduction of competition law to regulate such activities in the market.[8] Competition law is therefore important because apart from protecting the competitors against each other, it also protects the consumers.[9]

The Competition Authority of Kenya, hereinafter ("CAK") regulates competition law in Kenya. In curbing the restrictive trade practices, the CAK came up with a leniency programme under the Competition Act of Kenya, 2010, hereinafter, (the "Act").[10] Further, given the underlying cost of policing multiple companies in a market, for example, the Kenyan market, and the fact that the CAK is constrained by financial resources and expertise to discover and counteract cartel formation and activities that breach the Competition Act, the concept of leniency programme becomes a reasonably commercial tool to compliment enforcement as the CAK had to come up with a more strategic plan to better serve Kenyan citizens.[11] Generally, the leniency programme in Kenya's competition regime is designed to totally or partially forgive a company that has breached competition law rules by engaging in unfair or restrictive trade practices, such as being a member of a cartel, and coming forward to confess to the CAK before the latter discovers it.[12] On coming forward, the cartel member that cooperates with the relevant authority receives a total or partial pardon, the quantum of which is decided by the CAK.[13]As earlier said, the confession by the erring company must be furnished before the CAK is aware of the offensive practice or is aware but requires further information.[14] The CAK ensures anonymity and assures any applicant that comes forward that their identity will not be disclosed.[15] This is in order to encourage more entities to come forward.

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[7] Black's Law Dictionary, 9th ed.

[8]UNCTAD, *Research Partnership Platform Competition Law and the State*: Summary of answers to questionnaire, UNCTAD/DITC/CLP/2015/3, Volume 1, 2015.

[9] Whish R and Bailey D, 'Competition Law' Seventh edition, Oxford University Press 2012, 20.

[10] CAK further issued the Leniency Programme Guidelines ("Guidelines") through the Kenya Gazette No. 4736, published on 19 May 2017, to oversee the process of granting of leniency by the Authority.

[11] Competition Authority of Kenya, '*The Commencement of the Leniency Programme in Kenya',* Newsletter, Issue No. 2, July, 2017.

[12] Competition Authority of Kenya, '*The Commencement of the Leniency Programme in Kenya', 3,* Newsletter, Issue No. 2, July, 2017.

[13] Section 89A, *Competition Act* (Act No. 12 of 2010).

[14] Competition Authority of Kenya, '*The Commencement of the Leniency Programme in Kenya', 3*.

[15] Section 26, Competition Authority of Kenya, '*Leniency Programme Guidelines*'.

There are a number of cartels in the market in Kenya that have been pointed out in this chapter. Majority of cartels take part in restrictive trade practices such as fixing of prices and allocation of markets.[16] Price fixing is common in the oil industry and agricultural industry.

When you look at the situation of the oil industry in Kenya, it is one of the industries that has been majorly affected by cartel activities from time to time. The government therefore sought to regulate it by creating a specific body to regulate this industry, in this case, the ERC. The Energy (Petroleum Pricing) Regulations, 2010, was introduced in order for the government to control maximum prices of petroleum products by a formula to be agreed upon by the ERC. The OMC's however are still disputing this approach by the government. Previously the oil industry was self-regulatory. The regulation was however introduced because consumers complained of frequent increase in prices of oil products between 2004 and 2011. The consumers were of the view that the OMC's were colluding in order to set high oil prices in order to make more profits. The OMC's on the other hand blamed the government regulation claiming inefficiency by the government when it came to the tendering process. However, the ERC regulation of prices enabled ERC to set the maximum amount of oil prices at retail and wholesale prices.[17] However, this is not the only industry that is affected by cartels. There was also a need to have a general legislation that would regulate all the various industries in the economy.

Another example of cartels was the issue of pharmaceutical companies in Kenya. The National Quality Control Laboratory (NQCL) and the Pharmacy and Poisons Board are regulatory agencies established in order to make and import pharmaceuticals into the country. Due to conflict between both bodies, the task of importing pharmaceuticals fell into the hands of cartels. Due to this, there has been exploitation by private individuals such as selling certain drugs in quantities that are more than the prescribed quantities which may be harmful to the users and may lead to death. Further, it has also led to an increase in importation of counterfeit

[16] Section 21, *Competition Act* (Act No. 12 of 2010).

[17] Munyua JN & Ragui M, 'Drivers of Instability in Prices of Petroleum Products in Kenya', Jomo Kenyatta University of Agriculture and Technology (JKUAT), Nairobi, Kenya, Prime Journal of Business Administration and Management (BAM), 922 –www.primejournal.org/BAM on 30th March, 2013 .

drugs. As it can be seen when such activities fall in the hands of unqualified persons who are only in it for profit, it affects the industry at large and the consumers.[18]

In the agricultural sector, there is currently a court case involving small scale tea farmers and cartels that operate the large scale tea farms.[19] The cartels fixed prices of the tea products in order to regulate the market thereby denying the small scale farmers their rightful earnings.[20] In such practices, it is usually the small entities that suffer in the hands of the cartels.

Cartels seek to have control of the market, thereby preventing any new entrants to the market from accessing the market in a bid to reduce competition. In most cases, they get involved in restrictive trade practices in order to ensure that they have captured a large market size therefore creating a monopoly in the supply of goods and services.[21] For this reason, the new entrants into the market out of desperation, may decide to take part in restrictive trade practices with the cartels due to the fear of being prevented from accessing the market.

Restrictive trade practices as the Competition Act of Kenya 2010 provides include fixing purchase prices and also fixing of selling prices directly or indirectly. There is an instance where the CAK imposed a fine of Kenya Shillings seven hundred and twenty one thousand, seven hundred and fifteen (KES 721,715) on the Association of Kenya Reinsurers after finding it guilty of price fixing and for conducting unfair trade practices.[22] Another example of a restrictive trade practice involves coming up with other similar trading conditions that would enable them to control the market[23]. This is largely seen in the oil industry as previously discussed, where the OMC's exploited the consumers which led to the introduction of the Energy (Petroleum Pricing) Regulations, 2010 whereby the government controlled the prices of petroleum products.[24] The restrictive trade practices further includes dividing markets by cartels by allocating themselves customers, allocating themselves suppliers, and further allocating

[18] Ireri N, 'Loopholes Cartels Exploit to Siphon Millions from Govt' Daily Nation, 15th February 2020 –<https://www.kenyans.co.ke/news/49778-loopholes-cartels-exploit-siphon-millions-govt> on 15th February, 2020.
[19] The case is still ongoing in court and a final determination is yet to be arrived at.
[20] *Governor of Kericho County v Kenya Tea Development Agency & 30 others Ex-Parte Ktda Management Services Limited* (2016) eKLR.
[21] Elhauge E and Geradin D, *Global Competition Law and Economics*, Second edition, Hart Publishing, 2011, 284.
[22]Wahome M, '*Authority Fines Group for Underhand Deals*', The Daily Nation (15 April 2015), –< https://www.nation.co.ke/business/Authority-fines-group-for-underhand-deals/-/996/2687164/-/dclii7/-/in>on 15th April 2015.
[23] Section 21 (3) (a), *Competition Act*, (Act No. 12 of 2012).
[24] Munyua JN & Ragui M, '*Drivers of Instability in Prices of Petroleum Products in Kenya*', 922.

themselves different areas or specific types of goods and services.[25] A market is defined in the Competition Authority Guidelines on Relevant Market Definition as the *products' market*, which constitutes all the goods and services that can be reasonably interchanged or substituted by the consumer based on their characteristics, their prices and also their intended use.[26] The other market is the *geographical market* which the area that the entities involved take part in the demand and supply of goods. Such markets can be distinguished from other market areas based on their conditions of competition that vary in the different areas.[27] Another restrictive practice would also be collusive tendering.[28] Further, another practice is the minimum resale price maintenance.[29] Cartels can further limit production or control production and further control market outlets or access to the market. They also control technical development or investments.[30] They may apply certain conditions that are different to other parties trading in the similar field of business thereby placing these parties at a competitive disadvantage.[31] To determine whether an agreement that is prohibited is taking place, or that a concerted practice is taking place between two parties, there is a presumption that one party is seen to own a significant interest in the other or one party has at least one director or a substantial shareholder in common. This presumption may however be rebutted if the party, the director or the shareholder involved is able to establish that there is a reasonable basis that would explain that such a practice was a normal commercial activity that was aimed at responding to the conditions that were prevailing in the market.[32]

They may also conclude contracts setting terms that the contract would only be accepted under certain conditions which naturally or according to commercial usage are not connected in any way with the contract itself.[33] Further, cartels may restrict the use of intellectual property rights in such a manner that is not fair or reasonable and is discriminatory.[34] When it comes to

[25] Section 21 (3) (b), *Competition Act,* (Act No. 12 of 2012).
[26] Rule 11, Competition Authority of Kenya Revised Guidelines on Relevant Market Definition.
[27] Rule 12, Competition Authority of Kenya Revised Guidelines on Relevant Market Definition.
[28] Section 21 (3) (c), *Competition Act,* (Act No. 12 of 2012).
[29] Section 21 (3) (d), *Competition Act,* (Act No. 12 of 2012).
[30] Section 21 (3) (e), *Competition Act,* (Act No. 12 of 2012).
[31]Section 21 (3) (f), *Competition Act,* (Act No. 12 of 2012).
[32] Ochieng J and Mbedi M, *Within Limits: Understanding Restrictive Trade Practices Under the Competition Act, 2010,* –< https://www.oraro.co.ke/2018/12/12/within-limits-understanding-restrictive-trade-practices-under-the-competition-act-2010/.
[33]Section 21 (3) (g), *Competition Act,* (Act No. 12 of 2012).
[34] Section 21 (3) (h), *Competition Act,* (Act No. 12 of 2012).

intellectual property, competition increases as businesses continue to come up with new inventions. This helps them to strengthen their identity and goodwill therefore promoting increasing their competitive edge. Protecting the Intellectual Property rights of a company is therefore beneficial in the long term as the success of a business may be attributed to the manner in which the Intellectual Property rights of a business are managed, how they are protected and how they are commercialized.[35] When an applicant for a leniency programme comes forward to the CAK to disclose engagement in a restrictive trade practice, the CAK gives the applicant a formal acknowledgement[36] recording the timing of their application and their priority in the application in comparison with other applicants. It then reserves for the applicant a place for a period of twenty-eight (28) days while conducting further internal investigation and attempts to perfection of its leniency application.[37] Priority is given on a first come first serve basis. The first applicant is the one who receives the leniency.

It should be noted however that the application for leniency would only be acceptable when certain conditions are fulfilled. The first condition is that the CAK should not in any way have any knowledge of the contravention that had taken place.[38] Another condition is that if the CAK has knowledge of the contravention taking place, it does not have sufficient information on the contravention taking place [39] hence the need for more information from a cartel member. The final condition is that the CAK has begun investigations but requires further evidence to enable it penalize the offenders. Applications are therefore allowed as they will lead to introduction of new evidence.[40]

To fully qualify for the leniency programme an applicant is required from the time the investigations begin until the time a determination is made by the CAK to provide full, timely and truthful information.[41] The applicant is also required to cooperate fully with the CAK.[42]

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[35] Syekei J, *Intellectual Property and the new Competition Act in Kenya,– < https://www.bowmanslaw.com/insights/intellectual-property/intellectual-property-and-the-new-competition-act-in-kenya/>*

[36] This is known as "Marker" as defined in the Leniency Programme Guidelines.

[37] Competition Authority of Kenya, "*Leniency Programme Guidelines*" (Under Section 89A of the Competition Act No. 12 of 2010), 2.

[38]Rule 11 (i), Competition Authority of Kenya, "*Leniency Programme Guidelines*".

[39]Rule 11 (ii), Competition Authority of Kenya, "*Leniency Programme Guidelines*".

[40]Rule 11 (iii), Competition Authority of Kenya, "*Leniency Programme Guidelines*".

[41]Rule 12 (i), Competition Authority of Kenya, "*Leniency Programme Guidelines*".

[42]Rule 12 (ii), Competition Authority of Kenya, "*Leniency Programme Guidelines*".

The applicant is also required to keep the whole process confidential.[43] Finally, the applicant is required to stop the conduct of engaging in the practice unless directed otherwise by the CAK.[44]

The study seeks to find out how efficient the leniency programme has been since its introduction in Kenya.

1.2 Problem statement

Kenya decided to adopt the corporate leniency programme as seen in other countries due to increased number of cartel activities that are taking place in the country. In most cases, the CAK is not aware of the cartel activities taking place. It opted for the leniency programme in order to encourage voluntary self-reporting by various entities taking part in cartel activities. Even after the introduction of the corporate leniency programme in Kenya, we are still experiencing cases of cartels taking part in restrictive trade practices. The dominant entities are still taking part in practices that curtail competition in Kenya. The leniency programme only applies in cases where the CAK is not aware of the kind of practices taking place. If the CAK is aware before an entity comes forward to confess, then the programme would not be applicable in such a situation. However, we see that it is not a guarantee that entities will come forward and voluntary confess to taking part in the restrictive trade practices and in most cases a cartel member only comes forward if the confession would benefit them if they have had a falling out with some of the cartel members. Further, some entities may still be participating in other cartel activities that the CAK is not aware of and only reports the activities of the cartel that is no longer beneficial to them.

The study looks at whether so far in Kenya there have been situations where entities taking part in cartel activities have come forward to confess to the CAK on any restrictive trade practices that they have taken part in.

The study also looks at the legal framework of Kenya to determine whether the implementation of the programme has been effective so far.

[43]Rule 12 (iii), Competition Authority of Kenya, "*Leniency Programme Guidelines*".
[44]Rule 12 (iv), Competition Authority of Kenya, "*Leniency Programme Guidelines*".

1.3 Justification of the study

As explained in the background, the CAK was established in order to regulate competition in Kenya and to ensure equality in the market. There are, however, cartels that seek to maintain control of the market and the best way to do that is to enter into agreements of restrictive trade practices with competitors in order to restrict market access and share. The CAK is usually not aware of such restrictive trade practices that are taking place.

The study looks at whether there is a gap in the competition law of Kenya and the corporate leniency programme that hinders effective competition in Kenya. There is the need to analyse how effective the legislation has been. This will assist to offer an insight on whether the corporate leniency programme would achieve its aim in reducing cartel activities therefore enhancing competition in Kenya.

This is also a fairly new area in Kenya, therefore there is not enough written on this area of corporate leniency programme. This study will therefore be a contribution in this area of law in the hope of it being useful to the policy makers involved in enacting the competition laws by the use of the recommendations given at the end of this thesis in order to effectively implement the programme.

1.4 Statement of objectives

The general objective is to examine the role of the corporate leniency programme in promoting competition in Kenya.

The specific objectives include:

1. Analysing the competition legal framework of Kenya.
2. Comparing the competition legislation of both South Africa and Kenya and identifying the gaps in Kenya's legislation.
3. Examining the Competition Act of Kenya and the Corporate Leniency Programme and identifying how they can be amended to ensure effectiveness of the leniency programme drawing lessons from South Africa's programme.

1.5 Research Questions

1. Is the corporate leniency programme able to fulfill its objective of curtailing cartel activities in Kenya?
2. Is the corporate leniency programme sufficient in promoting competition in Kenya?
3. What are the challenges facing the implementation of the leniency programme in Kenya?
4. How can the Kenyan legislation be improved in order to ensure that the corporate leniency programme is effective in Kenya?

1.6 Hypothesis

The study is based on the hypothesis that the leniency programme guidelines implemented in Kenya in 2017 to curb restrictive trade practices has so far had no effect in improving competition in Kenya.

1.7 Literature Review

1.7.1 Rationale behind Competition Law

Competition law came about for various reasons as there was need to maintain order in the market. According to David P. Fidler, competition law mainly addresses the behaviour of private economic entities.[45] This is because generally, most of the entities in the market that are competing against each other are owned privately by individuals. In most cases however, entities owned by the state tend to be monopolies.[46] An example in Kenya is the Kenya Power and Lighting Company. The entire state relies on it for provision of electricity and it is owned by the state. Competition law therefore contains rules directed to regulate competitive behaviour of economic undertakings or entities in a market.[47] In this case, private economic entities.[48]

[45] Fidler D P, 'Competition Law and International Relations', The International and Comparative Law Quarterly, Vol. 41, No. 3, Cambridge University Press on behalf of the British Institute of International and Comparative Law, 563 –https://www.jstor.org/stable/760547 on 30th April, 2019.

[46] Most state-owned entities are monopolies because they provide essential amenities that would be required by the public. The state monopolises them in order to ensure that the prices are within the reach of the consumers.

[47] Fidler D P, 'Competition Law and International Relations', 564.

[48] It is important to note that according to the United Nations Conference on Trade and Development (UNCTAD), in most countries, entities owned and operated by the government are exempted from scrutiny by competition law.

Several jurisdictions with different economic statuses like the UK[49] and USA[50] adopted competition law for various reasons. Richard Whish and David Bailey emphasized on protection of the consumer and that it should be the essential reason for introduction of competition law. They also pointed out that when it comes to protecting the consumer, some of the requirements such as setting prices at a certain range may not be favourable to the producers in the market, thus leading them in some cases to abandon the market.[51] Another reason for competition law as emphasized by Joyce Karanja would be in order to create a market in which the producers and the traders can compete and trade freely in terms of their quality of products and services and continue to control their prices.[52] Competition law ensures that such a conducive environment is created. Therefore, competition law provides an effective framework for competitive activities. Its aim is to improve the competitive environment and by doing this it creates a conducive environment for carrying out investments thereby promoting transfer benefits to the customers in the market. [53]

Competition law also enables wealth redistribution and dispersal of economic power.[54] When resources are left in the hands of monopolists, it may threaten democracy and it also limits the freedom of choice of the consumer and the economic opportunity for alternate producers or suppliers.[55] Competition law is also intended to protect competitors, especially the small entities that are coming up. There is need to protect them against the dominant entities in the market. They are to be given a fair chance to succeed.[56] Competition law can also prevent the measures taken to isolate a domestic market from another. For example, those involved in restrictive trade practices such as formation of cartels, banning some exports and also dividing markets and sharing of markets would be punished.[57] This is because competition law is supposed to

[49] The Competition Act 1998 and the Enterprise Act 2002.
[50] United State Antitrust Law.
[51] Whish R and Bailey D, 'Competition Law', edition, Oxford University Press 2012, 20.
[52] Ng'ang'a J K, 'East African Community Law-Institutional, Substantive and Comparative EU Aspects; EAC Competition Law' Published by Brill. (2017), 433 –https://www.jstor.org/stable/10.1163/j.ctt1w76vj2.31 on 30th April, 2019.
[53] Ng'ang'a J K, 'East African Community Law-Institutional, Substantive and Comparative EU Aspects; EAC Competition Law', 433.
[54] Whish R and Bailey D, 'Competition Law', 21.
[55] Whish R and Bailey D, 'Competition Law', 21.
[56] Whish R and Bailey D, 'Competition Law', 21.
[57] Whish R and Bailey D, 'Competition Law', 23.

regulate market competition. Therefore, those who defy the rules set by competition law will have to face consequences.

There may be other issues that would require attention in the market and competition law would be the applicable law to use in regulating. One such issue may be one to do with mergers of entities. Competition law may also be applied when it comes to analyzing mergers and cooperation agreements. Merger controls may be applied by some states in order to prevent foreign corporates from taking over domestic markets.[58]

When looking at competition law in a national and international perspective, Fidler points out that different states have particular state values.[59] He further points out that when an issue goes beyond the state, it complicates matters. According to him, there is no supreme authority internationally that would keep the member states in line as the government keeps check of its citizens. He points out that there is usually anarchy when it comes to dealing with matters internationally.[60] He advocated for regulation of competition law within a state itself rather than involving other states.

Eleanor M. Fox and Deborah Healey in analyzing competition law came to a conclusion that it should apply to state owned enterprises as well as state officials who take part in the restrictive trade practices with the cartels. Further, it should also apply to entities that have been accorded exclusive privileges and special obligations[61] except when it is considered necessary to carry out a public mandate.[62]

Apart from the positive, there are also negative aspects of competition law. Fidler was of the view that that competition law did not have much consideration on how it relates to the international environment it operates in.[63] Some issues have been discussed such as extraterritorial enforcement of competition law but they fail to relate competition law in a

[58] Whish R and Bailey D, 'Competition Law', 23.
[59] Fidler D P, 'Competition Law and International Relations', 569.
[60] Fidler D P, 'Competition Law and International Relations', 569.
[61] The Competition Act of Kenya does not expressly provide for any exceptions where state officials can take part in restrictive trade Practices. However, section 25 allows for an entity to apply to the Authority for permission to take part in a restrictive practice. The Authority has discretion to allow or refuse to grant the application.
[62] Fox E M and Healey D, 'When the State Harms Competition—The Role for Competition Law', Antitrust Law Journal, Vol. 79, No. 3 (2014), pp. 769-820 Published by: American Bar Association, 812,
–<https://www.jstor.org/stable/43486966 on 3rd June, 2019.
[63] Fidler D P, 'Competition Law and International Relations', 564.

broader way. A wider scope covering the international approach was needed.[64] Further, it should be noted that competition law may grant to the sellers excess market powers thereby enabling them to increase their prices above the required levels in the market or lower their prices below the required levels in the market.[65]

It was clear that Competition Law on its own was not enough when it came to regulating competition. There was an increased number of cartels and there was therefore need to discover them and get rid of them.

1.7.2 Cartel Formation

When looking at formation of cartels, Andrew R. Dick, observed that the evidence showing how cartels were formed was very little.[66] According to him, it was not easy to get evidence on how cartels were formed. He pointed out that there were studies done earlier that reviewed case histories of agreements of price fixing that had been prosecuted in order to determine the economic conditions that supported the collusion. According to him, the studies however failed to give a clear determination of cartel formation. Most of the samplings were biased which led to interpretation of misleading evidence.[67]

When an entity can easily access a market, it brings constraints to existing cartels. The entry is however slower in industries where the competitive advantage of the big entities exceeds the small entities (also known as large economies of scale) and where sunk costs[68] are involved. By slowing these entries, it increases the time cartels can sustain their supra-competitive profits.[69]

The fact that there was little evidence showing the formation of cartels meant that there were other ways that the authorities needed to come up with in order to detect the cartel activities. This is what led to the formation of cartels hence the introduction of leniency programmes.

[64]Fidler D P, *'Competition Law and International Relations',* 564.
[65] Ng'ang'a J K, 'East African Community Law-Institutional, Substantive and Comparative EU Aspects; EAC Competition Law', 433.
[66] Dick A R, 'Identifying Contracts, Combinations and Conspiracies in Restraint of Trade', Managerial and Decision Economics, Vol. 17, No. 2, Special Issue: The Role of Economists in Modern Antitrust, 203-216, published by: Wiley, 204–https://www.jstor.org/stable/2487732 on 26th April, 2019.
[67] Dick A R, 'Identifying Contracts, Combinations and Conspiracies in Restraint of Trade', 204.
[68] These are costs already incurred and are not recoverable.
[69] Dick A R, 'Identifying Contracts, Combinations and Conspiracies in Restraint of Trade', 208.

1.7.3 Rationale Behind Leniency Programmes

Leniency programmes are seen to have different effects. One effect as pointed out by Joseph E Harrington, Jr and Myong-Hun Chang is that it can make cartels less stable and the entity that applies for leniency can receive a higher payoff. It is clear that a leniency programme can affect the rate of cartel formation by leading to the disabling of the cartels that are active by shutting them down and further preventing new cartels from forming.[70] Zhijun Chen and Patrick Rey also added that when a cartel activity is reported by an entity, there is an amnesty rule that would allow the first informant to continue operating even though there is an ongoing investigation. According to them, the leniency programme in the US has proven to be the most effective tool for antitrust enforcement. The Antitrust Division has been able to easily detect several cartels that are international and convict those involved.[71]

Secondly, there may be a higher probability of paying penalties by the other entity reported against. This is because entities in a cartel that is collapsing would find it more convenient to apply for leniency.[72]

Thirdly, a leniency programme determines the penalties which the cartel members are likely to pay. This is because the firms that apply for leniency usually have their penalties reduced. According to Harrington and Chang, leniency programmes assisted in reducing cartel formation.[73] In some cases, however, there are situations where the leniency programmes may instead of leading to a decrease of cartel formation, it leads to an increase.[74] To add on this, Jeroen Hinloopen and Adriaan R. Soetevent pointed out that such leniency programmes were referred to as exploitable. This is because many of the cartel members are given reduced fines upon reporting any cartel activities, which leads them to forming more cartels and reporting

[70] Harrington J E, JR, and Chang M-H, 'The Journal of Law & Economics' , Vol. 58, No. 2 (May 2015), 417-449 Published by: The University of Chicago Press for The Booth School of Business, University of Chicago and The University of Chicago Law School, 435 −https://www.jstor.org/stable/10.1086/684041 on 26th April, 2019..
[71] Chen Z and Rey P 'On the Design of Leniency Programs', The Journal of Law & Economics, Vol. 56, No. 4, 917-957 Published by: The University of Chicago Press for The Booth School of Business, University of Chicago and The University of Chicago Law School, 917. −https://www.jstor.org/stable/10.1086/674011 on 26th April, 2019.
[72] Harrington J E, JR, and Chang M-H, 'Modeling the Birth and Death of Cartels with an Application to Evaluating competition Policy', journal of the European Economic Association, Vol. 7, No. 6 (December 2009), 1400-1435, Published by: Oxford University Press, 1419 −https://www.jstor.org/stable/40601207 on 26th April, 2019.
[73] Harrington J E, JR, and Chang M-H, 'Modeling the Birth and Death of Cartels with an Application to Evaluating competition Policy', *1419.*
[74] Harrington J E, JR, and Chang M-H, 'The Journal of Law & Economics', 417.

them continuously. They are of the view that such a programme is too generous therefore leading to increased cartel activities.[75]

Chen and Rey further added that despite the fact that they have experienced a high success rate in the application of the leniency programme, it gives cartels an incentive to break the collusive agreements that they are involved in and also denounce the cartel activities, which may lead to more ways of creating collusive strategies. They state further that the cartels may abuse the programme if too generous. Further, Harrington and Chang were of the view that if the leniency programme is actually fully effective in reducing the rate cartels are formed, then they should have been able to observe that the duration of the discovery of formation of cartels had reduced significantly.[76] From their study they are yet to see the significant decrease of cartels since the leniency programme was introduced.

In most cases, cartels that are collapsing are the ones that are involved in leniency programmes.[77] There may be other cartels that are still active that have not yet been discovered and that is why the CAK came up with the leniency programme in order to encourage cartel members to voluntarily come forward and disclose such activities that are taking place. We see that even if prosecution of a certain cartel entity is going on, it does not mean that it has significantly led to a decrease in the cartel numbers. Further, some entities may use the leniency programmes to their advantage. A cartel member will decide to apply for leniency if it is of the view that it is a better option than the risk of being discovered and convicted.[78] Further, it is seen that if the leniency programme is too generous, the firms colluding may consider it profitable to report their behavior consensually to avoid being detected and subjected to fines.[79]

If a cartel member senses there is a danger of being discovered, then it would proceed to the authority to exercise the leniency programme. The first one to confess is usually the first one to receive priority in the leniency programme therefore an entity may decide to report before the other members. This does not therefore mean that the leniency programme can be considered

[75] Hinloopen J and Soetevent A R, 'Evidence on the Effectiveness of Corporate Leniency Programs' The RAND Journal Of Economics, Vol. 39, No. 2 (Summer, 2008), 607-616 Published By: Wiley on Behalf of RAND Corporation, 607 –https://www.jstor.org/stable/25474385 on 4th June, 2019.
[76] Harrington J E, JR, and Chang M-H, 'Modeling the Birth and Death of Cartels with an Application to Evaluating competition Policy', 1420.
[77] Harrington J E, JR, and Chang M-H, 'The Journal of Law & Economics', 435.
[78] Harrington J E, JR, and Chang M-H, 'The Journal of Law & Economics', 418.
[79] Chen Z and Rey P 'On the Design of Leniency Programs', 918.

as fully functional or effective. Some entities will use them only if it is seen to benefit them at the expense of others.[80]

In granting immunity, Eberhard Feees and Markus Walzl were looking at whether the first to report can be granted full immunity when investigations were underway. However, they were of the view that if an entity is offering relatively little or insufficient evidence, they should not be granted full immunity as there is a lot of uncertainty and the investigations may not be fruitful. Entities that provide sufficient evidence however are to be granted full immunity as it enables predictability. There has to be certainty therefore the evidence has to be sufficient.[81]

Similarly, Ikuo Ishibashi and Daisuke Shimizu support this view as they stated that leniency to later applicants in cartel activities should be as low as it can possibly be in order to prevent incidences where firms collude and only reveal when they are being investigated. They are of the view that the authority regulating competition law should be as generous as it can be to the first applicant and severe as it can possibly be to the later applicants.[82]

Further, according to Leslie M. Marx, Claudio Mezzetti and Robert C. Marshall, when an investigation was already open, leniency was not allowed. However, there were some changes that were made to the US antitrust programmes in 1993 and the EU leniency programme in 2002. These changes provided for application for leniency which was granted after an investigation had already been opened. This programme targeted multiproduct colluders where an entity that was being persecuted for collusion and had not received any leniency could have their fines reduced if the entity applied for leniency in a separate condition or product where it was involved in collusion with another entity. If such a firm is discovered to be engaging in cartel activities with another entity without disclosing the activities, they are prosecuted for engaging in the other activities and the penalties are increased.[83]

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[80] Hinloopen J and Soetevent A R, 'Evidence on the Effectiveness of Corporate Leniency Programs', 607.

[81]Feess E and Walzl M, 'Evidence Dependence of Fine Reductions in Corporate Leniency Programs' : Journal of Institutional and Theoretical Economics (JITE) / Zeitschrift für die gesamte Staatswissenschaft, Vol. 166, No. 4 (December 2010), 573-590 Published by: Mohr Siebeck GmbH & Co. KG, 587 –https://www.jstor.org/stable/20798613 on 10th August, 2019.

[82]Ishibashi I and Shimizu D "Collusive behavior under a leniency program": Journal of Economics, Vol. 101, No. 2 (October 2010), 169-183 Published by: Springer, 181– https://www.jstor.org/stable/41795709 on 10th August, 2019.

[83]Marx L M, Mezzetti C and Marshall R C, "Antitrust Leniency with Multiproduct Colluders": American Economic Journal: Microeconomics, Vol. 7, No. 3 (August 2015), 205- 240 Published by: American Economic Association, 206 –https://www.jstor.org/stable/24467007 on 10th August, 2019.

Looking at the leniency programmes in different jurisdictions, it is clear that it was not fully effective and there were certain improvements that were made gradually in order to ensure the efficacy of the programme. In the Kenyan context, it is a fairly new programme and that is why the study is necessary in order to critically look at it and give recommendations on how to better run the programme.

1.8 Theoretical Framework

1.8.1 Economic Theory of Fairness

Adam Smith, a moral philosopher, advocated for economic fairness and was against monopolies. He is also greatly linked with the ideologies of free market and open seas. He is generally referred to as the father of economics. Smith advocated against corporations that were dominant and abusive.[84] There is an established Smith's inquiry that looks at the simple system from an individual and how it allocates resources, accumulates resources and reallocates resources through free markets in order to promote progress in the market. It is a market model that is freely competitive and self-adjusting.[85] The simple system looks at the individual freedom in comparison with the economic progress of the society.[86] He wanted to see how the freedom of an individual would affect the progress of the economy. He was very much concerned with the progress in a market. Further, according to Smith, there is a thriving market when there are specific conditions set out which are bearable to those participating in the market.[87] Free trade was further emphasized by both John Stuart Mill and David Ricardo. According to Mill, when looking at the political economy, whereas he was socialistic, he still had some individualism. He advocated for the doctrine of free trade and came up with the famous principle of *Laissez-faire* that advocated for people to look after their own business and that the government should intervene only when it is in the public interest and the interference should be very minimal. He was very jealous of the interference of the government in economic and industrial matters and was of the view that as much as there must be state control, which is inevitable and right, it should be to a certain extent.

[84] Smith (1776) Book V, Chapter 1, para 107.
[85] Hutchison T, 'Adam Smith and the Wealth of Nations', 19 J.L. & Econ. 517 (1976), 516-517.
[86] Hutchison T, 'Adam Smith and the Wealth of Nations', 507.
[87] Hutchison T, 'Adam Smith and the Wealth of Nations', 517.

Further, he added that any restrictions on trade and restraint is an evil which does not produce the desired results. He also pointed out that there were however some restrictions to the doctrine of Free Trade. When it came to freedom, the questions to be asked according to Mill included the level of public control that was acceptable in order to prevent fraud. Another question would be the extent of sanitary precautions taken, or the arrangements made by employers in order to protect employees in dangerous occupations. According to him, such questions involved giving liberty as it was better to leave people to be themselves instead of controlling them. Also, when it comes to interference with trade, his conclusion was that the interferences were done by the buyer and not by the producer or the seller.[88]

Ricardo on the other hand came up with the doctrine of comparative advantage. His doctrine was also to encourage and justify free trade. He compared two nations that were involved in making two different products. According to him, even if one of the nations is seen to be better in making both of the products, what would benefit both nations is if one of them made one product and the other one made the other product. Both nations would then decide to trade with each other instead of competing against each other.[89] There was a comparison between absolute advantage and comparative advantage. Ricardo gave an example using England and Portugal's production of cloth and wine. Undoubtedly, both countries could produce cloth and wine of equal quality. However, there was a possibility that Portugal could produce both wine and cloth in a shorter duration compared to England. However, it should be noted that the cost of production between both countries is different. In an example given, England would need one hundred men to produce cloth in one year and one hundred and twenty men to produce wine in one year. Portugal on the other hand would need ninety men to produce cloth in one year and eighty men to produce wine in one year. Basically, Portugal had an absolute advantage in making cloth due to the few labour hours whereas England had a comparative advantage due to the lower opportunity cost it had.[90]

[88] Mill J S, 'On Liberty', Fourth Edition. London: Longmans, Green, Reader and Dyer, 1869, par 171 –https://en.wikisource.org/wiki/On_Liberty/Chapter_5 on 26th April, 2019.
[89] Fisher B D, 'NAFTA: Testing Ricardo's Theory of Comparative Advantage by Empirical Evidence Pre- and Post NAFTA', 15 Chi.-Kent J. Int'l & Comp. L. 1 (2015), 5.
[90] Bernhofen D M and Brown J C, 'Retrospectives: On the genius behind David Ricardo's 1817 Formulation of Comparative Advantage', Vol. 32, No. 4 (Fall 2018), 227-240 Published by: American Economic Association, 227 –https://www.jstor.org.ezproxy.library.strathmore.edu/stable/26513503 on 26th April, 2019.

This encourages international trade as the nations will produce more of what they are to export and consume less of it. They then import more of what they require from other countries thus encouraging trade.[91]

Ibn Khaldun, a theorist from Tunisia was also of the same view when it came to free trade. He was against the government involvement in commercial activities especially when it came to fixing of prices. He stated that when the state buys goods and fixes prices at the lowest possible price, it denies other private traders their source of livelihood. It also does not promote civilization of the economy. It is seen to increase levels of poverty in the society. He was looking at the situation in countries such as Algeria, Egypt and many other parts of Africa.[92]

Still on free market, Germinal G. Van, a scholar from Côte d'Ivoire, West Africa, advocated for liberalism. He advocated for a liberalized economy in Africa. His theory however is seen to have been rejected by African countries as it was seen to favour the European system that was seen as oppressive to Africans. Africans saw the Europeans as oppressive and that they wanted to maintain their dominance on African countries. It was further argued that the emphasis that liberalism puts on the individuals is incompatible with the well-known African culture of collectiveness as opposed to individualism. This therefore resulted into restraint and stagnant African economies as most African economies were controlled by the government. Later on, African countries started to embrace the private property ownership. This led to such countries rising and thriving economically.[93]With regards to monopolies, it is clear that monopolies started a long time ago. Smith was against it entirely as it created poor management and did not promote fairness in the market. We also see that there was some legislation in the government that created room for monopolies.[94] Smith also talks about the inequalities in every economy. He says that it occurs in three ways. The first one is by restraining the competition in certain sectors to a smaller number than what would normally be required; secondly, by

[91] Bernhofen D M and Brown J C, 'Retrospectives: On the genius behind David Ricardo's 1817 Formulation of Comparative Advantage', 227.
[92] Karatas S C, 'The Economic Theory of Ibn Khaldun and the Rise and Fall of Nations', FSTC Limited, 2003 204, April 2006, 3.
[93] Van G G, 'The Case for Free-Market Liberalism in Africa', – https://mises.org/wire/case-free-market-liberalism-africa on 15th April, 2020.
[94] Hutchison T, 'Adam Smith and the Wealth of Nations', 518.

increasing some of the sectors beyond what it would usually be; and, thirdly, by obstructing the free circulation of labour and stock in every sector and from place to place.[95]

The barriers to entry into the market clearly started a long time ago. Acts such as restricting competition in the market and obstructing circulation of stock does not promote fairness in any market. On the trade restrictions however, Ricardo was of the view that trade restrictions did not cut out domestic competition or enable the supposed monopolies to charge more than the actual competitive price. The restrictions instead raised the natural price because they increased market inefficiency. Also when the cost of production is increased, a section of the labour of the country ends up being less productively employed.[96] Mill on his view of the monopoly problem stated as a solution that any industry with only few competitors should have the entities combined and be treated as a public utility or and come under a unified public control or direct public operation.[97]

Ibn Khaldun, in his economic theory was of the view that in the economy, the prices of goods were driven by supply and demand. According to him where goods were scarce, they would go at a high price. One would buy goods where they are in surplus and at a lower price and then sell them at a higher price where they are scarce and on high demand.[98]

When it came to cartels, Smith was of the view that it involved people in the same trade that rarely met but their conversation ended up in a conspiracy that was seen to be for the good of the public. They may make decisions such as increasing the prices from the required market standard. There was no law that could prevent the meetings. Though there can be no law hindering people of the same trade from sometimes meeting, it should not do anything to support them or treat them as necessary.[99] There was a need to find the cartels and prevent them from taking part in activities that hindered effective competition in the market. There was also the Prisoners' Dilemma doctrine. In the context of cartels, it could be interpreted that such cartels took part in their activities because the members had a reputation of keeping quiet and

[95] Mayer M S, ed. 'Tradition of Freedom', 292.
[96] McKenzie R B and Lee D R, 'In Defense of Monopoly: How Market Power Fosters Creative Production', The University of Michigan Press, 9 –http://www.press.umich.edu/titleDetailDesc.do?id=93419 on 15th April, 2019.
[97] Hariss A. L, 'J. S. Mill on Monopoly and Socialism: A Note: Journal of Political Economy, Vol. 67, No. 6 (Dec, 1959), 604-611 Published by the University of Chicago Press', 604. –https://www.jstor.org/stable/1827314 on 12th June, 2019.
[98] Karatas S C, the Economic Theory of Ibn Khaldun and the Rise and Fall of Nations, 6.
[99] Mayer M S, ed. "Tradition of Freedom", 293.

cooperating when it came to keeping the terms of their agreements. This is also because if they decide to disclose the activities, it would reduce their prospects of ever engaging in such practices with other entities.[100] This is where the various competition law regulations arose in various jurisdictions. In our case in Kenya, the Competition Act 2010 of Kenya was established in order to control these restrictive trade practices that such cartels may indulge in.

There was however Karl Marx, a known socialist who was against any form of capitalism. He was of the view that competition was violent and would lead to war.[101] According to Marx, it would stir up competing interests in order to be ahead of their competitor. This leads to instances where an entity creates barriers to entry against another in order to prevent them from accessing the market in order to reduce competition.

In as much as the various theorists had their different views, it is important to note that apart from Karl Max, they advocated for a free and fair market without interference. They also encouraged competition free from monopolies. It was also important to have a proper legal framework that regulated activities in the market to avoid unfairness. At the time there was no proper legal framework and it was therefore easy to manipulate the market.

1.8.2 Economic Theory of Deterrence

When you look deeper into cartels, there is the economic theory of deterrence by Gary Becker, where before one commits an economic crime, the firms involved tend to look at the gain they would receive from the violation as opposed to the expected punishment. According to Gary, deterrence enables an entity to refrain from taking part in such illegal practices as they are socially undesirable.[102] However, this is not usually the case. This is because when the chances of being detected and punished are low, such entities would continue with the illegal practices.

This theory was challenged by George Stigler. He was of the view that Becker's theory meant that the society should allow efficient crimes or torts.[103] This meant that some crimes may be

[100] Tullock G, 'Adam Smith and the Prisoners' Dilemma', The Quarterly Journal of Economics, Vol. 100, Supplement (1985), 1073-1081, Published by: Oxford University Press, 1077.
–https://www.jstor.org.ezproxy.library.strathmore.edu/stable/1882937 on 15th April, 2019.
[101] Tsoulfidis L 'Classical vs. Neoclassical Conceptions of Competition', 14.
[102] Stephan A and Nikpay A, 'Leniency Theory and Complex Realities', CCP Working Paper 14-8, Centre for Competition Policy & School of Law University of East Anglia & Partner, Global Antitrust and Competition, Gibson, Dunn and Crutcher,4.
[103]Raskolnikov A, *Deterrence Theory: Key Findings and Challenges*, Cambridge Handbook of Compliance, Forthcoming; Columbia Law & Economics Working Paper No. 610 (2019), 2.

overlooked as long as what the offenders would benefit from it is greater than the harm they would cause or the penalty that they would face. Other scholars such as Curry and Doyle advanced the theory while also avoiding the issue between Becker and Stingler's debate. They formalized Richard Posner's suggestion which provided that when you add market exchange as a choice between the act of a crime being committed and not doing anything at all, the maximization of social welfare is seen as the equivalence of minimizing the cost of the committed crime. They argue that the gain the offender has obtained is not part of his cost therefore it was not necessary to come to a decision that an offender's gain should count or not count.[104]

In this theory of economic deterrence, when you look at the different views, it is clear that whereas some advocated for some form of leniency as long as the act does not fully affect the victim, others were of the view that doing that would be allowing people to commit illegal acts while using it as an excuse. It was therefore advocated that when it came to looking at crimes that were committed, instead of looking at the gain of the offender, the crime should be looked at for what it was and the punishment was to be given accordingly.

When you compare it with the study of the leniency programmes, it does not look at the gain one has made from the cartel activities, as long as one comes forward and cooperates with the authority, they are pardoned. Where one does not cooperate with the authority, the penalties are heavy compared to the entities that cooperated with the authority.

1.9 Methodology

The study uses the qualitative research method. The method to be used to gather information for this paper will be through review and analysis of primary, secondary and tertiary sources of literature. The research involves using statistical data to look at whether there are any entities that have come out to disclose any cartel activities that they have taken part in and how they have been treated. Further, the research involves looking at publications of information on the CAK, other reputable organisations, and journal articles on the issue of cartels and leniency.

[104] Raskolnikov A, *Deterrence Theory: Key Findings and Challenges*, Cambridge Handbook Of Compliance, Forthcoming; Columbia Law & Economics Working Paper No. 610 (2019),

The researcher then looks at the set international standards, practices, and countries that have had similar issues in the past or when they were comparably at the stage of Kenya's development and whether it has been effective on their part.

The researcher looks at South Africa's leniency programme in order to look at how it works and how it has been since its implementation in 2004. South Africa was the best option as it is an African country like Kenya and in large part both countries have certain commonalities in their legal thinking and political, socio-economic backgrounds. Though it is comparatively more developed, it is more likely to face similar issues as Kenya.

1.10 Limitations

A limitation in conducting this study is the fact that the leniency program is fairly new in Kenya. It has been two years since its introduction and therefore the period may not be long enough to test the full efficacy of the programme.

Another limitation is due to the sensitivity of some of these cases, it was difficult to get in touch with individuals from CAK willing to share any information on the programme so far on any applications made or companies involved.

To mitigate the limitations, I decided to use the qualitative study approach using readily available data by looking at the legal framework of Kenya and using South Africa as a case study as the data is readily available.

1.11 Chapter Breakdown

The objectives of my study will be in four chapters.

Chapter one is the current chapter which is the proposal and the introductory chapter. It introduces the problem and gives the background, the problem statement, the justification of my study, the statement of objective, research questions, hypothesis, literature review, theoretical framework, methodology and the limitations.

Chapter two focuses on the legal framework of Kenya by examining the Competition Act and the Corporate Leniency Programme of Kenya. It then looks at the loopholes and challenges in the Competition Act and the Leniency Programme that hinders the effective running of the programme.

Chapter three focuses on the legal framework of South Africa by examining the Competition Act of South Africa and the Corporate Leniency Policy in South Africa. It also looks at the challenges South Africa has faced in running the leniency policy in order for Kenya to borrow a leaf from on how to avoid such challenges.

Chapter four gives the conclusion based on the findings on the research and gives recommendations that Kenya should borrow from South Africa's legal framework in order to have an effective framework and properly run the programme.

CHAPTER 2

AN EXAMINATION OF THE COMPETITION LEGAL FRAMEWORK IN KENYA

2. Introduction

This chapter is on the legal framework of the competition law governing Kenya. The competition law evolved from the time Kenya gained independence in 1963 until the time the current Competition Act 2010 was enacted. The first Act that Kenya was relying on was the Price Control Act, 1956. Further developments led to the Restrictive Trade Practices, Monopolies and Price Control Act which eventually led to the enactment of the Competition Act, 2010. Kenya at independence was still relying on products from UK until it managed to produce its own products for import and export. The progression on the framework of the current competition act thereafter led to the enactment of the corporate leniency programme in 2017. There are however some loopholes in the legal framework that should be addressed. These loopholes hinder effective running of the programme.

2.1 History of Competition Law in Kenya

When Kenya gained its independence in 1963, the level of industrialization was seen to be very low.[105] Due to this, most of the essential consumer commodities that were needed by the settler communities were imported from the UK to support Her Majesty's motherland. There was also a Price Control Regime that aimed to ensure that consumers were not exploited by the tendering process[106] by the Price Control Act.[107]

Thereafter, Kenya continued developing its economy by establishing import substitution industries to enable Kenya and the East African Communities to meet their requirements.[108] There was also the transfer of firms owned by foreigners to Kenyans. This led to the enactment of the Trade Licensing Act,[109] that legalized takeover of foreign owned entities to Kenya by

[105] Njoroge P M, 'Enforcement of Competition Policy and Law in Kenya Including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/Price Fixing', 2 –http://siteresources.worldbank.org/INTCOMPLEGALDB/Resources/PeterNjoroge.pdf on 20th April,2020.
[106] Njoroge P M, 'Enforcement of Competition Policy and Law in Kenya Including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/Price Fixing', 2
[107] Enacted on 16th October, 1956.
[108] Njoroge P M, 'Enforcement of Competition Policy and Law in Kenya Including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/Price Fixing', 3.
[109] Cap 497 of the laws of Kenya.

Kenyan citizens through denying trading licences to certain businesses and trades.[110] There was also the legalization of control of import and export of goods and control of essential supplies under Imports, Exports and Essential Supplies Act.[111]

Kenya's commercial activities were thereafter controlled by the Price Control Act, the Trade Licensing Act and the Imports, Exports and Essential Supplies Act. The latter act provided for restrictive practices such as fixing of prices of some certain types of goods and services. The Act also provided for the transferring of certain business enterprises from being owned by foreigners to being owned by Kenyan citizens. The Act also provided for industries of imports substitution. The Act further provided for licensing for imports and exports. Further, it provided for the establishment of import quotas for some types of goods. The Act also provided for full prohibition of importation of certain goods. The Act also provided for letters of no objection. The Act further provided for the allocation of foreign exchange and also fixed exchange rates.[112]

There was the East African Community collapse that led other countries such as Tanzania and Uganda to import their products from other countries such as China.[113] This affected Kenya as it lost its market from Tanzania and Uganda. It could not compete with the other countries as it had high prices, low quality commodities and poor packaging and design. Kenya therefore needed to improve its marketability and competition.[114] The government decided to expose Kenya to domestic market competition. It did so by allowing certain imports in Kenya that were not previously allowed. This would also enable them to be prepared to take part in competition in the export market.[115] Some imports that were considered competing were allowed in Kenya and some items that had been banned were removed from the banned list. Items that had their prices controlled were removed from the price control list.[116] There was

[110] Njoroge P M, 'Enforcement of Competition Policy and Law in Kenya Including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/Price Fixing', 4.
[111] Cap 502, Laws of Kenya, through Legal Notice N0. 303 of 1964.
[112] Njoroge P M, 'Enforcement of Competition Policy and Law in Kenya Including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/Price Fixing', 4.
[113] Njoroge P M, 'Enforcement of Competition Policy and Law in Kenya Including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/Price Fixing', 4.
[114] Njoroge P M, 'Enforcement of Competition Policy and Law in Kenya Including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/Price Fixing', 4.
[115] Njoroge P M, 'Enforcement of Competition Policy and Law in Kenya Including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/Price Fixing', 4.
[116] Njoroge P M, 'Enforcement of Competition Policy and Law in Kenya Including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/Price Fixing',4.

also the addition of industries that were licensed in order to promote domestic competition. They also reduced prices for consumers and they increased opportunities for getting employment. They further improved their efficiency when it came to the usage and allocating scarce resources to the competing needs of individuals.[117]

Consequently, there was a proposal to develop a competition policy and regulation by the Working Party on Government Expenditures (WPGE) in 1982. In its report, (WPGE) stated that there would be greater reliance on policy instruments that would influence farm management as well as influence industrial decisions to be made on product selection, investments and also employment. Further, the report stated that there was an increase in private sector activities and there was also an increase in the scope and magnitude of community efforts. According to the report, this may create opportunities for abuse, favoritism and exploitation.[118]

Kenya had slowly begun to shift from a regime with price control to a market economy. It was therefore important to have law in place regulating competition. In 1989, the Restrictive Trade Practices, Monopolies and Price Control Act was introduced.[119]

2.2 Current law governing Competition in Kenya

Currently, the Competition Act, 2010[120] governs competition in Kenya. This Act was previously known as The Restrictive Trade Practices, Monopolies and Price Control Act.[121] The Act's mandate was later on increased to cover consumer protection[122] and abuse of dominant position.[123] The Competition Act established the CAK.[124] Its main role is to regulate competition activities in Kenya. Further, it is expected of the CAK to act independently and impartially and perform all its functions without fear of anyone or favoring anyone.[125] It is

[117] Njoroge P M, 'Enforcement of Competition Policy and Law in Kenya Including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/Price Fixing', 4.
[118] Chapter III, the Working Party on Government Expenditures Report, 24-27.
[119] UNCTAD, Voluntary Peer Review on Competition Policy: Kenya (2005), TD/RBP/CONF.618, 7. –https://unctad.org/en/Docs/tdrbpconf6d8_en.pdf
[120] No. 12 of 2010.
[121] This act did not provide for consumer protection. However, the Competition Act protects the consumer.
[122] Section 55, *Competition Act* (Act N0. 12 of 2010).
[123] Section 23, *Competition Act* (Act N0. 12 of 2010).
[124] Section 7, *Competition Act* (Act N0. 12 of 2010).
[125] Section 7 (2), *Competition Act* (Act N0. 12 of 2010).

important to note that there have not been any significant amendments since the incorporation of the Restrictive Trade Practices, Monopolies and Price Control Act until the enactment of the Competition Act in 2010. This raises the question as to whether the competition legislation is very effective and therefore did not need any amendments. One could also argue that before legislation is amended in Kenya in order to cater for regularly arising matters, it usually takes a long time. The latter argument would render Kenya's legislation ineffective as it does not regularly cater for new arising matters.

The Act further provides the punishment to anyone taking part in any of these practices as imprisonment for a term that does not exceed five years or payment of a fine that does not exceed ten million Kenya shillings or may be subjected to both the imprisonment and the fine.[126]

As much the Competition Act provides for the restrictive trade practices it also provides for exceptions on when the restrictive practices are allowed. The undertaking is required to apply for the exemption in the manner that is prescribed together with any information that the CAK would require.[127] The CAK then publishes a notice in the Gazette of such an application indicating the nature of exemption that an entity sought and requiring any interested persons to submit to the CAK within 30 days any written representations they would wish to make regarding the application.[128] The CAK then looks at the exemption and decides whether to grant the exemption or not grant giving reasons.[129] Some of the factors that CAK may look at before granting an exemption to participate in restrictive trade practice are whether the practice would maintain or promote exports.[130] It should not change the status of the exports. The CAK also checks on whether granting the exemption would improve or prevent a decline when it comes to producing and distributing goods or providing services.[131] Further, the CAK looks at whether granting the exemption would promote technical or economic progress or stability in any industry.[132] In addition, whether the exemption would benefit for the public in a manner that

[126] Section 21 (9), *Competition Act* (Act N0. 12 of 2010).
[127] Section 25 (2), *Competition Act* (Act N0. 12 of 2010).
[128] Section 25 (3), *Competition Act* (Act N0. 12 of 2010).
[129] Section 26, *Competition Act* (Act N0. 12 of 2010).
[130] Karanja J, 'Restrictive Trade Practices Under Kenyan Law', –https://www.bowmanslaw.com/insights/mergers-and-acquisitions/restrictive-trade-practices-under-kenyan-law/.
[131] Karanja J, 'Restrictive Trade Practices Under Kenyan Law'.
[132] Karanja J, 'Restrictive Trade Practices Under Kenyan Law'.

outweighs the lessened competition that may result from such an agreement or a concerted practice.[133]

The CAK can further amend or revoke the grant of exemption if it is satisfied that it was granted on incorrect or misleading information or there has been a material change in granting of the exemption or a condition in which the exemption was granted has not been complied with.[134]

In this case, one could argue the effectiveness of the exemptions. Despite what is provided for in the Act, there may be some cases of abuse as some entities may find some loopholes that would enable them apply for the exemptions. In addition to that, it also would have to rely on the integrity of the members of the CAK. Some entities may collude with members of the CAK in order to apply for the exemption.

The Act does not restrict the restrictive trade practices to the practices that only take place in Kenya. Even if the conduct takes place outside the Kenyan jurisdiction, as long as it involves a Kenyan Citizen or a company incorporated in Kenya, the Act still applies to the restrictive practices.[135]

Apart from the Competition Act, The East African Community (EAC) enacted East African Community Competition Act which also applies to Kenya.[136] Further, the Common Market for Eastern and Southern Africa (COMESA), also governs competition in Kenya under the provisions of the COMESA Competition Commission (CCC) Regulations (the COMESA Regulations).[137] The COMESA Competition Commission signed an agreement of cooperation in April 2016 with the CAK. One of the issues specified in the agreement was that both authorities would share information regarding investigations that would concern the other regulator's jurisdiction.[138]

[133]Karanja J, 'Restrictive Trade Practices Under Kenyan Law'.
[134] Section 27, *Competition Act* (Act N0. 12 of 2010).
[135] Section 6, *Competition Act* (Act N0. 12 of 2010).
[136] The EAC Competition Authority is in operation however, it has not received or processed information regarding mergers, restrictive trade practices or cartels yet.
[137] Kenya is a member of the EAC (which comprises of six partner states) and COMESA (which comprises of nineteen member states).
[138] Kiunuhe A and Wagacha N, ' Cartel Regulation' –https://gettingthedealthrough.com/area/5/jurisdiction/44/cartel-regulation-kenya/ on January, 2020

2.3 Corporate Leniency Programme in Kenya

2.3.1 Rationale for Corporate Leniency Programme in Kenya

The leniency programme was introduced in Kenya in order to achieve five main aims. The first one is *deterrence*.[139] It was intended to make cartel membership unattractive as the members would fear that one of their fellow members would report their activities to the CAK.[140] This is because cartels are formed on the basis of trust. If cartel members stop trusting their fellow members, it prevents them from taking part in cartel activities. This is also seen as a cost-effective tool for investigation by the CAK.[141]

Another reason the leniency programme was introduced is *detection*.[142] Once a member of a cartel applies for leniency it leads to investigations. Some other members of the cartel may decide to confess later on before investigations are open against other cartel members in the hope of being granted leniency.[143]

The third reason for leniency is *sanctioning.*[144] When one comes forward with a confession, they provide to the CAK firsthand information that they would have difficulty obtaining. Once the CAK obtains this information, it makes it easy to prosecute the cartel members and come up with the appropriate financial penalties.[145]

The fourth reason the leniency programme was introduced was in order to ensure *cessation*.[146]Once a member of a cartel applies for leniency, they cease to participate in the activity. They may also stop participating because they may fear that another member has already applied or will be intending to apply.[147]

The final reason for a leniency programme is cooperation.[148] The programme is seen to promote international cooperation with other countries when it comes to investigation of cartels. This is

[139] This is provided in Section 13 of the "Leniency Programme Guidelines" (Kenya).
[140] Andiva B & Masereti B, 'Cartel Enforcement: Adoption of Leniency Progamme in Kenya', 5 –https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/56f1398222482e727503f6af/1458649477919/Barnabas+Andiva+and+Edith+Masereti_+Cartel+Enforcement+-+Adoption+of+Leniency+Programme+in+Kenya.pdf
[141] Andiva B & Masereti B, 'Cartel Enforcement: Adoption of Leniency Progamme in Kenya', 5.
[142] This is provided in Section 13 of the '*Leniency Programme Guidelines*' (Kenya).
[143] Andiva B & Masereti B, 'Cartel Enforcement: Adoption of Leniency Progamme in Kenya", 5.
[144] This is provided in section 11(ii) and 11(iii) of the '*Leniency Programme Guidelines*', (Kenya).
[145] Andiva B & Masereti B, 'Cartel Enforcement: Adoption of Leniency Progamme in Kenya', 5.
[146] This is provided for in section 12 (iv) of the '*Leniency Programme Guidelines*', (Kenya).
[147] Andiva B & Masereti B, 'Cartel Enforcement: Adoption of Leniency Progamme in Kenya', 5.
[148] This is provided for in section 12(ii) of the *'Leniency Programme Guidelines*' (Kenya).

because when one applies for leniency, they are also required to state in which other jurisdiction leniency has been sought and applied and they are to also provide a waiver in order to allow the competition agencies to communicate.[149]

The five aims stated above were in order to ensure that cartel activities were curtailed.

2.3.2 Application of the Corporate Leniency Programme

As explained in the chapter 1, the CAK in most cases is not usually aware that there are certain restrictive trade practices taking place hence the introduction of the leniency programme.[150] The programme was introduced in Kenya under section 89A of the Competition Act.[151] Apart from the CAK, the Competition Tribunal hears matters that arise from the CAK.[152] The final hearing from any disputes is the High Court of Kenya.[153] The challenge here is how effective this system is especially when the matter goes to the High Court. This is because the parties have no channel for seeking further redress once the matter is determined by the High Court.

The leniency programme guidelines provide for different kinds of leniency. There is the conditional leniency.[154] This is the original immunity given to the applicant temporarily after effective application for leniency. Before being granted conditional immunity, the CAK has to be satisfied that material proof and data that will assist in the inquiries, conclusions, choices and subsequent proceedings has been provided by the applicant.[155] The applicant is required to cooperate fully with the CAK and follow the conditions as provided for in the guidelines.[156] Leniency is granted as 'first through the door'.[157] It applies to the first person to come to the CAK with a confession regarding their participation in a cartel. Such a person qualifies for conditional immunity when according to the CAK's satisfaction, they have provided required evidence that is sufficient. There is also the 'full, total or permanent leniency' granted to the applicant after they have received conditional leniency and the entire investigation process has

[149] Andiva B & Masereti B, 'Cartel Enforcement: Adoption of Leniency Progamme in Kenya', 6.
[150] The Competition Act was amended in 2014 to introduce Section 89A which provided for the leniency programme.
[151] There was the issue of the Leniency Programme Guidelines ("Guidelines") through the Kenya Gazette No. 4736, published on 19 May 2017, to oversee the process of granting of leniency by the Authority.
[152] Section 71, *Competition Act* (Act No. 12 of 2010).
[153] Section 40, *Competition Act* (Act No. 12 of 2010).
[154] This is found on the glossary of terms of the Leniency Programme Guidelines.
[155] Competition Authority of Kenya, '*The Commencement of the Leniency Programme in Kenya'.*
[156] Competition Authority of Kenya, "Leniency Programme Guidelines".
[157] This is found on the glossary of terms of the Leniency Programme Guidelines.

been completed and a final determination issued. The applicant is granted 100% immunity when the investigation is completed.[158]

The guidelines provide that an undertaking is eligible to apply for its leniency through the legal entity in through which it was incorporated. That entity should be the one controlling its decision-making processes. This also covers the directors and the employees on condition that they are in full cooperation with the CAK.[159] The applicant should show that it had not coerced other parties to take part in the restrictive practice with it.[160] In the event that a subsidiary applies for leniency, it would only be eligible for leniency in accordance with its involvement in the restrictive practice. It would not be eligible for leniency for the participation of the parent company. This is because the parent company is not under its subsidiary.[161] Further, if a parent company applies for leniency, it would be eligible for leniency in accordance with its involvement in the restrictive practice and eligible as well as to its subsidiary's participation in the restrictive practice. This is due to the fact that the parent company controls the subsidiary company.[162] A parent company would therefore benefit from the leniency on its own application and the application of its subsidiary.[163]

When it comes to joint venture entities, leniency can only be granted to one entity in the joint venture and not both entities. However, if a particular joint venture is regarded as a separate entity that two parent companies control, it is considered eligible to apply for leniency. However, for the two parent companies, they are eligible to apply for leniency as they are not controlled by the joint venture.[164] It is important to note however that when a joint venture is involved in a in a restrictive practice, one of the parent company's application for leniency does not cover the joint venture. This is because both parent companies control the joint venture therefore it cannot lie on only one parent company.[165]

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[158] Section 13 (i), Competition Authority of Kenya, "*Leniency Programme Guidelines*".
[159] Section 5, Competition Authority of Kenya, '*Leniency Programme Guidelines*'.
[160] Section 6, Competition Authority of Kenya, '*Leniency Programme Guidelines*'.
[161] Section 7, Competition Authority of Kenya, '*Leniency Programme Guidelines*'.
[162] Section 8, Competition Authority of Kenya, '*Leniency Programme Guidelines*'.
[163] Thethy AG, '*Review of the Competition Act Leniency Programme Guidelines',*
–http://www.kaplanstratton.com/wp-content/uploads/2017/09/Review-Competition-Act-Leniency-Programme-Guidelines.pdf.
[164] Section 9, Competition Authority of Kenya, '*Leniency Programme Guidelines*'.
[165] Section 10, Competition Authority of Kenya, '*Leniency Programme Guidelines*'.

The CAK only accepts applications for leniency on the condition that it is not aware of the restrictive practice taking place.[166] If the CAK already knew of the restrictive practice, it will not grant the application for leniency. However, if the CAK was aware of the restrictive practice taking place, leniency is granted to an applicant if the CAK does not have enough information to carry out an investigation.[167] The applicant would therefore be required to provide further information that will assist the CAK to conduct an investigation. Another condition is that if the CAK has begun conducting an investigation but requires additional evidence. They may allow applications as long as they lead to the introduction of new evidence.[168]

When an application for leniency is made, a formal acknowledgement known as a 'marker' is granted by the CAK showing the record of timing by the applicant in comparison with other applicants. This ensures that it reserves for the applicant a position for a period of twenty-eight days. The CAK then continues with its internal investigations in order to make good the leniency application.[169] During this twenty-eight-day period, the applicant is required to submit relevant information. Such information is submitted either orally or in writing.[170] Further, after the expiry of the twenty-eight days, the applicant can seek an extension if they have not been able to make good the leniency application due to unavoidable circumstances.[171] The CAK thereafter holds an initial meeting with the applicant after they have made good the application. The applicant may bring forward any relevant information and answer questions asked by the CAK.[172] The CAK is further required within fourteen days to communicate to the applicant in writing informing them if they qualify for leniency or not.[173]

On the application of leniency and throughout the whole process of investigation, the applicant is required to provide full information that is truthful and timely; the applicant is also required to cooperate fully; the applicant is also required to keep the entire application process confidential; further, the applicant is required to immediately stop taking part in the restrictive

[166] Section 11 (i), Competition Authority of Kenya, '*Leniency Programme Guidelines*'.
[167] Section 11 (ii), Competition Authority of Kenya, '*Leniency Programme Guidelines*'.
[168] Section 11 (iii), Competition Authority of Kenya, '*Leniency Programme Guidelines*'.
[169] Glossary of terms, 'Leniency *Programme Guidelines*'.
[170] Section 20, Competition Authority of Kenya, '*Leniency Programme Guidelines*'.
[171] Section 21, Competition Authority of Kenya, '*Leniency Programme Guidelines*'.
[172] Section 22, Competition Authority of Kenya, '*Leniency Programme Guidelines*'.
[173] Section 23, Competition Authority of Kenya, '*Leniency Programme Guidelines*'.

practice unless the CAK directs otherwise.[174] This programme therefore relies on the information and the truthfulness of a cartel member involved.

Leniency is also granted at a first come first serve basis. The first applicant may be granted immunity, which is 100% reduction in penalties. The second applicant may be granted a reduced penalty that is up to 50%. Further, the third applicant may be granted a reduced penalty of up to 30%. Subsequent applicants before the investigation is completed are granted a reduction in penalties that is up to 20%.[175]

The CAK further takes all the necessary steps to ensure that the applicant's identity remains confidential throughout the whole process.[176] In the event that an applicant granted conditional leniency is in breach of certain terms, the CAK may revoke it. Before revoking, the CAK writes to the applicant informing them of the breach giving the applicant an opportunity to correct the breach before the conditional leniency is revoked. The obligation to cooperate on behalf of the applicant is also suspended.[177] When the CAK revokes the conditional leniency of an applicant, it may further pursue the matter according to the provisions of the act.[178]

An entity may also enter into an agreement for settlement with the CAK on the award of damages to the complainant and any amount proposed as a pecuniary penalty.[179]

2.4 Cooperation with Regional Bodies

Kenya is also in cooperation with the EAC and COMESA. The CAK is to work in cooperation alongside other authorities in order to curb cartels. COMESA has experienced some challenges when it comes to running the programme which Kenya should take note of. For instance, the capacity to handle requests for information from other jurisdictions is inadequate. This inadequacy is caused by lack of enough resources and also lack of enough human capacity.[180] Another challenge is the fact that the various jurisdictions have different laws therefore there is lack of harmonization of the laws between the different countries and their approaches and also

[174] Section 12, Competition Authority of Kenya, '*Leniency Programme Guidelines*'.
[175] Section 13, Competition Authority of Kenya, "*Leniency Programme Guidelines*".
[176] Section 14, Competition Authority of Kenya, "*Leniency Programme Guidelines*".
[177] Section 30, Competition Authority of Kenya, "*Leniency Programme Guidelines*".
[178] Section 31, Competition Authority of Kenya, "*Leniency Programme Guidelines*".
[179] Section 38, *Competition Act* (Act No. 12 of 2010).
[180] Nkhoma V 'Enforcement Cooperation in the COMESA Region', 7.
–https://www.ftc.gov/system/files/documents/public_events/316871/comesavincentnkhoma.ppt

enforcement methods.[181] Another challenge is that there are certain legal restrictions that prevent sharing of information. Due to those restrictions, it makes cooperation with other countries difficult.[182] A further challenge is that there are legal restrictions when it comes to the admissibility of information from the other jurisdictions in national courts. This also makes it difficult to cooperate with various countries.[183] There are also several sovereignty issues and there was the need to domesticate COMESA regulations.[184] Another challenge is also the lack of mutual interest by the countries to promote formal cooperation.[185]

2.5 Loopholes in Kenya's Legal Framework

2.5.1 Competition Act (Act No. 12 of 2010)

There are some loopholes noted in the Competition Act that should be addressed in order to ensure effective running of the programme.

There is the established Competition Authority and the Competition Tribunal under the Competition Act. Anyone that is aggrieved by the decision of the CAK can appeal to the Tribunal.[186] Any appeal from the Tribunal goes to the High Court. The CAK, if dissatisfied or aggrieved by the decision of the Competition Tribunal may lodge an appeal against the decision in the High Court.[187] Due to lack of a specialized court for hearing competition matters, the determination of matters may take time as the High Court also has several other matters to attend to that are not in competition law. This also increase the backlog of the cases in court.

Another loophole is that the Competition Act provides that any aggrieved party may appeal to the High Court. The High Court's decision is final.[188] There is no room to further in case of dissatisfaction appeal to the Court of Appeal or even the Supreme Court. This leaves a party aggrieved without further room for seeking redress.

Another gap noted is the aspect of accountability. It is not expressly provided for who the CAK and the Tribunal are accountable to for their actions and decisions.

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[181] Nkhoma V 'Enforcement Cooperation in the COMESA Region', 7.
[182] Nkhoma V 'Enforcement Cooperation in the COMESA Region', 7.
[183] Nkhoma V 'Enforcement Cooperation in the COMESA Region', 7.
[184] Nkhoma V 'Enforcement Cooperation in the COMESA Region', 7.
[185] Nkhoma V 'Enforcement Cooperation in the COMESA Region', 7.
[186] Section 73, *Competition Act* (Act No. 12 of 2010).
[187] Section 77, *Competition Act* (Act No. 12 of 2010).
[188] Section 40, *Competition Act* (Act No. 12 of 2010).

Further, when you look at the penalties' sections of the Competition Act, the Act only provides for penalties where one is convicted for taking part in restrictive trade practices.

The amount is not less than 10 million Kenya Shillings or a term of imprisonment of a period that does not exceed 5 years.[189] These penalties are only for the entities that are taking part in restrictive trade practices. The Act does not provide for penalties when one does not comply with an order that is given by the CAK or the Competition Tribunal.

2.5.2 Corporate Leniency Programme Guidelines

When you look at Kenya's corporate leniency programme guidelines, it has shortcomings that may make it difficult to smoothly run the programme. Those shortcomings pose as the challenges that deter the programme from running smoothly in Kenya hence prevent it from being implemented effectively.

The leniency programme does not provide for recognition of an occurrence that some entities may not be aware that the conduct they taking part in is illegal. They may be subjected to fines and punishment for innocently taking part in a cartel conduct. Further, when they become aware that the conduct is illegal, they may not want to come forward and confess that they were taking part in it as they have no assurance that they will not be penalized.

The leniency programme does not also specifically provide for who an applicant should be. This makes it difficult to know the person who is legible in the firm to apply for leniency as it only provides for an applicant generally.[190]

When it comes to granting of immunity, the leniency programme only provides for reduction of fines for the applicants who were not the first to approach the CAK.[191] It is not provided for that if the matter goes to the Tribunal, the CAK would step in and ask for significant treatment on behalf of the other applicants as they also cooperated. The fines may be reduced by the CAK but when it reaches the Tribunal it is not a guarantee they will be granted the same leniency.

Further, when you look at the programme, there is no such provision that once granted immunity in another jurisdiction one would have to apply afresh in Kenya or if one is pardoned

[189] Section 21, *Competition Act* (Act No. 12 of 2010).
[190] *Leniency Programme Guidelines* (Kenya).
[191] Section 13, *Leniency Programme Guidelines* (Kenya).

for one activity it does not apply to another activity. This leads to uncertainty as one is not aware if they would be required to apply afresh if already granted immunity in another country or if when granted for one activity it should extend to others.

Further, the programme provides that when one is granted immunity from criminal prosecution and their fines are reduced, there is no provision whether an aggrieved party may still seek civil or criminal suit against them. It is not clear whether the applicant is completely scot free or another party aggrieved by their cartel activity may institute a suit against them.

The leniency programme does not further provide for what should happen to an applicant whose application is unsuccessful or whether CAK is at liberty to grant other approaches to unsuccessful applicants. This may discourage other applicants from applying in the event they are unsuccessful.

When it comes to communication, the programme does not expressly provide for communication with the applicant informing them that another applicant had already come forward. It only provides for the applicant being informed within fourteen days that their application for leniency is not successful.[192] It is therefore not clear as to whether they are informed that another applicant has come forward and was successful. Further, after the application is rendered successful, the applicant then meets with the CAK[193] though there is no clear timeline as to when the meeting is to be scheduled.

When it comes to setting a meeting with the commission, the programme only gives the requirements of the initial meeting with the CAK until the final meeting on the surface. The guidelines do not clearly provide what is expected during the meetings. The programme only provides for the initial meeting that the CAK is to peruse documents and inform the applicant on whether its application for immunity has qualified within fourteen days.[194] There are no further details of requirements such as the full identity of the applicant. One is also not sure on when further evidence can be introduced.

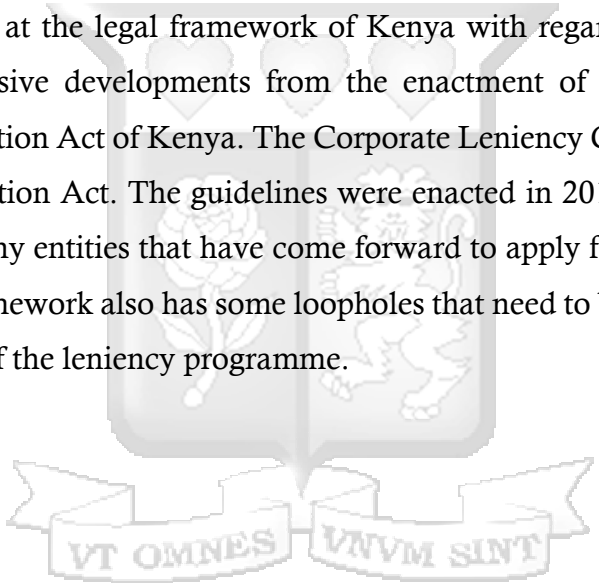
[192] Section 23, *Leniency Programme Guidelines* (Kenya).
[193] Section 23, *Leniency Programme Guidelines* (Kenya).
[194] Section 23, *Leniency Programme Guidelines* (Kenya).

Further, the guidelines do not go in depth on the investigation and analysis. It only provides that the CAK would undertake the investigation and the applicant is to cooperate.[195] It is not clear on the methods the CAK would use to conduct an investigation, whether they will carry out interviews or such other methods.

In the final meeting with CAK, the applicant is required to sign the leniency contract.[196] There is no mention of what the CAK intends to do with the information provided neither does it further mention what is to be required of the applicant. It also does not mention any repercussions of the applicant withdrawing its application at this stage.

2.6 Conclusion

This chapter was looking at the legal framework of Kenya with regards to competition law. There have been progressive developments from the enactment of the first Act, until the enactment of the Competition Act of Kenya. The Corporate Leniency Guidelines were derived from the current Competition Act. The guidelines were enacted in 2017 but as of 2020, there are no reported cases of any entities that have come forward to apply for entity and have been granted leniency. The framework also has some loopholes that need to be addressed in order to ensure effective running of the leniency programme.



[195] Section 27, *Leniency Programme Guidelines*, (Kenya).
[196] Section 29, *Leniency Programme Guidelines* (Kenya).

CHAPTER 3

AN EXAMINATION OF THE COMPETITION LEGAL FRAMEWORK IN SOUTH AFRICA

3. Introduction

This Chapter is on the legal framework of South Africa. It had a strong market economy mostly foreign based and therefore needed to develop laws that would protect the local industries. The first Competition Act was enacted in 1998 and has had three amendments since its enactment. The Corporate Leniency Policy was introduced in 2004 and later on amended in 2008 to address certain gaps. Since the introduction of the policy, South Africa has so far reported 54 leniency applications. South Africa has also had some challenges that it has faced when it comes the running the policy therefore not rendering it fully effective.

3.1 History of Competition Law in South Africa

South Africa, being an African country like Kenya has been seen to be more advanced in developing their laws in comparison to Kenya. There were several foreign investors attracted to their resources thereby leading to economic policies that were intended to protect the foreign investors.[197] There were also certain risks of overspecialization and the government further introduced policies aimed at reducing dependence on the mining sector by encouraging other sectors such as agricultural and local manufacturing sectors to emerge.[198] The mining manufacturing industries and also the local industries would therefore need to be regulated hence the adoption of Competition law.

The Competition Act no. 89 of 1998 regulates competition law in South Africa. So far it has had three amendments. The first amendment is by the Competition Amendment Act, No. 35 of 1999 (it commenced in 1 September 1999); Competition Amendment Act, No. 15 of 2000 (it commenced in 1 September 2000); and Competition Second Amendment Act, No. 39 of 2000 (it commenced in 1 February 2001).[199]

[197] Siclen S V, 'Competition Law and Policy in South Africa', AN OECD Peer Review, March 2003, 9. –http://www.oecd.org/southafrica/34823812.pdf

[198] Siclen S V, 'Competition Law and Policy in South Africa', 9.

[199] Competition Act no. 89 of 1998 (South Africa).

The Competition Act established the Competition Commission which had the main aim of investigating, controlling and further evaluating restrictive trade practices in South Africa.[200] It also monitors abuse of dominant positions and also regulates mergers.[201]Apart from the Commission, there is also established the Competition Tribunal and the Competition Appeal Court.[202] The function of the Tribunal is to adjudicate matters concerning competition and giving a determination.[203] The Appeal Court on the other hand hears appeals from the Tribunal and gives a determination.[204] The Commission, the Tribunal and the Appeal Court are accountable to the South African Department of Economic Development.[205]

South Africa's Competition law prescribes for the punishment that one is to face if found contravening certain provisions of the Act. The offender is subjected to punishment of a fine that does not exceed R500 000-00 or sentenced to imprisonment for a term that does not exceed10 months. The offender may also be subjected to both the fine and sentenced to imprisonment.[206] Other offenders in relation to the Act are subjected to a punishment of a fine that does not exceed R2 000-00 or subjected to imprisonment for a term that does not exceed 6 months. The offenders may also be subjected to both the fine and sentenced to imprisonment.[207]

The Act also provides for instances where entities can apply for exemptions in order to take part in the restrictive trade practices frowned upon.[208] An entity may approach the Commission to apply for an exemption which meets the requirements prescribed.[209] The Commission can thereafter grant an exemption, whether conditional or unconditional; or refuse to grant an exemption.[210] The exemption can be granted for a specified time[211] and may be revoked at any time if the information given regarding the exemption was false or where the requirement for the condition given is not adhered to or has not fully been met. An example of an instance where an exemption is usually granted is if the conduct the exemption is sought for is for an

[200] Section 19, *Competition Act* (South Africa).
[201] Competition Commission, South Africa –http://www.compcom.co.za/who-are-we/
[202] It was formerly known as the Competition Board.
[203] Section 26, *Competition Act* (South Africa).
[204] Section 26, *Competition Act* (South Africa).
[205] Competition Commission, South Africa –http://www.compcom.co.za/about-us-2/
[206] Section 74 (1) (a), *Competition Act* (South Africa).
[207] Section 74 (1) (b), Competition Act (South Africa).
[208] Introduced by Section 5 of the Competition Second Amendment Act, 2000.
[209] Section 10 (1), *Competition Act* (South Africa).
[210] Section 10 (2), *Competition Act* (South Africa).
[211] Section 10 (4A), *Competition Act* (South Africa).

objective that is non- commercial and socio-economic.[212] Further, if the reason for granting the exemption ceases to exist, the exemption may be revoked.[213] Further, the Commission is supposed to issue a notice through the gazette before granting or revoking an exemption and give reasons for granting or intention to revoke. This enables affected parties to respond within twenty days of the notice to provide their presentations in written form explaining why the exemption should not be issued or why it should not be revoked.[214] The Commission thereafter is to issue a notice of any exemption issued or any revocation made through a gazette notice.[215]

3.2 Corporate Leniency Policy in South Africa

As mentioned in chapter 1, the rationale for a leniency programme was in order to assist the body set to regulate competition to curb restrictive trade practices that they may not be aware are taking place. The corporate leniency policy in South Africa was established in 2004[216] to maintain competition and prevent restrictive trade practices.[217]

The policy was amended in 2008[218] in order to incorporate some leniency features that it did not contain but were contained in other jurisdictions.[219] A few of the reasons as to why it was important to amend the policy in 2008 was because the previous version of the policy was not clear and certain.[220] The revised version made it clear that immunity would apply only when the conditions set out in the policy were met.[221] It did not rely on the discretion of the Commission as in the previous version. This was beneficial as it applied to anyone who cooperated with the Commission instead of allowing room for bias when granting immunity. The scope of the application of the policy was further increased to also apply to the instigators and the coercers of a cartel therefore making all the members of a cartel eligible[222] to apply for

[212] An OECD Peer Review, 'Competition Law and Policy in South Africa', May 2003, 50. –https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf
[213] Section 10 (5), *Competition Act* (South Africa).
[214] Section 10 (6), *Competition Act* (South Africa).
[215] Section 10 (7), *Competition Act* (South Africa).
[216] Labuschagne R and Lebohang M, 'Cartel Leniency in South Africa: Overview' –https://uk.practicallaw.thomsonreuters.com/4-517-8581?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1
[217] The Competition Commission applies it in order to curb cartel activities.
[218] Notice 628 of 2008, Government Gazette No. 31064 of 23 May 2008.
[219] The amendments became effective in May 2008.
[220] Lavoie C, '*South Africa's Corporate Leniency Policy: A Five Year Review',* 9, –http://www.compcom.co.za/wp-content/uploads/2014/09/clp-paper-conference-Chantal-Lavoie.docx.
[221] Section 5.5, *Corporate Leniency Policy* (South Africa).
[222] This would increase instability among all cartel members.

immunity whether they were the ring leaders or not.[223] It was not limited to only the leaders of a cartel.

The amended policy also introduced the marker procedure, which was not in the previous version. The marker[224] is intended to secure the applicant's position in the queue for being granted immunity. Once the marker is granted, it determines the amount of time that is required in order to provide the necessary information, documents and evidence needed.[225] This is also because at that point, the applicant may not be having the sufficient information that is required. The marker therefore enables them to secure a place in the queue and later on provide the required information needed at a later time after the marker is granted. The amendment of the policy further gave room to application for immunity orally instead of restricting it to a written application.[226]

The amendment to the policy also made it clear that the division responsible for receiving and dealing with the applications for immunity is the Exemptions and Enforcement Division.[227] This had not been made clear before in the previous policy version.

The policy is applied to alleged cartels in the country. It is also applicable to other jurisdictions if the activities taking place there affects South Africa as well.[228] Further, it should be noted that just because immunity has been granted in one jurisdiction, it is not a guarantee that South Africa will also grant immunity. One is required to apply afresh for immunity in South Africa.[229]Further, different cartel activities warrant separate applications for leniency for each activity. If one receives immunity for a particular activity, it does not extend to the other activities as well.[230]

It is important to note that it is the firm and not individual employees allowed to apply for leniency.[231] The policy will not apply if the entity that came forward was the one that instigated

[223] Section 5.7, *Corporate Leniency Policy* (South Africa).
[224] The marker is seen to help the Commission detect cartel activities at an earlier stage.
[225] Section 12.2, *Corporate Leniency Policy* (South Africa).
[226] Section 15*, Corporate Leniency Policy* (South Africa).
[227] Section 11.1.1.1, *Corporate Leniency Policy* (South Africa).
[228] Section 5, *Corporate Leniency Policy* (South Africa).
[229] Section 5.3, *Corporate Leniency Policy* (South Africa).
[230]Section 5.4, *Corporate Leniency Policy* (South Africa).
[231] Moodaliyar K, '*Are Cartels Skating on Thin Ice? An Insight into the South African Corporate Leniency Policy',* Hein Online, 160, April, 21, 2020.

the cartel.[232] The policy will also not be applicable in cases where the activities of the cartel fall outside the ambit of the act.[233] It will also not apply where another firm has made an application that is successful in respect of the same conduct. Further, it will not apply where the applicant does not meet the conditions as they have been set out in the policy.[234] In such a case, the Commission uses the approach where unsuccessful applicants may attempt to settle with the Commission and also attempt negotiations through a settlement agreement and consent order that may result into the fine being reduced.[235]

The policy also gives room for applicants who are unsure whether their applications will be successful. They are still encouraged to apply hypothetically to the Commission to enable them get clarity either through telephone conversation or in writing. The firm has an option of remaining anonymous.[236] If the firm chooses to disclose its identity at that point in time, the Commission no longer has a duty to protect its identity. However, the information received by the Commission will continue to be treated with confidentiality.[237] It is also important to identify cartel conduct in order to determine whether certain applications relate to the same contravention. The Commission looks at the product or service and compares it with the alleged contravention and the entities involved.[238]

When it comes to granting immunity, it is not automatic that an applicant will be granted immunity. It is only offered to an applicant that meets all the requirements as set out by the Commission. [239] An applicant that is successful is first granted conditional immunity as it awaits the determination of the proceedings. When the proceedings are finalized, the applicant is granted either total immunity or receives no immunity at all.[240] This is after the matter has been referred to the Tribunal by the Commission and the Tribunal or Appeal Court has made the final determination.[241] The first one to apply for immunity before the Commission is the first

[232] Moodaliyar K, '*Are Cartels Skating on Thin Ice? An Insight into the South African Corporate Leniency Policy',* 160.
[233] Section 7.1.1, *Corporate Leniency Policy* (South Africa).
[234]Section 7, *Corporate Leniency Policy* (South Africa).
[235]Section 7.2, *Corporate Leniency Policy* (South Africa).
[236]Section 8.1, *Corporate Leniency Policy* (South Africa).
[237]Section 8.2, *Corporate Leniency Policy* (South Africa).
[238] Lavoie C, 'South Africa's Corporate Leniency Policy: A Five-Year Review', 4.
[239] Moodaliyar K, 'Are Cartels Skating on Thin Ice? An Insight into the South African Corporate Leniency Policy', 159.
[240] Section 9, *Corporate Leniency Policy* (South Africa).
[241] Section 9.1.1, Corporate Leniency Policy (South Africa).

one to receive immunity provided that they have met the conditions as stated in the policy.[242] This first through the door policy creates a race between entities when it comes to applying for leniency before the Commission.[243]

It is reported that the Commission had received fifty-four (54) leniency applications since the policy was introduced in 2004. After the policy was amended in 2008, there has been significant increase in the application for leniency. The marker procedure has also led to the increase of several applications.[244] The fact that South Africa has only received 54 applications since its implementation in 2004 means that is the policy is not as effective and there is need to improve on it in order to increase the number of applications.

It is also important to set a strict review process before granting immunity to the applicants.[245] Certain conditions have to be met by an applicant when it comes confessing its involvement in a cartel. The information given in conjunction with all the evidence and documents pertaining cartel involvement must be complete and truthful.[246] The applicant should be the first one to come before the Commission with the all the relevant information, evidence and any documents that would enable the Commission to initiate the proceedings.[247] The Commission should not be aware of the contravention taking place.[248] However, if the Commission is aware of the contravention, but does not have sufficient information and no investigation has been initiated.[249] In this case the applicant should have sufficient information or evidence that will assist the Commission in initiating an investigation.[250] Further, if investigations have already been initiated, and the Commission does not have sufficient evidence to prosecute[251], an applicant may provide more evidence to assist in the investigation.[252] It is however argued that the circumstances create a burden to the applicant that is onerous to have them provide the information that is required by the Commission to enable successful prosecution of a cartel.

[242] Section 10.1 (b), Corporate Leniency Policy (South Africa).
[243] Lavoie C, 'South Africa's Corporate Leniency Policy: A Five-Year Review', 7.
[244] UNCTAD, 'The use of leniency programmes as a tool for the enforcement of competition law against hardcore cartels in developing countries', November, 2010, TD/RBP/CONF.7/4 , 11.
[245] Lavoie C, 'South Africa's Corporate Leniency Policy: A Five-Year Review', 7.
[246] Section 10.1 (a), *Corporate Leniency Policy* (South Africa).
[247] Section 10.1 (b), *Corporate Leniency Policy* (South Africa).
[248] Section 5.5.1, *Corporate Leniency Policy* (South Africa).
[249] Section 5.5.2, *Corporate Leniency Policy* (South Africa).
[250] Moodaliyar K, '*Are Cartels Skating on Thin Ice? An Insight into the South African Corporate Leniency Policy',* 161.
[251] Section 5.5.3, *Corporate Leniency Policy* (South Africa).
[252] Moodaliyar K, '*Are Cartels Skating on Thin Ice? An Insight into the South African Corporate Leniency Policy',* 161.

The policy does not provide for an instance whereby an applicant is a new entrant into the cartel and comes forward to apply for leniency but does not have the required information that would bring a case that is successful against such a cartel. As such, such an applicant would not qualify for leniency.[253]

The applicant is required to fully co-operate with the Commission until it finalises the investigations and it concludes the proceedings.[254] The applicant is also required to stop taking part in the cartel activity it was taking part in and is required to act in a manner that the Commission will direct.[255] In addition, the applicant is to be discrete and not alert their fellow cartel members that it has applied for immunity.[256] Further, the applicant is also not to destroy, give false information or even hide any information, evidence or documents that are in relation to the cartel activities.[257] The applicant is also not to misrepresent any material facts of the activities of the cartel or act in a dishonest manner.[258]

The aim of the leniency policy was to encourage self-reporting and ensure that any member who willingly approaches the Commission to confess is not subjected to prosecution in the event that proceedings are instituted against cartel members.[259] The most ideal time an entity is encouraged to apply for immunity is at its own free will, when the Commission is not aware of the contravention that is taking place.[260] When it comes to admission of taking part in cartel activities, it is important to note that lack of admission would defeat the purpose of the leniency policy. An applicant would be required to admit to being in contravention of the Act after they sign a conditional immunity agreement once the Commission determines that it qualifies for immunity. During this period, the applicant is expected to have had enough time to internally investigate its conduct and is therefore able to admit that it was involved in a cartel conduct.[261] The leniency policy also recognizes the fact that not all the firms taking part in the restrictive trade practices are aware that they are taking part in an illegal activity. Some of the sectors may however be used to having some activities that may seem legal. Later on, when they discover it

[253] Moodaliyar K, '*Are Cartels Skating on Thin Ice? An Insight into the South African Corporate Leniency Policy',* 161.
[254] Section 10.1 (c), *Corporate Leniency Policy* (South Africa).
[255] Section 10.1 (d), *Corporate Leniency Policy* (South Africa).
[256] Section 10.1 (e), *Corporate Leniency Policy* (South Africa).
[257] Section 10.1 (f), *Corporate Leniency Policy* (South Africa).
[258]Section 10.1 (b), *Corporate Leniency Policy* (South Africa).
[259] Section 3.4, *Corporate Leniency Polic*y (South Africa).
[260] Moodaliyar K, 'Are Cartels Skating on Thin Ice? An Insight into the South African Corporate Leniency Policy', 160.
[261] Lavoie C, 'South Africa's Corporate Leniency Policy: A Five-Year Review', 6.

is illegal, they may fear disclosing it.[262] Also, since it is a first come first serve basis, the policy encourages an entity that discovers it is taking part in illegal activities to be fast enough to self-report before another entity comes to report before it.[263]

In as much as only the first entity in a cartel that comes forward is legible for immunity, if the other members may wish to come clean when a confession has already been made and immunity granted, the Commission may decide to explore other processes not provided for in the policy such as fine reduction, an agreement for settlement or even a consent order. Also, if the matter at hand is further referred to the Tribunal, the Commission may intervene on behalf of the first applicants to apply for immunity for them to be accorded favorable treatment.[264]

The leniency policy does not apply in some instances. The first one is when the restrictive conduct does not fall within the scope that the Competition Act covers.[265] Another instance is when another entity has already come forward and submitted its application for immunity in relation with the same activity and its application was successful.[266] The leniency policy will also not apply where an entity does not meet any condition or requirements provided for in the policy.[267] In such a situation, the Commission will then investigate the matter in accordance with the provisions of the Competition Act and all the members of the cartel, if they are found guilty, will be subjected to the penalties as provided for in the Act.[268]

The leniency policy further provides that all the information will be treated confidentially. Any disclosure to be made will be made with the consent of the applicant as long as the applicant does not unreasonably deny giving consent.[269]

[262] Section 3.7, *Corporate Leniency Policy* (South Africa).
[263] Lavoie C, 'South Africa's Corporate Leniency Policy: A Five-Year Review', 6.
[264] Section 5.6, *Corporate Leniency Policy* (South Africa).
[265] Section 7.7.1, *Corporate Leniency Policy* (South Africa).
[266] Section 7.7.2, *Corporate Leniency Policy* (South Africa).
[267] Section 7.7.3, *Corporate Leniency Policy* (South Africa).
[268] Moodaliyar K, '*Are Cartels Skating on Thin Ice? An Insight into the South African Corporate Leniency Policy',* 161.
[269] Section 6.2, *Corporate Leniency Policy* (South Africa).

3.2.1 Case scenarios in South Africa where the Leniency Policy has been applied

The applications for leniency started with the airline industry and further spread to the milk industry and bread industry which eventually spread to other industries like the construction industry, transport industry and also the energy industry.[270]

There is a popular known case in South Africa referred to as the "bread scandal". The matter involved the Competition Commission and Pioneer Foods (Pty) Limited.[271] In 2006, there was a complaint brought before the Commission. The complaint was brought against Premier Foods, Tiger Brands and Pioneer Foods where it was alleged that they formed part of cartels in the bread manufacturing industry.[272] They fixed prices and also divided markets. There were two investigations. One was in the Western Cape region and the other one was a national complaint. After the commencement of the first investigation of the Western Cape by the Commission, Premier Foods made an application for leniency and indicated that they would co-operate fully. It disclosed that the other entities were involved in cartel activities by fixing pricing and also other conditions of trade. Premier went further to reveal that the cartel was in operation in various areas of the country and was involved in dividing markets in the various territories. This led to the opening of the second investigation by the Commission, which was the national complaint.

Tiger Foods filed its reply to the complaint and later on approached the Tribunal with the aim of negotiating with the Commission in order to enter into an agreement to obtain a consent order. It cooperated by providing evidence regarding the bread cartel to the Commission. It further conducted its own internal investigations as to the bread cartel and found that the allegations were true. The Tribunal thereafter imposed on Tiger Foods a fine of R 98 874 869.90 (ninety-eight million, eight hundred and seventy-four thousand, eight hundred and sixty-nine Rands) due to its involvement in the activities of the bread cartel. Further, Pioneer Foods denied being involved in the cartel. In the national complaint, Foodcorp, entered into an agreement for consent with the Commission and a fine of R45 406 359. 82 (forty-five million, four hundred and six thousand, three hundred and fifty-nine Rands) was imposed on it.

[270] *Lavoie* C, 'South Africa's Corporate Leniency Policy: A Five-Year Review'*, 12.*
[271] Competition Commission v Pioneer Foods (Pty) Ltd (15/CR/Feb07, 50/CR/May08) [2010] ZACT 9.
[272] This was at the Western Cape.

Pioneer Foods did not admit to taking part in the restrictive practices and instead of entering into a consent agreement like the other entities, it opted to go for trial. It also did not apply for leniency. Later on, during the hearing, Pioneer Foods conceded to the fact that it contravened the provisions of the Competition Act in respect to some of the alleged restrictive trade practices.

As Pioneer food had previously refused to acknowledge that it was involved in cartel activities, it was to be subjected to heavy penalties in comparison to the other entities. In relation to the Western Cape, it was determined that Pioneer Foods, Premier Foods and Tiger Foods had contravened section 4 (1) (b) (i) and (ii) of the Competition Act which provides against fixing of the price of purchasing and the price of selling either directly or indirectly or any other condition of trade. They were also involved in collusive tendering. Pioneer Foods was therefore subjected to the payment of a fine of R 46 019 954 (forty-six million, nineteen thousand, nine hundred and fifty-four Rands).

In the national complaint, it was eventually determined that Pioneer Foods, Premier Foods and Tiger Brand were involved in a restrictive trade practice to fix trading conditions and agreed not to compete on the price or poach another's customers. Pioneer Foods was given a cease and desist order to prevent it from continuing to take part in the cartel activities. It was subjected to the payment of a fine of R 149 698 660 (one hundred and forty-nine million, six hundred and ninety-eight thousand, six hundred and sixty Rands) within twenty days of the order.

3.2.2 Challenges South Africa has faced in running the Leniency Policy

The leniency programme as explained is still new in Kenya. Since it has been running in South Africa, the study looks at some of the challenges faced by South Africa so far in running the policy. The policy is seen as unconstitutional by some people such as the cartel members that have been prosecuted against as it is seen to only deal with cartels selectively.[273] It is seen to contravene the constitutional provision of equality that states every person is considered equal before the law. They have the right to equal protection and benefit of the law.[274] This means that the Commission may tend to favour some entities over others and grant them immunity while refusing to grant others.

[273] *Lavoie* C, 'South Africa's Corporate Leniency Policy: A Five-Year Review'*, 10.*
[274] Section 9, *Constitution of the Republic of South Africa* (1996).

The Competition Commission had a meeting addressing the challenges that they have faced in implementing the policy.[275] One challenge has been implementing certain sections in the Competition Act. For instance, the 2009 Competition Amendment Act[276] introduced section 73A of the Competition Act that is still yet to been implemented to date due to controversy. It sought to punish individuals that let their firm take part in cartel activities. In this case, the directors. The main reason for its controversy was the fact that it went against certain constitutional provisions. This is because the Competition Tribunal or Appeal Court is required to give a finding confirming that such persons have been involved in restrictive trade practices. This is seen to infringe their constitutional rights such as the right to a fair trial; the right to be presumed innocent unless proven guilty and the right to be accorded adequate time and also adequate facilities that are required to enable one prepare for a defence.[277] They are presumed guilty and not given a proper chance to have a proper defence and prepare for the trial.

In addition to this, the Commission stated that two methods of assessment of cartel activities were provided for in the Competition Amendment Act. The first one was the civil processes that were directed at the conduct of the firm which was prosecuted by the Competition Commission.[278] The second method was the criminal process that aimed at the conduct of directors and managers and they were to be prosecuted by the National Prosecution Authority.[279] The Authorities are against the introduction of criminal sanctions as opposed to civil liabilities when it comes to cartels. This is because its implementation may be problematic as it involves the Competition Commission cooperating with the National Prosecuting Authority.[280] National Prosecuting Authority is seen to have no experience in enforcement of competition law. They would need to cooperate and there may also be issues when it comes to coordination between the Competition Commission and the National Prosecuting Authority.[281]

[275] Parliamentary Monitoring Group, 'Competition Commission Legislation Implementation Challenges' –https://pmg.org.za/committee-meeting/23749/.
[276] Section 12, *Competition Amendment Act* (Act No. 1 of 2009).
[277] Section 35, Constitution of the Republic of South Africa.
[278] Parliamentary Monitoring Group, 'Competition Commission Legislation Implementation Challenges' –https://pmg.org.za/committee-meeting/23749/.
[279]Parliamentary Monitoring Group, 'Competition Commission Legislation Implementation Challenges'.
[280] Corlia C V and Botha M M 'Challenges to the South African corporate leniency policy and cartel enforcement', 326. –https://www.researchgate.net/publication/282282430_Challenges_to_the_South_African_corporate_leniency_policy_and_cartel_enforcement
[281] Corlia C V and Botha M M 'Challenges to the South African corporate leniency policy and cartel enforcement'.

Another challenge the Commission stated was that they had a huge number of litigation suits instituted against them especially on technical grounds.[282] There were several interlocutory applications in the form of appeals and reviews. The Commission was of the view that they needed to restrict appeal rights.[283] For instance, there was a case brought before the High Court in South Africa.[284] The Commission was seen to have acted unlawfully and selectively. The third respondent in the matter, Consolidated Wire Industries (Pty) Ltd under the leniency policy had applied for conditional immunity. In exchange, it provided evidence of its participation in cartel conduct with the applicants and they were also involved with the fourth to the twelfth respondents. Due to this, the Commission made a promise for leniency to the third respondent in this matter which was considered unlawful. Further, in the Tribunal proceedings, it did not seek relief against the third respondent. It however sought relief against the other members involved in the cartel, hence selective. Further, the Commission granted the respondent conditional immunity without authority. Therefore, it was considered unlawful to refer the complaint to the Tribunal. The matter on appeal proceed until the Supreme Court where it ruled in favour of the Tribunal. It was held that the conditional immunity was granted in accordance with the criteria as in the policy. Further, on addressing the issue of selective prosecution, the court held that just because the commissioner initiates a complaint against a certain member engaging in prohibited practices instead of all of them, does not render the practice unprohibited.

Another challenge pointed out by the Commission was that there was an upcoming number of investigations and also referrals which led to the creation of capacity constraints and that required more resources when it came to solving cases. These demanded new ways of resolving the cases.[285]

The Commission also pointed out that they had challenges regarding the abuse of dominance such as excessive pricing which related to the calculation of the economic value.[286] Further,

[282] Parliamentary Monitoring Group, '*Competition Commission Legislation Implementation Challenges.*
[283]Parliamentary Monitoring Group, '*Competition Commission Legislation Implementation Challenges.*
[284] *Agri Wire (Pty) Ltd and Another v Commissioner of the Competition Commission and Others* (660/2011) [2012] ZASCA 134; [2012] 4 All SA 365 (SCA); 2013 (5) SA 484 (SCA) (27 September 2012).
[285] Parliamentary Monitoring Group, '*Competition Commission Legislation Implementation Challenges'.*
[286] Parliamentary Monitoring Group, '*Competition Commission Legislation Implementation Challenges'.*

when it came to predatory pricing,[287] they had challenges defining average variable costs and marginal costs.[288] When it came to determining price discrimination, the main challenge was the requirement of proof that the transactions between the different purchasers and those with different economies of scale were equal.[289] Another challenge pointed out by the Commission in the area of market inquiries was resources. This was particularly human resources that were outsourced.[290]

These are some of the challenges South Africa is facing when it comes to running the policy despite the efforts made to ensure cartel detection and curtailing of the cartel activities. It is important for Kenya and other jurisdictions intending on running the programme to note the challenges and look at the methods that have been taken or are being taken to deal with the challenges.

3.3 Conclusion

This chapter was looking at the legal framework of South Africa in regards to competition law. South Africa has been taking step by step actions in reforming its competition laws to enable it to adapt any new issues that relate to competition law that may be arising. The leniency policy was enacted under the Competition Act in order to enable entities to voluntary report cartel activities that were taking place. The policy was enacted in 2004. It was however amended in 2008. After the amendment is when an increased number of leniency applications was registered.

[287] This involves setting very low prices in order to prevent other firms from competing therefore they are forced to leave the market.
[288] Parliamentary Monitoring Group, '*Competition Commission Legislation Implementation Challenges'*.
[289] Parliamentary Monitoring Group, '*Competition Commission Legislation Implementation Challenges'.*
[290]Parliamentary *Commission Legislation Implementation Challenges'*.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS ON REFORMING KENYA'S COMPETITION LAW FRAMEWORK WITH TRANSPLANTABLE SOLUTIONS FROM SOUTH AFRICA

4. Introduction

This chapter gives the conclusion of my research based on the findings and also recommendations on how Kenya can improve its competition law and effectively run the corporate leniency programme. The rationale for introducing the programme was in good faith. However, Kenya needs to address the loopholes in order to have an effective competition regulation regime. The recommendations are based on the comparison with South Africa's current Competition Act and also its leniency policy. Further recommendations given are also based on the challenges that South Africa has experienced in implementing its policy. Once Kenya notes the challenges South Africa has been facing, it will be able to devise methods that would enable it to avert facing similar challenges to ensure the smooth running of the programme.

4.1 Conclusion based on the study of the competition legal frameworks of both Kenya and South Africa

The conclusion seeks to answer the research questions based on the findings. Looking at the current corporate leniency programme, it will not fulfil its main objective of curtailing cartel activities unless the loopholes and ambiguities as pointed out in the research are addressed. The guidelines should be made clear in order for any applicant to be encouraged to apply for leniency based on assurances by the CAK. Some of these assurances as discussed include the CAK taking up the initiative to assure the applicants that even if their application for leniency is not successful and the matter proceeds to the Tribunal, the CAK may intervene on the applicant's behalf before the Tribunal to give less severe penalties for the applicant as long as it fully cooperates with CAK. This and other assurances ensure the programme is run smoothly and effectively and it promotes competition law.

The guidelines alone would not be sufficient when it comes to curtailing cartel activities and promoting competition in Kenya. This is because apart from the leniency programme guidelines, the issues pointed out in the Competition Act should also be addressed as they also

affect the leniency programme. This will ensure an effective competition law regime. It is important to have proper competition law as other guidelines and rules are derived from it. Therefore, when you have an ineffective competition law, the other rules and guidelines derived from it are also ineffective.

Further, as previously discussed, challenges such as lack of awareness should be addressed. This is in order to ensure the effective running of this programme, the government should ensure that there is sensitization of the programme as most people may not be not aware of the existence of such a programme and how it works. The government should come up with sensitization programmes and other training mechanisms that will ensure that the public is made aware of the existence of the programme and educated on how it works. This will encourage people to come clean and will assist in reducing cartel activities in Kenya. Cooperation between enforcement authorities such as the CAK and the Office of the Director of Public Prosecution should be encouraged. Both authorities should be involved in mutual cooperation in order to ensure the effective running of the programme.

4.2 Recommendations based on the study of the competition legal frameworks of both Kenya and South Africa

4.2.1 Legislative Reforms

4.2.1.1 Reform on Kenya's current Competition Law

1. Creation of Specialized courts

South Africa has the Competition Commission, the Tribunal and the Appeal Court. The Competition Appeal court is specialized for hearing appeals from the Tribunal. In Kenya the matters are heard by CAK and then the Competition Tribunal. Any appeal from the Tribunal is to be taken to the High Court of Kenya. To avoid backlog of cases and lengthy process of determining such cases from the Tribunal, Kenya should borrow a leaf from South Africa by creating a specialized court that should deal with the matters of appeal from the Tribunal. This would ensure that appeal matters in competition law are handled effectively and in good time. It avoids backlog of appeals from the Tribunal and also avoids rushing to determine cases haphazardly for the sake of getting rid of the bulk of cases.

2. **Creation of a further room for appeal for aggrieved parties**

When a party goes up to the High Court and is still aggrieved, Competition Law of Kenya should consider allowing for room for appeal to the Court of Appeal and also the Supreme Court even if it is to be based on certain limitations. When you look at South Africa, aggrieved parties may appeal further from the Competition Appeal Court to the Supreme Court of Appeal or the Constitution Court.[291] Kenya may also consider having certain limitations so that even though not all the matters go through to the Court of Appeal, there is still a chance that certain cases may be heard if the parties feel aggrieved. The High Court's decision should not be final.

3. **Creation of an Oversight Authority**

There is also the accountability aspect. There should be a clear and defined body that the CAK and the Competition Tribunal are accountable to in Kenya as in South Africa. In Kenya it is not expressly provided for and one would be left to speculate the body that CAK and the Tribunal are accountable to. This is unlike South Africa where it is clear that the Competition Commission, Competition Tribunal and the Competition Appeal Court are accountable to South Africa's Department of Economic Development.[292]

4. **Review of the penalty provisions**

When you look at the penalties' provisions in the Kenyan Competition Act, it should make provisions on what is to happen when one is given an order by the CAK and the Tribunal but fails to adhere to it. The Act only provides for penalties when one is found taking part in restrictive trade practices but not when they defy an order.

It is important to have a comprehensive competition law because that is where the leniency programme originates from. This is also because the rules of competition law also apply in the leniency programme. Without a comprehensive competition law, the leniency programme will not be effectively applied.

[291] Section 62(4), *Competition Act* (South Africa).
[292] Competition Commission, South Africa –http://www.compcom.co.za/about-us-2/.

4.2.1.2 Reform on Kenya's current Corporate Leniency Programme

Looking at the challenges that may come about in implementation of the corporate leniency programme, there is a lot of ambiguity that needs to be dealt with when you look at Kenya's corporate leniency programme. The recommendations proposed include:

1. **Amendment of the scope of leniency**

The programme should provide for how the entities involved in cartel activities without the knowledge that such activities are illegal are to be treated. They are to be considered as provided for in South Africa's leniency policy.[293] This is because Kenya's leniency programme only provides for leniency for the first party to come forward. It should provide for the rest of the members of the cartel who were not aware that it was illegal and decided to come forward as soon as they realized it was illegal. Further, those entities may not be the first ones to approach the CAK for leniency but during the investigations, they may become aware that the conduct was illegal. The programme should provide for a way forward for such entities to avoid uncertainty of what would happen to them.

2. **Proper definition of an applicant**

The leniency programme should define who an applicant should be. It is clear in South Africa's policy that the applicant should be one authorized by an entity to act for them. The rest of applicants would only be considered as whistle blowers.[294] It is important for Kenya to have a proper definition of an applicant, whether it should be any employee or a director or any authorized person in order to avoid any confusion that may arise when it comes to applying for leniency.

3. **Include a provision for those not first to approach the CAK when the matter goes before the Tribunal**

Another issue is that when it comes to granting of immunity for the first to approach the CAK. The CAK should also intervene for the other entities that were not the first to approach when it deems fit when the matter goes to the Tribunal in order to have their penalties reduced. The CAK only offers penalties reduction for matters that are before it for entities that were not the

[293] Section 3.7, *Corporate Leniency Policy* (South Africa).
[294] Section 5.8, *Corporate Leniency Policy* (South Africa).

first to approach it for leniency[295] but does not address what would happen to the matters that go before the Tribunal. The South Africa policy considers this and assures the other parties that were not the first to approach the Commission that if the matter is referred to the Tribunal, it may intervene and suggest less penalties for them.[296] This provision would encourage more entities to cooperate and assist the CAK in the investigation as they are assured that even if the matter goes to the Tribunal, they will receive leniency.

4. **Include a provision for application for leniency in Kenya when already granted in another jurisdiction**

The leniency programme should also be clear on application for immunity when an entity has been granted leniency in another jurisdiction. It should be clear whether the entity is to apply for fresh immunity or that the immunity will apply in the Kenyan jurisdiction as well. On the same matter, it should also be clear whether an entity that is granted immunity in one activity, the immunity will spread to the other activities or the entity has to apply afresh for immunity. These should expressly be provided for as in the South Africa policy[297] in order to avoid ambiguity.

5. **Include a provision on whether once pardoned one would be free from civil or criminal suits from other aggrieved parties**

The leniency programme should further provide whether once one is granted immunity, they are completely free from any other civil or criminal suits by other parties aggrieved by their activities or whether such suits can still be instituted against them. This should be made clear as in the policy in South Africa that gives a disclaimer that being granted immunity does not prevent them from further civil or criminal suits by other parties.[298] It is important to address such ambiguities in order for such entities to be fully aware of what to expect even after the process of investigation and a decision is made.

[295] Section 13, *Leniency Programme Guidelines* (Kenya).
[296] Section 5.6, *Corporate Leniency Policy* (South Africa).
[297] Section 5.9, *Corporate Leniency Policy* (South Africa).
[298] Section 6.4, *Corporate Leniency Policy* (South Africa).

6. Cater for unsuccessful applicants in as long as they cooperate with CAK

The CAK should also consider unsuccessful applicants for leniency and offer to grant them lenient approaches as long as they cooperate with the CAK. This is provided for in the policy in South Africa.[299] When the CAK considers using such an approach, it encourages applicants to apply for leniency and cooperate with it in their investigations even though they are not sure that their application will go through.

7. Proper communication channels by CAK

The CAK should also consider using proper communication channels with the applicants within reasonable timelines. For instance, once an entity has applied for leniency, it should be informed in good time whether there was another applicant before it. In South Africa's case, the applicant is informed within five days that there was already an applicant before it.[300] In Kenya however, it takes fourteen days for the CAK to communicate and inform the applicant whether their application was successful or not.[301] The CAK should also give the successful applicant a reasonably specified timeline on when to set the first meeting with the CAK. The guidelines only provide that a successful applicant may set up the first meeting with CAK but it does not give specific timelines. When you look at South Africa, it has specified five days or a reasonable time for the setting up of the first meeting with the Commission.[302] This is important as it makes the programme more efficient.

8. Increase the scope of the purpose of the meetings with CAK

Further, when it comes to the meeting with the CAK, the leniency guidelines should be more thorough when it comes to detailing the scope and the purpose of each meeting with the CAK as the policy in South Africa is. It should clearly outline the purpose of the meetings and the requirements of the meetings as well as provide for the process of investigations, analysis and verification of the information it receives in detail. It should go into details as to the requirements of the meetings with the applicants and what is to be expected from the applicants from the first meeting until the final meeting.

[299] Section 7.2, *Corporate Leniency Policy* (South Africa).
[300] Section 11.1.1.2, *Corporate Leniency Policy* (South Africa).
[301] Section 23, *Leniency Programme Guidelines* (Kenya).
[302] Section 11.1.1.3, *Corporate Leniency Policy* (South Africa).

In the first meeting, the CAK should go in depth as to the requirements of the first meeting including the full identity of the applicants in case they had made an anonymous application. For the second meeting, the guidelines should allow for room for an applicant to introduce further evidence required for the investigation. The guidelines should also expound the investigation process and provide for the methods of investigation that they would use such as interviews or other methods they deem fit. Further, as seen in South Africa's policy, it is important for the CAK to be open and inform the applicant during the final meeting whether it intends to proceed with instituting proceedings against the entities involved in the cartel conduct. South Africa's policy goes ahead to inform the applicant in the final meeting that if the applicant intends to withdraw their application at that point it would be at their own risk and they would still be dealt with in accordance with the Act.[303] This is an important disclaimer that should be included in the leniency programme in Kenya in case the applicant decides to withdraw their application at that point.

9. Clarity on the number of times an applicant can be pardoned

The programme should also be clear on the number of times a particular entity can be pardoned. This is to prevent entities from taking advantage of the programme by taking part in the restrictive practices knowing that they will apply for leniency and be pardoned once they feel that they have achieved their goals by engaging in a certain restrictive practice. This has also not been provided for in the policy in South Africa.

In Kenya, there are no cited cases of entities that have come before the CAK to apply for leniency. It could be because entities do not really trust the process or may not be aware of the existence of the leniency programme. Most entities are aware of the existence of competition law but may not be aware of the existence of the leniency programme. To ensure the effective running of this programme, the government should ensure that there is sensitization of the programme as most people may not be not aware of its existence and how it works. The government should come up with sensitization programmes and other training mechanisms that will ensure that the public is made aware of the existence of the programme and educated on how it works. This will encourage people to come clean and will render the programme effective in reducing cartel activities in Kenya.

[303] Section 11.1.5.2, *Corporate Leniency Policy* (South Africa).

When you look at the leniency programme guidelines in Kenya in comparison with the leniency policy in South Africa, there is still much to be desired. There is a lot of ambiguity in some areas of the guidelines which the CAK should consider revising. Regulations that are clear without ambiguity are more effective when it comes to their application.

4.2.2 Recommendations based on challenges experienced by South Africa's leniency policy

1. **Uphold the constitutional rights of the parties involved**

The CAK should ensure that it practices the rule of law and deal with cartel members impartially and independently without any fear or favour as provided for in the Competition Act.[304] The Commission in South Africa has faced accusations that it deals with issues in an unconstitutional manner when it comes to dealing with the cartels. It is alleged that it tends to favour some cartels over others therefore dealing with them differently yet everyone is equal before the law.

The CAK should further ensure that when proceedings are instituted against cartels, they accord them their constitutional rights such as their right to a fair trial; their right to be presumed innocent unless proven guilty and the right to have adequate time and adequate facilities required to prepare for a defence.[305]

2. **Cooperation between authorities involved in law enforcement**

On the issue of coordination between Authorities, there is the provision for civil liabilities and criminal liabilities. In Kenya the CAK may have to work hand in hand with the Office of the Director of Public Prosecution when dealing with cartels. Both authorities should ensure that they cooperate as they have the same goal in order to ensure smooth running of the entire process. In South Africa, it is alleged that the National Prosecuting Authority is seen to have no experience in enforcement of competition law. Kenya should look at this and even consider having workshops and seminars for both authorities and even other parties that may be involved in order to educate and share on the enforcement of competition law and even discuss on how to collaborate when dealing with cartels.

[304] Section 7, *Competition Act* (Act No. 12 of 2010).
[305] Article 50, *Constitution of Kenya* (2010).

The Commission in South Africa is facing a number of litigation suits based on their decisions. Some matters have proceeded to the Supreme Court. The CAK should ensure that it deals with the issues before it properly without leaving room for suspicion of favorism. It should make sound decisions to avoid suits against it. It should ensure that its decisions are fair in order to avoid its matters being overturned by the Tribunal or even the High Court. This is also because having several decisions overturned on appeal would show that the CAK is inefficient.

3. **Increase resources and ensure accountability on the use of the resources**

On the issue of limited resources, the government should ensure that the CAK has enough resources to facilitate the whole process of investigation until the decision-making stage. The CAK should also ensure that it does not mismanage the funds allocated to it but put the funds into good use for the sole purpose of running the entire process. The CAK should also be made accountable for the use of resources by making reports on the matters that it has handled and also giving the breakdown of how it used the resources allocated to it. This ensures efficiency, accountability and responsibility.

4. **Invest in qualified experts on technical matters**

The CAK should also ensure that it engages a sufficient number of experts to assist in matters that may be technical. The experts would assist in determining the abuse of dominance such as excessive pricing which would involve calculation of the economic value. On predatory pricing the experts would assist in defining average variable costs and marginal costs. Further, on determining price discrimination, the experts would help find proof that the transactions between the different purchasers and those with different economies scale were equal.

5. **Invest in quality human resource**

In addition to that, the CAK should also invest in human resource that are qualified to work in the CAK in the various departments and even on the management level. They should be conversant with the competition law policies. Having qualified people also ensures that the CAK is run smoothly and conducts its functions effectively. In South Africa, the greatest challenge as seen was the workload but limited employees. It was suggested that the Commission to have permanent jobs instead of contract jobs.[306] This would be effective as it

[306]Parliamentary Monitoring Group, 'Competition Commission Legislation Implementation Challenges'.

ensures that experienced people stay in the position and from gaining experience, they then become experts in the sector. Having jobs on a contractual basis in some cases may lead to having inefficient employees.

The CAK may encounter some of these challenges as the running of the leniency programme progresses. Some of the recommendations listed have also been proposed by South Africa. It would be important for the CAK to look at these challenges facing South Africa and since it is still new, it should use the measures proposed to avoid them early enough in order to avoid facing them when the programme is fully running. This would ensure that the leniency programme runs smoothly and effectively and it will also reduce cartel activities.

4.3 Recommendations based on cooperation with Regional Bodies

The CAK has also fostered relationships with COMESA and EAC and the challenges COMESA is facing when it comes to dealing with the various countries was discussed in chapter 2. Kenya should ensure that it cooperates with EAC, COMESA and the other regional bodies that it is part of in order to ensure a smooth process of curbing cartels. Kenya should not make it difficult in ways such as imposing restrictions that will curtail information sharing. It should also ensure that it fosters mutual cooperation when it comes to information sharing to promote cooperation especially with cartel activities involving several jurisdictions.

4.4 Predictions

Owing to the harsh economic conditions caused by the effects of Covid-19, most entities are making losses, and their dwindling finances will likely trigger them to engage in restrictive practices (cartel formation) in order to stay afloat or ahead of their peers. It is common knowledge that corporations exist for the primary purpose of making profits for their shareholders, and if this aim is disabled, shareholders, especially in public companies, might consider the need to deploy their capital elsewhere. In that race to survive, corporations more than before, will be eager to lessen competition by fixing prices, dividing markets and such other restrictive practices that have been discussed in this study.

Going forward, it will be more difficult for Competition Authority of Kenya to detect cartel activities as most entities will begin to see them a do-or-die affair, and the most assured self-help approach to survive the economic turbulence. In that situation, it will be easier to convince

hesitant companies to join a cartel, and self-reporting based on the current rules, will be grossly insufficient to combat the heightened number of cartels. As a consequence, consumer prices of goods and services will rise astronomically and households and small businesses will become poorer, thereby making it difficult for the Kenyan economy to recover within a reasonable time. The CAK will therefore need to be more vigilant and significantly improve their efforts in detecting cartel formations, using the recommendations provided in this thesis.

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APPENDICES

Appendix A

Plagiarism Report

Appendix B

Ethical Clearance Report