



KENYA'S SPECIAL COMPLIANCE PROCESS

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What is the SCP?

- ▶ The Competition Authority of Kenya (CAK) designed a Special Compliance Process (SCP) to encourage trade associations to conduct a critical self-assessment of their rules and practices in order to
 - ▶ Identify any potential anti-competitive conduct
 - ▶ Rectify such conduct, and
 - ▶ Prevent future anti-competitive conduct
- ▶ An efficient way of reaching a wide range of disparate stakeholders and advocating for compliance with the Act
- ▶ e.g. Construction Fast-Track in SA and Competition and Trade Association Compliance Programme in Chile

Provisions of the Act covering trade associations

- ▶ Section 21 and particularly 22 of the Act
 - ▶ Unjustifiable exclusion
 - ▶ Recommendations on prices and price-related aspects
 - ▶ Terms of sale
- ▶ Despite clear provisions in the Act governing Trade Association, several complaints made to CAK since 2010
- ▶ Trade Associations appear to have rules, practices and procedures which contravene the Act

Processes

- ▶ Legal framework
 - ▶ Options available: Investigation, Market Inquiry, Voluntary Compliance
 - ▶ SCP a hybrid of market inquiry and voluntary compliance
- ▶ SCP commenced under section 9(a) (Functions of the CAK) and section 18(1)(a) (Market Inquiry)
- ▶ Covers Trade Associations and their members in the Agricultural & Agro Processing Sector and in Financial Services Sector
 - ▶ Prioritization criteria

Legal Framework; Options

- ▶ Investigations: The CAK has the option of receiving information upon a formal complaint or commence investigations *suo moto* under section 31 of the Act, propose a decision under section 34, ensure due process by affording the respondents a hearing under section 35 and make a final decision under section 36 or a Settlement Order under section 38.
- ▶ Inquiry/Investigations: The CAK could commence investigations *suo moto* through an inquiry under section 18 of the Act. It would upon making a report of its findings seek to implement a voluntary compliance process under section 18(1)(a). On the other hand, it could commence investigations under section 34 and ensure due process by affording the respondents a hearing under section 35 and make a final decision s. 36 or a Settlement Order under section 38.
- ▶ *Voluntary Compliance*: The Trade Associations could voluntarily admit to probable contraventions and upon complete disclosure, the Association can voluntarily enter into a settlement agreement/order with the CAK.

Prioritisation of sectors to apply the SCP

- ▶ Delicate balance had to be struck
- ▶ The process had to be designed in such a way that it would balance the objectives of changing the behaviour of firms and associations, deterring future conduct, and revealing the extent of conduct that had existed historically.
- ▶ Factors considered in prioritisation included:
 - a) complaints from undertakings and the consumer
 - b) strategic plan and prioritisation policy of the CAK,
 - c) the important sectors of the Kenyan economy in line with Vision 2030

Guiding principles of the SCP

- ▶ Addressing arrangements between parties in a horizontal relationship who are members of a Trade Association and where such arrangements relate to the rules, practices and procedures of the Trade Association and are likely to contravene the Act;
- ▶ Ensure full disclosure of any past conduct, rules, practices, procedures including the exchange of competitively sensitive information and evidence of how the contraventions have been remedied to ensure compliance in future.
- ▶ Provision of 'immunity ' to Trade Associations from investigation for information submitted in the SCP.
- ▶ Enforcement against Trade Associations that fail to comply with the SCP by not disclosing and/or remedying any past contraventions (or who contravene the Act subsequently).
- ▶ Conduct that was subject of an already ongoing investigation and conduct by members of a Trade Association which is not carried out under auspices of the Trade Association excluded from SCP.

Stakeholder engagement & awareness

- ▶ SCP began with individual engagement of regulators in both the finance and agriculture sectors.
- ▶ This was followed by the publication of gazette notices notifying the general public of the Inquiry.
- ▶ Next were meetings with stakeholders, specifically industry associations, in both the finance and agriculture sectors
- ▶ The CAK also held a second-tier sensitization workshop for the trade associations in the Finance and Agricultural sector to create awareness on the SCP.

Sectors covered

- ▶ Finance: including Insurance, Commercial and Retail Banking, Micro-Finance, Forex Exchange/Bureau and Capital Markets
- ▶ Agriculture and Agro-processing: including various levels of the agricultural value chain, from inputs such as seed, fertilizer, animal feed and pesticides through to crop production and agricultural outputs into consumer products, livestock and meat production

Information required

- ▶ Documents required included
 - ▶ Rules of the Association
 - ▶ Constitution
 - ▶ Membership details
 - ▶ Minutes, resolutions and
 - ▶ All other relevant documents

Outcomes

- ▶ Process ended on 29 Feb 2016 (less than a year after initiated)
- ▶ Outcomes not yet published, but
 - ▶ Contributed to raising awareness of Competition Act
 - ▶ Identified practices that Associations may not have known could amount to possible contraventions, and
 - ▶ Will likely result in undertakings to prevent contraventions in future
- ▶ Some of the contraventions discovered included unjustifiable exclusion from membership to trade associations, price fixing, and market allocation

Challenges

- ▶ Developing the legal framework for the SCP as this was a novel process which had not been employed previously.
- ▶ Varying degrees of participation by Trade associations based on:
 - ▶ Level of sophistication in the sector/of members
 - ▶ Size of the association's members
 - ▶ Location and dispersion of members
- ▶ Resources (Authority and Associations)

Useful lessons and applicability in other jurisdictions (1/2)

- ▶ For competition agencies with nascent competition laws like in Kenya, the SCP is an opportunity to create awareness of the competition regime.
- ▶ The SCP means addressing the conduct and dealing with any issues upfront so as to remove/reduce these possible steep liabilities going forward.
- ▶ The SCP also develops awareness on the benefits of competition law and involves concrete steps by market players to ensure that their organisations do not engage in anti-competitive conduct

Useful lessons and applicability in other jurisdictions (2/2)

- ▶ Compliance processes are beneficial to competition authorities as a way to achieve pro-competitive outcomes while saving resources in terms of the costs of launching a formal investigation.
- ▶ Credibility of the process is maintained as associations that did not participate are still liable for prosecution
 - ▶ e.g. Recent Dawn Raid conducted by the CAK in fertiliser industry